This manual is published in the spring of 2013 by the Gillis W. Long Poverty Law Center of Loyola University New Orleans College of Law to assist members of the legal profession who work to try to make “justice for all” a reality in Louisiana.

The Gillis W. Long Poverty Law Center was established at Loyola University College of Law in 1985. Congress appropriated funds to honor the memory of Louisiana Representative Gillis W. Long who was known for his advocacy for the disadvantaged.

This manual is the fifth cooperative effort of Loyola and legal services and pro bono lawyers in Louisiana. Earlier editions were published in 1986, 1993, 2001, and 2005.

This book is designed as a practical guide for lawyers. These chapters are not intended to be exhaustive studies of any substantive area of law.

If you have any questions about this manual or the Gillis Long Poverty Law Center, please feel free to contact us by phone at (504) 861-5762 or by mail at 7214 St. Charles Avenue, New Orleans, LA 70118 or on the web at http://www.loyno.edu/gillislong/.

There are many more lawyers providing free legal help to working and poor people than the general public will ever know. This manual is dedicated to you. Thanks to each of the authors who gave generously of their time to share their expertise. Special thanks are due to Mark Moreau and David Williams, two experienced and dedicated legal services lawyers, who more than any other people, made this manual possible. Thanks also to who work day in and out to make the Gillis W. Long Poverty Law Center work. And finally, thanks to the many members of the Loyola University community, faculty, staff and students, who try so hard to make our university a home for excellence in scholarship and service.

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# TABLE OF CONTENTS

1. **BANKRUPTCY IN LOUISIANA**

1. INTRODUCTION ................................................................. 3
2. WHO CAN FILE BANKRUPTCY .................................................. 3
   2.1 Who may be a bankruptcy debtor? ........................................ 3
   2.2 Waiting periods between bankruptcy discharges ....................... 4
   2.3 The Chapter 13 “good faith” requirement and prior bankruptcies ... 5
3. WHERE DO I FILE BANKRUPTCY ............................................... 6
4. WHO SHOULD FILE BANKRUPTCY ............................................. 6
5. CHAPTER 7 LIQUIDATION OR CHAPTER 13 REORGANIZATION ............... 8
6. THE AUTOMATIC STAY .......................................................... 10
7. THE DISCHARGE, DISCHARGE INJUNCTION, ANTI-DISCRIMINATION AND SET-OFF ......................................................... 12
   7.1 The discharge ............................................................. 12
   7.2 Denial or revocation of discharge ....................................... 12
   7.3 Creditor claims that specific debt is non-dischargeable ........... 12
   7.4 The discharge injunction ............................................... 13
   7.5 Bankruptcy discrimination claims ...................................... 15
   7.6 Set-offs .......................................................................... 15
8. THE FILING FEE ................................................................. 15
9. THE EMERGENCY BANKRUPTCY PETITION ................................ 15
10. INTRODUCTION TO THE VOLUNTARY PETITION AND SCHEDULES ............ 16
11. SCHEDULE A—REAL PROPERTY ............................................. 17
12. SCHEDULE B—PERSONAL PROPERTY ...................................... 18
   12.1 Cash on hand ............................................................. 18
   12.2 Checking, savings or other financial accounts ....................... 18
   12.3 Security deposits ....................................................... 19
   12.4 Household goods and furnishings ...................................... 19
   12.5 Books, pictures and other art objects ................................ 19
   12.6 Wearing Apparel ......................................................... 20
   12.7 Furs and jewelry ......................................................... 20
   12.8 Firearms and sports, photographic and other hobby equipment .. 20
   12.9 Interests in insurance policies ......................................... 20
   12.10 Annuities ................................................................. 21
   12.11 Interests in IRA, ERISA, Keough or other pensions .............. 21
   12.12 Stocks and interests in businesses ................................... 22
   12.13 Interests in partnerships ............................................... 22
   12.14 Government and corporate bonds ..................................... 22
   12.15 Accounts receivable ................................................... 22
   12.16 Alimony .................................................................... 22
   12.17 Other liquidated debts owing debtor ................................ 22
   12.18 Tax refunds ................................................................ 23
   12.19 Contingent and non-contingent interests in estates .............. 24
   12.20 Other contingent and unliquidated claims ......................... 24
   12.21 Automobiles, trucks .................................................... 25
   12.22 Other personal property ............................................... 25

(iv)
# TABLE OF CONTENTS

13. SCHEDULE C—PROPERTY CLAIMED AS EXEMPT ..........................25
14. INTRODUCTION TO SCHEDULES D, E AND F ..........................26
15. SCHEDULE D AND CREDITORS HOLDING SECURED CLAIMS, LIEN STRIPPING, AUTO LOAN CRAM DOWNS ..........................26
16. SCHEDULE E—CREDITORS HOLDING UNSECURED PRIORITY CLAIMS ..............................................................28
17. SCHEDULE F—CREDITORS HOLDING UNSECURED NON-PRIORITY CLAIMS ............................................................29
18. SCHEDULE G—EXECUTORY CONTRACTS AND UNEXPIRED LEASES ...........................................................................29
19. SCHEDULE H—CO-DEBTORS ..........................................................29
20. SCHEDULE I—CURRENT INCOME OF INDIVIDUAL DEBTOR ................................................................................30
21. SCHEDULE J—CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR .................................................................30
22. STATEMENT OF FINANCIAL AFFAIRS .........................................................30
23. CHAPTER 7 DEBTOR’S STATEMENT OF INTENTION .........................32
24. CHAPTER 13 PLAN ...........................................................................32
25. OTHER BANKRUPTCY FORMS TO BE FILED ........................................33
   25.1 Pay advices ..............................................................................33
   25.2 Pre-bankruptcy credit counseling and personal financial management course certificates ..................................................33
   25.3 Tax returns ..............................................................................34
   25.4 Statement regarding tax returns filed ...........................................34
   25.5 Statement on Section 527 notices .................................................34
   25.6 Statement of current monthly income ....................................34
26. CHAPTER 7 REAFFIRMATION .................................................................35
27. DEALING WITH TAXES IN BANKRUPTCY ........................................35
   27.1 You should order a tax transcript from the IRS in all bankruptcies ........................................................................35
   27.2 All bankruptcy debtors must provide the trustee with their most recent tax returns .................................................35
   27.3 How to litigate tax issues with IRS in a bankruptcy ...............................................................................36
   27.4 Taxes that may be discharged in a bankruptcy .........................................................................................36
   27.5 What taxes must be paid in a Chapter 13 bankruptcy ................................................................................38
   27.6 Are there any tax advantages to a Chapter 13 bankruptcy ................................................................................38
   27.7 Effect of bankruptcy on liens ........................................................39
   27.8 Bankruptcy stay of tax collections and litigation ................................................................................39
   27.9 Effect of bankruptcy on collection statute of limitations ................................................................................39
28. MOTION TO AVOID LIENS ..................................................................39
29. EVENTS IN A CHAPTER 7 “NO ASSET” CASE ..................................40
30. EVENTS IN A CHAPTER 13 CASE .........................................................41
31. MISCELLANEOUS CHAPTER 13 ISSUES ........................................42
32. APPEALS .......................................................................................42
33. ATTORNEY FEES ............................................................................44
34. REMEDIES AGAINST NON-ATTORNEY BANKRUPTCY PETITION PREPARERS .........................................................44
# 2. STRATEGIES FOR REPRESENTING THE LOUISIANA CONSUMER

## 1. INTRODUCTION

## 2. OFFENSE OR AFFIRMATIVE ACTIONS

2.1 How To Analyze A Consumer Case

2.2 Unfair Trade Practices Law

2.3 Truth In Lending Act

2.4 Truth In Lending Rescission

2.5 Debtor Harassment Remedies

2.6 Credit Insurance

2.7 Fair Credit Reporting

2.8 Equal Credit Reporting Act

2.9 Payday Loans

2.10 Odometer Act

2.11 Louisiana Lemon Law

2.12 Redhibition

2.13 Magnuson-Moss Warranty Act

2.14 Home Improvement Contractor Claims

2.15 Rent-To-Own Contracts

2.16 Health Insurance

2.17 Client Restitution Funds

2.18 FTC Preservation Of Consumer Claims/Defenses

2.19 Negligent Misrepresentation

2.20 Spot Delivery

2.21 Expanded Liability For Acts Of Corporation

## 3. DEFENSES AND TRANSACTION AVOIDANCE

3.1 Overview

3.2 Incapacity

3.3 Error

3.4 Fraud

3.5 Duress

3.6 Unlawful Cause

3.7 Failure And Want Of Consideration

3.8 Standard Form And Adhesionary Contracts

3.9 Unenforceable Waivers Of Rights

3.10 Unconscionability

3.11 Debt Buyer Lawsuits

3.12 Home Solicitation Sales

3.13 Truth In Lending Rescission

3.14 Mail Or Telephone Orders

3.15 Unsolicited Goods

3.16 FTC Credit Practices Rule

3.17 Protection For NonEnglish Speakers

3.18 Other Cancelable Contracts

3.19 Usury

3.20 Repossessions
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.21 Executory Process</td>
<td>131</td>
</tr>
<tr>
<td>3.22 Deficiency Judgements</td>
<td>132</td>
</tr>
<tr>
<td>3.23 Remission Of A Debt</td>
<td>133</td>
</tr>
<tr>
<td>3.24 Husband-Wife Issues</td>
<td>134</td>
</tr>
<tr>
<td>3.25 Creditor’s Attorney Fees</td>
<td>135</td>
</tr>
<tr>
<td>3.26 Default Judgements</td>
<td>136</td>
</tr>
<tr>
<td>3.27 School Loan Defenses</td>
<td>136</td>
</tr>
<tr>
<td>3.28 Loan Consolidation Issues</td>
<td>138</td>
</tr>
<tr>
<td>3.29 Worthless Checks</td>
<td>138</td>
</tr>
<tr>
<td>4. EXEMPTIONS</td>
<td>139</td>
</tr>
<tr>
<td>4.1 Overview</td>
<td>139</td>
</tr>
<tr>
<td>4.2 Exemptions</td>
<td>139</td>
</tr>
<tr>
<td>4.3 Exempt Funds Deposited In Bank Account</td>
<td>143</td>
</tr>
<tr>
<td>4.4 How To Protect The Exemption</td>
<td>143</td>
</tr>
<tr>
<td>4.5 Damages For Wrongful Seizure</td>
<td>144</td>
</tr>
<tr>
<td>5. ARBITRATION AGREEMENTS</td>
<td>144</td>
</tr>
<tr>
<td>6. GOVERNMENT LAW ENFORCEMENT AGENCIES</td>
<td>148</td>
</tr>
</tbody>
</table>

3. DOMESTIC VIOLENCE PRACTICE IN LOUISIANA

1. INTRODUCTION ................................................................................. 153

2. LAWYERING IN DOMESTIC VIOLENCE CASES ..................................... 153
   2.1 Ethical Lawyering In Domestic Violence Cases ....................... 153
   2.2 How Attorneys Can Help Domestic Violence Victims ................ 153
   2.3 Safe Lawyering In Domestic Violence Cases .......................... 156
   2.4 Interview Tips For Domestic Violence Cases ........................ 159
   2.5 Understanding Myths About Domestic Violence Victims And 
       Batterers – And How It Can Affect Your Case ..................... 160

3. STRATEGIC USE OF LOUISIANA’S DOMESTIC VIOLENCE LAWS ............ 161

4. PROTECTIVE ORDERS AND LOUISIANA FAMILY VIOLENCE 
   STATUTES ..................................................................................... 162
   4.1 Overview ............................................................................. 162
   4.2 The Domestic Abuse Assistance Act, LA. REV. STAT. ANN. §§ 
       46:2131-2143, And The Dating Violence Prevention Act, 
       LA. REV. STAT. ANN. § 46:2151 ........................................... 164
   4.3 Other Options For Permanent Protective Orders And Other 
       Types Of Injunctions ......................................................... 183
   4.4 Contempt Motions ................................................................ 186
   4.5 Foreign Protective Orders And Interstate Violations .......... 186
   4.6 Prohibitions On Gun Ownership Or Possession .................... 187

5. DIVORCE ....................................................................................... 188
   5.1 Timing For Divorce ................................................................ 188
   5.2 Injunctions With Divorce .................................................... 189
   5.3 Name Change With Divorce ................................................... 192
   5.4 Spousal Support At Divorce ................................................ 192
   5.5 Use And Occupancy Of Family Home In Divorce Suits ............ 194

(vii)
6. CUSTODY AND VISITATION IN DOMESTIC VIOLENCE CASES .............................................. 195
   6.1 Overview ..................................................................................................................... 195
   6.2 The Post-Separation Family Violence Relief Act (PSFVRA): Appliability And Remedies ........................................................................................................... 197
   6.3 Litigating Post-Separation Family Violence Relief Act Cases ........................................ 201
   6.4 Jurisdiction and Interstate Child Custody Issues .......................................................... 215
   6.5 Representing Vulnerable Populations In Domestic Violence Cases ................................... 217

7. TRYING THE CASE: PRACTICE TIPS FOR PROTECTIVE ORDER AND CHILD CUSTODY LITIGATION ................................................................. 219
   7.1 Assessing The Case ....................................................................................................... 219
   7.2 Pre-Trial Practice And Case Planning ........................................................................... 221
   7.3 Direct Examination ...................................................................................................... 223
   7.4 Structuring Your Direct Examination ....................................................................... 224
   7.5 Preparing Your Client For Direct ................................................................................. 224
   7.6 Cross-Examination Of Abusers .................................................................................... 227
   7.7 Note On Opening And Closing Arguments .................................................................. 229
   7.8 Evidentiary Issues Related To Protective Orders And Family Violence Cases .................. 229

8. HELPING YOUR CLIENT ACHIEVE ECONOMIC INDEPENDENCE .................................. 233

9. MISCELLANEOUS .............................................................................................................. 234

4. EMPLOYMENT ISSUES ........................................................................................................ 237

1. INTRODUCTION .............................................................................................................. 237

2. WHY EMPLOYMENT LAW IS IMPORTANT FOR POVERTY LAW ADVOCATES .................. 237

3. THE EMPLOYMENT RELATIONSHIP AND THE PROBLEM OF MIS-CLASSIFICATION ................................................................. 237

4. REMOVING EXTERNAL BARRIERS TO EMPLOYMENT ................................................. 238
   4.1 The problem of criminal records .................................................................................. 238
   4.1.1 Challenging criminal record job barriers ................................................................. 238
   4.1.2 Correcting inaccurate or unauthorized information .................................................. 239
   4.1.3 Removing records through expungement ................................................................. 239
   4.1.4 Questions from prospective employers or licensing bodies ..................................... 240
   4.2 Occupational licenses .................................................................................................. 240
   4.3 Driver’s licenses ........................................................................................................... 241
   4.4 Credit Problems ........................................................................................................... 241

5. “AT-WILL” EMPLOYMENT DISCHARGE ........................................................................ 241
   5.1 At-will exceptions ........................................................................................................ 242
   5.1.1 Unionized employees ............................................................................................... 242
   5.1.2 Employees under individual contract ....................................................................... 242
   5.1.3 Violation of public policy ......................................................................................... 243
   5.1.4 Protected activity/protected rights/discrimination ..................................................... 243
      5.1.4.1 Race, color, religion, sex and national origin discrimination ............................ 244
      5.1.4.2 Age discrimination ............................................................................................. 245
      5.1.4.3 Disability discrimination ..................................................................................... 246
      5.1.4.4 Pregnancy discrimination ................................................................................... 247
5.1.4.5 Labor union membership .............................................. 247
5.1.4.6 Other laws .......................................................... 247

6. PUBLIC EMPLOYMENT ......................................................... 248
   6.1 Protective constitutional and statutory framework .................. 248
   6.2 Issues to consider in evaluating a civil service case .......... 249
   6.3 Filing the administrative appeal .................................... 253
   6.5 The administrative appeal process .................................. 254
   6.6 Judicial review .......................................................... 255

7. EVALUATING FOR BENEFITS ELIGIBILITY .......................... 255

8. UNEMPLOYMENT COMPENSATION BENEFITS .......................... 256
   8.1 Background ............................................................. 256
   8.2 Disaster unemployment assistance (“DUA”) ....................... 256
   8.3 Regular UC eligibility ................................................ 257
      8.3.1 Monetary eligibility determinations .......................... 257
      8.3.2 Able to work, available for suitable work, and actively searching ................................................ 259
      8.3.3 Claim determinations ............................................ 259
      8.3.4 Disqualifications based on discharge: issues and arguments ............................................................................. 260
      8.3.5 Disqualifications based on a voluntary quit ................... 264
      8.3.6 Disqualification of temporary employees ....................... 265
      8.3.7 Disqualifications based on labor disputes ..................... 265
   8.4 Appeals and Review ..................................................... 266
      8.4.1 Untimely appeals ................................................... 266
      8.4.2 Administrative appeals .......................................... 266
      8.4.3 Judicial review ..................................................... 268
   8.5 Overpaid UC benefits .................................................. 269

9. HEALTH, RETIREMENT, AND OTHER EMPLOYMENT BENEFITS .................................................. 271

10. WAGE ISSUES ............................................................... 272
    10.1 Unpaid wage claims under state law ............................... 272
    10.2 Minimum wage and overtime complaints ......................... 276
        10.2.1 Minimum wage .................................................. 276
        10.2.2 Overtime complaints ........................................... 278
    10.3 Compensatory time .................................................... 278
    10.4 Unequal pay based on gender ....................................... 278
    10.5 Family or medical leave ............................................. 279
    10.6 Worker’s compensation .............................................. 282
    10.7 Other state payment and leave laws ............................... 282

11. WORK CONDITIONS ........................................................ 283
    11.1 Health and safety ..................................................... 283
    11.2 Child labor ............................................................. 284
    11.3 Drug and alcohol testing .......................................... 285
    11.4 Polygraph testing .................................................... 286
    11.5 Interference with political rights .................................. 286

APPENDIX A— Frequent Job-Related Complaints By Low-Income Clients, With Statutory Checklist 287

APPENDIX B— Administrative Enforcement Agencies .................................................. 292
5. LOUISIANA FAMILY LAW PRACTICE

1. INTRODUCTION .................................................. 297

2. FUNDAMENTALS .................................................. 297

3. KNOW THE COURT STAFF ....................................... 298

4. IN FORMA PAUPERIS ............................................. 299

5. DIVORCE .......................................................... 299
   5.1 What are the grounds for Divorce in Louisiana? .......... 299
   5.2 How to determine the separation period required for a divorce? ... 300
   5.3 Which courts have jurisdiction and venue for a divorce? ... 301
   5.4 Should the client file for a 102 or 103 divorce? .......... 302
   5.5 Divorce under civil code article 102 ....................... 303
      5.5.1 Overview of article 102 ................................. 303
      5.5.2 How do I get an article 102 divorce? ................. 303
      5.5.3 Pleading and notice requirement s for an art. 102 petition ................................. 304
      5.5.4 When does a defendant need to file an answer? ... 304
      5.5.5 Pleadings requirements for the Rule to Show Cause ...... 305
   5.6 Divorce under civil code article 103 ....................... 306
      5.6.1 Overview of article 103 ................................. 306
      5.6.2 Felony conviction or adultery divorces ................. 306
      5.6.3 Pleadings requirements for an art. 103 petition ...... 307
      5.6.4 Procedures to obtain an article 103 judgment .......... 307
      5.6.4.1 If defendant does not answer ...................... 307
      5.6.4.2 If defendant or curator files an answer .......... 309
      5.6.4.3 Notice for divorce judgment by default ........... 310
   5.7 Covenant Marriage ........................................... 310
   5.8 Bigamous Marriage ........................................... 310
   5.9 Name Confirmation ........................................... 311
   5.10 Default divorces involving a service member ............. 311
   5.11 Citation and Service of Divorce Petition and Other Pleadings . 311
      5.11.1 Waiver of citation and service ...................... 312
      5.11.2 Personal or Domiciliary service by the sheriff .... 312
      5.11.3 Certified mail by long-arm statute .................. 313
      5.11.4 Service by private process server ................... 314
      5.11.5 Service on curator .................................... 314
   5.12 Ancillary or incidental matters to a divorce ............. 315

6. CHILD CUSTODY .................................................. 315
   6.1 Introduction ................................................ 315
   6.2 The “best interest” standard ................................ 317
   6.3 Pleadings for a custody claim .............................. 317
   6.4 Trying a child custody case ................................ 318
      6.4.1 Burden of proof ........................................ 318
      6.4.1.1 Initial custody determination ....................... 318
      6.4.1.2 Modification of considered decree ................. 318
      6.4.1.3 Modification of consent judgment ................... 319
      6.4.2 Settlement and Pre-trial preparation .................. 320
      6.4.2.1 Considering settlement ................................ 320
      6.4.2.2 Evaluate best interest under C.C. art 134 factors . 321
### TABLE OF CONTENTS

| 6.4.2.3 Screen for “history of family violence” | 321 |
| 6.4.3 Witnesses and documentary evidence | 322 |
| 6.4.4 Civil Code art 134 custody factors | 323 |
| 6.4.5 Joint Custody Implementation Plan | 328 |
| 6.4.6 Custody to non-parents under C.C. art. 133 | 329 |
| 6.5 Kinship Care Subsidy Program (KCSP) Payments | 330 |
| 6.6 Ex Parte Custody | 331 |
| 6.7 Custody by Mandate or Power of Attorney | 332 |
| 6.8 Relocation of a Child's Principal residence | 333 |
| 6.9 Uniform Child Custody Jurisdiction and Enforcement act (UCCJEA) | 334 |
| 6.9.1 Introduction | 334 |
| 6.9.2 Overview of 2007 Amendments | 335 |
| 6.9.3 Jurisdiction under UCCJEA | 335 |
| 6.9.3.1 Understanding the interplay of UCCJEA and PKPA | 335 |
| 6.9.3.2 Personal jurisdiction is not required for child custody | 336 |
| 6.9.3.3 Notice and service of process | 336 |
| 6.9.3.4 Home State jurisdiction | 336 |
| 6.9.3.5 Significant connections/substantial evidence jurisdiction | 337 |
| 6.9.3.6 Deferral jurisdiction | 338 |
| 6.9.3.7 Default or vacuum jurisdiction | 338 |
| 6.9.3.8 Temporary emergency jurisdiction | 338 |
| 6.9.3.9 Simultaneous proceedings | 339 |
| 6.9.3.10 Mandatory inter-court communication | 339 |
| 6.9.3.11 Motions to decline jurisdiction | 339 |
| 6.9.3.12 Exclusive continuing jurisdiction | 341 |
| 6.9.3.13 Modification of other states’ custody determinations | 341 |
| 6.9.3.14 Enforcement remedies | 342 |
| 6.9.3.15 Attorney fees | 342 |
| 6.10 Other Statutes governing Interstate or International Custody Disputes | 343 |
| 6.10.1 Indian Child Welfare Act (ICWA) | 343 |
| 6.10.2 International Parental Kidnapping Act (IKPA) | 343 |
| 6.10.3 Uniform International Child Abduction Prevention Act | 343 |
| 6.10.4 Hague Convention | 343 |
| 6.10.5 Uniform Enforcement of Domestic violence Protective Orders Act | 344 |
| 6.11 Additional Custody Laws | 344 |
| 6.12 Custody Resource Information | 345 |

### VISITATION RIGHTS

| 7.1 What visitation issues arise in a legal aid practice? | 346 |
| 7.2 Who has rights to visitation? | 346 |
| 7.3 When can a court decide visitation rights or disputes? | 347 |
| 7.4 Courts may regulate, supervise, and enforce visitation to protect children | 347 |
## TABLE OF CONTENTS

12. COMMUNITY PROPERTY .................................................. 381
   12.1 Introduction ....................................................... 381
   12.2 Basic Principles for Community Property Division and Spousal reimbursement ............................................. 382
   12.3 Community Property Partition Procedures .................................................. 382

13. OTHER HELPFUL FORMS .................................................. 390

6. FEDERALLY SUBSIDIZED HOUSING

1. TRADITIONAL/CONVENTIONAL PUBLIC HOUSING .................. 455
   1.1 Introduction ....................................................... 455
   1.2 Eligibility ......................................................... 455
   1.3 Admissions Issues .................................................. 456
      1.3.1 Preferences ..................................................... 456
      1.3.2 Denials of Admission .......................................... 456
         1.3.2.1 Criminal Record ........................................... 456
         1.3.2.2 Eviction from Any Federal Housing for Drug Related Criminal Activity Within Three Years of Application .................................................. 457
         1.3.2.4 Prior Debt Owed to PHA ..................................... 457
   1.4 Rent Computation .................................................... 457
      1.4.1 Childcare Expense Deduction ................................... 458
      1.4.2 Medical Expense Deduction ...................................... 459
   1.5 Minimum Rents and Flat Rents ....................................... 459
   1.6 Grievance Procedure ................................................ 460
   1.7 Evictions from Public Housing ....................................... 461
      1.7.1 Practice Tips .................................................. 462
   1.8 One Strike Criminal Activity Evictions ............................ 462
   1.9 Community Service Work Requirement ................................ 465

2. SECTION 8 HOUSING CHOICE VOUCHER PROGRAM .................... 465
   2.1 Introduction ....................................................... 465
   2.2 Eligibility ......................................................... 466
   2.3 Admissions ......................................................... 467
      2.3.1 Denial of Admissions ........................................... 467
   2.4 Using the Voucher .................................................. 468
      2.4.1 Extensions and Suspensions .................................... 468
      2.4.2 Request for Tenancy Approval .................................. 469
   2.5 Utility Allowances .................................................. 469
   2.6 Rent Computation .................................................... 470
      2.6.1 Issues for Families with One or More Disabled Member . 471
      2.6.2 Reasonable Accommodation ..................................... 471
   2.7 Non-Rent Charges ................................................... 471
   2.8 Voucher Terminations and Denials ................................... 472
      2.8.1 Hearing Requirements ........................................... 472
      2.8.2 Reasonable Accommodations ..................................... 473
      2.8.3 Practice Tips .................................................. 473
## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.9</td>
<td>Evictions and HCVP</td>
<td>474</td>
</tr>
<tr>
<td>2.9.1</td>
<td>Nonpayment and Payment by the PHA as Defenses to Eviction</td>
<td>475</td>
</tr>
<tr>
<td>2.9.2</td>
<td>Termination from HCVP in Following Court Eviction</td>
<td>475</td>
</tr>
<tr>
<td>2.10</td>
<td>Program Moves and Tenant Right to Terminate Lease</td>
<td>476</td>
</tr>
<tr>
<td>2.10.1</td>
<td>Portability</td>
<td>477</td>
</tr>
<tr>
<td>2.11</td>
<td>Effects of Criminal Activity</td>
<td>477</td>
</tr>
<tr>
<td>2.12</td>
<td>Need for Repairs to Unit</td>
<td>478</td>
</tr>
<tr>
<td>2.12.1</td>
<td>Practice Tips</td>
<td>478</td>
</tr>
<tr>
<td>3.</td>
<td>OTHER FEDERALLY SUBSIDIZED PROGRAMS</td>
<td>479</td>
</tr>
<tr>
<td>3.1</td>
<td>Other Federally Assisted Section 8 Programs</td>
<td>479</td>
</tr>
<tr>
<td>3.1.1</td>
<td>Introduction</td>
<td>479</td>
</tr>
<tr>
<td>3.1.2</td>
<td>Eligibility and Admissions</td>
<td>479</td>
</tr>
<tr>
<td>3.1.3</td>
<td>Rent Computation</td>
<td>479</td>
</tr>
<tr>
<td>3.1.4</td>
<td>Evictions from Multifamily Housing</td>
<td>479</td>
</tr>
<tr>
<td>3.1.5</td>
<td>Repairs or Abatement for Multifamily Housing</td>
<td>481</td>
</tr>
<tr>
<td>3.2</td>
<td>Section 515 Rural Rental Housing Program (7C.F.R § 3560 et seq)</td>
<td>481</td>
</tr>
<tr>
<td>3.2.1</td>
<td>Tenant Eligibility</td>
<td>481</td>
</tr>
<tr>
<td>3.2.2</td>
<td>Important Lease Requirements</td>
<td>482</td>
</tr>
<tr>
<td>3.2.3</td>
<td>Termination of Occupancy</td>
<td>482</td>
</tr>
<tr>
<td>3.2.4</td>
<td>Grievances</td>
<td>483</td>
</tr>
<tr>
<td>3.3</td>
<td>Special Federal Housing Programs for the Homeless</td>
<td>483</td>
</tr>
<tr>
<td>3.3.1</td>
<td>Supportive Housing</td>
<td>483</td>
</tr>
<tr>
<td>3.3.2</td>
<td>Shelter Plus Care</td>
<td>484</td>
</tr>
<tr>
<td>3.4</td>
<td>Low-Income Housing Tax Credit Program</td>
<td>484</td>
</tr>
<tr>
<td>4.</td>
<td>OTHER ISSUES IN SUBSIDIZED HOUSING</td>
<td>485</td>
</tr>
<tr>
<td>4.1</td>
<td>VAWA – Housing Provisions of the Violence Against Women Act and the Protection for Domestic Violence Survivors</td>
<td>485</td>
</tr>
<tr>
<td>4.2</td>
<td>Failure to Give Earned Income Exclusions</td>
<td>487</td>
</tr>
<tr>
<td>4.3</td>
<td>Public Housing Authority</td>
<td>488</td>
</tr>
<tr>
<td>4.4</td>
<td>Section 8 Multifamily Restructuring/Mark to Market</td>
<td>490</td>
</tr>
<tr>
<td>4.5</td>
<td>State Public Housing Agencies Law</td>
<td>491</td>
</tr>
<tr>
<td>4.6</td>
<td>Uniform Relocation Act Assistance for displaced Families</td>
<td>491</td>
</tr>
<tr>
<td>4.7</td>
<td>Service Member Civil Relief Act</td>
<td>492</td>
</tr>
<tr>
<td>4.8</td>
<td>Choice Neighborhoods Grant (CNI)</td>
<td>493</td>
</tr>
<tr>
<td>4.9</td>
<td>Mid-Term Lease Changes</td>
<td>493</td>
</tr>
<tr>
<td>5.</td>
<td>SELECTED LOUISIANA CASE LAW ON FEDERALLY SUBSIDIZED HOUSING</td>
<td>493</td>
</tr>
<tr>
<td>5.1</td>
<td>Utility Charges</td>
<td>493</td>
</tr>
<tr>
<td>5.2</td>
<td>Utility Allowances</td>
<td>494</td>
</tr>
<tr>
<td>5.3</td>
<td>Evictions</td>
<td>495</td>
</tr>
<tr>
<td>5.3.1</td>
<td>Notice of Lease Termination</td>
<td>495</td>
</tr>
<tr>
<td>5.3.2</td>
<td>Waiver/Lease Modification</td>
<td>495</td>
</tr>
<tr>
<td>5.3.3</td>
<td>Lease Violation</td>
<td>496</td>
</tr>
<tr>
<td>5.3.4</td>
<td>Appeal Bond</td>
<td>496</td>
</tr>
<tr>
<td>5.4</td>
<td>Recertification of Income</td>
<td>496</td>
</tr>
<tr>
<td>5.5</td>
<td>Non-Rent Charges</td>
<td>497</td>
</tr>
<tr>
<td>5.6</td>
<td>Grievance Hearings</td>
<td>497</td>
</tr>
<tr>
<td>5.7</td>
<td>Demolition</td>
<td>497</td>
</tr>
</tbody>
</table>
7. FORECLOSURE DEFENSE IN LOUISIANA

1. INTRODUCTION .......................................................... 501
2. WHY HOME FORECLOSURE DEFENSE IS IMPORTANT .......... 501
3. WHAT CAN BE DONE FOR A HOMEOWNER WHO FACES FORECLOSURE ........................................... 501
4. WHEN CAN FORECLOSURE PREVENTION COUNSELING HELP A HOMEOWNER ........................................ 502
5. HOW DO I STOP AN IMMINENT FORECLOSURE .............. 502
6. WHAT IF THE FORECLOSURE SALE HAS ALREADY OCCURRED .............................................................. 502
7. WHAT DOCUMENTS DO I NEED TO EVALUATE THE CLIENT’S POSSIBLE FORECLOSURE DEFENSES? .............. 503
8. THE MAJOR FORECLOSURE DEFENSE OPTIONS ................. 504
   8.1 Bankruptcy ............................................................. 504
   8.2 Mortgage rescission rights ....................................... 504
   8.3 Loan servicing programs .......................................... 504
       8.3.1 The Making Home Affordable Program (HAMP) ..... 504
       8.3.2 FHA-Insured Home Loans .................................. 506
       8.3.3 VA Loans ......................................................... 506
       8.3.4 USDA Loans ...................................................... 506
           8.3.4.1 USDA Direct Loans .................................... 506
           8.3.4.2 USDA Guaranteed Loans ................................. 507
       8.3.5 National Mortgage Settlement .............................. 507
   8.4 Reverse mortgages ................................................ 507
9. FORECLOSURE DEFENSE PROCEDURES ............................... 508
   9.1 Executory process .................................................. 508
   9.2 Ordinary process and Lost Note Statute ....................... 509
   9.3 Collateral mortgages .............................................. 509
   9.4 Other Defenses to Executory or Ordinary Process ........ 509
       9.4.1 Prescription ...................................................... 509
       9.4.2 MERS .............................................................. 510
       9.4.3 Satisfaction ...................................................... 510
10. TORT CLAIMS AGAINST LENDERS ..................................... 510
    10.1 Wrongful foreclosure ............................................. 510
    10.2 Abuse of rights doctrine ....................................... 511
    10.3 Other tort claims ................................................. 511
11. DEFICIENCY JUDGMENTS AFTER SALE BY EXECUTORY PROCESS ..................................... 511
12. OTHER MORTGAGE ABUSES ............................................ 511
13. TAX ISSUES IN FORECLOSURES ....................................... 511
8. IMMIGRATION FOR LEGAL AID LAWYERS

1. INTRODUCTION .......................................................... 515
   1.1 Sources of Immigration Law ..................................... 515
       1.1.1 Statutes .................................................. 515
       1.1.2 Regulations ............................................. 515
       1.1.3 Policy Statements and Memoranda ...................... 516
       1.1.4 Court cases and Agency Adjudications ............... 516
   1.2 Overview of Suggested Resources ............................. 516
   1.3 LSC funding restrictions depending on Immigration Status . 517

2. WHO'S WHO IN IMMIGRATION .......................................... 519
   2.1 Agencies ....................................................... 519
       2.1.1 Immigration and Customs Enforcement (ICE) ........ 519
       2.1.2 Citizen and Immigration Services (CIS) ............. 519
       2.1.3 Customs and Border Protection (CBP) ................. 519
   2.2 Immigration Courts (EOIR) .................................. 520
   2.3 Louisiana Directory of Immigration Agencies, Courts and Detention Centers ........................................... 520
       2.3.1 Agency Offices .......................................... 520
       2.3.2 Immigration Courts ..................................... 521
       2.3.3 Detention Centers ..................................... 521

3. OVERVIEW OF IMMIGRATION CONCEPTS ............................ 521
   3.1 Types of Immigration Statuses ................................ 521
       3.1.1 Citizen .................................................. 522
       3.1.2 Immigrant .............................................. 522
       3.1.3 Nonimmigrant ........................................... 522
       3.1.4 Unauthorized ........................................... 523
   3.2 Inadmissibility and Deportability ............................ 523
   3.3 Effects of Criminal Convictions .............................. 524
   3.4 Immigration Status and Public Benefits .................... 529

4. COMMON IMMIGRATION APPLICATIONS FOR LEGAL SERVICES ATTORNEYS ................................................................. 530
   4.1 Family-based petitions and relief under the VAWA ........ 530
       4.1.1 Self-Petition (Form I-360) ............................ 532
       4.1.2 Batteried Spouse/Child Waiver (Form I-751) .......... 536
       4.1.3 VAWA Cancellation ..................................... 538
   4.2 U Nonimmigrant Status ........................................ 541
   4.3 T Nonimmigrant Status ........................................ 549
   4.4 Special Immigrant Juvenile Status ........................... 554
   4.5 Naturalization .................................................. 558
   4.6 Hague Convention Child Abduction Actions ................ 560
   4.7 Spousal Support ............................................... 562

5. SUMMARY ................................................................. 564

6. APPENDIX ................................................................. 564
   Glossary of acronyms, .............................................. 564
   INA Conversion Chart ............................................... 565
   45 CFR § 1626 for “Restrictions on Legal Assistance to Aliens” chart . 566

(xvi)
9. LOUISIANA LANDLORD-TENANT LAW

1. INTRODUCTION ................................................................. 571
2. SOURCES OF LANDLORD-TENANT LAW ............................... 571
3. HOW TO DEFEND EVICTIONS: A CHECKLIST .......................... 572
4. EVICTION DEFENSES: QUICK REFERENCE GUIDE .................... 574
5. EVICTIONS ............................................................... 576
  5.1 Jurisdiction ............................................................. 576
  5.2 Procedure For Prosecuting An Eviction ............................ 577
    5.2.1 Notice to Vacate ............................................... 577
    5.2.2 Rule For Possession .......................................... 578
    5.2.3 Trial .......................................................... 578
    5.2.4 Judgment ...................................................... 579
    5.2.5 Execution of Eviction Judgment .............................. 580
  5.3 Procedure For Defending An Eviction ............................... 580
    5.3.1 Verified Answer and Affirmative Defense .................. 580
    5.3.2 Motion to Continue .......................................... 581
    5.3.3 Pre-trial Discovery ......................................... 581
    5.3.4 Recordation of Testimony ................................... 582
  5.4. Appeals And Post-Judgement Remedies ............................. 582
    5.4.1 Appellate Jurisdiction ...................................... 582
    5.4.2 Motion For Suspensive Appeal ............................... 583
    5.4.3 Appeal Bonds ................................................ 584
    5.4.4 Effect of Suspensive Appeal ................................. 586
    5.4.5 Rent Obligation During Pendency of Appeal ................. 586
    5.4.6 Motion to Dismiss Appeal ................................... 586
    5.4.7 Supervisory Writs .......................................... 587
    5.4.8 Motion for New Trial ....................................... 588
    5.4.9 Petition for Nullity of Judgment ............................ 588
  5.5 Federal Remedies ...................................................... 589
    5.5.1 Fair Housing Act ............................................. 589
    5.5.2 Age Discrimination Act of 1975 ............................... 590
    5.5.3 Bankruptcy Code ............................................. 590
    5.5.4 Violations of federal law .................................... 591
  5.6. Defenses To Eviction ............................................... 591
    5.6.1 Introduction ................................................. 591
    5.6.2 No Cause Eviction .......................................... 591
    5.6.3 Eviction for Nonpayment of Rent ............................ 595
    5.6.4 Good Cause Eviction ........................................ 598
  5.7. Other Eviction Related Issues ..................................... 601
    5.7.1 Disaster Executive Orders .................................. 601
    5.7.2 Lease-Purchase Agreements and Bonds for Deed .......... 602
    5.7.3 Eviction of “possessors” .................................... 603
    5.7.4 Eviction and rent claims by co-owners ..................... 603
    5.7.5 Suit for Money and Eviction .................................. 604
    5.7.6 Sale or Foreclosure of Property ............................. 604
    5.7.7 Reconduction of Lease ....................................... 605
    5.7.8 Landlord’s Seizure of Tenant’s Property for Unpaid Rent . 605
5.7.9 Unpaid Rent and Attorney Fees .......................... 606
5.7.10 Unenforceable Lease Provisions ......................... 606
5.7.11 Tenant's Lease Cancellation Rights ...................... 607

6. LOCKOUTS AND UTILITY TERMINATIONS ....................... 608

7. REPAIR AND DEDUCT: CIVIL CODE ARTICLE 2694 ............. 610
  7.1 Uses .......................................................... 610
  7.2 Checklist Of Article 2694 Requirements .................... 610
  7.3 Analysis Of Article 2694 Requirements ...................... 611
     7.3.1 Repair Obligations and Warranties .................... 611
     7.3.2 Adequate Notice And Demand on Landlord ............... 613
     7.3.3 Application to Rent ................................... 614
     7.3.4 Proof That Repairs Were Necessary and that Price Was Reasonable ........................................ 615
  7.4 Pleading Requirements For An Article 2694 Defense .......... 616
  7.5 Alternative Remedies In The Event Of Failure
     Under Article 2694 ........................................... 616
     7.5.1 The Defense of Good Faith ............................ 616
     7.5.2 The Right to Remove Improvements or to be Reimbursed .................................................. 616
     7.5.3 Damages .................................................... 616

8. TENANT DAMAGE CLAIMS ........................................ 616
  8.1 Warranty Of Habitability .................................... 617
  8.2 Peaceable Possession ....................................... 617
  8.3 Unfair Trade Practices Act .................................. 617
  8.4 Federal Fair Debt Collection Practices Act ................. 619
  8.5 Federal Fair Credit Reporting Act .......................... 619
  8.6 Invasion Of Privacy And Trespass ........................... 619
  8.7 Property Damage ............................................. 619
  8.8 Third Party Crimes .......................................... 620

9. HOUSING DISCRIMINATION ...................................... 620
  9.1 Introduction .................................................. 620
  9.2 Properties Covered By Fair Housing Act ...................... 620
  9.3 Prohibited Bases Of Discrimination ......................... 621
  9.4 Discriminatory Practices .................................... 623
  9.5 Examples Of Discriminatory Practices ....................... 624
     9.5.1 Familial Status Discrimination ....................... 624
     9.5.2 Handicap Discrimination ............................... 625
     9.5.3 Sex Discrimination .................................... 626
     9.5.4 Racial Discrimination ................................ 626
  9.6 Procedure .................................................... 628
  9.7 Proving A Violation ......................................... 629
  9.8 Relief .......................................................... 631
     9.8.1 Actual Damages ......................................... 631
     9.8.2 Punitive Damages ....................................... 631
     9.8.3 Equitable Relief ........................................ 631
     9.8.4 Attorney's Fees ........................................ 632

(xviii)
10. SECURITY DEPOSITS .................................................. 632
  10.1 Summary Of Rent Deposit Return Act ......................... 632
  10.2 Pre-Litigation Planning ........................................... 632
  10.3 Major Issues In Litigation ....................................... 633
    10.3.1 Introduction .............................................. 633
    10.3.2 Landlord Defenses ........................................ 633
    10.3.3 Adequacy of Landlord's Itemization ....................... 636
    10.3.4 Amount of Tenant's Recovery ............................. 636
  10.4. Miscellaneous Procedural Issues .............................. 637
    10.4.1 Venue ..................................................... 637
    10.4.2 Prescription ............................................... 637
    10.4.3 Burden of Proof .......................................... 637
    10.4.4 Security deposit claims against bankrupt landlord .... 637

11. INTERNET RESEARCH ................................................. 637

12. OTHER TREATISES .................................................... 638

13. SAMPLE EVICTION ANSWER ......................................... 638

10. MEDICAID

1. INTRODUCTION ....................................................... 647

2. ELIGIBILITY FOR MEDICAID ......................................... 647
  2.1. Client has been denied as over-income ....................... 647
    2.1.1 Interview questions ...................................... 648
    2.1.2 Overview of reviewing income eligibility ................ 648
    2.1.3 Check if the client can qualify under one of the
           highest income limit eligibility categories providing
           full or nearly full Medicaid coverage .................... 649
    2.1.4 Check if client can qualify under any of the other
           eligibility categories ..................................... 649
    2.1.5 Check if the appropriate income exclusions and
           deductions were applied. ................................... 661
    2.1.6 Other Medicaid provisions that trump the AFDC
           and SSI methodologies ................................... 664
    2.1.7 Usually it is inappropriate to get distracted by
           Louisiana's very limited "medically needy" eligibility ... 666
  2.2. Client has been denied Medicaid based on excess resources . 669
    2.2.1 Check the correct resource limit was applied .......... 669
    2.2.2 Check if the client can qualify for all services needed
           under a different category, with a higher or no resource
           limit. ...................................................... 670
    2.2.3 Quick options to consider in dealing with excess
           resources. .................................................. 672
    2.2.4 Delve into the rules of the SSI program .................. 675
    2.2.5 Specific Medicaid liberalizations of the cash
           assistance rules. ......................................... 675
    2.2.6 Advocacy-DHH can liberalize resource rules ............ 675
  2.3 When must Louisiana Medicaid reject an application because
      the applicant was denied SSI for being "not disabled"? .... 676
TABLE OF CONTENTS

2.4 Disqualifications ..............................................677
  2.4.1 Transfer of assets for less than fair market value ........677
  2.4.2 Parent-only sanctions for not cooperating with
       child support ...........................................678
  2.4.3 Other TANF/FITAP sanctions ............................678
  2.4.4 Residence ..............................................678
  2.4.5 Not having a Social Security number ....................678
  2.4.6 Non-citizens ............................................679

3. procedure- dealing with limitations periods and
   choosing the correct forum for securing relief
   for the client ..................................................679
  3.1 Limitation periods ........................................679
    3.1.1 Denial notice (applicant not previously certified) ..........679
    3.1.2 Denial of “prior approval” for a particular service
          (applicant not previously certified for it) ...............680
    3.1.3 Denial of “prior approval” for a particular service
          by one of the Bayou Health “Prepaid” plans ...............680
    3.1.4 Termination notice (eligibility or services received
          until the notice) .......................................680
    3.1.5 Relief if the client missed the appeal period by a
          day or two ............................................682
    3.1.6 Appellant missed the hearing ...........................682
    3.1.7 Adverse fair hearing decision ...........................683
    3.1.8 If the recipient did not get notice, it might not be the
          agency’s fault. .........................................684
  3.2 First steps ................................................684
    3.2.1 Obtain HIPAA releases ..................................684
    3.2.2 Choose the forum relief will be pursued in carefully ..684
  3.3 Work directly with the agency, rather than waiting for
      resolution by a court or ALJ ................................685
  3.4 Reapplying ..................................................685
  3.5 Often faster and more effective than fair hearing requests:
      escalating policy issues to state level decision makers ....686
  3.6 As to “Bayou Health” issues, can the recipient withdraw
      from Bayou Health, switch plans, or switch primary care
      physician to solve the problem .............................687
  3.7 Particular rights and procedures with fair hearing requests ...687
    3.7.1 Right to an additional medical assessment ...............688
    3.7.2 Few ALJ decisions are favorable ........................688
    3.7.3 Limitations on ALJs’ ability to issue decisions
          adverse to the Department ..............................688
    3.7.4 Theoretical availability of discovery ......................688
    3.7.5 The hearing record should not be limited to facts
          that were before the agency at the time of the
          adverse decision .......................................689
    3.7.6 Date of appeal is determined by earliest action,
          including postmark ......................................689
    3.7.7 90 day time limit for decision ..........................690
    3.7.8 Appeals improperly dismissed ............................690

(xx)
<table>
<thead>
<tr>
<th>Section</th>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.7.9</td>
<td>Agency duty to comply with appeal decisions and issue corrective payments</td>
<td>690</td>
</tr>
<tr>
<td>3.8</td>
<td>Possibility of getting a state court stay while a fair hearing is pending</td>
<td>691</td>
</tr>
<tr>
<td>3.9</td>
<td>State court judicial review of hearing decisions</td>
<td>691</td>
</tr>
<tr>
<td>3.9.1</td>
<td>Beginning suit and time limitations</td>
<td>691</td>
</tr>
<tr>
<td>3.9.2</td>
<td>Venue</td>
<td>692</td>
</tr>
<tr>
<td>3.9.3</td>
<td>Limitations on judicial review</td>
<td>692</td>
</tr>
<tr>
<td>3.10</td>
<td>Civil rights actions under 42 U.S.C. §1983</td>
<td>693</td>
</tr>
<tr>
<td>3.10.1</td>
<td>Correct defendant(s)</td>
<td>694</td>
</tr>
<tr>
<td>3.10.2</td>
<td>More than 30 day filing period</td>
<td>694</td>
</tr>
<tr>
<td>3.10.3</td>
<td>Open record</td>
<td>695</td>
</tr>
<tr>
<td>3.10.4</td>
<td>Lack of jurisdiction over state-law and state-plan claims in federal court</td>
<td>695</td>
</tr>
<tr>
<td>3.10.5</td>
<td>Federal “enforceable rights,” that meet standards under the Wilder and Blessing Supreme Court cases, must be at issue</td>
<td>695</td>
</tr>
<tr>
<td>3.10.6</td>
<td>Meeting the Wilder-Blessing test may no longer be enough: Gonzaga and state sovereignty issues</td>
<td>696</td>
</tr>
<tr>
<td>3.10.7</td>
<td>Avoid relying solely on regulations or interpretive materials</td>
<td>697</td>
</tr>
<tr>
<td>3.10.8</td>
<td>Include constitutional claims, if possible</td>
<td>697</td>
</tr>
<tr>
<td>3.10.9</td>
<td>Complications from requesting a fair hearing before going to federal court</td>
<td>698</td>
</tr>
<tr>
<td>3.10.10</td>
<td>State court §1983 actions</td>
<td>699</td>
</tr>
<tr>
<td>3.10.11</td>
<td>State court inability to grant relief if agency certifies no funds are available</td>
<td>700</td>
</tr>
<tr>
<td>3.10.12</td>
<td>Precluding removal to federal court by avoiding federal claims</td>
<td>700</td>
</tr>
<tr>
<td>3.11</td>
<td>Federal court jurisdiction based on the Supremacy clause may be available if a state policy is in conflict with federal law</td>
<td>700</td>
</tr>
<tr>
<td>3.12</td>
<td>Complications if the federal agency is made a party to any court proceeding</td>
<td>701</td>
</tr>
<tr>
<td>4.</td>
<td>FINDING THE GOVERNING LAW</td>
<td>701</td>
</tr>
<tr>
<td>4.1</td>
<td>Overview</td>
<td>701</td>
</tr>
<tr>
<td>4.2</td>
<td>The easy case: violation of Louisiana’s Medicaid Eligibility Manual standards</td>
<td>701</td>
</tr>
<tr>
<td>4.3</td>
<td>Is the Medicaid Eligibility Manual legally binding when adverse?</td>
<td>702</td>
</tr>
<tr>
<td>4.4</td>
<td>As to eligibility issues for persons who are aged, blind, or disabled: The Social Security Administration POMS</td>
<td>703</td>
</tr>
<tr>
<td>4.5</td>
<td>Federal statutes, regulations, and other regulatory materials</td>
<td>703</td>
</tr>
<tr>
<td>4.6</td>
<td>Other state-level materials</td>
<td>705</td>
</tr>
<tr>
<td>4.7</td>
<td>Case law</td>
<td>707</td>
</tr>
<tr>
<td>4.8</td>
<td>Draw no adverse conclusions</td>
<td>708</td>
</tr>
<tr>
<td>5.</td>
<td>APPLYING FOR MEDICAID</td>
<td>708</td>
</tr>
<tr>
<td>5.1</td>
<td>The agency must assess every application for all eligibilities, even if it is a shortened application</td>
<td>708</td>
</tr>
<tr>
<td>5.2</td>
<td>Infants born to a Medicaid mother need not apply</td>
<td>709</td>
</tr>
</tbody>
</table>
5.3. Some other children get certified without applying, as well ............709
5.4. The right to apply for Medicaid without delay ..........................709
5.5. Medicaid eligibility under all categories should be explored after any FITAP or SSI application is filed .................710
5.6 145 or 90 days for the agency to review applications ..................710

6. FREQUENT ISSUES IN MEDICAID TERMINATIONS .....................711
6.1. Recipients remain eligible until found ineligible under every category ........................................711
6.2. Client failure to respond to agency paperwork may be immaterial if agency could have obtained the needed information from on-line databases ........................................711
6.3. If client has missed their 30 days to administratively appeal, other options may be available ...............................711
6.4. Children remain eligible for Medicaid for a full year from the last time they were found eligible .............................711
6.5. Right to continued Medicaid services while a request for a fair hearing is pending ........................................712
6.5.1 Exceptions to the right to continued benefits pending appeal: ........................................712
6.6. Right to continued Medicaid for persons who are appealing SSI terminations with SSA ........................................714
6.6.1 Louisiana prematurely cuts off Medicaid, during the SSI appeal period ........................................714
6.7. Medicaid that was based on disability should not be terminated without applying the SSI “medical improvement” standards ....714

7. DUTY TO REPAY MEDICAID FOR CERTAIN SERVICES RECEIVED AFTER AGE 55 ........................................715

8. WHAT MEDICAID COVERS ........................................715
8.1. Some Medicaid categories cover less than the full range of Medicaid services ........................................716
8.2. Medicaid as payment in full ........................................716
8.2.1 Providers cannot pick and choose which services they bill to Medicaid ........................................716
8.2.2 QMB providers cannot refuse to accept Medicaid ........................................716
8.2.3 The agency and providers cannot discriminate against recipients for having other medical coverage ........................................717
8.3 Getting coverage for old bills ........................................717
8.4 Bayou Health –“coordinated care” through private companies for Medicaid recipients ........................................720
8.4.1 Plans must provide at least what other Medicaid offers, and can provide more ........................................721
8.4.2 Plans are obligated to provide recipients with increased access to services ........................................721
8.4.3 Coordinating with other private insurance ........................................721
8.5 “All medically necessary” services for children, and sometimes adults ........................................722
8.5.1 Right to all medically necessary services for recipients under age 21 ........................................722

Table of Contents
8.5.2 Medically necessary home health services, which include medical equipment and supplies .......... 723
8.5.3 Medically necessary outpatient hospital services ...... 723
8.5.4 Medically necessary services for pregnancy .......... 723

8.6 Requirements governing limits placed on other services ...... 724
8.6.1 Caveat — if the service is an optional service under federal law, & you win a contested case, would the state choose to drop the option? .......... 724
8.6.2 Any service a state covers must be provided in a way that is sufficient to achieve the purpose of the service (for most recipients) .......... 724
8.6.3 The agency must not deny a service to persons who need it more than those for whom it covers the service (“comparability”) ......................... 726
8.6.4 For mandatory services, lines drawn must not arbitrarily discriminate by diagnosis or condition—for example, surgery cannot be denied because it is to deal with obesity ......................... 727
8.6.5 Standards must be “reasonable” and designed to achieve the goals of the program .......... 727
8.6.6 ADA and §504 claims to extend services .......... 728

8.7 Specific service offerings: ........................................ 728
8.7.1 Prescription drug coverage ......................... 728
8.7.2 Dental services for pregnant women ................ 734
8.7.3 Prosthetic dentures ......................... 734
8.7.4 Payment for private health insurance premiums ...... 734
8.7.5 Psychological services for children needing them: .... 735
8.7.6 Louisiana Behavioral Health Partnership ............ 735
8.7.7 “Personal care services” to assist with transferring, bathing, feeding, and similar care in the home: .... 736
8.7.8 “Hospice care” for persons with terminal illnesses: .... 738
8.7.9 Programs for All-inclusive Care for the Elderly (“PACE”) ............................................. 739
8.7.10 Obtaining services beyond normal limits, with Medicaid’s prior approval .......... 739
8.7.11 Prior approval denials outside of Bayou Health are usually because of documentation problems, and often do not mean the recipient is ineligible for the service ......................... 740
8.7.12 Prior approval requests for medical equipment, appliances and supplies are “automatically approved” if not ruled on within 25 days, and other procedural rights ......................... 740
8.7.13 Few limitations on coverage for emergency room visits 741
8.7.14 For certain facility residents, a way to pay for needed services not usually covered by Medicaid .......... 742
8.7.15 Dealing with inability to find a willing provider .......... 742

TABLE OF CONTENTS

(xxiii)
11. SOCIAL SECURITY DISABILITY PRACTICE IN LOUISIANA

1. INTRODUCTION .........................................................747
2. THE DIFFERENCE BETWEEN SSI AND SSDI .......................747
   2.1 Supplemental Security Income .................................747
       2.1.1 SSI Eligibility Rules ..................................747
       2.1.2 Citizenship and Alien Status Eligibility Rules ....748
       2.1.3 SSI Resource Rules .....................................748
           2.1.3.1 Definition of resource ..........................748
           2.1.3.2 Resource Limit ..................................749
           2.1.3.3 Valuation ........................................749
           2.1.3.4 When resources are counted ......................749
           2.1.3.5 Excluded Resources ...............................749
           2.1.3.6 Disposing of Resources ..........................750
       2.1.4 SSI Income Rules ........................................751
           2.1.4.1 Basic eligibility rule ............................751
           2.1.4.2 Calculating the amount of benefits due .......751
           2.1.4.3 Definition of income .............................751
           2.1.4.4 Countable income ................................751
           2.1.4.5 In-Kind income rules .............................752
           2.1.4.6 Excluded income ................................752
           2.1.4.7 Income deductions ................................753
           2.1.4.8 Income deeming ................................753
   2.2 Social Security Disability Insurance (SSDI) Eligibility ..753
3. THE APPLICATION AND APPEALS PROCESS .......................755
   3.1 Stage One: The Initial Decision on the Application ....755
   3.2 Stage Two: The Hearing ......................................756
   3.3 Stage Three: Appeals Council Review .......................756
   3.4 Stage Four: Federal Court Review ...........................758
4. PROVING DISABILITY: THE SEQUENTIAL EVALUATION ..........759
   4.1 Adult Cases ..................................................759
       4.1.1 Step One: SGA ........................................760
       4.1.2 Step Two: Severity ....................................760
       4.1.3 Step Three: Meeting or Equaling a Listing ..........761
       4.1.4 Step Four: Ability to Do Past Relevant Work .......761
       4.1.5 Step Five Ability to Do Other Work ..................761
   4.2 Children Cases ...............................................762
   4.3 Termination of Benefits .....................................764
       4.3.1 The Martinez and the Clark case- denials and terminations for “fleeing felons” and Parole/Probation violations ..........................764
   4.4 Overpayments .................................................765
5. HOW TO HANDLE A DISABILITY HEARING .......................766
   5.1 Develop the Evidence ........................................766
       5.1.1 Obtain and review records ..............................766
       5.1.2 Develop a theory of the case ..........................767

( xxiv )
5.1.2.1 Review all relevant listings in the Listing of Impairments ........................................... 767
5.1.2.2 For adults, prepare for the possibility that you may not win at Step Three .................. 767
5.1.2.3 Prepare a detailed job duty description of the jobs your client held in the 15 years prior to application ................................................................. 767
5.1.2.4 Review the Grid Rules (Medical Vocational Guidelines) .................................................. 767
5.1.2.5 Determine how to evidence the client’s actual mental and physical residual functional capacity ................................................................. 768
5.1.3 Determine what onset date can be proved .................................................................................. 768
5.1.4 Request a letter or an evaluation form from a treating physician or psychologist spelling out how the claimant’s conditions meets or equals a particular listing or prevents him from holding a full-time job ................................................................. 768
5.1.5 If the record evidence clearly shows the claimant meets a listing, submit a brief requesting a decision on the record .................................................................................. 768

5.2 Prepare for the Hearing ............................................................................................................. 769
5.2.1 Request rescheduling if necessary .......................................................................................... 769
5.2.2 Submit updated medical records, letters from treating sources, and pre-hearing briefs at least 10 days before the hearing if at all possible ............................................................................. 769
5.2.3 Become thoroughly familiar with the medical evidence .......................................................... 769
5.2.4 Write a pre-hearing brief. A good pre-hearing brief will greatly improve your chances of success ............................................................................................................. 769
5.2.5 Try to line up at least one witness who could testify on client’s behalf .................................. 769
5.2.6 Prepare the witnesses .............................................................................................................. 770
5.2.7 Prepare your client .................................................................................................................... 770

5.3 The Hearing ............................................................................................................................... 770
5.3.1 Request a new hearing if client fails to show up ..................................................................... 770
5.3.2 Tape the Hearing ...................................................................................................................... 770
5.3.3 Opening Statement .................................................................................................................. 770
5.3.4 Ask to examine your witnesses, if possible ............................................................................. 771
5.3.5 Point out any non-verbal behaviors that support your case .................................................. 771
5.3.6 Prepare for cross-examination of the vocational expert (VE) and the medical expert (ME) .... 771
5.3.6.1 The ME’s testimony .............................................................................................................. 771
5.3.6.2 The VE’s testimony .............................................................................................................. 771
5.3.7 Make closing statement ........................................................................................................... 772
6. PRACTICE TIPS .........................................................772
  6.1 Cite Social Security Rulings (SSRs), HALLEX policies, and POMS policies where favorable ..................772
  6.2 If relevant, remind the ALJ that a person is disabled if unable to work full-time ..............................773
  6.3 To show that your client cannot do light or sedentary work, remind the ALJ how the Dictionary of Occupational Titles defines “occasionally” and “frequently.” .........................773
  6.4 Lessen the impact of unfavorable non-treating medical opinion .........................................................773
  6.5 Explain why the treating source’s opinion should be adopted ..............................................................774
  6.6 Inform the ALJ of the correct standard for evaluating claimants who abuse substances ........................774
  6.7 If your client has failed to follow prescribed treatment, be prepared to give a good reason why ................775
  6.8 Always look for prior claims that can be reopened in order to maximize your client’s receipt of back benefits ......776
7. COMPENDIUM OF FIFTH CIRCUIT CASE LAW ..........................776
  7.1 Onset and duration of disability ..................................................776
  7.2 Sequential Evaluation ..............................................................777
  7.3 Step Two: Severity ..................................................................777
  7.4 Step Four: Return to Past Work ................................................777
  7.5 Step Four and Five: Residual Functional Capacity (RFC) .................................................................777
  7.6 Step Five: Vocational-Medical Guidelines (“Grid Rules”) .................................................................778
  7.7 Disability Terminations ..............................................................779
  7.8 Children’s Disability Evaluation ..............................................779
  7.9 Mental Illness ........................................................................779
  7.10 Pain and other Non-exertional impairments ......................779
  7.11 Failure to follow prescribed treatment .................................780
  7.12 Treating Physician Rule ..........................................................780
  7.13 Effect of other statutory definitions of disability and other agencies’ determinations of disability ..........781
  7.14 Drug addiction or alcoholism .................................................781
  7.15 ALJ’s duty ...........................................................................782
  7.16 Legal effect of Social Security Rulings (SSRs) and HALLEX Policies ....................................................783
  7.17 Appeals Council ..........................................................783
  7.18 Federal Court Review .................................................783
  7.19 Federal Court Review- Consideration of New Evidence ..................784
  7.20 Overpayments ..................................................................785
  7.21 Other SSI/SSDI Rules ..............................................................785
8. RESOURCES FOR THE ADVOCATE ............................................786
  8.1 Sources of Law ..........................................................786
  8.2 Reporting services, newsletters, treatises and manuals ..........786
  8.3 Electronic Resources ..............................................................786
  8.4 Medical information online ...................................................787
12. SUCCESSIONS IN LOUISIANA

1. INTRODUCTION ............................................................... 791
2. WHAT IS A SUCCESSION .................................................. 791
3. BASIC LAWS OF SUCCESSION .......................................... 792
4. INTESTATE SUCCESSION .................................................. 793
   4.1 Classifying property for intestate successions ................. 793
   4.2 Who inherits community property by intestacy ............... 794
   4.3 Who inherits separate property by intestacy ................. 795
   4.4 A closer look at the 5 classes of heirs ......................... 795
5. TESTATE SUCCESSIONS ................................................... 798
   5.1 Donations ............................................................... 798
   5.2 Wills (Testaments) ................................................... 800
   5.3 Revocation of wills .................................................. 803
   5.4 Other issues related to testaments ............................... 804
6. OTHER LEGAL ISSUES RELATED TO ALL SUCCESSIONS .......... 809
   6.1 Capacity to inherit .................................................. 809
   6.2 Acceptance and voluntary exclusion from an inheritance ... 809
   6.3 Renunciation .......................................................... 810
   6.4 Representation ........................................................ 811
   6.5 Grounds for involuntary exclusion from an inheritance .... 812
   6.6 Succession debts ...................................................... 812
   6.7 Marital portion ........................................................ 813
   6.8 Effect of inheritance on public benefits ....................... 813
7. PROCEDURAL ISSUES IN SUCCESSION CASES ....................... 814
   7.1 Small succession by affidavit ..................................... 814
   7.2 Questions for small succession cases ............................ 815
   7.3 Filing a court succession .......................................... 816
   7.4 Succession pleading forms ........................................ 818
8. ADMINISTERED SUCCESSIONS ........................................... 821
9. INHERITANCE TAXES ..................................................... 822

13. TEMPORARY ASSISTANCE FOR NEEDY FAMILIES

1. INTRODUCTION ............................................................. 825
2. DEALING WITH ADVERSE ACTIONS: REAPPLYING,
   NEGOTIATION, ADMINISTRATIVE APPEALS, AND
   JUDICIAL REVIEW ........................................................ 825
   2.1 Reapplying .............................................................. 826
   2.2 Filing a fair hearing request ..................................... 826
   2.3 Attempt to work issues out while awaiting a fair hearing . 827
   2.4 Procedural rules governing the fair hearing ................... 827
   2.4.1 Theoretical availability of discovery ......................... 828
   2.4.2 The hearing should not be limited to consideration
         of what was before the agency at the time of the
         adverse decision .................................................. 828

(xxvii)
7.3 Temporary Exceptions to STEP Requirements .................................. 854
7.4 Exemptions not explicitly recognized ........................................... 854
  7.4.1 Disability accommodations .................................................... 854
  7.4.2 Failure to comply with the minimum wage ............................... 855

8. OTHER SANCTIONS ........................................................................ 856
  8.1 Non-cooperation with child support enforcement ............................. 856
  8.2 Special requirements on minor unmarried parents ......................... 857
  8.3 School attendance requirement .................................................... 857
  8.4 Parenting skills training requirement ............................................ 858
  8.5 Immunization requirement ............................................................ 858
  8.6 Refusing a full time job ............................................................... 858
  8.7 Drug screening and treatment ..................................................... 859
  8.8 Intentional Program Violations .................................................... 859
  8.9 One-year drug conviction ban .................................................... 859
  8.10 Probation and parole violators, and persons fleeing prosecution or confinement .................................................... 859
  8.11 Strikers .................................................................................... 860
  8.12 Convictions for claiming benefits in two states ............................. 860

9. CONTINUED ASSISTANCE FOR RECIPIENTS EARNING THEIR WAY OFF ASSISTANCE, ESPECIALLY MEDICAID .............................................. 860

10. PROTECTION FROM GARNISHMENT AND DEBIT CARD TRANSFER FEES ................................................................. 861

11. CONCLUSION ................................................................................ 861

14. TAX LAW FOR LEGAL SERVICES AND PRO BONO ATTORNEYS

  1. INTRODUCTION ........................................................................... 865
  2. FEDERAL TAXES–HOW TO SCREEN CASES ................................. 865
    2.1 Overview of federal tax problems ............................................... 865
    2.2 Notices from the IRS–How to Assess What Your Client Faces ....... 865
    2.3 Notices from the IRS–Examples ................................................ 865
    2.4 Other tax documents ............................................................... 866
    2.5 Access to Taxpayer Information ................................................. 867
    2.6 Communications with the IRS on notices and correspondence .... 867
    2.7 Critical deadlines .................................................................... 867
  3. APPEALS ........................................................................................ 867
    3.1 30 day notices of right to administrative appeal ......................... 867
    3.2 How do I appeal to an IRS Appeals Officer ................................. 868
  4. TAX COURT .................................................................................... 868
    4.1 Time limits for Tax Court review ............................................... 868
    4.2 How to file a Tax Court Petition ............................................... 869
    4.3 Should the case be filed under the Small Tax or Regular Tax Case procedures .................................................... 870
    4.4 How do I draft a Tax Court petition ......................................... 870
    4.5 What if it is the last day to file a Tax Court petition ................. 871
    4.6 What happens in a Tax Court case after the petition is filed ....... 871
    4.7 How is Tax Court litigation different from other litigation ....... 871
# TABLE OF CONTENTS

5. **REFUNDS** ................................................................. 872  
5.1 Refund Claims and Lawsuits ......................................... 872  
5.2 Missed the Tax Court deadline? What can be done? .......... 873  

6. **COLLECTIONS** .......................................................... 874  
6.1 How long does the IRS have to collect taxes ...................... 874  
6.2 What are the most common IRS collection actions ............. 875  
6.3 What should I look for as defenses to a collection action .... 875  
6.4 What is a “Substitute for Return” and what can be done about it ......................................................... 875  
6.5 What can the IRS seize from a taxpayer in a levy ............. 876  
6.6 How can a levy be released ......................................... 876  
6.7 What if an IRS collection action will cause a significant financial hardship ................................................. 876  
6.8 How do I deal with a wage levy notice ........................... 877  
6.9 Can an employer fire for a wage levy ............................ 878  
6.10 How do I help someone with a bank account levy notice?  878  
6.11 How do I help a taxpayer with a Social Security levy? .... 878  
6.12 The IRS offset a tax refund—what are the taxpayer’s rights? 879  
6.13 How do IRS liens work? ........................................... 879  
6.14 Does a lien attach to inherited property? ....................... 880  
6.15 Can a notice of federal tax lien be appealed? ................ 880  
6.16 How can IRS liens be removed? ................................ 880  
6.17 When can the IRS take a taxpayer’s home? .................... 881  

7. **COLLECTION ALTERNATIVES** ..................................... 882  
7.1 What are a taxpayer’s options when faced with IRS collection actions ......................................................... 882  
7.2 Currently Not Collectible Hardship—Immediate Relief for Many Legal Aid Clients ............................................. 882  
7.3 Installment Agreements ............................................. 883  
7.4 Offers in Compromise ................................................. 884  

8. **BANKRUPTCY** ............................................................ 886  
8.1 You should order a tax transcript from the IRS in all bankruptcies ................................................................. 886  
8.2 All bankruptcy debtors must provide the trustee with their most recent tax return ............................................. 886  
8.3 Post-bankruptcy tax returns must be timely filed ............. 886  
8.4 Chapter 13 debtors must file any required tax returns for the last 4 years ......................................................... 887  
8.5 The filing of a bankruptcy—timing of tax refunds—report to trustee ................................................................. 887  
8.6 How to litigate tax issues with the IRS in a bankruptcy ...... 888  
8.7 Taxes that may be discharged in bankruptcy ................... 888  
8.8 What taxes must be paid in a Chapter 13 bankruptcy? .... 890  
8.9 Are there any tax advantages to a Chapter 13 bankruptcy? 890  
8.10 Effect of bankruptcy on liens ....................................... 891  
8.11 Bankruptcy stay of tax collections and litigation .......... 891  
8.12 Effect of bankruptcy on collection statute of limitations .... 891

(...xxx...)
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>9</td>
<td>FAMILY LAW AND TAX ISSUES</td>
<td>891</td>
</tr>
<tr>
<td>9.1</td>
<td>Tax collection remedies against spouses</td>
<td>891</td>
</tr>
<tr>
<td>9.2</td>
<td>Injured Spouse relief—Non-liable spouse's rights to tax refund</td>
<td>892</td>
</tr>
<tr>
<td>9.3</td>
<td>Marital Disputes over Tax Refunds</td>
<td>893</td>
</tr>
<tr>
<td>9.4</td>
<td>Tax Liability in Community Property States</td>
<td>893</td>
</tr>
<tr>
<td>9.5</td>
<td>Innocent Spouse Relief</td>
<td>895</td>
</tr>
<tr>
<td>9.6</td>
<td>Louisiana state tax innocent spouse relief</td>
<td>898</td>
</tr>
<tr>
<td>9.7</td>
<td>Dependency Exemptions</td>
<td>898</td>
</tr>
<tr>
<td>9.8</td>
<td>Divorced or separated parents and dependency exemptions</td>
<td>898</td>
</tr>
<tr>
<td>9.9</td>
<td>Can a divorce or custody decree meet the requirement of a signed Form 8332?</td>
<td>899</td>
</tr>
<tr>
<td>9.10</td>
<td>May a family court reallocate a dependency exemption?</td>
<td>899</td>
</tr>
<tr>
<td>9.11</td>
<td>Domestic Violence and Tax Issues</td>
<td>900</td>
</tr>
<tr>
<td>10</td>
<td>CONSUMER DEBT AND TAX ISSUES</td>
<td>901</td>
</tr>
<tr>
<td>10.1</td>
<td>Debt Cancellation Income</td>
<td>901</td>
</tr>
<tr>
<td>10.2</td>
<td>Was there a discharged debt?</td>
<td>902</td>
</tr>
<tr>
<td>10.3</td>
<td>When is a debt discharged?</td>
<td>903</td>
</tr>
<tr>
<td>10.4</td>
<td>Exclusion of debt cancellation income from income</td>
<td>904</td>
</tr>
<tr>
<td>10.4.1</td>
<td>Insolvency, bankruptcy, mortgage restructuring or foreclosure</td>
<td>904</td>
</tr>
<tr>
<td>10.4.2</td>
<td>HAMP tax issues</td>
<td>905</td>
</tr>
<tr>
<td>10.4.3</td>
<td>Other reductions in principal</td>
<td>905</td>
</tr>
<tr>
<td>10.4.4</td>
<td>Foreclosures and tax consequences—how to calculate</td>
<td>905</td>
</tr>
<tr>
<td>10.4.5</td>
<td>Disaster relief legislation</td>
<td>907</td>
</tr>
<tr>
<td>10.4.6</td>
<td>Gifts</td>
<td>907</td>
</tr>
<tr>
<td>10.5</td>
<td>Allocation of cancellation of debt income among co-obligors</td>
<td>907</td>
</tr>
<tr>
<td>10.6</td>
<td>Identity Theft</td>
<td>907</td>
</tr>
<tr>
<td>11</td>
<td>HOUSING LAW AND TAX ISSUES</td>
<td>908</td>
</tr>
<tr>
<td>11.1</td>
<td>Rental or other housing assistance</td>
<td>908</td>
</tr>
<tr>
<td>11.2</td>
<td>Litigation recoveries in federal housing cases</td>
<td>908</td>
</tr>
<tr>
<td>11.3</td>
<td>Return of capital or property damage</td>
<td>908</td>
</tr>
<tr>
<td>12</td>
<td>PUBLIC BENEFITS AND TAX ISSUES</td>
<td>909</td>
</tr>
<tr>
<td>12.1</td>
<td>Waiver of government overpayments due to economic hardship</td>
<td>909</td>
</tr>
<tr>
<td>12.2</td>
<td>Unemployment Compensation</td>
<td>909</td>
</tr>
<tr>
<td>12.3</td>
<td>SSI and Social Security Benefits</td>
<td>909</td>
</tr>
<tr>
<td>12.4</td>
<td>Disaster assistance</td>
<td>910</td>
</tr>
<tr>
<td>12.5</td>
<td>Welfare and other public assistance</td>
<td>910</td>
</tr>
<tr>
<td>12.6</td>
<td>Impact of earned income credits on welfare</td>
<td>910</td>
</tr>
<tr>
<td>12.7</td>
<td>Levies against Social Security and welfare benefits</td>
<td>910</td>
</tr>
<tr>
<td>13</td>
<td>EMPLOYMENT LAW</td>
<td>911</td>
</tr>
<tr>
<td>13.1</td>
<td>Taxation of Settlements</td>
<td>911</td>
</tr>
<tr>
<td>13.2</td>
<td>Employee or Independent Contractor?</td>
<td>912</td>
</tr>
<tr>
<td>14</td>
<td>LEGAL FEES AS INCOME</td>
<td>913</td>
</tr>
<tr>
<td>15</td>
<td>DISASTER TAX LAW</td>
<td>913</td>
</tr>
<tr>
<td>16</td>
<td>EARNED INCOME CREDIT</td>
<td>914</td>
</tr>
</tbody>
</table>

TABLE OF CONTENTS
15. LANGUAGE ACCESS

1. INTRODUCTION ......................................................935
2. THE RIGHT TO AN INTERPRETER IN LOUISIANA COURTS ....935
   2.1 How to apply for an interpreter ...............................935
   2.2 Who bears the cost of an interpreter? .........................936
   2.3 What qualifications must an interpreter have? .................937
3. HOW TO COMMUNICATE WITH LEP CLIENTS ....................937
4. HOW DO I DECIDE WHETHER A CLIENT NEEDS AN INTERPRETER?..939
5. USE OF INTERPRETERS AT DEPOSITIONS .........................939
6. HOW TO WORK WITH AN INTERPRETER ............................939
7. PREPARATION OF YOUR LEP CLIENT FOR TESTIMONY ..........940
8. INTERPRETER ETHICS .............................................941
9. LOUISIANA LEGAL ISSUES RELATIVE TO INTERPRETERS ....942
   9.1 Overview ......................................................942
   9.2 The Refusal or Failure to Appoint an Interpreter ..........943
   9.3 Interpreter Error—Accuracy ................................945
   9.4 Interpreter Qualifications—Competency .......................946
   9.5 Interpreter Bias—Impartiality ................................947
   9.6 Timeliness of the Objection to Interpreter Errors
      (Accuracy) and Qualifications (Competency) ...............949
   9.7 The Standard of Review Used for Interpreter Issues .........950
10. FEDERAL LAW REGARDING INTERPRETERS .......................950
11. FURTHER DISCUSSION OF INTERPRETATION AND
    INTERPRETERS ..................................................951
12. CONCLUSION .....................................................953

APPENDIX A
   Quick Reference ..................................................954

APPENDIX B
   Appendix 5.1B, Request for Interpreter and Order .............955

APPENDIX C
   Appendix 5.1C, Interpreter’s Oath ................................957

APPENDIX D
   National Association of Judiciary Interpreters & Translators
   Standards for Performance and Professional Responsibility for
   Contract Court Interpreters in the Federal Courts ............958
CHAPTER 1

BANKRUPTCY IN LOUISIANA

Lauren Bartlett and Mark Moreau
About The Authors

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1. INTRODUCTION

The goal of bankruptcy is to give debtors a “fresh start.” The U.S. Supreme Court has said of bankruptcy that “[i]t gives to the honest but unfortunate debtor...a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.”\(^1\) For the poorest of poor debtors, bankruptcy can mean the difference between homeless and hungry, and having enough money to buy food for their children and keep a roof over their heads.

Louisiana bankruptcy attorneys charge attorneys fees starting at $700 for a Chapter 7 bankruptcy and $2,400 for a Chapter 13 bankruptcy. Many attorneys also require at least some of their fee to be paid upfront, along with the bankruptcy court filing fee, which is impossible for the poorest of the poor. With this manual, we encourage additional pro bono and legal aid attorneys to handle bankruptcies. Many attorneys think of bankruptcy as daunting and complicated. In fact, bankruptcy law is fairly straightforward and can provide the ultimate debt relief to clients who can move forward with a clean slate.

This manual will focus exclusively on bankruptcies under Chapter 7 and Chapter 13 of the Bankruptcy Code, which are meant for individuals with consumer debts. Moreover, this manual focuses on bankruptcy for low-income debtors. This manual does not cover bankruptcy for debtors who file with incomes above the Louisiana median income.\(^2\)


2. WHO CAN FILE BANKRUPTCY?

2.1 WHO MAY BE A BANKRUPTCY DEBTOR?

11 U.S.C. § 109 governs eligibility for bankruptcy. Just about anyone can file bankruptcy. Anyone who resides, has a domicile, property or a place of business in the United States may file a Chapter 7 or Chapter 13 bankruptcy. A debtor does not have to be insolvent. Unmarried couples must file separate bankruptcy petitions, which will increase the filing fees.

11 U.S.C. § 109(g) establishes a 180 day waiting period between bankruptcies. If the debtors have been in any bankruptcy at any time within the prior 180 days, they will be ineligible for bankruptcy if:

1. the prior case was dismissed for willful failure to abide by orders of the court, or to appear before the court for proper prosecution of the case; or

2. they requested and obtained a voluntary dismissal after the filing of a request for relief from the § 362 automatic stay.

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\(^2\) Legal aid programs generally limit representation to families under 200% of federal poverty. As of November 10, 2011, the median incomes for Louisiana families for means testing under the 2005 bankruptcy legislation were all considerably above 200% of federal poverty, to wit: 1 earner-$37,931, 2 person family-$46,169, 3 person family-$54,638, 4 person family-$65,778. Add $7,500 for each person above 4. If a debtor is above these median incomes, she is subject to the “means test” formula to determine whether she is presumed ineligible for a Chapter 7 discharge.
To be eligible for bankruptcy, a debtor must, with some exceptions, complete a credit counseling briefing from an approved nonprofit counseling agency within the 180 days before filing the bankruptcy petition. Some credit counseling agencies will waive their fees and provide free pre-bankruptcy credit counseling for low-income debtors.

For a Chapter 13 bankruptcy, a debtor must have sufficient “regular income” to cover basic living expenses, their mortgage and the required payments to the trustee. “Regular income” is not limited to wages. It also includes government benefits, spousal or child support and other types of regular income. The court may consider a relative’s income when evaluating whether the debtor has “regular income” or whether the plan is feasible, provided the relatives have a substantial interest in the plan’s success. Also, Chapter 13 debtors can’t have more than $360,475 in non-contingent, liquidated, unsecured debt and $1,081,400 in non-contingent, liquidated, secured debt.

2.2 WAITING PERIODS BETWEEN BANKRUPTCY DISCHARGES

The Bankruptcy Code establishes minimum waiting periods between discharges. These waiting periods are not eligibility provisions. However, they determine whether a debtor may receive a discharge in a bankruptcy. Generally, a Chapter 7 bankruptcy serves no purpose if the debtor can’t get a discharge. However, a debtor may file and benefit from a Chapter 13 even if she is barred from a discharge under 11 U.S.C. §1328(f). A Chapter 13 without a discharge may provide a stay from collection and an opportunity to cure arrearages.

Under 11 U.S.C. § 727(a)(8)-(9), Chapter 7 debtors may not obtain (1) a Chapter 7 discharge if they received a Chapter 7 discharge in a case filed within 8 years of the new bankruptcy, or (2) a Chapter 13 discharge within 6 years of the new bankruptcy unless the statutorily defined payout was met. Thus, a Chapter 13 debtor with a 5 year plan could qualify for a discharge in a new Chapter 7 bankruptcy filed 1 year after completion of her Chapter 13 plan. The 8 year § 727(a)(8) look back period is not tolled by an intervening Chapter 13 bankruptcy that did not result in a discharge. However, there is a Louisiana bankruptcy case that applies tolling to another § 727(a) look back provision. So, you may face a tolling issue in Louisiana.

Under 11 U.S.C. § 1328(f)(1)-(2), Chapter 13 debtors may not obtain a discharge if they received a discharge in (1) a Chapter 7 bankruptcy during a 4 year period before the “date of the order for relief” or (2) a Chapter 13 bankruptcy during a 2 year period before the “date of the order for relief.” The majority of courts

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3 A list of approved bankruptcy credit counseling agencies is available at: http://www.uscourts.gov/FederalCourts/BankruptcyResources/ApprovedCreditAndDebtCounselors.aspx.

4 11 U.S.C. §§ 109(e); 101(30). An unemployed or self-employed person may face challenges on the “regular income” requirement. See e.g., In re Henley, 350 B.R. 716, 721-22 (Bankr. W.D. La. 2006).

5 In re Hammonds, 729 F.2d 1391 (11th Cir. 1984) (public assistance may be used to fund a Chapter 13 plan); In re Antoine, 208 B.R. 17 (Bankr. E.D.N.Y. 1997) (Chapter 13 eligibility turns on regularity of income, not the type of income).


7 In re Bateman, 515 F.3d 272 (4th Cir. 2008); In re Lewis, 339 B.R. 814 (Bankr. S.D.Ga. 2006).

8 Tidewater Finance Co. v. Williams, 498 F.3d 249, 252-53, n. 2 (4th Cir. 2007).

9 See In re Myers, 2008 WL 2783455 (Bankr. M.D.Ala. 2008). If the statutory pay out was met in the Chapter 13 bankruptcy, the debtor could qualify for a discharge in a Chapter 7 bankruptcy filed 1 day after completion of the Chapter 13 plan. Id.

10 Tidewater Finance Co. v. Williams, 498 F.3d 249 (4th Cir. 2007).

have held that these § 1382(f) waiting periods run from filing date to filing date, and not from discharge date to filing date.\textsuperscript{12} Under the majority “filing date to filing date” interpretation, § 1382(f)(2) would rarely prohibit a discharge in a second Chapter 13 bankruptcy.\textsuperscript{13}

In a prior bankruptcy, a debtor may have filed a Chapter 7, converted to Chapter 13 and received a Chapter 13 discharge. Or the debtor may have filed a Chapter 13, converted to Chapter 7 and received a Chapter 7 discharge. How are the § 1382(f) look back or waiting periods between bankruptcy discharges calculated in converted cases? The filing date of the converted case for purposes of determining the § 1382(f) waiting period relates back to the filing date of the bankruptcy, not the date the case was converted. The issue is whether the “case filed under” trigger in §1382(f) means the Chapter under which the case was filed, or the Chapter to which it was converted. The vast majority of courts have held that the “case filed under” means the Chapter to which the case was converted.\textsuperscript{14} Thus, for example, the §1382(f)(1) four year look back or waiting period would apply when the prior bankruptcy was filed as a Chapter 13, but converted to a Chapter 7. One court has held that the relevant look back period is determined by the Chapter that the case was originally filed under.\textsuperscript{15}

### 2.3 THE CHAPTER 13 “GOOD FAITH” REQUIREMENT AND PRIOR BANKRUPTCIES

The Bankruptcy Code does not restrict the right to file a Chapter 13 bankruptcy after a prior Chapter 7 or Chapter 13 bankruptcy.\textsuperscript{16} The only eligibility bar to the filing of a new Chapter 13 bankruptcy is if the 180 day waiting period in § 109(g) applies, e.g., the case was dismissed for willful failure to abide by a lawful order of the court or to appear before the court for proper prosecution of the case. Simple failure to pay filing fees or plan payments in a prior Chapter 13 case, without more, should not be considered willful so as to preclude another filing within 180 days.\textsuperscript{17} A failure to attend the creditors’ meeting may or may not be viewed as a willful failure to appear before the court for proper prosecution of the case.\textsuperscript{18} The issue of § 109(g) willful malfeasance is generally not litigated in the first case. Therefore, this issue would normally be raised and litigated by motion in the second case, and the debtor will have the opportunity to present evidence on the willfulness issue.

A court must confirm a Chapter 13 plan if the statutory requirements are met.\textsuperscript{19} Good faith is a requirement for confirmation.\textsuperscript{20} Good faith is determined on the “totality of circumstances” and on a case-by-case basis.\textsuperscript{21} Good faith may exist when there have been repetitive Chapter 13 bankruptcies or dismissal of prior bankruptcies for failure to make plan payments.\textsuperscript{22} Filing of a bankruptcy on the

\textsuperscript{12} In re Sanders, 551 F.3d 397 (6th Cir. 2008); In re Bateman, 515 F.3d 272 (4th Cir. 2008); In re Knighten, 355 B.R. 922 (Bankr. M.D. Ga. 2006)(filing constitutes an “order for relief”). It appears that there are no reported bankruptcy court cases in the Fifth Circuit on this issue.

\textsuperscript{13} In re Bateman, 515 F.3d 272 (4th Cir. 2008).

\textsuperscript{14} See e.g. In re Ybarra, 359 B.R. 702, 709 (Bankr. S.D. Ill.2007).

\textsuperscript{15} In re Hamilton, 383 B.R. 469 (Bankr. W.D. Ark. 2008).


\textsuperscript{17} See e.g., In re Howard, 134 B.R. 225 (Bankr. E.D. Ky. 1991).


\textsuperscript{19} Matter of Chaffin, 816 F.2d 1070, 1073 (5th Cir. 1987).

\textsuperscript{20} 11 U.S.C. § 1325 (a)(3).

\textsuperscript{21} Beard v. U.S. Trustee, 188 B.R. 220 (W.D. La. 1995) aff’d 84 F.3d 431 (5th Cir. 1997).

\textsuperscript{22} See e.g., In re Eisen, 14 F.3d 469 (9th Cir. 1994); In re Smith, 43 B.R. 319 (Bankr. E.D. N.C. 1984)(good faith found despite dismissal of 3 prior Chapter 13 bankruptcies for failure to make plan payments).
eve of a state court trial is not sufficient evidence of bad faith.\textsuperscript{23} Good faith has been found when the unsecured creditors were unpaid by the plan, and the only plan payments were for the debtor’s attorney fees.\textsuperscript{24} Even where the new Chapter 13 bankruptcy can’t result in a discharge due to the application of the § 1382(f)(1) look back period, good faith may exist for the new Chapter 13 bankruptcy.\textsuperscript{25}

\section*{3. WHERE DO I FILE BANKRUPTCY?}

Generally, a debtor may file in the judicial district in which he has resided for 180 days prior to filing the bankruptcy, or for a longer portion of that 180 day period than any other judicial district.\textsuperscript{26}

There are three U.S. District Bankruptcy Courts in Louisiana: the Eastern District; the Middle District; and the Western District, whose jurisdiction is as follows:

**Eastern District**: Assumption, Jefferson, Lafourche, Orleans, Plaquemines, St. Bernard, St. Charles, St. James, St. John the Baptist, St. Tammany, Tangipahoa, Terrebonne, and Washington parishes.

Court location: 500 Poydras Street, New Orleans, Louisiana.

**Middle District**: Ascension, East Baton Rouge, East Feliciana, Iberville, Livingston, Point Coupee, St. Helena, West Baton Rouge and West Feliciana parishes.

Court location: 707 Florida Street, Baton Rouge, Louisiana.

**Western District**: Avoyelles, Acadia, Allen, Beauregard, Bienville, Bossier, Caddo, Calcasieu, Caldwell, Cameron, Catahoula, Claiborne, Concordia, DeSoto, East Carroll, Evangeline, Franklin, Grant, Iberia, Jackson, Jefferson Davis, Lafayette, LaSalle, St. Landry, Lincoln, St. Martin, Madison, St. Mary, Morehouse, Natchitoches, Ouachita, Red River, Rapides, Richland, Sabine, Tensas, Union, Vernon, Vermillion, Webster, West Carroll and Winn parishes.

Court location: 300 Fannin Street, Shreveport, Louisiana.

\section*{4. WHO SHOULD FILE BANKRUPTCY?}

Many clients will tell you that they need to file bankruptcy when they realize they can’t pay their debts. But even if this is the case, bankruptcy is not necessarily the answer.

The first rule of thumb is that bankruptcy is for people who have something to lose. There are generally three things to lose: your income (through a garnishment or levy), your property (through a seizure or sale), and your peace of mind. Bankruptcy can address each of these losses. Also, bankruptcy can preserve valuable rights, such as a driver’s license, which may have otherwise been suspended or seized for failure to post a financial responsibility bond following an accident, the right to a school transcript or, in many states, prevent eviction from public housing.\textsuperscript{27}

\begin{footnotesize}
\textsuperscript{23} In re Stanley, 224 Fed. Appx. 434 (5th Cir. 2007); Matter of Little Creek Development Co., 799 F.2d 1068 (5th Cir. 1986).
\textsuperscript{24} In re Crager, 691 F.3d 671 (5th Cir. 2012).
\textsuperscript{25} In re Bateman, 515 F.3d 272 (4th Cir. 2008).
\textsuperscript{26} 28 U.S.C. § 1408.
\textsuperscript{27} See Perez v. Campbell, 402 U.S. 637 (1971)(bankruptcy prohibits state from revoking driver’s license for failure to pay discharged debt); In re Kuehn, 563 F.3d 289 (7th Cir. 2009)(school transcript); Loyola University v. McClarty, 234 B.R. 386 (E.D. La. 1999)(school transcript); In re Stoltz, 315 F.3d 80 (2d Cir. 2002) (bankruptcy prohibits public housing authority from evicting tenant for failure to pay discharged rent).
\end{footnotesize}
The second rule of thumb is that bankruptcy is for people who are deeply in debt and who anticipate the future acquisition of income or property. In other words, a person who is deeply in debt and currently “judgment-proof,” but who is about to become gainfully employed, may wish to consider bankruptcy in order to avoid a garnishment or seizure of hard-earned future savings or property. The term “judgment-proof” refers to a person who is insolvent and their creditors are unable satisfy judgments or potential judgments against them. Typically, a person who is judgment-proof has no savings, does not earn wages and does not have any property that creditors are able to seize.

Moreover, clients may want to think twice about filing a bankruptcy if they anticipate receipt of an inheritance or a civil suit settlement or judgment. In Louisiana, these future assets would be seized by the trustee (either Chapter 7 or Chapter 13) and used to pay creditors. In those cases, the client should be made aware of her other options, including “workouts” with her aggressive creditors until she comes into possession of the lawsuit, insurance or inheritance funds. Also, some debtors may lose the right to discharge older income taxes if they file bankruptcy prematurely. Debtors currently without auto or health insurance may want to consider delay in filing a bankruptcy until they secure insurance coverage.

Clients who have debts, including but not limited to student loans, most taxes, government fines, criminal restitution, marital debt and past due child or spousal support, should be advised that such debts generally can’t be discharged in bankruptcy. Debtors with substantial non-dischargeable tax debts may want to consider an offer in compromise with the IRS in lieu of a bankruptcy. See 11 U.S.C. § 523(a) for a full list of exceptions to discharge.

Student loans can’t be discharged in bankruptcy “unless excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor’s dependents.” 11 U.S.C. § 523(a)(8). Many circuit courts, including the Fifth Circuit, have adopted “the Brunner test” for the dischargeability of student loans. The Brunner test has three parts which the court must consider before deciding whether to except a student loan from discharge. The debtor must prove:

1. That she cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans;
2. That additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
3. That the debtor has made good faith efforts to repay the loans.

The main point here is that you evaluate the client’s situation and advise her of both bankruptcy and non-bankruptcy options. The client must be informed of what it means to be “judgment-proof”, if that description applies. If so, the client must also be made aware of when bankruptcy may become advisable in the future. Likewise, the client with something to lose must weigh the non-bankruptcy options, including negotiating extended pay-backs with creditors, litigation if applicable, and delaying filing to await other contingencies or to do some pre-bankruptcy planning.

28 See e.g., In re Loving, 2011 WL 3800042 (Bankr. S.D. Ala. 2011)(right to discharge taxes lost because debtor filed bankruptcy a few days early).
29 See Effectively Representing Your Client Before the IRS , Ch. 21 (ABA 5th ed. 2011).
30 Brunner v. New York State Higher Education Services Corp., 831 F.2d 395 (2d Cir. 1987); see also In re Gerhardt, 348 F.3d 89 (5th Cir. 2003); In re Salyer, 348 B.R. 66 (Bankr. M.D. La. 2006); In re McMullen, 316 B.R. 70 (Bankr. E.D. La. 2004).
Also consider whether a husband and wife should file a joint petition or individual petitions or whether just one spouse should file if that spouse has “separate debts.” A husband and wife may file a joint petition or individual petitions. Generally, I encourage married clients to file jointly, for the ease of case administration. I also encourage both spouses to file if they have been married for at least a few years even if they believe the debts are separate and the creditors are going after just one spouse. In Louisiana, most debts are community debts. Having both spouses file bankruptcy and receive a discharge protects them from further litigation, and/or having to file another bankruptcy, in the future.

In Louisiana, an obligation incurred by a spouse before or during the community may be satisfied from the property of the community and from the separate property of the spouse who incurred the obligation. A spouse may have a spousal reimbursement claim against his former spouse if (1) community property is used to acquire or improve the other spouse’s separate property or (2) his separate property was used to satisfy a community obligation or the other spouse’s separate obligation. Spousal reimbursement claims prescribe in 10 years.

There may be some situations where only one spouse should file. For example, a spouse with significant § 507 priority debt such as premarital child support or taxes may render a Chapter 13 plan infeasible if both spouses jointly file bankruptcy. However, the non-debtor spouse may qualify for a Chapter 13 plan if she files as an individual since her spouse’s premarital debts will not have to be paid in full in her individual bankruptcy. The 11 U.S.C. § 524(b)(3) discharge injunction can protect both spouses’ interests (including those of the non-filing spouse) in community property acquired after the bankruptcy.

Finally, if bankruptcy is the chosen option, consumer clients must choose between Chapter 7 and Chapter 13. An informed choice will require an analysis of all debts (past, present and future), income level, budgetary expenses, and assets.

5. CHAPTER 7 LIQUIDATION OR CHAPTER 13 REORGANIZATION?

A Chapter 7 bankruptcy is designed for debtors with significant debts, who do not have assets like real estate, or at least no equity in any real estate that they own, and do not have enough income to repay all of their debts. In a Chapter 7 bankruptcy, the Trustee wants to liquidate or sell the debtor’s non-exempt assets and use the proceeds to pay debts. In most Chapter 7 consumer bankruptcies, most of the debtor’s assets are exempt and may not be liquidated. Generally, the remaining debts are discharged, i.e., personal liability on discharged debts is forgiven. But, pre-petition liens survive a bankruptcy discharge unless voided. Some

35 Birch v. Birch, 55 So.3d 796 (La. App. 2 Cir. 2010).
36 For further discussion of this issue, see National Consumer Law Center, Consumer Bankruptcy Law and Practice, § 6.4 (9th ed. 2009).
debts, e.g., most student loans and taxes, are non-dischargeable and also survive the bankruptcy.

A bankruptcy filed under Chapter 13 is called “reorganization.” Unless provided for in the plan, the debtor does not surrender or give up assets in a Chapter 13. In a Chapter 13 bankruptcy, the debtor will fully or partially pay her creditors over time. A Chapter 13 bankruptcy is used most often by debtors to prevent home foreclosure or repossession of a vehicle.

In a Chapter 13 bankruptcy, the debtor proposes a repayment plan to be reviewed by Chapter 13 Trustee and confirmed by the judge. The debtor’s Chapter 13 Plan states a proposal to repay creditors over a period of 3 or 5 years, either at 100 cents on the dollar or less, so long as the creditors are paid at least what they would have received in a Chapter 7 liquidation. This is known as the “liquidation test” for Chapter 13 eligibility.

In Louisiana, homeowners often fail to meet the liquidation test because they don’t have a homestead exemption or their net equity in their home is too high. Also, to qualify for a Chapter 13 bankruptcy, a debtor’s plan must fully pay secured and priority creditors over the plan period. Judgment creditors become “secured creditors.” Therefore, bankruptcy should be filed before a creditor obtains a judgment in a collection lawsuit. If possible, secure an extension to plead in collection lawsuits and file the bankruptcy before a default or other judgment is entered.

The Chapter 13 debtor must have enough documented “regular income” to show that she can cover her regular household expenses, including her mortgage and any car payments, as well as the additional monthly payment to the Chapter 13 Trustee, which the plan requires for the creditors.

In a Chapter 13 bankruptcy, priority unsecured debts, which include but are not limited to child support and taxes, must be paid fully by the debtor within 3-5 years through the repayment plan. Therefore, if a debtor owes $24,000 in past due priority taxes to the IRS, the whole $24,000 must be paid through their Chapter 13 bankruptcy within 3 to 5 years. See 11 U.S.C. § 507(a) for a full list of unsecured priority debts that must be paid in a Chapter 13 bankruptcy plan. At the end of a Chapter 13 bankruptcy, the debtor receives a discharge of any eligible unsecured debts. Thus, the debtor may be left with a mortgage, but her mortgage will be current and all other debts will be paid off and/or discharged.

Debtors who are in foreclosure or at risk of having property repossessed, and have enough documented income to pay for all household expenses, their monthly mortgage payment and the required payment to the Trustee, should consider filing a Chapter 13 bankruptcy. Debtors who have significant debts, imminent risk of wage garnishment, and no real estate ownership, should consider filing a Chapter 7 bankruptcy.

If a debtor files a Chapter 13 but then later decides she no longer wishes to keep her home, or she can no longer make her payments under the plan, she can convert her Chapter 13 bankruptcy to a Chapter 7 pursuant to 11 U.S.C. § 39 The unusually low homestead exemption in Louisiana, compared to other Southern states, makes it more difficult for homeowners to save their homes through Chapter 13 bankruptcy reorganization.


41 Filing the bankruptcy before a judgment also prevents the creation of a lien or the need to file a separate motion in the bankruptcy action to void the lien. Liens survive bankruptcy as to pre-petition property.

1307(a). No reason must be given for converting from a Chapter 13 to a Chapter 7. A debtor may also convert from a Chapter 7 to a Chapter 13 under 11 U.S.C. § 706. However, this conversion right is no longer absolute. It may be forfeited for pre-petition bad faith. The court may dismiss a Chapter 7 bankruptcy, or convert the Chapter 7 bankruptcy to a Chapter 13 bankruptcy, where the debtor’s income is so great that the debtor should have filed a Chapter 13 under 11 U.S.C. § 707.

If a debtor can’t complete her Chapter 13 plan, she may also seek a modification of the plan or a hardship discharge. Proposed modifications are decided under 11 U.S.C. § 1329. A hardship discharge may be an option if:

- a debtor’s problems are caused by circumstances for which she “should not justly be held accountable”
- a modification of the plan is not practical, and
- payments to unsecured creditors are not less what they would have received under Chapter 7.

6. THE AUTOMATIC STAY

An automatic stay goes into effect immediately upon the filing of any bankruptcy. It is the cornerstone of Bankruptcy Code relief. Found at 11 U.S.C. § 362, the automatic stay has a sweeping scope, stopping practically every non-criminal proceeding that could possibly face a consumer debtor. The types of proceedings stayed are listed at 11 U.S.C. § 362(a), and those proceedings that are not stayed are set forth at 11 U.S.C. § 362(b). Lawsuits are put on hold, foreclosure proceedings are stopped, and even the Internal Revenue Service has to stop most collection activity. If your client faces garnishment or foreclosure, you should immediately notify the sheriff, creditor or his attorney of the stay.

One noteworthy exception to the automatic stay is the collection of past due alimony or support from property that is not property of the estate. 11 U.S.C. § 362(b)(2)(B). Property of the estate is defined at 11 U.S.C. § 541 and basically includes everything the debtor owns at the moment the bankruptcy petition is first filed. Because, in Chapter 7 cases, wages earned after the bankruptcy petition are not considered property of the estate under 11 U.S.C. § 541, proceedings to collect past due alimony or support in state court may go forward, to the extent the claimant seeks only to garnish the debtor’s post-petition wages.

In Chapter 13 cases, however, the definition of “property of the estate” is enhanced by the provisions of 11 U.S.C. § 1306 to include post-petition wages. Accordingly, if the debtor files a Chapter 13, all alimony or support enforcement proceedings are generally stayed and the plan must provide for payment.

Evictions are automatically stayed by the filing of a bankruptcy petition. There are two exceptions to a § 362 bankruptcy stay of evictions: (1) the eviction

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43 However, a creditor may seek to oppose the Chapter 7 discharge under 11 U.S.C. § 727 for refusal to obey a lawful order in the Chapter 13 bankruptcy. See e.g., In re Dorsey, 505 F.3d 395 (5th Cir. 2007); Standiford v. U.S. Trustee, 641 F.3d 1209 (10th Cir. 2011).
44 Marama v. Citizens Bank of Massachusetts, 549 U.S. 365 (2007) abrogating Matter of Martin, 880 F.2d 857 (5th Cir. 1989); see also In re Jacobersen, 609 F.3d 647 (5th Cir. 2010).
45 See e.g., In re Mesa, 467 F.3d 874 (5th Cir. 2006); In re Mendoza, 111 F.3d 1264 (5th Cir. 1997).
judgment was obtained prior to bankruptcy filing and (2) an eviction based on “endangerment” of property and illegal drug use on the property if it occurred within 30 days prior to the filing of the bankruptcy. A complaint to enforce the stay should be filed with the bankruptcy court in order to bar any attempted state court eviction. If your client is a public or subsidized housing tenant who is behind in his rent, a bankruptcy, particularly a Chapter 13 reorganization, can delay or stop the eviction. As stated above, it is imperative that the bankruptcy be filed before the landlord obtains an eviction judgment. The landlord’s efforts to evict, seize tenant property or collect rent after the tenant has filed a petition in bankruptcy violates the automatic stay and justifies the award of damages and attorney’s fees.

The automatic stay, although applicable to all types of bankruptcies, only provides temporary protection against secured creditors. For example, a Chapter 7 debtor who files a bankruptcy petition on the eve of a foreclosure sale on his home will have a temporary reprieve, in that notice of filing of the bankruptcy will prevent the sale from going forward on the scheduled day. However, the foreclosing lender can then file a motion to lift stay and the judge is likely to grant the motion, allowing the foreclosing lender to set a sale and have the home sold within 30 to 60 days.

In Chapter 13 cases, the automatic stay remains in force throughout the life of the confirmed plan, or up to 5 years. In a Chapter 13 case, the stay also prohibits creditors from taking action against co-debtors who have not filed for bankruptcy if the debt is paid in the Chapter 13 plan. In Chapter 13 cases, foreclosing lenders whose arrearages are to be cured through the plan must accept resumption of regular ongoing monthly installment payments, as long as their arrearages are fully paid through the plan. However, if the debtor falls behind on their post-petition monthly payments to the mortgage lender, which are often paid outside the plan, the lender may file a motion to lift stay. The court will likely lift the stay unless the debtor files a motion to modify the plan (see more on the motion to modify below) or can show that he was not in fact behind on his payments.

In the Fifth Circuit, creditor action in violation of a §362 stay is not void but voidable. Actions in violation of the stay may be voidable even if the creditor did not have notice of the stay. Willful violation of the stay subjects the violator to actual damages, punitive damages and attorney fees. Failure to rectify a violation of a bankruptcy stay will make a violation willful and provide the debtor with a private cause of action for damages. Upon demand, many creditors will voluntarily void actions taken in violation of the stay.

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49 In re Stoltz, 315 F.3d 80 (2d Cir. 2002); contra Housing Authority v. Eason, 12 So.3d 970 (La. 2009) rev’d 9 So.2d 269 (La. App. 4 Cir. 2009); see M.Moreau, State Appellate Court Recognizes Bankruptcy as Public Housing Defense, 39 Housing Law Bulletin 137 (June 2009). Due to the Eason case, a Chapter 13 bankruptcy would be the recommended option for a public or subsidized housing tenant in Louisiana.
50 In re Ozene, 337 B.R. 214 (9th Cir. BAP 2006).
53 In re Smith, 876 F.2d 524 (5th Cir. 1989).
54 In re Walker, 168 B.R. 114 (E.D. La. 1994), aff’d 51 F.3d 562 (5th Cir. 1995); In re Crawford, 388 B.R. 506 (Bankr. S.D.N.Y. 2008)($60,000 punitive damages award).
55 In re Repine, 536 F.3d 874 (5th Cir. 2008); Pettite v. Baker, 876 F.2d 456 (5th Cir. 1989).
7. THE DISCHARGE, DISCHARGE INJUNCTION, ANTI-DISCRIMINATION AND SET-OFF

7.1 THE DISCHARGE

The successful Chapter 7 and Chapter 13 cases end with the entry of a discharge.\textsuperscript{56} At discharge, the automatic stay is terminated and a permanent discharge injunction goes into effect.\textsuperscript{57} Because the discharge injunction does not affect valid mortgages and liens, secured lenders may then proceed with foreclosure remedies against their collateral, if the loan is in default. Obviously, if the loan is up to date, either because the Chapter 7 debtor never fell behind on his mortgage or the Chapter 13 debtor successfully cured his arrearage, there is no default situation.

7.2 DENIAL OR REVOCATION OF DISCHARGE

The court may deny debtors a discharge if the debtor fails to keep or produce adequate books or financial records, fails to explain satisfactorily any loss of assets, acts in bad faith, violates a lawful order or commits a bankruptcy crime such as perjury, etc.\textsuperscript{58}

The court may also revoke a discharge in bankruptcy. This can happen when the court finds the discharge was obtained through fraud, the debtor acquired property that is property of the estate and knowingly and fraudulently failed to report the acquisition of such property or to surrender the property to the trustee, or if the debtor makes a material misstatement or fails to provide documents or other information in connection with an audit of the debtor’s case.\textsuperscript{59} In the Middle District of Louisiana, creditors often file adversary complaints to oppose discharges under § 523 (a)(2) for alleged fraud in the loan process, e.g., falsification of loan applications, failure to disclose other loans or liens, etc. The debts will be found dischargeable if the creditor did not reasonably or justifiably rely on the alleged misrepresentations or if the debtor error is inadvertent.\textsuperscript{60} Attorney fees may be awarded against the losing creditor unless its opposition to discharge under 11 U.S.C. § 523 (a)(2) was “substantially justified.”\textsuperscript{61}

7.3 CREDITOR CLAIMS THAT SPECIFIC DEBT IS NON-DISCHARGEABLE

A bankruptcy court has the authority to declare a debt non-dischargeable.\textsuperscript{62} Legal aid clients may be creditors of a bankruptcy debtor. For example, they may have been ripped off by a home improvement contractor, landlord, ex-spouse or criminal who later files bankruptcy. When may they oppose the discharge of a debt?

Consumer claims may be non-dischargeable for fraud, breach of fiduciary duty or willful and malicious injury under §§ 523(a)(2), (a)(4) and (a)(6). Many courts have held that a claim against an unlicensed home improvement contractor is non-dischargeable under § 523(a)(2) if he falsely represented that he was a

\textsuperscript{56} See 11 U.S.C. § 727 and § 1328.
\textsuperscript{57} See 11 U.S.C. § 524.
\textsuperscript{58} For a full list, see 11 U.S.C. § 727; Bankruptcy Rule 4005.
\textsuperscript{59} 11 U.S.C. § 727.
\textsuperscript{60} See e.g., In re Weber, 450 B.R. 595 (Bankr. M.D. La. 2011); In re Davis, 2011 WL 1396851 (Bankr. M.D. La. 2011); In re Smith, 2010 WL 5101160 (Bankr. M.D. La. 2010); In re Williams, 431 B.R. 150 (Bankr. M.D. La. 2010).
\textsuperscript{62} In re Morrison, 555 F.3d 473 (5th Cir. 2009).
licensed contractor and the homeowner reasonably relied on that representation. False promise to complete home repairs in return for final payment is a misrepresentation that can preclude discharge. A violation of a consumer protection statute may be non-dischargeable under § 523(a)(2)(A) or § 523(a)(6). Breach of a fiduciary duty may also make a debt non-dischargeable. A landlord’s conversion of a security deposit may be non-dischargeable as a breach of fiduciary duty or conversion.

Debts incurred through fraud, breach of fiduciary duty and conversion may also be non-dischargeable in a Chapter 13 bankruptcy. A consumer creditor may have grounds to oppose confirmation of a Chapter 13 bankruptcy or object to a Chapter 13 plan that lists a particular debt as dischargeable. Be sure to comply with local court rules on deadlines for objections to confirmation of a plan.

Marital debt incurred in a divorce or marital property settlement is non-dischargeable. A creditor should use Official Form 10 to file a proof of claim with the bankruptcy court. The proof of claim must be filed within 90 days after the first date set for the § 341 meeting of the creditors. If the claim is a priority claim that fact should be noted. A proof of claim is allowed unless objected to.

A creditor must raise a non-dischargeability issue by an adversary proceeding in bankruptcy court. The deadline for filing an adversary complaint is 60 days after the first date set for the § 341 meeting of creditors, regardless of when the meeting is actually held. Note that the deadline for an adversary complaint to challenge dischargeability is 30 days before the deadline for a proof of claim. Determination that a debt is non-dischargeable without notice and hearing constitutes an abuse of discretion.

7.4 THE DISCHARGE INJUNCTION

The § 524 discharge injunction is self-effectuating and protects the discharge. Its express language “voids” certain judgments and enjoins the commencement or continuation of actions against the debtor. No creditor with notice of the bankruptcy should commence or continue any legal proceedings against the debtor as that would violate the § 524 permanent discharge injunction or the § 362 stay.

63 In re Hebert, 2011 WL 351667 (Bankr. E.D. La. 2010); In re Ellis, 2007 WL 2463317 (Bankr. E.D. La. 2007); In re Fuselier, 211 B.R. 540, 545 (Bankr. W.D. La. 1997); In re Grenier, 2009 WL 763352 (Bankr. D. Mass. 2009) (collecting cases); but see In re Sabban, 600 F.3d 1219 (9th Cir. 2010).
67 In re Stokes, 995 F.3d 76 (5th Cir. 1993); In re Nagle, 274 F.3d 481 (8th Cir. 2001); Piccicuto v. Dwyer, 57 (1st Cir. 1994).
70 In re Andersen, 170 F.3d 1253 (10th Cir. 1999).
71 See e.g., Middle District of Louisiana, Local Rule 3015-2 (15 days prior to confirmation hearing); Eastern District of Louisiana, Local Rule 3015-1 (7 days prior to confirmation hearing); Western District of Louisiana, Local Rule 3015(b)-1 (7 days prior to confirmation hearing).
72 See 11 U.S.C. §§ 523(a)(15),(5); In re Kincaide, F.3d (5th Cir. 2013), 2013, WL 450976.
73 Bankruptcy Rule 3002(b), 5005(a).
74 Bankruptcy Rule 7001.
75 Bankruptcy Rule 4007(c).
76 In re Case, 937 F.2d 1014 (5th Cir. 1014).
77 The statute uses “void” rather than voidable. See also In re Meadows, 428 B.R.894 (Bankr. N.D. Ga. 2010); In re Guarola, 328 B.R. 158 (9th Cir. BAP 2005).
Other creditor actions may violate the injunction. Creditor counterclaims in a debtor’s suit, which are based on a discharged debt, also violate the discharge injunction.\footnote{78}{In re Javar, 422 B.R. 242 (Bankr. D. Mont. 2009).} Selling the discharged debt to a debt buyer violates the discharge injunction.\footnote{79}{In re Laboy, 2010 WL 427780 (Bankr. D. P.R. 2010).} Repossession of property violates the discharge injunction.\footnote{80}{In re Walker, 180 B.R. 834 (Bankr. W.D. La. 1995).}

Clients should be advised not to ignore any future lawsuits based on debts discharged in their bankruptcy or laws or stayed by bankruptcy. Under § 524, the bankruptcy discharge is no longer an affirmative defense and a debtor may not waive this defense.\footnote{81}{In 2008, the Louisiana legislature amended La. Code Civ. Proc. art. 1005 and 927 to eliminate bankruptcy as an affirmative defense and make it a peremptory exception. Act 824 of 2008. Old Louisiana state jurisprudence that holds that a valid judgment can be entered against a debtor on a debt that has been discharged in bankruptcy is no longer good law after the 1970 amendments to 11 U.S.C. § 524. See e.g., Beneficial Fin. Co. v. Kramer, 270 So.2d 283 (La. App. 3 Cir. 1972).}

Repossession of property violates the discharge injunction.\footnote{82}{In some cases, state court actions can be removed to federal court. 28 U.S.C. § 1452; Bankruptcy Rule 9027.}

11 U.S.C. § 524(e) provides that a discharge under § 524 does not affect the liability of any co-debtor. Thus, a co-debtor or surety who did not also file bankruptcy would still be liable on an outstanding debt that was discharged by a debtor. However, the 11 U.S.C. § 524(b)(3) discharge injunction can protect both spouses’ interests (including those of the non-filing spouse) in community property acquired after the bankruptcy.\footnote{83}{In re Kaye, 2012 WL 364092 (Bankr. E.D. La. 2012); In re Dyson, 277 B.R. 84 (Bankr. M.D. La. 2002); In re Strickland, 153 B.R. 909 (Bankr. D. N.M. 1993).}

A debtor may enforce a violation of the § 524 discharge injunction by filing a motion or adversary complaint in bankruptcy court.\footnote{84}{In re Kage, 2012 WL 364092 (Bankr. E.D. La. 2012); In re Dyson, 277 B.R. 84 (Bankr. M.D. La. 2002); In re Strickland, 153 B.R. 909 (Bankr. D. N.M. 1993).} A proceeding to enforce a discharge injunction is a core proceeding. Bankruptcy courts have jurisdiction over such cases and may even re-open a closed case to enforce a discharge injunction.\footnote{85}{The Ninth Circuit has held that enforcement of a discharge injunction must be by motion, rather than adversary complaint. Barrientos v. Wells Fargo Bank, N.A., 633 F.3d 1186 (9th Cir. 2011) (interpreting Bankruptcy Rules 9020 & 9014 to require use of motion procedure). The Second Circuit has held that discharge injunction enforcement is proper by motion. In re Kailkow, 602 F.3d 93 (2d Cir. 2010).}

A bankruptcy court may hold a creditor in contempt for violation of a discharge injunction and award damages, attorney fees and other relief.\footnote{86}{In re G erw in, 300 Fed. Appx. 293 (5th Cir. 2008).} A state court judgment that violates the discharge injunction or order may be voided or vacated.\footnote{87}{In re Bayhi, 528 F.3d 393, 402 (5th Cir. 2008) (Rooker-Feldman doctrine does not bar vacatur of state court judgment that violates discharge order).}

When a client comes to you about a lawsuit filed by a creditor after a debt has been discharged in bankruptcy (or another collection action), you should also advise them as to potential monetary claims under the federal Fair Debt Collections Act, federal Fair Credit Reporting Act, the Louisiana unfair trade practices act and contempt of court.\footnote{88}{Bankruptcy Court Miscellaneous Fee Schedule (28 U.S.C. § 1930).}
7.5 BANKRUPTCY DISCRIMINATION CLAIMS

Also, 11 U.S.C. § 525 (a), entitled “Protection against discriminatory treatment”, prohibits certain actions by government units solely because of a debtor’s bankruptcy.90 A debtor may enjoin conduct prohibited by § 525(a) even if the § 362 automatic stay does not apply or is no longer in effect.91 11 U.S.C. § 525(b) prohibits private employers from firing employees due to a bankruptcy, but does not apply to hiring decisions.92 Section 525 claims may be litigated in federal or state court.93

7.6 SET-OFFS

Non-fraudulent government overpayments may be discharged in bankruptcy. Recoupment of these pre-petition discharged debts from the debtor’s future government payments, e.g., Social Security benefits, would not be a permissible offset under 11 U.S.C. § 553.94 However, several courts have allowed recoupment of a discharged pre-petition VA benefits overpayment from post-petition VA benefits.95

8. THE FILING FEE

The full filing fee for a Chapter 7 bankruptcy is $306 and for a Chapter 13 bankruptcy it is $281. These fees can change, so check the clerk of court’s website for current fee rates. In a Chapter 7 bankruptcy, debtors whose income is below 150% of the Federal Poverty Income Guidelines, can apply for a waiver of the filing fee or to pay the fee in installments (Form B-3B). However, despite the new laws, these Chapter 7 initial filing fee waivers are rarely granted in some jurisdictions. Also, paupers may be able to qualify for 28 U.S.C. § 1915 pauper status for fees other than the initial filing fee, e.g., an appeal or creditor’s adversary complaint.96 A debtor does not have to pay a filing fee for an adversary complaint.97

In a Chapter 13 bankruptcy, the debtor must pay the full filing fee, but can pay the filing fee in installments. To do this, the debtor must pay at least $61 towards the bankruptcy court filing fee upon filing the petition. If the debtor plans to pay just $61 with the petition, an Application and Order to Pay Fee in Installments (Official Form B-3A) needs to be filed. The Application to Pay Fee in Installments should allow for the full fee to be paid within 30 days of filing the emergency petition or else the judge may not sign the order.

9. THE EMERGENCY BANKRUPTCY PETITION

Bankruptcy attorneys are often confronted with a new client whose property is going to sheriff’s sale the next day or possibly in the next two hours. There is no time to prepare a complete set of bankruptcy forms. For this situation, an emergency bankruptcy petition may be filed. The client may file this pro se and the attorney may be appointed as counsel of record later. The client must file the

92 Compare Robinet v. WESTconsin Credit Union, 686 F.Supp.2d 1206 (W.D. Wis. 2010) with In re Burnett, 635 F.3d 169 (5th Cir. 2011).
93 In re Morrow, 189 B.R. 793, 804 (Bankr. C.D. Cal. 1995).
94 Rowan v. Morgan, 747 F.2d 1052 (6th Cir. 1984).
95 See e.g., In re Beaumont, 586 F.3d 776 (10th Cir. 2009).
96 In re Richmond, 247 Fed. Appx. 831 (7th Cir. 2007)(adversary proceeding); In re Ravid, 296 B.R. 278 (1st Cir. BAP 2003)(appeal).
97 Also, certain child support creditors may not have to pay filing fees for an adversary complaint.
2 page “Voluntary Petition” (Official Form B-1), Statement of Compliance with Credit Counseling Requirement (Official Form B-1 Exhibit D), Statement of Social Security Number (Official Form B-21), an initial list of creditors, and Notice to Individual Consumer Debtor and Certificate of Notice to Individual Consumer Debtor (Official Forms B-201A and B-201B). 98

Once the emergency petition is filed, the automatic stay will go into effect, staying the sale, assuming the petition was filed prior to the commencement of the sale. The remaining schedules and other forms must be filed within 14 days. 99 That time may be further extended by filing a motion for extension of time.

It is vital to check with the bankruptcy court’s clerk to determine whether the forms required by local rule and custom differ than those outlined above. In the event you can’t get to the courthouse before it closes and the sale is going forward first thing in the morning, the bankruptcy court clerk has someone on 24 hour call that you may call to arrange an after-hours filing. Be sure that the date and time of the filing is recorded on the petition.

The file stamped petition should then be faxed to the foreclosing lender and the Sheriff’s office. A follow-up phone call should be made to verify receipt. In these situations, there may be insufficient time to collect the information to perform a complete analysis and therefore you may not be able to give the client a fully informed assessment of options. If that is the case, you may want to have the client file the emergency petition pro se and put it in writing to the client that you may not be able to file the remaining forms and petitions on their behalf depending on your the investigation and whether or not they provide the information that you need.

10. INTRODUCTION TO THE VOLUNTARY PETITION AND SCHEDULES

The Petition (Official Form B-1) is the central form required to file bankruptcy and only requires basic information. Ten schedules, Schedules A through J, are designed for the disclosure of all of the debtor’s assets and liabilities, claimed exemptions, and budget. These disclosures are intended to be comprehensive in nature and are to be taken quite seriously. The debtor is required to sign a Declaration Concerning Debtor’s Schedules (Official Form B-6), attesting to the truth of these schedules, under penalties of perjury and bankruptcy fraud, both criminal offenses which could require jail time.

More and more, creditors oppose a Chapter 13 Plan or seek to oppose or revoke a debtor’s Chapter 7 bankruptcy discharge for failure to disclose all assets and debts. 100 Your clients must be advised of the importance of complete disclosure. You may need to help your client by asking the proper questions to make sure they have disclosed all asset and debts. For example, clients do not always understand succession property, claims to life insurance policies, and co-signing for debt. It is your duty as the attorney to make sure that you explain all the nuances of assets and debts. Instead of relying on broad questions like “What real property do you own?” ask specific questions like “Are your mother and father

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98 All of these bankruptcy forms are available at: http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx
99 Bankruptcy Rule 1007(c).
100 See e.g. In re Duncan, 562 F.3d 688 (5th Cir. 2009); In the Matter of Beauvoir, 966 F.2d 174 (5th Cir. 1992). Note: if your client is a creditor, an adversary proceeding may be filed to contest a discharge in appropriate cases. The creditor has the burden of proof that the schedule of assets was false.
still alive? If not, did they own any real estate when they passed away?" to get
the information that you need. The National Consumer Law Center's Bankruptcy
Basics book has a good sample questionnaire that can be used to tease all assets
and debts out of your client. It is a good idea to start with that questionnaire and
then design your own once you are comfortable with the process.

It is also very important to view the clients' credit reports and tax transcripts
before filing bankruptcy. Your client may pull their credit reports from Equifax,
Experian and Transunion for free at www.annualcreditreport.com. You may need
to assist them in pulling the credit reports offline, but the client needs to be there
to verify his or her personal information, because the website asks very specific
questions like “which type of car did you own in 1999?” which need to be answered
and you will not know the answers. If you answer the questions wrong, then the
credit report will not be available online. A tax transcript will help you determine
what taxes are owed, whether they are dischargeable and what tax returns have
not been filed. A tax transcript can be ordered by an IRS Form 4506-T or elet-
tronically by the IRS or attorneys who have electronic assess to these records.

If a minor omission is found by the trustee, he or she may ask your client to
amend with additional information. A material omission, however, may have dire
consequences, including a denial of discharge under 11 U.S.C. § 727(a)(2)-(4) or
indictment for bankruptcy fraud.

Most attorneys now pay to use software which automatically fills out the
forms, schedules, plan, etc., according to data input and can even automatically
file the bankruptcy electronically, e.g., Best Case, E-Z Forms, Standard Legal.
These bankruptcy software programs save significant time and often guide you
through each of the Louisiana bankruptcy courts’ idiosyncratic procedures.

11. SCHEDULE A - REAL PROPERTY

Schedule A (Official Form B-6A) requires the disclosure of all interests in
real estate, including a description of the asset, the nature of the interest, the cur-
rent market value of the interest, and the amount of any claim secured by the
interest.

The description should include both the location of the property and its legal
description. It is sufficient to simply attach a photocopy of the legal description
taken from an act of sale or mortgage, or from a mortgage certificate.

The nature of debtor's interest is usually full ownership. Sometimes, the
property is co-owned. Sometimes the debtor's interest is a usufruct or a naked
ownership subject to another person's usufruct.

When disclosing the current value of debtor's interest in the property, a practical
approach must be taken. First, the market value of the property must be deter-
mimed. Clients will tend to have an inflated sense of what their property is worth,
and this will not serve them well in bankruptcy. I suggest looking at the tax asses-
sor's value of the property on the parish tax assessor's website, which is usually
a low valuation. It is a good idea to also look at online valuation resources like
zillow.com, which is usually a high valuation and use a valuation in between for
the purposes of schedule A. If there are questions as to the property value, you
should get a Broker's Price Opinion (BPO) from a local real estate agent, which
only costs about $75-100, as opposed to a full appraisal that may cost between
$300-400.
Next, you have to determine the value of the debtor’s interest in the property. If the debtor solely owns the property, there is no problem. If property is merely co-owned, the percentage of ownership should be indicated, and only the fractional value should be listed under the market value. One could argue, however, that a 50% co-ownership interest in real estate is actually worth less than 50% of the market value of the property as a whole because, if the other co-owner objects to a sale, the interest can only be liquidated by a sheriff’s sale following a partition order. Usufructs, naked ownerships and fractional interests are even more difficult. Consult a real estate agent or an attorney who regularly practices real estate law for complicated questions regarding valuation.

Schedule A also asks for the amount of the secured claim. Here, the name and rank of the mortgage or lien holder, as well as the amount for each, is listed. More detailed explanations of these secured claims are disclosed in Schedule D.

A parental usufruct may be exempt from seizure by creditors.101

12. SCHEDULE B - PERSONAL PROPERTY

Schedule B (Official Form B-6B) contains 35 categories of personal property. Between Schedule A and Schedule B, all property of the debtor (except for rights under leases and executory contracts) must be disclosed.

12.1 Cash on hand

Cash is not exempt in Louisiana.102 Any cash owned by the debtor on the date of filing is property of the estate and fair game for administration by the trustee. Remember that when filing a Chapter 13, you need to show the Debtor can pay, but that Chapter 13 may be converted to a Chapter 7 later and the trustee may want to administer any cash listed on Schedule B.

For cash, timing is everything. Cash acquired after the filing of the bankruptcy (except from accounts receivable) is not property of the estate. Therefore, plan on filing the petition prior to the next payday, as opposed to immediately afterward.

12.2 Checking, savings or other financial accounts, certificates of deposits, or shares in banks, savings and loan, thrift, building and loan, and homestead associations, or credit unions, brokerage houses, or cooperatives.

The trustee will determine the actual collected balance as of the filing date of the bankruptcy and may ask to see bank statements if there are any questions. If a check had been written pre-petition but had not cleared by the bankruptcy filing date, the trustee will likely consider the funds transferred by that check to be property of the estate and may require your client to pay that over to him, even though the check may have cleared the day after filing. Accordingly, advise clients to clear their checking accounts at least one week prior to filing. Clients can do this by paying for their living expenses with cash or cashier’s checks prior to the expected bankruptcy filing date.


102 In re Sinclair, 417 F.3d 527 (5th Cir. 2005) (exempt wages deposited into account no longer exempt); In re Mier, 2006 WL 1228892 (W.D. La. 2006) (workers compensation deposited into account not protected from seizure).
Clients should also be sure to list joint accounts either here or in the Statement of Financial Affairs, “Property Held for Another.” Keep in mind that if joint accounts hold a considerable amount of cash, the trustee may attempt to take it and take his chances litigating any dispute that may arise as to actual ownership. Therefore, the debtor should engage in planning that does not prejudice the true owner of a joint account, usually a relative.

12.3 **Security deposits with public utilities, telephone companies, landlords, and others.**

In consumer cases these are relatively insignificant. If the debtor has paid them, these security deposits usually are collateral for services provided but not yet billed or paid. In that sense these funds are encumbered. Generally, trustees are not interested in consumers’ security deposits.

12.4 **Household goods and furnishings, including audio, video, and computer equipment.**

Debtors must do their best to list out each piece of furniture and appliances, though some may be aggregated (e.g., kitchen table and 4 chairs). It is best to go through each room with the client and try to get the client to visualize the room and list all belongings in that room. I list DVDs and VHS tapes here and have never had a problem.

The market value must be estimated realistically. For household goods, I ask my clients to estimate what price they could get if goods were sold at a garage sale. The reality is that used furniture is worth only a small fraction of its original cost. In a high profile case where there is valuable antique furniture, it may be worthwhile to obtain an appraisal of what the property could sell for in a liquidation sale.

Most household goods and furnishings are exempt under La. R.S. 13:3881(A)(4).

12.5 **Books, pictures, and other art objects, antiques, stamp, coin, record, tape, compact disc, and other collections or collectibles.**

Most people have books, pictures, records, tapes, and CDs. Most people do not have “collections” that can be sold for any significant value. Some bankruptcy attorneys write “none” for this category. It is better practice to disclose “Misc. Items” and put down a garage sale value. Trustees are not going to administer routine belongings. On the other hand, signed or numbered artwork, or stamp, coin, or record collections of any significance may be of interest to a trustee, and these need to be precisely disclosed.

“Family portraits” are exempt, as are “arms and military accoutrements” and “musical instruments” that are actually played by a family member.\(^{103}\)

The term “antiques” is somewhat confusing here, because certain antiques may have already been listed under household furnishings at item 4. One Louisiana bankruptcy court decision held that luxury items, “such as antique furniture, are exempt so long as they are ‘used by the debtor or a member of his family’ and otherwise fall under the provisions of this section.”\(^{104}\) On the other hand, Louisiana bankruptcy courts have disallowed claimed exemptions for property whose value is mostly “artistic,” “ornamental” or “related to prestige and status.”\(^{105}\)

\(^{103}\) La. R.S. 13:3881(A)(4)(b)-(c).


12.6 Wearing apparel.

Everyone has clothing, and it is all exempt. La. R.S. 13:3881(A)(4)(a). Usually I estimate the value of each person’s clothing to be around $200 for children, $500 for adults.

12.7 Furs and jewelry.

Generally, used furs are not valuable, and even if your client has a valuable fur, one fur is exempt as an article of clothing.\textsuperscript{106} If your client has more than one fur, the additional fur(s) may likewise be exempt, if they are “used by” the debtor or a member of his family, as opposed to being held in storage. On the other hand, a claimed exemption on an extra fur may be disallowed under the language contained in \textit{Ward v. Turner}, cautioning that debtors “should refrain from making claims for multiple items with the same function”, and that such claims do not satisfy the purpose of Louisiana’s exemption statute which is “to provide for the subsistence, welfare, and fresh start of a debtor to the end that his family will not be destitute and to the end that the debtor will not become a charge on the state.”\textsuperscript{107}

Jewelry is not exempt, except for “any wedding or engagement rings worn by either spouse, provided the value of the ring does not exceed five thousand dollars.” La. R.S. 13:3881(A)(5). Most people have some jewelry, if not costume jewelry, although they probably paid a lot more than they could sell it for. Even if there is no real value, it is good practice to disclose, for example, “miscellaneous items of inexpensive or costume jewelry” with little value. For valuable jewelry, have your client obtain a liquidation sale value from a pawn shop or a respected jeweler if there is a market for the item. A debtor may be able to buy non-exempt jewelry back from the trustee if he decides to administer said jewelry.

Jewelry is often insured on a homeowners’ insurance policy. It is good practice to ask the client to go back several years and determine what jewelry was listed on policy declarations and riders, and reconcile these records with what is being listed in the asset schedules.

12.8 Firearms and sports, photographic and other hobby equipment.

Most debtors forget to list their guns in this section if they are filling out a questionnaire on their own. Be sure to specifically ask clients if they own a gun. Only a person’s “arms and military accoutrements” are exempt. La. R.S. 13:3881(A)(4)(c). This exemption does not exempt a debtor’s personal gun collection which the debtor does not use for any military purpose.\textsuperscript{108}

12.9 Interests in insurance policies

All life insurance policies owned by the debtor should be disclosed. Term life insurance policies have no market value. Whole life and universal life policies may have cash surrender values, and this value should be disclosed as the market value.

Life insurance policies are exempt.\textsuperscript{109} However, Louisiana limits the exempt amount that may be invested in any policy issued within 9 months prior to filing of a bankruptcy to $35,000.

\begin{footnotes}


\end{footnotes}
12.10 Annuities

An annuity is created when a person pays a life insurance company a single premium, which is later distributed back to them over time. Most people use annuities to accumulate funds free of income and capital gains taxes. Annuities are exempt. Annuities are also powerful planning tools, but may have less flexibility than life insurance in terms of liquidity.

12.11 Interests in IRA, ERISA (including 401(k)), Keogh, or other pension or profit sharing retirement plans

If your client is the beneficiary of an employer-based pension or profit sharing retirement plan, or a 401k, 403(b) and 454(b) plan, these are excluded from the bankruptcy estate under federal non-bankruptcy law. These retirement plans are covered by the Employee Retirement Income Security Act (ERISA) and do not constitute “property of the estate.” 11 U.S.C. §541(C)(2) (2006). This is because the restrictions that ERISA places on the transfer of a beneficial interest in the pension plan are enforceable in bankruptcy court. Id. Therefore, interest in the funds in the 401(k) account, for example, cannot be transferred to creditors or the bankruptcy trustee. The 401(k) account is in effect a spendthrift trust, by virtue of ERISA's mandated anti-alienation language found at 29 U.S.C. §1056(d). Thus, you do not need to worry about a state exemption for ERISA plans, nor do you have to worry about La. R.S. 20:33, because the pension funds are not the type of property that can be included in a bankruptcy estate. Nonetheless, these plans should be disclosed at item 11 of Schedule B, with an asterisk explaining they are not property of the estate under 11 U.S.C. §541(C)(2).

For non-ERISA accounts, such as IRAs and some SEPs, SIMPLEs, and Keogh plans, Louisiana law provides for an exemption under La. R.S. 13:3881(D). As amended in 2010, La. R.S. 13:3881(D)(3) provides for an exemption for “all individual retirement accounts or individual retirement annuities of any variety or name, whether authorized now or in the future in the Internal Revenue Code of 1986, or the corresponding provisions of any future United States income tax law…” [emphasis added]. However, contributions to a non-ERISA account are not exempt if made less than one calendar year from the date of filing for bankruptcy. La. R.S. 13:3881(D)(2). On the other hand, a transfer from one tax-deferred arrangement to another or from one annuity contract to another is not to considered a contribution, and is thus still exempt under La. R.S. 13:3881(D)(3).

One possible issue to keep in mind here is whether the funds have already been taken out of the pension plan, account or trust at the time the bankruptcy is filed.

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110 La. R.S. 20:33; 13:3881(D); and 22:912.
113 In re Woodyear, 162 F.3d 1160 (5th Cir. 1998) (savings plan was part of bankruptcy estate and non-exempt because QDRO took the funds out of the pension plan, account or trust).
12.12 Stocks and interests in incorporated and unincorporated businesses

If your client is a sole proprietor of an ongoing business, that should be disclosed here (as well as other places). I would put the value as unknown here. However, the assets and liabilities of the business are the debtor’s, and should be listed in the debtor’s various asset and liability schedules.

12.13 Interests in partnerships and joint ventures

If the venture or partnership is merely the co-ownership of real estate without anything more, it should be sufficient to disclose this in Schedule A.

12.14 Government and corporate bonds and other negotiable and non-negotiable instruments

In this category, the most common items for consumers are savings bonds. Savings bonds are often held for the benefit, and in the name, of a minor child, and if this is the case, that should be disclosed in the Statement of Financial Affairs and not here.

12.15 Accounts receivable

This can be a problem for sole proprietors. When the bill is not paid immediately after the service is rendered, an account receivable is created. Accounts receivable that exist at the bankruptcy filing are property of the estate.

If your client has accounts receivable, strategic thinking is in order. First of all, is it possible to legitimately time the bankruptcy filing to minimize the accounts receivable at filing date? Second, the receivables should be broken down and analyzed for age and likelihood of collectability, and a discounted amount should be disclosed as the market value. Third, 3/4ths of the gross receivables should be claimed as exempt as wages, especially if the debtor has little or no business expenses.114 Fourth, if the trustee is interested in administering the receivables, remind him that he must file returns and pay the income and (possibly) self-employment taxes on monies collected.

12.16 Alimony, maintenance, support and property settlements to which the debtor is may be entitled

The right to receive past due alimony, support, or maintenance that has accrued and is due and owing as of the bankruptcy filing date is property of the estate. Past due child support is exempt under La. R.S. 13:3881(A)(1)(a).

The right to receive a property settlement is usually property of the estate, as pre-bankruptcy property settlements are usually vested, the rights are identifiable and non-contingent, and they are in the nature of a receivable or a promissory note.

12.17 Other liquidated debts owing debtor including tax refunds

If the amount of a claim has been ascertained or is readily determinable, it is liquidated—whether contested or not.115 Therefore, a liquidated debt is one


115 Ready determination turns on whether the amount of the debt can be determined in a simple hearing. In re Slack, 187 F.3d 1070 (9th Cir. 1999).
which is already determined and is either fixed or objectively capable of calculation at any given time. A good example is a money judgment. The debt is resolved and commemorated in the form of a judgment, although the exact amount owed depends on how much interest has accrued to date and the amount of other recoverable “costs” that may have been tacked on.

12.18 Tax refunds

Tax refunds and earned income credits are tricky and sometimes debtors and their attorneys are caught unaware. There are basically three scenarios to consider.

The first scenario is where the debtor has filed a bankruptcy after having filed a tax return for the previous year, with a refund still due and owing from the government. A tax refund attributable to pre-petition income is property of the bankruptcy estate. Generally, a trustee will pro-rate a tax refund by the days prior to the bankruptcy filing and treat the pro-rated part of a post-petition tax refund as a pre-petition asset available to satisfy pre-petition debts. For example, if the debtor filed his bankruptcy 73% of the way through the year, the trustee will claim 73% of the tax refund under the “pro rata by days” method. If the taxpayer is able to file earlier in a year, he will be able to protect more of a tax refund from the trustee and creditors.

In Louisiana, and many other states, large portions of a low-income taxpayer’s tax refund may be exempt from seizure. For example, in Louisiana, the earned income credit is exempt from seizure. However, the child tax credit is not exempt in Louisiana. Thus, in Louisiana, the issue will be how much of the child tax credit portion of the tax refund (generally about $1,000) qualifies as pre-petition assets subject to turnover to the trustee.

A child tax credit differs from the earned income credit in several respects. The child tax credit has both refundable and non-refundable portions. The child tax credit may not accrue until the end of the tax year. Bankruptcy courts have held that the refundable portion of the child tax credit is property of the estate, but that the non-refundable portion is not. One court has held that no part of the child tax credit is property of the bankruptcy estate since the earliest accrual date of a child tax credit is January 1 of the next year.

Many bankruptcy courts have standing orders for debtors to turnover tax refunds to the trustee. Entitlement to the refunds can be litigated by motion should the trustee to decide to claim all or part of the refund.

The second scenario is where the debtor recently filed past due tax returns to the trustee. Entitlement to the refunds can be litigated by motion should the trustee to decide to claim all or part of the refund.

The third scenario is where the debtor has filed a bankruptcy but has not yet filed a tax return that is past due. A debtor must file his past due tax return from the most recently ended tax year immediately upon filing his petition, if not before.

117 See e.g., In re Meyers, 616 F.3d 626 (7th Cir. 2010).
120 In re Law, 336 B.R. 780 (8th Cir. B.A.P. 2006); In re Matthews, 380 B.R. 602 (Bankr. M.D. Fla. 2007); In re Donnell, 357 B.R. 386 (Bankr. W.D. Tex. 2006); see also In re Zingale, 451 B.R. 412 (9th Cir. B.A.P. 2011).
Debtors should be referred to tax attorneys for assistance in these cases before filing the bankruptcy. The bankruptcy attorney should work closely with the tax attorney to make sure that tax problems are known, and are capable of being resolved in a timely manner. See Section 27 Dealing with Taxes in Bankruptcies, infra.

12.19 Contingent and noncontingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust

This asks for disclosure of inheritances not yet received. Any significant inheritance they will be lost in a Chapter 7. You are not required to disclose potential inheritances because of an expected legacy from someone who has not yet died. However, if someone dies within 180 days after the bankruptcy petition is filed, that legacy or inheritance, whether or not a succession is open or completed, comes into the bankruptcy estate pursuant to 11 U.S.C. § 541(a)(5). Thus, it is always prudent to discuss this with the client and ask if he has any rich relatives near death. A heir may renounce his right to inherit after the decedent dies. A pre-petition renunciation (other than a “donative” renunciation) may prevent a creditor from seizing the renouncing heir’s share. Furthermore, the Fifth Circuit has held that a pre-petition renunciation of an inheritance is not a fraudulent transfer that would deny discharge.

If your client is the beneficiary of, or has an interest in, a trust, that could be disclosed here if it has not been disclosed elsewhere. Likewise for a beneficiary’s interest in an insurance policy or death benefit plan.

12.20 Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each

Contingent and unliquidated assets, as opposed to liquidated assets, go here. Usually, the debtor’s claims as plaintiff or counterclaimant in litigation (or potential litigation for pre-petition injuries or claims) are disclosed here. Also, any potential disaster benefits including Road Home Funds should be listed here. All potential claims in litigation and disaster benefits should be listed here or they may be lost under the judicial estoppel doctrine.

For example, personal injury suits with the debtor as plaintiff must be disclosed here. A debtor’s claim for damages, arising out of a personal injury sustained prior to the filing of the bankruptcy, whether or not pursued, is considered property of the estate. If it is not disclosed, the debtor will probably lack stand-

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123 See e.g., Matter of Simpson, 36 F.3d 450 (5th Cir. 1994); In re Brumfield, 1998 WL 834999 (M.D. La. 1998). One district court has opined that Simpson is no longer good law after Drye v. United States, 528 U.S. 49, 52 (1999). See e.g., In re Schmidt, 362 B.R. 318, 321-23 (Bankr. W.D. Tex. 2007). However, the Fifth Circuit recently considered Drye and reaffirmed Simpson as to both Louisiana and Texas, holding that a pre-petition renunciation of an inheritance is not a fraudulent transfer that would deny discharge under 11 U.S.C.§ 727 (a)(2). See In re Laughlin, 602 F.3d 417 (5th Cir. 2010).
124 In re Laughlin, 602 F.3d 417 (5th Cir. 2010).
125 Disaster assistance may be part of the bankruptcy estate if the debtor’s right to receive assistance has been established by legislation prior to the filing of bankruptcy. See e.g., In re Burgess, 438 F.3d 493 (5th Cir. 2006); In re Bracewell, 454 F.3d 1234 (11th Cir. 2006) cert. denied 549 U.S. 1301 (2007).
126 Jethroe v. Omnova Solutions, Inc., 412 F.3d 598 (5th Cir. 2005).
ing to pursue that claim after the bankruptcy is finished, as the trustee will not have disclaimed or abandoned it back to the debtor.

While the form instructs you to give the “estimated value”, you should do so in the description of the asset, but my practice is to put “unknown” in the column calling for the market value of the asset.

Louisiana law does not exempt proceeds from personal injury lawsuits.\textsuperscript{128}

\subsection*{12.21 Automobiles, trucks, trailers, and other vehicles and accessories}

The equity value of a motor vehicle for exemption purposes is based on the NADA retail value. See the NADA “the yellow book” at: www.nadaguides.com. Traditionally, attorneys use the private party sale value to determine market value.

One motor vehicle per household is exempt up to $7,500 in value under La. R.S. 13:3881(A)(7). A school bus is exempt as a “motor vehicle.”\textsuperscript{129} The only additional vehicle that may be exempted is one which is modified to adapt its use to the physical disability of the debtor or his family and is used for transportation of the disabled person.\textsuperscript{130} An additional motor vehicle may not qualify as an exempt tool of the trade.\textsuperscript{131}

\subsection*{12.22 Other personal property of any kind not already itemized}

I usually add an extra “Misc. Items none worth more than $50 per item” and put value at $500 or above to this category, just to cover any items that the debtor may have forgotten to include.

\section*{13. SCHEDULE C - PROPERTY CLAIMED AS EXEMPT}

Louisiana exemptions apply in bankruptcies as opposed to federal bankruptcy exemptions.\textsuperscript{132} Most Louisiana exemptions can be found at La. R.S. 13:3881. Louisiana debtors are also entitled to claim “non-bankruptcy federal exemptions” such as those found in ERISA, the Social Security Act, and veterans benefits, to name a few.\textsuperscript{133} If a debtor has recently moved to Louisiana, it is possible that another state’s exemption laws or the § 522 federal exemptions might govern his bankruptcy.\textsuperscript{134} A claimed exemption is presumed valid and the objecting party has the burden of proof that the exemption is not properly claimed.\textsuperscript{135}

In a Chapter 7, exempt property will be retained by the debtor but non-exempt property of value will be administered by the trustee. Is the debtor is willing to part with it or repurchase it from the trustee? This question needs to be asked and answered prior to the filing, because its answer has a direct bearing on whether to proceed by Chapter 7 or Chapter 13, or not at all.

A family home may be exempt from seizure as a homestead. La. R.S. 20:1 grants a homestead exemption up to $35,000 of net equity in a debtor’s primary home. A mobile home may qualify for a homestead exemption even if its owner

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\textsuperscript{128}\textit{Matter of Wischan}, 77 F.3d 875 (5th Cir. 1996).
\textsuperscript{129}\textit{In re Belsome}, 434 F.3d 774 (5th Cir. 2005).
\textsuperscript{130}La. R.S. 13: 3881 (A)(8).
\textsuperscript{131}In re Belsome, 434 F.3d 774 (5th Cir. 2005).
\textsuperscript{132}Under 11 U.S.C. §522(b), Louisiana has opted out of the federal bankruptcy exemptions. See La. R.S. 13: 3881 (B).
\textsuperscript{133}La. R.S. 13: 3881(B) expressly states that property exempt under federal law, other than 11 U.S.C. § 522(d), is exempt.
\textsuperscript{134}In re Fernandez, 2011 WL 3423373 (Bankr. W.D. Tex. 2011); \textit{In re Arrol}, 170 F.3d 934 (9th Cir. 1999); \textit{In re Camp}, 631 F.3d 775 (5th Cir. 2011).
\end{flushleft}
does not own the underlying land. The homestead exemption is without limit for medical bills for treatment of a catastrophic injury. In addition, a judgment creditor for a credit card debt may not seize or sell a homestead. The La. R.S. 20: 1 homestead exemption may protect the insurance proceeds of a home damaged by a casualty. Under current law, the homestead exemption is not available to co-owners other than spouses and their minor children. A surviving spouse is eligible for a homestead exemption if she has any interest in the property, including a usufruct. Property co-owned by siblings or unrelated persons, such as co-habiting couple, will not be protected by the homestead exemption. A prior judicial mortgage will prime a homestead exemption. Without a homestead exemption, many indigent debtors will lose their home in a Chapter 7 bankruptcy or fail to qualify for a Chapter 13 reorganization because of the liquidation test.

14. INTRODUCTION TO SCHEDULES D, E, AND F.

Schedules D, E, and F combined comprise a complete list of creditors. All creditors need to be listed on one of these schedules. From the debtor’s point of view, the primary importance of these schedules is to identify the debt that is to be eliminated and/or paid off. While the instructions contained in these schedules demand certain detailed information, compliance with these instructions is not a prerequisite to obtaining the discharge of a particular debt. Rather, timely notice of the bankruptcy proceeding is all that is necessary to discharge an obligation to a creditor, assuming that the debt is otherwise dischargeable. The listing of creditors should be complete. Debts that our clients typically overlook are: (1) loans that they have cosigned for another; (2) deficiencies after repossession; and (3) overpayments of public assistance.

From the trustee’s point of view, however, these schedules serve several different and important functions. First, correct listing and classification of creditors is necessary for determining the priority of disbursements by the Trustee, if any.

15. SCHEDULE D AND CREDITORS HOLDING SECURED CLAIMS, LIEN STRIPPING, AUTO LOAN CRAM DOWNS

Examples of creditors holding secured claims include mortgage companies, auto loan companies, a rent-to-own company, bond for deed vendor, a finance company or any other company to which you pledge possessions to receive credit. The “Amount of Claim” needs to include the mortgage balance as well as any arrearages. We suggest getting a current reinstatement quote or a payoff from the mortgage or finance company to make sure you have a good estimate of the arrearages that will be claimed.

139 La. R.S. 20: 1 (A)(2); La. R.S. 13: 3881 (A)(9); In re McColum, 348 B.R. 377 (Bankr. E.D. La. 2006) aff’d 363 B.R. 789 (E.D. La. 2007). The courts have not ruled on whether disaster assistance to rebuild a damaged home is exempt.
141 See e.g, Matter of Brocato, 30 F.3d 641 (5th Cir. 1994)(2 unrelated women); In re Mazoue, 240 B.R. 878 (E.D. La. 1999); In re Davis, 2008 WL 793520 (Bankr. W.D. La. 2008).
143 The liquidation test for a Ch. 13 bankruptcy is found at 11 U.S.C. § 1325(a)(4).
Since the downturn in the economy and the foreclosure crisis, real estate values have dropped in some parts of Louisiana and many homes are now “underwater”, meaning there is negative equity in the home and that the value of the property is less than the balance of the mortgage on the home. For example, a home may only be valued now at $150,000, but the balance of the mortgage on the home is still $165,000. 11 U.S.C. §1322(b)(2) provides that the rights of creditors with a claim secured by a security interest in real property that is the debtor’s principal residence may not be modified in a Chapter 13 bankruptcy. The majority of courts have found that a mobile home is not a “principal residence” within the meaning of § 1322(b)(2) anti-modification clause unless the mobile home is “real property.”

However, a Louisiana court has held that a mortgage on a mobile home can’t be crammed down even if the debtor does not own the underlying real property.145

In the above example, the mortgage company's claim for $165,000 must be listed on Schedule D and no portion of that claim can be discharged in a Chapter 13. Whereas in a Chapter 7 bankruptcy, where the debt is not reaffirmed, personal liability on the mortgage on the principal residence may be discharged, however the mortgage company can still seize and sell the property in a foreclosure. After a Chapter 7 discharge, the mortgage company would be prohibited from suing the debtor for a deficiency judgment.

In the case where a second mortgage or other lien on the debtor’s principal residence is wholly unsecured, that lien can be stripped off and the debt discharged in a Chapter 13 bankruptcy.146

For example, sometimes second mortgages are completely unsecured. If the value of the home is $150,000 and the primary mortgage balance is $150,000 and the balance on the second mortgage is $15,000, the second mortgage is wholly unsecured. That second mortgage should be listed on Schedule F, as an unsecured creditor, not on Schedule D, which is for secured creditors. Upon completion of the Chapter 13 plan and discharge, the whole debt underlying the second mortgage will have been eliminated. The debtor or his attorney then needs to file a Motion to Avoid Lien to obtain a bankruptcy court avoiding the lien. This court order and a lien or mortgage cancellation request should be filed with the mortgage office in the parish where the property at issue is situated.

Unlike liens attached to the debtor’s principal residence, partially unsecured auto loans and mortgages on second homes can be crammed down in a Chapter 13 bankruptcy.147 The Bankruptcy Code recognizes that a lien is only a secured claim to the extent there is value in the property at issue. Moreover, the Code states that under secured claims can be bifurcated into their secured and unsecured components under 11 U.S.C. § 506(a). For example, the debtor owns a vehicle worth $12,000 and the balance on the auto loan is still $16,000. The auto loan company should be listed on Schedule D with a secured claim of $12,000. The auto loan company should also be listed on Schedule F with an unsecured claim of $4,000. Upon completion of the Chapter 13 plan and discharge, the balance on the auto loan will be only $12,000. The $4,000 unsecured claim will have been eliminated and the auto loan company will be prohibited from collecting on that extra $4,000.

144 In re Coleman, 392 B.R. 761 (8th Cir. BAP 2008).
145 In re Fells, 2007 WL 3120113 (Bankr. W.D. La. 2007). Note that the In re Shepherd case relied upon by the In re Fells decision was reversed on appeal. See In re Shepherd, 381 B.R. 675 (E.D. Tenn. 2008).
146 11 U.S.C. § 506(a); In re Bartee, 212 F.3d 277 (5th Cir. 2000); In re Bourque, 2007 WL 274971 (Bankr. E.D.La. 2007).
To complicate things, if there is an arrearage, or past due payments, owed by the debtor of $2,000 to the auto loan company, on top of the $16,000 mortgage balance, that arrearage may be cured inside the Chapter 13 plan. The debtor can then make regular installments on the $12,000 secured claim outside of the plan, according to the terms of the loan documents.

Or the debtor can attempt to pay off the secured claim of $12,000 and pay the arrearage of $2,000 inside the plan. In that case, the debtor could propose in his Chapter 13 plan to pay $14,000 over five years at the judicial interest rate (usually much, much lower than the contract rate) through his Chapter 13 plan. The creditor may object to the debtor paying off the loan through the Chapter 13 plan, arguing that it is denied adequate protection because collateral’s value is diminishing faster than the secured balance is being paid. However, if the debtor is able to make more payments to unsecured creditors by paying the auto loan inside the Plan, the judge may deny the objection and confirm the Chapter 13 plan. If his Chapter 13 plan is confirmed, the debtor would make monthly payments to the Trustee, which would include his payment to the auto loan company and payments to other creditors, and the Trustee would distribute those payments per the confirmed Chapter 13 plan.

Courts may require different procedures for stripping mortgages in a cram down. Some courts require the debtor to file an adversary proceeding. Most courts prefer that a lien strip in a Chapter 13 bankruptcy to be handled as part of the Chapter 13 plan with explicit notice to the creditor of the proposed lien strip.

A bond for deed or lease purchase agreement should be listed as a secured debt on Schedule D. The vendor may argue that it is an executory contract or lease and that the debtor’s remedies are limited to assuming or rejecting the contract pursuant to 11 U.S.C. § 365. However, Louisiana bankruptcy courts should allow the bond for deed buyer to treat the bond for deed as a secured debt that can be cured in a Chapter 13 bankruptcy.

16. SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

Schedule E contains creditors whose claims are entitled to priority over the claims of general unsecured creditors. These priorities are listed and ranked at 11 U.S.C.§ 507. The priority creditors that generally appear in our bankruptcy cases are (1) taxing authorities for past due taxes; and (2) ex-spouses with alimony and/or child support claims. Student loans are not priority debts.

It is important to keep in mind that whatever priority tax claims rightfully appear here are ipso facto non-dischargeable under 1 U.S.C. § 523(a)(1)(A). The only good thing to say about priority tax debts is that if there is money in the bankruptcy estate net of administrative expenses, these non-dischargeable taxes will be paid with that money, thus somewhat relieving the client’s remaining tax liability after bankruptcy.

For Chapter 13 debtors, Schedule E debts must be paid in full “unless the holder of a particular claim agrees to a different treatment.” This requirement, in effect, maintains the non-dischargeability of priority taxes that would be non-
dischargeable in a Chapter 7, except that they will be discharged once they are paid in full through the plan. Indeed, because of 11 U.S.C. § 1322(a)(2), priority debts are paid 100 percent in Chapter 13, while other unsecured debts may be paid on a smaller percentage basis, ending with a 11 U.S.C. § 1328 discharge.

17. SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

Schedule F is the list of unsecured creditors who enjoy no priority and who have no collateral securing their rights. Most of our clients’ creditors fall under this category. These debts include revolving charge cards, signature loans, medical and hospital bills, past due utility bills, and tort liability, to name a few. It is vital to list each and every creditor on the debtor’s credit report. If debts are obviously prescribed, I put the value down as “unknown.”

It is very important tell clients to list each and every possible creditor the first time around because amendments to these schedules cost $30, which is a lot of money for most of our clients.

18. SCHEDULE G - EXECUTORY CONTRACTS AND UNEXPIRED LEASES

The term executory contract is not defined in the Bankruptcy Code, but refers to “a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.”

In Chapter 7 cases, under 11 U.S.C. § 365, the trustee (who steps into the shoes of the debtor) may accept or reject the executory contract. Unless the trustee accepts an executory contract within 60 days of the filing of the bankruptcy petition, it is deemed rejected. 11 U.S.C. § 365(d)(1). In a Chapter 13 case, the trustee can accept or reject an executory contract up until confirmation of the Chapter 13 plan. 11 U.S.C. § 365(d)(1).

19. SCHEDULE H – CO-DEBTORS

This schedule calls for the listing of any person or entity that is also liable as a co-obligor or guarantor of any debts listed on the other schedules. This includes non-debtor spouses or former spouses, co-signers, joint tortfeasors, etc.

Co-debtors are frequently overlooked, with severe consequences down the line if a co-debtor is omitted from the schedules and does not timely receive actual notice of the bankruptcy. Should the creditor collect from the co-debtor, the co-debtor will have a right of contribution against the bankrupt debtor, unless the co-debtor (as creditor) was timely notified of the bankruptcy and his potential claim discharged. A co-debtor should also be listed as a creditor in Schedule F. In a community property state, former spouses may be co-debtors on many of the debts listed in a bankruptcy.

152 Debt buyers often sue on prescribed debt. Therefore, list these creditors to make it clear that the debts are discharged.
153 In re Murexco Petroleum, Inc., 15 F.3d 60 (5th Cir. 1994).
20. SCHEDULE I - CURRENT INCOME OF INDIVIDUAL DEBTOR

While Schedule I is completed by individual debtors in both Chapters 7 and 13, it plays a different role in each.

In Chapter 7, Schedule I’s primary function is to protect against abusive filings. Under 11 U.S.C. § 707(b) the United States Trustee, the bankruptcy trustee, or any party in interest, has the right to move that the court dismiss the Chapter 7 if it finds that the granting of relief would be an abuse of the Chapter 7 bankruptcy. 11 U.S.C. § 707(b)(2) lays out when the court should assume abuse.

In Chapter 13 cases, Schedule I is used (along with Schedule J) to determine if the Chapter 13 plan feasible. The issue is whether the Chapter 13 debtor has enough “disposable income” to pay his regular monthly expenses, like his mortgage, light bill and food, as well as an additional payment to the trustee for payment of creditors under the Chapter 13 plan. Although food stamps and other public assistance may not be “income” for most purposes, they should be listed as income in Schedule I. This information shows how the Chapter 13 debtor can pay his expenses.

21. SCHEDULE J - CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR

Schedule J requires disclosure of all expenses. The Trustee uses the IRS National Standards for Food, Clothing and Other Items. The Trustee will presume “abuse” if the expenses listed on Schedule J are above the IRS standards. The court will scrutinize expenses like private school tuition, car payments for more than one vehicle per family, travel, and any other luxury expense. The court wants as much disposable income as possible to go to the creditors in a Chapter 13 bankruptcy. This means that expenses for non-necessary expenses should be minimized. The court also uses expense information to determine whether the Chapter 13 plan is feasible. In a Chapter 7 bankruptcy, disposable income is scrutinized for “abuse” to determine whether the bankruptcy should be dismissed for “abuse” under 11 U.S.C. § 707(b).

22. STATEMENT OF FINANCIAL AFFAIRS

The Statement of Financial Affairs (Official Form B-7) has questions designed to disclose significant past financial transactions relevant to the bankruptcy and a complete financial picture. The questions on the Statement of Financial Affairs must be answered truthfully and with care, lest the debtor risk denial of discharge or prosecution for perjury or bankruptcy fraud. There are 25 questions in all. Debtors not “in business” (most consumer debtors) are only required to answer questions 1 through 17.

Questions 1 and 2 request income information for the year of and the two calendar years prior to the bankruptcy filing. Question 1 relates to income from employment or operation of a business, and question 2 relates to any other income including but not limited to social security, retirement benefits, unemployment, tax refunds and food stamps. Be sure to get award letters from social security and the food stamp office to verify amounts from previous years, where possible. This information should come directly from clients’ tax returns and award letters.

Question 3a requests information concerning payments totaling $600 or more to any given creditor within 90 days prior to filing bankruptcy. The purpose of this question is to give the trustee information on avoidable transfers under 11 U.S.C. § 547(b). 11 U.S.C. § 547 allows the trustee to basically undo a payment (made within 90 days of the bankruptcy filing) to an unsecured creditor if that creditor was paid in preference to other similarly situated creditors and if the payment allowed that creditor to recover more than it would have recovered solely through the bankruptcy.

Question 3c requests information on all payments made to insiders within the year prior to filing bankruptcy. This is because the preference period under 11 U.S.C. § 547 is extended to one year for insiders.

Questions 4a and 4b query the debtor for all suits, executions, garnishments and attachments to which she is or was a party within the year prior to the bankruptcy filing, as well as any property attached, garnished or seized during that period of time. The purpose of this information is to enable the trustee to determine what property may have been acquired or may be acquirable by the debtor because of litigation pending in the last year, as well as what property the debtor may have lost in the past year due to litigation. The trustee can then make further investigation to determine whether any of that property can be brought into the bankruptcy estate.

Also, the trustee can require the debtor to account for litigation proceeds she may have received prior to filing bankruptcy, to be sure there is a legitimate explanation for the debtor’s spending of the proceeds if that is the case.

The trustee can also avoid fraudulent conveyances under 11 U.S.C. § 548. Very generally, an avoidable fraudulent conveyance is a transfer of property, within one year of the bankruptcy filing, with an intent to “hinder, delay, or defraud” a creditor, or a transfer where the debtor received “less than a reasonably equivalent value in exchange for such transfer” and was insolvent at the time of the transfer or became insolvent as a result of the transfer.

Question 5 requires an itemization of all property that has been repossessed, sold at foreclosure, or returned with a year of the filing, and Questions 6a and 6b, requests a listing with assignments and receiverships. These three questions provide additional information for the trustee concerning possible avoidances under 11 U.S.C. §§ 547 and 548.

Question 7 asks about gifts made within the year prior to bankruptcy filing, again with a view toward 11 U.S.C. § 548. It requires disclosure of all gifts “except ordinary and usual gifts to family members aggregating less than $200 in value per individual family member and charitable contributions aggregating less than $100 per recipient.” You just cannot give property away if you know you are going bankrupt.156 If the trustee believes that there was a fraudulent conveyance, she may sue the recipient of the gift under 11 U.S.C. § 548 to get it back, and/or she can seek a denial of the debtor’s discharge under 11 U.S.C. § 727(a)(2)(A).

Question 8 asks for losses from fire, theft, other casualty, or gambling within one year prior to filing. This query provides information to assist in understanding what has happened to the debtor’s wealth, as well as giving the trustee more leads on obtaining money for the bankruptcy estate, including insurance proceeds.

156 There is a safe harbor of 15% of gross income for contributions to a qualified charitable organization. 11 U.S.C. § 548(a)(2). A Louisiana bankruptcy court found that the 15% limit is applied to each contribution, rather than the aggregate contributions, and that a contribution in excess of 15% of gross income is void in its entirety. See In re Zohdi, 234 B.R. 371 (Bankr. M.D. La. 1999). Other courts have disagreed with both these conclusions. Universal Church v. Geltzer, 463 F.3d 218 (2d Cir. 2006); In re McGough, 4456 B.R. 682 (Bankr. D. Colo. 2011).
Question 9 requires disclosure of all payments “to any persons, including attorneys”, related to debt counseling or bankruptcy in the year prior to filing. There is a strong interest in protecting debtors from being exploited or overcharged by attorneys and credit consolidation services.

Question 10 asks for a listing of all other property “transferred either absolutely or as security” within the year prior to filing, except for property transferred in the “ordinary course of the business or financial affairs of the debtor.” In simpler terms, the question asks what property has been sold or given away in the past year that has not already been described. Most frequently, consumer debtors may have sold a car or a house in the past year. If this is the case, your client should be prepared to show what happened to the money realized by the sale, in addition to the other information the question asks for. The trustee will want to be sure your client isn’t hiding the money somewhere, and he will want to be sure that the money was actually paid and received, especially if the transferee was a relative or other insider. It must be an arms-length transaction, or it will be susceptible to avoidance under 11 U.S.C. § 548 and the trustee may object to the debtor’s discharge under 11 U.S.C. § 727.

Question 13 asks the debtor about “setoffs” within 90 days prior to the case. See 11 U.S.C. § 553 to understand what is meant by the term “setoff” and when a setoff may be avoided. Usually a setoff will not be disturbed. The most common setoff in a consumer context is a bank taking money from its depositor’s account when its depositor is in default on a loan owed to the bank.

Question 14 requires disclosure of all property held for another person. This will usually be a child’s savings bonds or savings account. It may be necessary to prove that this property is the child’s and not the debtor’s.

23. CHAPTER 7 DEBTOR’S STATEMENT OF INTENTION

Within 30 days of filing his Voluntary Petition, a Chapter 7 debtor must file Debtor’s Statement of Intention (Official Form B-8).157 For secured debts, the debtor indicates whether he wants to reaffirm a debt, redeem certain types of collateral by paying a sum equal to the fair market value of the collateral at the time of the filing of the bankruptcy, or surrender the collateral to the lender. In cases where the secured debt is greater or equal to the value of the asset it encumbers, the bankruptcy trustee does not administer, or sell, the property, since there would be no gain to the trustee. If there is no other non-exempt property (see more below on exemptions in bankruptcy), then creditors are advised by the clerk that the bankruptcy is a no asset case, and that there is no need to file claims.

24. CHAPTER 13 PLAN

In Chapter 13 cases, the debtor’s proposed repayment plan will be set in the form Chapter 13 plan. The Chapter 13 plan is the most important document of all in a Chapter 13 case. The plan lays out a proposal for who gets paid, how much and when. The trustee and the creditors may object to the repayment plan and the plan must be confirmed by the judge before the trustee disburses funds to the creditors.

If the debtor can’t fully pay all unsecured creditors, the issue is whether he has committed all of his “projected disposable income” to the unsecured creditors over the plan period. The Bankruptcy Code bases disposable income on “current monthly income” minus certain exclusions and reasonably necessary expenses. In determining projected disposable income, a court may consider changes in a debtor’s income or expenses that are known or virtually certain at the time of confirmation.\(^{158}\)

The Chapter 13 plan must be filed within 14 days of the filing of the voluntary petition.\(^{159}\) Many courts have suggested forms for Chapter 13 plans available on their websites and often judges do not like the form Chapter 13 plan that is prepared by the bankruptcy software programs such as Best Case. You should look at the suggested Chapter 13 plan forms on the bankruptcy court’s website and talk to other bankruptcy attorneys to find out what the local culture is for Chapter 13 plans. Whereas 11 U.S.C. § 1322 prescribes the contents of the Chapter 13 plan, local culture will dictate what must be included in the Chapter 13 plan and could mean the difference between getting your plan confirmed or your case dismissed.

The secured, priority and unsecured creditors’ treatment (i.e., the percentage to be paid) will be set forth in the plan. 11 U.S.C. § 1322(a)(3). As a general rule, creditors within the same classification must be treated similarly. 11 U.S.C. § 1322(b)(1).

Debtors may propose a 0% plan to unsecured creditors, whereby only secured creditors and priority creditors will be paid. The judge will scrutinize a 0% plan carefully and will only allow such a plan for a “below the means” debtor with a very limited income and limited expenses.

A Liquidation Analysis is required to be filed with the Chapter 13 plan in some jurisdictions, including the Eastern District of Louisiana. The Liquidation Analysis form can be found on the court website or obtained from the Chapter 13 Trustee’s office.

25. OTHER BANKRUPTCY FORMS TO BE FILED

25.1 PAY ADVICES

Copies of payment advices or evidence of payment, if any, received by the debtor from an employer within 60 days before the filing of the petition must be filed with the court.\(^{160}\) This includes pay stubs, social security, pensions, food stamps, etc. Remember to properly redact the pay stubs for filing with the court.

25.2 PRE-BANKRUPTCY CREDIT COUNSELING AND PERSONAL FINANCIAL MANAGEMENT COURSE CERTIFICATES.

Debtors must file a statement of completion of pre-bankruptcy credit counseling when filing their petition and must file a statement of completion of a course in personal financial management before discharge will be entered.\(^{161}\) Failure to file these documents will lead to either a notice to cure or and order to show cause why the case should not be dismissed.\(^{162}\)

\(^{158}\) Hamilton v. Lanning, 130 S.Ct. 2464 (2010).  
\(^{159}\) Bankruptcy Rule 1007.  
\(^{160}\) Bankruptcy Rule 1007(b)(1)(E).  
\(^{161}\) Bankruptcy Rule 1007 1007(b)(31)(7).  
\(^{162}\) Some courts view a bankruptcy filed without a certificate of credit counseling as void ab initio and strike the petition as a nullity rather than dismiss the case. See e.g., In re Wytenbach, 382 B.R. 726 (S.D. Tx. 2008) aff’d 291 Fed. Appx. 673 (5th Cir. 2008); contra In re Ross, 338 B.R. 134 (Bankr. N.D. Ga. 2006). The “striking” approach affects the stay in the filed case and future cases. It also results in the case not being counted as a “pending case” for the purposes of the 180 day look back rule of 11 U.S.C. § 109(g).
25.3 TAX RETURNS

The trustee requires that the debt or submit a copy of the tax return for the most recently ended tax year within 7 days of the first meeting of the creditors. Some trustees allow the tax returns to be scanned and emailed.

25.4 STATEMENT REGARDING TAX RETURNS FILED

For Chapter 7 bankruptcies, there is no statutory requirement to file 4 years of tax returns. However, there is a local culture in many jurisdictions, including the Eastern District of Louisiana, which requires the debtor to file a statement with the court that she has filed the last 4 years of tax returns or explain why she is exempt from filing tax returns.

Chapter 13 debtors must file all required tax returns for tax periods ending within 4 years of the debtor’s bankruptcy filing. Prior year tax return forms can be found at www.irs.gov. The required returns must be filed with the IRS before the first meeting of the creditors. A debtor may request that a trustee hold the creditors meeting open for an additional 120 days to enable the debtor to file the required returns. The failure to file the required returns will prevent confirmation of a Chapter 13 bankruptcy plan and will result in the dismissal of the Chapter 13 case or conversion to Chapter 7.

For all bankruptcies, a debtor must file any tax return that becomes due after the commencement of the bankruptcy case or obtain an extension for filing the return before the due date. If the debtor fails to timely file required returns or extensions, a taxing authority may request that the court dismiss the bankruptcy or convert it to another chapter of the Bankruptcy Code. If the debtor does not file the required return or obtain an extension within 90 days after the taxing authority’s request, the court must dismiss or convert the case. You should advise bankruptcy clients of their duties to file tax returns and insure that they comply. Your advice should be documented in writing.

25.5 STATEMENT ON SECTION 527 NOTICES

Attorneys working for nonprofit agencies, including Legal Services, should file a statement with the court stating that they are a non-profit, tax-exempt corporation under Internal Revenue Code § 501(c)(3), that they do not charge their clients for their bankruptcy legal services nor for their petition preparation services. Moreover, that as such, the program is not a “debt relief agency” as defined in 11 U.S.C., § 101(12A)(B). Therefore, they are not required to provide the Notices that a “debt relief agency” is required to provide under 11 U.S.C. §527. I do this preemptively to avoid questions from the clerk of court and the trustee regarding whether or not notices under 11 U.S.C. § 527 were provided.

25.6 STATEMENT OF CURRENT MONTHLY INCOME

Chapter 7 and 13 debtors are required to file a Statement of Current Monthly Income (Official Form B-22A) and Chapter 13 debtors are required to also file a Statement of Current Monthly Income (Official Form B-22C). In a Chapter 7 case, this statement which helps the judge perform an “abuse” analysis under 11 U.S.C. § 707. In Chapter 13 cases, this statement helps the judge decide whether or not to confirm a Chapter 13 Plan.

165 11 U.S.C. §§ 1307 (e), 1308.
26. CHAPTER 7 REAFFIRMATION

Reaffirmation of debt in a Chapter 7 bankruptcy is almost never appropriate for legal aid clients. Debt that has been reaffirmed in a Chapter 7 bankruptcy can never be discharged. Most low income clients will have problems paying debts again sometime later in their lives. If they have to file bankruptcy again, unpaid non-dischargeable, reaffirmed debt, will cause great problems and even mean the difference between saving a home in foreclosure or not. The reason that reaffirmation agreements have extensive disclosures, must be filed with the court, require a hearing before the judge and a judge’s approval, and require certification from the attorney that the debtor was fully informed and voluntarily made the agreement is because reaffirmation agreements are hardly ever for the debtor’s benefit in the long term. More often than not the creditor is manipulating the debtor into a reaffirmation agreement.166

27. DEALING WITH TAXES IN BANKRUPTCIES

27.1 YOU SHOULD ORDER A TAX TRANSCRIPT FROM THE IRS IN ALL BANKRUPTCIES

Always order an account record or tax transcript from the IRS. This information will help you to determine what taxes are owed and whether they are dischargeable. Without accurate information on the assessment dates and tax return filing dates, you may file a bankruptcy before a tax becomes dischargeable and saddle the debtor with tax debt that he could have discharged. Also, a tax transcript or account record will enable you to verify that your client has filed all required tax returns.

27.2 ALL BANKRUPTCY DEBTORS MUST PROVIDE THE TRUSTEE WITH THEIR MOST RECENT TAX RETURN

At least 7 days before the first date set for the creditors meeting, the debtor must provide the trustee with a copy of the federal income tax return (or tax transcript) for the most recent year ending before the commencement of the case if a return was required for that year.167 Also, creditors must be given a copy of the tax return or tax transcript if the creditor makes a timely request, which is defined as 15 days before the first date set for the creditors meeting.168 If the debtor fails to file a required return or transcript, his bankruptcy may be dismissed.169 An interested party may move for dismissal. If such a motion is filed, the debtor must show that that his failure was due to circumstances beyond his control.

If a taxpayer has lost his return, he can usually get a copy from his tax preparer. Most low-income taxpayers use professional tax preparation services. Also, low-income tax clinic attorneys have immediate electronic access to IRS tax transcripts provided the client signs a Form 2848 authorizing the low-income tax clinic attorney to represent him in tax matters for the relevant years. If these options are not available, you should immediately file an IRS Form 4506-T to obtain a record of account, tax transcript or “account transcript.”

27.3 HOW TO LITIGATE TAX ISSUES WITH THE IRS IN A BANKRUPTCY

If the debtor owes federal taxes, name the IRS as a creditor. Use the following address for your bankruptcy schedule: Internal Revenue Service, c/o Centralized Insolvency Operations, P.O. Box 7346, Philadelphia, PA 19101-7346. The telephone number for this IRS unit is 800-913-9358.170

Be sure to claim the earned income credit portion of any tax refund claim as exempt if this credit is exempt under your state law.171 List any pending tax refund claims as assets.

Priority tax debt should be listed on Schedule E unless secured by a lien.172 Non-priority tax debt should be listed on Schedule F. Be careful to list dischargeable non-priority tax debt on Schedule F so as to avoid an admission of non-dischargeability.

An adversary proceeding is not required to discharge a tax debt. However, a debtor can only be certain that a tax has been discharged by filing an adversary proceeding and obtaining a judicial determination of the dischargeability of the debt. Before you file an adversary proceeding, call the IRS attorneys. They may be willing to abate the tax. Adversary proceedings and motions against the IRS should be served on the Attorney General, local United States attorney and the designated IRS office.173

If you dispute a proof of claim by the IRS or its “secured” status, first try to resolve the matter with the IRS insolvency advisor. Resolution at this level could obviate the need for litigation of your issue.

A bankruptcy court may also have jurisdiction to determine a tax liability where the taxpayer has not fully paid the tax. For example, you may persuade the bankruptcy court to determine whether the taxpayer should have received an Earned Income Credit. This can be done by filing an 11 U.S.C. § 505 motion to determine tax liability.174 Tax refund claims may be heard by the bankruptcy court even where the taxpayer has not met the jurisdictional requirements for district court litigation, i.e., full payment of the tax deficiency, and has missed the deadlines for Tax Court review.

Chapter 13 bankruptcy debtors, unlike Chapter 7 debtors, have the right (or standing) to litigate any refund lawsuits in their own names.175 The trustee will seek to recover tax refunds won by the Chapter 13 debtor as “disposable income” that must be included in the plan. However, there may be challenges to the trustee’s action depending on your jurisdiction and the facts of the debtor’s financial situation.176

27.4 TAXES THAT MAY BE DISCHARGED IN BANKRUPTCY

Certain income tax debts may be discharged in bankruptcy. A Chapter 7 or Chapter 13 bankruptcy may provide some tax debt relief. If most of the client’s debt is federal tax, an Offer in Compromise (IRS Form 656) may provide the client with better relief from his tax debt than a bankruptcy. In some cases, an Offer in Compromise may be the only option if the taxpayer filed his tax return after the IRS assessed the tax by a substitute for return.

170 The Eastern District of Louisiana web page has a list of address information for all state and local taxing authorities.
171 In Louisiana, the earned income credit is exempt from seizure under La. R.S. 13: 3881 (A)(6).
172 See 11 U.S.C. § 507. Secured debt is listed on Schedule D.
173 Bankruptcy Rule 7004(d)(4).
174 Bankruptcy Rule 9014, In re Luongo, 259 F.3d 323 (5th Cir. 2001); Matter of Taylor, 132 F.3d 256 (5th Cir. 1998).
175 See e.g., Cable v. Ivy Tech State College, 200 F.3d 467, 472-74 (7th Cir. 1999).
176 See e.g., In re Freeman, 86 F.3d 478 (6th Cir. 1996).
In a bankruptcy, you should always evaluate whether any of the income tax debt can be discharged. The analysis should be done for each tax year. The rules for determining whether an income tax is dischargeable are very complex.\(^\text{177}\) Income taxes are only dischargeable if these tests are met:

- **The 11 U.S.C. 523(a) timely filed return test—a new bar to discharge?**
  
  In a 2010 Chief Counsel notice, the IRS held that a late filed tax return would not bar bankruptcy discharge of the related tax unless the return was filed after an assessment pursuant to § 6020(b) substitute for return.\(^\text{178}\) However, despite this favorable IRS notice, many courts have held that a late filed return [with the possible exception of a return filed pursuant to I.R.C. § 6020(a)] can never be a “return” for bankruptcy discharge purposes.\(^\text{179}\) The IRS notice had rejected the reasoning of several courts that found that a late filed return barred discharge. If you have this issue, you should check to see if the IRS has changed its 2010 position in light of recent court rulings that bar discharge.

- **The 3 year tax return due date test**
  
  Tax return was due at least 3 years before bankruptcy filed.\(^\text{180}\) For example, if a 2007 tax return was due on April 15, 2008, the bankruptcy petition must be filed after April 15, 2011, for the 2007 income tax to be dischargeable.\(^\text{181}\)

  The 3 year look back period may be suspended by bankruptcy and collection due process appeals.\(^\text{182}\) Offers in compromise don’t suspend the 3 year period.\(^\text{183}\)

- **The 2 year tax return filing date test**
  
  Tax return must have been filed at least 2 years before the bankruptcy was filed. This test will exclude debtors with unfiled returns and certain late filed returns. For example, if a 2007 tax return was not filed until April 15, 2009, the bankruptcy could not be filed until after April 15, 2011, if the debtor seeks to discharge the 2007 income taxes. Note that the “filing date” in the IRS records may be weeks or even months after the debtor mailed the return to the IRS. The only way to know the IRS filing date is to obtain the tax transcript or account record from the IRS.

  I.R.C. § 6020 (b) authorizes the IRS to prepare a “substitute for return” for a taxpayer who fails to make or file a return. A substitute for return filed by the IRS without the taxpayer’s participation and consent will not qualify as a tax return for the two year tax return filing date test.\(^\text{184}\) Furthermore, the IRS maintains that a tax can’t be discharged if

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\(^\text{177}\) See National Consumer Law Center, Consumer Bankruptcy Law and Practice (9th ed. 2009), § 15.4.3.1; Effectively Representing your Client Before the New IRS (ABA 5th ed. 2011), Ch. 21; M. King, Discharging Taxes in Consumer Bankruptcy Cases (2012).

\(^\text{178}\) Chief Counsel Notice, CC 2010-016 (Sept. 2, 2010).

\(^\text{179}\) See e.g., In re McCoy, 666 F.3d 924 (5th Cir. 2012) (interpreting post-2005 language of 11 U.S.C. § 523(a)(1)(B)(i)).

\(^\text{180}\) For example of the interplay between the look back periods, see Severo v. Comm’r, 129 T.C. 160 (2007), aff’d 586 F.3d 1213 (9th Cir. 2009).

\(^\text{181}\) See In re Loving, 2011 WL 3800042 (Bankr. S.D. Ala. 2011) (taxes not dischargeable because debtor filed on April 8, 3 years after she filed her tax return, but less than 3 years after due date of the return).


\(^\text{183}\) Chief Counsel Advice 2004-04-049 (Jan. 5, 2004).

the taxpayer filed his tax return after the IRS assessed a tax deficiency when the taxpayer failed to respond to the 90 day deficiency letters based on the IRS’s preparation of a “substitute for return.”\textsuperscript{185}

- **The assessment date test (at least 240 days before bankruptcy filed)**
  For the assessment date test, the IRS must have assessed the tax against the tax debtor at least 240 days before the bankruptcy petition was filed. You can only determine the assessment date by reviewing the IRS tax transcript or account record.\textsuperscript{186} Generally, assessment is made within 3 years of the tax return’s due date. You don’t want to file a bankruptcy petition before 240 days (with extensions) has run from the assessment.

  The 240 day assessment test may be extended if the taxpayer filed a prior bankruptcy. The length of the bankruptcy plus 6 months must be added to the time periods.\textsuperscript{187} Offers in Compromise, collection due process appeals and Taxpayer Assistance Orders may also toll or increase the time requirements.\textsuperscript{188}

- **No fraud or willful evasion**
  A fraudulent return or a willful attempt to evade or defeat tax will deny the debtor the right to discharge the tax debt.\textsuperscript{189} The IRS bears the burden of proof on fraud or evasion.\textsuperscript{190}

- **Timely notification test**
  To discharge a tax, the debtor must notify the IRS of the bankruptcy in time for the IRS to file a timely proof of claim.\textsuperscript{191}

### 27.5 WHAT TAXES MUST BE PAID IN A CHAPTER 13 BANKRUPTCY?

In Chapter 13 bankruptcies, the plan must provide for priority and secured tax debts. Older taxes may be “non-priority” and therefore dischargeable. In some cases, you can prevent a tax debt from becoming “secured” by filing the bankruptcy before the IRS files its lien.

### 27.6 ARE THERE ANY TAX ADVANTAGES TO A CHAPTER 13 BANKRUPTCY?

For the most part, the 2005 bankruptcy legislation eliminated the so-called Chapter 13 “super discharge” of taxes. However, Chapter 13 can still be used to discharge priority taxes paid with money from loans and credit cards, tax penalties and post-petition interest on certain taxes.

A Chapter 13 bankruptcy may secure a more favorable repayment plan for taxes than an installment agreement.


\textsuperscript{186} See Effectively Representing Your Client Before the IRS, § 17.2 (ABA 5th ed. 2011)(information on how to ascertain assessment date).

\textsuperscript{187} Severo v. Comm ’r, 129 T.C. 160 (2007), aff’d 586 F.3d 1213 (9th Cir. 2009).

\textsuperscript{188} I.R.C. § 507 (a)(8)(A)(ii); I.R.M. 5.9.13.19.3(2)(concept of tolling); see also In re Emerson, 224 B.R. 577 (Bankr. W.D. La. 1998)(appeal of rejected offer in compromise does not toll the 240 day period in I.R.C. § 507).

\textsuperscript{189} See e.g., Matter of Bruner, 55 F.3d 195 (5th Cir. 1995).


\textsuperscript{191} United States v. Hairepoulos, 118 F.3d 1240 (8th Cir. 1997).
27.7 EFFECT OF BANKRUPTCY ON LIENS

Discharge of a tax debt in bankruptcy will not extinguish a pre-petition lien.\(^ {192}\) It only extinguishes the personal liability. Generally, liens recorded before the bankruptcy will not be canceled.\(^ {193}\) If they survive, the IRS will be able to seize the liened asset. This puts debtors with homes and retirement plans at risk of future tax collection.\(^ {194}\) However, sometimes the IRS does not bother enforcing liens after a bankruptcy. A tax lien will not attach to property acquired after a bankruptcy if the underlying tax liability was discharged in the bankruptcy.

27.8 BANKRUPTCY STAYS OF TAX COLLECTIONS AND LITIGATION

A bankruptcy stay will apply to IRS collection actions. A Chapter 7 bankruptcy will even stay nondischargeable taxes for a few months. Generally, collection activity in violation of the stay will be void.\(^ {195}\) A § 362 (a) stay will also stay the commencement or continuation of a Tax Court proceeding.\(^ {196}\)

During a stay, the IRS may take these actions without violating the stay:

- set-off a pre-petition tax refund against pre-petition income tax debt
- intercept an income tax refund against past due child support
- assess the tax
- issue a notice and demand for payment of an assessment
- issue a notice of deficiency while a stay is in effect.\(^ {197}\)
- conduct an audit to determine a tax liability

27.9 EFFECT OF BANKRUPTCY ON COLLECTION STATUTE OF LIMITATIONS

The time period to collect taxes is extended by the filing of a bankruptcy that does not discharge all of the taxes. The balance on the 10 year statute of limitations is extended by the length of the bankruptcy plus 6 months.\(^ {198}\)

28. MOTION TO AVOID LIENS

Until 2006, La. R. S. 9: 5166 provided a cause of action to avoid a lien relative to a discharged in bankruptcy. The legislature repealed R.S. 9: 5166 in 2005, and replaced it with R.S. 9: 5175 and R.S. 44: 114 to provide an action to extinguish judgments discharged in bankruptcy where the creditor has no equity as a result of a judicial mortgage over and above superior liens.\(^ {199}\) A creditor’s right to foreclose on a lien survives bankruptcy even though personal liability has been discharged unless the lien is cancelled by bankruptcy court or state court.\(^ {200}\)

A debtor may also seek to cancel a lien in bankruptcy court under the Bankruptcy Code. The debtor has the burden to affirmatively file a motion to avoid a lien. Otherwise, the lien may survive bankruptcy unless it can be extinguished under R.S. 9: 5175 and R.S. 44: 114.

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\(^{192}\) In the Matter of Orr, 180 F.3d 656 (5th Cir. 1999); In re Isom, 901 F.2d 744 (9th Cir. 1990).
\(^{193}\) Generally, a lien will be valid until the 10 year statute of limitations has run. I.R.C. §§ 6322, 6502 (a).
\(^{194}\) Generally, the IRS will not seek to levy retirement plans unless there has been “flagrant misconduct” by the debtor. I.R.M. 5.9.17.4.3; 5.11.6.2.
\(^{197}\) 11 U.S.C. § 362(b)(9), In re Luongo, 259 F.3d 323 (5th Cir. 2001) (IRS right to offset); I.R.M. 5.9.2.5.
\(^{198}\) I.R.C. § 6503 (b).
\(^{199}\) Act 169 of 2005.
11 U.S.C. § 522(f)(1) allows the debtor to avoid (1) certain judicial liens that impair property claimed as exempt and (2) non-possessor, non-purchase money security interests in household goods and tools of the trade. These liens may be avoided to the extent that they impair the exemption in the property. If a lien is avoided, the creditor becomes an unsecured creditor.

A debtor may avoid a lien by filing a motion. There is no time limit to file a motion to avoid a lien. However, the debtor should file the motion as soon as possible and while the case is still open. This avoids the additional cost of a motion to reopen and also avoids the risk that the bankruptcy court may deny a motion to reopen the bankruptcy. The courts agree that a Chapter 13 debtor may use § 522(f) to avoid liens. A Chapter 13 debtor should file a motion to avoid a lien rather than merely rely on the provisions of the Chapter 13 plan for avoidance of a lien.

29. EVENTS IN A CHAPTER 7 “NO-ASSET” CASE

A typical Chapter 7 bankruptcy case is a “no-asset” case, meaning the debtor has no exempt or unsecured property that can be liquidated and sold by the trustee. The debtor and/or the debtor’s attorney files the petition, forms, schedules and other documents described above. The court mails notice of filing of the bankruptcy case, and advising of the date, time, and place of the 11 U.S.C. § 341 meeting of creditors, to the debtor, the debtor’s attorney and all other entities listed on the mailing matrix within 1-2 weeks of the filing of the petition. The meeting of creditors is held about 6 weeks later in a building near the courthouse, but not in a courtroom. Generally speaking, the meeting is an opportunity for the Chapter 7 trustee to confirm the information in the schedules and, if necessary, to question the debtor with respect to his property. The meeting is also an opportunity for the creditors to ask questions of the debtor about the bankruptcy or the debtor’s property. Typically, no creditors show up at these meetings. Though sometimes, creditors with purchase money security interests will attend these meetings to determine whether or not the debtor still owns the collateral, what condition the collateral is in, and what the debtor intends to do with the collateral.

About 9 weeks after the meeting of creditors, the debtor and the debtor’s attorney will receive a copy of the debtor’s discharge notice in the mail. Typically, it is unnecessary for the debtor or the debtor’s attorney to make any court appearances.

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201 A lien securing a domestic support obligation may not be avoided.
202 In re McMorris, 436 B.R. 359 (Bankr. M.D. La. 2010)(judicial liens based on deficiency judgment in foreclosure totally avoided since each lien fully impaired the debtor’s homestead exemption). See also, Matter of Maddox, 15 F.3d 1347 (5th Cir. 1994).
203 Bankruptcy Court Rules 4003 (d), 9014. For a sample form, see National Consumer Law Center, Bankruptcy Basics, Appx. F, Forms 33-36.
204 In re Wilding, 475 F.3d 428 (1st Cir. 2007)(avoided 2 years after discharge); In re Chiu, 304 F.3d 905 (9th Cir. 2002); Matter of Bianucci, 4 F.3d 526 (7th Cir. 1993)(motion to reopen to avoid lien should be granted absent prejudice to creditor); In re Babineau, 22 B.R. 936 (Bankr. M.D. Fla. 1982)(lien avoided after confirmation of Ch. 13 plan).
205 The bankruptcy court has broad discretion on whether to reopen a case. Delay in bringing a motion to avoid a lien increases the risk that a motion to reopen a closed case will be denied.
207 See 11 U.S.C. § 1202 for more on the Trustee’s duties and responsibilities.
A typical Chapter 13 bankruptcy case begins with the debtor’s attorney filing the petition, Chapter 13 plan, forms, schedules and other documents described above. Just like in a Chapter 7 bankruptcy, within 1-2 weeks of the filing of the petition, the court mails notice of filing of the bankruptcy and advises the debtor, the debtor’s attorney and all those on the mailing matrix of the § 341 meeting of creditors, and for a Chapter 13 case, also advises of the date and time for the hearing on confirmation of the Chapter 13 plan and the last date to file proof of claims.

The debtor must start making his proposed payments to the Trustee and on secured debts he proposed to pay outside of his plan within 30 days of filing the bankruptcy. The meeting of creditors is held about 6 weeks later and the Chapter 13 trustee confirms the information in the schedules and other documents. Again, typically, no creditors show up at these meetings. After the meeting of the creditors and before the confirmation hearing, creditors typically begin filing Proof of Claims and may object to the Chapter 13 Plan as proposed.

The debtor has the opportunity to object to the Proof of Claims where debts are prescribed, the creditor has made calculation errors or has not provided proof that the debt is owed, and for other reasons as well. If the debtor objects to claims that have been filed, the debtor should move to continue the confirmation hearing until after the objections to proof of claims have been resolved. The amounts listed on the proof of claims that have been filed must match the amounts proposed to be paid in the Chapter 13 plan or be below the amounts proposed in the plan. Otherwise, the trustee will object to the Chapter 13 plan and the judge will not confirm the plan. The debtor can modify the Chapter 13 plan at any time before the confirmation hearing without charge. If the secured creditor and/or priority creditors have not submitted proof of claims, the debtor can file a proof of claim on their behalf. Some judges will not confirm the Chapter 13 plan unless all secured and priority proof of claims have been filed.

About 6 weeks after the § 341 meeting of creditors, the confirmation hearing is held before the judge in his or her courtroom. The debtor does not have to attend the confirmation hearing but the debtor’s attorney usually has to attend if any objections to the plan have been filed. Sometimes, if no objections to the plan have been filed or all objections to the plan have been resolved through negotiations between the debtor and the creditor, the judge will confirm the Plan without hearing. But each judge has different practices for confirmation hearings and it is best for the debtor’s attorney to plan to attend the confirmation hearing.

Once the Chapter 13 Plan is confirmed, the debtor needs to make all of the payments under the Plan as confirmed. If the debtor falls behind on her payments, either to the trustee under the plan or on her payments outside the plan, she can move to modify her Chapter 13 Plan and propose an amended Plan.

After the debtor has completed all of her payments under the Chapter 13 plan, the court will enter a discharge and the debtor and the debtor’s attorney will receive a copy of the debtor’s discharge notice in the mail.

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212 11 U.S.C. §1327
214 The full time proposed does not have to pass under the Chapter 13 plan, but the total payment amount must be made to the trustee.
31. MISCELLANEOUS CHAPTER 13 ISSUES

If a creditor does not timely file a proof of claim in a Chapter 13 bankruptcy, its claim will be barred. A confirmed Chapter 13 plan binds a secured creditor that had notice, even if the plan omitted it and failed to provide payment for the secured debt. A recent Supreme Court case has abrogated a Fifth Circuit rule that secured creditors were not necessarily bound by a confirmed plan.

In 2005, Congress amended the Bankruptcy Code to make it clear that Social Security benefits are not included in the definition of “current monthly income” for the purposes of Chapter 13 bankruptcies. Therefore, Social Security benefits are not “disposable income” that must be used for a Chapter 13 plan. Failure to include Social Security in proposed plan payments does not constitute bad faith that would require denial of confirmation.

Chapter 13 debtors with child support obligations face special challenges. A Chapter 13 plan may not be confirmed unless the debtor is current in all post-petition “domestic support obligations.” A discharge will not be granted unless a Chapter 13 debtor certifies that his domestic support obligations are current including all pre-petition debt to extent provided for in the plan. Failure to make post-petition support payments is a ground for dismissal or conversion.

Bankruptcy Rule 3002.1, eff. December 1, 2011, requires mortgage creditors to notify the debtor and trustee when a mortgage payment is changing and when fees have been charged to the debtor during a Chapter 13 case. The initial cases have held that the mortgage creditor may not charge the debtor for attorney fees for providing the new information required by Rule 3002.1.

32. APPEALS

Bankruptcy court judgments, orders and decrees may be appealed to the district court as permitted by 28 U.S.C. § 158. Local bankruptcy rules may also prescribe rules for appeals. In Louisiana, the appeals go to the district court since appeals to bankruptcy appellate panels have not been authorized. A district court judgment may be appealed to the circuit court of appeal. A motion for rehearing of the district court judgment is available unless the district court rules specify otherwise.

A notice of appeal from a bankruptcy court judgment or order must be filed with the clerk of court for bankruptcy court within 14 days of entry of judgment.
The bankruptcy clerk must receive the notice of appeal within this 14 day period. The 3 day extension for service by mail does not apply to notices of appeals in bankruptcy cases.

The notice of appeal must substantially conform to (1) the appropriate Official Form, (2) contain names of all parties to the judgment, order or decree appealed and the phone numbers of their attorneys, and (3) be accompanied by the filing fee.

The basic steps in a bankruptcy appeal are:
1. A notice of appeal within 14 days of entry of judgment;
2. Payment of fee or motion for leave to proceed in forma pauperis;
3. If the appeal is an interlocutory appeal, (rather than an appeal from a final judgment or order), a motion for leave to appeal must also be filed;
4. If a stay is needed, a motion for stay pending appeal, addressed first to the bankruptcy judge;
5. A designation of the record and issues on appeal filed within 14 days after the filing of the notice of appeal or entry of the order granting leave to appeal;
6. If a transcript is designated for the appeal, the party must request the transcript and arrange for payment of the transcript;
7. Unless different time limits are specified, the appellant’s brief must be filed within 14 days after entry of the appeal on the docket. (district court clerk’s entry of the appeal on the district court docket after receiving the record from the bankruptcy clerk).

The standard for district court review of a bankruptcy court decision depends on whether the matter is a core or non-core proceeding. Most bankruptcy decisions will be core proceedings. A “non-core” proceeding does not depend on the bankruptcy court for existence and can proceed in another court.

Generally, in core proceedings, conclusions of law are subject to de novo review and fact findings are reviewed for “clear error.” These standards for review apply for appeals to both the district court and circuit court of appeal. “Clear error” exists for factual findings if a review of the entire evidence leaves the reviewing court with a “definite and firm conviction that a mistake has been made.” Given the deferential standard of “clear error” for factual findings, one should consider a motion for reconsideration or new trial with the bankruptcy court in cases that involve erroneous factual findings.

228 In re Bad Bubba Racing Products, Inc., 609 F.2d 815 (5th Cir. 1980).
230 Official Form 17 is used for Notices of Appeal.
232 Bankruptcy Rules 8001, 8003.
233 Bankruptcy Rule 8005. In many cases, failure to obtain a stay creates a risk that the appeal will be barred by mootness. See e.g., In re Manges, 29 F.3d 1034 (5th Cir. 1994) cert. denied 513 U.S. 1152 (1995).
234 Bankruptcy Rule 8006. Issues not raised in the Rule 8006 designation are waived. In re GGM, P.C., 165 F.3d 1026 (5th Cir. 1999).
235 Bankruptcy Rule 8009. The form of the appeal brief is specified by Bankruptcy Rule 8010. Failure to address an issue in the brief may be considered waived by the appellate court. In re Grothues, 226 F.3d 334 (5th Cir. 2000).
237 Dunmore v. United States, 358 F.3d 1107 (5th Cir. 2004).
238 Bankruptcy Rule 8013; In re Barnett, 597 F.3d 651, 653 (5th Cir. 2010); In re Texas Pig Stands, Inc., 610 F.3d 937, 941 (5th Cir. 2010).
239 In re Oursou, 258 F.3d 393 (5th Cir. 2001).
240 In re Williams, 337 F.3d 504 (5th Cir. 2003).
241 See Bankruptcy Rules 9023, 3008.
In a “non-core” proceeding, the bankruptcy court hears the matter and submits proposed findings of fact and conclusions of law to the district court. The district court reviews the fact findings and conclusions of law de novo in a “non-core” proceeding.242

Appeals may be taken from a final order of a bankruptcy court. Leave of the district court is required for an appeal of an interlocutory appeal. A motion for leave to file an interlocutory appeal must be filed if the order appealed is not a final order.243 A bankruptcy court may not certify an interlocutory order for immediate appeal. The issue of what is a “final order” is not always clear.244

33. ATTORNEY FEES

Attorney fees are available to pro bono or legal aid counsel in bankruptcy cases.245

Attorney fees may be awarded to the debtor for violations of the § 362 stay or § 524 discharge injunction.246 A debtor may also be entitled to attorney fees if a creditor loses a motion to oppose a discharge based on § 523(a)(2), false pretenses, fraud or false statements. Attorney fees may be awarded if the creditor’s opposition was not “substantially justified.”247 Of course, there may be claims for attorney fees based on violation of various consumer protection laws or violations of 11 U.S.C. § 110 by bankruptcy petition preparers. A creditor may obtain attorney fees in a dischargeability action if attorney fees would be recoverable in the underlying action under state or federal non-bankruptcy law.248 Attorney fees may be available against a state or local government under 42 U.S.C. § 1988 for violations of federal statutory rights established by the Bankruptcy Code in 11 U.S.C. §§ 362, 366, 524 and 525. An additional basis for federal agency violations of Bankruptcy Code statutory rights may be the Equal Access to Justice Act.

34. REMEDIES AGAINST NON-ATTORNEY BANKRUPTCY PETITION PREPARERS

By fraud or incompetence, non-attorney bankruptcy petition preparers may injure their low-income clients. These victims may come to legal aid offices for help after the non-attorney petition preparers are ripped them off or mishandled their bankruptcy cases.

Section 110 of the Bankruptcy Code regulates non-attorney bankruptcy petition preparers. If a non-attorney preparer violated Section 110 or commits any unfair, deceptive or fraudulent act, the debtor may bring an action under Section 110 for actual damages, statutory damages of the greater of $2,000 or twice the fee charged by the non-attorney preparer, and attorney fees.249

242 Copeland v. Merrill Lynch, 47 F.3d 1415 (5th Cir. 1995).
243 Bankruptcy Rules 8001, 8003.
244 See National Consumer Law Center, Consumer Bankruptcy Law and Practice, § 14.94 (9th ed. 2009).
245 In re Hunt, 238 1098 (9th Cir. 2003).
248 In re Dinan, 448 B.R. 775, 784-87 (9th Cir. BAP 2011). For example, a consumer could claim attorney fees if he prevailed on his adversary complaint that a state unfair trade practice judgment or claim was non-dischargeable.
CHAPTER 2

STRATEGIES FOR REPRESENTING THE LOUISIANA CONSUMER

Mark Moreau
About The Author

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Mr. Moreau is a member of the Louisiana and New York bars. He has been the 1992-93 Chairman of the Louisiana State Bar Association Consumer Protection, Lender Liability and Bankruptcy Section and has served on the Advisory Subcommittee on Lease for the Louisiana State Law Institute. Mr. Moreau is the recipient of the Louisiana State Bar Association’s Career Public Interest Award, the New Orleans CityBusiness Leadership in Law Award, the National Taxpayer Advocate’s Award and the Louisiana Coalition Against Domestic Violence’s Into Action Award. He was the original author of Strategies for Representing the Louisiana Consumer in the 2001 edition of the Louisiana Legal Services and Pro Bono Desk Manual.

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This chapter is dedicated to the memory of the late Patrick Breeden, 1932-2012, who was a trail-blazing consumer rights attorney in Louisiana for more than 40 years. Pat was a great friend to legal aid attorneys and a tireless advocate for consumers. His efforts to mentor and support legal aid and consumer rights attorneys were exceptional and generous. Pat, you did so much to mentor me. I am so honored to have had the opportunity to co-counsel with you and to have stood in court with you in advocating for our clients. We will all miss your friendship, advocacy, leadership and extraordinary knowledge of consumer law.
1. INTRODUCTION

Three strategies for representing a consumer are covered in this practice manual:

- “offense” or affirmative actions;
- “defense” or transaction avoidance; and
- exemption planning

Debt workout and bankruptcy should also be considered if necessary. This Chapter will only focus on Louisiana consumers’ non-bankruptcy strategies.

2. “OFFENSE” OR AFFIRMATIVE ACTIONS

2.1. HOW TO ANALYZE A CONSUMER CASE

Many statutes create affirmative consumer claims. Raise any claims the consumer has against the seller, creditor or collector in response to debt collection efforts. The best defense is a good offense. Assertion of an affirmative claim provides excellent leverage to settle a case or totally offset the alleged debt. The consumer’s claim, particularly if statutory attorney fees are available, may even exceed the creditor’s claim.

There are at least 6 separate stages of any consumer transaction to analyze for claims that a consumer may raise relative to a debt. These are the sale, the warranty, the credit terms, performance, debt collection tactics and seizure. Below is a brief overview of these 6 stages:

1. The original sale of goods or services
   The major source of consumer claims for sale abuses or misrepresentations will be the Unfair Trade Practices and Consumer Protection Law (“UTPL”), La. R.S. 51: 1401 et seq. Use a “smell” test. Anything that you find outrageous, unfair, unjust or fraudulent is likely to constitute a viable UTP claim. May the contract be rescinded or cancelled? For example, door to door sales and transactions involving a non-purchase money security interest in the consumer’s primary residence may be subject to cancellation.

2. Subsequent warranty performance
   Defective goods and services may provide a consumer claim. Do not assume that an “as is” or “warranty waiver” clause in the contract prevents a consumer from suing the creditor. Such waivers are often invalid. At this stage, the major consumer protections will be found in UTPL, redhibition, lemon law, Magnuson Moss Warranty Act and warranties of workmanlike performance under La. Civ. Code art. 2762 and 2769.

3. The credit terms
   Again, anything you find outrageous, unfair or deceptive about the solicitation or terms of the credit agreement may be actionable. Also, technical or seemingly minor violations of statutory protections may be actionable. The federal Truth in Lending Act, Equal Credit Opportunity Act, Credit Repair Act, state usury and Consumer Credit Laws may apply
4. **Creditor’s subsequent performance**

There may be claims based on a creditor’s conduct in servicing a loan. The federal Real Estate Settlement Procedures Act imposes enforceable requirements on servicers.¹

5. **Debt collection tactics**

Unlawful collection practices are rampant and are often actionable.² The National Consumer Law Center’s Fair Debt Collection manual has a helpful interview and case analysis checklists for identifying unlawful collection practices.³ Unlawful collection tactics expose the collector, its attorney or the creditor to statutory and actual damages under the federal Fair Debt Collection Practices Act, the Louisiana unfair trade practices act or Louisiana Civil Code art. 2315.

6. **Enforcement of court order or security interest**

A creditor’s seizure of wages or property may violate the law. If so, the consumer may have a damage claim.

2.2 **THE UNFAIR TRADE PRACTICES LAW**

2.2.1. **Scope**

The Louisiana Unfair Trades Practices and Consumer Protection Law (“UTPL”) makes “unfair or deceptive acts or practices in the conduct of any trade or commerce” unlawful.⁴ The UTPL broadly defines a “consumer transaction” to include any transaction involving trade or commerce to a natural person, the subject of which is primarily intended for personal, family or household use.⁵

The definition of an unfair trade practice is broadly and subjectively stated. What constitutes an unfair trade practice is determined on a case by case basis.⁶ The UTPL was modeled on the Federal Trade Commission Act, 15 U.S.C. § 45.⁷ Federal jurisprudence under the FTC Act is incorporated into the UTPL.⁸ Interpretations of the FTC Act should be considered to adjudge the scope and applicability of the UTPL.⁹ Also, court decisions on unfair trade practices laws of other states, identical or similar to Louisiana laws, are persuasive authorities.¹⁰

A mere breach of a contract, without more, is not an unfair or deceptive trade practice.¹¹ However, misrepresentation, deceit or fraud in a contract may be an

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¹ See National Consumer Law Center, Repossessions and Foreclosures (7th ed. 2010).
² See National Consumer Law Center, Fair Debt Collection (7th ed. 2011).
⁵ La. R.S. 51: 1402 (3).
⁷ Cheramie Services, Inc. v. Shell Deepwater Production, Inc., 35 So.3d 1053, 1056, n. 4 (La. 2010).
⁸ The Federal Trade Commission Act does not create a private cause of action for FTC Act violations. However, a violation of the FTC Act will often be considered a violation of state unfair trade practices laws which does provide private remedies to injured consumers.
⁹ State ex rel Guste v. Orkin Exterminating Co., Inc., 528 So.2d 198, 200-01 (La. App. 4 Cir. 1988); writ denied 533 So.2d 18 (La. 1988); Moore v. Goodyear Tire & Rubber Co., 364 So.2d 630, 633 (La. App. 2 Cir. 1978); Capital Home Preservation Co. v. Perryman Consultants, Inc. 47 So.3d 408 (La. App. 1 Cir. 2009) writ denied 27 So.3d 856 (La. 2010).
unfair or deceptive trade practice, as well as unfair or unconscionable contract terms.\textsuperscript{12} Also, intentional or systematic breaches of contracts may violate unfair trade practice laws.\textsuperscript{13}

2.2.2. Exempted persons or conduct

Certain banks, insurance companies and utilities are exempt from UTPL.\textsuperscript{14} With one exception, the exemption applies to these entities’ activities that are subject to the regulator’s jurisdiction. Thus, a UTPL claim against an insurer is not barred if the act or practice is not within the Insurance Commissioner’s jurisdiction.\textsuperscript{15} The broader exemption is for certain banks or lenders: “Any federally insured financial institution, its subsidiaries, and affiliates or any licensee of the Office of Financial Institutions, its subsidiaries, and affiliates or actions” are exempted. This is broader than the exemption that was in effect until late 2006.\textsuperscript{16} Conduct which complies with section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) and rules promulgated thereunder is also exempt.\textsuperscript{17}

2.2.3. Determine whether there is a UTPL claim

A right of action to enforce the UTPL is not limited to consumers and business competitors. La. R.S. 51: 1405(A) grants a right of action to any person who has suffered any ascertainable loss from a UTPL violation.\textsuperscript{18}

You should look for a UTPL cause of action in consumer problems. Many consumer and credit transactions are covered by the unfair trade practice laws: automobile repair, warranty, sale, unfair contract clauses, home improvement scams, door-to-door sales, mail order, real estate sales/practices, collection, repossession, foreclosure, abuse of process, credit terms, credit card practices, mortgage assistance scams, landlord-tenant abuses, mobile home parks, nursing homes, attorney misconduct, etc.

Look for a potential UTPL violation in all aspects of the consumer transaction: advertising, sales presentation, consummation of the sale, credit terms, seller’s performance and subsequent debt collection practices.

2.2.4. Practice tip: contract and tort defenses do not apply to deceptive trade practice claims

Waiver, ratification, the parol evidence rule, contractual limitations on liabilities, remedies and tort defenses will not defeat UTPL claims since they are based on misrepresentation or deceit and not on the contract. This fact makes the UTPL claim a powerful remedy even in the face of seemingly dispositive contract clauses.

\textsuperscript{12} See e.g., Laurents v. Louisiana Mobile Homes, Inc., 689 So.2d 536 (La. App. 3 Cir. 1997); Marshall v. Citicorp Mortgage, Inc., 601 So.2d 669 (La. App. 5 Cir. 1992).

\textsuperscript{13} See e.g., Orkin Exterminating Co., Inc. v. Federal Trade Commission, 849 F.2d 1354 (11th Cir. 1988).

\textsuperscript{14} La. R.S. 51: 1406; Bank of New York v. Parnell, 32 So.3d 877, 887 (La. App. 5 Cir. 2010), rev’d in part, 56 So.3d 160 (La. 2010).

\textsuperscript{15} Lamarque v. Massachusetts Indem. & Life Ins., 794 F.2d 197 (5th Cir. 1986).

\textsuperscript{16} Compare Levine v. First National Bank of Commerce, 917 So.2d 1235 (La. App. 5 Cir. 2006), aff’d in part, rev’d in part, 948 So.2d 1051 (La. 2006); Bank of New York v. Parnell, 32 So.3d 877, 887 (La. App. 5 Cir. 2010), rev’d in part 56 So.3d 160 (La. 2010) with Bank of New Orleans & Trust Co. v. Phillips, 415 So.2d 973 (La. App. 4 Cir. 1982).

\textsuperscript{17} La. R.S. 51: 1406(4).

\textsuperscript{18} Cheramie Services, Inc. v. Shell Deepwater Production, Inc., 35 So.3d 1053 (La. 2010).
2.2.5. Unfair trade practices
A practice is “unfair” when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.19

2.2.6. Deceptive trade practices
A practice is “deceptive” if it has a tendency or capacity to deceive even a significant minority of consumers.20 Fraud, deceit or misrepresentations constitute “deceptive” trade practices.21 It is not necessary to prove the seller’s intent or scienter (knowledge of the falsity), nor the consumer’s actual reliance or actual deception. The essential issue is whether the consumer was misled by the seller’s statements or actions.

2.2.7. Examples of unfair or deceptive trade practices
f. Retention of “trade in” car after car dealership was unable to obtain financing at agreed upon terms for car to be purchased. McFadden v. Import One, Inc., 56 So.3d 1212 (La. App. 3 Cir. 2011).

19 Cheramie Services, Inc. v. Shell Deepwater Production, Inc., 35 So.3d 1053, 1059 (La. 2010); McFadden v. Import One, Inc., 56 So.3d 1212 (La. App. 3 Cir. 2011); Risk Management Services, L.L.C. v. Moss, 40 So.3d 176, 184-85 (La. App. 5 Cir. 2010) writ denied 44 So.3d 683 (La. 2010).
21 Risk Management Services, L.L.C. v. Moss, 40 So.3d 176, 185 (La. App. 5 Cir. 2010) writ denied 44 So.3d 683 (La. 2010).


o. Real estate agent’s failure to tender prospective purchaser’s offer to buy home to seller. Harris v. Poche, 930 So.2d 165 (La. App. 4 Cir. 2006).

p. Misleading real estate purcharser as to outstanding mortgage to delay his seeking legal redress. Egudin v. Carriage Court Condominium, 528 So.2d 1043 (La. App. 5 Cir. 1988), writ denied 532 So.2d 136.


r. Performance of work prior to 3 day cancellation period. In the Matter of Fabbis, Inc., 81 FTC 678 (1972).

s. Telling a consumer that he is liable for damages if he exercises his 3 day rescission right. In the Matter of Certified Building Products, Inc., 83 FTC 1004, 1020-22 (1973), aff’d 512 F.2d 1278 (5th Cir. 1975), cert. denied 426 U.S. 906 (1976).

t. Failing to deliver home per specifications and refusing to make refund or correct defects. Laurents v. Louisiana Mobile Home, Inc., 689 So.2d 536, 547 (La. App. 3 Cir. 1997).

u. Failure to return and complete home repairs after representing that project would be completed if last payment made. See Crawford v. Pitts, 99-0419 (La. App. 1 Cir., 3/31/00), cited in In re Pitts, 2004 WL 3244479 (Bankr. M.D. La. 2004).

v. Violations of Louisiana unfair trade practice regulations, e.g., bait advertising, misrepresentation of old, used or secondhand goods, deceptive charitable solicitations. La. Administrative Code, Title 16, ch. 5.

2.2.8. Liability

The UTPL creates a statutory action against any “person” who engages in an unfair or deceptive trade practice or act. Thus, a corporate officer may have liability under the UTPL when he personally engages in unlawful acts. But, you should expect most corporate officers to claim immunity from personal liability by a “no cause of action” exception or motion for summary judgment.

2.2.9. Remedies

a. Overview

Remedies for unfair trade practices are broad and powerful. Actual damages, treble damages, restitution, contract avoidance, civil penalties, injunctive relief and attorney fees may be available. The remedies under the UTPL are cumulative to each other and to any remedies or penalties available under all other Louisiana laws.

24 La. R.S. 51: 1408 (B); see Vercher v. Ford Motor Co., 527 So.2d 995 (La. App. 3 Cir. 1988)(damages for mental anguish available for UTPL violation even though unavailable in a redhibitory action).
b. **Actual damages**
   The measure of damages under the UTPL is broad. For example, damages may include compensation for interruption of life, including lost wages, lost time and inconvenience.\(^{25}\) Damages for emotional distress and humiliation are considered actual damages under Louisiana's unfair trade practices law (provided there has been a required loss of money or property as required for the act to apply).\(^{26}\) UTPL creates statutory causes of action. Thus, these causes of action sound in tort and support tort theories of damages and are more extensive that damages allowed for breach of contract.\(^{27}\)

c. **Treble damages**
   Treble damages must be awarded if the court finds an unfair trade practice after the defendant's receipt of the Attorney General's notice.\(^{28}\) Attorneys filing a UTPL action should send a copy of the filed petition to the Attorney General to obtain this remedy.

d. **Contract avoidance**
   Under La. R.S. 51: 1403, a consumer contract, express or implied, made by any person in violation of the UTPL is an illegal contract and no recovery may be had on the contract.\(^{29}\) A contract that is unfair, deceptive or unlawful may violate the UTPL.\(^{30}\) Forum selection clauses for a plaintiff action violate the UTPL and are unenforceable.\(^{31}\) An arbitration agreement that prohibits a consumer from seeking UTPL statutory remedies may violate R.S. 51: 1403.\(^{32}\) An unlawful or prohibited contract provision may render the entire contract unenforceable by the offending party.\(^{33}\)

e. **Injunctive relief**
   The courts of appeal are split on whether private litigants are entitled to injunctive relief from unfair trade practices.\(^{34}\) The First, Second and Fifth Circuits have held private litigants don't have a UTPL right of action for an injunction. The Third and Fourth Circuits have found a right to injunctive relief.\(^{35}\)

f. **Attorney fees**
   If damages are awarded for an unfair or deceptive trade practice, the court must award reasonable attorney fees and costs to the prevailing

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\(^{25}\) See e.g., Slayton v. Davis, 901 So.2d 1246 (La. App. 2 Cir. 2005); see also National Consumer Law Center, Unfair and Deceptive Acts and Practices, § 13.3.3.4 (7th ed. 2008).

\(^{26}\) Laurens v. Louisiana Mobile Homes, Inc., 689 So.2d 536 (La. App. 3 Cir. 1997); Bank of New Orleans & Trust Co. v. Phillips, 415 So.2d 973 (La. App. 4 Cir. 1982).

\(^{27}\) Harris v. Poche, 930 So.2d 165 (La. App. 4 Cir. 2006).

\(^{28}\) McFadden v. Import, Inc., 56 So.3d 1212, 1221 (La. App. 3 Cir. 2011).


\(^{31}\) La. R.S. 51: 1407 (A); Thompson Tree & Spraying Service, Inc. v. White Spinning Const., Inc., 68 So.3d 1142 (La. App. 3 Cir. 2011). Note that many pre-2007 cases on forum selection may have been superseded by the 2006 amendments to La. R.S. 51: 1407(A).

\(^{32}\) See e.g., Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 671 (S.C. 2007), cert. denied 552 U.S. 990 (2007). In Simpson, the South Carolina Supreme Court interpreted a South Carolina statute, which was virtually identical to R.S. 51:1403, to hold that arbitration agreement prohibiting unfair trade practice remedies was unconscionable and unenforceable.

\(^{33}\) See e.g., Baierd v. McTaggart, 629 N.W.2d 277 (Wis. 2001).

\(^{34}\) Family Resource Group, Inc. v. Louisiana Parent Magazine, 818 So.2d 28 (La. App. 1 Cir. 2001).

\(^{35}\) See e.g., Huey T. Littleton Claims Service, Inc. v. McGuffee, 497 So.2d 790 (La. App. 3 Cir. 1986); Reed v. Allison & Perrone, 376 So.2d 1067 (La. App. 4 Cir. 1979).
plaintiff. A prevailing defendant may only be awarded attorney fees if the court finds that the unfair trade practices action was groundless and brought in bad faith or for harassment.

2.2.10. Pleadings
The facts for a UTPL cause of action should be pleaded. Your petition should also cite the UTPL and be forwarded to the Louisiana Attorney General. The failure to expressly cite the unfair trade practices statute in the petition is not fatal to a UTPL cause of action so long as the petition sets forth sufficient facts to state a UTPL cause of action.

2.2.11. Arbitration
It is not clear whether an arbitrator has authority to award treble damages under La. R.S. 51:1409, which states that the consumer must bring an “action” and the “court” shall make an award. If only a Louisiana court may award treble damages, an arbitration agreement may be unenforceable as to an unfair trade practice claim, thus allowing the consumer to pursue his unfair trade practice claims in court. Furthermore, an arbitration clause is unenforceable if a consumer can’t use a statutory remedy, such as the unfair trade practices law, in arbitration. Treble damages are mandatory under Louisiana law. So, there may be a strong argument for reversal of an arbitrator’s failure to award treble damages if an arbitrator has authority to handle unfair trade practice claims and award treble damages.

There may be a threat of prescription or preemption in the arbitration of an unfair trade practice claim if there is no underlying lawsuit that timely asserts an unfair trade practice claim. Arguably, the claim could prescribe or preempt during arbitration and the arbitrator might rule that he no longer had authority to render a decision. There is no Supreme Court case or statute that says that filing an arbitration claim prevents the running of preemption.

2.2.12. Prescription or Preemption?
Several circuit courts of appeal have long held that unfair trade practice claims are barred by “preemption” one year after the date of the transaction or act that gave rise to the right of action. These rulings mean that interruption, suspension and contra non valentum will not apply to preemption of unfair trade practices. However, some courts, but not all, have held that the peremptive

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36 La. R.S. 51:1409(A); McFadden v. Import One, Inc., 56 So.3d 1212 (La. App. 3 Cir. 2011).
38 Dominion Exploration & Production, Inc. v. Waters, 972 So.2d 350, 362, n. 12 (La. App. 4 Cir. 2007).
39 See generally, Peoples Security Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141 (4th Cir. 1993). But see Hodges v. Reasonover, 103 So.3d 1069 (La. 2012), which expresses the view that unless limited by the parties’ contract or rules of the specific arbitral tribunal, arbitrators have the power to render whatever relief is justified by the record, to the full extent provided for by law and equity. Hodges further states that, depending on the contract, a party could be entitled to the same rights and remedies as if the case were heard in state court.
42 Hodges v. Reasonover, 103 So.3d 1069 (La. 2012) (J. Weimer, concurring).
44 See Morris v. Sears Roebuck & Co., 765 So.2d 419 (La. App. 4 Cir. 2000); Tubos de Acero Mexico v. American International Investment Corp., Inc., 292 F.3d 471, 480-81 (5th Cir. 2002).
period does not begin to run where there is a continuing violation or a continuing tort.\(^{45}\) Note, however, that a continuing tort is occasioned when the unlawful acts continue, as distinguished from the mere continuation of the ill effects of the original, wrongful act.\(^{46}\) Also, a mere failure to correct a wrong may not be a continuing violation that would extend the preemptive period.\(^{47}\)

The Louisiana Supreme Court has not ruled on whether prescription or peremption applies to unfair trade practices.\(^{48}\) Furthermore, La. R.S. 51: 1409(E) expressly uses the word, “prescribed”, when establishing the time limit to bring an unfair trade practices action.

The issue of when peremption of an unfair trade practice begins to run is complex. La. R.S. 51: 1409(E) states that prescription begins to run from the “time of the transaction or act which gave rise to this right of action.” La. R.S. 51: 1409(A) states that a person does not have a right of action until he suffers “any ascertainable loss of money or movable property … as a result of the use or employment by another person of an unfair or deceptive practice, method, act or practice….” Thus, R.S. 51: 1409(A) and (E) could be subject to varying interpretations. Does peremption begin to run on the date of the deceptive act or transaction or the date of injury? Unfair trade practices often involve fraud or deceit which prevents the consumer from discovering the violation until he suffers injury.

Louisiana courts of appeal have held that peremption runs from the date of the transaction or act that gives rise to the right of action.\(^{49}\) These courts have said that peremption runs from the date of the wrongful act even if the victim is unaware of the wrongful act. However, this narrow view seems incorrect under R.S. 51: 1409(A) to the extent that a court bases peremption on the date of an act or transaction before the unlawful act or transaction actually caused a legally compensable injury. Other states have held that the statute of limitations for an unfair trade practice claim does not begin to run until the consumer suffers a legally compensable injury (generally the trigger for an unfair trade practice right of action) or has a right of action.\(^{50}\) Given the adverse Louisiana cases on when peremption begins to run, it is important to identify the act or transaction that gave rise to the “right of action.” Determine the last act or transaction that was an unfair or deceptive practice. Then, determine the date that the consumer suffered an ascertainable loss of money or property and any conduct that may constitute a “continuing violation.”


\(^{47}\) Cf., Crump v. Sabine River Authority, 737 So.2d 720, 728 (La. 1999).

\(^{48}\) Miller v. Conagra, Inc., 991 So.2d 445, 455-57 (La. 2008) (declining to decide whether R.S. 51: 1409(E) is prescriptive or preemptive).

\(^{49}\) See e.g., Morris v. Sears Roebuck & Co., 765 So.2d 419 (La. App. 4 Cir. 2000); Mayo v. Simon, 646 So.2d 973 (La. App. 3 Cir. 1994).

\(^{50}\) See e.g., Berg v. Byrd, 720 A.2d 1283 (Md. App. 1998); Gaidon v. Guardian Life Ins. Co., 727 N.Y.S.2d 30 (N.Y. 2001); Salenga v. Mitsubishi Motors Credit of Am., Inc., 107 Cal. Rptr. 3d 836 (Cal. App. 2010); Tissmann v. Linda Martin Homes Corp., 610 S.E.2d 68 (Ga. 2005); see also, National Consumer Law Center, Unfair and Deceptive Acts and Practices, § 12.3.2.2 (7th ed. 2008). These cases are consistent with the general rule that a statutory claim does not arise until there is a violation of the statute and the plaintiff is entitled to bring an action and seek a remedy.
2.3 TRUTH IN LENDING ACT

2.3.1 Overview

The Truth in Lending Act ("TILA") requires the accurate and meaningful disclosure of the costs of consumer credit.\(^{51}\) Congress enacted TILA to assure "meaningful disclosure of credit terms" and thereby enable consumers to make informed choices in the credit marketplace.\(^{52}\) The consumer should "be able to compare more readily the various credit terms available."\(^{53}\) Generally, creditors are individuals or businesses that (1) regularly offer or extend credit to consumers and (2) the credit is subject to a finance charge or is payable by written agreement in more than four installments.\(^{54}\) The TILA is implemented by Regulation Z.\(^{55}\) Interpretations of Regulation Z are now issued by the Consumer Financial Protection Bureau.

The TILA also contains several provisions unrelated to disclosures, but which give consumers important substantive rights. For example, TILA contains a provision which outlaws the use of the Rule of 78's in any pre-computed consumer credit transaction with a term longer than 61 months.\(^{56}\) It also contains certain substantive terms that are prohibited in high-cost mortgages.\(^{57}\)

TILA remedies are (1) actual damages, (2) statutory damages, and (3) reasonable attorney fees.\(^{58}\)

TILA actions generally prescribe in one year.\(^{59}\) Home Ownership and Equity Protection Act (HOEPA) violations now have a three-year prescriptive period.\(^{60}\)

The TILA statute of limitations begins to run on the day after the "triggering event" and ends on the one year anniversary of the triggering event,\(^{61}\) but fraudulent concealment may toll the statute of limitations.\(^{62}\) Note, however, that other federal courts have held that the TILA statute of limitations commences on the date of the act or event.\(^{63}\) Therefore, to be on the safe side, TILA actions should be asserted within the shorter statute of limitation period.

A TILA claim may be litigated in state courts. A state court is not bound by federal court of appeal decisions, but will review those opinions as further guidance for its analysis.\(^{64}\) However, prescribed TILA claims may not be used as a defense in Louisiana state courts.\(^{65}\)

\(^{52}\) Id.
\(^{53}\) Id.
\(^{55}\) 12 C.F.R. § 1026.
\(^{57}\) See 15 U.S.C. § 1639(c)-(j); NCLC, TRUTH IN LENDING ch. 9 (8th ed. 2012).
\(^{58}\) See NCLC, TRUTH IN LENDING ch. 11 (7th ed. 2010). Dodd-Frank increased statutory damages to $2,000.
\(^{62}\) See, e.g., King v. California, 784 F.2d 910 (9th Cir. 1989). But see Moor v. Travelers Ins. Co., 784 F.2d 632 (5th Cir. 1986) (mere failure of creditor to make disclosures does not toll the statute of limitations).
\(^{63}\) See, e.g., In re Butcher, 829 F.2d 596 (6th Cir. 1987), cert. denied 484 U.S. 1078 (1988); cf. Pugh v. Brook, 158 F.3d 530 (11th Cir. 1998); Bartlik v. U.S. Dept. of Labor, 62 F.3d 163 (6th Cir. 1995).
\(^{64}\) FIA Card Services, N.A. v. Weaver, 62 So.2d 709, 711 (La. 2011).
2.3.2 Closed-End Credit

Closed-end credit is defined as consumer credit other than open-end credit. Open-end credit is a plan under which the creditor reasonably contemplates repeated transactions, prescribes the terms of such transactions, and provides for a finance charge on the outstanding unpaid balance. Closed-end credit usually involves one transaction such as an installment sale, mortgage, or a loan with a fixed repayment plan, e.g., car loans.

The most frequent TIL violations in closed-end credit are the failure to accurately disclose:

- Annual percentage rate
- Payment schedule
- Finance charge
- Amount financed
- Itemization of amount financed

Where there is a single creditor, disclosures must be made by that creditor. Where there are multiple creditors, the creditors must agree amongst themselves as to which creditor must give the disclosures. Disclosures must be made to the consumer who is obligated in the transaction. If there is more than one consumer, then disclosures may be given to any one consumer who has primary liability on the obligation, not a surety or guarantor.

The disclosures are to be:

- meaningful;
- clear and conspicuous;
- in written;
- segregated;
- made before the credit is extended or before consummation;
- reflective of the terms of the legal obligation between the creditor(s) and the consumer(s); and
- and various other items “as applicable.”

Disclosures of particular importance in closed-end transactions are those which are tied to special consumer relief when they are violated, such as amount financed, finance charge, annual percentage rate, payment schedule, total payments, and security interests. See NCLC, Truth in Lending ch. 5 (8th ed. 2012).

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66 12 C.F.R. § 1026.2(a)(10).
67 12 C.F.R. § 1026.2(a)(20).
69 12 C.F.R. § 1026.17(d).
71 12 C.F.R. § 1026.17(d); Official Interpretations § 1026.17(d)(2).
74 12 C.F.R. § 1026.17(a)(1).
75 12 C.F.R. § 1026.17(a)(1).
77 12 C.F.R. § 1026.17(b).
78 12 C.F.R. § 1026.17(c)(1).
Special consumer relief for violations of these provisions include:

- statutory damages;¹⁰⁰
- an extended right of rescission for non-purchase money mortgage transactions;¹⁰¹ and
- enhanced damages.¹⁰²

There are many violations of TILA for which statutory damages are no longer available, and only actual damage relief is available.¹⁰³

For electronic disclosures, see NCLC, TRUTH IN LENDING § 4.3 (8th ed. 2012).

2.3.3 Open-End Credit

The TILA defines “open-end credit” as a plan in which a creditor (1) reasonably contemplates repeated transactions; (2) prescribes the terms of the transactions; and (3) provides for a finance charge which may be computed from time to time on an outstanding unpaid balance.¹⁰⁴

Regulation Z broadens this definition by defining “open-end credit” as:
consumer credit extended by a creditor under a plan in which (1) the creditor reasonably contemplates repeated transactions; (2) the creditor may impose a finance charge from time to time on an unpaid balance. If the finance charge is precomputed at the inception of the transaction, it is not an open-end transaction; and (3) the amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.¹⁰⁵

It is important to recognize that the label of a plan or account does not determine its nature for TIL purposes.¹⁰⁶ Each plan must be independently measured against the definition of open-end credit, regardless of the terminology used in the industry to describe the plan.¹⁰⁷

The form and timing of initial disclosures in open-end transactions are to be:
- clear and conspicuous;¹⁰⁸
- more conspicuous for annual percentage rate and finance charge;¹⁰⁹
- in writing;¹¹⁰
- in a form that the consumer may keep;¹¹¹
- on an integrated document provided all at once to the consumer;¹¹²
- before the first transaction;¹¹³
- in each periodic statement thereafter.¹¹⁴

¹⁰³ See 15 U.S.C. § 1640(a); NCLC, TRUTH IN LENDING § 11.6 (8th ed. 2012).
¹⁰⁶ See Official Interpretations § 1026.2(a)(20) cmt. 7.
¹⁰⁷ Of 12 C.F.R. § 1026.5 (open end initial disclosures) to § 1026.18 (closed-end); NCLC, TRUTH IN LENDING § 5.5 (8th ed. 2012).
¹⁰⁸ 12 C.F.R. § 1026.5(a)(1)(i).
¹⁰⁹ 12 C.F.R. § 1026.5(a)(2)(ii); Official Interpretations § 1026.5(a)(2) cmt. 1-2.
¹¹⁰ 12 C.F.R. § 1026.5(a)(1)(ii).
¹¹¹ 12 C.F.R. § 1026.5(a)(1)(i).
¹¹² Official Interpretations § 1026.5(a)(1) cmt. 4.
¹¹³ 12 C.F.R. § 266.5(b)(1)(i); Official Interpretations § 1026.6(b)(1)(i) cmt. 1.
The contents of initial disclosures in an open-end, charge card, or credit card transaction, to the extent applicable, are as follows.\textsuperscript{95}

- The conditions under which a finance charge may be imposed together with either the time period, if any, in which the customer may pay without incurring additional finance charges, or the fact that there is no free ride or grace period;
- The method of determining the balance on which the finance charge is imposed;
- The method of determining the amount of the finance charge, including any minimum or fixed amount;
- Each periodic rate, the range of balances to which it is applicable, and the corresponding nominal annual percentage rate;
- Identification of other charges which may be imposed and their method of computation in accordance with FRB regulations;
- If the indebtedness is or will be secured, a statement to that effect with an appropriate identification of the collateral; and
- A statement as to billing error rights and the right to assert claims and defenses in a form prescribed by the FRB (with periodic transmittal of a statement of such rights).

For credit cards and charge cards, The Fair Credit and Charge Card Disclosure Act, amending TILA, and enacted in 1988, provides for more detailed and uniform disclosure of rates, fees and other cost information in applications and solicitations to open credit card and charge card accounts.\textsuperscript{96} The first set of disclosures includes the application and solicitation disclosures.\textsuperscript{97}

For home equity lines of credit (HELOC), creditors are required to make special “early disclosures” at the time a HELOC application is received as well as the “initial” disclosures generally required of all open-end creditors.\textsuperscript{98}

2.3.4 Fair Credit Billing Act

The Fair Credit Billing Act (“FCBA”) provides a resolution procedure for credit card billing disputes.\textsuperscript{99} It was enacted by Congress to protect the consumer against inaccurate and unfair credit billing and credit card practices.\textsuperscript{100} The FCBA requires creditors to inform consumers of the dispute procedures when an account is opened, compels creditors to investigate and respond to a consumer’s complaints within a set time, and forbids the collection of finance charges on incorrectly billed amounts.

The FCBA regulates open-end credit accounts as well as all consumer credit cards but not closed-end credit, and only applies to consumer accounts and not to business credit.\textsuperscript{101} The FCBA applies to numerous billing errors including extension of credit to an unauthorized user or extension of credit for property or services not accepted by the consumer, and provides for prompt crediting of payments, refund of credit balances, and a number of special protections for credit cards.\textsuperscript{102}

\textsuperscript{95}15 U.S.C. § 1637(a).
\textsuperscript{96}Pub. L. No. 100-583, 102 Stat. 2960 (Nov. 3, 1988).
\textsuperscript{97}See generally NCLC, TRUTH IN LENDING § 6.5 (8th ed. 2012).
\textsuperscript{100}15 U.S.C. § 1601(a).
\textsuperscript{102}15 U.S.C. § 1666(b); see also NCLC, TRUTH IN LENDING § 7.9 (8th ed. 2012).
Because the FCBA protects both individuals who are actually liable on an account and those whom the creditor claims are obligors, it provides a potential avenue of relief for victims of identity theft when credit card fraud is involved.\textsuperscript{103}

The consumer’s billing error rights may be exercised by sending a written notice of billing error to the creditor.\textsuperscript{104} This notice must be received by the creditor no later than 60 days after the creditor first transmitted the first periodic statement in which the error appeared.\textsuperscript{105} The consumer may withhold payment of the amount in dispute and its related charges, or pay the amount and charges without waiving its billing error rights.\textsuperscript{106}

First, the creditor must acknowledge receipt of the billing error notice within 30 days of receiving it.\textsuperscript{107} Second, the creditor must conduct a reasonable investigation to determine whether a billing error occurred.\textsuperscript{108} The creditor’s investigation and resolution must occur within two complete billing cycles or ninety days, whichever is sooner.\textsuperscript{109} A consumer may refuse to pay $50 of the disputed amount, even if the amount was correct, when the creditor does not acknowledge within 30 days or determine a matter within 90 days.\textsuperscript{110}

The creditor may not attempt to collect the amount in dispute pending the resolution of the billing error, but may reduce the consumer’s credit limit by that amount.\textsuperscript{111} A consumer’s account may not be canceled, closed, restricted or accelerated because of a billing error notice.\textsuperscript{112} The creditor may not threaten or make an adverse report regarding the disputed amount.\textsuperscript{113} However, the creditor may report the amount as in dispute.\textsuperscript{114}

If the creditor determined that the billing error occurred, it must correct the error and credit the account with any disputed amount and related charges and mail or deliver a correction notice to the consumer.\textsuperscript{115} The creditor must report the resolution to each credit agency notified of the delinquency. If the creditor determines that there was no billing error or a different error, the creditor must mail or deliver an explanation to the consumer, furnish copies of documentary evidence if requested, and correct any different error discovered and credit the account with any disputed amount and related charges.\textsuperscript{116}

The FCBA is a part of the TILA to which the one year statute of limitations generally applies. The limitations period may not begin to run on an alleged violation until the creditor’s obligations under 15 U.S.C. § 1666a are satisfied.\textsuperscript{117}

\begin{footnotesize}
\begin{enumerate}
\item[104] 12 C.F.R. § 1026.13(b)(1).
\item[105] Id.; see Dawkins v. Sears Roebuck & Co., 109 F.3d 241 (5th Cir. 1997).
\item[106] 12 C.F.R. § 1026.13(d)(1); see also Official Interpretations § 1026.13(d)(1) cmt. 2.
\item[107] 12 C.F.R. § 1026.13(c)(1).
\item[108] 12 C.F.R. § 1026.13(f).
\item[109] 12 C.F.R. § 1026.13(c)(2).
\item[111] 12 C.F.R. § 1026.13(d).
\item[112] Id.
\item[113] 12 C.F.R. § 1026.13(d)(2).
\item[114] Official Interpretations § 1026.13(d)(2) cmt. 1. But see 12 C.F.R. § 1026.13(d)(4), which does not prevent a card issuer from pursuing normal collection routines on the undisputed amount, including filing suit or referral to a collection agency.
\item[115] 12 C.F.R. § 1026.13(e).
\item[116] 12 C.F.R. § 1026.13(g).
\item[117] A claim for a violation of the limits on liability for unauthorized use provision accrues when the consumer’s account is debited with the charge. See Draiman v. American Express Travel Related Services Co., 892 F.Supp. 1096 (N.D. Ill. 1995).
\end{enumerate}
\end{footnotesize}
Therefore, a claim may be filed considerably more than a year after the error first appeared on a periodic statement.\textsuperscript{118} FCBA's provisions place prohibitive and affirmative responsibilities on the creditor. As such, an important issue is whether the consumer can obtain injunctive relief forcing the creditor to comply with these requirements, which may be more effective than penalties that may not amount to much.\textsuperscript{119}

The consumer is entitled to actual and statutory damages for any violation of the Act.\textsuperscript{120} Also, any creditor who fails to comply with the FCBA forfeits any right to collect the disputed amount, up to $50.\textsuperscript{121} To avoid liability for the disputed amount over $50, the consumer will need to rely on another provision of TILA or another federal or state law.

### 2.3.5 Consumer Leasing Act

The Consumer Leasing Act (“CLA”) of 1976 is Part E of TILA.\textsuperscript{122} The Act is administered not through Regulation Z, but separately through the Consumer Financial Protection Bureau’s Regulation M, codified at 12 C.F.R. § 1013 and the CFPB Official Interpretations of Regulation M, found at 12 C.F.R. § 213 supp. I.

The CLA governs advertising and disclosures for those consumer leases of personal property with terms exceeding 4 months.\textsuperscript{123} Because of the 4 months limitation, the Act is inapplicable to many consumer transactions. If the lease is terminable without penalty before 4 months, it is not covered by the CLA.\textsuperscript{124} Unfortunately, the abusive rent-to-own transactions are generally structured to avoid CLA coverage. However, such rent-to-own transactions may be construed as credit sales and therefore subject to TILA.\textsuperscript{125}

Certain leases are exempt from CLA coverage. For example, the CLA does not apply to leases where the total contractual obligation exceeds $51,800.\textsuperscript{126} The total contractual obligation is not necessarily the same as the total of payments.\textsuperscript{127} Generally, waivers of TIL rights are unenforceable.\textsuperscript{128}

The CLA does not apply to a credit sale as defined by TILA.\textsuperscript{129} TILA defines a credit sale as a transaction where the consumer pays in the lease a sum at least substantially equivalent to the value of the property and has the option to become the owner of the property at the end of the lease for no additional consideration or for nominal consideration.\textsuperscript{130} In this situation, the lease is covered by TILA and not CLA.

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\textsuperscript{118}For a more detailed discussion on calculating the one year limitations period, see generally NCLC, TRUTH IN LENDING § 12.2 (8th ed. 2012).


\textsuperscript{120}15 U.S.C. § 1640(a); see also NCLC, TRUTH IN LENDING ch. 11 (8th ed. 2012).

\textsuperscript{121}15 U.S.C. § 1666(e).

\textsuperscript{122}15 U.S.C. §§ 1667-1667f.

\textsuperscript{123}12 C.F.R. § 1013.2(e)(1).

\textsuperscript{124}See, e.g., Smith v. ABC Rental Systems of New Orleans, Inc., 618 F.2d 397 (5th Cir. 1980) (CLA does not apply to week-to-week rental).


\textsuperscript{126}15 U.S.C. §1667(l). This amount is adjusted annually for inflation.

\textsuperscript{127}Official Interpretations § 1013.2(e) cm t. 3.

\textsuperscript{128}NCLC, TRUTH IN LENDING § 12.5.4 (8th ed. 2012) (most waivers of TIL rights are generally ineffective). But see id. (specific signed waivers clearly referring to TIL claims may be upheld); Jefferson Bank & Trust Co. v. Stamatiou, 384 So.2d 388, 391 (La. 1980) (holding parties are free to govern their relationship through contract, and contractual provisions have effect of law on parties).

\textsuperscript{129}15 U.S.C. § 1667(1).

\textsuperscript{130}15 U.S.C. § 1602(g); Reg. M § 1026.2(a) (16).
The CLA defines consumer leases as being primarily for personal, family, or household purposes. The CLA does not apply to leases for agriculture, business, or commercial purposes. Only natural persons are protected under the CLA, not corporations, trusts, estates, partnerships, cooperatives, joint ventures, persons operating under a business name, associations, or government subdivisions, agencies or instrumentalities. The CFPB Commentary states that a guarantor is not a lessee for purposes of the CLA, so that a natural person guaranteeing for an organization does not bring the lease within the Act’s scope.

The CLA only applies to lessors who regularly engage in leasing, offering to lease, or arranging to lease under a consumer lease. Assignees of the lessor are also covered if the assignees are substantially involved in the transaction. Under CLA, assignees who are substantially involved with the lessor are defined as lessors, and they are liable even for violations not apparent on the face of the lease disclosures.

Auto leases are the most common transactions subject to the CLA. The CLA can be used to challenge excessive early termination penalties because it requires that such early termination penalties be reasonable. Other common CLA violations involve the location of the consumer’s signature, trade-ins and down payments, official fees and taxes, “other” charges, express warranties, excess mileage and early termination penalties.

The one year statute of limitations for private actions under the CLA does not begin until the lease is terminated. Equitable tolling and fraudulent concealment can toll the limitations period.

Remedies for violating the CLA can be found in Truth in Lending Part B. An unreasonable formula for calculating the early termination penalties leads to statutory damages (usually $2,000) plus actual damages and attorney fees. Failure to comply with any of the thirty disclosure requirements leads to an award for statutory damages (usually $2,000) plus actual damages plus attorney fees. Statutory and actual damages and attorney fees are available for certain advertising violations.

For electronic disclosures, see NCLC, TRUTH IN LENDING § 13.3.2.4 (8th ed. 2012). Regulation M allows disclosures in electronic form subject to client consent and certain rules. For consumer rights and remedies under Louisiana law, see La. R.S. 9:3301-3308.

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132 Id.
133 Id.; Reg. M 1013.2 (j); Official Interpretations 1013.2(j)-1.
134 Official Interpretations § 1013.2(g) cmt. 1.
136 Official Interpretations § 1013.2(h) cmt. 3.
137 Id.
138 Id.
139 12 C.F.R. §1013.4(g)(1).
140 See NCLC, TRUTH IN LENDING § 13.7 (8th ed. 2012).
141 15 U.S.C. § 1667(d); see, e.g., Carmichael v. Nissan Motor Acceptance Corp., 291 F.3d 1278 (11th Cir. 2002) [car lease terminated upon repossession]; see also NCLC, TRUTH IN LENDING § 13.7.4 (8th ed. 2012).
142 See NCLC, TRUTH IN LENDING § 12.2.3 (8th ed. 2012).
144 See NCLC, TRUTH IN LENDING § 13.4.1 (8th ed. 2012).
145 12 C.F.R. Part 1013.
2.3.6 **Home Ownership and Equity Protection Act (HOEPA)**

Elderly, low-income, minority, and other vulnerable homeowners who cannot obtain access to mainstream forms of credit are forced in many cases to turn to high rate home equity loans in order to finance home repairs, credit consolidation, or other important personal credit needs. Lenders often offer home equity loan products designed to hide the true costs and disadvantages of high rate credit to vulnerable consumers. These loans are secured by home equity so lenders are protected from risk because they either collect high rates from payments made from refinancing, or obtain repayment through foreclosure. The risk of foreclosure means that homeowners faced with unmanageable loans can and do lose their shelter. See generally NCLC, TRUTH IN LENDING, Ch. 8 (8th ed. 2012).

In 1994, Congress passed the Home Ownership and Equity Protection Act ("HOEPA"), which was designed to prevent some predatory lending practices targeted at vulnerable consumers. HOEPA created a special class of regulated closed-end loans made at high annual percentage rates or with excessive costs and fees.

In 2010, HOEPA was amended by the Dodd-Frank Act to also include purchase money mortgage loans, open-end credit plans and home equity lines of credit. HOEPA still excludes reverse mortgages from its coverage. It is important to remember that loans which are not covered by HOEPA at all, or covered loans which contain abusive provisions not regulated by HOEPA, may nevertheless be challenged using other TIL remedies, consumer credit laws, or state unfair trade practice provisions. The HOEPA legislative history makes clear that the law is not intended to preempt other state or federal regulations which more stringently regulate consumer credit.

HOEPA, as amended by the Dodd-Frank Act of 2010, defines a special class of covered closed-end loans by setting up three triggers for the special protections of the law: (1) the annual percentage rate trigger, (2) the points and fees trigger and (3) the pre-payment trigger. Dodd-Frank authorizes the CFPB to issue regulations to adjust the HOEPA triggers for high-cost mortgages. All covered loans must be “consumer credit” transactions and must be secured by the consumer’s principal dwelling.

If a lender has erroneously concluded that a particular loan is not a HOEPA loan, it is highly likely that the borrower will have an extended right of rescission, and a claim for damages, because the lender will not have provided the extra HOEPA disclosures.

HOEPA was governed by the same statute of limitations for damages and rescission as TILA, but the Dodd-Frank Act of 2010 extended the statute of limitations to 3 years for state attorney generals to enforce a violation of 15 U.S.C. § 1639. The limitations period for damages claims is subject to the equitable tolling doctrine. In most states, damage claims also can be asserted by way of recoupment after the statute of limitations has expired, but La. Code Civ. Proc. art. 424 prohibits the use of prescribed TILA claims as set-offs.

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146 HOEPA is an amendment to TILA, codified at 15 U.S.C. § 1639 and in Regulation Z at 12 C.F.R. §§ 1026.31, 1026.32, 1026.34. See generally NCLC, TRUTH IN LENDING § 9.6 (8th ed. 2012).

147 Pub. L. 111-203.


151 12 C.F.R. § 1026.32(a).


a. **The Annual Percentage Rate Trigger**

The Dodd-Frank Act of 2010 amended the annual percentage rate trigger to cover loans that exceed the average prime offer rate by 6.5 percentage points in most first lien loan mortgages and 8.5 percentage points for subordinate lien mortgages.

The application is received when it reaches the creditor in any one of the ways applications are normally transmitted, even if the application is incomplete. The application date will then be determinative of which treasury rates to evaluate for determining coverage. For a detailed analysis of computing the APR trigger, see NCLC, *Truth in Lending* § 9.7.2 (8th ed. 2012).

It will be the accurate rate which controls, so the APR must be evaluated for errors. For example, when a creditor misallocates a component of the finance charge to the amount financed, the correct rate should be calculated and coverage should be evaluated based on the correct rate. For adjustable rate loans, coverage will be determined by evaluating the APR on the date of consummation. If a teaser rate is involved, the properly calculated composite APR is the relevant one.

b. **The Points and Fees Trigger**

The second trigger is based on the total amount of points and fees charged. Lenders charging total points and fees in excess of 5% of the “total transaction amount” for transactions $20,000 or over or in excess of 8% or $1,000 (or such other amount prescribed by the CFPB for transactions under $20,000 violate the Act. The “total transaction amount” is the amount financed minus costs which are included as both points and fees and financed by the creditor. A charge cannot be both in the points and fees trigger and in the total loan amount.

Points and fees include:

- All finance charges as defined in 12 C.F.R. § 1026.4, except interest or the time-price differential;
- All compensation paid to mortgage brokers;
- All items listed in 12 C.F.R. § 1026.4(c)(7) (other than escrowed taxes) unless the charge is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor, and

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155 Official Interpretations § 1026.32(a)(1)(i) cmt. 1.
158 Id.
159 Id.
160 Id.
162 As calculated according to 12 C.F.R. § 1026.18(b).
163 Included costs are enumerated in 12 C.F.R. §§ 1026.32(b)(1)(iii), (iv).
164 Official Interpretations § 1026.32(a)(1)(ii) cmt. 1.
• Premiums or other charges for credit life, accident, health, or loss-of-income insurance, or debt-cancellation coverage (whether or not the debt-cancellation coverage is insurance under state law) that provides for cancellation of all or part of the consumer’s liability in the event of the loss of life, health, or income or in the case of accident, written in connection with the credit transaction (for loans consummated after October 1, 2002).\footnote{168}{12 C.F.R. § 1026.3(b)(iv).}

You must determine whether the charges included in the point and fee trigger are “payable by the consumer at or before closing.”\footnote{169}{15 U.S.C. § 1602(aa)(1)(B); 12 C.F.R. § 1026.32(a)(1)(ii).}

Lender attempts to avoid HOEPA coverage by undercounting the settlement charges relevant to the points and fees trigger is one of the most widespread abuses in the high-rate home-equity market. For this reason, it is critical that advocates carefully sift through the points and fees charged by the creditor to determine which can be counted toward this trigger.\footnote{170}{See generally NCLC, TRUTH IN LENDING § 9.8.3 (8th ed. 2012).}

c. **The new prepayment penalty trigger**

The Dodd-Frank Act added a new prepayment penalty trigger for high cost mortgages. A consumer loan secured by a principal residence is a high cost mortgage if the loan documents permit either (1) a prepayment penalty after 36 months or (2) a prepayment penalties that, in the aggregate, exceed more than 2% of the amount prepaid.

d. **Expanded Definition of Creditor**

HOEPA has a broader definition of “creditor” than TILA. Any person who makes two or more mortgages which qualify for coverage under the triggers or who makes one or more such mortgage through a mortgage broker is covered.\footnote{171}{15 U.S.C. § 1602(b); 12 C.F.R. § 1026.2(17).} Individuals or entities who meet this expanded definition of creditor under HOEPA are also creditors for all TILA purposes.\footnote{172}{Id.} The Dodd-Frank Act extends the definition of creditor to third party brokers.

e. **Exempt Transactions**

Loan products deliberately designed to evade the terms of the Act should be covered.\footnote{173}{See NCLC, TRUTH IN LENDING §§ 2.1.2 (8th ed. 2012).} However, the following transactions are exempted:

• Residential mortgage transactions.\footnote{174}{15 U.S.C. § 1602(aa)(1).} These transactions include purchase money security interests to finance the acquisition or initial construction of the consumer’s dwelling.\footnote{175}{15 U.S.C. § 1602(w). See also Official Interpretations § 1026.2(a)(24).} Consequently, all refinancing and other home equity loans are covered, but purchase and construction loans are generally not;\footnote{176}{See In re Crisomia, No. 00-35085DWS, 00-0938, 2002 WL 31202722 (Bankr. E.D. Pa. 2002); Flynn v. People’s Mortgage, Inc., No. 98-C-3760, 1998 WL 831907 (N.D. Ill. 1998); NCLC, TRUTH IN LENDING §§ 9.6.2.4.1 (8th ed. 2012).}
• Reverse mortgages. However, other protections, including a counseling requirement, may apply;\textsuperscript{178}

• Open-end credit.\textsuperscript{179} These transactions should be carefully examined to make sure that the regulation requirement that “the creditor reasonably contemplates repeated transactions” is met.\textsuperscript{180}

The CFPB has discretionary authority under the Act to exempt specific mortgages or categories of mortgages from some of the prohibitions under the Act, but not from the disclosures.\textsuperscript{181} In order to create an exemption, the CFPB must find that the exemption is in the interest of the borrowing public and is granted only to products that maintain and strengthen home ownership and equity protection.\textsuperscript{182}

f. Prohibited Terms

Inclusion of a prohibited term constitutes a failure to deliver required disclosures for the purposes of rescission under TILA.\textsuperscript{183} Most of the prohibitions are not absolute. Care should be taken to make sure that where an exception is invoked, the creditor has met the preconditions to the exception.\textsuperscript{184} Inclusion of a prohibited term gives rise to civil liability under 15 U.S.C. § 1640(a), enhanced damages under 15 U.S.C. § 1640(a)(4), and an extended right to rescind under 15 U.S.C. § 1635.\textsuperscript{185}

The following terms are prohibited in HOEPA loans:

• pre-payment penalties (there is a complex five-part exception);\textsuperscript{186}

• interest rate increasing upon default;\textsuperscript{187}

• most balloon payments.\textsuperscript{188} Balloon payments must be disclosed in the HOEPA notice;\textsuperscript{189}

• negative amortization;\textsuperscript{190}

• taking more than two prepaid payments in covered loans;\textsuperscript{191}

• “due-on-demand” or “call” provisions (allowing a creditor to call in the loan or accelerate the note at any time for loans entered into on or after October 1, 2002). There are 3 exceptions to this prohibition: consumer fraud, consumer default, consumer action or inaction that adversely affects the creditor’s security.\textsuperscript{192}


\textsuperscript{179} 15 U.S.C. §§ 1602(i), (aa)(1); 12 C.F.R. § 1026.2(a)(20).

\textsuperscript{180} 12 C.F.R. § 1026.34(a). This is a question of fact which must be litigated on a case-by-case basis.


\textsuperscript{182} Id.

\textsuperscript{183} 15 U.S.C. § 1639(j).

\textsuperscript{184} NCLC, TRUTH IN LENDING § 2.4, 9.6.2.4 (8th ed. 2012).


\textsuperscript{186} 15 U.S.C. § 1639(c); 12 C.F.R. §§ 1026.32(d)(6), (7); Official Interpretations §§ 1026.32(d)(6), (7); NCLC, TRUTH IN LENDING § 9.6.9.2 (8th ed. 2012).

\textsuperscript{187} 15 U.S.C. 1639(d); 12 C.F.R. § 1026.32(d)(4); NCLC, TRUTH IN LENDING § 9.6.9.3 (8th ed. 2012).

\textsuperscript{188} 15 U.S.C. 1639(e); 12 C.F.R. § 1026.32(d)(1).

\textsuperscript{189} 12 C.F.R. § 1026.32(d)(3); Official Interpretations § 1026.32(e)(3) cmt. 1(i); NCLC, TRUTH IN LENDING § 9.6.9.4 (8th ed. 2012).

\textsuperscript{190} 15 U.S.C. 1639(f); 12 C.F.R. § 1026.32(d)(2); NCLC, TRUTH IN LENDING § 9.6.9.5 (8th ed. 2012).

\textsuperscript{191} 15 U.S.C. 1639(g); 12 C.F.R. § 1026.32(d)(3); NCLC, TRUTH IN LENDING § 9.6.9.6 (8th ed. 2012).

\textsuperscript{192} 12 C.F.R. § 1026.32(d)(8); NCLC, TRUTH IN LENDING § 9.6.9.7 (8th ed. 2012).
g. **Prohibited Acts or Practices**

Regulation Z titled “Prohibited Acts or Practices”\(^{193}\) prohibits:

- extending credit without regard to ability to pay;\(^{194}\)
- payments from proceeds to home improvement contractors;\(^{195}\)
- notice to assignee;\(^{196}\)
- early refinancing except if it’s in the consumer’s best interest based on totality of circumstances at the time credit extended;\(^{197}\)
- structuring an open-end loan to evade HOEPA.\(^{198}\)

h. **Disclosure Requirements**

There are two sets of disclosure requirements. The first set is found at 15 U.S.C. § 1638. The second set, which is supplementary to the first set, is found at 15 U.S.C. § 1639.\(^{199}\) These disclosures must be given not less than three days prior to consummation of the loan.\(^{200}\) For a discussion on HOEPA disclosure requirements, see NCLC, *Truth in Lending* § 9.6.5. (8th ed. 2012).

1. **Conspicuous Type Size**

A conspicuous type size must be used.\(^{201}\) However, a particular type size is not required.\(^{202}\) Guidance on the conspicuous requirement may be found in case law on the TILA “clear and conspicuous” standard at 15 U.S.C. § 1632(a).

2. **Number of Copies**

The creditor is required to provide only one copy of the HOEPA notice even if there are multiple borrowers.\(^{203}\) In rescindable transactions, the lender must give a copy of the HOEPA notice to all consumers to whom the right to rescind applies.\(^{204}\)

3. **Content of Disclosures**

The creditor must use specific language in disclosing (1) that the borrower is not required to complete the agreement; and (2) the borrower could lose his/her home if he/she does not meet the obligations under the loan.\(^{205}\) For fixed-rate loans, the creditor must disclose the accurate APR and the amount of the regular monthly payment (which should include any balloon payment).\(^{206}\) Amounts for voluntary credit insurance should not be included because it has not yet been agreed to by the consumer.\(^{207}\)
For variable rate loans, the additional disclosures include: \(^{208}\)
- the annual percentage rate;
- the amount of the regular monthly payment;
- a statement that the interest rate and the monthly payment may increase; and
- the amount of the maximum potential monthly payment.

4. Timing of Disclosures
Disclosures must be given not less than three business days prior to consummation of the transaction. \(^{209}\) It is not adequate to mail them within that time frame. The timing rules in TILA are federal law which govern a particular class of transactions and pre-empt state law on this issue. \(^{210}\) “Business day” is defined to exclude only Sundays and legal holidays. \(^{211}\) The Official Interpretations state that when one of these particular holidays falls on a weekend but is observed on the preceding or following weekday, the actual day is considered the holiday, not the observed day. \(^{212}\)

5. Modification or Waiver of Notice
Once made, loan terms may not be changed if they make the disclosures inaccurate. New disclosures must be given. \(^{213}\) When required, new disclosures may be made by telephone under the following conditions: \(^{214}\)
- the change must be initiated by the consumer;
- the creditor must provide the new disclosures in writing at the time of consummation; and
- the creditor and consumer must certify in writing at the time of consummation that the new disclosures were provided by telephone not later than three days prior to the date of consummation of the transaction.

6. Electronic Disclosures
In 2001, the Federal Reserve Board issued an interim rule, governing electronic disclosures under TILA. \(^{215}\) This interim rule is titled The Electronic Signatures in Global and National Commerce Act (E-Sign). \(^{216}\)

7. Consequences of Failure to Disclose
The creditor’s failure to give the consumer the proper disclosures gives rise to civil liability under 15 U.S.C. § 1640(a) and enhanced damages under 15 U.S.C. § 1640(a)(4). In addition, failure to make the advance-look disclosures will constitute a failure to make “material disclosures.” \(^{217}\) Failure to properly make the HOEPA disclosures will give rise to an extended right to rescind the transac-

\(^{209}\) 15 U.S.C. § 1639(b)(1); 12 C.F.R. § 1026.31(c)(1).
\(^{210}\) NCLC, TRUTH IN LENDING § 9.6.5.9 (8th ed. 2012).
\(^{211}\) 12 C.F.R. § 1026.2(a)(6).
\(^{212}\) Official Staff Commentary § 1026.2(a)(6) cmt. 2.
tion for up to three years from the date of consummation. This should apply equally to failure to make the necessary disclosures at all, failure to make accurate disclosures and failure to follow the proper disclosure procedures required under 1639(a).

8. Extension of Assignee Liability

A big problem for consumers is lenders transferring fraudulently obtained mortgages to assignees who then assert the defense of a holder in due course despite the consumer having perfectly valid claims. For some loans, the Federal Trade Commission’s Holder Rule abrogates the traditional protections of a holder in due course. It may also be possible to prove that the assignee is not a holder in due course. Also, assignees have some potential liability for TILA violations under existing law including liability for rescission when that remedy is available. Assignees of HOEPA-covered loans are liable for all claims and defenses that the consumer could assert against the originator.

9. Remedies

For violation of any provision of HOEPA, a consumer may claim actual damages, statutory damages, attorneys fees and costs under 15 U.S.C. § 1640(a). There are also special damages for violations of 15 U.S.C. § 1639 available under 15 U.S.C. § 1640(a)(4) unless the creditor demonstrates that the failure to comply is not material. The enhanced damages include all finance charges and fees paid by the consumer. The enhanced damages supplement existing civil liability provisions. Multiple violations of the substantive provisions of HOEPA may entitle a consumer to multiple statutory damage awards, but consumers are limited to a single recovery for multiple failures to disclose. A covered loan that includes prohibited terms is subject to the extended right to rescind under 15 U.S.C. § 1635.

2.4 TRUTH IN LENDING RESCISSION RIGHT

The Truth in Lending Act provides a powerful remedy to a consumer whose family home is threatened by a nonpurchase money mortgage. So powerful a right that one court held it may be malpractice for an attorney to fail to advise a client of her rescission right. The possibility of a Truth in Lending rescission should be checked in every case involving a nonpurchase money mortgage entered within the prior 3 years.

The rescission right is specifically exempt from the general rule that TILA does “not affect the validity or enforceability of any contract or obligation under State or Federal law.”
2.4.1 When TIL Rescission Applies

TIL rescission may be available where (1) the transaction is subject to the Truth in Lending Act, see § 2.3, supra, e.g., a consumer credit transaction, and (2) whenever there is a nonpurchase money security interest in the consumer’s principal dwelling. The TIL rescission remedy can apply to first or second mortgages, home equity loans, home improvement contracts and liens arising by operation of law, e.g., mechanic’s liens. TIL rescission has even been applied to exempted transactions where a creditor gave a rescission notice. This would undoubtedly be the result in Louisiana given Jefferson Bank & Trust Co. Stamatiou, 384 So.2d 388 (La. 1980) (erroneous inclusion of FTC preservation of defense language in a contract was enforced against the bank).

2.4.2 The Extended Rescission Right

The creditor must deliver to each owner two copies of a notice of the right to rescind and one copy of the TIL disclosure statement containing the material disclosures. The notice of the right to rescind must be given “clearly and conspicuously in writing, in a form that the consumer may keep.”

The consumer has three business days to rescind from the latest of (1) consummation of the transaction, (2) delivery of proper notice of right to rescind, or (3) delivery of all material disclosures. The three days only begin to run when all material and accurate TIL disclosures and proper notice of the right to rescind have been given a consumer in a form he may keep. Sometimes, the rescission notice and material disclosures are not delivered until well after the transaction has been consummated, or a corrected disclosure is sent out after an error was discovered.

If the creditor fails to properly deliver the proper notice of the right to rescind or to make any of the specified material disclosures, the consumer has a continuing right to rescind until whichever of the following event occurs first: (1) the expiration of three years after consummation of the transaction; (2) the transfer of all the consumer’s interest in the property; or (3) the sale of the property.

The three-year period limits only the consumer’s right to rescind, not the consumer’s right to seek judicial enforcement of that rescission. Therefore, the key to a successful TIL rescission is finding a disclosure or notice violation that will support an extended three year right to rescind and then delivering a notice of rescission prior to the expiration of the three year period.

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230 A first mortgage refinancing may be subject to the right of rescission.
233 See also Capital Bank & Trust Co. v. Lacey, 393 So.2d 668 (La. 1980) and Chrysler Credit Corp. v. Sanders, 545 So.2d 1167 (La. App. 4 Cir. 1989), following Stamatiou.
234 12 C.F.R. §§ 1026.15(b), 1026.23(b).
235 12 C.F.R. §§ 1026.5(a)(1), 1026.17(a)(1).
236 15 U.S.C. § 1635(a); 12 C.F.R. § 1026.23(a)(3).
237 12 C.F.R. §§ 1026.23(a)(3), 1026.17(a)(1).
238 12 C.F.R. § 1026.19(a)(2).
239 Material disclosures are specifically defined by the statute and regulation. 15 U.S.C. § 1602(v); 12 C.F.R. § 1026.23(a)(3).
241 NCLC, Truth in Lending, § 10.3.2.1 (8th ed. 2012); 15 U.S.C. §§ 1635(f) - (g).
242 NCLC, Truth in Lending, § 10.3.2.1 (8th ed. 2012).
2.4.3 Grounds for Extended Right to Rescind

The grounds for extending the right to rescind from three days to three years are:

a. **Material TIL Violation** (failure by the creditor to make any of the specified material disclosures). Material disclosures are defined at 15 U.S.C § 1602(v); 12 C.F.R. § 1026.15 n.36; 12 C.F.R. § 1026.23 n.48. For example, disclosures are inaccurate because ineligible or unreasonable costs have been folded into the amount financed. If oral representations or other written document accompanying the notice are misleading or other written documents accompanying the notice are misleading or contradictory to otherwise accurate information in the notice, the clear and conspicuous requirement is violated. However, in such a case, the creditor is protected by the 1995 TIL amendments which establish different levels of tolerance for the finance disclosure, and other disclosures affected by the finance charge; the *de minimis* standard versus the *de maximus* standard.

b. **Performance of Work Before Expiration Of 3 Day Rescission Period** ("Spiking" or a variation of spiking such as the "two-contract dodge") may extend the time for rescission, depending on the circumstances.

c. **No Notice or Defective Notice Of Right To Rescind**. The 1995 amendments give lenders a safe harbor only for use of the wrong model form in a transaction consummated prior to September 30, 1995.

2.4.4 How Rescission Works

According to the Act and Regulation Z, the rescission process begins with the consumer giving notice to the creditor that she is rescinding the transaction. Once the creditor receives notice, the Act and Regulation require that the next three steps must occur.

First, the security interest automatically becomes void and the consumer is no longer obligated to pay any finance or other charge.
Second, the creditor has 20 days from receipt of notice to return any money or property given to anyone, and to take any action necessary to reflect the termination of the security interest.\(^ {251} \)

Third, after the creditor has complied with the preceding mandate, the consumer is to tender back to the creditor the principal amount of the loan, less closing costs, prepaid finance charges and payments made on the loan.\(^ {252} \) In this process, all of the consumer’s prior payments get credited to principal, none to interest.

Finally the courts are given the authority to modify the process, at least to some degree.\(^ {253} \) For detailed analysis of this process, see NCLC, Truth in Lending, § 10.7 (8th ed. 2012).

### 2.4.5 Relief Provided by TIL Rescission

- **a. Automatically voids the security interest.**\(^ {254} \) The consumer may sue to enforce either in federal or state court.\(^ {255} \)
- **b. Defeats foreclosure since security interest is cancelled.**\(^ {256} \)
- **c. Voids all finance and other loan charges.** The creditor is only entitled to the unpaid load principal or the fair market value of the goods or services provided.\(^ {257} \)
- **d. Statutory damages for noncompliance with rescission.**\(^ {258} \) Separate statutory damages are also available if the creditor fails to respond to the rescission notice.\(^ {259} \)
- **e. Actual damages for noncompliance with rescission.**\(^ {260} \) Separate actual damages may also accrue under state law if there is a wrongful seizure based on a rescinded security interests.\(^ {261} \)
- **f. Explicit vesting.** Forfeiture of the entire debt if the creditor refuses to accept a valid tender of the principal or goods within twenty days.\(^ {262} \) This remedy is subject to the court’s equitable modification authority.
- **g. Implicit vesting.** Forfeiture of the property or proceeds if the creditor does not respond to the rescission notice.\(^ {263} \) This remedy is subject to the court’s equitable modification authority.
- **h. Reasonable attorney fees.** Some courts have determined that attorney fees are not available against an assignee. As a precaution, in cases

\(^ {252} \) 15 U.S.C. § 1635(b); 12 C.F.R. § 1026.15(d)(3), 1026.23(d)(3); NCLC, Truth in Lending, § 10.6.5 (8th ed. 2012).
\(^ {253} \) 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(4), 1026.23(d)(4).
\(^ {254} \) 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(1); 1026.23(d)(1).
\(^ {256} \) See NCLC, Truth in Lending, § 10.9.2 (8th ed. 2012).
\(^ {258} \) 15 U.S.C. §§ 1635(f), 1640(g); NCLC, Truth in Lending § 10.9.3 (8th ed. 2012).
\(^ {260} \) 15 U.S.C. §§ 1635(g), 1640(g); NCLC, Truth in Lending, § 10.9.3 (8th ed. 2012).
\(^ {261} \) Anderson v. Lester, 382 So.2d 1019, 1028-29 (La. App. 3 Cir. 1980).
\(^ {263} \) Gerasta v. Hibernia Nat’l Bank, 575 F.2d 580 (5th Cir. 1978) [§ 1640 does not provide for forfeiture; actual damages and attorney fees compensate the borrower]; Brown v. National Permanent Federal Sav. & Loan, 683 F.2d 444 (D.C. Cir. 1982) (relying on Gerasta). See also Bilal v. Household Fin. Corp. (In re Bilal), 296 B.R. 828 (D. Kan. 2003) (only remedy for creditor’s failure to satisfy its tender obligation is damages). These cases confuse remedies under § 1635 with those authorized by § 1640. However, these two cases can be challenged on several grounds. See NCLC, Truth in Lending, § 10.9.5 (8th ed. 2012).
where the underlying violations are not apparent on the face of the documents, attorneys may wish to rescind against both the original creditor and the assignee. The original creditor is still liable for rescission even though it no longer holds the obligation.  

2.4.6 **Resources**

For detailed information on how to analyze and handle a TIL rescission case, see NCLC, *Truth in Lending*, Ch. 10 (8th ed. 2012).

2.4.7 **Additional state rescission rights**

Additional rescission remedies to protect a consumer’s home are available under La. R.S. 9:2711 and 3538-40.

2.5 **DEBTOR HARASSMENT REMEDIES**

2.5.1 **Overview**


FDCPA is a fertile source for monetary claims against collectors who violate the law. Carefully review the collection activity to determine whether a FDCPA lawsuit or reconventional demand can be asserted against the collector. Also look at the Louisiana Unfair Trade Practices Act and Civil Code article 2315 which provide consumers with remedies against creditors who engage in unfair and deceptive collection practices. The Louisiana Consumer Credit Law also has a procedure (albeit ineffectual like most LCCL provisions) which limits a creditor’s collection contacts with a consumer. FDCPA claims should be specifically pleaded.

2.5.2 **How to stop debt collection harassment**

The FDCPA does not apply to creditors. It only applies to debt collectors. The FDCPA requires collection agencies and attorneys to cease most contact with the consumer upon the consumer’s written request. Also, the Louisiana Consumer Credit Law generally limits a creditor to one mail contact per month and four personal contacts after the consumer has notified the creditor to cease further contacts. Creditors will also usually honor a request from the consumer’s lawyer that further contacts cease.

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265 Cole v. Lovett, *supra*.


267 See, e.g., Conway v. AT&T Corp., 84 F.Supp. 2d 492 (S.D.N.Y. 2000).

268 Vollenweider v. Helwig Construction Co., Inc., 40 So.3d 185 (La. App. 5 Cir. 2010).


270 La. R.S. 9:3562(3).
2.5.3 Federal Fair Debt Collection Practices Act

a. Scope

The Federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §1692 et seq., prohibits use of deceptive and unfair debt collection practices by debt collectors. A “debt collector” is defined by the FDCPA as:

1. any person whose principal business is collecting debts, e.g., collection agencies;\(^{271}\)
2. any person who regularly collects debts owed to another;
3. creditors using false names;
4. creditors collecting for another person;
5. repossession companies;
6. suppliers or designers of deceptive forms;
7. debt buyers after default;\(^ {272}\)
8. debt poolers;
9. check guarantee services;
10. flat rate and other collectors;\(^ {273}\)
11. lawyers regularly collecting consumer debts.

The FDCPA does not apply to in-house collection activities by a creditor. 15 U.S.C. § 1692a(6)(A) generally excludes these persons from FDCPA coverage:

1. creditors (collecting their own debts), e.g., retail stores, banks, finance companies;
2. corporate collectors collecting only for their affiliates;
3. state and federal officials performing their duties;
4. process servers;
5. bona fide nonprofit consumer credit counselors;
6. persons collecting debts as part of bona fide fiduciary or escrow arrangements;
7. a credit extender’s collection (in its own name) of a debt that it originally extended and then sold or assigned to another creditor while remaining responsible for some or all aspects of collection;
8. assignees (before default), e.g., car finance companies, banks;
9. enforcer of a security interest in an account used as collateral for a commercial loan.

b. Application to attorneys

An attorney who regularly collects debts is subject to all provisions of the FDCPA.\(^ {274}\) An attorney meets the “regularly” test if:

1. the attorney engages in debt collection in more than isolated instances, e.g., more than a handful of times per year;\(^ {275}\)

\(^{271}\) Pettit v. Retrieval Masters Creditors Bureau, Inc., 211 F.3d 1057 (7th Cir. 2000).
\(^ {272}\) Ruth v. Triumph Partnerships, 577 F.3d 790 (7th Cir. 2009); Federal Trade Commission v. Check Investors, Inc., 502 F.3d 159 (3d Cir. 2007).
\(^ {273}\) White v. Goodman, 200 F.3d 1016 (7th Cir. 2000).
2. Debt collection is a minor but regular part of the attorney’s practice;\(^{276}\)

3. The attorney collects debts more than a few times in a year.\(^{277}\)

Attorneys often violate the FDCPA. Common violations by attorneys include failure to provide a validation rights notice in the initial communication\(^{278}\), filing suit in improper venue\(^{279}\), filing a time barred suit\(^{280}\), threat to take illegal or unintended action\(^{281}\), failure of all communications (including follow-up letters) to include warning that it is an attempt to collect a debt, misleading communications that a document has been issued or approved by a court\(^{282}\), stating creditor’s post-judgment remedies without disclosing debtor’s exemptions or opportunity to defend suit\(^{283}\), and communications with third parties.\(^{284}\)

Attorneys must review their client’s file before signing collection letters.\(^{285}\) Form letters sent by creditors and supplied by attorneys using the attorney’s letterhead with no participation by the attorney in the manner implied by the letter violate the FDCPA.\(^{286}\)

The creditor may be liable for its attorney’s FDCPA violations.\(^{287}\) Under the Rules of Professional Conduct, a FDCPA claim against the attorney may require his withdrawal from representation of the creditor.\(^{288}\)

c. Prohibited Collection Practices

The general categories of collection practices prohibited by the FDCPA are listed below. Hundreds of collection practices have been found unlawful by the courts. An extensive listing and discussion of FDCPA violations can be found in NCLC, *Fair Debt Collection* (7th ed. 2011). Volume Two of *Fair Debt Collection* has extensive case summaries by issue and state.

1. Failure to provide proper validation notice

The collector must notify the consumer within 5 days of the initial communication of the amount of the debt, name of creditor, the right to dispute the debt, the right to obtain verification (or “vali-
dation”) of the debt, and the right to obtain the name and address of the original creditor, if different from the current creditor.\(^{289}\) This is a strict liability provision and an unintentional violation of the validation requirements violates the FDCPA.\(^{290}\) Failure to provide this validation notice subjects the collector to statutory damages.\(^{291}\)

The language of the validation notice must be substantively the same as the statutory language and must not impose additional burdens on the consumer. The debt validation notice must be effective, conspicuous and cannot be overshadowed or contradicted by other messages in the initial communication from the collector.\(^{292}\) Statutory notice under the Act is to be interpreted from the perspective of the least sophisticated debtor."\(^{293}\) Forms that suggest that harm may occur to the consumer before the expiration of the 30 day validation period have been held to violate Section 1692g(a).\(^{294}\) If the debt is disputed, the collection agency must cease collection efforts and investigate the consumer’s dispute.\(^{295}\)

Each collector must provide a validation notice in connection with its initial communication but such notice may be on a separate sheet of paper. Validation notices must be sent in a post-judgment collection letter if it is the collector’s initial communication.\(^{296}\) The consumer is entitled to dispute a debt orally to overcome a collector’s assumption that a debt is valid, although only a written dispute of the debt triggers the collector’s duty to provide verification of the debt.\(^{297}\)

2. Unfair Practices

The FDCPA prohibits collectors from using unfair or unconscionable means to collect any debt.\(^{298}\) The legal concept of unfairness is broadly construed by the courts to preclude practices that offend public policy, are immoral or oppressive, or cause substantial injury.\(^{299}\) The list of unfair practices in § 1692f is not exhaustive and applies to attempted collection as well as actual collection.\(^{300}\)

In determining whether a practice is unfair, the FTC has established a three-prong test: (1) substantial injury to the consumer, (2) not outweighed by countervailing benefits to consumers or com-
petition, and (3) not reasonably avoidable by the consumer. The least sophisticated consumer standard is applied. The concept of unconscionable is generally defined by "shocking to the conscience." See the Uniform Commercial Code (UCC) sections 2-302 and 2-719(3).

Examples of unfair or unconscionable practices include:

- Suing on time-barred debts without proper inquiry
- Using requests for admission containing false information, when litigating against a pro se defendant
- Collection of unauthorized amounts. Possible illegal charges include:
  a. noncontractual collection charges;
  b. interest charges;
  c. dishonored check charges;
  d. service charges;
  e. attorney’s fees;
  f. litigation costs;
  g. late fees;
  h. prepayment fees;
  i. charges under dispute; and
  j. taxes.

- Taking or threatening nonjudicial action to repossess when (a) no present right to the collateral, (b) no present intent to exercise such rights or (c) property is exempt from seizure. 15 U.S.C. §1692f(6).
- Using any language or symbol, other than debt collector’s address, on any envelope mailed to consumer, except collector may use his name if it does not indicate that he is in the debt collection business.
- Accepting, soliciting, depositing, or threatening to deposit any post-dated check. A collector’s acceptance of a postdated check violates the FDCPA unless it gave the consumer who wrote the check 3-10 business days notice prior to depositing the check.
- Causing any charges to be made to the consumer, e.g., collect telephone calls or telegrams, unless the consumer is made aware of the collection purpose.

301 FTC Official Staff Commentary § 808, 2.
302 LeBlanc v. Unifund CCR Partners, 601 F.3d 1185 (11th Cir. 2010).
304 McCollough v. Johnson, Rodenburg & Lauinger, L.L.C., 610 F.3d 939 (9th Cir. 2011).
307 Peter v. GC Services, L.P., 310 F.3d 344 (5th Cir. 2002); Rutyna v. Collection Accounts Terminal, 478 F.Supp. 980 (N.D.Ill. 1979) (use of "Collection Accounts Terminal" on envelope violated 1692f). Any business name with "debt" or "collector" in it may not be used. FTC Official Staff Commentary 808(8)-1.
• Communicating with the consumer by postcard.\footnote{15 U.S.C. § 1692f(7).}
• Filing suit without legal authority or advising a creditor to sue, when such counseling by a collector constitutes unauthorized practice of law under state law. Louisiana recently amended its debt collection statute to specifically permit collectors who represent creditors to sue using a Louisiana licensed attorney.\footnote{See La. Rev. Stat. Ann 9:3576.19B & C. See also Hoskin v. Plaquemines Parish Government, 743 So.2d 736 (La. App. 4 Cir. 1999); Alco Collections, Inc. v. Poire, 680 So.2d 735 (La. App. 1 Cir. 1996); Poire v. Alco Collections, Inc., 107 F.3d 347 (5th Cir. 1997); Pisarello v. Administrator’s Serv. Corp., 464 So.2d 917 (La. 4 Cir. App. 1985).}
• Threats to contact or contacting third parties, e.g., employer, neighbor, relative, except with the consumer’s direct prior consent, court permission, or to effect a postjudgment judicial remedy.\footnote{Swanson v. Southern Credit Service, Inc., 869 F.2d 1222, 1225 (9th Cir. 1988).}
• Dunning letters sent by a collector on law office stationary but actually from an in-house attorney, or signed by an outside attorney who had no knowledge of the debt.
• Filing suit (including a suit to confirm arbitration award) in a forum far from the consumer’s residence or from where the contract was signed.\footnote{15 U.S.C. § 1692i; Addison v. Braud, 105 F.3d 223 (5th Cir. 1997); Chase Bank USA, N.A. v. Roach, 978 So.2d 1103, 1104 (La. App. 3 Cir. 2008)(suit to confirm arbitration).}
• Contacting a consumer known to be represented by an attorney.\footnote{15 U.S.C. §1692c(a)(2).}
• Arranging for a consumer to deposit her paycheck directly into an account from which it would be transferred to the lender and causing her to sign a waiver of her Electronic Funds Transfer Act right to cancel the transfer, where the EFTA forbids such a waiver.\footnote{Cobb v. Monarch Finance Corp., 913 F. Supp. 1164 (N.D. Ill. 1995).}
• Use of harassing or abusive telephone calls or letters.\footnote{15 USC § 1692d; U.S. v. Central Adjustment Bureau, Inc., 667 F. Supp. 370 (N.D. Tex. 1986), aff’d per curiam, 823 F.2d 880 (5th Cir. 1987).}

3. False or misleading representations
The FDCPA prohibits collectors from using false, deceptive or misleading representations or means in connection with the collection of any debt. 15 U.S.C. § 1692e. Here, the “least sophisticated consumer” standard is used to determine whether the representation is misleading.\footnote{Gonzalez v. Kay, 577 F.3d 600 (5th Cir. 2009); Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th Cir. 1985).}

There is no requirement of intent. Knowledge of a statement’s falsity is not a necessary element.\footnote{But see Jenkins v. Heintz, 124 F.3d 824 (7th Cir. 1997) cert. denied, 523 U.S. 1022 (1998) (a negligent misrepresentation did not state a claim under the FDCPA).} That a practice is customary does not prevent it from being deceptive. Actual deception need not be shown except to establish damages.\footnote{Morgan v. Credit Adjustment Board, Inc., 999 F. Supp. 803 (E.D. Va. 1998) (that the consumer never read the collection letter had no bearing on whether the FDCPA was violated).}
information is deceptive. The materiality of the deception may be inferred, and showing detrimental reliance is unnecessary. Truth and good faith are not defenses. "Puffing" is not a defense unless the deception has no capacity to deceive.

Examples of false, deceptive or misleading representations include:

- Threat to sue for debt when no such intent exists.\(^{321}\)
- Unequivocal threat to sue in letter that failed to disclose that debt buyer would not sue consumer who disputed debt per 15 U.S.C. § 1692g\(^{322}\)
- Threat of arrest or seizure unless such action is legal and collector plans to take such action.\(^{323}\)
- Implied affiliation with government. For example, presence of State’s name or word “National” in business name may violate 1692e.\(^{324}\)
- Misrepresentation of character, amount, or legal status of debt.\(^{325}\)
- Use of speed-o-gram or simulated telegram.\(^{326}\)
- Simulation of legal process.
- That an individual is an attorney or that the communication is from an attorney when such is not the case.
- That a sale or other transfer of any interest in the debt will cause the consumer to lose any claim or defense to payment of the debt.\(^{327}\)
- That the consumer committed a crime or other disgraceful conduct.\(^{328}\)
- Threatens to or communicates false credit information.\(^{329}\)
- Debt collectors using a name other than the true name of its business.\(^{330}\)

4. Harassment

The FDCPA prohibits collectors from engaging in any conduct the natural consequence of which is to harass, oppress or abuse any person. 15 U.S.C. § 1692d. This section of the FDCPA protects any person, not just the debtor.\(^{331}\) A 1692d harassment claim is viewed from the "perspective of a consumer whose circumstances

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\(^{322}\) Wilhelm v. Credico, Inc., 519 F.3d 416 (8th Cir. 2008).


\(^{324}\) Peter v. G.C. Services, L.P., 310 F.3d 344 (5th Cir. 2002).


\(^{326}\) Romine v. Diversified Collection Services, 155 F.3d 1142 (9th Cir. 1998).


make him relatively more susceptible to harassment, oppression or abuse.” 332 Specific 1692d prohibitions include, but are not limited to:

- Threat of use of violence or other criminal means to harm person, reputation or property.
- Use of obscene, profane or abusive language.
- Repeated or continuous telephone calls.
- Publishing lists of defaulting debtors.
- Threats to contact third parties.
- Telephone messages left with neighbors when the collector could have reached the consumer directly.
- Intimidating, belittling, and insulting behavior.
- Calling the consumer at work despite prior warnings that the consumer cannot talk at work.333

5. Communications with Consumer

The FDCPA places various restrictions on a collector’s communications with a consumer. 15 U.S.C. § 1692c. Specific examples of 1692c restrictions include:

- Communications at unusual or inconvenient times and places, e.g., between 9 p.m. and 8 a.m. or at the consumer’s place of employment.334
- Communications with a consumer represented by an attorney.335
- Communications after consumer notifies collector to cease.336
- Communications with third parties.337

Cell phone communications

A recent phenomenon that may arise in debtor harassment cases is the use of the caller ID service that allows a subscriber to view automatically the telephone numbers from which incoming telephone calls are placed, including unlisted numbers. This technology is particularly troublesome for a consumer who may wish to preserve the privacy of his or her telephone number and location.338

Consumers should be aware that the FCC has responded to this problem by requiring carriers to provide calling parties with a method of blocking caller ID. In many states, telephone companies also offer line blocking, which blocks caller ID for all calls from that line. Line blocking, however, will not protect the privacy of callers who dial an 800, 888, 887 or 866 number.

332 Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th Cir. 1985).
338 See NCLC, Fair Debt Collection (7th ed. 2011), 9.3 et seq. See also Romine v. Diversified Collection Services, Inc., 155 F.3d 1142 (9th Cir. 1998). Accord, Udus v. Universal Communications Co., 56 F.3d 1177 (Colo. App. 2002) (holding that business that sent telegram-like messages to individuals, without consumers’ knowledge or consent, to capture phone numbers when a special number was dialed to retrieve a message, was a collection agency under state fair debt collection law).
6. Obtaining location information about consumer from third parties

The FDCPA strictly regulates how a collector may obtain location information about a consumer. Collectors may not directly contact a consumer’s employer except for location information in some circumstances. 15 U.S.C. § 1692c(b). A collector may contact a third party to obtain a consumer’s residential address and phone number or work address. 15 U.S.C. §§ 1692a(7), 1692b.

A collector shall:
• Identify himself.
• State that he is confirming or correcting location information.

A collector shall not:
• State that the consumer owes a debt.
• Use the collection company’s name unless it is requested.
• Use language or symbols in the envelope or contents that indicate that it is in the collection business.
• Communicate with a third party more than once unless requested to do so or unless he reasonably believes the person has correct or complete information.
• Communicate by post card.
• Communicate with a third party once he knows the consumer is represented by an attorney unless the attorney fails to respond within a reasonable time.

d. Actual Damages

Actual damages are available to any person injured by a FDCPA violation. 15 U.S.C. § 1692k(a)(1). Actual damages generally include pecuniary losses, e.g., lost wages, out of pocket expenses, and physical injuries such as ulcers, vomiting and insomnia. Actual damages may include personal humiliation, embarrassment, mental anguish or emotional distress. Clients who have suffered emotional distress may have substantial damage claims. Jury trials are available for FDCPA claims in federal court.

e. Statutory Damages

Statutory damages of up to $1,000, in addition to actual damages (and other statutory or punitive damages under state law), are available for FDCPA violations. An award of maximum statutory damages is appropriate if a violation of the FDCPA is proved. Proof of actual damages is not a prerequisite for statutory damages. Multiple statutory awards are appropriate if there are multiple plaintiffs or multiple defendants. However, most courts limit an individual plaintiff to $1,000 in statutory damages in an action against one defendant even if there are multiple FDCPA violations.

339 Southern Siding Co. v. Raymond, 703 So.2d 44 (La. App. 1 Cir. 1997) writ denied 709 782 (La. 1998) (damages of $5,000 for emotional distress in FDCPA suit upheld without medical evidence).
340 See NCLC, Fair Debt Collection (7th ed. 2011), §§ 2.5.4, 6.3.1, 6.3.2.
341 Sibley v. Fulton Dekalb Collection Service, 677 F.2d 830 (11th Cir. 1982).
343 Beaudry v. Telecheck, 579 F.3d 702 (6th Cir. 2009).
The FD CPA requires courts to consider four factors in determining the amount of statutory liability in individual actions: (1) intent, (2) frequency, (3) persistence, and (4) nature of the collector’s noncompliance. The FD CPA imposes liability for any failure to comply, without regard to the violator’s intent. However, the collector’s intent is one factor considered in determining the amount of statutory damages (but not actual damages). The collector can defend itself from liability for violations by showing that they were unintentional, that they resulted from good faith error, and that he maintained procedures reasonably adapted to avoid such errors.\(^{346}\)

A Louisiana federal court awarded the consumer FD CPA statutory damages of $1,000 on a default judgment.\(^{347}\) No actual damages were awarded as plaintiff’s complaint did not request any. The court found that the maximum statutory damages were per proceeding and not per violation.\(^{348}\)

**f. Attorney’s Fees**

Several circuits have held that reasonable attorney’s fees must be awarded in “any successful action” to enforce liability even though neither actual nor statutory damages were awarded.\(^{349}\) However, in the Fifth Circuit, attorneys’ fees may be reduced or denied if there is nominal relief or no award of actual damages.\(^{350}\) Attorney fees may be awarded to a legal services attorney.\(^{351}\) The lodestar approach (reasonable hours x prevailing hourly rate) is used to calculate attorney fees in FD CPA suits.\(^{352}\) If a case is settled, counsel should take appropriate steps to preserve the attorney fee claims.\(^{353}\)

**g. Res judicata and compulsory counterclaims**

Res judicata prevents a party from relitigating any matter of fact or law that was or should have been adjudicated in a prior action. Is a FD CPA claim a compulsory counterclaim to a state court debt action against the consumer? The federal appellate courts have held that FD CPA claims are not compulsory counterclaims and, therefore, could be adjudicated in federal court subsequent to a state court judgment or suit, if the FD CPA claim was not actually litigated in state court.\(^{354}\) Therefore, so long as not contesting the amount of the debt, a consumer should have the choice of raising a FD CPA claim as a reconventional demand in state court lawsuit or by an independent federal court lawsuit.

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\(^{346}\) 15 U.S.C. § 1692k(c).


\(^{348}\) Accord, Wright & Financial Services, Inc., 22 F.3d 647 (6th Cir. 1994).

\(^{349}\) Zagorski v. Midwest Billing Services, Inc., 128 F.3d 1164 (7th Cir. 1997); Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991); Pipiles v. Credit Bureau, Inc., 886 F.2d 22 (2d Cir. 1989).

\(^{350}\) Johnson v. Eaton, 80 F.3d 148 (5th Cir. 1996); McGowan v. Credit Center, 546 F.2d 73 (5th Cir. 1977); see also Neyland v. Balsano, 2009 WL 2762817 (E.D. La. 2009).


\(^{353}\) NCLC, Fair Debt Collection (7th ed. 2011), § 6.8.3.

h. **Rooker-Feldman doctrine**

A debt collector may seek to defend a FDCPA lawsuit by claiming that the Rooker-Feldman doctrine bars a federal FDCPA lawsuit after a state court judgment against the consumer on the underlying consumer debt. Under the Rooker-Feldman doctrine, lower federal courts lack jurisdiction to review state court judgments.\(^{355}\) The doctrine applies to claims that were actually raised before the state court and claims that are inextricably intertwined with state court determinations. The Rooker-Feldman doctrine has been narrowed by more recent Supreme Court decisions, and probably has little application to FDCPA lawsuits that do not contest the accuracy of the amount of debt.\(^{356}\) Many courts, including those in the Fifth Circuit, have rejected the Rooker-Feldman defense to a FDCPA lawsuit.\(^{357}\) However, an Eastern District of Louisiana case applies Rooker-Feldman to bar a FDCPA lawsuit in a case where there was a final state court order in a foreclosure suit and the federal plaintiff tried to challenge the validity of the debt.\(^{358}\)

i. **Statute of Limitations**

A FDCPA claim must be brought within one year from the date on which the violation occurred.\(^{359}\) The courts have split on whether an FDCPA complaint may be filed on the anniversary date of the violation or must be filed the day before the anniversary date. The Fifth Circuit has followed the anniversary date rule under Rule 6(a) of the Federal Rules of Civil Procedure.\(^{360}\)

Courts have reached different conclusions on when a violation occurs. For example, one court has ruled that the violation occurs when the collection letter is sent while another has opined that the violation occurs upon receipt.\(^{361}\) Some courts add 5 days to the mailing of the collection letter where the FDCPA violation arises under § 1692g.\(^{362}\) La. Code Civ. Proc. art 424 prohibits the use of prescribed FDCPA claims as set-offs.\(^{363}\) However, many FDCPA violations create a cause of action under the Louisiana Unfair Trade Practices Act. Prescribed unfair trade practice claims may be raised as set-offs.

j. **State law remedies for creditors’ unfair collection practices**

Unfair or deceptive collection practices may violate the Louisiana Unfair Trade Practices Act. A FDCPA violation should be an unfair or deceptive

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\(^{356}\) See Exxon Mobil Corp. v. Arabia, Inc., 544 U.S. 280 (2005); Lance v. Dennis, 546 U.S. 459 (2006); see also, NCLC, Fair Debt Collection (7th ed. 2011), § 7.4.4.


\(^{359}\) 15 U.S.C. § 1692k(d).


\(^{363}\) La. Code Civ. Proc. art 424 may be unconstitutional since it discriminates against use of certain federal consumer protection laws as set-offs.
trade practice. Several Louisiana courts have found debt collection practices outlawed under the FDCPA to be unfair trade practices when committed by a creditor. A creditor or collector may also be liable in tort under La. Civil Code art. 2315 for abusive collection practices.

2.6 CREDIT INSURANCE

In Louisiana, the average consumer is charged almost twice what consumers in most other states are charged for credit life insurance. Louisiana has the lowest (worst for consumers) credit life insurance loss-ratio in the nation. Millions of dollars in excessive credit life insurance premiums are charged annually to poor Louisiana consumers. There are several possible remedies for credit life insurance abuse.

2.6.1 Violation of Fiduciary Duty

A lender, in effect, acts as an insurance salesman when it sells credit life insurance. Therefore, the lender has a concomitant fiduciary duty to the customer. A credit life insurance policy can be voided if a reasonable man, knowing the terms and results, would not have purchased it. Some courts have found the sale of credit life insurance to be a breach of the lender’s fiduciary duty when the lender failed to disclose the availability of cheaper insurance or sold more expensive separate policies instead of joint policies. Remedies for these violations of fiduciary duty can arise under the Louisiana UTPL, usury, and unconscionability.

2.6.2 Failure to Disclose

The failure to disclose the nature and terms of the credit life insurance to the consumer may be a violation of unfair trade practices law. Is it also a UTPL violation to engage in costly refinancing without informing consumers that separate loans would have been cheaper.

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366 Louisiana allows lenders to charge up to $1.00 per $100 of single credit life insurance. La. R.S. 9:3332(A) (2010). This is about double the national average.
367 Loss ratio is the ratio of benefits (claims) paid by insurers to premiums paid by consumers.
368 Louisiana’s loss ratio is 24.85%. The National Association of Insurance Commissioners recommends a 60% minimum loss ratio. The national average in 2007 was 42.85%. NAIC, Credit Life Insurance and Credit Accident & Health Insurance Experience 2005-2009, at 27-28 (April 1, 2009).
369 See Sun Finance Co., Inc. v. Briscoe, 384 So.2d 555 (La. App. 4 Cir. 1980) (failure to obtain credit life insurance violated lender’s duty to customer). Louisiana law imposes a fiduciary duty on insurance agent to place requested insurance and to promptly notify consumer if he failed to obtain requested insurance. Dahan v. Novelties & Co., LLC v. Ohio Cas. Ins. Co., 51 So.3d 129, 133 (La. App. 4 Cir. 2010).
370 Marshall v. Citicorp Mortgage, Inc., 601 So.2d 669 (La. App. 5 Cir. 1992); see also Wallace v. First Assurance Life of America, 862 So.2d 374 (La. App. 2 Cir. 2003) (where dealer filled in insurance section on contract, and both consumer and dealer understood the consumer to want coverage on the full amount of the debt, the insurer was required to pay the full amount upon the consumer’s disability).
371 See, e.g., Browder v. Hanley-Dawson Cadillac, 379 N.E.2d 1206 (Ill. App. 1978) (failure to disclose cheaper coverage is UDAP violation); Robinson v. Rebsamen Ford, Inc., 530 S.W.2d 660 (Ark. 1975) (policy sold at $7.75 per $100 without informing consumer of similar insurance available at $4.44 per $100).
373 See NCLC, THE COST OF CREDIT §§ 8.7.1, 8.7.2, 8.7.4, 8.7.5 (4th ed. 2009).
2.6.3 Unconscionability

In *Marshall v. Citicorp Mortgage, Inc.*, the court held that the sale of decreasing insurance for a term and balance less than the loan in combination with the Rule of 78’s was unconscionable under La. R.S. 9:3516(36) since a reasonable man, knowing the results, would not have purchased the insurance. 376 The court then held the life insurance terms of the loan agreement unenforceable in accordance with La. R.S. 9:3551 and allowed the consumer to recover the premium costs and interest. 377

It has also been held unconscionable for a lender to finance a loan over a 6 year period without informing the borrower that a 3 year loan would have a lower monthly payment and would have cost less overall. 378 In *Besta v. Beneficial Loan Co. of Iowa*, the longer term loan cost the borrower an additional $3,000 from which she received no additional benefit. The *Besta* court found the longer loan unconscionable because no reasonable person would have accepted the more expensive term. The creditor was only allowed to collect as if the cheaper 3 year loan had been written. 379

For further explanation on credit insurance and unconscionability, see NCLC, *The Cost of Credit* § 8.7.5 (4th ed. 2009).

2.6.4 Voluntariness and Truth in Lending

Creditors who require credit insurance but do not include the premiums in the finance charge violate the Truth in Lending Act. 380 Such a violation would entitle the consumer to statutory damages (probably the statutory maximum of $2,000), rebate of the premiums and related interest (which could easily be 1/3 to 1/2 of the loan) and attorneys’ fees.

The relevant question is whether the creditor’s conduct undermines or negates the import of the voluntariness disclosure. The proof requirements for a TIL claim based on coerced insurance purchase are: (1) the lender affirmatively represented, by words or conduct, that insurance was in fact required and (2) as a result, the borrower purchased insurance coverage that he would not likely have otherwise purchased. 381 For more on proof of coercion, see generally NCLC, *Truth in Lending*, § 3.9.4.5.2.4.

The Fifth Circuit held in *USLIFE Credit Corp. v. FTC* that parol evidence is inadmissible to contradict voluntariness disclosures absent allegations of illiteracy, fraud, or duress. 382 Fortunately, given subsequent developments, *USLIFE* is now questionable law. A FRB Official Staff Commentary § 216.4(d)-5 states that “whether insurance is in fact required or optional is a factual question.” The Supreme Court held in *Ford Motor Credit v. Milhollin* that FRB opinions interpreting the TILA are to be given the greatest deference unless demonstrably irrational. 383

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376 Marshall, 601 So.2d at 671-72.
377 *Id.*
378 *Besta v. Beneficial Loan Co. of Iowa*, 855 F.2d 532 (8th Cir. 1988).
379 *Id.* at 535-36.
382 *USLIFE Credit Corp. v. FTC*, 599 F.2d 1387 (5th Cir. 1979).
Several courts have declined to follow *U.S.LIFE* since *Milhollin*.\(^{384}\) Consideration should be given to litigating TIL credit insurance claims in state courts since they are not bound by federal court of appeal decisions.\(^{385}\)

### 2.6.5 Other Issues

A creditor may have an implied obligation to seek credit disability benefits before repossessing a mortgaged vehicle.\(^{386}\) If a creditor has sold a consumer a policy for which he is ineligible, the creditor may be estopped from denying coverage.\(^{387}\)

### 2.7 FAIR CREDIT REPORTING

#### 2.7.1 Federal Fair Credit Reporting Act

##### 2.7.1.1 Scope

The Fair Credit Reporting Act ("FCRA")\(^{388}\) regulates the activities of consumer reporting agencies, the users of reports, and those who furnish information to consumer reporting agencies. It also provides rights to consumers affected by such reports. Its purpose is to "require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information."\(^{389}\) The Consumer Financial Protection Bureau issues Regulation V, 12 C.F.R. § 1022, which implements the FCRA.

The FCRA applies when a person collects information on a "consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" and such information is used (1) by a third party for denying or increasing the charge for "credit or insurance to be used primarily for personal, family, or household purposes", or (2) for purposes relating to employment opportunities, government benefits, or certain other business transactions.\(^{390}\)

##### 2.7.1.2 What is a consumer?

The FCRA applies to "consumers," and the Act defines a consumer broadly as any individual.\(^{391}\) This definition only includes natural persons.

##### 2.7.1.3 What rights do consumers have?

The FCRA creates the following consumer rights relative to credit reporting:

- Notice of adverse action on credit, insurance, or employment;\(^{392}\)

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385 See, e.g., Anderson v. Lester, 382 So.2d 1019 (La. App. 3 Cir. 1980).  
386 See Reed v. Peninsular Life Ins. Co., 367 So.2d 89 (La. App. 4 Cir. 1979). Under La. R.S. 10:9-609 (2010), a secured party’s right to possession appears to accrue on default unless otherwise agreed to in the security agreement. Other courts have interpreted UCC 9-503 to require the creditor to allow the debtor an opportunity to establish eligibility for disability insurance coverage before repossessing the collateral. See Carter v. U.S. Nat’l Bank of Oregon, 768 F.2d 930 (Or. App. 1989).  
392 15 U.S.C. § 1681m(a); see, e.g., Fischl v. General Motors Acceptance Corp., 708 F.2d 143 (5th Cir. 1983).
• Notice of the nature of the information being disseminated;\textsuperscript{393}
• The consumer’s current credit score or the score most recently calculated by the agency for a credit-related purpose;\textsuperscript{394}
• Access to information in credit file.\textsuperscript{395} The consumer cannot be charged for information within 60 days of adverse action or notification that credit rating has been adversely affected;\textsuperscript{396}
• Reporting agencies are obligated to reinvestigate disputed credit entries.\textsuperscript{397} They must also inform users of the report of the dispute;\textsuperscript{398}
• Reporting agencies must use reasonable procedures to insure maximum possible accuracy;\textsuperscript{399}
• Reporting agencies must eliminate false, outdated, misleading or obsolete data;\textsuperscript{400}
• Right to dispute credit entries;\textsuperscript{401}
• User obtaining information under false pretenses;\textsuperscript{402}
• Officer or employee of a reporting agency furnishing information to an unauthorized person.\textsuperscript{403}

2.7.1.4 What is a consumer reporting agency?
A consumer reporting agency means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.\textsuperscript{404}

The FCRA also created a category called “nationwide specialty consumer reporting agencies.”\textsuperscript{405} A nationwide specialty consumer reporting agency is defined as a consumer reporting agency that compiles and maintains files on a nationwide basis relating to medical records or payments, residential or tenant histories, check-writing histories, employment histories or insurance claims.\textsuperscript{406} These agencies must provide the consumer with a free credit report.\textsuperscript{407}

Person is broadly defined to include any individual, partnership, corporation, trust, estate, cooperative, association, government or government subdivision or agency, or other entity.\textsuperscript{408} No FCRA cases have decided when a person “regularly
engages” in consumer reporting activities and the FTC Commentary provides little
guidance as well. However, given the similarity of the language between the Truth
in Lending Act and the FCRA and their equally broad remedial purposes, courts
§ 1681.

The terms “assemble” and “evaluate” are not defined in the Act, nor in the
legislative history. However, if a person retains the information in files or collects
information from multiple sources and formats it in a report for a customer, the
information is being assembled; the person is thereby a consumer reporting
agency, and the protections of the Act apply.409

There is a statutory exception in the definition of consumer report for infor-
mation from a business’ own experience with the consumer.410 Thus, a creditor
reporting its own experience to a consumer reporting agency does not thereby
become a consumer reporting agency under the Act.411 The FCRA also has a statu-
tory exception that allows consumers to prohibit an affiliate from using informa-
tion on a consumer report for solicitation for marketing purposes when the
information being used avoids being a consumer report because of the affiliation
exception.412

2.7.1.5 What is a “permissible purpose”?

The FCRA does prohibit a consumer reporting agency from disclosing accu-
rate, non-obsolete information to those deemed to have a permissible purpose. Permissible purposes are:

- credit or insurance to be used primarily for personal, family or household
  purposes;413
- employment purposes;414
- other purposes authorized under 15 U.S.C. § 1681b dealing with per-
  missible purposes:
  - to review or collect current accounts;
  - to establish eligibility for government licenses or other benefits;
  - to evaluate credit and prepayment risks of existing credit obliga-
    tions;
  - to respond to a legitimate business need for the information in con-
    nection with a transaction initiated by a consumer;
  - for use by government officials in setting or modifying child support
    payment levels;
  - to respond to a court order;
  - in accordance with the written instructions of the consumer to
    whom it relates.

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409 See Lewis v. Ohio Professional Electronic, Network LLC, 190 F. Supp. 2d 1049 (S.D Ohio 2002) (defendants who assem-
ble information about arrests from sheriffs in two states and furnish it for monetary compensation are subject to the
FCRA).
414 Id.
2.7.1.6 Consumer’s File vs. Consumer Report

A consumer’s file is all information on that consumer recorded and retained by a consumer reporting agency. A consumer’s file is not communicated to a third party. The disclosure to the consumer of information in a consumer’s file may not be a consumer report.

A consumer report is information from the consumer’s file which is communicated to a third party and involves “written, oral, or other communication of any information.”

2.7.1.7 Obsolete information

Consumer reporting agencies have two separate obligations: (1) they cannot supply obsolete information, and (2) must follow reasonable procedures designed to avoid violations of the FCRA’s obsolete information requirements. Therefore, even if a reporting agency has reasonable procedures in place, if they are negligent in reporting obsolete information, they have committed a violation of the FCRA.

Consumers frequently ask how long credit information can be kept in their files. All applicable dates relate to the occurrence of events involving adverse information; the date the consumer reporting agency acquired the adverse information is irrelevant. The general rule is that any adverse item cannot be reported if it is more than 7 years old. For example, a delinquent account may be reported for seven years from the date of the last regularly scheduled payment before the account became delinquent.

The following types of information are exceptions to the general rule:

- Bankruptcies can only be included for 10 years from the date of entry of the order of relief. In a voluntary bankruptcy, the filing by the consumer of the bankruptcy petition itself is the entry of the order for relief from which the ten-year limitation is measured;
- Lawsuits and judgments are obsolete after seven years from their date of entry or until the governing statute of limitation has expired, whichever is longer. For suits, the date of entry is the date the suit was initiated and for judgments the date of entry is the date judgment was rendered;
- Paid tax liens may not be reported more than seven years after the date of payment;
- If an account is placed for collection, charged to profit or loss, or subjected to similar action (e.g., voluntary and involuntary repossessions) more than 180 days after the preceding delinquency, the debt may still be included in consumer reports for only seven years and 180 days from

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416 See Cousin v. Trans Union Corp., 246 F.3d 359 (5th Cir. 2001); see also State v. Credit Bureau of Nashua, Inc., 342 A.2d 640 (N.H. 1975) (sale of files from one credit reporting agency to another does not involve a consumer report).
418 See 15 U.S.C. §§ 1681c, 1681e(a), 1681o.
421 15 U.S.C. § 1681e(a)(2); see also Beaver v. TRW Corp., No. CIV-87-1214E, 1988 WL 123636 (W.D.N.Y. 1988) (a satisfied judgment less than seven years old may be reported).
422 15 U.S.C. § 1681e(a) (3).
the beginning of the delinquency.\footnote{Any person who provides information about a delinquent account placed for collection or written off, must also inform the reporting agency when the preceding delinquency commenced within 90 days of reporting the information. Any agency which does not receive the date of delinquency within 90 days risks reporting obsolete information. The furnisher of information is not liable to the consumer, but the reporting agency is. FCRA § 623(a)(5), 15 U.S.C. §1681s-2(a)(5).} This limit, created by 1996 legislation, is effective for any item added to a consumer’s reporting agency file after December 29, 1997.\footnote{FCRA § 605(c)., 15 U.S.C. § 1681c(c), added by Pub. L. No. 104-208 § 2406, 110 Stat. 3009 (Sept. 30, 1996).}

- Under the Higher Education Act, if a loan is a Federal Family Loan (Stafford, SLS, PLUS), reports on defaults may be included in consumer reports for seven years from the last of three dates. The first date occurs when the Secretary of Education or the guaranty agency pays a claim to the loan holder on the guaranty, and is, in effect, the date that the U.S. takes over the loan. The second date occurs when the Secretary of Education, guaranty agency, lender, or any other loan holder first reported the account to the consumer reporting agency. The third date occurs if a borrower re-enters repayment after defaulting on a loan and subsequently goes into default on the loan.\footnote{20 U.S.C. § 1080a.} Perkins loans are not subject to any limit on reporting.\footnote{20 U.S.C. § 1087cc(c)(3).}

- No limit applies to criminal convictions.\footnote{15 U.S.C. § 1681c(a)(5).}

There are three exemptions to the FCRA’s requirements on obsolete information: (1) a “credit transaction involving, or which may reasonably be expected to involve, a principal amount of $150,000 or more;” (2) the “underwriting of life insurance involving, or which may reasonably be expected to involve, a principal amount of $150,000 or more;” or (3) the “employment of any individual at an annual salary which equals, or which may reasonably be expected to equal, $75,000 or more.”\footnote{15 U.S.C. §§ 1681c(b).}

2.7.1.8 Statute of Limitations

The statute of limitations is generally 2 years from the violation.\footnote{15 U.S.C. § 1681p.} The Supreme Court has determined that the 2 years begins to run from the date of the violation not from the date of discovery.\footnote{Andrews v. TRW, Inc., 534 U.S. 19 (2001).} An exception to this statute of limitations is where a defendant has materially and willfully misrepresented any information required under the FCRA to be disclosed and that information is material to the establishment of the defendant’s FCRA liability. Under these circumstances, the discovery rule applies such that the action may be brought within two years after discovery by the individual of the misrepresentation.\footnote{Hyde v. Hibernia Nat’l Bank, 861 F.2d 446 (5th Cir. 1988).} Each transmission of an erroneous credit report triggers a new statute of limitations period.\footnote{Hyde, 861 F.2d at 450.}

2.7.1.9 Damages

A consumer reporting agency or user of information who negligently fails to comply with any requirement of the FCRA is liable for actual damages, attorney’s
fees and court costs. Actual damages may include emotional distress. If the violation is willful, a consumer is entitled to actual damages (pecuniary losses or intangible injury) or statutory damages ranging from $100 to $1,000, and punitive damages at the court’s discretion. Each violation of the FCRA is a separation violation. Jury trials are permitted.

2.7.2 Louisiana’s Fair Credit Reporting Statute

Louisiana’s fair credit reporting statute is La. R.S. 9:3571.1. This statute mandates that “[e]ach credit reporting agency shall, within five business days of receipt of a written request from a consumer, mail, first class, to that consumer a copy of his credit report, including the nature and substance of any information being provided to credit reporting agency customers of the agency.” The fee for such credit report shall not exceed $8 and is subject to increase based upon the annual percentage increase in the retail Consumer Price Index in the preceding year.

Louisiana law creates a private right of action for violation of its credit reporting statute, and allows for recovery of actual damages, plus reasonable attorney fees, court costs, and other reasonable costs of prosecution of the suit. The consumer must show that the credit reporting agency violated its duty of ordinary care in obtaining or amassing information or that it failed to exercise due diligence in discovering such error. La. R.S. 9:3571.1G(1), (2).

2.7.3 Federal Credit Repair Organization Act

The Federal Credit Repair Organization Act (CROA), adopted in 1996, became effective April 1, 1997. The purpose of the CROA is to provide consumers “with the information necessary to make an informed decision regarding the purchase of [credit repair] services” and “to protect the public from unfair or deceptive advertising and business practices by credit repair organizations.”

The CROA broadly applies to any person who performs or offers to perform any services, for a fee or other valuable consideration for the express or implied purpose of:

- improving any consumer’s credit record, credit history, or credit rating; or

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434 Pinner, 805 F.2d at 1265.
435 15 U.S.C. § 1681n(a); see Sapia v. Regency Motors of Metairie, 276 F.3d 747, 753 (5th Cir. 2002) (“For the violation to be willful, thereby justifying an award of punitive damages under the Fair Credit Reporting Act, a defendant’s course of conduct must exhibit a conscious disregard for or entail deliberate and purposeful actions taken against a plaintiff’s rights.”) (internal quotation marks omitted) (citing Cousin v. Trans Union Corporation, 246 F.3d 359, 372 (5th Cir. 2001)); Sapia, 276 F.3d at 753, where the court held that “(E)ven with no actual damages, we have allowed recovery for humiliation and mental distress and for injury to one’s reputation and creditworthiness.”) (citing Fischl v. Trans Union Corporation, 246 F.3d at 151); Cousin, 246 F.3d at 372 (“Malice or evil motive need not be established for a punitive damages award, but the violation must have been willful.”) (citing Fischl v. General Motors Acceptance Corp., 708 F.2d 143, 151 (5th Cir. 1983)); Phillips v. Grendahl, 312 F.3d 357 (8th Cir. 2002) (requiring knowing and intentional commission of an act that violates the law.
436 White v. Imperial Adjustment Corp., No. 00-35085DWS, 00-0938, 2002 WL 1809084 (E.D. La. Aug. 6, 2002).
437 Coletti v. Credit Bureau Services, 644 F.2d 1148 (5th Cir. 1981).
• providing advice and assistance to any consumer with regard to any activity or service described in clause (i).\textsuperscript{444}

There are several exceptions:\textsuperscript{445}
• section 501c(3) non-profit organizations;
• a creditor restructuring a consumer’s debt;
• any depository institution.

A credit repair organization must provide a form disclosure to the consumer prior to executing any agreement or contract with the consumer.\textsuperscript{446} The form disclosure must contain specific language as set forth by the statute.\textsuperscript{447} The consumer must sign the disclosure statement to acknowledge receipt, and a copy of same must be kept by the credit repair organization for two years.\textsuperscript{448}

The credit repair contract must disclose the following information:\textsuperscript{449}
• name and principal business address of the organization;
• terms and conditions of payment;
• total of all payments;
• full and detailed description of services to be provided;
• a conspicuous, bold face notice of a three day right to cancel placed in immediate proximity to the consumer’s signature.

A contract that does not contain the required disclosures is void and unenforceable.\textsuperscript{450} Thus, the 3 day right to rescind is effectively extended until three days after the credit repair organization complies with the Act.

The CROA prohibits:\textsuperscript{451}
• untrue or misleading statements to potential and actual customers, to consumer reporting agencies, and to creditors, e.g., statements regarding the consumer’s creditworthiness, standing or capacity;
• actions intended to alter a consumer’s identification for the purpose of concealing adverse information which is accurate and current, e.g., establishing a new credit identity by using an Employer Identification Number instead of social security number;
• counseling or advising consumers to take actions that would fall into the two preceding bulleted prohibitions, supra;
• credit repair organizations from making untrue or misleading representations about the services it provides;
• credit repair organizations from charging or receiving payment for their services until the service is fully performed.

These prohibitions apply to statements made to any person who has extended credit or to whom the consumer has applied or is applying for credit, but not to a third party who has purchased a debt from the original creditor.

\textsuperscript{446} 15 U.S.C. § 1679c(a).
\textsuperscript{447} Id.
\textsuperscript{448} 15 U.S.C. § 1679c(c).
\textsuperscript{449} 15 U.S.C. § 16779d(b).
\textsuperscript{450} 15 U.S.C. § 1679d(a)-(c).
\textsuperscript{451} 15 U.S.C. § 1679d(b).
Private remedies allowed by CROA are (1) the right to cancel the contract, and (2) a private cause of action for actual and punitive damages. A consumer may not waive any other protection provided by the Act and any attempt to obtain a waiver is itself a violation of the Act.

The statute of limitations for an action under the CROA is five years from the occurrence of the violation. Where the violation relates to the organization’s material and willful failure to disclose, the five years begin to run from when the consumer discovers the misrepresentation.

Auto dealers are subject to the CROA. The used car market targets those perceived as having bad credit and promises to find those consumers financing and help them reestablish or improve their credit records. Two cases found auto dealers liable under the Ohio Credit Service Organization Act. In these cases, dealers’ advertisements promised an improved credit record, credit was provided or arranged, and money exchanged hands. The courts found that even if no separate, identifiable fee is charged for arranging credit, remuneration was provided for a transaction which included the provision of credit.

2.7.4 Louisiana’s Credit Repair Statute

Louisiana’s credit repair statute is entitled the Credit Repair Services Organizations Act (CRSOA). The statute defines a credit repair services organization as a person who, with respect to a buyer, in return for the payment of money or other valuable consideration, directly or indirectly, provides or represents that he can or will, directly or indirectly, provide any of the following services:

- Improving a buyer’s credit record, history or rating;
- Advice or assistance to a buyer with regard to improving a buyer’s credit record, history or rating. La. R.S. 9:3573.2(A)(3).

“Buyer” is defined as “an individual who is solicited to purchase or who purchases the services of a credit repair services organization.” “Person” means an individual, corporation, partnership, trust, association, joint venture pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity not specifically listed herein.

Exempt entities include licensed lenders, banks or savings associations whose deposits are federally insured, credit unions; nonprofit attorneys, consumer reporting agencies, and nonprofit certified public accountants.

Louisiana’s statute prohibits the following conduct by a credit repair services organization:

- charging or receiving money from a buyer without having obtained a surety bond;

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456 Id.
461 La. R.S. 9:3573.2(B).
462 La. R.S. 9:3573.3.
• making or using false or misleading representations;
• engaging, directly or indirectly, in a fraudulent or deceptive act, practice, or course of dealing;
• making or advising a buyer to make a statement that is false or misleading;
• advertising services without filing a registration statement;
• making nonessential requests for credit information relating to a buyer from any source providing such information for no cost.

Louisiana’s statute further requires that credit repair services organizations do the following:
• obtain a surety bond or establish a trust account;\textsuperscript{463}
• before executing a contract or agreement with a buyer or receiving valuable consideration, provide the buyer with a disclosure statement;\textsuperscript{464}
• the contract must be in writing, dated, signed by the buyer, and must include:\textsuperscript{465}
  ○ A five-day right of rescission;
  ○ terms and conditions of payment;
  ○ a full and detailed description of services to be performed;
  ○ the address of the credit repair services organization principal place of business and the name and address of its agency for service of process.

A waiver of a buyer’s rights is prohibited and void.\textsuperscript{466} A breach by the credit repair services organization of the contract or of any obligation required by law is a violation of the statute.\textsuperscript{467}

A credit repair services organization’s violation of the statute or breach of contract gives rise to a private action by the buyer for actual damages, costs, and reasonable attorney fees.\textsuperscript{468} Actual damages shall not be less than the amount paid by the buyer to the credit repair services organization.\textsuperscript{469} A buyer may also request injunctive relief.\textsuperscript{470} The statute of limitations for bringing an action under this statute is four years after the date of the execution of the contract for services to which the action relates.\textsuperscript{471} Louisiana’s statute also provides for criminal penalties for willful violations of its provisions.\textsuperscript{472}

\subsection*{2.7.5 Telemarketing of Credit Repair Services}

The Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 directs the Federal Trade Commission to “prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices”\textsuperscript{473} and to enforce those rules.\textsuperscript{474} The Act further allows states to bring a

\textsuperscript{463} La. R.S. 9:3573.4(A).
\textsuperscript{464} La. R.S. 9:3573.6(A).
\textsuperscript{465} La. R.S. 9:3573.7.
\textsuperscript{466} La. R.S. 9:3573.8.
\textsuperscript{467} La. R.S. 9:3573.7(D).
\textsuperscript{468} La. R.S. 9:3573.10(A).
\textsuperscript{469} \textsuperscript{469} id.
\textsuperscript{470} La. R.S. 9:3573.10(C).
\textsuperscript{471} La. R.S. 9:3573.12.
\textsuperscript{472} La. R.S. 9:3573.13.
\textsuperscript{474} 15 U.S.C. § 6105.
civil action for violation of those rules,\textsuperscript{475} and provides consumers a private right of action for telemarketing fraud, but only if the amount in controversy exceeds $50,000.\textsuperscript{476} Thus, if a consumer’s damages are not large enough to bring a claim under the Act, then consumers may invoke the rule as a per se violation of state UDAP statutes, thereby entitling the consumer to actual or statutory damages, attorneys fees and costs.

The FTC adopted its Telemarketing Rule, which applies to credit repair services that are marketed through at least one interstate telephone call without a face-to-face meeting.\textsuperscript{477} It specifically covers cases where the consumer makes the first call to the credit repair clinic in response to an advertisement or a direct mail solicitation, including by fax, e-mail or similar method. It does not cover 900-number calls to credit repair clinics because these are regulated by different statutes and rules.\textsuperscript{478} Although it does not cover charitable organizations,\textsuperscript{479} it does cover for-profit organizations that solicit contributions or sell goods or services on behalf of non-profit organizations.\textsuperscript{480}

Although the Rule provides no direct private remedy, the Rule does provide greater protection than the Act regarding payment for services. The Rule prohibits a credit repair organization from requesting or receiving any payment for the services until it has provided the consumer a credit report, issued at least six months after the credit repair services were provided, that demonstrates that the promised results have been achieved.\textsuperscript{481}

For a discussion of credit repair organizations, see James P. Nehf, \textit{Legislative Framework for Reducing Fraud in the Credit Repair Industry}, 70 N.C.L. REV. 781 (1992); see also NCLC, \textit{FAIR CREDIT REPORTING ACT} (7th ed. 2010).

\section*{2.8 \quad \textbf{EQUA L CREDIT OPPORTUNITY ACT}}

\subsection*{2.8.1 \quad The Federal Equal Credit Opportunity Act}

\subsubsection*{2.8.1.1 \quad Overview}

The Equal Credit Opportunity Act\textsuperscript{482} (ECOA) is a discrimination and disclosure statute. The ECOA prohibits discrimination against a credit applicant at any stage of a credit transaction\textsuperscript{483} on the basis of race, color, religion, national origin, sex, marital status, age, income based on public assistance, and good faith exercise of Consumer Credit Protection Act remedies.\textsuperscript{484} The Consumer Financial Protection Bureau issues Regulation B, 12 C.F.R. § 1002, which implements the ECOA.

The ECOA is important for low-income clients because of its potential remedies for women, minorities, young persons and welfare recipients who are discriminatorily denied credit. Much of the ECOA litigation involves sex or marital status discrimination or the failure to provide specific reasons for credit denial.

\begin{itemize}
\item \textsuperscript{475} 15 U.S.C. § 6103.
\item \textsuperscript{476} 15 U.S.C. § 6104.
\item \textsuperscript{477} 16 C.F.R. § 310.
\item \textsuperscript{478} See 47 U.S.C. § 228.
\item \textsuperscript{479} 16 C.F.R. § 310.6(a).
\item \textsuperscript{480} 68 Fed. Reg. 4530, 4589-90 (2003).
\item \textsuperscript{481} 16 C.F.R. § 310.4(a)(2).
\item \textsuperscript{482} 15 U.S.C. § 1691.
\item \textsuperscript{483} 12 C.F.R. § 1002.4. This section of the code is also known as “Regulation B.”
\item \textsuperscript{484} 12 C.F.R. § 1002.2(c).
\end{itemize}
Before bringing an ECOA action, an advocate must consider three preliminary questions:

• Has there been an extension of “credit” covered by the ECOA? If so, is the transaction fully subject to the requirements of the ECOA, or has the FRB exempted the transaction from certain Regulation B requirements?

• Is the client an “applicant” who can invoke the statute’s protection and recover under its remedy provisions?

• Is the party being sued a “creditor” under the ECOA definition, and therefore subject to the statute’s requirements and liable for damages?

All three of these initial issues must be affirmatively resolved before the advocate begins to consider specific ECOA violations.

2.8.1.2 Credit

1. ECOA generally only applies to credit transactions.485 Credit is the right granted by a creditor to: (1) defer payment of a debt; (2) incur debt and defer its payment; or (3) purchase property or services and defer payment.486 ECOA’s definition is broader than TILA’s.

2. ECOA also covers commercial credit, such as credit for business, agricultural or investment purposes.487

3. Deferral of payment requires no formal agreement.

4. Leases:

• If a lease is a disguised credit sale, it should fall within ECOA’s definition of credit.

• ECOA also applies to personal property leases covered by the Consumer Leasing Act.488

• Residential leases almost always involve deferred payment of an obligation, and thus credit.489

• Rent-to-own transactions are terminable at will without penalty, and therefore, are not covered by the Consumer Leasing Act.490 Consequently, the holding in Brothers does not apply explicitly, and the ECOA’s coverage is left unclear.491

5. Utility Service

The ECOA generally applies to utility service. A utility company is a creditor when it supplies utility service and bills to the user after the service has been provided.492 This is because ECOA applies to any deferral of payments. The CFPB has exempted most forms of government regulated utility service from a few particular ECOA provisions.

6. Transactions Exempted

The CFPB has created partial exemptions for: public utility, incidental consumer, business, securities and credit extended to the government. However, these creditors must still comply with all other ECOA requirements.

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485 12 C.F.R. § 1002.4.
486 15 U.S.C. § 1691a(d); 12 C.F.R. § 1002.2(j).
487 See Official Interpretations § 1002.1(a)-1, 1002.2(j)-1.
488 See Brothers v. First Leasing, 724 F.2d 789 (9th Cir. 1984).
491 See NCLC, CREDIT DISCRIMINATION (5th ed. 2009).
492 Official Interpretations § 1002.3(a)-2.
2.8.1.3 Applicants
1. An applicant is “any person who requests or who has received an extension of credit” and any person who is or may become contractually liable regarding an extension of credit. 493
   a. “Contractually liable” means being expressly obligated to repay all debts on an account, pursuant to an agreement. 494
   b. “Extension of credit” means the granting of credit in any form, including but not limited to credit granted in addition to existing credit, open-end credit, refinancing or renewal of other credit, consolidation of obligations, or the continuation of existing credit. 495
   c. One need not submit a full application to a creditor. 496
   d. “Applicant” includes the following:
      • persons applying for a “renewal or continuation of credit;”
      • one who “has received an extension of credit;”
      • one who “applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit;”
      • a person who inquires about credit;
      • a person who requests credit;
      • a person whose application is approved but who decides not to accept the offer;
      • a person who requests an increase of an existing credit limit;
      • a person who just has existing credit with a creditor;
      • a homebuyer where the buyer seeks to assume the seller’s mortgage unless the creditor’s policy is to not permit assumption; or
      • potential applicants, so that creditors who discourage applications on a prohibited basis will be liable.

2. Applicants include persons who are or may become contractually liable for extensions of credit. Guarantors, sureties, endorsers and similar parties are applicants for purposes of 12 C.F.R. § 1002.7(d) [dealing with spouses’ signatures]. 497 Guarantors (who are not initially liable but who may become liable) are applicants.

3. Cosigners, who are immediately liable before another party defaults, are applicants.

2.8.1.4 Creditors
1. There are 3 types of creditors covered by ECOA: 498
   • Any person who regularly extends, renews, or continues credit;
   • Any person who regularly arranges for the extension, renewal, or continuation of credit; or
   • Any person, such as an assignee of an original creditor, who participates in the decision to extend, renew, or continue credit.

493 12 C.F.R. § 1002.2(e).
494 12 C.F.R. § 1002.2(i).
495 12 C.F.R. § 1002.2(q).
497 12 C.F.R. § 1002.2(e).
2. There are 2 exclusions from the definition of creditor:\textsuperscript{499}
   - A person whose only participation in a credit transaction involves honoring a credit card; and
   - Where a transaction involves more than one creditor, and one creditor violated ECOA, the other creditors are not liable to the extent they lacked “reasonable notice” of the violation before becoming involved in the transaction.

2.8.1.5 Prohibited Bases for Discrimination
1. Sex
   - Sex and marital status discrimination go hand-in-hand and both should be considered when a case involves either:\textsuperscript{500}
   - Creditor inquiries or decisions based on an individual’s child bearing or rearing intentions or maternity leave are prohibited.\textsuperscript{501}
   - Differential treatment of income sources traditionally associated with women is prohibited.\textsuperscript{502}
   - Discrimination based upon sexually defined occupations is prohibited.\textsuperscript{503}
   - Factors that appear sex neutral may have a disparate impact on women, e.g., accounts historically listed in only the husband’s name thereby eliminating any credit history for the wife.\textsuperscript{504}
   - Considering the name that a telephone account is listed in is prohibited.\textsuperscript{505}

2. Familial Status
   ECOA does not expressly prohibit discrimination based upon familial status. However, some forms of familial status discrimination may be challenged under the ECOA as discrimination based on sex or marital status. For example, discrimination based on an applicant being pregnant should be challenged under the ECOA as sex discrimination, and discrimination based on having or not having children could be considered discrimination based on marital status.\textsuperscript{506}

3. Marital Status
   ECOA expressly prohibits discrimination based upon marital status.\textsuperscript{507} Marital statuses include single, divorced, separated, married, or widowed. ECOA also prohibits discrimination based on an applicant’s income that is associated with alimony, child support and separate maintenance payments.\textsuperscript{508} Discrimination based on co-applicants who are not married but wish to share an account is prohibited. However, a creditor may refuse to combine incomes of individuals who are applicant and cosigner, or applicant and guarantor.\textsuperscript{509} A government-authorized special purpose credit program is permitted to favor married couples over unmarried couples.\textsuperscript{510}

\textsuperscript{499} 12 C.F.R. § 1002.2(l).
\textsuperscript{500} NCLC, CREDIT DISCRIMINATION § 3.3.4.1 (5th ed. 2009).
\textsuperscript{501} Id. at § 5.5.2.2.3.
\textsuperscript{502} Id. at § 6.5.2.6.
\textsuperscript{503} In re Alden’s, Inc., 1978 WL 206105 (FTC 1978).
\textsuperscript{504} NCLC, CREDIT DISCRIMINATION § 6.2.2.4, 6.5.3. (5th ed. 2009).
\textsuperscript{505} Id. at § 6.5.4.
\textsuperscript{506} NCLC, CREDIT DISCRIMINATION § 3.5.1. (5th ed. 2009).
\textsuperscript{507} 12 C.F.R. § 1002.2(a).
\textsuperscript{508} NCLC, CREDIT DISCRIMINATION § 3.3.4 (5th ed. 2009).
\textsuperscript{509} See Official Interpretations, 12 C.F.R. § 1002.6(b)(1)-1.

(97)
A married applicant may seek credit as an individual. The statute explicitly overrides any state laws prohibiting the separate extension of consumer credit to spouses. The creditor may not ask about the applicant’s marital status unless:

- The applicant resides in a community property state or is relying on any property located in such a state to establish creditworthiness.
- To ascertain the creditor’s rights and remedies upon default. This provision must be read in conjunction with the provision that requires a spouse to cosign and applicable state law.
- The credit involves a regulated public utility company, incidental consumer credit, or securities credit.
- The creditor seeks the information solely to determine eligibility and premium rates for insurance.
- The information is required for monitoring purposes.
- The creditor seeks the information solely to determine eligibility for a special purpose credit program.

Requiring a non-borrowing spouse’s signature on a credit instrument constitutes marital status discrimination under the ECOA unless the creditor reasonably believes that the signature is necessary to make the secured property available to satisfy the debt. The joint signature requirement should be an ECOA violation in Louisiana since one spouse can create an enforceable lien on community property without the other’s signature.

A utility company’s failure to provide gas service to a woman whose husband owed utility arrearages unless the husband moved out constituted unlawful marital status discrimination under the ECOA.

4. Public Assistance Status

ECOA prohibits discrimination based upon a consumer receiving income from “... any public assistance program.” Under Regulation B, a protected public assistance program is “[a]ny federal, state, or local governmental assistance program that provides a continuing, periodic income supplement, whether premised on entitlement or need.” Examples of such programs are FITAP, KCSP, food stamps, rent, mortgage supplement or assistance programs, Social Security, SSI, unemployment benefits, veterans’ benefits, emergency relief programs, and federal fuel assistance.

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511 15 U.S.C. § 1691d(c); see also 12 C.F.R. § 1002.7(a).
512 12 C.F.R. § 1002.5(d)(1).
513 Official Interpretations §1002.6(b) (1)-1.
514 12 C.F.R. § 1002.7(d).
515 See NCLC, CREDIT DISCRIMINATION § 2.2.6.2 (5th ed. 2009).
516 Official Interpretations §1002.7(e)-2.
517 See NCLC, CREDIT DISCRIMINATION § 5.5.3 (5th ed. 2009).
518 Id. at § 5.5.3.4.
520 See Kerico v. Doran Chevrolet, Inc., 572 So.2d 103 (La. App. 1 Cir. 1990).
521 Utility companies can be considered “creditors” under the ECOA. See O’Dowd v. South Central Bell, 729 F.2d 347 (5th Cir. 1984).
522 In re Brazil, 21 B.R. 333 (Bankr. N.D.Ohio 1982).
524 Official Interpretations § 1002.2(a)-3.
525 Id.
However, there are certain circumstances when a creditor may inquire about a consumer's income from public assistance. Under these circumstances, ECOA limits the information that a creditor may request about an applicant's public assistance status. The information that a creditor may request depends on what kind of scoring system the creditor uses. If the creditor uses an empirically sound credit scoring system, then it may not ask the applicant's public assistance status at all. However, if the creditor does not use such a system, then it is using a "judgmental system" and may ask about the applicant's public assistance status.526

2.8.1.6 Notification of Action Taken On An Application

Failure to give notice to credit applicants of non-consummation of their loan violates the ECOA.527 Vague or nonspecific reasons for credit denial also violate the ECOA.528 An ECOA notice must be given within thirty days of a credit application.529

2.8.1.7 Private Remedies

ECOA provides for actual and punitive damages, equitable relief, and attorney fees for successful claims, but limits the size of punitive damages.530 ECOA's private remedies are similar to those provided in TILA,531 FDPCA,532 and FCRA.533 In many situations, it is possible to use case law under these statutes to support an ECOA claim.534 Actual damages, including personal affront, embarrassment, humiliation, are available for procedurally flawed denials of credit.535 The Dodd-Frank Act extended the ECOA statute of limitations from two years to five years.

See NCLC, CREDIT DISCRIMINATION ch. 11, (5th ed. 2009) for a more detailed discussion on private remedies under ECOA. See also Louisiana's Equal Credit Opportunity Act.536

2.9 PAYDAY LOANS

If possible, consumers should be advised to avoid payday and similar loans, which are usually short-term, high-interest cash advances against the borrower's paycheck. Usually, clients receive no paperwork whatsoever – they just receive cash in return for a postdated check far exceeding the amount of the cash received. $150 in cash for a $250 postdated check is a typical example. Less costly alternatives include negotiating a payment plan, using credit cards, and negotiating an advance from an employer.

Many states ban these loans, but Louisiana does not. For those who have entered into a payday-type loan, the following subsections explain the limits on charges for such loans. Note also that in Louisiana, virtually all small loans are regulated by state law, even if not tied to a payday.

526 12 C.F.R. § 1002.2(y); see Official Interpretations 1002.6(b) (2)-5.
527 Jochum v. Pico Credit Corp. of Westbank, Inc., 730 F.2d 1041 (5th Cir. 1984).
528 Fischl v. General Motors Acceptance Corp., 708 F.2d 143 (5th Cir. 1983).
529 12 C.F.R. § 1002.9(a)(l)(i). See NCLC, CREDIT DISCRIMINATION ch. 10 (5th ed. 2009) for a further discussion on notification requirements.
530 12 C.F.R. § 1002.16.
532 15 U.S.C. §§ 1692k(a), (b).
534 See generally NCLC, CREDIT DISCRIMINATION, § 11.7.1 (3d ed. 2009).
535 See, e.g., Bhandari v. First Nat'l Bank of Commerce, 808 F.2d 1082 (5th Cir. 1987); Fischl v. General Motors Acceptance Corp., 708 F.2d 143 (5th Cir. 1983).
536 La. R.S. 9:3583.
1. Current law

The Federal Reserve Bank has issued a rule that payday loans are covered by the Truth in Lending Act.

The Louisiana Deferred Presentment and Small Loan Act\(^\text{537}\) covers loans of $350 or less made after January 1, 2000 if they are made for relatively short periods of time. In the case of deferred presentment of a check, the lender agrees to hold the check for no more than thirty days prior to negotiation or presentment; in the case of a small consumer loan (as defined in La. R.S. 9:3516(14)), loans for 60 days or less are covered.\(^\text{538}\) Persons and entities making such loans must be licensed under the Act, and are subject to Rules issued by the commissioner of the office of financial institutions.

For loans covered by the Act, a licensee may charge an initial flat fee of up to 16.75% of the face amount of the check or the amount loaned (not 16.75% per annum), but with a dollar maximum of $45.\(^\text{539}\) However, if the loan remains unpaid at contractual maturity, the licensee may charge an amount equal to the rate of 36% per annum for a period not to exceed one year and beginning one year after contractual maturity, the rate shall not exceed 18% per annum.\(^\text{540}\) No other charges are permitted except for a single fee for a NSF or otherwise dishonored check.\(^\text{541}\)

In addition to the above limits on charges, the lender is prohibited from:\(^\text{542}\)

- selling any goods or services in connection with the loan or transaction;
- refusing a partial payment of $50 or greater;
- dividing a transaction or loan into multiple agreements;
- threatening or referring a customer for prosecution for an NSF check;
- structuring the repayment of a loan in such a manner as to attempt to circumvent the Act;
- renewing or rolling over the loan, except that if the customer pays at least 25% of the amount advanced plus fees charged, the transaction or loan can be renewed to the extent of the balance owed.

The borrower is entitled to a refund of unearned charges if he prepays in full on or before the fifth day after the loan.\(^\text{543}\)

A lender is prohibited from accepting as payment, offering to accept as payment, or requiring for use as security any check issued pursuant to the federal Social Security Act, as well as accepting any check issued pursuant to the federal Social Security Act while acting as a depository institution (unless such lender is a federally insured financial institution).\(^\text{544}\)

\(^{537}\) La. R.S. 9:3578.1 – 8.
\(^{538}\) La. R.S. 9:3578.3(2), (6).
\(^{539}\) La. R.S. 9:3578.4(A).
\(^{540}\) Id.
\(^{541}\) Id.
\(^{542}\) La. R.S. 9:3578.6(A).
\(^{543}\) La. R.S. 9:3578.5 (less $20, which is considered earned and not subject to refund).
\(^{544}\) La. R.S. 9:3578.6(B).
2.10 ODOMETER ACT

In 1994, Congress repealed the existing federal odometer disclosure law, the “Motor Vehicle Information and Cost Savings Act,” but reenacted virtually the same set of laws in 49 U.S.C. §§ 32701-32711. This new federal odometer disclosure law still prohibits odometer tampering and requires transferors of cars to disclose the true mileage. Cases decided under the previous Act should still be good law under the new one.

The importance of the law should not be underestimated. Legislative history of the 1986 amendments to the Motor Vehicle Information and Cost Saving Act stated that 7.5% to 15% of all used cars and about 70% of all leased cars had their odometers rolled back prior to sale, and there is no reason to believe sellers have become more ethical in recent years.

A car dealer’s constructive knowledge of an incorrect odometer reading requires him to disclose this to the purchaser. Violation of the odometer disclosure law entitles the consumer to a minimum of treble actual damages or $3,000, plus reasonable attorney’s fees. Even if the Plaintiff cannot prove actual damages, he may still be able recover the statutory minimum of $3,000. Actual damages are generally the difference between the purchase price and fair market value with the true mileage.

A consumer may recover damages from each transferor who made false mileage statements with intent to defraud. “Intent to defraud” need only be proved by a preponderance of evidence. The courts find intent to defraud when the transferor either knew that a mileage disclosure was false or recklessly disregarded obvious indications of its falsity. Marking all mileage disclosures as “unknown” will not protect a dealer from liability. False disclosures also constitute unfair trade practices. Vehicle history reports with odometer information may be obtained from private companies.

Several non-mileage disclosures are also required under the federal odometer law, such as the transferor’s printed name, address and signature, and the identity of the vehicle, including make, model and year. This may expand a consumer’s judicial remedies for some unfair trade practices since the statute of limitations for Odometer Act violations is 2 years after the claim accrues (date of discovery) – a longer period than the one year allowed under the state unfair trade practices act.

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548 49 U.S.C. § 32710; see, e.g., Saber v. DiLeo, 723 F. Supp. 1167 (E.D. La. 1989) ($10,500 treble damages and $13,555 attorney fees); NCLC, AUTOMOBILE FRAUD § 6.8.1.1-6.8.1.10 (4th ed. 2011);
550 See, e.g., Haluschak v. Dodge City of Wauwatosa, Inc., 909 F.2d 254 (7th Cir. 1990) ($22,500 treble damages awarded).
552 Landrum v. Goddard, 921 F.2d 61 (5th Cir. 1991).
554 Denmon v. Nick’s Auto Sales, 537 So.2d 796 (La. App. 2 Cir. 1989).
555 Cf. Boudreaux v. Puckett, 611 F.2d 1028 (5th Cir. 1980).
556 See e.g., www.search.dmv.org.
557 See NCLC, AUTOMOBILE FRAUD § 5.6.7 (4th ed. 2011); for other disclosure requirements, see generally 49 U.S.C. § 32705(a)(2).
The Motor Vehicle Information and Cost Savings Act prohibits more than
odometer tampering. It also prohibits a dealer, while selling a vehicle, from giving
a false statement to the buyer in making the required disclosures on the title reas-
signment. Actionable false statements can be found in advertising, oral claims,
or documents other than the title assignments. The misstatement can relate to
the vehicle’s make, mileage, model, year, VIN or the transferor’s identity. Dealers
also violate the Act routinely in the procedures they use in transferring title. Viola-
tions, if with intent to defraud, can result in $3,000 minimum damages, treble
damages and attorney fees.

The state statute that prohibits odometer tampering provides for criminal
but not civil penalties. Nevertheless, violation of the statute would constitute
error or fraud sufficient to vitiate the contract.

For further information and case authority, see NCLC, Automobile Fraud (4th
ed. 2011).

2.11 LOUISIANA LEMON LAW

Louisiana’s lemon law governs a manufacturer’s duties with respect to a
new motor vehicle, including the chassis and drive train of a motor home. Both
sales and leases are covered. A manufacturer’s duties with respect to a new
motor vehicle include:

- Repairing the vehicle;
- Replacing the vehicle with a comparable vehicle;
- Refund the full purchase price.

The manufacturer must replace the defective vehicle or give a refund if the
nonconformity has been subject to 4 or more repair attempts without repair of the
nonconformity, or the vehicle has been out of service for a cumulative total of 45
or more days during the warranty period. If the manufacturer has an informal
dispute resolution procedure which complies with the Magnuson-Moss Warranty
Act, the consumer may not seek a §1944A-C refund or replacement until he has
first resorted to such procedures.

The definition of “nonconformity” under the lemon law has been broadly con-
strued. In Williams v. Chrysler Corp., the court held that defective exterior paint
could qualify as a “nonconformity” where the vehicle was out of service for 40
days for repainting. On the other hand, in Johns v. American Isuzu Motors, Inc.,
the court held that the purchaser did not establish the grounds for recovery where
essentially all problems were satisfactorily repaired by the dealership – 90 to 95
percent of her dissatisfaction concerned a rattle, and she did not prove that her
vehicle had defects substantially impairing its use and/or market value.

560 La. R.S. 32:726.1.
562 La. R.S. 51:1941(3).
563 La. R.S. 51:1944(B); Guidry v. Ford Motor., 868 So.2d 945 (La. App. 5 Cir. 2004).
566 La. R.S. 51:1944A(1).
568 La. R.S. 51:1943; see also Rhodes v. All Star Ford, Inc., 599 So.2d 812, 815 (La. App. 1 Cir. 1992).
569 La. R.S. 51:1944D.
570 530 So.2d 1214 (La. App. 2 Cir. 1988).
571 622 So.2d 1208 (La. App. 2 Cir. 1993).
A consumer shall be entitled to attorney fees if judgment is rendered in part or whole in his favor.572

Louisiana prohibits the sale of a vehicle with a lemon buyback history without disclosing this history.573 Violation of this statute should also be an Unfair Trade Practice by both the dealer and the manufacturer.574

The prescriptive period for lemon law rights seems to be three years from purchase or one year from the end of the warranty period, whichever is longer.575

2.12 REDHIBITION

1. Definition

Redhibition is the avoidance of the sale of a thing for defects which make it useless or its use so inconvenient and imperfect that a knowledgeable buyer would not have bought it.576

Redhibition is available in any of the following situations:

- latent defects that are neither discoverable by simple inspection nor declared by the seller;577 or
- seller's bad faith misrepresentation of thing's quality.578

Redhibition is available where a seller, knowing of a buyer's intended use of a thing, declares that it is satisfactory for that purpose.579

Defects discoverable by ordinary laymen upon an inspection reasonable under the circumstances are not actionable.580 Whether an inspection is reasonable depends on the facts of each case and includes such factors as the knowledge and expertise of the buyer, the opportunity for inspection, and the assurances made by the seller.581 One court has interpreted the duty to inspect to bar a purchaser of a home from recovering for a leaky roof because he failed to hire a roof inspector.582

2. Waiver or Renunciation

It is very difficult for a seller to establish that the consumer waived or renounced the redhibition warranty. The waiver language must be in the key sale document, be clear and unambiguous, and must be brought to the buyer's attention.583 General language that an immovable is being sold "as is" does not waive the warranty against redhibitory defects.584

A sale made "as is" is a waiver of some but not all warranties. The vendor is not relieved of the implied warranty that the good must be fit for the use for which

572 La. R.S. 51:1947; see also Williams, 530 So.2d 1214.
574 See NLC, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 5.4.3 (8th ed. 2012).
580 See Triche v. Shore, 380 So.2d 1255 (La. App. 4 Cir. 1980).
582 Lemaire v. Breaux, 788 So.2d 498 (La. App. 5 Cir. 2001). But see McGough v. Oakwood Mobile Homes, Inc., 779 So.2d 793 (La. App. 2 Cir. 2000) (mobile home buyer was not required to climb on the roof to inspect it prior to purchase).
584 Tarifa v. Riess, 856 So.2d 21 (La. App. 4 Cir. 2003).
it is intended.\textsuperscript{585} Thus, even used equipment must operate reasonably well for a reasonable period of time.\textsuperscript{586} The “as is” stipulation, especially in the sale of used goods, means that the good is not warranted to be in perfect condition and free of all defects which prior usage and age may cause.\textsuperscript{587}

A waiver of the warranty against redhibitory defects does not protect the seller from liability for fraud.\textsuperscript{588}

3. Proof of Defects
   a. Existence of defect at time of sale
      The buyer must prove that a redhibitory defect existed at the time of delivery.\textsuperscript{589} If the defect appears within 3 days of delivery, there is a presumption that it existed at the time of the delivery.\textsuperscript{590} Failure within the design life or a relatively short time after delivery also creates a reasonable inference that the defect existed at the time of the sale. In the absence of some other explanation, defects which do not usually result from ordinary use for the amount of time passed may be inferred to have pre-existed the sale.\textsuperscript{591}

   b. Nature of defect
      Defects in essential function or safety are redhibitory.\textsuperscript{592} In addition, cumulative minor defects are redhibitory if they render the thing’s use so inconvenient and imperfect that it must be supposed that the buyer would not have bought it. It does not matter that the defects have been repaired.\textsuperscript{593} The buyer must prove that some redhibitory defect exists, but does not have to prove the specific cause of the thing’s failure.\textsuperscript{594} Some testimony, whether expert or lay, concerning the nature of the defects is required. Repairs or replacements by a seller may constitute an admission that there is a redhibitory defect.\textsuperscript{595} The absence of expert testimony is not fatal to a buyer’s case.\textsuperscript{596}

   Regarding redhibition actions involving mobile homes, La. R.S. 51:911.23(B), provides that “[i]n any redhibitory action brought against the seller of a manufactured home or mobile home, the standards set forth in the Code shall be considered in establishing whether or not a defect exists.” The Code referred to is the National Mobile Home Construction and Safety Standards Act.\textsuperscript{597}

\textsuperscript{585}La. Civ. Code art. 2520.
\textsuperscript{586}Berney v. Rountree Olds-Cadillac Co., Inc. 763 So.2d 799 (La. App. 2 Cir. 2000).
\textsuperscript{587}See, e.g., Bond v. Broadway, 607 So.2d 865 (La. App. 2 Cir. 1992); Creger v. Robertson, 542 So.2d 1090 (La. App. 2 Cir. 1989).
\textsuperscript{589}La. Civ. Code arts. 2530.
\textsuperscript{590}Id.
\textsuperscript{591}See, e.g., Granger v. Deville, 583 So.2d 583 (La. App. 3 Cir. 1991) (leaky water pump was first noticed about six days after the sale; since this is the type of problem which results from long use, and since the problem arose such a short time after sale, the court assumed it existed at the time of sale); Rhodes v. All Star Ford, Inc., 599 So.2d 812 (La. App. 1 Cir. 1992) (broken gas gauge and shaky steering wheel were inferred to have preexisted the sale when such defects do not usually result from ordinary use).
\textsuperscript{592}Prince v. Paretti Pontiac Co., 281 So.2d 112 (La. 1973); Joseph v. Ford Motor Co., 499 So.2d 428 (La. App. 4 Cir. 1986).
\textsuperscript{593}See, e.g., Miller v. Ford Motor Co., 815 So.2d 907 (La. App. 3 Cir. 2002) (new car repainted prior to sale due to cosmetic damage on the sales lot is a redhibitory defect); Morrison v. Allstar Dodge, Inc., 792 So.2d 9(La. App. 1 Cir. 2001); Fidele v. Crescent Ford Truck Sales, Inc., 786 So.2d 147 (La. App. 5 Cir. 2001).
\textsuperscript{594}Prince, 281 So.2d 112.
\textsuperscript{595}See, e.g., Kennedy v. Vidalia Home Serv. Inc., 256 So.2d 827 (La. App. 3 Cir. 1972).
\textsuperscript{596}See, e.g., Guidry v. St. John Auto Exch., 379 So.2d 878 (La. App. 4 Cir. 1978) (buyer won on his own testimony despite seller’s expert testimony).
\textsuperscript{597}42 U.S.C. §§ 5401-26; La. R.S. 51:911.22 (1).
4. Good Faith Seller's Obligation/Right To Repair

A buyer is not required to give a seller in bad faith (including a manufacturer) an opportunity to repair the defects in the thing sold.\textsuperscript{598}

a. Where buyer seeks rescission

La. Civ. Code art. 2522 provides in pertinent part:

The buyer must give the seller notice of the existence of a redhibitory defect in the thing sold. That notice must be sufficiently timely as to allow the seller the opportunity to make the required repairs. A buyer who fails to give that notice suffers diminution of the warranty to the extent the seller can show that the defect could have been repaired or that the repairs would have been less burdensome, had he received timely notice.

Formal notice by the buyer to the seller is not required if the seller otherwise receives notice, and a formal request to repair is not required if the seller had adequate time to make repairs.\textsuperscript{599} A request for a replacement or for return of the purchase price satisfies the requirement for tender.\textsuperscript{600}

If entitled to or given the opportunity to make repairs, a good faith seller is only required to restore or reduce the price if he is unable or fails to repair.\textsuperscript{601} An important issue is how many repair opportunities must be given to a seller before the buyer can get a refund or go elsewhere for repairs. In some cases, one repair opportunity may be sufficient.\textsuperscript{602} Most consumer redhibition cases involve cars. The lemon law's previous presumption of 4 or more repair attempts (or 45 days cumulative “out of service”)\textsuperscript{603} was adopted by several courts in Civil Code article 2531 redhibition cases involving cars.\textsuperscript{604}

A seller's conditional offer to repair will allow the buyer to immediately sue for a refund or reduction in price.\textsuperscript{605} Conditional offers to repair, which involve a splitting of costs, may be rejected by the buyer if they violate the Civil Code article 2475 warranty obligation.

b. Where buyer seeks reduction in price (quanti minoris).

While a tender of the object sold for repair of vices is usually a condition precedent to an action for rescission based on redhibition, it is not required to maintain an action in quanti minoris, or a reduction in the purchase price.\textsuperscript{606}

\textsuperscript{598}See, e.g., Dalme v. Blockers Manufactured Homes, Inc., 779 So.2d 1014 (La. App. 3 Cir. 2001).

\textsuperscript{599}Lafleur v. Desormeaux 692 So.2d 617 (La. App. 3 Cir. 1997).

\textsuperscript{600}See, e.g., Lindy Investments v. Shaktetown Corp., 209 P.3d 802 (5th Cir. 2000); Mitchell v. Popiwichak, 677 So.2d 1050 (La. App. 4 Cir. 1996).

\textsuperscript{601}La. Civ. Code art. 2531.

\textsuperscript{602}See, e.g., Hi Pure Industries v. Ecco High Frequency Corp., 356 So.2d 1043 (La. App. 1 Cir. 1977).

\textsuperscript{603}La. R. S. 51:1943(A).

\textsuperscript{604}See, e.g., Webb v. Polk Chevrolet Inc., 509 So.2d 139 (La. App. 1 Cir. 1987).

\textsuperscript{605}Kennedy v. Jacobson Young Inc., 151 So.2d 368 (La. 1963) (offer to repair on 50-50 basis); Davis v. Bryan Chevrolet, 148 So.2d 800 (La. App. 4 Cir. 1963).

\textsuperscript{606}See, e.g., Creger v. Robertson, 542 So.2d 1090 (La. App. 2 Cir. 1989); Abercrombie v. Pierrin Realty & Const., 532 So.2d 212 (La. App. 3 Cir. 1988); Broussard v. Breaux, 412 So.2d 176 (La. App. 3 Cir. 1982).
5. Items of Buyer’s Recovery

In some situations, such as the purchase of a new car, if the defects are such that the buyer would not have purchased the item, he may be entitled to rescission.\textsuperscript{607} Rescission may require the buyer to return the goods, even if they are attached to his home, and to give seller credit for their use, but seller has to pay for the reasonable costs of removal.\textsuperscript{608} In general, a party who legitimately rescinds a transaction is entitled to legal interest from the date of judicial demand until rescission.\textsuperscript{609}

A buyer may recover the price (or reduction of price if the defects are not sufficient for rescission) and expenses of the sale, e.g., finance charges, in a redhibitory case against a seller who was ignorant of the defect.\textsuperscript{610} Although both the good and bad faith seller may be entitled to a credit against the buyer’s recovery for the value of the use of thing under La. Civ. Code arts. 2531 and 2545, the Louisiana Supreme Court has held: “Compensation for the buyer’s use, however, ought not be granted automatically by the courts; even the value of an extensive use may be overridden by great inconveniences incurred because of the defective nature of the thing and constant interruptions in service caused by the seller’s attempts to repair.”\textsuperscript{611}

The calculation of the reduction in price to which the buyer is entitled has been variously stated to be the difference between the sale price and the price a reasonable buyer and seller would have agreed upon if they had known of the defects,\textsuperscript{612} and the cost of repairs.\textsuperscript{613}

If the seller is in bad faith, a buyer may also recover consequential damages, including for mental anguish, aggravation, inconvenience, and attorney’s fees.\textsuperscript{614} “Manufacturers” are presumed to know of redhibitory defects of products they sell.\textsuperscript{615} Damages for mental anguish under article 2545 are limited to situations where at least one object of the contract is the gratification of some “significant non-pecuniary interest.”\textsuperscript{616} In \textit{Chaudoir v. Porsche Cars}, the court upheld an award of damages for mental anguish arising from redhibitory defects in the purchase of a “top of the line” Porsche because it was purchased in part for show, not just as transportation.\textsuperscript{617} In addition to recovery of the purchase price, a court may award interest from the time it was paid, reimbursement of reasonable expenses occasioned by the sale and by preservation of the thing, damages caused by the defect and reasonable attorney fees.\textsuperscript{618}

\begin{itemize}
  \item See Morrison v. Allstar Dodge, Inc., 792 So.2d 9 (La. App. 1 Cir. 2001).
  \item Lindy Investments v. Shakertown Corp., 209 F.3d 802 (5th Cir. 2000).
  \item Carpenter v. Lafayette Woodworks, Inc., 653 So.2d 1187 (3rd Cir. 1995).
  \item La. Civ. Code arts. 2531; see, e.g., Aucoin v. Southern Quality Homes, LLC, 984 So.2d 685 (La. 2008); Carpenter v. Lafayette Wood, 653 So.2d 1187 (La. App. 3 Cir. 1995); Blue v. Schoen, 556 So.2d 1364 (La. App. 5 Cir. 1990); Flornate v. Griffis, 476 So.2d 4 (La. App. 5 Cir. 1985); Alexander v. Burroughs, 359 So.2d 607 (La. 1978).
  \item Capitol City Leasing Corp. v. Hill, 404 So.2d 935, 939 (La. 1981); see, e.g., Frueh v. Toyota Motor Sales, 692 So.2d 467 (La. App. 3 Cir. 1997) (upholding the denial of a credit, noting that “the vehicle was in and out of the repair shop at least twelve (12) times over a 2 1/2 year period and that plaintiff suffered a grave inconvenience as a result of the vehicle problems.”); Parish v. Bill Watson Ford, Inc., 554 So.2d 727 (La. App. 4 Cir. 1978) (setting the credit at 10-15 cents per mile); Lindy Investments v. Shakertown Corp., 209 F.3d 802 (5th Cir. 2000).
  \item Agee v. Speers, 803 So.2d 466 (La. App. 2 Cir. 2002).
  \item Sanders v. Earnest, 793 So.2d 393 (La. App. 2 Cir. 2001).
  \item La. Civ. Code art. 2545; see also Aucoin v. Southern Quality Homes, LLC, 984 So.2d 685 (La. 2008); Pratt v. Himel Marine, Inc., 823 So.2d 394 (La. App. 1 Cir. 2002); Morrison v. Allstar Dodge, Inc., 792 So.2d 9 (La. App. 1 Cir. 2001).
  \item Dalme v. Blockers Manufactured Homes, Inc., 779 So.2d 1014 (La. App. 3 Cir. 2001).
  \item See Morrison v. Allstar Dodge, Inc., 792 So.2d 9 (La. App. 1 Cir. 2001).
\end{itemize}
6. **Solidary liability**

The courts are split on whether a seller and manufacturer are liable in solido.\(^{619}\)

7. **Prescription**

By statute, prescription as to a good faith seller is, with one exception, four years from the date of delivery or one year from the day the defect was discovered by the buyer, whichever occurs first.\(^{620}\) The exception is for a defect of residential or commercial immovable property, where the period as to a good faith seller is one year from delivery.\(^{621}\) When attempts to repair are performed, prescription does not commence until the seller “tenders it back to the buyer or notifies the buyer of his refusal or inability to make the required repairs.”\(^{622}\)

Redhibition prescribes against bad faith sellers one year from the discovery of the defect\(^ {623}\) or five years if the vice is concealed by false representations.\(^ {624}\)

Here too, repair efforts will toll the commencement of the prescriptive period.

2.13 **MAGNUSON-MOSS WARRANTY ACT**

The Magnuson-Moss Warranty Act\(^ {625}\) does not require warranties or prescribe their duration. It does, however, provide that if a manufacturer chooses to give a written warranty, certain disclosures and substantive provisions must be met. It also provides for an award of attorney fees for breach of any written or implied warranty or service contract. Otherwise, relief under the Act does not differ substantially from the relief that is available to a purchaser of defective goods under redhibition. However, where a seller attempts to reduce the consumer’s rights under redhibition (such as a waiver), the Act can be helpful since it prohibits restrictions on implied warranties (such as redhibition) where a written warranty or service contract has been given. For a written limitation to be valid, it must be available to the consumer prior to the sale.

If a seller issues a written warranty, it must comply with the applicable disclosure requirements promulgated by the FTC. Suit may be brought in state or federal court, but as to the latter, only for claims in excess of $50,000.\(^ {626}\)

For more information on the Act generally, see NCLC, *Consumer Warranty Law* (4th ed. 2010).

2.14 **HOME IMPROVEMENT CONTRACTOR CLAIMS**

2.14.1 **Warranty of workmanlike performance**

Contractors must perform their work in a good and workmanlike manner free from defects in materials and workmanship and suitable for its intended purpose.\(^ {627}\) This duty is implicit in every home improvement contract.

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\(^{619}\) Aucoin v. Southern Quality Homes, LLC, 984 So.2d 685, 693, n.12 (La. 2008).


\(^{622}\) La. Civ. Code art. 2534(C); see, e.g., Dixie Roofing Co. v. Allen Parish School Board, 690 So.2d 49 (La. App. 3 Cir. 1996); see also, de la Houssaye v. Star Chrysler, Inc., 284 So.2d 63 (La. App. 4 Cir. 1973).

\(^{623}\) La. Civ. Code art. 2534(B).

\(^{624}\) La. Civ. Code art. 3542; see Keanney v. Maloney, 296 So.2d 865 (La. App. 4 Cir. 1974).


\(^{627}\) La. Civ. Code art. 2762, 2679; Lang v. Sproull, 36 So.3d407, 414 (La. App. 2 Cir. 2010); Austin Homes, Inc. v. Thibodeaux, 821 So.2d 10 (La. App. 3 Cir. 2002).
2.14.2 Homeowner’s right to cancel contract

A homeowner has an absolute right to cancel a home improvement contract for no cause, even if the work has commenced. \(^{628}\) La. Civ. Code art. 2765. Cancellation under Civil Code art. 2765 will limit the contractor’s claim to actual labor, materials and lost profits measured by the unpaid balance minus the costs to complete the work. \(^{629}\) If a contract is cancelled for cause, the contractor will not be entitled to lost profits.

2.14.3 Unlicensed or unregistered home improvement contractors

A home improvement contractor must register with the Louisiana State Licensing Board for Contractors in order to engage in “home improvement contracts” in excess of $7,500. \(^{629}\) See La. R.S. 37: 2150.1 (7)-(8); 2175.1. In Louisiana, many home improvement contractors fail to register with the Licensing Board. \(^{630}\) Check www.lslbc.louisiana.gov to see if a contractor is licensed or registered. \(^{631}\)

Persons who violate any of the provisions of R.S. 37: 2175.1 et seq. are subject to suspension of their state registration (which is required for them to engage in home improvement contracting services) and administrative penalties equal to 25% of the price of the unlawful contract. \(^{632}\) See R.S. 37: 2175.4. Contracts must comply with the requirements of R.S. 37: 2175.1. Note, however, that a contract with a licensed or registered contractor will not be null if the contract does not comply with R.S. 37.2175.1. \(^{633}\)

Complaints may be filed with the State Licensing Board which could result in fines or cease and desist orders against a contractor. However, the Board does not pursue all violations and the Board does not grant relief to an owner, other than suspension of a license for failure to pay a judgment. \(^{634}\)

If a home repair contractor is unlicensed or unregistered, the contract is null and void and he loses his contract and lien rights. Arbitration and attorney fees clauses, based on the null and void contract, should also be null. \(^{635}\) Cf., West Baton Rouge School Board v. T.R. Ray, Inc., 367 So.2d 332, 334 (La. 1979) (arbitration clause voided because architect was unlicensed).

If the contract is null, the contractor is limited to unjust enrichment, at best, and may even be zeroed out under the malum in se doctrine. \(^{636}\) See e.g., Dennis Talbot Construction Co. v. Privat General Contractors, Inc. 60 So.3d 102 (La. App. 3 Cir. 2011) (subcontractor totally barred from recovery under contract and unjust enrichment doctrine). \(^{637}\)

\(^{628}\) Representations by the contractor that the owner may not cancel should constitute an actionable unfair trade practice.

\(^{629}\) Kinchen v. Gilworth, 454 So.2d 1130 (La. App. 4 Cir. 1984), writ denied 458 So.2d 478 (La. 1984).

\(^{630}\) Based on experience, it would appear that most home improvement contractors are unlicensed or unregistered.

\(^{631}\) Click on the box “is a contractor licensed or registered?” Louisiana State Licensing Board of Contractors, Rules and Regulations, Section 109, require that a contractor conduct business in the properly licensed name. Licensed individuals may add DBA to their individual name. But, they may not sign a contract only in their DBA name. LSLBC Bulletin 11-07 (July 15, 2011).

\(^{632}\) See R.S. 37: 2175.1 (C).

\(^{633}\) Like any government enforcement agency, the Licensing Board has priorities that vary from time to time. Check with the Board to see if an owner’s complaint is the type that the Board would consider. Check the Board’s monthly bulletins for information on prosecution policies. In 2011, the Governor issued Executive Order BJ 11-18 relative to the Hazard Mitigation Grant Program, which created new priorities for prosecution of “home raising” contractors.

\(^{634}\) See also Alonzo v. Chiifici, 526 So.2d 237, 240-43 (La. App. 5 Cir. 1988), writ denied 527 So.2d 307 (La. 1988); Hagberg v. John Bailey Contractor, 435 So.2d 580, 584-88 (La. App. 3 Cir. 1983), writ denied 444 So.2d 1245 (La. 1984); Tradewinds Environmental Restoration, Inc. v. St. Tammany Park LLC, 578 F.3d 255 (5th Cir. 2009).
An unlicensed contractor has the burden of proving the amount of unjust enrichment. His recovery, if any, is limited to the lesser of the owner’s enrichment or the contractor’s impoverishment. A mere showing of impoverishment is insufficient. Many contractors don’t have records for labor since they pay laborers in cash and off the books. A contractor could be totally barred from recovery if his work was so substandard and negligent that it was of no benefit or use to the homeowner.

### 2.14.4 Damages for breach of workmanlike standards or contract

Damages suffered by homeowner because of contractor’s breach of contract or other wrongful acts are calculated as follows:

If the contractor is licensed and the contract valid, the issue is generally the homeowner’s cost to repair the defects or finish the work if the contractor substantially performed the contract. If the contractor has “substantially performed” a valid contract, he will usually be entitled to his contract price. If there is an unpaid balance on a substantially performed contract, the homeowner’s damages may be reduced by the unpaid balance. For example, if the cost of remediying the defects is $12,000, and there is an unpaid balance of $3,000, the homeowner will be entitled to a $9,000 judgment.

If the contractor did not “substantially perform” the contract, he may not recover on the unpaid balance of the contract. The contractor has the burden of proving substantial performance. If “substantial performance” is not proven, the contractor is limited to a claim for unjust enrichment. If the contractor fails to prove unjust enrichment beyond what the owner has already paid on the contract, he will be denied any recovery whatsoever.

In cases with an unpaid contract balance, the contractor’s claim is generally easy to prove. The contractor must prove the contract, that the work was substantially performed and the unpaid balance. If the contractor meets his burden, the homeowner must then prove: (1) the existence and nature of the defects; (2) that the defects are due to faulty materials or workmanship; and (3) the cost of repairing the defects. The litigants’ respective burdens should be factored into the assessment of the contingencies of the litigation.

The factors for determining “substantial performance” include the extent of defect or nonperformance, degree to which nonperformance has defeated purpose of contract, ease of correction, and use or benefit to owner of work already performed.

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635 See Moroux v. Toce, 948 So.2d 1263, 1273 (La. App. 3 Cir. 2006), writ denied 952 So.2d 698 (La. 2007).
636 See e.g., Brignac v. Boisdore, 288 So.2d 31, 35-36 (La. 1974).
637 Alonzo v. Chiffici, 526 So.2d 237 (La. App. 5 Cir. 1988), writ denied 527 So.2d 307 (La. 1988). In Alonzo, the contractor was disallowed recovery for his cash expenditures. He did not have invoices or apportioned checks for his alleged cash expenditures.
638 Many contractors are tax cheaters who do not pay income or employment taxes. This violation of federal and state tax laws makes it risky for them to litigate their cases in court. The crimes will come out during a trial and the judge is required to report the crimes to law enforcement.
639 See e.g., National Tea Co. v. Plymouth Rubber Co., Inc., 663 So.2d 801 (La. App. 5 Cir. 1995).
640 Ocmand v. Lubrano, 78 So.3d 783 (La. App. 5 Cir. 2011).
641 Ocmand v. Lubrano, supra.
642 Jackson v. Spurlock, 424 So.2d 1088, 1089 (La. App. 1 Cir. 1982).
In some cases, there may be a claim that the entire work must be replaced and redone, or that the contractor is not entitled to any of the unpaid balance on the contract. See e.g., Taaffe v. Factory Direct Installations, Ltd., 13 So.3d 562 (La. App. 4 Cir. 2009) (only way to correct defective workmanship was to remove and replace roof).

2.14.5 Unfair Trade Practices

An additional inquiry is whether any of contractor’s acts constituted unfair or deceptive trade practices which may entitle the owner to enhanced damages. See e.g., Laurents v. Louisiana Mobile Homes, Inc., 689 So.2d 536 (La. App. 3 Cir. 1997) (failure to build home per specifications).

The advantages of an unfair trade practice claim may include “emotional anguish” damages, inconvenience, owner’s lost time, treble damages, attorney fees and personal liability for corporate officers and agents. Emotional distress is considered “actual damage” under the unfair trade practices law. Awards for emotional distress for property damage have run up to $45,000 per person. Treble damages are mandatory if a court finds that the unfair trade practice continued after receipt of the Attorney General’s notice which is issued when a consumer files an unfair trade practice lawsuit. Some unfair trade practices may be non-dischargeable in bankruptcy.

Generally, a mere breach of a contract, without more, is not an unfair or deceptive trade practice. However, misrepresentation, deception or fraud in connection with the contract may constitute an unfair or deceptive trade practice. A contract that violates the unfair trade practices law may be an illegal contract under which recovery is barred.

2.14.6 Lien Rights

An unlicensed home improvement contractor may not file a lien against the owner’s home. La. R.S. 37: 2175.6. Filing an unauthorized or false lien may constitute an actionable unfair trade practice.

Generally, a contractor has 60 days after the work is “substantially completed” to file his lien. La. R.S. 9: 4822. A construction job may be “substantially completed” even if minor curative work is needed. A contractor may file a lien before the work is completed. Paul Hyde, Inc. v. Richard, 854 So.2d 1000 (La. App. 4 Cir. 2003). Paul Hyde, Inc., also noted in dicta that an agreement to arbitrate does not preclude a contractor from filing a lien. If the contract was for more than $25,000, a general contractor must file a “notice of contract” before the work begins to preserve his lien rights. See La. R.S. 9: 4811; 4822 (B).

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645 Laurents v. Louisiana Mobile Homes, Inc., 689 So.2d 536 (La. App. 3 Cir. 1997).
646 Holzenthal v. Sewerage & Water Board of New Orleans, 950 So.2d 55 (La. App. 4 Cir. 2007) (quantum review).
647 McFadden v. Import, Inc., 56 So.3d 1212, 1221 (La. App. 3 Cir. 2011).
649 See e.g., State ex rel Guste v. Orkin Exterminating Co., Inc., 528 So.2d 198 (La. App. 4 Cir. 1988), writ denied 533 So.2d 18 (La. 1988).
650 See e.g., Laurents v. Louisiana Mobile Homes, Inc., 689 So.2d 536 (La. App. 3 Cir. 1997).
651 La. R.S. 51: 1403.
653 See e.g., Atlas Amalgamated Inc. v. Castillo, 601 S.W.2d 728 (Tex. App. 1980).
655 No other Louisiana appellate court has taken a position on this issue. Some other states’ courts have ruled that arbitration precludes the filing of a lien.
656 Whether a claimant is a general contractor, contractor or subcontractor for lien rights analysis is a complex question. See e.g., Burdette v. Drushell, 837 So.2d 54 (La. App. 1 Cir. 2002); Executive House Building, Inc. v. Demarest, 248 So.2d 405 (La. App. 4 Cir. 1971).
Subcontractors and laborers only have 30 days after the filing of notice of termination of work to file their liens if a "notice of contract" was properly and timely filed under R.S. 9:4811. If a "notice of contract" was not filed, subcontractors would have 60 days after the notice of termination of substantial completion of the work to file their liens.

Lien rights under La. R.S. 9:4801-02 are extinguished if the claimant does not file an action against the owner within one year after the filing of the statement of claim or privilege.657 The law is not clear whether the filing of an arbitration claim will preserve lien rights.658

The Residential Truth in Construction Act, La. R.S. 9:4851 et seq., requires that notice of lien rights be given to owners in residential home construction and improvement contracts. Damages and attorney fees are available if this mandatory notice is not given and the owner's property is liened.659

2.14.7 Criminal remedies against home improvement contractors

It is a violation of criminal law, La. R.S. 14:202(A), for a contractor to fail to pay his subcontractors.660 Therefore, an owner may file a criminal complaint against the contractor if subcontractors file liens on his house. Such complaints may lead to removal of the subcontractors' liens. Remember that attorneys may not threaten criminal prosecution to gain advantage in a civil case. La. Rules of Professional Conduct, Rule 8.4(g).

Act 156 of 2009, codified at La. R.S. 37:2158, made it a crime to engage in business of contracting without the authority provided in La. R.S. 37:2160 if the contractor caused more than $300 damage to a person. This crime applies to persons who must be licensed contractors for contracts in excess of $75,000.

2.14.8 Piercing the corporate veil of home improvement companies

In a home improvement contract dispute with a limited liability company, consideration should be given to also suing the company owner as an individual defendant. Some contractors see their limited liability company as a vehicle for defrauding their creditors. They thinly capitalize the limited liability company. Then, they shut the company down if judgment is entered against the company and start a new limited liability company.661 Therefore, it is important to plead a basis for piercing the corporate veil when available.

Several courts have held that professionals, including contractors regulated under R.S. 37, are not shielded by La. R.S. 12:1320 from personal liability when they commit negligence.662 This approach is the simplest way of seeking personal liability against a construction company owner. In addition, the corporate veil is pierced if the officer engaged in fraud, malfeasance or criminal wrongdoing.663

658Because of the uncertainty of the law, some contractors will file both an arbitration claim and a lawsuit, and seek to stay the litigation pending arbitration.
659La. R.S. 9:4855; Landry v. Rocco, 386 So.2d 1013 (La. App. 3 Cir. 1980).
660Many district attorneys' offices prosecute this crime.
661Failure to properly liquidate a limited liability company may create personal liability for a company member. See e.g., La. R.S. 12:1335.1, 1338, 1341.
663See Carter v. State Dept. of Transp & Development, 46 So.3d 787, 792 (La. App. 2 Cir. 2010); see also La. R.S. 12:95 (corporation law does not shield an officer from personal liability for fraud)
The existence of a cause of action under the Louisiana unfair trade practices law may obviate the need to pierce the corporate veil. The unfair trade practices statute imposes liability on any “person” who engages in unfair or deceptive trade practices or acts. La. R.S. 51:1409(A), 1402(8), 1405. A general manager has been held to be personally liable for a construction company’s unfair trade practice of failing to build a mobile home according to specifications.\(^{664}\) Other grounds for piercing the corporate veil may also be available.

### 2.14.9 Prescription

Generally, there is a 10 year prescription for breach of home improvement contracts or failure to perform construction work in a good and workmanlike manner.\(^{665}\) However, lawsuits should be filed within 1 year if there are unfair trade practice claims against the contractor. Also, new home construction is governed by special rules for prescription.\(^{666}\)

### 2.15 RENT TO OWN CONTRACTS

#### 2.15.1 Covered Transactions

The Louisiana Rental-Purchase Act\(^{667}\) governs agreements for a consumer’s use of personal property that: (1) are for an initial period of four months or less; (2) are automatically renewable with each payment after the initial period; (3) do not require the consumer to continue renting the property after the initial period; and (4) permit the consumer to become the owner of the property.\(^{668}\) If an agreement satisfies all four of these prerequisites, then it must contain certain disclosures, and is also prohibited from containing certain provisions.

Renegotiations are to be treated as new agreements which require new disclosures.\(^{669}\) However certain events, such as the substitution of property, addition or return of property in a multiple-item agreement are not to be treated as renegotiations.\(^{670}\) Extensions do not require new disclosures.\(^{671}\)

#### 2.15.2 Required Disclosures

The disclosures required by the Rental-Purchase Agreement Act (“Act”) must be made as part of the agreement in writing, on the face of the contract, above the line for signature of the consumer, and must be conspicuous.\(^{672}\) The twelve required disclosures are listed in La. R.S. 9:3355 and include:

1. the total number, amount, and timing of all payments necessary to acquire ownership;
2. a statement that the consumer will not own the property until all payments necessary to acquire ownership are made;
3. a statement that the consumer is responsible for the Fair Market Value of lost, stolen, or damaged property;
4. a description of the property, including whether new or previously rented;

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\(^{664}\) Laurents v. Louisiana Mobile Homes, Inc., 689 So.2d 536, 547 (La. App. 3 Cir. 1997).


\(^{666}\) La. R.S. 9: 3150 et seq.

\(^{667}\) La. R.S. 9:3351-3362.

\(^{668}\) La. R.S. 9:3352(6).

\(^{669}\) La. R.S. 9:3359(A).


\(^{671}\) La. R.S. 9:3359(B).

\(^{672}\) La. R.S. 9:3354(C).
5. the cash price of the property;
6. the total of initial payments required at or before consummation of the transaction;
7. a statement that the total of payments does not include other charges, such as late payment, default, pickup, etc;
8. a clear summary of the terms of the option to purchase, including the right to exercise an early purchase option;
9. the identity of the party responsible for maintaining or servicing the property;
10. the date of the transaction and identities of the parties;
11. notice of right to terminate;
12. disclosure of the right of the lessee to reinstatement.

The right to reinstatement allows the consumer to “cure” overdue payments within a certain period of time by paying all past due rental charges, late fees, and, if the property has been picked up by the lessor, any applicable pick-up fees.673

2.15.3 Prohibited Provisions

The provisions which are forbidden in a rental-purchase agreement include confession of judgment, negotiable instrument, security interest in other goods, wage assignment, waiver of claims or defenses, right to enter without permission, and mandated insurance or waiver of liability for damage to or loss of the property.674 The lessor may, however, require the consumer to provide proof of insurance.

2.15.4 Remedies

Any violation of the Act is a prohibited practice under the Louisiana Unfair Trade Practices and Consumer Protection Act and is subject to the enforcement provisions of that statute.675

2.15.5 Prescription

Since violation of the Act is an unfair trade practice, the one year period provided by that Act applies. In some circumstances, the acts or omissions of the rental company may be continuing violations so that the peremptive period arguably begins anew as to each such violation.

2.15.6 Protections Afforded to Sellers

This provision of the Act is unfavorable to consumers. Agreements which comply with the requirements of the Act are exempt from eight specified laws, including those governing consumer credit sales, consumer credit transactions, consumer loans and consumer leases.676

2.15.7 Additional Resources

For more information on Rent to Own abuses and claims, see NCLC, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (8th ed. 2012); NCLC, TRUTH IN LENDING (8th ed. 2012); NCLC, CONSUMER BANKRUPTCY LAW AND PROCEDURE (9th ed. 2009); FORECLOSURES (4th ed. 2012).

674 La. R.S. 9:3356.
675 La. R.S. 9:3361.
2.16 HEALTH INSURANCE

In recent years, there has been tremendous litigation concerning health insurance coverage issues. These contracts are heavily regulated in Louisiana.\textsuperscript{677} Consumer advocates estimate that 40\%-50\% of claims denials are wrongful. Exclusionary clauses in health insurance policies are narrowly construed by the courts.\textsuperscript{678} Where an exclusion is ambiguous, it will be interpreted against the insurer.\textsuperscript{679}

State insurance law mandates certain types of coverage and prohibits or limits cancellations in other cases. For example, cancellation is prohibited after a claim is made for a terminal, incapacitating, or debilitating condition.\textsuperscript{680} La. R.S.22:887(A)(1) regulates the notice of cancellation. Under La. R.S.22:975, cancellation shall not prejudice any “benefit accrued or expenses incurred for services rendered prior to cancellation.” In addition, laws such as COBRA or ERISA may entitle an insured to continued insurance or payment for benefits covered under the health insurance plan. An insured may bring a civil action under ERISA, 29 U.S.C. § 1132(a)(1)(B) to recover benefits due under the health insurance plan if denial of the coverage was arbitrary and capricious.\textsuperscript{681}

State law requires that group health insurance be determined by conditions pertaining to employment or age.\textsuperscript{682} Therefore, an insurer may not exclude an insured’s child based on alleged misrepresentations concerning the child’s health status in a form adding the child as a dependent.\textsuperscript{683} Also, a health insurance policy may not “deny, exclude or limit benefits for a covered individual for losses due to a preexisting condition incurred more than twelve months following the effective date of the individual’s coverage.”\textsuperscript{684}

2.17 CLIENT RESTITUTION FUNDS

Some occupational licensing agencies may have either restitution funds for consumers victimized by their professionals or the authority to condition relicensing on restitution to the victims. For example, the Real Estate Commission may reimburse persons who have suffered monetary damages from acts committed by licensed real estate brokers or salesmen.\textsuperscript{685}

2.18 FTC PRESERVATION OF CONSUMERS’ CLAIMS AND DEFENSES RULE

The FTC Preservation of Consumers’ Claims and Defenses Rule\textsuperscript{686} (the “Holder Rule”), makes even holders in due course of a consumer credit contract or note subject to many claims and defenses which the debtor could assert against the seller who extended credit in payment for his services. Note that a creditor must satisfy La. R.S. 10:3-302(a)(2) to be considered a holder in due course. Thus, if it did not purchase the note for value, in good faith and without knowledge of other parties’

\textsuperscript{677} See, e.g., La. R.S. 22:975, 1000, 1012.
\textsuperscript{678} See, e.g., Oxner v. Montgomery, 794 So.2d 86 (2d Cir. 2001); Tally v. BC/BS of Louisiana, 760 So.2d 1193 (La. App. 3 Cir. 2000); Sanders v. Home Indemn. Ins. Co., 594 So.2d 1345 (La. App. 3 Cir. 1991).
\textsuperscript{679} Robarts v. Blue Cross, 821 So.2d 87 (La. App. 5 Cir. 2002).
\textsuperscript{680} La. R.S. 22:1012; see also Gahn v. Allstate Life Insurance Co., 926 F.2d 1449 (5th Cir. 1991).
\textsuperscript{681} Welch v. HMO Louisiana Blue Cross, 2008-cv-04576 (E.D. La. 11/20/09).
\textsuperscript{682} La. R.S. 22:1000.
\textsuperscript{683} Kornm an v. Blue Cross/Blue Shield of La., 662 So.2d 498 (La. App. 5 Cir. 1995).
\textsuperscript{684} La. R.S. 22:1029.
\textsuperscript{685} La. R.S. 37:1461.
\textsuperscript{686} 16 C.F.R. § 433.1-3.
defenses or recoupment claims, it may not even be a holder in due course. In any event, if it is a holder in due course, it is still subject to the FTC Holder Rule and any claims or defenses that the debtor could have asserted against the seller. The FTC Holder Rule prohibits a creditor from asserting its normal holder in due course rights under La. R.S. 10: 3-305. The holder’s refusal to accept liability under the Holder Rule may be an independent UTPL violation. Absent FTC Holder Rule language in a contract or note, a holder in due course would only be subject to the defenses of infancy, duress, lack or capacity, illegality which nullifies the obligation, fraud in the factum, and discharge of the obligor in insolvency proceedings.

The FTC preservation language must be included in any consumer credit contract for the sale of goods or services. The presence of the FTC language in the contract gives the buyer a contractual right to assert seller-related claims against holders. Transactions that would normally be beyond the FTC Holder Rule are also covered if the agreement contains the FTC notice preserving claims and defenses. In a pre-2001 decision, the Louisiana Supreme Court held that the consumer is precluded from asserting his defenses against a holder if the seller unlawfully omitted the FTC notice. In 2001, the Legislature adopted Article 9 of the Uniform Commercial Code which reads omitted language required by law (e.g., the FTC Holder Rule as expressly noted in the UCC comments) into the contract or note. If the seller omitted the FTC Holder Rule from a contract or note, a UTPL claim for omission of the Holder Rule language may exist against the seller or holder/creditor. If you discover a seller who omits the FTC Holder Rule from a consumer credit contract or note, consider filing a complaint with the FTC which has the power to enforce its Holder Rule.

Two courts have improperly allowed holders to use La. Code Civ. Proc. art. 424 to avoid the debtor’s redhribition claims despite the existence of Holder Rule defenses. Art. 424 states that a prescribed redhribition claim cannot be raised as a defense to a negotiable instrument. A contract containing the FTC preservation language, however, is not a negotiable instrument.

Consumers may use the Holder Rule to obtain an affirmative recovery from the creditor of all amounts paid on the debt, relief from the amount outstanding on the note, and any statutory attorney fees. In a May 3, 2012 advisory opinion,
the FTC has held that the Holder Rule does not limit a consumer’s affirmative recovery to situations where rescission is warranted or where the goods or services sold to the consumer were worthless. The FTC advisory opinion rejected contrary interpretations by some courts.

Generally, the consumer cannot raise seller-related claims when the creditor has a non-purchase money security interest in the collateral or when the consumer obtains a purchase money loan independent of the seller’s referral or recommendation. However, a lender may be solidarily liable with a contractor if the contractor routinely refers homeowners to that lender.

2.19 NEGLIGENT MISREPRESENTATION

The Louisiana Supreme Court has employed standard duty-risk analysis to this delictual action and held that for the cause of action of negligent misrepresentation to arise, there must be a legal duty on the part of the defendant to supply correct information, there must be a breach of that duty, and the breach must have caused plaintiff damage. The legal duty may arise under factual scenarios of both non-disclosure and misinformation.

2.20 SPOT DELIVERY

2.20.1 Overview

Spot delivery or “yo-yo sales” is one of the most widespread automobile dealer abuses today. A dealer will supposedly finalize an installment sale of a car, give the consumer possession of the car “on the spot,” even transfer title to the consumer, and then later tell the consumer to return the car because the financing has fallen through. This could leads to (1) the consumer agreeing to rewrite the loan at higher payments, (2) the lender’s repossession of the vehicle, (3) the consumer losing his trade-in.

In the typical motor vehicle installment sales agreement, the dealer is the lender and has agreed to the credit contract by signing it. The lender is the dealer’s assignee. If the lender declines the assignment, there is still a binding credit agreement between the consumer and dealer. The consumer simply makes payments to the dealer. The consumer is not in default of this agreement simply because the dealer fails to assign the agreement to a third party.

2.20.2 Louisiana Law

La. R.S. 32:1261(2)(f) requires, where a sale is conditioned on financing, that the following provisions shall be in writing and shall be a part of the conditional sales contract:

- if the sale is not concluded by the financing of the sale to the purchaser within 25 days of the delivery, the sale contract shall be null and void;
- the trade-in shall not be sold by the dealer until the conditional sale is complete;


700 See W alker Mobile H om e Sales v. W alker, 965 S.W.2d 271 (Mo. Ct. App. 1998) (consumer not liable to dealer where consumer offered to make installment payments to dealer, but dealer refused to accept payments because prospective assignee refused to take assignment).
there shall be no charge to the consumer if the conditional sale is not completed, including, but not limited to, mileage charges or charges to refurbish the trade-in vehicle;

if the conditional sale is not completed, the dealer shall refund all sums placed as a deposit or for any other purpose;

the purchaser shall return the vehicle to the dealer within 48 hours of notification by the dealer that the conditional sale will not be completed.

This statute applies to new and used car dealers and their salesman or agents. It also applies to new or used vehicles.

2.20.3 Information on spot delivery abuses

Look in the National Consumer Law Center’s manuals for more information on various spot delivery abuses:

NCLC, CREDIT DISCRIMINATION ch. 10 (5th ed. 2009).

2.21 EXPANDED LIABILITY FOR ACTS OF A CORPORATION

2.21.1 Overview

Are persons other than the corporation or limited liability company liable to the consumer? If the contract was with a corporation or limited liability company, any suits against other persons, e.g., company owners or corporate officers, will be met with an exception of no cause of action or a motion for summary judgment on the issue of personal liability. If you name an individual defendant, pleadings and discovery should be conducted to establish the theory of the defendant’s personal liability.

Normally, only the corporation is liable. However, liability may be imposed on other defendants under several doctrines or theories, e.g., (1) successor or transferee liability, (2) statutory causes of action against a person, usually a corporate officer or agent, (3) lack of personal immunity for regulated professionals, (4) piercing the corporate veil, (5) establishing the existence of a single business enterprise where two or more superficially independent corporations operate as a single business, and (6) establishing a joint venture among generally independent entities who jointly agree to work on a particular project (at least as to contractual liability).701

2.21.2 Successor or transferee liability

In a corporate reorganization, a successor corporation is generally liable for the former corporation’s obligations.702 Members of a limited liability company may have some personal liability for the company’s debts after liquidation.703 Failure to follow the statutory requirements for liquidation may expose an LLC member to greater personal liability. Claims against a limited liability company in liquidation (and ultimately the members) must be presented or suit filed within certain time limits.704 Unscrupulous contractors may close a limited liability company in an attempt to avoid collection of judgments and other claims.

701 For theories for personal liability without piercing the corporate veil, see G. Morris, Personal Liability for Corporate Participants without Corporate Veil-Piercing: Louisiana Law, 54 La. L. Rev. 207 (1993).
702 La. R.S. 12: 115(D); but see Morrison v. C.A. Guidry Produce, 856 So.2d 1222 [La. App. 3 Cir. 2003].
703 La. R.S. 12: 1335.1, 1341.
704 La. R.S. 12: 1341, 1338(C)-(D).
2.21.3 Statutory cause of action

The existence of a statutory cause of action may obviate the need to pierce the corporate veil if the corporate officer personally participated in the wrongful act. For example, the unfair trade practices statute imposes liability on any “person” who engages in unfair or deceptive trade practices or acts. A general manager has been held to be personally liable for a construction company’s unfair trade practice of failing to build a mobile home according to specifications.

2.21.4 Regulated professionals

Several courts have held that professionals are not shielded by La. R.S. 12:1320 from personal liability when they commit negligence. This approach is often the simplest way of seeking personal liability against a company owner if the business is a regulated profession.

2.21.5 Piercing the corporate veil

The theory of piercing the corporate veil applies to limited liability companies and corporations. The corporate veil may be pierced if the officer engaged in fraud, malfeasance or criminal wrongdoing. Fraud is a “misrepresentation or a suppression of the truth made with the intent either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other.” The Louisiana courts have not defined “malfeasance” in the context of piercing the corporate veil. However, the common meaning of “malfeasance” is a wrongful or unlawful act. When fraud, deceit or malfeasance are pleaded and proved, the plaintiff does not have to plead and prove “alter ego” status to pierce the corporate veil and hold an officer personally liable for his acts or omissions.

Finally, the corporate veil may be pierced if the corporation is the alter ego of the member or owner. It is not easy to pierce the corporate veil under the “alter ego” doctrine. The totality of circumstances is determinative of “alter ego” status. The Louisiana Supreme Court has identified 5 non-exclusive factors to be used in applying the alter ego doctrine (1) commingling of assets, (2) failure to follow statutory formalities for incorporating and transacting corporate affairs, (3) undercapitalization, (4) failure to provide separate bank accounts and bookkeeping records, and (5) failure to hold regular shareholder and director meetings.

2.21.6 Single business enterprise

The “single business enterprise” or “instrumentality” theory has been employed to extend liability beyond a separate entity where two or more corpora-
tions operate as a single business. Unlike piercing the corporate veil, it is not used to impose personal liability on a corporation’s shareholders. Rather, it extends liability to each of the affiliated corporations. The influential Green v. Champion Insurance Co. case established 18 factors to determine whether a group of affiliated entities constitute a “single business enterprise.” The list is illustrative, not exhaustive, and no one factor is dispositive of the issue of “single business enterprise.” A parent company will be liable for the subsidiary’s debts where it disposed of all of the subsidiary’s assets.

2.21.7 Joint venture
Companies may be jointly liable where there is a joint venture. The existence of a joint venture is determined by the intent of the parties as manifested by their agreement, express or implied. A joint venture exists when the parties have contributed capital, labor, skill and industry in a common effort with a view to participate in profits and share losses. The intent is determined by the facts and circumstances of each case.

3. DEFENSES AND TRANSACTION AVOIDANCE

3.1 OVERVIEW
Contracts have the effect of law for the parties, but may be dissolved on grounds provided by law. As discussed herein, there are various Louisiana and federal laws that permit rescission. In addition, Civil Code rules on contract interpretation may sometimes be used to limit or bar the application of an adverse contractual provision.

3.2 INCAPACITY
Unemancipated minors, interdicts and persons deprived of reason do not have the capacity to contract. A contract made by a person without capacity can be rescinded at the request of that person or his legal representative.

“Deprived of reason” may include mental conditions such as limited intellectual capacity, illiteracy, heavy sedation, etc. A non-interdicted party claiming he was deprived of reason must show that the other party knew or should have known of his incapacity by convincing evidence in order to rescind the contract.

714 Green v. Champion Insurance Co., 577 So.2d 249, 258 (La. App. 1 Cir. 1991), writ denied 580 So.2d 668 (La. 1991); In re New Orleans Train Car Leakage Fire Litigation, 690 So.2d 255, 257 (La. App. 4 Cir. 1997).
718 Comeaux v. C.F. Bean Corp., 750 So.2d 291, 298 (La. App. 4 Cir. 1999); American Fidelity Fire Ins. v. Atkinson, 420 So.2d 691 (La. App. 2 Cir. 1982).
724 See, e.g., In re Adoption of Smith, 578 So.2d 988 (La. App. 4 Cir. 1991), writ denied, 581 So.2d 687.
725 See, e.g., Higgins v. Spencer, 531 So.2d 768 (La. App. 1 Cir. 1988), writ denied, 532 So.2d 106.
727 Smith, 578 So.2d 988.
It is difficult to establish incapacity after the death of the alleged incompetent. The acts of a deceased person may not be attacked for lack of mental capacity unless a petition for his interdiction was filed or a judgment of interdiction was rendered before his death, the contract was gratuitous, the contract itself contains evidence that he was lacking understanding, or it was confected within 30 days of the alleged incompetent’s death. 

3.3 ERROR

Consent for a contract may be vitiated by error only when the error concerns a cause without which the obligation would not have been incurred, and that cause was known or should have been known by the party not in error. An inability to understand English may support a finding of lack of consent. A calculated risk which turns out to have been ill-advised is not “error” which will permit rescission.

The party in error, who obtains rescission because of his own error, is liable for the other party’s losses. If rescission is denied in order to protect the other party’s interests, the party in error may nevertheless receive reasonable compensation for losses he has sustained. The prescriptive period for rescission based on error is 10 years.

Examples of transactions subject to rescission for error include:

- Business school tuition where the school did not assist student in finding employment as promised. *Delta School of Business v. Shropshire*, 399 So.2d 1212 (La. App. 1 Cir. 1981).
- A commercial lease where the lessor was aware that proper permits and parking were unavailable for the use intended. *Fuller v. Barattini*, 574 So.2d 412 (La. App. 5 Cir. 1991).

In general, a party who legitimately rescinds a transaction is entitled to legal interest from the date of judicial demand until rescission. 

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729 La. Civ. Code art. 1926; see, e.g., Gipson v. Fortune, 30 So.3d 1076 (La. App. 2 Cir. 2010), writ denied, 34 So.3d 298 (La. 2010); Atkins v. Bridgewater, (La. App. 2 Cir. 2001) (deed not open to attack on the grounds of incapacity after grantor’s death because it was not gratuitous).

730 Civil Code art. 1948-49.

731 See e.g., Duong v. Salas, 877 So.2d 269 (La. App. 4 Cir. 2004), writ denied 885 So.2d 590 (La. 2004); Lerrick v. White Top Cabs, 10 So.2d 67 (La. App. 4 Cir. 1942).


733 Civil Code art. 1952.

734 Civil Code art. 1952; see, e.g., Twin City Pontiac, Inc. v. Pickett, 588 So.2d 1125 (La. App. 2 Cir. 1991) (purchaser who knew or should have known of dealer’s subtraction error has to pay the correct price).


736 Carpenter v. Lafayette Woodworks, Inc., 653 So.2d 1187 (La. App. 3 Cir. 1995).
3.4 FRAUD

Fraud is a misrepresentation made with the intention to obtain an unjust advantage and may vitiate consent for a contract. Fraud must be pleaded with specificity, needs to be proven by a preponderance of evidence, and may be established by circumstantial evidence. The courts have held that fraud may be inferred from the “existence of highly suspicious conditions or events.” Rescission, damages and attorney fees may be granted for fraud. Many cases of fraud can also be attacked as unconscionable or a violation of the Unfair Trade Practices Act.

Generally, the prescriptive period for fraud is 1 year. However, an action for annulment of an absolutely null contract does not prescribe and an action for annulment of a relatively null contract for fraud is 5 years. A fraud that constitutes a breach of fiduciary duty may be governed by a 10 year prescriptive period.

Examples of transactions rescinded by the courts for fraud include:

- Selling an air conditioning system as manufactured when it was shop made by seller. Organ v. Covington Heating & Air Conditioning, 552 So.2d 759 (La. App. 1 Cir. 1989).

- Selling what was primarily a life insurance policy as a purported investment contract to plaintiffs. Landreneau v. Nat. Investors Life Insurance Co., 692 So.2d 464 (La. App. 3 Cir. 1997).

- Selling a used vehicle with a repair history as new. Bingham v. Ryan Chevrolet, 691 So.2d 817 (La. App. 2 Cir. 1997).

- Appeal bond where surety was told that his signing of bond would not affect him in any way. Lupo v. Lupo, 475 So.2d 402 (La. App. 1 Cir. 1985).

- Sale of mineral rights for $100 by elderly woman who had no formal education and was ignorant of the value of her interests. Placid Oil Co. v. Taylor, 345 So.2d 254 (La. App. 3 Cir. 1977), writ denied 347 So.2d 261.

- Note and mortgage signed by elderly woman, who had 4th grade education, where nature of documents and extent of her liability thereon were misrepresented or not explained to her. Chrysler Credit Corp. v. Henry, 221 So.2d 529, 533 (La. App. 4 Cir. 1969).

- Failure to disclose true cost of home improvement contract to illiterate elderly man. Carter v. Foreman, 219 So.2d 21 (La. App. 4 Cir. 1969).

- Note and mortgage signed by payee who was told that documents were only to insure payment of $25 check. X-L Finance Co. v. Carrier, 215 So.2d 185 (La. App. 3 Cir. 1968).

- Unknowing execution of mortgage on home. Fidelity Credit Corp. v. Bradford, 177 So.2d 635 (La. App. 3 Cir. 1965).

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739 See, e.g., Vanguard Finance, Inc. v. Smith, 256 So.2d 662, 664 (La. App. 4 Cir. 1972).
743 Simmons v. Templeton, 723 So.2d 1009, 1013 (La. App. 4 Cir. 1998) (citing La. Civ. Code art. 3492). Note that some claims for breach of fiduciary duty may be governed by a shorter prescriptive period, e.g., 4 years for a suit against a tutor.
Life insurance policy sold to uneducated farmer where insurance agent misrepresented that large dividends would be paid on policy. *Broussard v. Fidelity Standard Life Insurance Co.*, 146 So.2d 292 (La. App. 3 Cir. 1962).

### 3.5 DURESS

Duress vitiates consent when it is of such nature as to cause a reasonable fear of unjust and considerable injury to a party’s person, property or reputation. When rescission is granted because of duress, damages and attorney fees may be awarded.

Examples of duress found sufficient by the courts for rescission include:

- Threat of criminal charges when no evidence that charges were justified. *Wiertz v. Craig*, 458 So.2d 1311 (La. 1984).

### 3.6 UNLAWFUL CAUSE

A contract is void when it violates a rule of public order or public policy. A cause of an obligation is unlawful when enforcement would produce a result prohibited by law or against public policy.

Examples of contracts voided for unlawful cause include:

- Construction contract with unlicensed contractor. *Dennis Talbot Constr. Co. v. Privat General Contractors, Inc.*, 60 So.3d 102 (La. App. 3 Cir. 2011);
- Contract for real estate commission not from licensed broker. *Towne Center, Ltd. v. Keyworth*, 618 So.2d 467 (La. App. 4 Cir. 1993).
- *Mobley v. Harrel*, 571 So.2d 662 (La. App. 2 Cir. 1990) (promissory note for unlawful gambling debt);

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744 La. Civ. Code art. 1948, 1959. The reasonable fear and injury must be related. See Zamjahn v. Zamhahn, 839 So.2d 309 (La. App. 5 Cir. 2003) (a threat by one spouse to tell the parties’ children of the other spouse’s visits to internet adult sites was insufficient to invalidate a donation on the ground of duress because court found other overriding motivations).

745 Id. at 1964.


747 Id. at 1968.
• **U.S. Leasing Corp. v. Keiler**, 290 So.2d 427 (La. App. 4 Cir. 1974) (lease provision that allowed both repossession and acceleration of future rentals).

• **Auffrichtig v. Auffrichtig**, 796 So.2d 57 (La. App. 2 Cir. 2001) (agreement to pay $100 per month in alimony for 172 weeks, terminable only upon death of either party, and to maintain health insurance on ex-wife until her remarriage, regardless of fault, need, ability to pay, or open concubinage, did not violate public policy, as agreements were confected in anticipation of or after dissolution of marriage, when the marriage was irretrievably and irreparably broken).

• **Executone of Central Louisiana, Inc. v. Hospital Service Dist. No. 1 of Tangipahoa Parish**, 798 So.2d 987 (La. App. 1 Cir. 2001) (award of a contract to an unlicensed contractor, when a license is statutorily required, would be an award in contravention of prohibitory law, and the court, on its own motion, and any interested person, may attack a contract as an absolute nullity on those grounds).

• **Patterson v. Martin Forest Products, Inc.**, 774 So.2d 1148 (La. App. 2 Cir. 2000) (a minor, whose very employment is in contravention of the Child Labor Law and who sustains injury while so employed, may elect to recover in either workers’ compensation, which has the effect of ratifying or confirming the relatively null contract of hire, or in tort by filing suit, and thus, tacitly invoking the relative nullity of his employment contract).

### 3.7 FAILURE AND WANT OF CONSIDERATION

Failure of consideration and want of consideration are separate defenses.\(^{748}\) Failure of consideration is when consideration was present at the time of contract formation, but has since partially or wholly ceased to exist.\(^{749}\) Failure of consideration is an affirmative defense and must be set forth in the answer.\(^{750}\) The appropriate remedy for a partial failure of consideration is a reduction in the purchase price.\(^{751}\)

Want of consideration is a defense that asserts that no consideration ever existed.\(^{752}\) La. Code Civ. Proc. art. 1005 makes no reference to want of consideration; therefore, it is not required to be set forth in the answer.\(^{753}\)

Parole evidence is admissible between the parties to the instrument to show failure or want of consideration.\(^{754}\)

### 3.8 STANDARD FORM AND ADHESIONARY CONTRACTS

It is a general principle of contract law that ambiguous provisions in a contract which cannot otherwise be resolved must be interpreted against the drafter.\(^{755}\) Thus, when there is doubt, standard form contracts are interpreted

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\(^{749}\) Id.


\(^{751}\) See, e.g., Jackson v. Slidell Nissan, 693 So.2d 1257 (La. App. 1 Cir. 1997); Decuir v. Sam Broussard, Inc., 459 So.2d 1375 (La. App. 3 Cir. 1984).

\(^{752}\) Smith, 272 So.2d at 683.

\(^{753}\) Id.

\(^{754}\) Azreme v. Esquire Title, 731 So.2d 422 (La. App. 5 Cir. 1999).

against the drafter.\textsuperscript{756} When there are two conflicting, but reasonable interpretations, the court must adopt the interpretation most favorable to the non-preparer.\textsuperscript{757}

A related principle is that contracts must be interpreted in favor of the obligor when there is doubt that cannot otherwise be resolved unless the obligor was at fault in creating the doubt.\textsuperscript{758}

Contracts of adhesion must also be interpreted against the preparer.\textsuperscript{759} A contract of adhesion is a take-it-or-leave-it standard contract prepared by the party with superior bargaining power.\textsuperscript{760} They raise the question as to whether the party with weaker bargaining power actually consented to the terms.\textsuperscript{761}

### 3.9 Unenforceable Waivers of Rights

The Louisiana Supreme Court has stated that “[s]afeguards protecting consumers must be more stringent than those protecting businessmen.”\textsuperscript{762} Waivers of warranty are strictly construed against the seller.\textsuperscript{763} They must be contained in the contract, clear and unambiguous, and brought to the attention of the buyer.\textsuperscript{764} Also, oral assurances that goods are in “good condition” can qualify any otherwise effective renunciation of warranties.\textsuperscript{765} An “as is” clause may be ineffective if it fails to clearly state that the buyer waives both express and implied warranties.\textsuperscript{766}

### 3.10 Unconscionability

Contracts or terms that are unconscionable may be voided or modified under La. R.S. 9:3516(36), which states that “a contract or clause is unconscionable when it is so onerous, oppressive or one-sided that a reasonable man would not have freely given his consent to it.”\textsuperscript{767} A combination of legal terms or practices may be unconscionable.\textsuperscript{768} However, there is a strong presumption favoring arbitration. When interpreting arbitration clauses, courts resolve doubt in favor of arbitration.\textsuperscript{769}

### 3.11 Debt Buyer Lawsuits

Debt buyers buy old credit card debt for pennies on the dollar. They then file suit or an arbitration claim against consumers many years after the last transaction. They often lack competent evidence to prove the alleged debt. In such cases, the alleged debt can be successfully defended. The National Consumer Law Center’s \textit{Collection Actions} (2d ed. 2011) has comprehensive strategies for defending debt buyer lawsuits.


\textsuperscript{757}See, e.g., Rayford v. Louisiana Savings Ass’n., 380 So.2d 1232, 1238 (La. App. 3 Cir. 1980).

\textsuperscript{758}La. Civ. Code art. 2057. See also Carter v. BMAP, 591 So.2d 1184 (La. App. 1 Cir. 1991); Lakewood Estates v. Seale, 649 So.2d 17 (La. App. 4 Cir. 1994); Kenner Industries, Inc. v. Sewell Plastics, Inc., 451 So.2d 557 (La. 1984); Pittman v. Pomeroy, 552 So.2d 983 (La. App. 2 Cir. 1989) (purchase option construed in tenant’s favor).


\textsuperscript{760}Id.

\textsuperscript{761}Id.; Laffeur v. Law Offices of Anthony G. Busbee, 960 So.2d 105 (La. App. 1 Cir. 2007).


\textsuperscript{763}Boos v. Benson Jeep-Eagle Co., 717 So.2d 661, 664 (La. App. 4 Cir. 1998).

\textsuperscript{764}See, e.g., id.; Moses v. Walker, 715 So.2d 596 (La. App. 3 Cir. 1998); Bowes v. Fox-Stanley Photo Products, Inc., 379 So.2d 844 (La. App. 4 Cir. 1980) (disclaimer on customer receipt did not exonerate merchant).

\textsuperscript{765}See, e.g., Harvell v. Michelli, 500 So.2d 871, 873 (La. App. 1 Cir. 1986).

\textsuperscript{766}Id. See also the discussion of waiver of redhibitory defects, supra at I.K.

\textsuperscript{767}See, e.g., Marshall v. Citicorp Mortgage, Inc., 601 So.2d 669, 671 (La. App. 5 Cir. 1992); Community Acceptance Corp. v. Kinchen, 417 So.2d 22 (La. App. 1 Cir. 1982).

\textsuperscript{768}Marshall, 601 So.2d at 671.

\textsuperscript{769}Aguillard v. Auction Management Corp., 908 So.2d 1, 24-25 (La 2005) (adopting United States Supreme Court’s interpretation of federal arbitration law).
In Louisiana, a suit on credit card debt is considered a suit on an open account.\textsuperscript{770} A debt buyer must prove ownership of the account.\textsuperscript{771} In many cases, particularly where the debt has been sold more than once, it will be difficult or impossible to prove a chain of title. Also, the debt buyer must prove the agreement and the amount of the debt.\textsuperscript{772} An unauthenticated generic form agreement is not sufficient proof of a credit card agreement.\textsuperscript{773} As plaintiff, the debt buyer must prove a prima facie case by competent evidence. The burden of proof does not shift to the debtor until the plaintiff has proved a prima facie case by competent evidence.\textsuperscript{774} A prima facie case as to the amount due will require an itemized statement of account that is verified by competent testimony or affidavit.\textsuperscript{775} The itemized statement of account should show all the debits and credits which produce the balance due. Discrepancies in the balance due in the invoices, affidavits and pleadings will be insufficient for a prima facie case unless the disparity is adequately explained.\textsuperscript{776}

Discovery can reveal the lack of competent evidence for ownership, agreement and the amount of the debt. Debt buyers generally file motions for summary judgment with incompetent affidavits to prove the debt. The debtor should timely oppose the motion for summary judgment. Also, it is important to file a motion to strike the incompetent affidavits prior to the hearing on the motion for summary judgment.\textsuperscript{777} If the motion for summary judgment is defeated, the debt buyer generally abandons or dismisses the lawsuit.

Debt buyers commonly sue on time-barred debts or the wrong person. The Louisiana prescriptive period for suits on open accounts is three years from the last payment or credit entry on the account.\textsuperscript{778} They may even use false affidavits in their efforts to prove the debt. Later payments do not revive a prescribed debt. Some debt buyers may serve requests for admission with the petition which seek to establish false facts, e.g., that the suit is not time-barred. Debt buyers that engage in collection activities are subject to the federal Fair Debt Collection Practices Act.\textsuperscript{779} Suits on time-barred debts without proper inquiry, use of requests for admission containing false information and use of false affidavits may constitute violations of the FDCPA.\textsuperscript{780}

Debt buyers may seek to collect by filing arbitration claims. Often, consumers don’t receive notice of an arbitration claim or fail to defend. The consumer may raise the lack of an agreement to arbitrate as a defense to a lawsuit to confirm

\begin{itemize}
\item \textsuperscript{770}CACV of Colorado, LLC v. Spiehler, 11 So.3d 673 (La. App. 3 Cir. 2009)
\item \textsuperscript{771}CACV of Colorado, LLC v. Spiehler, 11 So.3d 673 (La. App. 3 Cir. 2009); Bureaus Investment Group #2 L.L.C. v. Howard, 947 So.2d 37, 38-39 (La. 5 Cir. 2006)(did not reference individual account).
\item \textsuperscript{772}Citibank South Dakota, N.A. v. Stanford, 956 So.2d 756 (La. App. 2 Cir. 2007); CACV of Colorado, LLC v. Spiehler, 11 So.3d 673 (La. App. 3 Cir. 2009).
\item \textsuperscript{773}FIA Card Services, N.A. v. Weaver, 62 So.3d 709, 718 & n. 8 (La. 2011).
\item \textsuperscript{774}Walker v. Kropp, 678 So.2d 580 (La. App. 4 Cir. 1996); St. Tammany Parish Hospital v. Burris, 804 So.2d 960, 964 (La. App. 1 Cir. 2001).
\item \textsuperscript{775}HTS, Inc. v. Seahawk Oil & Gas Co., 889 So.2d 442 (La. App. 3 Cir. 2004); Gulf States Asphalt Co., Inc. v. Baton Rouge Services, Inc., 572 So.2d 148 (La. App. 1 Cir. 1990).
\item \textsuperscript{776}HTS, Inc. v. Seahawk Oil & Gas Co., 889 So.2d 442 (La. App. 3 Cir. 2004).
\item \textsuperscript{777}Samaha v. Ruzi, 977 So.2d 880, 890 (La. 2008). A model motion to strike and memo are on www.probono.net/la.
\item \textsuperscript{780}McColough v. Johnson, Rodenburg & Lauinger, L.L.C., 610 F.3d 939 (9th Cir. 2011)(time barred suit and improper use of requests for admission); Gionis v. Javitch, Block, Rathbone, L.L.P., 238 Fed. Appx. 24 (6th Cir. 2007), cert. denied 552 U.S. 1185 (2008)(use of false affidavits).\end{itemize}
the arbitration award even if the time to file a motion to vacate an arbitration award has expired.\textsuperscript{781} The debt buyer must present competent evidence of the agreement to arbitrate. Often, they fail to offer competent evidence.

\subsection{3.12 HOME SOLICITATION SALES}

The FTC Rule on “Cooling Off Period For Door-To-Door Sales” provides a right to cancel within 3 days any home solicitation, lease or rental, whether cash or credit, for goods or services greater than $25.\textsuperscript{782} Mail order and telephone buying are not covered,\textsuperscript{783} but see the discussion of Louisiana law immediately below, and also § 3.14 infra regarding mail or telephone orders. If the seller does not pick up the goods within 20 days of the cancellation, the goods become the buyer’s property without any obligation to pay for them.\textsuperscript{784} Violation of this FTC Regulation is a deceptive trade practice under § 5 of the FTC Act.\textsuperscript{785}

Louisiana law provides a right to cancel both cash and credit home solicitation sales of goods and services until midnight of the third business day after execution of an agreement to purchase.\textsuperscript{786} La. R.S. 9:3538(E) exempts from this right some sales pursuant to the consumer’s request for goods or services “without delay because of an emergency.” A home solicitation sale is a personal solicitation of the sale at any place other than the seller’s business establishment.\textsuperscript{787} It includes sales from the seller’s place of business if the consumers’ agreement to purchase is made at the consumer’s home.\textsuperscript{788} The definition of “home solicitation sale” expressly includes telephone sales. The general definition may include sales made via the Internet. Also, sales outside the consumer’s home, e.g., at his place of employment or in a hotel room, should be covered.\textsuperscript{789}

Violations of La. R.S. 9:3539-40, e.g., failure to provide cancellation notice or refund down payments, constitute unfair trade practices and subject the seller to damages and attorney fees.\textsuperscript{790} The consumer has an extended right to cancel the sale beyond the 3 day period until the seller provides the notice of the consumer’s right to cancel.\textsuperscript{791}

\subsection{3.13 TRUTH IN LENDING RESCISSION}

The Truth in Lending Act provides a right to cancel transactions subject to the TILA whenever a non-purchase money security interest is taken in the consumer’s primary residence.\textsuperscript{792} For a detailed discussion of TIL rescission rights, see TIL Rescission Right, supra at § 2.4.

\subsection{3.14 MAIL OR TELEPHONE ORDERS}

16 C.F.R. § 435.2 states that mail order or telephone sellers have a reasonable basis to expect that it will be able to deliver ordered merchandise within the advertised deadline or 30 days if no time is specified. If the deadline cannot be met, the seller must give the consumer the option of canceling the order or accept-

\textsuperscript{781} FIA Card Services, N.A. v. Weaver, 62 So.3d 709 (La. 2011).
\textsuperscript{782} 16 C.F.R. § 429.
\textsuperscript{783} Id. at § 429.0.
\textsuperscript{784} Id. at § 429.1.
\textsuperscript{785} See NCLC, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 9.2.7 (8th ed. 2012).
\textsuperscript{786} La. R.S. 9:3538.
\textsuperscript{787} La. R.S. 9:3516(20).
\textsuperscript{788} La. R.S. 9:2711.1A(1).
\textsuperscript{790} La. R.S. 9:2711.1C (granting relief under La. R.S. 51:1409).
\textsuperscript{791} La. R.S. 9:3539(c).
\textsuperscript{792} 15 U.S.C. § 1635.
ing the delay.\footnote{16 C.F.R. § 435.1(b).} The Rule is written broadly enough to apply to internet sales and fax orders. Sending only part of what was ordered within 30 days is not sufficient. The Louisiana statute governing home solicitation sales will also apply if the consumer was at home when the agreement to purchase was made by telephone.\footnote{La. R.S. 51:461.}

### 3.15 UNSOLICITED GOODS

Goods sent without order or request by the consumer may be considered a gift.\footnote{La. R.S. 51:461.} Federal law also prohibits the use of the mails to send unordered merchandise with the exception of free gifts and requires a notice disclosing that the consumer may treat the merchandise as a gift.\footnote{39 U.S.C. § 3009.} The consumer has a remedy under 39 U.S.C. § 3009 or the state unfair trade practices act for violations.\footnote{Kipperman v. Academy Life Ins. Co., 554 F.2d 377 (9th Cir. 1977)(private cause of action under 39 U.S.C. § 3009); Crossley v. Lens Express, Inc., 2001 WL 650728 (W.D. Tex. 2001)(same); Sunshine Art Studio, Inc., 81 FTC 836 (1972), aff’d 481 F.2d 1171 (1st Cir. 1973); contra Wisniewski v. Rodale, Inc., 510 F.3d 308 (3d Cir. 2007)(no private cause of action under 39 U.S.C. § 3009).} The Louisiana statute governing home solicitation sales will also apply if the consumer was at home when the agreement to purchase was made by telephone.\footnote{La. R.S. 51:1405(A).}

### 3.16 FTC CREDIT PRACTICES RULE

The FTC Credit Practices Rule, 16 C.F.R. § 444, is the most important precedent dealing with unfair remedies used by creditors in enforcing consumer credit contracts.\footnote{For more information on this FTC Rule, see NCLC, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 6.11 (8th ed. 2012).} It prohibits, inter alia, the following:

- Waiver of exemptions from execution (security interests in exempt property are not, however, prohibited). 16 C.F.R. § 444.2(a)(2).
- Non-purchase money security interests in certain household goods. 16 C.F.R. § 444.2(a)(4).
- Failure to provide cosigners with a specified warning as to potential liability. 16 C.F.R. § 444.3(a)(2).
- The pyramiding of late charges. 16 C.F.R. § 444.4(a).

### 3.17 PROTECTION FOR NONENGLISH SPEAKERS

The FTC Door-to-Door Sales Rule requires sellers to provide a buyer with a copy of the contract in the language used in the sales presentation.\footnote{16 C.F.R. § 429.1(a).}

### 3.18 OTHER CANCELABLE CONTRACTS

A consumer has a 3 day right to cancel any contract in excess of $500 resulting from a sales presentation or promotional program as a condition of receiving a prize or a gift.\footnote{La. R.S. 51:1721.} A violation of this right constitutes an unfair trade practice under La. R.S. 51:1405(A).\footnote{La. R.S. 51:1722.} Physical fitness service contracts are likewise subject to a 3-day cancellation right, and may also be cancelled if the center moves more than 10 miles away, etc.\footnote{La. R.S. 51:1577 (contract cancelled unless center provides center provides close alternative within 30 days).} No physical fitness services contract can have a duration greater than 36 months.\footnote{La. R.S. 51:1578.} A consumer also has a right to cancel most mail and check solicitation sales.\footnote{See La. R.S. 9:3541.1.} A mail and check solicitation arises from a solicitation received by a con-
sumer through the mail and through the cashing of a check sent with the solicitation. A consumer who has a pre-existing credit relation with the sender loses the right to cancel a mail and check solicitation.

A home owner has an absolute right to cancel a home improvement contract for no cause, even if the work has commenced. La. Civ. Code art. 2765. Cancellation under Civil Code art. 2765 will limit the contractor's claim to actual labor, materials and lost profits measured by the unpaid balance minus the costs to complete the work. If a contract is cancelled for cause, the contractor will not be entitled to lost profits.

3.19 USURY

Interest that may be charged on a loan or a debt is generally limited to 12% per annum, except for loans made by banking institutions or for consumer credit. Charging 18% on a balance due for services rendered is illegal. An employer, however, may not lend or advance money to any one of his employees at an interest rate greater than just 8% per annum.

The maximum rates for consumer loans by finance companies and banks and for consumer credit sales are very high. For example, the maximum loan finance charge for a loan not exceeding $1,400 is 36% per year; for amounts between $1,400 and $4,000 it is 27%.

The penalty for charging a usurious interest rate is the forfeiture of all interest. Even an attempt to charge usurious interest can result in the forfeiture of the right to any interest on the debt. If a person pays a higher rate of interest, he may sue to recover that payment within two years.

The interest rates that national banks may charge on loans or credit cards are limited to the rates state banks, where the bank is located, are permitted to charge for similar loans. Where excess interest has been charged, the entire interest is forfeited. Where excess interest has been charged and actually paid, the borrower is entitled to twice the total interest paid. A method of calculating interest may also violate the 12 U.S.C. § 85. The limitation period is two years.

The charging of interest on interest is prohibited.
3.20 REPOSSESSIONS

3.20.1 Law for security agreements entered into before January 1, 2005

A buyer’s default does not allow a seller to repossess collateral without resort to proper legal process unless the buyer consents to the method of repossession.\(^{824}\) The consent of the owner must be shown by the seizing creditor in order to avoid legal liability.\(^{825}\) Repossession over the buyer’s objection subjects the seller to damages; the measure of damages for the wrongful taking of a movable is the value of the property seized.\(^{826}\) Where the defendant holds a security interest in the seized property, the value of this seized property for damages purposes corresponds with the equitable interest the plaintiff has acquired in it.\(^{827}\) General damages may also be awarded for the plaintiff’s embarrassment, humiliation, or inconvenience as a result of the wrongful seizure, plus attorney fees and costs.\(^{828}\)

Contractual provisions purporting to irrevocably authorize a creditor’s entry into the debtor’s home without debtor’s consent have been invalidated as against public policy.\(^{829}\) Unauthorized entry into a debtor’s home infringes upon his constitutional guarantee to privacy.\(^{830}\) Regardless of whether a debt is justly due, a debtor has a right to be free from unreasonable coercion and unreasonable violations of his right to privacy in his personal affairs.\(^{831}\) The debtor is entitled to general and special damages in tort for violations these rights.\(^{832}\)

Licensed or regulated lenders and financial institutions may obtain and sell collateral through a summary procedure under the “Additional Default Remedies Act” in addition to the procedures provided by the statutes mentioned therein.\(^{833}\) The secured creditor using La. R.S. 6:966 does not have the right to a deficiency judgment.\(^{834}\) In 2003, the legislature amended La. R.S. 6:966(A) to limit the use of the procedures in the Act for seizure and disposition of collateral without previous citation and judgment following default to situations where the security agreement imports a confession of judgment.\(^{835}\)

Article 9 of the Uniform Commercial Code, contains savings clauses for perfection of many pre-effective-date transactions.\(^{836}\) It provides creditors with the following rights to repossess collateral:

- Self-help repossession that does not “breach the peace.” The courts have interpreted this rule under the UCC to mean that the creditor cannot use force or threats, cannot enter the debtor’s home and cannot seize any property over the debtor’s objections.\(^{837}\)
- Executory or ordinary process.\(^{838}\)

\(^{824}\) Biggs v. Prewitt, 669 So.2d 441 (La. App. 1 Cir. 1995); Jones v. Petty, 577 So.2d 821 (La. App. 2 Cir. 1991).
\(^{825}\) Cook v. Spillers, 574 So.2d 464 (La. App. 2 Cir. 1991) (“Mere inaction or the absence of protests to the taking does not imply consent.”).
\(^{826}\) Id.
\(^{827}\) Id.; see also Bryant v. Sears Consumer Financial, 617 So.2d 1191 (La. App. 3 Cir. 1993).
\(^{828}\) La. R.S. 51:1409(A).
\(^{829}\) Fassitt v. United T.V. Rental, Inc., 297 So.2d 283 (La. App. 4 Cir. 1974).
\(^{831}\) Pack v. Wise, 155 So.2d 909 (La. App. 3 Cir. 1963).
\(^{832}\) Id.
\(^{834}\) La. R.S. 6:966(E) (formerly La. R.S. 6:966(f)).
\(^{835}\) Act 646, effective August 15, 2003.
\(^{837}\) La. R.S. 6:965(B).
\(^{838}\) La. R.S. 10:9-629.
• Private or public sale of any goods in his possession or that have been voluntarily surrendered to him for purposes of sale, provided such sale is conducted in good faith and in a commercially reasonable manner. 839

• “Strict foreclosure” or retention of the collateral in full or partial discharge of obligation. 840

A client who does not want to surrender the secured property should not allow the creditor into his home or otherwise consent to repossession. If voluntary surrender is in the client’s interest, care should be taken to insure a full release (or maximum credit) for surrender so that a deficiency judgment will be barred. See Deficiency Judgments, infra at § 3.22.

The 2001 revisions include a change in the law regarding partial dation en paiements. Now, specific terms pertaining to the proposed dation and the proposed remaining deficiency must be explained to and consented to by a consumer debtor. 841 The creditor’s right to obtain a deficiency judgment is then governed by Chapter 9 of the Louisiana Commercial Laws rather than the Louisiana Deficiency Judgment Act. 842

Responsibility lies with the seizing creditor for all personal effects located inside seized collateral for only 72 hours following seizure. 843

If the secured party fails to comply with Article 9 procedures for selling or disposing of collateral, he may be enjoined or sued for damages caused by his wrongful actions. 844 There is no requirement in Article 9 that the debtor seek a preliminary injunction rather than a TRO. 845

3.20.2 Law for security agreements entered into on or after January 1, 2005

The following modifications to existing law were all enacted by Act 191 of the 2004 Regular Session. They govern security agreements entered into on or after January 1, 2005, provided that with respect to motor vehicles, the secured party seeking to utilize the new remedies to repossess a motor vehicle must include a notice in the security agreement that “Louisiana law permits repossession of motor vehicles without judicial process.” 846 A secured party for these purposes includes the lessor of a motor vehicle. 847

Financial institutions chartered under the laws of any state or the United States may use the new procedures. 848 The definition of “default” has been modified to mean non-payment of two consecutive payments or 60 days, whichever is shorter. 849

Under the new La. R.S. 6:966(E), which replaces 9:966(J), the secured party will have a right to a deficiency judgment.

842 Ford Motor Co. v. Melancon, 677 So.2d 145, 148 (La. App. 3 Cir. 1996).
843 La. R.S. 6:966(I).
848 La. R.S. 6:966(C).
The new procedures for seizure and disposition of collateral without previous citation and judgment following default apply even if the security agreement does not include a confession of judgment.\textsuperscript{850} The motor vehicle debtor will no longer be entitled to notice immediately prior to repossession if they have received a general notice of the secured party’s right to repossession upon default without further notice or judicial process.\textsuperscript{851} Within 3 days of repossessing collateral without judicial process, a secured party must file a “Notice of Repossession” with the recorder of mortgages and with an appropriate official (constable, marshal or sheriff) where the collateral is located.\textsuperscript{852}

A person repossessing collateral must obtain a repossession agent license.\textsuperscript{853} Previous case law regarding the prohibition on breach of peace has essentially been codified in La. R.S. 6:965(C)(1). This provision defines a breach of peace to include unauthorized entry into a closed dwelling, whether locked or unlocked, as well as repossession following oral protest against seizure of the collateral by the debtor.

Effective January 1, 2005, the owner of personal property located within seized collateral has 10 days to contact the secured party to demand its immediate return.\textsuperscript{854} After 30 days, the property is deemed abandoned and the secured party no longer responsible for it.\textsuperscript{855} It is unclear what the secured party’s rights and duties are between the 11th and 29th days.

Unlike under prior law, the collateral may also be sold at judicial sale.\textsuperscript{856}

3.21 EXECUTORY PROCESS

A debtor must assert defenses to executory process by injunction or suspensive appeal.\textsuperscript{857} If a suspensive appeal is filed, it must be taken within 15 days of the signing of the order of seizure, with security exceeding by one half the balance due on the debt.\textsuperscript{858} Unless the defect in the proceedings is apparent on the face of the pleadings, an injunction generally should be sought rather than a suspensive appeal so that affirmative defenses may be raised. However, if the injunction is denied, a devolutive appeal will not stop the sale from proceeding.

A temporary restraining order is unavailable for executory process involving immovable property, but the debtor may apply for a preliminary injunction under La. Code Civ. Proc. art. 3602.\textsuperscript{859} The grounds for the defense are itemized in art. 2751. The grounds for injunction without security listed in art. 2753 are useful but not exclusive.\textsuperscript{860} The sale may also be enjoined “if the procedure required by law for an executory proceeding has not been followed.”\textsuperscript{861} Thus, defects in authentic evidence or service may bar executory process.\textsuperscript{862} If a preliminary injunction

\textsuperscript{850} See La. R.S. 6:966(A).
\textsuperscript{851} Id. at (2).
\textsuperscript{852} La. R.S. 6:966.1.
\textsuperscript{853} La. R.S. 6:966(D).
\textsuperscript{854} La. R.S. 6:966(F).
\textsuperscript{855} Id.
\textsuperscript{856} La. R.S. 6:966(A)(1).
\textsuperscript{858} La. Code Civ. Proc. art. 2642.
\textsuperscript{861} La. Code Civ. Proc. art. 2751.
\textsuperscript{862} First Guaranty Bank, 529 So.2d 834; see also Ford Motor Credit Co. v. Savoie, 532 So.2d 820 (La. App. 4 Cir. 1988) (illegible signatures on mortgage invalidate executory process).
to enjoin the executory process is denied, a suspensive appeal of the order denying
the injunction does not suspend the executory process proceeding.\textsuperscript{863}

In general, when property has been sold under executory process after
appraisal and in accordance with statutory provisions governing appraisal, the
creditor may obtain a personal judgment against the mortgagor for any deficiency
remaining after the application of the net proceeds of sale to the secured debt.\textsuperscript{864}
Appraisals must be completed at least two days before the sale.\textsuperscript{865} Untimely
apraisals will deprive the creditor of his right to a deficiency judgment.\textsuperscript{866} For
more information on executory process, see generally Patrick S. Ottinger,\textit{ Enforce-

Seizure of property under executory process without authentic evidence will
give rise to a damages claim for wrongful seizure, and possibly a 42 U.S.C. § 1983
civil rights action.\textsuperscript{867} The creditor’s attorney may also be liable for damages.

\section*{3.22 DEFICIENCY JUDGMENTS}

\subsection*{3.22.1 Overview}

In assessing whether there is a defense to a deficiency judgment, one must
or federal common law applies. The applicable law will depend on the nature of
the transaction or repossession and the date of the security interest.

La. R.S. 10:9-601-24 governs deficiency judgments for security interests
under Article 9 of the UCC except to the extent that executory process is used.
The Deficiency Judgment Act, La. R.S. 13:4106 is limited to judicial sales of mort-
gaged property and does not apply to public or private sales subject to Article 9.
2771.

\subsection*{3.22.2 Repossession under La. R.S. 6:966}

Seizure under La. R.S. 6:966 does \textit{not} bar the recovery of a deficiency judg-
ment.\textsuperscript{868}

\subsection*{3.22.3 Repossession under Article 9 of the UCC - La. R.S. 10:9}

This subject is covered under Repossessions, \textit{supra} at § 3.20. See also James
A. Stuckey, \textit{Louisiana’s Non-uniform Variations in U.C.C. Chapter 9}, 62 LA. L. REV.
793 (2002).

\subsection*{3.22.4 Judicial Sales of Mortgaged Property - The Deficiency Judgment Act}

The Deficiency Judgment Act bars a deficiency judgment if mortgaged prop-
erty is judicially sold without appraisal.\textsuperscript{869} It only applies to sales of mortgaged
property by executory process and does not apply to sales pursuant to writs of
fieri facias.\textsuperscript{870}

\textsuperscript{863}United Companies v. Hall, 722 So.2d 48 (La. App. 1 Cir. 1998); Acme Mortgage Co., Inc. v. Cross, 464 So.2d 945, 946-
The Supreme Court’s decision in *First Guaranty Bank* significantly limited the situations in which a deficiency judgment will be barred. The lack of authentic evidence in executory process does not bar deficiency judgments. The debtor may only assert the lack of authentic evidence as a defense to executory process by injunction or through appeal of the sale.

*First Guaranty Bank* held that an appraisal in accordance with the law (La.Code Civ. Proc. art. 2723, La. R.S. 13:4363-65) is still a condition precedent for a deficiency judgment. To obtain a deficiency, a creditor must plead and prove that the property was sold after appraisal in accordance with codal and statutory laws. Several courts have held after *First Guaranty Bank* that a deficiency judgment will be barred unless there is strict or full compliance with the appraisal process.

However, two courts have held that only fundamental defects in the appraisal process will bar a deficiency judgment. *Citicorp Acceptance Co. v. Roussell* cites various examples of fundamental and non-fundamental defects:

- **Fundamental Defects:** *Citizens Bank of Ville Platte v. American Druggists Ins. Co.*, 471 So.2d 1119 (La. App. 3 Cir. 1985) (appointment of unqualified appraiser); *Ardoin v. Fontenot*, 374 So.2d 1273 (La. App. 3 Cir. 1979) (failure to describe property on appraisal form).
- **Non-fundamental Defects:** *American Bank & Trust Co. v. Bandaries*, 552 So.2d 621 (La. App. 2 Cir. 1989) (delayed judicial sale without notice to debtor); *Louisiana National Bank v. Laborde*, 527 So.2d 41, 44 (La. App. 3 Cir. 1988) (failure to type in the appraiser’s name in an appraisal form); for additional non-fundamental defects, see *Citicorp*, 601 So.2d at 355.

A creditor may not obtain a deficiency judgment against an original or the second of three mortgagors who was not made a party to the executory process and who did not receive notice to appoint an appraiser and notice of seizure.

### 3.23 REMISSION OF A DEBT

A secured party may tacitly or expressly remit a debt gratuitously, thereby extinguishing it. An obligee’s voluntary surrender to the obligor of the instrument evidencing the obligation gives rise to a presumption that the obligee intended to remit the debt. No consideration is required for remission of a debt. No particular form is required to establish a remission, but the obligor has

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872 Id. at 844; see also Security Homestead Fed. Savings Co. v. Ullo, 589 So.2d 5 (La. App. 5 Cir. 1991).
873 Ford Motor Credit Co. v. Savote, 532 So.2d 820 (La. App. 4 Cir. 1988).
874 529 So.2d at 844.
876 See, e.g., Echo v. Power Equip. Dist, 719 So.2d 79 (La. App. 1 Cir. 1998) (“The debtor protection policy of the Deficiency Judgment Act requires strict compliance with its provisions because the deficiency judgment is a harsh remedy.”); Samco Mortgage Corp v. Armstrong, 579 So.2d 521 (La. App. 4 Cir. 1991) (notice of private sale misled debtor as to right to appoint appraiser); Security Homestead, 589 So.2d at 5.
878 Jefferson Bank v. Bart Dev., 648 So.2d 989 (La. App. 5 Cir. 1994); Citizens Sav. & Loan Ass’n v. Kinchen, 588 So.2d 1214 (La. App. 1 Cir. 1991); see also Small Engine Shops, Inc. v. Cascio, 878 F.2d 883, 885 (5th Cir. 1989).
the burden of proving the remission.\textsuperscript{882} On the other hand, the obligee has the burden of proving that a remission was a mistake or unintentional.\textsuperscript{883} However, the release of a real security given for the performance of an obligation does not give rise to a presumption of remission of the debt.\textsuperscript{884}

### 3.24 HUSBAND-WIFE ISSUES

Husband-wife issues may provide relief for one spouse. Examples include:

- The failure to notify a spouse of the sale of community property voids the sale.\textsuperscript{885}
- Seizure of one spouse’s wages and income without prior notice to and joinder of the other spouse has been upheld, although there is some authority to the contrary.\textsuperscript{886}
- A mortgage executed on community property by one spouse alone is invalid.\textsuperscript{887} However, the underlying debt may still be enforceable against the community and can lead to the innocent spouse’s loss of her interests through seizure and sale.\textsuperscript{888} The innocent spouse may be able to protect her homestead exemption if she is the occupant.\textsuperscript{889} If the spouse’s signature was forged, she may sue her husband, the lender and notary for the notary’s negligence.\textsuperscript{890} A bank may be liable for damages if it fails to release a void mortgage.\textsuperscript{891} Effective August 15, 2004, “if the homestead is the separate property of one of the spouses, the homestead exemption may be waived by that spouse alone in any mortgage granted on the homestead, without the necessity of obtaining a waiver from the non-owning spouse.”\textsuperscript{892}
- Except in very limited circumstances set forth in La. Civil Code art. 2357, a non-debtor spouse may not be personally liable on a debt incurred by the other spouse.\textsuperscript{893}
- Credit cardholder could not be held liable for balance due on account when spouse forged his name on credit card because the presumption of community benefit does not apply to “[a]n obligation resulting from an intentional wrong not perpetrated for the benefit of the community.”\textsuperscript{894}

\begin{thebibliography}{9}
\bibitem{882} Simpson v. Goodman, 727 So.2d 555 (La. App. 1 Cir. 1998); Arledge v. Bell, 463 So.2d 856 (La. App. 2 Cir. 1985) (remission may occur by either oral declaration or in writing).
\bibitem{883} See United Cos. v. Falterm an, 656 So.2d 1090 (La. App. 5 Cir. 1995).
\bibitem{885} Magee v. Am iss, 502 So.2d 568, 572 (La. 1987) (the notice must meet the standards set forth in Mennonite Board of Missions v. Adams, 462 U.S. 791, 796-801 (1983)).
\bibitem{886} Price v. Secretary, Dept. of Revenue and Taxation, 664 So.2d 802 (La. App. 3 Cir. 1995); Hebert v. Unser, 593 So.2d 977 (La. App. 5 Cir. 1992); Kerico v. Doran Chevrolet, Inc., 572 So.2d 103 (La. App. 1 Cir. 1990); Shel-Boze, Inc. v. Melton, 509 So.2d 106 (La. App. 1 Cir. 1987); but see Jackson v. Galan, 868 F.2d 165 (5th Cir. 1989); Williams v. First Nat’l Bank of Commerce, USDC No. 79-3185 (E.D. La., Mar.11, 1981) (class action judgment that nonparty spouse must be served with petition and allowed legal delays before community property seized).
\bibitem{887} Bridges v. Bridges, 692 So.2d 1186 (La. App. 3 Cir. 1997); Webb v. Pioneer Bank & Trust Co., 530 So.2d 115 (La. App. 2 Cir. 1988).
\bibitem{888} Webb, 530 So.2d at 118.
\bibitem{889} Exemptions, infra at § 4.2.
\bibitem{890} id. at 118-19.
\bibitem{891} Coburn v. Commercial National Bank, 453 So.2d 597 (La. App. 2 Cir. 1984).
\bibitem{893} Finance One v. Barton, 769 So.2d 739 (La. App. 1 Cir. 2000); Tri-State Bank And Trust v. Moore, 609 So.2d 1091 (La. App. 2 Cir. 1992); Lawson v. Lawson, 535 So.2d 851 (La. App. 2 Cir. 1988).
\bibitem{894} First Nat’l Bank of Commerce v. Ordoyne, 528 So.2d 1068 (La. App. 5 Cir. 1988).
\end{thebibliography}
• A bankruptcy discharge preventing recovery of the debtor’s community property acquired after the commencement of the case also protects the non-debtor spouse’s interest in the same property.  

3.25 CREDITOR’S ATTORNEY FEES

Contractual attorney fees may be challenged as unreasonable. Under certain attorney fee statutes, a creditor’s fee claim must be denied if his demand notice erroneously states the debt amount. Also in a suit on an open account, the plaintiff has the burden of proving its entitlement to attorney fees under La. R.S. 9:2781 by proof of either the defendant’s receipt of written demand or proof that plaintiff exercised due diligence in attempting delivery of the written demand. In general, statutes authorizing awards of attorney fees must be strictly construed because of their penal nature.

3.26 DEFAULT JUDGMENTS

Many clients do not consult an attorney until after a default judgment has been entered. Fortunately, Louisiana has very liberal procedures for nullifying default judgments for lack of jurisdiction, service of process, fraud or ill practices. The “fraud or ill practices” grounds in Code Civ. Proc. art. 2004 are generally the most helpful. “Ill practice” has been broadly defined as any improper practice or procedure which operates, even innocently, to deprive a litigant of some legal rights.

Louisiana courts have even allowed nullifications of judgments where the defendant was served and failed to appear if the plaintiff had no cause of action. The two criteria used to determine whether a judgment has been obtained by actionable fraud or ill practices are: (1) when the circumstances under which the judgment was rendered show the deprivation of legal rights of the litigant who seeks relief, and (2) when the enforcement of the judgment would be unconscionable and inequitable. A lawsuit or judgment on a nonexistent cause of action may even subject the plaintiff to liability under the Unfair Trade Practices Act.

Always check to see if notice of judgment was sent to a defendant who was defaulted. If there was no notice of judgment, a motion for new trial or appeal may be available since the legal delays for those post-judgment remedies generally don’t commence until there has been a notice of judgment. A new trial must be granted for peremptory grounds such as the judgment is contrary to the law and evidence or for discretionary grounds if there is a good ground for a new trial.

896 See, e.g., Central Progressive Bank v. Bradley, 502 So.2d 1017 (La. 1987); Discover Bank v. Rusher, 53 So.3d 651 (La. App. 4 Cir. 2010) (attorney fees reduced from $4,585 to $1,000 in simple suit on open account).
898 Jefferson Door Co. v. Lewis, 713 So.2d 835, 837 (La. App. 5 Cir. 1998).
899 Frank L. Beier Radio, 449 So.2d at 1015-16.
903 Id.
904 Argence LLC v. Box Opportunities, 980 So.2d 786 (La. App. 4 Cir. 2008).
Also, an appeal may be an effective remedy if the creditor failed to prove a prima facie case by competent evidence. Default judgments are often reversed for the plaintiff’s failure to prove its case by competent evidence.

3.27 SCHOOL LOAN DEFENSES

School loan law is the subject of an entire volume published by NCLC, but defense issues will be briefly summarized below. Because remedies vary with the type of loan, advocates should determine what type the client has. See www.nslds.ed.gov or call (800) 433-3243 for a central database on student aid.

3.27.1 Fair Debt Collection Practices Act

The Federal Fair Debt Collection Practices Act (FDCPA) is the key statute offering students protection from debt collection harassment. It does not, however, apply to any officer or employee of the United States or any state to the extent that their activities are in the performance of their official duties. Nor does it apply to creditors themselves, such as a lender who has not yet turned a Federal Family Educational Loan over to a guarantor or where a school’s in-house staff is collecting on a Perkins Loan. The Act covers third party collection agencies, and should also cover private guaranty agencies, such as USA Funds.

While the FDCPA is covered elsewhere in this manual, there are some abusive collection practices which are unique to the student loan area.

3.27.2 Closed School Discharge

The Secretary shall discharge most types of student loans if the borrower was unable to complete the program due to the school’s closure while he was enrolled. Closure within 90 days of the student’s withdrawal will also be covered; this period can be extended by the Secretary. A school’s closure date is usually the date when it ceases offering all programs at a particular branch, not just the program in which the student is enrolled. For a list of school closure dates in Louisiana, contact the Collections Section of the Louisiana Department of Justice.

3.27.3 False Certification Discharge

False certification of ability to benefit from the school’s program may be a basis for discharge of the loan, depending on the type of loan and the nature of the falsity. Proof of false certification may require more than the borrower’s own statement to that effect.

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906 Arias v. Stolthaven New Orleans LLC, 9 So.3d 815 (La. 2009) (inadmissible evidence will not support a default judgment). Moore Finance Co., Inc. v. Ebarb, 70 So.3d 856 (La. App. 2 Cir. 2011) (default judgment reversed on appeal because affidavit did not make a prima facie case for suit on promissory note—creditor’s affidavit failed to state that debtor had failed to pay debt).

907 NCLC, STUDENT LOAN LAW (4th ed. 2010). In addition, a helpful article may be found at 37 Clearinghouse Review 583 (March-April 2004).


909 15 U.S.C. §§ 1692a(6). The United States, however, may be subject to suit under other laws, such as the Federal Tort Claims Act or the Privacy Act. See the most recent NCLC volume on Fair Debt Collection.

910 Id.

911 Rowe v. Educational Credit Mgt. Corp., 559 F.3d 1028 (9th Cir. 2009); Brannan v. United States Aid Funds, 94 F.3d 120 (9th Cir. 1996); Murungi v. Texas Guaranteed, 693 F.Supp.2d 597 (E.D.La. 2010) aff’d 402 Fed Appx. 849 (5th Cir. 2010) (guaranty agency not a debt collector under FDCPA where collection is incidental to bona fide fiduciary obligation; see also Murungi v. Texas Guaranteed, 646 F.Supp.2d 804 (E.D.La. 2009) (guaranty agency not a debt collector where it acquired loan before it was placed in default).

912 See NCLC, STUDENT LOAN LAW §§ 7.4 (4th ed. 2010).


915 Id.

3.27.4 General Contract Law Defenses

Contract law defenses such as fraud, error, failure of consideration, and unconscionability, may be available to the debtor.\textsuperscript{917} For example, infancy can be raised as a defense to dispute private loans but not Perkins loans.\textsuperscript{918} Courts have, however, held that an unsatisfactory education does not constitute lack of consideration because the student receives the funds in exchange for a promise to pay it back.\textsuperscript{919}

For more information on state law claims such as unfair trade practice violations, see generally NCLC, \textit{Student Loan Law} § 7.4 (4th ed. 2010).

For more information on raising defenses when federal Family Education Loans have lost their guaranteed status, see generally NCLC, \textit{Student Loan Law} § 7.5.4.3 (4th ed. 2010).

For more information on raising defenses after a loan has been consolidated, see generally NCLC, \textit{Student Loan Law} § 7.5.4.4 (4th ed. 2010).

3.27.5 Discharge Based on Disability

Generally, if the borrower becomes permanently and totally disabled, payment on her loan will be excused.\textsuperscript{920} The regulations regarding disability discharge have changed several times, most recently in 2010. For a discussion of the changes, see NCLC, \textit{Student Loan Law} § 9.7.4.1 (4th ed. 2010).

3.27.6 Discharge in Bankruptcy

A student loan may be discharged in bankruptcy only if the debtor can show that repayment would impose an "undue hardship on the debtor and the debtor’s dependents."\textsuperscript{921}

3.27.7 Prescription

The Higher Education Technical Amendments of 1991 eliminated all statutes of limitations for any collection action by a school, guaranty agency, or the United States under a federal loan program.\textsuperscript{922} For non-federal program loans, a suit on a promissory note evidencing the loan must be brought within five years.\textsuperscript{923} Laches does not apply to federal collection efforts on these loans.\textsuperscript{924}

3.27.8 Tax Refund Intercepts

Tax refund interception is the major technique used to collect on defaulted student loans.\textsuperscript{925} Even amounts owed to the borrower as Earned Income Tax Credits may be intercepted (except to the extent, if any, that they are paid during the year earned). There is no statute of limitation applicable to this technique. A non-debtor spouse may file an injured spouse claim to get her portion of the tax refund. See \textit{Tax Law for Legal Services and Pro Bono Attorneys}, § 9.2, infra.

While harsh, interception may be preferable to permitting the account to be turned over to a collection agency, where a large portion of voluntary payments go to collection fees, or to consolidating a loan, which results in 18.5% collection fees.\textsuperscript{926}

\textsuperscript{917} Id. at § 7.5.4.1.
\textsuperscript{918} Id.
\textsuperscript{919} See, e.g., U.S. v. Durbin 64 F.Supp. 2d 635 (S.D. Tex. 1999).
\textsuperscript{920} 20 U.S.C. § 1087(a); see generally NCLC, \textit{Student Loan Law} § 9.7 (4th ed. 2010).
\textsuperscript{921} 11 U.S.C. § 523(a)(8); see also NCLC, \textit{Student Loan Law} ch. 10 (4th ed. 2010).
\textsuperscript{922} 20 U.S.C. § 1092a.
\textsuperscript{923} See, e.g., Governor’s Sp. Com’ns Educ. v. Dear, 532 So.2d 902 (La. App. 5 Cir. 1988).
\textsuperscript{925} Authorized by 31 U.S.C. § 3720A.
\textsuperscript{926} See generally NCLC, \textit{Student Loan Law} 8.1, 8.2 (4th ed. 2010).
3.27.9 Administrative Offset of Benefits

Federal agencies may recover money owed on student loans by offsetting a debtor's social security benefits. There is no statute of limitation on the offset of Social Security benefits to pay a student loan. However, the first $9,000 of Social Security benefits per year are exempt and offset is limited to 15% of the benefit.

3.27.10 Rescheduling Loan Payments

There are seven different ways for students to reschedule their payments: deferments, forbearance, loan consolidation, repayment plans, guaranty agency compromise, Department compromise, and Chapter 13 bankruptcy.

3.28 LOAN CONSOLIDATION ISSUES

Loan consolidation constitutes a new extension of credit and is subject to all the possible claims and defenses applicable to original loans discussed above in this manual. In some cases, the consolidation may change the nature of the debt for certain purposes.

3.29 WORTHLESS CHECKS

There are three parties to a check (negotiable instrument): the person who writes the check is the “drawer”; the bank on which the check is written is the “drawee”; and the person or entity to whom the check is written is the “payee”. If the check is dishonored due to insufficient or non-sufficient funds, “NSF”, then the payee becomes the creditor of the drawer for the debt owed. Creditors have a civil remedy and a criminal remedy which they may pursue.

3.29.1 Civil Remedy

The creditor must first make written demand for payment by certified or registered mail. If the drawer fails to pay within 15 working days after receipt of such demand, then the creditor may sue the drawer in a civil action for damages of twice the amount owed, but in no case less than $100, plus attorney fees and court costs. An example of a written demand is set forth at La. R. S. 9:2782(C).

Whenever any check is written, and the bank having the account refuses to pay the check, such refusal shall be prima facie evidence that at the time the check was presented for payment, the drawer did not have the money in the bank to pay the check.

The payee or holder is also allowed to charge a service charge of $25 or 5% of the face amount of the check, whichever is greater. The payee must post the amount of the service charge in a convenient and conspicuous place on its business premises where a person entering the location will see it.
Pursuant to Louisiana’s commercial laws which govern banking activity, the consumer’s obligation to pay these checks may not be enforced unless the consumer is given notice of dishonor of the instrument, or notice of dishonor is excused.\(^{936}\)

Notice of dishonor may be given by any person, by any commercially reasonable means, and is sufficient if it reasonably identifies the instrument and indicates that the instrument has been dishonored or has not been paid or accepted.\(^{937}\)

Return of an instrument given to a bank for collection is sufficient notice of dishonor.\(^{938}\)

### 3.29.2 Criminal Remedy

Writing worthless checks is a crime pursuant to La. R.S. 14:71, which defines issuing of worthless checks as “the issuing, in exchange for anything of value, whether the exchange is contemporaneous or not, with intent to defraud, of any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time of the issuing that the offender has not sufficient credit with the bank, or other depository for the payment of such check, draft, or order in full upon its presentation.”\(^{939}\)

Failure to pay the instrument within ten days after notice of its nonpayment, upon presentation by certified mail to the drawer, either at the address shown on the instrument or the last known address for such person shown on the records of the bank, or within ten days after delivery or personal tender of the written notice, shall be presumptive evidence of the intent to defraud.\(^{939}\)

When the offender has issued more than one worthless check within a 180-day period, the amounts of all the worthless checks issued during that 180-day period may be added together to determine the grade of the offense.\(^{940}\)

When the amount of the checks are $500 or more, the offender shall be imprisoned, with or without hard labor, for not more than 10 years, or may be fined not more than $3,000, or both.\(^{941}\)

Because the punishment for issuing worthless checks includes imprisonment at hard labor, this crime is classified as a felony.\(^{942}\)

### 4. Exemptions

#### 4.1 Overview

Often, an indigent’s income and assets are exempt from seizure. Exemption planning and litigation, if necessary, may protect income and assets that are essential for the indigent’s subsistence. Available exemptions are listed below.

#### 4.2 Exemptions

1. **Homestead.** The homestead is exempt from seizure and sale for an amount up to $35,000 of its net equity.\(^{943}\) A mobile home may qualify as a homestead even if the owner does not own the underlying land.\(^{945}\)

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\(^{936}\) See La. R.S. 10:3-502.

\(^{937}\) See Haik v. Rowley, 377 So.2d 391 (La. App. 4 Cir. 1979).

\(^{938}\) Bollich v. La. Bank & Trust Co., 271 So.2d 274 (La.App. 3 Cir. 1972).

\(^{939}\) La.R.S. 14:71(A)(2).

\(^{940}\) La.R.S. 14:71(F).

\(^{941}\) La.R.S. 14:71(D).

\(^{942}\) La.R.S. 14:2(4).

\(^{943}\) La. R.S. 20:1(A)(1) (Homestead is defined as “a residence occupied by the owner and the land on which the residence is located, including any building and appurtenances located thereon, and any contiguous tracts up to a total of five acres if the residence is within a municipality, or up to a total of two hundred acres of land if the residence is not located in a municipality.”).


\(^{945}\) In re Baker, 71 B.R. 312 (Bankr. W.D. La. 1987).
tion does not apply to all debts. Examples of debts excluded from its protection are debts for the purchase price of property, labor or materials furnished to construct or repair of the homestead, taxes and restitution for certain crimes.\textsuperscript{946} Also, if the homeowner is in bankruptcy and has recently moved to Louisiana, another state’s law may govern the exemption of a homestead.\textsuperscript{947} 

a. If the obligations arise directly as a result of a catastrophic or terminal illness or injury, the exemption shall apply to the full value of the homestead based upon its value one year before such seizure.\textsuperscript{948} The debtor must show exactly how the funds were used to qualify for this exception.\textsuperscript{949} 

b. Under current law, the homestead exemption is not available to co-owners other than spouses and their children. A surviving spouse is eligible for a homestead exemption if she has any interest in the property, including a usufruct.\textsuperscript{950} Property co-owned by siblings or unrelated persons, such as co-habiting couple, will not be protected by the homestead exemption.\textsuperscript{951} 

c. Absent a valid homestead waiver, junior mortgage and judgment creditors cannot judicially sell a homestead unless the net equity exceeds $35,000.\textsuperscript{952} 

d. A homestead waiver signed only by one spouse is not effective as to the non-signing spouse.\textsuperscript{953} The exception to this rule is where the homestead is the separate property of the signing spouse. Such waivers shall be recorded in the mortgage records of the parish where the homestead is situated and are effective from the time of recording.\textsuperscript{954} 

e. Where spouses are separated, the owner-occupant may be able to claim the entire $35,000.\textsuperscript{955} 

f. Temporary absence does not constitute abandonment. Abandonment is a question of intent and is not to be presumed, and even a temporary absence does not create a presumption.\textsuperscript{956} The burden of proof is on party alleging abandonment, and dual residency does not constitute abandonment.\textsuperscript{957} To protect the homestead, the owner should claim the homestead exemption at the time of seizure and sale or when the sale proceeds are still with the sheriff or purchaser at sale.\textsuperscript{958}
g. The homestead exemption extends to the proceeds of insurance payments and the proceeds of sales.

h. A related law, La. R.S. 13: 3851.1, prohibits seizure of homesteads for credit card debt during the debtor’s life or until he transfers his homestead.

2. Usufruct. The parental usufruct on minor child’s property is exempt. Other usufructs generally are not exempt.

3. Earnings. 75% of disposable earnings per week, but not less than 30 times the federal minimum hourly wage (or $217.50 per week) is exempt. Termination of employment does not change the exempt character of wages. Self-employment income may also be exempt up to 75% of disposable earnings. Wages paid as damages in a personal injury suit may not be exempt. Also, wages deposited into a bank account may lose exemption from seizure.

4. Federal earned income tax credit. This tax credit is exempt except for seizure by the Department of Revenue for arrears in child support payments. However, the child care tax credit portion of the tax refund is not exempt.

5. Motor Vehicle. One motor vehicle per household is exempt up to $7,500 in equity value. The equity value of the motor vehicle is based on the NADA retail value of the particular year, make and model. The only additional vehicle that may be exempted is one modified to adapt its use to the physical disability of the debtor or his family and is used for transportation of the disabled person. An additional vehicle may not qualify for exemption as a tool of the trade.

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961 “Parents have during marriage the enjoyment of the property of their children until their majority or emancipation.” La. Civ. Code Ann. art. 223 (2010).
963 Keys v. Box, 476 So.2d 1141 (La. App. 3 Cir. 1985).
964 “Disposable earnings” means that part of the earning of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld and which amounts are reasonable and are being deducted in the usual course of business at the time the garnishment is served.
965 29 U.S.C. § 206(a)(1)(C) (federal hourly minimum wage is $7.25 per hour).
967 Laurencic v. Jones, 180 So.2d 803 (La. App. 4 Cir. 1965).
969 Matter of Wischan, 77 F.3d 875 (5th Cir. 1996).
970 In re Sinclair, 417 F.3d 527 (5th Cir. 2005). Many states’ laws protect exempt wages from seizure when deposited in a bank account. However, current Louisiana law does not.
975 In re Belsome, 434 F.3d 774 (5th Cir. 2005).
6. Household Goods and Personal Items. Certain household goods are exempt without any value limitation on the amount of the exemption. Even some “luxury” items, such as antique furniture, may be exempt. Wedding or engagement rings up to $5,000 in value are exempt.

**Note:** non-possessor security interests in household goods other than a purchase money security interest are illegal under the FTC Credit Practices Rule, 16 C.F.R. § 444.2(a)(4) (2011).

7. Tools of Trade. Property used in the exercise of a profession by which one earns one’s livelihood is exempt.

8. Educational Assistance Funds. GSL loans, Pell grants or other forms of educational assistance should be exempt from seizure even though the law does not expressly exempt such funds from garnishment. The Higher Education Act, 20 U.S.C. § 1001 et seq., imposes criminal penalties when GSL funds are used for non-educational purposes, and so it can be argued that these funds are exempt from seizure.


17. State Retirement Benefits. The retirement Benefits of Louisiana teachers, school lunch employees, firefighters, police state employees, and tax assessors other state employees are exempt. La. R.S. 17:1233


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979 See, e.g., Mexic v. Mexic, 634 So.2d 18 (La. App. 1 Cir. 1994).
982 See, e.g., Oubre v. Hinchman, 365 So.2d 17 (La. App. 4 Cir. 1978); Bank of Louisiana v. Nash, 360 So.2d 259 (La. App. 4 Cir. 1978).
983 See, e.g., Obre v. Hinchman, 365 So.2d 17 (La. App. 4 Cir. 1978).
984 See, e.g., Mexic v. Mexic, 634 So.2d 18 (La. App. 1 Cir. 1994).
986 See, e.g., Mexic v. Mexic, 634 So.2d 18 (La. App. 1 Cir. 1994).
987 See, e.g., Obre v. Hinchman, 365 So.2d 17 (La. App. 4 Cir. 1978).
989 See, e.g., Azeez v. Hinchman, 365 So.2d 17 (La. App. 4 Cir. 1978).
991 See, e.g., Mexic v. Mexic, 634 So.2d 18 (La. App. 1 Cir. 1994).
993 See, e.g., Obre v. Hinchman, 365 So.2d 17 (La. App. 4 Cir. 1978).
994 See, e.g., Mexic v. Mexic, 634 So.2d 18 (La. App. 1 Cir. 1994).
22. Retirement, disability, and death funds of certain federal civil service employees.

4.3 EXEMPT FUNDS DEPOSITED IN BANK ACCOUNT
Social Security benefits and veteran’s benefits deposited in bank accounts remain exempt from garnishment. Other exempt funds, such as retirement benefits, educational assistance funds, wages, and homestead proceeds retain their exempt status when deposited in a bank account so long as the source of funds is traceable. Care should be taken not to commingle exempt and nonexempt funds. However, cash is not exempt in Louisiana, and this can create serious problems for debtors in protecting otherwise exempt income.

31 C.F.R. § 212.1 et seq. (Feb. 23, 2011) requires banks to recognize exemption from seizure of any remaining portion of the past two months’ electronic deposits from Social Security, SSI, veterans benefits, Railroad Retirement, Railroad Unemployment and Federal Employee Retirement. Garnishment or offset orders from the federal government (e.g., taxes, federally guaranteed loans) or state child support enforcement agencies are limited by this rule. A protected amount calculated and established by a bank pursuant to 31 C.F.R. § 212.6 is conclusively considered to be exempt from seizure.

4.4 HOW TO PROTECT THE EXEMPTION
If a debtor’s exempt property is seized, a motion or summary proceeding for the release of the exempt funds should be filed. In most cases, the creditor’s attorney should quickly agree to release exempt funds without litigation in order to avoid damages for wrongful seizure.

The debtor may also enjoin the sale of exempt property or property wrongfully seized. The injunction petition should fully allege the facts which establish the right to the exemption. Property may not be sold if the price is not sufficient to cover sales costs, applicable homestead exemption and mortgages superior to that of the seizing creditor. The homestead exemption should always be claimed at the time of the seizure and sale or when the sale proceeds are still with the sheriff or purchaser at sale.

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991 Welfare recipients who receive homestead proceeds from a sale should be advised of the impact of their welfare benefits and options for minimizing the same. See e.g., In re Sinclair, 417 F.3d 527 (5th Cir. 2006).
993 See, e.g., Belle v. Chase, 468 So.2d 744 (La. App. 5 Cir. 1985).
995 Holmes v. Bordelon, 40 So.2d 816 (La. App. 2 Cir. 1949).
4.5 DAMAGES FOR WRONGFUL SEIZURE

Damages and attorney’s fees are generally available for wrongful seizures. A wrongful seizure may also be an actionable unfair trade practice. Enhanced damages, including treble damages, may be available if the wrongful seizure is an unfair trade practice.

Many seizures are wrongful. Some examples include:

- Seizures under executory process where there is a lack of authentic evidence. Bank of New York Mellon v. Smith, 71 So.3d 1034 (La. App. 3 Cir. 2011) writ denied 75 So.3d 462 (La. 2011).
- Seizure of a spouse’s separate property. See, e.g., Ford Motor Credit Co. v. Corbello, 482 So.2d 203 (La. App. 3 Cir. 1986); Bryant v. Sears Consumer Financial, 617 So.2d 1191 (La. App. 3 Cir. 1993).

5. ARBITRATION AGREEMENTS

5.1 INTRODUCTION

Arbitration may be governed by the Federal Arbitration Act or the Louisiana Binding Arbitration Act. These laws are very similar. Section 2 of the Federal Arbitration Act on the enforceability of arbitration agreements preempts state law as to transactions affecting commerce. Courts rarely find that a consumer transaction, even a local transaction, does not affect interstate commerce. Thus, the Federal Arbitration Act will apply to most consumer transactions. Courts must enforce the Federal Arbitration Act with respect to all arbitration agreements covered by that statute. There are some federal statutory exceptions to the Federal Arbitration Act which prohibit arbitration. For example, no residential mortgage loan and no extension of credit under an open end consumer

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999 La. Code Civ. Proc. art. 2298; see, e.g., Houma Mortg. v. Marshall, 664 So.2d 1199 (La. App. 1 Cir. 1995); Mihalogianakis v. Jones, 563 So.2d 306 (La. App. 4 Cir. 1990) (damages and costs awarded for wrongful garnishment); Ogg v. Ferguson, 521 So.2d 525 (La. App. 4 Cir. 1988) (damages and attorney fees awarded for seizure of wrong property); Belle v. Chase, 468 So.2d 744 (La. App. 5 Cir. 1985) (damages and attorney fees awarded for seizure of exempt property).

1000 See e.g., Bryant v. Sears Consumer Financial Corp., 617 So.2d 1191 (La. App. 3 Cir. 1993) writ denied 619 So.2d 533 (La. 1993).


1002 See e.g., FIA Card Services, N.A. v. Weaver, 62 So.3d 709 (La. 2011).


credit plan secured by a consumer’s principal dwelling may include terms that require arbitration. The courts are sharply divided on whether the Magnuson-Moss Act prohibits arbitration of warranty claims. However, a Louisiana court has held that the Magnuson-Moss Act does not prohibit arbitration.

5.2 AN AGREEMENT TO ARBITRATE IS REQUIRED

Arbitration is a matter of contract. Some parties may not be bound by arbitration if they did not sign the agreement or lacked capacity. A party can’t be required to submit to arbitration unless he has agreed to arbitration. Debt buyers often can’t prove an arbitration agreement by competent evidence.

5.3 WHEN CAN ARBITRATION BE CONTESTED?

Whether arbitration is required focuses on three questions: (1) was an arbitration agreement formed, (2) is the agreement valid and enforceable and (3) is the dispute or issue within the scope of the agreement. The court must determine whether an issue is referable to arbitration under a written arbitration agreement. If the issue is referable or arbitrable, a court should stay the lawsuit. If an issue is not referable, the court should allow the non-referable issue(s) to proceed in the lawsuit. The parties may have to conduct separate arbitration and judicial proceedings if arbitrable and non-arbitrable claims exist. An order compelling arbitration is an interlocutory judgment and may be reviewed in an application for supervisory writs.

The proponent of arbitration has the burden of proof that there is an agreement to arbitrate. Whether an agreement to arbitrate was formed is always determined by the courts, if the issue is timely and properly raised. The other gateway issues of “arbitrability” under the Federal Arbitration Act are the enforceability of the arbitration agreement and whether it applies to the dispute at issue. The enforceability and applicability of the arbitration agreement are determined by the court unless there is clear and unmistakable evidence that the parties intended for these arbitrability issues to be arbitrated. An arbitration award is not judicially enforceable if the agreement to arbitrate is invalid or can’t be proved.

1006 15 U.S.C. § 1639e(e)(1). Sarbanes-Oxley whistleblower actions are also excluded from arbitration. 18 U.S.C. § 1514A.

1007 Howell v. Cappaert Manufacturing Housing, Inc., 819 So.2d 461 (La. App. 2 Cir. 2002) (writ denied 827 So.2d 1161 (La. 2002)(S-2); see also Walton v. Rose Mobile Homes, LLC, 298 F.3d 470 (5th Cir. 2002)(2-1).

1008 Prasard v. Bullard, 51 So.3d 35 (La. App. 5 Cir. 2010) (absent piercing of the corporate veil, non-signatory member of LLC was not bound by arbitration agreement signed by consumer and the LLC); Snyder v. Belmont Homes, Inc., 899 So.2d 57, 64 (La. App. 1 Cir. 2005), writ denied 904 So.2d 699 (La. 2005) (child’s claim not bound by arbitration since child is not bound by arbitration clause signed by parents); but see Hansford v. Cappaert Manufactured Housing, 911 So.2d 901, 905 (La. App. 2 Cir. 2005) (husband’s signature to arbitration agreement could bind wife to arbitration).


1013 See e.g., KPMG LLP v. Cocchi, 132 S. Ct. 23 (2011); Bolden v. FedEx Ground Package System, Inc., 60 So.3d 679 (La. App. 4 Cir. 2011).

1014 Collins, 752 So.2d 825, 829 (La. 2000); Bolden v. FedEx Ground Package System, Inc., 60 So.3d 679, 681-83 (La. App. 4 Cir. 2011).

1015 FIA Card Services, N.A. v. Weaver, 62 So.3d 709 (La. 2011).


1018 FIA Card Services, N.A. v. Weaver, 62 So.3d 709 (La. 2011).
The formation and enforceability of an arbitration agreement is determined by state law contract principles such as fraud, duress, error, unconscionability, adhesion, etc.\textsuperscript{1019} However, the state law defense is preempted by the Federal Arbitration Act if it applies only to arbitration or derives its meaning from the fact that an agreement to arbitrate is at issue.\textsuperscript{1020} Also, if a party challenges the entire contract as invalid under state law for fraudulent or unlawful provisions, the Federal Arbitration Act requires that the challenge be arbitrated.\textsuperscript{1021}

An arbitration agreement may not exist if the underlying contract was validly cancelled.\textsuperscript{1022} Arbitration provisions which restrict the arbitrator’s power to award relief afforded by a federal or state statute may be unlawful.\textsuperscript{1023} In some cases, tort and statutory claims may exceed the scope of an arbitration agreement or an arbitrator’s authority.\textsuperscript{1024} However, the Louisiana Supreme Court has expressed the view that unless otherwise limited by the parties’ contract or the rules of the specific arbitral tribunal, arbitrators have the power to render relief to the full extent provided by law and equity.\textsuperscript{1025} An arbitration agreement that shortens the statute of limitations may be unconscionable and unenforceable.\textsuperscript{1026}

\section{5.4 THE COSTS OF ARBITRATION—REMEDIES FOR AN INDIGENT CONSUMER?}

Arbitration can be prohibitively expensive for indigent litigants and may subject them to sanctions for failure to pay.\textsuperscript{1027} Excessive arbitration filing fees may render an arbitration clause unenforceable due to unconscionability if the fees prevent the indigent from having his claims or defenses heard in the arbitral forum.\textsuperscript{1028} Currently, Louisiana does not have a statute that regulates waiver of filing and arbitrator fees for indigents. So, an indigent litigant may have to seek a court ruling that the arbitration clause is unenforceable if the opposing party won’t pay the arbitration fees or the arbitration agency and arbitrators won’t waive their fees. Another alternative is to ask the opposing party to waive arbitration and resolve the matter by litigation or by submission of the case to a cheaper arbitration company. To present a case for unenforceability due to your client’s indigency, you should immediately explore these alternatives.


\textsuperscript{1020}AT & T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

\textsuperscript{1021}Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006).

\textsuperscript{1022}Johnson v. Blue Haven Pools of Louisiana, Inc., 928 So.2d 594 (La. App. 1 Cir. 2006).


\textsuperscript{1025}Hodges v. Reasonover, 103 So.3d 1069 (La. 2012)(depending on agreement, parties have same rights and remedies as if case were being heard in state court). But see concern expressed in Justice Weimer’s concurring opinion if an “action” is required to prevent peremption. Id. id.

\textsuperscript{1026}Pitts v. Watkins, 905 So.2d 553 (Miss. 2005).

\textsuperscript{1027}Financial inability to pay arbitration fees is a defense to a contempt action for failure to pay these fees. See La. R.S. 13: 4206. Cf, Turner v. Rogers, 564 U.S. ___, 131 S.Ct. 2507 (2011)(financial inability is defense to contempt).

\textsuperscript{1028}Green Tree Fin. Corp. v. Randolph, 513 U.S. 79, 90 (2000) (arbitration agreement unenforceable if large arbitration costs preclude party from effective vindication of rights); Hodges v. Reasonover, 103 So.3d 1069 (La. 2012); Murphy v. Mid-West Natl. Life Ins. Co. of Tennessee, 78 P.3d 766 (Idaho 2003)($2,500 in fees for claim under $10,000 made arbitration agreement unenforceable).
It is a myth that arbitration is cheaper than litigation. The arbitration fees can substantially exceed the costs of a judicial lawsuit. Initial filing fees in consumer cases often range from $375 to more than $2,000. The hourly rates for arbitrators can be $375 or higher. In some cases, the parties may have to conduct separate arbitration and judicial proceedings if arbitrable and non-arbitrable claims exist. If the losing party in arbitration does not pay, the prevailing party must file a lawsuit to confirm the arbitration award, thereby incurring additional court fees.

The Louisiana Attorney General has ruled that a consumer credit extender may not use an arbitration clause where the arbitration costs to the consumer exceed those allowable under the Louisiana Consumer Credit Law.

5.5 OTHER WAYS TO CONTEST ARBITRATION
A bankruptcy court may decline to compel arbitration when the proceeding derives exclusively from the Bankruptcy Code. Mandatory arbitration clauses in contracts of insurance are prohibited by statute. This even applies to a federally reinsured crop insurance policy. The right to arbitrate may be waived by a party’s litigation conduct.

5.6 ENFORCEMENT OF ARBITRATION CLAUSES
If one party fails to pay its arbitration filing fees or costs, the Louisiana arbitration statute allows the other party to remove the case to a court. In a case of refusal or failure to arbitrate, the Federal Arbitration Act directs the court to compel arbitration. Federal and state law both provide a right to a jury trial on the issue of whether the arbitration agreement is enforceable.

5.7 VACATUR AND JUDICIAL REVIEW
Judicial review of arbitration awards is limited. The arbitration statutes only provide for (1) a motion to modify, correct or vacate the arbitration award on certain grounds and (2) defense of a suit to confirm an arbitration award if there is a challenge to the existence or enforceability of the award. Generally, the grounds for vacatur are limited to corruption, fraud, arbitrator misconduct in the hearing or cases where the arbitrator was biased or exceeded his powers. The arbitration statutes do not provide grounds to appeal or vacate an arbitration award on its merits. However, some courts allow a narrow review for manifest disregard of the law.

A party dissatisfied with the arbitration award should immediately file a motion to modify, vacate or correct if statutory grounds for review exist. The deadlines for these motions are 90 days under the Federal Arbitration Act and 3

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1029 The 2012 hourly rate for Southeast Louisiana MAPS arbitrators is $375.
1032 In re Gandy, 299 F.3d 489, 495 (5th Cir. 2002).
1033 Hobbs v. IGF Insurance Co., 834 So.2d 1069 (La. App. 3 Cir. 2002).
1035 La. R.S. 9: 4203 (E).
1038 9 U.S.C. §§ 10-11; La. R.S. 9: 4210-11; see e.g., Napolitano v. Gill, 88 So.3d 446 (La. 2012) (improper exclusion of witness testimony may be grounds for judicial review).
1040 Webb v. Massiha, 993 So.2d 345 (La. App. 5 Cir. 2008), writ denied 990 So.2d 780, 781 (La. 2009).
1041 A denial of a claimant’s claim can be the subject of a motion to vacate. See Major League Baseball Players Ass’n v. Garvey, 532 U.S. 504 (2001).
months under the Louisiana Binding Arbitration Act. Generally, the vacatur motion is filed in state court, even if the FAA applies to the consumer transaction, unless there is independent federal subject matter jurisdiction for the motion.

Statutory grounds to vacate may be raised in response to a suit for confirmation if they are raised within the statutory deadlines for motions to vacate. The statutes say that the motion must be "served" within the 90 day (federal) or 3 month (Louisiana) delay period. Many creditors wait until the expiration of the deadlines for motions to vacate before filing their suits to confirm. This strategy limits the defenses available to the consumer. The arbitration statutes create a trap for the unwary. You may think a client who just received a suit to confirm has X days to respond. However, it is possible that the 90 day period to raise a "motion to modify, correct or vacate" defenses will run before the X days to answer the suit and preclude any defenses the consumer had. Note that both federal and state law state that a "motion" may be used to seek vacatur of an arbitration award.

An arbitration award is not a final judgment unless and until confirmed by a court. Thus, an unconfirmed arbitration award does not preclude, by operation of res judicata, a subsequent action for contempt for violation of a court order.

5.8 PROS AND CONS OF ARBITRATION FOR CONSUMERS

Generally, consumers will want to oppose arbitration for many reasons, e.g., the prohibitive costs, lack of discovery and appeal rights, bias of the arbitral forum, etc., if they can. However, in some cases, it may be in the consumer's interest to compel arbitration. If the creditor files suit, rather than an arbitration claim, the consumer may except to the suit on prematurity or seek to stay the suit.

For more information on contesting arbitration agreements and also on conducting arbitrations, see generally NCLC, CONSUMER ARBITRATION AGREEMENTS (6th ed. 2011). This NCLC manual has many briefs for the various arguments to attack an arbitration agreement.

6. GOVERNMENT LAW ENFORCEMENT AGENCIES

6.1 OVERVIEW

There are several government law enforcement agencies that can help consumers: the Federal Trade Commission, the Consumer Financial Protection Bureau, the Louisiana Attorney General, the Louisiana Insurance Commissioner and local district attorney economic crime units. Also, there are opportunities for consumer law attorneys to collaborate with government law enforcement agencies.

6.2 FEDERAL TRADE COMMISSION (FTC)

Section 5 of the Federal Trade Commission Act authorizes the Federal Trade Commission to investigate and prosecute unfair and deceptive trade practices and to promulgate rules against such practices. The FTC's webpage, www.ftc.gov, has a page for consumers and advocates to file complaints against businesses or individuals who engage in unfair and deceptive business practices. The FTC webpage also has a searchable index of its enforcement actions and orders by defendant, and helpful briefs. So, you can check to see what has been held to be unlawful and who has been the subject of FTC enforcement actions.

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1043 Interdiction of Wright, 75 So.3d 893 (La. 2011).
The FTC webpage has a wealth of consumer law information. You can order their publications for use in consumer education. There is a comprehensive guide for attorneys on how to help clients with identity theft. (See www.idtheft.gov/probono). The FTC promotes collaboration with legal services providers and has a listserv for its legal services providers collaborative, which consumer attorneys should join.

6.3 CONSUMER FINANCIAL PROTECTION BUREAU (CFPB)

In the Dodd-Frank Act of 2010, Congress established the Consumer Financial Protection Bureau. The CFPB’s broad powers under the Dodd-Frank reforms include oversight, regulation and enforcement of consumer financial protection laws. The CFPB is now responsible for most federal consumer finance regulations, e.g., the Truth-in-Lending Act, Fair Credit Reporting Act, Equal Credit Opportunity, Home Mortgage disclosures, Mortgage Assistance Relief Services, etc. The CFPB’s webpage is www.ConsumerFinance.gov, and it takes complaints from consumers on credit cards, mortgages, bank accounts and services and private student loans. The CFPB is also interested in collaboration with consumer advocates.

6.4 LOUISIANA ATTORNEY GENERAL

The Louisiana Attorney General has the authority to enforce the Louisiana Unfair Trade Practices Law, La. R.S. 51: 1401 et seq. The Attorney General may seek injunctive relief against unfair and deceptive trade practices. The Attorney General has a consumer protection hotline to take consumer complaints.

6.5 LOUISIANA INSURANCE COMMISSIONER

The Louisiana Insurance Commissioner accepts insurance complaints from consumers about insurance companies and adjusters and enforces insurance laws. The Commissioner’s Office of Consumer Advocacy responds to consumers’ complaints about violations of insurance law and the policyholder’s Bill of Rights, La. R.S. 22: 41. The OCA may provide remedies for violations of La. R.S. 22: 1892 in the handling of an insurance claim. The Commissioner regularly publishes Consumer Alerts. Its webpage, www.ldi.state.la.us, has a search function for insurance companies’ agents for service of process.

6.6 DISTRICT ATTORNEYS

Many parish district attorneys prosecute violations of criminal law for consumers who have been ripped off. Larger parish district attorneys may have an economic crime unit. Conviction of an economic crime defendant may lead to an order of restitution for the victim.

CHAPTER 3
DOMESTIC VIOLENCE PRACTICE IN LOUISIANA
Becki Truscott Kondkar & Mark Moreau
About The Authors

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1. INTRODUCTION

Domestic violence is the leading cause of female poverty and homelessness in America.\(^1\) The overwhelming majority of homeless families in the United States are made up of single mothers with children, and domestic violence is a direct cause of homelessness for many, if not most of them.\(^2\) Although it is true that domestic violence exists at all levels of our society, poor women are more likely to experience more violence across their life spans at the hands of more perpetrators than women who are not poor.\(^3\) And at the same time that poverty increases a woman’s risk of repeat victimization, the victimization women experience often keeps them trapped in poverty.\(^4\) For all of these reasons and more, domestic violence perpetrators perpetuate a cycle of violence and poverty that plagues our society.\(^5\)

Holistic legal assistance is essential for the protection of domestic violence victims and their children. The major reasons that women cannot leave their abusers include fear of retaliatory attacks, lack of economic resources, concern for their children, and lack of effective law enforcement. Virtually all civil law practice areas provide opportunities to help abused women protect themselves and their children from abusers – many of whom are career criminals, child abusers or molesters.\(^6\)

2. LAWYERING IN DOMESTIC VIOLENCE CASES

2.1 ETHICAL LAWYERING IN DOMESTIC VIOLENCE CASES

Lawyer competence in domestic violence cases requires not only that attorneys understand the substantive law related to a client’s legal claims, but also that he or she possess basic competence in understanding the dynamics of domestic violence and its effects on victims and their children.\(^7\) A lawyer who possesses basic competence about domestic violence is more likely to adequately address client safety concerns when crafting legal strategy and resolutions, to identify or discover important evidence, and to develop a case strategy that minimizes potential case weaknesses by helping the trier of fact understand victim behavior that seems counter-intuitive or self-destructive when not properly contextualized.

2.2 HOW ATTORNEYS CAN HELP DOMESTIC VIOLENCE VICTIMS

A 2003 study found that legal aid is the most effective service for reducing domestic violence in the long run.\(^8\) Lawyers make a difference in victims’ lives.

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4. Id.
6. See Andrew Klein, Offenders in the Criminal Justice System, in 3 Violence Against Women in Families and Relationships supra note 3 at 115, 117. A majority of abusers have been arrested before, but not necessarily for domestic violence. Id; see also TK Logan et al., The Kentucky Civil Protective Order Study: A Rural and Urban Multiple Perspective Study of Protective Order Violation Consequences, Responses & Costs 6 (2009). Note also the significant co-occurrence of domestic violence and child sexual abuse. Evan Stark, Rethinking Custody Evaluation in Cases Involving Domestic Violence, 6 J. Child Custody 287, 291. (2009).
Examples of how civil legal assistance can make a difference in victims’ lives include:

1. **Protective Orders**
   Protective orders do not guarantee safety. But a recent comprehensive study examining the effectiveness of protective orders concluded that victims experienced a significant reduction in abuse, violence, and fear during the six months following issuance of a protective order. Protective orders criminalize conduct that usually would not be a criminal offense, e.g., contact by telephone or third parties. They can also help a victim get effective service from the police, and support from family, employers, and landlords.

2. **Divorce**
   Divorce can help end the violence. Some abusers no longer view their spouses as property after divorce. Divorce can also provide the victim with certain financial protections.

3. **Child Custody and Visitation**
   Many abusers use child custody litigation to continue their harassment and abuse of victims. The proper resolution of child custody and visitation is essential for the protection of women and children. Many abusers also physically, sexually or emotionally abuse their children. But even when domestic violence and physical abuse of the child do not co-occur, well regarded empirical studies show that many children who witness domestic violence suffer social, cognitive, and psychological consequences virtually identical to those suffered by children who are themselves physically abused. Good lawyering in domestic violence cases can help victims obtain custody orders that protect themselves and their children from future harm.

4. **Spousal and Child Support**
   Many women need support to remain independent from their abusers. Abusers are much less likely than non-abusers to pay child support. They often stop paying support to force the victim to return to them or to punish them for leaving. The traumatic and often disabling effects of abuse can also make it difficult for victims to get or maintain employment or achieve financial independence.

5. **Community Property**
   The right to a home, car or pension may be essential to avoiding homelessness, keeping a job, or securing economic independence. While these assets may be essential for financial stability, victims of abuse routinely negotiate away financial support and assets to which they are entitled in exchange for securing safe custody arrangements for their children.

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9 See TK LOGAN ET AL. supra note 6, at 6-7. The study also shows reduced efficacy when stalking behavior preceded the protective order, and differences in effectiveness for urban and rural victims. Rural women experienced more violations of protective orders than urban women in the study. Id.

10 PETER JAFFE, CLAIRE CROOKS & NICK BALA, DEPT OF JUSTICE CANADA, MAKING APPROPRIATE PARENTING ARRANGEMENTS IN FAMILY VIOLENCE CASES: APPLYING THE LITERATURE TO IDENTIFY PROMISING PRACTICES 16 (2005); Joan Zorza & Leora Rosen, Guest Editor’s Introduction, 11 VIOLENCE AGAINST WOMEN 983, 985-86 (2005).

11 PETER JAFFE, CLAIRE CROOKS & NICK BALA, supra note 10.


14 Evan Stark, supra note 12, at 4.
6. **Housing**

Up to 50% of all homeless women and children are fleeing domestic violence.\(^{15}\) Even if not “homeless,” victims of domestic violence and their children often live in chronically unstable housing circumstances that contribute to significant negative health and social outcomes.\(^{16}\) Service providers for victims report that it costs a victim about $5,000 for each housing relocation necessitated by domestic violence.\(^{17}\) In Louisiana, finding a new apartment and moving can easily cost $1,500, without counting all the personal property the abuser may destroy or the victim has to abandon. And even when a victim is not fleeing from domestic violence, abusers sometimes force housing emergencies by failing to pay the mortgage or rent, or causing the victim to be evicted because of his conduct. Eviction for a lease violation can cause a subsidized tenant to lose her rent subsidies for several years. For this reason, victims in subsidized housing need special help to protect their housing rights.

7. **Employment**

Abusers often harass their victims at work or take other action to get them fired.\(^{18}\) Absences from work due to court appearances and abuse can also lead to problems with employers. Job protection is essential to economic independence from the abuser.

8. **Public Benefits**

A victim may need help with welfare, disability benefits and unemployment compensation. Domestic violence is a hardship exemption from the 24 and 60 month limits on Family Independence Temporary Assistance (FITAP) welfare.

9. **Taxes**

A battered woman should not file joint returns with her abuser because she could incur unexpected tax liabilities. Abusers often keep their spouses in the dark about financial information. Significant innocent spouse, injured spouse, and equitable relief may be available to victims who face tax liabilities caused by the abuser. Victims may also need help in securing their rights to dependency exemptions and the Earned Income Credit, which can improve their financial situation.

10. **Consumer Debt**

Economic independence can be supported by the reduction of consumer debt through bankruptcy and non-bankruptcy strategies.\(^ {19}\)

11. **Immigration**

An immigrant battered spouse who leaves her abuser may face deportation. Abusers often fail to file ICE documents on spouses as a means of coercion. She may, however, self-petition (file a petition in her own name) the ICE for legal resident status or suspension of deportation. Legal Services Corporation (LSC) attorneys may represent immigrant domestic violence victims in domestic violence matters.\(^ {20}\)

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15 Chiquita Rollins et al., *Housing Instability is as Strong a Predictor of Poor Health Outcomes as Level of Danger in an Abusive Relationship*, 27 J. INTERPERSONAL VIOLENCE 623, 625 (2012).

16 Id. at 635.


18 *BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF CRIMES* (1991). Abusers harass 74% of employed battered women at work either in person or by phone. Id.


20 *Immigration for Legal Aid Lawyers*, § 1.3, infra.
12. Victim Compensation Funds

Victims may be eligible for reparations under the Louisiana Crime Victims Reparations Act. Among other things, victim compensation can be awarded for medical bills, lost wages, and therapy necessitated by the crime. Lawyers can help determine victim eligibility for victim compensation, assist with necessary paperwork, and advocate for victims as they navigate the process of requesting compensation.

2.3 SAFE LAWYERING IN DOMESTIC VIOLENCE CASES

1. Office Protocol

No lawyer can absolutely protect her client from a determined domestic violence criminal. We can, however, act to minimize the risks to our clients, ourselves and others. Safety tips for lawyers include:

- Screen to determine whether your client is a domestic violence victim. (You may want to use the Power and Control Wheel in your screening. See www.ncdsv.org for a copy of this tool to assess the overall patterns of abusive and violent behaviors in a case). Simply asking someone whether he or she is a “victim of domestic violence” is not an effective screening tool because victims often do not readily identify themselves as victims in response to that question. Additionally, be on alert for other issues that may necessitate further screening (e.g., if the man accompanies your client to the office and insists on participating in the interview, listens to your phone conversations, or is excessively litigious. These can be signs that domestic violence is involved).

- Assess the level of risk to your client and make sure she has a safety plan. See discussion in Lethality Assessments, infra.

- Keep all client information confidential. Train office staff on office security procedures and the importance of absolute confidentiality. Safeguard any client files that are taken out of the office.

- Protect the confidentiality of your client’s address in pleadings and discovery to the extent possible.

- Practice safe communications with your client. This means first establishing safe contact information and carefully documenting client files with this information. Your client file should clearly and prominently indicate whether and when it is safe to call a victim of abuse, whether it is safe to leave messages, and whether it is safe to mail documents to her at home.

- When you do initiate contact by telephone, always speak only to your client. Do not tell a family member that you are a lawyer. If possible, block caller id when you call. At the beginning of the conversations, ask her if it is safe to talk. Do not leave messages on answering machines.

22 For a comprehensive resource on screening and handling domestic violence cases, and for safe lawyering see AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, A LAWYER'S HANDBOOK (Margaret B. Drew et al. eds., 2d ed. 2004).
23 In Louisiana, only protective orders under Louisiana Revised Statute 46: 2135-36 expressly allow the victim's address to remain confidential.
and never leave detailed messages at all. In high risk cases, have a code word or expression that you and your client both understand is a signal that your client is in danger.

- Let your client know ahead of time about case developments so that she may take extra safety precautions. Always keep your client informed about the filing and service of pleadings on batterers so that they can do appropriate safety planning.
- For lawyer safety, avoid using your own cell phone to contact victims. Many perpetrators routinely monitor victim communications and will not hesitate to “return” your call.
- Victims should not be kept in a public waiting room in your office when safety is an issue. Consider the use of telephone or shelter intake when needed.

2. **Court Protocol**

Court hearings pose special risks to victims. On the day of court, an abuser knows exactly when and where to find his victim.

- Arrive early to court so that your client is not alone with the abuser.
- Meet your client inside the courthouse, on the inside of the security checkpoint. Do not stand outside of the courthouse or outside of the security checkpoint with your client either before or after court.
- Your client should be escorted to the courthouse by someone if possible and should be kept away from the abuser.
- In some cases, you may want to introduce your client to a court officer and identify the abuser. If the courthouse does not have a safe place for victims, advise your client to stand or sit near a deputy. Never leave your client alone with an abuser. You should sit between your client and the abuser. Ask the court to hold the abuser until your client can leave the courthouse escorted by a security officer if available. Be aware that the abuser’s relatives may also present a risk to your client.
- Hold depositions in safe settings, e.g., a courthouse with a metal detector. Follow the safety rules for court appearances. If necessary, try to quash depositions that seek your client’s personal attendance in the presence of the abuser.
- Abusers’ attorneys are often inexperienced in domestic violence or family law and may create more safety risks. Be explicit with opposing counsel regarding your expectations relating to safety protocols, e.g., whether his or her client can be present for depositions, settlement negotiations, etc.

3. **Lethality Assessments**

You should review the risk of lethality or danger to your client. If the case has been referred by a shelter or another battered women’s organization, ask for their assessment of lethality. A simple rule of thumb for assessing risk is to determine whether your client is afraid she will be killed or hurt. A victim’s perception that she is in danger is a reliable indicator that she is.24

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24 Jacqueline C. Campbell et al., *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide* 24 J. INTERPERSONAL VIOLENCE 653, 657, 669-670 (2008). In this study, the authors conclude that a victim’s perceived risk of being killed or harmed was a strong indicator of actual risk. At the same time, the victim’s perception cannot be the only measure of risk because many victims also minimize their risk as a coping mechanism. *Id.*

(157)
Separation from the abuser is the most dangerous time for victims.\textsuperscript{25} For this reason, attorneys often will be assisting victims during a time when she is most at risk and must take special precautions for her safety. Also keep in mind that abusers who violate protective orders, commit violence in public, stalk or escalate the violence are particularly dangerous.\textsuperscript{26}

The following factors may be used to help assess whether the abuser has the potential to kill his partner:

- Threats of homicide or suicide
- Fantasies of homicide or suicide
- Stalking
- History of victim strangulation or choking
- Depression or other mental health issues
- Access to or use of weapons
- Obsession about partner or family
- Centrality of battered woman to abuser’s life
- Substance abuse
- Rage or separation violence
- Frequency of violence
- Escalation of violence
- Violation of protective order
- Prior criminal history or protective orders
- Hostage taking
- Abuse of pets

The more of these factors present, the greater the risk of severe harm to your client.\textsuperscript{27}

4. Safety Planning

Making sure that your client has a safety plan, either by helping her create one or by referring her to someone who will, is a fundamental obligation in domestic violence cases. Ideally, your client will have developed a safety plan with a battered women’s counselor. But do not assume that she has one – always inquire to ensure that she has a safety plan. If she does not have a safety plan, discuss the need for one with her and refer her to a counselor who can help her develop one.

The American Bar Association Lawyers’ Handbook on Domestic Violence and other guides recommend that you advise your client to:

- ALWAYS keep a protective order on her person and extra copies of her protective order at home and at work. If she has a cell phone, she may also want to store a photo or copy of the protective order on her cell phone. A photo of the abuser stored on the cell phone may also help law enforcement or security personnel.\textsuperscript{28}

\textsuperscript{25} Evan Stark, supra note 12, at 104. In this article, Stark points out that the majority of abuse victims are not living with their perpetrator, and that physical separation is rarely an “antidote” for abuse. Id.

\textsuperscript{26} Jacquelyn C. Campbell et al., supra note 24, at 655; The Am. Bar Ass’n Comm’N on Domestic Violence supra note 21 at 40-45.

\textsuperscript{27} The Am. Bar Ass’n Comm’N on Domestic Violence supra note 21 at 40-45. Most of these factors may also be found in Jacquelyn C. Campbell et al., supra note 23, at 655.

\textsuperscript{28} Louisiana law requires the clerk of court to file protective orders with the state’s protective order registry. This enables the police in any parish to check the state registry. La. Rev. Stat. Ann. § 46:2135 (H)(2011).
• Visit her local police station. Meet the officers and ask them to place her protective order on file.
• Make the home as safe as possible and go to a safe place with the children if necessary.
• Develop an escape route and a safety plan for the family.
• Keep a bag packed and hidden in case flight becomes necessary.
• Keep a copy of all essential documentation, phone numbers and addresses in a safe location other than home.
• Tell neighbors and co-workers the abuser’s identity.29
• Alter routines and trade cars with a friend or relative.
• Travel to and from work with another person.
• Stay alert and prepared to flee while exiting or entering vehicles.
• Keep her addresses and telephone numbers confidential.
• Screen incoming calls and keep a diary.
• If affordable, get a cell phone to call the police at 911. Most cell phones even when not activated can be charged and programmed to call 911.
• Give protective orders to school authorities to prevent the abuser from picking up the children.
• Refrain from using Facebook and other social media—these can be used to track down your client.

Be specific. When discussing safety issues with your client, prompt the discussion with questions like:
• Where will he know to look for you?
• Does he know he can find you at the children’s bus stop?
• Does he know what church service you attend every week?
• Do you need to change the locks on your home?
• Do your children know what to do if he comes to your house?
• Do you have any friends or family who cannot be trusted to keep your address confidential?

Note on address confidentiality: The Louisiana Secretary of State maintains an address confidentiality program for victims of domestic violence, sexual abuse, and stalking. The program is designed to prevent abusers from locating victims using public records, and provides a victim with a substitute address in place of their actual address. If you are working with a victim who is relocating, this system works best if she contacts the program before the actual relocation so that no records are made of the new address. To learn more about the program, visit www.sos.louisiana.gov/acp.

2.4 INTERVIEW TIPS FOR DOMESTIC VIOLENCE CASES

1. Shame, fear, or pride may prevent a victim from talking about abuse. She may feel that she will be judged, or she may have concerns about privacy and confidentiality. Confidentiality issues are important to address early on
because of some victims' tendency to believe that batterers are omnipotent – in other words, they often believe that the batterer has the ability to know where the victim is and what she is doing at all times, and that the batterer is connected to "important" people in the community.

2. The Power and Control Wheel and the Woman Abuse Scale are good interviewing tools to help a victim describe her relationship and the abuse. Work gradually toward direct, factual questions to elicit information, e.g., are you afraid of him, has he ever hurt you or threatened you, has he ever pushed, hit, kicked or choked you.

3. Many women will minimize the abuse, or the effects of the violence on their children, as a means of coping. One common way that victims minimize abuse is to describe it in terms that suggest mutual violence ("we were fighting"). Make sure to clarify these issues with follow up questions.

4. Do not confuse futile retaliatory violence by a victim with "mutual conflict." If a victim perceives that you will not believe she is a victim if she tells you the truth about her own conduct, you may miss important information. Most victims do get angry and do fight back. Be realistic about the fact that not all victim resistance to an abuser is self-defense.

5. If you feel your client is minimizing the danger she is in, tell her that you are concerned for her safety and the safety of her children.

6. Never blame the victim. Respond to her in a non-judgmental way. She is a crime victim and you should treat her as such.

7. Do not ask what she did to cause him to beat her. There is nothing about her or her actions that could prevent or justify the crimes committed against her.

8. Do not ask why she did not leave sooner or why she went back.

9. Do not refer to the abuser by his relationship (e.g., husband, boyfriend). Refer to him by his first name.

10. The danger of death, serious injury, ongoing trauma and the welfare of her children are the immediate "life" issues that the client faces. After the client knows that you will handle her immediate problems, explore all of her legal options for safety, economic resources and housing.

11. Do not interview a victim with a third party present. Although a victim may want to have a supportive friend in the room, she will lose confidentiality if you do so. Also, clients may not make frank disclosures of negative information with other family or friends present. The presence of new dating partners presents even more problematic issues that should be avoided.

2.5 UNDERSTANDING MYTHS ABOUT DOMESTIC VIOLENCE VICTIMS AND BATTERERS – AND HOW IT CAN AFFECT YOUR CASE

There are many myths about domestic violence. Some impair effective counseling of and advocacy for a victim. Those include the following:

 Myth: Victims are poor, uneducated, helpless, emotionally fragile, and often minorities.

 Fact: While some of these factors can make someone more vulnerable to abuse, domestic violence happens to women in all socioeconomic, ethnic, and age, groups, and to women of all education level and psychological dispositions.
Myth: Real victims are helpless and are too afraid to fight back.
Fact: Anger is the prevailing emotional response to abuse. Many victims are strong, willful, and resilient. Most victims engage in a variety of forms of resistance to abusive and controlling behavior, including retaliatory violence that is not self-defense. Many minimize their victimization by describing it in terms that suggest the violence is more mutual than it is.

Myth: Abusers are poor and uneducated, and have problems with anger management.
Fact: Abusers can be well-spoken, well-educated, socially adept, and charismatic. Abusers rarely appear “abnormal” in psychological testing, and abusers are no more likely to suffer from mental illness than others in the general population. Most expertly manage their anger by directing it primarily to a specific intended target - the intimate partner.

Myth: Victims have a psychological make-up that causes them to stay in violent relationships.
Fact: Victims of domestic violence are crime victims. Domestic violence can happen to anyone. There are many reasons why some victims do not immediately leave a relationship or return to a relationship. The complexities of the decision-making process victims face is rarely obvious to an outside observer.

Myth: The victim’s behavior caused the battering.
Fact: The victim does not cause and cannot control the abuser’s behavior. The perpetrator chooses to abuse his partner regardless of her behavior.

Myth: Domestic violence perpetrators can still be good parents, so long as you separate them from the victim.
Fact: Perpetrators of abuse are unlikely to change unhealthy parenting habits at separation. To the contrary, after separation, children are at increased risk of physical and emotional abuse themselves.

3. STRATEGIC USE OF LOUISIANA’S DOMESTIC VIOLENCE LAWS

Louisiana has several civil statutes that create legal remedies designed specifically for victims of domestic violence. The most commonly used statutes include the Protection from Family Violence Act, Part II, Domestic Abuse Assistance, which provides for emergency protective orders, and the Post-Separation Family Violence Relief Act, which applies to child custody determinations where there is a “history of family violence.” For simplicity, in this chapter, we will generally refer to the protective order laws in the Protection from Family Violence Act, La. Rev. Stat. 46: 2131-43, as the Domestic Abuse Assistance Act or DAAA.

30 Andrew Klein, supra note 6 at 120.
31 Lundy Bancroft & Jay G. Silverman, supra note 13.
34 Id. § 9:361-369.
35 Id. § 9:364(A).
Before initiating litigation for a victim of domestic violence, the lawyer should understand how these statutes may interact and/or affect strategy in any particular case. Attorneys should consider using a combination of these statutes to address both short and long-term client needs. For example, when a victim requests temporary child custody in a protective order proceeding, the lawyer should be thoughtful about the potential effect of any resulting temporary child custody arrangements on the permanent custody case.

When considering case strategy, lawyers should also avoid a “one size fits all” approach to domestic violence litigation. Domestic violence litigation requires careful consultation with clients about issues such as (1) whether legal action will positively or negatively impact victim safety (i.e., will it be a deterrent, or a trigger for this particular batterer), (2) whether non-legal alternatives exist for accomplishing the victim’s goals, and (3) whether litigation is likely to result in an abuser having increased access to shared children (i.e., will the abuser initiate custody litigation or begin exercising visitation he did not previously exercise).

By examining these issues, lawyers help clients consider the risks and benefits of any particular course of action and make informed decisions about court processes. For example, a client may believe strongly that he or she needs a custody order, even though an abuser has not sought visitation for a period of years. It is the lawyer’s job to make sure the client understands that, in this context, initiating litigation could result in increased abuser contact with a child. The client may nonetheless decide that the benefits outweigh the risks. Discuss these decisions fully and frankly with your clients. Clients who are more engaged in weighing the risks and benefits of any particular course of action are more likely to be safe and more likely to feel satisfied with outcomes from litigation.

4. PROTECTIVE ORDERS AND LOUISIANA FAMILY VIOLENCE STATUTES

4.1 OVERVIEW

1. **What types of protective orders are available in civil court?**

   Louisiana has seven civil statutes under which a person may seek relief from domestic abuse by petitioning a court for a protective order or injunction:
   - Protection from Family Violence Act, Part II, Domestic Abuse Assistance,\(^ {36}\) and the Dating Violence Prevention Act,\(^ {37}\) which applies the remedies of the Domestic Abuse Assistance Act to certain dating relationships and will be discussed together in this section.
   - Post-Separation Family Violence Relief Act.\(^ {38}\)
   - Injunction against Abuse Ancillary to Divorce.\(^ {39}\)
   - Preliminary Injunction and Temporary Restraining Order.\(^ {40}\)
   - Children’s Code.\(^ {41}\)
   - Civil Code Ancillaries, Part V.\(^ {42}\)

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\(^{36}\) Id. §§ 46:2131-2143.

\(^{37}\) Id. § 46:2151.

\(^{38}\) Id. §§ 9:361-369.

\(^{39}\) Id. §§ 9:372-372.1.

\(^{40}\) LA. CODE CIV. PROC. ANN. art. 3601-3612 (2012).

\(^{41}\) LA. CHILD. CODE ANN. art. 1564-1575.

\(^{42}\) LA. REV. STAT. ANN. § 9:575 (protects adult parents or grandparents from abuse by adult children or grandchildren).
Most petitioners seeking a protective order in Louisiana do so under the Domestic Abuse Assistance Act. The Domestic Abuse Assistance Act authorizes broad relief to petitioners in need of protection from abuse, including temporary restraining orders and protective orders that award, among other things, temporary custody, temporary housing, and temporary support to victims. Permanent or indefinite injunctions against abuse and harassment (not including the ancillary relief described above) are available under the Domestic Abuse Assistance Act, the Post-Separation Family Violence Relief Act or by request for an Injunction Ancillary to Divorce.

2. What is the difference between a protective order issued by a criminal court and a protective order issued by a civil court?

Criminal courts also issue restraining orders in the form of “stay away” orders pursuant to peace bonds, bail restrictions, conditions of release, or conditions of probation and sentencing orders. These criminal stay away orders expire when the prosecution is dismissed or the probation is completed. As a practical matter, victims often receive conflicting information about when these orders expire, and many victims do not even know whether an order is in place. In 2012, the legislature amended La. Rev. Stat. 14:40.2 to allow criminal courts to issue protective orders to protect stalking victims either indefinitely or for a fixed period up to 18 months upon sentencing of the defendant for stalking.

The expiration of a criminal stay away order may trigger the need for a civil protective order. But even a victim who has a valid criminal stay away order in place may also need a civil protective order. Because criminal courts do not have subject matter jurisdiction over issues such as child custody, child and spousal support, and possession of a jointly used or owned residence, a criminal stay away order cannot include important relief that is available to victims who request a civil protective order.

Protective orders issued in both civil and criminal courts are enforceable by law enforcement the same way, and it is a crime to violate either of them.

3. What is the Protective Order Registry?

The Louisiana Protective Order Registry is a statewide database for all court orders that prohibit abuse against a current or former spouse, dating partner, family, or household member. All temporary restraining orders or protective orders prohibiting a person from harming a family member, household member, or dating partner, including orders entered under Louisiana’s general civil injunction statute, must be entered on a Uniform Abuse Prevention Order Registry form, and the clerk of court must file the order with the Louisiana Protective Order Registry immediately. This requirement is a key safety and enforcement feature for victims of domestic violence. Orders that are not prepared on the uniform order form and that are not entered into...
the Protective Order Registry are more difficult for victims to enforce because law enforcement may have difficulty verifying the order’s validity, and are sometimes less responsive to non-registry orders. Also, it is easier for abusers to purchase guns in violation of federal law if a protective order is not in the registry. Protective Order Registry forms are available on the Louisiana Supreme Court’s website page at www.lasc.org.


Most victims seeking a protective order request one under these two statutes. The Dating Violence Prevention Act differs from the first only in that it extends the relief available under the Domestic Abuse Assistance Act to two categories of relationships not covered by the Domestic Abuse Assistance Act: (1) current and former dating partners who have not co-habited or who do not have children in common, and (2) same-sex partners.

1. **Who can get a protective order under these statutes?**

   **The Domestic Abuse Assistance Act, LA. REV. STAT. ANN. §§ 46:2131-2143:**
   - **Family members:** spouses, ex-spouses, parents, stepparents, foster parents, children, stepchildren, foster children, grandparents, and possibly grandchildren.\(^{51}\)
   - **Household members:** person of opposite sex presently or formerly living with defendant as spouse, whether married or not.\(^{52}\)

   **The Dating Violence Prevention Act, LA. REV. STAT. ANN. § 46:2151:**
   - **Dating partners:** person who is or has been in a social relationship of a romantic or intimate nature, including same-sex relationships.\(^{53}\)

   Most unwed heterosexual couples will proceed under the Domestic Abuse Assistance Act and most unwed homosexual couples will proceed under the Dating Violence Prevention Act.

2. **What can these orders do for a victim of domestic abuse?**

   Relief includes *ex parte* temporary restraining orders and protective orders. The Court may order a temporary restraining order and, after a contradictory hearing, a protective order. The temporary restraining order may be entered without bond, and upon a showing of good cause.\(^{54}\) A showing of “immediate and present danger of abuse” constitutes good cause.\(^{55}\)

   \(^{50}\) [LA. REV. STAT. ANN. § 46:2132(4)].

   \(^{51}\) See [McCann v. McCann, 09-1341 (La. App. 3 Cir. 3/10/10); 33 So. 3d 389.](#)

   In [McCann](#), the Court affirmed a protective order that protected the petitioner’s grandchildren against their step-grandfather on grounds that the statute gives broad discretion to enter any order “likely to lead to a cessation of abuse.” Id. Although the Domestic Abuse Assistance Act does not define “family member” to include grandparents and grandchildren, it does explicitly state that the Act’s provisions apply to grandparent/grandchild relationships when the grandparent is the victim of an adult child. [LA. REV. STAT. ANN. § 46:2132(4).](#) This language suggests that minors who are victims of an abusive grandparent do not fall within the category of eligible petitioners. *Id.* But the Louisiana Court of Appeal for the Third Circuit concluded in *McCann* that the Act can protect grandchildren against a grandparent. [McCann](#), 33 So. 3d 389.

   \(^{52}\) [LA. REV. STAT. ANN. § 46: 2132(4)].

   \(^{53}\) [Id. § 2151.](#)

   \(^{54}\) [Id. § 2135.](#)

   \(^{55}\) [Id. § 2135(A).](#)
Courts have significant discretion in fashioning relief for victims of abuse. The Domestic Abuse Assistance statute and the Protection From Dating Violence Act both authorize courts to enter any protective order that will “bring about a cessation of abuse.” This provision gives courts significant latitude in fashioning relief for victims of domestic abuse, and Louisiana’s courts of appeal have consistently affirmed orders that expand relief beyond that specifically enumerated in the statute.

Available relief under the statutes includes, but is not limited to, the following:

- Prohibit abuse, harassment, contact or interference of the petitioner.
- Prohibit an abuser from going near the residence and place of employment of petitioner and minor children.
- Award possession and use of jointly owned or leased property such as an automobile.
- Award possession and use of the residence or household to petitioner and evict defendant, unless the residence is (1) solely owned by defendant, or (2) solely leased by the defendant and the defendant has no duty of support to the protected person or party.
- Prohibit either party from transferring, encumbering or disposing of property mutually owned or leased by the parties, except when in the ordinary course of business or as necessary for the support of the party or the minor children.
- Award temporary custody of minor children or persons alleged to be incompetent.
- Award or restore to the petitioner possession of all separate property and all personal property and restrain the defendant from transferring, encumbering, concealing, or disposing of personal property of the petitioner.
- Allow a party to return once to the residence, escorted by law enforcement, to retrieve personal clothing and necessities.
- Grant the petitioner exclusive care, possession, or control of any pets that belong to or are under the care of the petitioner and the minor children who live in the household of either party and prohibit the defendant from harassing, interfering with, abusing, or injuring a pet held by either party or a minor child.

- Grant the same relief as provided for in the temporary restraining order section 2135.
- Award temporary support or the provision of suitable housing or...

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56 See McCann v. McCann, 09-1341 (La. App. 3 Cir. 3/10/10); 33 So. 3d 389 (affirming order expanding eligibility for protection to step-grandchildren against step-grandfather); Francois v. Francois, 06-712 (La. App. 3 Cir. 11/2/06); 941 So. 2d 722, 726 (affirming order expanding distance requirements for the stay away provision); Beard v. Beard, 05-CA-302 (La. App. 5 Cir. 11/29/05); 917 So. 2d 1160, 1163 (affirming order to evict abuser from his separately owned property even though the eviction order was not incident to an award of child custody for petitioner).
• Grant the petitioner possession of the residence to the exclusion of the defendant.
  ○ Defendant may be evicted from a residence solely owned by the defendant and possession given to the petitioner, if the petitioner has been awarded temporary custody of minor children born to the parties.  

• Award temporary custody or establish temporary visitation.
• Order a medical evaluation for the defendant or abused person or both.
  ○ If a medical evaluation is ordered for both parties two separate evaluators will be appointed.
  ○ After the medical evaluation, a court may order counseling or other medical treatment.
• Order the defendant to pay all court costs, attorney fees, costs of enforcement and modification proceedings, costs of appeals, evaluation fees, and expert witness fees.  
• Order defendant to pay all costs of medical and psychological care for abused adult and children necessitated by domestic violence under section 2136.1.

3. What is “abuse” under the statute?
  a. Definition.
    Domestic abuse “includes but is not limited to physical or sexual abuse and any offense against the person as defined in the Criminal Code of Louisiana, except negligent injury and defamation, committed by one family or household member against another.” As a practical matter, courts generally limit protective orders to physical abuse, sexual abuse, or an offense against a person that constitute violations of the criminal code.  
    See discussion infra “Standard for awarding a protective order.”

  b. Standard for issuing an Ex Parte Temporary Restraining Order.
    A temporary restraining order under section 2135 of the Domestic Abuse Assistance Act requires “good cause” which is defined by section 2135(A) as “immediate and present danger of abuse.” Article 3603.1 of the Louisiana Code of Civil Procedure further provides that notwithstanding the Domestic Abuse Assistance Act, the Post-Separation Family Violence Relief Act, Injunction against Abuse Ancillary to Divorce, the Children’s Code Domestic Abuse Assistance laws, or the provisions on injunctions in the Louisiana Code of Civil Procedure, no temporary restraining order or preliminary injunction prohibiting harm of another person or going near her shall issue “unless the complainant has good and reasonable grounds to fear for his or her safety or that of the children, or the complainant has in the past been the victim of abuse by the other spouse.”

58 But see Beard, 917 So. 2d at 1163. In Beard, the Court affirmed an order granting the wife possession of her husband’s separately owned residence, even though she had not been awarded custody of any minor children. Id. The Court concluded that the statute provided broad discretion to make awards beyond the enumerated relief and to tailor the relief to the circumstances of the case. Id.
60 LA. REV. STAT. ANN. § 46: 2132(3).
Different judges use different standards to determine whether an interlocutory injunction should issue. For example, some judges will not issue an interlocutory injunction unless the abuse occurred within a certain number of weeks. Lawyers should know the personal practices of each judge.

c. **Standard for awarding a protective order.**

The standard for issuance of a protective order under section 2136 of the Domestic Abuse Assistance Act (as distinguished from a temporary restraining order) is that the court “may issue any protective order . . . to bring about a cessation of abuse of a party, any minor children, or any person alleged to be incompetent.” Louisiana Courts of Appeal apply an “abuse of discretion” standard when reviewing the issuance or denial of protective orders.

Although the statute’s definition of domestic abuse can be interpreted broadly because of the “including but not limited to” provision, most Louisiana Courts of Appeal have concluded that, in the absence of physical violence, threats, assault, or an offense against the person, general harassment is not covered by the domestic abuse statutes. “Family arguments that do not rise to the threshold of physical or sexual abuse [or] violations of the criminal code are not in the ambit of the Domestic Abuse Assistance Act.” Most courts, then, have declined to apply the statute’s protections in cases that involve contentious family relationships but no apparent risk of physical harm.

Even in the absence of physical violence or threats, general harassment – occurring in a context and fashion that would cause a reasonable person to fear for his or her safety – could be factually distinguishable from other cases where courts have refused to apply the statute for lack of physical violence. Harassment that would cause a reasonable person to fear for his or her safety should fall within the scope and purpose of the statute. In particular, harassment that rises to the level of stalking should entitle a petitioner to protection. Louisiana Criminal Code Revised Statute § 14:40.2 defines stalking as “the intentional and repeated following and harassing of a person that would cause a reasonable person to feel alarmed or suffer emotional distress.” A petitioner who proves those elements, then, has proved a violation of the Louisiana Criminal Code and need not rely on the “includes but is not limited to” provision of the protective order statute.

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62 A particular court’s local rules relative to protective orders will be found at Rule 32. See Court Rules at the Louisiana Supreme Court’s webpage, lasc.org.
63 LA. REV. STAT. ANN. § 46:2136. Note, however, that Louisiana Protective Order Registry Form 3, a protective order pursuant to title 46 section 2131, includes boilerplate findings of immediate and present danger of abuse and good and reasonable grounds to fear for safety as the reasons for issuing the protective order.
64 Mitchell v. Marshall, 2000-1259 (La. App. 3 Cir. 5/1/02); 819 So. 2d 359, 361.
65 Culp v. Culp, 42,239-CA (La. App. 2 Cir. 6/20/07); 960 So. 2d 1279, 1283 (holding that parents’ bickering, child manipulation and general harassment are beyond the scope of the statute).
66 Id.; see also Coy v. Coy, 46,655-CA (La. App. 2 Cir. 7/13/11); 69 So. 3d 1270 (finding that general harassment in the form of excessive phone calls was insufficient to support award of protective order); Fontenot v. Newcomer, 10-1530, 10-1531 (La. App. 3 Cir. 5/4/11); 63 So. 3d 1149 (finding parents following an adult child around town without physical violence is insufficient general harassment); Harper, 537 So. 2d 282.
On the other hand, a party in need of protection should not have to wait until actual harm or a crime is committed before being eligible for protection. A protective order can be issued to prevent the possibility of abuse. In Newton v. Berry, the court held that a stepfather's act of disrobing, getting into bed with minor child, and tickling the child's stomach, constitutes "grooming" behavior that meets the definition of "domestic abuse," whether or not those acts rise to the level of a crime.\footnote{Newton v. Berry, 44,383-JAC (La. App. 2 Cir. 5/20/09); 15 So. 3d 262, 276. In Newton the Court did conclude, however, that the behavior described constituted an offense under the criminal code. \textit{Id.}} The Newton court concluded that there was "nothing in the law [that] would require the courts to ignore such behavior and leave a child at the mercy of the perpetrator until more harm is done."\footnote{Newton, 15 So. 3d at 267.}

Similarly, where there is a history of physical violence, a perpetrator's impending release from incarceration can be grounds for issuance of a protective order.\footnote{See Wise v. Wise, 02-C A -5 7 4 (La. App. 5 Cir. 11/13/02); 833 So. 2d 393.} In Wise v. Wise, the court affirmed a protective order in favor of a petitioner who testified about past abuse and the defendant's threat to retaliate against her upon release from a six-month incarceration that resulted from the Defendant's failure to pay child support.\footnote{Id.}

In general, Louisiana Courts of Appeal have supported awards of protective orders to victims. A battery does not need to be injurious to constitute domestic violence within the meaning of the statute.\footnote{Michelli v. Michelli, 93 CA 2128 (La. App. 1 Cir. 5/5/95); 655 So. 2d 1342.} Likewise, threats and intimidation, without physical violence, can be grounds for issuance of an order.\footnote{See Cory v. Cory, 43,447-JAC (La. App. 2 Cir. 8/13/08); 989 So. 2d 855; Harper v. Harper, 537 So. 2d 282 (La. App. 4 Cir. 1988).} In Cory v. Cory, the court affirmed issuance of a protective order to a wife even though the husband had never hit her; he had threatened to "whip her ass," walked toward her in an intimidating manner, and revved his truck engine while she was standing in the driveway.\footnote{Cory, 989 So. 2d 855.} And a party seeking protection from abuse need not prove a \textit{pattern} of violence or abuse.\footnote{See McCann v. McCann, 09-1341 (La. App. 3 Cir. 3/10/10); 33 So. 3d 389 (affirming award of protective order where petitioner proved one incident where husband struck her on the arm and hand with keys).}

4. \textbf{How long can an order last?}

\textbf{a. Temporary Restraining Order (TRO).}

Two conflicting provisions address the duration of temporary restraining orders under the Domestic Abuse Assistance Act, as amended in 2009, and the Protection from Dating Violence Act. Louisiana Revised Statute 46: 2135(B) provides that the temporary restraining order may last for up to 21 days from the judge's signature and that it can be reissued as deemed necessary by the court if the hearing is continued. A continuance must be set within 15 days unless there is good cause for further continuance.\footnote{LA. REV. STAT. ANN. § 2135(E) (2011).}
On the other hand, article 3604 (C) of the Louisiana Code of Civil Procedure allows temporary restraining orders to last longer, including those granted under the Domestic Abuse Assistance Act and the Protection from Dating Violence Act. That article provides that (1) a temporary restraining order remains in effect until the hearing or 30 days, whichever occurs first, (2) a court may extend the order for a period not to exceed 30 days (if done before the expiration of the temporary restraining order), and (3) if the initial Rule to Show Cause is heard by a hearing officer, the temporary restraining order may remain in effect for 15 days or until the district judge signs the protective order, whichever occurs last. 76

b. Protective Order.

After 2012 legislative amendments to the Domestic Abuse Assistance Act, different time limits may apply to different portions of a final protective order. Section 2136(F)(1) provides that a protective order issued under either the Domestic Abuse Assistance Act or the Protection from Dating Violence Act must be for a fixed period of time not to exceed 18 months, but those orders may be extended after a contradictory hearing. In 2012, the legislature amended the Domestic Abuse Assistance Act by adding section 2136(F)(2). That section allows the portion of the protective order directing a defendant to refrain from abusing, harassing, or interfering with the victim to last indefinitely. The amendment is significant because, prior to the change, most victims could obtain permanent injunctions against abuse only if they qualified for and requested either an injunction ancillary to divorce or an injunction under the Post-Separation Family Violence Relief Act.

c. Ancillary relief in the Protective Order.

Generally, child custody, support, and other ancillary relief provisions expire with the expiration of the Domestic Abuse Assistance Act protective order. Under section 2136(F)(1), the portions of the protective order that award ancillary relief can last up to eighteen months and, presumably, for any additional fixed period of time that the order is extended by the court. But even if the order’s provisions prohibiting abuse, harassment and interference last indefinitely, the ancillary relief cannot. 77

On the other hand, if a petition states other bases for relief, the child custody order may last longer. 78 Claims under the Domestic Abuse Assistance Act may be asserted in a divorce or custody action. A pleading under the Domestic Abuse Assistance statute that specifically requests relief under the Post-Separation Family Violence Relief Act could also result in a custody determination that lasts longer than the protective order.

76 LA. CODE CIV. PROC. ANN. art. 3604(C) (2012).
77 Id. § 46:2136(F)(2)(a).
78 See Anders v. Anders, 618 So. 2d 452 (La. App. 4 Cir. 1993). In Anders, the trial court had authority to address child support, temporary alimony, and community debts in the protective order hearing where the protective order petition was dismissed but included a petition for divorce in the same pleading. Id.
The duration of spousal support awards in protective orders are not limited by the rules governing other types of temporary spousal support. A spousal support order in a section 2131 protective order may (1) last longer than an interim spousal support order in a divorce action and (2) survive a reconciliation defense.\(^7^9\)

5. **Can a protective order be extended?**

Yes. Under section 2136(F), an order entered under either of these Acts may be extended beyond 18 months, after a hearing, if the petitioner applies for an extension prior to the order’s expiration.\(^8^0\) Presumably, the entire protective order may be extended for another 18 months, and the portion prohibiting harassment, abuse and interference with person or employment may be extended indefinitely. In determining whether to extend an order under the Domestic Abuse Assistance Act, the trial court enjoys “vast” discretion.\(^8^1\) Although nothing in the law requires a showing that the defendant violated the prior protective order, past failure to abide by a protective order is a proper basis for extending an order of protection.\(^8^2\) Once a protective order expires without having been extended, a petitioner probably cannot get another protective order in the absence of new allegations or evidence.\(^8^3\)

Some judges may be willing to extend a protective order, but unwilling to also extend some of the ancillary relief granted in the original order, such as temporary child custody and spousal support. For this reason, a petitioner who requests an extension may need to file other actions to resolve those issues (if the protective order claims were not already raised in a divorce or custody action).

6. **Can a protective order be changed or modified?**

Yes. Either party may move the court to modify a prior protective order’s substance or duration. But the court may modify an order only after notice to the other party and after a contradictory hearing.

**Substance.** A substantive modification may only do two things: (1) exclude any item included in the prior order, or (2) include any item that could have been included in the prior order.\(^8^4\) These limitations preclude an abuser from using the modification process to seek relief he could not have been awarded as a defendant in the original action – e.g., making requests for child custody or a mutual injunction.

**Duration.** The court may modify the indefinite effective period of an order after notice and a hearing.\(^8^5\) A defendant’s motion to modify the effective period of an order is subject to strict notice requirements set forth in section 2136(F)(2)(c).

\(^7^9\) See McInnis v. McInnis, 38,748-C A (La. App. 2 Cir. 8/18/04); 880 So. 2d 240.
\(^8^0\) See also Coie v. Coie, 42,077 (La. App. 2 Cir. 2/21/07); 948 So. 2d 1276, 1279 (holding the trial court erred by extending terms of expired protective order); Keneker v. Keneker, 579 So. 2d 1083 (La. App. 5 Cir. 1991) (extending protective orders under the Domestic Abuse Assistance Act must be made prior to expiration of last order).
\(^8^1\) Francois v. Francois, 06-712 (La. App. 3 Cir. 11/2/06); 941 So. 2d 722, 726.
\(^8^2\) Id.
\(^8^3\) See Clayton v. Abbitt, 44,427-C A (La. App. 2 Cir. 7/1/09); 16 So. 3d 512, 513 (reversing second issuance of protective order where it was not supported by new allegations after expiration of the first order).
\(^8^4\) LA. REV. STAT. ANN. § 46:2136(D) (2012).
\(^8^5\) Id. §46:2136(D)(2) and (F)(C)
7. **What are the penalties for violating a protective order?**

Violation of a temporary restraining order or a protective order under the Domestic Abuse Assistance Act may be punished through either contempt proceedings in civil court, or criminal prosecution. In civil court contempt proceedings, the penalties include jail for up to six months and/or a fine up to $500.86 A fine, if imposed, may be forwarded to the petitioner or dependants as support.87 Lawyers pursuing contempt actions against defendants should specifically request that fines be allocated as support to the petitioner.

Also, under the Louisiana Criminal Code it is a crime to violate a protective order.88 A defendant who violates a temporary restraining order (TRO) after it is served, or a protective order after it is issued (regardless of service), may be arrested and criminally prosecuted for violation of the order.89 Thus, where a TRO has not been served, law enforcement can enforce the terms of the order, but cannot arrest for a violation. See discussion infra for how double jeopardy applies to these two enforcement mechanisms.

a. **Petitioner's burden of proof in contempt proceedings.**

Any contempt proceeding that punishes past behavior, rather than compels future behavior, is criminal in nature.90 Accordingly, even if tried in civil court, criminal contempt must be proved beyond a reasonable doubt.91 Civil contempt requires proof by a preponderance of evidence.

b. **Note on victims who contact their abusers.**

A petitioner’s actions do not excuse a violation of the court’s order. Nor can a petitioner “violate” an order by contacting an abuser, unless the order is mutual and the provision prohibiting contact is directed to both parties. This should rarely be the case.

8. **How does a related criminal proceeding affect protective order or contempt proceedings in civil court?**

a. **Continuances.**

Some judges improperly refuse to conduct hearings on protective order petitions because a related criminal proceeding against the abuser is pending. The existence of a pending criminal case does not constitute “good grounds” for a continuance.92 A petitioner’s constitutional right to a civil remedy prevails when weighed against a criminal defendant’s Fifth Amendment rights.93

b. **Fifth Amendment.**

In a civil case, the court may draw an adverse inference against a party who asserts his Fifth Amendment privileges.94

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89 Id.
90 State v. Hope, 449 So. 2d 633 (La. App. 1 Cir. 1984); see also Clark v. G.G. Cooley Serv., 35,675-C.A (La. App. 2 Cir. 4/5/02); 813 So. 2d 1273.
94 McCann v. McCann, 09-1341 (La. App. 3 Cir. 3/10/10); 33 So. 3d 389 (citing Miles v. La. Landscape, 97-CA-118 (La. App. 5 Cir. 6/30/97); 697 So. 2d 348 (applying adverse inference in Domestic Abuse Assistance Act case)); see also Baxter v. Palmigiano, 425 U.S. 308, 318-19 (1976).
c. **Double Jeopardy and the Protective Order Case.**

Double jeopardy does not bar criminal prosecution for the same act for which a civil protective order is issued. Nor does it bar criminal prosecution where a civil court has dismissed a petition for a protective order following an evidentiary hearing on the same facts and evidence.\(^{95}\)

d. **Double Jeopardy and the Contempt Case.**

Double jeopardy can bar enforcement of a protective order through both a contempt proceeding and criminal prosecution, if the contempt proceeding is also criminal in nature. When the primary purpose of a contempt proceeding in civil court is to punish past behavior rather than compel future behavior, the proceeding is criminal in nature.\(^{96}\) In other words, when the punishment for contempt does not allow a party the opportunity to avoid the sentence or fine by satisfying certain obligations, it is criminal.\(^{97}\) Because section 2137 of the Domestic Abuse Assistance Act explicitly states its punishment purpose, double jeopardy would presumably bar punishing the same violation through both contempt proceedings under Revised Statute 46:2137 and criminal prosecution under the Criminal Code, Revised Statute 14:79.

On the other hand, if a contempt proceeding is *civil* in nature because its primary purpose is to compel compliance with an order (i.e., the defendant can do something to avoid jail), double jeopardy should not attach. And double jeopardy does not prevent a battered spouse from enforcing a civil protection order through criminal contempt while the state proceeds with criminal prosecution for crimes committed against the victim at the time the abuser violated the civil protective order.\(^{98}\)

9. **Is the petitioner always entitled to a hearing?**

Yes. A petitioner who is denied a temporary restraining order upon filing a Petition for Protection from Abuse is entitled to a hearing within ten days of the date of service of the petition under Revised Statute 46:2135(D). Whether or not a TRO is granted, the court may not dismiss a petition for a protective order prior to a hearing on the merits.\(^{99}\)

10. **Can the court proceed with a hearing if the defendant is in jail?**

Yes. Many courts erroneously place the burden on the petitioner to file a writ of *habeas corpus ad testificandum* to ensure the presence of an incarcerated defendant. But in Louisiana, a prisoner’s right to access state and federal courts does not include the right to be physically present at the trial of a civil suit.\(^{100}\) At least one Louisiana Court of Appeal has specifically applied this rule in a child custody case.\(^{101}\) Moreover, in a protective order case, the court bears the burden of advancing any costs for a *habeas corpus ad testificandum*.\(^{102}\)

\(^{95}\) State v. Carter, 2011 KW 2401 (La. App. 1 Cir. 4/3/12).
\(^{96}\) State v. Hope, 449 So. 2d 633 (La. App. 1 Cir. 1984).
\(^{97}\) Clark v. G.G. Cooley Serv., 35,675-CA (La. App. 2 Cir. 4/5/02); 813 So. 2d 1273.
\(^{99}\) Vallius v. Vallius, 2010-C A -0807 (La. App. 4 Cir. 12/8/10); 53 So. 3d 655, 658, but see Young v. Young, 08-0865 (La. App. 3 Cir. 12/10/08), 999 So.2d 351, 355 (holding court may deny motion to modify protective order without hearing if Title 46 petition makes no allegations of domestic abuse).
\(^{100}\) Falcon v. Falcon, 07-CA-491 (La. App. 5 Cir. 12/27/07); 975 So. 2d 40; Ardoin v. Bourgeois, 2004-1663 (La. App. 3 Cir. 11/2/05); 916 So. 2d 329; Proctor v. Calahan, 95-210 (La. App. 3 Cir. 8/30/95); 663 So. 2d 110.
\(^{101}\) Leeper v. Leeper, 44,777-CA (La. App. 2 Cir. 9/23/09); 21 So. 3d 1006.
\(^{102}\) LA. REV. STAT. ANN. § 46:2134 (F).
A prisoner who wishes to secure his presence at a civil trial bears the burden of filing a writ of habeas corpus ad testificandum.\textsuperscript{103} Even when he does so, the trial court has the discretion to deny it.\textsuperscript{104} In \textit{Taylor v. Broom}, the court affirmed the denial of a prisoner's request to be present at a civil hearing because of transportation costs and security risks.\textsuperscript{105}

11. \textbf{Can the court order mutual protective orders?}

Not unless both parties have filed a petition. A protective order may not be granted to a party who has not requested such relief by written petition because due process requires reasonable notice to a party that an order may be issued against them.\textsuperscript{106}

In general, mutual injunctions should be opposed because they (1) discourage victims from enforcing orders against abusers by making them fearful of arrest, (2) become a tool for abusers to harass victims, and (3) make it difficult for law enforcement to enforce orders. In addition to the serious enforcement and safety concerns presented by mutual orders, they also disadvantage victims of abuse in future litigation. Because mutual orders imply equally abusive behavior by the parties, they can (1) make it difficult for victims to defend against fault allegations that bar final spousal support awards and, (2) cause victims to lose custodial presumptions in favor of an abused parent under the Post-Separation Family Violence Relief Act.

Some attorneys will propose to resolve a protective order case by “dismissing” the Petition for Protection from Abuse and entering a mutual injunction against abuse and harassment that does not go into the Protective Order Registry. But the Louisiana Code of Civil Procedure requires that even those orders be immediately reduced to a Louisiana Protective Order Registry form and submitted to the registry by the clerk of court.\textsuperscript{107}

12. \textbf{What if an abuser files a protective order petition to harass the victim?}

An abuser who files a baseless petition can be cast with costs, if the court determines the petition was frivolous.\textsuperscript{108} A party who files a petition for an improper purpose may also be sanctioned under article 863 of the Louisiana Code of Civil Procedure.\textsuperscript{109} In \textit{Woods v. Woods}, the court affirmed sanctions against a petitioner-husband who used his education and experience as an attorney to wage war on his wife by filing a baseless petition against abuse.\textsuperscript{110}

13. \textbf{How does the court allocate costs and attorney's fees?}

\textbf{a. Filing Fees.}

Filing fees may not be charged for civil protective order petitions or the issuance of a protective order.\textsuperscript{111} These rules obviate the need to seek in forma pauperis status for protective order petitioners. The peti-

\textsuperscript{103} Id.; \textit{Falcon}, 975 So. 2d. 40.
\textsuperscript{104} \textit{Leeper}, 21 So. 3d at 1010-11; Taylor v. Broom, 526 So. 2d 1367, 1368-69 (La. App. 1 Cir. 1988).
\textsuperscript{105} \textit{Taylor}, 526 So. 2d at 1368-69.
\textsuperscript{106} \textit{Bays v. Bays}, 2000-C-1727 (La. 2/21/01); 779 So. 2d 754; see Lee v. Smith, 08-CA-455 (La. App. 5 Cir. 12/16/08); 4 So.3d 100; Branstetter v. Purohit, 2006-CA-1435 (La. App. 4 Cir. 5/2/07); 958 So. 2d 740.
\textsuperscript{107} LA. CODE CIV. PROC. ANN. art. 3607.1 (2012).
\textsuperscript{108} LA. REV. STAT. ANN. § 46:2136.1(B) (2011).
\textsuperscript{109} \textit{Woods v. Woods}, 43,182-CA (La. App. 2 Cir. 6/11/08); 987 So. 2d 339.
\textsuperscript{110} Id.
\textsuperscript{111} LA. REV. STAT. ANN. § 46:2134 (F); LA. CODE CIV. PROC. ANN. art. 3603.1.
tion, orders, and process are free for protective order petitioners. A court may not refuse to allow the filing of a protective order suit because of “unpaid” costs from a prior proceeding.\footnote{Cf., Hawkins v. Jennings, 1997-1291 (La. App. 3 Cir. 3/6/98), 709 So. 2d 292; Rochon v. Roemer, 1993-CP-2444 (La. 1/7/94), 630 So. 2d 247.}

\section*{b. Court Costs.}

All court costs and attorney fees must be paid by the abuser, and a court may not cast a petitioner with court costs unless it determines that the petition was frivolous.\footnote{Tit. 46 § 2136.1(A-B).} Applying this standard, even where the petition is dismissed and the protective order is denied, a court may not cast costs to the petitioner in the absence of evidence showing that the petition was frivolous.\footnote{Vallius v. Vallius, 2010-CA-0807 (La. App. 4 Cir. 12/8/10); 53 So. 3d 655; see also Jimenez v. Jimenez, 05-CA-645 (La. App. 5 Cir. 1/31/06); 922 So. 2d 672, 674 (reversing trial court order that cast costs to petitioner decided before frivolous provision).} Upon an explicit finding that a petition is frivolous, the petitioner \textit{may} be cast with both costs and reasonable attorney fees.\footnote{LA. REV. STAT. ANN. § 46:2136.1(B).} But a plain reading of the statute makes it clear that even a petitioner who files a frivolous action need not \textit{necessarily} be cast with costs.

\section*{c. Attorney's Fees and Other Costs.}

Under the Domestic Abuse Assistance Act abusers \textit{shall} be made to pay all court costs, attorney’s fees, and other costs related to the litigation, including, but not limited to, costs for evaluations, expert witnesses, enforcement or modification proceedings, and costs for medical or psychological care of an abused party or child of the abused party, if the care is necessitated by the abuse.\footnote{Cf., Jarrell v. Jarrell, 35,837 (La. App. 2 Cir 2/27/02), 811 So. 2d 207 (interpreting a similar provision of the Post-Separation Family Violence Relief Act).} An abuser may even be required to pay costs and attorney fees if the victim is the nonprevailing party on some aspects of the litigation.\footnote{Wellborn v. 19th Judicial Dist. Court, 07-1087 (La. 1/16/08); 974 So. 2d 1.}

\section*{14. What other filing and procedural issues should I know about?}

\subsection*{a. Jurisdiction and Venue.}

Jurisdiction is proper in any court empowered to hear family or juvenile matters.\footnote{Id.; LA. REV. STAT. ANN. § 46:2136.1(A).} But where both District Court and Family Court operate concurrently, the Family Court has exclusive subject-matter jurisdiction over all actions brought under either the Domestic Abuse Assistance Act or the Protection from Dating Violence Act.\footnote{Id.; LA. REV. STAT. ANN. § 46:2133(A).}

Venue is proper in any of the following parishes:

- Parish of household or marital domicile
- Parish where petitioner or defendant resides
- Parish where abuse occurs
- Parish where divorce or annulment action could be brought (domicile of petitioner or defendant or last matrimonial domicile).
b. Forms.

The Protective Order Registry provides form Petitions for requesting protective orders under the Domestic Abuse Assistance Act. Do not be tied to space limits on the forms. If necessary, add a page so that the Petition will include a sufficiently comprehensive narrative of the abuse you intend to elicit testimony about. Although the forms include a “checklist” to elicit information about types of abuse, e.g., slapping, kicking, etc., lawyers should not rely on that checklist to plead specific acts of abuse. See discussion infra for drafting tips. Some plaintiffs will be eligible for protective orders under both the Domestic Abuse Assistance Act, and the Post-Separation Family Violence Relief Act. Both statutes may be pleaded together.

Once an order is granted, the protective order itself must be reduced to a Uniform Abuse Prevention Order form. The judge will expect you to complete this form. All necessary relief should be checked.

c. Filing.

If a divorce is pending, a protective order application under the Domestic Abuse Assistance Act should be filed in the divorce action.

d. Service.

The protective order should be served on the defendant at the close of the hearing. The petitioner should leave the courthouse with certified copies of the protective orders. She should have three to four copies so that she can keep one at home, one on her person, one at work, and one for school officials if children are involved. Clerks of courts must immediately file, process and issue temporary restraining or protective orders without any charge for court costs. Furthermore, the law does not allow the court to withhold judgments or certified copies thereof from in forma pauperis litigants.

15. What special issues need to be considered when requesting temporary child custody in a protective order case?

a. How long can the temporary custody determination last?

It depends. Sections 2135 and 2136 of the Domestic Abuse Assistance Act authorize the court to award “temporary” custody at the protective order hearing. The “temporary” custody award in a section 2136 protective order may only last for the duration of the protective order or until modified (whichever occurs first). However, if the petition stated other bases for relief, the child custody order may last longer.
Arguably, a protective order pleading that requests relief under the Post-Separation Family Violence Relief Act would not be limited to a “temporary” custody award, and could result in a custody order that lasts longer than the protective order. Ultimately, custody must be resolved through settlement or litigation under a statute other than the protective order statute.

b. Should a protective order petitioner invoke the Post-Separation Family Violence Relief Act (PSFVRA)?

Sometimes. The PSFVRA provides a variety of protections to victims and their children that are not routinely awarded in a protective order case. For example, if a petitioner meets her burden under the PSFVRA, the court may award a perpetrator of abuse only supervised visitation, and that visitation is conditioned upon the perpetrator’s successful completion of a batterer treatment program.\(^\text{126}\)

On the other hand, a petitioner who invokes the PSFVRA in a protective order proceeding has an additional burden – she must prove not just that a protective order is necessary to end abuse, but also that the defendant has a “history of family violence” as defined under that Act. So while one act of family violence could be sufficient for issuance of a protective order, it may be insufficient to prove a “history of family violence” under the PSFVRA for sole custody rights. One act of domestic abuse constitutes a “history of family violence” under that Act only if it results in serious bodily injury.\(^\text{127}\)

Because a finding on whether the defendant has a “history of perpetrating family violence” may be binding on a permanent custody determination, lawyers should carefully consider whether they can litigate that issue fully within the short time frames demanded by the protective order statute. For discussion on the issue of whether those findings are binding, see part infra “What is the effect of fact finding in a protective order case on permanent custody determinations.”

c. Do the same rules about ex parte custody determinations apply to custody requests under this act?

Louisiana Code of Civil Procedure article 3945 provisions on ex parte temporary custody orders do not apply to verified petitions alleging applicability of a family violence statute.\(^\text{128}\)

d. What is the effect of fact finding in a protective order case on permanent custody determinations?

Findings and rulings made in Domestic Abuse Assistance Act protective orders are not res judicata in any subsequent proceeding.\(^\text{129}\) This means that the family violence has to be re-litigated in subsequent proceedings, most notably a subsequent custody suit seeking sole custody under PSFVRA. Therefore, you should be prepared to prove incidents of family violence again. On the other hand, if the protective order find-


\(^{127}\) Id. § 364.


ing included a finding of a “history of family violence” under the Post-Separation Family Violence Relief Act, that finding is made under a different statute and could be binding in that suit and future litigation. See discussion supra “How long can a temporary custody determination last?”

Despite the fact that most findings in a “stand alone” Title 46 protective order proceeding are not binding in future litigation, as a practical matter, judges are unlikely to make subsequent rulings significantly inconsistent with their own prior factual determinations. Lawyers should carefully consider the impact of a protective order hearing on future custody litigation, and should be prepared to litigate the hearing as if it were determinative on the permanent custody litigation. This also means that lawyers should consider the impact of consent judgments on temporary custody on future custody litigation. For example, a judge may be reluctant to impose Post-Separation Family Violence Relief Act visitation restrictions in a case where a petitioner has previously consented to less restrictive visitation in protective order proceedings. For more discussion on child custody and res judicata, see supra.

16. How can I be sure to address my client’s financial and housing needs?

Many victims of domestic violence cannot meaningfully benefit from a protective order if the litigation does not address her immediate financial and housing needs. For this reason, attorneys should always plan to address child support, spousal support, and housing at the hearing on a protective order. In doing so, consider the following:

a. Safety concerns:

Support. Although financial security is a key to victim stability, it is also true that for some victims, pursuing claims for support can increase their danger. Be sure to discuss these issues with the client, both so she can do additional safety planning, and so that she can consider the risks associated with financial litigation. As a general rule, lawyers should aggressively pursue support claims, but should not take for granted that the client feels safe doing so. In rare cases, clients will decline to pursue child support because of safety concerns. In other cases, victims may determine that an abuser is more likely to leave her alone if he is not tied to her through support obligations. Some clients decline to pursue spousal support because they want to avoid continued dependence on an abuser.

Housing. Similarly, a victim’s housing stability can be critical to keep her safe and stable while gaining independence from an abusive partner. Housing stability can also be important for future custody litigation. At the same time, even if the court is willing to evict an abuser as part of the protective order relief, some victims do not feel safe returning to live in a previously shared residence. Lawyers should help clients consider safety issues associated with returning to a residence where the abuser can easily find her, and where an abuser may find it easier to break in or monitor her activities. When clients do not want to
return to a previously shared residence, the pleadings should instead request that the perpetrator pay for alternative housing. When possible, be specific – rent, deposits, moving costs, and costs associated with the transfer of utilities can all be requested in the petition.

b. Litigating support obligations.

Once a petitioner has requested child or spousal support in her petition for protection from abuse, she must be prepared to prove those claims, in addition to proving the abuse.

1. For both child and spousal support claims, the petitioner should be prepared to prove both her income, and the defendant’s income.

   - Proving the petitioner’s income. Plan for your client to testify about her income and employment, and to introduce evidence of that income in the form of wage statements, tax returns, etc. Note on victim’s unemployment. If your client is unemployed, be prepared to argue why income should not be imputed to her. For example, if she lost her job or suffered employment instability because of the abuser’s harassment or abuse, he should be estopped from benefiting from his own bad acts. Similarly, if the abuser did not allow the victim to work when they were together, income should not be imputed to her. And by statute, if she is disabled or the primary caregiver of a child under the age of five, income should not be imputed.\textsuperscript{130}

   - Proving the defendant’s income. The first TRO issued by the court should include an order that requires the defendant to bring proof of his income to the hearing.\textsuperscript{131} But lawyers should prepare to prove the abuser’s income without the proof that he has been ordered to produce. Some clients will have access to old tax returns or wage statements that can prove the defendant’s income. Where you suspect that the defendant is concealing or underreporting income, Revised Statute 9: 315.1.1 provides guidance on the types of evidence that can be used to establish his actual income. See also, S. Raman, *Louisiana Family Law Practice*, § 8, infra.

   - Self-employment. In some cases, the defendant’s income is elusive and difficult to prove, particularly for those who are self-employed. Some abusers will conceal income by “banking” with relatives. In those cases, plan to introduce evidence of the parties’ expenses and standard of living, and the income those expenses would require.\textsuperscript{132} In some cases, abusers report expenses on their income and expense worksheets that exceed the earnings they claim, creating impeachment opportunities for trial.

\textsuperscript{131} See Louisiana Protective Order Registry form 1 n. 15.
• **Underemployment.** Similarly, it is not unusual for abusive partners to punish their victims and avoid support obligations by becoming voluntarily under-employed after separation. For purposes of calculating support, the issue of whether a party is voluntarily under-employed is a question of the obligor-party’s good faith. The underemployment must result from no fault or neglect of the party.

2. **For spousal support claims, the petitioner must also show need and ability to pay.**

• **Need.** An award of interim spousal support requires that the requesting spouse demonstrate need. Need can be shown by proving that the petitioner lacks sufficient income to maintain the standard of living that she enjoyed while residing with her spouse. To support a spousal support claim, then, the client must prove her need through evidence of her income, her expenses, and her previous standard of living. “Standard of living” evidence can include testimony about the number of bedrooms in the marital home or the frequency with which the parties dined out, as well as other information about the parties’ lifestyle. But if an abuser intentionally deprived a dependent spouse of basic needs or a comfortable standard of living during the marriage, he cannot avoid a spousal support obligation by arguing that she must continue living similarly. In most jurisdictions, the parties must prepare and submit an income and expense form to assist the determination on the petitioner’s need.

• **Ability to pay.** The only limit on a claimant spouse’s needs is the obligor party’s ability to pay. An obligor spouse has the ability to pay when his income exceeds his expenses and child support obligations. When a spouse does not have the ability to pay an award equal to the other spouse’s needs, “interim spousal support should be fixed at a sum that will as nearly as possible be just and fair to all parties involved.”

• **Spousal support claims against poor abusers.** Do not decline to request spousal support from an abuser simply because he is poor - if your client is poorer, she may still be entitled to support. The law governing temporary spousal support aims to put both parties as close as possible to the stan-

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133 Romans v. Romans, 01-587 (La. App. 3 Cir. 10/31/01); 799 So. 2d 810, 812.
135 Carmouche v. Carmouche, 03-CA-1106 (La. App. 5 Cir. 2/23/04); 869 So. 2d 224, 227 (upholding interim spousal support where claimant’s expenses exceeded her income even on “nominal, bare subsistence living expenses”).
136 Brown v. Brown, 44-989-CA (La. App. 2 Cir. 1/27/10); 31 So. 3d 532, 538 (awarding support after finding that living conditions during the marriage were deplorable but that those living conditions alone are not indicative of the standard of living during the marriage).
137 Hitchens v. Hitchens, 38,339-CA (La. App. 2 Cir. 5/12/04); 873 So. 2d 882, 884.
138 Lambert v. Lambert, 2006 2399 (La.App. 1 Cir. 3/23/07); 960 So. 2d 921, 930.
139 Derouen v. Derouen, 04-1137 (La. App. 3 Cir. 02/02/05); 893 So. 2d 981, 985.
standard of living they enjoyed before the separation. In cases where neither party has substantial income or assets, it is useful to examine the parties’ relative financial positions. Do this by comparing their respective incomes to the federal poverty level, and then calculate how far above or below the poverty level each person’s income puts them. The court can make an award that is just and fair between two poor parties by awarding spousal support in an amount that puts the parties at equal footing above or below the poverty level. This analysis can be particularly compelling in cases where the claimant spouse is a custodial parent whose standard of living will affect the child.

- **Fault.** Fault is not a defense to temporary spousal support. Abusers will sometimes claim infidelity as “fault” grounds to avoid paying support. But because a protective order includes only a temporary spousal support award, the law governing temporary spousal support applies. Petitioners must show they are free from fault only in claims for final support.\textsuperscript{140}

- **Reconciliation.** Reconciliation applies only to actions brought in divorce. It has no effect on support claims brought between two people who have never been married or who have not filed for divorce.\textsuperscript{141} Thus, in a protective order case where support is awarded, a subsequent reconciliation has no bearing on whether support is owed for the period of reconciliation.

c. **Litigating the request for temporary housing.**

When making a request for temporary housing, make sure you are clear about homeownership issues and how they affect your request for relief. The Domestic Abuse Assistance Act specifies the relief available to victims when the abuser is a sole homeowner. If the abuser is the sole owner, he can be evicted and possession can be awarded to the petitioner, but only if she is the custodian of shared children.\textsuperscript{142} On the other hand, at least one appellate court has affirmed an award of possession to a petitioner when the abuser was the sole owner, and the parties did not have children in common.\textsuperscript{143}

17. **Should I negotiate with the abuser or opposing counsel?**

In most cases, it makes sense to make a quick initial determination about whether the abuser will contest a protective order. In some cases, abusers will agree to the order that you have requested. This scenario is less likely in cases that involve ancillary claims for support and/or child custody. In order to negotiate effectively, you should consult with your client before

\textsuperscript{140} LA. CIV. CODE ANN. art 113 (2012).
\textsuperscript{141} Stanley v. Nicosia, 09-191 (La. App. 5 Cir. 9/29/09); 19 So. 3d 56, 58 (citing McInnis v. McInnis, 38, 748 (La. App. 2 Cir. 8/18/04); 880 So. 2d 240 (holding that in protective order case between two unmarried parties subsequent reconciliation had “no bearing” on whether support was owed for a period of subsequent reconciliation)).
\textsuperscript{142} LA. REV. STAT. ANN. §§ 46:2135(A), 2136(A)(2).
\textsuperscript{143} Beard v. Beard, 05-CA-302 (La. App. 5 Cir. 11/29/05); 917 So. 2d 1160.
court about the possibility of settlement and determine what, if any, issues are subject to negotiation. For example, you should know in advance what type of supervised visitation arrangements your client wants so that any negotiated order can include all necessary specifics. In general, follow these rules when negotiating with the other side:

- Do not negotiate in front of your client.
- Do not agree to a mutual injunction.
- Do not agree to an "injunction" that does not go into the LPOR. Do not assume that the order can be converted to a registry order in the future should it become necessary.\footnote{See generally, Branstetter v. Purohit, 2006-1435 (La. App. 4 Cir. 5/2/07); 958 So. 2d 740, 743-44 (holding that trial court erred when it converted a non-registry injunction entered by consent into a registry injunction without notice in a subsequent contempt proceeding).}
- Do not agree to custodial arrangements or visitation without assessing the effects on future custody litigation under the Post-Separation Family Violence Relief Act.
- Do not give a \textit{pro se} defendant legal advice. This means you should not answer questions like: "If I agree to this, does it mean I am admitting to the abuse?"
- Be cautious about offers to "pay" for the client's cell phone. If the phone remains in the abuser's name, he may be able to activate GPS tracking services.

Consent agreements should be court approved so that the abuser may be held in contempt if he violates the agreement.\footnote{See \textit{LA. REV. STAT. ANN.} § 46:2136.} Be sure to read the consent agreement on the record since abusers often refuse to sign the consent agreement.\footnote{See McInnis v. McInnis, 38,748-CA (La. App. 2 Cir. 8/14/04); 880 So. 2d 240 (finding consent judgment read into record becomes legal judgment even if not reduced to writing); Alogdon v. Guertin, 97-CA-0235 (La. App. 4 Cir. 10/1/97); 701 So. 2d 480.}

18. \textbf{What other issues should I consider when drafting pleadings and orders?}

\textbf{a. The Petition.}

1. \textbf{Amending a pro se petition.}

If a client has come to you after filing a \textit{pro se} petition, review it to determine whether it should be amended and re-filed. If amending is necessary, a new court date will be probably be set and the defendant will have to be re-served.

2. \textbf{Drafting an original petition.}

When drafting a protective order petition, the LPOR forms will prompt you to write about the most recent incident of violence and the history of violence. In general, petitions should specifically plead the most recent violence and the two worst incidents of violence, but should also include descriptions that establish the general nature, frequency, and severity of the violence. Also include information about injuries, threats of harm, stalking behavior, and the use of weapons.
3. **Special child custody considerations.**
   A protective order petitioner may invoke the Post-Separation Family Violence Relief Act by asking that it be applied to the child custody determination.\textsuperscript{147} Here, the petitioner will need to show a “history of family violence” to secure sole custody.

   A petitioner requesting temporary child custody in a protective order proceeding may also want to make sure the petition includes information about whether the child has been present during the violence, whether the child has intervened to protect the abused parent, or whether the child has also been abused.

b. **The Order.**
   1. **Forms.**
      The protective order must be reduced to a Uniform Abuse Prevention Order form.\textsuperscript{148} The judge will expect you to complete this form. All necessary relief should be checked.

   2. **Petitioner’s Address.**
      The Louisiana Protective Order Registry (LPOR) Forms provide a space for the petitioner’s protected residential address. If the protective order includes a specific home address that the defendant must stay away from, the order may not sufficiently protect a petitioner who moves to a new address. Since petitioners often move, the better practice may be to omit a specific address and instead include a provision prohibiting the defendant from going “anywhere the petitioner may reside.” The same logic applies to stay-away provisions regarding employment. If the current residential address and place of employment is already known to the defendant, the stay-away provision could be drafted to include those specific addresses AND anywhere else the petitioner may reside or be employed.

3. **Child Custody.**
   Visitation and custody provisions should be drafted to minimize the risk to the petitioner and her children. Avoid using joint custody “reasonable visitation” clauses. “Reasonable visitation” is never appropriate in domestic violence cases. Provisions for custody and visitation should be specific, easy to understand, and enforceable. For example, protective orders should explicitly state where and when visitation exchanges can occur (with safety considerations in mind), and create explicit but limited exceptions for contact with children. Use a supervised visitation center or police station for safe exchanges whenever possible.

4. **Mutual Orders.**
   Mutual protective orders should almost never be agreed to. Mutual protective orders, if not factually justified, re-victimize the victim, provide an abuser with another vehicle to harass the victim, and can impair future legal rights for victims. Lawyers often have

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\textsuperscript{147} LA. REV. STAT. ANN. § 9:368.

\textsuperscript{148} LA. CODE CIV. PROC. ANN. art. 3607.1 (2012).
unrealistic expectations about victims’ normal reactions to abuse. The fact that a victim has engaged in physical resistance or even retaliatory violence against a predominant aggressor is rarely an appropriate justification for a mutual protective order if the victim poses no future risk of harm to an abuser. For further discussion, see part supra, “Can the court order mutual protective orders?”

4.3 OTHER OPTIONS FOR PERMAMENT PROTECTIVE ORDERS AND OTHER TYPES OF INJUNCTIONS

The requirements and features of the other primary civil protective and restraining orders are set forth below.

4.3.1 Post-Separation Family Violence Relief Act Injunction, LA. REV. STAT. ANN. § 9:362

a. Overview.
   Petitioners can seek protective orders under this statute if (1) the parties have a child in common, and (2) the petitioner proves family violence. The statute requires that in all “family violence cases,” all court orders include an injunction in favor of the abused party or child. This Act allows victims to request permanent injunctions against abuse. The terms of those injunctions are set out by Revised Statute section 9:362(4), and include more restrictive provisions on contact than many injunctions entered under either the Protection from Family Violence Act statutes (title 46) or Injunctions Ancillary to Divorce. For this reason, many victims seek a permanent injunction under this Act as part of their divorce or custody judgment.

b. Available Relief.
   An injunction under this statute includes the following relief, as defined by Rev. Stat. § 9:362(4):
   • Prohibit contact with abused parent or children except for contact expressly allowed for specific and limited purposes relating to the welfare of the children.
   • Bar abuser from going within 50 yards of home, school, employment or person of abused parent and children.
   • Bar abuser from going within 50 feet of automobile of abused parent and children.

   The Post Separation Family Violence Relief Act includes many additional and important protections to victims and their children. See discussion infra.

c. Duration of Injunctions.
   The rules for civil injunctions in the Louisiana Code of Civil Procedure govern. Normally, a temporary restraining order lasts for two to ten days and may, at any time before its expiration, be extended for good cause for up

\[149\] LA. REV. STAT. ANN. § 9:366.
to ten days. However, article 3604(B) of the Code of Civil Procedure provides that a temporary restraining order issued in conjunction with a rule to show cause for a preliminary injunction prohibiting a spouse from harming the other spouse or child, in a divorce suit, shall remain in force until the hearing on the preliminary injunction.\footnote{\textsc{La. Code Civ. Proc. Ann.} art. 3604(B) (2012). Act 582 of 2012 amended Article 3604(B) to maintain TROs in effect until the preliminary injunction hearing in divorce cases only. In other cases, the duration of the TRO will be limited to either 21 or 30 days as applicable.}

In many cases, petitioners do not request a preliminary injunction in PSFVRA cases, but instead finalize a permanent injunction at divorce. This is true because if emergency circumstances require an immediate order, most petitioners seek a TRO under the Domestic Abuse Assistance Act. Where a preliminary injunction is requested, the hearing must be set for two to ten days after service of the notice.\footnote{\textsc{La. Code Civ. Proc. Ann.} art. 3602.} The preliminary injunction remains in effect until the hearing on the permanent injunction or until dissolved. The PSFVRA does not expressly waive the bond requirement for interlocutory injunctions. However, Code of Civil Procedure art. 3610 expressly waives bond for all TROS, preliminary or permanent injunctions seeking protection from domestic abuse, dating violence, stalking or sexual assault. Also, the PSFVRA may be used in conjunction with a Domestic Abuse Assistance Act proceeding and section 2135 of that Act does waive the bond requirement for temporary restraining orders.\footnote{\textsc{La. Rev. Stat. Ann.} §§ 46:2131-2143.}

A permanent injunction does not expire. However, a pre-divorce injunction may be extinguished if it is not specifically mentioned in the divorce judgment.\footnote{\textsc{Steele v. Steele}, 591 So. 2d 810 (La. App. 3 Cir. 1991). This argument should not apply to PSFVRA cases, but attorneys should be cautious and request an injunction in the divorce if possible.}

d. Penalties for Violation.

Violation of a PSFVRA injunction can be punished through contempt actions in civil court or criminal prosecution. Contempt is punishable by up to six months in jail and a fine of up to $500.\footnote{\textsc{La. Rev. Stat. Ann.} §13:4611(b).} The defendant may be arrested and criminally prosecuted for violation of the TRO after service or violation of the preliminary or permanent injunction after issuance.\footnote{\textsc{La. Rev. Stat. Ann.} §14:79.} See discussion \textit{supra} for contempt and double jeopardy.

In addition to the above penalties, the Post-Separation Family Violence Relief Act requires that any violation of an injunction “shall result in a termination of all court ordered child visitation.”\footnote{\textsc{La. Rev. Stat. Ann.} §9:366(B). However, many trial judges will refuse to apply this law to terminate visitation.} This strong enforcement provision is available to petitioners exclusively under this Act.

e. Orders.

These injunctions, if granted at divorce, should be included in the divorce judgment and must \textit{also} be reduced to a Uniform Abuse Prevention Order form for submission to the LPOR.
4.3.2 Injunction against Abuse Ancillary to Divorce, LA. REV. STAT. ANN. § 9:372.

a. Overview.

These injunctions are available to victims of abuse who are married to their abusers and are seeking divorce. The injunctions available under this provision are more generic and less specific than those available through other statutes, and prohibit a “spouse from physically or sexually abusing the other spouse or a child of either of the parties.” The text of the statute includes no language about stay away provisions or restricting other forms of conduct that is not already illegal.

b. Duration of Injunction.

These orders can be permanent, but must be issued prior to the divorce; additionally, if an injunction is not included in the divorce, prior injunctions issued under this statute may expire upon divorce. These injunctions, if granted at divorce, should be included in the divorce judgment and must also be reduced to a Uniform Abuse Prevention Order form for submission to the LPOR.

c. Penalties for Violation.

These injunctions, like all injunctions prohibiting abuse, are entered into the Louisiana Protective Order Registry and are a crime to violate. So although these orders appear to only prohibit behavior that is already criminal, they do create additional criminal penalties for enforcement. In other words, a defendant who violates one of these injunctions could potentially be charged both with the violation of the order, and the underlying crime that was committed during the violation.

4.3.3 General Civil Injunction, LA. CODE CIV. PROC. ANN. art. 3601-3612.

a. Overview.

Injunctions under this Article are available to any party seeking protection from abuse. Article 3601 is the only relief available to adult victims who are ineligible for relief under the Domestic Abuse Assistance Act, the Protection from Dating Violence Act, the Post-Separation Family Violence Relief Act and Louisiana Revised Statute 9:575. For example, a party who is being stalked or harassed by someone with whom they were never romantically involved may seek relief under article 3601. The plaintiff must show a likelihood of irreparable injury and bond is waived for any injunction seeking protection from stalking, domestic abuse, dating violence or sexual assault.

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158 Lawrence v. Lawrence, 02-1066 (La. App. 3 Cir. 3/5/03); 839 So. 2d 1201 (finding that an injunction may not be issued three years after divorce); Steele, 591 So. 2d 810 (finding that a pre-divorce injunction under predecessor statute expired upon divorce when not expressly continued in divorce judgment).

159 LA. REV. STAT. ANN. §14:79.


161 LA. REV. STAT. ANN. §46:2151.


163 LA. CODE CIV. PROC. ANN. art. 3603(A) (1), 3610 (2012).
b. Duration of Injunction.

A temporary restraining order, if issued against a party other than a spouse, can last for no longer than ten days, but may be extended in ten-day intervals. The temporary restraining order, if issued against a spouse in a divorce suit to prohibit harm, lasts until the preliminary injunction hearing. The preliminary injunction lasts until the trial on the permanent injunction. A permanent injunction against abuse does not expire. It is for life unless modified.

c. Penalties for Violation.

Penalties for violation of an article 3601 injunction include contempt. Contempt is punishable by up to six months in jail and a fine up to $1,000. The defendant may be arrested and criminally prosecuted under Louisiana Revised Statute 14:79 for violation of the TRO after served or violation of the preliminary or permanent injunction after issued.

4.4 CONTEMPT MOTIONS

1. How do I bring a contempt motion for violation of a protective order or injunction?

Draft a contempt motion or rule to show cause that clearly states the notice that the abuser had of the injunction, the injunction and the terms violated, and all the facts or conduct alleged to constitute contempt. A person is bound by an injunction from time that he has notice regardless of whether he has been served with the injunction. A certified copy of the contempt motion and rule to show cause must be served on the abuser at least 48 hours before the hearing in the same manner as a subpoena. Generally, this means personal or domiciliary service on the abuser. Be prepared to prove the contempt without testimony from the abuser since he may invoke the 5th Amendment.

2. May the court refuse to hear a contempt motion for violation of a protective order or injunction?

No. The court must rule on a domestic violence victim’s motion for contempt for violation of a protective order or injunction. It can’t refuse to schedule the motion or decide the motion without a hearing.

4.5 FOREIGN PROTECTIVE ORDERS AND INTERSTATE VIOLATIONS

1. Registry and Enforcement of Foreign Orders.

a. The Violence against Women Act requires that states give full faith and credit to orders of protection entered in other states. The police may enforce foreign protective orders which have not been
made executory in Louisiana, and can arrest for violation of a foreign protective order. La. R. S. 13:4248 provides that a foreign protective order may be made executory in Louisiana by filing an ex parte petition. The petitioners address may remain confidential with the court.

b. **Safety considerations should guide the decision about whether to register a foreign order.**

The petitioner can keep her address confidential. However, the abuser will be sent notice of the filing of the petition. The petitioner can file the ex parte petition by mail or through counsel. There is no need for the petitioner to travel to Louisiana to file the ex parte petition. She should not be charged any filing fees for the petition since it involves a protective order. The advantages to an executory Louisiana order are that police will be more likely to enforce the order, and can verify the order through the Louisiana Protective Order Registry. The police may be reluctant to enforce a foreign protective order if it does not indicate on its face that the abuser was served. In addition, once the order becomes executory in Louisiana, a defendant is subject to contempt proceedings in a Louisiana civil court. The victim’s refuge state should have jurisdiction to enter a prohibitory injunction even if personal jurisdiction over the defendant does not exist in the refuge state. A Louisiana court should have personal jurisdiction over a non-resident abuser for any type of injunction, affirmative or prohibitory, if the non-resident has minimum contacts with Louisiana, e.g., making threatening phone calls or sending letters to victim in Louisiana.

c. **Interstate violations are a crime.**

It is a federal crime to cross a state line to commit domestic violence or to violate a protective order. The Federal Bureau of Investigation and United States Attorneys’ Office should be contacted if an interstate violation of a protective order occurs.

4.6 **PROHIBITIONS ON GUN OWNERSHIP OR POSSESSION**

1. **Federal prohibitions apply to anyone who is subject to a Protective Order.** Title 18 section 922(g) of the United States Code makes it unlawful for a person to possess or purchase a firearm if he is subject to a court order that:

   (1) was issued after a hearing of which he received actual notice and had an opportunity to participate;

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174 See Louisiana Protective Order Registry Form E.
176 *Id.*
177 *La. Rev. Stat. Ann.* §14:79(A)(1)(a). To arrest for a violation, a party must have been served with a TR O. But a protective order, if issued after a hearing for which the defendant had notice, need not be served. *Id.* For this reason, law enforcement will have to examine a foreign order for indications that either a TR O was served, or that the defendant had notice of the protective order hearing.
(2) restrains such person from harassing, stalking or threatening an intimate partner (or child) or engaging in other conduct that would place an intimate partner (or child) in reasonable fear of bodily injury; and

(3) includes a finding that such person represents a credible threat to the physical safety of the intimate partner or child; or

(4) by its terms explicitly prohibits the use or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

Thus, a protective order that expressly prohibits use of physical force or has a finding that the abuser poses a credible threat to the physical safety of the intimate partner or child invokes federal law prohibiting the abuser’s possession of a gun. The LPOR forms include the warning that federal law prohibits purchase or possession of firearms.

If the abuser has a gun, ask the court to expressly order him to turn his guns over to law enforcement officials and to produce proof of said surrender to the court. Violation of 18 U.S.C. § 922 may be prosecuted by federal authorities. Some abusers may be willing to consent to a protective order on the theory that section 922(g) would not apply to them since “no hearing occurred.”

2. **Gun prohibitions apply to those convicted of a domestic violence crime.**

In addition, 18 U.S.C. §922(g) prohibits persons who have been convicted of a misdemeanor crime of domestic violence from purchasing or possessing a firearm. There are exceptions for law enforcement and military personnel.

5. **DIVORCE**

5.1 **TIMING FOR DIVORCE**

1. **How does domestic violence affect divorce?**

   Domestic violence can affect the timing of a divorce. The requisite separation period for divorce may be shorter in domestic violence cases than in other cases. Under Louisiana Code of Civil Procedure article 103.1, the requisite separation period for divorce when there are minor children is 365 days, unless there is domestic violence. In domestic violence cases, the requisite separation period – even when the parties have minor children – is 180 days. Only the victim of abuse may invoke the shorter time delay.

2. **How does a court determine whether the 180-day separation period applies?**

   Where there is a protective order in place, the 180-day time delay applies. Where no protective order is in place, the Petitioner must request a Rule to Show Cause for why the 365 day time period should not apply, and must prove the domestic violence. For this reason, attorneys representing victims should plan to present evidence of domestic violence sufficient to support both (1) the reduced time delay, and (2) a permanent injunction under one of the two statutes discussed below.

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181 LA. CODE CIV. PROC. ANN. art. 103.1 (2012).
182 LA. CIV. CODE ANN. art. 103.1(B) (requiring a showing of abuse by other spouse).
183 Id. art. 103.1(1)(C).
5.2 INJUNCTIONS WITH DIVORCE

1. What types of injunctions are available at divorce?


      The Post-Separation Family Violence Relief Act cases where there is family violence, the court must include an injunction against abuse in the judgment for divorce. The terms of the injunction include restrictive no contact and stay away provisions in addition to typical prohibitions against physical abuse and harassment. The statute does not put a time limit on these injunctions, and they are typically issued as permanent injunctions. These injunctions, like all injunctions prohibiting abuse, should be reduced to an LPOR form, are entered into the Louisiana Protective Order Registry and are a crime to violate.

   b. Injunction against Abuse Ancillary to Divorce, LA. REV. STAT. ANN. § 9:372.

      These injunctions are also available to victims of abuse who are married to their perpetrators and are seeking divorce. The injunctions available under this provision are more generic and less specific than those available through other statutes, and prohibit “a spouse from physically or sexually abusing the other spouse or a child of either of the parties.” But like all injunctions prohibiting abuse, these injunctions are entered into the Louisiana Protective Order Registry and are a crime to violate.

      These orders can be permanent, but must be issued prior to or in the divorce. Also, if an injunction is not included in the divorce, prior injunctions issued under this statute may expire upon divorce. These injunctions, if granted at divorce, should be included in the divorce judgment and must also be reduced to a Uniform Abuse Prevention Order form for submission to the LPOR. A subsequent divorce judgment may supersede a protective order if it fails to restate the injunctions against abuse.


      These injunctions are frequently issued as mutual injunctions in divorce cases, but should rarely be used in domestic violence cases. In domestic violence cases, both judges and opposing counsel often propose these injunctions to promote settlement. But injunctions against harassment are a poor substitute for injunctions against abuse for several reasons. First, any mutual injunction should be considered potentially dangerous to victims for reasons described supra. But even if these orders are not mutual, they provide little protection to victims. Injunc-

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185 LA. REV. STAT. ANN. § 9:363.
186 LA. REV. STAT. ANN. §14:79.
187 Id.
188 Lawrence v. Lawrence, 02-1066 (La. App. 3 Cir. 3/5/03); 839 So. 2d 1201 (holding that an injunction may not be issued three years after divorce); Steele v. Steele, 591 So. 2d 810 (La. App. 3 Cir. 1991).
189 See Steele, 591 So. 2d 810 (holding that a pre-divorce injunction under predecessor statute expires upon divorce if not expressly continued in divorce judgment).
tions against harassment, unlike injunctions prohibiting abuse, are not reduced to a Louisiana Protective Order Registry form and are not entered into the protective order registry. They are enforceable through contempt proceedings rather than arrest under the Criminal Code’s protective order violation statute, making enforcement both more difficult and less likely to address immediate safety issues.190 Also, these orders do not exempt an abused party from the custodial relocation notice requirements that protect victims with children who relocate,191 and they do not invoke federal firearm prohibitions.192

2. **How do I choose which injunction to request at divorce?**

When assessing which injunction best meets your clients’ needs consider the following:

a. **Differences in relief.**

In general, these orders are similarly enforceable, but provide different relief. The Post-Separation Family Violence Relief Act explicitly defines injunctions to include restrictive stay away and no contact provisions.193 For example, the distance prohibitions against contact are more restrictive under this statute than under the Domestic Abuse Assistance Act. On the other hand, Rev. Stat. § 9:372 injunctions against abuse ancillary to divorce tend to be generic prohibitions against conduct that is already illegal (physical and sexual abuse). Revised Statute § 9:372 includes no explicit language regarding stay away provisions, prohibitions on contact, or restrictions on conduct that is not already illegal.194 But even though an Injunction Ancillary to Divorce appears to prohibit only behavior that is already criminal, most courts will include additional remedies, like stay away provisions, if they are specifically pled. In fact, the Louisiana Protective Order Registry Form for § 372 injunctions includes remedies not specifically enumerated in the statute, and those forms create persuasive authority in favor of expanded relief.195

b. **Enforceability.**

In any case, even a very limited Injunction against Abuse Ancillary to Divorce creates an important remedy for victims because it creates additional criminal enforcement mechanisms. These orders, like all injunctions prohibiting abuse, are entered into the Louisiana Protective Order Registry and are a crime to violate.196 So an abuser who violates either type of injunction could potentially be charged both with violation of the order, and also any underlying crime committed during the violation. For discussion on double jeopardy issues, see part *supra*.

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190 LA. REV. STAT. ANN. § 14:79.
192 18 U.S.C. § 922 (g).
193 LA. REV. STAT. ANN. 9 §§ 361.
194 But see Louisiana Protective Order Forms, which include no contact provisions for injunctions issued under LA. REV. STAT. ANN. § 9:372.
195 McCann v. McCann, 09-1341 (La. App. 3 Cir. 3/10/10); 33 So. 3d 389, 396.
196 LA. REV. STAT. ANN. § 14:79.
c. Additional consequences for violation in custody cases.

Finally, one important difference between the options for injunctions at divorce includes the effect of protective order violations on custody determinations. If a Petitioner is awarded an injunction under Rev. Stat. § 9:366, any violation of that injunction requires that the abusive parent’s visitation be terminated. This law can function both as a strong deterrent for batterers, and an important tool to protect victims and their children.

d. Making a decision.

Given these differences, lawyers should consider how the protections available under each statute fit a client’s specific circumstances, whether the visitation termination provision of the PSFVRA is likely to be invoked against an abuser who violates an injunction, and whether the evidence satisfies the requisite burdens. A petitioner who desires the flexibility of more substantial contact because of shared children may find a no contact provision impractical and instead opt for a less restrictive order in an Injunction Ancillary to Divorce under section 372. On the other hand, a petitioner who has been stalked and harassed, or who feels the risk of future harm is imminent or likely, may want a more restrictive order under the PSFVRA in order to prevent her abuser from using shared children as an excuse to facilitate unwanted or dangerous contact. These issues should be discussed in detail with clients so that lawyers can request and draft orders that are tailored to meet each client’s specific needs, and also so that ultimate decisions affecting client safety are the client’s, not the lawyer’s. If the client elects not to seek a permanent injunction under the PSFVRA, you should document this decision in writing to the client, after a full discussion of the advantages and disadvantages of the injunction.

3. If my client still has a valid protective order under the Domestic Abuse Assistance Act, why would she also need an injunction at divorce?

Duration. These orders can last longer than any other orders available under the protective order statutes, and can be permanent. For reasons described supra, a client who fails to request a permanent injunction at divorce may miss her opportunity for a permanent order.

Relocation. Also, once a Domestic Abuse Assistance Act order expires, the relocation statute may apply to victims who do not obtain more permanent orders, because victims of domestic violence are exempt from the notice requirements of relocation only if a protective order is “in effect.” Note that Act 197 of 2012 amended R.S. 46:2136 to allow a party to modify a DAAA protective order to be for an indefinite period, but only as to the portion that prohibits the defendant from abusing, harassing or interfering with the person as provided in R.S. 46:2135(A)(1).

197 LA. REV. STAT. ANN. § 9:366(B).
198 While lawyers should defer to client decisions on issues regarding safety, some clients minimize the risk of future harm and, initially, can be unrealistic about the possibility of safe contact with abusers. See Jacquelyn C. Campbell et al., supra note 24. In this situation, the lawyer might ask the client to consider whether her expectations of an abuser’s future conduct are supported by the abuser’s past conduct. An unrealistic order that anticipates cooperation by an abuser can be unsafe for victims and can also increase the likelihood of future litigation, which can be quite expensive.
4. **Can I still obtain a default judgment without a hearing if my client requests an injunction?**

Maybe. Different judges will have different practices for default divorces. But where a petitioner has requested a permanent injunction at divorce, lawyers should plan to introduce testimony and evidence about the violence to support an award of a permanent injunction.

5.3 **NAME CHANGE WITH DIVORCE**

A married woman’s maiden name is her legal surname. Marriage does not change her legal surname. The divorce petition and judgment should be drafted to confirm your client’s maiden name if she wishes to resume use of that name.

5.4 **SPOUSAL SUPPORT AT DIVORCE**

1. **Overview.**

Domestic violence victims often need spousal support in order to survive. Years of abuse cause many victims to have serious health problems which adversely impact their ability to support themselves. This section discusses special issues that arise when a domestic violence victim claims spousal support.

2. **Special Issues in Domestic Violence Cases.**

To get final spousal support, a spouse must show that she was free from fault in the dissolution of the marriage and that she lacks the means of support. Proof of freedom from fault is not required for interim spousal support. In domestic violence cases, the fault standard presents some challenges.

a. **Fault.**

Sometimes abusers seek to benefit from the collateral consequences of their abuse by characterizing victim behavior resulting from the abuse as fault grounds to avoid support. Fault that bars spousal support must be serious and an independent contributory or proximate cause of the break up.

- **Abandonment.** Abandonment without lawful cause is a common ground for finding "fault" that bars final spousal support. It is not uncommon for an abuser to allege abandonment when the abused house leaves because of the violence. In order to defend against fault, the victim must prove the abuse if she has not already done so. Even threats of violence constitute lawful cause for abandonment and thus justify abandonment.

- **Self-defense.** If the victim of abuse has committed violence against the other that is a “reasonable and justifiable response” to the abuser, she is not “at fault” in the break up of the marriage.

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200 LA. CODE CIV. PROC. art. 3947(B) (2012).
201 Id.
202 Bowes v. Bowes, 2000-CА-1062 (La. App. 4 Cir. 8/15/01); 798 So. 2d 996. Physical abuse or threats of violence may prevent a finding of fault. See Almon v. Almon, 97 CA 2004 (La. App. 1 Cir. 9/25/98); 718 So. 2d 1073; Richards v. Richards, 525 So. 2d 163 (La. App. 3 Cir. 1988); Firstley v. Firstley, 427 So. 2d 76 (La. App. 4 Cir. 1983).
203 Smith v. Smith, 08-575, 15 (La. App. 5 Cir. 1/12/10); 31 So. 3d 453, 462 (citing Pearce v. Pearce, 348 So. 2d 75 (La. 1977)).
204 Caldwell v. Caldwell, 95-CA-963 (La. App. 3 Cir. 3/13/96); 672 So. 2d 944.
205 Smith, 31 So. 3d at 464. In Smith, the wife arrested for simple battery after throwing scalding water on her husband was not at fault in the break-up of the marriage where evidence showed a history of abuse and that she acted in self-defense. Id.
DOMESTIC VIOLENCE

- **Reconciliation.** Reconciliation often occurs in violent relationships prior to the final separation. Reconciliation that follows “fault” nullifies the prior fault. Thus, the critical question is the alleged misconduct that occurred between the last reconciliation and the filing of the divorce action. But in some cases, reconciliation can be challenged as not mutual – if a perpetrator moves back into a shared home without the victim’s consent, or the victim returns to a shared home for fear of her safety, her intent to reconcile may be at issue. The motives and intent of the parties will determine reconciliation. In general, however, if domestic violence, financial abuse, fear or coercion contributed to the circumstances that the abuser claims constitute reconciliation, the requisite intent and forgiveness may be lacking and application of the nullification principle is both wrong and inequitable.

- **Mental health and substance abuse.** Many victims suffer from mental illness or alcoholism because of physical abuse. “Misconduct” caused by mental illness is excused and will not bar final support. The mental illness must precede the misconduct. In these cases, expert medical testimony on the mental illness and the causal relationship to the misconduct is highly recommended, but not required.

Further, a victim’s habitual intemperance may be excused by mental illness. One study found that 67% of abusers frequently abuse alcohol. The abuser’s intemperance may preclude a finding of fault against the victim. A course of conduct, such as drinking, when approved and consented by both spouses, cannot constitute mutual fault.

b. **Costs of Medical and Psychological Care.**

Spousal support claims should be supplemented by requests that abusers pay for psychological and medical care that victims and children need because of the abuse. Victims and their children often need several years of psychological therapy to overcome the effects of family violence. The PSFVRA requires the abuser to pay the costs of the medical and psychological care necessitated by family violence. Such support should be in addition to any spousal support ordered. It should not be limited by the abuser’s income or denied because of the victim’s means. Necessary medical and psychological care must be assessed against the abuser even if the court finds the victim to be at “fault” in the break-up of the marriage.

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206 Doane v. Benenate, 95-C A-0953 (La. App. 4 Cir. 2/15/96); 671 So. 2d 523.
207 Woods v. Woods, 27199-CA (La. App. 2 Cir. 8/23/95); 660 So. 2d 134.
208 Richard Irons & Jennifer Schneider, When is Domestic Violence a Hidden Face of Addiction, 29 J. Psychoactive Drugs 337 (1997). This study reports that battered women comprise 64% of female patients admitted to inpatient psychiatric service. Id.
209 Doane, 671 So.2d 523; Eppling v. Eppling, 537 So. 2d 814 (La. App. 5 Cir. 1989).
212 Richard Irons & Jennifer Schneider, supra note 207.
213 Jenkins v. Jenkins, 38,873-CA (La. App. 2 Cir. 8/22/04); 882 So. 2d 705.
214 The stress of domestic violence often causes substance abuse. Untreated substance abuse will severely affect a victim’s employability. Substance abuse is expensive. Ask your client if she is interested in getting medical treatment for substance abuse.
5.5 USE AND OCCUPANCY OF FAMILY HOME IN DIVORCE SUITS

Housing is one of the most important needs of a domestic violence victim and her children. Abusers often punish victims by: (1) denying them financial support necessary to make rent payments, (2) causing them to be evicted, (3) failing to pay the home mortgage, or (4) damaging the house to make it uninhabitable.

Two statutory procedures are available to a spouse or parent who needs to obtain use and occupancy of the family home or apartment: Section 2135-6 of the Domestic Abuse Assistance Act and Injunctions and Incidental Orders under La. Rev. Stat. § 9:374. A petitioner who is not seeking a protective order under the domestic abuse statutes will have to address her housing needs under section 9:374, a general use and occupancy statute that applies to shared residences of divorcing couples.


Under the Domestic Abuse Assistance statute, a domestic abuse protective order or TRO may grant possession of the residence or household to the exclusion of the defendant, by evicting him or restoring possession to the petitioner where:

- The residence is jointly owned in equal proportion or leased by the defendant and the petitioner or the person on whose behalf the petition is brought;
- The residence is solely owned by the petitioner or the person on whose behalf the petition is brought;
- The residence is solely leased by the defendant and the defendant has a duty to support the plaintiff or the person on whose behalf the petition is brought.215

This relief can be obtained in a temporary restraining order without a contradictory hearing, and can be continued by protective order for up to eighteen months. In addition, a protective order issued under section 2136 may grant two additional forms of housing relief in the form of 1) granting the petitioner possession of, and evicting a defendant from, a residence is solely owned by the defendant, where the petitioner has been awarded temporary custody of the parties’ minor children, or 2) ordering the provision of suitable alternative housing.216 See discussion supra “Domestic Abuse Assistance Act.”


Section 374 addresses use and occupancy of a shared residence in divorce. Under this statute, the court can award use and occupancy only after the filing of a divorce (or a separation of property in the case of community property) and a contradictory hearing.

a. Community Property. Where the family residence is community property, either spouse may petition for use and occupancy. The court may award use and occupancy pending partition of the community property or further orders, whichever occurs first.217

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b. **Separately Owned Property.** Where the family residence is the separate property of either spouse, the spouse who has physical custody or has been awarded temporary custody of the minor children of the marriage, may petition for use and occupancy. After a contradictory hearing, the court may award the use and occupancy of the family residence and use of community movables or immovables pending partition of the community property or until 180 days after termination of the marriage, whichever occurs first.\(^{218}\)

c. **Standard for awarding use and occupancy.** Courts should award use and occupancy based upon the best interest of the family, and, in doing so, must consider the relative economic status of the parties and the needs of the children.\(^{219}\) Ordinarily, occupancy by the spouse who has custody of children is in the best interest of the family.\(^{220}\) In cases involving a “history of family violence,” victims should have a strong case for occupancy of the marital residence because Louisiana custody laws require, in general, that they be awarded sole custody.\(^{221}\)

d. **Rent reimbursement claims.** Use of section 374 raises issues regarding rent. Be prepared to address this issue if requesting use and occupancy under that statute.\(^{222}\)

6. **CUSTODY AND VISITATION IN DOMESTIC VIOLENCE CASES**

6.1 **OVERVIEW**

The presence of domestic violence presents special issues in child custody determinations. Domestic violence triggers different laws and different litigation practices than those used in other child custody cases. A family law attorney who fails to distinguish between cases that involve domestic violence and those that do not risks both malpractice, and also harm to victims and their children. This section addresses custody laws and litigation issues unique to domestic violence cases. It will touch only peripherally on general laws for custody and visitation. Discussion of general custody law can be found in the family law chapter, [infra](#).

**Domestic violence and children\(^{223}\)**

Domestic violence has devastating effects on children. An increasingly robust body of research suggests that children living in homes where a parent is abused suffer emotional, psychological, and long-term life consequences practically identical to those of children who are themselves physically abused.\(^{224}\) Children living in these homes are at risk of developing profound psychological, behavioral, cog-

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\(^{218}\) Id.

\(^{219}\) Id.


\(^{221}\) LA. REV. STAT. ANN. § 9:364.

\(^{222}\) Prior to 2004, rent for use of family home could not be retroactively assessed unless the parties agreed or the court ordered. McCarroll v. McCarroll, 96-C-2700 (La. 10/21/97); 701 So. 2d 1280. Under the pre-2004 law, a rent order could only be rendered at the time of the award of the family home. Chace v. Chace, 29591-CA (La. App. 2 Cir. 5/7/97); 694 So. 2d 613, 616. Now section 374(C) requires the court to decide at the time of an award of use of the family home whether or not to award rent for the use, and, if so, the amount of the rent. Section 374(C) allows the parties to agree to defer the rent issue. If the rent issue is deferred, the court may order rent retroactive to the award of use of the family home.


\(^{224}\) BEHIND CLOSED DOORS: THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, [supra](#) note 12; Evan Stark, [supra](#) note 6, at 292.
nitive, social and educational problems – problems that often manifest in impaired functioning as adults.\textsuperscript{225} Even more, children whose mothers are abused are at significantly increased risk of also being abused.\textsuperscript{226} And after separation, children who have never been previously physically abused by a domestic violence perpetrator are at increased risk of being physically abused themselves.\textsuperscript{227} But despite overwhelming empirical data to the contrary, many family court judges and court-appointed evaluators persist in the erroneous belief that domestic violence has a limited impact on children and parenting – that once two parents separate, the effects of domestic violence on children will dissipate.

For all of the reasons described above and more, one of the most important services a lawyer can provide to a victim of abuse is to help her address her legal needs for child custody. This is no small task. When victims leave abusive partners, abusers routinely seek to punish and harass their victims through aggressive custody and visitation litigation.\textsuperscript{228} Visitation periods and visitation exchanges can expose both victims and their children to continuing injury. After separation, child contact is the most common context in which victims will be re-assaulted.\textsuperscript{229} When insufficient visitation protections are in place for children, or when abusers are awarded sole or joint custody, some victims reconcile as a last resort to help keep their children safe.

Nationally, abusers have been very effective at making good on their promises to punish victims by taking their children away. Batterers are more likely to seek custody of their children than are non-violent fathers.\textsuperscript{230} A variety of government and institution sponsored gender bias studies conducted in state courts across the nation have shown that, contrary to the commonly held believe that women are favored by courts in contested custody litigation, women face serious disadvantages in family law courts.\textsuperscript{231} Moreover, some studies suggest that mothers who are victims of abuse may be more likely to lose custody of their children than women who are not.\textsuperscript{232} And despite good domestic violence custody laws, domestic violence perpetrators are frequently awarded sole or joint custody of children.\textsuperscript{233} Innumerable issues contribute to this problem, including a lack of education about domestic violence and its effects. In many cases, abusers exploit easy opportunities to characterize the lingering psychological effects of the abuse as parenting deficits in the victim. In other cases, perpetrators benefit from misconceptions about abusers – expectations that abusers will present as angry or impulsive, or with mental health issues that can be detected by psychological testing or evaluation.

\textsuperscript{225} Evan Stark, \textit{supra} note 6, at 292. While children in these homes are at much greater risk of these harms, not all children suffer these harms – many children show significant coping skills and resilience in the face of abuse. \textit{Id.}; \textit{The Effects of Intimate Partner Violence on Children 2} (Robert Geffner, Robyn Spurling Igelm an & Jennifer Zellner eds., 2003).

\textsuperscript{226} Evan Stark, \textit{supra} note 6, at 292 (describing “robust link” between domestic violence and child physical and sexual abuse); \textit{The Effects of Intimate Partner Violence on Children supra} note 224.

\textsuperscript{227} \textit{Bancroft & Silverman, supra} note 26.

\textsuperscript{228} Evan Stark, \textit{The Battered Mother’s Dilemma, in 2 Violence Against Women in Families and Relationships supra} note 12, at 96.

\textsuperscript{229} Evan Stark, \textit{supra} note 6, at 291.

\textsuperscript{230} Joan Zorza & Leora Rosen \textit{supra} note 10, at 986.

\textsuperscript{231} \textit{Id.} at 314; \textit{see also Stephanie Dallam, Are “Good Enough” Parents Losing Custody to Abusive Ex-Partners} (updated 2008), available at http://leadershipcouncil.org/1/pas/dv.html (citing and summarizing state-sponsored gender bias studies).

\textsuperscript{232} Evan Stark, \textit{supra} note 6, at 314; Joan S. Meier, \textit{supra} note 222; Peter Jaffe \textit{supra} note 10, at 16.

\textsuperscript{233} Joan S. Meier, \textit{supra} note 222, at 662; Evan Stark, \textit{supra} note 6.
The Post-Separation Family Violence Relief Act (PSFVRA), Louisiana Revised Statute 9:361-369, addresses these problems.\(^{234}\) That Act creates important legal remedies to protect abused parents and their children, and also abused children. In part, it protects victims and children by reducing judicial discretion in family violence cases, creating custodial presumptions that favor sole custody for the non-abusive parent, and imposing restrictions on the abusive parent’s access to children. Because the PSFVRA should govern most custody determinations in family violence cases, this section focuses on that Act.

6.2 THE POST-SEPARATION FAMILY VIOLENCE RELIEF ACT (PSFVRA): APPLICABILITY AND REMEDIES

1. Who can invoke the Post-Separation Family Violence Relief Act?

   The PSFVRA applies to custody and visitation disputes that involve a history of family violence, whether the parents are unwed, married or divorced.\(^{235}\)

2. What relief is available to a victim of domestic violence under the Post-Separation Family Violence Relief Act?

   The PSFVRA imposes mandatory standards for determining custody and visitation disputes where there is a “history of family violence.” The PSFVRA includes a variety of important remedies for victims of abuse that include the following:


      The PSFVRA prohibits the award of sole or joint custody to an abusive parent.\(^{236}\) The presumption in favor of the abused parent can be overcome only if the abusive parent proves that he has completed a treatment program (typically six months in duration), that he is not abusing alcohol or drugs and that the best interest of the children requires his participation as a custodial parent because of the abused parent’s absence, mental illness, substance abuse or “such other circumstances” which affect the children’s best interest.\(^{237}\)

      This means that even after proving completion of a treatment program and freedom from substance abuse, the abuser must still prove that the child’s best interest requires his participation as a custodial parent because the other parent has abandoned the child, suffers from mental illness, substance abuse or “such other circumstances” which affect the child’s best interest. The phrase, “such other circumstances” refers to the preceding statutory terms in Rev. Stat. § 9:364(C), which all involve circumstances that rise to a level of parental unfitness. Thus,

\(^{234}\) See D.O.H. v. T.L.H., 01-174 (La. App. 3 Cir. 10/31/01); 799 So. 2d 714, 721-32 (Woodard, J., dissenting) (discussing the intent of the PSFVRA and how domestic violence affects children).

\(^{235}\) See Evans v. Terrell, 27615-CA (La. App. 2 Cir. 12/6/95); 665 So.2d 648. The PSFVRA applies to family violence cases without regard to the parents’ marital status. See LA. REV. STAT. ANN. §§ 9: 362 (1)-(4), 363-364 (2011); see also LA. CIV. CODE ANN. art. 245 (2012) (establishing that custody rules applicable to married or divorced parents are applicable to unwed parents).

\(^{236}\) The statutory presumption against awarding abusers custody is an important reform. It removes the burden from the victim to show the connection between spouse abuse and harm to the children. The statutory presumption denies discretion to judges who may be uneducated or biased on the issue of domestic violence.

\(^{237}\) LA. REV. STAT. ANN. § 9:364.
under the rule of *ejusdem generis*, “such other circumstances” must be things similar to the preceding terms, which includes only factors suggesting parental unfitness.²³⁸ In other words, mere “best interest” circumstances that do not rise to a level of parental unfitness are not sufficient. Additionally, if one interprets the statute to require only a showing of “best interest” circumstances, the statute’s specific reference to an “abused parent’s absence, mental illness, substance abuse” is rendered superfluous and meaningless. This interpretation violates rules of construction requiring that a statute be read to give effect to all of its words and parts.²³⁹

b. The PSFVRA prohibits courts from denying victim custody because of problems attributable to the abuse. **LA. REV. STAT. ANN. § 9:364(A).**

The fact that an abused parent suffers from the effects of the abuse cannot be grounds to deny her custody.²⁴⁰ This provision provides an important advocacy tool for victims, because many victims have problems attributable to the abuse that abusers frame as parenting deficits during custody disputes. These problems can include mental health issues such as depression and anxiety, as well as financial, employment, and housing instability.

c. The PSFVRA imposes restrictions on an abusive parent’s visitation. **LA. REV. STAT. ANN. § 9:364(C).**

The PSFVRA prohibits the abusive parent from exercising even supervised visitation until he proves that he has completed a treatment program.²⁴¹ After that, he may have supervised visitation.²⁴² Upon a showing that the perpetrator is not abusing alcohol or drugs, poses no danger to the child, and that unsupervised visitation is in the child’s best interest, he may eventually be awarded unsupervised visitation.²⁴³ For discussion on an opposing view asserting that supervised visitation can take place during the treatment rather than after completion of treatment, see infra, “Can the court order visitation prior to the completion of a treatment program?”

Additionally, visitation should never occur outside the sight or hearing of the supervisor, cannot be overnight or in the abuser’s home, and must be paid for by the abuser.²⁴⁴

²³⁸ Under the statutory construction rule of *ejusdem generis*, general words are restricted to a sense analogous to the less general words. *Pumphrey v. City of New Orleans*, 2005-0979 (La. 4/4/06); 925 So.2d 1202, 1211.


²⁴⁰ **LA. REV. STAT. ANN. § 9:364 (A).**

²⁴¹ **LA. REV. STAT. ANN. § 9:364 (C).** Several courts have specifically affirmed that supervised visitation cannot begin until the abuser has completed a treatment program. See *Duhon v. Duhon*, 01-0731 (La. App. 3 Cir. 12/12/01); 801 So.2d 1263, 1265; *Morrison v. Morrison*, 97 CA 0295 (La. App. 1 Cir. 9/19/97); 699 So.2d 1124, 1127; cf. *Folse v. Folse*, 98-1976 (La. 6/29/99); 738 So. 2d 1040; *Crowley v. Crowley*, 96-CC-2413 (La. 10/11/96); 680 So. 2d 661 (staying visitation where family violence found). But see *Lewis v. Lewis*, 34,031-Ca (La. App. 2 Cir. 11/3/00); 771 So.2d 856 (allowing supervised visitation before completion of the treatment program in a case where that issue was not raised or addressed). In light of *Lewis*, some opponents argue that supervised visits can take place during treatment. For further discussion of these issues see “Can the court order visitation before the completion of a treatment program?”

²⁴² **LA. REV. STAT. ANN. § 9:364(C).**

²⁴³ *Id.*

²⁴⁴ **LA. REV. STAT. ANN. § 9:362(6).**
d. The PSFVRA prohibits courts from using a batterer’s friends or family as visitation supervisors. LA. REV. STAT. ANN. § 9:362(6).

The PSFVRA specifically excludes an abuser’s friends, relatives, therapist, or associates as visitation supervisors.245 The requirement that an abuser’s visitation be “supervised” is easily undermined by the appointment of supervisors who are unlikely to meaningfully supervise the visitation. The court may appoint a victim’s friends or family to supervise visitation, but only if the victim consents.246

e. The PSFVRA prohibits courts from ordering mediation in domestic violence cases. LA. REV. STAT. ANN. § 9:363.

A party who shows that she or any of the children has been a victim of family violence perpetrated by the other spouse or parent may not be ordered to mediate a divorce, child custody, visitation, child support, alimony or community property proceeding.247 This rule applies for any family violence case and does not require proof of a “history of family violence.”248


Under the PSFVRA, all orders entered in family violence cases shall include an injunction against abuse. The Act defines “Injunction” to include specifically enumerated provisions for protection.249 In general, the injunctions are permanent.

g. The PSFVRA requires that an abuser’s visitation be terminated if he violates an injunction against abuse. LA. REV. STAT. ANN. § 9:366.

An abuser’s visitation rights must be completely terminated if any of the following occurs:

- He violates an injunction (protective order) as defined in Rev. Stat. § 9:362.250 This termination appears to be permanent.251
- It is proven by clear and convincing evidence that he sexually abused his child.252 The visitation termination continues until the abusive parent proves that he has successfully completed a treatment program for sexual abusers and that supervised visitation would be in the child’s best interest.253 Even after this is proved, only supervised visitation can be allowed.

245 LA. REV. STAT. ANN. § 9:362(6); Hollingsworth v. Semerad, 35,264-CA (La. App. 2 Cir. 10/31/01); 799 So. 2d 658 (amending trial court judgment to require “unbiased” supervisor even where PSFVRA was held inapplicable).
246 LA. REV. STAT. ANN. § 9:362(6).
247 LA. REV. STAT. ANN. § 9:363.
248 The PSFVRA’s custodial presumption requires that petitioner show a “history” of family violence that includes either more than one incident of family violence, or one incident resulting in serious bodily injury. LA. REV. STAT. ANN. § 9:364(A).
251 The legislative history of the Post-Separation Family Violence Relief Act makes it clear that the legislature intended to eliminate the courts’ power to allow visitation for violators of injunctions. Compare Act 1091 of 1992 with Act 888 of 1995 and Act 750 of 2003. A brief on this issue is available at www.probono.net/la.
252 LA. REV. STAT. ANN. § 9:364 (D).
253 Buchanan v. Langston, 36,520-CA (La. App. 2 Cir. 9/18/02); 827 So. 2d 1186. If sex abuse is proven, however, Louisiana Children’s Code article 1570(F) may be invoked instead to suspend visitation until the child is eighteen years old.
• He physically abuses his child.\textsuperscript{254} Visitation is terminated until the abusive parent proves that visitation would not cause physical, emotional or psychological damage to child, and then, visitation must be restricted to minimize risk of harm to the child.\textsuperscript{255}


Section 365 mandates that any mental health professionals appointed to conduct a custody evaluation in a case where family violence is an issue must have current and demonstrable training and experience working with perpetrators and victims of family violence.\textsuperscript{256} An untrained mental health professional could botch the evaluation and endanger the parties.\textsuperscript{257} When appropriate, contest an evaluator's qualifications under section 365.\textsuperscript{258} Failure to object to an unqualified court appointed evaluator at the time of appointment could waive the objection.\textsuperscript{259} Attorneys representing victims should not only object to an evaluator's qualifications where appropriate, but should also seriously consider opposing the appointment of a custody evaluator entirely.\textsuperscript{260} See discussion \textit{infra} “Should the Court appoint a custody evaluator?”


Fortunately, Louisiana’s relocation notification statute does not apply when an “order” issued pursuant to the Domestic Abuse Assistance Act, the Protection from Dating Violence Act, the Post-Separation Family Violence Relief Act, Children’s Code article 1564, or any other restraining order, preliminary injunction, permanent injunction, or any protective order prohibiting a person from harming or going near the other person is in effect, other than a section 9: 372.1 injunction.\textsuperscript{261} See discussion \textit{infra}, “What should I do if my client wants to relocate?”


The Post-Separation Family Violence Relief Act discourages vindictive litigation by abusers by mandating that all attorney fees and costs be paid by the perpetrator of family violence. Many abusers continue their harassment of the victim through protracted custody and visitation litigation. Revised Statute 9:367 provides a powerful deterrent to such lit-
igation. Once “family violence” has been found, the abuser must pay all of the victim’s attorney fees incurred in furtherance of the Act. The perpetrator of abuse may be made to pay the victim’s reasonable attorney fees, even if he is the prevailing party in subsequent litigation.262

6.3 LITIGATING POST-SEPARATION FAMILY VIOLENCE RELIEF ACT CASES

1. What is the legal standard for applying the custody and visitation provisions of the Post-Separation Family Violence Relief Act?

a. The petitioner must prove a “history of family violence.”

The custody and visitation provisions of the Post-Separation Family Violence Relief Act are triggered by finding that there is a “history of family violence.” The Act defines a “history of perpetrating family violence” as either (1) one incident of family violence resulting in serious bodily injury or (2) more than one incident of family violence.263 In other words, if a petitioner proves one of these two alternative bases for showing a “history” of family violence, the Act applies.264

b. “Family violence” is defined broadly.

Under the act, “family violence” includes, but is not limited to physical or sexual abuse and any offense against the person as defined in the Criminal Code, except negligent injury and defamation, committed by one parent against the other parent or any of the children.265 It does not include reasonable acts of self-defense by one parent to protect herself or the child from the family violence of the other parent.266

This definition of family violence tracks the definition of “domestic abuse” in the Domestic Abuse Assistance Act. The two definitions differ only in that the PSFVRA limits acts of “family violence” to acts perpetrated by one parent upon the other parent (as opposed to the various relationships between parties that can invoke application of the DAAA). Accordingly, case law decided under the DAAA addressing the issue of what constitutes “domestic abuse” is instructive for purposes of examining what constitutes “family violence” under the PSFVRA. See “Standard for awarding a protective order” supra.

262 Jarrell v. Jarrell, 35,837-CA (La. App. 2 Cir. 2/27/02); 811 So. 2d 207 (affirming award of almost $10,000 in attorney fees to victim who unsuccessfully opposed increased visitation time with abuser).

263 LA. REV. STAT. ANN. § 9:364(A). Note that this definition resulted from a statutory amendment that occurred in response to a bad decision in Simmons v. Simmons, in which the court refused to apply the PSFVRA even though the husband admitted to hitting his wife several times – but never in the presence of the children or because he was “provoked” by his wife’s adultery. 26,414-CA (La. App. 2 Cir. 1/25/95); 649 So. 2d 799. The Simmons definition of history of family violence has been legislatively overruled. As noted by Hicks v. Hicks, the outdated Simmons test for history of family violence is wrong. 98-1527 (La. App. 3 Cir. 5/19/99); 733 So. 2d 1261. Generally, cases on “history of family violence” decided before the 1995 amendment are likely to be wrong.

264 LA. REV. STAT. ANN. § 9:364. This section should preclude any attempt by an abuser to invoke the jurisprudential reformation rule, i.e., that abatement of prior misconduct makes evidence of the prior misconduct irrelevant for determining fitness for custody. See Crowson v. Crowson, 32,314-CA (La. App. 2 Cir. 9/22/99); 742 So. 2d 107.

265 LA. REV. STAT. ANN. § 9: 362 (3); G.N.S. v. S.B.S., 35,348-CA (La. App. 2 Cir. 9/28/01); 796 So.2d 739 (granting sole custody based on violence to child); Hollingsworth v. Semerad, 35,264-CA (La. App. 2 Cir. 10/31/01); 799 So. 2d 658; Duhon v. Duhon, 01-0731 (La. App. 3 Cir. 12/12/01); 801 So. 2d 1263 (unjustified corporal punishment of child constituted “family violence”). Note that a father’s abuse of the stepmother does not allow the mother to invoke the PSFVRA to restrict custody and visitation.

266 LA. REV. STAT. ANN. § 9:362(3).
In general, “family violence” includes battery, even if merely offensive and not injurious, threats to injure without touching, and forced sex. The violence does not have to be frequent or continuous. The statute’s definition is subject to broad interpretation because of the “including but not limited to” language, but as in Domestic Abuse Assistance Act cases, courts are unlikely to apply the statute in cases that do not involve physical violence, threats, assault, or an offense against the person that constitutes a violation of the criminal code. Because stalking is an offense against the person that violates the criminal code, the Post-Separation Family Violence Relief Act should apply in serious stalking cases, even in absence of direct threats or physical violence.

Despite the likelihood that, as a general rule, courts will not apply the PSFVRA in cases with no threats of harm or physical violence, lawyers should consider whether some cases still warrant the Act’s application. There is a legitimate argument that, from the standpoint of effecting the Act’s protective purpose, abuse in the form of extreme control, coercion and intimidation - even in absence of physical abuse – should sometimes be included within the meaning of the statute. Recent research on lethality in abuse cases suggests that factors relating to control and coercion better predict lethality risk and other negative outcomes for victims than does the frequency or severity of past physical abuse. So, for example, a victim who has not been physically abused but who is not allowed to leave her home without her husband’s permission, who has been “punished” by abuse of a family pet, or who is routinely stalked and monitored, could be more at risk of being killed by her abuser when she leaves him than a victim who has been hit or slapped with relative frequency in the past.

The PSFVRA’s broad definition of family violence allows a good faith argument for applying the Act’s protections in cases with non-physical abuse that nonetheless suggests high risk of lethality. But these cases can present challenges for litigation that require expertise in abuse cases - attorneys and their clients should carefully weigh the victim’s lethality risk against the risk that the victim will lose credibility with a Judge who may perceive that she is exaggerating the seriousness of her situation.

c. The court should proceed logically in determining whether the act applies.

Once a party pleads the Post-Separation Family Violence Relief Act, the court should use a logical procedure for determining whether it applies. In doing so, the court should first examine each alleged inci-

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267 See Hicks v. Hicks, 98-1527 (La. App. 3 Cir. 5/19/99); 733 So. 2d 1261; Michelli v. Michelli, 93 CA 2112 (La. App. 1 Cir. 5/5/95); 655 So. 2d 1342; Harper v. Harper, 537 So. 2d 282 (La. App. 4 Cir. 1988).

268 Michelli, 655 So. 2d 1142.

269 Smith v. Smith, 44-663 (La. App. 2 Cir. 8/19/99) 16 So. 3d 643, 651(holding the trial court did not err in refusing to apply the PSFVRA where evidence showed that each party provoked verbal and physical altercations and no serious bodily injury had occurred).

270 Evan Stark supra note 6, at 293; Jacquelyn Campbell et al., Risk Factors for Femicide in Abusive Relationships, 93 AM. J. PUB. HEALTH 1089 (2003) This study found that three factors (1) separation, (2) the presence of a weapon, and (3) the existence of control increased lethality risk nine-fold. The frequency and severity of past violence was a less accurate predictor of dangerousness. Id.
dent of family violence to determine (1) whether it was proved and (2) for each that was proved, determine whether it meets the statutory definition of “family violence.” Next, the court should consider whether the proven incidents, taken together or alone, constitute a “history of family violence.” In other words, determine whether any one incident proved by the petitioner resulted in serious bodily injury, or whether the petitioner proved more than one incident. If the petitioner has shown one of these two alternatives, the Act must be applied in making the custody determination.271

2. **Can a court refuse to apply the PSFVRA or make custody orders before determining whether the PSFVRA applies?**

No. If the petitioner proves a history of family violence, the court must apply the protections of the Post-Separation Family Violence Relief Act.272 Louisiana’s Courts of Appeal have consistently admonished trial courts on the Act’s mandatory application.273 Even more, the trial court may not avoid application of the Act’s protections by refusing to make a determination on the question of whether there is a “history of family violence.”274 Once the Act has been pled, all custody determinations must be predicated on a finding about family violence - the court may not issue even an interim or temporary custody order without first determining that issue.275 Even where the PSFVRA has not been pled, it is improper to make a custody determination before resolving outstanding pleadings alleging domestic violence - related Domestic Abuse Assistance Act proceedings could determine whether the PSFVRA applies.276

3. **Can the court refuse to make a finding of “family violence” if the evidence is uncontroverted?**

In most cases, no. Even though the trial court’s determination of “family violence” is entitled to great weight and will not be disturbed on appeal absent clear abuse of discretion,277 the trial court must apply the Act as written and may not impose a higher burden on the petitioner than that demanded by the Act.278 Thus, where the victim offers unrefuted testimony about specific acts of family violence, she does not also have to produce corroborating

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271 See Hicks, 733 So.2d 1261.
272 See LA REV. STAT. ANN § 9:364 (2011). Although the trial court has discretion in its factual determination on “family violence,” once the finding has been made, the court is bound to apply the Act.
273 Ledet v. Ledet, 03-CA-537 (La. App. 5 Cir. 10/8/03); 865 So. 2d 762 (reversing and remanding for a determination on family violence); Lewis v. Lewis, 34,031-CA (La. App. 2 Cir. 11/3/00); 771 So. 2d 856; Hicks, 733 So.2d 1261 (reversing custody award to father where uncontroverted evidence proved at least on act of family violence resulting in serious bodily injury, but trial court failed to apply the act); see also Crowley v. Crowley, 96-CC-2413 (La. 10/11/96); 680 So. 2d 661 (reversing trial court that made finding that there was a history of family violence but did not apply the act’s requirement that the victim be awarded sole custody).
274 Ledet, 865 So. 2d 762. In Ledet, the trial court refused to hold an evidentiary hearing on the abuse allegations and suspended ruling on the abuse allegations for sixty days. The appellate court ordered the trial court to (1) hold and complete a hearing on the “family violence” allegations within fifteen days, (2) make findings on the “family violence” allegations, and (3) set custody in accordance with those findings and the PSFVRA. Id.
275 Id., 865 So. 2d 762; Ford v. Ford, 01-387 (La. App. 3 Cir. 10/17/01); 798 So. 2d 316; McFall v. Armstrong, 10-1041 (La. App. 5 Cir. 9/13/11); 75 So. 3d 30, 40.
276 McFall, 75 So. 3d at 40 (reversing custody determination made before Domestic Abuse Assistance Act (DAAA) petition was resolved and holding that the DAAA proceeding will determine whether the court is mandated to apply the Post-Separation Family Violence Relief Act).
277 Buchanan v. Langston, 36-520-CA (La. App. 2 Cir. 9/18/02); 827 So. 2d 1186.
278 Hicks, 733 So. 2d at 1266.

(203)
evidence. The uncontradicted evidence must be taken as true in the absence of circumstances in the record casting suspicion on its reliability. As a practical matter, however, lawyers should plan to introduce all corroborating evidence available.

4. **Can the court grant an injunction if the victim’s testimony is disputed by the abuser?**

Yes. Often, a victim is the only witness to her abuse. The burden of proof for family violence is on the victim. However, this burden can be met by the victim’s testimony if the court finds her credible. Of course, corroborating evidence is very helpful in the “she said/he said” cases.

5. **Can the court apply the Act in a case where the petitioner failed to plead it?**

Yes, but it may not have to. The PSFVRA cannot be pled for the first time on appeal, but the Act need not be formally pled for the court to apply it. In other words, if a petitioner fails to plead the act, she cannot complain on appeal that the court should have applied it. But even when it has not been formally pled, the court may make a finding of family violence that triggers the Act’s provisions.

6. **What satisfies the treatment program requirements under the PSFVRA?**

The PSFVRA requires that a parent with a history of perpetrating domestic violence successfully complete a “treatment program” before exercising supervised visitation. “Treatment program” is defined as one “designed specifically for perpetrators of domestic violence.” Lawyers representing domestic violence victims should be fully prepared to litigate both (1) whether the treatment program satisfies this definition, and (2) whether it was successful. In most cases, lawyers should aggressively challenge any attempt to substitute batterer intervention courses with “anger management.” The two are substantively different in important ways, and should not be conflated for the reasons described below.

a. **What type of “treatment program” satisfies the requirement?**

To date, this issue has not been directly addressed by a Louisiana appellate court. In *DOH v. TLH*, the Louisiana Court of Appeal for the Third Circuit upheld a trial court order finding that “anger management” satisfied the requirement, but did not actually opine upon whether anger management satisfied the statutory mandate. Instead, the court held that because the petitioner had presented no evidence or experts to refute the testimony regarding the perpetrator’s “anger management” the trial court did not err as a matter of law.
In fact, anger management does not satisfy the PSFVRA requirements. The dissenting opinion in *DOH v. TLH* correctly asserts that, with respect to both substance and procedure, anger management courses fall short of providing meaningful rehabilitation for batterers. Anger management is not a course of therapy specifically designed for perpetrators of domestic violence, and it is not recognized as such by experts in domestic violence. If a therapist confounds the two types of therapies, that fact alone suggests that he or she is untrained in domestic violence. Moreover, many experts believe that anger management programs increase danger to victims. The United States Department of Justice Office on Violence Against Women, which funds domestic violence programs nationwide, asserts that the practice of substituting anger management for batterer intervention compromises victim safety and allows perpetrators to escape responsibility. The remedial purposes of the statute – to provide protection for victims and their children by imposing meaningful rehabilitative requirements on batterers - are not met by the substitution of batterer intervention programs with either “anger management” or individual therapy.

Lawyers representing victims should aggressively litigate this issue, using expert testimony when possible. As a general rule, a program designed specifically for perpetrators of domestic violence should be at least twenty-six weeks long.

**b. What is “successful” completion?**

Ineffective treatment may be challenged in a hearing on a request for either supervised or unsupervised visitation. The fact that a party presents a “certificate of completion” for batterer intervention or anger management should not be equated with “successful completion” as a matter of fact or law. Any statutory interpretation of “successful” that imposes only the formal requirements of *attendance* belies the clear legislative purpose of the Act. Ostensibly, “successful completion” would require that a party not only meet the formal requirements of attendance and cooperation, but also that he has learned to accept responsibility for his battering behavior and its impact on children and parenting. So, for example, where a batterer “completes” a course, but remains unwilling to acknowledge the gravity of abusive behavior on family dynamics, or continues to engage in victim-blaming, the “success” of his therapy should be at issue in the litigation. The continuing denial of abuse is evidence that treatment has not been successful. When possible, present expert testimony about the types of behavior that would suggest meaningful reform.

Additionally, it is often important that lawyers help clients understand that even a highly-regarded batterer intervention program is unlikely to produce meaningful reform for a significant portion of batterers. Clients are often overly optimistic about the prospects of an

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287 *Id.* at 722-32.
288 This language can be found in Office on Violence Against Women grant solicitations under the topic heading “Activities that Compromise Victim Safety and Recovery” found at: http://www.ovw.usdoj.gov/docs/fy2012arrest-solicitation.pdf.
abuser's participation in batterer intervention. Research on the effectiveness of batterer intervention programs is controversial. But increasingly, it suggests that burgeoning court reliance on these programs is problematic because batterer intervention programs largely fail to prevent or even reduce future violence.\textsuperscript{290}

7. \textit{Can the Court award visitation prior to the completion of an abuser treatment program?}

No. A parent with a history of family violence is allowed only supervised visitation, and that visitation is “conditioned upon that parent’s participation in and completion of” a treatment program for abusers.\textsuperscript{291} In other words, the treatment must be first completed. The requirement of “completion” supplements the requirement of participation, and clarifies that mere participation is insufficient to support a supervised visitation award.

This plain reading of the statute is consistent with the PSFVRA’s remedial purposes, and is supported by Louisiana’s rules on statutory construction. Under Louisiana Civil Code article 9, “When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.”\textsuperscript{292} Despite the statute’s clarity about pre-conditions for visitation, attorneys representing abusers often conjure artificial ambiguity by arguing that section 9:364(C) should be interpreted to allow supervised visitation \textit{during} participation in a batterer intervention program, rather than after completion of the program. This argument belies the statute’s plain language and attempts to create ambiguity where none exists. It contradicts the clear meaning of the phrase “conditioned upon,” and requires that the phrase “and completion of” be given no effect.\textsuperscript{293}

In cases where abusers raise this issue, attorneys representing victims can look to a variety of Louisiana’s rules on statutory construction to support the statute’s plain meaning. In general, Louisiana rules do not support interpretations that favor ambiguity over clarity. For example, Louisiana Revised Statute 1:4 states, “when the wording of a section is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit.” Here, the word “and” is unambiguous and should not be construed contrary to its common usage in order to void its effect.\textsuperscript{294} Additionally, Louisiana Revised Statute 1:9 makes it clear that, for purposes of statutory interpretation, the disjunctive “or” is not interchangeable with “and.” Simply put, “and” means “and.”

\textsuperscript{290}Michael Rempel, \textit{Batterer Programs and Beyond}, in \textit{1 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS} 180 (Evan Stark & Eve Buzawa, eds., 2009). Given the discouraging evidence on program efficacy, some experts suggest that batterer intervention programs should be used to promote a more achievable goal of accountability, rather than re habilitation. \textit{Id.} at 188.

\textsuperscript{291}LA. REV. STAT. ANN. § 9:364(C).

\textsuperscript{292}See also \textit{LA. REV. STAT. ANN.} § 1:4.

\textsuperscript{293}Applying this logic, an abuser’s visitation would be preserved indefinitely with a showing of participation alone. Some proponents of this position propose that the statute be read so that the completion requirement is not a pre-requisite, but is instead grounds for \textit{terminating} visitation later if not fulfilled. This interpretation requires circuitous reasoning and conflicts with the fact that the legislature created explicit termination provisions in other parts of the statute. In other words, if the legislature had intended that it be a termination provision rather than a condition precedent, they would have said so.

\textsuperscript{294}Under Louisiana Revised Statute 1.3, words and phrases must be construed using their common usage.
No Louisiana Court of Appeal has directly interpreted section 9:364(C), but several have upheld orders suspending visitation until treatment completion. Two appellate courts appear to have overlooked the completion requirement when remanding to a trial court. Given no contrary treatment, the plain and best reading of the statute requires that courts deny supervised visitation until the treatment program is successfully completed.

8. Should the court appoint a custody evaluator?

a. No, it is probably procedurally premature, and unlikely to help in a family violence case.

The appointment of a custody evaluator is usually premature, and also unhelpful, in PSFVRA cases. Courts often appoint mental health professionals to conduct evaluations of the parties and children to assist with custody determinations. In a “family violence” case, you should oppose the appointment of a custody evaluator at least until the court has ruled on the allegations of “family violence.” Thereafter, if a history of family violence is proven, section 364 prohibits the court from awarding sole or joint custody to the abuser and a custody evaluation is unnecessary. The rationale for appointment of a custody evaluator is to enable the court to determine the child’s best interest and minimize risk to the child. If the court’s custody determination is mandated by section 364, the child’s best interest does not become and may never become an issue. Thus, the appointment of a custody evaluator is premature before the court has ruled on the “family violence” allegations.

A contradictory hearing to determine good cause should take place before a custody evaluator is appointed. A request for mental health evaluations is governed by La. Rev. Stat. 9: 331 and article 1464 of the Louisiana Code of Civil Procedure. These statutes require that evaluations be ordered only for good cause shown and upon notice to the other party. The existence of an abuse claim does not constitute “good cause” for an evaluation. The presentation of testimony and evidence
**is the best way to determine whether abuse has occurred.** For the reasons described above, once the abuse has been proved, the PSFVRA’s mandatory custody provisions are triggered and the mental conditions of the parties should not be at issue.

Lawyers should contest the issue of “good cause” in most domestic violence cases. Procedurally, evaluations, parenting assessments, and best interest assessments should not occur before an abuser has completed a batterer’s treatment program and proved that he is free from alcohol and substance abuse. Unless the abuser alleges that the child’s best interest requires the abuser’s participation as a custodial parent because of the other parent’s absence, mental illness, substance abuse or other circumstances affecting the child’s best interest, the motion should be denied.\(^\text{303}\)

If the court orders an evaluation over your objection in a domestic violence case, request an opportunity to examine evaluator qualifications in advance of the appointment of a specific evaluator. The fact that the court has routinely relied on an evaluator in the past is not evidence that the evaluator meets the PSFVRA standards for appointment of a mental health professional. If an evaluation is ordered, it must be paid for by the abuser, and not split by the parties.\(^\text{304}\)

**b. Apart from the procedural issues raised above, the appointment of a custody evaluator is rarely appropriate in domestic violence cases.**

For reasons that are beyond the scope of this chapter, a growing body of studies suggests that the appointment of a custody evaluator makes it less likely that family courts will respond appropriately to reports of abuse in custody cases.\(^\text{305}\) Some experts have concluded that the increasingly frequent appointment of custody evaluators and guardians *ad litem* are a principal reason that abusers routinely win custody.\(^\text{306}\) Many, if not most, custody evaluators lack meaningful training and expertise in even basic dynamics of domestic violence; they are unfamiliar with reputable professional literature in the field, and do not believe that domestic violence is an important factor to consider in making custody recommendations.\(^\text{307}\) In fact, a great deal of evidence suggests that evaluators are biased against believing reports of abuse because they are unaware of the fact that contested custody cases have a much higher rate of domestic violence than uncontested cases.\(^\text{308}\) The National Council of Juvenile and Family Court Judges cautions against

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\(^{303}\) *La. Rev. Stat. Ann.* § 9: 364. Under Title 9 section 364, the abuser cannot have unsupervised visitation or move for custodial rights until he has successfully completed a treatment program designed for perpetrators of abuse, which usually takes six months, and is free from drug and alcohol use. Even then, the abuser can only get unsupervised visitation if it is in the child’s best interest. And custodial rights are even more difficult for an abuser to obtain. The abuser must prove that the child’s best interest requires his participation as a custodial parent because of the other parent’s absence, mental illness, substance abuse or *such other* circumstances which affect the child’s best interest.

\(^{304}\) *Id.* § 367.

\(^{305}\) Evan Stark, *supra* note 6, at 299.

\(^{306}\) *Id.* Joan S. Meier, *supra* note 222.

\(^{307}\) Stark, *supra* note 6, at 298-99; Joan S. Meier *supra* note 222, at 708.

\(^{308}\) Joan S. Meier *supra* note 222, at 708. Ironically, many evaluators express skepticism about abuse allegations in “high conflict” cases, but fail to recognize that highly contested custody cases do in fact involve higher rates of abuse because batterers are more likely to engage in protracted custody litigation to punish their victims. *Id.*
using custody evaluations in abuse cases and has published a guide for judges that explains the reasons.\textsuperscript{309} That guide is an excellent resource for attorneys opposing the appointment of an evaluator in domestic violence cases.

The same logic that applies to custody evaluations, also applies to general mental health evaluations and psychological testing in domestic violence cases. Many custody evaluations and mental health evaluations include psychological testing. Psychological testing tends to normalize abusers and pathologize victims.\textsuperscript{310} Domestic violence is not a mental health problem, and abusers typically appear normal in response to psychological testing and evaluation.\textsuperscript{311} Victims, on the other hand, can present poorly in response to mental health evaluations that do not properly account for their experiences of abuse. A poorly conducted mental health evaluation of a victim suffering from the effects of abuse will usually pathologize her normal responses to abuse.\textsuperscript{312} It is not uncommon for some psychological testing to result in victims being labeled anxious, paranoid, histrionic, borderline personality disordered, or even schizophrenic.\textsuperscript{313} And once an evaluator improperly labels a victim with a personality disorder, both the evaluator and the court sometimes conclude that the “conflict” between the parties is attributable to her condition, not the abuse.\textsuperscript{314} Nonetheless, courts often give disproportionate weight to reports on psychological testing because they wrongly assume that the testing is probative for determining whether someone is a perpetrator or victim of abuse, and for determining parenting capacity. Even more, poorly trained judges and mental health professionals are unlikely connect a victim’s psychological presentation to the effects of abuse, or to recognize symptoms of Post Traumatic Stress Disorder that can make victims seem less credible during the evaluation process and while testifying.\textsuperscript{315} Typically, this happens when victims appear to over-react to “trivial” issues, lack emotional affect when describing violence, or giggle inappropriately.\textsuperscript{316} Untrained mental health professionals will fail to properly contextualize these reactions, and often reinforce the court’s tendency to attribute these behaviors to a lack of credibility.

For all of these reasons, attorneys representing victims may need to oppose evaluations, and if an evaluation is nonetheless ordered, oppose an evaluation that includes psychological testing. There are strong arguments to exclude evidence of psychological testing because the tests most commonly used by evaluators lack scientific validity for use in the context of custody disputes or abuse.\textsuperscript{317}
c. Note on Parental Alienation:

The use of custody evaluations in abuse cases also makes it much more likely that an abuser will benefit from inadmissible and discredited “parental alienation” theories. “Parental alienation” theory is a legal defense abusers use in custody cases to refute legitimate reports of abuse. 318 Using this theory, a child’s report of abuse, her alignment with a non-abusive parent, or her rejection of an abusive parent, is attributed – not to the child’s experiences of abuse – but to a vindictive mother who has “poisoned” her child against the other parent. 319 Under this theory, any evidence that the victim presents to prove the abuse or to refute alienation claims can be used, instead, as evidence of alienation. 320

The parental alienation defense is delivered primarily through testimony from custody evaluators who lack expertise in domestic violence and label victims “unfriendly parents” or “alienators” when they seek appropriate restrictions on an abusive parent. In general, testimony about parental alienation syndrome (or related parental alienation theories named differently) should be excluded under evidentiary standards for admissibility because it is not supported by empirical science and has been rejected by researchers. 321 Attorneys should aggressively contest the admissibility of testimony and reports that rely on alienation theories. Realistically, however, attorneys should expect resistance from family courts. Many courts rely heavily on custody evaluations that promote alienation theories, and too few attorneys insist on evidentiary gatekeeping in custody cases.

At the same time attorneys should contest “parental alienation” as a scientific theory, it is also important to recognize that abusers do indeed engage in a range of harmful behaviors that are designed to undermine the relationship between victims and their children. 322 Lawyers representing victims should present evidence and testimony that proves the ways that an abuser undermines the victim’s parenting and denigrates her to the children. This evidence generally does not require psychological testimony, and can be proved without invoking problematic “alienation” theories.

9. What role does the “best-interest” standard play in a Post-Separation Family Violence Relief Act case?

None – in the initial stages of litigation. The Louisiana Civil Code factors relating to the “best interests” of the child do not apply once a finding of fam-

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318 Joan S. Meier, The Misuse of Parental Alienation Syndrome in Custody Suits, in 2 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS 147 (Evan Stark & Eve Buzawa. eds., 2009). At most, parental alienation is a legal hypothesis to explain a problem in a parent-child relationship. Id. at 150. The theory is not supported by empirical evidence and has been broadly discredited as a scientific theory. Id.

319 Id. at 148.

320 Id. at 149-50. Meier gives many examples of this phenomenon: if the child continues to report abuse during visits, those reports are framed as extreme brainwashing of the child; if the child’s therapist opines that the child is abused, the therapist is characterized as contributing to the alienation; if the mother seeks to corroborate the reports of abuse with other evidence, that behavior is attributed to her extreme need to alienate the child. Id.


322 This defense, as used routinely in family court, differs from legitimate psychological concepts of alignment, estrangement, and alienation. Some parents, especially batterers, do indeed engage in behavior that denigrates the other parent and damages the relationship between the child and the other parent. But evidence of that conduct can be presented in court without the need for psychological testimony that presupposes the conduct exits because there has been a report of abuse.

(210)
ily violence triggers application of the PSFVRA. The “best interest” standard is not operative in a family violence case until the litigation reaches the stage where an abuser has satisfied the requirements to request unsupervised visitation.

Unsupervised visitation may be allowed only upon proof that (1) the abuser has completed a treatment program, (2) is not abusing alcohol and drugs, (3) poses no danger to the child, and (4) unsupervised visitation is in the child’s best interest. The issues of whether the visitation is in the child’s best interest and the risk of danger to the child will usually be contested in an abuser’s motion for unsupervised visitation.

Treatment programs largely fail to cure an abuser. It may never be in the best interest of a child who has herself been subjected to physical or emotional abuse to have unsupervised visitation with the abuser. Children who witness violence against the abused parent are traumatized by it. Continued contact with an abuser causes confusion and fear, especially in cases where the abuser refuses to acknowledge his behavior and wants to ignore that it ever happened. Whether the child was the subject of abuse, or witnessed it against a parent, it can take a long time (and a lot of therapy) before unsupervised visitation is in a child’s best interest.

10. What should I do if my client wants to relocate?

Remember that the exemption to the relocation statute applies only in cases where protective orders are currently in effect. Advise your clients about these rules and the possible need to extend nonpermanent protective orders or injunctions (particularly Title 46 orders) if they plan to relocate.

Although the Post-Separation Family Violence Relief Act requires that all orders subsequent to a finding of family violence include an injunction, sometimes sole custody decrees or divorce judgments are entered without a protective order. If this is your case, you should carefully assess whether compliance with the relocation statute is required. There do not appear to be any appellate decisions on this issue.

Even if compliance with the relocation statute is not required, there may be a need to seek modification of visitation if the abuser has a court order for visitation. Failure to seek modification may expose the victim to a contempt motion even if the relocation statute authorized her to move without notice and court approval. This is especially true if it is unlikely that a victim cannot comply with a visitation order from her new location.

If your client is not exempt from the relocation statute, she must notify the other parent of her intent to relocate. Absent consent, court authorization is required to relocate a child before a final decision on the proposed relocation. Relocation is not a change of circumstance warranting a change of custody. Under La. Rev. Stat. 9: 355.11, moving without prior notice or

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323 Hicks v. Hicks, 98-1527 (La. App. 3 Cir. 5/19/99); 733 So. 2d 1261, 1266.
325 See generally Michael Rempel, Batterer Programs and Beyond, in 3 VIOLENCE AGAINST WOMEN supra note 2, at 179.
327 LA. REV. STAT. ANN. § 9:355.3 - 355.4.
328 Id. § 355.5.
moving in violation of a court order may be considered in a motion to modify custody. However, Rev. Stat. 9: 355.11 does not create an exception to the Bergeron standard for modification of custody decrees. The factors for determination of a contested relocation are listed at Rev. Stat. 9: 355.12-13. The relocating parent must show that the relocation is in good faith and the child’s best interest. The relocation statute mandates that the court consider family violence and substance abuse when considering opposition to relocation. The existence of domestic violence and stalking behavior, even when the behavior has abated, should strongly favor relocation of the abused parent.

11. What if the court finds that the violence is mutual?

In some cases, the court may find that both your client and her abuser have a history of perpetrating abuse. The Post-Separation Family Violence Relief Act addresses this scenario. Where a court finds that both parents have a history of perpetrating abuse, it must award sole custody to the parent who is less likely to continue the family violence. Lawyers should be prepared to present evidence, testimony, and argument on this issue should it become necessary during the litigation.

All case planning in domestic violence cases should anticipate that abusers will allege that the victim is either the primary aggressor, or mutually violent. Although anger is the prevailing emotional response to abuse, judges often believe that anger is inconsistent with “real victims.” They sometimes expect victims to present as fearful and passive, and to behave consistently with notions of “learned helplessness.” When victims instead present as angry or resistant to their abusers, they are readily cast as mutually violent perpetrators, or “high conflict” litigants. This tendency to cast victims as mutually violent sometimes varies with racial and socio-economic demographics, and can be more challenging for some clients than for others. Carefully consider how these issues will play out in your case and plan accordingly.

12. What options are appropriate for supervised visitation?

This issue can present practical challenges for litigants and attorneys. The PSFVRA does not allow supervision by people associated with the batterer, and it is generally not safe or appropriate for a victim’s friends or family to supervise either. For supervised visitation, the best option is usually a supervised visitation center. In communities that lack supervised visitation centers, lawyers and clients must carefully weigh their options. Petitioners may specifically request that the court appoint a police officer or competent professional as the supervisor. Supervisors can be police officers with some sensitivity to juvenile or domestic issues. These officers may be more willing and able to intervene to prevent harm to the child during a visit. Social workers in your community may also be available for supervision. It is a good idea to have a specific list of potential supervisors and their contact information.

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330 Gray v. Gray, 2011-548 (La. 7/1/11), 65 So.3d 1247, 1260.
331 Id. § 355.13.
333 H.S.C. v. C.E.C., 2005-1490 (La. App. 4 Cir. 11/8/06); 944 So. 2d 738, 750 (reversing order denying relocation request).
334 LA. REV. STAT. ANN. § 9: 364(B).
335 Id.
available at the hearing on custody. Otherwise, the court may appoint a supervisor with whom you are unfamiliar, and who may be ill-suited to supervise in a family violence case. 336

**Note on using supervisors as witnesses.** As a practical matter, lawyers should be cautious about eliciting professional opinions from even trained visitation supervisors, and should seek to exclude the testimony if offered by an abuser. It is usually not relevant. Generally speaking, the fact that an abuser does not abuse in a supervised visitation setting, or that a child enjoys a parent’s company during supervised visits, is in no way probative on the issues of (1) whether there is a history of past abuse, (2) whether there is a likelihood of future abuse, or (3) whether unsupervised visitation is in a child’s best interest. Abusers can be very effective at co-opting mental health and social work professionals. Most mental health professionals have little, if any training in domestic violence and even those that do rarely have enough to meaningfully understand basic dynamics of abuse. 337 Abusers are likely to be on their best behavior in settings where they know they must be. And children are often delighted to see even an abusive parent in a setting where they are safe, and where “good daddy” shows up to see them. Courts often give far too much weight to testimony about parent-child observations; information from these visits rarely leads to relevant or probative evidence in abuse cases.

13. **Can the victim introduce evidence of family violence that occurred prior to a stipulated or considered decree?**

Sometimes. In custody cases, it is not uncommon for victims to have previously litigated or negotiated a custody case without raising issues of domestic violence. Many family law attorneys do not adequately advise victims about domestic violence in custody litigation, resulting in stipulated or considered decrees that fail to address domestic violence or victim and children safety.

In a case for custody modification, the court will determine whether to admit evidence of abuse that pre-dates a prior custody decree on a case-by-case basis. 338 The evidence should not be automatically excluded or admitted. 339 Instead, the evidence should be admitted if it is (1) relevant and material, and (2) involves an issue that the parties did not have a “full and fair opportunity to litigate” in the prior proceeding. 340 For custody cases, this means the issue must have been “actually adjudicated.” 341 Where there is doubt concerning whether *res judicata* applies, the doubt must be resolved against its application. 342

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336 Batterers are often very manipulative and can be extremely effective at co-opting court appointed professionals who are untrained in domestic violence.
337 Joan S. Meier *supra* note 222, at 708.
338 Raney v. Wren, 98 CA 0869 (La. App. 1 Cir. 11/6/98); 722 So. 2d 54, 58.
339 *Id.* at 58.
340 *Id.* at 57 (citing Smith v. Smith, 615 So. 2d at 931). The trial court erred in a custody modification case by excluding evidence of physical and verbal abuse that occurred prior to the stipulated custody judgment. *Id.* The court found that the trial court erred because the parties did not have previous opportunity to litigate the issue. *Id.*
341 LA. REV. STAT. ANN. § 13: 4232 (3).
342 Redman v. Bridgefield Casualty Insurance Co., 11 CA 651 (La. App. 5 Cir. 2/28/2012); 88 So.3d 1087, 1092.
In general, however, the doctrine of *res judicata* does not apply to child custody cases.\footnote{La. Rev. Stat. Ann. § 4232. The Official Comments to section 4232 explain that “the general principle of res judicata is subject to the exceptions set forth in R.S. 13:4232 and to any other exceptions that may be provided for in the substantive law as, for example, in cases of family matters.” See also Tit. 13 § 4232(3) (excepting matters incidental to divorce from doctrine of res judicata except as to matters actually adjudicated); Hulshoff v. Hulshoff, 11-1055 (La. App. 3 Cir. 12/7/11); 81 So. 3d 57; Granger v. Granger, 11-77 (La. App. 3 Cir. 6/15/11); 69 So.3d 666; Kleiser v. Kleiser, 619 So. 2d 178 (La. App. 3 Cir. 1993); Hansel v. Hansel, 2000-CA-1914 (La. App. 4 Cir. 11/21/01); 802 So.2d 875.} To the contrary, the court is bound to consider all matters relevant to the best interests of the child, including parental conduct that occurred prior to the last custody decree.\footnote{Touchet v. Touchet, 36,881-CA (La. App. 2 Cir. 1/29/03); 836 So.2d 1149; G.N.S. v. S.B.S., 35-348-CA (La. App. 2 Cir. 9/28/01); 796 So. 2d 739 (citing Hargrove v. Hargrove, 29590-CA (La. App. 2 Cir. 5/9/97); 694 So.2d 645).} But even if *res judicata* applied to custody cases, it would not apply where the interests of justice are not served by its use. Louisiana’s *res judicata* statute explicitly contemplates equitable application of the doctrine. Section 4232 (1) creates an exception for “exceptional circumstances,” and the official comments to the statute explain, “this discretion is necessary to allow the court to balance the principle of *res judicata* with the interests of justice.”\footnote{La. Rev. Stat. Ann. 13 § 4232 A (1).} Where issues of abuse have never been meaningfully considered, the interests of justice and the best interest of the child would require their consideration. This logic rings particularly true in cases where, because the abused parent was awarded primary custody in a consent decree, it was not necessary that she litigate the issues of abuse. If, thereafter, the perpetrator seeks increased custodial access, equitable principles and the best interest of the children require examination of the abuse.

14. **What if my client doesn’t want PSFVRA restrictions on the abuser’s visitation?**

Victims often minimize the effects of domestic violence on their children. Not only can it be painful for victims to acknowledge the true effects of violence on their children, but victims also sometimes receive conflicting messages from family, friends, and religious institutions that prioritize the value of two-parent households over freedom from abuse. Ultimately, it is the client’s decision whether to plead the PSFRVA, and whether to seek restrictions on an abuser’s access to children. But responsible lawyering requires that lawyers help clients make informed choices about these issues by encouraging them to examine (1) whether the client is being realistic about the abuser’s capacity for shared parenting or safe visitation (i.e. does his past behavior support this conclusion?), (2) whether the client is well-informed about the impact of domestic violence on children and parenting, and (3) whether the client understands the legal ramifications of failing plead the PSFVRA or failing to seek important visitation restrictions in the initial stages of custody litigation.

15. **Is the Post-Separation Family Violence Relief Act the only way to get supervised visitation and sole custody in a domestic violence case?**

No – but it is usually the best. Even when the Post-Separation Family Violence Relief Act does not apply, a court may impose supervised visitation as safety or best interests require.\footnote{Dufresne v. Dufresne, 08-CA-215, 08-CA-216 (La. App. 5 Cir. 9/16/08); 992 So. 2d 579, 586 (citing Harper v. Harper, 33 452 (La. App. 2 Cir. 2/61/00), 764 So. 2d 1186).} Louisiana appellate courts have
affirmed even termination of visitation in a variety of circumstances under both Civil Code article 136 (award of visitation rights) and Civil Code article 134 (factors in determining best interests). Although it is possible to obtain meaningful protection and visitation restrictions under these general custody statutes, those statutes do not require that courts impose appropriate restrictions in domestic violence cases. Simply put, under general custody statutes, the judge has more discretion to enter custody orders that ignore the risks to victims and their children, and victims are not entitled to all of the important relief enumerated in the PSFVRA, including sole custody. For this reason, petitioners who can prove a history of family violence and plead under the PSFVRA have much stronger appellate remedies if a court fails to put appropriate protections in place for custody and visitation.

6.4 JURISDICTION AND INTERSTATE CHILD CUSTODY ISSUES

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), La. Rev. Stat. 13: 1801-1842, applies to all “child custody proceedings” in which legal custody, physical custody, or visitation with respect to a child is at issue. A “child custody proceeding includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights and protection from family violence, in which the custody or visitation issue may appear.” In domestic violence cases, interstate jurisdiction issues typically arise when a victim moves out of state to get away from an abuser. If a victim relocates to a new state but is made to litigate contentious custody issues in the first state, her safety and stability may be compromised. In these cases, lawyers may be called upon to represent victims who need help asking Louisiana courts to either accept or decline jurisdiction under the UCCJEA’s domestic violence provisions. The UCCJEA includes important protections for domestic violence victims and their children that can help lawyers advocate for victims.

The UCCJEA’s inconvenient forum and emergency jurisdiction rules have changed so that it is easier to protect victims who flee the child’s “home state” to escape violence. Under the UCCJEA, a child’s “home state” has jurisdiction to decide custody. Home state is defined in § 1813 as “the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding.” In some domestic violence cases, Louisiana will be the “home state” and the victim may need to establish or protect its status as such. In other cases, Louisiana may be the home state but the victim instead needs help asking Louisiana to decline jurisdiction.

347 Teague v. Teague, 44-005-CA, 44-006-CA (La. App. 2 Cir. 11/25/08); 999 So. 2d 86, 98 (affirming visitation termination due to habitual drug use); Willis v. Duck, 98-1898 (La. App. 3 Cir. 5/5/99); 733 So. 2d 707, 714, 716 (affirming visitation termination due to mother’s history of drugs, neglect, theft, and unemployment).

348 One possible exception to this rule is in child sex abuse cases. In those cases, the PSFVRA’s heightened burden of proof requiring “clear and convincing” evidence might create more challenges for proving the abuse and restricting visitation than would otherwise be required. If proven, however, the PSFVRA mandates stringent and comprehensive protection for sexually abused children.

349 Stoneman v. Drollinger, 64 P.3d 907, 1001-02 (Mont. 2003); Kovach v. McKenna, 2011-C-0228 (La. App. 4 Cir. 4/1/11). In Kovach, the appellate court reversed a trial court’s denial of a motion to decline its home state jurisdiction in favor of the family violence victim’s refuge state. In its opinion, the Kovach Court found that the “domestic violence and residence of the child in another state for more than six months predominates over all other considerations in La. Rev. Stat. Ann. §13:1819.”
jurisdiction in favor of a refuge state. Alternatively, Louisiana may be the refuge state, not the home state, and a victim needs help establishing temporary emergency jurisdiction for protection here.

**Home state jurisdiction and inconvenient forum.** When a victim flees domestic violence, litigation of custody in the refuge state can greatly enhance a victim’s safety and economic welfare. Under title 13:1819, a Louisiana court with UCCJEA jurisdiction may decline home state jurisdiction in favor of a domestic violence victim’s refuge state by conducting an “inconvenient forum” analysis. Although the inconvenient forum analysis includes a list of factors for consideration, factors (1) domestic violence and (2) the length of time that the child has resided outside of Louisiana, are often determinative on the issue of whether a Louisiana court should decline its jurisdiction. When representing a victim who has left Louisiana for a refuge state, lawyers should consider whether to file a title 13: 1819 motion requesting that Louisiana decline jurisdiction. These motions may be filed at any time in the litigation.350

The leading case on applying the domestic violence factor in an inconvenient forum analysis is Stoneman v. Drollinger.351 Additionally, in an unpublished Louisiana case, Kovach v. McKenna, a Louisiana appellate court ordered declination of Louisiana’s home state jurisdiction under section 13: 1819 and dismissal of the abuser’s Louisiana custody suit. In doing so, the Kovach Court concluded that “domestic violence and residence of the child in another state for more than six months predominated over all other considerations in La. Rev. Stat. 13:1819.”352 As in Kovach, many trial courts may find an absence from the state of 6 months or more (even if it occurs after the initial filing) weighs heavily in favor of declining jurisdiction under a section 1819 “inconvenient forum” analysis. UCCJEA decisions from other states have upheld declination as inconvenient forum when the child has been absent for a lengthy time.353 The ruling on a motion to decline as inconvenient forum is reviewable for abuse of discretion by supervisory writs.354

**Temporary emergency jurisdiction.** The new §13: 1816 of the UCCJEA is also helpful to protect victims. Section 13:1816 addresses a Louisiana court’s authority to issue temporary emergency orders to protect family violence victims who have fled to Louisiana. Revised Statute §13: 1816(A) expressly allows temporary emergency jurisdiction to protect a child, if the child or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. The prior UCCJL provision had allowed emergency jurisdiction to protect the child only if the child was subject to the threats or abuse.

It is important to note, however, that section 13:1816 emergency orders provide only temporary relief. Ultimately, the custody case must be resolved in the state that has proper jurisdiction under § 1813-15, unless that state declines jurisdiction under the inconvenient forum test. If no prior custody order exists and no suit has been commenced in a state with § 1813 subject matter jurisdiction, a tem-

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351 64 P.3d 997 (Mont. 2003); see also, Rainbow v. Rainbow, 990 A.2d 535 (Me. 2010) (declination of home state jurisdiction in favor of refuge state was appropriate where there was domestic violence).
352 Kovach v. McKenna, 2011-C-0228 (La. App. 4 Cir. 4/1/11). This unpublished opinion is available at www.probono.net/La.
353 See e.g., Fox v. Mina, 2011 WL 255557 (Ky. App. 2011) (3 years); Fickinger v. Fickinger, 182 P.3d 763 (Mont. 2008) (3 ½ years); Dillon v. Dillon, 37 Conn L. Rptr. 291 (Conn. Super. 2004) (2 years, 8 months)
354 Kovach v. McKenna, 2011-C-0228 (La. App. 4 Cir. 4/1/11); see also, Addington v. McGehee, 29729-CA (La. App. 2 Cir. 1997); 698 So. 2d 702, 704.
porary emergency order will remain in effect until an order is obtained from the
home state or a state that has proper § 1813 jurisdiction.\footnote{355} If a prior custody order
exists, the judge must confer with the other state’s judge.\footnote{356} Then, the court with
temporary emergency jurisdiction must specify a reasonable time limit for the peti-
tioner to obtain an order from the state with proper § 1813-15 jurisdiction, or to
seek declination from that court.\footnote{357} The temporary emergency order will remain
in effect until an order is obtained from the other state or the time limit expires.\footnote{358}

6.5. REPRESENTING VULNERABLE POPULATIONS IN DOMESTIC
VIOLENCE CASES

1. Representing Immigrant Victims
   a. Communication.

   Representing battered immigrants presents special issues for
   lawyers. First and foremost, lawyers should do their best to make sure
   that, if English is not the victim’s first language, they establish a rea-
   sonable way to communicate with their clients by using professional
   interpreters and establishing a protocol for contact and communication
   that reduces stress on the victim. In general, lawyers should avoid
   using the victim’s friends and family as interpreters for client meet-
   ings for a variety of reasons, including the risk of waiving attorney-client
   privilege. And for court, the abuser should be made to pay the cost of
   a professional interpreter.\footnote{359} Prepare your client for testimony through
   interpreters. See Luz Molina et al., Language Access, §§ 6-7 in this Man-
   ual. It is a good idea to have a non-witness friend, relative, or other per-
   son who speaks the same language as your client listen to testimony to
   tell you if the professional interpreter is interpreting accurately.

   b. Referral.

   Next, find an immigration expert. Lawyers should be extremely
cautious about inadvertently creating immigration problems for their
clients, and should seek to protect clients from immigration abuse.

   c. Deportation.

   Battered immigrant spouses who leave their abusers may face
deportation. They may, however, self-petition for legal resident status
or suspension of deportation. See, J. Dinnerstein, Immigration Options
for Immigrant Victims of Domestic Violence, 38 Clearinghouse Rev. 427
(Sept./Oct. 2004). LSC attorneys may represent battered immigrant
spouses. Recently, the Violence Against Women Act was amended to
allow the use of VAWA funds to represent battered immigrant spouses.

   Immigration law is complex and frequently changes. You should
develop a relationship with an immigration expert for cases where a bat-
tered immigrant spouse needs legal help to avoid deportation. See Laila
Hlass, Immigration for Legal Aid Lawyers, Chapter 8 infra.

\footnote{355} LA. REV. STAT. ANN. § 13: 1816 (B) (2011).
\footnote{356} LA. REV. STAT. ANN. § 13:1816(D).
\footnote{357} LA. REV. STAT. ANN. § 13:1816(C).
\footnote{358} Id.
\footnote{359} LA. REV. STAT. ANN. § 46: 2136.1; LA. REV. STAT. ANN. § 9:367.
d. Generally.

Some basic rules for representing battered immigrant spouses include:

- Do not obtain a final divorce order for any battered immigrant client before filing a VAWA self-petition. A divorce decree will preclude a self-petition.
- Obtain details about immigration related abuse. (Threats to deport, withholding assistance, or preventing them from being able to legally work.
- A client should always speak to an immigration law expert before speaking with the ICE. ICE may arrest them and deport them before they have a chance to speak to a lawyer.
- Clients should not sign ICE documents without first speaking to an immigration lawyer.
- A self-petitioning domestic violence victim must show battering or extreme cruelty. A state court proceeding that builds the factual record can help a self-petitioning victim.
- Findings in the custody case may help a self-petitioning immigrant prove “extreme hardship” if deported.
- Consider including a provision in the protective order that prohibits the husband from withdrawing the application for permanent residence that he filed on his wife’s behalf, or contacting immigration, any government agency, or law enforcement to interfere with her status in any way. The evidence needed for an application for permanent residence is lower than that required for a self-petition under the VAWA.
- Plan to respond and object if the abuser raises immigration issues in court. Alternatively, immigration abuse can be a part of your abuse case.
- If the abuser has sponsored the victim, obtain copies of the Affidavit of Support he signed. This can help with support hearings.
- NEVER AGREE TO A MUTUAL PROTECTIVE ORDER.

For more information, see Laila Hlass, Immigration for Legal Aid Lawyers, §§ 4.1.1-3, infra.

2. Representing Victims in Same-Sex Domestic Violence Cases

Louisiana’s Dating Violence Act allows victims to obtain orders of protection against same-sex partners. But these cases present unique challenges, especially when mutual violence is alleged. Law enforcement may be less likely to adequately assess predominate aggressor in response to calls for service, and more likely to make dual arrests. This phenomenon, in turn, makes it even more important that service providers themselves assess cases

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diligently to make sure they are representing the victim. Some issues unique to working with LGBT clients include distrust of traditional service providers, service provider homophobia or ignorance, and unique vulnerabilities to abuse in the form of threats to “out” the victim, threats to take away children that the victim may have limited (or no) legal rights to seek access to, and the inability to avoid an abuser in a socially insular community.\textsuperscript{361} Also, there is significant evidence that transgendered persons constitute one of the most vulnerable populations for partner abuse, but are among the least likely to access services.\textsuperscript{362}

7. TRYING THE CASE: PRACTICE TIPS FOR PROTECTIVE ORDER AND CHILD CUSTODY LITIGATION

7.1 ASSESSING THE CASE

1. Assessing the client’s need for legal assistance.

When domestic violence victims are turned away by legal services providers, they often have no place else to turn. This fact places enormous pressure on attorneys to diligently assess cases and to err on the side of providing desperately needed advocacy. In doing so, legal services attorneys must balance considerations of clients’ needs, the capacity of the firm, and the likelihood of accomplishing meaningful client outcomes. While a victim lying in the hospital with a broken leg may present an opportunity to handle a compelling domestic violence case, a victim whose injuries are more difficult to prove and whose abuser has never been arrested may actually have an even more pressing need for attorney advocacy. And even the most compelling case can involve a victim who is unlikeable or who presents as angry and aggressive. It can be a real challenge to assess cases without making judgments about clients who are unlikeable, angry or ungrateful. Further, the most compelling cases are not necessarily the clients who first present with the most compelling narrative, or even those who seem the most fearful. Anger – not fear – is the prevailing emotional response to abuse, and many victims minimize their experiences of abuse by using language that inaccurately suggests mutuality of violence between the parties. To complicate matters even more, some victims who truly need legal help sabotage their own cases by not being honest with their attorneys about important bad facts that need to be prepared for in litigation. Over time, a skilled interviewer will begin to catch these nuances and learn to investigate further so that victims in need of help are not turned away. Here are some tips for assessing a case for representation:

a. How serious is the abuse?

- Is the violence escalating?
- Is there a pattern of stalking, controlling and monitoring that suggests high lethality risk even in the absence of physical abuse?
- Has the violence ever involved choking, strangulation, or use of weapons?
- Have there been threats to kill?

\textsuperscript{361}Id.
\textsuperscript{362}Id.
b. **Is the client particularly vulnerable in the court system for any of the following reasons?**
   - She has limited capacity to express herself or articulate her situation because of mental health issues or impaired mental capacity
   - She has limited English proficiency
   - The abuser has an attorney
   - The abuser has significantly more financial assets for litigation than she does
   - The abuser has initiated litigation against her
   - Her case involves complicated issues that require expert testimony, or testimony from medical professionals
   - The client has a criminal record that she will be unable to adequately address if she represents herself

c. **Can meaningful legal outcomes be realized for the client?**
   - If you do prevail, will the outcome significantly improve safety and stability for the victim or her children?

On the other hand, when assessing a case for representation, try **not** to decline representation based **solely** on reasons like these:
   - There is no evidence to corroborate her reports of abuse. It is not at all unusual for victims to have never called the police and never sought medical attention.
   - There are no visible physical injuries.
   - The client is unlikeable.
   - The client is angry.
   - The client has resisted her abuser by engaging in either self-defense or futile retaliatory violence.
   - The client has a criminal record.
   - The client has substance abuse or mental health issues resulting from the abuse.
   - The client withholds negative facts in early interviewing processes for fear that you won’t take her case.
   - The client has initiated contact with an abuser after separation or after obtaining a protective order.

2. **Assessing whether to file emergency pleadings.**

   **Not all domestic violence cases should be addressed through emergency proceedings.** Once you’ve determined that you will assist a victim in addressing her legal needs, it is important to be realistic with clients about what can be accomplished in the court system. In some cases, the complexity of the facts or evidence in a case make it impossible to competently litigate cases in the time frame demanded by a protective order statute. For example, cases that require expert testimony to address issues relating to victim behavior, children who align with an abuser, or child sex abuse, can be difficult to prepare for in the time frames required under protective order statutes. In those cases, lawyers should speak frankly with their clients.
about immediate safety considerations, long-term litigation goals, and options for different types of proceedings. Rushing to court for a protective order can do more harm than good if the case cannot be litigated properly and results in findings and orders that pre-dispose the court to rule against your client on important issues in the future. For discussion on developing a thoughtful, comprehensive case strategy, section 3, “Strategic Use of Louisiana’s Domestic Violence Laws,” supra.

7.2 PRE-TRIAL PRACTICE AND CASE PLANNING

Domestic violence protective cases can present unique challenges in pre-trial practice. The emergency nature of protective order proceedings means that in many cases, formal pre-trial discovery is unavailable. In some cases, lawyers must prepare for court despite a seriously limited capacity to conduct important investigative functions. For this reason, lawyering in these cases requires a style of pre-trial preparation that accounts for a variety of scenarios that cannot be determined in advance of the hearing. But good pre-trial practice, even in this setting, makes it possible to avoid a true “trial by surprise” scenario in the courtroom. Here are some tips for pre-trial practice:

1. Develop a compelling case theme
   a. Make it logical, provable, and compelling.
      Your theme must match your evidence and must not overstate your case.
   b. Eliminate distractions.
      Have a concise message that is not watered down by unnecessary information or facts.
   c. Co-opt “bad facts.”
      Lawyers often miss the opportunity to co-opt “bad facts” in the earliest stages of litigation. In many cases, a “bad fact” can be incorporated into a case theme such that actually bolsters the victim’s case. For example, if your client suffers from housing and unemployment instability, connect those problems to the defendant’s bad acts (harassment on the job, fleeing to shelter because of abuse), and incorporate that into your case theme (i.e. “this is a defendant who hopes the court will reward him for his own bad acts, instead of righting the wrongs against his family”).
   d. Support your case AND respond to the other side.
      Your client almost always knows what the batterer will say about her, and how he will present in court. Address it into your case theme when possible.
   e. Thread your case theme throughout every element of your case.
      If possible, begin with your pleading. Carry it throughout and drive it home in closing argument by “connecting the dots” with the evidence presented.
   f. Communicate your theme to your client.
      Sharing the case theme with the client helps you confirm that you “got it right” and that your testimony and evidence will support your theme. Your client should have a shared understanding about what information is most important to convey to the court so that she will stay focused when testifying.
2. **Investigate and Conduct Discovery**

   **Overview.**

   Given the shortened time frame of protective order proceedings, lawyers representing victims must not only conduct quick, focused investigations, they must quickly decide when to edit evidence and testimony that detracts from the clients “core story” and fails to meaningfully support the case theme.

   Once you determine to proceed, you must quickly determine what, if any, witness testimony you will present in addition to your client’s testimony. Competent lawyering demands that, even within this shortened time frame, you prepare each witness for court by running through the direct, preparing for cross-examination, and explaining the process of objections.

   In most jurisdictions, it is not common practice to conduct formal discovery in protective order proceedings, even though it may be possible within the time frames allowed. In others, there is insufficient time to conduct written discovery, but sufficient time to give reasonable notice of a deposition. Lawyers should exploit all opportunities to conduct formal discovery in advance of a protective order hearing. When a defendant fails to respond, it creates the opportunity for a continuance that includes maintaining the TRO in place while you compel the discovery process. Discovery is not only valuable to help you prepare for the defendant’s version of events, but also for ensuring that you can produce the best evidence of the abuser’s income and ability to pay support.

   Once you examine your options within the time frame dictated by statute, make a case plan that establishes what you need to prove, and whether the sources of proof will require:

   - Informal discovery (any investigation you can do on your own) or
   - Formal discovery (interrogatories, requests for production, requests to admit, depositions, subpoena)

   Abusers manipulate the system. Do not rely on the abuser to respond honestly to discovery. Whenever possible, try to get the information directly from a third party, e.g., employer, hospital, day care center, Internal Revenue Service, etc. Approach depositions with caution. Consider taking the deposition in a secure setting, such as a courthouse with metal detectors, and do not allow the abuser to be alone with the victim.

3. **Select the evidence that best supports the client’s “core story”**

   Don’t try to prove everything and every incident. Plan to prove a limited number of incidents, and choose your best evidence. In general, your case plan should include proving:

   - The two most recent incidents of abuse
   - Two or three of the worst incidents of abuse
   - The general nature and frequency of abuse
   - Incidents resulting in serious bodily injury or medical attention
   - Incidents involving the use of weapons
   - Threats to kill
   - Routine or escalating talking and monitoring behavior

   (222)
In domestic violence cases, the most frequent sources of evidence to corroborate abuse include:

- Photographs of injuries or property damage\textsuperscript{363}
- Phone records
- Voice mails or audiotapes
- Emails/text messages (take photographs when possible)
- Clothing
- Police reports
- 911 tapes
- Medical records

In addition to client testimony, witnesses often include:

- Children
- Police
- Neighbors
- Family
- Friends
- Co-workers

\textbf{Note on child testimony:} Few issues generate more controversy in family court than child witnesses. In domestic violence cases, children are often the only witnesses who can corroborate the victim's testimony about abuse in the home. Many judges believe strongly that children should not testify because of the risk that the experience of testifying will be traumatic. But in some cases, the child's testimony is a critical component to securing orders of protection that will prevent future harm. In many cases, the child's testimony makes it more likely that the child will be safer in the future. But children, like all people, are complicated. They can exhibit a wide range of responses to their experiences of abuse, all of which must be anticipated by the lawyer eliciting the testimony. Clients often accurately predict how children will respond to questioning, and this can help lawyers prepare.

Finally, consider the other types of evidence you will need:

- Evidence in the abuser’s control or possession
- Evidence that supports ancillary claims such as child and spousal support, child custody, and housing needs
- Evidence necessary to rebut claims from the other side
- Evidence of positive parenting or previous caretaking history

\textbf{7.3 DIRECT EXAMINATION}

A compelling direct examination is the foundation of a successful trial. Although it is rarely given the attention that cross-examination receives in trial advocacy training, a weak direct examination will lose your case much more quickly than a weak cross-examination. In domestic violence cases, direct examination sometimes makes up your entire case-in-chief, and the importance of conducting it skillfully cannot be understated. The challenges associated with

\textsuperscript{363} Cell phones can be used to take immediate photos of injuries.
conducting a cohesive direct examination of a client who still suffers from the
effects of abuse makes the task of preparing for direct even more arduous. Be
aware that many victims, even those represented by attorneys, may clam up on
direct examination and hurt their cases. Counsel clients on the need to tell their
story to the judge.

In short, an effective direct examination will do all of the following:

- Support your case theme with facts and details
- Evoke vivid and compelling imagery of your client’s experience
- Minimize the impact of stereotypes and strategies typically employed
  against victims in family court
- Establish the necessary factual basis for your legal claims.

7.4 STRUCTURING YOUR DIRECT EXAMINATION

a. Establish the identity of the parties and their relationship to one another.
   Include any other foundational facts that you need to prove as a prelim-
   inary matter to entitle her to a protective order.

b. Humanize your client by asking introductory questions.
   Does she work, is she a full-time parent, how long have they been mar-
   ried, is she in the military?

c. Ask preliminary questions that put the incident of abuse in context.
   An effective direct examination will begin “painting a picture” for the
   trier of fact, and begin to trigger the imagination. The lawyer must direct
   the testimony so that it stays focused on the core story, but contextualizes it
   enough to make it vivid and compelling.

d. Follow up and clarify. Ask questions about anything your client “glossed
   over,” and clarify any vague or confusing language.

e. Ask questions that wrap up the story of the abuse and moves the client
   out of trauma before she has to answer questions from opposing counsel.

   Questions about entitlement to ancillary relief may help move the client
   out of the trauma of abuse—before she faces cross-examination by the
   abuser.

f. Address negative facts to take the sting out of her anticipated cross-
   examination. “Bury” this in the middle.

g. Ask questions that establish her entitlement to ancillary relief, such as
   custody, support, use and possession of a home or car, etc.

h. Finish strong.

7.5 PREPARING YOUR CLIENT FOR DIRECT

- Frankly discuss the emotions the hearing might trigger
- Don’t discourage emotional expression during her testimony
- Encourage honesty in her emotional responses in the courtroom
- Explain why it is important that your client tell what happened to her
- Advise her about the importance of tone and body language for credibility
• Make sure your client understands that being “tough” to prove something to her batterer can backfire in court
• Reconcile all inconsistencies or seemingly illogical facts and behavior in advance of court
• Know bad facts: ask your client whether she is worried about any issues that might be brought up in court
• Make sure your client understands your case theme, and what facts and evidence in her case are most compelling and best support her claims. While a lawyer should never manufacture a client’s testimony, it is critical that the lawyer prepare the client to testify about what is important to the judge and to leave out what is unimportant.
• Encourage your client to use language and style that is natural to her (except when it is necessary to slow her down).
• Avoid discussing domestic violence terminology that, if repeated during client testimony, will sound disingenuous and coached (i.e., “he’s obsessed with power and control”)
• Identify a client’s tendency to be distracted by issues that don’t support her “core story,” (such as the batterer’s recent infidelity). Talk to her about what the focus should be on in court, and why.
• Identify and address a client’s tendency to “gloss over” details of painful events. Practice doing it differently.
• Identify and address client’s tendency to minimize, deny, or use language that characterizes abuse as mutual.
• Ask the client to make a timeline of abuse that can serve as a reference point for both of you.
• Make sure she understands the process of objections.
• Practice the direct, for both substance, pace and to ensure that the client can tell her full story.
• Prepare the client for a judge’s questioning style

1. **Tips for eliciting a strong narrative**
   • Start and end strong
   • Paint a vivid picture of individual incidents
   • Pace yourself and your client
   • Draw upon the full range of your client’s experiences (the constraints of her life), but stay focused on violence
   • Go back to elicit painful but compelling details that the witness avoided describing
   • Take the sting out of bad facts
   • Plan for the victim/racial/gender stereotypes that may be imposed on your client
   • Where appropriate, incorporate positive parenting themes
   • Demonstrate the logic of your client’s counter-intuitive behavior

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364 Some judges use an inappropriate questioning style that may intimidate or traumatize a victim. You do not want your client to be adversely affected by an untrained judge’s questioning style.
2. Dealing with bad facts
   a. Generally.
   Domestic violence victims rarely conform to societal notions of “good” or “deserving victims.” Representing victims of domestic violence can be challenging not only because clients are imperfect, but also because society imposes stereotypes on victims that are unrealistic. For example, most people expect victims to appear afraid—in fact, the prevailing emotion experienced by most victims is anger. As a result, it is important that attorneys prepare to deal with allegation of victim aggression, or mutual violence.

   In addition to stereotypes about victims, victims actual do behave in ways that present challenges to litigation. Some of the bad facts that lawyers are likely to need to confront include the following:
   - A victim with substance abuse issues
   - A victim with mental health issues
   - A victim who is not the predominant aggressor, but who “hit first” or injured the abuser
   - A victim who has an arrest history
   - A victim who contacts her abuser, while also claiming to fear him
   - A victim whose fear seems inconsistent with the abuse she is reporting

   *For guidance on representing clients with mental health issues, an excellent resource guide is the National Center on Domestic Violence, Trauma & Mental Health’s “Representing Domestic Violence Survivors Who are Experiencing Trauma and Other Mental Health Challenges: A Handbook for Attorneys” available at http://www.csaj.org/documents/407.pdf.

   b. Victim Stereotypes.
   Also, for every domestic violence case, victim and perpetrator stereotypes will come into play. Effective case planning includes preparation for a variety of predictable defenses that batterers use against their victims, most of which play upon gendered stereotypes that include some version of either (1) the lying/vindictive/scorned woman, (2) the hysterical, crazy, or exaggerating woman, (3) the provocateur, or (4) the cheating manipulator. Your client is likely to know which of these the batterer will use. Do not underestimate the effectiveness of these powerful cultural archetypes.

   In addition to the gendered stereotypes that abusers frequently exploit, commonly held beliefs about “real victims” of domestic violence also present challenges in protective order cases. For example, judges often believe that anger is inconsistent with “real victims,” who they expect victims to present as fearful, passive, or helpless. When victims present as angry or resistant to their abusers, they are readily cast as mutually violent perpetrators, “high conflict” or “contentious” litigants.
c. Perpetrator Stereotypes.

Lawyers must also prepare for the role that stereotypes about abusers will play in their case. The relative economic privilege and professional status of abusers often dictates which stereotypes about victims and abusers are most effective. The commonly held belief that domestic violence is primarily committed by people of lower socio-economic status can make it harder for victims whose perpetrators have financial resources and professional credentials. Additionally, abusers benefit from the tendency to conflate domestic violence with “anger management” problems. Although most abusers tend to be experts at managing their anger by directing it to one safe target (your client), judges often expect abusers to present as volatile and angry. When they instead present as calm and in control, the abuser’s behavior is wrongly perceived as incongruous with the victim’s reports of abuse. Similarly, judges who wrongly assume that domestic violence is associated with mental illness often believe that normal psychological testing and the absence of an identifiable pathology is probative on the issue of domestic violence.

2. Avoid common mistakes in direct examination

- Be absolutely clear about your client’s timeline
- Make sure your client’s testimony paints a vivid picture of individual incidents, rather than sweeping or generic descriptions of abuse
- Don’t disregard compelling evidence about the emotional toll of being routinely stalked and monitored
- Carefully edit and assess testimony about power, control, and abusive behavior that is not physical
  - It must support, and not detract, from your client’s “core story” (in other words, avoid the perception that you are “grasping at straws” for evidence of abuse)
  - It should be connected to an element of your legal claim
  - Exception: Generally, evidence of stalking and monitoring behavior should be presented
- If it doesn’t make sense to you, it won’t make sense to the court
- Lay a foundation and authenticate your evidence
- Anticipate objections and plan your response.

7.6 CROSS-EXAMINATION OF ABUSERS

Contrary to popular belief, cross-examination skills are not a gift that some lawyers possess, and others do not. A good cross-examination can be conducted by any lawyer who prepares diligently. The key to a strong cross-examination in a domestic violence case is to work closely with your client to anticipate how the abuser will present and what he will focus on in his testimony. Often times, abusers inadvertently corroborate a victim’s testimony about things such as the abuser’s stalking behavior or his fixation on fidelity issues by discussing those matters on direct (i.e. “I checked her cell phone so I knew she had been calling him.”).
The number one mistake that many attorneys make during cross-examination is asking one question too many. That last question sometimes allows the abuser to explain something away, or, worse yet, allows him to deny a fact that he did not deny in his own direct examination. If he did not deny a specific incident in his direct, the worst thing you can do is raise it during cross.

Another common mistake by attorneys in these cases is over-reliance on questions that ask the abuser whether he actually committed specific incidents of abuse. These questions are rarely, if ever, fruitful.

As a general rule, cross-examination of the abuser should be tailored to both the lawyer’s style and the abuser’s presentation. An overly aggressive cross-examination of a pro se abuser can make it look like the attorney is picking a fight and trigger sympathy for the abuser. It is important to give these issues thoughtful consideration in advance of the hearing. Don’t plan your cross by relying on the hope that a dramatic movie-style moment will transpire. Be realistic.

Finally, the cross-examiner should plan to make a few clear, concise points, and stop. Important points will lose their impact if lost amidst a rambling barrage of questions that make trivial points, if any. In assessing your cross-examination plan, consider these questions:

- Have I limited myself to only a few, discrete and important points?
- Is each question simple, direct, and clear?
- Have I asked only leading questions?
- Have I limited myself to only one fact per question?
- Have I avoided “why” questions?
- Does every question have a purpose?
- Have I examined each question to make sure it does not give the abuser an opportunity to explain himself?
- Can I control the answer to every question?
- Do I have a plan for every possible answer?
- Does the question require a yes/no answer?
- Am I clear about which question is “the one question too many?”
- Have I avoided being overly transparent such that the witness might catch on and do damage control?
- Did I save the important points to connect the dots in closing argument?
- Is my strategy consistent with the advice my client gave me about how he will behave and what he will say?
- Have I done my homework to discover all possible sources of impeachment material?
- Have I avoided trying to get evidence that I can get from a more predictable or more friendly source?
- Have I prepared myself to be flexible, and to follow my witness?
- Do I have a plan to move on when the going gets rough? Don’t increase the impact of negative information by being befuddled and slowing down.
7.7 **NOTE ON OPENING AND CLOSING ARGUMENTS**

Judges will often discourage opening and closing argument in these cases. Do it anyway, but don't waste the court's time with a rote recitation of facts. Opening is your opportunity to frame the case and lay the groundwork for your theme. Closing is our chance to connect the dots, tie your evidence to the law, tell your client's story and why the court should believe it, and address any sticky issues that the court seems to be focusing on. These functions are essential to a successful trial, and even a truncated argument is better than none.

7.8 **EVIDENTIARY ISSUES RELATED TO PROTECTIVE ORDERS AND FAMILY VIOLENCE CASES**

7.8.1 **Prior Bad Acts or Convictions, Louisiana Code of Evidence article 404.**

Prior bad acts or crimes should be admissible in many protective order cases since a key custody issue under Louisiana Revised Statutes title 9 section 364 is whether there is a “history of family violence.”

Prior bad acts may also be admissible to prove a greater likelihood of abuse in the future and the need for protective measures.

In the protective order context, prior bad acts may be relevant to prove intent, motive or absence of mistake. A defendant may claim that the plaintiff is fabricating the abuse charges to gain advantage in a divorce or custody case. Evidence of prior abuse rebuts this defense.

7.8.2 **Police reports and arrest records**

Louisiana law requires the police to write a report whenever they respond to a domestic violence call. In Louisiana, police reports are generally inadmissible. You may be able to introduce a police report if the defendant does not object. Police reports (or testimony about them) are admissible in child custody actions under the limited applicability rules of Louisiana Code of Evidence article 1101. Police officer witnesses may use the police report to refresh their recollection. A well-written police report will include the defendant’s admissions, excited utterances by those present and a description of injuries. In practice, many judges do not follow article 1101 and will make a victim’s proof of domestic violence more difficult by excluding police reports. By ordinance or policy, a police report may be free to domestic violence victims in your parish. Check local law. Arrest records are admissible in custody cases. Many abusers are serial abusers and may have abused former intimate partners for which there may be arrest or conviction records.

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365 See Raney v. Wren, 98 CA 0869 (La. App. 1 Cir. 11/6/98); 722 So. 2d 54, 58; Michelli v. Michelli, 93 CA 2128 (La. App. 1 Cir. 5/5/05); 655 So. 2d 1342. Even acts that occurred prior to a custody decree should be admissible. Wren, 722 So. 2d at 58.

366 See Wise v. Wise, 02-CA-574 (La. App. 5 Cir. 11/13/02); 833 So. 2d 393; Cruz Foster v. Foster, 597 A.2d 927, 930 (D.C. 1991) (noting abuser’s past conduct is perhaps the most important evidence of his future conduct).

367 LA. CODE EVID. ANN. art. 404(B), 402.


369 LA. CODE EVID. ANN. art. 803(8)(b); State v Sigur, 578 So. 2d 143 (La. App. 1 Cir. 1990).

370 See Gautreau v. Gautreau, 96-1548 (La. App. 3 Cir. 6/18/97); 697 So. 2d 1339, writ denied 97-1939 (La. 11/7/97), 703 So. 2d 1272.

371 Currently, Code of Evidence art. 1101 would not apply to a protective action that did not involve child custody issues.

372 Fernandez v. Pizzaloto, 04-1676 (La. App. 4 Cir. 4/27/05), 902 So. 2d 1112; L.E.P.S. v. R.G.P., 08-1349 (La. App. 3 Cir. 6/3/09), 11 So. 3d 653, 641.
7.8.3 Admissions against interest
Abusers may make admissions to the investigating police officers relative to acts of violence. Abusers tend to minimize their behavior. Nonetheless, even the minimized behavior may constitute battery or assault which would constitute grounds for a protective order or finding of family violence. Such admissions are admissible as an exception to the hearsay rule. 373

7.8.4 Threats to harm
A threat by the abuser to harm the victim is not hearsay. It is an admission. 374

7.8.5 Abuser's writings
Letters or e-mails by an abuser are his own statements and therefore are not inadmissible hearsay. 375

7.8.6 Flight from crime scene
Evidence of an abuser’s flight from crime scene (e.g., assault and battery of victim) is relevant and admissible as an indication of consciousness of guilt. 376

7.8.7 Former Testimony
Former testimony in another hearing may be admissible if the defendant is an “unavailable witness” because of his refusal to testify in current proceeding. 377

7.8.8 Audiotapes
Audiotapes of the defendant’s statements or threats, even secretly recorded telephone conversations, may be admissible. 378 911 tapes can be very compelling evidence. Defendants may leave threats on an answering machine.

7.8.9 Excited Utterances
An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition. 379 Well-written police reports may contain excited utterances by the victim or children to which the police officer may testify.

7.8.10 Child’s Hearsay Statements
A child’s hearsay statements to a doctor, mental health professional or abuse expert may be admissible. 380 The Louisiana Code of Evidence provides that the rules of evidence should serve only as guidelines in child custody proceedings. 381 In other words, the rules of evidence still apply in custody proceedings, but only “to the extent they promote the purposes of the proceeding.” 382 The reason for relaxed evidentiary rules in child custody cases is that strict application of the rules does not serve the best interests of the child. The Louisiana Supreme Court, and several courts of appeal, have concluded that a child’s hearsay statements should be admissible in child custody cases under the PSFVRA. 383

373 LA. CODE EVD. ANN. art. 804(B)(3).
374 See e.g., State v. Burmaster, 97-517 (La. App. 3 Cir. 2/25/98), 710 So. 2d 274, 281.
375 State v. Strickland, 94-0025 (La. 11/1/96), 683 So. 2d 218, 229.
376 State v. Mills, 505 So.2d 933 (La. App. 2 Cir. 1987).
377 Id. art. 804 B (1); State v. Adams, 609 So. 2d 894 (La. App. 4 Cir. 1992).
378 State v. Jeanlouis, CR96-474 (La. App. 3 Cir. 11/6/96); 683 So. 2d 1355; Briscoe v. Briscoe, 25955- CA (La. App. 2 Cir. 8/17/94); 641 So. 2d 999.
379 LA. CODE EVD. ANN. art. 803 (2).
380 G.N.S. v. S.B.S., 35,348-C A (La. App. 2 Cir. 9/28/01); 796 So. 2d 739, 750-51.
381 LA. CODE EVD. ANN. art. 1101(B)(2).
382 Id.
7.8.11 Fifth Amendment

The defendant may assert the 5th Amendment privilege in a protective order hearing if there is a concurrent criminal prosecution. His silence can be construed against him in a civil proceeding. The existence of a criminal prosecution should not constitute grounds for continuance of a protective order hearing. La. Rev. Stat. 46: 2135 mandates that the protective order hearing be held within certain delays. A finding in a protective order or hearing cannot be res judicata in a subsequent proceeding. It is not a violation of due process or the 5th Amendment for a criminal defendant to have to defend a related civil proceeding. In a criminal contempt proceeding for violation of a protective order or injunction, you must be prepared to prove your case without the defendant’s testimony since he may assert the 5th Amendment right against self-incrimination.

7.8.12 Relaxed evidentiary rules in child custody cases

Article 1101(B) (2) of the Code of Evidence states that, in child custody cases, the specific exclusionary rules contained in the code of evidence “shall be applied only to the extent that they tend to promote the purposes of the proceeding.” Article 1101 has been held to apply to child custody actions under the Post-Separation Family Violence Relief Act.

In Gautreau v. Gautreau, a police officer’s testimony about a police report was admitted under article 1101 of the Code of Evidence despite an objection by the opposing party. In practice, many judges do not follow article 1101 and will make a victim’s proof of domestic violence more difficult by excluding police reports.

7.8.13 Medical records

Certified medical records may be admitted into evidence without a witness. Title 13 section 3714 (A) of the Louisiana Revised Statutes governs the admission of medical records in Louisiana. That statute provides that certified copies of medical records shall be received in evidence as “prima facie proof” of its contents, upon the condition that the opposing party has the opportunity to summon the author as witness for cross-examination. Because medical records are considered inherently reliable, then, certification is the only requirement to lay a foundation of authenticity.

In domestic violence cases, medical records can present three common evidence issues that lawyers should plan for in advance: (1) notice to the opposing party, (2) hearsay within the medical record, and (3) statements made by your client that conflict with her testimony because she lied about the cause of her injuries. First and foremost, the notice requirement of this statute premises admissibility on fair notice to the other side. In non-emergency cases, this means attor-

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384 See McCann v. McCann, 09-1341 (La. App. 3 Cir. 3/10/10); 33 So. 3d 389; Miles v. La. Landscape, 97-CA-118 (La. App. 5 Cir. 6/30/97); 697 So. 2d 348.
385 LA. REV. STAT. ANN. 46 § 2134 (E).
386 LA. REV. STAT. ANN. § 9: 361; Fosse, 738 So. 2d 1040; D.O.H. v. T.L.H., 01-174 (La. App. 3 Cir. 10/31/01); 799 So. 2d 714, 717.
387 Gautreau v. Gautreau, 96-1548 (La. App. 3 Cir. 6/18/97); 697 So. 2d 1339, writ denied 97-1939 (La. 11/7/97), 703 So. 2d 1272.
neys should provide copies to opposing counsel of the records they intend to use, far enough in advance of trial to allow for issuance of a subpoena. In emergency cases, notice is a trickier issue. Judges tend to admit certified medical records in emergency proceedings, but it is still a good idea to let opposing counsel know before the case begins that you will be introducing medical records. If opposing counsel nonetheless objects to the record’s admission on notice grounds, there is a strong argument to be made in favor of admitting the records: In emergency cases where a TRO has been issued, it is the defendant’s due process rights that require a quick hearing – to ensure that he is not subjected unfairly to an order that he had no notice of. If the defendant decides that he cannot fairly defend the case on such short notice, it is his right to request more time before being made to do so. If the defendant did not feel he could be prepared to meet the evidence, he could have requested more time to prepare. If he did not, even after being told that petitioner would introduce the records, that was his decision. (Then, if necessary, indicate the extent to which you made efforts to comply with the notice requirement as best as possible).

The two other issues you should plan to deal with relate to the contents of the records. If there is hearsay within the document that you intend to admit as substantive evidence to prove the truth of matter asserted, you may need to argue other hearsay exceptions. To be clear about the rule, the statute allows the contents of the record to be taken as “prima facie proof.” But if, for example, there is a hearsay statement within the report, the report is simply prima facie proof that the statement was made, not of the truth of the statement. In order for that hearsay to be admitted as substantive proof, it must fall within a hearsay exception. Those exceptions will usually include: statement in aid of medical treatment, excited utterance, and prior consistent statement. And in the event that medical records show your client attributing her injuries to a source other than abuse by her partner, if the records are good proof of the injuries, you should often seek to admit them anyway, and prepare your client to testify about why she did not report the abuse to her doctor. In some cases, it is because the batterer accompanied her to the hospital, or told her what to say. In other cases, it is attributable to shame or fear. Know why she told the doctor what she told him, and make sense of it to the Judge during her direct examination. Don’t forget to prepare your client for tough questioning on this in cross.

7.8.14 Electronic Evidence.

Electronic evidence in the form of emails, text messages, face books page, etc., present both opportunities and challenges for domestic violence litigation. Some of the best evidence of stalking and threats can be found in these sources. The mechanics of having them admitted into evidence can be tricky and require advance planning. When possible, attorneys introducing text messages should have the cell phone with text messages available in court, but should also try to find better ways to present the evidence (i.e. a print out of the messages or even photographs of them). You should rely on your client, not the abuser, to lay the necessary foundation to authenticate them and to establish both the sender and the recipient of the communication.
7.8.15 Expert testimony on domestic violence.

The admissibility of expert testimony is governed by La. Code of Evidence art. 702. That article provides that “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”\(^\text{389}\)

In one recent Louisiana case, the defendant raised a *Daubert* challenge to testimony from a clinical social worker with a specialty in domestic violence intervention and prevention, and the Louisiana Fifth Circuit Court of Appeal upheld the trial court’s admission of the testimony.\(^\text{390}\) And expert testimony about Post Traumatic Stress Disorder is admissible for explaining, in general terms, reactions to abuse that are used to attack the victim witness’s credibility.\(^\text{391}\)

7.8.16 Relevance issues in child custody cases.

Child custody cases under the PSFRVA present important relevance issues that must be raised by lawyers representing victims. Because the PSFVRA mandates specific outcomes once a determination of “family violence” is made, the “best interests” evidence normally considered in custody determinations is usually not relevant. The perpetrator may want to testify that he takes his kids to church every Sunday or coaches the soccer team, but that type of evidence has no bearing in a PSFVRA case. Lawyers should be diligent in objecting to that type of evidence so that it does not detract from the relevant abuse issues.

8. HELPING YOUR CLIENT ACHIEVE ECONOMIC INDEPENDENCE

8.1 INTRODUCTION

Your client’s economic welfare or independence is often critical to her recovery and escape from domestic abuse. She may need additional help with other poverty law problems, e.g., public assistance, tax, subsidized housing, evictions, foreclosures, consumer debt, employment, etc.

8.2 SUBSIDIZED HOUSING

Many domestic violence victims live in subsidized housing. Issues that may arise for your client include:

- Eviction or subsidy termination for alleged crimes by the abuser or victim’s temporary absence due to flight from abuser
- Need to ask housing authority to remove the abuser from the lease
- Portability of victim’s voucher to another apartment or city
- Transfer to another apartment for safety reasons
- Right to rent decrease or minimum rent because of loss of family income
- Early lease termination
- Admission preference due to domestic abuse

For more information, see Renae Davis *et al.*, *Federally Subsidized Housing*, Chapter 6 in this Manual.


\(^{390}\) *McFall v. McFall*, 10, 14-1041 (La. App. 5 Cir. 9/13/11); 75 So. 3d 30, 38.

\(^{391}\) *State v. Chauvin*, 2002-K-1188 (La. 5/20/03); 846 So. 2d 697.
8.3 TAX

Many married victims, often unknown to them, have substantial tax debt problems that could cripple them economically if not resolved. Fortunately, there are “innocent spouse” relief laws that can relieve many domestic violence victims of their federal tax debt. These laws are discussed in detail in Tax Law for Legal Services and Pro Bono Attorneys, § 14.9.5, 14.9.10, in this Manual. The innocent spouse relief laws are complex. We recommend that you refer your client to low-income tax specialists, such as the Low Income Taxpayer Clinic at Southeast Louisiana Legal Services (504-529-1000). You should counsel your client against signing any joint returns with her abuser.

8.4 PUBLIC ASSISTANCE

A client’s options for welfare should be explored. Food stamps may be applied for on an expedited basis. FITAP welfare (or TANF) takes longer to get. The 24 and 60 month limits on FITAP welfare may be waived for domestic violence victims.\(^\text{392}\)

9. MISCELLANEOUS

9.1 MILITARY

The military does not tolerate domestic violence.\(^\text{393}\) The military services have Family Advocacy Programs which help reduce family violence. Commanding officers and military family advocates can ensure that victims receive victim advocacy services, medical care, risk assessments, safety planning, Military Protective Orders, counseling and legal assistance.

Military Protective Orders are similar to civil protective orders. They may be issued by commanding officers and formal hearings are not required. They are usually issued for up to 10 days. If a longer order is needed, the commanding officer gives the victim and alleged offender an opportunity to respond.

A commanding officer must direct or make a formal inquiry into charges of domestic violence against a service member. The offender may face non-judicial punishment or courts-martial.

9.2 OCCUPATIONAL LICENSING BOARDS

If an abuser is a member of a profession or occupation that is regulated by a licensing board, he may be subject to rules of professional conduct that prohibit spouse abuse. For example, attorneys have been disciplined for abusing their spouses.\(^\text{394}\)


\(^{393}\) For a guide on the military’s response to domestic violence, see Judith Beals & Patricia Erwin, Understanding the Military Response to Domestic Violence: Tools for Civilian Advocates (Battered Women’s Justice Project 2007) available at www.bwjp.org. The Battered Women’s Justice Project has significant resources on the Military-Civilian Advocate Resource Network.

\(^{394}\) In re Magid, 655 A.2d 916 (N.J. 1995); In re Nevill, 704 P.2d 1332 (Cal. 1985).
CHAPTER 4
EMPLOYMENT ISSUES
About The Author

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1. INTRODUCTION

This chapter covers select employment issues within the priorities of LSC-funded poverty law programs (see www.lsc.gov). The focus of the chapter is to help advocates handle those issues they can, recognize other claims that clients may be able to pursue elsewhere, and ensure that clients are referred to appropriate external resources. How extensively an issue is covered depends on the author’s understanding of availability of other treatises, poverty advocates’ priorities, external resource availability, and limitations of space. Feedback by users of this revised chapter is welcome.

2. WHY EMPLOYMENT LAW KNOWLEDGE IS IMPORTANT FOR POVERTY LAW ADVOCATES

Low-income workers are routinely subject to wage theft, arbitrary or discriminatory firing, and other abuses. Public awareness of possible claims and resources is low. Appropriate intervention may help clients retain or recover their jobs. Once employment is lost, clients usually face other pressing legal needs (e.g., foreclosure, collection defense or need for bankruptcy, family law issues, and need for survival benefits such as food stamps and unemployment compensation). Job-related complaints often reveal underlying issues (e.g., disability, criminal records, mis-classification as independent contractor) interfering with steady employment and related benefits. It is critical to the people we serve that employment-related complaints be received and addressed within the limits of our resources.

3. THE EMPLOYMENT RELATIONSHIP AND THE PROBLEM OF MIS-CLASSIFICATION

This chapter addresses common problems arising between an employee and employer. For clients to obtain desired relief as employees, relevant definitions under particular statutes or controlling case law must be met. If a statute has no specific controlling definition, deciding whether a client is an employee or independent contractor is a factual, case-by-case determination. The most important factor is whether the principal retains the right to control and supervise the work (regardless of the degree to which it is actually exercised). Other factors include selection and engagement, payment of wages, and power of dismissal. E.g., Hillman v. Comm-Care, Inc., 01-1140 (La. 1/15/02) 805 So.2d 1157; Tate v. Progressive Sec. Ins. Co., 4 So.3d 915 (La. App. 4 Cir. 1/28/09).

4. REMOVING EXTERNAL BARRIERS TO EMPLOYMENT

4.1 THE PROBLEM OF CRIMINAL RECORDS.

Many Louisianians are unable to get jobs and occupational licenses due to pervasive discrimination against those with arrest or conviction records. Employers lack legal protection from “negligent hiring” lawsuits based on use or non-use of background checks, and it is not illegal for employers to ask about, or consider, someone’s criminal record, even if it’s old or unrelated to the job. See R.S. 23:291. It is not illegal to fire even a good employee for failing to disclose a record. Some employers are affirmatively required by law to deny jobs or licenses to people with certain criminal records. Louisiana also being the prison capital of the world, huge numbers of able-bodied formerly incarcerated annually join the ranks of the unemployed. This entire unfortunate situation has a disproportionate impact on people of color. You may be able to help by:

• **Challenging** a job denial on constitutional or other grounds;
• **Correcting** inaccurate information or removing unauthorized information from government or private databases; or
• **Removing** the record through expungement.

4.1.1 Challenging criminal record job barriers.

Laws on some occupations may explicitly exclude those with certain records. A general “morality” or “suitability” provision may also be invoked as a bar. R.S. 37:2950(A) provides that disqualifications from any licensed occupation cannot be based solely on prior criminal record, except for a felony conviction “directly” related to the job. However, quite a few occupations are exempt, and contrary law may be held to override its provisions. See, e.g., Hall v. State, 729 So.2d 772 (La. App. 1 Cir. 4/1/99) (gaming licensing restriction upheld although contrary to R.S. 37:2950).

Occupational restrictions may be subject to challenge on statutory or constitutional grounds. The Equal Employment Opportunity Commission (EEOC) has recognized that denial of employment solely on the basis of a criminal history has a disparate impact on African Americans and Latinos and may thus be actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. www.eeoc.gov/laws/guidance/arrest_conviction.cfm. See also, Glessman v. Saenz, No. CGC-02-403255 and Doe v. Saenz, No. CGC-02-407530 (Cal. Sup. Ct. 12/19/03) (state Dep’t of Social Services forced to make case-by-case determinations about class members’ eligibility for employment); AFSCME v. State, 789 So.2d 1263 (La. 6/29/01) (state law defining felony conviction during employment as mandatory cause for termination of classified civil service employees, found unconstitutional in part); Gordon v. La. State Board of Nursing, 804 So.2d 34 (La. App. 1 Cir. 6/22/01) (denial of license to paroled and pardoned felony narcotics offender held illegal); Nixon v. Commonwealth, 839 A.2d 277 (Pa. 2003) (state law barring persons with criminal records, even those with decades-old convictions unrelated to their ability to perform the jobs, from employment in any facility catering to older adults, found unconstitutional [PA law comparable to La. R.S. 40:1300.51 et seq.]). Cf. In re Carr, 2011 WL 5412783 (La. App. 1 Cir. 11/9/11) (rational basis found for board’s denial of waiver); In re King 33 So.3d 873 (La. 1/8/10), rehearing denied (4/5/10) (expunged conviction used to disbar attorney).

(238)
4.1.2 Correcting inaccurate or unauthorized information.

R.S. 15:588 gives a right to access and seek correction of state criminal history information retained by the Louisiana Department of Public Safety’s Louisiana Bureau of Criminal Identification and Information. Tools for helping clients with these problems may also be found in the Fair Credit Reporting Act, 15 U.S.C. §1681 et seq. and applicable state law (see this manual’s Consumer Law chapter and Clearinghouse Review articles on http://povertylaw.org). See, e.g., Henderson v. HireRight Solutions, Inc. Not reported in Fed.Supp.2d, 2010 WL 2349661 (E.D. Pa. 6/7/10). If the information provider is not a consumer reporting agency or governmental body, you may have to be creative in seeking relief in other ways, e.g., under tort provisions or anti-discrimination laws. Your assistance in correcting reports can help clients find or keep jobs.

4.1.3 Removing records through expungement.

In Louisiana, expungement generally means the removal of a record from public access only, although in some cases, records may also be destroyed. R.S. 44:9(G). After expungement, most private employers should no longer have access to the record from official sources. However, it usually stays available to law enforcement and criminal justice agencies, and many state boards and agencies. Also, expungement does not automatically remove data maintained by private data collection companies (they must be individually approached to have a record removed) or available online. For these reasons, expungement is clearly a very limited remedy. Still, it can help some clients get or keep jobs.

The first step is to determine what the record is. Some courts provide online access to these records. If not, you or your client may get the needed information from the office of your local public defender or D.A., or a law enforcement agency.

Second, once you have the actual record, determine if it can be expunged. If it’s federal, it usually cannot be expunged. See U.S. v. Tyler, 670 F.Supp.2d 1346 (M.D. Fla. 2009). As to Louisiana records, at the time this chapter was written the legislature has instructed the State Law Institute to examine and recommend revision of the expungement law. So, this chapter defers discussion on the details at this step - review the current law carefully to decide if your client’s record may be expunged. Revision should not change the remedial purpose of Louisiana’s expungement law. See State v. Boniface, 369 So.2d 115, 116-17 (La. 1979).

Finally, if a record can be expunged, many clients can easily handle the process themselves. For those needing help, there may be a local advocacy group, law student clinic, or community organization that offers this kind of aid http://louisianalawhelp.org. At the time of this chapter’s writing, there is a limited cost exemption in the statute; otherwise, courts charge varying fees which clients may or may not be able to afford. The process may be ex parte or may require a contradictory hearing with law enforcement and the D.A., but each record must be addressed in the parish of arrest. In the future there may well be uniform state court forms, but at the time of this chapter’s writing, courts either formulate their own or don’t provide any. Cases requiring contradictory hearing, a local refusal to honor the limited statutory fee exemption, or a refusal by the state central criminal records repository to honor an expungement order, may require attorney intervention. You should find practice guides, pro se information, and a resources directory on either www.probono.net/la or http://louisianalawhelp.org.
4.1.4 Questions from prospective employers or licensing bodies.

Clients with criminal records may ask you what to say on an application, or may come to you with problems resulting from their answers. Louisiana currently has no state law preventing questions about expunged criminal records (another reason why expungement is a very limited remedy). Lying about a criminal record may lead to criminal prosecution (e.g., federal employer) or other adverse consequences, such as denial of unemployment compensation. R.S. 44:9(I) provides that generally, a person whose arrest or conviction has been expunged under that law is not required to disclose the record or the fact that it has been expunged. However, the obligation to disclose is not always so clear, and other laws may be held to trump. See, e.g., Twin B. Casinos v. State, 809 So.2d 995 (La. App. 1 Cir. 9/28/01) (license denied due to applicant’s failure to answer honestly question about expunged arrest record); In re Gavin, 8 So.3d 556 (La. 5/15/09) (attorney applicant’s failure to disclose arrests a factor in denying LA license).

4.2 OCCUPATIONAL LICENSES.

Many low-income workers rely on occupational licenses or certification for their preferred employment. They face denial, suspension, termination, or non-renewal for a variety of reasons. They may present initially on a completely different issue; they may be unaware that loss of a license could be imminent, or that you (or an associate) may be able to help retain it.

This is an area in which you can often offer concrete help. Licensees generally have established appeal, hearing, and judicial review rights under the relevant occupation’s statutory and regulatory provisions. The number of regulated professions is very high, so research your client’s particular occupation. Laws governing most licensing bodies are in Title 37 of the Louisiana Revised Statutes; the Louisiana Administrative Procedures Act, R.S. 49:950 et seq. (which applies to certain actions taken by certain administrative agencies); and the Louisiana Administrative Code.

Don’t limit analysis to substantive issue(s); licensing bodies often commit procedural errors which may be successfully challenged. E.g., Schackai v. La. Board of Massage Therapy, 767 So.2d 955 (La. App. 1 Cir. 9/22/00), writ denied, 776 So.2d 464 (La. 12/8/00). R.S. 37:21 provides certain general time limitations on initiating disciplinary and concluding proceedings; special laws may also apply. The standard of judicial review after administrative proceedings are final is narrower than in civil appeals, but adverse agency actions may still be set aside under R.S. 49:964(G).

Clients may also be entitled to constitutional protections. Someone who already has a license - a vested property interest - cannot be deprived of it without due process. See, e.g., Paillot v. Wooton, 559 So.2d 758 (La. 1990); Williams v. Parish of St. Bernard, 2007-1316 (La. App. 4 Cir 5/28/2008), 984 So.2d 937; Lord v. State Board of Chiropractic Examiners, 739 So.2 273 (La. App. 1 Cir. 6/26/99) (renewal applicant distinguished). However, even a job applicant may have a constitutionally-protected liberty interest affording due process. See, e.g., Cronin v. O’Leary, 2001 WL 919969, 13 Mass.L.Rptr. 405, not reported in N.E.2d (MA Superior Court 2001). Other protections (e.g., equal protection) may also apply. See, e.g., State v. Weaver, 805 So.2d 166 (La. 1/15/02); Reaux v. LA Board of M.E., 850 So.2d 723 (La. App. 4 Cir. 5/21/03).
4.3 DRIVER’S LICENSES.

Driver’s license problems can interfere with employment. The state must comply with statutory, regulatory and constitutional requirements in suspending or revoking a license. You may be able to help your client get the action stayed during appeal, and/or reduced or reversed. R.S. 32:401 et seq. See, e.g., Fontenot v. Department of Public Safety, 92-1874 (La. App. 1 Cir. 1993), 625 So.2d 1122. Through separate procedures, you may be able to help clients suffering financial hardship get a restricted license. See R.S. 9:315.34; 32:414 et seq.; 430; 667 et seq.; Moore v. State of Louisiana, Department of Public Safety, 655 So.2d 644 (La. App. 2 Cir. 5/10/95). Details are deferred in this chapter because there is a hardship practice guide on www.probono.net/la; http://louisianalawhelp.org.

4.4 CREDIT PROBLEMS.

More and more employers run credit checks on potential employees, and use adverse information in making hiring decisions. Generally, this is not illegal, provided employers give appropriate notice and opportunity to respond to incorrect information. A poor credit history, whether caused by identity theft or clients themselves, can thus unfortunately interfere with the ability to get and keep a job. Help clients resolve the credit problem if you can, or refer them to other sources of help (see the Consumer Law chapter). As with the denial of a job due to a criminal record, if the credit history is not relevant to the job requirements, its use may raise a Title VII disparate impact claim.

5. “AT-WILL” EMPLOYMENT DISCHARGE.

The vast majority of Louisiana employees have virtually no effective job protection whatsoever. Arbitrary firing is usually completely un-actionable because of the prevailing employment at-will doctrine, based on C.C. Art. 2747. If there is no specific contract and an employee is hired for an indefinite period, then the employment relationship is considered terminable at the will of either party. Deus v. Allstate Ins. Co., Inc., 15 F.3d 506 (5th Cir. 1994) cert. denied, 513 U.S. 1014; Quebedeaux v. Dow Chemical Co., 820 So.2d 542 (La. 6/21/02); Wallace v. Shreve Memorial Library, 79 F.3d 427 (5th Cir. 1996), cert. quest. den. 673 So.2d 602 (La. 5/17/96), appeal decided 97 F.3d 746 (5th Cir. 1996).

However, you can still help. Advising clients about the at-will doctrine may help end a fruitless search for legal redress or help in future job situations. Complaints about dismissals often focus on unfairness, lack of advance notice, or that a decision was based on inaccurate information. These are not exceptions to the at-will doctrine. Tolliver v. Concordia Waterworks District #1, 735 So.2d 680, 684 (La. App. 3 Cir. 2/10/99); Johnson v. Delchamps, Inc., 897 F.2d 808 (5th Cir. 1994) reh. den. Wusthoff v. Bally’s Casino Lakeshore Resort, Inc., 709 So.2d 913 (La. App. 4 Cir. 2/25/98). An employer may give a wrong reason, or none at all. Personnel handbook provisions also do not create an exception to at-will status. Mix v. University of New Orleans, 609 So.2d 958 (La. App. 4 Cir. 1992), writ den. 612 So.2d 83 (1993). Even an employer's violation of a law may not necessarily be an exception. See, e.g., Sanchez v. Georgia Gulf Corp., 860 S.2d 277 (La. App. 1 Cir. 11/12/03), Judges Kuhn and Whipple, dissenting; writ denied, 2004-0185 (La. 4/2/04) (violation of mandatory drug testing provisions under R.S. 49:1001 et seq. held not to support a claim for wrongful termination).
For what little it’s worth, very large employers should (absent “unforeseeable business circumstances”) provide advance notice under The Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S. C. §2101 et seq. Employers with 100 or more employees must give 60 days written advance notice of mass layoffs or plant closings to employees, the chief local elected official, and to the appropriate state agency. Separate layoffs may sometimes be aggregated. Noncompliant employers may be sued for back pay for each day of the violation. §2104; United Food and Commercial Workers Union Local 751 v. Brown Group, 517 U.S. 544 (1996). Unlike some other states, Louisiana has no state counterpart to WARN.

Lawsuits for wrongful discharge where no contract is alleged (and where no other time period is applicable) are held to sound in tort, and governed by a 1 year prescriptive period. Young v. Martin Marietta Corp., 701 F. Supp. 567 (E.D. La. 1988); Maquar v. Transit Management of Southeast Louisiana, Inc., 593 So.2d 365 (La. 1992).

5.1 AT-WILL EXCEPTIONS.

Despite at-will status, there may still be a cause of action. Even if you can’t represent the client due to your limited resources, you may help by identifying possible claims and referring to possible help elsewhere (e.g., government agency or the private bar). Other lawyers may see claims you miss, so encourage clients to get other opinions through free consultations.

5.1.1 Unionized employees.

This type of employee is rarely seen by poverty law advocates in Louisiana. Getting involved with terminations covered by a collective bargaining agreement (contractual agreement that usually specifies cause for job loss and provides a process to challenge adverse employment decisions) is unlikely for a Louisiana poverty law advocate. However, you can give clients some advice, and make appropriate referrals.

If an employee and employer are unable to resolve their dispute, the union has the right to submit the matter to an arbitrator. The arbitrator’s decision is enforceable in court. Clients may find legal representation through the union, or through the private bar. Sometimes clients complaints include the union as well as the employer. In that instance, you should also advise clients about a union’s duty of fair representation. See, e.g., 29 U.S.C. §§141; 151-169. The National Labor Relations Board (www.nlrb.gov) may be a potential agency referral. The scope of a union’s representation may not include related claims such as unemployment compensation, so be sure to screen and advise clients about issues like that which flow from job loss.

5.1.2 Employees under individual contract.

This category of employee, based on C.C. Arts. 2746-50, is also rarely seen by the poverty law advocate. In a limited duration employment contract, the parties agree to be bound for a certain period of time during which neither party is free to end the relationship without cause, and reasonable notice must be given prior to termination. See, e.g., Finkle v. Majik Market, 628 So.2d 259 (La. App. 5 Cir. 1993); Hughes v. Muckelroy, 700 So.2d 995. (La. App. 1 Cir. 1997), These relationships may be found in public as well as private employment. See, e.g., Wallace
While a contract may be oral or written, any ambiguity will be construed in favor of employment at-will. Wallace, Id.; Schwarz v. Administrators of Tulane Educational Fund, 97-0222 (La. App. 4 Cir. 9/10/97), 699 So.2d 895. An unjustly discharged employee may seek recovery of all “salaries” due for the term’s remainder. An action for discharge is governed by the 10 year prescriptive period of C.C. Art. 3499.

Clients may sometimes be sued for violation of non-compete agreements. These are governed by R.S. 23:921. Look carefully at the agreement; it must be strictly construed against the party seeking its enforcement, and it may not comply with statutory requirements (e.g., specification of geographic scope, valid time limit). Contracts executed under this law are disfavored as a matter of public policy. See, USI Ins. Services, LLC v. Tappel, 09-CA-149 (La. App. 5 Cir. 11/10/09), 28 So.3d 419, writ denied, 2009-2697 (La. 2/26/10), 28 So.3d 271.

5.1.3 Violation of public policy.

A public policy exception (“Abuse of Right” doctrine) is very occasionally argued in wrongful discharge cases (although it has gained little traction in Louisiana). See, e.g., Sinclair v. Allen Parish School Board, Not reported in Fed.Supp.2d, 2011 WL 4896474 (W.D. La. 2011); Gil v. Metal Service Corp., 412 So.2d 706 (La. App. 4 Cir. 1982); Franz v. Iolab, Inc., 801 F.Supp. 1537 (E.D. La. 1992); Guillory v. St. Landry Parish Police Jury, 802 F.2d 822 (5th Cir. 1986). The necessary elements of this type of claim are said to be: (1) the exercise of rights exclusively for the purpose of harming another or with the predominant motive to cause harm; (2) exercise of rights without serious or legitimate reasons; (3) the use of the right in violation of moral rules, good faith or fundamental fairness; or (4) the exercise of the right for a purpose other than that for which it was granted. See, e.g., Morse v. J. Ray McDermott & Co., 344 So.2d 1353 (La. 1977); Truschinger v. Pak, 513 So.2d 115 (La. 1987); Illinois Central Railroad Co. v. International Harvester, 368 So.2d 1009 (La. 1979); Jones v. New Orleans Legal Assistance, 568 So.2d 663 (La. App. 4 Cir. 1990) (no public policy violation); Capone v. Kenny, 94-0888 (La. App. 4 Cir. 11/30/94), 646 So.2d 518 (should be limited to contractual situations); Ballaron v. Equitable Shipyards, Inc., 521 So.2d 481 (La. App. 4 Cir. 1988) (doctrine inapplicable where employer’s request for polygraph in embezzlement investigation reasonable).

5.1.4 Protected activity/protected rights/discrimination.

Violation of statutory or constitutional provisions may give rise to a cause of action. See, e.g., Howard v. Town of Jonesville, 935 F.Supp. 855 (W.D. La. 1996); Sampson v. Wendy’s Management, Inc., 593 So.2d 336 (La. 1992). The table below lists major statutes which may provide a basis for challenging an at-will termination when discrimination is involved. What follows is a very brief (many treatises and other resources are available) discussion of the more common complaints. Many other laws exist which may give an aggrieved employee a cause of action. Research other possibilities which may apply. Although as a poverty law advocate you likely lack the resources to represent clients on these types of claims, recognize the possibility of existing claims and refer clients to appropriate agencies and to other legal resources.
5.1.4.1 Race, color, religion, sex and national origin discrimination.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, prohibits discrimination because of a person’s race, color, sex,\(^2\) religion or national origin in many aspects of the employment relationship, including: pre-hiring procedures, working conditions, performance reviews, post-employment references, harassment on the job, and retaliation. A claim may also be raised under sections 1981 and 1983 of the Civil Rights Act of 1866 (42 U.S.C. §1981 and §1983) and the later addition, 42 U.S.C. §1981a. See, e.g., Sommer v. State, 97-1929 (La. App. 4 Cir. 3/29/00), 758 So.2d 923; Smith v. Ouachita Parish School Board, 29873 (La. App. 2 Cir. 9/24/97), 702 So.2d 727; Graham v. St. Landry Parish, 96-904 (La. App. 3 Cir. 2/5/97), 689 So.2d 595.

In cases of national origin or race discrimination, the Immigration Reform and Control Act of 1986 (“IRCA”), Pub.L.No. 99-603, 100 Stat. 3359, may apply. IRCA prohibits employers from hiring persons who are not legally entitled to work in the U.S. and requires that employers verify employees’ eligibility and identity. IRCA also prohibits discrimination in hiring, firing or recruiting or referring for a fee, based on national origin and/or citizenship status by covered employers against those who may legally work in the U.S. 8 U.S.C. §1324b. Protection is given to U.S. citizens, U.S. nationals, and aliens who have work authorization: lawful permanent residents, lawful temporary residents, refugees, and asylees. Some employer actions which may constitute illegal discrimination or be otherwise illegal under this statute include:

- Treating people differently in the hiring process.
- Exempting some from proving genuineness of a identity or eligibility document.
- Requiring submission of documents not listed on the “I-9” form.
- Citizen or resident only policies when not required by law or government contract.
- Basing decisions on appearance, accent, name, etc. rather than work-related criteria.
- Retaliation or other reaction against exercise of rights under the statute.

IRCA complaints must be filed with the Department of Justice’s Office of Special Counsel (OSC) (unless brought before the EEOC within the scope of a Title VII charge) within 180 days of the unlawful action. OSC will investigate and decide whether to bring the complaint before a special administrative law judge (ALJ). If OSC declines, the complainant may do so. Anyone dissatisfied with an ALJ’s decision may, within 60 days, appeal to the U.S. Court of Appeal for the circuit in which the violation occurred, or where the employer resides or transacts business. §1324b(I).

Louisiana’s Employment Discrimination Law, R.S. 23:301 et seq., also provides a cause of action, at 23:332 et seq., to plaintiffs who have suffered intentional employment discrimination because of their race, color, religion, sex, or national origin. The law generally covers employment agencies, labor organiza-

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\(^2\) Sexual orientation discrimination is not covered by federal law at present, although same-sex harassment based on sex is prohibited. See, e.g., Williams v. Waffle House, 2010 WL 4512819 (M.D. La. 2010). Louisiana state law also provides no protection, but check your local laws.
tions, public and private employers with 20 or more employees, who provide com-
pensation and receive services. Religious institutions, nonprofit organizations,
domestic servants, and relatives are exempted from coverage. There is no provi-
sion prohibiting retaliation, and plaintiffs found to have pursued “frivolous” claims
may be held liable for damages, costs and attorney fees. The applicable prescrip-
tive period, 1 year, is subject to suspension for limited periods of investigation by
the EEOC or its Louisiana counterpart. R.S. 23:303, 332.

5.1.4.2 Age discrimination.

The federal Age Discrimination in Employment Act (ADEA), statute, 29
U.S.C. §621 et seq., prohibits discrimination because of their advanced age against
employees 40 and over in any aspect of employment, and prohibits retaliation.
Enforcement lies with the EEOC. Administrative filing is required at least 60 days
before filing suit, but a plaintiff need not wait for issuance of a “right to sue” notice
before filing suit. Upon issuance, however, the 90 day time period to bring a suit
begins to run. 29 U.S.C. §626(c).

Louisiana’s Employment Discrimination Law, at R.S. 23:311 et seq., also
deals with age discrimination and is construed in light of federal precedent.
O’Boyle v. Louisiana Tech University, 32,212 (La. App. 2 Cir. 10/1/99); 741 So.2d
1289; LaBove v. Raftery, 2000-1394 (La. 11/28/01), 802 So.2d 566; Eastin v.
Enerty Corp. 09-293 (La. App. 5 Cir. 7/27/10), 42 So.3d 1163. Domestic servants
and relatives are excluded from coverage. The one year prescriptive period
179; Harris Savings and Loan Ass’n, 95-223 (La. App. 3 Cir. 7/27/95), 663 So.2d
92, writ denied 664 So.2d 405.

The Older Workers Benefit Protection Act (1990), 29 U.S.C. §§623, 626
& 630, amended the ADEA to prohibit the use of an employee’s age as basis for
discrimination in benefits or layoffs. It also requires covered employers to give
employees 21 days to decide whether or not to sign a waiver of right to sue. In
group waivers, each employee must get 45 days. After signing, an employee has
7 days to revoke consent. 29 U.S.C. §626(f); Oubre v. Entergy Operations, Inc., 522
U.S. 422 (1998). An effective waiver must:

- Be knowing and voluntary;
- Use language understandable to the average person;
- Specify that it applies to the ADEA;
- Not cover any rights discovered by the employee after signing;
- Provide something of value, over and above what is already owed to the
  employee;
- Advise of employee’s right to consult an attorney before signing;
- Include a fixed time to make a decision; and
- If made to a group, group must be defined, with job titles and ages of all in
  the group, and ages of all in same job classification or unit to whom the offer
  is not being made.

(245)
5.1.4.3 Disability discrimination.

Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12102 et seq. prohibits discrimination by covered employers in any aspect of employment against qualified individuals on the basis of a qualified disability. §12112(a), (b), (d). The law requires notices and prohibits retaliation, and was amended to overcome restrictive jurisprudential interpretations. ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553. A covered individual is one who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. §12111(8).

If a disability and need for accommodation is obvious, an employee need not expressly or formally request accommodation. The fact that a person has applied for, or is even receiving, Social Security or other disability benefits based on the inability to work, does not automatically bar an ADA claim. Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999). 3

"Reasonable accommodation" may include, but is not limited to, job restructuring; modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; modification of examinations, training materials or policies; provision of qualified readers or interpreters. §12111(9)(B). What is reasonable accommodation is a highly specific and individualized fact inquiry, focusing on the employee's and employer's particular circumstances. So long as the accommodation offered is reasonable, an employer does not have to provide something that the employee prefers more.

Accommodation that causes "undue hardship," i.e., "significant difficulty or expense," is not required. §12111(10). If a disability would in the work at issue endanger the person's health, the employer's refusal to hire does not violate the ADA. Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002). It is not a reasonable accommodation to exempt an employee from an essential function of their job. Jones v. Kerrville State Hospital, 142 F.3d 263 (5th Cir. 1998). It is ordinarily not reasonable to expect the employer to change seniority rules. US Airways, Inc. v. Barnett, 535 U.S. 391 (2002). Title I of the ADA is enforced by the Equal Employment Opportunity Commission (EEOC). §12117. Private lawsuits are authorized, but administrative exhaustion is required.

Section 504 of the Rehabilitation Act, 29 U.S.C. 793 et seq. is similar to the ADA. It prohibits discrimination on the basis of disability by most employers receiving federal assistance. It may protect employees of federally funded private employers who are too small to be covered by the ADA. § 504 also requires certain affirmative hiring efforts. It is enforced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs. Private suits are authorized, and administrative exhaustion is not required except for federal employees. Carter v. Orleans Parish Public Schools, 725 F.2d 261 (5th Cir. 1984); Doe v. Garrett, 903 F.2d 455 (11th Cir. 1990).

Louisiana's Employment Discrimination Law provides a cause of action in R.S. 23:322 et seq which is very similar to that available under the ADA. See, e.g. Lindsey v. Foti, 2011-0426 (La. App. 1 Cir. 11/9/11), 81 So.3d 41; Harvey v. Wal-Mart Louisiana L.L.C., 665 F.Supp.2d 655 (W.D.La. 2009). Employers cannot dis-

3 You'll also want to advise your client as to how other laws may interact. A good place in which to start your research is the Clearinghouse Review Journal of Poverty Law and Policy. http://povertylaw.org.
criminate against “an otherwise qualified disabled person on the basis of disability” when that disability is “unrelated to the person’s ability, with reasonable accommodation” to perform job duties.

5.1.4.4 Pregnancy discrimination.

It’s a common mis-perception that it is illegal discrimination for an employer to refuse pregnancy leave or fail to guarantee job security after delivery. That’s not necessarily the case. The Pregnancy Discrimination Act, 42 U.S.C. 2000e(k), amended Title VII to protect employees and job applicants from discrimination in any aspect of employment based on pregnancy, childbirth, or any related medical condition. Laxton v. Gap, Inc., 333 F.3d 572 (5th Cir. 2003); Urbano v. Continental Airlines, Inc., 138 F.3d 204 (5th Cir.), cert. denied 525 U.S. 1000 (1998). It is enforced by the EEOC. Private suits are authorized. Actions prohibited by the statute include:

- Treating pregnant employees and those recovering from abortion who need time off from work or certain job duties differently than all other temporarily disabled employees.
- Forcing employees to take leave because of pregnancy if they remain able to do the essential functions of the job.
- Hiring or refusing to hire solely because a woman is pregnant.
- Denying health care coverage for pregnancy if other medical conditions are covered. However, an employer may exclude coverage for abortion unless the life of woman would be endangered or there are medical complications after the abortion.

Louisiana’s Employment Discrimination Law addresses “pregnancy, childbirth and related medical conditions” in R.S. 23:341 et seq. The statute covers public and larger private employers and prohibits employment discrimination because of these conditions unless based on a “bona fide occupational qualification.” It also requires state employers to provide leave for up to four months. There is no retaliation provision. Allison-LeBlanc v. Department of Public Safety and Corrections, Office of State Police, 95-0295 (La. App. 1 Cir. 10/6/95), 671 So.2d 448 (predecessor statute raised in context of civil service appeal). Administration exhaustion is not required.

5.1.4.5 Labor union membership.

Both federal and state statutes prohibit discrimination against workers for belonging or refusing to belong to a labor union. 29 U.S.C. § 141 et seq.; R.S. 23:881 et seq. and 981 et seq. (“Right to Work” law). Activities which can be characterized as organizing are also protected.

5.1.4.6 Other laws.

This chapter is intended to give you an overview only, not a comprehensive list, of the most common potential claims. Other laws may exist which give your client a cause of action. Research other possibilities that may apply.
6. PUBLIC EMPLOYMENT LOSS

6.1 PROTECTIVE CONSTITUTIONAL AND STATUTORY FRAMEWORK.

Enjoying some limited job protection are public employees covered by a state, parish, or municipal civil service system (under which non-policy forming employees are selected on the basis of merit and discharged only for reasons connected to work performance), Banister v. Department of Streets, 95-0404 (La. 1/16/96), 666 So.2d 641, 646, or by other legal protections. Civil service systems are governed by a constitutional and statutory framework. La. Const. Art. 10; R.S. Title 33.

As a public employee dismissible only for cause possesses a constitutionally-protected property interest, to satisfy procedural due process the employee is generally entitled to a limited pre-deprivation hearing, with an opportunity for a more comprehensive post-deprivation hearing. See Cleveland Bd. of Ed. v. Loudermilk, 470 U.S. 532, 545-46 (1985).

Most civil service employees who’ve been fired or suspended will be financially eligible for free legal aid, and your representation can make a very real difference. For that reason, this chapter explores in some detail the principles applicable to Louisiana civil service systems in general, and offers some practice guidelines. Federal employees are rarely seen by poverty law advocates, and treatises are available elsewhere.

Civil service protections apply to members of the classified service. See, e.g., Wallace v. Shreve Memorial Library, 79 F.3d 427 (5th Cir. 1996), cert. den. 673 So.2d 602, 96-0792 (La. 5/17/96), app. dec. 97 F.3d 746 (5th Cir. 1996); Knecht v. Board of Trustees for State Colleges and Universities and Northwestern State University, 91-C-0751 (La. 12/2/1991), 591 So.2d 690; Department of State Civil Service v. Housing Authority of East Baton Rouge, 95-1959 (La. App. 1 Cir. 5/10/96), 673 So. 2d 726, writ den. 679 So.2d 434 (La. 9/20/96). Classified employees with permanent status may be disciplined only for cause expressed in writing. La. Const. art. X, §8. Those with non-permanent status have less protection.

The unclassified service includes persons in a variety of positions, including elected officials, registrars of voters, etc. La. Const. Art. 10, 2(B); La. R.S. 33:2401 et seq. Unclassified service members without employment contracts may usually be discharged without cause, being essentially at-will employees. Tolliver v. Concordia Waterworks District #1, 98-00449 (La. App. 3 Cir. 2/10/99), 735 So.2d 680, 684; Manuel v. Town of Mamou, 97-651 (La. App. 3 Cir. 12/10/97), 704 So.2d 358; Mix v. University of New Orleans, 609 So.2d 958 (La. App. 4 Cir. 1992), writ den. 612 So.2d 83 (1992).

Most civil service systems are governed by commissions or boards, quasi-legislative bodies “vested with broad and general rule-making and subpoena powers for the administration and regulation of the classified service.” La. Const. Art. 10, §10; §3 (state); §2 (cities); R.S. 33:2396, 2397. A director provides the executive and administrative leadership. Art. 10, §§8-7; R.S. 33:2399, 2400. Most if not all systems enact their own rules, which must be published and made available to the public on request. These rules have the effect of law and prevail over contradictory statutory provisions unless they are unreasonable or unconstitutional. Banister v. Department of Streets, 95-0404, p. 4 (La. 1/16/96), 666 So.2d 641; Hudson v. Department of Public Safety and Corrections, Louisiana State Penitentiary, 96 0499 (La. App. 1 Cir. 11/8/96), 682 So.2d 1314, writ den. 687
So.2d 408. The interpretation and meaning of civil service rules is purely a question of law. Perkins v. Director of Personnel, 197 So.2d 116 (La. App. 1 Cir. 1967), writ ref. 199 So.2d 924.

6.2 ISSUES TO EXPLORE IN EVALUATING A CIVIL SERVICE CASE.

- **What is the employee’s status?**
  
  Classified or unclassified? Permanent, temporary, probationary, or other? The employer’s characterization may not be correct. Reference to personnel or civil service department records may be needed to resolve the issue.

- **How severe is the employee’s loss?**
  
  Job loss, either through termination or “non-disciplinary” removal, is a severe economic blow, as are long-term suspensions (30 days or more). If you don’t take a case because the loss isn’t severe enough to justify use of limited resources, clients can be advised on how to exercise their rights *pro se*, or referred to a law school clinic or the private bar.

- **Was the discipline taken by the appropriate person?**
  
  If the person who took the action lacked authority, the action is null and void. Lane v. Dept. of Public Safety and Corrections, 00-2010 (La. App. 1 Cir. 2/15/02), 808 So.2d 811; Department of Agriculture and Forestry v. Jones, 93-0128 (La. App. 1 Cir. 3/11/94), 633 So.2d 900, writ denied 637 So.2d 482. If a disciplinary letter is not signed by the agency’s head official, the issue should be raised before hearing, and the appointing authority (“AA”) must present sufficient documentary evidence of appropriate authority (direct or delegated).

- **Has the AA illegally punished twice for the same conduct?**
  
  Determine prior disciplinary history, and the sequence of events leading to the current charge; check central and departmental personnel files if possible. Suspension *pending investigation*, followed by termination based upon the same charge, is valid. Ayio v. Parish of West Baton Rouge School Bd., 569 So.2d 234 (La. App. 1 Cir. 1990). Punishment twice for the same offense is not valid (even if civil service rule purports to allow it). Bruno v. Jefferson Parish Library Dept, 04-504 (La. App. 5 Cir. 11/30/04), 890 So.2d 604; Lundy v. University of New Orleans, 98-0054 (La. App. 1 Cir. 2/19/99), 728 So.2d 927. If discipline is voided due to procedural defects, the same conduct may properly be used to support subsequent discipline. Baker v. Southern University, 590 So.2d 1313 (La. App. 1 Cir. 1991); Usun v. LSU Health Sciences Center Medical Center of Louisiana at New Orleans, 2002 CA 0295, 0296 (La. App. 1 Cir. 02/14/03), 845 So.2d 491. Meantime, the employee must be reinstated and reimbursed for lost wages and emoluments. Raise the issue before hearing if possible.

- **Are the charges impermissibly stale?**
  
  The AA is not estopped from discipline on a *current* act of misconduct just because it has failed to discipline for similar infractions in the past, nor is it required to put an employee on notice that its practice of toleration will be changed. Bolar v. Department of Public Works-Water, 95-346 (La. App. 5 Cir. 10/31/95), 663 So.2d 876, *writ den.* 666 So.2d 680. However, it should
be estopped from using stale charges when the delay is not imputable to the employee. See, e.g., Board of Trustees, State Employee Group Benefits Program v. Moncrieff, 644 So.2d 679 (La. App. 1 Cir. 1994); Lombas v. Department of Police, 467 So.2d 1273 (La. App. 4 Cir. 1985); Leteff v. Department of Corrections, Headquarters, 462 So.2d 254 (La. App. 1 Cir. 1984); Cartwright v. Department of Revenue and Taxation, 460 So.2d 1066 (La. App. 1 Cir. 1984); Robbins v. New Orleans Public Library, 208 So.2d 25 (La. App. 4 Cir. 1968). The AA may also use old misconduct in support of the severity of its punishment on a current offense. Raise this issue before hearing if possible.

- **Were there rule or due process violations?**

  Raise any procedural violations before hearing, if possible (most civil service systems allow for summary disposition or other pre-hearing motions). If the AA failed to follow applicable procedures (whether required by statutes, rules, or constitutional principles), the action should be voided. Perkins v. Sewerage and Water Board, 95-1031 (La. App. 1 Cir. 2/29/96), 669 So.2d 726, reh’g den; Baker v. Southern University, 590 So.2d 1313 (La. App. 1 Cir. 1991); Shortess v. Department of Public Safety and Corrections, 2006-2013 (La. App. 1 Cir. 9/14/07), 971 So.2d 1051 (“non-disciplinary” removal). You can recover needed income for your client, even though the AA may start over. See, e.g., Usun v. LSU Health Sciences Center Medical Center of Louisiana at New Orleans, 2002-0295 (La. App. 1 Cir. 2/14/03), 845 So.2d 491, 496.

  As mentioned above, a property right in continued employment entitles most public employees to procedural due process. The critical elements to procedural due process are notice and an opportunity to respond. Loudermill, supra; Moore v. Ware, 01-3341 (La. 2/25/03), 839 So.2d 940; Wallace v. Shreve Memorial Library, 79 F.3d 427 (5th Cir. 1996), certified question denied 96-0792 (La. 5/17/96), 673 So.2d 602, appeal decided 97 F.3d 746 (5th Cir. 1996); Murray v. Department of Revenue and Taxation, 504 So.2d 561 (La. App. 1 Cir. 1986).

  Due process protections attach even if the AA incorrectly characterizes the job separation as voluntary on the employee’s part. Paul v. New Orleans Police Dept., 96-1441 (La. App. 4 Cir. 1/15/97), 687 So.2d 589, writ denied 692 So.2d 447. Don’t take the AA characterization of a client’s status at face value. The AA may make a mistake, or your client may be unaware of her legal status. See, e.g., Carroll v. N.O.P.D., 2002-2230 (La. App. 4 Cir. 3/25/03), 844 So.2d 148 (reinstatement ordered because commission failed to meet its burden of proving probationary status); Robinson v. Natchitoches Parish Housing Authority, 554 So.2d 1384 (La. App. 1 Cir. 1989), writ den. 558.2d 583. **Due process is a flexible standard and what protections are required depends upon the particular situation. Gilbert v. Homar, 520 U.S. 924, 930 (1997); Moore v. Ware, supra.**

  **Before** non-disciplinary removal, termination, suspension or other deprivation, some type of notice and opportunity to respond is generally required for due process. Department of Public Safety and Corrections, Office of Youth Services v. Savoie, 569 So.2d 139 (La. App. 1 Cir. 1990). If the property deprivation is relatively short, or emergency suspension is necessary due to financial exigency, safety concerns or health hazards, there doesn’t have to be pre-deprivation process. Exactly when due process protections attach is
not precisely defined. See, e.g., Frye v. Louisiana State University Medical Center in New Orleans, 584 So.2d 259 (La. App. 1 Cir. 1991) (property interest in 1 day’s pay not sufficient to require due process notice and hearing before suspension); Monier v. St. Charles Parish School Board, 10-526 (La. App. 5 Cir. 5/10/11), 65 So.2d 731 (ditto 2 days); Casse v. Sumrall, 547 So.2d 1381 (La. App. 1 Cir. 1989), writ den. 551 So.2d 1322 (layoff due to financial exigency did not implicate due process). No formal “hearing” is required; just notice (oral or written) of the proposed action, an explanation of the nature of the evidence, and the opportunity to present arguments against the proposed action. The notice need not always provide complete details, but enough to inform the employee. Danny Beck v. City of Baker, 2011 CW 0803 (La. App. 1 Cir. 9/10/12), 102 So.3d 887. Still, it’s not uncommon for the AA to make mistakes that can void the action. See, e.g., Bell v. Department of Health and Human Resources, 477 So.2d 91 (La. 1985), reh’g den. 483 So.2d 945 (La. 1986), cert. denied, 479 U.S. 827 (1986); Henderson v. Sewerage and Water Board, 99-1508 (La. App. 4 Cir. 12/22/99), 752 So.2d 252; Patterson v. Personnel Bd., City of Baton Rouge and Parish of Baton Rouge, 95-1603 (La. App. 1 Cir. 4/4/96), 672 So.2d 1118, reh’g den. 679 So.2d 1348.

Final notice affecting property rights must also comport with due process by providing sufficient notice of the complained-of action and possible appeal rights. It must be in writing. La. Const. Art. 10, §8. An employee must be informed of the time, place and nature of any alleged misconduct in sufficient detail to adequately prepare a defense. See, e.g., George v. Department of Fire, 92-2421 (La. App. 4 Cir. 4/17/94) 637 So.2d 1097; Maurello v. Department of Health and Human Resource, Office of Management and Finance, 510 So.2d 458 (La. App. 1 Cir. 1987), writ den. 514 So.2d 460, app. after rem. 546 So.2d 545. An employee who resigns to avoid disciplinary action is not entitled to such notice. Pugh v. Department of Culture, Recreation and Tourism, Sabine River Authority, 597 So.2d 38 (La. App. 1 Cir. 1992).

- Can the appointing authority meet its burden of proof to show legal cause?

Under La. Const. Art. 10, §8(A), a permanent classified civil service employee may only be disciplined for cause expressed in writing. The AA bears the burden of proving, by a preponderance of evidence, that the conduct complained of “impairs the efficiency of the public service and bears a real and substantial relation to efficient operation of the public service in which the employee is engaged.” Leggett v. Northwestern State College, 140 So. 2d 5 (La. 1962); Mathieu v. New Orleans Public Library, 2009-2746 (La. 10/19/10), 50 So.3d 1259; Shields v. City of Shreveport, 579 So.2d 961, 964 (La. 1994); Walters v. Department of Police of the City of New Orleans, 454 So.2d 106, 113 (La. 1984). There is no presumption of correctness attached to an AA’s action. Auferdemorte v. Department of Police, 437 So.2d 364 (La. App. 4 Cir. 1983). Furthermore, not every rule violation is sufficient to support disciplinary action. Johnson v. New Orleans Fire Department, 95-0546 (La. App. 4 Cir. 11/16/95), 665 So.2d 126. An employee may also not be disciplined for exercising a constitutional right. Normand v. City of Baton Rouge, Police Dept., 572 So.2d 1123 (La. App. 1 Cir. 1990). Research case law to find factual situations similar to your client’s case. However, three issues are spotlighted below.
Drug or alcohol use. Don’t assume the validity of a test request. It may have violated applicable system rules, or be constitutionally flawed. See, e.g., Richard v. Lafayette Fire and Police Civil Service Bd., 2008-1044 (La. 2/6/09), 8 So.3d 509; Lemoine v. D.O.P.W., 2002-2532 (La. App. 1 Cir. 9/26/03), 857 So.2d 550. Refusal to take a test may be justified. See, e.g., Safford v. Department of Fire, 627 So.2d 708 (La. App. 4 Cir. 1993). Cf. Razor v. New Orleans Dept. of Police, 2004-2002 (La. App. 4 Cir. 2/15/06), 926 So.2d 1; George v. Department of Fire, 93-2421 (La. App. 4 Cir. 5/17/94), 637 So. 2d 1097 (plaintiffs lost constitutional arguments). There may also be another defense, or an argument for mitigation. See, e.g., Small v. Department of Police, 98-0292 (La. App. 4 Cir. 10/21/98), 720 So.2d 751 (officer given wrong pain medication by daughter; termination reduced to suspension). Second, look for flaws in the test procedure. Finally, if a test result is the only basis for discipline, the AA must prove “with great care” the chain of custody and that proper procedures were followed. See, e.g., Krupp v. Department of Fire, 2007-1260 (La. App. 4 Cir. 11/19/08), 995 So.2d 686; Ruddock v. Jefferson Parish Fire Civil Service Bd., 96-831 (La. App. 5 Cir. 1/28/97), 688 So.2d 112. Question your client closely and review documents carefully to see if errors in obtaining or handling a sample may have taken place. The AA may fail to meet its burden of proof. See, e.g., Carroll v. N.O. Police Dept., 04-0122 (La. App. 4 Cir. 9/29/04), 885 So.2d 636; Blappert v. Department of Police, 94-1284 (La. App. 4 Cir. 12/15/94), 647 So.2d 1339 (failure to rebut employee testimony that sample mislabeled). Cf. Murray v. Department of Police, 97-2650 (La. App. 4 Cir. 5/27/98), 713 So. 2d 838, writ den., 98-1730 (La. 10/9/98), 713 So.2d 838.

Criminal conduct. Conduct that constitutes violation of a criminal statute may constitute cause for dismissal or other discipline. Roy v. Alexandria Civil Service Commission, 2007-1458 (La. App. 3 Cir. 4/2/08), 980 So.2d 225 (appeals court affirmed Commission ruling that battery off-duty not cause to terminate); AFSCME v. State, 01-0422 (La. 6/29/01), 789 So.2d 1263 (statute mandating felony conviction as cause for termination from service only constitutional vis-a-vis unclassified state employees); Caldwell v. Caddo Levee Dist., 554 So.2d 1245 (La. App. 1 Cir. 1989), writ den. 559 So.2d 126 (unjust to dismiss when exonerated of criminal charges). The burden of proof is less than in criminal proceedings; although the facts must be clearly established they need not be established beyond a reasonable doubt. Blackwell v. Sumrall, 97-0084 (La. App. 1 Cir. 2/20/98), 708 So.2d 1147.

Non-disciplinary removals. This can be a subterfuge by an AA seeking to avoid the closer scrutiny given to disciplinary removals. Look carefully at relevant rules. Non-civil service laws may also give your client additional rights. See, e.g., Shortess v. Department of Public Safety and Corrections, supra. (non-disciplinary removal under state system subject to the ADA).

**Is the punishment appropriate or should it be modified?**
A civil service commission or board must not only determine whether the AA had legal cause for the action, but also whether the punishment
imposed is commensurate with the offense. Mathieu v. New Orleans Public Library, 2009-2746 (La. 10/19/10), 50 So.3d 1259; Walters v. Dept. of Police, 454 So.2d 106 (La. 1984). Discipline should be modified if it was arbitrary, capricious, or characterized by an abuse of discretion. Factors to be considered include the nature of the offense, work record (performance evaluations, usually annual), and prior disciplinary record. Because of its extreme nature, termination is often reversed for lesser punishment. For that reason, an appeal should almost always request a reduction in discipline as alternative relief, and be sure that relevant evidentiary support gets into the record. Search court decisions and civil service opinions for cases involving conduct similar to your client’s, and bring them to the attention of adjudicator(s).

- **If your client was not a permanent employee, can he prove a discriminatory or retaliatory reason for the discipline?**

  Your client has the burden of proof in this situation, and it is not often easy to meet. La. Const. Art. 10, 8(B) requires that in the case of employees who are temporary, provisional or probationary, the AA must give the real reason for dismissal or other discipline, and that action must be nondiscriminatory and not in retaliation for exercising a legal right. See, e.g. Preen v. Dep’t of Welfare, 93-1278 (La. App. 4 Cir. 4/28/94), 636 So.2d 1127 (successful claim of racial discrimination); Department of Public Safety and Corrections v. Thornton, 625 So.2d 713 (La. App. 1 Cir. 1993) (violation of civil service rule found in termination of probationary employee without obtaining input about work performance from immediate supervisor); Ray v. City of Bossier City, 37,708 (La. App. 2 Cir. 10/24/03), 859 So.2d 264, writ denied 2003-3214 (La. 2/13/04) (summary judgment in favor of employer reversed; employees allegedly fired for exercising First Amendment right to free expression).

  Not all types of discrimination can be raised in the civil service context. Certain categories of prohibited discrimination are listed in La. Const. 10, §8(B). It has been held that this is an exclusive listing of bases for civil service appeals based on discrimination. See, e.g., Tennessee v. Department of Police, 2009-1461 (La. App. 4 Cir. 3/2/09), 33 So. 3d 354. Employees may pursue other claims in an appropriate judicial forum. See McCain v. City of Lafayette, 98-1902 (La. App. 3 Cir. 5/5/99), 741 So.2d 720 (district court held to have jurisdiction over age-discrimination plaintiff’s state law claims for general damages and loss of reputation); Louisiana Department of Agriculture and Forestry v. Sumrall, 98-1587 (La. 3/2/99), 728 So.2d 1254 (finding invalid state civil service rules allowing appeals on additional bases of discrimination). If you are only taking a civil service appeal but other claims may exist, confirm the limited scope of your representation in writing.

### 6.3 FILING THE ADMINISTRATIVE APPEAL.

Classified employees have the right to appeal disciplinary action to the appropriate commission. La. Const. Art. 10, §8,12. The civil service department may have an appeal form or a letter may suffice; check the rules. Disciplinary action must generally be appealed within the time limits and in the manner specified by the applicable statute or rule. R.S. 33:2424. If the AA is at fault for your client missing the time limit, proof of a rule violation or equitable argument such as laches or contra non valentem may be held to interrupt the running of the appeal period. See, e.g., Sterne v. Department of State Civil Service, 98-0525 (La. App. 1
What to include in an administrative appeal. Review the system’s rules. In some cases a simple statement that the client wants to appeal a particular AA action could be enough. But, clients seeking a reduction in penalty in the alternative should explicitly request it, and clients alleging discrimination or retaliation must provide sufficient specifics to enable the AA to prepare a defense. R.S. 33:2424 et seq. and applicable system rules; Griffen v. Department of Health and Human Resources, 599 So.2d 294 (La. 1992). Attorney’s fees can be requested. Remember, as discussed above certain claims can’t be raised within a civil service employee appeal.

Review as quickly as possible any appeal filed before your intervention; amendment may be needed and the right to do so time-limited. See, e.g., Brown v. Department of Health and Hospitals Eastern Louisiana Mental Health System, 2004-2038 (La. App. 1 Cir. 11/4/05), 917 So.2d 522; Carter v. Department of Revenue and Taxation, 563 So.2d 920 (La. App. 1 Cir. 1990).

6.4 THE ADMINISTRATIVE APPEAL PROCESS.

State and city civil service commissions are constitutionally authorized to appoint referees or hearing examiners to conduct hearings on appeals. Art. 10, §12(A), (B). Depending on the system, these officers may have the power to make decisions (which may then be appealed to the full commission) or merely the power to make reports and recommendations to the appointing commission (which makes the actual decision). R.S. 33:2424, 2426 and system rules. Learn the rules applicable to the system with which you are dealing, as options and time limits for exercising them will vary. Whether you’ll want to present your own witnesses or documentary evidence will depend on the facts of your case and who carries the burden of proof. While hearsay and other incompetent evidence may be admissible at hearing, make objections as appropriate. Incompetent evidence should be disregarded by the adjudicator and by a reviewing court, but are not always. Harrell v. Dept. of Health and Hospitals, 2010-1281 (La. App. 1 Cir. 9/10/10), 48 So.3d 297; Berger v. New Orleans Police Dept., 95-1668 (La. App. 4 Cir. 12/28/95), 666 So.2d 709. If you fail to make an evidentiary objection at hearing, a court may find it waived.

On reversal or modification of AA action, an employee should be reinstated to his former position; receive back pay, benefits and emoluments; and have attorney’s fees awarded if requested. See, e.g., Blappert v. Department of Police, 94-1284 (La. App. 4 Cir. 12/14/94), 647 So.2d 1339; Baker v. Southern University, 590 So.2d 1313 (La. App. 1 Cir. 1991). Reimbursable benefits and emoluments have been held to include:


• State supplemental pay. Hebbler v. New Orleans Fire Dept., 310 So.2d 113 (La. 1975); Johnson v. Department of Police, 97-2748 (La. App. 4 Cir. 4/22/98), 715 So.2d 12.
• Annual leave time that would have accrued. *Lombas v. New Orleans Police Department*, 501 So.2d 790 (La. App. 4 Cir. 1986).

• Pay for overtime reasonably certain to have been required. *Carroll v. N.O. Police Department*, 04-0122 (La. App. 4 Cir. 9/29/04) 946 So.2d 674.


Not reimbursable is the employee’s increased tax liability incurred as a result of lump-sum payment of back wages. *Christoffer v. Department of Fire*, 98-2408 (La. 5/18/99), 757 So.2d 863. It is also OK for system rules to allow for set off of wages and other income the employee received while off the job, such as unemployment compensation benefits. However, income earned from work during what would have been off-hours should not be set off. *Patterson v. Personnel Bd., City of Baton Rouge and Parish of Baton Rouge*, 95-1603 (La. App. 1 Cir. 4/4/96), 672 So.2d 1118, *reh’g den.*, *writ den*. 679 So.2d 1348 (La. 9/27/96).

6.5 JUDICIAL REVIEW.

Review by a court of appeal of any final commission decision may be sought within 30 calendar days. La. Const. art. 10, §12; La. C.C.P. art. 5059. Which court has jurisdiction depends on the commission involved. Indigents may prosecute civil service appeals *in forma pauperis*. Commission action reversing disciplinary action must be promptly executed even if the AA appeals, unless there is authority to appeal suspensively. See *Danforth v. DPW*, 02-0529 (La. App. 4 Cir. 5/14/03), 845 So.2d 650; *Mouton v. Department of Fire*, 97-2709 (La. App. 4 Cir. 3/25/98), 713 So.2d 494.

7. EVALUATING FOR BENEFITS ELIGIBILITY.

Clients with employment-related complaints should be screened for benefits eligibility. Helping jobless people and families get benefits due from an employer or from the government should be a high priority for poverty law advocates. However, even if your practice is in a completely different area, the ability to recognize benefits issues, and point them out to your clients, can greatly help the people you are trying to serve.

Clients can have mistaken ideas about benefits eligibility (e.g., erroneously believing that they must possess a separation notice (commonly called a “pink slip”) to apply for unemployment compensation benefits). Others, particularly formerly middle class families who’ve dropped into poverty, may not be aware of what benefits exist, or how to apply.

Summary of post-separation issues to cover with clients

• Eligibility for unemployment compensation benefits.
• Job-linked health insurance or pension benefits.
• Unpaid wages or other amounts may be due.
• If client has poor health, eligibility for Social Security disability insurance benefits and/or Supplemental Security Income (SSI) (separate chapter).
• Minor children in the household may allow for Temporary Assistance for Needy Families, Kinship Care Subsidy Program benefits, child support or other available benefits from an absent parent (e.g., veterans or Social Security benefits) (separate chapters).

• Eligibility for food stamps or other food program benefits.

8. UNEMPLOYMENT COMPENSATION BENEFITS.

8.1 BACKGROUND.

All states have an unemployment compensation (UC) or insurance system, originating in federal relief programs begun in the world-wide depression of the 1930's. Participating states accept federal money for administrative costs, and must comply with federal requirements to avoid financial penalties. 26 U.S.C. §3301 et seq., 42 U.S.C. §501 et seq. and 26 C.F.R. §3301 et seq. Regular unemployment compensation benefits are weekly cash payments provided by the state to eligible persons who have lost a job under qualifying circumstances, for a limited period of time. Most low-wage workers have little or no savings, and few have family members able and willing to help out for long, so the UC program offers the primary safety net.

Louisiana's UC program is run by the agency currently called the Louisiana Workforce Commission (LWC). The state statutory provisions governing Louisiana's program are found at R.S. 23:1471 et seq., the “Louisiana Employment Security Law.” The LWC also has regulations in the Administrative Code. Not all employers and jobs are covered. R.S. 23:1472 (11), (12). Excluded are many religious, charitable and political jobs; federally-financed work-relief or training programs; inmate programs; domestic service; and jobs in certain rehabilitation facilities.

Practice tip While helping a client get UC should be a high priority in itself, doing so can also provide an opportunity to better evaluate the merits of another claim (e.g., civil service appeal).

The express purpose of the UC program is not to reward the employee or to punish the employer, but to protect the stability of the state and the family in a time of hardship. R.S. 23:1471. Thus, the law is remedial in nature and its provisions must be liberally construed in favor of awarding benefits. Parker v. Gerace, 354 So.2d 1022 (La. 1978); National Gypsum Co. v. Administrator, 313 So.2d 239 (La. 1975). Don’t hesitate to remind adjudicators of that.

8.2 DISASTER UNEMPLOYMENT ASSISTANCE (“DUA”)

DUA is different from regular UC, being fully funded by the federal government, and may be available if regular benefits are not payable after a presidentially declared disaster. DUA is authorized during a disaster period, pursuant to the Stafford Act, 42 U.S.C.5177, 20 C.F.R. §625.1 et seq., to those unemployed workers and the self-employed who lived, worked or were scheduled to work in a disaster area, and due to a federally declared disaster:

• No longer have a job or place to work;

• Can’t reach the job or place of work;
• Can’t work due to damage to the place of work; or
• Can’t work due to injury caused by the disaster.
• Have become the head of the household and must now seek work due to the disaster-related death of the former household head.

The DUA program is administered in Louisiana by the agency currently called the Louisiana Workforce Commission. Louisiana residents who are dispersed by disaster to another state should contact that state’s unemployment system administering agency for information.

8.3 REGULAR UC ELIGIBILITY.

Federal law mandates some eligibility restrictions and allows states to impose others at their option. An unemployed person is eligible to receive non-disaster UC in Louisiana if she:
• makes a proper claim;
• has sufficient “base period” wages;
• registers for work with the agency;
• is able to work, available for work, and conducting an active search for work;
• is unemployed for a 1 week waiting period;
• is a U.S. citizen, an alienlawfully admitted for permanent residence, or “permanently residing in the U.S. under color of law”; and
• is not otherwise disqualified.

Some of these requirements repeatedly cause problems for clients, particularly in light of the unreasonably short appeal periods; the agency’s reliance on internet and overburdened phone systems, with very little help available for the non-English speaker; mobility of many claimants; and the agency’s bias toward employers (e.g., if an employer and employee offer conflicting statements, the agency will almost always accept the employer’s version).

8.3.1 Monetary eligibility determinations.

After a claim is filed, the agency determines whether a claimant is monetarily eligible. A claimant must have worked long enough and earned enough within a certain period of time. This “base period” is the first four calendar quarters of the last five complete calendar quarters preceding the week of benefit application. R.S. 23:1472(4)(7). The amount of wages earned during the base period, subject to a statutory maximum, determines a claimant’s weekly benefit amount (WBA). R.S. 23:1592(B). Any of a claimant’s employers during the base period has standing to oppose a claim.

The agency’s Notice of Monetary Determination is supposed to be mailed to the claimant and base period employers within 30 days after a claim is filed. R.S. 23:1624. A monetary determination may be reconsidered at any time within the subsequent year. R.S. 23:1626. The claimant may work after filing a claim and still draw some UCB, if he or she does not earn in excess of the WBA. R.S. 23:1593.

Review monetary decisions carefully. They are often wrong, either because a claimant’s earnings are under-reported or miscalculated, or because of an arguably unconstitutional “high quarter ratio” requirement in R.S. 23:1600(5).
That wage spread formula is likely to unfairly impact those with sporadic employment. Monetary eligibility is based on a claimant’s work history during a “base period,”). The base period generally excludes the calendar quarter in which a claim is filed, and the preceding quarter. There are two state statutory requirements for base period wage sufficiency:

- A minimum earnings requirement found in R.S. 23:1592(A) (currently, $1200).
- Total base period wages must be at least one and a half times the amount earned in the highest calendar quarter of the base period. R.S. 23:1600(5). This “high quarter ratio” requirement is a historical “left-over” from earlier statutory revisions. The result is that some workers need only $1200 in the base period to be eligible (if their wages are spread among quarters), but others can be found ineligible, as having “insufficient wages,” even though they earned several times the $1200 minimum, because “too much” of their wages are concentrated in a single quarter. This arguably denies equal protection of laws.

Review the notice with your client. Find out: (1) the amount generally earned per pay period, in the base period and since; (2) how many times your client filed for UC during and since the base period, and to what end; (3) whether base period wages are truly his and are correct; and (4) whether any employers or earned wages are excluded from the base period. If the claimant is not making weekly reports to the agency as to continued unemployment and availability for work as required, try to correct that situation.

What you can do if a monetary ineligibility determination is incorrect:

- If the base period is missing earned wages, supply earnings documentation. This could be helpful in increasing the WBA, even if the client is already eligible. If earnings were not reported, your client may also want to provide the documentation to the Social Security Administration. If the client does not have documentation, you can ask the LWC to investigate the employer; you can also supply affidavit evidence.
- If it would make a client eligible to count wages when earned rather than when paid, the LWC can shift wages from one payperiod to another. R.S. 23:1598. This can often shift one paycheck from one quarter to another, because paychecks are usually issued about two weeks after the relevant work period.
- The client may still eligible on an earlier claim (e.g., regular benefits were exhausted and client didn’t file for extended benefits, or client was previously disqualified on the merits but should now be requalified with new earnings).
- Filing a new claim in the next calendar quarter (or even later) may result in monetary eligibility (if your client has additional recent earnings which are not in the base period). This would drop the first quarter in the prior claim, and add a new quarter.

Act quickly to protect your client’s rights. A monetary determination may be reconsidered at any time within the subsequent year. R.S. 23:1626. However, this generous time period arguably only applies to situations of wage under-reporting or miscalculations. To make a legal challenge such as a ‘high quarter ratio’ denial, it’s best to act within the usual 15 calendar day appeal period, whether pursuing an administrative appeal or filing a federal lawsuit.
8.3.2 Able to work, available for suitable work, and actively searching.

This is an eligibility condition that applies separately to each week of a claim. R.S. 23:1600(3)(a). Your client may work and still draw some UC, if she does not earn in excess of her WBA. R.S. 23:1593. Conversely, a client may be subsequently disqualified if he is found to have failed, without good cause, to apply or accept available, suitable work. R.S. 23:1601(3). Currently, the LWC requires claimants to weekly document this eligibility condition by phone or internet.

☞ Practice Tip Disability or non-English accommodation is potentially available but might need your active intervention through the agency’s Legal Division to arrange. You may also be able to document your client’s eligibility retroactively, if he failed to comply due to disability or agency misrepresentation or other error (e.g., the agency’s internet claims system, which leaves the printing of its rules optional, allows for claimants unaware of their reporting or other requirements to remain uninformed, and likely to make mistakes).

- Able and available for work. Registration for work and subsequent reporting searches make a prima facie showing that he is able and available for work. *Chrysler Corp. v. Doyal*, 352 So.2d 322 (La. App. 4 Cir. 1977). Claimants unable because of medical or other problems to perform prior work may still be available for other work. On the other hand, claimants may not arbitrarily remove themselves from available work with unreasonable conditions such as certain hours or conditions not usual or customary in the occupation, trade or industry. *Lykes Bros. S.S. Co., Inc. v. Doyal*, 338 So.2d 594 (La. 1976).4

- Suitability of work. Claimants may not have to accept work offered that is not in their customary occupation or is below the range of the prevailing wage scale. In a challenge on this issue, the agency carries the initial burden of proving these two factors. This creates a presumption of suitability which a claimant can rebut. *Lykes Bros. S.S. Co. v. Doyal*, Id. (work not “suitable” if acceptance of it would force the claimant to forego seniority-secured rights or benefits); *Johnson v. Administrator*, 166 So.2d 366 (La. App. 3 Cir. 1964) (job paying two-thirds of prior wages not suitable). Cf. *Lee v. Whitfield*, 506 So.2d 638 (La. App. 4 Cir. 1987) (see strong dissent); *Mason v. Administrator*, 486 So.2d 1171 (La. App. 3 Cir. 1986) (un-investigated assumptions re: job duties improper); *Wilson v. Doyal*, 215 So.2d 213 (La. App. 3 Cir. 1968) (claimant failed to rebut presumption).

- Search for work. Claimants have the burden of proof to show weekly search for work. *South Central Bell Telephone Co. v. Louisiana Dept. Of Labor*, 527 So.2d 1113 (La. App. 1 Cir. 1988), *writ denied* 532 So.2d 153; *McCullers v. OES*, 405 So.2d 631 (La. App. 3 Cir. 1981).

8.3.3 Claim determinations.

In addition to monetary and other eligibility questions, LWC determines whether a claimant is “qualified” based on the circumstances of job separation. La. R.S. 23:1625; 1601. The agency solicits information from both the claimant

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4 A person with health problems and few options may have applied for disability benefits, either through the Social Security Administration or an insurance company. Counsel your client about the inherent conflict such claims usually present, and the potential consequences.
EM PLOYM EN T ISSUES

and the employer. One source is the separation notice (commonly called a “pink slip”) that R.S. 23:1576 requires employers to file with the LWC (and copy to the employee) within three days of a separation, providing a “full explanation” of the cause of separation. Another source of course is the explanation solicited from the claimant on filing.

A not-uncommon query from clients is whether employers can be held liable for untrue statements made in the UC claim process. The defense of qualified privilege applies to untrue and defamatory statements in this context; proof would be required of prior knowledge, acting in reckless disregard, or negligence in failing to ascertain the truth. See, e.g., Nolan v. Jefferson Parish Hosp. Service Dist. No. 2, 11-291 (La. App. 5 Cir. 3/13/12), 90 So.3d 1178.

Base period employers get another opportunity after receiving notice of a claim filed. R.S. 23:1625.1 mandates that any protest must be filed within 10 days. An employer who fails to timely respond is deemed to have abandoned their right to appeal. R.S. 23:1625.1(B). The agency is not supposed to consider a late response unless the employer shows “good cause.” This is a relatively new (2009) law which is not consistently followed by the agency. Be sure to investigate the facts on this issue and vigorously protect your clients’ rights. Either get a copy of the claim file before, or review the file during, any subsequent appeal hearing so as to challenge any employer response that was not timely.

The agency may ask claimants or employers for additional information before making a decision. Once a decision is made, the agency issues a “Notice of Claim Determination” to the claimant and base period employers. Neither state nor federal law set a specific time limit in which the agency must act. The notice must include reasons and may be contested. Louisiana allows only 15 days after notification is given or mailed to file an appeal.

Both federal and state law require that benefits be “promptly” paid upon any initial determination that UC is payable (whether at the local office, ALJ, Board of Review, or court level). 42 U.S.C. §503(a)(1); R.S. 23:1635; see also California Department of Human Resources Development v. Java, 402 U.S. 121 (1971) and progeny. You can contest unreasonable delays or suspension of benefits pending appeals taken against your client.

8.3.4 Disqualifications based on discharge: Issues and Arguments.

R.S. 23:1601(2) disqualifies a claimant if she is found to have been discharged by a base period or subsequent employer for “misconduct connected with his employment”. The burden to prove misconduct is on the employer. Charbonnet v. Gerace, 457 So.2d 676, 679 (La. 1984); Banks v Administrator, 393 So.2d 696, 699 (La. 1981). Prior to 1990, there was no UC statutory definition of misconduct. The 1990 statutory definition is more restrictive than prior jurisprudential definitions. For some time, Louisiana courts continued to interpret the statutory definition in light of pre-amendment jurisprudence and the statute’s remedial purpose. Recently, arguments in favor of applying the statutory definition literally have gained favor in the First Circuit. See, e.g., Fontenot v. Cypress Bayou Casino, 2006-0300 (La. App. 1 Cir. 6/8/07), 964 So.2d 1035. Other circuits have declined to follow the First Circuit’s path. See, e.g., New Orleans Private Patrol Service, Inc. v. Kuykendall, 2011-1052 (La. App. 4 Cir. 2/29/12), 85 So.3d 793; Johnson v. Dykes Oil Co., 46,462 (La. App. 2 Cir. 8/10/11), 72 So.3d 418.
Regardless of the circuit in which you find yourself, parse the statutory definition carefully, remember that the Louisiana Employment Security Law is a remedial statute, and note whether the adjudicator cited the statutory definition of misconduct. In the unpublished decision of St. Tammany Parish Sheriff’s Office v. Administrator, Louisiana Workforce Comm’n, 2012-0092 (La. App. 1 Cir. 9/21/12), 2012 WL 4337735, this approach was sufficient to preserve a claimant’s UC.

Helpful arguments from past cases could still help your client defeat a disqualifying misconduct determination:

- Violation of an employer’s rule is not per se misconduct; it depends on the facts. See, e.g., Brandon v. Lockheed Martin Corp., 2003-1917 (La. App. 4 Cir. 4/14/04), 872 So.2d 1272; Bowden v. Reliant Energy Resource Corp. 46,048 (La. App. 2 Cir. 1/26/11), 57 So.3d 513. Some employers cannot prove that their employees even knew of a policy or rule; if your client didn’t know about it, be sure to develop or highlight that fact.

- Misconduct should be connected with employment. See, e.g., Morris v. Gerace, 353 So.2d 986 (La. 1977). Cases involving adverse publicity can be tricky. South Central Bell Telephone Co. v. Sumrall, 414 So.2d 876 (La. App. 4 Cir. 1982) and Sensley v. Administrator, 552 So.2d 787 (1st Cir. 1989) (drug charges). Compare the connection to employment requirement in R.S. 23:1601(1) (voluntary quits) - it’s only right that the same requirement apply in termination cases.

- Misconduct cited by an employer must be the actual reason for the discharge. Randle v. Administrator, 499 So.2d 488 (La. App. 2 Cir. 1986).

- The totality of the circumstances should be considered. See, e.g., Brandon v. Lockheed Martin, supra; Raymond v. OES, 551 So.2d 844 (La. App. 3 Cir. 1989). The case law is extensive and varied on the issue of misconduct; review the jurisprudence carefully in light of the facts of your client’s case. Be sure to develop or highlight any favorable circumstances.

- Employers should be required to prove wrongdoing intentional. See, e.g., Cadwallader v. Administrator, 559 So.2d 1346 (La. 1990); Charbonnet v. Gerace, 457 So.2d 676 (La. 1984); Banks v. Administrator, 393 So.2d 696, 699 (La. 1981); New Orleans Private Patrol Service, Inc. v. Kuykendall, supra; Lafitte v. Reliant Energy Resource Corp., 37,709 (La. App. 2 Cir. 10/17/03), 859 So.2d 253; Brinson v. Administrator, Div. of Employment Sec., 34,988 (La. App. 2 Cir. 8/22/01), 793 So.2d 522; Harsco Corp. v. Victoria, 01-1486 (La. App. 3 Cir. 3/20/02), 812 So.2d 871. Most employers do a poor job of presenting evidence of wrongful intent; if you represent the client at hearing, you’d likely want to ask him the question, so his denial of any intent to do wrong is on the record.

- A single, isolated incident has often been found insufficient to justify denial of benefits, even if the employer credibly shows wrongful intent. This is most effective when the claimant’s record on the job is otherwise fairly good. The nature of the violation, the type of job, and other circumstances are important facts. See, e.g., Associated Catholic Charities of N.O. v. Repath, 522 So.2d 1272 (La. App. 4 Cir. 1988); Canty v. Administrator, 517 So.2d 1240 (La. App. 4 Cir. 1987); ConAgra Broiler Co. v. Gerace, 657 So.2d 391 (La. App. 3 Cir. 1995).
• A “hot-headed” incident is sometimes excused. See, e.g., *Toney v. Francis*, 618 So.2d 597 (La. App. 2 Cir. 1993); *French v. Whitfield*, 561 So.2d 977 (La. App. 4 Cir. 1990); *Collins v. Blache*, 509 So.2d 718 (La. App. 3 Cir. 1987). *But see*, e.g., *Kliebert v. Peevey*, 503 So.2d 1011 (La. 1987); *Murdock v. Felix’s Restaurant, Inc.*, 743 So.2d 716 (La. App. 4 Cir. 1999); *Emke v. Mouton*, 617 So.2d 31 (La. App. 4 Cir. 1993); *Bell v. Berg*, 559 So.2d 33 (La. App. 4 Cir. 1990); *Carter v. Blache*, 476 So.2d 873, 879 (La. App. 2 Cir.1985). An argument, confrontation, insubordination, or even a fight may often be successfully framed this way. Any favorable circumstance should be developed or highlighted as many factors could be relevant.

• Incidents involving poor judgment or negligence have been held to lack the requisite element of wrongful intent. See, e.g., *Raymond v. OES*, 551 So.2d 844 (La. App. 3 Cir. 1989); *Hypolite v. Blache*, 482 So.2d 940 (La. App. 3 Cir. 1986), writ denied, 485 So.2d 65; *Jacobs v. Gerace*, 381 So.2d 935 (La. App. 3 Cir. 1980); *Simmons v. Gerace*, 377 So.2d 407, 410 (La. App. 2 Cir. 1979); *Biddle v. Administrator*, 539 So.2d 795 (La. App. 3 Cir. 1989); *Brown v. Whitfield*, 537 So.2d 1257 (La. App. 4 Cir. 1989); *Jacquet v. Consolidated Cos., Inc.*, 499 So.2d 1002 (La. App. 3 Cir. 1986); *Joseph v. Blache*, 525 So.2d 597 (3d Cir. 1988); *Wesley v. Whitfield*, 508 So.2d 968 (La. App. 4 Cir. 1987); *Brewington v. Administrator*, 497 So.2d 418 (La. App. 3 Cir. 1986). Don’t give up even if there were multiple errors; these do not necessarily prove intentional wrongdoing and all relevant factors should be considered. A sympathetic court has noted that “over a significant period of time mistakes may happen as a result of human error.” *Harsco Corp. v. Victoria*, 01-1486 (La. App. 3 Cir. 3/20/02), 812 So.2d 871.

• Poor work performance, or the simple inability to meet job standards has often been found non-disqualifying. See, e.g., *Harsco Corp. v. Victoria*, supra; *St. Tammany Parish School Board v. State of Louisiana Department of Labor*, 01-0757 (La. App. 1 Cir. 5/10/02), 818 So.2d 914; *Martin Mills, Inc. v. Leon*, 576 So.2d 1165 (La. App. 3 Cir. 1991); *Lowery v. Whitfield*, 521 So.2d 815 (La. App. 2 Cir. 1988); *Thomas v. Blache*, 488 So.2d 1282 (La. App. 4 Cir. 1986). *But see*, *Thibeaux v. Our Lady of Lourdes Med. Ctr.*, 591 So.2d 1290 (La. App. 3 Cir. 1991) (five warnings about substandard work held to constitute disqualifying misconduct). Unsatisfactory work performance may sometimes be explicitly cited in a pink slip or employer protest, which can be helpful. But even policy violations may be successfully framed as simple inability or incapacity. See, e.g., *Lafitte v. Reliant Energy Resource*, 37,709 (La. App. 2 Cir. 10/17/03), 859 So.2d 233. Relevant factors should be highlighted or developed (e.g., ask your client at hearing if they were trying their best, and elicit facts impacting their physical or mental capacities).

• Another employee’s primary fault may exculpate your client. See, e.g., *Charbonnet v. Gerace*, 457 So.2d 676 (La. 1984); *Popularas v. Dep’t of Labor*, 488 So.2d 1242 (La. App. 4 Cir.1986); *Toney v. Francis*, 618 So.2d 597 (La. App. 2 Cir. 1993); *Jacobs v. Gerace*, 381 So.2d 935 (La. App. 3 Cir. 1980).

• There may have been a reasonable basis for disobedience. See, e.g., *Raymond v. OES*, 551 So.2d 844 (La. App. 3 Cir. 1989); *Pixley v. Blache*, 488 So.2d 1126 (La. App. 2 Cir. 1986); *Hypolite v. Blache*, 482 So.2d 940 (La. App. 3 Cir. 1986), writ denied, 485 So.2d 65 (1986). *E.g.*, did your client think their action was serving the employer’s interest? If so, bring that out.

Common “offenses” in discharge cases include:

- **Absences** and being tardy. The reason is often crucial. If your client had reasons beyond her control, be sure they get in the record. See *Banks v. Administrator*, 393 So.2d 696 (La. 1981) (fifteen absences in six months not sufficient to disqualify); *City of Monroe v. Tolliver*, 41,969 (La. App. 2 Cir. 3/7/07), 954 So.2d 203 (city notified of incarceration on charges that were later dropped); *Harris v. Houston*, 97-2847 (La. App. 4 Cir. 11/4/98), 722 So.2d 1042 (health problems, unreliable automobile, and single parent with young child; no misconduct despite prior warnings); *Brister v. Whitfield*, 522 So.2d 1254 (La. App. 4 Cir. 1988) (public transportation problems); *Jefferson Parish D.A. v. Whitfield*, 515 So.2d 1143 (La. App. 5 Cir. 1987), writ denied, 519 So.2d 146 (absence after hurricane and home flooded); *Bridges v. Sumrall*, 430 So.2d 218 (La. App. 4 Cir. 1983) (illness induced by job stress); *Gunderson v. Libby Glass*, 412 So.2d 656 (La. App. 2 Cir. 1982). However, there are some cases in which the mere fact of prior warnings has led to a disqualification, despite the reasons. E.g., *Jones v. Truly*, 670 So.2d 1294 (La. App. 5 Cir. 1996).

- **Drinking** off the job should not disqualify a claimant because misconduct should be connected with the employment. However, evidence of actually drinking, or being intoxicated, on the job is usually sufficient to disqualify. *Sanders v. Administrator*, 520 So.2d 1091 (La. App. 3 Cir. 1987) (employee discharged for consuming alcohol while on call).

- Where discharge is based on “the use of illegal drugs,” an employer attempting to use test results under R.S. 23:1601(10)(a) must show that testing was done pursuant to a written substance abuse rule or policy, and that collection and testing were performed under certain conditions. If the employer’s test violated its own policies, the test result should not be considered. In that instance, use a comparable case in the workers’ compensation area, *Israel v. Gray Ins. Co.*, 98-525 (La. App. 3 Cir. 10/28/98), 720 So.2d 803, which has been relied on by an Orleans Parish district court in ruling for the claimant (neither the LW C nor the employer appealed the decision). The burden on employers to show statutory compliance otherwise is not too strict. See, e.g., *Glazer Steel Corp. v. Administrator, Office of Employment Security*, 98-0441 (La. App. 4 Cir. 9/30/98), 719 So.2d 674; *CEG Welding Supply, Inc. v. Moore*, 31,167 (La. App. 2 Cir. 12/14/98), 723 So.2d 524. An employer may also use other acts as a basis for urging disqualification. See, e.g., *Landry v. Shell Oil Co.*, 597 So.2d 521 (La. App. 1 Cir. 1992) (employee pled guilty to possession of marijuana which also violated policy). Refusal to take a drug test has been held to be misconduct in one case, *Chiles Offshore Inc. v. Administrator*, 551 So.2d 849 (La. App. 3 Cir. 1989), but it is not necessarily disqualifying misconduct. Refusal on valid constitutional grounds, or even a positive result if the request is not in accordance
with the employer’s policy, should not result in disqualification. There has been success at the district court level on these issues. See www.probono.net/la Library.

8.3.5 Disqualifications based on voluntary quit.

Employees who leave part-time or interim work to protect full-time or regular employment are protected from disqualification. R.S. 23:1601(1)(c). However, the statute is very restrictive toward employees who leave their jobs for other reasons. A claimant is disqualified if he voluntarily left a base period or subsequent employer “without good cause attributable to a substantial change made to the employment by the employer.” R.S. 23:1601(1)(a) (emphasis added). Dupre v. State Board of Review, 2003-0153 (La. App. 4 Cir. 9/24/03). Prior to 1988 and 1990 amendments, the statute merely required good cause connected to the employment. Older case law, which did not require the second element, should be considered carefully. The burden of proof in quit cases is on claimants.

This section of the law considers not just base period, but also subsequent, employers. However, leaving a job with a subsequent employer cannot be disqualifying if it pays less than one’s UC. Billingsley v. Office of Emp. Sec., 537 So.2d 826 (La. App. 5 Cir. 1989); Franks v. Administrator, 493 So.2d 699 (La. App. 2 Cir. 1986). The following are some issues to keep in mind.

- If leaving was not completely voluntary it could be a constructive discharge. Employees prevented from reporting to work or replaced without their consent have not left the job voluntarily. Simmons v. Houston, 98-2662 (La. App. 4 Cir. 5/12/99), 737 So.2d 220; Shoennagel v. La. Office of Emp. Sec., 413 So.2d 652, 654 (La. App. 1 Cir. 1982); Piggly-Wiggly v. Gerace, 370 So.2d 1327 (La. App. 2 Cir. 1979); Towner v. Dept. of Emp. Sec., 364 So.2d 1362 (La. App. 3 Cir.1978). Similarly, an employee who is forced to resign in lieu of discharge or who would be discharged if he did not resign, has not voluntarily left his employment. Wood v. La. Dept. of Empl. Sec. 632 So.2d 899 (La. App. 2 Cir. 1994); Ray v. Whitfield, 521 So.2d 726 (La. App. 2 Cir. 1988); Southern Bell Telephone and Telegraph Co. v. Admin., 200 So.2d 761, 763 (La. App. 3 Cir. 1967).

- In determining good cause, a court should use a standard of reasonableness as applied to the average man or woman, not the supersensitive. Gonzalez Home Health Care, LLC v. Felder, 2008-0798 (La. App. 1 Cir. 9/26/08), 994 So.2d 687, writ not cons., 2008-2568 (La. 1/9/09), 998 So.2d 730; Coleman v. Blache, 566 So.2d 181, 184 (La. App. 2 Cir. 1990); Clemmons v. Blache, 501 So.2d 1020 (La. App. 2 Cir. 1987); Nason v. Administrator, 475 So.2d 85 (La. App. 2 Cir. 1985), writ denied, 478 So.2d 149 (La. 1985). Dissatisfaction with (initially-agreed upon) working conditions is not generally considered “good cause” for leaving. Dupre v. State Board of Review, 2003-0153 (La. App. 4 Cir. 9/24/03), 857 So.2d 1135, writ denied 862 So.2d 991 (La. 1/9/04).

- A change in work conditions by the employer, such as work schedules or pay, can be “good cause.” King v. LW C, 2009-0526 (La. App. 3 Cir. 10/7/09), 20 So.3d 1211; Banks v. Elledge, 535 So.2d 808 (La. App. 2 Cir. 1988); La. Dept. of Corrections v. Administrator, 457 So.2d 825(La. App. 1 Cir. 1984); Jantzen of La., Inc. v. Blache, 464 So.2d 33 (La. App. 3 Cir.1985). Cf. Marchand v. Forster, 37,222 (La. App. 2 Cir. 6/25/03), 850 So.2d 941 (new owner’s
change in adopting payroll tax withholding, effectively reducing employee’s take-home pay, and refusal to give employee a raise, not sufficient to meet the standard); Davis v. La. State Office of Emp. Sec., 555 So.2d 649 (La. App. 4th Cir. 1989) (new conditions, although unwelcome, were within the written job description); Ortega v. Administrator, 626 So.2d 959 (La. App. 3 Cir.1993) (reduction in overtime not substantial change by employer when evidence showed prior variations in employee’s overtime and employee was still full-time when resigned).

- **Discriminatory or unsafe treatment** uncorrected by an employer can meet the “good cause” and “substantial change” requirements as an employee is entitled to expect a workplace that complies with applicable legal standards. See, e.g., Harris v. Curt Eysink, Executive Director LWC and Piccadilly Restaurants LLC, 2011-1636 (La. App. 4 Cir. 6/27/12), ___ So.3d ___, 2012 WL 2446147 (uncorrected sexual harassment good cause); Gautreaux v. Whitfield, 520 So.2d 979 (La. App. 3 Cir. 1987) (sexual discrimination); Buckley v. State of La., 383 So.2d 52 (La. App. 2 Cir. 1980) (series of unfair and discriminatory actions); Murphy v. State Through Dept. of Empl. Security, 385 So.2d 338 (La. App. 1 Cir. 1980) (multiple obscene phone calls and no immediate employer solution); Southern Hardware and Lumber Co. v. Vesich, 250 So.2d 780 (La. App. 4 Cir. 1971) (failure to stand up for employee after customer battery). Cf. Gonzales Home Health Care v. Felder, 994 So.2d 687, supra; McClodden v. Gerace, 522 So.2d 1379 (La. App. 2 Cir.1988).

- A claimant who quits due to adverse health reactions from the job or because of a job injury should not be disqualified if causation adequately proven. See, e.g., Chalik v. Gerace, 459 So.2d 82, 86 (La. App. 2 Cir. 1984) (increased workload caused headaches); Campbell v. Blache, 499 So.2d 412 (La. App. 4 Cir. 1986) (no showing of causal connection between employment and employee’s heart disease). But these cases may be dated by the later change to the statutory quit standard.

### 8.3.6 Disqualification of temporary employees.

A new (2012) provision, R.S. 23:1601(1)(b) mandates that a temporary employee working for a staffing firm is disqualified (i.e., deemed to have voluntarily quit) if:

- “At the time of hire,” he was advised by the staffing firm that he must report for reassignment at the conclusion of each assignment and that UC benefits may be denied for failure to do so; and
- He fails, “without good cause,” to contact the firm for a reassignment at the conclusion of the current assignment.

### 8.3.7 Disqualification due to labor disputes.

A claimant will be disqualified for any week in which the unemployment is due to a labor strike. R.S. 23:1601(4). The burden of proof is on the claimant to show that he is not “participating in or interested in” the strike, or to show that his unemployment was actually due to a labor lockout. National Gypsum Co. v. Administrator, 313 So.2d 230 (La. 1975), appeal dismissed, 423 U.S. 1009 (otherwise available and reported for work); General Motors Corp. v. Darby, 31,516 (La. App. 2 Cir. 1/22/99), 728 So.2d 516 (no active role in work stoppage and
reported to work); *Piggly-Wiggly of Springhill, Inc. v. Gerace*, 370 So.2d 1327 (La. App. 2 Cir. 1979) (labor dispute no longer in active progress; unconditionally offered to return to work); *Senegal v. Lake Charles Stevedores*, 197 So.2d 648 (La. 1967) (non-union claimant still “interested in” labor dispute due to benefits received); *Amstar Corp. v. Administrator*, 388 So.2d 1167 (La. App. 4 Cir.1980) (non-striking union members refusing to cross picket line disqualified); *Cities Service Oil Co. v. Administrator*, 383 So.2d 1315 (La. App. 3 Cir. 1980) (refusal to cross picket lines because of reasonable and genuine fear of injury or violence is not disqualifying); *Elmer Candy v. Administrator*, 286 So.2d 423 (La. App. 1 Cir.1973) (claimants failed to show they were “not interested” in dispute); *Cf. Local 730 v. Com., Unemp. Comp. Bd. of Rev.*, 480 A.2d 1000 (Pa. 1984) (employer’s unilateral actions in raising pay and benefits after expiration of contract were a disruption of status quo which brought about work stoppage within definition of a lockout); *Sunstar Foods, Inc. v. Uhlendorf*, 310 N.W. 2d 80 (Minn. 1981) (reduction in wages of 25-26%, unilaterally imposed by the employer, is condition so unreasonable as to constitute a lockout).

### 8.4 APPEAL & REVIEW.

An appeal of a Notice of Claim Determination, as with most UC actions, must be filed within 15 calendar days. R.S. 23:1629, 1630. There are issues in the administrative appeals process which advocates commonly encounter.

#### 8.4.1 Untimely appeals.

This is a common problem because clients may fail to update their address, their mail may not be delivered even if they do, and the agency isn’t statutorily required to use any communication means but regular mail. However, don’t give up just because your client has missed a deadline - determine where the fault lies. The agency’s position will be that peremption applies and that the right to appeal expires at the end of the 15 day appeal period. *Baughman v. Covenant Transp., Inc.*, 45,122 (La. App. 2 Cir. 4/14/10), 34 So.3d 1087. However, courts have likened it to prescription and recognized that a claimant may rebut the presumption that a decision was mailed on the date it was said to have been mailed, or to present evidence that a notice was misleading or that the agency committed fraud. See, *e.g.* Bailey v. Cajun Insulation, 453 So.2d 237, 241 (La. 1984); *Jones v. Whitfield*, 529 So.2d 885 (4th Cir. 1988), *writ denied*, 533 So.2d 375 (1988); *Doescher v. Administrator*, 353 So.2d 388 (4th Cir. 1977). *Cf. Harding v. Raising Canes USA L.L.C.*, 10-320 (La. App. 5 Cir. 11/23/10), 55 So.3d 837; *Hughes v. Louisiana Power & Light Co.*, 98-1007 (La. App. 5 Cir. 3/10/99), 735 So.2d 44. Furthermore, if your client did not get a notice the agency claims to have mailed, the agency should prove its claim. *Duron v. Albertson’s LLC*, 560 F.3d 288 (5th Cir. 2009) (pre-supposition of mailing requires sufficient evidence of record that letter actually mailed). Preserve the issue by referencing it in your pleadings and attaching claimant affidavit and other supporting evidence.

#### 8.4.2 Administrative appeals process.

An administrative appeal is heard by an administrative law judge (ALJ) within the “Appeals Tribunal.” R.S. 23:1628 et seq. However, the LWC may contract with the State’s Division of Administrative Law (DAL) to conduct your client’s hearing. Under R.S. 49:992(D)(4), the LWC is currently exempt from mandatory
use of the DAL's centralized administrative hearings panel. The ALJ hearing is fairly informal (the ALJ, sometimes a non-lawyer, reviews the exhibits, questions the witnesses, and allows cross-examination), but it is recorded.

Claimants’ right to a “fair hearing” is protected by federal and state law. 42 U.S.C. 503(a)(3); R.S. 23:1629(B). Also, agency rules set forth hearing procedures which must be followed. LAC 40:IV:101 et seq. The traditional elements of due process must be provided. Your clients’ rights include adequate notice of the issues; the right to view exhibits before the hearing; to subpoena witnesses and evidence; and to cross-examine adverse witnesses. You or your client should request a copy of the hearing office file before the hearing; it is free. The agency isn’t required to mail administrative decisions to a legal representative. Due process or “fair hearing” issues can arise in different contexts, including:

- Claimants often seek help with hearings at short notice, because agency rules only require that hearing notices be sent 10 days in advance. LAC 40:IV:111. You can ask for postponement, under LAC:IV:113.

- Notices don’t give much detail about the issues to be addressed at the hearing. This might give grounds for postponement, if your client wants it, or grounds for evidentiary objections at the hearing. The ALJ is precluded from addressing issues not contained in the notice of hearing. Daniel v. Wal-Mart Assoc., Inc., 2003-0441 (La. App. 1 Cir. 12/31/03), 868 So.2d 137; Barber v. Administrator, 664 So.2d 844 (La. App. 3 Cir. 1995); Banks v. Administrator, 393 So.2d 696, 699 (La. 1981); Murray v. City of New Orleans, 517 So.2d 1200 (La. App. 4 Cir. 1987); Randle v. Administrator, 499 So.2d 488 (2d Cir. 1986) (employer not entitled to remand to prove different reason for discharge).

- Telephone hearings are now the norm, and can be difficult for a variety of reasons. If you need an in-person hearing, request a change in writing and explain your reasons. Ask for exhibits to be delivered before the hearing; if they are not, object on the record and/or ask for postponement.

- Evidence at ALJ hearings presents special challenges. Strict rules of evidence are not followed, but keep in mind that the ALJ decision must be based on sufficient competent evidence. Banks v. Administrator, 393 So.2d 696 (La. 1981). Hearsay, though admissible, is not competent evidence. DeJean v. Adm’r, Office of Employment Security, 04-327 (La. App. 3 Cir. 9/29/04), 883 So.2d 493; Schlesinger v. Administrator, 583 So.2d 100 (La. App. 3 Cir. 1991); Cole Oil and Tire Co., Inc. v. Davis, 567 So.2d 122 (La. App. 2 Cir. 1990); French v. Whitfield, 561 So.2d 977 (La. App. 4 Cir. 1990) (direct contradictory testimony by employee cannot be overcome by hearsay evidence from another employee). Hearsay may be used for corroboration. Jackson v. Louisiana Bd. of Review, 41,862 (La. App. 2 Cir. 1/10/07), 948 So.2d 327; Flagg v. State, 494 So.2d 1305 (La. App. 2 Cir. 1986). It is vital that you make appropriate evidentiary objections on the record (although sometimes an ALJ may get snippy about it). An objection may remind an ALJ that certain evidence may not be relied on, and it should keep a court from finding that you have waived objection. See, e.g., Woods v. Cameco Industries, Inc., 2001 0298 (La. App. 1 Cir. 3/28/02), 815 So.2d 370 (pro se claimant was held to have waived hearsay objection; but see strong dissent by Judge J. Downing): Bush v. Winn-Dixie of Louisiana, Inc., 573 So.2d 508 (La. App. 4 Cir. 1990) and Chalik v. Gerace, 459 So.2d 82 (La. App. 2 Cir. 1984) (failure to object meant issue preclusion on appeal).
• **Missed ALJ hearings** easily happen with telephone hearings in particular. Fault may lie with a claimant’s malfunctioning phone, an ALJ misdialing, and known problems with the ability of LWC phones to connect to certain cell carriers. Under LAC 40:IV:113, a fifteen minute delay is given appellants not initially present for in-person hearings, and you could argue that the same grace period should apply in phone situations. See *Schexnider v. Blache*, 504 So.2d 864 (La. 1987) (emphasizes due process requirements applicable in telephone hearings). Under Rule 113, the time limit to ask for reopening - in writing and specifying the “good cause” - is five days from the date of the ALJ decision. If appealing, you can ask for a remand for a new hearing. Preserve the issue by submitting an affidavit or other evidence (e.g., phone records).

• Clients who handle hearings **pro se often may make poor appeal records**. You may be able to get **new hearings on remand** if you present a good case that clients, through no fault of their own, did not get a fair hearing (e.g., language barriers; the ALJ excluded or prevented the presentation of relevant evidence, or acted as an advocate for the employer by making objections to the claimant’s evidence or prompting the employer). A new hearing request has to involve more than a “second chance” argument that the state lost in *Holmes v. Forster*, 2000-0632 (La. App. 4 Cir. 2/14/01), 781 So.2d 656. Compare *Marchand v. Forster*, 37,222 (La. App. 2 Cir. 6/25/03), 850 So.2d 941 (remand ordered).

After an ALJ decision, claimants have two options: request reopening/new hearing (discussed above), or appeal to the Board of Review (BOR), a group of political appointees based in Baton Rouge. There are only 15 calendar days to appeal an ALJ’s decision. R.S. 23:1652; 1630. Advance or defend your client’s case before the BOR with a letter.

Aggrieved employers can also appeal and sometimes send new evidence that is not just to support remand, but is merely to supplement their case presented at hearing. In that situation, you should object, and point out that this violates the law and due process by improperly considering evidence not received at the ALJ hearing. If the BOR wants to consider new evidence, it is required to have a good reason for reopening, and to have a new hearing for all parties to address it.

The BOR must issue a written decision no later than 60 days after receipt of the appeal. R.S. 23:1630(B). Its decision becomes the final agency decision, which may be appealed to state district court.

8.4.3 Judicial review.

R.S. 23:1634 governs judicial review. Review is limited to 1) whether the facts are supported by sufficient (competent) evidence, and 2) whether the facts justify the decision as a matter of law. *Charbonnet v. Gerace*, 457 So.2d 676 (La. 1984). Filing in the appropriate state district court must be accomplished within the 15 calendar day period. Venue is in the parish of your client’s residence, or, if he now lives out of state, in Baton Rouge or the parish where the claimant lived when he or she originally filed for UC. Service of the service of the petition on the agency director is deemed to be completed service on the employer also. R.S. 23:1634(B). The agency notifies any employer defendant.
R.S. 23:1692 exempts a claimant (whether pursuing a claim or defending, at district or appellate level) from fees and costs, unless, after contradictory hearing, the claim is found to be frivolous. *Ford v. Patin*, 534 So.2d 1003, 1006 (La. App. 3 Cir. 1988); *Joiner v. La. Dept. of Labor Emp.*, 525 So.2d 608, 611 (La. App. 3 Cir. 1988), writ denied, 530 So.2d 570 (1988). Court and sheriff staff are sometimes unaware of this law, or mistakenly believe that it only exempts UC claimants as petitioners, not defendants.

Although the court may remand the case to the agency to take additional evidence, judicial review is limited to the existing record. R.S. 23:1634(B). *Dupre v. State Board of Review*, 2003-0153 (La. App. 4 Cir. 9/24/03), 857 So.2d 1135; *Clark v. American Bldg. Mnt.*, 02-1609 (La. App. 1 Cir. 4/2/03); 844 So.2d 409.

**Practice tip** The LWC or an employer may seek remand just to put on a better case. Unless it is to your client’s advantage, vigorously oppose it as a violation of §1634 and an abuse of the court’s discretion. *See, e.g., Holmes v. Forster*, 2000-0632 (La. App. 4 Cir. 2/14/01), 781 So.2d 656 (agency’s request for remand to allow employer opportunity to present a better case soundly rejected; court reviews prior remand case law). The [Civil Law Library](http://www.probono.net/la) has a sample brief in opposition.

The agency is supposed to file an answer and a copy of the administrative record with the court (and send a copy to the claimant or his attorney) within 60 days of being served with the petition. If it fails to do so, a claimant may seek the payment of interim benefits if “sufficient evidence” on record supports it. R.S. 23:1634(A); *Toney v. Whitfield*, 531 So.2d 445 (La. 1988). For sample briefs and pleadings on this issue, see [Civil Law Library](http://www.probono.net/la).

**Practice tip** The administrator routinely fails to meet this deadline, and sometimes files an *ex parte* “motion for extension.” This motion, whether or not granted by a judge, is irrelevant to the issue of interim benefits. A judgment favorable to the claimant on application for interim benefits should result in prompt payment of benefits under R.S. 23:1635 and 42 U.S.C. §503.

If you obtain a remand from the court, request the court set a reasonable time limit for remand proceedings in the judgment. Otherwise, the agency is likely to put the case at the end of its adjudication queue, even though the 60 day time limit of R.S. 23:1630(B) arguably should apply. If a court orders remand for a new hearing, but does not retain jurisdiction, a favorable decision or Board “recommendation” could be interpreted as an administrative determination that payments are due your client, invoking the prompt payment (“when due”) provisions of 42 U.S.C. §503 and R.S. 23:1635.

### 8.5 OVERPAID UNEMPLOYMENT COMPENSATION BENEFITS.

As required by federal law, Louisiana has a process to detect, establish and recover overpaid benefits. R.S. 23:1740 *et seq.* The agency may discover an error on its own, through federal audit, or through a third party (e.g. fraud report). Prescriptive period for collection is five years, ten for fraud, with generous interruptions allowed. See R.S. 23:1713(C)(2); 23:1601(8)(b). In an effort to comply with the 2010 Improper Payments Elimination and Recovery Act (IPERA), P. L. 111-204, the U.S. Department of Labor issued new performance standards for state
recovery efforts. IPERA also expanded the Treasury Offset Program, one means of collection (see below). Clients who get a notice of overpayment must appeal within 15 calendar days. R.S. 23:1713(A). The notice should include a total amount and the week(s) overpaid, and indicate whether it is fraud or non-fraud.

If an appeal is timely filed, the issue of waiver of collection should be automatically considered at the hearing. R.S. 23:1713(B). Those interested in seeking waiver should document their expenses, obligations, and limited resources, and show how repayment would adversely affect them for at least the next six months. Some may not bring sufficient evidence of their finances to the hearing. Some ALJs may not address waiver if a pro se claimant fails to bring it up (because they didn't know what the term “waiver” meant, or because the ALJ intimidated them). If your client should have been eligible for a waiver, and the issue was not thoroughly and appropriately addressed at hearing and in the decision, pursue it on further appeal.

Waiver should be granted when (1) fraud is not involved; (2) the overpayment was “without fault of the claimant,” and (3) recovery would “defeat the purpose” of the benefits already authorized or would “be against equity and good conscience.” For definitions of these terms see R.S. 23:1713(B) and LAC 40:IV.371. The agency’s strategy is to find claimant at “fault” (which is not defined in the authorizing statute or implementing regulation) in any way possible. Be prepared to vigorously advocate for your client on this issue. An unpublished, favorable 4th Circuit decision, and the brief that led to it, is available on www.probono.net/la.

Fraud overpayments, which are a very small percentage (at this time less than 3%) of overall benefits paid nationally, require the agency to prove intentional misrepresentation or concealment of a material fact. A finding of fraud has more serious consequences for your client. Waiver of repayment and avoidance of penalties are not options. R.S. 23:1713(B); 1714.

UI Program Integrity Provisions of Trade Act (P.L. 112-140), signed October 21, 2011, imposes new state requirements for overpayments. Overpaid claims will be assessed to those employers (and third-party representatives of employers) who fail to respond “timely or adequately” to an agency’s information request.

Collection procedures. The notice of overpayment should explain repayment options. If a beneficiary does not arrange payment, the agency has several options under R.S. 23:1740 et seq.:

- Offset from future claims payable (which often happens without written notice, to the puzzlement of those who may have forgotten a long-ago overpayment notice, or who are the victim of agency error). (Due process requires notice of the action.)
- Civil action.
- Offset from state income tax refunds.
- Treasury Offset Program (TOP) (federal income tax refund offset). IPERA expanded the pre-existing TOP to include non-fraud UC overpayments, eliminated the 10 year time limit on collection, and requires that offset notice recipients be given 60 days to provide evidence to show that a UC debt is not past due and legally enforceable. 31 C.F.R. §285.58(3)(i)(ii).
9. HEALTH, RETIREMENT AND OTHER EMPLOYEE BENEFITS

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §301 et seq. sets uniform minimum standards in an attempt to ensure that employee benefit plans (e.g., pensions, health care, disability, prepaid legal services, scholarship funds, daycare centers, training benefits) are fairly administered and remain financially sound. The law applies to plans provided by most private employers, other than religious entities. ERISA preempts most, but not all, state and local laws relating to employee benefit plans. 29 U.S.C. §1144. Some provisions of interest include:

- Employers may not discriminate against lower paid workers. §§401(a)(4), 410(b).
- Uniform and shorter vesting schedules in pension plans are required.
- Assignment or alienation of pension benefits, with the exception of qualified domestic relations orders, are generally prohibited.

Two federal agencies have jurisdiction: the U.S. Department of Labor (DOL), through its Pension and Welfare Benefits Administration, and the Treasury Department’s Internal Revenue Service. ERISA confers enforcement authority on the DOL, which may pursue certain investigations, bring a civil action to correct violations, and impose criminal penalties on willful violators. Individuals may also sue, and may seek injunctive relief, payment of benefits due, other equitable relief, and attorney’s fees and costs. §1132.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), 29 U.S.C. §1181 et seq. amended ERISA to provide for improved portability and continuity of employment-connected health insurance coverage. It requires insurers to cover workers who change jobs if their last employers provided insurance. The law also prohibits discrimination in coverage based on certain health status-related factors, such as medical history and claims experience. It limits the length of time insurers may refuse to cover pre-existing medical conditions to 12 months for most persons. What may be considered a pre-existing condition, and for how long, is also restricted. Insurers of departing plan participants must also provide written certificates of coverage.

The Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), 29 U.S.C. §1161 et seq. amended ERISA to provide employees and other beneficiaries of employment-related group health care plans with an opportunity to elect continuation of coverage at group plan rates in the event of certain “qualifying events” (such as job loss or reduction of hours). A qualified beneficiary is entitled to exercise their rights under the statute even if they are covered under another health care plan. See, e.g., Geissal v. Moore Medical Corp., 524 U.S. 74 (1998).

COBRA applies to group health plans of employers with 20 or more employees on the typical work day in the previous year. The employer is obligated to notify the plan administrator, who must then notify the employee or other beneficiary of their right to elect continuation of coverage. §1166. The employee or other beneficiary has 60 days of the qualifying event to make an election. Generally, coverage must continue only for 18 months, although the statute allows for longer coverage in certain circumstances. §1162(2)(A). Many employers fail to comply with COBRA notice requirements.
R.S. 22:1045 provides for continuing insurance for older surviving spouses after decease of their worker spouse. The surviving spouse must notify the insurer of her exercise of the option within 90 days of the death, and meet other conditions in the statute.

10. WAGE ISSUES

10.1 UNPAID WAGE CLAIMS.

Getting the “last paycheck may be resolvable with a phone call or letter to the employer. Most employees separated from a job in Louisiana have a right to prompt payment of “the amount then due under the terms of the employment.” Louisiana Wage Payment Law, R.S. 23:631 et seq. Payment is due within 15 days or the next regular payday, which ever comes first. R.S. 23:631(A)(1). Payment is effective on actual delivery at the customary place of payment, or on mailing. R.S. 23:631(A)(2). The main purpose of this law is to compel employers to timely pay all amounts owed employees promptly on dismissal or resignation (regardless of reason), and to protect discharged Louisiana employees from unfair and dilatory wage practices by employers. See, e.g., Berard v. L-3 Communications Vertex Aerospace, LLC, 2009-1202 (La. App. 1 Cir. 2/12/10), 35 So.3d 334, writ denied 38 So.3d 302 (La. 2010).

Not all workers are covered. The statute covers employees only, which excludes independent contractors. Remember not to automatically accept the employer’s label. See, e.g., Jeansonne v. Schmolke, 2009-1467 (La. App. 4 Cir. 5/19/10), 40 So.3d 347 (contractor’s general manager found to be employee despite employer’s use of 1099 form). The law applies to public as well as private employers, Stafford v. City of Baton Rouge, 403 So.2d 733 (La. 1981), but it does not apply to those covered by collective bargaining agreements which provide otherwise. R.S. 23:631(A)(3). The statute requires that the pay period have been by the “hour, day, week or month” and does not cover relationships that lack a term of pay period. Slaughter v. Board of Sup’rs of Southern University and Agr. and Mechanical College, 2010-1049 (La. App. 1 Cir. 8/2/11), 76 So.3d 438, cert. den.; Franklin v. Ram, Inc., 576 So.2d 546 (La. App. 2 Cir. 1991); Keith v. Little, 434 So.2d 548 (La. App. 2 Cir. 1983). Citizenship status is irrelevant. Agusiegbe v. Petroleum Associates of Lafayette, Inc., 486 So.2d 314 (La. App. 3 Cir. 1986); Baca v. Brother’s Fried Chicken, 2009 WL 1349783 (E.D. La. 5/13/09).

Not all payments are covered:

• Only compensation earned during the pay period. See, e.g., Slaughter v. Board of Sup’rs of Southern University and Agr. and Mechanical College, 2010-1049 (La. App. 1 Cir. 8/2/11), 76 So.3d 438; Boudeaux v. Hamilton Medical Group, Inc., 94-0879 (La. 10/17/93), 644 So.2d 619 (severance not “wages”); Delaney v. Whitney Nat. Bank, 96-2144, 97-0254 (La. App. 4 Cir. 11/12/98), 703 So.2d 709 (retirement benefits not “wages”); Boyd v. Gynecologic Associates of Jefferson Parish, Inc., 08-1263 (La. App. 5 Cir. 5/26/09), 15 So.3d 268 (advances not “wages”).

• Vacation and other pay only if earned or vested under employer policies, and not forfeited by employer “use it or lose it” policies. See, e.g., Wyatt v. Avoyelles Parish School Board, 2001-3180 (La. 12/4/02), 831 So.2d 906; Beard v. Summit Institute of Pulmonary Medicine and Rehabilitation, Inc., 97-1784 (La.
EMPLOYMENT ISSUES

3/4/98), 707 So.2d 1233; Semien v. GEO Group, Inc., 10-642 (La. App. 3 Cir. 12/8/10), 52 So.3d 1019, writ denied, 11-0083 (La. 2/25/11), 58 So.3d 458 (PTO and LTI not payable under policy description as unearned); Kately v. Global Data Sys., Inc., 2005-1227 (La. App. 3 Cir. 4/5/06), 926 So.2d 145 (ambiguity in vacation policy interpreted against employer who drafted it).

- Commissions and bonuses often, but not always. See, e.g., Kaplon v. Rinkus Consulting Group, Inc. of Louisiana, 2009-1275 (La. App. 4 Cir. 4/28/10), 39 So.3d 725, writ denied 2010-1207 (La. 7/2/10), 39 So.3d 587 (bonus forfeiture policy deemed illegal); Jeansonne v. Schmolke, supra; Herbert v. Insurance Center, Inc., 97-298 (La. App. 3 Cir. 1/7/98), 706 So.2d 1007, writ denied (forfeiture of commissions permissible absent proof that they were “actually earned” upon date of separation); Patterson v. Alexander & Hamilton, Inc., 02-1230 (La. App. 1 Cir. 4/2/03), 844 So.2d 412 (where only collection of the fee is outstanding, and collection is beyond the control of the employee, he has earned his commission); Graves v. Automated Commercial Fueling Corp., 2005-2561 (La. App. 1 Cir. 11/3/06), 950 So.2d 759 (commissions considered earned where no written policy existed on commissions post-separation).


The law allows for penalties of 90 days’ wages or full wages from demand until payment, whichever is less, on an employer who fails or refuses on demand to pay all undisputed amounts. The penalty provision is strictly construed, and good faith defenses by an employer will preclude imposition of penalties. Kaplon v. Rinkus Consulting Group, Inc. of Louisiana, 2009-1275 (La. App. 4 Cir. 4/28/10), 39 So.3d 725, writ denied 2010-1207 (La. 7/2/10), 39 So.3d 587. The law also requires reasonable attorney’s fees if a well-founded suit must be filed. R.S. 23:632.

The right to payment is non-waivable. R.S. 23:634. Contracts or policies requiring an employee to forfeit actual wages earned are generally unlawful. Beard v. Summit Institute of Pulmonary Medicine and Rehabilitation, Inc., 97-1784 (La. 3/4/98), 707 So.2d 1233 (personnel policy requiring forfeiture of accrued vacation unlawful); Herbert v. Insurance Center, Inc., 97-298 (La. App. 3 Cir. 1/7/98), 706 So.2d 1007, writ denied (forfeiture of commissions permissible absent proof that they were “actually earned” upon date of resignation); see also Wirtz v. William H. LaDew of Louisiana, Inc., 282 F.Supp. 742 (E.D.La. 1968) (forfeiture of overtime pay unlawful under FLSA). The validity of contractual extensions of the statutory time limit has been raised, but not decided. See Becht v. Morgan Bldg. & Spas, 02-2047 (La. 4/23/03), 843 So.2d 1109.

Demand for payment is necessary. The obligation to pay exists irrespective of demand. However, sufficient demand is necessary for an employee to invoke the enforcement and penalty provisions of the statute. Oral demand may be sufficient, if it is “fairly precise and certain.” See, e.g., Monroe Firefighters Ass’n v. City of Monroe, CIV.A, 2009 WL 805132 (W.D.La. 2009); Lambert v. Usry & Weeks, 94-216 (La. App. 5 Cir. 9/14/94), 643 So.2d 1280; Hughes v. Cooter Brown’s Tavern, Inc., 591 So.2d 1334 (La. App. 4 Cir. 1991), writ denied 594 So.2d 1318 (girlfriend’s appearance insufficient). It has also been held that an employer who files a general denial waives technical deficiencies in pre-suit demand. Carriere v. Pee Wee’s
Practice tip Avoid dispute about the sufficiency of prior oral requests and send written demand by mail (consider sending a copy by regular and certified mail - the refusal of the employer to sign for the certified letter will undercut any argument of good faith if you have to sue) or by fax - if you have a receipt with the employer's fax number).

Filing suit. A suit must be filed within 3 years. C.C. Art. 3494. Venue is appropriate in any of the locations authorized by the Code of Civil Procedure, and also in the parish where the work was performed. R.S. 23:639. A suit seeking only penalties and attorneys fees states a cause of action, if wages were paid but not paid timely. Sifers v. Exxon Corp, 338 So.2d 763 (La. App. 4 Cir. 1976).

Employer defenses. The statute is strictly construed, being penal in nature, and its provisions may yield to equitable defenses. Boudreaux v. Hamilton Medical Group, Inc., 94-0879 (La. 10/17/93), 644 So.2d 619; Smith v. Acadiana Mortg. of Louisiana, Inc., 42,795 (La. App. 2 Cir. 1/30/08), 975 So.2d 143 (defenses must be in good faith and non-arbitrary). An employer who shows an equitable defense may avoid penalties, but not attorney's fees, if wages are actually due. Robledo v. Otr Motors of Louisiana, Inc., 582 So.2d 892 (La. App. 2 Cir. 1991); Berard v. L-3 Communications Vertex Aerospace, LLC, 35 So.3d 334, supra.

Some recognized defenses to payment include:

• Prior overpayments which could be offset against wages due. King v. American Rice Growers Exchange, 417 So.2d 904 (La. App. 3 Cir. 1982), writ denied 421 So.2d 909.

• Property loss or damage. Slaughter v. Board of Sup'rs of Southern University and Agr. and Mechanical College, 2010-1049 (La. App. 1 Cir. 8/2/11), 76 So.3d 438, cert. den.; Moore v. Fleming Subway Restaurants, Inc., 28,543 (La. App. 2 Cir. 8/21/96), 680 So.2d 78. While R.S. 23:635 prohibits an employer from deducting “fines” from wages (e.g., for violating a work rule), that doesn’t apply to willful or negligent damage of employer property.

• R.S. 23:634(B) allows withholding of preemployment medical exam or drug test costs from wages due an employee who resigns within 90 days.

Some recognized defenses to penalties include:


• Good faith error (e.g., true clerical error). Williams v. Lafayette School Board, 533 So.2d 1359 (La. App. 3d Cir. 1989); Houser v. Carruth Mortg. Corp., 476 So.2d 830 (La. App. 5 Cir. 1985); cf. Carmichael v. Galliano Marine Serv. LLC, CIVA, 09-3098, 2010 WL 1416555 (E.D.La. 2010) (admitted clerical error not allowed as defense given 4 months’ lapse between complaint filing and employer's payment).

• Bona fide dispute about the amount due. Thomas v. Orleans Private Industry Council, Inc., 95-157 (La. App. 4 Cir. 2/15/96), 669 So.2d 1275, writ denied 96-0686 (La. 4/26/96), 672 So.2d 671; Kearney v. Lee Med. Int'l, Inc., 06-597 (La. App. 5 Cir. 1/16/07), 951 So.2d 417, writ denied, 2007-0344 (La. 3/30/07), 953 So.2d 70.

• Employment did not end in resignation or termination. *Smith v. Dishman & Bennett*, 35,682 (La. App. 2 Cir. 1/23/02), 805 So.2d 1220.

**Rejected defenses** include the following sample:

• Poor bookkeeping practices or other negligence on part of the employer. *Graves v. Automated Commercial Fueling Corp.*, supra; *Metrailer v. Cameron Cable & Cordage, Inc.*, 440 So.2d 976 (La. App. 3 Cir. 1976), *writ denied*, 445 So.2d 436; *Pace v. Parker Drilling Co. and Subsidiaries*, 382 So.2d 988 (La. App. 1 Cir. 1980), *writ denied* 383 So.2d 1016.

• Employee's abrupt resignation. *Martin v. Sterling Associates, Inc.*, 46,461 (La. App. 2d Cir. 8/10/11), 72 So.3d 411 (notes that resolution of most defenses involved credibility issues not suitable for summary judgment); *Harrison v. CD Consulting, Inc.*, 2005-1087 (La. App. 1 Cir. 5/5/06), 934 So.2d 166.

• Employee's refusal to pick up check when mailing requested. *Simon v. Crowley Industries, Inc.*, 287 So.2d 549 (La. App. 3 Cir. 1973), *writ denied* 290 So.2d 331.

• Employee's failure to complete tax withholding forms or to sign receipt acknowledging payment. *Krajcer v. D.H. Holmes, Co., Ltd.*, 571 So.2d 171 (La. App. 4 Cir. 1990), *writ denied* 573 So.2d 1141; *Holmes v. Tradigrain, Inc.*, 411 So.2d 1132 (La. App. 4 Cir. 1982), *writ denied* 414 So.2d 1252.

• Reliance on unlawful company policy. *Patterson v. Alexander & Hamilton, Inc.*, 02-1230 (La. App. 1 Cir. 4/2/03), 844 So.2d 412; *Beard v. Summit Institute of Pulmonary Medicine and Rehabilitation, Inc.*, 97-1784 (La. 3/4/98), 707 So.2d 1233; *Kaplon v. Rimkus Consulting Group, Inc. of Louisiana*, 39 So.3d 725, supra.

• Reliance on legal advice and illegal post-resignation contract trying to avoid statutory obligations. *Goulas v. B&B Oilfield Services, Inc.* 2010-934 (La. App. 3d Cir. 8/10/11), 69 So.3d 750.

Defenses **to attorneys fees**. An award of reasonable attorney's fees is mandatory if a suit is well-founded, irrespective of any equitable defenses to payment or penalties which are raised by an employer. *Jeansonne v. Schmolke*, 40 So.3d at 362, supra; *Ginsburg v. Radio Group/Access 1 Communications Corp. of New York*, 35,624 (La. App. 2 Cir. 1/23/02), 806 So.2d 937; *Beard v. Summit Institute of Pulmonary Medicine and Rehabilitation, Inc.*, 97-1784 (La. 3/4/98), 707 So.2d 1233. A suit is "well-founded" if judgment is entered in favor of the employee entitling him to past due wages. *Herbert v. Insurance Center, Inc.*, 97-298 (La. App. 3 Cir. 1/7/98), 706 So.2d 1007, *writ denied* 98-0353 (La. 3/27/98), 716 So.2d 888; *Blaney v. Hulsey, Harwood & Hulsey*, 27,983 (La. App. 2 Cir. 2/28/96), 669 So.2d 661.
10.2 overtime and minimum wage violations.


10.2.1 minimum wage.

Not all employers and employees are covered. In general, covered employers must have annual sales totaling $500,000 or more, or be engaged in interstate commerce. The law covers private employers as well as federal, state and local governments. However, employees even of exempted firms may sometimes be individually covered in workweeks during which they have engaged in interstate commerce, the production of goods for interstate commerce, or an activity that is closely related and directly essential to the production of such goods.

Many statutory exemptions. Many workers are explicitly excluded from the statute’s protection regarding either minimum wage, overtime, or both. 29 U.S.C. §§213, 214. Employees exempted from the minimum wage and overtime provisions include, but are not limited to, executive, administrative and professional workers; taxi cab drivers; employees of most seasonal amusement or recreational facilities or camps; seafood industry workers; small newspaper employees and those who deliver newspapers; casual babysitters; students; apprentices; and handicapped workers. Statutory exemptions are narrowly construed, and the employer bears the burden of proving that an employee fits within the terms of an exemption. Johnson v. Big Lots Stores, Inc., 604 F.Supp. 2d 903 (E.D. La. 2009); Spradling v. City of Tulsa, Okl, 95 F.3d 1492 (10th Cir. 1996), cert. denied; Auer v. Robbins, 519 U.S. 452 (1997); Dole v. Mr. W. Fireworks, Inc., 889 F.2d 543 (5th Cir. 1989), cert. denied 495 U.S. 929.

Pay provisions. The federal minimum wage for covered employees, effective July 24, 2009, is $7.25 per hour. 29 U.S.C. §206(a)(1)(C). Special wage rates may apply to particular workers. For example:

• Tipped employees (whose hourly rate is only $2.13 per hour). Special rules govern tipped employees. They must customarily and regularly receive at

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5 There are other federal wage payment laws enforced by the U.S. Department of Labor, including the Davis-Bacon and related Acts, which regulate wage payment and fringe benefits on federally-financed or assisted construction. A full list and detailed information about all federal wage and hour laws can be found on www.dol.gov.

6 Although a state employee may no longer bring a private action against the state without its consent. Alden v. Maine, 527 U.S. 706 (1999).

7 Many employers violate the rule that the $2.13 only applies to time actually spent on activity for which the employee receives tips. For example, a waiter must be paid minimum wage for time spent cleaning up the kitchen.
least $30 per month in tips, they must be allowed to keep all tips, tips combined with hourly wage must at least equal the minimum wage, and certain other conditions must be met. §203(m), (t).

- Employees under 20 years of age may be paid $4.25 per hour for the first 90 days on the job. §206(g).
- Others, such as student learners, full-time students, and handicapped workers, may be paid less than the minimum wage under certificates issued by the Department of Labor.

Issues arise around transportation, travel time, and on-call or waiting time. FLSA covers only time on the job working. §203(o); 29 U.S.C. §251 et seq. (Portal-to-Portal Pay Act). Time on-call or on stand-by is covered only if an employee cannot use that time as they wish (e.g., they are geographically or otherwise limited). Service Employees Intern. Union, Local 102 v. County of San Diego, 60 F.3d 1346 (9th Cir. 1997), cert. denied 516 U.S. 1072. If travel or transportation is necessary to the employment and for the benefit of the employer, the employee must be compensated for that time. Mandatory training of nonexempt employees must also be compensated.

FLSA requires payment in cash or cash equivalent (e.g., food and lodging). §203(m). The regular rate of pay includes base pay plus premiums, cost of living allowances, bonuses, and fair value of anything the employer provides as part of pay, so long as the employee voluntarily receives the benefit, it is primarily for the employee’s benefit, and it is not illegal. The rate of pay does not include benefit plan contributions, paid vacations, discretionary bonuses, and so on. §207(e). Generally, uniforms and essential tools may not be deducted from an employee’s minimum wage.

Retaliation prohibited. It is illegal to discharge or “in any manner discriminate” against an employee because the employee has filed a complaint or instituted any proceeding under FLSA. 29 U.S.C. §215. This anti-retaliation provision protects both written and oral complaints. Kasten v. Saint-Gobain Performance Plastics Corp., 113 S.Ct. 1325 (2011).

Remedies. FLSA is enforced by the Wage and Hour Division of the U.S. Department of Labor (DOL). 29 U.S.C. §204. The New Orleans DOL office has jurisdiction over FLSA complaints in Louisiana. DOL may pursue criminal charges for willful violations or a civil lawsuit for back pay, penalties and injunctive relief on an employee’s behalf. Powell v. State of Florida, 132 F.3d 677 (11 Cir. 1998). However, DOL backlogs may make pursuit of a private enforcement action preferable.

An employee may file his own lawsuit to recover lost wages, penalties, attorney’s fees, and costs. 29 U.S.C. §§216, 217, 260. There is no exhaustion of administrative remedies requirement. Suit under FLSA must be brought within two years of the accrual of a cause of action, or within three years in the event of a “willful” violation. 29 U.S.C. §255. The latter statute of limitations requires a showing of knowledge or reckless disregard by the employer. McLaughlin v. Rickland Shoe Co., 486 U.S. 128 (1988); Johnson v. Big Lots Stores, Inc., 604 F. Supp. 2d 903 (E.D. La. 2009).

A collective action may also be brought to enforce the FLSA. §216(b). See, e.g., Green v. Plantation of Louisiana LLC, 2010 WL 5256354 (E.D. La. 2010). Cur-
rent LSC restrictions do not bar legal services advocates from bringing this type of group action. However, your clients should be able to find private counsel for most FLSA actions.

**Louisiana minimum wage laws.** While unlikely to exist, always check on the possible applicability of other state or local wage laws. FLSA does not restrict states or municipalities from establishing a higher minimum wage, but Louisiana has not joined others that have enacted a higher minimum wage. In fact, in 1997 the Louisiana legislature, responding to attempts in New Orleans to place a referendum for a higher minimum wage on the local ballot, passed R.S. 23:642, preventing municipalities from establishing a higher minimum wage, and its validity was upheld by the La. Supreme Court in *N. O. Campaign for a Living Wage v. City of New Orleans*, 02-0991 (La. 9/4/02), 825 So.2d 1098. Particular occupations may also be covered by specific laws (or union contracts) that set a special rate of pay. E.g., R.S. 33:1702 (constables and justices of the peace); R.S. 33:1991 et seq. (firefighters); R.S. 33:2211 et seq. (police officers).

### 10.2.2 Overtime Complaints.

**FLSA** does not restrict the number of hours an employee may work, unless child labor under 16 is involved. However, it does require that overtime (1 ½ regular rate of pay, or time and a half) be paid any covered employee for any hour worked in excess of 40 hours in a workweek. 29 U.S.C. §207. As with the minimum wage, some employees are exempt (e.g., taxi drivers, live-in domestic help, truck drivers). §213(b). Employers do make mistakes on exemptions. Of particular note for poverty advocates is the fact that some employees who work irregular work schedules (e.g., many healthcare workers) may be entitled to overtime even if they work less than 40 hours in a week. §207(f). For overtime purposes, tips are not counted as part of the regular rate of pay. If a terminated “exempt” employee worked overtime, the exempt status may have been lost through employer actions or policies (e.g., docking pay for absences or discipline).

**Louisiana law.** There is no generally-applicable state law on overtime. However, certain occupations may be governed by special statutory provisions. See, e.g., R.S. 33:1999 (firefighters). Also, employer policies or customs may confer enforceable rights.

### 10.3 COMPENSATORY TIME.

Comp time in lieu of payment is usually not legal. 29 U.S.C. §207(o). Only state or government agencies may give time off in place of wages, and only under restricted conditions. See, e.g., R.S. 33:2213.1 (police officers); *Knecht v. Board of Trustees for State Colleges and Universities and Northwestern State University*, 591 So.2d 690 (La. 1991); *Jones v. City Parish of East Baton Rouge*, 526 So.2d 462 (La. App. 1 Cir.1988); *Klein v. Rush-Presbyterian-St. Luke’s Medical Center*, 990 F.2d 279 (7th Cir. 1993).

### 10.4 UNEQUAL PAY BASED ON GENDER.

Low wages for women continue to persist, despite the 1963 passage of the **Equal Pay Act (“EPA”), 29 U.S.C. §206(d),** an amendment to the FLSA. The national average for women is 77% of what men earn; among the states, Louisiana is almost at the bottom (and worse than all other southern states), with 69%. Although as a poverty advocate you are unlikely to have the resources to pursue
litigation to correct an inequity, you should certainly inform your female clients of possible remedies for their situation and make appropriate referrals (unequal pay claims may be pursued under other federal laws, too, e.g. Title VII).

The EPA requires that men and women doing “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, be compensated with equal pay and benefits.” §206(d)(1). It covers most of the same employers as FLSA, and more employees, but the law is strictly applied. To establish a prima facie case under the Equal Pay Act, an employee must establish by a preponderance of the evidence that the employees being compared are:

- working in the same place;
- doing equal work (“substantially” equal level of skill, effort or responsibility and performed under similar conditions, and job titles or descriptions are not determinative); and
- receiving less pay than employees of the opposite sex.

To rebut a prima facie case, a defendant need only prove that the pay differential is due to a seniority system, a merit system, a system which measures earnings by quantity or quality of production; or a differential based on “any other factor other than sex” which is adopted for legitimate business reasons. See, e.g., Spears v. Louisiana, 767 F.Supp. 2d 629 (M.D. La. 2011); Wallace v. Louisiana Bd. of Sup’rs for Louisiana State Univ. Agr. & Mech. Coll., 364 F.Appx. 902 (5th Cir. 2010); E.E.O.C. v. Louisiana Network, Inc., 809 F.Supp. 1210 (M.D.La. 1992). To prevail, a plaintiff would need to show that the employer’s non-discriminatory reason is pretextual. McMillan v. Massachusetts Soc. for Prevention of Cruelty to Animals, 140 F.3d 288 (1st Cir. 1998).

The EEOC can enforce this law, but there is no administrative exhaustion requirement prior to filing a private lawsuit. Suit must be brought within two years; three with a willful violation. 29 U.S.C. §255. Relief available includes backpay, injunction, liquidated damages, attorney’s fees, and costs. Mitchell v. Jefferson County Bd. Of Education, 936 F.2d 539 (11 Cir. 1991), rehearing denied 946 F.2d 1549.

10.5 FAMILY OR MEDICAL LEAVE.

There is no generally applicable state law providing the average at-will employee with paid sick or personal leave. However, particular occupations may have special statutes giving them payment rights. E.g., R.S. 17:46 et seq.; 17:411 et seq. (certain teachers). Client complaints would require you to do some research. Employer policies and customs may also provide an employee with enforceable rights. Some laws provide rights to unpaid leave (e.g., the FMLA, discussed below). Unpaid leave laws can help preserve a job and related benefits.

The Family and Medical Leave Act of 1993 (“FMLA”), 29 U.S.C. §2601 et seq., provides covered employees with up to 12 weeks of unpaid leave during a year’s time, for: (a) the birth or adoption or foster placement of child; (b) family health needs; (c) an employee’s health needs; or (d) a qualified exigency related to the employee or family member’s duty in the Armed Forces. §2612. During FMLA leave, an employer must maintain pre-existing employment benefits for the employee. Of course, an employer may voluntarily, or through contract, provide greater benefits.
The FMLA covers most private and government employers. However, private sector employers are not covered unless they employed at least 50 employees in a 75 mile radius in 20 or more workweeks in the current or preceding calendar year and they are engaged in commerce or any activity affecting commerce. Employees are generally covered if they work for a covered employer; have been employed at the same workplace for 12 months or more (whether consecutive or not); and have worked at least 1250 hours (about 24 hours/week) during the year before taking leave. However, employers may exempt certain otherwise eligible employees or set conditions on leave for others. For example, teachers and instructors may be required to wait for leave until the end of a teaching period. §2618. Also, unless leave is necessary for a personal medical problem, spouses who work for the same employer must aggregate their leave time. §2612(f).

Birth, adoption or foster placement of a child. Leave must be taken within 1 year of a child’s arrival, and consecutively unless the employer agrees to a different arrangement. §2612(b)(1). Clients should be warned: working while on authorized FMLA leave for a new baby led to termination of a state civil service employee in Sterling v. Department of Public Safety and Corrections, Louisiana State Penitentiary, 97-1960, 97-1959, 97-1961 (La. App. 1 Cir. 9/25/98), 723 So.2d 448.

Family or employee’s health needs. Employees seeking leave because of their own health problems may have additional rights under the Americans with Disabilities Act (ADA). Employees covered by the ADA may be able to secure additional leave as an accommodation of their disabilities. Elements to permissible FMLA leave under this category include:

- Limited to “serious” health conditions. §§2612(a), 2611(11). This means an illness, injury, impairment or condition that involves inpatient care or continuing treatment by a recognized health care provider. §2611(6). However, an employee need not be physically unable to work. Hodgens v. General Dynamics Corp., 144 F.3d 151 (1st Cir. 1998).

- Employer may require certification by a health professional; second or even third opinions at the employer’s expense; and recertifications on a reasonable basis. §2613. See, e.g., Parsley v. City of Columbus, Ohio Dept. of Public Safety, 471 F.Supp. 2d 858 (S.D. Ohio 2006)(chronic back condition entitled employer to recertification every 30 days).

- The leave may be for an employee’s own health needs, or for certain immediate family members: (i) legal spouse, (ii) parent, or (iii) child (who must be either under 18 or if older, not able to take care of themself; stepchild or one for whom the employee is the legal guardian, or child for whom the employee acts in the place of a parent). §2612.

- It may be taken on an intermittent basis when medically necessary. §2612(b)(1). If intermittent leave significantly impacts an employer’s business, it may transfer an employee to a different position or require that leave no longer be intermittent. See, e.g., Covey v. Methodist Hosp. of Dyersburg, Inc., 56 F.Supp. 2d 965 (W.D. Tenn. 1999).

- Employers may require, or employees may elect, to use up paid leave prior to taking FMLA leave. §2612(d)(2).
Employee notice. An eligible employee seeking to use FMLA leave must provide 30-day advance notice, unless the need for leave was not foreseeable and/or notice not practicable. §2612(e). While notice need not be in writing, it is well-advised. When requesting leave, the FMLA need not be mentioned by name; notice will be sufficient under the act if the employee provides the employer with enough information to put the employer on notice that FMLA-qualifying leave is needed. See, e.g., Stoops v. One Call Communications, Inc., 141 F.3d 309 (7th Cir. 1998). An employer may place an employee on involuntary FMLA leave if the employee has given notice to the employer of a qualifying reason for absence that would trigger FMLA rights. Willis v. Coca-Cola Enterprises, Inc., 445 F.3d 413 (5th Cir. 2006).

Right to return. An employee generally has the right to return to the same or equivalent (terms, conditions, pay and privileges must be the same) position. §§ 2612(b)(2), 2614(a). Under certain very limited circumstances and conditions involving highly-paid “key” employees, an employer may refuse reinstatement. An employee may be fired during FMLA leave if the employer has reasons unrelated to the taking of leave. Anderson v. New Orleans Jazz & Heritage Festival & Found., Inc., 464 F.Supp. 2d 562 (E.D. La. 2006). During the leave, an employer must make the same insurance benefit contributions. However, seniority and pension benefits need not accrue during leave. If an employee does not return to work at the end of approved leave, the employer may recover health insurance premiums paid.

Retaliation or interference prohibited. Section 2615 makes it illegal for an employer to:

- Discharge or discriminate against an employee because he has filed a complaint or instituted or been involved in any proceeding under the statute. An employee must show that: (1) he availed himself of a protected right under the FMLA; (2) he was adversely affected by an employment decision; and (3) there was a causal connection between the protected activity and the adverse employment action. See, e.g., Hodgens v. General Dynamics Corp., 144 F.3d 151 (1st Cir. 1998). An employer may raise a legitimate nondiscriminatory reason, but an employee may prevail by showing that it was pretextual.

Remedies. The U.S. Department of Labor enforces the law. Most federal employees must seek enforcement through the U.S. Office of Personnel Management. DOL will investigate and may bring suit on its own. §§2616, 2617(b). A suit under the act may be brought within two years of a violation; three years if willful. §2617(C).

Louisiana leave laws. Louisiana law does not provide employees with any other generally-applicable statutory option except in cases of pregnancy, childbirth, or related medical conditions. See R.S. 23:342. However, R.S. 23:1015 et seq. does allow employers to provide up to 16 unpaid hours per year leave to parents or legal guardians to attend or participate in school conferences and activities.
for a child if these activities cannot be scheduled during non-working hours. R.S. 23:341 requires employers with 25 or more employees to provide up to four months of unpaid leave for “pregnancy, childbirth, or related medical conditions.” R.S. 23:965 requires employers to grant at least 1 day of paid leave for jury duty.

10.6 WORKER’S COMPENSATION.

Louisiana’s Worker’s Compensation Law, R.S. 23:1021-1415, is the general statutory scheme for compensating employees who have suffered a work-related injury, regardless of citizenship status. Rodriguez v. Integrity Contracting, 09-1537 (La. App. 3 Cir. 5/5/10), 38 So.3d 511, writs denied, 10-1296-1307 (La. 9/24/10), 45 So.3d 1074. The Louisiana Workforce Commission, www.laworks.net, has some useful information. Certain occupations or classes of employees may be covered by special laws (e.g., the Jones Act, 46 U.S.C. §688; the Longshore and Harbor Worker’s Compensation Act, 33 U.S.C. §901 et seq.; the Federal Employer’s Liability Act, 45 U.S.C. §51 et seq., and others).

There is an anti-retaliation provision. An employer is not precluded from hiring or firing an employee who has made a claim, but from acting “because of” that claim. Sampson v. Wendy’s Management, Inc., 593 So.2d 336 (La. 1992). To recover for retaliatory discharge, the employee must prove by a preponderance of the evidence that the claim was the reason. Penn v. Louisiana-1 Gaming, 06-928 (La. App. 5 Cir. 4/11/07), 954 So.2d 925. Merely showing close proximity in time between a claim and discharge is not enough. Hansford v. St. Francis Med. Ctr., Inc., 43,984 (La. App. 2 Cir. 1/14/09), 999 So.2d 1238. A discharge is not retaliatory or unlawful if it is based on the employee’s inability to perform his employment duties because of injury. Murphey v. Glenwood Regional Medical Center, 535 So.2d 1036 (La. App. 2 Cir. 1988), writ denied 536 So.2d 1203. However, an employer who is aware of an employee’s intent to file a claim cannot escape liability under the statute by preemptive discharge. Rholdon v. Bio-Medical Applications of Louisiana, Inc., 868 F.Supp. 179 (E.D. La. 1994). An aggrieved plaintiff may sue in a civil suit for penalties up to one year’s earnings, reasonable attorneys fees, and court costs. R.S. 23:1361. The claim is subject to a one year prescriptive period. Maquar v. Transit Management of Southeast Louisiana, Inc., 593 So.2d 365 (La. 1992).

10.7 SOME OTHER STATE PAYMENT AND LEAVE LAWS.

Jury duty. Employers cannot discharge employees for taking time off for jury service, and must provide at least one day of paid leave (although employer policies or custom may provide more). R.S. 23:965. Some occupations may have special statutes relating to jury duty leave. E.g., R.S. 17:1210 (teachers).

Voting. There is no general Louisiana law requiring employers to provide paid leave for voting during work hours. Employer policies or civil service rules may allow it.

Military service. Louisiana law requires that public employees be paid 15 days of leave per year for reserve or National Guard duty. R.S. 42:392, 394. Other employees are entitled to unpaid leaves of absence for such service. R.S. 29:38. Employees who leave work for the armed services also enjoy certain re-employment rights. R.S. 29:38; 29:410; 42:401; see also the Uniform Services Employment & Reemployment Rights Act, 38 U.S.C. §4301 et seq. Certain employees in particular occupations may have other rights provided by special statutes. E.g., R.S. 17:49 (teachers in special schools).
Rest, meal and smoking breaks. Contrary to popular belief, there is no general law requiring employers to set time aside, paid or unpaid, for rest breaks or meals. Louisiana statutes restrict workplace and school smoking, but protect employees from discrimination because of their status as smokers or nonsmokers. R.S. 23:966; 17:240.

Miscellaneous other payment provisions. Check the laws for particular laws that may apply to your client’s circumstances. The following are only a sample:

• unpaid wages from non-resident plantation owner, R.S. 23:637.
• payment under retirement or other benefit plans, R.S. 23:638, 651, 652 and 653.
• payments to door to door solicitors, R.S. 23:641.
• prohibition against employers lending or advancing money to employees at an interest rate greater than 8%, R.S. 23:691.
• voluntary and involuntary assignment of earnings and under what circumstances an employer may discharge an employee for garnishments, R.S. 23:731.
• requires employers to pay at least 4% annual interest on employees’ cash performance deposits, R.S. 23:891.
• prohibits requiring employee to pay costs of fingerprinting, medical exams, drug tests, or furnishing of any records available to or required by the employer, R.S. 23:897.
• wage requirements under the “Youth Corps Litter Control and Incentive Employment Program,” R.S. 23:1830.

11. WORK CONDITIONS

11.1 HEALTH AND SAFETY.

The Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq., requires covered employers to maintain a reasonably safe work environment. Traditionally it has been used to address work-related hazards. However, it may also be used to address problems with violence on the job, either from coworkers, supervisors, or from domestic partners. Most private employers are covered, but not federal, state or local government employers, the self-employed, family farms, and those whose occupations are covered by other specific federal statutes (such as mining, segments of the transportation industries, and nuclear energy). The law also imposes certain record-keeping and notice requirements, and prohibits retaliation against an employee who complains to the enforcing agency, the U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA). A complainant is entitled to have his identity kept confidential from his employer, to participate in workplace inspections, and to contest OSHA’s response.

Workplace standards fall into four major categories: general industry (29 C.F.R. §1910); construction (§1926); maritime (§§1915-19); and agriculture (§1928). Where OSHA has not promulgated a specific standard, an employer may still be responsible for violating the statute’s “general duty” clause, which requires employers to furnish a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” 29 U.S.C. §654(a).
Certain standards are generally applicable to all industry sectors:

- Access to an employee’s medical and toxic exposure records;
- Personal protective equipment at no cost to the employee; and
- Product hazard evaluation and labeling, and employee hazard training.

There is no private right of action, but complaints to OSHA may result in required changes or fines. Employers may also be subject to criminal penalties for record-keeping violations or interfering with a compliance officer. Retaliation complaints must be filed within 30 days. Violation of OSHA standards generally does not create civil liability under other remedies, but may be relevant or helpful in pursuing another cause of action.

The **Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §1801 et seq.**, addresses many aspects of the employment relationship for most migrant and seasonal agricultural workers. In addition to requiring contractor registration, written disclosure of terms and conditions of employment, certain record-keeping, and certain wage and supply arrangements, the law mandates compliance with certain health and safety standards in housing and transportation. Retaliation is prohibited. The statute is enforced by the Wage and Hour Division of the U.S. Department of Labor, which is authorized to conduct site and record inspections, conduct interviews, and pursue civil or criminal actions against violators. §1851 et seq. Private actions are also allowed. §1854.

**Louisiana** does not have an OSHA-approved job safety and health program. However, it **does have laws setting forth health and safety provisions for certain occupations.** See, e.g., R.S. 30:2027; 30:2351.55; 23:481 et seq. It also prohibits retaliation against an employee for testifying about or providing information for the enforcement of labor laws. R.S. 23:964, 967. State law also prohibits retaliation for testifying about or providing information for the enforcement of environmental violations. R.S. 30:2027; Brown v. Catalyst Recovery, 01-1370 (La. App. 3 Cir. 4/3/02), 813 So.2d 1156. This statute protects employees who report violations not just by their employer, but also by a third party. Bartlett v. Reese, 526 So.2d 475 (La. App. 1 Cir. 1988), writ denied 532 So.2d 177, appeal after remand 569 So.2d 195, writ denied 572 So.2d 72.

The employee must prove that the adverse action was motivated by the employee’s action. Overton v. Shell Oil Co., 2005-1001 (La. App. 4 Cir. 7/19/06), 937 So.2d 404, writ denied, 2006-2093 (La. 11/3/06), 940 So.2d 674 (protected activity need not be sole reason for termination); Powers v. Vista Chemical Co., 109 F.3d 1089 (5th Cir. 1997); Bernofsky v. Tulane University Medical School, 962 F.Supp. 895 (E.D.La. 1997). This and other similar “whistleblower” statutes require that reports of violations have provided sufficient information to allow the agency to investigate the alleged violation. See, e.g., Garrie v. James L. Gray, Inc., 912 F.2d 808 (5 Cir. 1990), rehearing denied, cert. denied 499 U.S. 907.

### 11.2 CHILD LABOR.

The **Fair Labor Standards Act, 29 U.S.C. §201 et seq.**, limits the categories and hours of work for minors. Children under age 16 are prohibited from working in most non-farm jobs or during school hours. §213. There are specific statutory exceptions such as working for parents, newspaper delivery, and provisions for
EMPLOYMENT ISSUES

temporary waiver and special certificates of apprenticeship by DOL. §§213, 214. Certain jobs declared hazardous by DOL are entirely off-limits to minors.

Under age 14, work outside school hours is generally prohibited (with several exceptions), and the hours of youths 14 and 15 years old are restricted to no more than 3 hours per school day or 18 hours per school week and 8 hours per non-school day or 40 hours per non-school week. Except during the summer, work for these youths may only be between 7 a.m. and 7 p.m. Violators are subject to civil or criminal action by DOL.

**Louisiana also regulates the employment of minors.** R.S. 23:151 et seq. It limits the occupations of minors, and restrict their hours and days on the job. R.S. 23:161-171, 211, 213-215, 251-258. Employers are required to maintain employment certificates or work permits and other documentation for most minors. R.S. 23:181-192, 217, 254-258. These laws are enforceable by the state’s labor agency, currently called the Louisiana Workforce Commission, and violators are subject to certain penalties, including fines, imprisonment, attorneys fees and interest. R.S. 23:231 et seq. R.S. 23:381-392 provide for certain exceptions to job restrictions through the apprenticeship system.

### 11.3 DRUG AND ALCOHOL TESTING.

The right of employers to require drug testing is limited by the U.S. and state constitutions. Drug or alcohol testing is considered a search and seizure covered by the Fourth Amendment to the U.S. Constitution (and its state counterpart), which prohibits unreasonable searches and seizures. Unfortunately, this constitutional protection applies only to governmental employers and to private employers acting for the Government. *Skinner v. Railway Labor Executives Ass’n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). Drug testing must be supported by individualized “reasonable suspicion” unless the employee is in a position of ‘special needs’ such as law enforcement or ‘safety-sensitive’ positions such as railroad workers. *Id.; Chandler v. Miller*, 520 U.S. 305 (1997); *United Teachers of New Orleans, et al. v. Orleans Parish School Board, et al.*, 142 F.3d 853 (5th Cir. 1998); *Aubrey v. School Bd. of Lafayette Parish*, 92 F.3d 316 (5th Cir. 1996). R.S. 49:1015 and 1021 require drug testing of state employees and “persons entering into contracts with the state to provide goods and services.” Some employers have written policies on drug testing which may confer other rights.

Employees unhappy with substance abuse testing, or how their employer has reacted, may also have other claims. R.S. 49:1001 et seq. sets forth certain standards and procedures which must be followed in drug testing by most employers. Employers must give employees a right of access to records relating to positive drug test results. R.S. 49:1011. Employees have a very limited cause of action in tort against employers and testing entities for wrongful disclosure of test results. R.S. 49:1012. R.S. 23:8997 prohibits employers in most cases from requiring employees to pay for costs of drug tests (as well as certain other procedures). Unfortunately, a claim for damages for an employer’s violation of drug testing requirements under R.S. 49:1001 et seq. has been rejected. *Sanchez v. Georgia Gulf Corp.*, 02-0904 (La. App. 1 Cir. 11/12/03), 860 S.2d 277, Judges Kuhn and Whipple, dissenting; *writ denied*, 2004-0185 (La. 4/2/04).
11.4 POLYGRAPH TESTING.

The Employee Polygraph Protection Act (EPPA), 29 U.S.C. §2001 et seq., prohibits most private employers from using polygraph or “lie detector” tests either for pre-employment screening or during the course of employment, with an exception in certain circumstances such as investigations into theft or sabotage. §2006(d). Governmental employers, and those in the security or pharmaceutical fields, are exempted. §2006.

Covered employers are also precluded from discharging, disciplining or discriminating against an employee or an applicant based on the result of any test, or for exercising their rights under the statute. §2002. A polygraph examiner retained by an employer is also potentially liable under this law. Calbillo v. Cawnder Oldsmobile, Inc., 288 F.3d 721 (5th Cir. 2002). Employers are required to post notices to advise employees of their rights. §2003. Employees’ rights are non-waivable. §2005(d). The law also sets certain testing standards, and limits disclosure of information obtained from a test. §§2007, 2008. The law is enforced by the U.S. DOL, Wage and Hour Division, which may seek injunctive relief or penalties. §§ 2004, 2005. Employees may also bring a private action within 3 years of a violation to recover back pay, benefits, reinstatement, and other relief. §2005(c).

Unlike many other states, Louisiana has no state counterpart to this federal statute. It has been held that an employer has the right to ask an employee to submit to a polygraph examination when investigating suspected personnel violations. Ballaron v. Equitable Shipyards, 521 So.2d 481 (La. App. 4 Cir. 1988), writ denied 522 So.2d 571. Even a civil service employee may be discharged for refusing to take a polygraph examination. See, e.g., Jones v. Department of Public Safety and Corrections, 2004 CA 1766 (La. App. 1 Cir. 9/23/05), 923 So.2d 699. Furthermore, it has been held that an employer is not liable in tort for discharging an employee at will after a polygraph exam that indicated he lied, even if the polygraph was negligently performed. Johnson v. Delchamps, Inc., 897 F.2d 808 (5th Cir. 1990).

11.5 INTERFERENCE WITH POLITICAL RIGHTS.

R.S. 23:961 et seq. prohibits employers with 20 or more employees from interfering with certain political rights of employees. Davis v. Louisiana Computing Corp., 394 So.2d 678 (La. App. 4 Cir. 1981), writ denied 400 So.2d 668. However, there are limits to political activities of certain governmental employees.
APPENDIX A:
FREQUENT JOB-RELATED COMPLAINTS BY LOW-INCOME CLIENTS,
WITH STATUTORY CHECKLIST

A. Wrongful discharge. A client’s rights depend upon the nature of the employment relationship, the reason for the discharge, and other factors. See, e.g.:
- LSA-C.C. Arts. 2747 (employment at will doctrine)
- C.C. Arts. 2746, 2748-50 (limited duration employment contract)
- La. Const. Art. 10 (public officials and employees)
- R.S. 33:2391 et seq. (city, parish, fire and police civil service)
- Miscellaneous federal and state statutes and rules provide other remedies for various occupations or employee categories or for discharge based on particular acts - e.g., discrimination and retaliation. Look at the particular circumstances of the client to determine if any other special statutes may apply. Additionally, state or federal constitutional protections such as due process or equal protection may apply.

B. Acts associated with discharge.
1. Humiliating treatment by employer.
   - May have right to sue in tort - C.C. Art. 2315. The three elements of a claim for intentional infliction of emotional distress are laid out in White v. Monsanto Co., 585 So. 2d 1205, 1209 (La. 1991). In general, a plaintiff must show outrageous conduct causing serious emotional harm.

2. No reason or prior notice given.
   - Under Louisiana law, an at-will employee may be terminated at any time with no reason given at all. Mix v. University of New Orleans, 609 So.2d 958 (La. App. 4 Cir. 1992), writ denied 612 So.2d 83 (1993).
   - R.S. 23:1576 - requires state employers to file notice giving the cause, within three days of separation; state LWC regulations require this of all employers; there are no private enforcement mechanisms, however.
   - Civil service and certain other public employees have various rights to notice, based on statute, rule, or constitutional right.

3. Poor references/negative comments to third persons.
   - May have right to sue in tort - C.C. Art. 2315. The five elements of a defamatory action (libel or slander) are laid out in Brannan v. Wyeth Laboratories, Inc., 526 So.2d 1101, 1105 (La. 1988). Words imputing a crime to another are defamatory per se and proof of malice is not required. Williams v. Touro Infirmary, 578 So.2d 1006 (La. App. 4 Cir. 1991).
   - R.S. 23:291 - possible cause of action if employer disclosure not in good faith or inaccurate; see also R.S. 23:1012 regarding drug testing.
• If discriminatory, may have action based on federal or state discrimination statutes.

4. **Occupational license revocation or suspension.**
• Occupations licensed by federal and state law are numerous; most Louisiana licensing schemes are found in Title 37 of the revised statutes (Professions and Occupations). These statutory schemes typically provide license holders with administrative and judicial review rights, designed to provide constitutionally-mandated due process.

C. **Post-separation benefits.**
1. **Unemployment compensation benefits.**
   • R.S. 23:1471 *et seq.* - Louisiana Employment Security Law

2. **Pension benefits and continuing health insurance.**
   • Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 U.S.C. §1162
   • R.S. 22:215.7 - surviving spouses

D. **Payment and leave issues.**
1. **Unpaid wages or other amounts due.**
   • Louisiana Wage Payment Act, R.S. 23:631 *et seq.*

2. **Minimum wage and overtime.**
   • FLSA, 29 U.S.C. §201 *et seq.* - sets federal standards for many employers and employees
   • R.S. 23:642 - prohibits higher minimum wage by local entities
   • Certain occupations or categories of employees may have the benefit of special wage statutes (e.g., firefighters, police officers, certain public officials, federal contract construction workers).

3. **Gender disparity in pay.**
   • Equal Pay Act, 29 U.S.C. §206(d)
   • Title VII, Civil Rights Act, 42 U.S.C. §§ 1981a, 2000e

4. **Garnishment.**
   • R.S. 23:731 - limits discharge because of garnishments
   • Consumer Credit Protection Act, 15 U.S.C. §1671 - same

5. **Leave.**
   • Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 et seq.
   • R.S. 23:965 - jury leave allowed; also prohibits discharge because of jury duty
   • R.S. 23:1015 - permits leave for school conferences and activities
   • Certain categories of employees have leave rights provided by special statute or rule (e.g., teachers, firefighters, civil service employees, veterans, military personnel).
6. Worker's compensation benefits.
   - R.S. 23:1021 et seq. - Louisiana workers' compensation scheme
   - Miscellaneous other statutes provide remedies for particular occupations or classes of employees, such as the Federal Employer's Liability Act, 45 U.S.C. §51 et seq.

E. Employment discrimination or retaliation based on:
   1. Race or color.
      - Executive Order 11246, 41 C.F.R. 60 (tracks Title VII categories)
      - R.S. 23:332
      - Local laws may exist - R.S. 51:2236
   2. National origin or immigration status.
      - Title VII
      - Immigration Reform and Control Act (IRCA), at 8 U.S.C. §1324b
      - R.S. 23:332
      - Local laws may exist - R.S. 51:2236
   3. Gender.
      - Title VII
      - R.S. 23:332
      - Local laws may exist - R.S. 51:2236
      - Title VII
      - Pregnancy Discrimination Act, 42 U.S.C. §2000e(k)
      - R.S. 23:341 et seq.
      - Local laws may exist - LSA-R.S. 51:2236
   5. Religious beliefs.
      - Title VII
      - R.S. 23:332
      - Local laws may exist - LSA-R.S. 51:2236
   6. Age.
      - R.S. 23:311 et seq.
      - R.S. 51:2236 - parishes and municipalities may adopt and enforce additional laws prohibiting “all forms of” discrimination and prescribing penalties
   7. Handicap or disability.
      - Americans with Disabilities Act (ADA), 42 U.S.C. §12101 et seq.
      - R.S. 23:323
      - Local laws may exist - LSA-R.S. 51:2236
8. **Sickle cell trait.**
   - R.S. 23:351 *et seq.*
   - Local laws may exist - R.S. 51:2236

9. **Labor union** - membership in or refusal to join.
   - R.S. 23:823, 824; 881 *et seq.*; 981 *et seq.* ("right to work" laws)
   - Local laws may exist - R.S. 51:2236

10. **Military service.**

11. **Exercising rights**
    Many federal and state statutes prohibit retaliation for an employee’s exercise of rights thereunder. Even in the absence of a statutory provision, the U.S. Supreme Court has found such protections implied in recent cases. See, e.g., *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). Statutes with such provisions include, *but are not limited to*, the following:
    - Political rights, R.S. 23:961, 962
    - Enforcement of labor laws in Louisiana, R.S. 23:964, 967
    - Refusal to participate in abortion, R.S. 40:1291.31
    - National Guard service, R.S. 29:38
    - Unemployment compensation benefits, R.S. 23:1691
    - Worker’s compensation claim, R.S. 23:1361
    - “Right to work” laws, R.S. 23:881, 981
    - Jury duty, R.S. 23:965
    - Family and Medical Leave Act, 29 U.S.C. §2615
    - Occupational Safety and Health Act, 29 U.S.C. §651 *et seq.*
    - Consumer Credit Protection Act, 15 U.S.C. §1674
    - Fair Credit Reporting Act, 15 U.S.C. §1681
    - Garnishments, R.S. 23:731
    - Clean Air Act (whistleblower provisions), 42 U.S.C. §7622
    - Louisiana Environmental Whistleblowers Law, R. S. 30:2027
    - Smoking or nonsmoking, R. S. 23:966
    - Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9610
    - Safe Drinking Water Act, 42 U.S.C. §300j-9(l)
    - Solid Waste Disposal Act, 42 U.S.C. §6971
    - Federal Water Pollution Control Act, 33 U.S.C. §1367
    - Fair Housing Act, 42 U.S.C. 3601 *et seq.*
F. Work conditions.

1. **Health and safety.**
   - Occupational Safety and Health Act (OSHA), 29 U.S.C. §651 *et seq.*
   - Agricultural Worker Protection Act (AWPA), 29 U.S.C. §1801 *et seq.*
   - R.S. 40:1300.41; 40:1300.1; 23:966 (state smoking laws)
   - Local laws may exist

2. **Child labor.**

3. **Drug/alcohol testing.**
   - ADA or Title VII if discriminatory
   - May have right to sue in tort - C.C. 2315
   - R.S. 49:1001 - state testing standards and procedures
   - R.S. 23:634 - restriction on employee payment of testing costs

4. **Polygraph testing.**
   - 29 U.S.C. §2001 (Employee Polygraph Protection Act)
   - R.S. 37:283 (Polygraphist’s Act) - affords no private right of action. *Ballaron v. Equitable Shipyards, Inc.*, 521 So.2d 481 (La. App. 4 Cir. 1988) (requiring employee consent to test not invasion of privacy)

5. **Privacy violations.**
   - May have right to sue in tort - C.C. Art. 2315
   - Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq.* (improper sharing of information)
   - Electronic Communications Privacy Act (ECPA), 18 U.S.C. §2510 *et seq.*
   - May have criminal complaint (e.g., R.S. 14:283 - video voyeurism)
   - Privacy Act, 5 U.S.C. §552a (as to federal agencies only)

6. **Dress or grooming codes.**
   - FLSA, 29 U.S.C. §201 *et seq.* - cost of clothing deductions may violate the statute
   - Title VII or ADA or other similar law if discriminatory
   - May have suit in tort for privacy violation - C.C. Art. 2315

7. **Workplace harassment or violence.**
   - State or federal criminal laws
   - Title VII, if discriminatory
   - May have right to sue in tort - C.C. Art. 2315

8. **Access to personnel information.**
   - R.S. 23:1016 (toxic exposure records only)
   - R.S. 49:1011 (positive employee drug test records)
   - There is no general state statute providing employee right of access; may be able to get information desired through administrative or other proceedings, such as unemployment compensation claim
APPENDIX B:
ADMINISTRATIVE ENFORCEMENT AGENCIES:
EEOC AND LOUISIANA COMMISSION ON HUMAN RIGHTS


The Equal Employment Opportunity Commission (EEOC) (www.eeoc.gov) was established by Title VII of the Civil Rights Act of 1964. 42 U.S.C. §2000e-16(b). The EEOC enforces the principal federal statutes prohibiting employment discrimination, usually through investigation of administrative charges brought by individuals who believe they have been discriminated against (although it may also pursue an investigation independently). The EEOC brings a lawsuit in only a small percentage of cases. EEOC regulations are found at 29 C.F.R. §1600 et seq. The agency issues enforcement guidelines which do not have the force of law, but which are used in investigating charges.

The EEOC may order a variety of relief including hiring, reinstatement or upgrading of employees; restoration of back pay; promotion; reasonable accommodation; posting of notices; any corrective action; fees and costs. If intentional discrimination is found, compensatory and punitive damages may be awarded under most EEOC-enforced laws. Claims not addressed in the charge generally may not be raised in subsequent litigation.

All laws enforced by the EEOC, except for the Equal Pay Act and retaliation claims, generally require the timely filing of an EEOC charge before a private lawsuit may be filed in court. Equitable tolling of the filing period is judicially allowed only under certain limited circumstances. St. Louis v. Texas Worker’s Compensation Com’n, 65 F.3d 43 (5th Cir. 1995), cert. denied 518 U.S. 1024. For example:

• When the defendant (actively or through the failure to post notices required by the statute), EEOC, or state agency has deceived or misled the plaintiff, equitable tolling may be permissible. See, e.g., Anderson v. Unisys Corp., 47 F.3d 302 (8th Cir. 1995), cert. denied 516 U.S. 913.


• Generally, the process of an EEOC complaint in Louisiana is as follows:

  • An aggrieved party files a charge within 180 days of the alleged unlawful action (300 days if the charge is also covered by a state or, with all laws but the ADEA, local anti-discrimination law, and, as is the case in Louisiana, a state agency exists to enforce the charge).
  
  • The commission “dual files” the charge with the Louisiana Commission on Human Rights if it is also covered by state or local law.

  • The commission prioritizes the charge and may investigate. While it may dismiss a complaint for lack of merit on its face, without conducting an investigation, the EEOC must accept all charges of discrimination. A complainant has the right to file and should not be turned away.

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8 Each EEOC office has priorities for impact litigation. If your client’s case falls within those priorities, the EEOC should provide considerable assistance. Retaliation is almost always viewed as a high priority.
• The commission either finds a violation or dismisses the complaint.
• If a charge is dismissed for insufficiency of evidence, a complainant may institute a civil action within 90 days of a charge's dismissal, after a 'right to sue' notice is issued.
• If the commission finds that discrimination has occurred, it will attempt mediation or settlement; if unsuccessful, it will decide whether to pursue the charge itself in federal district court.
• If it decides not to pursue a charge itself, it will issue a “right to sue” letter giving the complainant 90 days to file a lawsuit himself. If the action involves Title VII or ADA charges against state or local governments, the Department of Justice makes this last decision.

**EEOC in Louisiana.** The only office in Louisiana is located in New Orleans, at 1555 Poydras, Suite 1900, New Orleans, LA 70112; 1-800-669-4000. Charges can be made in person or by mail.

2. **The Louisiana Commission on Human Rights (LCHR).**
   R.S. 51:2231 et seq., the Louisiana Commission on Human Rights Act, provides for a commission ostensibly empowered to investigate and enforce complaints about employment practices arising under state discrimination laws. §2231(C). A plaintiff under Louisiana’s discrimination statutes is not required to file with the LCHR or the EEOC prior to filing a civil lawsuit in state court. *Coutcher v. Louisiana Lottery Corp.*, 97 0666 (La. App. 1 Cir. 11/7/97), 710 So.2d 259, writ denied 709 So.2d 758. The process of an LCHR complaint is essentially the same as with the EEOC, and the time limits for filing are the same. The LCHR will also “dual file” with EEOC any complaint which is also covered by federal law. Any party may seek judicial review of commission action in accordance with the Administrative Procedure Act, R.S. 49:964 (i.e., within 30 days).

**Reaching the LCHR.** Although it receives some EEOC funding as a “deferral agency” to handle complaints alleging violations of both federal and state laws, the LCHR is inadequately funded by the state. Its practical function is merely to extend the EEOC filing deadline to 300 days. The LCHR does not conduct independent investigations and there are no field offices in the state. There is thus no real practical reason to file with the LCHR. To get complaint filing forms, find the current contact information for the agency on [www.gov.state.la.us](http://www.gov.state.la.us).
CHAPTER 5
LOUISIANA
FAMILY LAW PRACTICE

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1. INTRODUCTION

This manual provides information on the practice of family law in Louisiana. Many practice pointers are given. The manual is not a comprehensive family law treatise.1 In Louisiana, family court practices vary from parish to parish. About 70% of Louisiana’s district courts also have hearing officers who help the district judges with family law cases. In courts without hearing officers, the district judge hears the entire case. Hearing officer procedures can vary significantly from parish to parish and affect the procedures for presenting and litigating a family law case. Attorneys and self-represented litigants need to know their local court rules and practices. This manual focuses on the common rules and procedures for family court cases. It does not discuss the unique rules or practices that a particular court may use.

The plague of domestic violence in our society requires that family law practitioners consider domestic violence in all aspects of their representation. An attorney who handles family law cases should know how to identify domestic violence, the special laws that apply to domestic violence cases, and the basic principles of “safe lawyering” in domestic violence cases. See Chapter 3 on Domestic Violence Practice in Louisiana, supra.

2. FUNDAMENTALS

Family law is a very pleading oriented and procedurally driven practice. The first impression our courts and adversaries form of us comes from the quality of our letters and pleadings. Do not delegate proofreading to support staff. Thoroughly read all documents and correct all errors. Careful proofreading will also enable you to double-check the content of your document to insure the clear expression of argument. Make sure that the facts pled are sufficient to plead a cause of action and carry your burden of proof.

Prior to filing any pleading, one should understand the appropriate procedure to follow in each matter. The Louisiana Code of Civil Procedure and R.S. Title 9 (Ancillaries) contain a wealth of information that is often overlooked by practitioners. All too often, attorneys file for relief that they are not entitled to and use a process that is unavailable for the relief sought. If a family law statute does not address a specific process then look at Local Court Rules, Uniform Family Court Rules,2 Uniform District Court Rules, or the Code of Civil Procedure for what is in place for civil cases in general. Be sure your adversary is using procedure correctly. If not, file the proper exception(s) and a supporting memorandum as required by court rules. The exception may provide you with extra time or a strategic advantage.

Family courts may look at the larger picture and may excuse some procedural mistakes - either because nobody “did it that way” or for reasons of judicial economy. Depending on where you are in the case, “choose your battles” in deciding how hard you need to press on the issue in order to “win the war.”

Common mistakes include the improper cumulation of actions, failure to join parties “needed for just adjudication,” improper venue, failure to state a cause of action, improper service and seeking a result over which the court does not have

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1 For more in-depth discussions of family law, see K. Triche, Handbook on Louisiana Family Law (2012) and R. Lowe, Louisiana Divorce (2012).
2 The Uniform Family Court Rules should be adopted by 2013.
jurisdiction. Thus, a good starting point is to review the Code of Civil Procedure. Pay particular attention to the articles on venue, exceptions, written motions, and discovery. Read the articles particularly relevant to family law. For example, Book VII –Special Proceedings, Title 4, Chapters 1 & 2 specifically address *ex parte* orders of custody. Civil Code article 102 divorces as well as other issues.

An example of an improper cumulation of actions is when a reconventional demand to a summary proceeding requests relief that must be instituted by ordinary proceeding. For example, client files for a protective order pursuant to La. R.S. 46:2131 *et seq*. The defendant files an Answer and Reconventional Demand wherein he not only *answers* the protective order petition but also *reconvenes* against the client for divorce. Insofar as the divorce action must be by an ordinary proceeding and the protective order is a summary proceeding, the reconventional demand may be improper because the delays for these hearings differ.

☞ Under La. Code Civ. Proc. art. 464-65, courts have some discretion in such examples. Remind the court that the summary proceeding must be heard within the statutory delays and not just continued to accommodate the delays for the ordinary proceeding.

To summarize: (1) know the Code of Civil Procedure as it pertains to your particular cause of action, and (2) proofread all pleadings and letters before they are sent. Our courts are very quick to pass judgment on attorneys based upon their perception of that attorney’s competency and attention to detail. Thus, it is important that you know what to file, how to file it, where to file it, and when to file it. With the advent of technology, there is no reason why you should not be able to access relevant law and practice information with the click of a mouse.

We all can agree that legal services family law attorneys have demanding and challenging workloads. At least 50% of all case filings (a conservative estimate) in most of our State District Courts are in family law and that number keeps rising. A large number of these cases involve self-represented litigants and some courts see about 70% of all family cases with one or both sides representing themselves. Also, family law makes up over 50% of all cases cumulatively handled by our three Louisiana legal services programs. As family law changes and expands every year, it is crucial to maintain the highest standards of representation for our clients.

### 3. KNOW THE COURT STAFF

It is as important to know the people who can help you present your case as it is to know the law. There is an old saying, “a good lawyer knows the law, a great lawyer knows how the judge thinks.” That truism can be extended to: “a great lawyer knows and is friendly with the staff of the Clerk’s Office, the Judges, the District Attorney and DCFS/Support Enforcement Services.” Some attorneys are amazingly rude to employees of these offices. It takes no additional time to be cordial and friendly to these persons and they may be of tremendous help to you and your clients. If an opportunity to help them presents itself, you should do so. Many of our service areas include rural parishes and our client population overlaps with theirs. Clearly, what “goes around, will come around.”
The Clerk of Court is not a part of the Judge’s Office and vice-versa. There is some overlap of duties involving the Minute Clerk and the Court Reporter. In most cases, the database and access to information between the two offices do not exist on a real-time basis. This is especially true when dealing with a Judicial District Court that covers more than one parish. The judicial law clerk may not have the entire suit record when reviewing a Motion that you filed.

4. IN FORMA PAUPERIS

Most legal services’ clients cannot pay court costs. In some Louisiana parishes, the costs for a simple divorce, without any ancillary matters, can be more than $1,000 if a curator must be appointed for an absentee spouse. Fortunately, an indigent’s right to proceed without prepaying costs (filing fees) is protected by La. Code Civ. Proc. art. 5181 et seq. Common unlawful actions against pauper clients include:

- your client is prevented from filing a new suit or pleading because of unpaid court costs. See Hawkins v. Jennings, 709 So.2d 292 (La. App. 3 Cir. 1998);
- court costs are split even though your client prevailed and was granted pauper status. See Holloway v. Holloway, 787 So.2d 600 (La. App. 3 Cir. 2001); Yarls v. Yarls, 30 So.3d 1101 (La. App. 4 Cir. 2010);
- your pauper client is denied a certified copy of the divorce judgment. See Carlile v. Carlile, 644 So.2d 835 (La. App. 1 Cir. 1994); La. Code Civ. Proc. art. 5188, as amended by Act 741 of 2012;
- your domestic violence client is charged for a protective order or taxed with the costs. See Jimenez v. Jimenez, 922 So.2d 672 (La. App. 5 Cir. 2006); Valius v. Valius, 53 So.3d 655 (La. App. 4 Cir. 2010);
- curator fees required for a pauper divorce. See Atkins v. Atkins, 2001-583 (La. App. 3 Cir. 2001); Jones v. Jones, 297 So.2d 198 (La. 1974);
- contempt of court or penalties for failure to pay costs of court-ordered experts when client lacks financial ability to pay. See Rochon v. Roemer, 630 So.2d 247 (La. 1994); La. R.S. 13: 4206;
- Use of Civil Code art. 2362.1 to cast the pauper client with costs. While attorneys’ fees and court costs occurred before divorce is granted, are a community obligation, the claim can only be satisfied from community assets. See Malone v. Malone, 260 La. 759, So.2d 397 (La. 1972) and Civil Code art. 2357.

5. DIVORCE

5.1 WHAT ARE THE GROUNDS FOR DIVORCE IN LOUISIANA?

Articles 102 and 103 of the Louisiana Civil Code provide the grounds for no-fault and fault divorces in Louisiana. La. R.S. 9: 307 provides the grounds for divorce in covenant marriages. Most marriages are not covenant marriages. Sample pleadings for article 102 and 103 divorces are at the end of this chapter.

Most divorce suits ask for a “no-fault” divorce based on the spouses’ physical separation. Generally, the required separation period for 102 and 103 divorces is 365 days if there are minor children of the marriage and the marriage is not a
covenant marriage.\(^3\) Except in the case of a covenant marriage, the required separation period is only 180 days if:

1. there are no children of the marriage or
2. a protective order or injunction has issued to protect the divorce plaintiff or a child of one of the spouses from abuse or
3. a court finding of physical or sexual abuse of the divorce plaintiff or a child of one of the spouses.

If the divorce defendant is a domestic violence victim, she would have to reconvene for divorce to qualify for a divorce based on 180 days physical separation or that a child of one of the spouses was physically or sexually abused.

Article 103 divorces may also be granted for adultery or a felony conviction without the necessity of waiting for a separation period to elapse.

### 5.2 HOW TO DETERMINE THE SEPARATION PERIOD REQUIRED FOR A DIVORCE

Answer the following questions to determine (1) the applicable separation period for divorce and (2) whether the parties have been separated long enough for a divorce based on physical separation:

**Is there a covenant marriage?**

First, determine if the client’s marriage was a covenant marriage. Most marriages are not covenant marriages. If there is no covenant marriage, the required separation period is either 365 days or 180 days, as applicable.

Always ask clients whether they have contracted a covenant marriage. Proof that your client has contracted such a marriage can be established by the marriage certificate which will have a declaration of their intent to enter into a covenant marriage under La. R.S. 9:273. If previously married parties have opted into a covenant marriage, this fact can be determined from the marriage certificate. La. R.S. 9:275 requires a notation of the parties’ intent to enter into a covenant marriage on the marriage certificate. A copy of the parties’ signed declaration of intent is attached to the marriage certificate.

**Are there minor children of the marriage?**

Determine whether there are children of the marriage that may require a separation period of at least 365 days instead of 180 days. The issue of whether there are minor children of the marriage is determined on these dates:

- For an article 103 divorce, the date that the divorce petition is filed.
- For an article 102 divorce, when the Rule to Show Cause is filed.


A “child born of the marriage” is a child conceived or born during the marriage of his parents, adopted by them or filiated in the manner provided by law. La. Civ. Code art. 3506(8). In the Author’s opinion, a child who is legitimated by marriage in accordance with La. Civ. Code. art. 195 or La. R.S. 40.46(A), is a child of the marriage.

If there are minor children, is there a protective order or court finding of abuse?

A protective order against domestic abuse, even if by consent motion, will allow spouses with minor children to obtain a divorce based on separation of only 180 days. A finding of physical or sexual abuse will also support divorce on separation of 180 days. La. Civ. Code art. 103.1 (1)(b)-(c).

Was there intent to be divorced?

In determining the separation period for a divorce with or without minor children, most practitioners incorrectly focus only on the physical separation period and overlook the need for also establishing an intent to be divorced. Letters or actions may constitute proof of intent. The “intent” may be questionable if the other spouse works offshore, is in a jail, the military or a hospital. The Supreme Court has held that “evidence that the parties have not resided under the same roof for the statutorily required period, without more, is not sufficient to obtain a divorce under the statute... From the point in time that a party evidences an intention to terminate the marital association, when coupled with actual physical separation, the statutorily required separation period begins to run.”

Did the spouses “reconcile” during the separation period?

An action for divorce is extinguished by the “reconciliation” of the parties. If reconciliation occurs, a divorce suit based on the prior separation period is defeated. Reconciliation is an affirmative defense to a divorce suit.

Reconciliation requires more than isolated incidents of sexual relations, cohabitation on a trial basis or vacations together. It requires both the mutual intent of both parties to reconcile and the actual resumption of living together as husband and wife. Mutual intent is a question of fact determined by the totality of the circumstances.

5.3 WHICH COURTS HAVE JURISDICTION AND VENUE FOR A DIVORCE?

A Louisiana court has jurisdiction to grant a divorce if one party is domiciled in Louisiana. Unlike some states, there is no minimum residency requirement. There is a rebuttable presumption of domicile after six months residency. Domicile is physical presence plus present intent to reside. If your client has been in Louisiana for less than 6 months, ensure that other proof of domicile exists such as: driver’s license, voter’s registration, etc. A service member is considered a domiciliary of Louisiana and the parish of his residence if he has been stationed at a military installation in Louisiana for 6 months and has resided in the parish where the divorce action is filed for at least 90 days prior to the filing of the action. As a general rule, a spouse of a service member should sue for divorce

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4 Adams v. Adams, 408 So.2d 1322, 1327 (La.1982).
6 Walkowiak v. Walkowiak, 749 So.2d 855, 858, n.2 (La. App. 2 Cir. 1999).
7 Millon v. Millon, 352 So.2d 325 (La. App. 4 Cir. 1977)(no reconciliation despite 6 acts of sexual intercourse); Woods v. Woods, 660 So.2d 134 (La. App. 2 Cir. 1995)(cohabitation on a trial basis); Noto v. Noto, 41 So.3d 1175 (La. App. 5 Cir. 2010)(vacation together).
and military pension division in the domicile state of the service member to avoid federal jurisdictional battles under 10 U.S.C. § 1408 and additional litigation expenses. 12

Venue for divorce is jurisdictional and may not be waived. 13 A divorce obtained in a court of improper venue is an absolute nullity. 14 A null divorce can render a second marriage invalid and affect community property and inheritance rights. An action for nullity based on a lack of jurisdictional venue may be brought at any time unless the defendant has acquiesced in the judgment. 15 A verification of the venue facts by the client’s affidavit will help protect you against malpractice for filing a divorce in a court of improper venue.

Venue should be pleaded in the petition. Venue is proper in any of three parishes:

(1) parish where plaintiff is domiciled, or
(2) parish where defendant is domiciled, or
(3) parish of last matrimonial domicile. 16

If several courts have venue, consider which court may be better for resolution of your client’s various claims. Some courts are more expensive than others are, or have more onerous procedures than others have.

Note that, in some cases, there may be jurisdiction and venue in Louisiana for a divorce action, but not ancillary matters such as child custody, child support, spousal support or marital property division. If this is the case, those ancillary matters will generally need to be resolved in another state.

☞ It is wise to double check the domicile of your client – especially in those parishes that overlap or zig-zag. The Author recommends that you include in your petition how long the petitioner has been domiciled in the parish. This forces you to check whether your client has met the requirements of domicile. Have the client verify the facts of venue. Caveat: the domicile rules for service members are very complex.

5.4 SHOULD THE CLIENT FILE FOR A 102 OR 103 DIVORCE?

Generally, an article 103 divorce will be simpler, faster, and cheaper. Both divorces require a petition. But, an article 102 divorce requires the extra step of a Rule to Show Cause when the required separation periods are met. By comparison, in most cases, an article 103 divorce can be obtained by a default judgment.

Factors that may weigh in favor of an article 102 divorce are:

- Domestic violence is involved 17
- Client needs interim relief for support or custody

Note this general rule may be infeasible if the service member is domiciled in a state that does not allow pension division.
14 La. Code Civ. Proc. art. 44, 3941(B); In re Succession of Jones, 6 So.3d 331 (La. App. 3 Cir. 2009). However, a spouse acquiesces in the null divorce judgment if he remarries. Glover v. Glover, 38 So.3d 541 (La. App. 3 Cir. 2010).
17 A domestic violence victim may obtain interim relief for support, custody and use of marital home pursuant to a protective order action under La. R.S. 46: 2131 et seq.
• Client lives with spouse and needs exclusive use of marital home or property
• An article 102 divorce, depending on facts, may extend period for interim spousal support
• Risk of kidnapping and flight—immediate custody order needed
• Child removed from Louisiana and home state jurisdiction needs to be preserved
• An earlier termination of community property regime is sought

Factors that may weigh against an article 102 divorce are:
• Required separation period may be longer than for an article 103 divorce (e.g., a spouse who is close to meeting the separation period for an article 103 divorce will extend the required separation period by filing an article 102 divorce)
• Additional costs for filing and serving the final Rule to Show Cause
• The required service for the final Rule to Show Cause may be expensive or impossible and cause greater delays and costs to client (note: service on out-of-state defendants will require at least 30 days notice and may entail foreign state fees which can’t be waived for paupers)
• If the other spouse is convicted of a felony after the marriage, there may be immediate grounds for an article 103 divorce.

5.5 DIVORCE UNDER CIVIL CODE ARTICLE 102

5.5.1 Overview of article 102 divorces
An article 102 divorce petition may be filed if the client has not been separated long enough for an article 103 divorce. An article 102 divorce may be filed even if the parties are still living together. However, the petition must be personally served on the defendant if the parties still live together. The petitioner may not obtain an article 102 divorce judgment until the required period has elapsed, which is either 180 or 365 days from the service of the original divorce petition or execution of waiver of service. The divorce is obtained by filing a Rule to Show Cause after the required separation periods have elapsed from the divorce petition. The required periods for an article 102 divorce cannot be waived. A divorce suit under article 102 is abandoned (dismissed) if the Rule to Show Cause is not filed within two years of service of the original petition or execution of the waiver of service.

5.5.2 How do I get an article 102 divorce?
The requirements for an article 102 divorce are:
1. A divorce petition
2. Physical separation (without reconciliation) for either 180 or 365 days after service of the divorce petition
3. Physical separation (without reconciliation) for either 180 or 365 days before the final Rule to Show Cause is filed
4. A Rule to Show Cause, with required affidavits, filed within 2 years of the service of the original divorce petition or execution of the waiver of service
5.5.3 Pleading and notice requirements for an article 102 divorce petition

Petitions for divorce under Civil Code article 102 must contain allegations of jurisdiction and venue and that the plaintiff wants a divorce. The article 102 divorce petition must be verified by the plaintiff's affidavit. An attorney's affidavit will not suffice. La. Code Civ. Proc. art. 3957 provides that a defendant may expressly waive service of the article 102 divorce petition and accompanying notice by written waiver executed after the filing of the petition and made a part of the record. If there is such a waiver, the required periods for separation (180 or 365 days) and for abandonment (two years) will run from the date of execution of the waiver.

A notice of the divorce petition, along with certified copy of the divorce petition, must be served on the defendant. If the parties are still living together, the defendant must be personally served. This notice is prepared and signed by the clerk of court.

5.5.4 When does a defendant need to file a response to an article 102 divorce?

If your client is the defendant, an Answer to an article 102 divorce is not necessary. The 102 divorce can only be granted by a Rule to Show Cause which cannot be filed for at least 180 or 365 days after service of the article 102 divorce petition. However, if your client has a lis pendens exception or motion for stay if a prior divorce is pending in another state or parish, she may want to file appropriate responsive pleadings. Affirmative defenses and jurisdictional objections may be asserted at the trial of the Rule to Show Cause.

The standard res judicata rule that a party must raise all causes of action arising out of a transaction or occurrence that is the subject of litigation does not apply to actions for divorce under Civil Code art. 102 or 103, actions for determination of incidental matters such as custody, support or visitation and community property partition. Such claims historically have been assertable after the divorce action has been concluded by judgment. Of course, there are time limitations for the assertion of spousal support claims against the other spouse.

A defendant must file a Reconventional Demand to an article 102 divorce to obtain ancillary relief for child or spousal support where the date of judicial demand governs retroactivity. Also, a defendant may want to reconvene for divorce if she has a claim for a 180 day divorce as a domestic violence victim or because she has grounds for immediate divorce due the plaintiff's felony conviction.

A spouse of a military service member may need to make an appearance in a divorce suit in order to protect her rights to division of a military pension. A divorce judgment that does not reserve the right to partition the community could

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18 This requirement means that an article 102 divorce plaintiff will have to incur the inconvenience of another trip to the office to verify under oath the petition.
20 In some cases, the defendant may have already obtained a divorce judgment from another parish or state. If so, an exception of res judicata may be appropriate.
21 La. Code Civ. Proc. art. 425(B); 1061 (B).
lead to the loss of the spouse’s community share of the service member’s military pension. In Louisiana, a spouse will have a right to part of her spouse’s military pension if certain requirements are met.

5.5.5 Pleading requirements for the Rule to Show Cause to obtain an article 102 divorce

Under La. Code Civ. Proc. art. 3952, the Rule to Show Cause for an article 102 divorce must allege:

1. proper service of the original petition on the defendant,
2. that 180 or 365 days, as applicable, have elapsed since that service, and
3. the spouses have lived separate and apart continuously for the previous 180 or 365 days, as applicable.

The Rule to Show Cause should also state that the parties did not have a covenant marriage, if this is the case, that the parties have not reconciled and whether the parties have minor children at the time the Rule is filed. A verified pleading or affidavit attesting to the fact that the defendant is not a member of the military services of the United States or its allies is also required.

Either party can move for the Rule. The Rule must be verified by an affidavit executed by the mover and proper service made all over again. A party in a 102 divorce action may expressly waive service of the Rule to Show Cause why a divorce should not be granted and the accompanying notice. The waiver must be a written waiver that has to be executed after the filing of the Rule to Show Cause and made part of the record.

Caveat: If your client is the defendant and needs the initial filing date of the 102 divorce for termination of the community, you will need to complete the 102 divorce rather than reconvening for a 103 divorce. How else can you protect community property interests? If an interest in community property is “threatened to be diminished by fraud, fault, neglect”, a judgment decreeing separation of property can be obtained. Consider use of a Civil Code art. 2374 motion or petition if termination of the community regime is important.

5.5.6 Proof of article 102 divorce at Rule to Show Cause

An article 102 divorce requires proof that 180 or 365 days have elapsed from the service of the petition (or written waiver) and that the spouses have lived separate and apart continuously for at least 180 or 365 days prior to the rule to show cause.

These facts may be established by:

1. the divorce petition;
2. proof of service of the divorce petition;

23 In most states, failure to reserve the partition of community or marital property will waive those rights. Thus, even though Louisiana does not require express reservation of partition rights in a divorce judgments, failure to do so could lead to significant loss of property rights if a party or the parties move to other states. See Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408(c)(1).

24 A spouse’s share of the military pension may be up to 50% depending on the length of the marriage and its overlap with the military service. The Sims formula is used to divide a military pension in Louisiana. See Defley v. Defley, 539 So.2d 928 (La. App. 2 Cir. 1989).


26 See Gray v. Gray, 463 So. 2d 14 (La. App. 5 Cir. 1985); Warner v. Warner, 859 So.2d 146 (La. App. 1 Cir. 2003), and La. Civ. Code art. 2375 (C) for retroactivity issues.
3. the Rule to Show Cause and the affidavit required by Code of Civil Procedure art. 3952;
4. the sheriff’s return of service of the rule or waiver of that service; and
5. the mover’s affidavit executed after the filing of the rule, stating that the parties have lived separate and apart continuously for at least 180 or 365 days prior to the filing of the Rule to Show Cause and are still living separate and apart and that the mover now desires to be divorced.\(^{27}\)

Note that an article 102 divorce will be an absolute nullity if the required periods (1) between service of the petition and the filing of the Rule to Show Cause or (2) between the separation date and the filing of the Rule to Show Cause are not met.\(^{28}\)

\(^{27}\)Use a checklist when finalizing the 102 divorce since its requirements are specific and mandatory. See East Baton Rouge Family Court’s Forms G-1 and G-2 for 102 divorces if your court does not have a checklist to ensure compliance with the requirements for a 102 divorce.

5.6 DIVORCE UNDER CIVIL CODE ARTICLE 103

5.6.1 Overview of article 103 divorce

Article 103 contains the “immediate causes for divorce” and the “no fault” cause for divorce based on 180 or 365 days of separation, without reconciliation, as applicable. Except in a covenant marriage, an article 103 divorce shall be granted on the petition of a spouse upon proof that:

1. the spouses have been living separate and apart, without reconciliation, for 180 or 365 days or more from the date the petition is filed; or
2. the other spouse has committed adultery; or
3. the other spouse has committed a felony and sentenced to death or imprisonment at hard labor.

5.6.2 Felony conviction or adultery divorces

An adultery divorce is not practical given the difficult burden of proof.\(^{29}\) As a practical matter, felony conviction is the only immediate way to obtain an article 103 divorce for spouses who have not met the required separation period of 180 or 365 days. A divorce may be granted because of a spouse’s felony conviction even if the conviction is on appeal or the sentence is suspended.\(^{30}\) A guilty plea to a felony is a conviction that will entitle a spouse to an Art. 103(3) immediate divorce.\(^{31}\) A felony conviction that predates the marriage is not cause for an immediate divorce.\(^{32}\)

\(^{29}\)There does not appear to be any statutory basis for the jurisprudential rules on the heightened burden of proof for adultery established by the courts. However, the reality is that these jurisprudential rules make it very difficult to prove adultery for an article 103 divorce. See e.g., Ogea v. Ogea, 378 So.2d 984 (La. App. 3 Cir. 1979)(defendant’s admission insufficient); Poole v. Poole, 7 So.3d 806 (La. App. 3 Cir. 2009)(testimony of defendant’s sexual partner insufficient in this case); but compare, Cannatella v. Cannatella, 91 So.3d 393 (La. App. 5 Cir. 2012)(trial court should have granted adultery divorce based on admissions and investigator’s testimony).
\(^{30}\)Tauzier v. Tauzier, 466 So.2d 565 (La. App. 5 Cir. 1985); Kitcher v. Kitcher, 480 So.2d 494 (La. App. 5 Cir. 1985); Nickels v. Nickels, 347 So.2d 510 (La. App. 2 Cir. 1977).
\(^{31}\)Scheppf v. Scheppf, 430 So.2d 370 (La. App. 3 Cir. 1983).
\(^{32}\)McKee v. McKee, 262 So.2d 111 (La. App. 2 Cir. 1972).
5.6.3 Pleading requirements for an article 103 divorce petition

For a divorce, the petition for an article 103 divorce should allege jurisdiction, venue, domicile of the parties, the grounds for divorce (typically 180 or 365 days of physical separation or a felony conviction), non-reconciliation, lack of covenant marriage, whether or not the parties have minor children of the marriage, and their names. Ancillary matters such as child custody, child support, spousal support, use of marital home, protective orders or injunctions, request for return of personal property and community reservation or partition may also be alleged in the divorce petition.

☞ If your client seeks to obtain a divorce quickly, it may be in her interest to refrain from making any allegations that could incite opposition. If the parties agree on all or most of the issues or your client does not anticipate opposition, file a “plain vanilla” divorce petition. If the defendant does not file an answer, such inaction may permit your client to take up the divorce and the ancillary issues (e.g., joint custody) by default without having to go to court.

☞ It is always a good practice to include the specific issue on which the default is being taken in the Waiver as well as the fact that the defendant will be cast with all court costs. The address of the defendant is necessary since the Clerk of Court will need it to bill the defendant. See Forms.

5.6.4 Procedures to obtain an article 103 divorce judgment

5.6.4.1 If defendant fails to file an answer or responsive pleadings

Many defendants do not answer an article 103 divorce lawsuit. Since the 103 divorce is an ordinary proceeding, issues must be joined in order to finalize it. If they fail to answer, the steps to obtain a default judgment of divorce are:

1. a motion for entry of preliminary default (also called the “judgment of default” or “default judgment”) and
2. if no answer is filed after the preliminary default and “judgment of default”, confirmation of the default judgment by proof of a prima facie after two days, exclusive of holidays, from entry of the “judgment of default.”

Generally, the preliminary default is entered by an ex parte written motion after the expiration of 15 days from service of the petition. In an article 103(1) divorce based on physical separation, if the defendant has executed an affidavit waiving service and legal delays, the preliminary default may be entered on the same date but in the Author’s opinion, should be procedurally after this affidavit is filed. The defendant may execute his affidavit before any notary.

A default judgment may be confirmed and a final divorce judgment entered in a suit for divorce based on physical separation under Civil Code art. 103 (1) even if the suit demands other ancillary or incidental relief. Confirmation of the default judgment may be made after two days, exclusive of legal holidays, from the entry of the default judgment (also called "preliminary default"). However, if the defendant made an appearance of record in the case, then the plaintiff must

send a “notice of the date of entry of the judgment” – I just send a copy of the default judgment to the defendant by certified mail and wait at least seven days, exclusive of legal holidays, before confirming the default judgment. Examples of an “appearance” include: a motion for time to plead, Answer, showed up at the Hearing Officer Conference, or signed a Consent Judgment. An affidavit or certificate of service of this seven days notice by certified mail should be filed into the suit record.

The default judgment may be confirmed by proof of a prima facie case by either (1) an affidavit attesting to the truth of all the factual allegations of the divorce petition or (2) by oral testimony of the plaintiff. Since the court has discretion whether to have a hearing or to allow a 1702(E) confirmation, it is best to check the local rule or with the court beforehand. Any concerns that a judge may have as to the court’s duty to review the best interest factors in custody cases can be addressed by making sure that the petition, prayer, and the affidavit of correctness, contain the relevant best interest factors as well as good cause for not having a custody implementation plan. Confirmation of an article 103(1) divorce by affidavit should include:

1. affidavit attesting to truth of factual allegations of divorce petition
2. two copies of proposed divorce judgment
3. affidavit of non-military service
4. affidavit that there are no minor children of the marriage and the wife is not pregnant
5. affidavit of non-covenant marriage
6. certification of the type of service, date of service, entry date of the preliminary default, and clerk’s certificate that defendant has not filed an answer or other responsive pleadings

Some courts will not allow a self-represented litigant to do a 1702(E) confirmation and will require a prima facie case at a hearing. Courts usually require a checklist or a certification form showing that the above requirements have been met. The affidavit attesting to the truth of the facts in the divorce petition needs to be executed as close as possible to the time when the divorce judgment is filed in order to assure that it is accurate. For example, the parties could have reconciled, opted into a covenant marriage or become pregnant. Some courts may require the testimony of two corroborating witnesses and most will not allow the other spouse to be a corroborating witness. If the affidavit attesting to the truth of the divorce facts is presented to the court, it must render a divorce judgment on the affidavit or direct that a hearing be held on the divorce.

As discussed, many defendants fail to answer the Petition for Divorce. Such is often the case when Support Enforcement Services is already handling the client’s claim for child support. Also, a defendant will often fail to file an answer in cases where custody is undisputed. In such cases, it is often better to defer the setting of a hearing on a Rule for support or other ancillary matters. But, if there are critical issues that need to be addressed immediately, e.g., a protective order, support or use of the family home, a Rule to Show Cause will need to be set.

In many jurisdictions, the delays for answering a petition will expire before the date scheduled for the Rule hearing. Most judges will not permit you to proceed with a confirmation of default for the divorce if the date for the Rule hearing has not passed. Thus, if no ancillary issues (custody, support, etc.) were set for hearing by a Rule to Show Cause, you may be able obtain a default judgment of divorce by oral testimony or the Code of Civil Procedure art. 1702(E) affidavit procedure. Generally, after interviewing your client, you will know whether the lawsuit will be contested or whether your client will benefit from a Rule hearing.

Note, that at least in the Fourth Circuit, the affidavit procedure (C.C.P. art. 1702E) for confirmation of default may not be used for child custody and child support. Confirmation of maiden name and any reservation of community partition rights should be granted in an affidavit procedure for confirmation of a default judgment since they do not require evidence. However, there are some judges who require an oral hearing in all divorce hearings with or without ancillary provisions.

☞ Child support, sole custody, or permanent injunctive relief should require prima facie evidence that supports the relief sought. The use of the Hearing Officer Conference (depending on local court rules), may also require that the ancillary matters are set as a summary proceeding. Some Courts will not allow the ancillary matter of child custody in a divorce to be confirmed without a hearing. Absent an agreement, pleadings, affidavits and evidence must support an award of child custody being made in accordance with the best interest factors of Civil Code art. 133. Byrd v. Byrd, 621 So.2d 124 (La. App. 2 Cir., 1993). However, the Fourth Circuit requires evidence and testimony, rather than affidavits, to prove a prima facie case for purposes of confirming ancillary matters in a default. See Falcon v. Falcon, 929 So.2d 219 (La. App. 4 Cir. 2006).

5.6.4.2 If the defendant or curator files an answer:

If an Answer (does not have to raise an affirmative defense) has been filed, the divorce will have to be tried contradictorily against the defendant or the curator, as applicable. A standard motion for summary judgment may not be used to obtain a divorce judgment. However, there is one limited exception for divorces. A summary judgment or judgment on the pleadings may be granted in an article 103(1) divorce where both parties are represented by counsel, An Answer has been filed, counsel for each party file a written joint stipulation of facts, request for judgment, and sworn verification by each party and a proposed judgment with a certificate that counsel and each party agree to the terms of the judgment.

☞ If a Hearing Officer Conference is set for the ancillary matters together with a Rule to Show Cause before the District Judge, you will not be able to finalize your divorce at the Rule unless the defendant is present at the Rule and joins the plaintiff in waiving rights to service of process, legal delays, and notice of trial. Another way to get the divorce without setting it for trial is to have the defendant – if he/she shows up at the Hearing Officer Conference – execute a waiver for the divorce issue and thus, allowing you to take it up by way of a confirmation of default after a default (also called “preliminary default”) has

39 Falcon v. Falcon, 929 So.2d 219 (La. App. 4 Cir. 2006).
41 If you file a divorce petition that includes ancillary matters over which Louisiana does not have jurisdiction, you should expect the adverse party to file a responsive pleading, such as an exception or motion to dismiss.
been entered. Ask the Hearing Officer to notarize the Affidavit. Otherwise, if the defendant shows up at the Hearing Officer Conference or Rule or makes any appearance, the Code of Civil Procedure art. 1702(A) for confirmation of the default must be complied with.

5.6.4.3 Notice of Divorce Judgment by Default

If the defendant was not personally served with the divorce petition, notice of the judgment of divorce, which was obtained by default, must be served on the defendant by the sheriff. If the defendant was personally served with the divorce petition or the divorce was contested, the notice of judgment shall be mailed by the clerk of court. Long-arm service of non-residents by certified mail or commercial courier qualifies as “personal service” for this notice of judgment rule. The notice of judgment is required to start the 30 day appeal period running. However, notice of judgment is no longer required in article 103(1) divorces (those based on physical separation) when the defendant waived service.

5.7 COVENANT MARRIAGE

“Covenant marriages” are governed by different divorce rules. See La. R.S. 9:272-275, 307-309. You must include in your petition for divorce whether the marriage entered into was/was not a covenant marriage. Few Louisiana citizens enter into such marriages. Therefore, discussion of such marriages will be brief.

A divorce procedure for “covenant marriage” couples is found in La. R.S. 9:307-309. The causes for divorce are (a) adultery, (b) commission of a felony by a spouse, (c) abandonment, (d) physical/sexual abuse of the spouse seeking the divorce or a child of one of the spouses, (e) living separate and apart without reconciliation for a period of two years, or (f) living separate and apart without reconciliation for one year from the date the judgment of separation of bed and board was signed. As a practical matter, the previously repealed cause of action denoted as Separation from Bed and Board has been resurrected in the Covenant Marriage Act. La. R.S. 9:307 (B).

Always ask clients whether they have contracted a covenant marriage. Proof that your client has contracted such a marriage can be established by obtaining a copy of the marriage license which will contain a declaration of their intent to enter into a covenant marriage pursuant to La. R.S. 9:273. If previously married parties have opted into a covenant marriage, this fact can be determined from the marriage certificate. La. R.S. 9:275 requires a notation of the parties’ intent to enter into a covenant marriage on the marriage certificate. A copy of the parties’ signed declaration of intent is attached to the marriage certificate.

5.8 BIGAMOUS MARRIAGE

If a marriage is bigamous, it must be terminated by a petition to annul, not a petition for divorce.

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46 See La. Code Civ. Proc. art. 3942, 2087A, 1974. In most cases, the 30 day appeal period runs from the expiration of the delay period for a motion for new trial.
5.9 NAME CONFIRMATION

While marriage does not change a wife’s name, the divorce judgment can confirm the name of a married woman.48 The confirmation is limited to her name at the time of the marriage, the name of her minor children, or her maiden name without having to comply with R.S. 13:4751 et seq. If it is not confirmed in the judgment, this will create problems when the time comes to change government issued identification cards such as driver’s license, Social Security, etc. See Federal Intelligence Reform and Terrorism Prevention Act of 2004. (Pub. L. 108-458; 12/17/04).

5.10 DEFAULT DIVORCES INVOLVING SERVICE MEMBER OR EX-SERVICE MEMBER

There are some potential risks to the spouse of a service member or ex-service member in taking a default divorce judgment.49 If the court does not meet the federal requirements for jurisdiction, 10 U.S.C. § 1408(c)(4), the spouse may be left with an unenforceable order as to the military pension. If the state that does have jurisdiction does not allow partition, the spouse could be left without a remedy. Failure to expressly reserve jurisdiction over partition of the community may also cause problems for the spouse in the divorce jurisdiction or a foreign jurisdiction. If a service member files for a divorce, his spouse should make an appearance and either request a pension division or challenge jurisdiction.

5.11 CITATION AND SERVICE OF DIVORCE PETITION AND OTHER Pleadings

Citation and service of the divorce petition or service in general may be the most difficult task in many divorces and ancillary matters. Self-represented litigants often struggle with Louisiana rules for service of process and need an attorney’s help. You cannot confirm a default divorce or have a hearing on a Rule for custody, support, etc., unless there is proper service on the other party. Every time a Rule is continued for lack of service, the court costs increase—substantially in some courts.

☞ You should check that the Court has allowed for enough time for any Rule dates set. For example, service on prisoners and non-residents can easily take 45 days or more to complete. A hearing (other than protective orders) cannot be heard unless there is at least 30 days notice to a non-resident. If you need to subpoena third party witnesses for the Rule hearing, be aware that some judges will not enforce a subpoena unless it has been issued 30 days before the hearing.

☞ Service of the citation shall be requested on all named defendants within ninety days (90) of commencement of the action. La. Code Civ. Proc. art. 1201(C). The failure to do so may result in an involuntary dismissal “unless good cause is shown why service could not be requested.” La. Code Civ. Proc. art. 1672(C).

Citation and service of the divorce petition are made as follows. Similar rules apply for service of other pleadings.

5.11.1 Waiver of Citation and Service:

Citation is not required for article 102 divorces and summary proceedings. A defendant may expressly waive citation and service by written waiver. Citation and service of the petition are required for article 103 divorces. For a 103(1) divorce, the waiver must be by affidavit signed and filed after the petition is filed. The defendant must receive a certified copy of the petition. Check local court rules for any requirements for waivers of citation and service. If the matter is truly uncontested (adverse is cooperative), you may be able to get around other time consuming and costly methods of service, e.g., service of prisoners and non-residents.

5.11.2 Personal or Domiciliary Service by the Sheriff:

Service on persons may be personal or domiciliary. Personal service is most commonly made at home (specifically for 102 divorces when the parties are still living together) or work. Domiciliary service requires service on a person of suitable age and discretion who resides in the defendant’s house. Domiciliary service at a defendant’s former home, at a relative’s home or on someone who does not live in his home will be insufficient.

Incarcerated persons are served by personal service on the warden or his designee. The warden or his designee, in turn, must make personal service on the incarcerated person. Proof of service is made by filing the affidavit of the person serving the citation and pleadings on the incarcerated person. The affidavit should indicate that the server was the warden’s designee and that personal service was made. La. Code Civ. Proc. art. 1235.1 allows for an alternative procedure when the warden fails to return the affidavit of personal service. This alternative procedure can be common and the Author recommends that counsel should submit an affidavit to the court detailing the service process if the warden’s affidavit is not forthcoming. Domestic violence perpetrators can be difficult to serve. Therefore, you may want to serve such defendants while they are still in prison. But, to get them out of jail to any hearing on a rule or the merits, may require an order of the Court. See Forms.

If a hearing is required in a case against a prisoner, some judges will require and rely on the plaintiff or mover to supply the “Writ to Secure the Presence of the Defendant” or “Writ of Habeas Corpus Ad Prosequendum” for hearings. When setting court dates (Hearing Officer Conferences, Rules, or Trials) be mindful of the transportation expense involved (set all matters on one day after consulting the judicial law clerk) as some prisons can be across the State. See form provided.

☞ Service of a defendant who is incarcerated in another state, should comply with the same due process safeguards as required by Code of Civ. Procedure art. 1235.1 or use the method for sheriff’s service under the other state’s law. See La. R.S. 13: 3204(A). Call the local legal aid for guidance on their state’s laws

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55 La. Code Civ. Proc. art. 1235.1
56 Johnson v. East Carroll Detention Center, 658 So.2d 724, 727 (La. App. 2 Cir. 1995).
57 See discussion in Domestic Violence Practice in Louisiana, § 3.4.2.10, which argues that some judges’ practice of requiring a party to produce a prisoner is erroneous.
for service of prisoners. Most legal aid clients are paupers. Some sheriffs from other states will graciously honor a Louisiana pauper order. Other states will only honor a pauper order from their state courts, which as a practical matter, will be impossible to obtain.

5.11.3 Certified Mail by Long-Arm Statute

If you know the address of an out-of-state divorce defendant, you must try to serve him by certified mail under the Long-Arm Statute, La. R.S. 13: 3201 et seq., or by a method approved by the law of the non-resident’s state.58

A certified copy of the citation and petition in an article 103 divorce or the notice, petition and rule to show cause in an article 102 divorce is sent by certified mail or commercial courier to the out-of-state defendant by plaintiff’s counsel.59 Many people no longer sign for certified mail. Delivery of process by an authorized commercial courier may have a greater likelihood of success. A defendant’s failure to pick up certified mail delivered to his home does not defeat service.60

It appears that a private process server may also be used to effect long-arm service if appointed by the Louisiana court.61 However, use of a private process server for an out-of-state service may not be economically practical for two reasons (1) the court is limited to appointing Louisiana residents and (2) oral testimony may be required if there is a challenge of the service made by the process server.62 Out-of-state defendants have 30 days, instead of 15 days, to answer a divorce lawsuit. The 30 day delay for taking a default judgment (also called “preliminary default”) does not begin to run until counsel files the required affidavit of service under the Long-Arm Statute into the record.63

For custody cases, service of the custody rule or petition may be made on a non-resident pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), La. R.S. 13: 1808. The UCCJEA allows for service of custody cases in a manner prescribed by Louisiana law for service of process (generally long-arm statute) or by “the law of the state in which service is made.”

☞ The Affidavit of Long-Arm Service should strictly comply with La. R.S. 13: 3205 (1)-(3).64 The person who actually mailed the citation and petition should execute the Affidavit. If your secretary mailed the process, she will need to execute the Affidavit. Make sure that the Affidavit expressly states that a certified copy was mailed or delivered and contains all the information required by subsection of R.S. 3205 under which service was effected. An Affidavit that merely states that the citation and petition were mailed is insufficient since it does not say that a certified copy was mailed.

58 Warren v. Warren, 622 So.2d 864 (La. App. 4 Cir. 1993)(long-arm statute for service of 103 divorce action on non-resident); Esposito v. Esposito, 2007 WL 3227186 (La. App. 1 Cir. 2007)(long-arm statute for service of article 102 divorce).
60 HTS, Inc. v. Seahawk Oil & Gas, Inc., 889 So.2d 442 (La. App. 3 Cir. 2004); Ainsworth v. Ainsworth, 860 So. 2d 164 (La. App. 4 Cir. 2003); Amin v. Bakhatsky, 812 So.2d 12 (La. App. 1 Cir. 2001); McFarland v. Dipel, 756 So. 2d 618 (La. App. 1 Cir. 2000); writ denied 770 So. 2d 349 (La. 2000).
64 For cases where the courts have found that Affidavit of Service did not comply with La. R.S. 13: 3205, see Downey v. Downey, 2011 WL 2119753 (La. App. 1 Cir. 2011); Esposito v. Esposito, 2007 WL 3227186 (La. App. 1 Cir. 2007); Donnelly v. Quatray, 866 So.2d 917 (La. App. 5 Cir. 2004); Corte v. Cash Technologies, Inc., 843 So.2d 1162, 1166 (La. App. 1 Cir. 2003); Rando v. Rando, 722 So.2d 1165 (La. App. 2 Cir. 1998).
5.11.4 Service by Private Process Server

On motion of a party, the court shall appoint a private process server when the sheriff does not make service within 10 days or is unable to make service.\(^{65}\) Proof of service may require oral testimony by the process server and/or an affidavit of service that states the place and method of service as would appear in a sheriff’s return.\(^{66}\) The court is limited to appointing non-party adult Louisiana residents as private process servers.

5.11.5 Service on Curator

If you cannot locate and serve a Louisiana defendant or serve a nonresident defendant by certified mail or other authorized means under the long-arm statute, what are your options? You will have to request appointment of a curator for the defendant under La. Code Civ. Proc. art. 5091 and make service on the curator. Note that you must try to serve a non-resident under the long-arm statute, La. R.S. 13:3201 \textit{et seq.}, before seeking appointment of a curator.\(^{67}\) Some clients will work harder to find an address for their spouse if you advise them as to the additional cost and delays for a curator divorce. A curator divorce can be void if the spouse is not an absentee or his whereabouts are known.

\(^{65}\) In \textit{Peschier v. Peschier}, 419 So.2d 923 (La.1982), the Supreme Court upheld annulment of a curator divorce 17 years after entry of the divorce judgment where the defendant was not an absentee and could have been readily located. Thus, a diligent search that includes: public records, the internet, telephone book, relatives, last known address should be documented in your Motion to Appoint Curator. You should use Westlaw or Google for “people search.” Include language that a diligent search was made. It may be good for your client to verify in the Motion that she has no knowledge of the defendant’s whereabouts and for how long.

A curator may waive citation and accept service of process. Generally, indigents cannot afford the publication fees or the curator’s attorney fees. Many courts will accommodate indigent plaintiffs by appointing a pro bono curator who will not charge attorney fees. However, the curator will expect his newspaper publication fees to be paid.

The divorce is tried contradictorily against the curator.\(^{68}\) Check with the judge’s law clerk as to the level of formality that the judge requires for taking up the divorce. By law, once the Answer has been filed and a reasonable amount of time elapsed (allowing for the curator to place ads, etc.) the matter should be set for trial. If the curator does not want to be present for the trial, ensure that the curator’s Waiver and “Note of Evidence” are in the suit record. The trial of a divorce against a curator usually consists of presenting a prima facie case for divorce by oral testimony as in a confirmation of a default.

While a default can be obtained against the Curator for failure to file an answer, this is usually not encouraged. All courtesies should be accorded to the Curator prior to this drastic action. A default judgment confirmed when the Curator has filed a responsive pleading will be a nullity.

\(^{66}\) La. Code Civ. Proc. art. 1293, which states that service of process “shall be proved like any other fact in the case.”
\(^{67}\) \textit{Randov. Rando}, 722 So.2d 1165 (La. App. 2 Cir. 1998)(service on a curator when plaintiff knows defendant’s out-of-state address violates statute and due process).
\(^{68}\) La. Code Civ. Proc. art. 5091 (B).
Some courts will cast the client with filing costs as well as curator costs – this is against the law. See Jones v. Jones, 297 So.2d 198 (La.1974). While as a practical matter the curator’s fees are usually paid by our clients or from litigation funds, the court costs should be cast to the absentee defendant. In some cases, the ability of the court to order “quasi in rem” decrees (costs) against the defendant who has had no minimum contacts with Louisiana and who has not subjected himself personally to the jurisdiction of the court, will not be possible. See La. Civ. Code art. 9. The requirement that the pauper has to pay for the curator fees is a potential issue for appellate court review. See e.g., Jones v. Jones, supra; Atkins v. Atkins, 2001-583 (La. App. 3 Cir. 2001).

5.12 ANCILLARY OR INCIDENTAL MATTERS TO A DIVORCE

In a divorce action, many ancillary issues may be decided by summary proceeding (rule to show cause) and a Hearing Officer Conference may be mandatory prior to the issue of obtaining the final judgment of divorce. La. Civil Code art. 105. Such issues may include injunctions against disposition or encumbrance of community property (La. R.S. 9:371), injunctions against abuse or harassment (La. R.S. 9:372, 9:372.1, 9:361), custody (La. Civil Code art. 131 et seq.), child support (La. Civil Code art. 141 et seq., La. R.S. 9:315 et seq), interim periodic spousal support (La. Civil Code art. 111 and 112), use and occupancy of the family residence, use of community movables (La. R.S. 9:374), the right to remove personal property from the family residence (La. R.S. 9:373) as well as the right to seek a judgment of separation of property upon proof that the parties have lived separate and apart for 30 days or more. (La. Civil Code art. 2374). Divorce hearings may be conducted in chambers by Local Rule, upon good cause shown, or with the mutual consent of the parties. La. R.S. 9:302.

6. CHILD CUSTODY

6.1 INTRODUCTION

Generally, custody issues are litigated in (1) a divorce suit, (2) a stand alone custody suit or (3) a domestic violence protective order suit. The initial evaluation of a custody case should answer the following questions:

1. Which state and/or courts have jurisdiction and venue?
   Do not make the client wait for an appointment if Louisiana courts in your service area lack jurisdiction or venue. Determine jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and venue under the La. Code of Civil Procedure in the initial screening. Refer the client to the proper jurisdiction if necessary. Jurisdiction to modify another state’s custody determination was narrowed under the UCCJEA, which became effective in 2007.

2. Does the client have standing to seek custody?
   A nonparent without physical custody of the child may lack standing to seek custody in district court. Nonparent physical custodians may sue affirmatively for custody or defend habeas corpus actions.69

69Wood v. Beard, 290 So.2d 675 (La. 1974).
3. **Which custody standard governs?**

The standard for obtaining custody varies depending on the parties and their litigation history.

**Parent v. Parent:** Custody disputes between parents are decided under the “best interest of the children” standard. Joint custody must be awarded to the parents unless there is a “history of family violence” or clear and convincing evidence that the children's best interest requires an award of sole custody. In family violence cases, there is a statutory presumption that no parent who has a “history of family violence” shall be awarded joint or sole custody.

**Parent v. Non-Parent:** The best interest standard does not apply to a custody contest between a parent and a non-parent. Rather, the non-parent must show that parental custody will cause substantial harm to the child. The non-parent’s burden of proof is clear and convincing evidence.

**Modifications:** Modifications of custody decrees (whether considered or non-considered) require a burden of proof that at a minimum, will require a substantial change of circumstances since the prior custody decree before the best interest of the child considerations are applied.

4. **Can the client meet the applicable custody standard?**

To evaluate a client’s legal problem, get as much information as possible from the client. Engage the client in conversation. Find out what is going on with the family. Often, one will discover information helpful to a client just by talking with her. Women seeking a divorce may not volunteer that there has been family violence. Pry a bit. Ask questions, even ones outside the parameters of the particular problem for which you are consulted. Experienced attorneys will listen to what is said and what is not said.

5. **Is there a “history of family violence?”**

If there is a history of family violence, the victim may have a strong case for sole custody and supervised visitation. See La. R.S. § 9:364; see also §5.6.4.2.3, infra, and Domestic Violence Practice in Louisiana, §3.6, supra.

*With experience, an attorney will acquire one of the most important skills in family law practice – what is known as “sixth sense”. Being able to evaluate an applicant’s account of their case, requires knowledge of the law and the ability to zero in on what could make or break the case. All this needs to be done in an expedient but competent manner that still assures that each client gets the consideration she deserves.*

Ask the client about witnesses who can support her version of the case facts. Get their names, addresses and phone numbers. Not only does this provide useful information for future proceedings, it allows you to verify your client’s version of the facts. Find out what the client thinks the other party and his witnesses will say about her. Most experienced attorneys know that the “truth” usually lies somewhere in the middle. It is better to know the facts at the front end than be surprised in court. Likewise, information about the client may be gleaned from the family’s contact with other organizations, i.e., Community Health Clinic, Child

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73 To determine the standard for modification of a custody decree, you will need to determine whether the prior decree was “considered” or “non-considered.” Most consent or stipulated judgments will be “non-considered” decrees.
Protection, Support Enforcement Services, etc. Verify your client’s story with the child’s teachers and counselors. It is better to spend more time during intake or before you accept the client for services, than waste resources on a client whose case has little or no merit.

6.2 THE BEST INTEREST STANDARD

Civil Code art. 132 provides that if the parents do not agree on custody, the court usually awards joint custody. Joint custody must be awarded absent the parties’ consent to sole custody, a history of family violence or clear and convincing evidence that sole custody is in the child’s best interest. Proof of a “history of family violence” will generally preclude any custody award to the abuser.

Civil Code art. 133 allows a custody award to a non-parent only if parental custody would result in substantial harm to the child. In a custody dispute between a parent and non-parent, the best interest standard does not become an issue until there has been a threshold determination that custody to the parent would cause substantial harm to the child. The language of Civil Code art. 133 does not require or allow joint custody with or between non-parents. However, the courts have upheld joint custody to the parent and non-parents where sole custody with the parent would cause substantial harm to the child.

Civil Code art. 134 lists the relevant factors for a court to consider in determining “best interest” in a custody dispute between parents. For a discussion of these factors, see the “How to Try a Custody Case” section.

6.3 PLEADINGS FOR A CUSTODY CLAIM

6.3.1 What pleadings must be filed to bring a claim for custody?

A custody determination may be sought by an original action for custody or by a Rule for Custody within a divorce or paternity lawsuit. An original action for only custody may be started by filing a petition for custody, i.e., a “Petition for Custody: Ordinary Proceeding.” The pleadings caption should be used to “flag” the Court’s attention to treat it as an ordinary proceeding. If there is already a pending ordinary action such as divorce, paternity suit, etc., a Rule for Custody may be filed as a summary proceeding within the ordinary proceeding.

When just a custody action is instituted by a petition for custody, formal service and citation of the petition on the defendant is required (unless defendant signs a waiver). Thereafter, the defendant is required to answer the petition within 15 days. If the defendant does not answer, the plaintiff may move for a default judgment. Confirmation of the default will require proof of prima facie case. If, instead, a custody rule is filed, the court will set a date for hearing of the rule, and the plaintiff must appear and prove her claim for custody at the hearing. The default procedures (reserved for ordinary proceedings) may not be used to obtain a custody judgment that is sought by a custody rule (summary proceeding). Some courts, by Local Rule will require that ancillary matters be first set for a Hearing Officer Conference. It is best to contact the Hearing Officer’s office in the event there is a need to bypass the Conference or to make this request at the time of filing.

74 The court shall order joint custody if the parties’ agreement for another custody arrangement is not in the child’s best interest or there is no clear and convincing evidence to the contrary. La. Civ. Code art. 132.
75 Snowton v. Snowton, 22 So.3d 1111, 1113 (La. App. 4 Cir. 2009).
76 La. R.S. 9: 364 (C).
77 McCormick v. Rider, 27 So.3d 277 (La. 2010); Whitman v. Williams, 6 So.3d 852 (La. App. 3 Cir. 2009); see also Revision Comment (c), La. Civ. Code art. 133 (joint custody between parent and non-parent is not precluded).
6.3.2 How should the custody claim be pleaded in the petition or rule?

Louisiana has “fact pleadings.” Thus, you must specifically plead those facts necessary to obtain the relief requested. Also, in family law matters, you generally cannot get what you do not pray for. If you are seeking sole custody for your client, you must plead specific facts, which if proven, would entitle your client to sole custody. You should pray for sole custody if the client has a case for sole custody and wants to pursue sole custody. Do not simply state that it is in the best interests of the children that your client be awarded sole custody. Rather, state the facts which clearly establish that an award of sole custody to your client is in the children’s best interest. If you seek a modification of custody, you must plead the grounds for modification. Failure to plead a change of circumstances subjects the custody pleading to a no cause of action exception.

An initial custody pleading should allege facts which establish custody jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJEA), La. R.S. 13:1801 et seq., and must attach an Affidavit that provides the information required by La. R.S. 13: 1821(A).

6.4 TRYING A CHILD CUSTODY CASE.

6.4.1 Burden of proof

6.4.1.1 Initial custody determination

First, identify the burden of proof applicable to your particular custody case. If a custody dispute between parents has never been heard by a court, the burden of proof will only be the “best interest of child.” Best interest for domiciliary parent status is determined by the preponderance of the evidence. Best interest for sole custody is governed by the clear and convincing evidence standard. If the case is an initial dispute between parents and non-parents, the burden of proof is substantial harm to the child by clear and convincing evidence.

6.4.1.2 Modification of considered decree

If a court receives evidence of parental fitness, any resulting judgment of permanent custody between parents will be a “considered decree” and subsequent modifications require a heavy burden of proof under the Bergeron standard. In Bergeron v. Bergeron, 492 So. 2d 1193 (La. 1986), the Supreme Court in reiterating jurisprudence constante, articulated the burden of proof necessary to modify a considered decree of “permanent” custody as follows:

When a trial court has made a considered decree of permanent custody, the party seeking a change bears a heavy burden of proving that the continuation of the present custody is so deleterious to the child as to justify modification of the custody decree, or of proving by clear and convincing evidence that the harm likely to be caused by a change in environment is substantially outweighed by its advantages to the child.

While the heavy burden of proof is synonymous with Bergeron, the affirmation by the court of two other rules is often overlooked. These rules are: the change of

79 Griffith v. Latiolais, 48 So.3d 1058 (La. 2010) [sole custody should not be awarded if this relief is not prayed for].
80 Rome v. Bruce, 27 So.3d 885, [La. App. 5 Cir. 2009]; Preuett v. Preuett, 4 So.3d 260, 264 (La. App. 3 Cir. 2009)
82 Trial courts often issue interim custody orders prior to the trial for permanent custody. Modification of an interim custody order is not governed by the Bergeron standard.
circumstances rule and the rule for appellate review where the determination of the trial judge in child custody matters is entitled to great weight, and his discretion will not be disturbed on review in the absence of a clear showing of abuse. Bergeron at 1203. It is from the change of circumstance rule that the rule for the burden of proof for a consent judgment evolved among the circuit courts and as articulated in Hensgens v. Hensgens, 653 So.2d 48 (La. App. 3 Cir. 2005) and recognized later by our supreme court in Evens v. Lungrin, 708 So.2d 731 (La. 1998). The need for the set of rules was summed up by the Bergeron court as follows:

“…more harm is done to children by custody litigation, custody changes, and interparental conflict, than by such factors as the custodial parent’s post divorce amours, remarriage, and residential changes, which more often precipitate custody battles under liberal custody modification rules than conduct that is obviously harmful to the child, such as abuse or serious neglect, which justifies intervention to protect the child....” 492 So.2d at 1199.

The Bergeron heavy burden of proof is difficult to overcome. As recently noted by the Supreme Court, Bergeron is applied sparingly to change considered custody decrees and is reserved for the most egregious offenses such as sexual molestation and physical abuse.84

For other examples of what constitutes a change in circumstances, see Sibernagel v. Sibernagel, 65 So.3d 724, 728 (La. App. 5 Cir. 2011) (long drive between parents’ homes no longer manageable); Lemoine v. Lemoine, 27 So.3d 1062 (La. App. 3 Cir. 2009) (exacerbation of allergies by smoking and dogs was a change of circumstance); Beene v. Beene, 997 So. 2d 169 (La. App. 2 Cir. 2008) (impact on child’s emotional welfare from domestic violence against mother by her subsequent ex-husband); Kyle v. Leeth, 727 So. 2d 497 (La. App. 1 Cir. 1998) (absence of single mother from child’s home 75% of time was not a change of circumstance).

The courts have applied Bergeron to a parent’s motion to modify a considered decree of permanent custody to a non-parent.85 Bergeron does not apply to a temporary custody award to a non-parent.86

6.4.1.3 Modification of consent judgment

A judgment reached by consent is a “stipulated judgment” and not a considered decree within the meaning of Bergeron. Therefore, modifications of consent judgments generally will not be governed by the Bergeron standard. Instead, modification of the consent judgment will only require proof of a material change in circumstances and the proposed modification is in the child’s best interest. See Evens v. Lungrin, 708 So.2d 731 (La. 1998). In some circuits, the parties may stipulate in a consent judgment to the application of the higher Bergeron burden of proof for custody modification.87 The circuits are also split as to whether the parties

84 Gray v. Gray, 65 So.2d 1247, 1261, n.16 (La. 2011). Gray found that unauthorized relocation to another state did not meet the Bergeron standard. There was no evidence that the relocation had a detrimental effect on the child.
85 See e.g., Bragg v. Horne, 764 So.2d 1177 (La. App. 2 Cir. 2000); Noe v. Noe, 640 So.2d 537 (La. App. 3 Cir. 1994); Miller v. Andrusko, 640 So.2d 368 (La. App. 1 Cir. 1994); Sheppard v. Hood, 605 So.2d 708 (La. App. 3 Cir. 1992).
86 Pounders v. Rouse, 528 So.2d 672 (La. App. 2 Cir. 1988).
87 Compare Adams v. Adams, 899 So.2d 726 (La. App. 2 Cir. 2005)(parties may stipulate to Bergeron for visitation); Reid v. Reid, 2011 WL 2120057 (La. App. 1 Cir. 2011)(trial court held that consent agreement for application of Bergeron to custody is enforceable) with Rodriguez v. Wyatt, 102 So.3d 109, 11-82, (La. App. 5 Cir. 2011)(stipulation that custody governed by Bergeron standard invalid absent a considered decree).
may stipulate in a consent judgment to a standard lower than the material change of circumstances recognized in Evans. 88 Note that a provision in a consent judgment stating that the custody arrangement may be reviewed in the future does not necessarily make the judgment an interlocutory or interim custody judgment. 89

Sometimes, a consent judgment may be a “considered decree.” In Cherry v. Cherry, 894 So.2d 1208 (La. App. 4 Cir. 2005), the court found that a consent judgment entered after 3 days of trial testimony was a “considered” decree which required the Bergeron burden of proof for modification. However, in Poole v. Poole, 926 So. 2d 60 (La. App. 2 Cir. 2006), another court found that a consent judgment entered after the second day of trial was a stipulated judgment and not “considered decree” and, thus, governed by the Evans “material change in circumstances” test rather than the Bergeron test. 90

The courts have struggled with the standard for a parent to modify a stipulated custody award to a non-parent. Some courts apply the Evans material change of circumstances test. 91 Other courts have required the non-parent to prove that parental custody would cause substantial harm to the child. 92 The conflict in the jurisprudence is reviewed in Jones v. Coleman, 18 So.3d 153 (La. App. 2 Cir. 2009). In Jones, the Second Circuit found that the considered vs. non-considered decree analysis of Evans and Bergeron should not apply to a parent’s motion to modify a non-parent’s custody award. Instead, the Second Circuit held that the non-parent who seeks to modify a stipulated custody judgment to a non-parent must show (1) his rehabilitation eliminates the “substantial harm” threat to the child at the time of the initial judgment and (2) the adequate environment in which the child was placed with the non-parent has materially changed.

What is the burden of proof if a non-parent seeks to modify a custody award to a parent? In Matter of Landrum, 704 So.2d 872 (La. App. 3 Cir. 1997), the court held that when the prior decree awarded joint custody to a parent and non-parent, the Civil Code art. 133 substantial harm burden of proof does not apply. However, Landrum required the non-parent, who was a joint custodian, to prove a material change of circumstances.

☞ Frequently, both trial and appellate courts get swayed by prior facts and concerns about the child’s safety without drawing a line that modification allegations and concerns have to be for events after the prior decree was rendered. Be aware to object or separate the two prong application of the Bergeron and Evans tests for modification.

6.4.2 Settlement and Pre-Trial Preparation

6.4.2.1 Consider settlement

An attorney should never try a custody case without first pursuing settlement. Spend time with your client to insure that she understands that whatever

88 The First Circuit in Perkins v. Perkins, 747 So. 2d 785 (La. App. 1 Cir. 1999) and the Third Circuit in Hensgens v. Hensgens, 653 So. 2d 48, 49 (La. App. 3 Cir. 1995), do not allow it in light of the Evans rule that repeated custody litigation is harmful to minor children. On the other hand, the Fifth Circuit in Ponzé v. Ponzé, 614 So. 2d 720 (La. App. 5 Cir. 1993) writ denied, 617 So.2d 941 (La. 1993), allowed it.
89 Silbernagel v. Sibernagel, 65 So.3d 724, 728 (La. App. 5 Cir. 2011).
90 See also, LeBlanc v. LeBlanc, 953 So.2d 115 (La. App. 3 Cir. 2007)(consent judgment entered on pleadings and written stipulations is not a "considered decree").
91 Dalme v. Dalme, 21 So.3d 477 (La. App. 3 Cir. 2009); Miller v. Andrasko, 640 So.2d 368 (La. App. 1 Cir. 1994).
92 Cutts v. Cutts, 931 So.2d 467 (La. App. 3 Cir. 2006); Bracy v. Bracy, 743 So.2d 930 (La. App. 2 Cir. 1999). But, Bracy is no longer followed by the Second Circuit.
result is truly in the children’s best interests will ultimately also end up being in
the parents’ best interest. The client also faces the risk of having a stranger, the
judge, decide what is in the children’s best interest and the result may be contrary
to the children’s best interest.

Encourage your clients to be reasonable. Turn down, not up, the heat
between the parties. You will not only become a better “family” lawyer, but a bet-
ter human being. If appropriate, recommend mediation as an alternative method
of settling disputes. Let your “word be your bond.”

In evaluating your client’s case, do not make the mistake of only believing
your client’s version of the facts. There are always two sides to every story.
Respect the objectives and concerns of both parties. The practice of family law is
not so much about winning or losing. Rather, it is doing as little damage as possible
to children who are in a difficult, often traumatic, situation not of their making.

6.4.2.2 Evaluate best interest under Civil Code art. 134 factors

After identifying the applicable burden of proof, review the 12 factors for
determination of the child’s best interest in Civil Code art. 134 to prepare your
case. The court is required to consider and weigh these factors based on the evi-
dence presented. These factors for custody determinations should provide you
with an outline for your case preparation. When interviewing your client regarding
a possible custody action, refer to these 12 factors. Question your client and
his/her witnesses on each factor and identify documentary evidence that supports
each factor in your client’s favor.

6.4.2.3 Screen for “history of family violence”

It is critical to identify whether there is a “history of family violence” against
your client. If there is, she will have a strong case for sole custody. If there is a
history of family violence, R.S 9: 364, not Civil Code art. 134, will govern the cus-
tody determination. Under La. R.S. 9: 364 (C), a history of family violence m-
dates that the court award sole custody to the victim. La. R.S. 9: 364 creates a
very high bar for the abuser to get any custodial rights other than visitation. After
proving completion of a treatment program and freedom from substance abuse,
the abuser must still prove that the child’s best interest requires his participation
as a custodial parent because the other parent has abandoned the child, suffers
from mental illness, substance abuse or “such other circumstances” which affect
the child’s best interest. The phrase, “such other circumstances” refers to the
preceding statutory terms in R.S. 9:364(C), which all involve circumstances on
the magnitude of parental unfitness. Thus, under the rule of ejusdem generis, “such
other circumstances” must be things similar to the preceding terms, “parental
unfitness…. ” The term, “such other circumstances” must be more than the best
interest standard.

Many family violence victims are traumatized and intimidated. At an initial
interview, they may tell you that they only want joint custody. As attorneys, we
must respect the client’s objective. However, many victims will later change their
minds and want sole custody. When they change their mind, it may be too late to

93 Molony v. Harris, 60 So.3d 70 (La. App. 4 Cir. 2011).
94 Cf., Hicks v. Hicks, 733 So.2d 1261, 1266 (La. App. 3 Cir. 1999).
95 Under the statutory construction rule of ejusdem generis, general words are restricted to a sense analogous to the less
general words. Pumphrey v. City of New Orleans, 925 So.2d 1202, 1211 (La. 2006).
amend the petition and it will require more filing fees and delay in the litigation. They may not remember that you told them about their right to sole custody. It is important to discuss with the client the advantages of sole custody. If they decide they only want joint custody, you should have them sign a statement acknowledging that you advised them of their right to sole custody and the various benefits of sole custody.\textsuperscript{96} It is well known that many abusers use custody litigation to continue their harassment of their victim.

6.4.3 Witnesses and documentary evidence

In many jurisdictions, teachers, principals or school counselors are persuasive witnesses. Our courts are invariably persuaded by disinterested third parties. Certainly, if a child is doing well in school and his teacher can testify that your client is involved in the child’s school activities and work, your client has a very good chance of being successful in court. Ask your client about his child’s school performance and school activities. Gather the names, phone numbers and addresses of potential witnesses. Note the specific areas of their anticipated testimony and how it relates to the Civil Code art. 134 factors. Also, obtain documentary evidence that supports your client’s case.

In child custody matters, the rules of evidence can be relaxed. See La. Code of Evidence art. 1101. Nonetheless, the judge may only allow proper evidence in order to assure fairness. Do not withhold testimony or documents you would like the court to hear or view just because they might be inadmissible under the normal rules in the Evidence Code. Submit to the court that the evidence is relevant, probative and admissible under the Code of Evidence art. 1101. Sharing such “improper” evidence in pre-trial scheduling orders (La. Code Civ. Proc. art. 1551) or discovery and giving an opportunity for the other side to refute it, bolsters your argument to the court for an art. 1101 admission of evidence.

Social media, particularly Facebook, have become a fertile source of evidence for custody litigation. Warn your client against the use of social media during custody litigation. Postings on Facebook, MySpace, Twitter and other social media may be discovered by the opposing party and used as evidence.\textsuperscript{97}

\textsuperscript{96} Wong v. Hoffman, 973 So.2d 4 (La. App. 4 Cir. 2007)(malpractice claim for advising client to agree to joint custody when there was physical abuse).

\textsuperscript{97} Olivier v. Olivier, 81 So.3d 22 (La. App.1 Cir. 2011).
parties may hire their own expert witnesses. Review each aspect of the expert’s anticipated testimony with him. Suggest areas of inquiry that opposing counsel may pursue in cross-examination. Be sure that you are both on the same page. The test for qualifying an expert is whether the expert has specialized knowledge, which can assist the court in understanding the evidence or in determining a fact in issue. La. Code of Evidence art. 702. Anticipate Daubert challenges to witnesses. If you are using a psychologist who has administered the MMPI-2 to the parties and/or the children, a good article to review is contained in the American Journal of Family Law, Vol. 10, 1-11 (1996) entitled, “The MMPI-2 in Child Custody Evaluations,” by Marc J. Ackerman, Ph.D. A good resource for cross examination of mental health professionals is Jay Ziskin’s Coping with Psychiatric and Psychological Testimony (Law and Psychology Press).


6.4.4 Civil Code art. 134 custody factors

You should know the custody factors upon which your judge places greater emphasis. There is a truism that “knowing the judge is better than knowing the law.” Therefore, it behooves an attorney to know what a specific judge wants in the way of testimony and evidence. However, the judge shall consider all relevant factors in determining the best interest of the child. It is legal error on the part of the court if the court’s decision does not articulate these or other factors relied upon. The factors provided by Civil Code art. 134 are:

Factor #1: The love, affection, and other emotional ties between each party and the child.

This factor often ties into Factor #12, prior responsibility for care of child. Evidence and testimony regarding the child’s relationship to your client should be presented. Witnesses can testify as to the character and quality of the interaction between the child and the parent based upon their personal observations. Review La. Code of Evidence art. 701 for opinion testimony by lay witnesses.

Factor #2: The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child.

Testimony by teachers can be very helpful to your case. Also, our society values regular church attendance. If a party is active in his church, this information should be presented to the court, particularly, if the child is also involved in church activities. Once again, know your judge. Church attendance may be more important to some judges than others.

Factor #3: The capacity and disposition of each party to provide the child with food, clothing, medical care and other material needs.

Our courts, as a general rule, do not decide custody based on a parent’s wealth. However, if a parent spends his available income on himself or frivolously at the expense of meeting the chil-
dren’s needs, this information should be presented to the court. Most judges are swayed by prompt and adequate medical treatment and care provided to a child – especially a child who has special medical needs.

Factor #4: The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.

This is a strong factor. See Hobbs v. Hobbs 962 So. 2d 1148 (La.App. 2 Cir 2007); Lee v. Lee, 766 So. 2d 723 (La. App. 2 Cir. 2000).

Factor #5: The permanence, as a family unit, of the existing or proposed custodial home or homes.

This factor relates to the desire for stability and continuity in a child’s living environment. Thus, evidence regarding the length of time the child has been in one place, accessibility to extended family members, and the quality and safety of the child’s neighborhood are important to a custody case. A parent with a revolving door of significant others will be disadvantaged. Also, a parent’s frequent moves that disrupt the child’s education and social life should be brought out. Ask your client how long he has lived at his current address and where he has lived over the previous two years. Inquire about the residence(s) of the opposing party. Most judges will have concerns about a parent that has been moving from place to place.

Factor #6: The moral fitness of each party insofar as it affects the welfare of the child.

When evaluating the moral fitness of the parents, the primary consideration is the child’s welfare. Thus, our courts have upheld custody awards to a mother whose past adulterous behavior did not have a detrimental effect on the children.100 The focus is on the detrimental effect of the parent’s illicit relationship on the child.101 An award of custody is not a tool to regulate or punish human behavior. Its only object is the best interest of the child.102 However, some courts have considered extramarital affairs in evaluating moral fitness.103 One court has refused to modify a consent judgment provision that prohibited overnight visitation by a member of the opposite sex finding that the Evans standard for modification was not met.104

In Montgomery v. Marcantal, 591 So. 2d 1272 (La. App. 3 Cir. 1991), the court stated: “The moral fitness of the parties is only one of the eleven factors to be considered…A parent’s actions and attitudes toward sex outside of the marriage are but one aspect of moral fitness.” Noting that the girlfriend had no negative impact on the

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100 Cleeton v. Cleeton, 383 So. 2d 1231 (La.1980); Shivers v. Shivers, 16 So.3d 500 (La. App. 2 Cir. 2009); Lake v. Robertson, 452 So.2d 376 (La. App. 3 Cir. 1984). This also holds true for continuing immorality that does not harm the child.

101 Montgomery v. Marcantal, 591 So. 2d 1272 (La. App. 3 Cir. 1991); Peyon v. Peyton, 457 So. 2d 321 (La. App. 2 Cir. 1984).

102 Griffith v. Latiolais, 48 So.3d 1058, 1070 (La. 2010); see also Gray v. Gray, 65 So.3d 1247, 1261 (La. 2011)(child custody should not be changed to punish a parent for past conduct that has no detrimental effect on the child).

103 Crowson v. Crowson, 742 So.2d 107 (La. App. 2 Cir. 1999).

104 Kingston v. Kingston, 80 So.3d 774 (La. App. 1 Cir. 2011)(reversed trial court order granting modification because modification of restriction on overnight visitation not in children’s best interest).
child and was an accepted member of the family, the court continued, “We recognize that in today’s society, conduct which would once have been scandalous is acceptable or perhaps even the norm... We are no longer willing to speculate on such matters.” The Supreme Court has repeatedly held that custody determinations should not be made to regulate or punish a parent’s behavior.

The courts have not used a parent’s homosexuality or a homosexual relationship to deny custody or domiciliary parent status if there was no detrimental effect on the child.105 Another court, has articulated a standard when evaluating such cases. Peyton v. Peyton, 457 So. 2d 321 (La. App. 2 Cir. 1984) involved a gay parent. In Peyton, the court determined that there are four factors to consider in a sexual lifestyle case:

- Is the child aware of the relationship?
- Has sex play occurred in the child’s presence?
- Is the sexual conduct notorious, bringing embarrassment to the child?
- What effect has the conduct had on family home life?

On the other hand, a court has found that an award of primary custody to a gay parent who is “openly living” with her partner, is rarely in the child’s best interest.106

Factor # 7: The mental and physical health of each party.

This is a strong factor. La. R.S. 9:331 provides that for good cause shown, the court may order mental health evaluations of the parties, the child, or all of the family to be conducted by a qualified mental health care provider selected by the parties or the court. In Matthews v. Matthews, 633 So.2d 342 (La. App. 1 Cir. 1993), the trial court was reversed for denying joint custody based solely on the opinion of a single doctor. The court may assess the costs of the evaluations as it determines is equitable. La. R. S. 9:331.1 provides that for good cause shown, after a hearing, a party may be ordered to submit to drug testing.

Factor # 8: The home, school, and community history of the child.

Evidence and testimony regarding the child’s involvement in school and extracurricular activities can be relevant to the issue of custody. For example, the circle of friends whom the child may have, the activities in which the child has participated, clubs of which the child is a member, exhibit to the court the child’s connection to his current custodial placement. A failure to involve the child in age and gender appropriate activities can be used against a parent. Most judges are swayed by how the child is doing in school and which parent is responsible for the performance.

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106 Scott v. Scott, 665 So. 2d 760 (La. App. 1 Cir. 1995).
Factor # 9: The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.

Perhaps, the least persuasive art. 134 custody factor, particularly, when the child is under 14 years of age, is the child’s preference. Courts take notice of the fact that the parent who can promise the children the most things often secures the children’s preference. Thus, unless the child is a teenager, who expresses a distinct preference and the court can evaluate the basis for such preference, this factor is not given much probative value. The jurisprudence has held that a child’s preference alone is insufficient to change custody.\textsuperscript{107}

Often, a parent will be convinced that the children’s preference will determine the outcome of the case. Consequently, parents begin an emotional tug of war with the children in the middle. It is up to the attorney to provide sound legal guidance in such situations. Thus, an attorney should think long and hard before hauling the children up to the courthouse and placing them in the middle of an emotionally charged, hotly contested custody dispute. Be sure that there is extremely good reason to do so. I would caution the attorney who does not have the child for a client, against interviewing minor child(ren) or preparing the child to testify. If such a decision is made, have the children situated away from the courthouse on standby until such time as their testimony is required. A person’s age alone, is not the test of whether that person shall be allowed to appear and present testimony. Rather, the test is whether that person has “proper understanding.” Whether the minor child has proper understanding, such that he will be allowed to testify, is a matter within the trial judge’s discretion.\textsuperscript{108}

\textsuperscript{107} See Watermeier v. Watermeier, 462 So.2d 1272 (La. App. 5 Cir. 1985) for the procedure that should be followed when a court interviews children. See also Weaver v. Weaver, 824 So.2d 438 (La. App. 3 Cir. 2002), where the Court reiterated that while counsel for the parties can stipulate to their absence during the testimonial taking by the judge in chambers, the waiver of the recordation of testimony is not permitted.

Factor # 10: The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party.

To many judges, this factor is of tremendous importance in determining the proper custodial placement of children. In fact, some judges have modified custody primarily due to the misconduct of the custodial parent and his attempt to undermine the child’s love and affection for the non-custodial parent. Our courts consider that changing custody from a non-cooperative, disruptive custodial parent to a blameless non-custodial parent can most surely be in the child’s best interest.

This factor presents the opportunity for counsel to discuss with his client the importance of co-parenting. Referring your client to

\textsuperscript{107} Jones v. Jones, 63 So.3d 1074 (La. App. 2 Cir. 2011); Thibodeaux v. O’Quain, 33 So.3d 1008 (La. App. 3 Cir. 2010).

a cooperative parenting program contemporaneously with or shortly after instituting an original custody action may provide you with a strategic advantage. Certainly, the information provided to your client through such a program can be helpful to the family and to your successful management of the case. At the very least, your client will be perceived by the court as positive and proactive.

Cases which discuss those problems arising when parties fail to cooperate include: *Angelette v. Callais*, 68 So.3d 1122 (La. App. 1 Cir. 2011) (no statutory requirement existed requiring a court to order mediation where parties cannot reach agreement on their own); *Thibodeaux v. O’Quain*, 33 So.3d 1008, (La.App. 3 Cir.2010) (“deliberate and willful alienation” of step-children by mother has a bearing on the weight given to this factor in the best interest analysis of her biological child).

**Factor # 11: The distance between the respective residences of the parties.**

In *Stewart v. Stewart*, 525 So. 2d 218 (La. App. 1 Cir. 1988) the court commented,

“While a great distance between the parents is not an absolute bar to joint custody, in this case the distance coupled with the animosity between the parties is sufficient to rebut the presumption that joint custody is in the best interest of the child.” *Stewart* was decided prior to the 1994 revision of Civil Code art. 133 which eliminated the presumption of joint custody. *See also Lachney v. Lachney*, 446 So. 2d 923 (La. App. 3 Cir. 1984) wherein the court concluded that a joint custody arrangement was unworkable insofar as one party resided in South Carolina and the other in Louisiana.

**Factor # 12: The responsibility for care and rearing of the child previously exercised by each party.**

This factor was added in 1994 to recognize what attorneys previously had always stressed in their case, that is, who has been the primary caretaker of the child. It is a strong factor for the custody determination. Thus, when meeting with your client, you should be concerned with your client’s history of caring for the child. In this regard, one should inquire as to who has been primarily responsible for such day to day activities as changing diapers, preparing meals, washing clothes, obtaining immunizations and medical and dental care, transporting the child to and from activities, disciplining the child, getting the child ready for bed, providing assistance with homework, etc. This has always been a very important consideration, despite being initially omitted from Article 134.

The importance placed upon the “primary” parent by our courts and legislature has been criticized. Psychologist, R.A. Thompson, observed: Basic maintenance tasks like meal preparation, dressing, bathing, and chauffeuring can be readily assumed by either parent regardless of the level of his or her predivorce responsibility for

(327)
these concerns. Many of these responsibilities are activities done for the child rather than with the child. The focus of a custody inquiry should properly be the meaning and significance of each parent’s relationship with the child. R.A. Thompson, *The Role of the Father After Divorce, The Future of Children*, 4, 210-35 (1994).

Such critics contend that the emphasis on the primary caretaker ignores the quality of the relationship between the child and the primary caretaker in favor of counting hours and rewarding many repetitive, concrete behaviors. Further in accordance with this line of thinking, critics contend that the most important emotional and interactive behaviors promoting children’s development and psychological, social, and academic adjustment, such as love, acceptance, respect, encouragement of autonomy, learning, and self-esteem, moral guidance, and absence of abusive interactions are not considered. *See* Kelly, J.B., *The Determination of Child Custody, The Future of Children*, 4, 121-42 (1994).

**Factor #13: Implicitly, the “catch-all” for any other factor(s) not addressed in Civil Code art. 134.**

6.4.5 **Joint Custody Implementation Plan (JCIP)**

If joint custody is awarded, *unless there is good cause*, a Joint Custody Implementation Plan (JCIP) must be submitted to the court. La. R.S. 9: 335. This requirement has to be addressed even in cases where an uncontested divorce in the nature of a 1702(E) or without a court hearing, is sought. How do you get around the JCIP when the defendant will not show up or file an answer? You should plead that good cause exists where the defendant is an absentee, incarcerated, out of state and the long arm statute is utilized, or where he has just been marginally (few visits a year) involved in the lives of the children. These facts should be crafted in your petition, prayer, affidavit of correctness, and the final judgment in support of a joint custody decree that contains the language of: “visitation as agreed to between the parties.”

Otherwise, the minimum requirements to qualify as an implementation order include: parental time periods for physical custody and the allocation of legal authority and responsibility of the parents. Unless the parties agree otherwise or good cause exists not to, one parent should be named as the domiciliary parent. Before the implementation plan is presented to the court for review and approval, it is important to know if the parents have discussed a shared custody arrangement with their children, if such an arrangement is practical. Parents, all too often, do not discuss their plans for shared custody with those family members most affected – the children. Parents may agree to a 50-50 joint custody shared arrangement because it suits their needs and schedules even though the children may absolutely hate such an arrangement. Get your client to check with the children about the proposed plans so that the attorney can provide guidance in shaping a plan that fits the family’s needs. Another recent development with custody plans is the non-designation of a domiciliary parent or designating co-domiciliary parents and close to a 50:50 shared physical custody plan (at least on paper). This shared plan would trigger Obligation Worksheet B and thus, a lower child support setting for the parent with the greater income. On good cause factors
dealing with the domiciliary status, See Griffith v. Latiolais, 48 So.3d 1058 (La. 2010) (trial court’s finding of good cause not to name domiciliary parent was reversed. Five years had passed since custody suit was filed, mother was making all decisions relative to child before suit was filed, and trial testimony indicated she was best suited for role). Wolfe v. Hanson, 991 So.2d 13 (La. App. 1 Cir. 2008), writ denied 983 So.2d 1292 (La.2008) (domiciliary parent should be named in a joint custody implementation plan where it is clear that the parents will likely disagree on important decisions about the children, such as recreational activity, school issues and discipline).

An example of a standard joint custody plan is provided. See below in “Other Helpful Forms”. It is imperative that all the parties sign off on the plan (making it an authentic act is not a bad idea) as it evidences the basis for an extrajudicial agreement between the parties.

☞ The JCIP by itself is not the judgment and the judgment must incorporate the JCIP. Rather than having two separate documents, it is okay to craft the judgment in such a manner so that the judgment and the JCIP are the same document.

☞ There are different forms of agreements. A stipulation in “open court” – where the court is conducting hearings and the judge is on the bench - has the effect of an approved judgment of the Court and is effective at the conclusion of that approval. Prompting the judge to “swear the parties in and to have them acquiesce to the agreement” that has been read into the record is always good practice. A contempt on violation(s) of this stipulated judgment (even though a written one has not been presented and signed) is permissible. Our law gives effect to the parties’ oral stipulation when it is “recited in open court and susceptible of being transcribed from the record of the proceedings.” See Melanson v. Melanson, 652 So.2d 114 (La.App. 5 Cir. 1995); McIntyre v. Becker, 918 So.2d 40 (La. App. 4 Cir.2005); La. Civ. Code art 3072.

But, many trial judges will not consider a contempt motion unless the consent judgment is reduced to writing. An extrajudicial agreement (outside open court) needs to be in writing and signed by all parties involved (attorneys included – if applicable). I will have the signature line of the pro se opposing party drawn up requiring that it be notarized (and not by me or my law firm). The agreement has to be approved and signed by the Court before it is adopted as the judgment of the Court and for it to be effective.

6.4.6 Custody to non-parents under La. Civil Code Art. 133

The burden of proof for a non-parent to obtain custody is much higher than the best interest standard that governs parental custody disputes. A parent has a paramount right to custody which can only be forfeited for compelling reasons. Wood v. Beard, 290 So.2d 675 (La. 1974). A non-parent must establish that the award of custody to “either parent would result in substantial harm to the child.” La. Civ. Code art. 133. The short-term distress of returning a child to a parent does not constitute the severe detriment required for a custody award to non-parents. Lewis v. Taylor, 554 So.2d 163 (La. App. 2 Cir. 1989) writ denied 554 So.2d 1237. Furthermore, a parent’s custodial rights should not be defeated by a non-parent’s litigation delays to withhold a child. State v. Weber, 161 So.2d 759, 766 (La. 1964). A parent’s poverty is not a reason to deny her custody. Creed v. Creed, 647 So.2d 1362 (La. App. 3 Cir. 1994).
If custody to the parents is denied, third parties with whom the child has lived in a wholesome and stable environment are preferred. However, if such a placement is not available, custody of the child may be awarded to a non-parent who meets both this higher burden of proof and can provide a stable and adequate environment for the child. Joint custody is not required. However, the court has discretion to order joint custody between a parent and non-parent.

If an illegitimate child’s mother dies before the father has acknowledged paternity, Civil Code art. 256 states that a court “shall give first consideration to appointment as tutor either of her parents or siblings who survive her, and secondly, the father, always taking into consideration the best interests of the child.” La. Code Civ. Proc. art. 4261 provides that the tutor shall have custody of the minor. See also In re Bagues, 236 So.2d 665 (La. App. 2 Cir. 1970). Thus, Civil Code art. 256 and Code of Civil Procedure art. 4261 combine to give a preference to the child’s maternal grandparents, uncles and aunts in the unique situation where an illegitimate child’s mother dies before his father acknowledges paternity.

Cases discussing parent vs. non-parent custody disputes include:

Gill v. Bennett, 82 So.3d 383 (La. App. 3 Cir. 2011) (grandmother was not entitled to custody of child born out of wedlock, even though she had acted as child’s primary caretaker for a period of time and had been afforded status as child’s permanent guardian in an Indiana court prior to the child’s relocation to Louisiana, absent a showing that an award of custody to mother and father would resulted in substantial harm to the child). Rupert v. Swinford, 671 So. 2d 502 (La. App. 1 Cir. 1995) (record supported finding that award of sole custody of child to father would cause substantial harm to child, and thus, trial court’s award of joint custody of father and maternal grandmother was not abuse of discretion, where there was testimony of father’s drug use, child had very close relationship with maternal grandmother with whom he had lived off and on for his entire life, and there was testimony that child had no regular meal times and kept late hours when staying with father). McKinley v. McKinley, 631 So.2d 45 (La. App. 2 Cir. 1994); In the Matter of Landrum, 704 So. 2d 872 (La. App. 3 Cir. 1997); Dalferes v. Dalferes, 724 So. 2d 805 (La. App. 4 Cir. 1998).

In re Melancon, 62 So.3d 759 (La. App. 1 Cir. 2010), the Court held that the nonparent failed to allege a cause of action under Civil Code art. 133 that allowed for an award of custody to a person other than a parent. Parent could not consent to joint custody with a non-parent. “In essence, the law today simply does not permit a parent to share custody with a non-parent without a showing of substantial harm to the child.” Id. at 764.

6.5 **KINSHIP CARE SUBSIDY PROGRAM (KCSP) PAYMENTS**

KCSP provides cash assistance of $222 per month for each eligible child who resides with a qualified relative other than a parent. The child must live in the home of one of the following qualified relatives (either biological or adoptive): grandfather or grandmother (extends to great-great-great), brother or sister (including half), uncle or aunt (extends to great-great), stepfather, stepmother, stepbrother, stepsister, first cousin, including first cousin once removed, and nephew or niece (extends to great-great), or the legal spouse of the above-listed
relatives. The qualified relative must possess or obtain within one year of certification, either legal custody or guardianship or provisional custody by mandate of the eligible child who is living in the home. The State reserves the right to pursue child support against the parent(s) and this may be of some concern to a grandparent. The kinship program can substantially improve the economic welfare of the family. The availability of kinship payments put an even higher priority on legal custody for non-parent caretakers of neglected children. See DSS website at: http://www.dss.state.la.us/index.cfm?md=pagebuilder&tmp=home&pid=138

6.6 EX PARTE CUSTODY

Prior to La. Code Civ. Proc. art. 3945, *ex parte* orders of temporary custody were either routinely granted or denied depending upon the court and/or judge. Art. 3945 seeks to end the race to the courthouse by a parent who seeks the unfair advantage of gaining custody of the children prior to a hearing. Article 3945 sets out the procedures required for an ex parte grant of custody.

A party is not entitled to an *ex parte* order of temporary custody unless it is established from specific facts shown in a verified pleading or by a supporting affidavit that immediate and irreparable injury will result to a child or children before the adverse party or his counsel can be heard in opposition. The applicant’s attorney must certify in writing that either efforts have been made to give the adverse party reasonable notice of the date and time the *ex parte* order is to be presented to the court or the reasons supporting the applicant’s claim that notice should not be required.

These *ex parte* orders expire automatically within 30 days of the signing of the order, but they can be extended for good cause shown for one period not in excess of 15 days. Further, the *ex parte* order must provide specific provisions for temporary visitation to the adverse party for not less than 48 hours during a 15 day period unless the verified petition or supporting affidavit clearly exhibits that the child would suffer immediate and irreparable harm should such visitation be ordered.

The order shall be endorsed with the date on which the *ex parte* order is signed and the date and hour that the rule to show cause is set. The rule hearing cannot be set more than 30 days after the signing of the *ex parte* order of temporary custody. Most importantly, failure to adhere to the provisions of Article 3945 makes the *ex parte* order unenforceable.

If the *ex parte* order of temporary custody is denied, article 3945 (F) requires the court to allocate the child’s time between the parents unless irreparable and immediate injury would result to the child.

Article 3945 does not apply to custody orders requested in a verified petition under the Domestic Abuse Assistance Act, R.S. 46: 2131 et seq., Children’s Code Art. 1564, *et seq.* or the Post Separation Family Violence Relief Act, R.S. 9: 361 *et seq.*

A word of warning: always be absolutely truthful and candid to the court, particularly, when requesting *ex parte* relief. Always provide the notice, necessary affidavits, and any other documents that support “irreparable injury” as required by Code of Civil Procedure art. 3945.
Do not rely on your client’s version of the facts or their certification of the petition. Here, as an officer of the court, you are required to search diligently for the truth – to the extent possible. Strictly comply with the law when seeking ex parte relief. Use an improper ex parte order obtained by the adverse party as an example of malice and proof that the adverse is unlikely to facilitate a joint custody relationship. See Civ. Code art. 134 factor 10 supra.

6.7 CUSTODY BY MANDATE OR POWER OF ATTORNEY

Parent(s) may grant a provisional custody by mandate to another person to take care of their child. La. R.S. 9:951. These mandates (notarial acts) may be effective for up to one year. La. R.S. 9:3861-62 provides a statutory form of power of attorney for military personnel to authorize another person to have custody. La. R.S. 9:3879.1 also authorizes powers of attorney to another person for the custody of a child. La. R.S. 9:975 authorizes non-legal custodians to give legal consent to medical or educational services by affidavit.

But, a mandate of provisional custody for the care, custody, and control of a minor child pursuant to R.S. 9:951 through 954 “shall in no way limit the authority and responsibility of a city or parish school board to provide for the assignment, transfer, and continuance of pupils among and within the public schools within its jurisdiction or on the authority of a board to prescribe rules and regulations pertaining to these functions, including but not limited to the determination of student residency for school attendance and school transportation purposes.” La R.S. 17:104.1

If a parent or a caregiver does not have legal custody, school districts where the demand for enrollment is great, will invariably reject the Custody by Mandate and deny school admission. In such cases, a Voluntary Transfer of Custody (VTOC) or a petition for custody may be necessary. The VTOC, while a juvenile court proceeding, can be filed either in Juvenile or District Court (concurrent jurisdiction). See Children’s Code art. 1510 et seq. If a VTOC is filed in Juvenile Court, any future modifications take place in that court unless the case is dismissed. Please note that the client is the parent or party who has legal custody - not the caregiver. The caregiver may be the client if he/she seeks to file a Petition for Custody against a parent. Obviously, the burden of proof would be much higher and parental unfitness must be shown (child faced with substantial harm, etc.) in a contradictory hearing. In the typical VTOC case, the parent and the caregiver are on “the same page”. Since the filing is voluntary, someone will have to pay the court costs (since the judgment is typically signed without a hearing, the costs are low) for the VTOC.

Caveat: It is important to know who your client is. The parties may have a “fall-out” down the road and want modifications. Also, if feasible, both parents (if no legal custody is in place) need to consent to the transfer. Sometimes the mother, under investigation by Office of Community Services will seek to transfer the child. It is wise (for your own peace of mind) to inquire into the suitability/fitness of the person who will receive the child.
6.8 RELOCATION OF A CHILD’S PRINCIPAL RESIDENCE

Act No. 627 of the 2012 Louisiana Legislative Session, made substantial amendments and reenactments to R.S. 9:355.1 et seq. Generally, in cases where the parties have equal physical custody (close to 50:50 and distinguished from shared custody. See Comment (b) of 2012 Revision), a parent may not relocate the child’s residence without either the other parent’s express written consent or the court authorization after a contradictory hearing. Under R.S. 9: 355.2(D), a parent must notify the other parent of the proposed relocation unless they have entered into an express written agreement for the relocation or a domestic violence protective order is in effect. The court may consider a relocation without prior notice as a factor in determining relocation and sufficient cause for paying reasonable expenses incurred by the person who is objecting. Be sure to advise clients of their duties to comply with the notice and approval requirements of La. R.S. 9: 355.5 should they decide to relocate. Relocation is defined as a change in the principal residence of a child for a period of sixty days or more, but does not include a temporary absence from the principal residence. La. R.S. 9:355.1(2).

In a custody case, you should always advise your client of her obligations under the relocation statute. Clients won’t know this law unless you tell them about it. The R.S. 9: 355.1 relocation procedures apply if any of the following exist:

- any intent to move out of state, regardless of the distance;
- there is no custody order and there is an intent to relocate the child’s principal residence to any Louisiana location that is more than 75 miles from the other parent’s domicile;
- there is a custody order and an intent to relocate the child’s principal residence to any Louisiana location that is more than 75 miles from the child’s principal residence at the time of the custody order.
- Where the parties have an equal physical custody order or the child has no principal residence and there is an intent to establish the child’s principal residence within the state that is more than 75 miles from the other party’s domicile.

Note that the duty to notify the other parent applies even if there is no custody order. Act 627 of 2012 amended the relocation statute to require notice to non-parents who have court ordered visitation. However, non-parents with only visitation orders may not object to the proposed relocation and may only seek a modification of the visitation schedule.

Notice of a proposed relocation must be given not later than (1) 60 days before the proposed relocation or (2) ten days after the relocating parent has knowledge of the information required for the relocation notice. Notice is by certified mail or commercial courier.

The other parent must object to the relocation within 30 days of receipt of the relocation notice. If an objection is made, the parent proposing relocation

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112 La. R.S. 9: 355.5.
must initiate a summary proceeding for court approval of the relocation within 30 days of the receipt of the objection. If an objection is filed, court approval may only be granted after a contradictory hearing.

The relocating parent has the burden of proving that the relocation is (1) made in good faith and (2) in the child’s best interest. The court must consider the statutory factors in its determination of a motion to relocate. Citations to some relocation cases include:

Gray v. Gray, 65 So.2d 1247 (La. 2011) (in allowing the relocation: no reason to retreat from the heightened Bergeron standard when a party seeks to modify a considered custody decree even in the context of a request for relocation);

Trahan v. Kingrey, 98 So.3d 347, 2011-1900 (La. App. 1 Cir. 2012) (relocation not allowed: since trial court failed to conduct any analysis of the mandatory factors, a de novo review resulted in a change of domiciliary parent status as well);

Smith v. Holtzclaw, 62 So.3d 345 (La. App. 2 Cir, 2011) (court accepts parties’ agreement);

Perez v. Perez, 85 So.3d 273 (La. App. 3 Cir. 2012) writ denied Perez v. Perez, 89 So.3d 1195 (La. 2012) (relocation allowed: although trial court did not consider the relocation factors specifically, the findings were reasonable based upon the entire record); In the author’s opinion, the dissent by Judge Keaty was more on point.

McLain v. McLain, 974 So.2d 726 (La. App. 4 Cir. 2007) (relocation not allowed: good faith nor best interests burden met). This is a good case that discusses some legitimate reasons for good faith relocation.

Quainoo v. Morelon-Quainoo, 87 So.3d 364 (La. App. 5 Cir. 2012) (relocation allowed: underemployment of objecting parent, good faith and best interest of relocating parent required reversal of trial court).

Gathen v. Gathen, 66 So.3d 1 (La. 2011) – evidentiary standards discussed and the failure of the trial court to expressly analyze each factor in R.S. 9:355.12 was not legal error. But, how do we know whether the trial court has considered all the mandatory factors? To insure that the trial court has considered these 12 factors, it is always best to ask the judge for written reasons for judgments in all messy, complicated cases. The legislature, in taking its cue from Gathen, amended the previous R.S. 9:355.12, and added “all relevant factors,” to the reenacted R.S. 9:355.14. See Act 627 of 2012.

6.9 UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

6.9.1 Introduction

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) applies to interstate and international custody disputes. A court must have subject matter jurisdiction under the UCCJEA to make an initial child custody determination. The UCCJEA has been adopted by every state except Massachusetts,
where proposed UCCJEA legislation is pending. The UCCJEA also governs a court’s continuing jurisdiction over the custody dispute and jurisdiction to modify custody judgments.

The UCCJEA applies to all “child custody proceedings” in which legal custody, physical custody, or visitation with respect to a child is at issue. A “child custody proceeding includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights and protection from family violence, in which the custody or visitation issue may appear. A “child custody proceeding” does not include adoption, authorization for medical care, juvenile delinquency, contractual emancipation or Hague Convention enforcement actions.\(^{117}\)

A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, is not subject to the UCCJEA to the extent that it is governed by the Indian Child Welfare Act.\(^{118}\) The federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, governs full faith and credit for custody determinations and will preempt the UCCJEA where variances exist.\(^{119}\)

### 6.9.2 Overview of 2007 Amendments to Louisiana Child Custody Jurisdiction

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), codified at La. R.S. 13: 1801 \textit{et seq.}, became effective on August 15, 2007 in Louisiana. The UCCJEA made significant changes to the prior law, the Uniform Child Custody Jurisdiction Law (UCCJL), La. R.S. 13:1701 \textit{et seq}. The more significant changes include:

1. Home state jurisdiction is prioritized
2. Clarification of temporary emergency jurisdiction
3. Exclusive continuing jurisdiction of state that made initial custody determination
4. Broader ban on modification of other states’ custody determinations
5. Inconvenient forum rule expanded to protect domestic violence victims
6. Adoption of local state law for notice and service of process
7. Simpler and swifter enforcement remedies
8. Mandatory attorney fees

### 6.9.3 Jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act

#### 6.9.3.1 Understanding the interplay of UCCJEA and PKPA

Both the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A, are legislative responses to jurisdictional problems posed by interstate child custody disputes. Both acts govern interstate child custody disputes. A custody judgment is only enforceable if the issuing court has jurisdiction under state law and the UCCJEA and complied with the PKPA. Conceptually, the UCCJEA is a jurisdictional statute that seeks procedurally to implement the PKPA, which is the federal full faith and credit law for child custody determinations.

\(^{117}\)La. R.S. 13: 1802(4); 1803.
\(^{118}\)La. R.S. 13: 1804.
\(^{119}\)As of 2012, the Louisiana UCCJEA is virtually identical to the Parental Kidnapping Prevention Act (PKPA). It is possible that some states have UCCJEA statutes that vary somewhat from the PKPA.
The PKPA provides for (1) the home state to have exclusive jurisdiction and for (2) “continuing jurisdiction” by a court that made a child custody determination consistent with its provisions. 28 U.S.C. § 1738A(c)(2)(E). The UCCJEA, as amended in 2007, now provides for exclusive jurisdiction by the home state and exclusive “continuing jurisdiction” by the court that made an initial child custody determination consistent with the UCCJEA. The new UCCJEA overrules Louisiana cases under the prior UCCJL, R.S. 13: 1701 et seq. that had held that a court did not have to defer to the home state in every case.\(^{\text{120}}\)

6.9.3.2 Personal jurisdiction is not required for child custody

Personal jurisdiction is not required for the adjudication of child custody.\(^{\text{121}}\) The concept of personal jurisdiction is irrelevant to custody disputes. A court may decide custody without personal jurisdiction over a defendant.\(^{\text{122}}\) As amended in 2007, UCCJEA child custody jurisdiction is in the nature of subject matter jurisdiction, which can’t be waived. The lack of UCCJEA subject matter jurisdiction can’t be waived by an appearance.

6.9.3.3 Notice and service of process

The repealed UCCJL provided for notice of a custody suit to persons outside Louisiana by certified mail with at least 10 days notice. The new UCCJEA does not prescribe a special notice procedure for interstate custody disputes. Rather, it incorporates the Louisiana law on notice and service of process for non-residents or the law of the state where the non-resident lives.\(^{\text{123}}\) The result of this change is that non-residents will need to be notified and served under Louisiana’s long arm statute, R.S. 13: 3204-05, which generally involves service by certified mail and 30 days notice before a hearing on a custody motion or rule except for family violence protective order actions under La. R.S. 46: 2131 et seq.\(^{\text{124}}\)

6.9.3.4 Home state jurisdiction

La. R.S. 13: 1813 (A) provides the exclusive jurisdictional basis for a Louisiana court to make an initial child custody determination.\(^{\text{125}}\) Under La. R.S. 13: 1813 (A)(1), the child’s home state will have exclusive jurisdiction to make an initial child custody determination. Thus, the home state trumps all other states, even if the custody suit in the other state was filed first.

The home state is the state in which the child lived with a parent or a “person acting as a parent” for at least 6 consecutive months prior to the commencement of a child custody proceeding.\(^{\text{126}}\) Both the UCCJEA and Louisiana law define commencement as the filing of the first pleading in a proceeding.\(^{\text{127}}\) A “temporary

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120 R.S. 13: 1813(A) repeals the UCCJL jurisdiction rules in R.S. 13: 1702 and legislatively overrules the Supreme Court’s holdings in Stelluto v. Stelluto, 914 So.2d 34 (La. 2005) and other cases that held that deference to the home state is not required in every case.


122 It is possible that a court with UCCJEA subject matter jurisdiction may lack personal jurisdiction to decide child support or other issues that require personal jurisdiction.


125 La. R.S. 13: 1813 (B).


127 La. R.S. 13: 1802(5); La. Code Civ. Proc. art. 421. Be careful to file in a Louisiana court of “competent jurisdiction” to avoid an adversary’s argument that art. 421 general definition supersedes the specific R.S. 13: 1802(S) definition of commencement. Also, promptly initiate service. It is possible that some states’ UCCJEA definitions of “commencement” may include service of the pleading.
absence" of the child, parent, or person acting as a parent when they are away from the home state does not take away from the computation of this 6 consecutive month period. In case of a child under 6 months old, home state means the state in which the child lived from birth with a parent or person acting as a parent. The Louisiana UCCJEA further extends this "temporary absence" window when the parent or person acting as a parent who has had to evacuate with the child due to a disaster, is unable to return to Louisiana for an extended period. Louisiana would still be considered the home state as long as they had lived in Louisiana for at least the prior 12 consecutive months to the initial custody proceeding.

The first step in any interstate custody dispute is to determine the home state, if any. Most cases should have a home state and exclusive jurisdiction will rest with the home state. The home state will have initial jurisdiction which will exist even if a custody determination has been made in another state.\footnote{128}

The determination of home state status should be relatively easy. Each litigant’s first pleading should contain an affidavit that discloses facts relevant to the determination of UCCJEA jurisdiction.\footnote{129} Possible issues may arise for cases that involve a child under 6 months old or a child’s temporary absences from a state. If a child was born in state A, lived there for 2 months with a parent and then relocated to state B for 3 months, state A would be the home state since state A is the only state where the child lived continuously from birth.\footnote{130}

While the UCCJEA does not define “temporary absence,” it is the author’s opinion that a temporary absence that is greater then 6 months (unless there is a disaster exception, or clearly defined reasons for being away from the home state such as vacation, school, etc.) would divest Louisiana from being considered the home state. Clearly, the UCCJEA permits home state jurisdiction when the “temporary absence” is within the 6-month window of the custody proceeding. Other states’ courts have looked at whether a state was the home state at any time within the prior 6 months. Thus, for example, if the custody suit was filed on July 1, the issue would be whether the state was the “home state” on the prior January 1, when the temporary absence commenced.\footnote{131}

6.9.3.5 Significant connections/substantial evidence jurisdiction

If there is no home state or if the home state has declined jurisdiction under R.S. 13: 1819 or 1820, you must determine which state had “significant connections” jurisdiction under R.S. 13: 1813 (A)(2).\footnote{132} “Significant connections” jurisdiction will not provide a court with initial jurisdiction under the UCCJEA if there is a home state.

\footnote{Cf., Mitchell v. Mitchell, 437 So.2d 122, 126 (Ala. App. 1982).}
\footnote{La. R.S. 13: 1821. These sworn facts should constitute judicial admissions that can be used in litigation of the jurisdictional issues. See e.g., La. Civ. Code 1853, Goines v. Goines, 989 So.2d 794, 797 (La. App. 5 Cir. 2008).}
\footnote{Stelluto v. Stelluto, 914 So.2d 34, 40 (La. 2005).}
\footnote{See e.g., Ogawa v. Ogawa, 221 P.3d 699 (Nev. 2009) (Nevada was home state even though children in Japan for 8 months); Sarpel v. Ellani, 65 So.3d 1080 (Fla. App. 2011), review denied 86 So.3d 1114 (Fla. 2012) (Florida was home state even when children in Turkey for almost 8 months); Hammond v. Hammond, 708 S.E.2d 74 (N.C. App. 2011); Prizzi v. Prizzi, 707 S.E.2d 961 (Va. App. 2011).}
\footnote{See e.g., Marsalis v. Marsalis, 52 So.3d 295 (La. App. 3 Cir. 2010). In the Author’s opinion, the Third Circuit got it wrong in finding home state under R.S. 13:1813(A)(2). On the other hand, the trial court’s finding that Louisiana was the home state, while correctly based on the finding that the prior 6 month consecutive period was in Louisiana (temporary absence of 4 months in Texas), nevertheless confused the analysis with reference to significant connection. The Texas appellate court disagreed with our Third Circuit and affirmed the Texas trial court’s finding of home state on the basis of default jurisdiction - a Texas court has jurisdiction if no court of any other state would have jurisdiction. See In re Marriage of Marsalis, 338 S.W.3d 131, (Tex.App.-Texarkana 2011). This is not what the UCCJEA envisioned… competing orders. Louisiana as the home state, because of the temporary absence in Texas, should have been enough.}
For “significant connections” jurisdiction to exist, (1) the child and his parents, or the child and at least one parent or person acting as a parent, must have a significant connection with the state other than mere physical presence and (2) substantial evidence must be available in the state on the child’s care, protection, training and personal relationships. The child’s physical presence is not required for significant connections jurisdiction. The focus is on which state has substantial evidence as to the child’s care, protection, training and relationships. If both states have “significant connections” jurisdiction, UCCJEA jurisdiction will lie with the first court in which a custody suit was filed.

6.9.3.6 Deferral jurisdiction

If all courts having jurisdiction under the UCCJEA have declined jurisdiction because Louisiana is the more appropriate forum, Louisiana could have UCCJEA jurisdiction under R.S. 13: 1803(A)(3).

6.9.3.7 Default or vacuum jurisdiction

The final jurisdictional basis is “default” or “vacuum” jurisdiction under R.S. 13: 1813(A)(4). It exists when no court of any other state would have jurisdiction under the other bases for UCCJEA, i.e., home state, significant connections or declination in favor of Louisiana.

6.9.3.8 Temporary emergency jurisdiction

The UCCJEA eliminates emergency jurisdiction as an alternative basis for initial subject matter jurisdiction. The UCCJEA significantly restricts the exercise of emergency jurisdiction compared to the UCCJL. The new law limits jurisdiction to emergencies such as abandonment or physical abuse of the child, his sibling or parent in a state other than the child’s home state. “Neglect” and “dependency” have been deleted from the prior UCCJL definition of “emergency.” The prior UCCJL case law holds that the circumstances of the case must be serious, significant, immediate, and based on credible evidence.133

The new R.S. 13: 1816 is helpful because it clarifies a Louisiana court’s authority to issue temporary orders to protect family violence victims who may have fled to Louisiana. R.S. 13: 1816(A) expressly allows temporary emergency jurisdiction to protect a child, or a sibling or parent of the child who is subjected to or threatened with mistreatment or abuse. The prior UCCJL provision had only allowed emergency jurisdiction to protect the child.

If no prior custody order exists and no suit has been commenced in a state with § 1813 subject matter jurisdiction, a temporary emergency order will remain in effect until an order is obtained from the home state or a state that has proper § 1813 jurisdiction. See R.S. 13: 1816 (B).

If a prior custody order exists, the judge must confer with the other state’s judge. Then, the court with temporary emergency jurisdiction must specify a reasonable time limit for the plaintiff to obtain an order from the state with proper §§ 1813-15 jurisdiction. The temporary emergency order will remain in effect until an order is obtained from the other state or the time limit expires. See R.S. 13: 1816(C).

133 Kelly v. Gervais, 567 So.2d 593 (La. 1990); Renno v. Evans, 580 So. 2d 945 (La. App. 2 Cir. 1991).
There is a mandatory duty for a Louisiana court to communicate with the other state’s judge if (1) the Louisiana court has been asked to make a custody determination under emergency jurisdiction and it is informed that a child custody proceeding or order exists in a state having §§ 1813-15 jurisdiction and (2) if the Louisiana court has §§ 1813-15 jurisdiction and it is informed that another state has exercised emergency jurisdiction. The purpose of the communication is to resolve the jurisdiction, protect the safety of the parties and child, and determine the duration of the temporary custody order. See R.S. 13: 1816 (D).

6.7.3.9 Simultaneous proceedings—R.S. 13: 1818 procedures to resolve jurisdiction dispute

How does the court resolve jurisdiction when there is a proceeding in another state? Except for temporary emergency jurisdiction cases under R.S. 13: 1816, the Louisiana court must examine the court documents and the parties’ R.S. 13: 1821 affidavits to determine UCCJEA subject matter jurisdiction before hearing a custody case. This creates an independent, affirmative duty for the court to review and determine jurisdiction. If the Louisiana court finds that the other state’s court had UCCJEA jurisdiction, the Louisiana court must stay the Louisiana proceedings and communicate with the other state's court. If the other state with UCCJEA jurisdiction does not determine that Louisiana is the more appropriate forum, the Louisiana court must dismiss the Louisiana proceeding.

6.9.3.10 Mandatory inter-court communications

Communications with another state’s court are mandatory only when (1) there are simultaneous custody proceedings or (2) when a Louisiana court exercising temporary emergency jurisdiction under R.S. 13: 1816 learns that a proceeding exists in another state or (3) a Louisiana court with non-emergency UCCJEA jurisdiction learns that another state has assumed temporary emergency jurisdiction. A Louisiana court may communicate with another state on other jurisdictional matters, but it is not required to do so. As a practical matter, it would be difficult for a court to evaluate factors B(7) and B(8) of the R.S. 13: 1819 analysis of an inconvenient forum motion without communicating with the other court.

6.9.3.11 Motions to decline jurisdiction

Under R.S. 13: 1819, a Louisiana court may decline its UCCJEA jurisdiction at any time if it determines that it is an inconvenient forum and another state is a more appropriate forum. A motion to decline may be raised at any time by any party, by the court on its own motion or at the request of another court. Only the court with UCCJEA jurisdiction may decide if it is an inconvenient forum.

The first inquiry under R.S. 13:1819 is whether it is appropriate for the court of another state to exercise jurisdiction. The court must allow the parties to submit “information” on this issue and shall consider 8 specific statutory factors. The use of “information” instead of “evidence” suggests that this issue may be decided

134 La. R.S. 13 : 1818
136 See e.g., Marsalis v. Marsalis, 52 So.3d 295 (La. App. 3 Cir. 2010); Burst v. Schmolke, 62 So.3d 829 (La. App. 4 Cir. 2011).
137 Otwell v. Otwell, 56 So.3d 1232 (La. App. 3 Cir. 2011); Hughes v. Fabbio, 983 So.2d 946 (La. App. 5 Cir. 2008).
on briefs, affidavits and other information. There are few appellate opinions on this issue. One state has said that the issue can be decided on information. Another court has said that an evidentiary hearing is required. 138

Often, factors #1 and #2, domestic violence and the length of time that the child has resided outside of Louisiana, will be major factors in the § 1819 analysis as to whether the Louisiana court should decline its jurisdiction. The leading case on the domestic violence factor for an inconvenient forum analysis is Stoneman v. Drollinger, 64 P.3d 997 (Mont. 2003). 139 This new UCCJEA provision significantly altered the UCCJL inconvenient forum rules to enable courts to better protect family violence victims who flee to another state to escape violence. 140 Under R.S. 13: 1819, a Louisiana court with UCCJEA jurisdiction may decline in favor of the victim’s refuge state.

In Kovach v. McKenna, the Fourth Circuit ordered declination of Louisiana’s home state jurisdiction and dismissal of the Louisiana custody suit. The Fourth Circuit’s judgment was based on its conclusion that “domestic violence and residence of the child in another state for more than six months predominate over all other considerations in La. R.S. 13: 1819.” 141 As in Kovach, many trial courts may find an absence of 6 months or more to be a significant factor in determining a §1819 “inconvenient forum” motion. UCCJEA decisions from other states have upheld declination as inconvenient forum when the child has been absent for a lengthy time. 142 The ruling on a motion to decline as inconvenient forum is reviewable for abuse of discretion by supervisory writs. 143

The UCCJEA does not require a Louisiana court with proper UCCJEA jurisdiction to communicate with the court of another state before it decides to decline jurisdiction to that court as a more appropriate forum. However, if the Louisiana court communicates with the other state’s court on a substantive matter, it must make a record of the communication. Furthermore, the parties shall be informed of the communication and granted access to the record of the communication. Finally, if the parties are not able to participate in the inter-court communications, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made. 144

Under R.S. 13:1820, a Louisiana court must decline jurisdiction (except in limited circumstances) if the person seeking to invoke its jurisdiction has engaged in “unjustifiable conduct.” Unjustifiable conduct may include wrongful removal, retention or concealment of the child. How does § 1820 apply to a domestic violence victim who seeks refuge in Louisiana, possibly in violation of a custody

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139 See also, Rainbow v. Rainbow, 990 A.2d 555 (Me. 2010)(declination of home state jurisdiction in favor of refuge state was appropriate where there was domestic violence).

140 Stoneman v. Drollinger, 64 P.3d 997, 1001-02 (Mont. 2003); Kovach v. McKenna, 2011-C-0228 (La. App. 4 Cir. 4/1/11). In Kovach, the appellate court reversed a trial court’s denial of a motion to decline its home state jurisdiction in favor of the family violence victim’s refuge state. In its opinion, the Kovach court found that the “domestic violence and residence of the child in another state for more than six months predominate over all other considerations in La. R.S. 13: 1819.”

141 Kovach v. McKenna, 2011-C-0228 (La. App. 4 Cir. 4/1/11). This unpublished opinion is available at www.probono.net/la.

142 See e.g., Fox v. Mina, 2011 WL 255557 (Ky. App. 2011)(3 years); Fickinger v. Fickinger, 182 P.3d 763 (Mont. 2008) (3 ½ years); Dillon v. Dillon, 37 Conn. L. Rptr. 291 (Conn. Super. 2004)(2 years, 8 months)

143 Kovach v. McKenna, 2011-C-0228 (La. App. 4 Cir. 4/1/11); see also, Addington v. McGeehee, 698 So.2d 702, 704 (La. App. 2 Cir. 1997).

decree. R.S 13: 1820 says that mandatory declination of jurisdiction does not apply where domestic violence victim invoked temporary jurisdiction pursuant to R.S. 13:1816. In addition, the comments to § 208 of the model UCCJE A state that a domestic violence victim’s flight to another state, in violation of a custody decree, should not result in that state’s automatic dismissal of the victim’s custody suit. Rather, an inquiry should be made into whether the flight was justified under the circumstances.

6.9.3.12 Exclusive continuing jurisdiction of state that made initial custody determination

The new La. R.S. 13: 1814 provides for exclusive continuing jurisdiction for the court that made an initial custody determination consistent with the jurisdictional rules of R.S. 13: 1813-15. The new statute establishes a bright line test that should make it easy for courts to decide if continuing jurisdiction still exists.

If Louisiana had initial jurisdiction, its exclusive continuing jurisdiction lasts until a Louisiana court decides that neither the child nor the parent(s) and persons acting as parents have a significant connection with Louisiana or the foreign state determines that the child, parent(s) and persons acting as parents no longer reside in Louisiana. Similarly, Louisiana can’t assume jurisdiction if another state had initial jurisdiction consistent with R.S. 13: 1813-15 unless the other state declines jurisdiction or the Louisiana court finds that the child, parent(s) and persons acting as parents no longer reside in the state that had exclusive continuing jurisdiction under the UCCJE A.

6.9.3.13 Modification of other states’ custody determinations

La. R.S. 13: 1815 significantly restricts when a court may modify a custody determination made by another state. The new law prohibits Louisiana from assuming jurisdiction to modify merely because Louisiana is the home state at the time of the motion to modify is filed. Preliminarily, it appears that Louisiana appellate courts have been correctly applying the new UCCJE A rules on jurisdiction to modify a foreign state’s custody determination. La. R.S. 13: 1815 provides that, except as authorized in R.S. 13:1816 (temporary emergency jurisdiction), a Louisiana court may not modify a custody determination made by another state unless:

(1) a Louisiana court has home state or significant connections jurisdiction and

(2) the court of the other state determines that it no longer has exclusive, continuing jurisdiction or that a Louisiana court would be a more convenient forum, or

(3) a Louisiana court or the other state’s court determines that the child, parents and persons acting as parents no longer reside in the other state.

145 Burst v. Schmelke, 62 So.3d 829 (La. App. 4 Cir. 2011) (Louisiana court as the initial jurisdiction ordered to decide whether it had continuing jurisdiction or would decline its jurisdiction).

146 Otwell v. Otwell, 56 So.3d 1232 (La. App. 3 Cir. 2011); Hughes v. Fabbio, 983 So.2d 946 (La. App. 5 Cir. 2008).

147 Under the prior UCCJL, Louisiana courts could modify if they were the home state at the time of the motion to modify. See e.g. Stanley v. Stanley, 720 So.2d 740 (La. App. 3 Cir. 1998).

148 See e.g., Brunt v. Abernathy, 79 So.3d 425 (La. App. 3 Cir. 2011) writ denied 83 So.3d 1050 (La. 2012); Hughes v. Fabbio, 983 So.3d 946 (La. App. 5 Cir. 2008).

149 Gill v. Bennett, 82 So.3d 383 (La. App. 3 Cir. 2011) (Louisiana had significant connections jurisdiction where “home state” court declined its initial and continuing jurisdiction in favor of Louisiana).

150 Guzman v. Sartain, 31 So.3d 426, 431 (La. App. 1 Cir. 2009).
6.9.3.14 Enforcement remedies

The procedures for registering and enforcing another state’s custody determination in Louisiana have been simplified. The UCCJEA does not require a foreign decree to be registered in order to be enforced.151 This new law parallels the Uniform Interstate Family Support Act (UIFSA) and Violence Against Women Act (VAWA) processes for registration of child support and protective orders and intended to make it easier for pro se litigants to seek enforcement. La. R.S. 13:1827 states that the other state’s decree may be registered in a Louisiana court by sending the Louisiana court a “letter or other document” along with copies of the foreign judgment and other information.152 On receipt of the documents, the Louisiana court is supposed to file the foreign judgment and serve notice on the opposing party advising him that the foreign judgment is immediately enforceable as a Louisiana judgment and that he has 20 days to request a hearing to contest the validity of the registered foreign judgment.

The grounds to contest the foreign judgment are (1) lack of UCCJEA jurisdiction, (2) the foreign judgment has been vacated, stayed or modified by a court with UCCJEA jurisdiction and (3) he was not given notice of the foreign court proceeding in accordance with the standards of R.S. 13:1808. No other defenses are allowed. La. R.S. 13:1828 further provides that a Louisiana court may grant any relief available under Louisiana law to enforce a registered child custody determination made by a court of another state.

R.S. 13:1827 speaks of simply filing a “letter or other document” to register and confirm a foreign custody judgment or order. However, R.S. 13:1830 requires a verified petition for “expedited” enforcement of a foreign custody judgment or order when a party seeks immediate physical custody pursuant to the foreign custody decree. Interestingly, R.S. 13:1830 (C) states that the hearing shall be heard on the next judicial day after service of the order directing the respondent to appear at a hearing.

R.S. 13:1835 mandates that a Louisiana court accord full faith and credit or enforce another state’s custody order where jurisdiction was exercised in “substantial conformity” or is consistent with the UCCJEA. R.S. 13:1805 allows for international application of the UCCJEA and treats the foreign country as if it were a state of the USA. See Guzman v. Sartin, 31 So.3d 426 (La. App. 1 Cir. 2009).

Appeals from a final order in a proceeding to enforce a foreign custody determination must be expedited and the Louisiana trial court is prohibited from staying an order enforcing the child custody determination pending appeal. Only the appeal court may issue a stay. See La. R.S. 13:1836. Also, the U.S. Supreme Court has ruled that the PKPA (and thus, the UCCJEA) do not create an implied cause of action in federal court. See Thompson v. Thompson, 484 U.S. 174 (1988). Rather, the federal full faith and credit clause must be enforced in the state courts.

6.9.3.15 Attorney fees

La. R.S. 13:1834 strengthens and expands the prevailing party’s claims for attorney fees and other expenses in an UCCJEA enforcement proceeding. R.S. 13:1834 mandates the award of attorney fees unless the party from whom fees are

151 Guzman v. Sartain, 31 So.3d 426, 430 (La. App. 1 Cir. 2009).
152 Given that this law was only adopted in 2007, it is possible that many courts don’t have a form for this letter request or a set filing fee.
sought establishes that the award would be “clearly inappropriate.” The comments to the model UCCJEA state that attorney fees may be inappropriate if an award would cause a parent and child to seek public assistance. The same rule for attorney fees and costs applies under R.S. 13: 1820 for cases that are dismissed or stayed because a court declined jurisdiction because of a party’s unjustifiable conduct, e.g., removing the child to Louisiana to avoid the home state’s jurisdiction.

*A wonderful resource for interstate custody questions is the Legal Resource Center on Violence Against Women, where they provide technical assistance and training on interstate custody issues, including the UCCJEA. [http://www.lrcvaw.org/](http://www.lrcvaw.org/) Also, [www.uccjea.net](http://www.uccjea.net) has excellent resources for interstate custody disputes.*

### 6.10 OTHER STATUTES GOVERNING INTERSTATE OR INTERNATIONAL CUSTODY DISPUTES

#### 6.10.1 Indian Child Welfare Act

The Indian Child Welfare Act (ICWA), 25 U.S.C. §1901-1963, gives tribes a substantial role in matters concerning custody of Indian children. State courts must defer to tribal jurisdiction in child custody proceedings involving an Indian child for matters such as foster placement, termination of parental rights, and adoption. While the ICWA is not triggered for custody and divorce proceedings, it is nevertheless wise to be cautious—if a matter is pending in tribal court.

#### 6.10.2 International Parental Kidnapping Act

The International Parental Kidnapping Act (IPKA), 18 U.S.C. § 1204 et seq., makes it a crime to remove a child from the United States or retain a child under the age of 16 years (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights. The offender shall be fined under this title or jailed not more than 3 years, or both. Under the laws of the United States and many foreign countries, if there is no custody decree prior to abduction, both parents may be considered to have equal legal custody of their child. Even though both parents may have custody of a child, it still may be a crime for one parent to remove the child from the United States against the other parent’s wishes. If you are contemplating divorce or separation, or are divorced or separated, or even if you were never legally married to the other parent, ask your attorney, as soon as possible, if you should obtain a decree of sole custody or a decree that prohibits the travel of your child without your permission or that of the court. If you have or would prefer to have a joint custody decree, you may want to make certain that it prohibits your child from traveling abroad without your permission or that of the court. See [http://travel.state.gov/abduction/abduction_580.html](http://travel.state.gov/abduction/abduction_580.html) for more information.

#### 6.10.3 Uniform International Child Abduction Prevention Act


#### 6.10.4 Hague Convention

The Hague Convention is a civil procedure for parents seeking the return of, or access to, their child. As a civil law mechanism, the parents, not the governments, are parties to the legal action. The countries that are parties to the Con-
The Hague Convention has agreed that a child who is habitually resident in one party country, and who has been removed to or retained in another party country in violation of the left-behind parent’s custodial rights, shall be promptly returned to the country of habitual residence. The Convention can also help parents exercise visitation rights abroad.\footnote{See \url{http://travel.state.gov/abduction/abduction_580.html}}

There is a treaty obligation to return an abducted child below the age of 16 if application is made within one year from the date of the wrongful removal or retention, unless one of the exceptions to return apply. If the application for return is made after one year, the court may use its discretion to decide that the child has become resettled in his or her new country and refuse return of the child. In any case, a court may refuse to order a child returned if there is:

1. A grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation in his or her country of habitual residence;

2. If the child objects to being returned and has reached an age and degree of maturity at which the court can take account of the child’s views (the treaty does not establish at what age children reach this level of maturity: that age and the degree of weight given to children’s views varies from country to country); or If the return would violate the fundamental principles of human rights and freedoms of the country where the child is being held.

Legal services attorneys may handle Hague Convention cases for a financially eligible person even if not a U.S. citizen or lawful alien.\footnote{45 C.F.R. § 1626.10(e).} Attorney fees may be recoverable under Art. 26 of the Convention, 42 U.S.C. § 11607 or the UCCJEA. The United States Central Authority for the Hague Convention will support any attorney handling a Convention case with technical assistance and attorney mentoring.

6.10.5 Uniform Enforcement of Domestic Violence Protective Orders Act

The Uniform Enforcement of Domestic Violence Protective Orders Act seeks to make interstate enforcement of protective orders more uniform. As of 2012, about 20 states had enacted it. Louisiana has not.

6.11 ADDITIONAL CUSTODY LAWS

You should have a working knowledge of other custody related statutes:

La. Civil Code art. 135 – provides for custody hearings to be closed to the public at the court’s discretion.

La. R.S. 9:351 – provides access to a parent of a minor child’s medical, dental, and school records regardless of the custodial status of the parent.

La. R.S. 9: 359—Military Parent and Child Custody Protection Act, prohibits final order modifying custody or visitation order until 90 days after the termination of deployment, provides for service member to testify by affidavit or electronic means, and other matters.

\footnote{See \url{http://travel.state.gov/abduction/abduction_580.html}}
La. R.S. 9: 291 – allows suits between spouses for support and custody without a divorce being filed. Parties need to be living separate and apart. A custody order issued prior to a divorce would be void if the parties actually reconciled. See Dooley v. Dooley, 443 So.2d 630 (La. App. 3 Cir. 1983).

La. R.S. 9:341 – provides for restricted visitation for a parent where the parent has been guilty of physical abuse or sexual abuse or exploitation or has permitted such abuse/exploitation.

La. R.S. 9:342 – provides for the posting of a bond to secure compliance with a visitation order on motion of a party or on the court’s own motion.

La. R.S. 9:343 – provides a procedure for the issuance of a civil warrant directing law enforcement to return a child to a custodial parent when the non-custodial parent retains the child in violation of an existing custody/visitation order.

La. R.S. 9:345 – provides for the appointment of an attorney to represent a minor child in custody/visitation proceedings. Such appointment may be made by motion of the court, parent, any party or the child. Also sets forth those factors which the court should consider in determining if such an appointment serves the best interest of the child.

La. R.S. 9:346 – Action for failure to exercise or allow visitation, custody, or time rights pursuant to a court ordered schedule. See also R.S. 13:4611 (1)(d) and 1(e) – punishment for contempt of court.

In contested custody cases where there is protracted discovery, motions, evidentiary issues, a convoluted set of facts and issues – it may be essential to move for a “Pre-Trial and Scheduling Conference Order” pursuant to your Court’s Local Rule or La. Code Civ. Proc. art. 1551. This allows you to eliminate many of the “grey areas” and to address discovery material and other issues before the trial. It also gives you an opportunity to “educate the court” as well as to “narrow down” the issues in the case.

6.12  CUSTODY RESOURCE INFORMATION

The following books are suggested for practicing attorneys and their clients who need more information about developing a workable plan for custody following divorce:


Mom’s House/Dad’s House by Isolina Ricci.

Second Chances: Men, Women and Children A Decade After Divorce by Judith S. Wallerstein and Sandra Blakes Lee.

The Unexpected Legacy of Divorce: A 25 Year Landmark by Judith Wallerstein.
7. VISITATION RIGHTS

7.1 WHAT VISITATION ISSUES ARISE IN A LEGAL AID PRACTICE?

The common visitation issues are:

- initial establishment of visitation in a divorce, custody or paternity action
- supervision or restriction of visitation because of family violence, parental unfitness, physical or sexual abuse
- modification or change of visitation
- relocation of domiciliary parent and need to adjust visitation
- contempt for violation of visitation orders
- access of non-parent relatives to visitation

7.2 WHO HAS RIGHTS TO VISITATION?

Generally, a non-custodial parent has a right to visitation unless a court finds that visitation would not be in the child’s best interest. The parent’s right to visitation is more than a “species of custody.” It has an independent basis in Civil Code art. 136, revision comments 1993(b). A parent is entitled to reasonable visitation rights unless visitation would seriously endanger the child’s physical, mental, moral, or emotional health. The presumption in favor of a parent’s visitation rights may only be overcome by clear and convincing evidence. Non-parent relatives other than grandparents may be granted visitation in “extraordinary circumstances.” The term, “extraordinary circumstances” is not defined in the jurisprudence. However, Civil Code art. 136(C) does state that extraordinary circumstances may include a parent “abusing a controlled dangerous substance”. Grandparents and siblings of a child of the marriage where the parents have lived apart for a period of 6 months may have reasonable visitation rights in extraordinary circumstances and also need to comply with Civil Code art. 136(D).
7.3 WHEN CAN A COURT DECIDE VISITATION RIGHTS OR DISPUTES?

Generally, visitation is decided in a divorce or custody lawsuit. Interim visitation may be decided in a domestic violence protective order lawsuit. However, a visitation order in a protective order case is time-limited and will need to be finalized in a divorce or custody lawsuit. A court that has jurisdiction and venue to decide custody may set or restrict visitation at the trial or on the hearing of a motion to determine custody and visitation.\footnote{161} Litigation costs can be minimized if the parties amicably work out a visitation schedule. In interstate custody disputes, a Louisiana court may not have UCCJEA jurisdiction to modify a custody (or visitation) determination of another state’s court. Nonetheless, a Louisiana court without UCCJEA jurisdiction to modify may issue a temporary order enjoining or implementing the visitation schedule or visitation provisions of a child custody determination made by another state.\footnote{162}

7.4 THE COURTS MAY REGULATE, SUPERVISE AND ENFORCE VISITATION TO PROTECT CHILDREN

The courts have vast discretion to regulate and supervise visitation to protect a child’s best interest or a parent’s rights. In addition to a court’s general authority under Civil Code art. 136, there are other statutes that may restrict or affect visitation.\footnote{163} Generally, these statutes involve family violence, physical abuse, sexual abuse, neglect, criminal misconduct, failure to visit a child or repeated interference with the other parent’s visitation. A court may order supervised visitation to protect the child even when a specific statutory restriction of visitation is not applicable.\footnote{164} Drug use may justify supervised visitation until the using parent provides proof of drug rehabilitation.\footnote{165}

For good cause shown, a court may require a party to post a bond to insure compliance with a visitation order and to indemnify the other party for any costs incurred.\footnote{166} A bond may be proper when a party fails to comply with a court ordered visitation schedule or fails to return the child at the end of his visitation period.\footnote{167} A court also has the power to order a bond to prevent international abduction.\footnote{168}

Failure to comply with visitation orders may subject a party to contempt, attorney fee sanctions and even modification of custody or visitation orders.\footnote{169} Absent good cause, neither parent may interfere with the other parent’s visitation, custody or time rights.\footnote{170}

\footnote{161} {La. Code Civ. Proc. art. 74.2.}
\footnote{162} {La. R.S. 13: 1826.}
\footnote{165} Richardson v. Richardson, 974 So.2d 761 (La. App. 4 Cir. 2007).
\footnote{166} La. R.S. 9: 342.
\footnote{167} Smith v. Pillow-Smith, 52 So.3d 264 (La. App. 4 Cir. 2010); Hodges v. Hodges, 827 So.2d 1271 (La. App. 3 Cir. 2002); Walet v. Caulfield, 858 So.2d 615 (La. App. 1 Cir. 2003).
\footnote{168} La. R.S. 13: 1858 (D)(2).
\footnote{169} La. R.S. 13: 4611(1)(e)
7.5 WHEN MAY A VISITATION ORDER BE CHANGED?

Generally, visitation may be changed if a change is in the children’s best interest and especially when the child is very young at the time of the original decree and subsequent changes are needed later. But, courts have not been consistent in articulating the distinction of visitation as a species of Civil Code art 136 and visitation [physical custody] that arises from joint custody, in R.S. 9:335(A)(2)(b). The term “custody” is usually broken down into two components: physical or “actual” custody and legal custody. Evans v. Lungrin, 708 So.2d 731, 737 (La. 1998). While for all intent and purpose, in the Author’s opinion, visitation and physical custody are synonymous in a joint custody decree, this classification of custody in Lungrin, has led to inconsistencies in applying the burden of proof for modifications of visitation/physical custodial periods contained in custody decrees.

It appears that the Bergeron higher burden of proof for modification of custody orders does not apply to changes to visitation in the custody order. Why visitation is sometimes considered as physical custody and sometimes as merely visitation by panels of the same appellate court is not apparent. In any case, Bergeron applies in some instances to changes in physical custody and where there is a request for increased visitation that changes physical custody, e.g., a change to shared physical custody. Similarly, a request for a substantial increase of summer visitation is a change in physical custody that must meet the Bergeron test. A court may not use “adjustment of visitation” to circumvent the Bergeron test for custody modification. The courts are also split as to whether the parties, in a consent judgment, can agree to the burden of proof that will be required in any modification of their custody decree.

7.6 HOW DOES FAMILY VIOLENCE AFFECT VISITATION RIGHTS?

Family violence is common in many divorce and custody actions handled by legal aid attorneys. Special laws apply to visitation in family violence cases to protect the victims. Visitation orders should be drafted to minimize harm to the abused parent and her children. Provisions should be specific and clear so that conflict between the parties is minimized. Specific times should be set for visitation. The term, “reasonable visitation” should never be used in family violence cases. Exchanges for visitation should be structured to minimize harm. Exchanges may need to be conducted by third parties and/or in public places including police stations.

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171 White v. Fetzer, 707 So. 2d 1377 (La. App. 3 Cir. 1998) writ denied 719 So.2d 466 (La. 1998)(if there is a consent decree for custody and visitation, Bergeron does not apply to a rule to increase visitation); Gerace v. Gerace, 927 So.2d 622 (La.App. 3 Cir. 4/5/06); Mosely v. Mosely, 499 So.2d 106 (La.App. 1 Cir.1986), writ denied, 505 So.2d 1138 (La.1987); Acklin v. Acklin, 690 So.2d 869 (La. App. 2 Cir. 1997); Reynier v. Reynier, 545 So.2d 663 (La. App. 5 Cir. 1989).

172 Schmidt v. Schmidt, 6 So.3d 197 (La. App. 4 Cir. 2009); DeSoto v. DeSoto, 893 So.2d 175 (La.App. 3 Cir. 2005); see Harang v. Ponder, 36 So.3d 954 (La.App. 1 Cir.2010).

173 Bonneccarrere v. Bonneccarrere, 37 So.3d 1038 (La. App. 1 Cir. 2010); Francois v. Leon, 834 So.2d 1109 (La. App. 3 Cir. 2002); Lee v. Lee, 766 So.2d 723 (La. App. 2 Cir. 2000) writ denied 744 So.2d 150 (La. 2000).

174 Davenport v. Manning, 675 So.2d 1230 (La. App. 4 Cir. 1996).


176 Compare. Adams v. Adams, 899 So.2d 726 (La. App. 2 Cir. 2005)(parties may stipulate to Bergeron for visitation); with Rodriguez v. Wyatt, ___So.3d____, 2011 WL 6187083 (La. App. 5 Cir. 2011)(stipulation that custody governed by Bergeron standard invalid absent a considered decree); Reid v. Reid, 2011 WL 2120057 (La. App. 1 Cir. 2011)(trial court held that consent agreement for application of Bergeron to visitation unenforceable since it violates public policy).

177 One study found that during visits, 5% of abusive fathers threaten to kill the mother. 34% threaten to kidnap the children and 25% threaten to hurt the children. J. Drue, The Silent Victims of Domestic Violence: Children Forgotten by the Judicial System, 34 Gonz. L. Rev. 229, 234 (1998-99).
La. R.S. 9: 364(C) of the Post-Separation Family Violence Prevention Act governs visitation where there is a “history of perpetrating family violence” against the child or the child’s parent. Family violence includes assault, stalking, physical and sexual abuse. “History of perpetrating family violence” means either more than one incident or one incident that results in serious bodily injury. In *Ford v. Ford*, 798 So. 2d 316 (La. App. 3 Cir. 2001), the court held that visitation could not be awarded until the “history of family violence” allegations under La. R.S. 9: 364 (C) were fully litigated.

A parent with a history of family violence (not sexual abuse) is only allowed supervised visitation, conditioned upon his participation in and completion of a treatment program for abusers. La. R.S. 9: 364 (C). There is some confusion in whether 9:364(C) prohibits visitation until the abuser has completed a treatment program. In *Morrison v. Morrison*, 699 So.2d 1124 (La. App. 1 Cir. 1997), the court held that no visitation may occur until the abuser has completed a treatment program. It is the Author’s view that the correct interpretation of La. R.S. 9:364(C) is that the supervised visitation is “conditioned upon the participation in and the completion of a treatment program.” Otherwise, if supervised visitation cannot occur until completion of the treatment program, the use of the word “participation” becomes redundant. How can you complete a treatment without participating in it? This view is supported by the Third Circuit’s decision in *Hicks v. Hicks*, 733 So.2d 1261 (La. App. 3 Cir. 1999), which held that visitation would be supervised until the perpetrator could prove that he has satisfied all requirements of the Post-Separation Family Violence Prevention Act.178

While it appears that the supervised visitation awarded pursuant to R.S. 9:364(C) should only begin after the abusive parent has started to participate in a treatment program, as a matter of practice, you should be able bring the matter back into court to stop the supervised visitation if the abuser has stopped participating without completing the program. The type of treatment program that the perpetrator needs to enroll in, is a controversial issue. See *D.O.H. v. T.L.H.*, 799 So.2d 714 (La. App. 3 Cir. 2001) for Judge Woodard’s excellent dissenting opinion.

Unsupervised visitation may be allowed only upon proof that the abuser (1) has completed a treatment program, (2) is not abusing alcohol and drugs, (3) poses no danger to the child, and (4) such visitation is in the child’s best interest. Ineffective treatment programs may be challenged in a hearing on a request for unsupervised visitation.179 The victim’s attorney fees in opposing unsupervised visitation must be paid by the abuser, whether the victim wins or loses her opposition to unsupervised visitation.180

Under La. R.S. 9: 366 (B), an abuser’s “court ordered visitation” must be terminated if he violates an injunction or protective order as defined in La. R.S. 9: 362(4). The legislative history of R.S. 9:366 (B) makes it clear that the legislature intended to eliminate the courts’ power to allow visitation for violators of injunctive orders.

178 A trial court has the discretion to deny supervised visitation until completion of the treatment program. See e.g., *Duhon v. Duhon*, 801 So.2d 1263, 1265 (La. App. 3 Cir. 2001). In the Author’s opinion, this discretion highlights the confusion with R.S. 9:341(A).
tions. Compare Act 1091 of 1992 with Act 888 of 1995 and Act 750 of 2003. However, many trial courts will refuse to permanently terminate all visitation by the abuser despite this express statutory mandate.

7.7 ARE THERE OTHER STATUTES THAT RESTRICT OR PROHIBIT VISITATION?

Yes, in addition to Civil Code art. 136 (A) and the Post-Separation Family Violence Prevention Act, these statutes provide the court with additional authority to restrict or supervise visitation:

**La. Civil Code art. 137**

A natural father shall be denied visitation if his child was conceived by his felony rape of the mother. A family member shall be denied visitation if his intentional criminal misconduct caused the death of the child’s parent. The burden of proof for the criminal misconduct is preponderance of evidence.

**La. R.S. 9:346**

This statute creates an action for failure to exercise or to allow visitation, custody, or time rights pursuant to a court ordered schedule. See also La. Civ. Code art. 136.1. This is the legislature’s recent attempts to encourage the non-custodial parent to exercise visitation or face consequences, e.g., custody/visitation modification, contempt, costs, attorney fees, etc. The implementation of this concept is problematic. 181

**La. R.S. 9: 364 (D)**

This statute applies when a parent has sexually abused his children. If the court finds by “clear and convincing evidence” that a parent has sexually abused his child, the court must prohibit all visitation (supervised or unsupervised) between the parent and the children (not just the abused child). Thereafter, supervised visitation only may be allowed and then only when the court finds by a preponderance of evidence, after a contradictory hearing, that the parent has completed a sex abusers treatment program and that supervised visitation would be in the children’s best interest.

**La. R.S. 9:341**

This statute applies to both physical and sexual abuse of a child by his parent. The R.S. 9:341 burden of proof for physical or sexual abuse is preponderance of evidence. This lower burden of proof is constitutional. 182 If the court finds physical or sexual abuse, the court must prohibit visitation between the abused parent and abused child until the parent proves that visitation would not cause physical, emotional or psychological damage to the child. R.S. 9:341 does not mandate a treatment program. However, the case law holds that the court may order the abuser to complete a treatment program under R.S. 9:341, even if R.S. 9:364(D) did not apply. 183 Also, even if R.S. 9: 341 does not apply, a court may order supervised visitation when necessary to protect a child. 184

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181 For an alternative approach, in Hennepin County, Minnesota, a 2012 pilot project addresses outcomes for children by helping unwed parents to co-parent, see <http://www.mfsrc.org/Conferences_files/2010/211315B.pdf>

182 Cf. In the Interest of A.C., 643 So.2d 719 (La. 1994).

183 Clark v. Clark, 550 So.2d 913 (La. App. 2 Cir. 1989); In the Interest of A.D., 628 So.2d 1288 (La. App. 3 Cir. 1993).

R.S. 9:341 and 9:364 (D) conflict as to the burden of proof in sexual abuse cases. Originally, both statutes only required proof of sexual abuse by a preponderance of evidence. In 1994, the Supreme Court found the preponderance of evidence rule in R.S. 9:364 (D) unconstitutional. In the Interest of A.C., 643 So.2d 719 (La. 1994). In 1995, the legislature amended R.S. 9:364 (D) to create a “clear and convincing evidence” standard for sexual abuse. However, the legislature did not amend the “preponderance of evidence” standard used in R.S. 9:341 which also governs restriction of visitation because of sexual abuse. R.S. 9:364 (D) is the later and more specific legislation. However, R.S. 9:368 provides that the remedies in R.S. 9:361 et seq. do not affect remedies found elsewhere in the law. One court has held that if the State (Dept. of Social Services) has custody, the R.S. 9:364(D) prohibition on visitation and all contact is inapplicable and therefore, the less restrictive provisions of R.S. 9:341 control.\textsuperscript{185} The legislature obviously needs to “clean up” this anomaly.

La. Children’s Code Art. 1570(F)

If sex abuse is proven, visitation shall be suspended until the child turns 18 years or a contradictory hearing to modify is had.\textsuperscript{186}

7.8 WHAT VISITATION RIGHTS DO RELATIVES HAVE?

Non-parent relatives, other than grandparents, may only be granted visitation in “extraordinary circumstances” and if the visitation is in the child’s best interest.\textsuperscript{187} Civil Code art. 136 and La. R.S. 9:344 provide for the award of visitation rights to non-parents. Civil Code art. 136(D) establishes factors for the court to consider in determining the child’s best interest. Under Civil Code art. 136(C), as amended by Act 763 of 2012, “abusing a controlled dangerous substance” determination by the court appears to be part of what constitutes “extraordinary circumstances” that would permit non-relative visitation. Children’s Code art. 1264 et seq. and 1269.1 et seq. allow for post-adoptive visitation rights by non-relatives.

In Troxel v. Granville, 530 U.S. 57 (2000), the United States Supreme Court held that a court must presume that “fit parents act in the best interests of their children” and therefore must accord “special weight to parents’ decisions and objections regarding request for third-party visitation.” Id. at 68-70.

\textsuperscript{185} In Interest of A.D., 628 So.2d 1288 (La. App. 3 Cir. 1993).
\textsuperscript{186} Buchanan v. Langston, 827 So.2d 1186 (La. App. 2 Cir. 2002); Teutsch v. Cordell, 15 So.3d 1272 (La. App. 2 Cir. 2009).
\textsuperscript{187} The “extraordinary circumstances” sufficient to warrant an award of grandparent visitation should be those that constitute a highly unusual set of facts not commonly associated with a particular thing or event. Shaw v. Dupuy, 961 So.2d 5 (La.App. 1 Cir. 2007), writ denied 951 So.2d 1092 (La. 2007). The provisions of C.C. art. 136 and R.S. 9:344(D) were amended and reenacted by Act 763 of 2012. See also prior discussion at § 5.7.2.

(351)
7.9 HOW HAVE THE COURTS APPLIED THE PRIOR CIVIL CODE ART. 136 (B) AND (C), BEST INTEREST ANALYSIS?

For a visitation request by non-parent relatives by blood or affinity, the Court must consider several factors to determine the child’s best interest:

- The length and quality of the prior relationship between the child and the relative;
- Whether the child is in need of guidance, enlightenment, or tutelage which can be provided by the relative;
- The child’s preference if he is mature enough;
- The willingness of the relatives to encourage a close relationship between the child and the parent;
- The mental and physical health of the child and the relative.

7.9.1 Cases granting visitation

In Broussard-Scher v. Legendre, 60 So.3d 1290 (La. App. 3 Cir. 2011), the grandmother was granted visitation where parents and child lived in grandmother’s house after leaving the birth hospital, parents returned to their apartment a week later and child stayed with grandmother, grandmother was the primary caregiver for child, and court-appointed expert testified that extraordinary circumstances existed and that it was in the best interest of child to award grandmother visitation.

In Ray v. Ray, 657 So.2d 171 (La. App. 3 Cir. 1995), the court granted visitation rights to paternal aunt based on facts that: father was dead, absence of paternal grandfather, child had lived with paternal aunt among other factors all of which presented “extraordinary circumstances.”

7.9.2 Cases denying visitation

In Shaw v. Dupuy, 961 So.2d 520 (La. App. 1 Cir. 2007), the court held that the parties’ inability to communicate or agree on many issues did not amount to the extraordinary circumstances required by Civil Code art. 136 (B) to support a visitation award to the non-custodial relatives.

In Flack v. Dickson, 843 So.2d 1261 (La. App. 3 Cir. 2003), the appellate court held that “extraordinary circumstances did not exist to support granting paternal grandparents visitation rights to minor child and there was no allegation or evidence that the child’s mother was unfit or did not adequately provide for the child, nor was there any showing that the mother’s decision regarding the paternal grandparents’ visitation was detrimental to the child and, in any event, record did not indicate that such visitation would serve child’s best interest.”

In McCarty v. McCarty, 559 So.2d 517 (La. App. 2 Cir. 1990), the grandmother was denied visitation rights where parents were married, not involved in divorce, custody or neglect litigation and child had not lived for an extended period of time with the grandmother.

In Lingo v. Kelsay, 651 So.2d 499 (La. App. 3 Cir. 1995), where maternal grandparents were denied visitation as parents were married, not involved in marital litigation and objected to the grandparents’ visitation.
7.10 HOW HAVE THE COURTS APPLIED LA. R.S. 9:344 TO GRANDPARENT OR SIBLING VISITATION?

La. R.S. 9:344 applies to visitation requests by grandparents and siblings where the parent(s) are deceased, incarcerated, or separated. Except for R.S. 9:344(B), this statute only applies to married parents. It may be grounds for challenge on the distinction between legitimate and illegitimate grandchildren.

7.10.1 Cases granting visitation

In Babin v. Babin, 854 So.2d 403 (La. App. 1 Cir. 2003), writ denied 854 So. 2d 338 (La. 2003), cert. denied 540 U.S. 1182 (2004), visitation was granted to the maternal grandmother, allowing her to spend four hours every three weeks with her deceased daughter’s minor children. An issue on appeal was whether the trial court erred as a matter of constitutional law in its application of the Louisiana Grandparent Visitation Statute, R.S. 9:344(A), by refusing to require a threshold showing of “serious circumstances” to justify the court’s intervention in the parent/child relationship. The appellate court ruled that the grandmother did not have show extraordinary circumstances to get visitation. Rather, the special factors listed in the statute supplied the legal basis for visitation. The court held that the length and quality of the relationship enjoyed with her grandchildren prior to her daughter’s death; the fact that the visitation awarded was not significantly intrusive upon the children’s relationship with their father; the restriction that the grandmother was not to diminish the father’s authority over the children or to undermine his ability to raise the children as he saw fit; all served to support the mandatory requirement under the statute that the visitation was “reasonable” and in the grandchildren’s “best interest.” See also Garner v. Thomas 13 So.3d 784 (La. App. 4 Cir. 2009).

In Vincent v. Vincent, 739 So.2d 920 (La. App. 1 Cir. 1999) the court found that the maternal grandmother has a cause of action for visitation where mother was incarcerated.

7.10.2 Cases denying visitation

In Galjour v. Harris, 795 So.2d 350 (La. App. 1 Cir. 2001), writ denied 793 So.2d 1229, 1230 (La. 2001), cert. denied 534 U.S. 1020 (2001), visitation was denied to the uncle and aunt since there were no extraordinary circumstances under Civil Code art. 136 and no right of action under R.S. 9:344. The court granted visitation to the maternal grandparents. The court held that grandparents don’t have to prove “extraordinary circumstances” in order to obtain visitation with their grandchildren when their child is dead, interdicted, or incarcerated.

When does R.S. 9:344 or Civil Code art. 136(B) apply? Civil Code art. 136(E) states that R.S. 9:344 will apply when there is a conflict between the codal article and the statute. Also, in McMillin v. McMillin, 6 So.3d 464 (La. App. 3 Cir. 2009), the court held that 9:344 (a more specific statute) does not apply when the parents were not married. Civil Code art. 136(B) did. Thus, R.S. 9:344 is read more strictly whereas Civil Code art. 136(B) is the general “catch all” provision for all relatives.

7.10.3 La. Children’s Code art. 1264 and 1269.1 et seq. (Adoption provisions).

This statute allows grandparent visitation when one parent dies. It also allows grandparent visitation when both parents die and child is then adopted by one set of grandparents.188

8. CHILD SUPPORT

8.1 INTRODUCTION

Child support is determined on the federally mandated child support guidelines found at La. R.S. 9: 315 et seq. The guidelines use the parents’ incomes to determine the appropriate amount of child support. La. R.S. 9: 315.20 prescribes worksheets A and B for the calculation of the support obligation. Worksheet A is for joint, sole or “split” custody. Worksheet B is for “shared custody.” A court may deviate from the child support guidelines if applying them would not be in the child’s best interest or would be inequitable to the parties. The party advocating for a deviation from the guidelines bears the burden of proof. If the court deviates from the presumptive guidelines, it must give reasons for the deviation. The reasons must include the amount required under a mechanical application of the guidelines. If the court reviews the parties’ stipulation for child support, it must review the adequacy of the stipulated amount under the child support guidelines.

La. Civil Code art. 141 provides that “in a proceeding for divorce or thereafter, the court may order either or both parents to provide an interim allowance or final support for a child based on the needs of the child and the ability of the parents to provide support. The court may award an interim allowance only when a demand for final support is pending.” An action for child support can also be brought if the parties are separated without the need for divorce to be pled.

After reading the child support statutes, you should read and understand the case law on these child support issues: voluntary underemployment or unemployment, extraordinary medical expenses, private school tuition, federal tax credit for daycare, assignment of the tax dependency deduction, expense sharing, adjustments to child support due to time spent with the non-domiciliary parent, extra judicial agreements, deviation from the guidelines, retroactivity, contempt, income assignment, and the calculation of gross income.

A custodial parent can get help from the Louisiana Department of Children and Family Services, Child Support Enforcement Services, in establishing and enforcing child support. If the custodial parent receives Medicaid, the Kinship Care Subsidy Grant or FITAP these services are free. Other custodial parents may receive these services for a $25 fee. Parents may apply for the state’s child support enforcement services on-line and can download a paper application from the webpage of the Department of Children and Family Services (DCFS)/Child Support Enforcement. They may also apply by calling Child Support Enforcement Services at 800-524-3578.

If the children or the client are receiving FITAP or the Kinship Care Subsidy Grant, the enforcement and collection of child support will have been assigned to the State by the custodial parent (usually our client). See La. R.S. 46:236.1.5. Thus, you are not able to pursue child support without getting the State to relinquish the assignment or to make them a party to the proceedings because the

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189 La. R.S. 9: 315.1 (B); Dufresne v. Dufresne, 65 So.3d 749 (La. App. 5 Cir. 2011).
190 Guillot v. Munn, 756 So.2d 290 (La. 2000); State ex rel. A.F. v. Fennidy, 82 So.3d 421 (La. App. 5 Cir. 2011).
191 The requirement that the judge give reasons for a deviation also apply to a court’s approval of a stipulated agreement that deviates from the child support guidelines. Leger v. Leger, 808 So.2d 632 (La. App. 1 Cir. 2001).
192 Steinbach v. Steinbach, 957 So.2d 291, 302 (La. App. 3 Cir. 2007).
194 La. R.S. 9:291
Dept. of Family and Children, Support Enforcement Services, is a party in interest that is necessary for “just adjudication.” With backlogs in the DCFS/SES system, child support is a vital economic benefit to our clients and should not be overlooked as they are usually retroactive to the date of filing.

Either party may raise child support without it being specifically pled and the court may hear and determine the issue if all parties consent. R.S. 9:356.

8.2 THE CHILD SUPPORT WORKSHEET A (SOLE, JOINT OR SPLIT CUSTODY)

A step by step guide for properly filling out Obligation Worksheet A at R.S. 9:315.20 is discussed below. Worksheet A is for child support in custody arrangements defined in R.S. 9:315.8 and 315.10. It does not apply to “shared custody” which is joint custody where each party has physical custody for approximately equal time. The Author has marked each section of Worksheet A with [A] through [P] and provided commentary and case citations for each section.

[A] - MONTHLY GROSS INCOME (LINE ITEM 1 ON WORKSHEET A)

8.3 GROSS INCOME

As defined in R.S. 9:315 (C)(3), gross income includes, but is not limited to:

- Salaries
- Wages
- Commissions
- Bonuses
- Dividends
- Severance pay
- Pensions
- Interest
- Trust income
- Recurring monetary gifts
- Annuities
- Capital gains
- Social security benefits
- Worker’s compensation benefits
- Allowances for housing and subsistence from military pay and benefits
- Unemployment insurance benefits
- Disability insurance benefits
- Spousal support received from a pre-existing spousal support obligation.

Note that gifts and lottery proceeds are not included as “gross income.” Previously, lottery proceeds were specifically excluded from gross income. However, the law has been amended and lottery proceeds are no longer specifically excluded. Thus, such proceeds may be counted as income. Depending upon the size and character of gifts, they may be considered by the court under R.S. 9:315.1 as a basis for a deviation from the guidelines.


Gross income also includes expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business, if these reimbursements or payments are significant and reduce the parent’s personal living expenses. These types of payments may include, but are not limited to a company car, free housing or reimbursed meals.\textsuperscript{197} The court may also consider as income the benefits a party derives from expense sharing or other sources. In computing expense sharing with another spouse, it is inappropriate to consider the income of another spouse, except to the extent that such income is used directly to reduce the costs of a party’s actual expenses.\textsuperscript{198}

Gross income also includes gross receipts minus ordinary and necessary expenses required to produce income from self-employment, rent, royalties, proprietorship of a business or joint ownership or partnership or closely held corporation.\textsuperscript{199} Ordinary and necessary expenses shall not include amounts allowable by the IRS for the accelerated component of depreciation expenses or investment tax credits or any other business expenses determined by the court to be inappropriate for determining gross income for the purposes of calculating child support.

In determining gross income for calculating support, one may look at a party’s actual gross income if he is employed to full capacity or may look to potential income if he is voluntarily unemployed or underemployed.\textsuperscript{200} A party cannot be voluntarily unemployed or underemployed if he is absolutely unemployable or incapable of being employed or if the unemployment or underemployment results from no fault or neglect of the party.\textsuperscript{201}

### 8.4 EXCLUSIONS FROM GROSS INCOME

Gross income does not include:
- Child support received or
- Benefits received from public assistance programs including:
  - Family independence temporary assistance plan
  - Supplemental security income
  - Food stamps and
  - Disaster assistance benefits
- Per diem allowances which are not subject to federal income taxation.
- Extraordinary over-time or income attributed to seasonal work regardless of the percentage of gross income when, in the court’s discretion, inclusion would be inequitable.

### 8.5 VOLUNTARY UNDEREMPLOYMENT OR UNEMPLOYMENT (R.S. 9:315.11)

If a party is voluntarily underemployed or unemployed, child support shall be calculated based on his income earning potential, i.e., the amount of income a person is capable of earning based on his career choice, educational and skill level. In determining a party’s income earning potential, the court may use the most recently published Louisiana Occupational Employment Wage Survey for

\textsuperscript{197} La. R.S. 9: 315 (C)(3)(b).
\textsuperscript{198} La. R.S. 9: 315 (C)(5)(c).
\textsuperscript{199} La. R.S. 9: 315 (C)(3)(c).
\textsuperscript{200} La. R.S. 9: 315 (C)(5)(b).
\textsuperscript{201} La. R.S. 9: 315 (C)(5)(b).
calculations. See R.S. 9:315.1.1(B); but see R.S. 13:3712.1 which states that the court shall accept a copy of a self-authenticating report from the Department of Labor, or from any state or reporting agency, as prima facie proof of its contents.

The amount of the basic child support obligation obtained by use of R.S. 9:315.11 (voluntary unemployment or underpayment) shall not exceed that amount which the party paying child support would have owed had no determination of the other party’s income potential been made. R.S. 9:315.9

The projection of an income for a voluntarily underemployed or unemployed individual is not applicable if:
- The party is unemployable;
- The party is incapable of employment;
- The unemployment exists without fault or neglect of the party;
- The party is physically or mentally incapacitated; and
- The party is actually caring for a child of the parties under the age of five. Note that the child must be a “child of the parties.” Other children don’t exempt a parent from being considered voluntarily underemployed or unemployed.

8.5.1. Cases on Voluntary Unemployment or Underemployment
8.5.1.1 Cases finding no voluntary unemployment or underemployment

*Mayo v. Crazovich*, 621 So. 2d 120 (La. App. 2 Cir. 1993); see also *Lauve v. Lauve*, 6 So.3d 184 (La. App. 4 Cir. 2008).

The plaintiff obligor left his unstable cementing business to enter the upholstery business to improve his financial condition. The court determined that a voluntary change of circumstances must be reasonable, justified, and in good faith without the intent to avoid the child support obligation. If the court so finds, the obligor will not be deemed to be voluntarily underemployed even if he fails to make a profit in the new business despite working diligently to do so.

*Saussy v. Saussy*, 638 So. 2d 711 (La. App. 3 Cir. 1994); see also *Walden v. Walden*, 835 So.2d 513 (La. App. 1 Cir. 2002).

The child support obligor was fired from his employment through no fault or neglect of his own. Thereafter, he obtained another job which paid significantly less than his prior employment. His failure to apply for jobs within his previous earning potential was not deemed to be voluntary unemployment insofar as the loss of income was deemed temporary. Also, the father in this case testified and the court accepted his testimony that with the change of employment he had more time to spend with his children. The court stated that a father’s children benefit not only by the money he is able to earn, but also by the presence of his company, and nowhere does the law require that a parent work 60 to 70 hours per week to the detriment of his children’s right to the parent’s company.

*Koch v. Koch*, 714 So. 2d 63 (La. App. 4 Cir. 1998); see also State, Dept. of Social Services v. Swords, 996 So.2d 1267 (La. App. 3 Cir. 2008).

The obligor sought to reduce his child support alleging that he had a significant decrease in income. The court determined that he was voluntarily
underemployed because he worked approximately 70 hours per week, without compensation, for a company of which he is a one-third owner. The court determined that he had made several voluntary choices regarding investments of assets which resulted in loss of income. He was not entitled to rely on his bad investment decisions to reduce his child support obligation.

**Commentary:** Voluntary unemployment or underemployment is generally a question of good faith. Good faith is a factual issue to be determined by the court. A parent whose change in circumstances is due to voluntary termination of employment may obtain reduction in his/her child support payments if he/she can show that:

- A change in circumstances occurred;
- The voluntary change in circumstances is reasonable and justified;
- He is in good faith and not attempting to avoid his obligation; and
- His action will not deprive the child of continued reasonable financial support. La. R.S. 9:315.1(A)

In virtually every case where a parent’s voluntary unemployment or underemployment was found to be in good faith, our courts have recognized extenuating circumstances beyond that parent’s control which influenced and necessitated the voluntary change of employment. Courts have generally allowed a reduction in child support where parents were returning to school with hopes of increasing their salary, or leaving employment due to a business’ financial difficulty or strained working relationship to find other employment or start a new business. In almost every case, our courts noted that the unemployment or underemployment was a short term sacrifice which could lead to a long term benefit.

In voluntary unemployment/underemployed cases, our courts will usually use the wage earned by the party prior to voluntary underemployment or unemployment as the best estimate of the obligated party’s potential income. Further, the courts may hold that an incarcerated payor is “voluntarily unemployed.” Also, this construction appears contrary to the plain language of La. R.S. 9:315(C)(5)(b) which expressly states that a party may not be deemed “voluntarily unemployed” if he is “incapable of being employed.”

8.5.1.2 Cases finding voluntary unemployment or underemployment

*Hutto v. Kneipp*, 627 So. 2d 802 (La. App. 2 Cir. 1993)

The obligor left full-time employment and a part-time job to enter the ministry. The court determined that Rev. Kneipp was in bad faith, noting the time frame in which he resigned from his prior employment coincided with the child support award made to the obligee. The court determined that the obligor was voluntarily underemployed and that his income earning potential must be considered in calculating his child support obligation. The court determined that it was appropriate to calculate Rev. Kneipp’s income based solely on his full-time position rather than holding him to a two job standard income.

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202 Lowentritt v. Lowentritt, 90 So.3d 1081(La. App. 5 Cir. 2012).
203 Massingill v. Massingill, 564 So. 2d 770 (La. App. 2 Cir. 1990); Hildebrand v. Hildebrand, 626 So. 2d 578 (La. App. 3 Cir. 1993).
204 Goodall v. Goodall, 561 So.2d 867 (La. App. 2 Cir. 1990).
Greene v. Greene, 634 So. 2d 1286 (La. App. 3 Cir. 1994)

The court determined that the obligee was voluntarily underemployed insofar as she had quit her job in an attorney’s office to take a lower paying job so that she could spend more time at home with her children, all of whom were over the age of five years. The court concluded that the obligee’s higher rate of pay should be utilized in calculating the obligor’s child support.

Toups v. Toups, 708 So. 2d 849 (La. App. 1 Cir. 1998)

Where a wife had a history of full-time employment, but at the time of trial, was only employed part-time by her current husband, it was proper to fix her gross income at her current part-time salary plus minimum wages up to full-time. Lewis v. Lewis, 616 So. 2d 744 (La. App. 1 Cir. 1993); see also Leonard v. Leonard, 615 So. 2d 909 (La. App. 1 Cir. 1993).

Gould v. Gould, 687 So. 2d 685 (La. App. 2 Cir. 1997)

If a party is voluntarily unemployed or underemployed, his child support obligation shall be calculated based on a determination of his income earning potential. If a party has made only “token” job hunting efforts with few results, has applied only for work within his preferred field, and has not considered or pursued other career options, the courts are inclined to base the party’s income not on the lower amount of current earnings, but rather upon his income earning potential. See Glover v. Glover, 677 So.2d 659 (La. App. 2 Cir. 1996).

8.6 EXPENSE SHARING

The court may also consider as income the benefits a party derives from expense sharing or other sources. However, in determining the benefits of expense sharing, the court shall not consider the income of another spouse, regardless of the legal regime under which the re-marriage exists, except to the extent that such income is used directly to reduce the cost of a party’s personal expenses.206

Here is an example of how it could be done. Determine the net income of the spouse for whom expense sharing is to be calculated. Examine that spouse’s expenses for herself only. Thereafter, subtract the spouse’s net income from her expenses. The balance of her expenses not covered by her net income must be the amount “shared” by her current spouse. This amount would be added to her income.

In Greene v. Greene, 634 So.2d 1286 (La. App. 3 Cir. 1994), the court held that any contribution to expenses shared by the parties and their new spouses, such as a car loan, credit card debt, cable television, or rental insurance is includable as income. See also Kern v. Kern, 786 So.2d 193 (La. App. 4 Cir. 2011).

In Wollerson v. Wollerson, 687 So. 2d 663 (La. App. 2 Cir. 1997), the court addressed the issue of what information is discoverable from a second spouse. The court upheld an order compelling the second wife to disclose information from her personal checking account insofar as it is one of the few ways that a former wife can determine the second wife’s contribution to the husband’s expenditures. The appellate court ordered the trial court to conduct an in camera inspection of the checking account information to determine the relevancy of the records requested.

Preexisting child support/spousal support obligation
(lines 1 a-b of Worksheet A)
In computing monthly adjusted gross income on the child support worksheet, one should subtract any pre-existing child support obligations established by judgment from a litigant’s monthly gross income.

Monthly adjusted income (line 2 of Worksheet A)
After subtracting either or both of these pre-existing obligations from a litigant’s monthly gross income, one arrives at the monthly adjusted gross income represented as D on the Child Support Worksheet. The first child support/spousal support judgment obtained will always be pre-existing, even if it is subsequently modified. The modification does not change the “pre-existing” character of the judgment.

The combined total of each party’s monthly adjusted gross income (line 3 of Worksheet A)

The percentage that each party’s monthly adjusted gross income bears to the total of the parties’ adjusted gross income (line 4 of Worksheet A)
To arrive at this percentage, divide each party’s monthly adjusted gross income by the total of the parties’ adjusted gross income.

The basic child support obligation (line 5 of Worksheet A)
This requires reference to the schedule of basic child support obligations contained in R.S. 9:315.14.

Net child care costs (LA. R.S. 9:315.3) (line 5 a on Worksheet A)
The net child care costs are determined by applying the Federal Credit for Child and Dependent Care Expenses provided in IRS Form 2441 to the total or actual child care costs. The form may be downloaded from http://www.irs.gov and is available for children aged 13 or younger. This is an addition to the basic child support obligation.

Child’s Health Insurance Premium Cost (La.R.S. 9:315.4)
(line 5 b on Worksheet A)
The Court may order one of the parties to maintain health insurance on the child/children. In determining which party should be required to maintain such insurance, the court shall consider each party’s insurance policy, his/her work history, personal income and other resources. A Qualified Medical Child Support
Orders (QMCSO) may also be sought—especially if the State is involved. See La. R.S. 46:236.8 and 29 U.S.C. § 1169. THE QMCSO is an order of the court that provides for child support or health care benefit coverage to a qualified dependent (child) of a participant (parent) in a group health plan.

When health insurance is provided by the payor parent, a credit must be given to that parent in the amount of the premium. Thus, after one adds in the premium amount, this amount is then subtracted from the payor parent’s child support obligation, (N on Worksheet A), to obtain the Recommended Child Support Order.207 (P on Worksheet A). Child support by definition includes medical support.208

Health insurance premiums added to the Basic Child Support Obligation do not include any amount paid by an employee or any amounts paid for coverage of other persons. If more then one dependent is covered by health insurance which is paid through a lump sum dependent coverage premium, and not all such dependents are the subject of the guidelines calculation, the coverage shall be pro-rated among the dependents covered before being applied to the guidelines.209

☞ In all cases where the child is on a medical card, the Louisiana Department of Children and Family Services is an “indispensable party” to any Qualified Medical Child Support Order (QMCSO) being entered.

[J] - Extraordinary Medical Expenses (Unreimbursed) (line 5 c of Worksheet A) (La.R.S. 9:315.5)

By court order or consent of the parties, extraordinary expenses incurred on behalf of the child shall be added to the basic child support obligation. Most courts will impute in proportion to the parties share of gross income.

Extraordinary medical expenses are defined as “unreimbursed medical expenses which exceed two hundred fifty dollars per child per calendar year”. These expenses include, but are not limited to, reasonable and necessary costs for dental treatment, orthodontist, asthma treatments, physical therapy, uninsured chronic health problems and professional counseling or psychiatric therapy for diagnosed mental disorders not covered by medical insurance.210

[K] - Extraordinary Expenses (R.S. 9:315.6) (line 5 d of Worksheet A)

By court order or consent of the parties, the following expenses incurred on behalf of the child may be added to the basic child support obligation:

Private or special elementary or secondary school tuition, books and supplies which school are necessary to meet the needs of the child. Any transportation expenses of the child to get the child from one party to the other. In Guillory v. Ventre, 610 So. 2d 1056 (La. App. 3 Cir. 1992), the court compared what the private school can provide that is needed by the child to what can be provided by the public schools regarding the same educational need. Private school tuition can be added to the basic child support obligation where the children had always attended private school and the family always had adequate income to pay for such tuition.211

207 See McDaniel v. McDaniel, 670 So. 2d 767 (La. App. 3 Cir. 1996).
208 State, Dept. of Social Services, Office of Family Serv. v. Sensley, 63 So.3d 229 (La. App. 1 Cir. 2011).
209 Ola v. Ola, 985 So.2d 786 (La. App. 1 Cir. 2008); Timmons v. Timmons, 605 So. 2d 1162 (La. App. 2 Cir. 1992); Widman v. Widman, 619 So. 2d 632 (La. App. 3 Cir. 1993).
210 See Greene v. Greene, 634 S0.2d 1286 (La. App. 3 Cir. 1994) amended 638 S0.2d 1245 (La. App. 3 Cir. 1994).
211 Walden v. Walden, 835 So.2d 513 (La. App. 1 Cir. 2002); Corley v. Corley, 600 So. 2d 908 (La. App. 4 Cir. 1992); Schultz v. Schultz, 637 So. 2d 847 (La. App. 4 Cir. 1993).
“Other extraordinary expenses” do not include extracurricular recreational activities such as dancing lessons, baseball, or gymnastics.\textsuperscript{212} Only the domiciliary parent is entitled to be reimbursed for transportation costs to and from the residence of the parents.\textsuperscript{213} Where the mother moved to another state with the minor child due to her new spouse’s employment, the court assessed the child’s travel costs 50/50 between the parents.\textsuperscript{214}  
\textsuperscript{212} The parent seeking to include the expense(s) has the burden of proof. See Basile v. Basile, 872 So.2d 1274 (La. App. 3 Cir. 2004).

[L] - Optional. Minus extraordinary adjustments (child’s income)  
(La. R.S. 9:315.7) (line 5e of Worksheet A)

A child’s income may be used to reduce that child’s basic needs, and thus, may be deducted from the basic child support obligation. However, this provision does not apply to income earned by a child while he/she is a full-time student, regardless of whether such income was earned during a summer or holiday break.

In \textit{Hall v. Hall}, 617 So. 2d 204 (La. App. 3 Cir. 1993), the court concluded that Social Security survivor benefits payable to the mother as the children’s payee is income under La. R.S. 9:315.7. The trial court’s decision to only deduct 50% of such benefits from the basic child support obligation was within its discretion.\textsuperscript{215}

[M] - Calculation of Total Child support Obligation (La. R.S. 9:315.8)  
(line 6 of Worksheet A)

Total child support obligation is computed by adding together the basic child support amount (G), the net child care costs (H), the cost of health insurance premiums (I), extraordinary medical expenses (J), and other extraordinary expenses (K) less the child’s income (L), if applicable.

[N] - Each party’s child support obligation (La. R.S. 9:315.8 (C))  
(line 7 of Worksheet A)

Each party’s child support obligation is determined by multiplying the total child support obligation by the percentage each party’s income bears to the combined monthly adjusted gross income.

[O] - Direct payments (La. R.S. 9:318.8(D))(line 8 of Worksheet A)

Direct payments made by the noncustodial parent on behalf of the child for work-related net child care costs, health insurance premiums, extraordinary medical expenses, or extraordinary expenses provided as adjustments to the schedule. See also, sections related to health insurance costs, \textit{supra}. The amount owed by the non-custodial parent after direct payments is deducted from his/her total child support obligation.

[P]. Recommended child support order (La. R.S. 9:315.8 (D))  
(line 9 of Worksheet A)

The payor parent shall owe his total child support obligation less any court ordered direct payments in O.

\textsuperscript{212} Lehr v. Lehr, 720 So. 2d 412 (La. App. 2 Cir. 1998); Valure v. Valure, 696 So. 2d 685 (La. App. 1 Cir. 1997)
\textsuperscript{213} Junes v. Junes, 600 So. 2d 771 (La. App. 5 Cir. 1992).
\textsuperscript{214} Deshotels v. Deshotels, 638 So.2d 119 (La. App. 1 Cir. 1994).
\textsuperscript{215} See also, Corley v. Corley, 600 So. 2d 908 (La. App. 4 Cir. 1992); Armstrong v. Rayford, 902 So.2d 1214 (La. App. 2 Cir. 2005).
R.S. 9:315.14 requires a minimum child support award of $100 per month except in shared or split custody as provided in R.S. 9:315.9 and 315.10. In cases when the obligor has a medically documented disability that limits his ability to meet the mandatory minimum, the court may set an award of less than $100. But what if the obligor is on SSI? See R.S. 9:315(C)(3)(d)(i). In State v. Duncan, 2010 WL 4273103, 2010-0426 (La. App. 1 Cir. 2010), the Court recognized the statutory prohibition against counting SSI as income, but vacated the child support on other grounds.

8.7 ADJUSTMENTS TO CHILD SUPPORT DUE TO TIME SPENT WITH THE NON-DOMICILIARY PARENT

Joint custody means a joint custody order that is not shared custody as defined in La. R.S. 9:315.9. In cases of joint custody, the court “shall consider the period of time spent by the child with the non-domiciliary party as a basis for adjustments to the amount of child support to be paid during that period of time.” La. R.S. 9:315.8(E)(1) If under a joint custody order, the person ordered to pay child support has physical custody of the child for more than 73 days, the court may order a credit to the child support obligation. The burden of proof is on the person seeking the credit. A day for the purposes of this Paragraph shall be determined by the court. However, in no instance shall less than 4 hours of physical custody of the child constitute a day. La. R.S. 9:315.8(E)(2)

Do the Louisiana Child Support Guidelines automatically allow for a deviation based solely on the amount of time a non-domiciliary parent spends with a child? No. In Guillot v. Munn, 756 So.2d 290 (La. 2000), the Supreme Court ruled that an automatic deviation is not allowed. Rather, the party urging a reduction in the child support obligation based on the amount of time spent with the child must bear the burden of proving that he:

1. exercises shared custody or extraordinary visitation with the child,
2. that the extra time spent with the non-domiciliary parent results in a greater financial burden on that parent and a concomitant lesser financial burden on the domiciliary parent, and finally,
3. that the application of the guidelines would not be in the child’s best interest or would be inequitable to the parties.

In Nixon v Nixon, 631 So.2d 42 (La. App. 2 Cir. 1994), the court determined that where custody of two children was split between the parents with both children living with the father during the summer months, the support obligation should be first determined separately for the number of children in the domiciliary custody for each parent. The amount of child support each parent owes the other is next calculated by multiplying the owed support obligation by the parent’s proportionate share of the combined adjusted income. The amounts the parties owe each other is then offset. After Mr. Nixon’s support obligation was proportioned over 12 months, he owed only $98.47 per month. See also Jones v. Jones, 877 So.2d 1061 (La. App. 2 Cir. 2004) for a R.S. 9: 315.8 (E) consideration of relative time spent with each parent.

In Birkenstock v. Birkenstock, 666 So. 2d 1168 (La. App. 5 Cir. 1995), wherein the children spent 50% of the time with their mother and 50% of their time with the father, the father wanted his child support obligation reduced from $755 to
The trial court reduced his obligation to $500 stating, “there is no hard and fast rule to determine just how much to reduce the child support obligation based on percentage of time the children live with either parent.”

In some jurisdictions, the so-called 11/12ths rule is applied. Thus, if the parents are joint custodians and one parent has the children for the nine months of the school year and the other parent has the children for the three month summer school vacation period, the court gives the non-primary domiciliary parent a break on his child support. At the same time, the court recognizes that the domiciliary parent’s expenses do not substantially decrease just because the children are not in the home during the summer. Thus, one would initially calculate monthly child support as usual for the payor parent. This amount is then multiplied by 11 months and then divided by 12. Thus, payor parent gets credit for one month of support in recognition of his summer custodial time with the children.

In Falterm an v. Falterm an, 702 So. 2d 781 (La. App. 3 Cir. 1997), the court held that adjustments to child support do not have to be made in proportion to the amount of time the children spend with the non-domiciliary parent. Here the children spent 40% of their time with their father during the school year and 60% of their time during the summer months. The court found that the children’s ongoing expenses provided by the mother were unaffected during the time the children were with their father and refused to reduce support for the time spent with their father.

In Temple v. Temple, 651 So. 2d 466 (La. App. 3 Cir. 1995), the court determined that “the statute…merely requires that the court consider time spent with the non-domiciliary parent, but does not require that the court make an adjustment for this time.”

8.8 **EFFECT OF SHARED CUSTODIAL ARRANGEMENT (R.S. 9:315.9) (WORKSHEET B)**

Shared custody means a joint custody order in which each parent has physical custody of the child for an approximately equal amount of time. Obligation Worksheet B at 9:315.20 is the form to use. The calculation is based on a formula that “first requires that the basic child support obligation be multiplied by 1.5 approximating the duplication of costs, such as housing, food, and transportation, incurred by both parents who have physical custody for approximately one-half of the year. Only after recognition of the duplication of costs in a shared custody arrangement is the adjusted basic child support obligation divided between the parents in proportion to their respective adjusted gross incomes. Secondly, each parent’s share of the basic support obligation shall be cross-multiplied by 50% or the actual percentage of time the child spends with the other parent and the parent owing the greater amount pays the difference to the other parent as support, after deducting each parent’s proportionate share of any direct payments made to third parties for the child.” A sharing of 45.5% of days with father and 54.5% with mother constituted shared custody, triggering R.S. 9:315.9. 216

8.9 **EFFECT OF SPLIT CUSTODIAL ARRANGEMENT (R.S. 9:315.10) (WORKSHEET A)**

Split custody means that each parent is the sole custodial or domiciliary parent of at least one child to whom support is due. Obligation Worksheet A is used.

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216 Desoto v. Desoto, 893 So.2d 175 (La. App. 3 Cir. 2005).
Each parent theoretically “calculates the total child support obligation owed to
the other parent…. Then the parent owing the greater amount as reflected in the
two work sheets, owes the difference as a child support obligation.” 217

8.10 DEVIATION FROM THE CHILD SUPPORT GUIDELINES
(R.S. 315.1)

The guidelines are mandatory and apply to any action to establish or modify
child support filed on or after October 1, 1999. The guidelines create a rebuttable
presumption that the amount calculated under the guidelines is the proper amount
for a child support award.

Courts may deviate from the guidelines if their application would not be in
the children’s best interest or would be inequitable to the parties. The specific
reasons for the deviation, as well as the amount required under a mechanical
application of the guidelines, must be stated.218 See R.S. 315.1(C) for examples of
some of the common reasons for a deviation. The court cannot deviate without
evidence on the father’s alleged expenses for a child of a subsequent marriage.219

8.11 AMOUNTS NOT SET FORTH IN OR THAT EXCEED THE CHILD
SUPPOR T GUIDELINES

Occasionally, you may have a case with an adverse party whose income is
either “off the guidelines” or combined with your clients’ income results in an “off
the guidelines” case. Extrapolation should not be used. The courts should review
evidence of the actual needs and lifestyle of the children.

Recent cases in this area are as follows:

Allie v. Allie, 80 So.3d 1349 (La. App. 3 Cir. 2011); Dejoie v. Guidry, 71
So.3d 1111 (La. App. 4 Cir. 2011); Harang v. Ponder, 36 So.3d 954 (La. App.
1 Cir. 2010); Earle v. Earle, 998 So.2d 828 (La. App. 2 Cir. 2008).

8.12 MODIFICATIONS OF CHILD SUPPORT

In Stogner v. Stogner, 739 So. 2d 762 (La. 1999), the Supreme Court issued
a decision on modification of child support judgments. Stogner made two important
findings. The first was that the appellate court had erred in requiring a “substan-
tial change” in circumstances instead of a simple change as provided in the prior
Louisiana Civil Code art. 142 and La. R.S. 9:311. The law was changed in 2001
to “a material change” thus overruling Stogner. The second Stogner finding was
that even a stipulated or consent judgment regarding child support must be
reviewed by the court for the adequacy of the stipulated amount in light of the
child support guidelines. If a stipulated amount differs from the guidelines, the
court must give specific oral or written reasons for deviating from the guidelines.
This holding is still good law. Thus, to modify a prior judgment of child support,
allege a “material change” in circumstances for your client from the previous
award date to the new filing. If a consent judgment is reached, ensure that the
child support amount is consistent with the child support guidelines and satisfies
Stogner.

218 Hildebrand v. Hildebrand, 626 So.2d 578 (La. App. 3 Cir. 1993).
219 Miller v. Miller, 610 So. 2d 183 (La. App. 3 Cir. 1992).
What is a “material change” in circumstances of the parties? The statute says that the change must have occurred from the prior award to the time of filing the motion to modify. Otherwise, the statute and jurisprudence do not define “material change” for private child support actions. Parties typically argue a change in the parties' income, increased expenses or a change in time spent with the child. If the state brought the child support action, a material change exists when strict application of the child support guidelines will result in a 25% change in the child support award. It is important that the record for the original award be supported by each party's Obligation Worksheet. Without such documentation, it is difficult to determine whether a material change has occurred since the prior award.

Parties can temporarily modify child support extrajudicially by an agreement. The agreement must meet the requirements of a contract and the evidence must establish that the parties have agreed to waive or modify court ordered payments. Also, the agreement must foster continued support of the child and not interrupt his maintenance or otherwise work to his detriment.

☞ R.S. 9:315.1(D) states that the Court may require the parties to provide the proof that is otherwise mandated by R.S. 9:315.2(A)… which provides that “the parties shall provide to the Court a verified income statement...earnings.” The Author’s position is that in order to comply with Stogner, the mandatory review expected of the Court can only be meaningful if the consent judgment is submitted in compliance with R.S. 9:315.2(A), i.e., together with supporting documentation of the parties income and not just a worksheet. Otherwise, the absurd result of the parties' colluded gross income would be self-serving in any amount that is submitted to the Court.

8.13 RETROACTIVITY OF INTERIM CHILD SUPPORT JUDGMENT (R.S. 9:315.21)

Except for good cause shown, a judgment awarding, modifying or revoking an interim child support judgment is retroactive to the date of judicial demand. A judgment that initially awards or denies final child support is effective as of the date the judgment is signed and terminates an interim child support judgment as of that date.

Be sure to ensure that the interim support obtained is based on the correct amount that your client is owed based on substantiated income (see Stogner, supra). If a lower amount is obtained, then your client is “short changed” as the final child support judgment down the road is generally not retroactive to the date of judicial demand but effective when the final support judgment is signed unless good cause exists. Common examples of interim amounts that may sometimes not be based on verified income usually arise in the context of Hearing Officer Conferences or Protective Order Hearings.

Most of the circuit courts incorrectly read the statute strictly and have held that the signing of a judgment of final child support terminates an existing award of interim child support as of that date and a trial court's determination that the final child support award be retroactive to the date of judicial demand is erroneous as a matter of law. This is despite the fact that the interim child support could have been erroneously set low. See Author’s query raised below in 2005.

223 La. R.S. 9: 315.21 (B).
But what if an interim child support is rendered at a lower amount – because it was based on insufficient documentation and then later, a “proper” higher final child support order is set at the Rule? Are you stuck with the interim support order which “shortchanged” your client? This would be inequitable. I would ensure that any interim order is correctly set based on levels of verified income. If the interim amount is estimated, then the interim order should provide for and be contingent upon a modification and retroactivity clause prior to the final support being set. This is allowed pursuant to R.S. 9:315.21(A). This modification of the interim order allows the client to be “reimbursed” as a result of it being retroactive to the date of original date of judicial demand ...and the good cause being that the interim order was only estimated and not set at the correct level. This two prong approach resolves the anomaly created by the various provisions and yet in the Author’s opinion, serves the practical intent and implementation of the retroactivity statute for interim support orders.

In 2010, the Louisiana Supreme Court provided the “common sense” approach needed to correct the anomaly that was raised by the Author above. In instances where the initial interim child support is not necessarily set at the correct level because of fraud, etc., the court stated: “[the obligee] correctly notes that the Court of Appeal opinion creates a perverse incentive for parties in divorce proceedings to falsely report their income and means in the hope of paying as little as possible in interim support. If good cause exists, the final judgment can be retroactive to the date of judicial demand even though there is an interim child support judgment in place.” See Vaccari v. Vaccari, 50 So.3d 139, 144 (La.2010). The burden of proving good cause is on the obligee (the party to whom support is owed). See Shaw v. Shaw, 87 So.3d 235 (La. App. 2 Cir. 2012).

The Hearing Officer statute, See R.S. 46:236.5(C), originally provided for the Hearing Officers to facilitate calculations (support matters) for the court. As a result of changes to the statute, by local rule, hearing officers now can play a greater role in all family law matters. They do this by making recommendations to the court in just about all family law matters. Attorneys must be very careful to ensure that if any recommendations are made, they are based on “findings of fact” which must be based on competent (sworn testimony, affidavits, etc.) evidence. Clients must participate in the process or at the very least, approve any stipulations to resolve the issues. Do not hesitate to appeal the “recommendations” by filing an objection within the delays allowed by your local rule.

8.14 TAX DEDUCTIONS RELATIVE TO CHILD SUPPORT ACTIONS

Federal and State tax dependency deductions are frequently just “handed out” to the non-domiciliary parent. They are governed by R.S. 9:315.18 and be sure to raise this if it is detrimental to your client. If granted, the domiciliary parent will need to sign IRS Form 8332, relinquishing the exemption. If it is not signed by the domiciliary parent, there is nothing that the IRS will do. A contempt action can be pursued in the child support proceedings to enforce compliance.224 The party seeking to have the dependent tax deduction taken away from a domiciliary parent has the burden of proving that no child support arrearages are owed and that it would substantially benefit the non-domiciliary party without signifi-

224 State v. Dept. of Social Services v. Mason, 44 So.3d 744 (La. App. 5 Cir. 2010).
cantly harming the domiciliary party. *State v. Landry*, 975 So.2d 157 (La. App. 3 Cir. 2008). Incorrectly, but as a practical matter, the onus and practice is usually placed on the domiciliary parent. So be ready to argue either significant harm to your client or that the obligor is in arrears.

The child tax credit, which is an offset against tax liability, goes with the dependency exemption and cannot be separately assigned by the court. See I.R.C. § 24(c)(1)(A). The Household and Dependent Care Credit, Head of Household, and the Earned Income Credit, are all defined and determined by the Internal Revenue Code. They follow the domiciliary parent and may not be reallocated by the court.

### 8.15 ENFORCEMENT OF CHILD SUPPORT AWARDS

Child support awards may be enforced by income assignment, contempt, motion for arrearages, recordation of judgment against motor vehicles, suspension of licenses, intercept of tax refunds, etc. The court must, except for good cause shown, award attorney fees when it renders an arrearages judgment. A judgment for arrearages due and made executory (not a mere child support order), shall be a judicial mortgage. An arrearages judgment may also be filed with the Office of Motor Vehicles to create a privilege on the payor’s motor vehicle.

Contempt of court for child support may involve punishment pursuant to R.S. 13:4611 and more specifically, incarceration. While La. R.S. 13:4206 does provide, that the inability to pay is a defense to contempt for failure to pay a money judgment – it was often overlooked. In *Turner v. Rogers*, 564 U.S. ___, 131 S.Ct. 2507 (2011), the U.S. Supreme Court held that due process requires “safeguards” for pro se indigents in civil contempt cases. These safeguards include clear notice that the ability to pay is a critical issue in a civil contempt hearing, a form or affidavit to elicit the indigent’s financial circumstances, and an express finding must be made by the Court on the ability to pay issue before ordering incarceration.*

*Do not hesitate to use the administrative suspension of certain licenses if the other side plays “games” and does not pay child support. See La. R.S. 9:315.40 et seq. In many cases, you may want to advise the client to contact support enforcement – especially if tax refunds or interstate enforcement becomes necessary. An action to make child support arrearages executory has a prescriptive period of 10 years. See La. Civ.Code art. 3501.1.*

### 8.16 INTERSTATE SUPPORT ORDERS (PARTIES OR ORDERS ACROSS STATE LINES)

Interstate support (child and spousal) orders are governed by the Uniform Interstate Family Support Act (UIFSA) at La. Children’s Code art. 1301.1 et seq. and lays out the basis for a court to have subject matter jurisdiction for the enforcement and modification of support orders across state lines (either parties or orders are between states). The UIFSA attempts to limit modification jurisdiction to just one state at a time, once there is an existing child support award

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226 La. R.S. 9: 323.
228 Also, as a general rule, non-payment resulting from financial inability cannot support a contempt charge which requires a finding of willful disobedience. Lutke v. Lutke, 750 So.2d 512, 517-18 [La. App. 2 Cir. 2000]. Testimony of non-payment alone is insufficient to prove willful disobedience. Id. at 518.
issued. *See Jurado v. Brashear*, 782 So. 2d 575 (La. 2001) for a discussion on UIFSA. Note also, that while personal jurisdiction is not necessary in divorce and custody matters, support matters on the other hand, require it for full faith and credit.

8.17 INTRASTATE SUPPORT ORDERS (PARTIES OR ORDERS IN DIFFERENT PARISHES).

Intrastate support (child and spousal) orders are governed by Code of Civil Procedure art. 2785 *et seq*. Surprisingly, this law is rarely invoked and there are no reported appellate decisions. The law mandates an elaborate registration and approval process before non-rendering courts of the support order can make modifications. Code of Civil Procedure art. 74.2 allows the party receiving the support to seek modification in the parish of his domicile. Therefore, it appears that in cases where the domicile is different from that of the rendering parish, the original order must be registered in the new parish prior to any modification action. The statute for intrastate registration of support orders for modification and enforcement are not venue provisions *See Scurria v. Griggs*, 917 So.2d 1215 (La. App. 2 Cir. 2005). Venue for support modification must be determined under Code of Civil Procedure art. 74.2.
**OBLIGATION WORKSHEET A**
(The worksheet for calculation of the total support obligation under R.S. 9:315.8 and 315.10)

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<tr>
<th>A. B. C.</th>
<th>Petitioner Respondent Combined</th>
</tr>
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<tbody>
<tr>
<td>1. MONTHLY GROSS INCOME (R.S. 9:315.2(A))</td>
<td>[A] $</td>
</tr>
<tr>
<td>a. Preexisting child support payment</td>
<td>[B]</td>
</tr>
<tr>
<td>b. Preexisting spousal support payment</td>
<td>[C]</td>
</tr>
<tr>
<td>2. MONTHLY ADJUSTED GROSS INCOME (Line 1 minus 1a and 1b)</td>
<td>[D] $</td>
</tr>
<tr>
<td>3. COMBINED MONTHLY ADJUSTED GROSS INCOME (Line 2 column A plus line 2 column B). (R.S. 9:315.2(C))</td>
<td>[E] //////////</td>
</tr>
<tr>
<td>4. PERCENTAGE SHARE OF INCOME (Line 2 divided by line 3). (R.S. 9:315.2(C))</td>
<td>[F] %</td>
</tr>
<tr>
<td>5. BASIC CHILD SUPPORT OBLIGATION (Compare Line 3 to Child Support Schedule). (R.S. 9:315.2(D))</td>
<td>[G] //////////</td>
</tr>
<tr>
<td>a. Net Child Care Costs (Cost Minus Federal Tax Credit)(R.S. 9:315.3)</td>
<td>[H] //////////</td>
</tr>
<tr>
<td>b. Child’s Health Insurance Premium Cost (R.S. 9:315.4)</td>
<td>[I] //////////</td>
</tr>
<tr>
<td>c. Extraordinary Medical Expenses (Uninsured Only) (Agreed to by parties or by order of the court) (R.S. 9:315.5)</td>
<td>[J] //////////</td>
</tr>
<tr>
<td>d. Extraordinary Expenses (Agreed to by parties or by order of the court) (R.S. 9:315.6)</td>
<td>[K] //////////</td>
</tr>
<tr>
<td>e. Optional. Minus extraordinary adjustments (Child’s income if applicable.) (R.S. 9:315.7)</td>
<td>[L] //////////</td>
</tr>
<tr>
<td>6. TOTAL CHILD SUPPORT OBLIGATION (Add lines 5, 5a, 5b, 5c, and 5d. Subtract line 5e.) (R.S. 9:315.8)</td>
<td>[M] //////////</td>
</tr>
<tr>
<td>7. EACH PARTY’S CHILD SUPPORT OBLIGATION (Multiply line 4 times line 6 for each parent.)</td>
<td>[N] $</td>
</tr>
<tr>
<td>8. DIRECT PAYMENTS (Made by the noncustodial parent on behalf of the child for work-related net child care costs, health insurance premiums, extraordinary medical expenses or extraordinary expenses.)</td>
<td>[O] //////////</td>
</tr>
<tr>
<td>9. RECOMMENDED CHILD SUPPORT ORDER (Bring down amount from line 6 for non-custodial or non-domiciliary party only. Leave custodial or domiciliary party column blank.)</td>
<td>[P] //////////</td>
</tr>
</tbody>
</table>

Comments, calculations, or rebuttals to schedule or adjustments if made under 8 above or if ordering a credit for a joint custodial arrangement.

Prepared by __________________________ | Date ________________________________
OBLIGATION WORKSHEET B
(The worksheet for calculation of the total child support obligation under R.S. 9:315.9)

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</table>

A. B. C. Petitioner Respondent Combined

1. MONTHLY GROSS INCOME (R.S. 9:315.2(A))
   - Petitioner: $<br>   - Respondent: $<br>   - Combined: $</p>

   a. Preexisting child support payment
   - Petitioner: $<br>   - Respondent: $<br>

   b. Preexisting spousal support payment
   - Petitioner: $<br>   - Respondent: $<br>

2. MONTHLY ADJUSTED GROSS INCOME (Line 1 minus 1a and 1b)
   - Petitioner: $<br>   - Respondent: $<br>   - Combined: $</p>

3. COMBINED MONTHLY ADJUSTED GROSS INCOME (Line 2 Column A plus Line 2 Column B) (R.S. 9:315.2(C))
   - Combined: $</p>

4. PERCENTAGE SHARE OF INCOME (Line 2 divided by line 3) (R.S. 9:315.2(C))
   - Petitioner: %<br>   - Respondent: %<br>   - Combined: %</p>

5. BASIC CHILD SUPPORT OBLIGATION (Compare Line 3 to Child Support Schedule) (R.S. 9:315.2(D))
   - Combined: $</p>

6. SHARED CUSTODY BASIC OBLIGATION (Line 5 times 1.5) (R.S. 9:315.9(A)(2))
   - Combined: $</p>

7. EACH PARTY’S THEORETICAL CHILD SUPPORT OBLIGATION (Multiply line 4 times 6 for each party) (R.S. 9:315.9(A)(2))
   - Combined: $</p>

   a. Net Child Care Costs (Cost Minus Federal Tax Credit) (R.S. 9:315.3) +
   - Combined: $</p>

   b. Child’s Health Insurance Premium Cost (R.S. 9:315.4) +
   - Combined: $</p>

   c. Extraordinary Medical Expenses (Uninsured Only)
      (Agreed to by parties or by order of the court) (R.S. 9:315.5)
      - Combined: $</p>

   d. Extraordinary Expenses
      (Agreed to by parties or by order of the court) (R.S. 9:315.6) +
      - Combined: $</p>

   e. Optional. Minus extraordinary adjustments
      (Child’s income if applicable.) (R.S. 9:315.7) –
      - Combined: $</p>

8. PERCENTAGE WITH EACH PARTY
   (Use actual percentage of time spent with each party, if percentage is not 50% (R.S. 9:315.9(A)(3))
   - Petitioner: %<br>   - Respondent: %<br>   - Combined: %</p>

9. BASIC CHILD SUPPORT OBLIGATION FOR TIME WITH OTHER PARTY
   (Cross Multiply line 7 for each party times line 8 for the other party) (R.S. 9:315.9(A)(3))
   - Petitioner: $<br>   - Respondent: $<br>   - Combined: $</p>

10. TOTAL EXPENSES/EXTRAORDINARY ADJUSTMENTS
    (Add lines 9a, 9b, 9c, and 9d; Subtract line 9e.)
    - Combined: $</p>

11. EACH PARTY’S PROPORTIONATE SHARE OF EXPENSES/EXTRAORDINARY ADJUSTMENTS (Line 4 times line 10) (R.S. 9:315.9(A)(4))
    - Petitioner: $<br>    - Respondent: $<br>    - Combined: $
12. DIRECT PAYMENTS
made by either party on behalf of the child for work-related net child care costs, health insurance premiums, extraordinary medical expenses, or extraordinary expenses. Deduct each party’s proportionate share of an expense owed directly to a third party. If either parent’s proportionate share of an expense is owed to the other parent, enter zero. (R.S. 9:315.9(A)(5))

13. EACH PARTY’S CHILD SUPPORT OBLIGATION
(Line 9 plus line 11 minus line 12) (R.S. 9:315.9(A)(4) and (5))

14. RECOMMENDED CHILD SUPPORT ORDER
(Subtract lesser amount from greater amount in line 13 and place the difference in the appropriate column) (R.S. 9:315.9(A)(6))

Comments, calculations, or rebuttals to schedule or adjustments:

Prepared by ___________________________      Date ________________________________

9. SPOUSAL SUPPORT
La. Civil Code articles 111-117 govern spousal support.

9.1 INTERIM SPOUSAL SUPPORT
The purpose of interim spousal support is to maintain the status quo of the parties without unnecessary economic dislocation until final periodic spousal support can be determined or until 180 days after the divorce judgment, whichever occurs first.229 However, interim spousal support may extend beyond this period for good cause. “Good cause” has not been defined by our courts. “Good cause” must be determined on a case by case basis.230 An example of “good cause” might be the disability of a claimant or a situation where the claimant is prevented from seeking employment due to circumstances beyond her control. Another example might be where a spouse is unduly delaying the community property partition to starve the other spouse. Some courts automatically order interim spousal support to extend 180 days from the divorce judgment. However, one should specifically plead for an award of interim spousal support extending, at a minimum, for 180 days from the date of rendition of the divorce judgment.

A spouse may be awarded interim spousal support based on her needs, the other party’s ability to pay, and the parties’ standard of living during the marriage. There is a movement by some courts to rely on the parties standard of living during the marriage in determining the amount of support granted. The burden of proof for interim spousal support is on the claiming spouse. The claiming spouse must prove that she lacks sufficient income to maintain the standard of living that she enjoyed while residing with the payor spouse during the marriage.231 Fault is not an issue for interim spousal support.

For an award of interim spousal support, the court looks to the net incomes of the spouses and their reasonable expenses. Thus, if you are preparing an affidavit of income and expenses for your client (the claiming spouse), be sure that you list each and every expense she may have or had during the marriage. For example, if your client has been forced to move in with relatives due to the phys-

230 Roan v. Roan, 870 So. 2d 626 (La. App. 2 Cir. 2004).
ical separation of the parties, be sure to include in his affidavit anticipated expenses for housing, utilities, food, tax on the support, etc., so that the court will fully appreciate your client's actual expenses. Clearly, the standard of living during the marriage did not include the spouse living with relatives. An award of interim spousal support is within the trial court's discretion and will not be disturbed on appeal absent a clear abuse of discretion.

One might not think it valuable to plead for spousal support for indigent clients. However, in doing so, you may well obtain additional financial help for your client. It may be minimal, but even an additional $25 per month can greatly help (negotiate medical insurance, car or house notes, etc.) a client with minor children during the divorce process.

9.2 TERMINATION OF INTERIM SPOUSAL SUPPORT

When a claim for final spousal support is pending, interim spousal support terminates not upon the rendition of the judgment of divorce, but upon the rendition of a judgment awarding or denying final spousal support or 180 days from the rendition of the judgment of divorce, whichever comes first.\(^{232}\) Often a payee will want to delay termination of interim spousal support because the award can be substantially higher than final spousal support and the payee may not win final support because of the fault issue.\(^{233}\) Thus, if your client is able to prove that she was not at fault, it is unwise to only ask for interim spousal support because then, if final spousal support is not before the court, the interim spousal support “shall terminate upon the rendition of a judgment of divorce.” There are other times when a client may want to get divorced irrespective of the spousal support ramifications. Document your client’s directive in the case file or have them “sign off” on their decision.

\(\text{☞ If your client is on SSI, spousal support may be taxable income and may cause problems with her SSI and Medicaid eligibility.}\)

9.3 FINAL PERIODIC SPOUSAL SUPPORT (CIVIL CODE ART. 112)

A spouse may be granted final periodic spousal support when that spouse has been free from fault in the dissolution of the marriage and does not possess sufficient means for support.\(^ {234}\) “Fault” which precludes final periodic spousal support must arise to the level of a previously existing fault ground for legal separation or divorce.\(^ {235}\) Also, the misconduct must not only be of a serious nature, but also, an independent contributing or proximate cause of the breakup of the marriage.\(^ {236}\) The most common types of fault include adultery, habitual intemperance, cruel treatment, abandonment and public defamation.\(^ {237}\)

Civil Code art. 111 provides that a party must be free from fault “prior to the filing of a proceeding to terminate the marriage” as opposed to prior to the rendition of the divorce judgment. Thus, a party may file a Civil Code art. 102 divorce, and thereafter, commit adultery. Is the spouse who filed for the 102 divorce precluded from receiving final periodic spousal support on the basis of fault? Based

\(^ {232}\) Roan v. Roan, 870 So.2d 626 (La. App. 2 Cir. 2004); Bickham v. Bickham, 849 So. 2d 707 (La. App. 1 Cir. 2003); Speight v. Speight, 866 So. 2d 344 (La. App. 3 Cir. 2004).

\(^ {233}\) Generally, a payee only wins final spousal support in about 40% of litigated cases.

\(^ {234}\) Carr v. Carr, 756 So. 2d 639 (La. App. 2 Cir. 2000); Patton v. Patton, 856 So.2d 56 (La. App. 2 Cir. 2003); Bowes v. Bowes, 798 So. 2d 996 (La. App. 4 Cir. 2001).

\(^ {235}\) Allen v. Allen, 648 So. 2d 359 (La. 1994); Ashworth v. Ashworth, 86 So.3d 134 (La. App. 3 Cir. 2012).

\(^ {236}\) Carr v. Carr, 756 So. 2d 639 (La. App. 2 Cir. 2000).

\(^ {237}\) Mayes v. Mayes, 743 So.2d 1257 (La. App. 1 Cir. 1999).
on the language of the statute, the answer is no. To defeat final periodic spousal support, “fault” must be a cause for the breakup of the marriage and must occur prior to the filing of a divorce action.

Reconciliation that follows misconduct which constitutes “fault” nullifies the prior fault. Conduct caused by mental illness is excused and will not bar final support. The mental illness must precede the misconduct. In these cases, expert medical testimony on the mental illness and the causal relationship to the misconduct is highly recommended, but not required.

The burden of proof in proving disqualifying fault should be with the non-claiming spouse because that would be his defense in not having to pay. But, courts have held that for a claimant spouse to prove entitlement to final support, that spouse must affirmatively prove freedom from fault. Thus, it appears that the claimant needs to put on some evidence that she was a “good” spouse and this appears to be the trend.

Our courts must consider all relevant factors when determining the entitlement, amount and duration of final support. Factors to consider in determining whether an ex-spouse is in need of post-divorce final periodic spousal support include his income, means, earning capacity, assets, the liquidity of those assets, his financial obligations, his health and age, the duration of the marriage and the tax consequences to the parties. These factors should be considered by the court whenever it makes or modifies a final spousal support award.

The principal factor to consider when making an award of final periodic spousal support is the relative financial positions of the parties. Final periodic support (previously permanent alimony) has been compared to a “pension” and courts have traditionally applied it conservatively to cover only the basic necessities of life. The spouse who proves that he is in “necessitous circumstances” is entitled to only an amount adequate for his “maintenance” which includes, food, shelter, clothing, reasonable and necessary transportation or automobile expenses, medical and drug expenses, utilities, household expenses and tax liability caused by the final support award.

Final spousal support cannot be set for an amount more than one-third the net income of the obligor spouse. See La. Civil Code art. 112(B). Also, pursuant to La. R.S. 13:3881, the maximum income that can be seized for spousal support is 60% of the disposable earnings while for child support, it is 50%. One would expect that children take priority over adult needs and that it would be the other way around.

There is a trend in our courts to award “rehabilitative support” which terminates after a specific period. Comment (c) to Article 112 explains that the word “duration” in the article “permits the court to accord rehabilitative support and forms of support that terminate after a set period of time.” Hence, factors of length of the marriage, education, ability to work; and health are important considerations.

238 Doane v. Benenate, 671 So.2d 523 (La. App. 4 Cir. 1996).
239 Doane v. Benenate, 671 So.2d 523 (La. App. 4 Cir. 1996).
241 Diggins v. Diggins, 6 So.3d 1030 (La. App. 3 Cir. 2009).
242 Thibodeaux v. Thibodeaux, 668 So. 2d 1269 (La. App. 5 Cir. 1987).
243 Preis v. Preis, 631 So. 2d 1349 (La. App. 3 Cir. 1994); Wascom v. Wascom, 713 So. 2d 1271 (La. App. 1 Cir. 1998); Brignac v. Brignac, 833 So.2d 373 (La. App. 5 Cir. 2002).
9.4 RETROACTIVITY OF SPOUSAL SUPPORT

See R.S. 9:321 for retroactivity of spousal support, which has the same rationale as the child support provisions at R.S. 9:315.21.

9.5 MODIFICATION AND INCOME ASSIGNMENT OF SPOUSAL SUPPORT

To seek a decrease or an increase in either interim spousal support or final support, the moving party must prove a “material” change in circumstances of the parties. Periodic support shall be terminated when it becomes unnecessary. Roberts v. Roberts, 700 So. 2d 1099 (La. App. 5 Cir. 1997). A final periodic spousal support award shall not exceed one-third of the payor’s net income. An Income Assignment Order is an appropriate enforcement vehicle for both spousal and child support awards. Ellefson v. Ellefson, 666 So. 2d 1112 (La. App. 5 Cir. 1995). But, See January v. January, 649 So.2d 1133 (La. App. 3 Cir. 1995), where the definition of “support” does not cover spousal support in R.S. 9:303 and income assignment is excluded. Garnishment under fieri facias would apply. The author believes that the Third Circuit’s interpretation of the definition of support is incorrect because when the entire statutory scheme is read together, spousal support goes hand in hand with child support.

☞ The right to claim after divorce the obligation of spousal support is subject to a peremption of 3 years. See La. Civil Code art. 117. The right to obtain a judgment for arrearages for spousal support, has a prescriptive period of 5 years. See La. Civil Code art. 3497.1. If the obligation to pay was a conventional one, prescription for arrearages would be 10 years. See La. Civil Code art. 3499.

10. PATERNITY AND NAME CHANGES

See the web site for the Louisiana Dept. of Health and Hospitals – Office of Public Health for an informational packet on “Birth Registration and Louisiana Paternity Laws” at: http://www.oph.dhh.state.la.us. The request for services in this area of the law has increased greatly. It is important to have the necessary affidavits or information available for our clients. It requires a working knowledge of the various statutes to be able to know what options the client may have. Brief synopses of the provisions are provided herein.

R.S. 9:392 - Acknowledgment; requirements; content

A putative father who executed an authentic Act of Acknowledgement of Paternity may seek to revoke his acknowledgment. R.S. 9:392 (7)(a) provides the procedure for revocation. See also Civil Code art. 195. Although some may argue that the putative father’s plight may not be that great, the problem is magnified when the mother is unable to obtain child support because there are two fathers (one who has acknowledged the child but is not the biological father as a result of DNA tests) and the another person who needs to be tested. Does the first father need to revoke before the second is tested? How many “fathers” should be tested?

R.S. 9:396 and R.S. 9:398.2 —allows for blood or tissue test for determining paternity.

R.S. 13:4751 et seq. — allows for name change of a child or adult to be contradictorily tried against the District Attorney. A new birth certificate is issued.
**R.S. 9:464** – allows for the name of the adult adopted person to be changed in the act of adoption. A new birth certificate may be issued.

**R.S. 40:46** – was amended by Act 621 of the 2012 Louisiana legislative Session. Allows for a new birth certification to be issued when there is a judgment of filiation pursuant to Civil Code art. 197 (child’s action to establish paternity).

**La. Code Civ. Proc. art. 3947 (B)** – allows for the name confirmation of a wife in the context of a divorce proceeding. The birth certificate is not changed. This is important if the wife was using the married name of her husband. The *Federal Intelligence Reform and Terrorism Prevention Act of 2004* includes several new requirements for identification and changing names on documents such as: Driver’s Licenses, Personal Identification Cards, and Social Security cards. Specifically, the Federal and/or State agency requires that a new card will not be issued under a woman’s maiden name unless the divorce decree specifically states it.

**R.S. 40:34(B)(iv)** – An “illegitimate” child is now referred to as a “child born outside of marriage.” The mother controls the name of the child on the birth certificate. If both parents agree, a two party affidavit can be executed and most health units have the form.

**R.S. 40:34 (B)(vi)** – allows for the name change of a child born of the marriage but whose biological father is someone other than the husband. A new birth certificate is issued. This is also known as the three-party affidavit. The married parents need to have been separated for at least 180 days prior to the date of conception and not have reconciled after that period as well. The affidavit can be obtained from the local health unit or the Vital Records Office.

**R.S. 40:34(B)(vii)** – In cases where the child is born during the marriage (the husband is the legal father) but the child’s biological father is someone else, the surname of the child can be: the biological father’s if he has sole or joint custody and the husband is no longer married to the mother. The child’s mother, the husband, and the biological father are indispensable parties in any filiation or paternity proceeding.

**Civil Code art. 189** – The time limit for disavowal by the husband is subject to a liberative prescriptive period of one year and its commencement date is provided for in the article.

**Civil Code art. 198** – The judicially created avowal action is now codified. It enables a man to establish the paternity of a child presumed to be the child of another. Applies prospectively and retroactively and the peremptive time periods are provided for.

### 11. ADOPTION

*A court exercising juvenile jurisdiction shall have exclusive original jurisdiction in adoption proceedings pursuant to Title XI or XII of the Louisiana Children’s Code. See La. Children’s Code art. 303.*

There are several types of adoptions under Louisiana law. Our law recognizes agency adoptions, private adoptions, intrafamily adoptions, international adoptions, and adult adoptions. The laws governing adoptions differ depending
on the type of adoption. Insofar as most adoptions handled by legal services attorneys are usually intrafamily adoptions, the discussion and forms herein will pertain to these adoptions.

There are two significant problems with most adoptions filed with our courts. First, attorneys fail to provide the type of notice to parents required by law within the time frames required by law. Second, attorneys fail to submit the necessary pleadings in proper form with content conforming to our adoption laws.

11.1 WHO MAY PETITION FOR ADOPTION?

The codal authority of intrafamily adoptions can be found in Louisiana Children’s Code articles 1243 et seq. Adoption statutes are interpreted strictly. Under La. Children’s Code art. 1243, the following persons may petition for an intrafamily adoption:

A. A stepparent, step-grandparent, great-grandparent, grandparent, aunt, great aunt, uncle, great uncle, sibling, or first cousin may petition if all of the following elements are met:
   1. The petitioner is related to the child by blood, adoption, or affinity through a parent recognized as having parental rights.
   2. The petitioner is a single person over the age of 18 or a married person whose spouse is a joint petitioner.
   3. The petitioner has had legal or physical custody of the child for at least 6 months prior to filing the petition for adoption.

B. When the spouse of the stepparent or one joint petitioner dies after the petition has been filed, the adoption proceedings may continue as though the survivor was a single original petitioner.

C. For purposes of this Chapter “parent recognized as having parental rights” includes not only an individual enumerated in Article 1193, but also:
   1. A father who has formally acknowledged the child with the written concurrence of the child’s mother.
   2. A father whose name or signature appears on the child’s birth certificate as the child’s father.
   3. A father, if a court of competent jurisdiction has rendered a judgment establishing his paternity of the child.

11.2 CONSENT OF PARENT(S) TO THE ADOPTION (LA. CHILDREN’S CODE ART. 1243)

A. A parent is free to execute an authentic act consenting to the adoption of his/her child;

B. If the parent of a “child born of the marriage” (legitimate) is married to the stepparent petitioner and executes an authentic act of consent, she need not join in the petition;

C. The parent of a “child born outside of marriage” who is married to the petitioning spouse shall join in the petition.
11.3 PARENTAL CONSENT NOT NECESSARY (LA. CHILDREN'S CODE ART. 1245); CLEAR AND CONVINCING EVIDENCE IS REQUIRED.

A. The petitioner has been granted custody of the child by a court and any one of the following situations exist:
   1. A parent has refused or failed to comply with a court order of support for at least 6 months.
   2. A parent has refused or failed to visit, communicate, or attempt to communicate with the child without just cause for a period of at least 6 months.

B. When a parent married to a stepparent (petitioner) has been granted sole or joint custody of the child by a court with jurisdiction, or is lawfully exercising actual custody of the child, and either of the following conditions exist:
   1. The other parent has refused or failed to comply with a court order of support for a period of at least 6 months; or
   2. The other parent has refused or failed to visit, communicate, or attempt to communicate with the child without just cause for a period of at least 6 months. (La. Children's Code art. 1245).

☞ Be wary of the client who states that since no father is listed on the birth certificate, she does not know who the father is. It may take "some prodding" and an explanation of the inherent problems of due process before you get a name(s).

It is always a safer practice to have a curator appointed when the biological father's identity is known but his whereabouts are unknown.

11.4 SERVICE REQUIREMENTS

La. Children's Code art. 1247 referencing Children's Code arts. 1133, 1134, 1136, and 1137-1143 sets forth the requirements for service on parents. Read carefully and comply with these provisions to the letter. Even if one parent has signed an Act of Consent to Adoption, the other parent must be served with a Notice of the Filing of Petition of Adoption along with a copy of that petition, unless it is waived.

☞ See Form on Notice of Filing of Petition for Adoption in Forms Section. Important to note that as of August 1, 2012, the notice form reiterates that ONLY IF the noticed person(s) file an answer in opposition of the adoption will he/she have an opportunity to present his/her opposition to the court. All social security numbers contained with the petition or its exhibits should be redacted from copies sent to the person(s) served with notice. Act. 603 of 2012.

La. Children's Code art. 1248 and 1249 provide specific methods and time frames for service on resident and nonresident parents. The attorney for the adoptive parent must serve, either personally or domiciliary, on a resident parent no later than 30 days prior to the hearing on the adoption petition. Whereas, for service on the nonresident parent must be by registered mail return receipt requested, postage prepaid, or by commercial carrier as defined in R.S. 13:3204(D), at the address listed in the petition, not less than 30 days prior to the hearing on the adoption petition.

La. Children's Code art. 1250 provides for the appointment of a curator ad hoc upon whom service shall be made if service cannot be made on the parent under articles 1248 or 1249.
11.5 HEARING

A home study shall not be conducted for intrafamily adoptions unless ordered by the court. La. Children’s Code art. 1252. Most courts will want a home study in the Order. Check with the Department of Children and Family Services (DCFS) prior to your hearing date to ensure that the home study was completed.

There are specific time frames for the setting of the hearing on an adoption petition. La. Children’s Code art. 1253. Thus, it is helpful to the Clerk and the Court if your order complies with these time frames. The Court shall hear the petition within 60 days if there is no opposition or within 90 days if there is opposition. This time may be extended for good cause or reduced to a minimum of 15 days with written approval of DCFS department and petitioner.

At this hearing, the Court as per La. Children’s Code art. 1253 shall consider the following:

1. Any motions to intervene in the proceedings that have been filed.
2. Other issues in dispute.
3. The confidential report by OCS, if any.
4. The testimony of the parties.

Also, if the child is 12 years of age or older, the court shall solicit and consider his wishes regarding the adoption. Thus, remember to take the child(ren) with you. Most judges like the child(ren) present and a camera is also a good thing to take along as well. Of all the good work family law attorneys do in court, this may be one of the most fulfilling moments in court for everyone.

Intervention in the proceedings may be by Motion and a showing of good cause and is limited to persons having a substantial caretaking relationship with the child for one year or longer, or any other person that the court finds to be a party in interest. Intervention by a party in interest shall be for the limited purpose of presenting evidence as to the best interests of the child. La. Children’s Code art. 1254.

After the Adoption hearing, the Court may enter a final decree of adoption or it may deny the adoption. The basic consideration is the best interest of the child. There is a rebuttable presumption in intrafamily adoptions where the petitioner already has legal custody that the adoption is in the best interests of the child. La. Children’s Code art. 1255.

Included in these materials are the most current forms for completion of an intrafamily adoption with various scenarios. Note the different notices provided to an alleged father (where no formal acknowledgment, legitimation, filiation order, or presumption of paternity) versus an adjudicated legitimate father.

11.6 CASE LAW ON ADOPTIONS

Here are some cases to review:

_In the Matter of R.E.,_ 645 So.2d 205 (La. 1994) – Sets out the notice requirements for natural fathers consistent with due process; discusses the burden of proof on natural fathers to affirmatively show efforts to preserve his opportunity to establish his parental rights; State must prove by clear and convincing evidence its allegations if seeking to terminate parental rights.
**Miller v. Miller**, 665 So. 2d 774 (La. App. 1 Cir. 1995) – Statutory presumption that stepparent adoption in the best interest of the child did not apply where natural father had joint custody.

**In re Landry**, 702 So. 2d 1092 (La. App. 3 Cir. 1997) – “Lawfully exercising actual custody” within the procedural rules governing intrafamily adoptions, means the parent who has actual, physical custody of the child where no custody decree exists. La. Ch.C. Art. 1245(C). But it does not apply if there is an ongoing custody dispute. See **In C.D.J. v. B.C.A.**, 74 So.3d 300 (La.App. 3 Cir. 2011) where the petition was dismissed on an exception of no cause of action because custody was still being litigated. The party petitioning the court carries the burden of proving that a parent’s consent is not required under the law.

**In re Bordelon**, 670 So.2d 676 (La. App. 3 Cir. 1996) – Adoption of child over incarcerated mother’s objections.

**Leger v. Coccaro**, 714 So.2d. 770 (La. App. 3 Cir. 1998) – Court held that adoption by stepfather was not in the child’s best interest. This appears to be a “bad” case where the appellate court engages in speculation about the mother’s current marriage and problems which may arise in that marriage. The appellate court noted the father’s failure to provide financially for the child, and curiously, seemed to be influenced more by the concern shown by the paternal relatives as opposed to the interest exhibited by the father.

**Anderson v. Ramer**, 661 So. 2d 584 (La. App. 2 Cir. 1995) – Concluded that father had failed to provide “significant” child support insofar as he was in arrears for about $10,000, exclusive of interest, at the time the adoption petition was filed.

While Children’s Code art. 1245’s provision of “refused or failed” does not state to what degree, the “significant” requirement in at least child support cases is as a result of Haynes v. Mangham, 375 So.2d 103 (La. 1979). See **Myers v. Myers**, 787 So.2d 546 (La. App. 2 Cir. 2001) where “significant” was not extended to non-support failures.

**German v. Galley**, 712 So.2d 1034 (La. App. 3 Cir. 1998) – Concluded that father’s payment of 21% of the child support owed in previous year was significant enough to prevent application of statute allowing for adoption of child without parental consent.

**In Re G.E.T.**, 529 So.2d 524 (La. App. 1 Cir. 1988) – Grandparents sought to adopt. Court found that the grandparents failed to prove that natural parents presented a risk of physical or psychological harm to the child and failed to meet their burden of proving the adoption was in the best interest of the child.

**Tutorship of Shea**, 619 So.2d 1236 (La. App. 3 Cir. 1993) – Grandparent adoption permitted where grandparents were awarded the sole custody of the child in tutorship proceedings and father’s consent not needed as he failed to provide significant support for 1 year.

*A child who is of Native American ancestry (Indian) may be subject to the Indian Child Welfare Act of 1978 (ICWA) and not subject to state court jurisdiction. Be careful!*

(380)
12. COMMUNITY PROPERTY

12.1 INTRODUCTION

This section in no way seeks to cover the breadth of matrimonial regimes. While the typical legal services case may not involve representation in community property matters, the need to have some knowledge of the process is important. Domestic violence attorneys should consider representation in property matters as this is often a factor in helping victims to break out of the cycle of domestic violence. Obviously, some partitions may require accountants and/or tax attorneys and involve a Qualified Domestic Relation Order (“QDRO”). Thus, it is best not to get in “way over your head.” Local bar programs may have referral services that would enable our clients to get specialized representation, especially in matters where the marital regime is large.

La. R.S. 9: 374 (E) does provide a simple summary procedure for a court to grant use of the community property, including a home, car or bank accounts, pending a partition of the community. This issue may be heard by a rule to show cause. Your client may need the home or car for her financial independence and for care of the children. This can be accomplished without becoming involved in a complex partition proceeding.

Even if you don’t represent the client in community partition, including an appropriate request for community partition in the divorce suit may save the client significant court costs when she does seek partition. See Judge Blanchet’s suggested language for pleading community property partition infra.

12.2 SOME BASIC PRINCIPLES FOR COMMUNITY PROPERTY DIVISION AND SPOUSAL REIMBURSEMENT

Pension division will require a Qualified Domestic Relations Order. These should be sought promptly as complex problems may occur if a spouse dies before the QDRO is obtained.\(^{244}\) It is prudent to check with the pension company for a template of the QDRO form that they will require. In military pension cases, it is important to seek a military pension division order promptly as delay may adversely affect collection of her share of the pension by direct payments from the Department of Defense.\(^{245}\)

A spouse may sue the other spouse for loss or damage to community property caused by the fraud or bad faith in managing the community property. Civil Code art. 2354. Upon termination of the community, a spouse may have a claim for reimbursement against the other spouse. Civil Code art. 2358. The right to reimbursement may exist if (1) community property was used to benefit separate property, (2) separate property was used to benefit community property, (3) community property was used to satisfy a separate debt, or (4) separate property was used to satisfy a community debt.\(^{246}\)

The right to sue for reimbursement prescribes in 10 years.\(^{247}\) However, the right to sue for an accounting of the use of community property prescribes in 3 years.

\(^{244}\) But see Gorham v. Gorham, 31 So.3d 421 (La. App. 1 Cir. 2009)(wife received entire interest in retirement plan).

\(^{245}\) Follow the Department of Defense regulations on contents for military pension division orders to ensure DOD recognition of the order for pension assignment to the non-service member.


\(^{247}\) Birch v. Birch, 55 So.3d 796 (La. App. 2 Cir. 2010); LeBlanc v. LeBlanc, 915 So.2d 966 (La. App. 3 Cir. 2005).
years from the date of termination of the community property regime.\textsuperscript{248} If a claim is in the nature of "conversion" rather than reimbursement, it may be subject to a 1 year prescription. There is no prescriptive period for the right of a co-owner to sue for partition of unpartitioned property.\textsuperscript{249}

Under the 2005 amendments to the Bankruptcy Code, a marital property debt, judgment or settlement is not dischargeable in bankruptcy.\textsuperscript{250} However, a spouse should consider timely filing an adversary complaint to contest the dischargeability of the debt. The notice of the creditors' meeting should state the deadline for opposing the dischargeability of debts. To protect a spouse's status as a "secured creditor", marital property judgments should be promptly recorded.

12.3 COMMUNITY PROPERTY PARTITION PROCEDURES

The Author gives credit to the Hon. Judge David A. Blanchet, 15\textsuperscript{th} Judicial District Court, Div. "H" and thanks him for the use of his "primer" material. It serves as a great starting point for the proper procedure and pleadings necessary to accomplish a judicial partition of community. The judge's unedited material is incorporated hereinafter.

1. A partition proceeding must be pending in order for the Court to judi-
   cially partition the former community of acquests and gains.

In other words, a pleading must have been filed that puts the partition of the community regime at issue. Otherwise, the Court is issuing an advisory opinion of what is actually an extrajudicial partition between the parties. Courts are without jurisdiction to issue advisory opinions and may only review matters that are justiciable.

A "justiciable controversy" connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of a conclusive character.

The supreme court has instructed the lower courts to refrain from rendering declaratory judgments when the issue presented to the court is academic, theoretical or based on a contingency which may not arise. See Reily v. State, 864 So.2d 223 (La. App. 3 Cir. 2003).

In my opinion, the following allegation does not serve to put the partition of the community at issue:

The spouses have acquired community property during the existence of the marriage and they desire that a partition of the community of acquests and gains be relegated to such future proceedings as may be necessary.

Instead, this allegation should read substantially similar to the following:

The spouses have acquired community property during the existence of the marriage and they desire that the community of acquests and gains be partitioned in accordance with La. R.S. 9:2801.

\textsuperscript{248} La. Civ. Code art. 2369.
\textsuperscript{249} LeBlanc v. LeBlanc, 915 So.2d 966 (La. App. 3 Cir. 2005).
\textsuperscript{250} 11 U.S.C. § 523 (a)(15).
Further, the prayer of the petition should seek a partition of the community of acquets and gains. It is not necessary that the Court issue an order requiring the parties to file their detailed descriptive lists in accordance with La. R.S. 9:2801(A)(1)(a) in order for the partition of the community to be at issue.

Further, La. R.S. 9:2801 allows that the partition action may be filed “as an incident of the action that would result in a termination of the matrimonial regime or upon termination of the matrimonial regime or thereafter.” There is no prohibition against a party praying for a judicial partition of the community in the initial petition for divorce.

Though not required, it would be wise for attorneys to also pray for an accounting pursuant to La. Civil Code art. 2369 since an obligation for an accounting prescribes in three years from the date of termination of the community property regime. This would prevent the obligation to account from prescribing in the event the partition matter is pending for more than three years from the date of termination of the community property regime. It would also be prudent for a spouse to assert in the prayer a claim for contributions to education or training of the other spouse in accordance with La. Civil Code art. 121 et seq., since this claim likewise prescribes three years from the date of signing of the judgment of divorce or declaration of nullity of the marriage.

Accordingly, the optimum prayer for partition and to settle the claims arising out of the marriage should be substantially similar to the following:

Petitioner prays that after due and proper proceedings had, that there be judgment herein partitioning the community of acquets and gains formerly existing between the parties, and adjudicating any and all other claims arising from the former community or the former matrimonial regime, including but not limited to claims for reimbursements, an accounting in accordance with La. C.C. Art. 2369, and for contributions to education or training of the defendant pursuant to La. C.C. Art. 121.

2. **No Judgment of Partition shall be rendered unless it is rendered in conjunction with, or subsequent to, the Judgment which has the effect of terminating the matrimonial regime.** See La. C.C. Art. 2336 and R.S. 9:2802.

Accordingly, it is recommended that a judgment partitioning the former community of acquets and gains contain a recitation that the community property regime has been terminated together with the date of termination. Though this is not required, attorneys should understand that if they fail to include this language in their judgment and/or stipulation, the execution of their partition judgment will be delayed since our office will have to request the file from the Clerk’s Office before the judgment can be rendered.

3. **The partition judgment must be in proper form.**

There are several ways for a judicial partition to be properly drafted. I have attached hereto a sample Judgment of Partition as Example 1, which sets forth a judgment of partition by joint stipulation of the parties. The
Court would also accept a separate written joint stipulation together with a partition judgment that mirrors that written stipulation. In addition, there are other ways to properly draft a partition judgment. For instance, a Community Property Partition Agreement can be attached to and made a part of a Judgment dismissing the partition action. See *Lapeyrouse v. Lapeyrouse*, 729 So. 2d 682 (La. App. 1 Cir. 1999). For an excellent discussion of the difference between an extrajudicial partition and a partition that constitutes a transaction or compromise not subject to lesion, see “When is a Partition Just a Partition and Not a Compromise?: *Hoover v. Hoover*,” 77 Tulane Law Review 1441, June 2003.

The Court will not sign any judgment that “approves and homologates” or “homologates as being fair and equitable to both parties” an attached community property partition, or that in any way homologates a community property partition.

La. R.S. 9:2801 is the exclusive procedure by which the former community of acquets and gains may be partitioned. This statute was originally enacted by the Legislature in 1982, more than 30 years ago, and contains no provisions concerning homologation. Homologation is found in the Louisiana Code of Civil Procedure under the heading “Partition Between Co-Owners”, art. 4601 et seq. Prior to 1982, this was the procedure to partition all co-owned property, including a former community of acquets and gains, and these articles provide for the appointment of a notary public by the Court to “make the partition in accordance with law.” When the partition has been completed by the notary, he is required to file his procès verbal of the partition, or a copy thereof, with the Court. Any party may then rule all the other parties into court to show cause why the partition should not be “homologated or rejected.” As you can see, homologation has to do with the acceptance or the rejection of the partition proposed by the court appointed notary public. There is no procedure by which a community property partition can be “homologated” by the Court since by definition the homologation is the acceptance by the Court of a partition proposed by the court appointed notary public.

Also, the Court will not sign a judgment with an attached community property partition where the judgment merely states that “the attached community property partition is made a judgment of the Court.” There must be language contained in the judgment or in the partition document stipulating that the community property partition shall be a judgment of the court. See attached Example 2.

Further, the Court will not sign the bottom of Community Property Partitions after the signature lines of the parties with language such as “Reviewed and Approved in Lafayette, Louisiana, on this ____ day of ____________. 2005.” The Court does not have the right to “review and approve” partitions. For the Court to enter a judicial partition without an actual adjudication resulting from a trial, there must be a stipulation of the parties. Otherwise, the Court is issuing an advisory opinion concerning what is actually an extrajudicial partition between the parties. Courts are without jurisdiction to issue advisory opinions and may only review matters that are
justiciable. See above discussion of *Reily v. State*, 864 So. 2d 223 (La. App. 3 Cir. 2003). Therefore, once a matter has been amicably settled by the parties as a private, extrajudicial agreement, the Court has no authority to review and approve the community property settlement.

The Court will refuse to execute a partition judgment that is not in proper form. For instance, La. Code Civ. Proc. arts. 1919 and 2089 require that all judgments and decrees which affect title to immovable property shall describe the immovable property affected with particularity. The purpose of these articles is to insure that the public in general and title examiners, successful litigants, officials charged with executions of judgments and surveyors in particular, can accurately deal with the immovable property. See *Hurst v. Ricard*, 558 So.2d 1269 (La. App. 3 Cir. 1990). It is well settled that a municipal address is not a proper legal description of immovable property and the Court will not sign partition judgments unless appropriate immovable property descriptions are contained therein.

Further, the attorneys must understand that any sums of money owed under a judicial partition will constitute a judicial mortgage against the obligor spouse which encumbers any property received by that spouse. Upon the payment of the money portion of the partition judgment, the obligor spouse is entitled to receive from the obligee spouse an Act of Partial Cancellation of the Judgment that is to be recorded in the mortgage records of the Clerk of Court’s office and which serves to partially cancel and erase the partition judgment insofar and only insofar as it pertains to the money judgment against the obligor.

4. **A Community Property Partition may be “extrajudicial”, that is a written agreement between the parties that is not made a judgment of the Court.**

The main reason parties seek to obtain a judicial partition, as opposed to an extrajudicial partition, is in an attempt to avoid lesion beyond moiety. If lesion is not a problem, then an extrajudicial partition will serve the parties just as well as a partition by judgment and it will save the parties on court costs. Also, an extrajudicial partition may be perfected by the parties at any time, even prior to the termination of the community regime. See La. Civ. Code art. 2336.

It should be noted that an extrajudicial partition which includes immovable property must be made by authentic act, or by act under private signature preferably acknowledged, and it must be recorded in the conveyance records to be effective against third parties. See La. Civ. Code. art. 1839. Also, the notary passing the extrajudicial partition should comply with the requirements of La. R.S. 35:12. After January 1, 2005, the Clerk of Court will not accept notarized documents which fail to contain the notary identification or bar roll number and the typed or printed name of the notary and the witnesses. The agreement should also contain a waiver of all liens, privileges, resolutory conditions, and the right of dissolution for non-payment of consideration. See *Sliman v. McBee*, 311 So.2d 248 (La. 1975) and La. Civ. Code art. 2561.
JUDGMENT OF PARTITION

NOW INTO COURT come HUSBAND and WIFE, who upon suggesting to this Honorable Court that an action to partition the community of acquets and gains formerly existing between them and to adjudicate any and all other claims arising from the former community or the former matrimonial regime has been filed in the above captioned and numbered proceeding pursuant to La. R.S. 9:2801, et seq., that pursuant to La. R.S. 9:2802 the matrimonial regime was terminated by this proceeding by judgment dated ______________ (or, by judgment rendered in conjunction herewith), and upon further suggesting that the parties have reached a transaction or compromise pursuant to La. C.C. Art. 3071, as more fully stipulated in this Consent Judgment of Partition;

Accordingly, after considering the stipulations of the parties as set forth in this Consent Judgment, the law and stipulations being in favor thereof,

IT IS ORDERED, ADJUDGED AND DECREED that the assets and liabilities of the community of acquets and gains formerly existing between HUSBAND and WIFE, and any and all other claims arising from the former community or the former matrimonial regime, including but not limited to claims for reimbursements, accountings, contributions to education or training pursuant to La. C.C. Art. 121, et seq., be and they are hereby partitioned, allocated and assigned, as follows:

IT IS ORDERED, ADJUDGED AND DECREED that HUSBAND, is hereby allocated, assigned and awarded the exclusive ownership of, and all right, title and interest, being a one hundred (100%) percent interest, in and to the following described immovable property:

[PROPERTY DESCRIPTION – mailing address is insufficient]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that HUSBAND, is hereby allocated, assigned and awarded the exclusive ownership of, and all right, title and interest, being a hundred (100%) percent interest, in and to the following described corporeal movable property which is currently in his possession:

[DESCRIPTION OF CORPOREAL MOVABLES]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that HUSBAND shall take delivery of the above referenced items from the possession of WIFE (specify location) at a mutually convenient time and at his cost, together with his separate property which is in the possession of HUSBAND, more fully described as follows:

[DESCRIPTION OF SEPARATE PROPERTY]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that HUSBAND, is hereby allocated, assigned and awarded the exclusive ownership of, and all right, title and interest, being a hundred (100%) percent interest, in and to the following described incorporeal movable property which is currently in his possession:

[DESCRIPTION OF INCORPOREAL MOVABLES]

(386)
IT IS ORDERED, ADJUDGED AND DECREED that WIFE, is hereby allocated, assigned and awarded the exclusive ownership of, and all right, title and interest, being a one hundred (100%) percent interest, in and to the following described immovable property:

[PROPERTY DESCRIPTION – mailing address is insufficient]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that WIFE, is hereby allocated, assigned and awarded the exclusive ownership of, and all right, title and interest, being a hundred (100%) percent interest, in and to the following described corporeal movable property which is currently in her possession:

[DESCRIPTION OF CORPOREAL MOVABLES]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that WIFE shall take delivery of the above referenced items from the possession of HUSBAND (specify location) at a mutually convenient time and at her cost, together with her separate property which is in the possession of HUSBAND, more fully described as follows:

[DESCRIPTION OF SEPARATE PROPERTY]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that WIFE, is hereby allocated, assigned and awarded the exclusive ownership of, and all right, title and interest, being a hundred (100%) percent interest, in and to the following described incorporeal movable property which is currently in her possession:

[DESCRIPTION OF INCORPOREAL MOVABLES]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that HUSBAND is allocated the following indebtedness, and HUSBAND, shall defend, indemnify and hold WIFE, harmless for the payment thereof:

[DESCRIPTION OF DEBT ASSUMED BY HUSBAND]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that WIFE is allocated the following indebtedness, and WIFE, shall indemnify and hold HUSBAND, harmless for the payment thereof:

[DESCRIPTION OF DEBT ASSUMED BY WIFE]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of WIFE/HUSBAND and against HUSBAND/WIFE, in the amount of $________________________, after taking into account all claims for reimbursements, accountings, contributions to education or training pursuant to La. C.C. Art. 121, et seq., and any and all other claims arising from the community of acquets and gains formerly existing between them. This equalizing sum shall be paid as follows:

[DESCRIPTION OF PAYMENT, i.e. PROMISSORY NOTE, CASH, ETC.]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties shall, at the other’s request and expense, at any time, and from time to time hereafter, take any and all steps, and execute any and all further documents, instruments and assurances that the other may reasonably require for the purpose of giving full force and effect to the provisions of this Judgment of Partition. Without in any way limiting the generality of the foregoing, the parties shall execute any and all documentation that may be necessary and/or requisite to transfer the property partitioned and/or conveyed herein in accordance with the terms and provisions contained herein, for any and all
purposes, including but not limited to the purposes of affecting recordation in the conveyance and/or mortgage records of the parish in which the properties are located, if and when called upon to do so, by each other.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that no vendor’s liens, resolutory conditions or rights to rescind this Judgment are created in favor of the parties and, if for any reason any vendor’s liens, resolutory conditions or rights to rescind should inadvertently be created by this Judgment, then and in that event, the parties do hereby waive any vendor’s liens, resolutory conditions or rights to rescind.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the temporary restraining order issued against HUSBAND recorded under Act No. ______________ and the temporary restraining order issued against WIFE, recorded under Act No. ______________, are hereby lifted, canceled and erased from the mortgage records of the Clerk of Court of ______________ Parish, Louisiana.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that reciprocal preliminary injunction issued against both parties, restraining, enjoining and prohibiting each of them, or any other persons, entities, firms, corporations or partnerships acting or claiming to act in their behalf in any matter from alienating, encumbering or disposing of any or all of the assets of the community of acquets and gains formerly existing between them contained in that certain Judgment on Rules dated ______________ and recorded under Act No. ______________ be and it is hereby lifted, canceled and erased from the records of the Clerk of Court of ______________ Parish, Louisiana, and that the said Judgment on Rules shall remain in full force and effect in all other respects.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that HUSBAND shall pay _____% of the court costs and WIFE shall pay ____% of the court costs of this proceeding.

JUDGMENT SIGNED in Chambers at ______________, Louisiana, this _____ day of ______________, 200__.

__________________________________________________________
DISTRICT JUDGE

STIPULATED TO AND APPROVED AS TO FORM AND CONTENT:

__________________________________________________________
Attorney for HUSBAND
Bar Roll No., Address & Phone No.

__________________________________________________________
HUSBAND

__________________________________________________________
Attorney for WIFE
Bar Roll No., Address & Phone No.

__________________________________________________________
WIFE
JUDGMENT OF PARTITION

NOW INTO COURT come HUSBAND and WIFE, who upon suggesting to this Honorable Court that an action to partition the community of acquets and gains formerly existing between them and to adjudicate any and all other claims arising from the former community or the former matrimonial regime has been filed in the above captioned and numbered proceeding pursuant to La. R.S. 9:2801, et seq., that pursuant to La. R.S. 9:2802 the matrimonial regime was terminated by this proceeding by judgment dated ______________ (or, by judgment rendered in conjunction herewith), and upon further suggesting that the parties have stipulated to and reached a transaction or compromise pursuant to La. C.C. Art. 3071, as more fully set forth in the attached Community Property Partition;

Accordingly, after considering the stipulations of the parties as set forth in the attached Community Property Partition, the law and stipulations being in favor thereof,

IT IS ORDERED, ADJUDGED AND DECREED that the attached Community Property Partition is incorporated herein by reference thereto and is hereby made a judgment of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the temporary restraining order issued against HUSBAND recorded under Act No. ______________ and the temporary restraining order issued against WIFE, recorded under Act No. ______________, are hereby lifted, canceled and erased from the mortgage records of the Clerk of Court of __________________ Parish, Louisiana.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that reciprocal preliminary injunction issued against both parties, restraining, enjoining and prohibiting each of them, or any other persons, entities, firms, corporations or partnerships acting or claiming to act in their behalf in any matter from alienating, encumbering or disposing of any or all of the assets of the community of acquets and gains formerly existing between them contained in that certain Judgment on Rules dated ______________ and recorded under Act No. ______________ be and it is hereby lifted, canceled and erased from the records of the Clerk of Court of __________________ Parish, Louisiana, and that the said Judgment on Rules shall remain in full force and effect in all other respects.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the partition proceeding filed in the above captioned and numbered proceeding is hereby dismissed, with prejudice, and HUSBAND shall pay _____% of the court costs and WIFE shall pay ____% of the court costs of this proceeding.

JUDGMENT SIGNED in Chambers at ______________, Louisiana, this _____ day of ______________, 200__.

_________________________________
DISTRICT JUDGE

(continued on next page)
STIPULATED TO AND APPROVED AS TO FORM AND CONTENT:

Attorney for HUSBAND
Bar Roll No., Address & Phone No.

HUSBAND

Attorney for WIFE
Bar Roll No., Address & Phone No.

WIFE

OTHER HELPFUL FORMS

Forms prepared by Acadiana Legal Service Corporation. These forms are for pro se purposes only. No representation or enrollment as counsel is implied or expressed. It is always best to retain the services of an attorney in any legal representation, as the law is complicated and may have changed.
CONSENT JUDGMENT AND PLAN FOR IMPLEMENTATION OF JOINT CUSTODY

This matter was set for Rule on the ___ day of ___, 2012. The parties in seeking to resolve their differences, have entered into a compromise that is incorporated and reflected herein.

A. Physical Custody: The care, custody and control of the minor children shall be awarded jointly to _______________________, (hereinafter “Mother”) and ___________________________ (hereinafter “Father”), under the following plan, with Mother designated as the domiciliary parent. The children shall reside with the Mother at all times they are not in residence with the Father.

1. WEEKEND AND WEEKDAY VISITATION: Father shall have liberal and frequent custodial periods of the children including, but not limited to the following:
   a. Alternating weekends each month from Friday after daycare at 5:30 p.m. until Monday morning when he returns the children to daycare at the beginning of the daycare schedule between the hours of 8:00 a.m. and 9:00 a.m.;
   b. During the “off” weeks (weeks when Father does not have weekend visitation), Father shall have visitation Wednesday evening from approximately 5:30 p.m., when he picks up the children at daycare until 8:00 a.m. on Thursday when he returns the children to daycare;

2. HOLIDAYS: All holidays and holiday periods shall be defined in accordance with the school calendar in effect for the school which the minor child[ren] attend(s).
   a. Thanksgiving shall be defined as commencing at 6:00 p.m. on the last school day preceding the Thanksgiving school holiday period of the minor child[ren] and concluding at 6:00 p.m. on the day before the child[ren] return(s) to school following said holiday period.
      i. In even-numbered years, the _____ shall be entitled to enjoy the entire Thanksgiving holiday period.
      ii. In odd-numbered years, the _____ shall be entitled to enjoy the entire Thanksgiving holiday period.
   b. The Christmas and New Year’s holiday period shall be defined in two parts: (1) the first half of said period shall commence at 6:00 p.m. on the last school day preceding the holiday period and concludes at 9:00 p.m. on Christmas Eve, and (2) the second half of said period shall commence at the conclusion of the first half and shall conclude at 6:00 p.m. on the day before the child[ren] return(s) to school following said holiday period.
      i. In even-numbered years, the _____ shall be entitled to enjoy the first half of the Christmas and New Year’s holiday period, and the other parent shall be entitled to enjoy the second half of the Christmas and New Year’s holiday period.
      ii. In odd-numbered years, the _____ shall be entitled to enjoy the first half of the Christmas and New Year’s holiday period, and the other parent shall be entitled to enjoy the second half of the Christmas and New Year’s holiday period.
c. **Mardi Gras** shall be defined as commencing at 6:00 p.m. on the last school day preceding the Mardi Gras school holiday period of the minor child[ren] and concluding at 6:00 p.m. on the day before the child[ren] return(s) to school following said holiday period.
   i. In even-numbered years, the _____ shall be entitled to enjoy the entire Mardi Gras holiday period.
   ii. In odd-numbered years, the _____ shall be entitled to enjoy the entire Mardi Gras holiday period.

d. **Easter** shall be defined as commencing at 6:00 p.m. on the last school day preceding the Easter school holiday period of the minor child[ren] and concluding at 6:00 p.m. on the day before the child[ren] return(s) to school following said holiday period.
   i. In even-numbered years, the _____ shall be entitled to enjoy the entire Easter holiday period.
   ii. In odd-numbered years, the _____ shall be entitled to enjoy the entire Easter holiday period.

3. **SPECIAL OCCASIONS:** Additional specific custodial rights which are to take precedence when in conflict with the recurring custodial periods set forth in Section A, hereinabove. Said additional specific visitation rights with the minor child[ren] and the times for the commencement and termination thereof are as follows:
   a. **Father’s Day:** The Father shall be entitled to every Father’s Day, from 6:00 p.m. on the day before Father’s Day until 6:00 p.m. on Father’s Day, regardless that this day does not happen to fall during his regular custodial/visitation time.
   b. **Mother’s Day:** The Mother shall be entitled to every Mother’s Day, from 6:00 p.m. on the day before Mother’s Day until 6:00 p.m. on Mother’s Day, regardless that this day does not happen to fall during her regular custodial/visitation time.

4. **VACATION PERIOD:**
   a. During the children’s summer vacation from school, the parties shall exercise custodial periods as follows: _______________________________.

5. **FIRST OPTION TO CARE FOR CHILD**
   a. Except for those periods of time when the parents are routinely working and the child[ren] is/are usually and customarily with a child care provider, in the event either of the parties is going to be unavailable to personally provide care and supervision of the minor child[ren] for a period of time in excess of _____ (___) hours, then the parent who will be unavailable shall give the other parent the first option to provide said care and supervision of the child[ren] from the beginning of the time of unavailability through the end of the period of unavailability.
   b. In the event that the parent to whom the first option is extended is unable to or does not accept said option, the parent who will be unavailable shall have the discretion to place the care and supervision of the minor child[ren] with another individual of suitable age and discretion, taking into account the age of the child[ren] to be cared for and the time of day and day of the week.

6. **GENERAL PROVISIONS**
   1. The parents are encouraged to communicate frequently in an effort to mutually agree in regard to the general health, welfare, education, and
development of the minor child[ren]. Each parent should not ignore the input of the other by the failure to communicate or use the child[ren] to inform each other of decisions on important matters.

2. Both parties shall provide each other with all relevant addresses (home and work) and telephone numbers (home, work, cellular, and pager) where the child[ren] may be contacted, including a geographical location and telephone number if the child[ren] is/are traveling with that parent outside of the State of Louisiana.

3. Neither parent shall attempt or condone any attempt whatsoever, directly or indirectly, by artifice or subterfuge, to estrange the minor child[ren] from the other party or injure or impair the mutual love and affection of the minor child[ren] for either parent. Further, neither party shall make any negative or condescending remarks, within the presence or within the hearing of either of the child[ren], about the child’s other parent, the spouse of the child’s other parent, the extended family of the child’s other parent or the extended family of the spouse of the child’s other parent.

4. At all times, the parents shall encourage and foster in the minor child[ren] sincere respect and affection for both parents and shall not hamper the natural affection for both parents or the natural development of the minor child[ren]’s love and respect for the other parent.

5. Except as provided herein, the child[ren] shall be subject to rules and regulations as agreed upon by the parents.

6. Each parent should maintain sufficient flexibility to allow for variations made necessary by the ebb and flow of social, educational, and recreational life.

7. Each parent shall maintain a sufficient day-to-day wardrobe for the child[ren], but it shall be the responsibility of the domiciliary parent to maintain and to provide to the non-domiciliary parent items of clothing for special circumstances (seasonal, social, and special occasion), unless the circumstances necessitating the special clothing are beyond the control of the domiciliary parent, and it shall be the responsibility of the non-domiciliary parent to return to the domiciliary parent any items of clothing at the conclusion of her/his custody/visitation period. It shall be the responsibility of each parent to return to the other parent any items of clothing which were sent with the child.

8. All information regarding school, report cards, conferences, trips, functions, meetings, etc. should be made available to the other parent as either parent receives same, but it shall be the responsibility of the non-domiciliary parent to take the steps necessary to procure copies of documents (report cards, progress reports, routine announcements, etc.) directly from the educational institution. The parents shall not communicate through the child[ren], or third parties, or use the child[ren] because they refuse to communicate.

9. Neither party shall have or be an overnight guest of the opposite sex to whom he or she is not related by blood or marriage while the child[ren] are in residence, nor shall either party permit the minor child[ren] to have or be an overnight guest of the opposite sex until he or she has reached the age of majority.

10. Each party shall keep the other fully advised of any and all extracurricular activities in which the child[ren] is/are participating, and shall give the other parent reasonable advance notice thereof, in order to permit the other parent to attend.
11. Neither party shall discuss or communicate about the child[ren] or legal proceedings between the parties within the presence or hearing of either of the minor child[ren], if such communication might estrange the minor child[ren] from the other party or injure or impair the mutual love and affection of the minor child[ren] for either party. Further, to the extent that the parties communicate between themselves regarding the child[ren] and/or the legal proceeding, neither of them shall allow the child[ren] any access to any written communication which is intended solely for the parties.

12. Neither party shall attempt to convince the child[ren] not to spend custodial time with the other parent, or to attempt to convince the child[ren] to terminate a custodial period with the other parent before said period is completed. Further, neither party shall denigrate the activities, nature or essence of the time spent with the other parent.

B. CHANGE OF RESIDENCE OF PARENT

Either parent may remove residence from the parish of their present domicile(s). Before or within sixty (60) days of such removal, the parent changing residence shall request a modification of this plan from the remaining parent. If agreement is reached, a joint motion for modification may be submitted to the Court. If no agreement is reached, the party changing residence shall request a modification from the Court.

In any event, each parent shall keep the other notified, at all times, of a current residential address, home telephone number, place of employment, work telephone, and, if applicable, cellular telephone and beeper numbers.

The residence of the child[ren] may be re-located only after compliance with the provisions of LSA-R.S. 9:355.1 et seq. This section shall not apply if either parent re-locates his or her residence in the Parish of ___________, State of Louisiana.

C. MARRIAGE OR REMARRIAGE

Upon marriage or remarriage, either party may seek a modification of custody or visitation, in accordance with the law.

D. EDUCATION

The domiciliary parent shall discuss educational issues with the other parent, and the parties shall attempt to reach mutual agreements regarding the education of the child[ren].

Pursuant to LSA RS 9:351, each parent is entitled to access to records and information pertaining to the minor child, and shall not be denied to a parent solely because s/he is not the child’s custodial or domiciliary parent.

E. TRANSPORTATION

Each parent is responsible for transportation of the child[ren] while in residence. Except as provided otherwise herein, and/or unless the parties reach a mutually acceptable alternative arrangement, the parent to whom the child[ren] is/are being transferred at the beginning or end of any custodial/visitation period, or his or her designee (which shall be an individual with a current driver’s license and insured in accordance with all Louisiana laws, and shall have legally required restraint systems and devices, including specifically seat/shoulder belts and child safety seats for children required to be so restrained), shall be responsible for picking up the child[ren] at the home of the other parent.

F. MEDICAL AND DENTAL

Except in emergencies, the domiciliary parent is responsible for all medical, psychiatric and dental treatment decisions for the minor child[ren], and shall discuss said treatment issues with the non-domiciliary parent. The domiciliary parent
shall advise the non-domiciliary parent of any and all appointments in advance of same and shall further advise the non-domiciliary parent of treatments rendered and anticipated treatments as soon as that information is received by the domiciliary parent. The non-domiciliary parent shall have the right to attend any and all appointments, but shall not be entitled to cancel or re-schedule any appointments except with the specific agreement of the domiciliary parent.

Pursuant to LSA RS 9:351, each parent is entitled to access to records and information pertaining to the minor child, and shall not be denied to a parent solely because s/he is not the child’s custodial or domiciliary parent.

The parties further agree that neither of them will be obligated to share in any of said expenses which are purely elective in nature unless the parties have mutually agreed on said expenses in advance of same. Cosmetic surgery or cosmetic dental treatment on the minor child[ren], unnecessary to the integrity of the dental structure, shall not be undertaken without the permission of both parents. Substance abuse treatment is deemed medical treatment.

G. COMMUNICATION BY AND WITH THE CHILD[REN]

The child[ren] shall have reasonable access to communication with each parent. No communication shall be intercepted, censored, or monitored. However, neither party shall badger the child[ren] regarding the nature and quality of the custodial periods spent with the other parent. Further, neither party shall deny the other party telephone access to the child[ren] on his or her birthday.

Each party shall provide to the other all residential, work and cellular telephone numbers where each of them may be reached at any given point in time while the child[ren] is/are in that party’s physical custody. In addition, when a party is traveling away from home with the child[ren], specifically for vacation or out-of-state travel, that party shall provide a telephone number and physical location where the child[ren] may be contacted.

H. TUTORSHIP

The parents shall enjoy the natural co-tutorship of the child[ren] in accordance with Articles 250 and 258 of the Louisiana Civil Code, except as limited herein.

I. PROPERTY OF THE CHILD[REN]

The parents shall have administration of the property of the child[ren] provided by Article 4262 of the Louisiana Code of Civil Procedure.

J. MEDICAL EMERGENCY OR ACUTE ILLNESS

In the event of a medical emergency or serious acute illness, each parent shall afford reasonable custodial/visitation time to the other upon request, and both shall take said circumstances into consideration in deviating from the custody/visitation schedule, so long as any custody/visitation periods which are missed are made up as soon as possible thereafter.

K. PLAN MODIFICATION

Each party may seek judicial modification of this plan. In the event the parties reach a mutually agreeable modification, they shall furnish to the Court a joint motion which accurately summarizes the modification for implementation by the Court. The joint modification shall be effective after Court approval, but may be retroactive if agreed by the parties and/or approved by the Court.

APPROVED AS TO FORM AND CONTENT:

Parent 1’s Signature  Parent 2’s Signature

Attorney 1’s Signature  Attorney 2’s Signature
The Court, in reviewing the parties’ agreement above, finds it in accordance with the law and makes it the judgment of the Court.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the following Joint Custody Plan be implemented between the parties concerning the minor children, ________________, ________________, and ________________.

THUS, READ AND SIGNED, this ___ day of ______, 20__, at ____________, Louisiana.

_________________________________
_____ JDC JUDGE (name)

Notes:
☞ Judge’s signature page must have case caption at the top. Judges name (or line for his/her name) needs to be provided. See La. Uniform District Court Rule 9.5 (Court’s signature and circulation of proposed judgment requirements).
☞ General pointers in drafting pleadings.

1. Petition: Caption; font size; spacing; clarity in paragraphs and grouping them so that they flow together. Main body consist of: Parties, Jurisdiction and venue; facts stating a cause of action and the relief therein; Prayer (that tracks and captures the relief being sought).

2. Order: Caption; tracks and captures the relief that is being sought or that is to be granted.

3. Judgment: Caption; preamble (how the case is before the court); who were present and the parties; the adjudication made by the court; the relief granted; signatures.

4. Memorandum in family law matters:
   Keep it simple. You can lose yourself and the Court in the facts. Be specific. In most family law cases, the memorandum can be combined with your Motion to Set Trial.

5. New trial: Seek written reasons from the court in anticipation of an appeal.
PLAINTIFF * ____ JUDICIAL DISTRICT COURT
VERSUS: * _________________ PARISH, LOUISIANA
DEFENDANT * DOCKET NO. _____________
FILED: _________________ * Dty. Clerk _______________
-----------------------------------------------------------------------------------------------------------------------
PETITION FOR DIVORCE (LA CIVIL CODE ARTICLE 102) AND DETERMINATION OF OTHER ANCILLARY MATTERS

The petition of ______________________, a person of the full age of majority, who is domiciled in ______________ Parish, State of Louisiana, respectfully rep- presents the following:

1. Made defendant herein is____________________________, a person of the full age of majority, who is domiciled in _____________ Parish, Louisiana.

2. This Court has subject matter jurisdiction over the status of the divorce as pursuant to Louisiana Code of Civil Procedure Article 10(A)(7), because one or both of the parties are domiciled in this state.

3. Pursuant to Louisiana Code of Civil Procedure Article 3941, this Court is a court of proper venue insofar as this parish was the parish of matrimonial domicile as well as the parish of residence for the petitioner.

4. The petitioner and her husband were married in 1998, in ___________________ Parish, Louisiana, and they last resided together in ___________________ Parish. The parties did not enter into a covenant marriage pursuant to R.S. 9:272 et seq.

5. The parties are living separate and apart as of the date this petition was filed and intend to live separate and apart continuously, and without reconciling with the intent to divorce, for a period of one hundred eighty days prior to a filing a rule to show cause why a divorce should not be granted.

6. Of the marriage between the parties, three children were born, namely: ___________________ born ______; ___________________ born _____; and ___________________ born ______. The minor children have been residing with the petitioner since the date of separation.

7. It is in the best interest of the minor children that joint custody be awarded to the parties, with the petitioner designated as the domiciliary parent, with specific visitation privileges to the defendant, as set forth in a joint custody implementation plan to be submitted to this Honorable Court.

8. Petitioner does not have sufficient income for the adequate support of the parties’ minor children, and is therefore entitled to receive child support of the children in accordance with the Louisiana Child Support Guidelines. In addition, petitioner asks that the defendant be ordered to maintain a policy of health and hospitalization insurance on the minor children.

9. Petitioner and defendant acquired certain community property during their marriage and petitioner is entitled as a result of the “disorder of the affairs of the defendant” to an order terminating the community property regime as per LSA-C.C. Art. 2374 and for a partition of the community property existing between the parties. Petitioner’s coun-
sel, in compliance with 45 CFR 1609 and the Rules of Professional Conduct, limits the scope of representation herein and excludes any representation or participation in any future community proceedings that may be conducted pursuant to R.S.9:2801 et seq.

10.

The defendant has a history of harassment, intimidation and physical abuse against the petitioner. Most recently, on the ___ day of __________, 20___, the defendant battered and punched petitioner, causing petitioner to seek medical attention for the injuries.

11.

Due to the defendant’s history of harassment, intimidation and physical abuse, petitioner desires and is entitled to a temporary restraining order, and in due course, a preliminary and permanent injunction, pursuant to Louisiana Revised Statute § 9:372 prohibiting the defendant, his agents or assigns, from any form of physical or sexual abuse.

12.

Petitioner does not have sufficient income for her maintenance during the pendency of these proceedings and the Defendant has the ability to provide support. Therefore, pursuant to Louisiana Civil Code Articles 111-113, petitioner desires and is entitled to interim periodic spousal support, and in due course, final periodic spousal support, in an amount to be determined by this honorable Court. Petitioner was not at fault in the breakup of the parties’ marriage.

13.

Petitioner has no place to live other than the family home. Therefore, petitioner desires and is entitled to use and occupancy of the family home and of its furnishings, pursuant to Louisiana Revised Statute § 9:374(B), pending further order of the court.

14.

Petitioner must transport the children to and from school and/or daycare, and to their doctor’s appointments. Therefore, petitioner seeks use of the family vehicle, a 2002 Ford Escape, which is currently in the petitioner’s possession, pursuant to Louisiana Revised Statute § 9:374(B), pending further order of the court.

15.

Petitioner requests that any right to bring other claims and/or actions incidental to this matter and for other relief based on any cause of action or issue arising out of the marriage, should be reserved unto her.

16.

Petitioner is a citizen of this State and because of her poverty and want of means, she is unable to pay the costs of this petition in advance or as they accrue, or to give security thereof, and desires to file and prosecute this action under the provisions of La. C.C.P. Arts. 5181-5188.

WHEREFORE, petitioner prays that:

1. Defendant, _____________________, be served with a copy of this Petition for Divorce, and that after the lapse of legal delays and due proceedings had, there be judgment herein in favor of petitioner and against defendant, decreeing a divorce a vinculo matrimonii between them; and

2. That a temporary restraining order issue herein, immediately and without bond, according to law, and in due course a preliminary and permanent injunction issue to the same effect, prohibiting the defendant, his agents or assigns from any form of physical or sexual abuse or harassment of the petitioner; and

3. Petitioner be allowed to file and prosecute this action under the provisions of La. C.C.P. Arts. 5181-5188; and

(398)
4. That a rule nisi issue, directed to the defendant, __________________, ordering him to show cause on a date and time to be set by this Honorable Court why:

A. A preliminary injunction/permanent injunction in the form and substance of the above Temporary Restraining Order should not issue herein; and

B. The parties should not be granted joint custody of the minor children with petitioner designated as the domiciliary parent, with specific visitation privileges to the defendant pursuant to a joint custody implementation plan to be submitted to the court; and

C. The defendant should not ordered to pay child support for the support and maintenance of the minor children of the marriage in an amount to be set by this court in accordance with the Louisiana Child Support Guidelines; and

D. The Petitioner should not be awarded periodic interim spousal support for her maintenance during the pendency of these proceedings, and in due course, final periodic spousal support, in an amount to be set by this Court; and

E. Petitioner should not be granted use of the family residence, and of its contents therein, and the family automobile pending further orders of the court; and

F. Petitioner should not be permitted to reserve her right to bring other actions incidental to or arising from the matrimonial regime, and for other relief based on any action or issue arising out of the marriage of the parties; and

G. The Defendant should not be assessed all costs of these proceedings; and

H. The community property regime should not be terminated in accordance with La. C.C.Art. 2374 as a result of the disorder of affairs of the Defendant; and

I. The Petitioner should not be entitled to all general and equitable relief.

Respectfully submitted,

By: ___________________________
    Attorney for Petitioner
VERIFICATION

BEFORE ME, notary public, personally came and appeared:

___________________________________

Petitioner in the foregoing “Petition for Divorce (La civil code article 102) and Determination of other Ancillary Matters” who, after being duly sworn, did depose and state that all of the allegations contained in the foregoing petition are true and correct to the best of her knowledge, information, and belief.

The minor children have been in her physical custody in this State since ______ and there are no prior custody decree(s) in this or any other state.* All interested parties in these proceedings have been named.

___________________________________

AFFIANT

SWORN TO AND SUBSCRIBED before me, this ______ day of __________, 20__.

___________________________________

NOTARY PUBLIC

___________________________________

(print name)

*The need to state the substantive jurisdictional basis for the court to hear a “child custody proceeding” as defined by R.S. 13:1802(4) is necessary pursuant to R.S. 13:1821 (UCCJEA).
ORDER

Considering the above and foregoing verified petition and annexed affidavits:

IT IS HEREBY ORDERED that a R.S. 9:372 temporary restraining order issue herein immediately, without bond, according to law, directed to the defendant, restraining, enjoining, and prohibiting the defendant, his agents or assigns, from any form of physical or sexual abuse.

IT IS FURTHER ORDERED that petitioner is allowed to file and prosecute this action under the provisions of C.C.P. art. 5181-5188.

(Note that the IFP form provides for the Order but the judge may overlook it if s/he has orders to sign here).

IT IS FURTHER ORDERED that the parties shall appear for a Hearing Officer Conference on the ____ day of __________, 2004, in ____________ Parish, with all the necessary documentation required by the Hearing Officer, in order to address all contested matters before the court.

(Note that courts that have Hearing Officers, will set the ancillary matters for a Conference)

IT IS FURTHER ORDERED that in the event that the parties have not resolved the contested matter(s) or a timely objection has been filed by either party, the Defendant, ______________, shall show cause on the _____ day of _____________, 20__, at 10:00 a.m. at the _________________ Parish Courthouse, as a ______ fixing before the Hon. Judge ______________________, why there should not be judgment in favor of petitioner and against defendant, as follows:

(a) Ordering the issuance of preliminary/permanent injunctions in the form and substance of the temporary restraining orders prayed for herein.

(b) Awarding the joint custody of the minor children of the marriage to the parties with petitioner being named primary domiciliary parent and defendant having specific custodial rights as set forth in a Joint Custody Implementation Plan to be submitted to this Court.

(c) Ordering the defendant to pay to petitioner interim periodic spousal support in an amount to be set by this Court and in due course, final periodic spousal support.

(d) Ordering defendant to pay to petitioner child support for the support and maintenance of the minor children of the marriage in an amount set by this Court in accordance with the Louisiana Child Support Guidelines, and further, that defendant be ordered to maintain a policy of health and hospitalization insurance on the aforesaid minor children.

(e) Granting to petitioner the use and occupancy of the family residence located at _________________________, and the use of the contents located therein, and further, the use of the 2002 Ford Escape community vehicle, VIN #_____________.

(f). Casting the defendant with all court costs.
THUS, READ AND SIGNED this ________ day of _________________, 20__, in ________________________, Louisiana.

_________________________________
JUDGE (NAME)

Clerk of Court:
PLEASE SERVE DEFENDANT PERSONALLY:
(Service info)

- The injunctions are tricky, especially when you need a permanent injunction pursuant to 9:362(4), 9:372, 9:372.1, etc. A permanent injunction is usually an ordinary proceeding and thus, cannot be resolved by a Rule Nisi. A preliminary injunction is a summary proceeding on the other hand and is set as a Rule. In cases where going back and forth to the court for numerous court dates is problematic, (long arm service cases, defendant is incarcerated, etc.), and where a divorce is being sought as well - it is best to get the TRO and if there are no Rules set for other ancillary matters, than plan on taking up the permanent injunction by way of a default at the confirmation of the divorce or at the trial if an answer was filed.

- You should not be able to get a permanent injunction granted by utilizing a C.C.P. Art.1702(E) divorce by pleadings. If issues are joined it should be set for trial. Some Courts may allow a R.S. 9:372.1 (if there is a prior protective order) without setting it for a hearing.

- The permanent injunctions of 9:372 and 9:361 must be on the Uniform Abuse Prevention Order Form (Louisiana Protective Order Registry Forms). In fact, even the TRO’s and Preliminary Injunctions have to be on the LPOR forms. See La. C.C.P. art 3607.1. and R.S. 46:2136.2(C).

- Courts that have the Hearing Officer system may facilitate the initial hearing as the Preliminary/Permanent injunction …rolled into one. As long as the defendant is aware of it and agrees to it, it is okay. If an objection is filed by the Defendant, see if the judge will take up the permanent injunction as well. Otherwise, it needs to be finalized at the time of the divorce. A 9:372 injunction must be “instituted during the pendency of the divorce proceedings.” See Lawrence v. Lawrence, 839 So.2d 1201 (La.App. 3 Cir.,2003).
PLAINTIFF * ____ JUDICIAL DISTRICT COURT
VERSUS: * _______________ PARISH, LOUISIANA
DEFENDANT * DOCKET NO. _____________
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PETITION FOR DIVORCE UNDER CIVIL CODE ARTICLE 103(1)
(with no MINOR CHILDREN)

The petition of __________, a person of the full age of majority and domiciled since 20 May 1990, in the Parish of __________________, State of Louisiana, respectfully represents:

1. Made Defendant herein is ___________, her husband and a person of the full age of majority and domiciled in the Parish of ____________, State of Louisiana.

2. Plaintiff and Defendant were married on the ______ day of __________, 19______, in _________________ Parish, Louisiana, however, their last matrimonial domicile was in __________________ Parish.

3. Plaintiff and Defendant physically separated in August 2000 and Petitioner has voluntarily continued to live separate and apart with the intent to be divorced, without reconciliation, since that date.

4. Plaintiff now desires to obtain and is entitled to obtain a judgment of divorce a vinculo matrimonii on the bases of living separate and apart, without reconciliation, and with the intent to be divorced for one hundred and eighty days (180) days or more as per the provisions of C.C. Article 103(1). The parties did not enter into a covenant marriage pursuant to R.S. 9:272 et seq.

5. Of the marriage, two children were born, namely: __________________, and __________________, who are both of the age of majority. No children were adopted or legitimated nor is Plaintiff pregnant at this time.

6. Plaintiff is a citizen of this State and because of her poverty and want of means, she is unable to pay costs, either in advance, or as they accrue, or to give bond therefore, and requests that she be allowed to file and prosecute this action in in forma pauperis as per L.S.A. C.C.P. Article 5181-5188.

7. Petitioner desires to have her maiden name confirmed and requests that the court enter an order confirming her name as ________________, which is her maiden name.

8. Counsel for the plaintiff, Acadiana Legal Service Corporation and ATTORNEY seek to withdraw as counsel of record (for service purposes) pursuant to La. C.C.P. Art 1314 (A)(2b) after proceedings have been concluded, delays elapsed, and all parties advised.

WHEREFORE, plaintiff prays:

1. That the Defendant, _________________, be served with a copy of this petition and duly cited to appear and answer the same, and that after the lapse of all legal delays and due proceedings had, there be judgment herein in favor of Petitioner, _________________, and against Defendant, _________________, decreeing a divorce a vinculo matrimonii between them;
2. That the Plaintiff be allowed to file and prosecute this action in forma pauperis;
3. That the Defendant be assessed with all costs of these proceedings;
4. That Acadiana Legal Service Corporation and ATTORNEY be permitted to withdraw as counsel of record in accordance with La. C.C.P. Art 1314 (A)(2b) after proceedings have been concluded, delays elapsed, and all parties advised.
5. For an order confirming petitioner’s maiden name as _______ _ _________.
6. For all general and equitable relief.

Respectfully Submitted By:
ATTORNEY FOR PLAINTIFF
VERIFICATION

STATE OF LOUISIANA
PARISH OF ________________________

BEFORE ME, the undersigned authority, personally came and appeared,
__________________________________

who upon being duly sworn, did depose and say that:

He/she is the plaintiff in the above entitled matter, and all of the allegations contained in the petition are true and correct to the best of his/her knowledge, information and belief.

That there are no minor children born, legitimated, or adopted at the time of this filing in this State or any other State.*

__________________________________
PETITIONER

SWORN TO AND SUBSCRIBED before me, this _____ day of _____________, 20__. 

__________________________________
NOTARY PUBLIC

__________________________________
(print name)

See C.C. art. 103.1(1)(a)…no minor children of the marriage. C.C. art. 3506(8) defines children of the marriage as: born of the marriage (includes a child conceived during the marriage), those adopted, and those who have been filiated to the parent by law.

JUDGMENT of 103(1) DIVORCE

This cause was heard on the 1st day of February, 2012, pursuant to “PLAIN-TIFF’S PETITION FOR DIVORCE UNDER CIVIL CODE ARTICLE 103(1) (with NO MINOR CHILDREN). The divorce matter was taken up instanter at the request of the parties.

Present: PLAINTIFF: __________________ and her Attorney, ALSC;
DEFENDANT: __________________

The Court, after reviewing the record, the parties’ oral waivers in open court as to legal notices and trial delays for the divorce, testimony, and finding the law in accordance therein; for the oral reasons assigned in open court, rendered judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the PLAINTIFF, is granted an absolute divorce from the DEFENDANT, forever dissolving the bonds of matrimony that existed between them on the basis of the parties having lived separate and apart continuously and without reconciliation pursuant to La. Civil Code Article 103(1).

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that PLAINTIFF’S name be confirmed as _______________, which is PLAINTIFF’S maiden name.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that in accordance with C.C.P. Art 1314 (A)(2b), since this is a final judgment that terminate or disposes of all issues litigated and necessary notice having been given to all parties herein, counsel of record for petitioner ______and ALSC shall be hereby withdrawn as Counsel of Record, upon the lapse of appeal delays herein.

IT IS HEREBY FINALLY ORDERED, ADJUDGED, AND DECREED that the defendant is cast with all costs in these proceedings.

JUDGMENT RENDERED in OPEN COURT on the 1st day of February 2012.

JUDGMENT READ AND SIGNED in St. Martinville, Louisiana on this ______ day of __________________, 20__.

____________________________________
__ Judicial District Court Judge (NAME)

☞ The judgment of divorce is effective when signed and not when rendered. Any re-marriage plans of the client should wait until the judgment is signed. The judgment above is taken when the normal delays of citation, default, and/or trial are waived in open court and the petitioner is entitled to the relief.
AFFIDAVIT OF WAIVER OF SERVICE, CITATION, AND ALL DELAYS

STATE OF LOUISIANA

PARISH OF ________________________

BEFORE ME, the undersigned Notary Public, on the date mentioned below, personally came and appeared: DEFENDANT, affiant, who is domiciled at the address stated below; and who after being duly sworn, did depose and state:

1. He is the Defendant in the above-captioned suit for divorce which includes the matters of Divorce pursuant to La. C.C. Art 103(1) and Child Custody;
2. He has been furnished with a certified copy of this suit and hereby formally and expressly acknowledges and accepts service of the certified copy of the petition and waives formal Citation and service of process and the delays required by La. C.C.P Art. 1201(C);
3. He further waives the necessity of being given notice of any trial or hearing, all legal delays, and waives his appearance therein;
4. He further waives his right to respond pursuant to La. C.C.P. Arts. 928, 1001, & 1002.
5. He finally waives the necessity of being given notice of the signing of the Judgment, pursuant to La. C.C.P. Article 1913.

Affiant further stated that he understood that by executing this Affidavit, the petitioner would be allowed to go forward with the lawsuit in his absence and obtain the relief prayed for in her petition including all court costs.

______________________________________
DEFENDANT

______________________________________
______________________________________
______________________________________

(Address of Defendant required)*

SWORN TO AND SUBSCRIBED before me, this _______day of ________, 20__, in ____________________, Louisiana.

______________________________________
NOTARY PUBLIC

Print Notary Name Notary #

*Assists the Clerk of Court with collection efforts. It also thwarts any potential IFP problems when it is time to withdraw.
GRANDPARENTS’ PETITION FOR INTRAFAMILY ADOPTION

The petition of GRAMPY MACINTOSH APPLE and GRAMMY ANNE SMITH APPLE, both of the full age of majority and domiciled in Acadia Parish, respectfully represents:

I.

Petitioners, GRAMPY MACINTOSH APPLE AND GRAMMY ANNE SMITH APPLE, desire to adopt the child known to them as JONATHAN JAMES APPLE who is under seventeen (17) years of age. All information required by Children’s Code Article 1246 is attached to this petition as Exhibit A. A certified copy of the child’s birth certificate is attached as Exhibit B.

II.

Petitioners were married to one another on the 8th day of May, 1955 and are still married as evidenced by the marriage certificate attached as Exhibit C.

III.

The child was born out of wedlock to petitioners’ daughter, Candy Mandy Apple, with no father listed on the birth certificate. Paul Walter Mellon is alleged to be the biological father of JONATHAN JAMES APPLE. However, Paul Walter Mellon has never formally acknowledged or legitimated the child, nor has any order of filiation been issued by a court, nor is he presumed to be the father of the child under the laws of Louisiana nor any other state. (See Exhibits D and E) Additionally, Paul Walter Mellon has failed to provide substantial parental care and support to the child. Therefore, under Children’s Code Article 1193 his consent or relinquishment are not necessary. {But note he must be served with a Notice of Filing of Adoption}

IV.

The mother of the child has consented to this adoption by Authentic Act of Consent which is attached as Exhibit F.

V.

The child has resided with petitioners for at least six (6) months prior to filing this petition. Additionally, petitioners obtained legal custody of the child through the Juvenile Court in the matter entitled “State of Louisiana In the Interest of the Minor, Jonathan James Apple”, at Docket J-1111, in Acadia Parish, Louisiana on October 31, 1999, a certified copy of which is attached as Exhibit G.

VI.

Petitioners do not desire to change the name of the child. {or: desire to change child’s name to ____________________________}

VII.

It is in the best interest of the child that this adoption take place. {If twelve (12) years old or older, state that child is aware of and wishes to be adopted by petitioners}

VIII.

Pursuant to Children’s Code Article 1243.2 petitioners request that the Office of Community Services be ordered to conduct a priority records check of any validated complaints of child abuse or neglect by petitioners, and provide this Court with a certificate indicating all information discovered or that no such information has been found.
VIII.

Pursuant to Children’s Code Article 1243.2, petitioners request that the BLANK Parish Sheriff’s Office be ordered to conduct a priority records check of all federal and state arrests and convictions as to petitioners in this state or any other in which petitioners have been domiciled since age of majority; and provide this Court with a certificate indicating all information discovered or that no such information has been found. {Some courts will want the State Police to do this}

IX.

Because of their poverty and want of means, petitioners are unable to pay in advance, present or future costs, or give bond, and wish to file this suit in forma pauperis. {Some jurisdictions will deny pauper status since this action is considered uncontested}

WHEREFORE, petitioners pray that:

A copy of a Notice of Filing of Petition be served {or if lives out of state by certified mail with return receipt or commercial courier} on the alleged father.

A copy of the petition and all exhibits be served by certified mail with return receipt on the Department of Social Services. {Pursuant to Children’s Code Article 1252 an investigation by the department is not necessary unless ordered by the Court}

The Department of Social Services be ordered to conduct a priority records check of any validated complaints of child abuse or neglect by petitioners in this state and any other in which petitioners have been domiciled since the age of majority, and provide a certificate of all information discovered or that none was found.

A copy of the Order only be served on the BLANK Parish Sheriff’s Office to conduct a priority records check for all federal and state arrests and convictions, and provide a certificate of all information discovered or that none was found.

A date for a hearing be set within sixty (60) days (if there is no opposition) or within ninety (90) days (if there is opposition) after the filing of this petition.

After hearing, a final decree of adoption be entered pursuant to Children’s Code Article 1255.

Respectfully submitted,

By: __________________________________________
ATTORNEY #
1020 Surrey Street
P. O. Box 4823
Lafayette, LA  70502-4823
Phone: (337) 237-4320
Fax: (337) 237-8839
Louisiana law provides that under certain circumstances your consent to the adoption of your child may be dispensed with and you can permanently lose your rights as a parent by final decree of adoption. An intrafamily adoption petition has been filed requesting the court to grant an adoption and terminate your parental rights to your child. A copy of the petition is attached to this notice. If you do not file a written answer stating your opposition to the adoption within fifteen days of receiving this notice you will lose the right to object to the adoption. If you choose to file a written answer stating your opposition to the adoption you must file it with the clerk of court at _______________. Only if you file an answer stating your opposition to the adoption will you have an opportunity to present your opposition to the adoption. If you file an answer stating your opposition, the court will set a hearing, and you will receive notice of the hearing of your opposition.

If you do not file an answer stating your opposition, and if the court at the adoption hearing finds that the facts set out in the petition are true and that adoption is in the best interest of your child, the court can enter a judgment ending your rights to your child. If the judgment terminates your parental rights, you will no longer have any rights to visit or to have custody of your child or make any decisions affecting your child, and your child will be legally freed to be adopted.

This is a very serious matter. You should contact an attorney immediately so that he or she can help you determine your rights. You have the right to hire an attorney and to have him or her represent you. If you cannot afford to hire an attorney and you oppose the adoption, your answer stating your opposition may request that the court determine if you have the right to have an attorney appointed. If you have filed an answer stating your opposition, whether or not you decide to hire an attorney, you will have the right to attend the hearing of your case, to call witnesses on your behalf, and to question those witnesses brought against you. You may call the telephone number on the attached form for information concerning legal aid. If you have any questions concerning this notice, you may call the telephone number of the clerk’s office which is ___________.

*As amended by Act 603 of the 2012 Legislative Session. See Ch. C. Art. 1107.1 et seq. that allows for “Intent to Surrender for Adoption” for the purpose of facilitating “early planning for the child who may be surrendered by the mother for adoption and to provide due notice at the earliest possible time to any alleged or adjudicated father who may have an interest in the child’s custody.” The consequences to the father is provided for in Ch. C. Art. 1107.6.
IN RE: GRAMPY MACINTOSH APPLE and GRAMMY ANNE SMITH APPLE Applying for Intrafamily Adoption of JONATHAN JAMES APPLE

FILED: ____________________

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VERIFICATION

STATE OF LOUISIANA
PARISH OF ACADIA

BEFORE ME, the undersigned authority, personally came and appeared, GRAMPY MACINTOSH APPLE and GRAMMY ANNE SMITH APPLE who upon being duly sworn, did depose and say that:

They are the petitioners in the above-entitled petition and all of the allegations contained in it are true and correct to the best of their knowledge, information and belief.

________________________________________
GRAMPY MACINTOSH APPLE

________________________________________
GRAMMY ANNE SMITH APPLE

SWORN TO AND SUBSCRIBED before me, this ____ day of ______________, 20___.

_____________________________________________
NOTARY PUBLIC

_____________________________________________
(print name)
IN RE: GRAMPI MacINTOSH APPLE        *        ___ JUDICIAL DISTRICT COURT
AND GRAMMO ANNE SMITH APPLE        *        _________ PARISH, LOUISIANA
Applying for Intrafamily Adoption of
JONATHAN JAMES APPLE                       *        DOCKET NO. _______________
FILED:_____________________               *        DTY. CLERK: ________________
-----------------------------------------------------------------------------------------------------------------------
PETITIONERS’ (EXHIBIT A)

I. FACTS CONCERNING PETITIONERS
   A. ADOPTIVE FATHER
      1. Father’s full name:
      2. Date of birth:
      3. Place of birth:
      4. Occupation:
      5. Marital status:
      6. Social Security No.:
         All parishes/counties and states where lived since 18 years old:
   B. ADOPTIVE MOTHER
      1. Mother’s full name:
      2. Date of birth:
      3. Place of birth:
      4. Occupation:
      5. Marital status:
      6. Social Security No.:
         All parishes/counties and states where lived since 18 years old:
   C. INFORMATION REGARDING MOTHER AND ADOPTIVE FATHER
      1. Current Address:
      2. Telephone numbers:
      3. Number of children born of the marriage:
      4. Number of adoptive children:
      5. Approximate annual income:

II. FACTS CONCERNING CHILD TO BE ADOPTED
   1. Birth registered in the name of:
   2. Name to be changed to:
   3. Date of birth:
   4. Place of birth:

III. FACTS CONCERNING MOTHER AND ALLEGED FATHER
   A. ALLEGED FATHER
      1. Father’s full name:
      2. Father’s mailing address:
      3. Social Security Number:
   B. MOTHER OF CHILD
      1. Father’s full name:
      2. Father’s mailing address:
      3. Social Security Number:

IV. OTHER INFORMATION
   A. Date and circumstances under which child entered petitioners’ home:
   B. Legal custodian of child:
   C. Relationship between petitioners and child:
IN RE: GRAMPY MACINTOSH APPLE AND GRAMMY ANNE SMITH APPLE
Applying for Intrafamily Adoption of
JONATHAN JAMES APPLE
FILED: ___________________

AUTHENTIC ACT OF CONSENT TO ADOPTION

STATE OF LOUISIANA
PARISH OF ACADIA

BEFORE ME, Notary Public, and in the presence of the undersigned competent witnesses, personally appeared

CANDY MANDY APPLE DOE

who, after being duly sworn, did depose and state:

She is the daughter of GRAMPY MACINTOSH APPLE and GRAMMY ANNE SMITH APPLE, petitioners in the above-captioned suit for adoption and continues to be domiciled in Louisiana since _________ (CH.C. Art. 1109 imposes a domiciliary of at least eight months).

She consents to the adoption of her child, JONATHAN JAMES APPLE , by GRAMPY MACINTOSH APPLE and GRAMMY ANNE SMITH APPLE, (and consents to changing the child's name to ____________________).

The child was born of her non-marital union with Paul Walter Mellon. No father was listed on the birth certificate, and Paul Walter Mellon has never formally acknowledged or legitimated the child, nor has any order of filiation been issued by a Court, nor is he presumed to be the father of the child under neither the laws of Louisiana nor any other state. Additionally, Paul Walter Mellon has failed to provide substantial parental care and support to the child.

Affiant declares herein that she has no mental incapacity and is under no interdiction. She is not under any stress or duress that would affect her ability to make this consent. Further, that she is making this surrender and gives her consent freely and voluntarily as it is in the best interest of the minor children. She understands that this consent and surrender is final and irrevocable upon execution and that it is made more than five (5) days after the children's birth.

Affiant states that she waives her right to the notice and service of the petition and all subsequent proceedings.

Affiant declares that she is aware of the provisions of the voluntary registration law, whereby contact may be established with the surrendered child upon the child's reaching the age of eighteen years. Affiant further is aware of her right to consult an attorney prior to the execution of this act so that she is informed of the meaning of these declarations, the consequences of her consent, and the surrender of her parental rights herein, especially her rights and obligations. She executes this act knowingly.

Affiant further avers that she is aware that it is unlawful to make a false statement concerning biological paternity or the surrender of parental rights and of the applicable penalties for violations of $10,000 or imprisonment for not more than five years or both.

She finally waives the right to join in the petition and be served with a copy of the petition.
THUS DONE AND PASSED, in ______, Louisiana, on this ______ day of
______________________, 20__, and in the presence of the undersigned competent
witnesses, ______________________ and ________________________,
who have signed their names with the appearer and me, Notary Public, after reading
of the whole.

Witnesses:

________________________________
________________________________
________________________________

CANDY MANDY APPLE DOE

________________________________
NOTARY PUBLIC

________________________________
(print name)

EXHIBIT F
ORDER

Considering the petition and attached affidavits filed in this matter it is ordered that:

A copy of a Notice of Filing of Petition for Adoption be served {or if lives out of state use certified mail with return receipt or commercial courier} on the alleged father.

The Petition for Adoption be filed and that a copy of the petition together with all appropriate exhibits be served on the Department of Social Services by certified mail with return receipt.

The Department of Social Services shall not study the proposed adoption and submit a confidential report of its findings to this Court pursuant to Children’s Code Article 1252. {An investigation by the department is not necessary unless ordered by the Court}

This matter be heard in Chambers at ____________________, Louisiana, on the ______ day of ____________________, 20__, at ______ o’clock a.m. before the Honorable ______________________, presiding.

The Department of Social Services conduct a records check for any validated complaints of child abuse for neglect in the State of Louisiana or any other state in which the prospective adoptive parents have been domiciled since becoming majors for the following prospective adoptive parent; and the Acadia Parish Sheriff’s Office conduct a records check on the following prospective adoptive parents for all federal and state arrests and convictions:

GRAMPY MACINTOSH APPLE
Date of Birth: ______________________________
Social Security Number: ______________________
State(s) of Domicile: _________________________

GRAMMY ANNE SMITH APPLE
Date of Birth: ______________________________
Social Security Number: ______________________
State(s) of Domicile: _________________________

The Department of Social Services and Sheriff prioritize this records check, and provide a certificate to this Court indicating all information discovered or that no such information has been found.

SIGNED, _________________, Louisiana, this ________ day of ______________, 20__.
SERVE BY CERTIFIED MAIL w/ RETURN RECEIPT

A COPY OF PETITION AND EXHIBITS:
Lafayette Regional Office of Community Services
Brandywine 1, Room 218
825 Kaliste Saloom Road
Lafayette, LA  70508
{And any other County/Parish where petitioners resided since majority}

SERVE BY CERTIFIED MAIL w/ RETURN RECEIPT or {COMMERCIAL COURIER}

A NOTICE OF FILING ADOPTION:
Barry Bosc Pear
123 Harmony Lane
Houston, TX  10001

PLEASE SERVE
A COPY OF ORDER ONLY:
BLANK Parish Sheriff’s Office
MOTION TO TERMINATE PARENTAL RIGHTS

On Motion of GRAMMY ANNE SMITH APPLE and GRAMPY MACINTOSH APPLE, who suggest to the Court that:

I. A Petition for Intrafamily Adoption was filed in this Court on ______________, 20__, in which Movers sought to adopt their grandchild, JONATHAN JAMES APPLE. All attachments required by law were filed with that petition.

II. The minor child, JONATHAN JAMES APPLE, was born out of wedlock, with no father listed on his birth certificate. The alleged biological father of the child is Paul Walter Mellon. He has never acknowledged or legitimated the child, nor has any court order of filiation been entered, nor is he presumed to be the legal father of the child under Louisiana law or any other state’s law.

III. A certified copy of the child’s birth certificate with no one indicated thereon as the father of the child was previously filed of record.

IV. Attached to this Motion is a certificate from Louisiana Vital Records that no registration has been filed in the Putative Father Registry as to this child.

V. Attached to this Motion is a certificate from the Clerk of Court in the parish where the child was born indicating that no Act of Acknowledgment, Legitimation or Judgment of Filiation has been recorded as to this child.

VI. The alleged father of this child was served with the Notice of Filing of Petition for Adoption by certified mail, return receipt requested, which was received on ______________, 20__, as evidenced by the certificate of mailing notice and return receipt filed of record.

VII. No opposition has been filed to this adoption specifically requesting a hearing to prove establishment of parental rights within the time allowed by law.

VIII. The mother of the child, Candy Mandy Apple, consented to the proposed adoption by executing an Authentic Act of Consent on ______________, 20__, which was previously filed of record in this matter.

WHEREFORE, Movers pray that this Court issue an order declaring the parental rights of the alleged biological father, Paul Walter Mellon, and the biological mother, Candy Mandy Apple, terminated with respect to the minor child, JONATHAN JAMES APPLE.

Respectfully submitted,

By: _______________________________
ATTORNEY #
1020 Surrey Street
P. O. Box 4823
Lafayette, LA 70502-4823
Phone: (337) 237-4320
Fax: (337) 237-8839
ORDER TERMINATING PARENTAL RIGHTS

Considering the above motion with affidavits and attachments, and upon finding that:

The alleged father, Paul Walter Mellon, was served with Notice of Filing of Petition for Adoption and has not timely filed an opposition to the proposed adoption, and

The mother, Candy Mandy Apple, consented to the proposed adoption by Authentic Act of Consent,

IT IS ORDERED that the parental rights of the alleged biological father, Paul Walter Mellon and mother, Candy Mandy Apple are hereby terminated with respect to the minor child, JONATHAN JAMES APPLE.

ORDERED AND SIGNED, in _____________. Louisiana, on this __________ day of ____________________, 20__.

_________________________________
JUDGE
IN RE: GRAMPY MacINTOSH APPLE * ___ JUDICIAL DISTRICT COURT
AND GRAMMY ANNE SMITH APPLE * _________ PARISH, LOUISIANA
Applying for Intrafamily Adoption of * *
JONATHAN JAMES APPLE * DOCKET NO. _______________
FILED: ___________________ * Dty. Clerk: __________________

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FINAL DECREE AND JUDGMENT OF ADOPTION

Considering the pleadings filed in this matter, the requirements of law having been met, the Court, upon considering {the confidential report of the Louisiana Department of Social Services, and} the records check and the testimony concerning the adoption, for the reasons orally assigned at the hearing held on the ______ day of _______________, 2012, and being satisfied that the adoption is in the best interests of the child:

IT IS ORDERED that: The child known to petitioners as JONATHAN JAMES APPLE be declared, for all legal purposes to be the child of petitioners to the same extent as if the child had been born of the petitioners’ marriage.

The name of the child remain unchanged. {or the name of the child be changed to _____________________}

The Clerk of Court of this Parish comply with the requirements of Children’s Code Article 1182(B) and forward a certificate of this final decree to the state Registrar of Vital Records for entry of a certificate of live birth of Jonathan James Apple.

{All further contacts with the Department of Social Services be dispensed with accordingly.}

JUDGMENT RENDERED AND SIGNED in Chambers in ______________, Louisiana, this _____ day of ______________, 20__.

_________________________________
JUDGE

If the parental rights of the parents were not terminated with a Motion to terminate the rights as in cases where the parents have executed an Act of Consent to the Adoption, the final decree must contain language that the parental rights are terminated.
PETITION FOR INTRAFAMILY ADOPTION

The petition of JOHN JAMES DOE, of the full age of majority, who is domiciled in Acadia Parish, respectfully represents:

I. Petitioner, JOHN JAMES DOE, desires to adopt his stepchild known to him as SAMUEL MICHAEL SMITH who is under seventeen (17) years of age. The child has resided with petitioner for at least six (6) months prior to filing this petition. All information required by Children’s Code Article 1246 is attached to this petition as Exhibit A. A certified copy of the child’s birth certificate is attached as Exhibit B.

II. Petitioner was married to Mary Jane Brown on the 11th day of May, 1993 and they are still married. (A copy of marriage certificate attached as Exhibit C)

III. The parents of this child, Mary Jane Brown and Peter Paul Smith, were divorced and sole custody awarded to Mary Jane Brown by Judgment signed on October 20, 1998 in the suit entitled “Mary Jane Brown Smith versus Peter Paul Smith”, bearing Docket No. 98-0000 in the 15th Judicial District Court, Acadia Parish, Louisiana. A certified copy of the judgment is attached to this petition as Exhibit D. (or no prior order of custody has been entered by this Court or any other. The mother of this child, Mary Jane Brown, has lawfully exercised physical custody of the child since…)

IV. Pursuant to Children’s Code Article 1244, Mary Jane Brown Doe has consented to this adoption by Authentic Act of Consent attached as Exhibit E.

V. The father of the child, Peter Paul Smith, has refused or failed to visit, communicate, or attempt to communicate with the child (or has refused or failed to comply with a court order of support) without just cause for a period of at least (6) months since the rendition of the judgment. Therefore, under Children’s Code Article 1245, his consent is not necessary. (or Peter Paul Smith is the father of this child who has consented to this adoption by Authentic Act of Consent which is attached to this petition as Exhibit F)

VI. Petitioner desires to change the name of the child to Samuel Michael Doe, thus making the surname of the child the same as petitioner’s.

VII. It is in the best interest of the child that this adoption take place. (If twelve (12) years old or older, state that child is aware of and wishes to be adopted by petitioner)

VIII. Pursuant to Children’s Code Article 1243.2 petitioner requests that the Office of Community Services be ordered to conduct a priority records check of any validated complaints of child abuse or neglect by petitioner in this state or any other in which petitioner has been domiciled since age of majority, and provide this Court with a certificate indicating all information discovered or that no such information has been found.
IX.

Pursuant to Children’s Code Article 1243.2 petitioner requests that the Acadia Parish Sheriff’s Office be ordered to conduct a priority records check of all federal and state arrests and convictions as to petitioner; and provide this Court with a certificate indicating all information discovered or that no such information has been found.

WHEREFORE, petitioner prays that:

A copy of the petition and all appropriate exhibits be served by certified mail with return receipt (or commercial courier if lives out of state) on the father of this child.

A copy of the petition and all appropriate exhibits be served by certified mail with return receipt on the Department of Social Services. (Pursuant to Children’s Code Article 1252, an investigation by the department is not necessary unless ordered by the Court)

The Department of Social Services be ordered to conduct a priority records check of any validated complaints of child abuse or neglect by petitioner in this state and any other in which petitioner has been domiciled since the age of majority, and provide a certificate of all information discovered or that none was found.

A copy of the Order only be served on the Acadia Parish Sheriff’s Office to conduct a priority records check for all federal and state arrests and convictions, and provide a certificate of all information discovered or that none was found.

A date for a hearing be set for not less than thirty (30) days or more than sixty (60) days after the filing of this petition.

The name of the child be changed to Samuel Michael Doe, thus making the surname of the child the same as petitioner's.

After hearing, a final decree of adoption be entered pursuant to Children’s Code Article 1255.

Respectfully submitted,

By: _________________________________
ATTORNEY #
1020 Surrey Street
P. O. Box 4823
Lafayette, LA  70502-4823
Phone: (337) 237-4320
Fax: (337) 237-8839
IN RE: JOHN JAMES DOE                         *        __th JUDICIAL DISTRICT COURT
Applying for Intrafamily Adoption of       *        DOCKET NO. _______________
SAMUEL MICHAEL SMITH                        *        __________ PARISH LOUISIANA
FILED:_____________________               *        Dty. Clerk___________________
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VERIFICATION

STATE OF LOUISIANA
PARISH OF ACADIA

BEFORE ME, the undersigned authority, personally came and appeared,

JOHN JAMES DOE

who upon being duly sworn, did depose and say that:

He is the petitioner in the above-entitled petition and all of the allegations contained in it are true and correct to the best of his knowledge, information and belief.

_______________________________________
JOHN JAMES DOE

SWORN TO AND SUBSCRIBED before me, this ____________________ day
of ________________________, 20__.  

_____________________________________________
N O T A R Y P U B L I C
(print name)
IN RE: JOHN JAMES DOE  
Applying for Intrafamily Adoption of 
SAMUEL MICHAEL SMITH  
FILED:_____________________ 

PETITIONER’S EXHIBIT A

I. FACTS CONCERNING PETITIONER
   A. ADOPTIVE FATHER
      1. Father’s full name:  
      2. Date of birth:  
      3. Place of birth:  
      4. Occupation:  
      5. Marital status:  
      6. Social Security No.:  
         All parishes/counties and states where lived since 18 years old:
   B. INFORMATION REGARDING MOTHER AND ADOPTIVE FATHER
      1. Current Address:  
      2. Telephone numbers:  
      3. Number of children born of the marriage:  
      4. Number of adoptive children:  
      5. Approximate annual income:  

II. FACTS CONCERNING CHILD TO BE ADOPTED
   1. Birth registered in the name of:  
   2. Name to be changed to:  
   3. Date of birth:  
   4. Place of birth:  

III. FACTS CONCERNING LEGITIMATE FATHER
    1. Father’s full name:  
    2. Father’s mailing address:  
    3. Social Security Number:  

IV. OTHER INFORMATION
    A. Date and circumstances under which child entered petitioner’s home:  
    B. Legal custodian of child:  
    C. Relationship between petitioner and child:
IN RE: JOHN JAMES DOE
Applying for Intrafamily Adoption of
SAMUEL MICHAEL SMITH
FILED:_____________________               *

* ___ JUDICIAL DISTRICT COURT
* DOCKET NO. _____________
* __________ PARISH LOUISIANA
* Dty. Clerk___________________

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AUTHENTIC ACT OF CONSENT TO ADOPTION

STATE OF LOUISIANA
PARISH OF ACADIA

BEFORE ME, Notary Public, and in the presence of the undersigned competent witnesses, personally appeared

MARY JANE BROWN DOE

who, after being duly sworn, did depose and state:

She is married to and living with JOHN JAMES DOE, petitioner in the above-captioned suit for adoption.

She consents to the adoption of her child, SAMUEL MICHAEL SMITH, by JOHN JAMES DOE, and consents to changing the child’s name to Samuel Michael Doe.

The child was born of her prior marriage to Peter Paul Smith. She was divorced and sole custody granted to her on October 20, 1998 in the suit entitled “Mary Jane Brown Smith versus Peter Paul Smith” at Docket Number 98-0000, in the Fifteenth Judicial District Court, in Acadia Parish, Louisiana.

The father of the child, Peter Paul Smith, has refused or failed to visit, communicate, or attempt to communicate with the child without just cause for a period of at least six (6) months after the judgment signed October 20, 1998 awarding her sole custody of the child.

(See Children’s Code Article 1245 for alternate grounds.)

She also waives the right to join in the petition and be served with a copy of the petition.

THUS DONE AND PASSED, in ___________, Louisiana, on this _______ day of ____________, 20__, and in the presence of the undersigned competent witnesses, ____________________________ and ___________________________, who have signed their names with the appearer and me, Notary Public, after reading of the whole.

Witnesses:

______________________________ ______________________________
______________________________ ______________________________
______________________________

NOTARY PUBLIC
(print name)

EXHIBIT E
ORDER

Considering the petition and attached affidavits filed in this matter it is ordered that:

The Petition for Adoption be filed and that a copy of the petition together with all appropriate exhibits be served on the father of this child and on the Department of Social Services by certified mail with return receipt.

The Department of Social Services study the proposed adoption and submit a confidential report of its findings to this Court pursuant to Children's Code Article 1252. {An investigation by the department is not necessary unless ordered by the Court}

This matter be heard in Chambers at Crowley, Louisiana, on the ______ day of ___________________, 2012, at ______ o'clock a.m. before the Honorable ____________________, presiding.

The Department of Social Services conduct a records check for any validated complaints of child abuse for neglect in the State of Louisiana or any other state in which the prospective adoptive parent has been domiciled since becoming a major for the following prospective adoptive parent; and the Acadia Parish Sheriff's Office conduct a records check on the following prospective adoptive parent for all federal and state arrests and convictions:

JOHN JAMES DOE

Date of Birth: _______________________________
Social Security Number: ______________________
State(s) of Domicile: _________________________

The Department of Social Services and Sheriff prioritize this records check, and each provide a certificate to this Court indicating all information discovered or that no such information has been found.

Crowley, Louisiana, this ________ day of ________________________, 20___.

__________________________________
JUVENILE COURT JUDGE

SERVE BY CERTIFIED MAIL w/ RETURN RECEIPT
A COPY OF PETITION AND EXHIBITS:
Lafayette Regional Office of Community Services
Brandywine 1, Room 218
825 Kaliste Saloom Road
Lafayette, LA  70508
{and any other county/parish where petitioner resided since majority}

SERVE PERSONALLY OR DOMICILIARY
A COPY OF PETITION AND EXHIBITS:
Peter Paul Smith
123 Harmony Lane
Opelousas, LA  70570

PLEASE SERVE
A COPY OF ORDER ONLY
Acadia Parish Sheriff’s Office
STATE OF LOUISIANA
PARISH OF ___________

CLERK’S CERTIFICATE OF NO ACKNOWLEDGMENT, LEGITIMATION,
OR JUDGMENT OF FILIATION OF ILLEGITIMATE CHILD

Pursuant to law, I, the undersigned Deputy Clerk of the Acadia Parish Court,
State of Louisiana, do hereby certify that upon diligent search of this Court’s records,
I find that there has been no authentic Act of Acknowledgment, Act of Legitimation, or
Judgment of Filiation filed in this Court by anyone acknowledging the minor child,
[NAME OF MINOR CHILD] born to [MAIDEN NAME OF MOTHER] in Acadia Parish
on ______________________, 19______.

All records of requests for Certificates of Acknowledgment, Legitimation, and/or
Judgments of Filiation and copies thereof issued by this Court are strictly confidential
records and shall not be open to public inspection.

THUS DONE AND SIGNED in_____________________, ____________ Parish,
Louisiana, on this _________ day of _______________________, 20__. 

__________________________________________
DEPUTY CLERK OF COURT

(Note: Prepare and submit this certificate to the Clerk’s office in the parish/county of
the child’s birth)

(Also need a Certificate from the Putative Father Registry of Vital Records (which they
generally prepare internally) to attach)

Exhibits D and E
EX PARTE CUSTODY
CERTIFICATION OF APPLICANT’S ATTORNEY (C.C.P. Art. 3945)

I ____________________, attorney representing _________________, petitioner herein, and applicant for temporary ex parte custody order, do certify to the court that:

1. (a) The following efforts have been made to give the respondent reasonable notice of the date and time the order is being presented to the court.

_____________________________________________________________

OR

(b) The reason(s) that such notice is not required

_____________________________________________________________

_____________________________________________________________

2. I have checked the civil suit records of this parish on the ______ day of ____________, 20___, in order to determine whether there is a prior custody order for the minor child(ren) involved in this matter and whether it affects the parties to this present proceeding. There is/is not a prior custody order. (Attach if there is one. If there is one in the same parish, the 3945 new filing should be in that suit and the cases may or may not need to be consolidated.)

_____________________________________________________________

PETITIONER’S SUPPORTING La. C.C. P. Art. 3945 AFFIDAVIT

STATE OF LOUISIANA
PARISH OF LAFAYETTE

BEFORE ME, the undersigned Notary Public, duly commissioned and qualified in this State and Parish, personally came and appeared,____________________, who, after being duly sworn, stated under oath that:

1. I have read the foregoing petition and all of the facts contained therein are true and correct to the best of my knowledge.

2. The other parent/party and I physically separated on ________________ (date).

3. Immediately prior to separating, my spouse and I resided together at _______________________.

4. For the last six (6) months the child(ren) have resided with _______________, at _______________________.

5. The child(ren) are presently in the physical custody of _______________________, and have been since ________________ (date).

6. I/he/she obtained the child(ren) in the following manner: (Describe where, when, and how obtained, and other special circumstances.)

_____________________________________________________________

7. I desire immediate temporary custody of the child(ren) for the following reasons:

_____________________________________________________________

_____________________________________________________________

8. To my knowledge, there is/is not a prior custody order in existence. (If there is, please state when, and where obtained, and attach a copy of such custody order.)

_____________________________________________________________
9. I agree to my (child)ren’s temporary visitation with the other parent/party as follows:

________________________________________________________________________

________________________________________________________________________

(Must not be less than forty-eight (48) hours during the fifteen-day period).

OR

I do not agree to a temporary visitation arrangement prior to the Rule to Show Cause for the following reasons:

________________________________________________________________________

________________________________________________________________________

(Must clearly demonstrate that immediate and irreparable injury will result to the child(ren) as a result of such visitation).

“I fully understand that this affidavit is made under oath and that if I have made any untruthful statements in it, I may be charged with perjury, tried in a criminal proceeding and subject to penalties of up to five years imprisonment and fines of up to $1000.00 or both.”

________________________________________________________________________

Affiant

THUS, SWORN TO AND SUBSCRIBED BEFORE ME this ________ day of ______________________ 20____.

________________________________________________________________________

NOTARY PUBLIC

____________________________________  ______________________

printed name Bar. No.
(SUBPOENA FOR A WITNESS)

Your Parish Clerk of Court
P.O. Box 123
St. Martinville, LA  70582

RE:  Apple Orange vs Grape Orange
     Docket Number:  12345-B, 00th JDC, Your Parish

Dear Clerk:

Please issue a subpoena for the following persons to be present for the Rule set before Judge ____________ on May 7, 2003 at 10:00 a.m. in the above captioned matter.

Grandpa Orange          Neighbor Orange
112 Plum Street        123 Pear Street
St. Martinville, LA 70582  St. Martinville, LA 70582

Or

In connection with these subpoenas, my client has been granted IN forma pauperis status in this case, therefore, she is not required by statute to pay the costs of filing the request for and issuance of subpoenas. Should you have any questions, please do not hesitate to contact my office. With kindest personal regards, I remain

Very truly yours,

___________________________
Attorney

(429)
SUBPOENA DUCES TECUM

TO: Mr. ________________
    Supervisor, Office of Community Services
    2729 Veterans Memorial Drive
    P.O. Box 849
    Abbeville, LA 70501

PLEASE TAKE NOTICE that Apple Orange, through the undersigned counsel, requests the following records from your Agency on the date, time, and place specified below:

DATE: Tuesday, February 19, 2002
TIME: 10.00 a.m.
PLACE: Before the Hon. Judge ____________, at the courthouse in Abbeville, Louisiana.

RECORDS: An entire copy of your investigation records in the ongoing juvenile matter entitled “State of Louisiana in the interests of Grape Orange Jr. “Docket No. 1234 JU 123 in the 15th. JDC for Vermilion Parish. These records include and are not limited to evaluations of all parties, home studies, and reports therein pertaining to this juvenile matter. Such records, if requested by you, may only be reviewed at the discretion of the court, by way of an in-camera inspection.

Respectfully submitted,

________________________________________
Attorney
NOW INTO COURT, through undersigned counsel, comes petitioner, APPLE ORANGE, who respectfully represents that:

I. Petitioner filed a Petition for Divorce in these proceedings on the 2nd day of January, 2002.

II. Petitioner has attempted to serve the defendant, GRAPES ORANGE, at his last known address at 524 Fruit Street, Plum, LA 70570; however, petitioner has been unable to effectuate service of process after several attempts. See Exhibit “A” Petitioner does not have knowledge of defendants’ whereabouts and a search with relatives and the telephone directory has also been unproductive.

III. Insofar as defendant, to the best of petitioner’s knowledge, is an absentee of the State of Louisiana, it is necessary that an attorney at law be appointed to represent him under the provisions of LSA – C.C.P. Art. 5091(1).

WHEREFORE, petitioner prays that an attorney at law be appointed to represent the absentee defendant, GRAPES ORANGE, upon whom service can be made in these proceedings conducted contradictorily.

Respectfully submitted,

By __________________________
Attorney
ORDER

Considering the above and foregoing,

IT IS ORDERED that __________________________, Attorney at Law, upon whom service can be made and these proceedings conducted contradictorily, is hereby appointed to represent the interest of the absentee defendant, GRAPES ORANGE.

THUS, DONE AND SIGNED on this ________ day of ________________, 20__, at ______________________________, Louisiana.

________________________________________
DISTRICT JUDGE

PLEASE SERVE:

CURATOR TO BE APPOINTED
BY THE DISTRICT JUDGE
Pro Se MOTION AND ORDER FOR CONTINUANCE

NOW INTO COURT, comes _________________________________, the Defendant, appearing in “proper person” in the above entitled and numbered cause, who respectfully provides that:

I.

There is presently a Rule for Custody / Child Support / Visitation /__________, (circle applicable ones) scheduled for hearings as follows:

(a). Before the Hearing Officer on the _____ day of ____________, 20___, at ______ a.m./p.m. and/or;

(b). Before Judge___________________ on the ____ day of ____________, 20___, at ______ a.m./p.m.

II.

That Defendant seeks a continuance of the hearings for the following reasons: (circle applicable one(s)).

(a) He/she was served with the Rule on ___/___/____, and that additional time is needed to prepare and/or seek and retain counsel not necessarily limited to Legal Aid;

(b). That he/she has a doctor’s appointment or other important prior engagement that can not be rescheduled without great disruption (provide proof if available).

III.

That the opposing party/counsel (Name and telephone number of opposing party or counsel): _______________________________________ has/has not been contacted and does/does not have objection to the continuance of this matter (circle that which applies); Notwithstanding this, it is requested that this hearing be re-set on the next available hearing date(s) in order to allow mover to have meaningful access to justice.

WHEREFORE, the undersigned party moves this court to grant a continuance of the hearings presently scheduled above and further that this matter be re-set for the next available hearing date(s).

___________________________________
(Signature of mover)

___________________________________
(Address)

___________________________________

Tel. _______________________________
ORDER

CONSIDERING the above and foregoing Motion, IT IS HEREBY ORDERED that the hearings presently scheduled above, is/are hereby continued and re-set as follows:

(a). Before the Hearing Officer on the _____ day of ____________, 20___, at _______ a.m./p.m. and/or;

(b). Before Judge____________________ on the ____ day of ____________, 20___, at _________ a.m./p.m.

THUS READ AND SIGNED in _____________, Louisiana, this ____ day of ____________, 20__.

____________________________________
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading was served upon _____________________________ (name of adverse or opposing counsel), by placing copy of the same in the U.S. mail, postage prepaid and properly addressed this ____ day of ____________, 20___, by me, __________________________________________

(signature of mover).
PETITION FOR VOLUNTARY TRANSFER OF CUSTODY

The petition of MOTHER, a person of majority age, domiciled in Vermilion Parish, Louisiana, respectfully represents that:

I.
Petitioner resides at 123 Fruit, Lafayette, LA 70512.

II.
Petitioner is the mother and natural custodian of the minor child, namely PEAR, born outside of marriage, and whose date of birth is June 27, 1992, as more fully appears from the attached certificate of birth. (Exhibit A)

III.
This Court, pursuant to its juvenile jurisdiction, has subject matter jurisdiction and venue is appropriate pursuant to La Ch. C. Art. 1513(2).

IV.
Petitioner avers that there is no legal custody decree with reference to the minor child. The biological father, FATHER, resides at 123 ½ North Young Peach, Abbeville, LA 70510 and actively participates in the life of the child. He visits with her twice per week. He also desires to knowingly and voluntarily transfer custody of the above named minor child to GRANDMOTHER ANGEL. He will execute an “Affidavit of Acceptance of Service and Waiver of Citation and All Delays”. He has not acknowledged the child.

V.
That Petitioner desires to knowingly and voluntarily transfer custody of the above named minor child until the child reaches the age of majority or until this transfer is revoked, to GRANDMOTHER, ANGEL, who resides at 123 Fruit, Abbeville, LA 70570. ANGEL is the maternal grandmother of the minor child and she is a responsible adult of the age of majority. See “Affidavit of Acceptance.” child has been living with ANGEL since 1996 and Ms. ANGEL has a stable home environment. A transfer of custody is necessary in order that the minor child may receive adequate care, treatment and schooling. Petitioner maintains her right to visitation as agreed to between the parties.

VI.
The La. Dept. Of Social Services has not recommended that this petition be filed.

VII.
That GRANDMOTHER ANGEL has agreed to and does desire to accept custody of PEAR to the extent and under the terms and conditions stated in this petition, as more fully appears in the attached Affidavit of Acceptance.

WHEREFORE, petitioner prays that there be a judgment herein transferring legal custody of the child, PEAR to ANGEL, to the extent and under the terms and conditions set forth in this petition.

BY: _____________________________
Attorney

CLERK OF COURT:
PLEASE RETURN A CERTIFIED COPY TO COUNSEL
“FATHER” WILL WAIVER SERVICE
STATE OF LOUISIANA
PARISH OF ____________

BEFORE ME, the undersigned Notary Public, personally came and appeared:

GRANDMOTHER ANGEL

who, being first duly sworn, did depose and state that:

She is a person of the full age of majority and resides at 123 Fruit, in Abbeville, Louisiana 70510. She has had PEAR in her physical care since the petitioner, MOTHER, voluntarily placed the minor child with her in 1996.

She does knowingly and voluntarily accept legal custody of the minor child, PEAR, cognizant of her responsibilities therein, until she reaches the age of majority or the Voluntary Transfer of Custody is revoked. She understands that the petitioner will have visitation rights.

She avers that she has a stable home, is employed, and does not have a criminal or any other background or health problems that would affect her providing a wholesome and nurturing environment for the minor child, her granddaughter.

______________________________
GRANDMOTHER ANGEL

SWORN TO AND SUBSCRIBED before me on this the _____________ day of _________________, 20__.  

______________________________
NOTARY PUBLIC

______________________________
(print name)
JUDGMENT

This cause comes before the Court on a Petition for Voluntary Transfer of Custody. The Court, after considering the pleadings and the affidavits filed, waives the necessity of a hearing pursuant to La Ch. C. Art. 1519, recites and renders judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the biological father, FATHER, is cognizant of this proceeding and by his affidavit, has indicated his consent.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the filed record supports the Voluntary Transfer of Custody of the minor child as having been knowingly and voluntary undertaken by all necessary parties;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there is a legitimate purpose to transfer custody and a factual basis to support that purpose herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the transfer of custody from PETITIONER to GRANDMOTHER ANGEL is in the best interest of the minor child, PEAR.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the legal custody of the minor child, PEAR, is hereby transferred from MOTHER to GRANDMOTHER ANGEL. MOTHER shall have visitation as agreed to between the parties.

IT IS FINALLY ORDERED, ADJUDGED, AND DECREED that all court costs of this proceeding shall be paid by MOTHER.

JUDGMENT READ, RENDERED, and SIGNED in Chambers, in ____________, Louisiana, on the ______ day of __________________, 20__. 

_____________________________
DISTRICT JUDGE
CIVIL WARRANT

ABC
VERSUS
XYZ

FILED: ____________________                *        Dty. Clerk:___________________

-----------------------------------------------------------------------------------------------------------------------

EX -PARTE MOTION AND ORDER TO HAVE WARRANT ISSUED FOR RETURN OF CHILD TO CUSTODIAL PARENT*

The petition of ABC, a resident and domiciliary of St. Mary Parish, Louisiana, respectfully represents that:

I. ABC is the lawful custodial parent of CHILD, born ______________. Attached hereto is a copy of the Judgment signed by this Honorable Court on ____________. The aforesaid judgment in accordance with the court’s order, specifically grants to ABC, sole legal custody of the minor child.

II. The child is currently in the custody of her mother, XYZ who has refused to relinquish the child to the custody of ABC (you should insert any other applicable circumstances) as ordered by the aforementioned judgment.

III. Mover desires and is entitled to the return of the child to his custody in accordance with the referenced judgment.

IV. Mover is entitled to have this Court enter a Civil Warrant directed to the proper law enforcement authority ordering the return of the child to ABC pending further order of the Court.

WHEREFORE, Mover prays that this Court issue a Civil Warrant to the appropriate law enforcement authority ordering the return to ABC of his child, CHILD.

Respectfully submitted,
ACADIANA LEGAL SERVICE CORPORATION

BY: __________________________________
GOOD ATTORNEY
1020 Surrey Street
P.O. Box 4823
Lafayette, LA  70502-4823
(318) 237-4320
Bar Roll Number:

☞ It is advisable to always tread very cautiously when pursuing a remedy that has severe consequences. Injunctions, civil warrants, ex parte custody, area all examples. Use of the civil warrant is strictly being read to be limited to use by the custodial parent. It appears that domiciliary parent and custodial parent are not synonymous and thus, the civil warrant should not be used when there is a joint custody decree. What if there is no domiciliary parent designated, joint custody, or co-domiciliary parent and a parent wants physical custody or visitation to be enforced? An expedited hearing and/or a Rule for Contempt should be utilized.
* "After reviewing this matter, the disciplinary board determined that the hearing committee’s factual findings are not manifestly erroneous. The board found that respondent improperly obtained both the civil warrant and the arrest warrant on an ex parte basis. Respondent’s use of La. R.S. 9:343 to obtain the civil warrant was contrary to the dictates of the law. He relied upon the statute in circumstances involving parents with joint custody when the statute only applies to circumstances in which a custodial parent seeks to obtain the return of his or her children from a non-custodial parent. Furthermore, respondent failed to provide notice of the filing of the motion to Debra or her counsel, Ms. Clayton."

In re Downing, 930 So.2d 897, 902-903, 2005-1553 (La. 5/17/06).

☞ If the Mover does not have sole custody, a La. C.C.P. Art. 3945 together with a Civil Warrant should be evaluated very, very carefully.

See R.S. 9:343 (return of child kept in violation of custody and visitation order); R.S. 14:451 (crime of interference with the custody of a child);

* The Third Circuit in Thibodeaux v. Thibodeaux, 104 So.3d 368, 771, 2012-752 (La. App. 3 Cir. 12/5/12), in the author’s opinion, rightfully disagreed with the footnote reference and analysis by the Supreme Court of R.S. 9:343 in In re Downing.
ORDER

Considering the foregoing Motion, Judgement annexed thereto, and finding the law in favor thereof;

IT IS ORDERED, that under the provisions of R.S. 9:343, a Civil Warrant be and is hereby issued and directed to the law enforcement officials of the St. Mary Parish Sheriff's Office, to accompany the said ABC to any place within the jurisdiction of this Court where the said XYZ, may be located as well as the minor child, CHILD and to execute said Warrant by removing the child immediately and forthwith from XYZ or her agents and delivering the child into the custody of ABC. Said Warrant to be issued posthaste without further orders of this Court.

THUS, READ AND SIGNED at _____________________, Louisiana, this ______ day of _____________________, 20___, at ___________ o’clock ______.m.

_____________________________
DISTRICT JUDGE

CIVIL WARRANT

TO: The Honorable David Naquin
SHERIFF OF St. Mary Parish

YOU ARE HEREBY ORDERED to accompany the said ABC to any place within the jurisdiction of this Court, where the said XYZ or her agent(s) may be located as well as the minor child, CHILD and to execute said Warrant by removing the child immediately and forthwith to the custody of ABC, Said Warrant to be issued posthaste and without further orders of this Court.

_____________________________
DEPUTY CLERK OF COURT
STATE OF LOUISIANA
PARISH OF__________

AFFIDAVIT OF CUSTODIAL PARENT SEEKING RETURN OF
CHILD KEPT IN VIOLATION OF COURT ORDER

BEFORE ME, the undersigned notary public, personally came and appeared
ABC, herein called affiant, who after being duly sworn did depose and say that affiant
is the custodial parent of CHILD by virtue of the judgment of the _______ Court,
Parish of ____________, State of Louisiana, bearing Docket Number __________,
in the matter entitled __________________, a certified copy of which is attached to
this affidavit.

Affiant declares that the attached custody and visitation order is true and cor-
rect.

Affiant summarizes the status of any pending custody proceedings as follows:
 ________________.

The child is being held in this parish by XYZ who has [refused to return the
child/removed the child from the custodial parent] in violation of the attached custody
order. Affiant further declares that the following facts concerning the [removal of/failure
to return] the child are true to the best of affiant’s knowledge, information, and belief:
 ________________.

Affiant desires the return of the child and desires the issuance of a civil warrant
directed to law enforcement authorities to return the child to the custodial parent pend-
ing further order of the court having jurisdiction over the matter, as authorized by LSA–
R.S. 9:343.

The child is currently being held at ___________. A picture of the child is attached.

___________________________
Affiant

SWORN TO AND SUBSCRIBED, before me, this ____________ day of _____,
20___, in ____________________, Louisiana.

___________________________
Notary Public

___________________________
(print name)
PARISH OF ______________

STATE OF LOUISIANA

Pursuant to La. C.C.P. Art. 1235.1(D), the undersigned attests that the following was complied with:

1. That service was requested on the defendant to be made through personal service on the Warden or his designee who in turn was supposed to make personal service on the defendant. An affidavit was furnished to the Warden or his designee to be filled out and returned to the undersigned counsel stating that personal service had been accomplished on the defendant within ten (10) days.

2. While service was made on the Warden or his designee on ______________ as is contained in the suit records, no affidavit has been forthcoming from the warden or his designee nor any “note of their inability” to serve the citation or pleadings has been received.

3. Hence, since it has been at least ten (10) days since service was made upon the warden or his designee and in the absence of compliance by the warden or his designee as required in (1) or (2) above, service is now deemed to have been accomplished on the defendant in the above entitled matter, (10) days from the date the warden or his designee were personally served, or on the ____ day of __________, 20___.

THUS, READ AND SIGNED on __________ day of __________________, 2012, in Lafayette, Louisiana.

________________________________
Good Attorney

LSBN:

SWORN TO AND SUBSCRIBED before me, this ______________ day of _____________, 20__, in ____________________, Louisiana.

________________________________
NOTARY PUBLIC

______________________________
Print Notary Name

______________________________
Notary #
ORDER AUTHORIZING NEED FOR A WRIT OF HABEAS CORPUS
AD TESTIFICANDUM *

1. The above-entitled civil case is set for a Hearing Officer Conference on August 4, 2011 at 10:30 a.m. before Hearing Officer Josie Frank. The conference is to be held at 118 South Court Street, Suite 132, Opelousas, LA 70570. The Rule Date is scheduled to be heard, before the Honorable Judge Alonzo Harris, on August 26, 2011 at 9:00 a.m. at the 27th JDC Court for the Parish of St. Landry. DDS, the defendant herein, is now confined and in the care, custody, and control of the Richland Detention Center, Dorm I, at 956 Highway 15, Rayville, LA 71269.

2. THE COURT, ACTING ON ITS OWN DISCRETION, FINDS AND ORDERS as follows: (Please select one and initial)

☐ The court finds that the testimony of the inmate is not required and/or that it is incumbent upon the inmate to seek to secure his presence in a timely manner; or

☐ The testimony of the inmate shall be taken and the proceedings conducted by teleconference, video link, or other available remote technology, or by telephone if agreed to by all parties; or

☐ The interests of justice require the presence of the inmate and no other methodology authorized hereunder is feasible. THEREFORE, IT IS ORDERED BY THE COURT, that a Writ of Habeas Corpus issue herein commanding the St. Landry Parish Sheriff’s Department to proceed to the Richland Detention Center and there take into custody, DDS, and bring him before this Court at the times and places specified above, then and there to defend himself; and upon completion of his testimony to return the defendant to the custody of the Richland Detention Center in Rayville, Louisiana, pursuant to La. R.S. 15:706(D).

THUS, READ AND SIGNED in ____________________, Louisiana, on this _____ day of __________________, 20__.

______________________________
27th JDC DISTRICT JUDGE

PLEASE SERVE:
ST. LANDRY PARISH SHERIFF’S OFFICE;
108 S. MARKET STREET;
OPELOUSAS, LA 70570

In the case of a civil court proceeding, the party requesting the presence of the prisoner shall deposit into the registry of the court an amount set by the court to be sufficient to cover the costs of transporting the prisoner to the civil court proceeding and returning the prisoner to the parish in which he was incarcerated. Upon application of the transporting agency, the court shall pay the transporting agency the costs of transporting the prisoner. See LSA-R.S. 15:706.
NOW INTO COURT, in proper person, comes the Mover, __________________
(print your name), who respectfully avers to the Court that:

1. Made Respondent is _________________________, who is domiciled in the
Parish of ___________________, Louisiana.

2. A Consent Judgment was entered in the above captioned and entitled case in
this parish that was signed on the _____ day of ________________, 20___, by this
Court. _________________________ (print name of custodial parent) was desig-
nated as the domiciliary parent in an award of joint custody of the following minor
child(ren):

_________________________, DOB:________
_________________________, DOB:________
_________________________, DOB:________
_________________________, DOB:________

The Physical custodial periods (visitation) were as follows:

__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________

3. Since the signing of the judgment, Mover believes that there has been a material
change in circumstances warranting a modification. These events include but are not
limited to: (describe what has happened that justifies a change of the judgment. These
events must have occurred after the prior custody judgment was signed. Ongoing
court proceedings may not be in the best interest of the child(ren) and thus, these
events must not be petty. You also have to prove these events. Attaching Exhibits
may help).

__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
It is in the best interest of the above named minor child(ren) that the prior judgment be modified by: (check all that apply)

☐ Designating the Mover as the domiciliary parent; and/or
☐ Granting the Mover more specified and shared visitation; and/or
☐ Restricting the custodial periods (visitation) of the Respondent.

4. All costs of these proceedings should be assessed to the Respondent.

WHEREFORE, Mover prays that:

1. A Rule to Show Cause issue in the above captioned matter directed to the Respondent to show cause as to why the prior judgment should not be modified so that the Mover is: (check all that apply)

☐ Designated as the domiciliary parent; and/or
☐ Provided more specific visitation; and/or
☐ Allowed to restrict the physical custodial periods (visitation) of the Respondent.

2. All costs of these proceedings should be assessed to the defendant.

Respectfully submitted,

_______________________________________
(sign your name)

_______________________________________
(Print your name and address)

_______________________________________

(Print your telephone number)
STATE OF LOUISIANA
PARISH OF _______________

BEFORE ME, the undersigned authority, personally came and appeared,

who, upon being duly sworn, did depose and say that:

He/She is the Mover in the foregoing Rule for Modification of Prior Consent Custody Judgment and all of the allegations contained therein are true and correct to the best of the Mover’s knowledge, information and belief.

Mover understands that ongoing court proceedings may not be in the best interest of the minor child(ren) but that this modification is warranted.

________________________________________
Mover

SWORN TO AND SUBSCRIBED before me, this ______________ day of ______________, 20__, in _________________, Louisiana.

________________________________________
NOTARY PUBLIC

________________________________________
Print Notary Name

________________________
Notary #
ORDER

Considering the foregoing verified petition and annexed affidavit:

IT IS ORDERED that the parties herein shall appear, with or without their respective counsel, before Hearing Officer, _______________________________ at the Parish Courthouse, Room No:_____ in ______________, Louisiana, on the ______ day of ______________ , 20___, at the hour of ____ o’clock __.m. to for a Hearing Officer Conference on the above contested issues.

IT IS FURTHER ORDERED that if the parties are unable to resolve the contested issues amicably or should an objection to the Hearing Officer’s recommendations be timely made, then the parties shall appear for the Rule to Show Cause on the _____ day of ________________, 20___, at ____.m. before the Honorable Judge ________________________, to show cause why: (check all that apply)

(a). □ The Mover should not be designated as the domiciliary parent; and/or
□ The Mover should not be granted more specific visitation; and/or
□ The Respondent’s custodial periods (visitation) should not be restricted.

(b). □ The Respondent should not be assessed court costs.

THUS, READ AND SIGNED, this _____ day of ______________, 20__, in _________________, Louisiana.

_______________________________________
TH. JUDICIAL DISTRICT COURT JUDGE

---

Service Information:
PLEASE SERVE RESPONDENT:

_____________________________________
(Name)
_____________________________________
_____________________________________
_____________________________________
(Physical address)
RULE TO REDUCE CHILD SUPPORT (DCFS/SES not involved)

NOW INTO COURT comes ____________________ (print your name) who represents as follows:

I.

On ___________ (date of child support judgment) the above Court ordered mover to pay child support to __________________ (print the name of the custodial parent) in the amount of __________ per month.

II.

Since that date, a material change in circumstances has occurred, including but not limited to: _______________________________________________________

(describe material and substantial change in circumstances and attach any documents supporting your position).

III.

As a result of the change in circumstances described above, the Court should reduce the child support obligation to an amount to be established at trial.

IV.

Mover requests that the reduction awarded by the Court be made retroactive to the date of the filing of this Rule.

WHEREFORE MOVER, respectfully prays that the Court order ______________ (print the name of the custodial parent) to show cause why the child support obligation should not be reduced.

Respectfully submitted,

________________________________________
(sign your name)

________________________________________
(Print your name and address)

________________________________________

(Print your telephone number)
ORDER

Considering the foregoing Rule to Reduce Child Support;

IT IS HEREBY ORDERED that a Hearing Officer's Conference shall be held on the _______ day of ___________, 20__ at ______o'clock in ____________________ Parish, Louisiana, before Hearing Officer __________________________________.

IT IS ORDERED that a rule to show cause issue in the above captioned matter directed to defendant, ______________________, on the _________ day of ___________________, 20__, at _________ o'clock, ____m., why the child support obligation should not be reduced.

THUS, READ AND SIGNED, in ______________________, Louisiana, this ____________ day of ______________, 20__.

_____________________________
DISTRICT JUDGE

PLEASE SERVE DEFENDANT:
(name and THE physical home or work address)

_____________________________________
_____________________________________
_____________________________________
_____________________________________

___________________________
Notary Public
___________________________
(print name)

(449)
MOTION AND ORDER TO AMEND JUDGMENT OF DIVORCE

ON MOTION of ____________________________, in proper person, and on suggesting to the Court that a Judgment of Divorce was granted by this Honorable Court on the _______ day of _________________, _________, in the above referenced docket number. However, the judgment was silent as to the resumption of the use of petitioner’s maiden name. Furthermore, Mover has not remarried nor changed her name in any way since the judgment of divorce was granted.

The federal Intelligence Reform and Terrorism Prevention Act of 2004 includes several new requirements for identification and changing names on documents such as: Driver’s Licenses, Personal Identification Cards, and Social Security cards. Specifically, the Federal and/or State agency requires that a new card will not be issued under a woman’s maiden name unless the divorce decree specifically states that her name is being changed.

On further suggesting to the Court, that the amendment does not seek to alter the substance of the judgment pursuant to La. C.C.P. Art. 1951 but seeks to confirm the Mover’s right to her maiden and legal name pursuant to La. C.C.P. Art. 3947(B).

Respectfully submitted,

_____________________________________
(print present name)

_____________________________________
(address)

_____________________________________

Tel. (      )____________________________

Considering the above:

IT IS ORDERED, ADJUDGED AND DECREED that the Judgment of Divorce is amended to specifically allow ____________________________________ to resume the use of her maiden and legal name, which is: ___________________________.

THUS READ AND SIGNED this _________ day of _________________, 20 ____,
in ________________________, Louisiana.

_____________________________________
____ TH. JUDICIAL DISTRICT COURT JUDGE
END NOTES

1). Proof of service includes the sheriff’s return of service (it must show personal service if the parties were living together at the time of the filing of the petition), return of receipt under R.S. 13:3204, or written waiver of service.

2). Note that claims other than divorce and custody may also require “minimum contacts” with Louisiana in order for Louisiana courts to have personal jurisdiction. Atkins v. Atkins, 588 So. 2d 407 (La. App. 2 Cir. 1991).

3). It is possible that some states may refuse to order a division of pension benefits if the divorce decree is silent as to property issues.

4). A Louisiana court with status jurisdiction to render a divorce may lack jurisdiction to decide custody, child support, spousal support or property division. Subject matter jurisdiction over Custody must exist under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Child support or money and property judgments \((in rem)\) requires that the defendant have “minimum contacts” with the State of Louisiana or consent to jurisdiction in addition to jurisdiction pursuant to the Uniform Interstate Support Enforcement Act (UIFSA). La. Ch.C. art. 1301.1 et seq.

5). In re Custody of Landry, 662 So.2d 169 (La. App. 1st Cir. 1995); McKinley v. McKinley, 631 So.2d 45 (La. App. 2nd Cir. 1994); Lingo v. Kelsay, 651 So.2d 499 (La. App. 3rd Cir. 1995); Schloegel v. Schloegel, 584 So.2d 344 (La. App. 4th Cir. 1991); see also Moreau & Ho, Child Custody Awards to Nonparents Under Article 146 (B), 34 Loy. L. Rev. 51, 70-74 (1987).

6). This rule does not apply if a history of family violence exists. See La. R.S. 9: 364. In such cases, sole or joint custody may not be awarded to the perpetrator.

7). Note, however, that a habeas corpus action may be tried summarily even though it is filed as a petition.

8). Note that this requirement may pose problems for domestic violence victims who should not have to disclose their specific address. Consider options for protecting the confidentiality of the victim’s address if necessary.

9). The Supreme Court used the term, “permanent”, in Bergeron. Technically, however, there are no “permanent” custody decrees since they are always subject to modification.


11). Mediation should not be used in domestic violence cases. See La. R.S. 9: 363.

12). In cases involving family violence, the mental health evaluation costs must be paid by the perpetrator. La. R.S. 9: 367; 46: 2136.1.

13). For an overview of psychological literature on effects of separation, see Moreau & Ho, Child Custody Awards to Nonparents Under Article 146(B), 34 Loy. L. Rev. 51, 66-70 (1987).
14). Only a prior action in an emergency jurisdiction state, which was otherwise consistent with the PKPA, would prime the home state. The PKPA definition of emergency jurisdiction supersedes any state law definition of emergency jurisdiction. Jones v. Jones, 456 So.2d 1109, 1112 (Ala.Civ. App. 1984).

15). See also La. R.S. 13: 1802(7)(a) and (b); 28 USC §§ 1738A(c)(2)(A)(ii); 1738A (b)(4). Home state status continues for six months if the child is absent because of his removal by a person claiming custody and a parent (or person acting as a parent) remains in the home state. As a practical matter, the home state parent should immediately file a custody action in his home state when there has been a removal or abduction.
CHAPTER 6
FEDERALLY SUBSIDIZED HOUSING

Renae Davis, Amanda Golob & Hardell Ward
About The Authors

Renae Davis is the Managing Attorney of Southeast Louisiana Legal Services’ New Orleans Housing Law Unit. Amanda Golob and Hardell Ward are staff attorneys with the Southeast Louisiana Legal Services’ New Orleans Housing Law Unit.
1. TRADITIONAL/CONVENTIONAL PUBLIC HOUSING

1.1 INTRODUCTION

The oldest and most widely known federal housing program is the conventional public housing program which originated with the United States Housing Act of 1937. See generally 42 U.S.C. § 1437d; 24 C.F.R. Parts 960, 966. Under this program, the housing is owned and administered by a local Public Housing Authority (PHA). The United States Department of Housing and Urban Development enters into an annual contributions contract with the local PHA. HUD must also provide operating subsidies. These contracts are for a term of forty years.

PHAs are public corporations created under La. R.S. 40:381 et seq. A PHA is a governmental actor within the meaning of the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983. Due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution and the Louisiana Constitution apply to PHA actions. As recipients of federal funding, PHAs are subject to Title VI of the Civil Rights Act and § 504 of the Rehabilitation Act. Many of their actions are also subject to the Fair Housing Act. The state APA is not applicable to a housing authority unless it elects to be governed by it. La. R.S. 40:406.

In many areas, traditional public housing has been phased out in favor of newer programs such as the Section 8 Housing Choice Voucher Program and Tax Credit housing. Also, mixed income communities are on the rise, in which only a portion of the units at a particular site are traditional public housing.

1.2 ELIGIBILITY

Families, the elderly (62 years or older), disabled persons, the remaining members of a tenant family, other singles, and displaced persons are eligible for public housing provided that their income does not exceed 80% of the area median income and that they do not have assets in excess of the limits set by the local PHA. Some of HUD’s housing programs, including Public and Indian housing, are now limited to citizens and certain categories of immigrants. 24 C.F.R. § 5.506.

Recent income targeting and poverty deconcentration regulations also affect who is eligible for public housing. The law now requires 40% of new admissions to public housing be restricted to families with incomes below 30% of the area median income. 42 U.S.C. § 1437n(a)(2)(A). PHAs may reduce that 40% target under “fungibility provisions.” Under the fungibility rules, a PHA can reduce families admitted to public housing by one, for each family admitted to the Section 8 Voucher programs with income below the income targeting rules for the Voucher program. Lower-income families must not be concentrated into a certain development. 42 U.S.C. § 1437n(a)(3). Each PHA must develop an admission policy that will provide for the deconcentration of poverty by encouraging higher income applicants to move into lower income projects and allow for the admission of lower income applicants at higher income projects. 42 U.S.C. § 1437n(a)(3)(B). A housing authority can offer incentives for higher income families to move to lower income projects. It may skip over applicants on the waiting list until it reaches a family that will accept the incentives. Skipping may be mandatory if it is necessary to achieve deconcentration.
1.3 ADMISSIONS ISSUES

1.3.1 Preferences

Congress has now permanently repealed all of the former federal preferences for public housing. 24 C.F.R. § 5.415-5.430 and 24 C.F.R. § 5.410(b) and (d), have been removed from the regulations. Housing authorities are now allowed to develop and implement local preferences such as for disabled or elderly persons, including residency preferences. But see Langlois v. Abington Housing Authority, 207 F.3d 43 (D. Mass. 2002), where a local residency preference was found to violate the Fair Housing Act under a disparate impact theory. Any preferences utilized by a housing authority should be consistent with the local area’s Consolidated Plan and be based upon local housing needs and priorities. Common preferences include for domestic violence victims, the homeless, elderly, disabled, and working families. However, if a preference for working families is given, this preference must be extended to families where the head (and spouse when applicable) are elderly or disabled. 24 C.F.R. § 960.206(b)(2).

1.3.2 Denials of Admission

Housing authorities often reject applicants for admission to public housing. If an applicant is rejected, the housing authority must give the applicant written notification of the factual grounds for the denial and notification of their right to an informal hearing to contest the denial. This notification must contain enough detail so that the applicant understands the reasons for the denial. Any informal hearing must be heard before a person other than the individual who made the decision to reject the applicant. This type of hearing is not included in the PHA’s grievance procedure—it is strictly an informal review. 24 C.F.R. § 960.208(a). Some common reasons for rejection of an applicant include the following:

1.3.2.1 Criminal Record

A prior criminal record or activity may be grounds for denial of admission to public housing. The regulations provide that a history of criminal activity involving crimes of physical violence to persons or property and other criminal acts may be used to reject an applicant. 24 C.F.R. § 960.205(3)(d) further provides that if a PHA receives unfavorable information with respect to an applicant, consideration shall be given to the time, nature, and extent of the applicant’s conduct and to factors which might indicate a reasonable probability of favorable future conduct such as evidence of rehabilitation, the family’s willingness to participate in social service or other appropriate counseling programs, or the family’s willingness to increase family income. Additionally, recent HUD policies are encouraging a more lenient interpretation in favor of giving ex-offenders more opportunities to access public housing. On June 17, 2011 HUD Secretary Shaun Donovan issued a letter to all PHAs encouraging them to allow ex-offenders to rejoin their families when possible. See http://www.nationalreentryresourcecenter.org/documents/0000/1126/HUD_letter_6.23.11.pdf.

If contesting whether a criminal conviction should be grounds for denying admission, be sure to bring evidence of mitigating factors to the Informal Hearing including but not limited to letters from probation or parole officers, employers, ministers, certification of completion of a drug rehabilitation or recovery program, etc. See also One-Strike Policy Admissions, § 6.1.8, below.
But PHAs must prohibit admission to all persons currently illegally using drugs as well as persons who have been either convicted of production of methamphetamines or are on the lifetime sex offender list. See 24 C.F.R. § 960.204(a)(3) and (4). Louisiana has, however, placed persons on the lifetime sex offender list who do not belong on it.

1.3.2.2 Eviction From Any Federal Housing For Drug Related Criminal Activity Within Three Years Of Application

Federal law now requires housing authorities to reject applicants for admission to public housing if the applicant has been evicted from other federally funded housing programs for criminal drug-related activity for a three-year period beginning on the date of such eviction. There are two exceptions to this under 24 C.F.R. § 960.204: a) if the evicted household member has completed a rehabilitation program or b) the circumstances leading to the eviction no longer exist (for example, evicted household member has died or is in prison).

1.3.2.3 Prior Debt Owed to PHA

PHAs will often reject applicants for prior debts owed to the housing authority. It should be noted that the debt must be currently owed in order to be a valid basis for rejection. Under state law, rent and debts on an open account have a 3 year prescriptive period. La. Civ. Code art. 3494. If an applicant formerly lived in public or Section 8 housing and has a debt older than 3 years, the debt is now prescribed, no longer owed and therefore cannot be a valid basis for rejection.

1.4 RENT COMPUTATION

Until changes were made to federal law discussed in § 6.1.5, below ("Minimum Rents And Flat Rents"), a public housing tenant’s portion of rent was calculated based upon 30% of her annual adjusted income. “Annual income” for federal housing programs is defined at 24 C.F.R. § 5.609. Most public housing tenants are still charged rent based on 30% of their income. Rent changes in between regular recertifications due to a tenant’s loss of income must be processed and are generally effective the month after the decrease in income is reported. 24 C.F.R. § 960.257. The only exception is if income is lost due to failure to comply with welfare work requirements.

A public housing tenant is not entitled to have her rent reduced due to welfare work sanctions. (Please note however, that she may ask for a grievance or an exemption to minimum rent if applicable.) A rent reduction may not be withheld until the welfare department notifies the PHA in writing that the loss of income was due to work sanctions and until the tenant has a chance for a grievance. If the loss of welfare arises from the exhaustion of time limits or despite the fact that the tenant complied with the welfare agency’s requirements but could not find a job, the tenant must be allowed the rent reduction. 42 U.S.C. § 1437j(d)(2).

You should closely scrutinize the deductions and exclusions provided in federal law at 24 C.F.R. §§ 5.603-634 when computing rent. Check to see if the PHA gave the proper credits or deductions for medical expenses, child care expenses, allowances for elderly, disabled, or minors, training income, and earned income exclusions. Because there are so many deductions and exclusions and HUD knows PHAs make many mistakes, there is a movement to change the way rents are done. This movement is called “Rent Simplification.”
Under the current rent rules, a public housing tenant’s rent is calculated in the following way:

STEP 1 — Compute all non-exempt income for the entire family for the year

STEP 2 — Subtract all eligible deductions for the family to get adjusted annual income

STEP 3 — Divide the adjusted annual income figure by 12 to get a monthly adjusted income

STEP 4 — Multiply the monthly adjusted income by 30% if the family pays income-based rent. This is how much the family pays for their share of rent IF they do not pay for their own utilities. If the family pays for their own utilities, go to STEP 5

STEP 5 — Subtract the utility allowance which the PHA uses for the family’s bedroom size and utility type from the number in STEP 4. This is what the family pays as its share of rent when they are responsible for their own utilities.

It can be very costly for a low income tenant if her rent is not calculated correctly. The most commonly missed deductions are for childcare and medical expenses. This is best shown by doing rent calculations with and without deductions for hypothetical families as shown below.

1.4.1 Childcare Expense Deduction

Childcare expenses may be deducted in a rent calculation if the childcare is needed so that a member of the household can work. Even if there are other members of the household available to watch the child, this deduction can still be taken. Receipts or other documentation from the childcare provider may be requested. Check your local PHA’s administrative plan for clarification on this.

Example: Mary is a public housing tenant making $800 per month at her minimum wage job. She lives in a unit where she does not pay for any of her own utilities. She has two minor children ages 3 and 6. She pays childcare expenses of $75 per week. Example A shows that her tenant share of rent would be $216 per month without the childcare deduction. Example B shows that properly calculated her rent would only be $119, resulting in a monthly savings to her of $97 per month.

EXAMPLE A

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual Income</td>
<td>$800 x 12 = $9,600</td>
</tr>
<tr>
<td>Subtract Minor Deductions(2)</td>
<td>$480 x 2 = 960</td>
</tr>
<tr>
<td>Adjusted Annual Income</td>
<td>$8,640</td>
</tr>
<tr>
<td>Adjusted Monthly Income(AMI)</td>
<td>$8,640/12 = $720</td>
</tr>
<tr>
<td>Multiply AMI x 30%</td>
<td>$720 x .30 = $216</td>
</tr>
</tbody>
</table>

EXAMPLE B

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual Income</td>
<td>$800 x 12 = $9,600</td>
</tr>
<tr>
<td>Subtract Minor Deductions(2)</td>
<td>$480 x 2 = 960</td>
</tr>
<tr>
<td>Subtract Childcare Deduction</td>
<td>$75 x 52 = $3,900</td>
</tr>
<tr>
<td>Adjusted Annual Income</td>
<td>$4,740</td>
</tr>
<tr>
<td>Adjusted Monthly Income(AMI)</td>
<td>$4740/12 = $395</td>
</tr>
<tr>
<td>Multiply AMI x 30%</td>
<td>$395 x .30 = $119</td>
</tr>
</tbody>
</table>
1.4.2 Medical Expense Deduction

Mary is a disabled grandmother raising two minor grandchildren in public housing. Her income is $862 per month from SSDI. Over the next year, she projects to have unreimbursed medical expenses of approximately $200 per month for doctor co-pays, prescription copays, medical transportation, and health insurance (over $100 a month often withheld for the latter from Social Security payments). Example C shows what her rent would be without the medical expense deduction and Example D shows that her rent would be lowered by $48 per month with this deduction. The medical expense deduction only applies if the annual expected medical expenses exceed 3% of the tenant’s annual income with the deduction being the difference between the expenses and 3% of annual income.

**EXAMPLE C**

<table>
<thead>
<tr>
<th>Description</th>
<th>Calculation</th>
<th>Adjusted Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual Income</td>
<td>$862 \times 12 = $10,344</td>
<td></td>
</tr>
<tr>
<td>Subtract Disabled Deduction</td>
<td>$400</td>
<td>$8984</td>
</tr>
<tr>
<td>Subtract Minor Deductions</td>
<td>$480 \times 2 = $960</td>
<td></td>
</tr>
<tr>
<td>Adjusted Annual Income</td>
<td></td>
<td>$8984</td>
</tr>
<tr>
<td>Adjusted Monthly Income (AMI)</td>
<td>$5384/12 = $749</td>
<td>$225</td>
</tr>
<tr>
<td>Multiply AMI x 30%</td>
<td>$449 \times .30 = $225</td>
<td></td>
</tr>
</tbody>
</table>

**EXAMPLE D**

<table>
<thead>
<tr>
<th>Description</th>
<th>Calculation</th>
<th>Adjusted Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual Income</td>
<td>$862 \times 12 = $10,344</td>
<td></td>
</tr>
<tr>
<td>Subtract Disabled Deduction</td>
<td>$200</td>
<td>$10,144</td>
</tr>
<tr>
<td>Subtract Minor Deductions</td>
<td>$480 \times 2 = $960</td>
<td>$998</td>
</tr>
<tr>
<td>Subtract Medical Deduction ($200 x 12 = $2400)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Compare to 3% of gross Income</td>
<td>$10,344 x .03 = $310</td>
<td>$2,090</td>
</tr>
<tr>
<td>$2,400 – $310 = $2,090</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Medical Expense Deduction Here</td>
<td>$2,090</td>
<td></td>
</tr>
<tr>
<td>Adjusted Annual Income</td>
<td>$7,094</td>
<td>$177</td>
</tr>
<tr>
<td>Adjusted Monthly Income (AMI)</td>
<td>$7,094/12 = $591</td>
<td></td>
</tr>
<tr>
<td>Multiply AMI x 30%</td>
<td>$591 \times .30 = $177</td>
<td></td>
</tr>
</tbody>
</table>

1.5 MINIMUM RENTS AND FLAT RENTS

As mentioned above, changes to federal law now allow for rents to be set at levels other than at the traditional 30% of adjusted income. The law requires PHAs to impose minimum rents of up to $50 per month. Hardship exemptions are allowed. Exemptions from the minimum rent include:

- a household’s inability to pay the minimum rent due to a loss of government assistance;
- a household’s facing eviction due to an inability to pay the minimum rent;
- other reasons as determined by the PHA. PHAs are required to notify households of the possible exemptions and to suspend charging minimum rents to households who request an exemption. If there is hardship which is long-term (over 90 days), an exemption should be granted. If the hardship is only temporary, the PHA should offer the tenant a reasonable repayment plan for any suspended rents or missed payments. 42 U.S.C. § 1437a(a)(3), 24 C.F.R. § 5.630.
Legislation enacted in 1998 allowed PHAs to charge a flat rent based upon the “rental value” of the unit instead of the tenant’s income. This type of rent is called a “flat rent”. The reason for implementing flat rents was to discourage higher income families from moving out of public housing. A tenant is given an annual choice to either pay a flat rent or an income based rent. PHAs must advise tenants in writing of the amount of the income based rent or the flat rent. If a flat rent is chosen and the resident has a loss of income, they can request a switch to income based rent. 24 C.F.R. § 960.253(f). Flat rent payers are not allowed the benefit of a utility allowance. 24 C.F.R. 960.253.

1.6 GRIEVANCE PROCEDURE

The right to a grievance procedure is one of the most important advantages which a public housing tenant has over other federally subsidized tenants and private tenants. All PHAs must establish a grievance procedure by which a tenant gets a hearing if she disputes any PHA action or failure to act, except for certain types of evictions (e.g. drug-related or criminal activity terminations) and class grievances. 24 C.F.R. § 966.51. A tenant must present her grievance to the project manager or someone else at the main office and discuss the grievance informally. The manager is then to prepare a summary of the discussion and give a copy to the tenant. If the tenant is not satisfied with the result, she may request a Formal Hearing within a reasonable time after receipt of the decision. You should consult the individual PHA plan or administrative plan for specific rules governing the grievance hearing process. The written request must state the reason for the request and the specific relief sought by the tenant. 24 C.F.R. § 966.55. Tenants are not entitled to use the PHA grievance process to contest proposed evictions for criminal or drug-related activity, if the PHA has decided to exclude such matters from the grievance process and local eviction court procedures satisfy due process. 24 C.F.R. § 966.51(a)(2)(i).

If the grievance concerns a dispute over a change in rent, the tenant must deposit into the PHA escrow account, an amount equal to the amount of rent which the PHA claims is now due as of the first of the month preceding the month of the change. In cases where a tenant is being evicted and still has the opportunity for a grievance hearing, the PHA must inform the tenant of her right to a hearing, if applicable. The PHA may not continue with the eviction process until the time for requesting a hearing has elapsed. If the tenant timely requests a grievance, the eviction is indefinitely suspended until the completion of the hearing process. A tenant has the right to review all relevant PHA documents prior to the hearing, to have an advocate assist her at the hearing, and a right to a public or a private hearing depending upon the tenant’s request. The tenant has a right to confront and cross-examine witnesses. The tenant is entitled to a written decision and the PHA is in general bound by the decision. 24 C.F.R. §§ 955.56 and 955.57.

You should use the Informal and Formal Grievance Hearing process when available for eviction proceedings, disputes over rent or other charges such as maintenance fees, transfer disputes, and for repairs. You may often experience lengthy delays in getting an Informal Hearing, getting a written decision from the Informal Hearing, and getting a date set promptly for a Formal Hearing. The grievance process can be used in conjunction with a request for rent abatement.
1.7 EVICTIONS FROM PUBLIC HOUSING

A public housing tenant may only be evicted for a serious or repeated violation of the dwelling lease. Good cause is always required to evict or refuse to renew a lease for public housing tenants except in the case of a tenant's refusal to comply with Community Service Work requirements. 24 C.F.R. § 966.4(l)(2), 42 U.S.C. § 1437d(l)(1). Congress has specifically provided that criminal activity, drug-related activity, and the illegal use of drugs or abuse of alcohol may be grounds for eviction.

In order to evict, a PHA must give proper written notice as required by federal and state laws. *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268 (1969). The notice shall not be less than a reasonable time but shall not exceed 30 days if the health or safety of other tenants, PHA employees, or other persons residing in the immediate vicinity of the premises is threatened; 14 days in the case of nonpayment of rent; and 30 days in any other case, except that if state law allows a shorter period, such shorter time may apply. In Louisiana, this means that eviction proceedings against a public housing tenant for any violation other than nonpayment of rent could be instituted upon a 5 day notice to vacate. 24 C.F.R. § 966.4(3), 42 U.S.C. § 1437d(l)(4). Any notice of lease termination required by state law may be combined with or run concurrently with the PHA's notice of lease termination. The notice must be served by delivering a copy to an adult member of the household residing in the dwelling or by prepaid first class mail properly addressed to the tenant. 24 C.F.R. § 966.4(k)(1)(I). Service by tacking of a notice of lease termination to a public housing tenant could be challenged as inadequate notice and a violation of due process. See the Louisiana Landlord-Tenant section of this Poverty Law Guide.

The notice to the tenant shall state specific grounds for lease termination with enough detail for the tenant to understand the reason for eviction and must inform the tenant of her right to make a reply, the right to examine PHA documents, the right to a grievance hearing if applicable, and the right to representation. When a PHA is not required to have a grievance hearing, such as in certain criminal or drug-related evictions, the PHA must nevertheless: (1) advise the tenant whether the eviction is for criminal activity or drug-related activity and it must: (2) advise the tenant of the specific judicial procedure to be used by the PHA for eviction; and (3) state that HUD has determined that such procedure complies with due process. 24 C.F.R. § 966.4(l)(3)(v).

The regulations further provide that in deciding whether to evict for criminal or drug-related activity, a housing authority still has discretion not to evict and to consider all of the circumstances of the case, such as the seriousness of the offense, the extent of participation by the leaseholder in the offense, the effects of an eviction on those not involved in the offending activity, and the steps the family has taken to accept personal responsibility and to prevent the action from occurring in the future. 24 C.F.R. § 966.4(l)(5)(vii)(B). A PHA may also allow continued occupancy for certain family members provided that those family members who engaged in the proscribed criminal activity are no longer allowed in the unit.

After the time allowed for in the notice expires, the PHA must file a rule for possession in the appropriate court. The regulations mandate that a PHA may only evict a tenant by court action. 24 C.F.R.§ 966.4(l)(4). At the hearing, the PHA has to prove the existence of a lease and that the lease was violated. The PHA must prove a violation by the preponderance of the evidence. Prior to trial, you
should request and review the tenant’s folder, subpoena documents and/or wit- 
nesses as necessary, file a verified answer with any applicable affirmative defense,
and supporting memorandum, and take advantage of the grievance process if 
available. In the case of an eviction for criminal activity, an advocate should check 
the criminal case as charges are frequently dropped or not prosecuted, or the 
party charged with criminal activity may actually have been found not guilty. The 
PHA often continues to proceed with the eviction for illegal activity even when 
under these circumstances it is unlikely that it will prove its case.

1.7.1 Practice Tips

Request a meeting with the PHA’s legal or other representative. Often they
are willing to negotiate and either remove the problematic household member 
from the lease, allowing the other household members to remain or allow a pro-
bationary period for the tenant during which the tenant cannot violate any of their 
obligations. A probationary period agreement can be entered into the court record 
as a consent agreement.

While the case is pending, you should have the tenant deposit the rent into 
the PHA escrow account or into escrow client trust account. PHAs will usually not 
accept rent from a tenant once a decision has been made to evict. Particularly with 
drug or criminal activity evictions which may last several months, it is important 
that the funds for rent be deposited into a safe place in the event that a settlement 
is reached or a favorable judgment obtained. If the tenant has not been putting the 
rent aside pending the eviction case, you may have won the lease violation eviction 
but then the tenant will be evicted for nonpayment of the accrued rent.

1.8 ONE STRIKE CRIMINAL ACTIVITY EVICTIONS

PHAs have been directed by Congress to use leases which provide that a pub-
lic housing tenant may be evicted for criminal activity which threatens the health, 
safety or right to peaceful enjoyment of the premises by other tenants, or for drug-
related criminal activity on or off the premises. 42 U.S.C. 1437d(l)(6). LSC-funded 
attorneys may not represent in public housing evictions persons convicted of or 
charged with drug crimes when the evictions are based on threats to health or 
safety of public housing residents or employees. 45 C.F.R. § 1633. However, such 
attorneys may represent a person facing eviction because a family member was 
convicted of or charged with drug crimes.

The United States Supreme Court ruled that such lease provisions are con-
stitutional and that there is no requirement that a tenant have knowledge of the 
alleged criminal activity for it to be a lease violation. Department of Housing and 
Urban Development v. Rucker, 535 U.S. 125 (2002). The court did not hold that 
eviction is required when this lease provision is violated. Note that criminal activ-
ity must threaten other tenants’ well-being; drug-related criminal activity does 
not have to do so. The criminal or drug-related activity which exposes the tenant 
to eviction must have been engaged in by the “public housing tenant, any member 
of the tenant’s household, or any guest or other person under the tenant’s control.” 
42 U.S.C. 1437d(l)(6). The last four words of this provision have been interpreted 
to apply only to “other person”. See also Housing Authority of New Orleans v. Green, 
657 So.2d 552 (La. App. 4th Cir. 1995), writ denied 661 So.2d 1355, cert. denied 
The theory behind making tenants guarantors of third parties’ conduct and establishing a one-strike and you’re out policy is that it will promote the general welfare of public housing tenants by motivating tenants to prevent criminal activity and ridding the developments of criminals. The 5th Circuit U.S. Court of Appeals has held that the eviction of tenants for criminal activities of their household members (or guests) does not violate federal constitutional rights. *Chavez v. Housing Auth. of El Paso*, 973 F. 2d 1245 (5th Cir. 1992). However, a tenant cannot be evicted for the criminal activity of a guest which occurred prior to the tenant’s current lease term. *Wellston Housing Authority v. Murphy*, No. ED 83156, 2004 Mo. App. Lexis 399, 2004 WL 555610 (Mo. Ct. App. Mar. 23, 2004). See also *Boston Housing Authority v. Bruno*, 58 Mass. App. Ct 486, 790 N.E. 2d 1121 (2003) where the court held that a PHA cannot shift on appeal to a theory that the offender was a guest after losing on its claim that the offender was a member of the household.

The housing authority must prove the criminal activity occurred. This does not require that there has been a conviction or even an arrest. Some courts have even granted evictions based upon One-Strike grounds when there was no arrest. See *Housing Authority of Los Angeles v. Vargas*, No. 89 U34272(Cal. Mun. Ct. Los Angeles Cnty. June 15, 1990). If the PHA seeks to terminate the tenancy for criminal activity based upon a criminal conviction, the PHA must provide the tenant a copy of the criminal record in advance of the grievance hearing or court trial. 24 C.F.R. § 966.4(l)(5)(iv).

The fact that a person has been arrested is not itself evidence of criminal activity. *Housing Authority of New Orleans v. Sylvester*, 2012-CA-1102 (La. App. 4 Cir.2/27/13); *U.S. v. Johnson*, 648 F.3d 273 (5th Cir. 2011); *U.S. v. Labarbera*, 581 F.2d 107 (5th Cir. 1978); *Landers v. Chicago Housing Authority*, 404 Ill.App.3d 568, 936 N.E.2d 735 (Ill.App. 1 Dist.,2010); *Bratcher v. Housing Authority of City of Milwaukee*, 327 Wis.2d 183, 787 N.W.2d 418 (Wis.App.,2010); *Pratt v. Housing Authority For City of Camden*, 2006 WL 2792784 (D.N.J.,2006). But evidence that led to such arrest may be used against the tenant. Police reports alone should not fulfill the PHA’s evidentiary burden. La. C.E. Art. 803(8)(b)(i,iv); *State v. Robinson*, 02-1253 (La.App. 5 Cir. 4/8/03), 846 So.2d 76, 84 writ denied 860 So.2d 1131, 2003-1361 (La. 11/26/03), 860 So.2d 1131, reconsideration denied 2003-1361 (La. 3/12/04), 869 So.2d 806; *Deville v. Aetna Ins. Co.*, 191 So.2d 324, 328 (La. App. 3 Cir.1966), writ refused 250 La. 13, 193 So.2d 527. See also *State v. Cockerham*, 522 So.2d 1245, 1247 (La. App. 4 Cir. 1988).

Drug-related criminal activity is defined as “the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance.” 42 U.S.C. § 1437d(l). Previously, only drug-related activity “on or near the premises” was a required basis for eviction. Many existing leases will not have been updated to conform to the new statutory requirement, and will still be governed by the previous limitation that the offense must be “on or near the premises.”

HUD regulations include as good cause for eviction criminal or other activity which threatens the health or safety of people who reside in the immediate vicinity of the premises, even if they are not public housing residents. 24 C.F.R. § 966.4(l)(2)(iii)(A). This appears contrary to the controlling statutory language, except with respect to drug-related criminal activity. Under the statute, criminal activity is grounds for eviction if it threatens the “health, safety or right to peaceful
enjoyment of the premises by other tenants." 42 U.S.C. § 1437d(l)(6). Given this language, it does not appear that Congress intended to protect non-public housing residents residing in the immediate vicinity of the premises.

The Personal Responsibility and Work Opportunity Act of 1996 requires public housing authorities to provide in their leases that tenancies can be terminated if a member of the household is fleeing from a felony prosecution or conviction, or is violating probation or parole. 42 U.S.C. § 1437d(l)(9); 24 C.F.R. § 966.4(l)(5)(ii)(B). Since passage of the Quality Housing and Work Responsibility Act of 1998, PHA leases have also been required to provide that the tenancy may be terminated for any household with a member who is illegally using a controlled substance, or whose illegal use of a controlled substance or abuse of alcohol interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents. See 42 U.S.C. § 13662; 24 C.F.R. § 966.4(l)(5)(vi). In determining whether to terminate a tenancy for illegal drug use or alcohol abuse under this provision, the PHA may consider whether such household member is participating in or has successfully completed a supervised drug or alcohol rehabilitation program, or has otherwise been rehabilitated, and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol. 24 C.F.R. § 966.4(l)(5)(vi).

Although strict responsibility for the acts of other household members, guests and persons under the tenant’s control has been upheld by some courts, many courts have refused to grant such evictions. HUD’s own regulation, codified at 24 C.F.R. 966.4(l)(5)(vii)(B), provides as follows:

In a manner consistent with such policies, procedures, and practices, the PHA may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity, and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action. The PHA may require a tenant to exclude a household member in order to continue to reside in the unit where that household member has participated in or been culpable for action or failure to act that warrants termination. (Emphasis added)

This equitable approach is supported by the legislative history of the 1990 amendments to this statute in the Cranston-Gonzales Affordable Housing Act. For example, the accompanying Senate Report specified that criminal activity is grounds for eviction of public housing residents only if that action is appropriate in light of all the facts and circumstances. The report states that each case should be judged on its merits, with the exercise of wise and humane judgment by the housing authority and the eviction court. The report gives as an example that eviction would be inappropriate if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity. S. Rep. No. 316, 101st Cong., 2d Sess. 179 (June 8, 1990). It should be noted that even after the United States Supreme Court decision in the Rucker case holding “One-Strike” evictions are constitutional, the United States Department of Housing and Urban Development issued two letters to all public housing agencies informing them that PHAs still did not have to evict even when
the lease is violated. To quote from the April 16, 2002 letter, “such evictions often do more harm than good” and “eviction should be a last resort.” (See April 16, 2002 Letter from HUD Secretary Mel Martinez and June 6, 2002 Letter from Asst. Secretary of HUD Micheal Liu, both at www.nhlp.org.) Also, state and federal law prohibit public housing authorities from evicting or terminating any other assistance to a tenant based upon criminal activity when the alleged criminal activity is domestic violence and the tenant was the victim of the crime. La. R.S. 40:506(D); see also Violence Against Women And Department of Justice Reauthorization Act of 2005 P.L. 109-162 § 607.

As discussed above, tenants are not entitled to use the PHA grievance process to contest proposed evictions for criminal or drug-related activity, if the PHA has decided to exclude such matters from the grievance process. 24 C.F.R. § 966.51(2)(a).

1.9 COMMUNITY SERVICE WORK REQUIREMENT

Each public housing authority must require all adult public housing tenants, not just heads of household give 8 hours per month of service to the community in which they reside, unless they meet one of several exceptions (set out below). 42 U.S.C. § 1437j(c). Residents can also perform “economic self-sufficiency” activities instead of community service. 24 C.F.R. § 5.603. Housing authorities must address the community service work requirement in their PHA plan. Leases must be changed to have a 12 month term with automatic renewal except if a nonexempt family member has violated community work requirements. 24 C.F.R. § 966.4(a)(2).

Exempt tenants include but are not limited to: those aged 62 or over, blind or disabled, primary caretakers of persons who are blind or disabled, engaged in “work activities” under TANF definition, or exempt from work requirements under state TANF program. Noncompliance with community work requirements at lease expiration can lead to eviction unless the tenant and noncomplying family member sign an agreement to cure within subsequent 12 months or noncomplying adult leaves household. 24 C.F.R. § 960.601(b), 960.607(b). The head of household cannot make-up hours for the noncompliant household member. A family retains its rights to an administrative grievance if found to be noncompliant.

The PHA must provide a general notice to all residents of the Community Service requirement along with a description of the exemptions and permissible work activities. It must also state in the notice the date by which a resident must start doing community service. This date is generally the recertification date.

2. SECTION 8 HOUSING CHOICE VOUCHER PROGRAM

2.1 INTRODUCTION

The Section 8 Housing Choice Voucher Program, like other federal assistance programs, traces its origins to the New Deal legislation of the 1930’s. The mission to provide affordable, habitable housing would move from the National Housing Act of 1934 to the Housing Act of 1937 and with the Housing and Community Development Act of 1974 Section 8 became the primary vehicle for the federal government’s efforts to provide an adequate supply of low-income housing.
In the HUD Section 8 Housing Choice Voucher Program (HCVP), the eligible families receive a federal rental subsidy to assist them in locating and being able to afford decent, safe and sanitary housing. The program is generally administered by local governmental entities called public housing agencies (PHAs). See generally 24 C.F.R. Part 982, 42 U.S.C. § 1437f.

It is important when embarking on any representation or advocacy involving the HCVP to determine and locate the local PHA which has jurisdiction over the region in which your work is directed. The PHA must adopt a written administrative plan that establishes local policies for administration of the program in accordance with HUD requirements. The administrative plan is a supporting document to the federal PHA plan and must be made available for public review; contact your local PHA and get a copy of their administrative plan to keep as a reference for all disputes you may have under the HCVP program.

The PHA administrative plan will address the selection and admission of new tenants, establishing and administration of the waitlist, extensions and suspensions of the voucher search period, occupancy policies, termination/denial of assistance based on criminal activity and other grounds, promotion of new areas for low-income housing, assisting families that claim to have been illegally discriminated against in housing, disapproval of owners, absence of members of the family, informal review procedures, repayment of monies owed by family back to PHA, Housing Quality Standards, inspection guidelines, and more. See 24 C.F.R. § 982.54.

2.2 ELIGIBILITY

In order to be eligible for Section 8 subsidies, a participant must be “income-eligible.” Income-eligibility is defined in 24 C.F.R. § 982.201(b). Of those who are deemed income-eligible, a PHA must reserve no less than 75 percent of families admitted in any fiscal year to those who qualify as extremely low income (30% Area Median Income for local area). A PHA may admit a lower percent of extremely low income families during a PHA fiscal year only with HUD approval.

Admission is usually done by wait list due to the overwhelming need for affordable housing and the desirability of the Section 8 program due to its allowing the tenant some measure of control in choosing where to live. A person may be on multiple PHA waiting lists in different areas and is not barred from applying if they are already receiving some housing subsidy. (If they are granted admission to HCVP, they must then relinquish any other housing subsidy they are otherwise receiving.) The PHA must delineate the system of admission preferences that the PHA uses to select applicants from the waiting list, including any residency preference or other local preference.

Admission can also be granted through special “non-wait list” admissions when funds are made available for a specific population. This can occur when HUD awards special funding to target specific families for admission to the HCVP program. When this happens, the PHA may admit these families regardless of their wait list position or if they were ever on the wait list. Generally, this occurs when other HUD action would result in a family rendered homeless due to the demolition, destruction, transfer and/or sale of otherwise assisted housing.
2.3 ADMISSIONS

When a family's position is reached on the wait list, the PHA will make a determination as to the family's eligibility. If the family is found to be eligible, the PHA will then admit that family to the program. As part of the admission procedures, the PHA must provide an oral briefing including a description of the program, the various responsibilities of the tenant and the owner, where a family can look for housing, and how portability works. 24 C.F.R. § 982.301(a) If the family is currently living in a high poverty census tract in the PHA's jurisdiction, the briefing must explain the advantages of moving to an area that does not have a high concentration of poor families. 24 C.F.R. § 982.301(a)(3).

Along with the oral briefing, the family is to receive an information packet which explains in-depth the nature of rent calculation, the lease addendum that HCVP requires, information to assist the family in finding a home, and the all important Request for Tenancy Approval. This information packet is separate from the actual HCV voucher but they are generally issued at the same time.

2.3.1 Denial of Admissions

An applicant may be denied admission only for very specific reasons. 24 C.F.R. § 982.552 and § 982.553 list both the mandatory and discretionary reasons why a PHA must or may deny admission to an eligible family. Issues dealing with criminal/drug behavior will be discussed below.

The PHA must deny admission to the program for an applicant if any member of the family fails to sign and submit required consent forms; fails to provide required evidence of citizenship or eligible immigration status; fails to meet the eligibility requirements concerning individuals enrolled at institutions of higher education.

The PHA must give an applicant prompt written notice of a decision denying admission to the program (including a decision that the applicant is not eligible, or denying assistance for other reasons). The notice must give a brief statement of the reasons for the decision. The notice must also state that the applicant may request an informal review of the decision, and state how to arrange for the informal review. 24 C.F.R. § § 982.201(f), 982.554(a).

The PHA must state the specific procedures for conducting the informal review in its administrative plan but the PHA's procedures must comply with three provisions: 1) it may be conducted neither by the person who made or approved the decision to deny, nor a subordinate of this person; 2) the applicant must have opportunity to present written or oral objections to the decision; 3) the PHA must issue the decision in writing after the informal review, including a brief statement of the reason for the final decision. 24 C.F.R. § 982.554(b).

The PHA is not required to provide the applicant an opportunity for an informal review when the denial of assistance relates to (1) Discretionary administrative determinations by the PHA; (2) General policy issues or class grievances; (3) A determination of the family unit size under the PHA subsidy standards; (4) A PHA determination not to approve an extension or suspension of a voucher term; (5) A PHA determination not to grant approval of the tenancy; (6) A PHA determination that a unit selected by the applicant is not in compliance with Housing Quality Standards. See 24 C.F.R. § 982.554(c). This "informal review" differs from the
“informal hearing” available when assistance is terminated. Compare 24 C.F.R. § 982.555 (Example: The “informal hearing” specifically provides for the right of discovery, 24 C.F.R. § 982.555(E)(2), whereas the “informal review” does not.)

It is important to act quickly when a family has received notice of a denial of assistance. The informal review process is usually time sensitive with hard deadlines set by the PHA. When assisting a client who has been denied assistance quick action to notify the PHA of the request for an informal review should be your first step. If possible, include with this notification a request to review the file of the family to determine what information the PHA is using as the basis for its determination. Many denials of assistance stem from the PHA making its determination of eligibility or issues on information that is bad/wrong/not up-to-date. Sometimes the PHA will have correct information but you can nonetheless take action that will allow the problem to be rectified before the review occurs, such as when a denial is due to an expunge-able criminal record.

2.4 USING THE VOUCHER

Vouchers are issued for at least a sixty day search period; the PHA may extend this time in accordance with their administrative plan or at their discretion but the term for the search period must be in writing and usually is placed on the voucher itself. 24 C.F.R. § 982.303(a). During this time, a tenant must locate a new residence and new landlord who is willing to rent to them while on the program and can meet Housing Quality Standards. Except for a few restrictions, private Louisiana landlords are not required to accept the vouchers, even if they currently have Section 8 HCV tenants or they have rented to Section 8 HCV tenants in the past. However, Louisiana landlords who participate in other federal programs cannot discriminate against Section 8 voucher holders.

Those other federal programs include:

a) 12 U.S.C. § 1701z-12; 24 C.F.R. § 290.19 and 290.39 prohibit the unreasonable refusal to “lease a vacant dwelling unit” in “a multifamily housing project purchased from HUD” to a holder of a Section 8 certificate “solely because of such prospective tenant’s status as a certificate holder;”

b) 26 U.S.C. § 42(h)(6)(B)(iv) and 26 C.F.R. § 1.42-5(c)(1)(xi) require owners of low-income housing tax credit projects to certify at least annually that they have in place an “extended low-income housing commitment” that prohibits, inter alia, “the refusal to lease to a holder of a Section 8 voucher or certificate...because of the status of the prospective tenant as such a holder;”

c) 42 U.S.C. § 1437o note, § 1437o(c)(2)(G)(I) and (d)(4)(D)(I) state that owners of rental rehabilitation projects and HODAG buildings “shall not discriminate against prospective tenants because of their receipt of or eligibility for housing assistance under any federal, state, or local housing assistance program.”

2.4.1 Extensions and Suspensions

If a tenant has not located a new potential residence within the initial search term, the voucher will expire, jeopardizing the tenant’s future participation in the program. Extensions can be granted, consistent with the PHA’s Section 8 Admin-
istrative Plan and PHA Plan. Extension of search time beyond 120 days is now mandatory when it is necessary as a reasonable accommodation for a disabled family. 24 C.F.R. § 982.303(b). A progress report showing the addresses of potential residences that the tenant reviewed may be required by the PHA. Such reports may be required at such intervals or times as determined by the PHA. § 982.303(d)

A PHA may allow for a suspension of the voucher term upon family submission of a request for tenancy approval. 24 C.F.R. § 982.303(c). The terms for any suspension are required to be detailed in the PHA's administrative plan. Suspensive periods are critical as tenants may not be aware that the voucher can expire if the tenancy approval is rejected and the tenant is forced to locate a new potential home. This is of great importance when engaging in interstate porting; voucher search periods do not naturally incorporate the delays and resources needed for travel. A tenant wanting to port should begin their search before completion of their lease term and should notify their PHA in writing of their plans.

2.4.2 Request for Tenancy Approval

Once a suitable home is found with an agreeable landlord, the tenant must submit a Request for Tenancy Approval which, among other things, will trigger the PHA to perform a Housing Quality Standards (HQS) inspection of the unit. See § 982.401 for a general review of the purpose of the HQS inspection. Important to note that in addition to all internal aspects of the home, HQS requires that the external site and neighborhood be free from adverse environmental conditions, free from disturbing noises, and other dangers to health, safety, and general welfare of the occupants. 24 C.F.R. § 982.401(l).

2.5 UTILITY ALLOWANCES

If a tenant is required to pay all of a utility, they are entitled, in the computation of their tenant portion of the rent, to an allowance for the reasonable level of consumption to be deducted from their tenant portion of rent. The amount of this allowance is determined by the utility allowance schedule, which must be created by the PHA with a copy delivered to HUD. The utility allowance schedule must be determined based on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality. In developing the schedule, the PHA must use normal patterns of consumption for the community as a whole and current utility rates. A HUD contractor has generated a spreadsheet off a national consumption study to guide Low Income Housing Tax Credit landlords in setting utility allowances. At least one PHA in the state has used this to generate is Section 8 utility allowances. Some of the assumptions in, and so allowances projected by, this tool are questionable.

The utility allowance sadly does not usually equal the actual amount of a voucher tenant's utility bills. PHAs are required to review the adequacy of their utility allowances and to increase the allowances when utility rates have increased by at least 10% since the utility allowance was last adjusted. 24 C.F.R. § 982.517(c)(1).

Because the tenants are responsible for excess rent if the gross rent (including utilities) is higher than the payment standard, only tenants whose gross rents are below the payment standard will reap the benefits of the utility allowance. 24
C.F.R. § 982.555(a)(1)(ii) states that opportunity for an informal hearing is required if a family disputes whether their utility allowance is correctly calculated under the PHA utility allowance schedule.

On request from a family that includes a person with disabilities, the PHA MUST approve a utility allowance which is higher than the applicable amount on the utility allowance schedule if a higher utility allowance is needed as a reasonable accommodation in order to make the program accessible to and usable by the family member with a disability. 24 C.F.R. § 982.517(e).

### 2.6 RENT COMPUTATION

HUD annually publishes the fair market rents (FMR) for each market area in the United States. See http://www.huduser.org/portal/datasets/fmr.html for official fair market rent data sets. The PHA must adopt a schedule that establishes voucher payment standard amounts for each unit size in each FMR area in the PHA jurisdiction. 24 C.F.R. § 982.503. PHA’s must set the payment standard at between 90-110% of FMR, the “basic range.”

This payment standard is the maximum monthly subsidy payment and is used to calculate the monthly housing assistance payment (HAP) for a family. The PHA pays a HAP payment that is equal to the lower of either the payment standard or the gross rent minus the total tenant payment. The tenant should negotiate with her landlord for lowest possible gross rent to benefit more from the HCV assistance. At the family’s request, the PHA must help the family negotiate the rent to owner. 24 C.F.R. § 982.506.

Where the gross rent is larger than the payment standard, the tenant is required to pay the excess amount, provided the total gross rent is determined to be a reasonable rent for comparable units in the area. 24 C.F.R. § 982.507. For the initial lease on the unit, gross rent cannot exceed 40% of the tenant’s income. 24 C.F.R. § 982.508. This sets the tenant’s share of rent somewhere between 30-40% of the tenant’s income. Following the initial term of the lease, the tenant’s share of rent is no longer capped at 40%. At this time, if a landlord wishes to raise the rent to an amount that would result in the tenant’s share exceeding 40% of tenant’s income, the tenant can elect to remain in the unit if, and only if, the PHA agrees that the new gross rent is still reasonable in the housing market. At all times the rent for the unit must still be reasonable as determined by the housing authority. 24 C.F.R. § 982.503. Once the rent has been established by the PHA, the owner may not demand or accept any rent payment from the tenant in excess of this maximum, and must immediately return any excess rent payment to the tenant. 24 C.F.R. § 982.451(b)(4)(ii). Such payments are considered illegal side payments and are totally disallowed under the program; in some cases, a tenant may offer to pay out of pocket an amount above the maximum rent as set by the PHA in order meet the demands of a landlord/owner for a particular unit; you must advise your client against such action as it will seriously jeopardize their future participation in the program.

Tenants under the HCVP program are entitled to a decrease in their share of rent when they timely report a decrease in income. The decrease should take effect in the month after the reporting of the income change. See Chapter 6, Calculating Rent and HAP Payments of the Housing Choice Voucher Program Guidebook, http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11750.pdf
Tenants are also entitled to an informal review of the determination of the family's annual or adjusted income and the use of such income to compute the HAP payment. A family seeking an informal review can seek representation by a lawyer or other representative. 24 C.F.R. § 982.555(e)(3). Before the hearing, the family and/or their representative must be given the opportunity to examine any PHA documents directly relevant to the hearing. If the PHA does not make the document available for examination on request of the family, the PHA may not rely on the document at the hearing. 24 C.F.R. § 982.555(e)(2)(i).

2.6.1 Issues for Families with One or More Disabled Members

24 C.F.R. § 5.617, “Self-sufficiency incentives for persons with disabilities” requires that the PHA exclude from rent calculation the income of a disabled family member who was previously unemployed for one or more years, whose income increases as part of an economic self-sufficiency or other job training program, or annual income increases as a result of new employment or increased earnings of a family member, during or within six months after receiving assistance or services from any state program for temporary assistance for needy families funded under Part A of Title IV of the Social Security Act. (In Louisiana IV-A funds at least the Family Independence Temporary Assistance Program (FITAP) and Kinship Care Subsidy Program (K CSP))

Under this provision, for the first twelve month accumulative period, the increase of income is wholly disallowed in the rent calculation. After the initial 100% disallowed period, the returning to work disabled family member is then allowed a 50% disallowance of the increase of income from the rent calculation. See 24 C.F.R. § 5.617(c)(1)(2)

2.6.2 Reasonable Accommodation

PHAs can grant a higher payment standard for a family as a reasonable accommodation for a disability. If the family includes a person with disabilities and requires a higher payment standard for the family, as a reasonable accommodation for such person, the PHA may establish a higher payment standard for the family within the basic range, 90-110% of FMR. See 24 C.F.R. § 982.505(d).

2.7 NON-RENT CHARGES

Federal law only mandates that the lease between tenant and owner comply with State and local Law. 24 C.F.R. § 982.308(c). This means, that thanks to Louisiana’s generous freedom to contract, tenant and owner are free to enter into agreements that may obligate a tenant to pay late fees, scheduled maintenance, and/or other charges/fees. The only protection a tenant has lies in 24 C.F.R. § 982.308(b)(2), which requires that if an owner uses a standard lease for other non-assisted tenants the owner must use the same standard lease for assisted tenants.

The collection of a security deposit is authorized by 24 C.F.R. § 982.313. The PHA may prohibit security deposits in excess of private market practice, or in excess of amounts charged by the owner to unassisted tenants. The owner is allowed to use the deposit for payment of any unpaid rents or damages but the regulation requires that the owner give the tenant an itemized list of any charges and refund promptly the full amount of the unused balance.
2.8 VOUCHER TERMINATIONS AND DENIALS

The PHA must give opportunity for an informal hearing of the PHA decision to terminate assistance to a participant. 24 C.F.R. § 982.555(a) & (c)(2). When a hearing is requested, the PHA must proceed with the hearing in a reasonably expeditious manner upon request of the family. 24 C.F.R. § 982.555(d). If the Section 8 participant timely requests a hearing, then the PHA must provide continued program assistance if the participant has an active HAP contract. 24 C.F.R. § 982.555(a)(2).

The PHA must give an applicant for participation prompt notice of a decision denying assistance to the applicant. The notice must contain a brief statement of the reasons for the PHA decision. The notice must also state that the applicant may request an informal review (which can differ from an informal hearing) of the decision and must describe how to obtain the informal review. 24 C.F.R. § 982.554(a).

The PHA must state the specific procedures for conducting the informal reviews and hearings in its administrative plan but the PHA's procedures must comply with three provisions 1) It may not be conducted by the person who made or approved the adverse decision nor a subordinate of this person; 2) the applicant or recipient must have the opportunity to present written or oral objections to the decision; 3) The PHA must issue in writing the decision after the proceeding, including a brief statement of the reason for the final decision. § 982.554(b).

2.8.1 Hearing Requirements

24 C.F.R. § 982.555(e) lays out the basic requirements for PHA hearings for HCVP participants. A family facing a proposed termination from the program can seek representation by a lawyer or other representative. 24 C.F.R. § 982.555(e)(3). Before the hearing, the family and/or their representative must be given the opportunity to examine any PHA documents directly relevant to the hearing. If the PHA does not make the document available for examination on request of the family, the PHA may not rely on the document at the hearing. § 982.555(e)(2)(i).

Grounds for program termination include any act or failure to act by a family member which results in failing to fulfill the Family Obligations. See 24 C.F.R. § 982.551. This includes, but is not limited to, family member’s absence from the unit, failing to notify the housing authority of an eviction notice and/or subsequent eviction from their unit, abandoning the unit (including constructive abandonment due to being vacant for more than 180 days), subletting the unit, failure to give the housing authority notice before vacating the unit, failing to provide proof of citizenship or immigration status, failure to allow HQS inspections, committing bribery or fraud in connection with the program, and not promptly informing the housing authority of additions to the household. 24 C.F.R. § 982.551 and 24 C.F.R. § 982.552(e).

The hearing can be conducted by any person, other than the person or a subordinate of this person who made or approved the decision to propose termination, as appointed by the PHA. The person who conducts the hearing is to regulate the conduct of the hearing in accordance with the PHA hearing procedures, but the rules of evidence are lax in comparison to most judicial proceedings. Nonetheless,
general rules of due process must be obeyed. The PHA and the family must be given the opportunity to present evidence, and may question any witnesses. Following the hearing, the person who conducts the hearing must issue a written decision, stating briefly the reasons for the decision. A copy of the hearing decision shall be furnished promptly to the family. 24 C.F.R. § 982.555(e).

The PHA is not bound by a hearing decision if it involves a matter for which the PHA is not required to provide an opportunity for an informal hearing [See 24 C.F.R. § 982.555(b) for a list of eight circumstances] or is contrary to HUD regulations or requirements, or otherwise contrary to federal, State, or local law. 24 C.F.R. § 982.555(f). If the PHA determines that it is not bound by a hearing decision, the PHA must promptly notify the family of the determination, and of the reasons for the determination.

Factual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing. 24 C.F.R. § 982.555(e)(6). Remember: the PHA bears the burden of proving the alleged violation. See Basco v. Machin, 514 F. 3d 1177 (2008).

2.8.2 Reasonable Accommodations

If the family includes a member with a disability, the PHA decision concerning termination is subject to a request for a reasonable accommodation. 24 C.F.R. § 982.552(c)(2)(i) and (iv).

2.8.3 Practice Tips

1) It is advisable to submit a pre-hearing memorandum to the Hearing Officer or Panel prior to the hearing, spelling out the facts, giving an analysis under the regulations as to why the PHA should not take the proposed action, and providing supporting documentation. If there is countervailing or exculpating evidence, submit a copy with hearing memo but be sure to bring it along with the memo to the actual hearing.

2) Always remind the PHA it bears the burden of proving the alleged program violation by a preponderance of the evidence under the law and, if applicable, that the termination is not mandatory but discretionary under Federal Law. Discretionary grounds are listed in 24 C.F.R. § 982.552(c), as opposed to the mandatory grounds in § 982.552(b). Confirm, though, that the local PHA administrative plan does not make discretionary grounds mandatory, before making the argument. The PHA administrative plan may also have language creating additional protections for the client. Argue that all pertinent circumstances and alternatives should be taken into account in determining whether to uphold a discretionary termination. 24 C.F.R. § 982.552(c)(2).

3) In some cases, a post hearing memo should also be forwarded or may be requested by the hearing officer depending upon what transpires at the hearing. In situations where evidence will potentially become available only after the hearing, note this in the prehearing memo and at the hearing. If the hearing goes forward, supplement as soon as possible.

4) There is no formal hearing after the Informal Hearing but the participant is entitled to a judicial review of the decision. The hearing officer's decision may be reversed if there is a determination that the decision is contrary to
HUD regulations or federal, state, or local law. Terminations may be challenged in court under 42 U.S.C. § 1983 when the PHA decision violates specific federal statutory entitlements or constitutional requirements. Not all statutory requirements can be enforced through § 1983. See Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).

5) Federal law requires that the person who conducts the hearing be neither the person who proposed termination nor a subordinate of that person. This is very helpful if termination notices are sent out under the signature of the PHA program director, since every Section 8 employee is a subordinate of that person. The PHA must designate a non-subordinate and/or insure that executive level heads do not participate in the decision to terminate.

6) PHAs often overreach and assert grounds when no underlying facts support the termination. For example, PHAs frequently allege fraud when only tenant omission or error exists.

7) The PHA is restricted to conducting a hearing only as to those issues delineated in the termination notice given to the participant.

8) Review the PHA file immediately and make note via memo or otherwise to the PHA/Hearing Officer/Panel in the event the determinative evidence is not located in the file.

9) While this is an informal review, prepare your client as you would normally for any civil hearing. Many clients become nervous and emotions run high. Do your best to put your client at ease and maintain control during the hearing.

10) Many times the only witnesses available to the PHA are the client’s case-worker and client’s landlord. You have the right to question all witnesses. Be prepared to ask questions if necessary. Even for violations specifically related to a client and landlord interaction, the PHA or Hearing Officer may neglect to have the landlord present for hearing.

11) Bring a copy of all case law, statutes, and even a copy of sections of the administrative plan to the hearing along with extra copies of any and all documents that you wish to use to make your case.

2.9 EVICTIONS AND HCVP

A tenant/participant of the HCVP program can only be evicted by the landlord in compliance with Louisiana Landlord-Tenant Law; in addition to any protections afforded in the lease and standard eviction law, the Section 8 HCVP program places additional restrictions and obligations upon a landlord seeking to evict a tenant. During the initial term of the lease, a Section 8 landlord may only evict for serious and/or repeated lease violations or violations of federal, state, or local law in connection with the occupancy/use of the premises. 24 C.F.R. § 982.310.

Following the initial term of the lease, inaction on the part of the tenant/landlord/both will cause the lease to naturally enter into a month-to-month tenancy; during a month-to-month tenancy, the HCVP requires a landlord only assert a diluted “good cause” to evict a tenant. 24 C.F.R. § 982.310(d) defines “good cause” rather loosely to include, but is not limited to: failure by the family to accept the offer of a new lease or revision; family history of disturbance of neighbors or destruction of property, or of living or housekeeping habits resulting in damage to
the unit or premises; the owner’s desire to use the unit for personal or family use, or for a purpose other than as a residential rental unit; or a business or economic reason for termination of the tenancy including the desire to lease the unit at a higher rent. As this list is non-exhaustive, it will fall to the adjudicator of the eviction to make a determination if the landlord’s cause for eviction is “good”; sadly, experience shows that Louisiana Judges and Justices of the Peace have been willing to accept “Owner wants possession of property following termination of initial lease term” as bonafide good cause allowing eviction of a Section 8 HCVP program tenant. See Khamnei v. Behrman 2009 WL 2413622, 2 (Vt.,2009) (holding that Section 8 landlord can choose not to renew at end of lease term, without restriction, and collecting authorities). If the landlord’s cause may not be adequate and the tenant needs more time to complete a program move consider filing a suspensive appeal and seek determination by the applicable appellate body. Further, proactive measures may be necessary to insure that the PHA does not attempt to hold such an eviction as a violation of a tenant’s family obligations, risking termination of assistance.

As the HCVP participant is afforded all protections at law and in lease, it is important to remember all Section 8 HCVP participants and landlord/owners are bound not only by the lease produced by the landlord but also the standard HUD Tenancy Addendum which by law is incorporated in all HCVP leases. Chief amongst the protections provided is the requirement that notice of eviction be granted in accordance with state law. While Louisiana law allows for the waiver of notice before the commencement of eviction action, the HUD Tenancy Addendum expressly forbids such waivers. 24 C.F.R. § 982.310(e)(1)(i). A Section 8 landlord must give a written notice of lease termination to his or her tenant which specifically states the grounds for the eviction. The notice must be given prior to the commencement of the eviction action. For lease violations, the notice must be at least a five-day notice to vacate under state law, but the length of the notice for a lease non-renewal will depend upon the time stated for non-renewal in the lease. Failure to provide this notice will result in a premature eviction action, allowing the dismissal of the action.

2.9.1 Nonpayment and Payment by the PHA as Defenses to Eviction

Both the HUD tenancy addendum and the owner’s housing assistance payment contract explicitly state that nonpayment of the housing authority’s portion of the rent is not a lease violation and that the tenant is only responsible for her share of the rent. 24 C.F.R. § 982.310(b). This is very important in cases where the PHA has abated the housing assistance payments because of landlord non-compliance with program requirements.

La. R.S. 9:3259.2 states that the application for and/or the receipt of any federal or state rent subsidy shall not be considered as payment of rent and shall not be a defense to an eviction. Ergo, landlord’s acceptance of the rent subsidy cannot be used to dismiss an eviction suit on the basis of acceptance of rent.

If a tenant loses her eviction hearing and a suspensive appeal is properly sought under Louisiana law, the PHA should not take action to terminate the tenant from participation or cancel future HAP payments on the basis of the eviction. 24 C.F.R.§ 982.311(b). (A tenant is still liable for the fulfillment of all other family obligations under the HCVP program.)
2.9.2 Termination from HCVP Following Court Eviction

The federal regulations require that participants can be terminated from the HCVP program if evicted for “serious violation of the lease.” 24 C.F.R. 982.551(b)(2). Defenses may include:

- whether the eviction was for a lease violation
- whether the eviction was due to tenant fault
- whether the lease violation was serious
- whether the eviction was legal under applicable law
- whether another statutory protection should preclude the eviction (e.g., Violence Against Women and Reasonable Accommodation protections)
- if the local administrative plan so provides, consideration of whether other circumstances argue against terminating assistance.

In proving these elements, the PHA should not be able to rely simply on the fact that the eviction judgment was issued. For the PHA to rely on the judgment as concluding the matter is a use of “offensive collateral estoppel” by a non-party. This is an extreme use of preclusion concepts, and unsupported by precedent in this state. See Alonzo v. State ex rel. Dept. of Natural Resources, 2002-0527 *8 (La.App. 4 Cir. 9/8/04) 884 So.2d 634, 638-39.

2.10 PROGRAM MOVES AND TENANT RIGHT TO TERMINATE LEASE

Once a tenant has found a new home, had it inspected, signed the lease, signed the HAP contract, and moved in, the tenant is obligated, except in special circumstances, to remain in the unit as a tenant until the PHA approves them to move from the unit. Failure to follow proper “program move” procedure exposes a tenant to a range of risks ranging from a period of non-assistance (meaning the tenant will be responsible for the entire lease amount to a new landlord), to proposed termination from the program. Following the initial lease term when the lease reverts to a month-to-month arrangement, a tenant can request a program move by giving advance notice to both the landlord and the PHA of their desire to move. It is important that the tenant has satisfied any outstanding issues/defaults with the landlord, as many PHAs use form documents to request information as to the current status of a tenant before they will approve a move; not only will the PHA delay the move process but if the issues/defaults violate a Family Obligation (24 C.F.R. § 982.551), a proposed termination may result. Further, many landlords wait until this time to specifically “speak their side” knowing it is their best chance to obstruct the move or obstinately receive assistance from the PHA to solve any problems they had with the tenant.

A PHA may, through its administrative plan, enact rules that prohibit a tenant from conducting a program move during the initial term of a lease (first year). 24 C.F.R. § 982.314(c)(2)(i). This leads to a particularly troubling situation when the landlord/tenant relationship has so deteriorated that the landlord is willing to do anything to get an eviction and force the tenant out of the unit. While you may be able to successfully defend against the eviction, rarely does even educating the landlord of the legal rights and obligations in the program have the effect of repairing a damaged tenant/landlord bond. Tenants, faced with an angry, motivated landlord who wants them out, are forced to choose between continuously
fighting off eviction actions or moving in violation of the program rules. Without experience and knowledge of the bureaucratic practices of the PHA, it is impossible to know which option is best for your client. Your first move in these situations must be to contact the PHA and hope that you can successfully convey the true nature of what is going on. The sooner the PHA is made aware of the total circumstances, the better chance your client will have to move assisted. You must remain active and prepared, however, as an improper program move will almost assuredly trigger a proposed termination and the need for an informal hearing.

2.10.1 Portability

A HCVP participant has the option of not only moving within their home PHA's jurisdiction but also to areas in the jurisdiction of another PHA under a process known as “Portability” or porting. Under this process, a HCVP participant can have their voucher ported to a new PHA jurisdiction which will issue the voucher and allow them to look and apply their voucher in this new area.

The procedures for this are spelled out in 24 C.F.R. § 982.355(c). In brief, the “initial” PHA informs the participant on how to reach the “receiving” PHA in the area they want to move to. The participant must then contact the receiving PHA. If the receiving PHA intends to “bill” the voucher, they will only administer the voucher, billing the costs back to the initial PHA. Under this method the initial PHA remains financially liable for the voucher and retains, along with the receiving PHA the right to deny or terminate assistance to the family in accordance with 24 C.F.R. §§ 982.552 and 982.553. If the receiving PHA intends to “absorb” the voucher, the receiving PHA assumes the full financial liability and becomes the sole PHA able to deny or terminate assistance to the family. The “absorbing” process essentially transforms the receiving PHA into a new initial PHA for the participant.

2.11 EFFECTS OF CRIMINAL ACTIVITY

As part of admission into the HCVP program, the PHA must perform a criminal background check. Certain criminal acts have the effect of banning a person from receiving federal housing assistance. Registered lifetime sex offenders and persons convicted of methamphetamine manufacturing or production are permanently banned. See 24 C.F.R. § 982.553(a)(2)(i) and 24 C.F.R. § 982.553(a)(1)(ii)(c). If a PHA proposes to deny admission for criminal activity as shown by a criminal record, the PHA must provide the subject of the record and the applicant with a copy of the criminal record. The PHA must give the family an opportunity to dispute the accuracy and relevance of that record, in the informal review process in accordance with § 982.554.

24 C.F.R. § 982.553(a) expressly prohibits a PHA from granting admission of a person for three years following an eviction from a federally assisted housing unit for drug-related criminal activity. The three-year ban can be lifted if the person who engaged in the criminal activity completes a PHA approved drug treatment program or if “the circumstances leading to eviction no longer exist (for example, the criminal household member has died or is imprisoned).” Further, the PHA must bar admission to any person whom the PHA can establish is currently engaging in illegal drug use/pattern of drug use, or alcohol abuse/pattern of abuse that may threaten the health, safety or right to peaceful enjoyment by other resi-
dents. A household member is “currently engaged in” criminal activity if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current. (a)(2)(iii)(c)(2). See the law set out in § 6.1.8, supra, establishing that arrests and police reports are not sufficient to meet the PHA's burden of proving criminal activity.

The exceptions provided for completing a treatment program and/or change in circumstances can be invaluable in overcoming a denial of admission. Some local municipalities are turning to rehabilitative programs as part of sentences for drug use, allowing applicants to take advantage of this exception. In many cases you will find removing the offending person from an application is an acceptable solution to allow the rest of the family a chance to secure housing.

The HCVP program becomes very unforgiving when it comes to criminal activity once a person becomes a participant. Where federal law mandates that each PHA establish rules that allow it to terminate assistance if it makes a determination that a family is currently engaged in or has a pattern of illegal drug use or drug-related criminal activity, engaged in violent criminal activity, or engaged in alcohol abuse that may threaten others, the PHA must prove any such action by preponderance of evidence. As with a denial of assistance, any criminal record relied upon by the PHA must be presented to the family for an opportunity to review and dispute the accuracy and/or relevance of that record.

2.12 NEED FOR REPAIRS TO UNIT

The owner of a unit is bound by the warranty of habitability and other landlord-tenant laws concerning maintenance and repairs, including tenant’s right to perform a “repair and deduct.” In addition to these obligations, the owner must comply with the Housing Quality Standards (HQS) of the HCVP program. If the owner fails to maintain the dwelling unit in accordance with HQS, the PHA must take prompt and vigorous action to enforce the owner obligations. PHA remedies for such breach of the HQS include termination, suspension, or reduction of housing assistance payments and termination of the HAP contract. 24 C.F.R. § 982.404(a)(2). The owner is not responsible for a breach of the HQS that is not caused by the owner, and for which the family is responsible (as provided in 24 C.F.R. § 982.404(b) and 24 C.F.R. § 982.551(c)).

2.12.1 Practice Tips

You should or you should advise your client to promptly notify the PHA of any damage or fault in the unit. This should trigger the PHA to perform a special inspection of the unit. (The PHA will make at least annual HQS inspections separate from any client-triggered special inspection.) See 24 C.F.R. § 982.405. If after inspection the unit is deemed to fail to meet the standards of HQS, the PHA will grant the owner a certain period of time to remedy the issue: usually 30 days; federal law allows only 24 hours if the defect is life threatening. See 24 C.F.R. § 982.404(a)(3). If the owner fails to make the required repairs in the required time the PHA shall “abate” the HAP contract and not pay its housing assistance portion to the landlord; during this time, the tenant is still liable for their tenant share of rent, if any. Once the property has entered abatement, the tenant can request a program move to a new residence; NOTE: if the HAP contract is abated for 180 days, it is automatically terminated. 24 C.F.R. § 982.455.
3. OTHER FEDERALLY SUBSIDIZED PROGRAMS

3.1 OTHER FEDERALLY ASSISTED SECTION 8 PROGRAMS

3.1.1 Introduction

Many federally subsidized housing programs provide housing assistance to tenants in multifamily complexes owned by private owners. These programs are usually subsidized by having insured, assigned, or noninsured below-market interest rate mortgages, or project based Section 8 assistance under Section 202 programs for the elderly or disabled. Other programs are the Section 236 program, the Section 221(d)(3) program, Rent Supplement, Rental Assistance Payments, Section 202 Projects, Section 8 Set Aside, Section 8 New Construction, Moderate Rehabilitation and Substantial Rehabilitation. The subsidies for these programs are tied to the unit, unlike the Section 8 tenant-based voucher program where the subsidy travels with the tenant. If the tenant is evicted or moves from the unit, they no longer receive a subsidy. The HUD Handbook 4350.3 for multifamily housing issued in June 2009 provides for how these varied programs operate.

3.1.2 Eligibility and Admissions

In these programs, the private owners select the tenants and may use a preference for working families. The tenant’s income eligibility is basically the same as for the upper limit of public housing and tenant-based Section 8. The owner is responsible for developing reasonable selection criteria and may consider housekeeping habits, credit history, a demonstrated ability to pay rent, and prior landlord references.

The HUD Handbook 4350.3 Rev 1, Part 4-9, states that a rejected applicant must be provided the right to respond in writing with an opportunity to request a meeting within 14 days if he disputes a rejection. The person holding the meeting with the applicant may not have participated in the decision to reject the applicant. The most common reasons for rejection include poor credit history, prior criminal history, or negative rental history.

Some federally-assisted projects may be designated specifically for the elderly or handicapped. This does not violate the Fair Housing act if the designation was done properly.

See HUD Handbook 4350.1 Rev.1 at Part 3 and Part 4 for more information

3.1.3 Rent Computation

If a tenant lives in housing under Section 236, 221(d)(3), or Section 202 housing that does not receive a Section 8 subsidy, the tenant will have to pay at least the minimum base rent established for the complex. If the tenant lives in federally assisted housing and also receives a Section 8 subsidy to help pay the rent, the rent is determined in the same manner as the rent for a public housing tenant. It is very important to determine which fact pattern the tenant falls under in order to determine how the rent is calculated. For information on rent computation for the various programs, make sure to check the regulations for the particular type of program.

3.1.4 Evictions from Multifamily Housing

Owners of multifamily federally assisted housing are required to have good cause for non-renewal of lease or to evict a tenant. Under 24 C.F. R. § 247.3, ten-
ants may only be evicted for material noncompliance with the rental agreement, material failure to carry out obligations under any state or local law, criminal activity or drug-related criminal activity on or near the premises, or other good cause. Material noncompliance is defined by the regulations as including one or more substantial violations of the lease, repeated minor violations of the lease which disrupt the livability of the project, adversely affect the health, safety or right to peaceful enjoyment of the premises, interferes with management of the project or have an adverse financial impact on the project, nonpayment of rent or other charges, criminal or drug-related activity, and failure to comply with the recertification process.

The owner must serve a termination notice upon the tenant by sending a letter properly addressed and stamped to the tenant at his address in the project with a proper return address and serving a copy of the notice on the tenant by delivering it to any adult person answering the tenant’s door, or if no adult responds, by placing the notice under the tenant’s door or affixing the notice to the door. Service is not deemed effective until both methods of service are effectuated. 24 C.F.R. § 247.4(b). The notice of termination must be in writing and must:

- State the tenancy is terminated on a date which is specified therein;
- State the reasons for the eviction with enough specificity for a tenant to prepare a defense (See Versailles Arms Apts. v. Pete, 545 So. 2d 1193 (La. App. 4th Cir. 1989));
- Advise the tenant that if they remain in the premises on the date specified for termination, the landlord may seek to enforce the termination by bringing court action, at which time the tenant may present a defense;
- Be served properly

The HUD Multifamily Handbook 4350.3 Rev. 1 cites the additional requirement for notices of lease termination, that the landlord must advise the tenant of his right to request a meeting to discuss the proposed lease termination. It states that the notice of the lease termination must advise the tenant he can meet with the landlord to discuss the proposed lease termination and that if he requests such meeting within ten (10) days of his receipt of the notice, the owner must meet with him. Many leases which federally assisted landlords use contain this requirement but not all of them. Always check the lease to see if this additional protection is required between the parties as such a meeting is a good discovery or mediation tool. If it is not in the current lease, you should always asks for the meeting citing HUD Handbook requirement at 4350.3 Rev. 1, Part 8-13 (B)(2). This will help you get a chance to negotiate or get discovery prior to trial if a compromise cannot be reached.

The time period for the notice of termination depends upon the reason for the eviction. In material noncompliance terminations, state law and the lease determine the length of notice required. A thirty (30) day notice of lease termination is required in terminations which are based upon other good cause. A landlord under the federally assisted multifamily housing programs may not rely upon any grounds at trial which were not stated in the notice of lease termination unless the owner had no knowledge of those grounds at the time he gave the notice to vacate.
3.1.5 Repairs or Abatement for Multifamily Housing

Private owners who participate in the HUD multifamily housing programs, such as Section 236, Section 211(d)(3), etc., have agreed to rent their complex or a portion of their complex to low income families for a given term, usually at least 20 years. When operating costs for the units rise and the subsidized owners run short of money, they usually reduce services and maintenance at the complexes. Residents of HUD multifamily complexes cannot use the local PHA to try to get the owner to make repairs or abate their rent since the landlord’s contract for subsidy payment is directly with HUD. In 1997, HUD announced a “Get Tough” partnership with the Justice Department. This initiative targeted fifty cities, including Greater New Orleans, and was designed to crack down on landlords who are guilty of offenses such as fraud, filing false claims, equity skimming and not providing safe, affordable and decent housing. HUD has taken remedial action such as prison sentences, civil fraud judgments, mortgage foreclosures, bans on doing business with HUD, recoupment of misused housing assistance funds, fines and appointment of new management. In addition, HUD has published a pamphlet for families living in Multifamily Housing called “Resident Rights and Responsibilities”. This pamphlet, available from HUD and the local HUD field office, describes the tenant’s right to decent, safe and sanitary housing.

First, tenants should report maintenance concerns to management of the complex. If the problem is not rectified in a timely fashion, the tenant should make a complaint to their local HUD field office. The tenant may also call the HUD National Multifamily Clearinghouse at 1-800-685-8470 or the HUD Office of the Inspector General Hot Line to report fraud, waste or mismanagement at 1-800-347-3735. This approach may be successful in getting the repairs made to the premises. If HUD cancels its contract with the owner or forecloses on a HUD insured mortgage, the tenant may then be eligible for replacement housing in the form of relocation vouchers and relocation assistance payment.

3.2 SECTION 515 RURAL RENTAL HOUSING PROGRAM
(7 C.F.R § 3560 et seq)

Section 515 Rural Rental Housing is a U.S. Department of Agriculture (USDA) rural rental housing program authorized under Section 515 of the Housing Act of 1949 (42 U.S.C. § 1485). The Rural Housing Service (RHS) is authorized to make loans to provide rental housing for low- and moderate-income families in rural areas. Though rarely used for this purpose, Section 515 loans may also be used for congregate housing for the elderly and handicapped. Many rural residents face the dual problem of limited incomes and a chronic lack of affordable housing. The Section 515 program provides loans with interest rates as low as one (1) percent to developers of affordable rural rental housing. The housing built must be modest in design and the builder must have been unable to obtain conventional credit. Tenant rent in this program is capped at 30% of adjusted annual income and 75-97% of admissions to the housing must be to very low-income persons.

3.2.1 Tenant Eligibility

In order to be eligible for occupancy the tenant must be a United States citizen or qualified alien, qualify as a very low-, low- or moderate income household or be eligible under the requirements established to qualify for housing benefits provided by sources such as HUD Section 8 assistance or Low Income Housing Tax Credit (LIHTC), when a tenant receives such housing benefits.
3.2.2 Important Lease Requirements

Borrowers must use a lease approved by USDA. It must be in compliance with 7 C.F.R. § 3560.156, and state law. The lease requirements are:

- Lease must be in writing;
- Initial leases must be for a one (1) year term;
- If the tenant is not subject to occupancy termination according to § 3560.158 (change in tenant eligibility) and § 3560.159 (termination of occupancy), a renewal lease or lease extension MUST be for a one (1) year period;
- Lease must contain procedures that the borrower and the tenant must follow in giving notice required under terms of the lease including lease violation notices;
- Lease must contain procedures for resolution of tenant grievances consistent with the requirements of § 3560.160 (tenant grievances);
- Lease must have terms under which a tenant may, for good cause, terminate their lease, with 30 days notice, prior to lease expiration

3.2.3 Termination of Occupancy

The only grounds for termination or non-renewal of the lease are material noncompliance or other good cause. Under those circumstances the borrower must give written notice of the violation and an opportunity to correct it. A tenant’s occupancy may not be terminated by a borrower when the lease expires unless there has been a lease violation or the tenant is no longer eligible for occupancy. See 7 C.F.R. § 3560.158. Borrowers may terminate tenancy for criminal activity or alcohol abuse by household members in accordance with provisions of 24 C.F.R. 5.858, 5.859, 5.860 and 5.861. The borrower must first give the tenant a notice of lease violation or occupancy agreement violation. The notice must be sent either first class mail to the tenant at her address or by serving a copy of the notice to any adult persons answering the door at the dwelling, or if no adult answers the door, by affixing the notice to the door or under the door. The notice must:

- Refer tenant to relevant portions of the lease or occupancy agreement
- State the violation with specificity to enable the tenant to understand and correct the problem
- State that the tenant will be expected to correct the violation by a certain date
- State that the tenant may informally meet with borrower to attempt to resolve the violation before the deadline corrective action
- Advise the tenant that if violation has not been corrected by date specified, the borrower may seek to terminate the lease by filing a judicial action at which the tenant may present her defense

If the tenant timely requests access to the grievance process, the borrower cannot continue with the eviction process until the grievance and appeal process is completed. Pending the court determination including appeals, the tenant is still entitled to rental assistance while occupying the unit.
3.2.4 Grievances

Grievances and appeals were established to ensure that there is a fair and equitable process for addressing tenant or prospective tenant concerns and ensure fair treatment of tenants in the event that an action or inaction by a borrower, including anyone designated to act for a borrower, adversely affects the tenants of a housing project. There are some exceptions to the grievance and appeals procedure, including RH authorized rent or rule changes, discrimination complaints, disputes between tenants and some evictions. Applicants to Rural Rental Housing are entitled to appeal their rejection.

When a borrower proposes to take an adverse action against a tenant, he must notify the tenant in writing by certified mail or hand delivery giving the specific reasons for the proposed action. The notice must advise the tenant of the right to respond within ten (10) calendar days of receipt and of the right to a hearing. If the applicant or tenant wants a hearing, she must make a written request within ten (10) calendar days. If the tenant requests this meeting timely, the owner is required to meet with the tenant informally within five (5) days of the request. If grievance is not resolved to the tenant’s satisfaction, the borrower must prepare a written summary of the meeting including the borrower’s position, the tenant’s position and results of the meeting within ten (10) calendar days.

The tenant then has ten (10) days calendar days to make a request for a hearing to the owner. A hearing panel is then selected and a hearing is scheduled within fifteen (15) calendar days after receipt of the tenant’s request for a hearing. A tenant has a right to examine and copy records and regulations. At the hearing, the tenant has the right to be represented by a lawyer or another representative, the right to present written and oral evidence, the right to present witnesses or refute and cross-examine witnesses and a right to a decision based solely upon the facts presented at the hearing. A written decision from the formal hearing is to be prepared within ten (10) calendar days from the date of the formal hearing. The decision must be sent to the RHS who shall review it and ensure that it is in compliance with USD A regulation, and the owner and the tenant shall take the necessary action or refrain from the action as necessary to carry out decision.

3.3 SPECIAL FEDERAL HOUSING PROGRAMS FOR THE HOMELESS

3.3.1 Supportive Housing

This program allows nonprofit organizations to receive funding for many services to the homeless including transitional housing or permanent housing for handicapped homeless persons. Transitional housing assistance for homeless persons is designed to facilitate movement of homeless individuals to independent living within 24 months or longer period as determined by HUD to be necessary to make transition. Residents may be required to pay up to 30% of their adjusted income as determined by HUD guidelines as their share of rent. Participants in this type of program may be required to leave the program at the end of the period or they may be required to leave the program if they violate program rules. Termination is to be viewed as last resort and the termination process requires that the residents be given written notice with a clear statement of the reasons for the termination. Residents are entitled to appeal the decision with an opportunity to present oral or written objections to a person other than the person who made the adverse decision or a subordinate of that person. Under 24 C.F.R. 583.300(I), a prompt written notice of the final decision is required.
3.3.2 Shelter Plus Care

Since 1992, HUD has awarded Shelter Plus Care funds to state and local governments and public housing agencies (PHA) to serve homeless persons with disabilities such as serious mental illness, chronic substance abuse and/or AIDS and related diseases. The program was created on the premise that housing and services need to be connected in order to ensure stability of housing for this population. The funds can be used to provide rental assistance in four ways: tenant-based rental assistance, sponsor-based rental assistance, project-based rental assistance and moderate rehabilitation for single room occupancy dwelling. Only tenant-based rental assistance may travel with the participant. Residents may leave a project or sponsor-based rental assistance program and be readmitted. The resident’s share of the rent is set at 30% of her adjusted income as determined by HUD rules. The occupancy agreement is automatically renewable upon expiration, except on prior notice by either the tenant or the landlord. Residents may be terminated from the program if they violate program requirements but termination is viewed as a last resort. 24 C.F.R. § 582.320(a) and (b). There must be a termination process and eviction if the resident refuses to leave, which includes the same requirements as the termination process described above to the Supportive Housing Program.

3.4 LOW-INCOME HOUSING TAX CREDIT PROGRAM

The Low-Income Housing Tax Credit program (LIHTC) was created to provide the private market with an incentive to invest in affordable rental housing. The LIHTC program was created in the Tax Reform Act of 1986, modified in 1988, substantially modified in 1990, extended by the Tax Extension Act of 1991, and again modified and made permanent by Omnibus Budget Reconciliation Act of 1993. Federal housing tax credits are awarded to developers of qualified projects. Developers then sell these credits to investors to raise capital (equity) for their projects, which reduces the debt that the developer would otherwise have to borrow. Since the debt is lower, a tax credit property can in turn offer lower, more affordable rents. If the property maintains compliance with program requirements, investors receive a dollar-for-dollar credit against their Federal tax liability each year over a period of 10 years.

The owner must agree to rent at least 20% of the units for a period of 15 years to families with incomes at or below 50% of area median income or 40% of the units to families with incomes at or below 60% of area median income. Created by Act 408 of the 2011 Regular Legislative Session, the Louisiana Housing Corporation is a new agency that will run Louisiana’s housing programs which includes the LIHTC properties. LIHTC units are rent-restricted. The gross rent of tenants including utility allowances cannot exceed 30% of the tenant’s income limitation. It is important to note that the LIHTC program restricts only the portion of the rent paid by the tenant, not the total rent. As a result, certain rental assistance programs can be used to raise the total rent above the LIHTC rent limit. Unless a tenant has a Section 8 subsidy, she can usually only afford the rents in a LIHTC program if her income is more than 30% of area median income. Owners who participate in the program cannot refuse to provide housing to Section 8 voucher holders merely because of their status as voucher holders. 26 C.F.R. § 42-5(c)(1)(xi). For a list of Low-Income Housing Tax Credit properties in your area, check the HUD website at www.hud.gov.

(484)
Court cases across the country have held that the LIHTC regulations require good cause for lease termination or non-renewal of lease. The requirement is based on 26 U.S.C. § 42(h)(6)(B)(i) and 26 U.S.C. § 42(h)(6)(E)(ii). For example, in *Cimarron Village Townhomes Ltd. v. Washington*, 659 N.W.2d 811 (Minn.App. 2003) the court held that an owner of a LIHTC project may not terminate a resident's lease at the end of a term without good cause, even where the tenant has no other subsidy such as a Section 8 voucher. The IRS issued a formal ruling requiring all owners of LIHTC properties to place good cause eviction requirements in the recorded property restrictions. IRS Rev. Rul. 2004-82, Q &A 5 (2004). There is very little case law on what is considered good cause under the program.

### 4. OTHER ISSUES IN SUBSIDIZED HOUSING

#### 4.1 VAWA—HOUSING PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT AND THE PROTECTION FOR DOMESTIC VIOLENCE SURVIVORS

Title VI of VAWA 2005 (Pub. L. 109-162; Stat. 2960; HR 3402) sets out provisions protecting tenants who are in public housing (42 U.S.C. § 1437d), participants of the Section 8 Housing Choice Voucher program (42 U.S.C. § 1437f(o)), Section 8 Project Based housing (42 U.S.C. §§ 1437f(c), (d)) and supportive housing for the elderly or disabled (73 Fed. Reg. 72,338). It does not include provisions for other HUD housing subsidy programs, Low income Housing Tax Credit program, or the Department of Agriculture Rural Housing program. It also does not cover private market housing without any type of rental subsidy. *Tenants in these other types of housing may be able to claim similar protection by alleging that adverse actions have an adverse impact based on gender, and therefore violate fair housing laws or state law.* For VAWA, protected tenants must be victims of actual or threatened domestic violence, dating violence, or stalking, or an immediate family member of the victim.

Public housing agencies (PHAs) administering the public housing and section 8 voucher programs and landlords, owners and managers participating in those programs must comply with VAWA. Among the requirements:

- **Admissions to Federally subsidized housing:** an individual's status as a victim of domestic violence, dating violence or stalking is not basis for denial of admission or denial of housing assistance. See 42 U.S.C. § 1437d(c)(3); 42 U.S.C. § 1437f(c)(9)(A); 42 U.S.C. § 1437f(o)(6)(B). However, VAWA does not require PHAs to create a preference for victims of abuse when making admissions decisions.

- **Safety Moves:** 1. **Portability of Section 8 voucher:** a PHA may permit a family with a section 8 voucher to move to another jurisdiction if they are in compliance with other obligations of the program and are moving to protect the health or safety of an individual who is or has been the victim of domestic violence, dating violence, or stalking. See 42 U.S.C. § 1437f(r)(5). The move may be permitted even if the family's lease has not expired. A tenant may incur liability from the owner for breaking the lease. 2. **Transfers in Public Housing:** VAWA does not explicitly address a PHA obligation to transfer a public housing tenant to another unit due to domestic violence, dating violence, or stalking. HUD has urged PHAs to implement policies to ensure tenants can move if they are experiencing domestic violence. See U.S. Department of Housing and Urban Development, Public Housing Occupancy Guidebook §§ 19.2, 19.4 (2003).
— **Evictions:** 1. Related directly to abuse—VAWA establishes an exception to the federal “one-strike” criminal activity rule. Criminal activity that is directly related to domestic violence, dating violence, or stalking does not constitute grounds for terminating assistance, tenancy or occupancy rights of the victim or an immediate family member of the victim. See 42 U.S.C. § 1437d(l)(5); 42 U.S.C. § 1437f(c)(9)(B); 42 U.S.C. § 1437f(d)(1)(B); 42 U.S.C. § 1437f(o)(7)(C); 42 U.S.C. § 1437f(o)(20)(A). 2. Exception to the Exception—a PHA or owner may still evict a tenant if the PHA or owner can demonstrate an “actual or imminent threat” to other tenants or employees of the property if the tenant is not evicted. See 42 U.S.C. § 1437d(1)(6)(E); 42 U.S.C. § § 1437f(o)(7)(D)(v) and (o)(20)(D)(iv). 3. Unrelated to abuse—VAWA does not protect tenants for acts for which they are being evicted if those acts are unrelated to domestic violence, dating violence or stalking. See 42 U.S.C. § 1437d(1)(6)(D); 42 U.S.C.§ § 1437f(c)(9)(C)(iv) and (o)(20)(D)(iii). 4. Removing abuser from unit— a PHA or owner may bifurcate a lease to evict, remove or terminate assistance to any tenant who is a participant in public housing or section 8 programs who engages in criminal acts of violence against family members or others. See 42 U.S.C. § 1437d(1)(6)(B); 42 U.S.C. § 1437f(o)(7)(D).

PHAs and owners may, but are not required to, ask an individual for certification that he or she is a victim of domestic violence, dating violence or stalking if the individual seeks to assert VAWA’s protection. Any request for certification must be in writing. See 42 U.S.C. § 1437d(u)(1); 42 U.S.C. § 1437f(ee)(1).

— **Types of Certification permitted**— the individual can self certify with form HUD-50066, documentation signed by victim and a victim service provider, an attorney or medical professional in which the professional attests that the victim has experienced incidents of abuse or a federal, state, tribal, territorial or local police or court record. 42 U.S.C. § 1437d(u)(1)(D); 42 U.S.C. § 1437f(ee)(1)(D).

— **Time Limit**—after receiving a written request to provide certification, an individual has fourteen (14) days to respond. If the individual fails to respond the owner or PHA may bring eviction proceedings or terminate assistance. However, the PHA or owner may extend the timeframe to respond to the written request. 42 U.S.C. § 1437d(u)(1)(A), (B); 42 U.S.C. § 1437f (ee)(1)(A), (B).


— **Resources to enforce housing rights under VAWA**
  - HUD Notices PIH 2006-23, PIH 2006-42
  - Form HUD-50066
  - Form HUD-91066, certification form for project based Section 8 program
FEDERALLY SUBSIDIZED HOUSING

— Cases


• Brooklyn Landlord v. RF (N.Y. Civ. Ct. 2007)

• Tenant v. Housing Authority of Salt Lake County (D. Utah 2006)

— Other Resources

• National Housing Law Project www.nhlp.org

• ACLU, www.aclu.org/fairhousingforwomen

4.2 FAILURE TO GIVE EARNED INCOME EXCLUSIONS

In 1990, Congress enacted a provision which required that public housing tenants who were formerly on welfare and who become employed after participating in a government-funded employment training program would not have their rent increased based upon the higher earned income for a period of 18 months after they get their job. HUD waited until 1994 before finally issuing regulations to implement that requirement. Many PHAs across the country, including many Louisiana PHAs, have not trained their staff and/or are refusing to follow the law, or are not following it properly. Many legal services programs have been successful in getting retroactive rent credits or rent reimbursements to residents who were entitled to but did not receive the benefit of the Earned Income Exclusion. The proper application of the Earned Income Exclusion can result in thousands of dollars of rent savings to public housing residents who are making the transition from welfare to work.

Congress tinkered with the Earned Income Exclusion rules in 1998 with the passage of the Quality Housing and Work Responsibility Act. Regulations at 24 C.F.R. § 5.617 implemented the new rules regarding income disregards. The law broadens the categories of public housing residents who may take advantage of the Earned Income Exclusion. The standard after October 1, 1999 covers residents:

(1) Previously unemployed person with disabilities who has earned, in the twelve months previous to employment, no more than would be received for 10 hours of work per week for 50 weeks at the established minimum wage; 2) residents who are in a job training or self-sufficiency program; and (3) residents who have been on welfare within the previous 6 months before getting a job. The rule requiring participation in a government funded training program before getting the job is no longer present. In addition, the new standard provides for a 12 month delay in tenant rents being increased after getting a job, followed by only a 50% increase in rent based upon the higher earnings for one year. Earnings disregards are limited to one first year period in a lifetime for each qualified tenant. 24 C.F.R. § 960.255(b).

You should routinely evaluate all clients who live in public housing to see if they qualify for the Earned Income Exclusion. Make sure that you check for the Earned Income Exclusion if a public housing tenant appears at your office with an eviction for nonpayment of rent. If the resident is or was eligible for the exclusion but did not receive it, the advocate will want to try to get either a retroactive rent credit or reimbursement for the tenant. Southeast Louisiana Legal Services has obtained a retroactive $1980 credit due to the PHA's failure to properly calculate a tenant's rent even though the 18 month delay period had already passed before she requested the credit.
In 2001, HUD extended the benefits of the Earned Income Exclusion to persons with disabilities who are participants in the Section 8 Voucher Program, the HOME Program, HOPWA, and Supportive Housing Program. 24 C.F.R. 5.617 (2003). This exclusion is virtually identical to the public housing disregard in operation except that it is limited to families where a disabled member begins employment. It requires a housing authority or other applicable housing provider to discount from an eligible family's income any increases due to:

1) increased income as a result of employment of a disabled family member who was previously unemployed;
2) if the family currently receives welfare or had received welfare during a six month period prior to getting employment;
3) if the family member's income increased during the member's participation in a self-sufficiency or job training program.

For more information about the Earned Income Exclusions, consult the following sources:

- HUD PIH NOTICE 98-2 Treatment of Income Received from Training Programs
- Mandatory Exclusion of Training Program Payments and Earned Income Increases in The Public Housing and Certificate and Voucher Program, NATIONAL HOUSING LAW PROJECT
- 42 U.S.C. § 1437(a),(c)
- 42 U.S.C. § 1437(a),(d)
- 24 C.F.R. § 5.612

### 4.3 PUBLIC HOUSING AUTHORITY PLANS

In the Quality Housing and Work Responsibility Act of 1998, Congress directed PHAs to submit annual and five-year plans to HUD. The plan must contain policies adopted by the PHA which were formerly made at the federal level. The PHA Plan is a comprehensive guide to public housing agency (PHA) policies, programs, operations, and strategies for meeting local housing needs and goals. There are two parts to the PHA Plan: the 5-Year Plan, which each PHA submits to HUD once every 5th PHA fiscal year, and the Annual Plan, which is submitted to HUD every year. This planning requirement is an important opportunity for legal services advocates, residents, and other community organizations to have an impact on PHA policy affecting both public housing and the Section 8 program.

The annual plan is a public document which must be prepared in consultation with residents through one or more Resident Advisory Boards (RAB). The RAB must represent both the interests of public housing residents and Section 8 residents. PHAs must make resources available to the RAB so that they may have meaningful input into the drafting of the plan. PHAs must hold public hearings to gather input from interested individuals and organizations. After the public hearings, the PHA is supposed to continue to work in partnership with the RAB in deciding whether to modify their plans after the hearings.
The five-year plan describes the goals and objectives of the PHA for the next five years. It is a long-range plan which should help you determine the PHA's future directions. For example, you may be able to tell if your PHA is planning to shift its mission to providing housing for moderate income persons instead of using most of its resources to house extremely low income persons. The details of the PHA plan will be in the one year plans.

The annual plan is about the operations, programs, and services which the PHA will have for the upcoming fiscal year. It must contain 18 specific topics, describe discretionary policies that apply to public housing and Section 8 tenants, and describe all other rules and policies of the PHA. The one year plan must have all the information which HUD requires, must be consistent with information and data available to HUD and the PHA, must be consistent with the local Consolidated Plan, and be consistent with civil rights and other federal laws. The 18 specific topics which must be covered in the PHA plan under HUD rules are the following:

1) Housing Needs of the Area particularly for special populations
2) Financial Resources of the PHA
3) Eligibility and Admissions Policies
4) Rent Policies for Public Housing and Section 8
5) Maintenance and Management
6) Grievance Procedures
7) Capital Improvements
8) Demolition and Sale of Public Housing
9) Designation of Housing for Elderly and Disabled Population
10) Conversion of Public Housing to Section 8 Voucher
11) Homeownership Programs
12) Services, Job Training, and Community Work Requirement
13) Safety and Crime Prevention
14) Pet Policy
15) Civil Rights Certification
16) Annual Audit
17) Asset Management
18) Table of Contents and Executive Summary of the Plan and location of any materials not being submitted with the PHA plan

The PHA planning process is an important area for legal services advocates to become involved in since it controls and set so many major policies at the local level. After it is drafted, the PHA plan may also become an important enforcement tool for housing advocates. Legal services attorney involvement in the PHA planning process does not violate LSC rules regarding advocacy. It may be done with LSC funds. If you would like more information about the PHA plan, you may want to consult the following:

4.4 SECTION 8 MULTIFAMILY RESTRUCTURING/MARK TO MARKET

Over the past few years, the nation has lost more than 100,000 units from the privately owned but federally assisted HUD multifamily housing stock through prepayments of HUD backed mortgages and Section 8 opt-outs and termination. These units were originally subsidized with HUD-insured mortgage such as Section 236 or with project based Section 8 assistance to make the units affordable to low income persons. As long-term use restrictions to low income persons have expired, the crisis in preserving affordable housing has escalated. The owners decide whether to remain program or to refuse contract renewal and “opt-out”. In 1997, Congress adopted the Mark to Market (M2M) program to enable owners to renew their Section 8 contracts, since reducing rent levels to actual market levels might cause mortgage defaults. The program provides the owner with three options: opt-out of the Section program, renew the Section 8 contract and accept a lower rent subsidy, or renew the Section 8 contract with a full Mark to Market restructuring of the mortgage. The program provides a debt restructuring option for projects which have above-market rents at the end of the original Section 8 contract as well as a mortgage insured or held by the Federal Housing Administration (FHA).

There are four major areas where advocacy work can protect or improve the restructuring process: (1) a project in poor physical condition can be rehabilitated by the restructuring, (2) residents can influence any decision to convert from project-based Section 8 to tenant-based Section 8 vouchers, (3) the restructuring plan can include adequate funds for project operations, and (4) project management or ownership can be changed or improved. Some legal services programs have successfully challenged prepayments and Section 8 opt-outs to try to preserve low-income housing in their community. 215 Alliance v. Cuomo, 61 F.Supp. 2d 879 (D.Minn. 1999). Some of the most common legal challenges include improper notice of prepayment, existence of state law mandating preservation of low-
income housing, and fair housing challenges. For more information on the crisis, consult the National Housing Law Project Green Book, HUD Housing Programs: Tenants’ Rights (4th Ed. 2012) and/or the following:

- 42 U.S.C. § 1437f;
- 24 C.F.R. Part 40;
- HUD PIH NOTICE 98-34;
- HUD PIH NOTICE 98-19;
- HUD PIH NOTICE 99-16.

4.5 STATE PUBLIC HOUSING AGENCIES LAW

In Act 1188 of 1997, the Louisiana legislature adopted a comprehensive revision of La. R.S. 40:381 et seq. which purports to regulate federally funded housing programs. The law, which is extraordinarily one-sided, tries to vest broad powers and maximum discretion with public housing authorities. Many of Act 1188’s provisions appear to be unlawful because they conflict with federal housing law or the Fair Housing Act. See *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268 (1969) (federal law binding on housing authorities and state courts). Since federal law is supreme, contrary state laws cannot authorize a housing authority to violate federal law.

Housing authority actions based on R.S. 40:381 et seq. may require new advocacy strategies. A housing authority must follow its own rules even when it has discretion. *Government of Virgin Islands v. Brown*, 571 F.2d 767, 772 (3d Cir. 1978); *Simmons v. Block*, 782 F.2d 1545 (11th Cir. 1986). Actions that are “arbitrary” are still unlawful under R.S. 40:486. Arbitrary actions should be reviewable under the state constitutional right to judicial review.

There are a few provisions in R.S. 40:381 et seq. that protect tenants. For example, R.S. 40: 456, 508-10, protect domestic violence victims from the consequences of such abuse, and tenants in general from criminals who frequent nearby apartments or the project. The best protection is found at La. R.S. 40:506(D) which prohibits housing authorities from ending assistance to tenants for lease violations based upon criminal activity when the tenant or the tenant’s family member is a victim of domestic violence.

4.6 UNIFORM RELOCATION ACT ASSISTANCE FOR DISPLACED FAMILIES

Demolition and large-scale “modernization” of public housing projects have resulted in the displacement and relocation of thousands of public housing residents. All too frequently, PHAs fail to notify residents of their rights under a federal law called the Uniform Relocation Act. Worse still, many PHA’s do not pay adequate relocation benefits to eligible families. To help PHAs comply with the law, they can refer to the HUD Handbook 1378 and 49 C.F.R. 24.203. Some of the benefits to which residents are entitled include:

- active participation of residents in the revitalization effort;
- notices clarifying a resident’s right to return;
• notices clarifying that most displacements will be permanent, not temporary, and benefits should be paid for permanent moves;
• comparable replacement housing including other public housing, a Section 8 voucher or some other housing option;
• adequate counseling must be provided to residents regarding housing options;
• assistance in locating other housing must be provided by the housing authority;
• the housing authority must pay relocation benefits which may include payments up to $125 per month for a maximum of 42 months after displacement. 42 U.S.C. 4624(a) See Renfroe v. Housing Authority of New Orleans, Case No. 2003-3613 (E.D.La.July 14, 2004) 2004 WL 1630496 and 34 Housing Law Bulletin 171 (August 2004);
• the housing authority must notify residents of appeal rights. If the displacing agency fails to notify the resident of their appeal rights, they are not required to exhaust administrative remedies when seeking enforcement of the Uniform Relocation Act prior to filing suit in court. See also Renfroe v.Housing Authority of New Orleans, Case No. 2003-3613 (E.D.La. July 14, 2004) and 34 Housing Law Bulletin 171 (August 2004).

4.7 SERVICE MEMBER CIVIL RELIEF ACT

One of the benefits for activated military members is protection from certain legal proceedings while serving on active duty. Coverage extends to all active duty service members in the armed forces including the National Guard. It sometimes covers dependents of service members. These protections are provided under the Service members Civil Relief Act (SCRA)(2003) which replaces the Soldier’s and Sailor’s Relief Act of 1940. 50 U.S.C. App. § 501 et. seq. Examples of benefits include the following:

• Stay of 90 days upon application in virtually all legal proceedings including administrative proceedings in which the service member has a pending case.
• Reduction of interest on any pre-service loan to 6% upon the service member’s giving the creditor written notice and a copy of their military orders. Also amounts due under a higher interest rate are forgiven, not deferred, and the lender cannot accelerate repayment of the loan principal.
• For up to 90 days after activation, a landlord cannot evict a service member or his dependents during a period of military service from a premises used as a primary residence where the monthly rent is not more than $2465 per month. The rent amount due is not forgiven. The law does allow eviction court discretion to shorten the 90-day stay if “justice and equity” require a shorter time.
• Foreclosures, forced sales, and seizure of property of service members are suspended during the 90-day period after termination of military service without a court order provided the security agreement was entered into before military service.
A service member can terminate a pre-service lease of a rental premises if called to active duty during the lease term. The law also allows this for a lease entered into during active service if the service member has a permanent change of station. See generally “The Service members Civil Relief Act”, 52 La. Bar Journal 94 (2004).

4.8 CHOICE NEIGHBORHOODS GRANT (CNI)

Choice Neighborhoods is HUD’s replacement for its Hope VI grant. 2010 was the first year the Choice Neighborhoods grant was given. It is a grant that seeks to transform an entire distressed neighborhood, focusing on housing. These other areas of transformation include but are not limited to job training, after school programs, transportation, and health initiatives. CNI has many protections for public housing tenants that were not part of its predecessor, Hope VI. The most important of these are a guaranteed right of return for public housing residents who are in good standing at the time of redevelopment and resident participation throughout the entire grant process, from the drafting of the application forward. See HUD website for more details: www.hud.gov/cn

4.9 MID-TERM LEASE CHANGES

Contracts have the effect of law between the parties; contracts must be performed in good faith. La. Civ. Code art. 1983. For a landlord to increase rent during the term of the lease or to otherwise try to change the terms and conditions of the lease would clearly violate this article. This is a helpful argument when a PHA or other subsidized landlord tries to implement changes to the lease agreement during the term of the lease.

This argument was used successfully to challenge the implementation of the new minimum rents required by federal law in 1996 to tenants who were in the middle of their lease terms. It could also be used to enforce a Section 8 tenant’s rights under an existing lease which may be in conflict with new federal law.

If a PHA wants to decrease its payment standards, it cannot do so right away. For each voucher holder, the lower payment standard can only go into effect at the voucher holder’s second annual lease recertification after the decrease in the standard. 24 C.F.R. 982.505(c)(3). Another systematic change many agencies are enacting is to give the smallest size voucher to each family irrespective of factors such as sex, age, or disability. For example, many agencies generally provide a three bedroom voucher to a mother with a boy and girl. But under subsidy standards, an agency could decide save money by only providing a two bedroom voucher for a three person household with this type of family composition. A voucher holder’s bedroom size cannot be decreased until the family’s annual recertification. Even then the family has to get a written notice informing them of the change and giving them an opportunity for a hearing to contest the change. 24 C.F.R. 982.555(a).

5. SELECTED LOUISIANA CASE LAW ON FEDERALLY SUBSIDIZED HOUSING

5.1 UTILITY CHARGES

Many states allow individual check metering. However, in Louisiana, PHAs are not permitted to institute surcharges based upon check metering. Federal regulations which govern public housing state that individual check metering shall
not be used if is against local law or the policies of the public service commission. The Louisiana Supreme Court ruled in *LaNasa v. New Orleans Public Service Commission*, Inc., 66 So.2d 332 (La. 1953), that the resale of electricity through check meters, even in the absence of profit, violated the contract between the customer and the utility company and was against New Orleans Public Service Commission policy which prohibited the resale of electricity.

From time to time, Louisiana PHAs try to impose charges for utility usage on tenants in master-metered complexes through the use of individual check metering. The reason PHAs may try to set surcharges for excess utility usage or try to use check metering is due to pressure from HUD and rising costs. Each PHA must submit a budget to HUD annually showing projected income and expenses for the rental of their complexes. Once HUD approves the budget, it pays the difference between expenses and income to the PHA. If there is less rent collected or if expenses are higher than anticipated due to high PHA-paid utility costs, for example, the amount of the operating subsidy is insufficient to cover the costs of running the development. Should a Louisiana PHA seek to impose excess utility charges or individual check metering, an advocate should be able to mount a successful legal challenge to such action.

### 5.2 Utility Allowances

**Junior v. Housing Authority of New Orleans**, USDC No.88-2172 (E.D. La.), 22 Clearinghouse Rev. 1302 (Mar. 1989)—In this Consent Judgment, HANO was required to increase the utility allowance schedules that the PHA used for its public housing tenants who had tenant-paid utilities. Also, any former tenant surcharged for electricity consumption after 1-1-82 and before 11-23-88 was entitled to a $250 offset against any debt owed to HANO.

**Sylvester v. HUD**, USDC No.88-1134 (E.D. La.), 25 Clearinghouse Rev. 1382 (Feb. 1992)—HUD and the PHA agreed in this Consent Judgment to increase utility allowances for tenants participating in its Section 8 Moderate Rehabilitation program. $500,000 in refunds were obtained for current and former tenants.

**Desire Area Resident Council v. HANO**, U.S. District Court, Case No. 01-1458 (E.D. La)-Suit filed on behalf of public housing residents relocated from projects due to demolition or redevelopment under the Uniform Relocation Act. Basis of suit was that the displaced tenants estimated average utility costs had increased under the Section 8 programs or other housing to which they had been relocated because the PHAs utility allowances were too low. As a result of the litigation, the PHA raised its utility allowances to appropriate levels and provided monetary relief to tenants for the difference between the estimated average of utility costs and the inadequate utility allowances.

**Johnson v. Housing Authority of Jefferson Parish**, 442 F.3d 356 (5th Cir.), cert. denied 549 U.S. 821 (2006). Suit filed based on parish’s failure to adjust utility allowances though utility costs had increased more than 10% since the last adjustment. Fifth Circuit reversed the District Court and held the HCV program rent provisions create enforceable rights. Case later settled with adjustments to allowances.
5.3 EVICTIONS

5.3.1 Notice of Lease Termination

_Apollo Plaza Apts. v. Gosey_, 599 So. 2d 494 (La. App. 3d Cir. 1992)—The court reversed an order evicting a federally subsidized tenant for an alleged lease violation. The court held that the notice to vacate served upon the tenant was vague in that it did not specify the grounds for the eviction with enough detail for the tenant to prepare her defense. This case is significant because the notice to vacate was more specific than most notices. It stated the tenant had failed to abide by the rules and regulations of her lease by “using loud and profane language, excessive visitors in and out of her apartment, unauthorized guest staying in the apartment, along with excessive noise coming from your apartment.”

The notice also failed to advise the tenant that she had ten days within which to meet with the landlord to discuss the termination or to advise the tenant of her right to defend the action in court. The lease required that these statements be contained in the notice of lease termination. Nevertheless, the court held that no prejudice to the tenant resulted due to these omissions. _But see Versailles Arms Apts. v. Pete_, 545 So. 2d 1193 (La. App. 4th Cir. 1986) where the court held that a landlord with the same notice provision in his lease, who fails to advise the tenant of her right to defend the action in court or her right to meet with the landlord, failed to comply with the lease. The notice was deemed to be insufficient and the rule for possession was dismissed. _Accord, Raintree Court Apts. v. Bailey_, No. 98-C-1138 (La. App. 5th Cir. 1998), _writ denied_, No. 99-CC-0408 (La. Sup. Ct. Apr. 1, 1999), 33 Clearinghouse Rev. 343 (Sept.-Oct.99).

_Monroe Housing Authority v. Coleman_, 46,307 (La.App. 2 Cir. 5/25/11) 70 So.3d 871—Housing Authority attempted to evict tenant for lease violations or other good cause, and claimed tenant’s lease had expired. Eviction was denied because supposedly expired lease was not entered into evidence and there was no evidence tenant had been offered a renewal of the lease and failed to sign.

_Housing Authority of Sabine Parish v. Lynch_, 2009-1293 (La.App. 3 Cir. 5/12/10) 2010 WL 1878639, upholding denial of eviction where tenant made angry statements to PHA employee, but did not threaten them, and refused one re-inspection but allowed another. Further, tenant refused to sign lease renewal documents, but apparently because suspicious because of PHA’s efforts to evict him; nothing showed he was not eligible to renew.

_Housing Authority Of New Orleans v. Eason_, 2009-992 (La. 6/26/09) 12 So.3d 970 (per curiam), federal statute prohibiting discriminatory treatment based on bankruptcy did not preclude evicting tenant for having violated lease by not paying rent, even though the back-rent obligation had been discharged in bankruptcy.

5.3.2 Waiver/Lease Modification

Numerous Louisiana courts have held that a landlord’s continued acceptance of late payment of rent without any advance notice that the lease will be strictly enforced in the future in regard to timeliness of rental payment, establishes a custom which has the effect of altering the lease. The landlord is not allowed to refuse late rent payments unless prior advance notice of strict compliance with the due date is given to the tenant prior to the month for which payment is sought. _Versailles Arms v. Pete_, 545 So. 2d 1193 (La. App. 4th Cir. 1989); _Housing Authority_
5.3.3 Lease Violation

New Hope Gardens v. Latin, 530 So. 2d 1207 (La. App. 2d Cir.1988)—Court held that a tenant who lives in federally subsidized housing may also use state law remedy of repair and deduct. However, where tenant refused to pay rent without making repairs in an attempt to use economic pressure to force the landlord to make repairs, the tenant may be evicted for nonpayment of rent.

Raintree Courts Apts. v. Bailey, No. 98-C-1138 (La. App. 5th Cir. 1998), writ denied, No. 99-CC-0408 (La. Sup. Ct. 1999)—The Court of Appeal held that under the lease and federal law, a federally subsidized landlord must prove a lease violation or show other good cause to refuse to renew the lease in order to evict his tenant. The landlord had tried to evict the tenant on the ground that there was "no lease" because the term of the lease was indefinite. The Court held that even though the term of the lease had expired, the landlord was required by federal law to prove a lease violation in order to evict the tenant.

Beechgrove Apartments v. Demoe, No. 99-C-366 (La. App. 5th Cir. 1999)—The Court of Appeal held that a brief violation of the one pet lease rule did not constitute a material violation that was sufficient to terminate the lease of a federally assisted tenant. 24 C.F.R. § 247.

5.3.4 Appeal Bond

Gross v. Williams, No.99-C-1865 (La. App. 4th Cir. 1999)—The Court of Appeal reversed the trial court's ruling that an appeal bond for a Section 8 tenant should be set at the full amount of the contract rent. An abuse of discretion was found because the PHA will continue to pay the housing assistance payment to the landlord. The bond was lowered to the tenant's portion of the rent to be paid monthly into the registry of the court during the appeal.

Steward v. West, 449 F.2d 324 (5th Cir. 1971)—Payment of rent allowed as bond for subsidized tenant's injunction against eviction.

5.4 RECERTIFICATION OF INCOME

Holly v. Housing Authority of New Orleans, 684 F. Supp. 1363 (E.D. La. 1988)—Section 8 termination reversed. Court found that tenant did not violate any obligations to inform Housing Authority of changes in family composition by failing to report short-lived marriage. Court ordered authority to provide tenant with new Section 8 certificate and pay compensatory damages.

Housing Authority Of New Orleans v. Jones, 470 So. 2d 144 (La. App. 4th Cir. 1985)—A public housing tenant who refuses to provide information about earning, family composition, or to otherwise cooperate with the annual recertification process was in violation of her lease and could be evicted.

Versailles Arms Apts. v. Granderson, 386 So. 2d 1039 (La. App. 4th Cir. 1980)—A HUD multifamily complex tenant who refused to recertify his income or family composition for the annual recertification process held to have engaged in material noncompliance with the lease and could be evicted for such noncompliance.
George v. Housing Authority Of New Orleans, USDC No. 88-461 (E.D.La.), 24 Clearinghouse Rev. 1291 (Mar. 1991)—While tenants must cooperate with the recertification process, this Consent Judgment established the right of Section 8 tenants not to have their rental assistance delayed or denied due to delays with third party verification of employment income during the recertification process.

5.5 NON-RENT CHARGES

Housing Authority of the City of Monroe v. Wheatley, 478 So. 2d 569 (La. App. 2d Cir. 1985)—The Court held that a public housing resident was not responsible for damages assessed against her by the public housing authority as a result of damage done to her apartment by an intruder and therefore could not be evicted for nonpayment of these damage charges. The damage was caused by her ex-boyfriend, an intruder who was not a guest or otherwise authorized to be in her unit, and she had called the police twice to report the break-in.

5.6 GRIEVANCE HEARINGS

Wooden v. HANO, USDC No. 75-2610 (E.D.La)(Settlement Agreement) —When a public housing tenant timely requests access to the administrative grievance process, eviction proceedings cannot be instituted or continued until the administrative process is complete.

Housing Authority of the City of New Iberia v. Austin, 478 So. 2d 1012 (La. App. 3d Cir. 1985), writ denied 481 So. 2d 1334 (La. 1986) — A public housing tenant’s failure to request a grievance under the authority’s administrative grievance procedure, was held as a waiver of her right to defend herself in an eviction proceeding. This decision is clearly wrong in light of 24 C.F.R. § 966.55(c) which expressly provides that a tenant retains her right to defend herself in a judicial proceeding even if no grievance hearing is requested.

5.7 DEMOLITION

Anderson v. Jackson, 556 F.3d 351 (5th Cir. 2009) — After Hurricane Katrina, public housing residents sued HUD and their local housing authority to enjoin plan to demolish their housing projects and replace them with mixed income developments. The Fifth Circuit affirmed denial of a preliminary injunction, holding that 42 U.S.C. § 1437p, governing demolition of developments, did not create rights that residents could enforce by private suit. Residents also could not sue HUD for monetary damages. But the court did not rule on whether the statute would have supported a claim under the federal Administrative Procedure Act, if the court had been ruling before most of the demolition was complete.
CHAPTER 7

FORECLOSURE DEFENSE IN LOUISIANA

Lauren Bartlett
About The Author

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Acknowledgments

Special thanks also to Charles Delbaum and the National Consumer Law Center for their ongoing assistance and wonderfully thorough and comprehensive consumer law manuals.
1. INTRODUCTION

This chapter covers strategies, defenses and remedies for homeowners who face a foreclosure sale of their homes. Foreclosures may be instituted by a lender, a judgment creditor or a government entity. This chapter will focus mostly on foreclosures by a mortgage lender for failure to pay the monthly mortgage note. More extensive legal practice information on foreclosures can be found in the National Consumer Law Center’s foreclosure manuals: Foreclosures (4th ed. 2012), Mortgage Lending (1st ed. 2012), Foreclosure Prevention Counseling (2nd ed. 2009).

2. WHY HOME FORECLOSURE DEFENSE IS IMPORTANT

A home is a low-income family’s most important asset and the key to family and financial welfare. The mortgage foreclosure crisis and the economic recession of 2008 elevated the practice of foreclosure defense in more ways than one. While it took longer for the foreclosure crisis to take hold in Louisiana, we continue to see more foreclosure filings across the state. Many homeowners facing foreclosure have also been affected by the BP Oil Spill and unemployment. There is a great, unfilled need for legal advice and representation in home foreclosures. This chapter will provide attorneys with basic knowledge and references for more information to help homeowners in foreclosure.

3. WHAT CAN BE DONE FOR A HOMEOWNER WHO FACES FORECLOSURE?

Possible options or remedies to prevent or mitigate foreclosure are:

- loan modification
- forbearance
- refinancing of the loan
- deed in lieu of foreclosure or short sale (owner voluntarily sells to lender for satisfaction of mortgage, and possibly relocation payments)
- if a co-owner is 62 or older, a reverse mortgage to pay off or refinance mortgage
- rescission of certain mortgages for violation of federal consumer protection laws
- injunction to arrest seizure and sale for executory process defects
- injunction if a judicial sale price won’t cover homestead exemption and superior mortgages
- Chapter 13 bankruptcy

Some homeowners may have credit disability or life insurance that will help pay the mortgage. If the homeowner is in default because of a recent disability or the death of a spouse, check to see if they had such insurance. Other possible sources of income are Earned Income Credit tax refunds, Social Security disability or sales of other real estate. You should review the client’s potential income and resources and minimize his other expenses, if possible.

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1. See Realtytrac.com for foreclosure statistics in your area.
3. Earned Income Credit tax refunds may be available for 3 tax years if the taxpayer has failed to claim these refunds.
For most homeowners, loan servicing relief under HAMP or a Chapter 13 bankruptcy will be the primary remedies that may be feasible. The various options to homeowners are discussed below, along with a list of documents you need to evaluate the available options to your client.

### 4. WHEN CAN FORECLOSURE PREVENTION COUNSELING HELP A HOMEOWNER?

If no foreclosure suit has been filed and the homeowner has not received a letter from the lender’s attorney, you may refer them to a HUD-certified housing counselor. Otherwise, you should immediately pursue home foreclosure prevention options for your client. A list of housing counseling agencies in Louisiana is available at: [http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm?&webListAction=search&searchstate=LA](http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm?&webListAction=search&searchstate=LA).

Generally, a budget analysis and counseling should be performed for foreclosure clients by either a housing counselor or an attorney. This helps insure that the client will be able to avoid foreclosure in both the short-term and the long-term, and provides a basis for assessing the client’s options.

The housing counselor can provide the homeowner with budget counseling, help the homeowner compile the documents necessary to apply for loss mitigation and advocate on behalf of the homeowner with the mortgage servicer. Some of the most common loss mitigation options available to borrowers from housing counseling include:

- loan modification (reduction in interest rate, extension of the maturity date for the loan, and principal forgiveness);
- forbearance (fixed period of time when either no payments or due or partial payments are due with a balloon payment due to catch up on all past due payments at the end of the forbearance period);
- refinance;
- deed in lieu of foreclosure; and
- short sales.

### 5. HOW DO I STOP AN IMMINENT FORECLOSURE?

You should always check immediately to ascertain the existence and date of any foreclosure case. A scheduled foreclosure sale may be stopped or delayed by:

- filing a bankruptcy petition, usually a Chapter 13 bankruptcy
- an application for relief under the Making Home Affordable Program (HAMP)

### 6. WHAT IF THE FORECLOSURE SALE HAS ALREADY OCCURRED?

After the sheriff has filed his process verbal or filed the sale for recordation in the parish conveyance records, the homeowner is precluded from asserting objections to the form or procedure of the sale or the lack of authentic evidence to support the seizure and sale.4

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However, under state law, there may be grounds to attack the sale as a nullity if the foreclosing creditor is the adjudicatee at the sale or still owns the property. For example, a sale may be annulled for:

- the sale was for less than two-thirds of the appraised value if appraised;\(^5\)
- the sale occurred without a prior seizure of the property;\(^6\)
- a judicial sale occurred without due process notice to a co-owner;\(^7\)
- fraud or ill practices.\(^8\)

Also, the foreclosure sale may be voidable if it was conducted in violation of a bankruptcy stay order.

In rare cases, there is money left over after all creditors have been paid. Here, the homeowner may seek return of those funds from the sheriff. Also, another party may have a co-ownership interest in the property (or even a homestead exemption claim), which may not be subject to the mortgage. In these cases, the co-owner should take immediate action to protect his interest in the funds from a foreclosure sale.\(^9\)

Some homeowners may have damage claims for wrongful seizure or other torts.\(^10\)

### 7. WHAT DOCUMENTS DO I NEED TO EVALUATE THE CLIENT’S POSSIBLE FORECLOSURE DEFENSES?

To assist a homeowner who faces foreclosure, gather these documents and information to assess their situation:

1. **Original loan closing paperwork:** Promissory note, Mortgage, HUD-1, Truth-in-Lending Disclosures, Act of Sale etc. Check to see whether the loan originated within the last 3 years. If so, complete a full Truth in Lending Rescission analysis. Check to see whether the loan is an Adjustable Rate Mortgage, Fixed Rate Mortgage, FHA Mortgage, Reverse Mortgage, etc. The original note and mortgage must be read thoroughly. Look for contract provisions on the order of application of payments to late fees, interest, principal, etc., and balloon payments, default and notice of acceleration to the borrower.

2. **Mortgage servicing paperwork:** Monthly statements, letters from mortgage servicer, escrow analysis statements. Check to see if the taxes and insurance are escrowed. Many homeowners do not know why their monthly mortgage payments have increased. More often than not, it is due to an escrow account. Though most mortgages provide homeowners with the right to buy and pay for their own insurance separately, many homeowners have let their insurance lapse and the lender has force-placed insurance that can be up to five times the annual premium they could obtain from a private insurer. Also check to see whether the homeowner has filed their homestead exemption or assessment freeze paperwork with the local tax assessor.

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\(^6\) Turner v. Glass, 188 So. 147 (La. 1939).
\(^7\) Magee v. Amiss, 502 So.2d 568 (La. 1987).
\(^10\) See § 10, infra.
3. Notices of Default, Notices of Acceleration and letters from attorneys threatening foreclosure. Be sure to dispute the debt within 30 days using a Qualified Written Request, as provided for under the Real Estate Procedures and Settlement Act (RESPA, 12 U.S.C. § 2605(e)).

4. Notice of Seizure, Petition for Executory Process (or Suit on a Note, if in ordinary process), Promissory Note and copy of Mortgage, and a copy of all other paperwork filed in the foreclosure suit. If a homeowner is two or more months past due on her monthly mortgage payments, check with the local courthouse to make sure a suit has not been filed. If an executory process suit has been filed, check to see whether the proper authentic evidence has been attached to the petition, including the original note (would be stored in a vault at the courthouse, not in the case file), a copy of the mortgage and a notice of default sent to the borrower. Check whether a sale date has been set by calling the parish sheriff’s office. The Notice of Seizure often contains a tentative sale date and should not be relied upon for accuracy.

5. Miscellaneous paperwork: Applications for Loan Modifications, previous Loan Modification Agreements signed by the borrower, Quitclaim Deeds by one borrower to another, Judgments of Possession or other succession paperwork for the property at issue, divorce judgments of borrowers.

8. **THE MAJOR FORECLOSURE DEFENSE OPTIONS**

**8.1 BANKRUPTCY**
A Chapter 13 bankruptcy reorganization may be necessary to stop a foreclosure sale. This option may be available if the homeowner has sufficient income to cure the loan arrearages, stay current on the mortgage and pay secured creditors over a 36 to 60 month period.

**8.2 MORTGAGE RESCISSION RIGHTS**
If the mortgage was executed less than three years ago, the consumer may have the right to cancel the mortgage under either the Home Ownership and Equity Protection Act (HOEPA) or the Truth in Lending Act. The homeowner’s notice of rescission automatically voids the lender’s security interest. A rescission can significantly reduce a consumer’s liability and lead to restructuring of the loan. Significantly, rescission of the mortgage defeats foreclosure since the security interest is cancelled. This forces the lender to sue by ordinary process. In defense to suit by ordinary process, the consumer may assert counterclaims or reconventional demands.

**8.3 LOAN SERVICING PROGRAMS OR PROCEDURES**

**8.3.1 The Making Home Affordable Program (HAMP)**
The Making Home Affordable Program (HAMP) directs the United States Department of Treasury to compensate mortgage servicers for modifying and refinancing loans where the borrower is or has undergone a hardship making it difficult for them to pay their mortgage. The hardship can include unemployment,

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12 The Making Home Affordable Program consists of separate initiatives for mortgage modification (Home Affordable Modification Program or “HAMP”), refinance (Home Affordable Refinance Program or “HARP”) and forbearance (Home Affordable Unemployment Program or “UP”). For more information on HAMP, see www.makinghomeaffordable.gov. See also, National Consumer Law Center, Foreclosures, §§ 2.8.4-2.8.6 (4th ed. 2012).
death of a borrower, illness etc. A list of HAMP mortgage servicers is available at: http://www.makinghomeaffordable.gov/get-assistance/contact-mortgage/Pages/default.aspx. The guidelines for servicing are found in Making Home Affordable Supplemental Directives and Handbook.13

Under HAMP, loan servicers are also directed to complete a Net Present Value ("NPV") Test, using a model developed by the Department of Treasury, which helps servicers determine whether a loan modification or foreclosure is more profitable for any given loan account and corresponding property.

A HAMP loan modification aims to bring the monthly mortgage payment down to 31% of the borrower’s monthly household income for 5 years by reducing the interest rate down to 2% or lengthening the life of the loan. See Net Present Value Test, Fannie Mae’s website, available at: https://www.efanniemae.com/sf/mha/mhamod/npvtest/.

HAMP is an important foreclosure prevention tool because it requires all participating mortgage servicers to review borrowers’ accounts for eligibility before filing a foreclosure action.

A homeowner who has not already done so and whose mortgage servicer participates in HAMP, can submit an application for HAMP, which requires that the sheriff’s sale be stopped to allow for review of the application and an approval or denial letter be sent to the borrower before proceeding with foreclosure.

This right of review for HAMP before foreclosure may be an affirmative defense to foreclosure.14 This is especially if the loan is owned by Fannie Mae. See Fannie Mae Servicing Guidelines, Fannie Mae’s website, available at: https://www.efanniemae.com/sf/mha/mhamod/.

If the mortgage servicer reviews the borrower’s account for HAMP, they will usually send the borrower a Trial Period Plan (TPP) and require the borrower to agree to make three consecutive on time payments under the TPP. Once those TPP payments are made, HAMP directs the mortgage servicer to permanently modify the loan. In certain circumstances, courts have held that a borrower who has complied with a Trial Period Plan has an affirmative defense to foreclosure under contract and other state law.15


For more information on HAMP, see National Consumer Law Center, *Foreclosures*, § 2.8 (4th ed. 2012).

### 8.3.2 FHA-Insured Home Loans

The HUD Federal Housing Administration’s purpose is to expand homeownership opportunities for people who are not adequately served by the private market. Lenders provide the funding for the mortgage, the FHA insures the lender so that it is 100% protected against the risk of default.

Because of the negative incentives for foreclosure with FHA-Insured loans, mortgage servicers of FHA loans have to comply with FHA loan servicing guidelines. 24 C.F.R. § 203.500-203.660. These guidelines illustrate six different options for homeowners who are in threat of foreclosure: forbearance; refinancing; loan modification; partial claim; pre-foreclosure sale; and deed in lieu of foreclosure. Mortgage servicers must review the loan for these loss mitigation options before proceeding with foreclosure proceedings. For more information, see National Consumer Law Center, *Foreclosures*, § 2.11 (4th ed. 2012).

Moreover, courts across the country have held that a mortgage company’s failure to comply the FHA Loan Servicing Guidelines is a complete defense to a mortgage foreclosure action.\(^\text{16}\)

### 8.3.3 VA Loans

The Department of Veterans Affairs (VA) guarantees loans made by lenders to veterans. Mortgage servicers of VA loans must comply with special servicing guidelines. 38 C.F.R. § 36.2275-83. A mortgage company’s failure to comply with the VA Loan Servicing Guidelines should also be a complete defense to a mortgage foreclosure action. However, there has not been much litigation on this issue since the VA Loan Servicing Guidelines were promulgated as federal regulations. For more information, see National Consumer Law Center, *Foreclosures*, § 2.11 (4th ed. 2012).

### 8.3.4 USDA Loans or Rural Housing Service

The United States Department of Agriculture Rural Development (USDA), Rural Housing Service, provides single family Direct and Guaranteed Loans under its directive to improve the economy and quality of life in rural America.

#### 8.3.4.1 USDA Direct Loans

USDA is the lender and servicer for Direct Loans. Special servicing for Direct Loans, including workout agreements, protective advances (USDA pays taxes and insurance on behalf of borrower), and payment assistance is required under 7 C.F.R. § 3550.201-211 and the USDA Handbook, available online at: [http://www.rurdev.usda.gov/Handbooks.html](http://www.rurdev.usda.gov/Handbooks.html). However, these special servicing options are not available post-acceleration of the loan and definitely not during foreclosure proceedings.

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Borrowers with USDA Direct Loans have a right to appeal adverse decisions, including a denial of special servicing. Borrowers must request an appeal in writing within 30 days of receipt of adverse notice. Borrowers send the request for an appeal to the address listed on the adverse notice. The appeals are heard by the National Appeals Division. For more information, see National Consumer Law Center, *Foreclosures*, § 3.4.2, § 2.11 (4th ed. 2012).

### 8.3.4.2 USDA Guaranteed Loans

USDA Guaranteed Loans are guaranteed by the USDA against default by the borrower. USDA Guaranteed Loans will not be serviced by the USDA and will not necessarily be identifiable from the loan documents. Special loss mitigation options are available to borrowers with USDA Guaranteed Loans. The servicing guidelines are outlined at: http://www.rurdev.usda.gov/regs/an/an4433.pdf. These guidelines have not yet been published into the Code of Federal Regulations. For more information, see National Consumer Law Center, *Foreclosures*, § 3.4.3, § 2.11 (4th ed. 2012).

### 8.3.5 National Mortgage Settlement

Consent judgments were entered against five leading mortgage servicers, Bank of America, JPMorgan Chase, Wells Fargo, Citibank and Ally/GMAC in *United States of America v. Bank of America Corp. et al.*, USDC No. 12-0361 (D.D.C. 4/4/12). The consent judgments, available relief and servicing standards for these servicers can be found at www.nationalmortgagesettlement.com. The consent judgments provide relief to Louisiana homeowners and should be reviewed if one of these banks is your client’s servicer. Also, see National Consumer Law Center, *Foreclosures*, § 2.9 (4th ed. 2012).

### 8.4 REVERSE MORTGAGES

A Home Equity Conversion Mortgage (HECM), also known as a reverse mortgage, is a federally insured loan that enables homeowners who are 62 years of age or older to withdraw some of the equity in their home or use the loan proceeds to refinance or buy a new primary residence. Unlike a traditional mortgage, no repayment is required until the borrowers no longer use the home as their principal residence or fail to meet the mortgage obligations. Borrowers are responsible for property taxes, general upkeep of the property and must keep all required insurance premiums current for the property. The regulations that govern the origination and servicing of an HECM are available at 24 C.F.R. § 206. Importantly, 24 C.F.R. § 206.27(c)(1) provides that the mortgage balance will be due and payable in full if a mortgagor dies and the property is not the principal residence of at least one surviving mortgagor, or a mortgagor conveys all or his or her title in the property and no other mortgagor retains title to the property. It is also important to note that there are “reverse mortgages” that are not federally insured, but those are usually scams.

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17 See NCLC Reports, Bankruptcy and Foreclosures, vol. 30 (May/June 2012).
9. FORECLOSURE DEFENSE PROCEDURES

9.1 EXECUTORY PROCESS

In Louisiana, most foreclosure cases are filed as a Petition for Executory Process under La. Code Civ. Proc. art. 2631-41. The day the Petition for Executory Process is filed a judgment is granted, ordering that a Notice of Seizure issue for the sheriff to seize and sell the property. Citation is unnecessary in executory proceedings, but the sheriff must attempt serve the defendant with a written notice of seizure. However, often the debtor is never served with any notice because service is made on a court-appointed curator. The curator does not file any pleadings in the executory process case. His duty is limited to attempting to notify the debtor.

A debtor must assert defenses to a petition for executory process by injunction or suspensive appeal. A suspensive appeal is not practical for a low-income homeowner since a bond equal to 150% of the debt must be posted. A preliminary injunction, but not a temporary restraining order, may issue to arrest the seizure and sale of immovable property. Therefore, a homeowner must move quickly to file for preliminary and permanent injunctions to enjoin the sale. The preliminary injunction should be heard not less than 2 days nor more than 10 days after service of the rule to show cause why the preliminary injunction should not issue.

The grounds and procedures for asserting foreclosure defenses by injunction are:

• the debt is extinguished or legally unenforceable; or
• the procedures required for executory process have not been followed.

The grounds for an injunction itemized in Code of Civil Procedure art. 2751 are not exclusive. An applicant for a preliminary injunction must prove irreparable injury and a prima facie for relief. Real property is unique, and the loss of one’s home meets the irreparable injury standard. The applicant must furnish security for the issuance of a preliminary injunction, except in the cases listed in Code of Civil Procedure art. 2753. If a preliminary injunction is denied, a suspensive appeal of the injunction denial does not suspend foreclosure by executory process.

The sale may be enjoined “if the procedure required by law for an executory proceeding has not been followed.” Thus, defects in authentic evidence may bar executory process, including attaching a copy of the mortgage but not an original promissory note. Under Louisiana law the mortgage follows the note. In addi-
tion, the plaintiff must establish the chain of title of the note and mortgage at issue through authentic evidence. An unendorsed promissory note is not prima facie evidence of ownership.31

9.2 ORDINARY PROCESS AND THE LOST NOTE STATUTE
If the note is lost, the creditor lacks authentic evidence or the mortgage is rescinded, the foreclosure will have to proceed as an ordinary proceeding. Also, the creditor has the right to convert an executory proceeding to an ordinary proceeding.32 In an ordinary proceeding, a debtor may assert defenses, offsets and reconventional demands.

In a foreclosure by ordinary process, the original promissory note does not have to be introduced into evidence if the requirements of the Lost Note Statute, La. R.S. 13:3741, are met.33 La. R.S. 13:3741 requires that the loss of the note be advertised in a public newspaper and proper means taken to recover the possession of the instrument.

9.3 COLLATERAL MORTGAGES
A “collateral mortgage” consists of: (1) an act of mortgage, (2) a collateral mortgage, or ne varietur, note paraphed for identification with the act of mortgage, and (3) a pledge of the collateral mortgage note to the creditor in order to secure the debt, usually represented by a hand note.34 The collateral mortgage is different from a conventional mortgage because money is not advanced directly on what is titled the “collateral mortgage note” but on a separate promissory note.35 This is an unusual and complicated type of mortgage. It is often misunderstood and improperly issued by small finance companies.

9.4 OTHER DEFENSES TO EXECUTORY OR ORDINARY PROCESS
Additional defenses to foreclosure are:

9.4.1 Prescription
Actions on promissory notes are subject to a liberative prescription of five years which runs from the date that payment becomes exigible.36 Generally, the maturity date of a note fixes the period at which the five year prescriptive period begins to run.37 If prescription is evident on the face of the petition, the plaintiff has the burden of proving that prescription has not run.38 When more than five years have elapsed after the maturity date of a note, and there is no interruption or renunciation of prescription, recovery on the note is barred by prescription.39

Creditors may seek to overcome a prescription plea by arguing that the debtor renounced prescription or acknowledged the debt by making a payment. Once prescription has run, acknowledgment is no longer applicable. Only “renunciation”

33 U.S. Bank National Ass’n v. Custer, 33 So.3d 303 (La. App. 5 Cir. 2010); Norwest Bank v. Walker, 933 So.2d 222, 225 (La. App. 4 Cir. 2006).
37 Acorn Community Land Ass’n of La. v. Zeno, 936 So.2d 836, 840 (La. App. 4 Cir. 2006).
may be applicable after prescription has run.\textsuperscript{40} Proof of renunciation, interruption or suspension of prescription must be clear, specific and positive.\textsuperscript{41} A renunciation must be clear, direct and absolute and manifested by words or actions of the party in whose favour prescription has run. There must be a new promise to pay for renunciation to exist. One may “acknowledge” a debt and even make a partial payment of the debt without renouncing prescription.\textsuperscript{42} An oral acknowledgment or an unsigned writing may be insufficient to constitute renunciation.\textsuperscript{43}

\textbf{9.4.2 Mortgage Electronic Registration Systems, Inc. (MERS)}

Mortgage Electronic Registration Systems, Inc., commonly referred to as “MERS”, states on its website that it is “an innovative process that simplifies the way mortgage ownership and servicing rights are originated, sold and tracked. Created by the real estate finance industry, MERS eliminates the need to prepare and record assignments when trading residential and commercial mortgage loans.” MERS website, Home Page, available at: www.mersinc.org. MERS is commonly listed in the mortgage at issue as a mortgagee. Though not as common today, there was a time when MERS was named as plaintiff on many foreclosure lawsuits, both in ordinary and executory process in Louisiana.

MERS does not have valid standing to foreclosure unless the promissory note at issue is endorsed in blank or is endorsed to MERS specifically.\textsuperscript{44}

\textbf{9.4.3 Satisfaction}

When the obligation secured by a mortgage has been fully satisfied, La. R.S. 9:5385 states that the mortgage holder shall, within thirty days of receiving a written demand, produce the satisfied promissory note or a release in a form sufficient to bring about the cancellation of the inscription of the recorded mortgage. Moreover, La. R.S. 9:5385 (B) provides that if the mortgage servicer fails to produce the satisfied promissory note or an instrument of release within thirty days after receiving a written demand, the mortgage servicer shall be liable for all damages and costs, including attorney fees.

\textbf{10. TORT CLAIMS AGAINST LENDERS}

\textbf{10.1 WRONGFUL FORECLOSURE}

To have a cause of action for wrongful foreclosure, a plaintiff must first show the seizure was illegal or wrongful. Next, under the duty/risk analysis, a plaintiff must show that the wrongful seizure was caused by the fault of one who owed a duty to the plaintiff, and that there was a breach of this duty.\textsuperscript{45} An aggrieved plaintiff is entitled to recover general and special damages caused by wrongful seizure of his property.\textsuperscript{46} Seizure in executory process without authentic evidence gives rise to an action for wrongful seizure.\textsuperscript{47}

\textsuperscript{40} Lima v. Schmidt, 595 So.2d 624, 631-32 (La. 1992).
\textsuperscript{41} Babin v. Babin, 10 So.3d 784, 785-86 (La. App. 5 Cir. 2009).
\textsuperscript{42} Neese v. Papa John’s Pizza, 44 So.3d 321 (La. App. 5 Cir. 2010).
\textsuperscript{43} State ex rel. Sunseri v. Thoman, 135 So.2d 791 (La. App. 1 Cir. 1962).
\textsuperscript{44} See Landmark National Bank v. Kesler, 216 F.3d 158 (Kan. 2009); Jackson v. MERS, 770 N.W.2d 487, 491-92 (Minn. 2009); In re MERSCORP v. Romaine, 861 N.E.2d 81 (N.Y. 2006); MERS v. Neb. Dept of Banking & Fin., 704 N.W. 2d 784, 788 (Neb. 2005); see also U.S. Bank Nat. Ass’n v. Custer, 33 So.3d 303 (La. App. 5 Cir. 2010).
\textsuperscript{46} Levine v. First National Bank of Commerce, 948 So.2d 1051 (La. 2006); Nassau Realty Co., Inc. v. Brown, 332 So.2d 206, 211 (La. 1976).
\textsuperscript{47} Bank of New York Mellon v. Smith, 71 So.3d 1034 (La. App. 3 Cir. 2011) writ denied 75 So.3d 462 (La. 2011).
10.2 ABUSE OF RIGHTS DOCTRINE

Under the abuse of rights doctrine, Louisiana courts exercise judicial control and can prevent exercise of what would normally be a party’s rights. However, a lender’s reasonable enforcement of an obligation by foreclosure is unlikely to provide an “abuse of rights” defense or damages claim.

10.3 OTHER TORT CLAIMS

Liability may exist for other torts by a lender, e.g., negligent misrepresentation, sending a letter improperly claiming that a debt was owed to it, or failure to credit mortgage payments.

11. DEFICIENCY JUDGMENTS AFTER SALE BY EXECUTORY PROCESS

If the property was sold in executory process without appraisal, no deficiency judgment can be had. Even untimely appraisals will deprive the creditor of his right to a deficiency judgment. The statutory prohibition against deficiency judgments when the real estate was sold without appraisal may not be waived by the debtor. In general, when property has been sold after appraisal and in accordance with the laws for appraisal, the creditor may obtain a personal judgment against the mortgagor for any deficiency remaining after the application of the sale proceeds to the secured debt. A creditor must file an ordinary action to seek a deficiency judgment. Deficiency judgment actions prescribe 5 years from the date of the sheriff’s sale.

12. OTHER MORTGAGE ABUSES

The federal Consumer Financial Protection Bureau has promulgated Regulation O, 12 C.F.R. § 1015 to regulate mortgage assistance relief providers. Check to see if a prior provider violated the provisions of Regulation O. For more information on mortgage assistance relief abuses, see NCLC, Foreclosures § 17.4.4 (4th ed. 2012)

13. TAX ISSUES IN FORECLOSURE

A foreclosure sale, short sale or cancellation of debt in a loan modification may have income tax consequences. See Chapter 14, Tax Law for Legal Services and Pro Bono Attorneys, infra.

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49 Fidelity Bank & Trust Co. v. Hamm ons, 540 So.2d 461 (La. App. 1 Cir. 1989)(rejecting abuse of rights claim even though executory process was improper).
51 Avery v. Citimortgage, 15 So.3d 240 (La. App. 1 Cir. 2009).
56 Dyck-O’Neal, Inc. v. Sands, 745 So.2d 68 (La. App. 4 Cir. 1999).
CHAPTER 8

IMMIGRATION FOR LEGAL AID LAWYERS

Laila Hlass


About The Author

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1. INTRODUCTION

For the first 100 years of the United States’ existence, there was a period of unrestrained immigration. Since then, Congress has been continuously restricting and regulating immigration through the Immigration and Nationality Act, which is amended nearly every year. Due to constantly evolving and growing statutory law, changing regulations, numerous administrative agencies, and vast case law, immigration law is notoriously complex. Therefore, this Chapter aims first to lay out the general landscape of immigration law for the Louisiana Legal Services attorneys, as well as to briefly explain how it might interact with other areas of law, including public benefits and criminal justice. This Chapter also provides more extensive information about certain applications that Legal Services attorneys are authorized to complete, specifically applications on behalf of U.S. citizens, Legal Permanent Residents and survivors of domestic violence and human trafficking.

1.1 SOURCES OF IMMIGRATION LAW

There are many sources of U.S. Immigration and Nationality law—from federal statutes, treaties, final agency regulations and proposed rules, administrative adjudications, informal agency guidance and memoranda and court decisions—unpublished and published.

1.1.1 Statutes

The Immigration and Nationality Act (INA), codified in Title 8 of the U.S. Code provides the primary statutory foundation of immigration law. Please note that when using the statute, most immigration practitioners refer to the section of the INA, rather than the corresponding U.S. Code citation. Included in the appendix, is an INA/U.S. Code conversion table. Furthermore, a number of publishers produce physical copies of the INA annually with corresponding regulations, and a pretty up-to-date version can be found on U.S. Citizen and Immigration Services website (www.uscis.gov) under “Laws.”

Some laws affecting immigration have not yet been codified and therefore are referred to by their public law number. Additionally there are a number of immigration-related laws throughout the U.S. Code, which are not under the INA. Furthermore, states, including Louisiana, oftentimes pass state laws related to immigration.

1.1.2 Regulations

The executive branch administers U.S. immigration law and often promulgates regulations in the Federal Register, which are then codified in the Code of Federal Regulations (C.F.R.). There are many administrative agencies involved in immigration matters, and they all publish their own relevant regulations. The most common section that a Legal Services attorney needs are those regulations published by U.S. Citizen and Immigration Services, which are found at 8 C.F.R. Chapter I. The Department of Homeland Security regulations are found at 6 C.F.R. Chapter I, Customs and Border Protection are found at 19 C.F.R. Chapter I, Immigration and Customs Enforcement at 19 C.F.R. Chapter IV, and Executive Office of Immigration Review are found at 8 C.F.R. Chapter V.
1.1.3 Policy Statements and Memoranda

The various administrative agencies often have internal policy guides and memoranda, which practitioners cite to and can provide helpful guidance. U.S. Citizen and Immigration Services (USCIS or CIS) published its Adjudicator Field Manual, which includes most of its policy memoranda and is published on their website (www.uscis.gov). CIS also posts many of their policy memos on their website under “Policy Memoranda” web page which can be accessed from the “Laws” link.

1.1.4 Court cases and Agency Adjudications

The Administrative Appeals Office has jurisdiction over the appeals of most types of decisions made by CIS adjudications officers. There are “adopted decisions” which are a few decisions designated by CIS leadership to serve as a policy guide for CIS adjudicators and the rest are considered unreported decisions. On AAO’s website, they publish both adopted and unreported, or “Administrative” decisions.

The Executive Office of Immigration Review, which contains both Immigration Courts and the Board of Immigration Appeals, publishes its precedent decisions on its website (http://www.justice.gov/eoir/) under the “Virtual Law Library.” Non-precedent decisions can be found sometimes on Westlaw or Lexis, in addition to often being shared by practitioners through various websites including the American Immigration Lawyers Association (AILA)’s Infonet, and Bender’s Immigration Bulletin, which has now been moved to “LexisNexis Immigration Law Community.”

1.2 OVERVIEW OF SUGGESTED RESOURCES

Books
- “Kurzban’s Immigration Sourcebook,” by Ira Kurzban, often referred to as the immigration attorney’s “bible,” is a comprehensive treatise relating to all aspects of immigration law.
- “Immigration Practice,” by Robert Divine, is a very good practice manual for all aspects of immigration law.
- “Immigration Trial Handbook,” by Anna Marie Gallagher and Maria Baldini-Potermijn, and “Representing Clients in Immigration Court,” by Catholic Legal Immigrant Network, Inc. provide overviews of inadmissibility and deportability, and a variety of defenses to removal.
- “Guide to Immigrant Eligibility for Federal Programs,” by the National Immigrant Law Center, reviews which noncitizens are eligible for which federal programs involving health care coverage, cash assistance, food assistance, job training and financial aid to attend college.

Websites
- The American Immigration Lawyers Association (http://www.aila.org/) is the professional bar association for attorneys who specialize in immigration law. They publish a number of books relating to immigration practice, have numerous trainings and conferences, and have extensive online immigration resources for its members.
• **Immigration Advocates Network** (http://www.immigrationadvocates.org) is a partnership of a number of nonprofits, and they have produced a clearinghouse of materials and information about national trainings regarding immigration. Pro bono and nonprofit attorneys can join for free.

• **Immigration Legal Resource Center** (http://www.ilrc.org/) is a national non-profit resource center that provides legal trainings, educational materials, and advocacy to advance immigrant rights. They have a number of books focusing on immigration applications relevant to Legal Service attorneys including “Representing Survivors of Human Trafficking,” “Special Immigrant Juvenile Status,” “The U Visa,” “The VAWA Manual,” “Remedies and Strategies for Permanent Resident Clients,” and “Naturalization and U.S. Citizenship.”

• **U.S. Citizen and Immigration Services** agency has an extensive website (http://www.uscis.gov/), which contains immigration application forms, laws, news and other resources.

### 1.3 LSC FUNDING RESTRICTIONS DEPENDING ON IMMIGRATION STATUS

In 1996, Congress created vast restrictions on Legal Services Corporation (LSC) grantees, including regarding their ability to represent non-U.S. citizens. See 45 C.F.R. § 1626 for “Restrictions on Legal Assistance to Aliens,” including a chart appendix, listing the types of immigrants, the section of the INA pertaining to them, the specific LSC regulation and examples of acceptable documents to prove immigrant status. The chart is included in this chapter’s appendix.

According to this regulation, LSC-funded organizations can represent foreign nationals or “aliens” who are present in the United States and fit in the following categories:

1. **Lawful Permanent Resident (LPR, also known informally as “green card” holder),** 45 C.F.R. § 1626.5(a).

2. **“Immediate relative” of a U.S. citizen, who has filed for adjustment of status (filing for “adjustment of status” refers to applying to obtain lawful permanent residence).** 45 C.F.R. § 1626.5(b). “Immediate relative” under the INA means a spouse, parent or unmarried child under 21.

3. **Refugee or asylee, as defined in INA § 207 and § 208.** 45 C.F.R. § 1626.5(c).

4. **Alien granted withholding or deferral of removal.** 45 C.F.R. § 1626.5(e).

5. **Grantee of conditional entry before April 1, 1980 under INA § 203(a)(7) because of a fear of persecution (These are people who would be considered refugees, but entered before the Refugee Act was passed.)** 45 C.F.R. § 1626.5(d).

6. **Special Agricultural Worker who has filed for “temporary residence” under IRCA.** 45 C.F.R. § 1626.10(d).

7. **H2A agricultural workers to be represented for contractual employment rights including wages, housing and transportation.** 45 C.F.R. § 1626.11.

8. **H2B temporary nonimmigrant non-agricultural worker admitted to or permitted to remain in the United States for forestry labor, for representation**


11. Victim of domestic violence seeking assistance directly relating to the abuse. 45 C.F.R. § 1626.4.

12. Citizens of Micronesia, Marshall Islands or Palau. 45 C.F.R. § 1626.10(a)


14. Victims of “U Visa” Crimes, if the assistance is directly related to preventing, protecting against future incidents or obtaining relief from the U-visa qualifying activity. VAWA Reauthorization of 2006, LSC Program Letter 06-2 (discussed in the VAWA section, infra).

Although LSC-funded attorneys may not provide legal assistance to an LSC-ineligible noncitizen, legal assistance does not include normal intake and referral services. 45 C.F.R. § 1626.3. Therefore legal services attorneys may interview ineligible noncitizens who apply for services in order to help refer the case, as well as draft a memo about the case in order to refer, as long as that is the “normal” procedure in the office. Legal services attorneys can also indirectly benefit LSC-ineligible noncitizens by representing LSC-eligible family members, as long as it affects a specific legal right or interest of the eligible client. 45 C.F.R. § 1626.2(e). For example, it is permissible to represent a U.S. citizen minor child who has unauthorized noncitizen parents, regarding the child’s own habitability housing claim, even though it would indirectly benefit the parents. Lastly, legal services attorneys can always engage in community education and outreach events to provide general legal rights information or information about their organization to LSC-ineligible noncitizens. 45 C.F.R. § 1638.4(a)

In order to determine eligibility, legal services attorneys should determine what category of noncitizen the potential client fits into. For noncitizens other than trafficking victims and domestic violence survivors and U status crime victims found under VAWA 2006, the legal services attorney should compare the immigration-related document produced by the applicant to the list in the Appendix to 45 C.F.R. § 1626, which is also included in the appendix of this chapter. Next the attorney should make a photocopy of the document, and for noncitizens eligible due to their relationship to a U.S. citizen, the attorney should obtain documentation of the U.S. citizen’s citizenship (a birth certificate, passport or certificate of citizenship will suffice) and documentation of the relationship between the applicant and the U.S. citizen (a marriage or birth certificate.)

There are some exceptions to the documentation requirements, in the case of an emergency, which is defined as a situation where immediate action is needed to preserve significant legal rights or to prevent significant harm to a person’s family, property, or other legal interests. 62 Fed.Reg 19409-01 *19413 (4/21/1997). It is
perm issible to begin providing representation to a noncitizen over the phone, when s/he cannot feasibly come to the office to show a document establishing eligibility as long as the individual provides enough information orally to determine eligibility and the applicant submits the necessary documentation as soon as possible. 45 C.F.R. § 1626.8(a). Furthermore if the applicant does come in the office but cannot produce the required documentation, the legal services attorney can provide emergency services as long as the noncitizen signs a statement of eligibility and provides the necessary papers as soon as possible. 45 C.F.R. § 1626.8(b).

2. WHO’S WHO IN IMMIGRATION

There are several federal government agencies that play a role in the immigration law landscape. For many years, the government agency in charge of immigration matters was Immigration and Naturalization Services, which was formerly part of the Department of Justice. In 2003, as a result of the Homeland Security Act, Congress got rid of INS, and divided up the responsibilities of INS among a few different bureaus under the Department of Homeland Security, as well as keeping some responsibilities under the Department of Justice.

2.1 AGENCIES

There are three main bureaus under the Department of Homeland Security, which are involved in immigration law.

2.1.1 Immigration and Customs Enforcement (ICE)

Immigration and Customs Enforcement (ICE) is in charge of enforcing immigration violations within the interior of the United States. Immigration agents, who are part of the Enforcement and Removal branch of ICE, arrest, detain and deport immigrants. Attorneys in ICE’s Office of Chief Counsel prosecute immigrants in removal proceedings. There are a number of other divisions within ICE charged with investigations, intelligence gathering, and policing federal facilities and air security.

2.1.2 Citizen and Immigration Services (CIS)

USCIS or simply CIS, presides over immigration “benefits.” They adjudicate applications involving lawful immigration to the United States, including citizenship, immigration of family members of permanent residents and US citizens, work authorization in the U.S., and humanitarian relief, to name a few. CIS is divided into regional and local offices, which have authority over different types of applications. The Administrative Appeals Office (AAO) is an administrative body within the headquarters of CIS.

2.1.3 Customs and Border Protection (CBP)

CBP manages port inspection of people and goods, at the land borders, as well as sea ports and international airports. The Border Patrol is in charge of arresting immigrants within a reasonable distance from the “border,” which has been designated as within 100 miles. Border patrol agents, like ICE agents, also have the authority to make a custody determination of an immigrant after arresting them—to release the immigrant, to set a bond, or to detain. If the decision is to detain, the immigrant is handed over to ICE, which maintains detention facilities.

(519)
2.2 IMMIGRATION COURTS (EOIR)

The Executive Office of Immigration Review (EOIR) is a division with the Department of Justice, which includes all Immigration Courts as well as the Board of Immigration Appeals (BIA). There are about 50 Immigration Courts, with about 200 Immigration Judges within the United States. Please see the Immigration Court Practice Manual for a detailed guide about appearances before the court, filing, hearings, motions and practice points in representing clients before the Immigration Court: http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm. There is a similar Practice Manual for the Board of Immigration Appeals: http://www.justice.gov/eoir/vll/qapracmanual/appmttn4.htm.

Generally, the direct appeal of an immigration judge decision goes to the Board of Immigration Appeals, and appeals of those decisions go the federal appellate court of the circuit where the Immigration Judge is located. For example, all decisions originating from Oakdale and New Orleans Immigration Courts could eventually be appealed to the Fifth Circuit.

2.3 LOUISIANA DIRECTORY OF IMMIGRATION AGENCIES, COURTS AND DETENTION CENTERS

2.3.1 Agency Offices

**USCIS Office:** The local New Orleans USCIS Field Office is located at 2424 Edenborn Avenue, Suite 300, Metairie, LA 70001. There is no phone number for this office, but immigration agents can be reached by calling the National CIS hotline at 1-800-375-5283 or scheduling an appointment with an officer at the New Orleans office by making an appointment through the InfoPass system: http://infopass.uscis.gov/. General processing times for certain applications can be found online as well as specific information about pending applications, when the receipt number is available, by going to https://egov.uscis.gov/cris/Dashboard/CaseStatus.do.

The local New Orleans CIS office conducts interviews and adjudicates applications for a number of applications, and is where immigrants have their “biometrics” appointments, to be fingerprinted and photographed, which is part of most immigration application processes.

**ICE:** There is an Oakdale ICE office, which oversees all detained cases that are in Oakdale Immigration Court. This ICE office is located at 1010 E Whatley Rd, Oakdale, LA 71463-2145. Glenda Raborn, the Chief Counsel of the New Orleans region, which covers 5 states, is part of the Oakdale office, as well as a number of assistant chief counsels, who can be reached at (504) 599-7938. Scott Sutterfield, who is currently the Deputy Director of ICE’s Enforcement Removal Office, is also located in the Oakdale Office.

The New Orleans ICE office is at 1250 Poydras St., Suite 325, New Orleans, LA 70113, phone: (504) 599-7800. In these offices, there are a few Assistant Chief Counsels who prosecute cases in the New Orleans Immigration Court, as well as the Field Office Director of ICE’s Enforcement and Removal Office, Philip Miller, and many agents. Immigrants may have to report to ICE officers at this building, if they have been released on their own recognizance, are part of an Alternatives to Detention Program, or if they are under an Order of Supervision. It is also where individuals can go to pay immigration bonds, and where practitioners should serve documents filed with the New Orleans Immigration Court.
**CPB:** The New Orleans Station is located 3819 Patterson Road, New Orleans, LA 70114, Mailing Address: P.O. Box 6218 New Orleans, LA 70174. Phone: (504) 376-2830; Fax: (504) 376-2836.

The Baton Rouge station is located at 11655 Southfork Avenue, Baton Rouge, LA 70816, Phone: (225) 298-5501; Fax: (225) 298-5505.

The Lake Charles Station is located at 4321 Common Street, Lake Charles, LA 70607, Mailing Address: P.O. Box 868 Lake Charles, LA 70602-0868, Phone: (337) 477-9245; Fax: (337) 477-6133.

### 2.3.2 Immigration Courts

**New Orleans Immigration Court** is located at One Canal Place, 365 Canal Street, Suite 2450, New Orleans, Louisiana, (504) 589-3992. Currently, there is only one presiding Judge, Judge W. Wayne Stogner. For those who wish to observe Master Calendar Hearings, they take place Mondays and Tuesdays, with 8:30am and 10:00am dockets. For more information, see [http://www.justice.gov/eoir/sib-pages/nol/nolmain.htm](http://www.justice.gov/eoir/sib-pages/nol/nolmain.htm).

**Oakdale Immigration Court** is located at 1900 East Whatley Road, Oakdale, Louisiana 71463, (318) 335-0365. Currently, there are three sitting judges, Judges Duck, Reese and Beatmann. For more information, see [http://www.justice.gov/eoir/sibpages/oak/oakmain.htm](http://www.justice.gov/eoir/sibpages/oak/oakmain.htm).

### 2.3.3 Detention Centers

There are four long term detention centers in Louisiana, where immigrants are sometimes detained during their Immigration Court proceedings, as well as when they are awaiting deportation. To determine where an immigrant is being detained, you can use ICE’s online detainee locator system (https://149.101.24.210/odls/homePage.do) if you have an Alien number AND Country of Birth or if you have the Name, Date of Birth, and Country of Birth.


**Tensas Parish Detention Center**, 8606 Highway 65, Waterproof, LA 71375-4523 (318) 749-5810.

### 3. OVERVIEW OF IMMIGRATION CONCEPTS

#### 3.1 TYPES OF IMMIGRATION STATUSES

There are many types of immigration statuses and oftentimes people may fluctuate between having some kind of authorization and not. In this section, we will cover broadly the concepts of citizenship, immigrant, nonimmigrant, and unauthorized immigrant.
Sometimes people are unaware of their own immigration statuses as well. In order to determine what status someone has it is important to get a complete immigration history. Sometimes individuals will have maintained most or all of their immigration related paperwork and documents, which will make it easier to understand their situation. Otherwise, an immigrant may have to do a Freedom of Information Act request to obtain their entire Alien file: http://www.uscis.gov/g-639.

3.1.1 Citizen

There are basically four ways that a person becomes a U.S. citizen—by birth in the United States; acquisition through birth abroad to at least one U.S. citizen parent; deriving citizenship through a parent’s naturalization or through a U.S. citizen’s adoption of a foreign born child; and naturalization. Naturalization is the process of a Legal Permanent Resident becoming a U.S. citizen.

The law for acquisition of citizenship has changed significantly over the years and the law that controls a particular case is the law that was in effect at the time of the individual’s birth abroad. These provisions can be found at INA §§ 301 and 309.

The current law of deriving citizenship is found under INA § 320 and states that children born outside the U.S. who have at least one parent who is or becomes a citizen by naturalization or birth while the child is still under eighteen years old and is unmarried, and who are residing in the U.S. in the legal and physical custody of the citizen parent after a lawful admission for permanent residence, will automatically become a citizen once these requirements are met, as long as they are met on or after the effective date of February 27, 2001, and before the child’s 18th birthday.

Documents which are evidence of U.S. citizenship include an American birth certificate, a certificate of citizenship, and a U.S. passport.

3.1.2 Immigrant

An immigrant is a noncitizen who has been granted permission to permanently live in the United States and can work without restriction, also known as a Lawful or Legal Permanent Resident (LPR). Proof of LPR status is commonly called a green card, and officially known as Form I-551. Green cards generally have an expiration date, which indicates when the card, not the status, expires. LPRs continue to maintain LPR status, even if they have an expired green card. LPRs may lose their status, which will be discussed further under the deportability section below.

Immigrant visas refer to petitions that lead to eligibility to obtain legal permanent resident status. These are generally family- and employment-based petitions, but annually there are also diversity visas distributed, resulting from a lottery. INA § 203(C).

3.1.3 Nonimmigrant

A nonimmigrant is a noncitizen who is making a temporary visit to the United States. Common nonimmigrants include tourists, temporary workers, and students. There are 22 categories of nonimmigrant classifications which can be found in the definitions section of the Immigration and Nationality Act, INA § 101(a)(15)(A-V). Immigration practitioners often refer to the “alphabet soup” of nonimmigrant visas, because each classification is represented by a different letter. For example temporary visitors for pleasure (tourists) and temporary visitors
for business are considered B-2/B-1 visitors, and you will see this notation in the
nonimmigrant’s passport, where the visa should be located. Visas are obtained
generally through U.S. consulate abroad and give noncitizens permission to seek
admission to the United States. When the nonimmigrant enters the United States,
Customs and Border Protection will decide whether or not to allow admission and
will stamp the admission date on the passport and provide an I-94 card, an arrival
and departure document, to the noncitizen. CBP will also make a decision at this
point as to how long to admit the nonimmigrant and will stamp the passport with
the date that the granted period of stay expires.

3.1.4 Unauthorized

Unauthorized, or “undocumented” aliens are either noncitizens present in the
United States who entered without permission, or nonimmigrants who fell out of
status, because they stayed longer than they were allowed to or because they vio-
lated the conditions of their stay in another way, such as by working when their
status did not allow them to.

3.2 INADMISSIBILITY AND DEPORTABILITY

Two very important concepts to understand in immigration are inadmissibility
and deportability. Inadmissibility grounds involve reasons why noncitizens may
be excluded from the United States, which might happen by 1) a US consulate
refusing to issue a visa 2) CBP refusing admission at a port of entry (land border,
sea port or airport) 3) CIS denying an application for Legal Permanent Residence
from an noncitizen within the United States applying to “adjust status,” and 4) an
Immigration Court finding in removal proceedings against people who never law-
fully entered the United States. Inadmissibility grounds are found at INA § 212(a),
and include among others: 1) certain health conditions, such as communicable
diseases; 2) criminal related grounds such as a “crime involving moral turpitude,”
which is defined through case law; a controlled substance related offense; and
multiple criminal convictions; 3) security-related grounds, including espionage,
terrorism, membership in the Communist or totalitarian party, participation in
genocide; 4) public charge; 5) not meeting labor certification and physician and
health care worker requirements; 6) illegal entrants and immigration violations
(being present without admission or parole, failure to attend removal proceedings,
misrepresentation of a material fact to obtain an immigration benefit, stowaways,
smugglers and student visa abusers); 7) not meeting documentary requirements
and 8) miscellaneous other grounds.

Deportability grounds involve reasons why noncitizens can be removed from
the United States and apply to individuals who entered the United States lawfully,
either as an immigrant or nonimmigrant. They are found at INA § 237(a), and
include 1) immigration status violations 2) criminal grounds including crimes
involving moral turpitude, aggravated felonies, high-speed flight, drug-related
offenses, firearms offenses, domestic violence and failure to register as a sex
offender 3) failure to register or falsification of immigration documents 4) security
related grounds including espionage, and terrorism 5) public charge and 6) unlaw-
ful voting. Furthermore, if LPR’s stay out of the country for too long, they can be
deemed to have abandoned their status. If they remain outside of the country for
6 months or longer, then there is a rebuttable presumption they have abandoned
their status, and if it has been a year or more, then it is considered abandoned.
When someone is put into removal proceedings, they are charged with “inadmissibility” and/or “deportability” grounds which are listed on a document called a “Notice to Appear.” In this context both grounds can also simply be referred to as “grounds of removal.”

### 3.3 EFFECTS OF CRIMINAL CONVICTIONS

As Justice Stevens recently wrote in the *Padilla v. Kentucky* case, “changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction...These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Padilla v. Kentucky*, 130 S. Ct. 1473, 1477 (2010). Because of the dire consequences of even minor criminal charges, it is vital to be aware of the potential effect of criminal convictions—no matter how old—when advising clients about applying for certain immigration benefits. When individuals apply for immigration benefits, they undergo “biometrics” appointments which include taking fingerprints, so that prints are later checked against a national database that has federal and state criminal systems information, as well as immigration violations information.

The intersection of criminal and immigration law, often called “crimmigration” is a complicated and nuanced area of law. A misdemeanor in criminal law can mean an aggravated felony in immigration law. Expungements and partial pardons do not erase criminal convictions for immigration purposes. Diversion programs can often have the same effect in immigration law as a conviction by a jury or judge. This section does not attempt to fully explain the intricacy of crimmigration, as entire books can be written about it. This section merely intends to define a few key terms, to highlight how immigration and criminal law interact, and to help Louisiana Legal Services attorneys identify when they must do further research before advising a noncitizen client about applying for a certain benefit.

As mentioned before, a conviction or admission of the elements of a crime or sometimes even the government having reason to believe a crime was committed can trigger “inadmissibility” or “deportability” grounds, which may result in: 1) a noncitizen being denied an immigration benefit, 2) a noncitizen being denied admission to the United States and/or 3) a noncitizen being placed in removal proceedings.

Inadmissibility issues come up when people are applying to adjust status to become Legal Permanent Residents, when they are applying for certain other immigration benefits, when they are trying to enter the United States, and can be brought up against unauthorized noncitizens in removal proceedings. Deportability issues come up for Legal Permanent Residents or people who entered the country with permission, and may result in them being placed in removal proceedings. In addition to “inadmissibility” and “deportability” issues, another immigration consequence is that some types of immigration relief require “good moral character,” which immigrants can be found lacking if they have certain arrests or convictions or admit to certain illegal conduct.

When analyzing if a crime will have an effect on a noncitizen, it’s important to ask first what status the noncitizen has, and what, if any, status they are seeking. This is important because it will reveal if the attorney needs to worry about “inadmissibility,” “deportability,” “good moral character,” or some combination of
those issues. Furthermore certain immigration statuses carry even more specialized consequences—people who have “Temporary Protective Status” (TPS) become ineligible for that status after the conviction of 2 misdemeanors or 1 felony. The sections below regarding specific types of applications will talk specifically about which inadmissibility grounds matter for that type of relief and what waivers might be available to people who raise the inadmissibility issue.

Below are some key “crimmigration” concepts:

Conviction
A “conviction” in immigration law is
“a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where —

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed. INA § 101(a)(48)(A).

Therefore, it is important in order to be a conviction that the proceeding to be “criminal in nature under the governing laws of the prosecuting jurisdiction.” Matter of Eslamizar, 23 I&N Dec. 684 (BIA 2004). Certain juvenile delinquency adjudications are not considered convictions, as juvenile adjudications are usually considered civil in nature, unless the minor is being treated as an adult. Matter of Devison, 22 I&N Dec. 1362 (BIA 2000). Generally, a deferred adjudication of guilt, or similar state disposition, is a “conviction” for immigration purposes as long as it meets the immigration-law definition, even though the state would not consider it a conviction for state-law purposes. The types of dispositions which are not considered convictions include:
1) Juvenile delinquency adjudications, as mentioned above 2) Acquittal 3) Dismissal before conviction, as long as there was no guilty or no contest plea, nor admission of facts sufficient warrant a conviction 4) Deferred prosecution (including diversionary programs) as long as there is no guilty or no contest plea, nor admission of facts sufficient to warrant a conviction 5) Deferred verdict where there is a trial, but the verdict is postponed and then the case is dismissed, without any guilty or no contest plea, nor admission of facts sufficient for a conviction 6) Potentially a deferred sentence if there has be no punishment, penalty or restraint, but even court costs count as a penalty 7) Convictions that are not final because they are on direct appeal or within the time period for a direct appeal.

Admission of Crime
Some grounds of inadmissibility, such as Crimes Involving Moral Turpitude (CIMT) and drug-related crimes, do not require a conviction, but merely an admission of having committed a crime or the formal elements of crime. INA § 212(a)(2)(A) and (C). In order to be a valid admission, 1) the conduct admit-
ted to must be clearly punishable by law where it happened 2) before admission, the noncitizen must be given a clear and understandable definition of the crime, including essential elements and 3) the admission must be free and voluntary. See Matter of M, 1 I&N Dec. 229 (BIA 1942), Matter of K, I&N Dec. 594 (BIA 1957), Matter of G, 1 I&N Dec. 225 (BIA 1942).

**Sentence**
In the INA, some references to sentence refer to the maximum possible term of imprisonment, for which the crime is “punishable,” while sometimes they refer to the actual sentence imposed or the “term of imprisonment.” Regardless of whether the sentence is suspended partially or fully, it is counted for the purposes of immigration for the full amount of the sentence.

**Term of Imprisonment**
Term of imprisonment includes “the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.” INA § 101(a)(48)(B). Therefore, it is important to look at a final criminal disposition as to the final sentence imposed, as individuals who served no time but had a suspended sentence often do not realize they had any sentence at all. Probation is not considered a term of imprisonment.

**Good Moral Character**
“Good Moral Character” is required for a number of types of immigration benefits including naturalization, cancellation of removal, VAWA self-petitioning, and voluntary departure, and often the relief defines a period of time when the good moral character is required. As with many immigration terms, good moral character is only defined in the negative in the INA. According to the statutory definition, a noncitizen cannot have good moral character if during the defined time s/he 1) was a habitual drunkard 2) committed acts under some inadmissibility grounds including miscellaneous, prostitution and commercialized vice, CIMTs, multiple crimes, drug trafficking, and alien smuggling 3) was deriving income principally from illegal gambling 4) was convicted of 2 or more gambling offenses 5) has given false testimony for the purpose of an immigration benefit 6) has been imprisoned as a result of a conviction for a total period of 180 days. Furthermore, the noncitizen cannot have good moral character if s/he 7) has ever been convicted of murder or 8) has been convicted of an aggravated felony after November 29, 1990. INA 101(f). This list is not exhaustive, as the Act states that “[t]he fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is not or was not of good moral character.”

**Post-conviction relief**
Post conviction relief generally refers to types of proceedings to mitigate or erase the effects of criminal convictions for immigration purposes. This relief may take shape in several forms of proceedings—a *habeas* petition questioning the validity of a conviction, a pardon request, a motion to vacate a conviction, or a modification of a sentence, to name a few. A full and unconditional pardon of a crime negates the conviction, although expungements do not.
**Crimes Involving Moral Turpitude**

Although not defined in the INA, Crimes involving Moral Turpitude (CIMTs or CMTs) are both a ground of inadmissibility and a ground of deportability. Case law defines CIMTs generally as morally reprehensible behavior, which usually has to involve some kind of specific intent, deliberateness, willfulness or recklessness.

If the noncitizen was convicted of or makes an admission of a CIMT other than a purely political offense, then they are inadmissible, unless it falls into one of the two exceptions: 1) Juvenile exception: if the noncitizen was under 18 years of age when committing the crime and the release from any confinement happened more than five years before the immigration application or 2) Petty Offense: the maximum possible penalty was not more than a one year sentence and the noncitizen was not actually sentenced to more than six months of imprisonment. The deportability ground kicks in if the noncitizen is convicted of a CIMT within 5 years of their admission and a sentence of one year or more may be imposed. According to the BIA, admission in this context means a lawful entry after being inspected at a port of entry (airport, border or sea port), as well as adjustment of status. *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005).

**Crimes of Violence**

Crimes of violence as defined in 18 USC § 16 include offenses with an element including “the use, attempted use, or threatened use of physical force against the person or property of another, or other felonies that involve “a substantial risk that physical force against the person or property of another may be used.”

Crimes of violence come up in immigration law as a type of aggravated felony when the crime had a term of imprisonment of one year or more. INA § 101(a)(43)(F). Also, a conviction of a crime of violence punishable by more than one year of imprisonment is considered to be a “failure to maintain non-immigrant status,” which is a deportability ground. 8 C.F.R. § 214.1(g).

**Multiple Criminal Convictions**

Multiple criminal convictions can be found in the inadmissibility and deportability grounds. A noncitizen is inadmissible if s/he was convicted of two or more offenses, other than purely political ones for which the aggregate term of imprisonments were five years or more, regardless of whether it was a single trial or single scheme of misconduct. INA § 212(a)(2)(B). A noncitizen is deportable if s/he was convicted after entry for two or more CIMTs not arising out of the same scheme. INA § 237(a)(2)(A)(ii).

**Controlled Substance Violations**

Controlled substance or drug-related violations come up in both the inadmissibility and deportability sections of the INA. If a noncitizen is convicted of, or makes an admission, of a violation including conspiracy or attempt to violate a law “relating to a controlled substance,” then they are inadmissible. INA § 212(a)(2)(A)(ii). There is a waiver available for a single offense of simple possession of thirty grams or less of marijuana under INA § 212(h).

If a noncitizen was convicted at any time after entry of a violation, including conspiracies and attempts, to violate any controlled substance related law, except for a single offense of possession of thirty grams or less of marijuana, then the noncitizen is deportable. INA § 237(a)(2)(B)(i).
Drug Abuser or Addict

If a noncitizen is a “drug abuser or addict” then s/he is deportable. INA § 237(a)(2)(B)(ii). A noncitizen is inadmissible under health related grounds as a “drug abuser or addict,” as well. INA § 212(a)(1)(iv).

The Public Health Service (PHS) regulation at 42 C.F.R. § 34.2(h) defines drug addiction as the nonmedical use of a substance listed in Section 202 of the Controlled Substances Act (21 USC.§ 802) that has resulted in physical or psychological dependence. The PHS regulation at 42 C.F.R. § 34.2(g) defines drug abuse as “the non-medical use of a substance listed in section 202 of the Controlled Substances Act ... which has not necessarily resulted in physical or psychological dependence.” The current definition of “nonmedical use” in the technical instructions is “more than experimentation with the substance (e.g., a single use of marijuana or other non-prescribed psychoactive substances, such as amphetamines or barbiturates).”

Drug Traffickers

Controlled Substance or Drug trafficking comes up in both the inadmissibility and deportability contexts. A noncitizen is inadmissible if the Department of Homeland Security or a consular officer knows or has reason to believe s/he is a drug trafficker or that s/he is the spouse, son or daughter of a drug trafficker, if s/he had reason to know s/he was benefiting from the trafficking within the last 5 years. INA § 212(a)(2)(C). In the deportability context, drug trafficking is listed as conduct which constitutes an aggravated felony, which makes the noncitizen deportable. INA § 237(a)(2)(A)(iii); see also INA § 101(a)(43).

Aggravated Felonies

An aggravated felony is listed as types of conduct, which could be from a state or federal conviction or even a foreign conviction if the term of imprisonment was completed within the previous 15 years. INA § 101(a)(43). The list includes (A) murder, (B) drug trafficking, (C) firearms or explosives trafficking, (D) money laundering, (E) explosive or firearms offenses, (F) crime of violence, (G) theft offense or burglary for which the term of imprisonment is at least one year, (H) demanding or receiving a ransom (I) child pornography, (J) racketeering or gambling for which a sentence of at least one year of imprisonment may be imposed, (K) operation of prostitution business or transporting for purpose of prostitution crimes or slavery, (L) treason and security related violations, (M) fraud or deceit in which the victim(s) experience a loss of greater than $10,000 or tax evasion in which the Government loses at least $10,000, (N) alien smuggling, except for a first offense involving an immediate family member, (O) unlawful entry in the US by an aggravated felon, (P) document fraud for which the term of imprisonment is at least 1 year except for a first offense for the purpose of helping an immediate family member, (Q) offense related to failing to appear for service of sentence if the underlying offense is punishable by a sentence of 5 years or more, (R) commercial bribery, counterfeiting, forgery or trafficking in vehicles for which the term of imprisonment is at least a year, (S) obstruction of justice related crimes for which the term of imprisonment is at least one year, (T) failure to appear before a court pursuant to a court order to answer to a felony charge, for which a sentence of 2 years could be imposed, and (U) an attempt or conspiracy to commit any of the above. INA § 101(a)(43).
Waivers of Criminal Inadmissibility

Under 212(h), many criminal inadmissibility grounds may be waived, including CIMTs, multiple convictions, prostitution and commercialized vice, crimes from which immunity has been claimed, and a single possession of marijuana offense, of less than 30 grams. To be eligible, 1) the crime must have occurred more than 15 years ago or only be related to prostitution and the noncitizen’s admission would not be contrary to national interest and the noncitizen has been rehabilitated or 2) the noncitizen is an immigrant who is a spouse, parent son or daughter of a U.S. citizen or Legal Permanent Resident who would suffer extreme hardship by the noncitizen’s removal and the noncitizen accepts any terms prescribed by DHS.

Resources:


3.4 IMMIGRATION STATUS AND PUBLIC BENEFITS

Only some noncitizens are eligible to receive public benefits, and they may be eligible to receive some types of benefits, but not others. The National Immigrant Law Center has great resources on this issue including a table listing eligibility of various forms of federal benefits with a number of types of immigration statuses available at http://www.nilc.org/pubs/guideupdates/tbl1_ovrvw-fed-pgms-rev-2011-10.pdf. They also produce a pamphlet, “When Is it Safe to Use Public Benefits?” available at www.nilc.org/document.html?id=164.

Even for those who are authorized to access benefits, it is important to consider if they might later deemed to be a “public charge,” and inadmissible, which may come into play in adjustment of status applications. DHS is concerned with benefits that implicate 1) cash public assistance for income maintenance and 2) institutionalization for long term care at government expense. Therefore some types of benefits that might trigger further consideration include Supplemental Social Security Income (SSI), cash temporary assistance for needy families (TANF), and Medicaid that’s being used for long-term care in some kind of facility. Some benefits that should not trigger consideration are programs like Supplemental Nutritional Assistance Program (food stamps), CHIP, WIC, school lunches, emergency disaster relief, housing benefits, Medicaid and health services (not for long term care), crisis counseling and intervention. Furthermore, your children or other family members use of benefits should not be counted against you, unless their cash welfare, such as TANF or SSI, is the only source of family income.
4. COMMON IMMIGRATION APPLICATIONS FOR LEGAL SERVICES ATTORNEYS

Below are explanations of a number of common immigration applications. It’s always important before completing the application to fully read all relevant statutory and regulatory language, as well as the instructions for filling out the applications, which is generally found on the CIS website. Furthermore, applications are often rejected if any information is missing or not filled out on an application—therefore, even if a section is not applicable, it’s best to write “N/A” and if the answer is none, it’s best to write “None.” USCIS has stated that “N/A” and “none” are not interchangeable, so be sure to select which term is a more appropriate answer.

For applications submitted to CIS or to court, any non-English documents need to be accompanied by an English translation with a certification by the translator of the accurateness and truthfulness of their translation. Recommended language for the “Certificate of Translation” is the following:

I    (translator)    certify that I am competent to translate from     (foreign language)     to English and that the foregoing translation of     (name of document)     is accurate to the best of my ability.

All forms and the addendums must have an original signature. Letters of support, medical evaluations and sworn declarations from witnesses and third-parties should also have original signatures. However, for documentary evidence, such as birth certificates, marriage certificates, and passports, submit copies not originals.

4.1 FAMILY-BASED PETITIONS AND RELIEF UNDER THE VAWA, (FOR VICTIMS OF DOMESTIC VIOLENCE, WHO ARE MARRIED TO, OR THE CHILD OF A US CITIZEN OR LPR, OR WHO ARE PARENTS ABUSED BY A US CITIZEN SON OR DAUGHTER)

U.S. immigration law allows citizens and Legal Permanent Residents to petition for family members to obtain a status that makes them eligible to apply for legal permanent residence. U.S. citizens are allowed to petition for their children, spouses, siblings, and if the individual is at least 21 years old, their parents. LPRs can petition for their spouses and parents, but only unmarried children and cannot petition for siblings.

The U.S. citizen or Legal Permanent Resident must sponsor their spouse by petitioning with CIS through an Alien Petition, Form I-130. The “intending immigrant” files an application to adjust status, Form I-485, after the I-130 is approved (Note: the I-485 may be filed concurrently when the petitioner is a “immediate relative”, as discussed infra). There are sometimes waiting times for certain family members for an available immigrant visa number. U.S. citizens can immediately file for their spouses, unmarried children under 21 and if they’re over 21, their parents—these relatives are referred to as “immediate relatives.” Other U.S. citizen relatives and LPR relatives must wait in line until an immigrant visa is available. Once the Form I-130 is filed, CIS will assign the immigrant a priority date, and once that priority date becomes “current,” it is possible to apply for legal permanent resident status. To determine when a priority date is current, one must go to the U.S. State Department’s Visa Bulletin, which is updated monthly.
If a marriage-based application for immigrant status is approved before the couple has reached their second anniversary, the immigrant spouse and children will be granted conditional Legal Permanent Residence for two years. 90 days prior to the expiration of the conditional permanent residency, the couple must then jointly file to remove the conditions so that the immigrant spouse can become a full Legal Permanent Resident, although there are certain exceptions for the noncitizen to file by his/herself. The full LPR status does not expire; however the card, which is proof of status, will expire after 10 years and then must be renewed. Children and Parents are granted LPR status without conditions. Only spouses and those spouse’s derivative children must go through the intermediate step of getting conditional residence and later removing those conditions.

In a domestic violence dynamic involving an immigrant spouse, parent, or child, the abuser often will use immigration status as another tool of power and control over the immigrant. The initial family petition (Form I-130) is filed by the U.S. citizen or Legal Permanent Resident, so an abuser has complete control over the process. Furthermore, participation is needed by the U.S. citizen and Legal Permanent Resident in the application for permanent residence and to jointly file to remove conditional residence. Because of this potential exploitation of the immigration system to further control and dominate battered spouses, children and parents, Congress created relief under the Violence Against Women Act (VAWA), so that battered family members can petition for themselves.

Three types of relief are available for certain survivors of domestic violence, including noncitizen parents of an abused child, parents (abused by USC, but not LPR, sons or daughters), abused spouses, and abused children, when the abuse was perpetrated by the U.S. citizens or Legal Permanent Resident family member: 1) VAWA self-petitioning, 2) Battered Spouse/Child Waiver of the Jointly Filed petition to Remove Conditions and 3) VAWA Cancellation. VAWA self-petitions allow spouses, children or parents of abusive U.S. citizens or LPRs, who have been subjected to physical abuse or extreme cruelty to petition on their own to CIS to obtain status. The Battered Spouse/Child Waiver allows a conditional resident, who is a spouse (or was one, but is divorced) or child of an abusive citizen or LPR to apply on his/her own to remove conditions to become a LPR, even if their conditional residency has expired. In Immigration Court proceedings, a noncitizen can apply for VAWA cancellation to obtain LPR status by showing 3 years of physical presence, the qualifying abuse and relationship to a citizen or LPR, and extreme hardship.

An initial question to ask when determining which relief is applicable is what is the noncitizen’s current immigration status. If they have a green card and the expiration date is two years from when it was issued, they are a conditional resident; if the green card is going to expire within 90 days or it has already expired, the noncitizen is eligible to file for a battered spouse/child waiver to remove the conditions on their Legal Permanent Residence. If the noncitizen’s qualifying relative (US citizen or LPR spouse, child or parent) has either filed nothing or filed an I-130 and/or I-485, but the noncitizen has not been approved as a LPR or conditional resident, then the noncitizen could be eligible for VAWA self-petitioning as well as VAWA cancellation. The noncitizen must be in removal proceedings to apply for VAWA cancellation, as only the Executive Office of Immigration Review has authority to grant this type of relief.
An important practice pointer for any client, especially one who has a history of previous immigration applications, is to make a Freedom of Information Act request for the entire A-file (or Alien file), so that the attorney is fully aware of what has been previously filed and what the client’s status truly is. CIS has information on their website for how to make a request for someone’s entire A-file, by filing Form G-639, found at http://www.uscis.gov/g-639.

A good resource for these three types of VAWA applications is the ILRC’s “VAWA Manual: Immigration Relief for Abused Immigrants,” by Evangeline Abriel & Sally Kinoshita.

4.1.1 Self-Petition (Form I-360)

The VAWA self-petition is an immigration benefit for survivors of domestic violence who have never had conditional resident status or Lawful Permanent Residence. This application can be filed regardless of whether or not the US citizen or LPR family member filed a petition for the survivor. An approved self-petition gives the applicant a status called “deferred action” which makes him/her eligible for 1) work authorization, 2) potentially some public benefits and 3) to file an adjustment of status (green card) application, as long as an immigrant visa number is available.

ELIGIBILITY

The law governing VAWA self petitions is found at INA § 204(a)(1)(A), (B) and 8 C.F.R. § 204.2(c), (e). CIS has issued numerous memoranda regarding VAWA relief, which can be found on their website, as well as listed under the “VAWA” section of Asista’s (www.asistahelp.org) website. The form that is used to file for VAWA status is the I-360, which is a versatile form used in several other immigration applications, so several sections of the form will be inapplicable.

There are basically four statutory elements for VAWA self-petitioner status:

1) Qualifying relationship to US citizen or LPR, and in the cases of spousal relationship, a good faith marriage is required;
2) Battery and/or extreme cruelty;
3) Joint residence currently or in the past with abusive relative; and
4) Good Moral Character.

Qualifying Relationship

Spouse

Abused spouses of U.S. citizen or permanent residents are eligible to self-petition for themselves as well as their unmarried children who are under 21 if they have not filed for themselves. The spousal relationship includes 1) current spouses, 2) the case of when an immigrant unwittingly entered into a bigamous marriage to a US spouse (“intending” or “putative” spouse) or 3) in the case when the immigrant was married to a U.S. spouse but within the past two years a) the spouse died, b) the spouse lost or renounced their status on account of or incident to the abuse or c) if there was a divorce connected to the abuse. INA 204(a)(1)(A)(iii). Also as referenced above, spouses must prove that they entered into, or intended to enter into, a good faith marriage.
Parent
The parent of a child who has been abused by their U.S. citizen or permanent resident spouse is eligible to self-petition and petition for their children, including those who have not been abused, if they have not filed for themselves. Parents of a U.S. citizen that have been abused by their U.S. citizen “son” or “daughter” (i.e., children over 21-years-old) are allowed to self-petition.

Child
Abused children under 21, who are unmarried and have been abused by their U.S. citizen or LPR parent are allowed to self petition, and can petition for any children of their own. Abused children may apply after age 21 but before age 25 if they can demonstrate that the abuse was the main reason for the delay in filing.

Battery and/or Extreme Cruelty
While some form of physical abuse is common in VAWA cases, applicants who suffer extreme cruelty but no physical abuse are still eligible for relief. As the Ninth Circuit stated in Hernandez v Ashcroft, “Congress clearly intended extreme cruelty to indicate nonphysical aspects of domestic violence. Defining extreme cruelty in the context of domestic violence to include acts that ‘may not initially appear violent but that are part of an overall pattern of violence.’ is a reasonable construction of the statutory text at hand.” 345 F.3d 824, 839 (9th Cir. 2003). Often, there are various forms of abuse occurring at the same time: verbal threats, isolation, economic marginalization, sexual violence, physical battery, as well as other acts of psychological abuse. It can be helpful to work with a domestic violence advocate and to consult the “power-control” wheel, which is used widely the domestic violence survivor advocacy community.

Joint Residence
Self-petitioners must show that they lived with their abusive family member at some time. Supporting evidence in addition to the noncitizen’s own statement is important: statements from others who knew of the joint residence, leases or mortgages, as well as any other document with the joint address on it, such as mail, utility bills, tax returns, insurance documents, school records, and police or court documents.

Good Moral Character
Good Moral Character is defined in INA 101(f), identifying certain classes of people who do not have good moral character and then concluding that the list is not exhaustive. However, if the noncitizen has no arrest record and does not fall into the categories of persons enumerated, including being a habitual drunkard or someone who commits certain act such as prostitution and gambling, then there is not much evidence required except the noncitizen stating they are a person of good moral character as well as a “certificate of good conduct” or “no arrest record” from their local police department.

There are certain exceptions to good moral character for battered spouses and children. There must be both a waiver available for the conduct
and also the conduct must be connected to the abuse that the noncitizen suffered. Some grounds which may be waived include engaging in prostitution, commission of a CIMT, a controlled substance conviction, if it is a single marijuana possession of 30 grams or less. A good resource to use is CIS’s Memorandum “Determinations of Good Moral Character in VAWA-Based Self-Petition,” by William Yates, (January 19, 2005), HQOPRD 70/8.1/8.2, available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/gmc_011905.pdf

STANDARD OF PROOF

Congress recognized that undocumented noncitizen survivors of abuse may have difficulty in securing evidence documenting the elements required for prevailing in a self-petition. As a result it created a special “any credible evidence” standard of proof for survivors of domestic violence. INA § 204(a)(1)(J). This is more generous than a preponderance of the evidence standard.

Advocates should seek to secure as much primary evidence of the VAWA eligibility requirements as possible; however, a self-petitioner could theoretically prevail on her claim even if the only evidence she has of the abuse is her declaration. In such a case, the declaration should be detailed and the reasons for the lack of primary evidence should be explained.

PROCEDURE

After thoroughly reading the instructions regarding Form I-360, the attorney should help their client complete the form and collect all supporting documentation. VAWA self-petitions should be filed with the Vermont Service Center, at Attn.: VAWA Unit, USCIS, Vermont Service Center, 75 Lower Welden Street St. Albans, VT 05479-0001.

Applicants who are immediate relatives of a US citizen can apply for work authorization and for adjustment of status concurrently with their self-petition. Relatives of LPRs must wait until after their I-360 is approved to file for work authorization. They also must wait for their immigrant visa priority date to be current before filing for adjustment. LPRs who have approved I-130s based upon the same abusive relationship can use that earlier priority date in order to apply for adjustment of status.

The self-petition application packet should include the following

• Form G-28, Notice of Entry of Appearance as Attorney;
• Cover Letter explaining eligibility;
• Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, with any necessary addendum, with applicant’s original signature;
• Table of Contents of Supporting Documents;
• Applicant’s signed statement to address eligibility for self-petitioner status;
• Supporting evidence, which should include
  • evidence of the abuser’s US citizenship or LPR status, such a copy of a U.S. birth certificate, a certificate of citizenship, or LPR card; marriage and divorce decrees, birth certificates or other evidence of the qualifying relationship to the abuser;
○ evidence of current residence in US and of joint residency such as employment records, utility receipts, school records, hospital or medical records, birth certificates of common children, mortgages, rental records, insurance policies, or affidavits;

○ evidence of the abuse, such as photographs, proof of protective orders, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel;

○ for applicants over 14, affidavit of good moral character accompanied by a local police clearance from each locality or State in the United States or abroad in which the applicant resided for 6 or more months during the 3-year period immediately preceding the filing of the self-petition;

○ affidavits, birth certificates of children, medical reports, and other relevant credible evidence of the extreme hardship that would result if the applicant were to be removed or deported;

○ and for spouses, evidence of good faith marriage, including proof that one spouse has been listed as the other’s spouse on insurance policies, property leases, income tax forms, or bank accounts as well as testimony or other evidence regarding courtship, wedding ceremony, shared residence, and experiences.

**FEE**

There is no filing fee for an I-360 based on being a battered spouse/child/parent. Furthermore, fees associated with biometrics and Form I-765, Application for Work Authorization, or Form I-485, Application to Adjust Status, can be waived.

**AFTER FILING**

Applicants should receive a receipt of filing notice, which will have an individualized receipt number. It is possible to check processing times for VAWA self-petitions by going to CIS’s website. If there is an unusual issue or the case is way outside of processing times, attorneys may follow up on the status of a VAWA self-petition by calling the VSC hotline (802) 527-4888 or emailing the designated email address for VAWA petitions: hotlinefollowupI360.vsc@dhs.gov. Please note, the email and hotline are intended for only attorneys.

Applicants that meet all filing requirements will receive a Prima Facie Determination Notice that is valid for 150 days and can be presented to government agencies that provide certain public benefits to certain victims of domestic violence.

Applicants who were unauthorized and whose I-360 is approved may be granted “deferred action,” status, allowing them to remain and apply to work in the United States until their priority dates become current at which time they can file their adjustment of status application.
ADJUSTMENT OF STATUS

VAWA self-petitioners are eligible to adjust status under INA § 245(a). Applicants who are immediate relatives of a U.S. citizen can apply for work authorization and for adjustment of status concurrently with their self-petition. Relatives of LPRs must wait until after their I-360 is approved and their immigrant visa priority date is current.

VAWA self-petitioners enjoy special exemptions of inadmissibility as well as expanded waivers of inadmissibility. For example, they are exempt from public charge and they are deemed paroled, so that entry without inspection is not an issue. Furthermore, they have expanded waivers for grounds of inadmissibility including misrepresentation, past unlawful presence and removal, domestic violence as long as it was self-defense, and crimes. The form for Waiver of Inadmissibility is Form I-601.

An application packet for adjustment of status should include:

- Form G-28
- Form I-485, Application to Adjust Status
- Filing Fee or fee waiver request through a written request or Form I-912
- Filing Fee for biometrics or a fee waiver request, Form I-912
- Form G-325A;
- Form I-693, Medical Exam completed by a civil surgeon in a sealed envelope;
  - Note: There is no fee waiver for the fees for medical exam that go directly to the civil surgeon; however, the adjustment application may be filed without the I-693 so long as it is supplied by the time of adjudication. Thus the self-petitioner will likely be able to secure work authorization and acquire income prior to obtaining the I-693.
- Photocopy of VAWA self-petitioner approval notice;
- Photocopy of applicant’s birth certificate and other identity documents;
- Form I-601, Waiver of Inadmissibility, if applicable, with supporting documents and filing fee or waiver; and
- If you are filing your I-485 concurrently with the I-360 because of status as an immediate relative of a US citizen abuser, you may apply for work authorization under the (c)(9) category with 2 photographs.

4.1.2 Battered Spouse/Child Waiver (Form I-751)

ELIGIBILITY

The law governing battered spouse/child waivers is INA § 216(c)(4)(C) and 8 C.F.R. § 216.5.

There are two basic elements to prove:

1) Good Faith Marriage and
2) Physical Battery or Extreme Mental Cruelty during the marriage.

Good Faith Marriage

Please refer to the above VAWA self-petition section regarding Good Faith Marriage.
Physical Battery or Extreme Mental Cruelty

According to regulations, physical battery or extreme mental cruelty includes “being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor) or forced prostitution shall be considered acts of violence.” 8 C.F.R. § 216.5(e)(3)(i). Regulations also further describe what type of evidence is required, but a later amendment requires DHS to consider “any credible evidence,” which means that CIS may not deny an application for failure to submit a particular type of evidence. In light of this, it seems that the requirement that mental cruelty must be supported by licensed mental health professionals’ evaluations is now invalid.

Whether or not the couple has divorced and the timing of the divorce does not affect the battered spouse/child waiver, although divorce does provide another reason to waive joint filing under 8 C.F.R. § 216.5(e)(2).

PROCEDURE

After thoroughly reading the instructions regarding Form I-751 the attorney should help his/her client complete the form and collect all supporting documentation. Form I-751’s based upon abuse or cruelty are filed with the Vermont Service Center, at USCIS, Vermont Service Center, 75 Lower Welden Street St. Albans, VT 05479-0001. Please note that if the applicant is in removal proceedings, then the Immigration Court has jurisdiction over the I-751 petition and it should instead be filed with the court.

If filing with CIS, the waiver of the joint petition to remove conditions application packet should include the following:

- Form G-28, Notice of Entry of Appearance as Attorney;
- Cover Letter explaining eligibility;
- Form I-751, Petition to Remove Conditions on Residence, with any necessary addendum, with applicant’s original signature;
- Filing Fee or Fee Waiver, Form I-912;
- Table of Contents of Supporting Documents;
- Applicant’s signed statement to address eligibility including good faith marriage and physical and/or mental cruelty;
- a copy of applicant’s Permanent Resident Card, and a copy of the Permanent Resident cards of any of conditional resident children included in the petition;
- Supporting evidence of good faith marriage, including birth certificate(s) of child(ren) born to the marriage; lease or mortgage contracts showing joint occupancy and/or ownership; financial records showing joint ownership or responsibility, such as joint savings and checking accounts, joint federal and state tax returns, insurance policies that show the other spouse as the beneficiary, joint utility bills, joint installments, or other loans; and affidavits sworn to or affirmed by at least two people who have known both spouses since conditional residence was granted and have personal knowledge of the marriage and relationship.
• Evidence of the abuse, such as copies of reports or records issued by police, courts, medical personnel, school officials, clergy, social workers, and other social service agency personnel; legal documents relating to an order of protection; evidence of seeking safe haven in a battered women’s shelter or similar refuge; photographs of injuries; and a copy of the divorce decree, if the marriage was terminated by divorce on grounds of physical abuse or extreme cruelty.

FEE

The fee can be found on the CIS website, and is currently $505 for the form with additional biometric fee of $85 for applicant and an additional $85 for each additional derivative children listed on the application. A fee waiver can be requested for the application and biometrics.

AFTER FILING

Once CIS receives the battered spouse/child waiver petition, the applicant’s conditional permanent resident status is extended by operation of law, and the attorney should receive a Notice of Action indicating that petition was received and the extension of conditional residence.

Any questions regarding processing times or the application can be directed at VSC hotline 1-802-527-4888. The Vermont Service Center will issue a decision from reviewing the application packet and if an interview is necessary it will be conducted at the local regional office in the district where the applicant lives.

4.1.3 VAWA Cancellation

VAWA cancellation is relief that noncitizens can seek in Immigration Court. The Immigration Judge and BIA, who are part of the EOIR agency, have jurisdiction over these applications, not CIS.

ELIGIBILITY

The statutory authority for VAWA cancellation is found at INA § 240A(b)(2), and relevant regulations include 8 C.F.R. §§ 1240.20, 1240.21, and 1240.58. To be eligible, the noncitizen must prove:

1. Qualifying relationship:
   • married to someone who was or is a U.S. citizen or LPR, which includes an intended marriage which was not legitimate because of U.S. citizen or LPR’s bigamy
   • child of someone who was or is a U.S. citizen or LPR
   • parent of a child of a U.S. citizen or LPR (and child is subjected to the harm);

2. battered or subject to extreme cruelty;

3. has been physically present in the U.S. for a continuous period of not less than 3 years before filing the petition;

4. been a person of good moral character during the 3 year period before filing;

5. is not inadmissible under criminal and related grounds (INA § 212(a)(2)) or security and related grounds (INA § 212(a)(3)), nor is deportable for
marriage fraud, criminal offenses, failure to register or falsification of documents or security related grounds (INA § 237(a)(1)(G), (2), (3), (4));
6. has not been convicted of an aggravated felony; and
7. extreme hardship to noncitizen or to noncitizen’s children or parents, if removed.

For discussion of the qualifying battery or extreme cruelty element, please see the self-petition section above.

Physically present in the US
The noncitizen must show s/he has been in the US for three years immediately preceding the application for VAWA cancellation. INA § 240A(b)(2)(A)(ii). The “stop time” rule—which breaks continuous presence when a noncitizen commits a criminal inadmissibility offense under INA 212(a)(2)—does not apply to battered spouses and children. INA § 240A(d)(1). If the noncitizen is outside of the U.S. for more than 90 days at one time or 180 days in the aggregate during the 3 year period, that will break the continuous period, rendering him/her ineligible, unless the absence was connected to the extreme battery or cruelty. INA § 240A(b)(2)(B)

Good Moral Character
The noncitizen will not be barred from being found to lack good moral character if the act or conviction was connected to the battery or extreme cruelty and a waiver is available. INA §240A(b)(2)(C). Please see the self-petition section above for further discussion.

For information about inadmissibility and aggravated felony, please see the “Effects of Criminal Convictions” section above.

Extreme Hardship
Economic deprivation, loss of employment, or difficulty readjusting to life in the native country would not constitute extreme hardship on their own. Matter of Anderson, 16 I. & N. Dec. 596 (BIA 1978). A determination of extreme hardship will be made on a case by case basis, but it can often be helpful to demonstrate how deportation would frustrate the progress that the noncitizen has made in overcoming domestic violence (DV) circumstances. Therefore it is highly relevant if s/he is seeking treatment or has a support system in place that would not be in place in the home country.

Circumstances to address can include the regular, non-DV-related hardship factors under 8 C.F.R. § 1240.58(b) and should include the special DV hardship factors under 8 C.F.R. § 1240.58(c):

(1) The nature and extent of the physical or psychological consequences of abuse;
(2) The impact of loss of access to the U.S. courts and criminal justice system (including, but not limited to, the ability to obtain and enforce orders of protection, criminal investigations and prosecutions, and family law proceedings or court orders regarding child support, maintenance, child custody, and visitation);
(3) The likelihood that the batterer’s family, friends, or others acting on behalf of the batterer in the home country would physically or psychologically harm the applicant or the applicant’s child(ren);
(4) The applicant’s needs and/or needs of the applicant’s child(ren) for social, medical, mental health or other supportive services for victims of domestic violence that are unavailable or not reasonably accessible in the home country;

(5) The existence of laws and social practices in the home country that punish the applicant or the applicant’s child(ren) because they have been victims of domestic violence or have taken steps to leave an abusive household; and

(6) The abuser’s ability to travel to the home country and the ability and willingness of authorities in the home country to protect the applicant and/or the applicant’s children from future abuse.

PROCEDURE

As mentioned above, this type of relief is exclusively available to individuals in removal proceedings, so the application is filed with the Immigration Court. It is important to consult EOIR’s Immigration Court Manual generally for rules on filing applications in court, and often Judges will impose their own requirements additionally.

The form for the application is EOIR-42B, which is available on EOIR’s website, along with instructions. The filing fee is $100 and there is a biometrics fee, but these can be waived by the Immigration Judge, if you file a motion to waive these fees. Before filing the application, you must file the fee or a copy of the Immigration Judge’s decision to waive the fee, along with a copy of the application without attachments, a copy of filing instructions, and an E-28, Notice of Entry of Appearance as Attorney to the Texas Service Center in order to initiate biometrics processing. The filing instructions can be found here: http://www.uscis.gov/files/article/PreOrderInstr.pdf.

As with everything in Immigration Court, anything filed with the Court must be served on ICE counsel as well.

The packet that should be filed with court should include:

- Form EOIR 28 Notice of Entry of Appearance as Attorney of Record (if it has not yet been filed);
- Form EOIR-42B, Application for Cancellation of Removal;
- Table of Contents with all supporting documents and additional sheets;
- Form G-325A;
- Copy of the CIS ASC notice of fee receipt and biometrics appointment instructions;
- Two passport-sized, color photographs of applicant with lightly printed name and A number on the back of each photograph; and
- Completed certificate showing service of these documents on the ICE Assistant Chief Counsel, unless service is made in court on the date of filing.

Supporting Evidence should include:

- Evidence of physical presence including copies of passports showing travel, bank statements, leases, deeds, licenses, receipts, letters, birth records, church records, school records, employment records, and evidence of tax payments.
• Evidence of Good Moral Character, including police records from wherever the applicant lived in the statutory period, as well as letters and sworn declarations of support from witnesses, such as family, friends, community members and employers. These individuals should preferably be U.S. citizens, according to the form’s instructions.

• Evidence of Qualifying Relationship, including birth records, marriage certificates, proof of divorce or termination of marriage, and death certificates; and

• Evidence of Battery or Extreme Cruelty, which is described above in the self-petition section.

FEE
As explained above the fee is $100 for the form, $85 for biometrics, and the fees can be waived by the Immigration Judge upon a motion.

4.2 U NONIMMIGRANT STATUS (FOR VICTIMS OF SERIOUS CRIMES INCLUDING DOMESTIC VIOLENCE)

U Nonimmigrant Status, informally called a “U Visa,” is a status that allows noncitizen survivors of serious enumerated crimes to stay in the United States, obtain permission to work, apply for LPR status eventually, and help certain family members obtain U status as well. It was created by the Victims of Trafficking and Violence Prevention Act of 2000 and later amended by the Violence Against Women Act of 2006 and the Trafficking Victims Protection Act of 2008. Congress created the U visa to “strengthen the ability of law enforcement agencies to detect, investigate and prosecute cases of domestic violence, sexual assault, trafficking and other crimes ... committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. ” Victims of Trafficking and Violence Protection Act of 2000 (Public Law No: 106-386, 114 Stat. 1464), Sec. 1513(a)(2)(A), Oct. 28, 2000.

U status lasts for 4 years, but after 3 years, the U Nonimmigrant can apply to adjust status to become a legal permanent resident. The statute defining U status eligibility can be found at INA § 101(a)(15)(U) and INA § 214(p) and related U regulations are at 8 C.F.R. § 214.14. Eligibility requirements regarding inadmissibility waivers related to U status can be found at INA § 212(d)(14) and 8 C.F.R. § 212.17. Law regarding adjustment of status to legal permanent residence is found at INA § 245(m) and 8 C.F.R. § 245.24. There are also CIS memoranda and information which can be found on their website. The CIS application form is Form I-918, and the waiver of inadmissibility is Form I-192. Some other good resources are ILRC’s U Visa Manual, “The U Visa: Obtaining Status for Immigrant Victims of Crimes,” and Asista (http://www.asistahelp.org/) has a section devoted to U Visa law, policy and other materials.

The VAWA 2006 amendments explicitly expand the range of services LSC grantees can provide to survivors of domestic violence, sexual assault trafficking and other U-visa related crimes, regardless of their immigration status. LSC grantees are allowed to use both LSC and non-LSC funds to provide an otherwise ineligible noncitizen legal services that are “directly related” to the preventing or obtaining relief from, the battery or cruelty, sexual assault or trafficking, or other U visa crimes, or whose child has been similarly victimized. Secondly, LSC recip-
ients can provide “related legal assistance” to otherwise ineligible noncitizens who are survivors of domestic violence even if they are not married to, or the child of, their abusers. Thirdly, LSC recipients can provide legal assistance using LSC funds to new categories of previously ineligible noncitizens. LSC Program Letter 06-2 (February 21, 2006), at 2. LSC providers can assist noncitizens in filing for a U visa, as well as any related legal assistance, which grantees can make determinations on a case by case basis. Letter 06-2 at 4. The U Visa status does not make noncitizens eligible for federal public benefits.

ELIGIBILITY

In order to be eligible for U status, the following requirements must be met:

1) The primary applicant has suffered substantial physical or mental abuse as a result of having been a victim of certain criminal activity;

2) The applicant (or in the case of an applicant child under 16, the parent or guardian) possesses information concerning that criminal activity;

3) The applicant (or in the case of an applicant child under 16, the parent or guardian) has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the criminal activity;

4) The applicant has a certification from a federal, state, or local law enforcement authority certifying his or her helpfulness in the investigation or prosecution of the criminal activity (this certification is CIS Form I-918B);

5) The criminal activity violated the laws of the United States or occurred in the United States; and

6) The applicant must be admissible or obtain a waiver of inadmissibility for any inadmissibility grounds. INA § 101(a)(15)(U); INA § 212(d)(14).

Substantial physical or mental abuse as a result of having been a victim of certain criminal activity

The first requirement is that the applicant suffered “substantial abuse” because they were the victim of a crime, which violates Federal, State or local law. There are three sub-parts to this requirement: 1) the victim, 2) the crime and 3) substantial mental or physical harm.

There are two classes of victims under the law: direct and indirect. A direct victim is a person who suffered direct harm or who is directly or proximately harmed. 8 C.F.R. § 214.14(a)(14). Bystander victims who suffer proximate harm can be considered direct victims. For example, as described in the preamble to implementing regulations, a pregnant woman who witnesses a vicious assault and suffers a miscarriage as a result, would be considered a direct victim; even though she was not the victim who was being assaulted, she suffered proximate harm. An indirect victim includes certain family members of direct victims, who are incompetent, incapacitated or dead. Under the regulations, if the direct victim was a victim of murder or manslaughter, or is incompetent or incapacitated as a result of the crime, then indirect victims include: 1) spouses, 2) unmarried children under 21, 3) parents, and 4) siblings under 18, if the victim is under 21. For the purpose of indirect victims, the age of the victim is controlled by their age at the time of the crime. Indirect victims, like direct victims, still have to prove the other elements of U
status including helpfulness and harm. Victims, who are culpable themselves for the qualifying criminal activity, are excluded from being considered a victim. 8 C.F.R. § 214.14(a)(14)(iii).

The qualifying crimes are listed in the statute and include one or more of the following crimes or any similar activity that violates a Federal, State, or local criminal law: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, felonious assault, female genital mutilation, hostage-taking, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, torture, trafficking, unlawful criminal restraint, witness tampering, a related crime, and an attempt, conspiracy or solicitation to commit any of the above crimes. 8 C.F.R. § 214.14(a)(9). If the crime is witness tampering, obstruction of justice or perjury, then there is an additional requirement, that the perpetrator committed the offense 1) to avoid or frustrate efforts investigate, arrest, or to prosecute or 2) to further his or her abuse or exploitation or undue control through the legal system. 8 C.F.R. § 214.14(a)(14)(ii). Note that these “enumerated crimes” are general categories and that the statute allows consideration of “any similar activity” in determining eligibility for U nonimmigrant status. Thus, one may be able to describe a victim of “stalking” (a crime not enumerated in the U statute) as a victim of domestic violence. Additional documentation proving the “similarity” of a non-enumerated crime to an enumerated crime should be submitted.

The harm suffered by the victim can be physical or mental, but must be substantial. Factors to consider if the harm is substantial include 1) nature of the injury, 2) severity of the perpetrator’s conduct, 3) severity of the harm suffered, 4) duration of infliction of harm and 5) permanent or serious harm to appearance, health, physical or mental soundness. 8 C.F.R. § 214.14(b)(1). CIS will consider the totality of circumstances to determine substantial abuse. Therefore if there are pre-existing, underlying factors that would cause a victim to suffer more greatly than might be expected, those factors and that aggravated harm should be considered. CIS writes in the instructions to the application that if the crime “caused the aggravation of a pre-existing physical or mental injury” that will be considered, and if the crime involved a series of acts or occurred repeatedly over a period of time that is also relevant to the “totality” evaluation. For example, perhaps the victim has long suffered severe domestic violence and rape at the hands of the perpetrator, but the U crime that was certified was just for a simple battery that caused minimal physical harm. As this battery was a part of a long pattern of abuse, the victim likely suffered substantial mental harm, even if the physical harm was minor, due to the pre-existing harm. In order to determine if someone suffered substantial harm, it is often advisable to involve a mental health professional to assess the victim.

**Possesses information concerning that criminal activity and Helpfulness**

The statute does not specify the extent of information the victim must possess. So as long as the victim has some information about the crime that should be sufficient.
In terms of helpfulness, the statute does not require the criminal investigation lead to an arrest or prosecution. Therefore, a victim who reports a qualifying crime which begins a criminal investigation should be sufficient for helpfulness. Under the regulations, there is an additional requirement that the applicant cannot refuse to provide reasonably requested assistance throughout the duration of their U status. 8 C.F.R. § 214.14(b)(3). There is an exception to the helpfulness requirement in that victims who are under 16 years of age can satisfy the requirement if their parent, guardian or next friend provides the assistance in their place. INA § 101(a)(15)(U)(i)(III), 8 C.F.R. § 214.14(b)(3). Evidence of this helpfulness should include the completed and signed U certification as well as the applicant’s own declaration describing how s/he helped (reporting the crime, providing details to investigators, potentially allowing physical evidence or photographs to be taken, and/or if they testified). Other evidence could include the police report, court transcripts if the victim testified, letters of support from investigators and/or prosecutors, other witness statements who have knowledge of how the victim assisted the investigation and/or prosecution.

Certification from a federal, state, or local law enforcement authority

In order to be eligible to apply for U status, a federal, state or local law enforcement entity must sign a completed certification, which is CIS Form I-918B and can be found on the CIS website (www.uscis.gov) under “Forms.” INA § 101(a)(15)(U)(i)(III).

A certifying agency can be a Federal, State, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime, including child protective services, the Equal Employment Opportunity Commission, and the Department of Labor. 8 C.F.R. § 214.14(a)(2). Some common examples of certifying agencies are police departments, District Attorneys’ offices, juvenile, domestic relations, civil or criminal judges, the FBI, the Department of Justice, the Department of Children and Family Services, and even ICE. The main consideration is if the entity has jurisdiction over the qualifying crime. Some victims might have several possible certifying agencies. Imagine a woman is the victim of domestic violence, so she obtains a protective order and her partner is convicted criminally of the abuse. Certifying entities would include the police to whom she reported the crime, the district attorney’s office that brought the charges, the criminal court judge who presided over the proceedings, and the civil court judge who granted the protective order.

The law enforcement certification must be certified by a certifying official, who is 1) the head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency or (2) a Federal, State, or local judge. 8 C.F.R. §214.14(a)(3).

Violated the laws of the United States or occurred in the United States

The qualifying crime must have violated the laws of the United States or occurred in the United States. INA § 101(a)(15)(U)(i)(IV); 8 C.F.R. § 214.14(b)(4). This includes Indian country, U.S. military installations, and U.S. territories and possessions. 8 C.F.R. §214.14(b)(4). Indian country is defined as (i) all land within any Indian reservation under the jurisdiction of
the United States, (ii) all dependent Indian communities within the borders of the United States regardless of if it is within a state; and (iii) all Indian allotments. 8 C.F.R. §214.14(a)(4). Military installations are defined as any facility, base, camp, post, encampment, station, yard, center, port, aircraft, vehicle, or vessel under the jurisdiction of the Department of Defense, including any leased facility, or any other location under military control. 8 C.F.R. § 214.14(a)(6). Even if the crime did not occur within the United States, its territories or possessions, military installations or Indian land, if the crime violates a federal statute that provides for extraterritorial jurisdiction, then it qualifies. 8 C.F.R. § 214.14(b)(4).

Admissibility
In order to qualify for U status, the applicant must be admissible, or obtain a waiver for the inadmissibility ground(s). INA § 214(a)(1), INA § 212(a). The U statute has broad waivers of inadmissibility—allowing any ground to be waived except for grounds related to Nazi persecutors, genocides, acts of torture or extrajudicial killings. INA § 212(d)(14). The standard is that it is at the discretion of DHS and that it in the public or national interest. 8 C.F.R. § 212.17(b). If the inadmissibility is due to criminal or related grounds, CIS will look at the number and severity of the applicant’s convictions. With violent or dangerous crimes or inadmissibility based on the security and related grounds, CIS will only exercise favorable discretion in extraordinary circumstances 8 C.F.R. § 212.17 (b)(2). It is also important to note that denials of waivers can’t be appealed, and waivers can also be revoked at any time, and that decision can’t be appealed, either. 8 C.F.R. § 212.17 (b)(3).

PROCEDURE
As with all immigration applications, practitioners should thoroughly read the instructions for filing the application, which are posted on the CIS website at http://www.uscis.gov/i-918. All applications for U Nonimmigrant Status are filed with and adjudicated by the Vermont Service Center, at: Attn.: Crime Victim Unit, U.S. Citizen and Immigration Services, Vermont Service Center, 75 Lower Weldon Street, St. Albans, VT 05479-0001.

The application packet should include the following

- Form G-28, Notice of Entry of Appearance as Attorney;
- Cover Letter explaining eligibility and potential inadmissibility issues;
- Form I-918, Petition for U Nonimmigrant Status with any addendum explanations signed by the applicant, if applicable;
- Form I-918 Supplement A, if applicable, “Petition for Qualifying Family Members of U-1 Recipients, for any derivative applicants;
- Form I-918 Supplement B, “U Nonimmigrant Status Certificate,” signed by a certifying official within the past 6 months;
- Form I-192, “Application for Advance Parole to Enter as Non-Immigrant,” requesting waivers for any ground of inadmissibility, with supporting evidence. (An individual may submit only one waiver to address multiple grounds of inadmissibility; however if there are derivative applicants, each one of them must submit their own waiver to address their own admissibility issues.)
• Filing Fee for Waiver of Inadmissibility, or Form I-912, “Request for Fee Waiver,” with supporting documents;
• Table of Contents of Supporting Documents;
• Applicant’s signed statement to address eligibility for U status, as well as inadmissibility issues;
• A copy of the identity page of applicant’s valid passport or a waiver of inadmissibility must be included to waive this requirement;
• If there are family member applications, then they must provide proof of the qualifying relationship, such as marriage certificate, birth certificate, and/or adoption decree;
• Any supporting evidence in support of I-918 and I-192, which may include police reports; court documents; medical records; letters, statements or reports from other individuals including medical personnel, school officials, clergy, family members or witnesses; news articles; orders of protection; photographs; psychological evaluations; or any other relevant documents; and
• A copy of the criminal statute(s) defining the crime which the applicant suffered.

The Form I-918 Supplement B, “U Nonimmigrant Status Certificate,” is the most critical part of the U application as it is a mandatory pre-requisite. Often law enforcement agencies are not familiar with U Nonimmigrant Status and informal advocacy and/or education is needed before the agency is willing to certify. It is best to talk to experienced local immigration practitioners familiar with U applications to find out if there is a point person for U certifications at the particular agency, or to do outreach to the agency. Many law enforcement agencies prefer that advocates draft up the form I-918 Supplement B for them, but some may prefer to do it themselves, so it is best to find out as much as possible about the local practice before approaching the agency. Law enforcement agencies are not mandated to sign off on U certification, even if all the information is true, so advocates should try to build relationships with local law enforcement to have a successful collaboration. A good resource is Legal Momentum and Vera Institute’s “Tool Kit for Law Enforcement of the U Visa,” found at http://www.acasa.us/pdfs/U-Visa-Toolkit%20%20FINAL.pdf.

As mentioned above, waivers of inadmissibility are available for most grounds. Common grounds of inadmissibility include immigration violations, including entering the United States without permission, failing to attend removal proceedings, misrepresentation or fraud for the purpose of obtaining an immigration benefit, alien smuggling, civil document fraud, prior removal orders, and unlawful presence; communicable disease; physical or mental disorders that may pose a threat; drug abuse or addiction; criminal acts or convictions including CIMTs, drug convictions, prostitution; and public charge.

It is a commonly held belief among advocates who regularly apply for U status that it is best to admit any potential inadmissibility in the initial application, and request a waiver, if needed. In fact, according to notes from a CIS meeting regarding U status with advocates, CIS stated: “[I]t’s better to acknowledge and explain as much as possible to not appear evasive. It’s better
to include and explain as much as possible upfront so your client will appear more credible. Err on the side of caution and disclose upfront.” Q&A on U Visas (November, 2007) at page 4, available at http://www.asistahelp.org/documents/resources/CIS_Q_A_on_Us_2007_9EB4BC84ED006.doc Furthermore, one practice is to seek waivers of inadmissibility for whichever grounds you have identified, and “any other ground for which CIS detects,” as a catch-all.

The inadmissibility waiver (Form I-192) must be accompanied by a fee or fee waiver (Form I-912), and if the conduct does trigger inadmissibility it is often best to have a separate client statement specifically addressing why the grounds should be waived, as well as other evidence in support of the waiver. An explanation addressing potential inadmissibility should be included in the cover letter to the whole application packet as well as being attached to the Form I-192. Think broadly about why it is in the public interest for your client to obtain the waiver. First, consider the purpose of U non-immigrant status itself: to “strengthen the ability of law enforcement agencies to detect, investigate and prosecute cases of domestic violence, sexual assault, trafficking and other crimes ... committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. ” In fact, if the applicant has no serious inadmissibility issues, USCIS will generally grant the waiver on the basis of the applicant’s eligibility for U status and without additional documentation.

If, however, there are more serious inadmissibility issues, USCIS will require additional documentation to support the waiver. Potentially their family will suffer hardship and statements from all family members can be included. If your client is involved in the community, you should include letters from community members, church leaders, etc. to show the positive impact the client is making. If there are reasons why it would be dangerous for your client to return to their native country, include country and news reports, as well as personal statements about what danger is likely to come to them if they cannot remain in the United States.

FEE

There is no fee for filing a U Nonimmigrant Status application, although there is a fee for the waiver of inadmissibility. Currently the fee is $545, although you can apply for a fee waiver. Furthermore, there is a fee for the work authorization applications, Form I-765, for any derivatives, if they wish to seek permission to work along with U-status. The fee waiver can also be sought for these filing fees. The filing fee request need only include the Form I-912, or a short statement from the applicant detailing their financial situation, although other proof of inability to pay may also be included in support of the request.

AFTER FILING

Once you submit an application to the Vermont Service Center, they will promptly issue a receipt of the application to the applicant and applicant’s attorney, with a receipt number that can be used to track the case status online through CIS’s website. If there is an unusual issue or a case way outside of processing times, an attorney may use the hotline for U & T applications: 802-527-4888 or use the email address hotlinefollowupI918I914.vsc@dhs.gov.
Average processing times can be found on CIS’s website, and currently the U processing time is between 4-5 months, but the Center says that it is only after the application is pending for a year that it will be flagged for being outside of processing times. The next correspondence after the initial receipts usually is a notice for biometrics to be taken at the local CIS office. If the Center feels that there is insufficient evidence to prove an element, they will issue a “Request for Evidence” (RFE), on blue paper and a deadline. CIS cannot grant extensions for RFEs, and it is important to respond to the RFE with evidence, even if the RFE requests evidence that has already been submitted. An approval or denial notice will then be sent out. If the U visa application is approved, the application will often get the work authorization card before the approval notice which contains an I-94, arrival/departure document. The I-94 document should be kept with the U Nonimmigrant’s passport and serves as proof of U status.

If the application is denied, a letter explaining why should be issued, and the applicant may appeal to the Administrative Appeals Office. The Vermont Service Center has stated that they are currently not referring denied U applicants to removal proceedings.

AFTER APPROVAL

Noncitizens may want to travel abroad after the approval of their U status, but they should be very careful. In order to adjust status to lawful permanent residence, the applicant must have three years of continuous physical presence in U status, so s/he may not be outside of the U.S. for more than 90 days at a time, or 180 days in total. Traveling abroad may also trigger further inadmissibility grounds, such as unlawful presence bars, and to be able to return, the applicants must submit and be approved for a waiver of inadmissibility for the new ground. Therefore, it is much safer if U Nonimmigrants refrain from traveling abroad until after they become LPRs.

In order to be eligible for adjustment of status, U Nonimmigrants also have an ongoing responsibility to respond to reasonable requests for assistance from the law enforcement officials, regarding their case.

ADJUSTMENT OF STATUS

The law regarding adjustment for U Nonimmigrants is found at INA § 245 and 8 C.F.R. § 245.25. U Nonimmigrants are eligible to adjust status to be LPRs 1) after three years of continuous physical presence, 2) if DHS determines that the nonimmigrant’s continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or otherwise in the public interest, 3) if they have not unreasonably refused to assist in investigation or prosecution, and 4) if not inadmissible on the grounds of Nazi persecutor, genocide, torture, or extrajudicial killing.

Applications should include:

- Form G-28;
- Form I-485, Application to Adjust Status;
- Filing Fee or fee waiver request, Form I-912;
- Filing Fee for biometrics or a fee waiver request, Form I-912;
• Form G-325A;
• Form I-693, Medical Exam completed by a civil surgeon in a sealed envelope
• Photocopy of U nonimmigrant status approval notice and photocopy of inadmissibility waiver approval, if applicable;
• Photocopy of all pages of applicant’s passport valid during the required period;
• Evidence of continuous physical presence, relating to discretion, and that the applicant has not unreasonably refused to cooperate with law enforcement (Applicant’s statement can address all of these points); and
• Form I-765, Application for Employment Authorization, under the (c)(9) category with 2 photographs.

4.3 T NONIMMIGRANT STATUS (FOR VICTIMS OF HUMAN TRAFFICKING)

Human trafficking, often referred to as modern day slavery, affects men and women around the world. Traffickers may take many forms and may use fake business schemes to entrap victims, such as educational or work programs, mail-order bride companies, maid and domestic worker programs, and unlawful adoption services. Individuals may believe the schemes are legitimate and enter them willingly but then are forced into various forms of forced labor situations such as sweatshops, sex trade, agricultural labor, and domestic servitude. The Trafficking Victims Protection Act of 2000 and subsequent reauthorization acts have created and developed protection for immigrant victims of a severe form of trafficking in the form of T Nonimmigrant Status. (Note that it is possible for trafficking victims to seek U Nonimmigrant Status, as trafficking is an enumerated crime, and depending on the circumstances they may be eligible for even more forms of immigration relief.)

Another form of interim relief for trafficking survivors is continued presence which allows federal law enforcement to permit the noncitizens presence in the United States if the noncitizen is a victim of a severe form of trafficking and a potential witness. Only federal law enforcement agencies can initiate this process, and once granted it can be issued for up to a one year increment, which may be extended. Once this has been granted, the Office of Refugee and Resettlement generates a letter for adults certifying their status, which allows them to apply for work authorization as well as access to public benefit programs. Those who have been certified can access the level of public benefits as refugees and asylees. The 5-year bar for certain public benefits does not apply to certified victims of human trafficking.

If approved for T Nonimmigrant Status, the individual will be granted four years of status, and after three, the noncitizen can apply for LPR status. Furthermore, during this time period they are eligible to work. They may also be eligible for special federal benefits programs.

ELIGIBILITY

The statutory and regulatory authority for T Nonimmigrant status is at INA § 101(a)(15)(T) and 8 C.F.R. § 214.11. Waivers of inadmissibility for T Nonimmigrant status are found at 8 C.F.R. § 212.16. Statutory and regulatory
authority for adjustment of status under T is INA § 245(l), and 8 C.F.R. 245.23. A relevant CIS Memorandum is “William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Changes to T and U Nonimmigrant Status and Adjustment of Status Provisions; Revisions to Adjudicator’s Field Manual (AFM) Chapters 23.5 and 39 (AFM Update AD10-38),” (July 21, 2010) (PM-602-0004).

In order to be eligible for T Nonimmigrant Status, also informally called “T Visa,” the applicant must show that s/he
1. is a victim of a severe form of trafficking in persons;
2. is physically present in the United States due to trafficking;
3. has been willing to comply with any reasonable request for assistance in the investigation or prosecution of acts of trafficking in persons, unless the applicant is a minor;
4. would suffer extreme hardship involving unusual and severe harm if removed from the United States
5. has not committed a severe form of trafficking in persons offense; and
6. is not inadmissible under INA § 212 (although there are generous waivers for T applicants).

There are also special provisions for those brought into the country for investigations or as witnesses, for those who are unable to participate in law enforcement interview because of trauma and for the parents or unmarried siblings under 18 who face retaliation as result of their family members’ escape from trafficking; each are allowed to apply for T Nonimmigrant status. TVPRA 2008.

Severe Form of Trafficking
Severe Form of Trafficking is defined statutorily defined as:
A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. 22 USC § 7102(8).

The component parts of this definition are also listed in the same statutory section.

Physically Present
The applicant must prove physical presence in the U.S., America Samoa or Northern Mariana Island on account of trafficking. If the applicant leaves and returns to the U.S., s/he must show that the return was a result of continued victimization by traffickers or a new incident of trafficking.

Reasonable Request to Assist
Adult applicants must comply with reasonable requests from law enforcement for assistance in the trafficking investigation and prosecution. Law Enforcement Agency (LEA) refers to any federal law enforcement agency
that has responsibility and authority for the detection, investigation or prosecution of severe forms of trafficking in persons, such as U.S. Attorneys, the FBI, CIS, DOJ, ICE, and United States Marshals. The TVPRA has expanded LEAs to include state and local law enforcement, which is reflected in the T application instructions, but not yet in the regulations.

In order to determine if the request for assistance was reasonable, CIS should look at the totality of circumstances including general law enforcement, prosecutorial and judicial practices, the nature of the victimization, specific circumstances of the applicant, and age and maturity of young victims. 8 C.F.R. 214.11(a).

Severe Hardship

This hardship is elevated from “extreme hardship,” and refers to the hardship suffered if removed to the home country. Factors to consider can include: applicant’s age and personal circumstances; health problems that require attention not reasonably available in the home country; physical and psychological harm caused by the trafficking; impact on applicant including loss of access to U.S. courts and judicial systems for purposes such as protection and redressing effects of trafficking, reasonable expectation that the laws, social practices or customs in an applicant’s country would punish applicant for having been the victim of trafficking; likelihood of revictimization; likelihood that the trafficker would severely harm the applicant; and likelihood that the applicant’s individual safety would be seriously threatened by the existence of civil unrest or armed conflict.

PROCEDURE

As with all immigration applications, practitioners should thoroughly read the instructions for filing the application, which are posted on the CIS website at http://www.uscis.gov/i-914. All applications for T Nonimmigrant Status are filed with and adjudicated by the Vermont Service Center, at: Attn.: Crime Victim Unit, U.S. Citizen and Immigration Services, Vermont Service Center, 75 Lower Weldon Street, St. Albans, VT 05479-0001.

The application packet should include the following:

- Form G-28, Notice of Entry of Appearance as Attorney;
- Cover Letter explaining eligibility and potential inadmissibility issues;
- Form I-914, Petition for T Nonimmigrant Status with any addendum explanations signed by the applicant, if applicable;
- Form I-914 Supplement A, if applicable, “Petition for Qualifying Family Members of T-1 Recipients, for any derivative applicants;
- Form I-914 Supplement B, “Declaration for Law Enforcement Officer,” signed by a certifying official within the past 6 months, if available, but this is not mandatory;
- Three identical, passport-sized color photographs, Name and A-number, if one exists, should be lightly written on the back of the photographs;
- Form I-192, “Application for Advance Parole to Enter as Non-Immigrant,” requesting waivers for any ground of inadmissibility, with supporting evidence. (An individual may submit only one waiver to address
multiple grounds of inadmissibility, however if there are derivative applicants, each one of them must submit their own waiver to address their own admissibility issues.);

- Filing Fee for Waiver of Inadmissibility, or Form I-912, “Request for Fee Waiver,” with supporting documents;
- If a derivative is applying, they will also need to submit proof of their relationship to the applicant as well as three, passport-sized color photographs;
- Table of Contents of Supporting Documents;
- Applicant’s signed statement to address eligibility for T status, as well as inadmissibility issues;
- A copy of the identity page of applicant’s valid passport, or a waiver of inadmissibility must be included to waive this requirement;
- If there are family member applications, then they must provide proof of the qualifying relationship, such as marriage certificate, birth certificate, and/or adoption decree; and
- Any supporting evidence in support of I-914 and I-192, which may include police reports; court documents; medical records; letters, statements or reports from other individuals including medical personnel, school officials, clergy, family members or witnesses; news articles; orders of protection; photographs; psychological evaluations; or any other relevant documents.

**I-914, Supplement B, Certificate**

The Law Enforcement Certificate is primary evidence of the trafficking, although it is not mandatory as in the U context. If the applicant does not provide a completed Form I-914, Supplement B, then s/he should submit an explanation, describing attempts to obtain the certification and why it unavailable, or if s/he did not attempt to obtain the certification, s/he must explain why not. Furthermore if it’s not available, applicant should provide evidence that CIS has arranged for continued presence based off of trafficking or sufficient secondary credible evidence of trafficking. 8 C.F.R. 214.11(f).

**Applicant’s sworn declaration**

Applicant’s statement should address all elements of eligibility, including how s/he entered the US, why s/he entered the US, how s/he was recruited into the trafficking situation, when and where the events occurred, who was responsible, length of detention by the traffickers; how and when s/he escaped or departed from the traffickers; what s/he has been doing since the escape; why could not return to home country after escape; future harm or mistreatment feared if s/he is removed from the United States; and why s/he fears this harm.

**FEE**

There is no fee for filing a T Nonimmigrant Status application, although there is a fee for the waiver of inadmissibility. Currently the fee is $545, although you can apply for a fee waiver. Furthermore, there is a fee for the work authorization applications, Form I-765, for any derivatives, if they wish to seek permission to work along with T-status. The fee waiver can also be
sought for these filing fees as well. The filing fee request need only include the Form I-912, as well as a short statement from the applicant detailing their financial situation, although other proof of inability to pay may also be included in support of the request.

AFTER FILING

Once you submit an application to the Vermont Service Center, they will promptly issue a receipt of the application to the applicant and applicant’s attorney, with a receipt number that can be used to track the case status online through the CIS website. If there is an extremely unusual issue, the attorney may contact the hotline for U & T applications: by calling 802-527-4888 or through the email address, hotlinefollowupI918I914.vsc@dhs.gov.

Average processing times can be found on CIS’s website, and currently the T processing time is between 4-5 months, but the Center says that it is only after the application is pending for a year that it will be flagged for being outside of processing times. The next correspondence after the initial receipt usually is a notice for biometrics to be taken at the local CIS office. If the Center feels that there is insufficient evidence to prove an element, they will issue a “Request for Evidence” (RFE), on blue paper and a deadline. CIS cannot grant extensions for RFEs, and it is important to respond to the RFE with evidence, even if the RFE requests evidence that has already been submitted. An approval or denial notice will then be sent out. Often the work authorization card will arrive before the approval notice which contains an I-94, arrival/departure document, that should be kept with the T Nonimmigrant’s passport.

If the application is denied, a letter explaining why should be issued, and the applicant may appeal to the Administrative Appeals Office. The Vermont Service Center has stated that they are currently not referring denied T applicants to removal proceedings.

ADJUSTMENT

The law regarding adjustment for T nonimmigrants is at INA § 245(l), and 8 C.F.R. § 245.23. T nonimmigrants are eligible to adjust status to be legal permanent residents 1) after three years of continuous physical presence or physically present in the United States for a continuous period during the investigation or prosecution of acts of trafficking and, in the opinion of the Attorney General, the investigation or prosecution is complete, whichever period of time is less, 2) has through that time been a person of good moral character, although exceptions can be made for incidents to the trafficking, 3) if they have not unreasonably refused to assist in investigation or prosecution, although there are exceptions if the victim was a minor or if removal would cause extreme hardship involving severe and unusual harm and 4) is not inadmissible, on a ground not yet waived, although there are a number of exceptions and waivers available.

Applications should include:

- Form G-28;
- Form I-485, Application to Adjust Status;
- Filing Fee or fee waiver request, Form I-912;
• Filing Fee for biometrics or a fee waiver request, Form I-912;
• Form G-325A;
• Form I-693, Medical Exam completed by a civil surgeon in a sealed envelope;
• Photocopy of T nonimmigrant status approval notice and photocopy of inadmissibility waiver approval, if applicable;
• Photocopy of all pages of applicant’s passport valid during the requirement period;
• Evidence of continuous physical presence, good moral character, and that the applicant has not unreasonably refused to cooperate with law enforcement (Applicant’s statement can address all of these points); and
• Form I-765, Application for Employment Authorization, under the (c)(9) category with 2 photographs.

4.4 SPECIAL IMMIGRANT JUVENILE STATUS (FOR CHILDREN WHO HAVE BEEN ABANDONED, ABUSED OR NEGLECTED)

In 1990, Congress created the Special Immigrant Juvenile (“SIJ”) status to allow a growing number of undocumented, state-dependent youth a way to self-petition for legal immigration status and seek permanent residence. According to the Federal Registrar, its purpose was to lessen “hardships experienced by some dependents of the United States juvenile courts.”

The process for obtaining SIJ status can be divided into two major steps, involving a decision from a state court and then from CIS. First, the youth must obtain an order with certain findings from a “juvenile court,” which is defined as any state court having authority over the care and custody of juveniles. 8 C.F.R. 204.11(a). This order must indicate that 1) the child is dependent on the court or the court has placed the child in the custody of an individual or entity, often through a legal proceeding related to foster care, guardianship or custody, 2) reunification with one or both parents is not viable due to abandonment, abuse, neglect or a similar basis and 3) it is not in the best interest of the juvenile to be returned to their country of origin. INA § 101(a)(27)(J). Once this order is obtained, then the youth can petition CIS for SIJ status. Once a child has been approved for SIJ status, they are immediately eligible to apply for legal permanent residency.

ELIGIBILITY

The statutory authority for SIJ is found in INA § 101(a)(27)(J), and regulations are found at 8 C.F.R. § 204.11, although at the time of this writing, new regulations are under review to be promulgated.

There are a couple memoranda, including “Memorandum #3 — Field Guidance on SIJS Petitions,”2 and “Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions.”3

State law also impacts SIJ determinations, as the court must have jurisdiction over the youth under a state proceeding, such as a Child In Need of

Care (CINC), custody, adoption, tutorship, juvenile delinquency, interdiction, or declaratory judgment proceeding.

In order to be eligible for Special Immigrant Juvenile Status, the youth:

1) must be under 21 at time of filing;
2) unmarried;
3) must be declared dependent on a “juvenile court” or such court places the youth under the custody or an entity or individual;
4) whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;
5) for whom it has been determined in administrative or judicial proceedings that it would not be in the youth’s best interest to be returned to his/her or a parent’s previous country of nationality or last habitual residence; and
6) is not subject to specific consent, or DHS has granted specific consent to the custody of the child.

Note: Special Immigrant Juveniles can have derivatives on their adjustment applications, except they can never confer any immigrant benefit to a natural parent or prior adoptive parent.

Declared Dependent or Placed in the Custody

Under the regulations, juvenile court is defined as court having jurisdiction under State law to make judicial determinations about the custody & care of juveniles. 8 C.F.R. § 204.11(a) In Louisiana, this might be a court of general jurisdiction or it could be called a juvenile court, depending on what kind of proceeding is being brought. The requirement is that the court declare the child dependent on the court OR the court places the child in the custody of an agency of the State (as in a foster care or CINC proceeding), OR places the child in the custody of an entity or individual (such as a custody, tutorship, or adoption proceeding). Some case law from other states suggests that a court can declare the child dependent on the court if the court exercises jurisdiction over the youth.

Reunification with 1 or more parents

The court must also make a finding that reunification with one or both parents is not viable due to abandonment, abuse, neglect or a similar basis found under law. Usually this finding is made based on conduct that occurred in the home country, which may have contributed to the child’s migration to the U.S.

Best Interests

There must be a finding as a result of administrative or judicial proceeding that it is not in the child’s best interest to return to the country of origin. The best interest of the child factors are found in Louisiana Civil Code Article 134. Factors to look at include: 1) emotional ties 2) capacity and disposition to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child 3) capacity and disposition to provide the child with food, clothing, medical care, and other material needs 4) the length
of time the child has lived in a stable, adequate environment, and the desir-
ability of maintaining continuity of that environment 5) the permanence, as
a family unit, of the existing or proposed custodial home or homes 6) the
moral fitness of each party, insofar as it affects the welfare of the child 7)
the mental and physical health of each party 8) the home, school, and com-
unity history of the child 9) the reasonable preference of the child, if the
court deems the child to be of sufficient age to express a preference 10) the
willingness and ability of each party to facilitate and encourage a close and
continuing relationship between the child and the other party 11) the distance
between the respective residences of the parties 12) the responsibility for
the care and rearing of the child previously exercised by each party.

PROCEDURE
The first step in the process involves requesting that the special findings be
made from a court having jurisdiction over the child, which as stated before
might be in any number of types of proceedings depending on the child’s living
situation. Some types of proceedings may include: CINC, custody, tutorship,
declaratory judgment, voluntary transfer of parental rights and adoption pro-
ceedings. It is highly recommended that an attorney very familiar with juve-
nile and family court matters be involved in this part of the process.

Some evidence that might be presented to the state court includes iden-
tity documents for child, statements from child, current sponsor, and anyone
who has knowledge of the abuse, abandonment or neglect of the parent(s),
potential witness(es) to testify, school and medical records, country condi-
tions, such as reports and/or news articles, psychological evaluation, any
prior documentary evidence of abuse or neglect by parent, such as prior
restraining order or police report, and if child was held in immigration cus-
tody, portions of the Office of Refugee Resettlement case file.

Once the SIJ predicate-order has been obtained, the child may self-peti-
tion to CIS for designation as a Special Immigrant Juvenile. If a SIJ applicant
is neither in removal proceedings nor has a prior order of removal, s/he may
wish to file for adjustment of status concurrently with the SIJ petition. SIJ
applicants in removal proceedings should only submit the self-petition to CIS,
as jurisdiction over adjustment of status will generally lie with the Immi-
gration Judge until proceedings are terminated.

In order to apply for designation as a Special Immigrant Juvenile, the
applicant must include:

- Cover Letter;
- Form G-28, Notice of Entry of Appearance as Attorney;
- Form I-360, Self-Petition;
- Copy of Birth Certificate with certified translation or other proof of age
  and identity; and
- Copy of Juvenile Court Order.

The SIJ petition should be filed with the Chicago Lockbox address. For
USPS deliveries: USCIS, P.O. Box 805887, Chicago, IL 60680-4120 and for
express mail: USCIS, Attn: FBAS, 131 South Dearborn - 3rd Floor, Chicago,
IL 60603-5517.
FEE

There is no fee for filing for the I-360 SIJ petition, but regular filing fees apply to any accompanying adjustment of status with biometrics or work authorization applications, although these fees can be waived.

AFTER FILING

CIS will promptly issue a receipt notice after filing of the application. According to statute, the I-360 shall be adjudicated within 6 months. Practices vary by region as to whether an interview is required to adjudicate the I-360, but the New Orleans CIS Field Office practice is to conduct an interview before making a final decision. If the I-360 and I-485 were filed concurrently, there will only be one interview which will review both I-360 eligibility as well as adjustment eligibility. If an applicant is approved for SIJ status they will receive an approval notice. If the petition is denied, they shall receive reasons for the denial, which can be appealed.

ADJUSTMENT

SIJ adjustment provisions are found under INA 245(h). Approved SIJ petitioners are deemed paroled are now exempted from seven inadmissibility grounds of the INA:

- 212(a)(4) (public charge);
- 212(a)(5)(A) (labor certification);
- 212(a)(6)(A) (aliens present without inspection);
- 212(a)(6)(C) (misrepresentation);
- 212(a)(6)(D) (stowaways);
- 212(a)(7)(A) (documentation requirements); and
- 212(a)(9)(B) (aliens unlawfully present).

Additionally, there are waivers available for most other grounds of inadmissibility for humanitarian purposes, family unity, or otherwise being in the public interest. The only unwaivable grounds of inadmissibility for SIJ petitioners are those listed at INA 212(a)(2)(A)-(C) (conviction of certain crimes, multiple criminal convictions, and controlled substance trafficking (except for a single instance of simple possession of 30 grams or less of marijuana)), and 212(a)(3)(A)-(C), and (E) (security and related grounds, terrorist activities, foreign policy, and participants in Nazi persecution, genocide, torture or extrajudicial killing).

Applications for adjustment should include:

- Form G-28;
- Cover Letter;
- Form I-485, Application to Adjust Status;
- Filing Fee or fee waiver request, Form I-912;
- Filing Fee for biometrics or a fee waiver request, Form I-912;
- Form G-325A;
- Form I-693, Medical Exam completed by a civil surgeon in a sealed envelope;
- Photocopy of SIJ status approval notice;
In order to be eligible an applicant must:

• be 18 years old or older at the time of filing, unless under an exception for some military and minors being naturalized with a parent;
• be a LPR;
• show continuous permanent residence in the United States for 5 years, or in the case of eligibility based on marriage to a U.S. citizen, 3 years;
• show continuous physically presence in the United States for 30 months, or in the case of eligibility based on marriage to a U.S. citizen 18 months if you are married to a U.S. citizen;
• show lived for at least 3 months in the state or CIS district where claim residence;
• have good moral character for the five or three year period of required continuous presence;
• be attached to the principles of the U.S. Constitution and well-disposed to the good order and happiness of the U.S.;
• have English literacy and knowledge of US government and history, unless an exemption applies due to physical or developmental disability or mental impairment; and
• not be barred from naturalization, because of opposition to government or law, belief in totalitarian forms of government, conviction of draft evasion or military desertion, applied for and obtained exemption or discharge from US military training or service based on alienage unless exemption was due to treaty and noncitizen had previously served in last country of nationality’s military, subject to order of removal or in removal proceedings, or if national or denizen of country at war with U.S., unless loyalty established by DHS investigation.
PROCEDURE

Currently for residents of Louisiana, the N-400 should generally be filed by regular mail to USCIS, P.O. Box 660060, Dallas, TX 75266, or by Express Mail or courier deliveries to USCIS, Attn: N-400, 2501 S State Hwy 121 Business, Suite 400, Lewisville, TX 75067. Military related naturalization applications are sent to Nebraska Service Center, P.O. Box 87426, Lincoln, NE 68501-7426, and for Express Mail or courier deliveries, use the following address: Nebraska Service Center, 850 S. Street, Lincoln, NE 68508. Please always double-check the filing instructions on CIS’s website for changes.

An applicant should file:

- Form G-28;
- Cover letter;
- Form N-400, Application for Naturalization;
- Filing and Biometrics fee, or Form I-912, Request for Fee Waiver;
- Copy (front and back) of LPR card (Form I-551);
- 2 passport-sized color photographs;
- If you are applying based on marriage to a U.S. citizen, you must also include proof that your U.S. citizen spouse has been a citizen for the last three years, current marriage certificate, proof of termination of previous marriage, if applicable; and documents referring to noncitizen and spouse such as tax returns, bank statements, or birth certificates of joint children;
- If applying based on military service, a completed original Form N-426, Request for Certification of Military or Naval Service.
- Supporting documents, such as criminal dispositions if applicable, proof of residence and physical presence.

After filing the application, the applicant will promptly receive a receipt of application. Later s/he should receive a biometrics appointment to take fingerprints, and a scheduled interview, where the examiner will go over all the information in the application and administer a test of the applicant’s English literacy and basic knowledge of the U.S. history and government. CIS produces study materials for the test that can be found on its website. Applicants have two opportunities to take the English and civics tests per application. If they fail any portion of the test during the first interview, they will be retested only on the portion of the test that they failed. Once the examination takes place CIS must make a decision within 120 days, and if there is no decision, the applicant can seek for a hearing on the naturalization in a federal district court. INA § 336 (b). If the examiner approves the application, the next step is the oath of allegiance ceremony, which can be done at CIS or at a federal court.

If CIS denies the application, it should notify the applicant in writing explaining why. The applicant has the right to appeal within thirty days of the date of the denial notice, by sending a Form N-336 with fee to the denying CIS office. This will result in another interview with another CIS officer. CIS must set that interview within 180 days and complete it using de novo review.
CIS may initiate removal proceedings against someone denied naturalization if they believe there is a ground of deportability. During the naturalization process, CIS will take a very close look at the applicant, including the original application for LPR status. If they believe LPR status was wrongfully granted then they may be able revoke that status, and put the applicant in removal proceedings. It is very important to do a thorough review of criminal history and previous applicant for LPR status when deciding to apply for naturalization.

**FEE**

Currently the application fee is $595, with a $85 biometric fee for a total of $680. There is no fee for military applicants filing under INA §§ 328 and 329. Also, applicants 75 years of age or older are not charged a biometric fee. Fee waivers are available for naturalization applications.

### 4.6 HAGUE CONVENTION CHILD ABDUCTION ACTIONS

**Resources & Sources of Law:**


- The statute implementing the Hague Convention in the United States is called the International Child Abduction Remedies Act, be found at 42 USC §§ 11601-10.


- The history and commentary by the official reporter at the Fourteenth Session of the Hague Convention on Private International Law is found in a report commonly referred to as the Perez-Vera Report, which is available at [http://www.hiltonhouse.com/articles/Perez_rpt.txt](http://www.hiltonhouse.com/articles/Perez_rpt.txt).


- Furthermore the Department of State has extensive resources and materials: [http://travel.state.gov/abduction/abduction_580.html](http://travel.state.gov/abduction/abduction_580.html)

**Overview:**

The Hague Convention on the Civil Aspects of International Child Abduction was drafted and signed in 1980, and in 1988, Congress ratified it to provide legal rights and procedures to return children who have been wrongfully removed. 42 U.S.C.S. § 11601(a)(4). The goal is to return children who were under sixteen at the time of abduction to the proper custodian in the proper jurisdiction for custody determination; to prevent wrongful removal of children by eliminating any incentive to shop for more favorable jurisdictions; and to make sure that legal rights of contracting countries are enforced in other contracting countries. Countries that are party to the Convention have agreed that a child who was living in one Convention country and who has been removed to or retained in another Convention
country in violation of the left-behind parent’s rights, must be promptly returned. Once the child has been returned, the custody dispute can then be resolved, by the courts of that jurisdiction. The Convention does not address who should have custody of the child, just if there has been a wrongful removal or retention of a child.

There are basically two types of Hague cases—return and access. This section mostly focuses on return. Access cases involve the left-behind parent enforcing visitation rights. Congress gave original jurisdiction to federal and state district courts of the United States as to actions that arise under the Hague Convention. 42 U.S.C.S. § 11603(a). Legal aid attorneys might get involved in a case as they are authorized to help a parent seeking assistance concerning international child abduction under the Hague Convention. 45 C.F.R. § 1626.10(e). Therefore, if the child is located in Louisiana, legal aid can assist foreign nationals in an international child abduction action under the Hague convention, as long as they meet regular income requirements, even if the foreign parents are living abroad. Furthermore, Hague Convention cases can be fee-generating, and pro bono attorneys can obtain these fees. 42 U.S.C. § 11607(b)(3). See, Cuellar v. Joyce, 603 F.3d 1142 (9th Cir. 2010), Haimdas v. Haimdas, 720 F. Supp. 2d 183 (E.D.N.Y. 2010).

Under the act, Congress delegates to the President to designate a Federal agency to serve as the Central Authority for the United States under the Convention. 42 U.S.C. § 11606. The Department of State has been designated the Central Authority for the United States, and a great deal of materials can be found on their website relating to how to pursue actions under the convention.

Process

The first step in a child abduction case is to determine the location of the child. If the child is in the US and was removed from a country that is also a party to the Hague convention, then the parent can contact the Central Authority for the Hague Abduction Convention in the child’s home country, who will help them fill out an application. The Central Authority will then forward the application to Department of State’s office to start the process in the United States.

The Department of State will then assign an officer to the case, who will locate the child in the United States, try to resolve the return of the child in a voluntary fashion, help explain the legal process in the United States, help find an affordable attorney; and find support groups and nonprofit organizations to assist. The Department of State will forward the application to the National Center for Missing and Exploited Children (“NCMEC”). This organization was created in 1984 “to provide services nationwide for families and professionals in the prevention of abducted, endangered, and sexually exploited children,” and they have an agreement with the Departments of State and Justice to manage international child abduction cases. NCMEC helps locate the child and tries to find an attorney to represent the left-behind parent and litigate the case.

The first decision that the attorney will need to make in a Hague removal case is to decide to apply in federal or state court. While federal courts may be more likely to follow the Hague Convention to the letter of the law, federal courts may take much longer to adjudicate the cases as they apply full-blown civil procedures within the trial. State courts have expertise in adjudicating family and
child custody issues, but may not honor the Hague mandate to determine only the return issue and may instead attempt to address the underlying merits of the custody action. A Hague access case can only be filed in state court.

To establish a *prima facie* case of wrongful removal or retention under the Hague Convention, a petitioner bears the burden of proof to show that:

1) the child was habitually resident in a signatory country immediately before the respondent removed them to another country;
2) the child's removal was in breach of the rights of custody of a person, an institution, or any other body;
3) that those rights were actually exercised at the time of removal or would have been so exercised in the absence of his removal;
4) the child was under the age of 16; and
5) the petition was filed within one year.

There are some exceptions to obtaining the return of the child, or "affirmative defenses" which include:

- The Article 12 Well-Settled Defense: The Child Has Become Well-Settled In His Or Her New Surroundings;
- The Article 13 Consent Or Acquiescence Defense: Petitioner Consented To Or Acquiesced In The Removal Or Retention;
- The Article 13 Grave Risk Defense: There Is A Grave Risk That The Child Would Be Exposed To Physical Or Psychological Harm Or An Intolerable Situation If Returned;
- The Article 13 Mature Child Objection To Removal Defense: A Mature Child Objects To Being Returned; and

As these are very specialized proceedings, it is best to not only consult the national resources available on the Department of State website and with the National Center for Missing and Exploited Children, but to contact national experts who are familiar with these cases. There are *pro bono* attorney mentors that are available upon request, through the State Department’s Office of Children’s Issues. Individual LSC grantees are invited to join the Attorney Network for Hague Abduction Convention cases by contacting the legal assistance coordinator at the State Department (202) 736-9096 or e-mail: hagueconventionattorneynetwork@state.gov.

### 4.7 SPOUSAL SUPPORT

The law regarding affidavits of support can be found at INA § 213, and 8 C.F.R. § 213a.1, A useful CIS memo is Michael Aytes’s *USCIS Memorandum, Consolidation of Policy Regarding USCIS Form I-864, Affidavit of Support*, (AFM Update AD06-20) HQRPM 70/21.1.13 (June 27, 2006).

The affidavit of support, Form I-864, is a required part of the adjustment of status application when the application is based on a family petition or some employment based petitions. The Form, which can be found at CIS’s website, requires that a U.S. citizen or LPR petitioner agrees to support the immigrant at
125% of the applicable federal poverty guidelines in case the immigrant earns less than that or becomes a public charge. The apparent purpose of this is to prevent immigrants from becoming public charges.


The sponsor submits himself to the personal jurisdiction of any federal or state court where a civil lawsuit to enforce the affidavit has been brought. 8 U.S.C. § 1183a(a)(1)(C). Furthermore, support obligations under the I-864 do not end with divorce, but should last until the sponsored immigrant 1) becomes a U.S. citizen; 2) has worked or is credited with 40 work quarters for Social Security purposes; 3) ceases to be a LPR and departs the U.S.; 4) re-adjusts status in removal proceedings; and/or 5) dies. 8 U.S.C.S. § 1183a(a)(2), (3); see also instructions for I-864, http://www.uscis.gov/files/form/i-864instr.pdf

The calculation of damages under the I-864 is based upon whether the beneficiary had income that annually reached 125% of the poverty guidelines. Once the income is over 125%, there should not be liability under the I-864. Barnett v Barnett, 238 P. 3d 594 (Alaska 2010). The court must look at each year to determine whether the beneficiary is under 125%—it cannot be determined in the aggregate. Naik v. Naik, 399 N.J. Super. 390 (App. Div. 2008).

Once it is determined that the I-864 is enforceable for support obligations, the next questions to ask are about potential set-offs or mitigation. In Shumye v. Felleke, the court found there were certain set-offs when determining the amount of the obligation, including the value of “affordable housing subsidies” and student grants. 555 F. Supp. 2d 1020 (N.D. Cal. 2008). In Naik v. Naik, the court found there is a set-off for spousal support, child support, and equitable distribution. 399 N.J. Super. 390 (App. Div. 2008). However in Younis, the court found that the purpose of child support is to see that children are provided the same “proportion of parental income” and therefore same standard of living, and therefore it does not benefit the other parent. The court also found that since the federal government does not consider child support, as it does alimony, to be part of someone’s gross income for tax purpose, then it should not count as a mitigation factor. Younis, 597 F. Supp. 2d at 555. In Chesire v. Chesire, the court found that the obligation “should be reduced by the amount of any income or benefits the sponsored immigrant received from other sources.” 2006 WL 1208010 (M.D. Fla. 2006). However, de minimis gifts should not be counted, and in fact, because gifts are also not taxable income, it is possible that they do not need to be considered even if they were large. Younis v. Farooqi, 597 F.Supp.2d 552, 555 n.3 (D.Md. 2009).

Another open question is what constitutes “reasonable efforts” to mitigate one’s damages under the affidavit of support. In Younis v. Farooqi, for example, the court found that the beneficiary had made reasonable efforts to find employment and therefore she met any duty that she had. The court also stated that “in the event the plaintiff is unable or even unwilling to attain full-time employment, that does not necessarily relieve the defendant of his liability under the affidavit, as these are not terminating conditions.” Younis v. Farooqi, 597 F.Supp.2d 552, 555 n.5 (D.Md. 2009).
5. SUMMARY

As detailed in the introduction, immigration law can be incredibly complicated, as it is constantly changing. For a new practitioner, a best practice is to consult with a seasoned immigration practitioner. Consequences in the immigration context can be dire. A naturalization or adjustment application gone awry may start the deportation process to a country where the noncitizen has a fear of returning. There is a vibrant immigration bar in Louisiana including private and nonprofit attorneys, who may be willing to help. The nonprofit attorneys are currently housed at Catholic Charities of New Orleans and Baton Rouge, LSU Law Clinic and Loyola Law Clinic.

Furthermore, while at first glance it may seem as though Legal Aid attorneys are prohibited from a great deal of immigration and noncitizen practice, there is actually a great deal that legal aid attorneys can do. Considering the vast number of noncitizens in Louisiana and the very few nonprofit immigration attorneys, it is imperative that Legal Services attorneys assist vulnerable, indigent noncitizens when they can.

6. APPENDIX

GLOSSARY OF ACRONYMS

AAO.......Administrative Appeals Office
AILA......American Immigration Lawyers Association
BIA........Board of Immigration Appeals
CBP ......Customs and Border Protection
CFR ......Code of Federal Regulations
CIMT .....Crime Involving Moral Turpitude
CIS ........Citizenship and Immigration Services
DHS.......Department of Homeland Security
DOJ ......Department of Justice
EOIR .....Executive Office of Immigration Review
ERO ......Enforcement and Removal Office
FOIA .....Freedom of Information Act
ICE .......Immigration and Customs Enforcement
INA .......Immigration and Nationality Act
INS .......Immigration and Naturalization Service
LEA ......Law Enforcement Agency
LPR ......Legal Permanent Resident
RFE ......Request for Evidence
SIJS ......Special Immigrant Juvenile Status
TPS ......Temporary Protective Status
TVPA ....Trafficking Victims Protection Act
TVPRA .Trafficking Victims Protection Reauthorization Act
USCIS ....United States Citizenship and Immigration Services,
also known as CIS
VAWA ....Violence Against Women Act
VSC ......Vermont Service Center
<table>
<thead>
<tr>
<th>INA</th>
<th>8 U.S.Code §conversion table</th>
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<tbody>
<tr>
<td>101-106</td>
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<td>201-210</td>
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<td>1521-1524</td>
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<td>501-507</td>
<td>1531-1537</td>
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</table>
### 45 C.F.R. § 1626 for “Restrictions on Legal Assistance to Aliens” chart

<table>
<thead>
<tr>
<th>Alien category</th>
<th>Immigration Act (INA)</th>
<th>LSC regs; 45 CFR § 1626</th>
<th>Examples of acceptable documents</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>LAWFUL PERMANENT RESIDENT</strong></td>
<td>INA § 101(a)(20); 8 USC § 1101(a)(20)</td>
<td>§1626.5(a)</td>
<td>I-551 or I-151 or I-181 (Memorandum of Creation of Record of Lawful Permanent Residence), with approval stamp; or passport bearing immigrant visa or stamp indicating admission for lawful permanent residence; or order granting registry, suspension of deportation, cancellation of removal, or adjustment of status from the INS, an immigration judge, the BIA, or a federal court; or I-327 Reentry Permit; or I-94 with stamp indicating admission for lawful permanent residence; or any verification from INS or other authoritative document.</td>
</tr>
<tr>
<td><strong>ALIEN WHO IS</strong></td>
<td><strong>married to U.S. citizen, or</strong></td>
<td><strong>INA §§ 208, 210, 244 (replaced by INA § 240A(b) for aliens in proceedings initiated on or after 4/1/97), 245, 245A, 249; 8 USC §§ 1158, 1160, 1254 (replaced by 1229b(b) for aliens in proceedings initiated on or after 4/1/97), 1255, 1255a, 1259</strong></td>
<td>Proof of relationship to U.S. citizen* and proof of filing:** I-485 (application for adjustment of status based on family-based visa, registry, or various special adjustment laws) or I-256A or EOIR-40 (application for suspension of deportation) or EOIR-42 (application for cancellation of removal) or I-817 (application for Family Unity Adjustment and Central American Relief Act (NACARA) suspension or special rule cancellation and adjustment) or OF-230 (application at consulate for visa) or I-129F (Petition for Alien Fiancé(e) (for spouses and children of USCs applying for K-status)</td>
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<tr>
<td><strong>—parent of U.S. citizen, or</strong></td>
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<tr>
<td><strong>—unmarried child under 21 of U.S. citizen and</strong></td>
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<tr>
<td><strong>—has filed an application for adjustment of status to permanent residency.</strong></td>
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*Proof of relationship may include: copy of marriage certificate accompanied by proof of spouse’s U.S. citizenship; copy of birth certificate, religious archival document such as baptismal certificate, adoption decree or other documents demonstrating parentage of a U.S. citizen; copy of birth certificate, baptismal certificate, adoption decree, or other documents demonstrating alien is a child under age 21, accompanied by proof parent is a U.S. citizen; or in lieu of the above, a copy of INS Form I-130 (visa petition) or I-360 (self-petition) containing information demonstrating alien is related to such a U.S. citizen, accompanied by proof of filing.

**Proof of filing may include a fee receipt or cancelled check showing that the application was filed with the INS or the immigration court; a filing stamp showing that the application was filed; or a copy of the application accompanied by a declaration or attestation signed by the immigrant, or the immigrant’s attorney or legal representative for the application, that such form was filed. Proof of filing is also established by: a letter or Form I-797 from INS or the immigration court acknowledging receipt of or approval of one of the above-listed forms.
45 C.F.R. § 1626 for “Restrictions on Legal Assistance to Aliens” chart  
(continued from previous page)

<table>
<thead>
<tr>
<th>Alien category</th>
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<th>LSC regs; 45 CFR § 1626</th>
<th>Examples of acceptable documents</th>
</tr>
</thead>
</table>
| REFUGEE        | INA § 207, 8 USC § 1157 | § 1626.5(c)               | I-94 or passport stamped “refugee” or “§ 207”  
 or I-688B or I-766 coded 8 C.F.R. § 274a.12(a)(3)(refugee) or § 274a.12(a)(4)(paroled as refugee)  
 or I-571 refugee travel document  
 or any verification from INS or other authoritative document. |
<table>
<thead>
<tr>
<th>Alien category</th>
<th>Immigration Act (INA)</th>
<th>LSC regs; 45 CFR § 1626</th>
<th>Examples of acceptable documents</th>
</tr>
</thead>
<tbody>
<tr>
<td>ASYLEE</td>
<td>INA § 208, 8 USC § 1158</td>
<td>§ 1626.5(c)</td>
<td>I-94 or passport stamped “asylee” or “§ 208” or an order granting asylum from INS, immigration judge, BIA, or federal court or I-571 refugee travel document or I-688B coded 8 C.F.R. § 274a. 12(a)(5)(asylee) or any verification from INS or other authoritative document.</td>
</tr>
<tr>
<td>GRANTED WITHHOLDING OR DEFERRAL OF DEPORTATION OR REMOVAL</td>
<td>INA § 241(b)(3) or former INA § 243(h), 8 USC § 1251(b)(3) or former 8 USC § 1253(H)</td>
<td>§ 1626.5(e)</td>
<td>I-94 stamped “§ 243(h)” or “241(b)(3)” or an order granting withholding or deferral of deportation or removal from INS, immigration judge, BIA, or federal court. Also acceptable I-688B coded 8 C.F.R. § 274a.12(a)(10)(granted withholding of deportation or removal) or any verification from INS or other authoritative document.</td>
</tr>
<tr>
<td>CONDITIONAL ENTRANT</td>
<td>INA § 203(a)(7), 8 USC § 1153(a)(7)</td>
<td>§ 1626.5(d)</td>
<td>I-94 or passport stamped “conditional entrant” or any verification from INS or other authoritative document.</td>
</tr>
<tr>
<td>H-2A AGRICULTURAL WORKER</td>
<td>INA § 101(a)(15)(H)(ii); 8 USC § 1101(a)(15)(ii)</td>
<td>§ 1626.11</td>
<td>I-94 or passport stamped “H-2” or any verification from INS or other authoritative document.</td>
</tr>
<tr>
<td>SPECIAL AGRICULTURAL WORKER TEMPORARY RESIDENT</td>
<td>INA § 210 8 USC § 1160</td>
<td>§1626.10(d)</td>
<td>I-688, 688A, 688B, or 766 indicating issuance under § 210 (or under 8 C.F.R. § 274a. 12(a)(2), with other evidence indicating eligibility under INA § 210) or any verification from INS or other authoritative document.</td>
</tr>
</tbody>
</table>
CHAPTER 9

LOUISIANA LANDLORD–TENANT LAW

Mark Moreau
About The Author

Mark Moreau, Co-Director, Southeast Louisiana Legal Services, New York University School of Law, LL.M. in Taxation, 1982, Buffalo Law School, J.D., 1975, Brown University, A.B., 1971. Mr. Moreau has worked as a legal aid attorney for 35 years. He started Louisiana’s first Low Income Taxpayer Clinic in 2000 and serves as the Clinic’s Director at Southeast Louisiana Legal Services.

Mr. Moreau is a member of the Louisiana and New York bars. He was the 1992-93 Chairman of the Louisiana State Bar Association Consumer Protection, Lender Liability and Bankruptcy Section and has served on the Advisory Subcommittee on Lease for the Louisiana State Law Institute. Mr. Moreau is the recipient of the Louisiana State Bar Association’s Career Public Interest Award, the New Orleans CityBusiness Leadership in Law Award, the National Taxpayer Advocate’s Award and the Louisiana Coalition Against Domestic Violence’s Into Action Award.

Acknowledgments

Special thanks to David Williams, Amanda Golob and Eric Foley of Southeast Louisiana Legal Services and to Walter McClatchey of Acadiana Legal Service for their comments and contributions to Louisiana Landlord-Tenant Law,
1. INTRODUCTION

This manual discusses Louisiana landlord-tenant law issues that commonly affect indigent tenants. The subjects covered are:

- Sources of Landlord-Tenant Law
- Eviction Defenses
- Lockouts & Utility Terminations
- Tenant’s Lease Cancellation Rights
- Repairs
- Tenant Damage Claims
- Housing Discrimination Remedies
- Security Deposits
- Internet Research
- Other Treatises

The section on Eviction Defenses includes a checklist on how to assess an eviction case and a quick reference guide to the most common eviction defenses. A more detailed discussion of eviction procedures and defenses follows the checklist and quick reference guide. In addition, the appendix has a model pro se eviction answer that lists possible defenses for a tenant to select as appropriate.

2. SOURCES OF LANDLORD-TENANT LAW

In analyzing clients’ housing problems, you should determine whether they have a landlord-tenant relationship with the adverse party. A landlord-tenant relationship exists when there is a lease between the parties. A lease is an oral or written contract by which one party consents to give the other party enjoyment of a thing at a fixed price. La. Civ. Code art. 2668, 2681.

The legal relationship between the landlord and tenant is a mixture of contractual, tort and statutory duties. Generally, the lease is the law between the landlord and tenant unless it violates the law or public policy. Therefore, each relevant provision in the lease must be analyzed to determine its proper interpretation and applicability. La. Civ. Code arts. 1983, 2045-57. As a contract, a lease may also be governed by Civil Code articles on obligations and contracts. La. Civ. Code art. 2669.

Some notable principles of lease analysis are:

- Uncertain or ambiguous lease provisions must be construed against the landlord and in favor of maintenance of the lease. *New Orleans Minority Business Center, Ltd. v. Duong*, 703 So.2d 157 (La. App. 4 Cir. 1997).

- Oral modifications or the parties’ course of conduct can change a written lease. *Karno v. Fein Caterer*, 846 So.2d 105 (La. App. 4 Cir. 2003); *Quigley v. T.L. James & Co.*, 595 So.2d 1235 (La. App. 5 Cir. 1992); *Aghili v. Strother*, 2007 WL 865413 (La. App. 1 Cir. 2007).

- If the lease does not govern a particular problem, then Louisiana Civil Code arts. 2668-2744 or other applicable laws will govern.

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1 Other possible legal relationships include owner-occupant, innkeeper-guest, employer-employee, owner-trespasser, owners in indivision.

• The lease provision may be unenforceable or prohibited if it violates the law or public policy. La Civ. Code art. 1968. (Examples of unenforceable lease provisions can be found at § 5.7.10 herein).

3. HOW TO DEFEND JUDICIAL EVICTIONS: A CHECKLIST

1. Ascertain client’s objective—more time or defeat eviction?
   • Explain possible eviction dates and state court eviction process
   • Advise on possible defenses

2. What stage is the eviction at?
   • Pre-lawsuit
   • Pre-judgment
   • Post-judgment

3. If post-judgment, does client have time and grounds for appeal, motion for new trial or petition for nullity of judgment?
   Most common grounds for petition for nullity are:
   • No notice of eviction lawsuit received
   • Landlord accepted rent, but proceeded with eviction
   • Eviction was for “no cause” and lease or law only allows eviction for cause
   Petitions for nullity of judgment can be filed within the eviction lawsuit. They are ordinary proceedings. Therefore, you must immediately apply for a temporary restraining order and preliminary injunction to stop the eviction.

4. If no judgment yet, explore possible settlement with landlord.
   • Assess whether pre-trial negotiations are consistent with defense strategies and client objectives.
   • What is the landlord’s price (rent, costs) for dismissal of eviction?
   • If eviction is for “no cause”, will landlord agree to extension of move-out date and under what conditions?
   • Section 8 voucher tenants can lose their vouchers if evicted for cause. Therefore, settlement is important
   • Landlord’s fears about vitiation of eviction can be allayed by entering consent judgment with extended executory date.
   • Compromise agreements should be in writing or recited and recorded in open court to be enforceable. La. Civ. Code art. 3071.

5. Analyze client’s defenses and remedies:
   • Is there a landlord-tenant relationship?
   • Does plaintiff have the right to evict by summary process?
   • Any leases or other agreements that govern the eviction?
   • If subsidized housing, what federal laws govern the eviction?
   • Procedural defenses?
   • Substantive defenses?
   • Affirmative lawsuits, e.g., housing discrimination or bankruptcy, to stop the eviction?
• If housing discrimination exists (look for failure to accommodate tenants with disabilities or evictions based on association with minorities or children), file suit in state or federal district court before eviction lawsuit is filed and secure injunction or lis pendens bar.

• Damage claims? They do not defeat evictions, but may provide settlement leverage.

6. Prepare for Trial
   • Select all defenses to be pleaded.
   • Identify evidence (witnesses and documents) needed for trial.
   • Subpoena evidence needed for proof of defenses.
   • Apply for continuances if evidence cannot be timely produced for trial
   • Draft pauper affidavits and verified answer and exceptions (sworn to by client before notary) that specially plead affirmative defense(s) entitling tenant to retain possession in a suspensive appeal. La. Code Civ. Proc. art. 4735.

   • Generally, judicial control doctrine should be pleaded, if applicable, since it is indisputably an affirmative defense.
   • File verified answer with clerk of court prior to trial.

7. Prepare for Appeal in Advance
   • Preliminarily assess merits of appeal if eviction ordered
   • Discuss requirements for appeal with client
   • Prepare motion for appeal and appeal bond
   • Explain that landlord may seek eviction on new grounds during appeal

8. Trial
   • Consider pre-trial conference for settlement purposes
   • Ask court to transcribe testimony in parish or city court eviction
   • Try exceptions before merits
   • Insist on dismissal if notice to vacate defective, rule for possession premature or if rent has been accepted
   • Limit landlord’s case to grounds raised in rule for possession
   • If the landlord has not proven a right to relief after presentation of his evidence, move for dismissal under La. Code Civ. Proc. art. 1672 (B)
   • Present evidence necessary to support your defenses; make a proffer of evidence if the court refuses to admit the evidence or allow the testimony
   • Preserve grounds for appeal

9. Appeal
   • Within 24 hours of judgment (a) file suspensive appeal motion and bond with city or parish court if city or parish court was the trial court or (b) file petition for suspensive appeal by trial de novo and bond with district court or parish/city court if trial court was justice of peace.
   • Ask for alternative bond (payment of rent into court registry) if tenant does not have surety. Tenant has right to surety or cash bond.

• Advise client of need to timely pay rent to court registry or landlord during pendency of appeal
• Make sure that estimated costs of appeal are timely paid if client is not proceeding in forma pauperis

4. EVICTION DEFENSES: QUICK REFERENCE GUIDE

Common eviction defenses and supporting case citations are:

1. Notice to vacate for “no cause eviction” less than 10 days before end of current rental month. *Solet v. Brooks*, 30 So.3d 96, 101 (La. App. 1 Cir. 2009); *Houston v. Chargois*, 732 So.2d 71 (La. App. 4 Cir. 1999).


4. Notice to vacate (contents and/or service) fails to comply with federal regulations for subsidized housing evictions. *Apollo Plaza Apts. v. Gosey*, 599 So.2d 494 (La. App. 3 Cir. 1992); *Versailles Arms Apts. v. Pete*, 545 So.2d 1193 (La. App. 4 Cir. 1989).


8. Acceptance of partial rent after notice to vacate defeats eviction. *Adams v. Dividend, Inc.*, 447 So.2d 80 (La. App. 4 Cir. 1984); *Housing Authority of Town of Lake Providence v. Burks*, 486 So.2d 1068 (La. App. 2 Cir. 1986); *Thompson v. Avenue of Americas Corp.*, 499 So.2d 1093 (La. App. 3 Cir. 1986).

9. Timely tender of rent constitutes payment of rent which defeats eviction for nonpayment of rent even if landlord refuses to accept rent. *Cantrell v. Collins*, 984 So.2d 738, 740-41 (La. App. 1 Cir. 2008); *Adams v. Dividend, Inc.*, 447 So.2d 80, 83 (La. App. 4 Cir. 1984).

10. A late rent payment defeats eviction if there was a custom of accepting rent late. *Versailles Arms Apts. v. Pete*, 545 So.2d 1193 (La. App. 4 Cir. 1989).

11. A partial rent payment defeats eviction if there was a custom of accepting partial rent. *Grace Apts. v. Hill*, 428 So.2d 862 (La. App. 1 Cir. 1983).

12. Section 8 tenant’s payment of her portion of rent may defeat eviction if housing authority failed to pay its portion due to abatement. Cf. McMillian v. Anderson, 57 So.3d 422 (La. App. 2 Cir 2011) (tenant’s claim failed because she did not submit evidence of abatement).


14. Evictions are subject to judicial control and may be denied even if a lease violation exists. Carriere v. Bank of Louisiana, 702 So.2d 648 (La. 1996); Ergon v. Allen, 593 So.2d 438 (La. App. 2 Cir. 1992).


16. Public housing, low income tax credit housing, rural housing leases may not be terminated at end of lease absent good cause. 24 C.F.R. § 966.4 (public housing); Rev. Rul. 2004-82; (low income tax credit housing); Carter v. Maryland Management Co., 835 A.2d 158 (Md. App. 2003) (low income tax credit housing); 7 C.F. R. § 3560.159 (rural housing).

17. The landlord failed to prove lease agreement, lease violation or expiration. Monroe Housing Authority v. Coleman, 70 So.3d 871 (La. App. 2 Cir. 2011); Owens v. Munson, 2009 WL 3454507 (La. App. 1 Cir. 2009); Kenneth and Allicen Caluda Realty Trust v. Fifth Business LLC, 948 So.2d 1137, 1138 (La. App. 5 Cir. 2006); PTS Physical Therapy Service v. Magnolia Rehabilitation Service, Inc., 920 So.2d 997, 1000 (La. App. 2 Cir. 2006); Houston v. Chargois, 732 So.2d 71 (La. App. 4 Cir. 1999).

18. Tenant not afforded opportunity to cure lease violation per rectification clause in lease or law. D & D Investment v. First Bank, 831 So.2d 488 (La. App. 5 Cir. 2002); Shell Oil v. Siddiqui, 722 So.2d 1197 (La. App. 5 Cir. 1998); Rain-tree Court Apts. v. Bailey, No. 98-C-1138 (La. App. 5 Cir. 1998); see also Mer- aux & Nunez v. Houck, 13 So.2d 233 (La. 1943).

19. Domestic violence victims in Section 8 and public housing can’t be evicted for domestic violence committed against them. 42 U.S.C. § 3604(b); 42 U.S.C. § 1437f(c)(9); 42 U.S.C. § 1437f(o)(7)(D)(i).

20. Unlawful discrimination. Mascaro v. Hudson, 496 So.2d 428 (La. App. 4 Cir. 1986). However, it is generally better to litigate such claims in federal or state district court before the eviction lawsuit is filed.


22. Plaintiff is not the owner or landlord or failed to prove ownership or lease. Savoy v. Jones, 484 So.2d 233 (La. App. 3 Cir. 1986); Fradella Construction, Inc. v. Roth, 503 So.2d 25 (La. App. 4 Cir. 1986); Reynolds v. Brown, 84 So.3d 655 (La. App. 5 Cir. 2011).

The article can be viewed or purchased at www.povertylaw.org
23. The alleged tenant or occupant is a co-owner. *Millaud v. Millaud*, 761 So.2d 44 (La. App. 4 Cir. 2000) (jurisdiction lies with district court); *Matthews v. Horrell*, 977 So.2d 62 (La. App. 1 Cir. 2007) (succession representative can’t evict co-heir).

24. Possessor, whether in good faith or bad faith, may retain possession until he is reimbursed for expenses and improvements which he is entitled to claim. La. Civ. Code art. 592; *Broussard v. Compton*, 36 So.3d 376 (La. App. 3 Cir. 2010).

25. Usufructuary may retain possession until he is reimbursed for expenses and advances he is entitled to claim from naked owner. La. Civ. Code art. 627; *Barnes v. Cloud*, 82 So.3d 463 (La. App. 2 Cir. 2011).


27. Lis pendens bars second eviction suit. *Enterprise Property Grocery, Inc. v. Selma, Inc.*, 886 So.2d 614 (La. App. 2 Cir. 2004); *Spallino v. Monarch Sign*, 771 So.2d 784 (La. App. 3 Cir. 2000); cf. *Revel v. Charamie*, 926 So.2d 582 (La. App. 4 Cir. 2006). Lis pendens also bars (1) an eviction suit which should be brought as a reconventional demand in prior litigation between parties, cf., *Trahan v. 2010 Beglis, LLC*, 81 So.3d 192 (La. App. 3 Cir. 2011) and (2) an injunction filed after an eviction, see *800 Canal St. Ltd. Partnership v. Storyville Dist. New Orleans, LLC*, 75 So.3d 958 (La. App. 4 Cir. 2011).


30. Bankruptcy Code, 11 U.S.C. § 525, prohibits public housing authority eviction for non-payment of discharged rent. *In re Stoltz*, 315 F.3d 80 (2d Cir. 2002); contra *Housing Authority v. Eason*, 12 So.3d 970 (La. 2009) rev’g 9 So.2d 269 (La. App. 4 Cir. 2009).

5. EVICTIONS

5.1 JURISDICTION

Justice of the peace and district courts have jurisdiction over evictions of residential tenants and occupants regardless of the amount of monthly or yearly rent, or the rent for the unexpired term of the lease. La. Code Civ. Proc. art. 4912 (A).

City and parish courts have jurisdiction over tenants if the monthly rental is less than $3,000 or the annual rental less than $36,000. La. Code Civ. Proc. art. 4844. City and parish courts are courts of limited jurisdiction. A jurisdictional oddity exists in that these courts do not have express statutory jurisdiction over evictions of tenants where the lease term is other than a day, week, month or year. Jurisdiction is not specified for evictions involving, for example, a lease with a six month term. This is significant because the landlord must prove jurisdiction in order to use the summary eviction procedure in a city or parish court.6 City and parish courts have jurisdiction over evictions of occupants where the annual value of the occupancy is less than $36,000. La. Code Civ. Proc. art. 4844 (A)(5).

6 Northeast Realty v. Jackson, 824 So.2d 1264 (La. App. 2 Cir. 2002); *Arona v. Arona*, 477 So.2d 120 (La. App. 4 Cir. 1985), writ denied 479 So.2d 367; see also Home Distribution, Inc. v. Dollar Amusement, Inc., 754 So.2d.1057, n. 2 (La. App.1 Cir. 1999) (law no longer provides a catchall jurisdiction clause for city and parish court evictions).
As a practical matter, city and parish courts will have jurisdiction over virtually all evictions of residential tenants. Jurisdictional disputes will arise where the eviction lawsuit does not involve a “tenant” or “occupant” as defined by La. Code Civ. Proc. art. 4704. For example, city and parish courts may lack jurisdiction where there is disputed title to the property or the defendant is a part owner.7

5.2 PROCEDURE FOR PROSECUTING AN EVICTION

5.2.1 Notice to Vacate

The first step in the eviction procedure is to deliver written notice to the tenant to vacate the premises. La. Code Civ. Proc. art. 4701. Most landlords use the form notice to vacate provided by the courts. However, they may draft their own notices. The notice must specify the grounds for termination of the lease.8 La. Code Civ. Proc. art. 4701 provides for the written waiver of the notice to vacate. Such waivers have been enforced by the courts.9 However, the notice to terminate a month-to-month lease for “no cause” may not be waived in advance. La. Civ. Code art. 2718. The notice must be in writing. La. Civ. Code art. 2719.

The notice to vacate comes into play when a tenant’s right of occupancy has ceased because of the termination of the lease by expiration of its term, by the landlord’s action, by nonpayment of rent, or for any other reason. The grounds for eviction are generally (1) tenant’s failure to pay rent as due, (2) tenant’s violation of the lease, or (3) tenant’s refusal to vacate the premises upon expiration or non-renewal of the lease.

This statement of grounds for lease termination must be placed in the notice to vacate, and subsequently in the citation to appear or rule to show cause.10 Louisiana courts have held that constitutional due process requires the statement to be in the notice to vacate to permit the tenant to prepare his defense.11 See Apollo Plaza Apts. v. Gosey, 599 So.2d 494 (La. App. 2 Cir. 1992) for a helpful case on what constitutes sufficient specificity. Therefore, if a tenant does not receive the statement of grounds in the notice to vacate, he should argue a due process violation and/or lease violation if also applicable. Notices to vacate to federally subsidized housing tenants must also comply with applicable federal laws.12

The notice to vacate must be delivered not less than 5 days nor more than 30 days before the premises are to be vacated. La. Code Civ. Proc. art. 4701. The time for delivery of the notice to vacate will be determined by the grounds for the eviction. If the eviction is for good cause, such as failure to pay rent, 5 days notice to vacate is required. Tete v. Hardy, 283 So.2d 252 (La. 1973).

No cause evictions of month-to-month tenants require 10 days notice prior to the end of the rental month. La. Civ. Code art. 2728.13 Solet v. Brooks, 30 So.3d 96, 101 (La. App. 1 Cir. 2009). The fact that a tenant is given more than 10 days notice is not a fatal defect. The statute only requires a minimum of 10 days. Lilly

7 See e.g., Fradella Construction, Inc. v. Roth, 503 So.2d 25 (La. App. 4 Cir. 1986); St. Pierre v. Hirschfeld, 569 So.2d 222 (La. App. 1 Cir. 1990).
8 Louisiana State Museum v. Mayberry, 348 So.2d 1274 (La. App. 4 Cir. 1977).
9 See , e.g. Guidry v. Castillo, 995 So.2d 50 (La. App. 5 Cir. 2008).
11 See e.g. La. State Museum v. Mayberry, 348 So.2d 1274 (La. App. 4 Cir. 1977).
12 See e.g. Versailles Arms Apartments v. Pete, 545 So.2d 1193 (La. App. 4 Cir. 1989); 24 C.F.R. § 982.310 (e)(notice for Section 8 voucher housing).
v. Angelo, 523 So.2d 899 (La. App. 4 Cir. 1988). Thus, a landlord who wants a month-to-month tenant out of his apartment, for any or no reason, merely needs to give 10 days written notice to vacate before the end of the rental month.\textsuperscript{14} Torco Oil Co. v. Grif-Dun Group, Inc., 617 So.2d 102 (La. App. 4 Cir. 1993).

The notice to vacate can be delivered by the landlord or served by the sheriff. In either case, the notice and service returns must be filed in the record. However, if the premises are abandoned or closed, or if the whereabouts of the tenant or occupant is unknown, the notice may be attached to a door of the premises. This is service by tacking. La. Code Civ. Proc. art. 4703. Other state or federal laws may impose additional requirements for the service of a notice to vacate on a subsidized tenant.

5.2.2 Rule For Possession

If the tenant fails to comply with the notice to vacate, a judicial eviction may be commenced by filing a rule for possession of premises with a proper court. La. Code Civ. Proc. art. 4732. This rule requires the tenant or occupant to show cause why he should not be ordered to deliver possession of the premises to the landlord or owner. The rule must state the grounds on which eviction is sought. La. Code Civ. Proc. art. 4731(A); St. Pierre v. Hirschfeld, 569 So.2d 222, 227 (La. App. 1 Cir. 1990).

Written pleadings are not required for evictions in justice of peace court. La. Code Civ. Proc. art. 4917.\textsuperscript{15} The court must issue a citation or order to show cause to the tenant. La. Code Civ. Proc. art. 4919. Either La. Code Civ. Proc. art. 4731 or due process should require the court to state the grounds on which eviction is sought by the landlord. However, many justices do not include any reasons in the citation or order.

The rule for possession must be served by the sheriff or constable. Under current Louisiana statutory law, the rule may be served by tacking. La. Code Civ. Proc. art. 4703. A federal court judgment requires that all eastbank Orleans Parish rules be served by regular mail in addition to tacking.\textsuperscript{16} The rule may be heard no earlier than the third day after service of the rule on the tenant. La. Code Civ. Proc. art. 4732.

5.2.3 Trial

The rule to show cause why the tenant should not deliver possession is a summary proceeding. La. Code Civ. Proc. art. 2592 (3). Trial of the rule should be conducted quickly and without observing all of the formalities of an ordinary proceeding. La. Code Civ. Proc. art. 2591. Jury trials are not available in Louisiana eviction proceedings. La. Code Civ. Proc. art. 1732 (3).

At the trial, the landlord has the burden of establishing a prima facie case of his right to possession.\textsuperscript{17} There are three essential elements to a landlord’s cause of action for eviction:

\textsuperscript{14}If no lease exists, e.g., the evictee is only an occupant, Civil Code art. 2728 does not apply and a 5 day notice to vacate would suffice. See Northeast Realty v. Jackson, 850 So.2d 947 (La. App. 2 Cir. 2003)(case decided under pre-2005 Civil Code article 2686).

\textsuperscript{15}The landlord must still give a written notice to vacate that complies with due process, applicable laws or lease provisions. The trial should be limited to the grounds stated in the notice to vacate.

\textsuperscript{16}See Sylvester v. Detweiler, USD No. 84-3399 (E.D. La. 1985); see also, Hughes v. Sanders, 847 So.2d 165 (La. App. 2 Cir. 2003) (J. Caraway, dissenting).

\textsuperscript{17}The reality in many trial courts is that the judge places the burden on the tenant, does not require proof of a prima facie case, and conducts a the trial that is "conversational" at best.
the relation of landlord and tenant between the parties,
the expiration or termination of the lease,
that due notice to vacate has been served upon the tenant, as required by law.


The landlord must prove the notice, the landlord-tenant relationship, violation of the lease or expiration of the lease. If there is a lease, it is the landlord’s burden to prove the lease and the lease violation. Sworn testimony and admissible documents must be introduced into evidence for the landlord to establish a prima facie case of entitlement to eviction. See Owens v. Munson, supra; Kenneth and Allicen Caluda Realty Trust v. Fifth Business LLC, supra; PTS Physical Therapy Service v. Magnolia Rehabilitation Service, Inc., supra. An eviction can’t be granted absent evidence. Poydras Center LLC v. Intradel Corp., 81 So.3d 80 (La. App. 4 Cir. 2011).

In addition, the landlord must show jurisdiction. Arnona v. Arnona, 477 So.2d 120 (La. App. 4 Cir. 1985), writ denied 479 So.2d 367 (La. 1985); PTS Physical Therapy Service v. Magnolia Rehabilitation Service, Inc., 920 So.2d 997, 1000 (La. App. 2 Cir. 2006).

After the landlord establishes a prima facie case, the burden shifts to the tenant to refute the landlord’s case and to prove any affirmative or special defenses pleaded.

Some justices of the peace enter eviction judgments without ever holding a trial. This is egregious legal error and violates the Code of Judicial Conduct. A judge who does this will probably be suspended by the Supreme Court. See e.g., In re Justice of the Peace Landry, 789 So.2d 1271 (La. 2001). A call to the judge may secure a rescission of the unlawful judgment.18

5.2.4 Judgment

The judgment of eviction must be rendered “immediately” after the trial of the rule. La. Code Civ. Proc. art. 4732. The failure to immediately render judgment probably makes the judgment invalid if it prejudices or prevents a timely appeal by the losing party. The judgment must be in writing. La. Code Civ. Proc. arts. 1911, 4923.

Notice of the judgment must be given to the tenant. La. Code Civ. Proc. arts. 1913, 4905, 4922. The judgment of eviction against the tenant is also binding on sublessees. Scott v. Kalip, 197 So. 205 (La. App. 2 Cir. 1940)(sublessee has right to sue sublessor for damages, if any, as a result of the eviction). Judgment must be effective for at least 90 days. La. Code Civ. Proc. art. 4732.

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18 Do not threaten the judge with disciplinary charges for his violation of the Code of Judicial Conduct. See Rules 8.4 (g), 8.3 (b), Louisiana Rules of Professional Conduct.

19 Cf. Versailles Arms Apts. v. Granderson, 377 So.2d 1359, 1362 (La. App. 4 Cir. 1979); Edenborn Partners v. Korndorffer, 652 So.2d 1027 (La. App. 5 Cir. 1995); Flores v. Gondolier, Ltd., 375 So.2d 400, 403 (La. App. 3 Cir. 1979).
5.2.5 Execution of Eviction Judgment

Under La. Code Civ. Proc. art. 4733, an eviction judgment is executed by applying for a warrant for possession if the tenant does not vacate within 24 hours after the “rendition” of judgment. “Rendition” means when a written judgment is signed. Execution of the judgment requires the tenant to remove not only himself and his possessions, but also to deliver the property free of other occupants.

The warrant for possession typically directs the sheriff or constable to immediately execute the eviction judgment. They can force open doors and windows, and seize and sell the property to pay for the costs.

5.3 PROCEDURE FOR DEFENDING A JUDICIAL EVICTION

5.3.1 Verified Answer and Affirmative Defense

A verified answer pleading an affirmative defense must be filed prior to the trial of the rule for possession to preserve the tenant’s right to suspensively appeal an eviction judgment. Thus, as a practical matter, the first step in defending an eviction is the preparation of a verified answer to the rule for possession. The answer must be written, signed and sworn to by the tenant under oath.

The answer must plead an affirmative defense entitled the tenant to retain possession of the premises. An affirmative defense should be specially pleaded and as specific as possible.

An affirmative defense in an eviction proceeding has been held to be one which raises a new matter not covered by the plaintiff’s petition and which would defeat the plaintiff’s demand on the merits, even if the plaintiff proves all of the allegations in his petition. Newport-Nichols Enterprises v. Grimes, Austin & Stark, Inc., 463 So.2d 111 (La. App. 3 Cir. 1985) (held that defendant’s defense of judicial control entitled the tenant to a suspensive appeal.) In Newport, the tenant pleaded good faith efforts to comply with the lease and that the breach of failing to furnish evidence of insurance was immaterial. You should always plead the defense of judicial control.

In Modicut v. Bremer, 398 So 2d 570 (La. App. 1 Cir. 1980), the plaintiff sued for eviction claiming non-payment of rent, and the defendant answered contending that he had complied with all of the terms and conditions of his lease. The court held that the defendant’s assertion of compliance was merely a general denial of the plaintiff’s allegation of non-payment. The plea of compliance was held not to have raised a new matter which would defeat the plaintiff’s claim, even if the claim was found to be true. The court held that a general denial is not an affirmative defense under La. Code Civ. Proc. art. 1005.

Modicut appears to be contrary to the Supreme Court’s decision in Trist v. Ravain, 98 So.2d 169 (La. 1957) where a defense of rent payment was held to be

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20 Housing Authority of City of Lake Charles v. Minor, 355 So.2d 270 (La. App. 3 Cir. 1977).
21 Miles v. Kilgore, 191 So. 556 (La. App. 2 Cir. 1939).
22 A post-trial answer will not be considered. Williams v. Bass, 847 So.2d 80 (La. App. 2 Cir. 2003). However, an answer filed after trial but before judgment with leave of court may suffice. Newport-Nichols Enterprises v. Grimes, Austin & Stark, Inc., 463 So.2d 111 (La. App. 3 Cir. 1985).
24 La. Code Civ. Proc. art. 4735; Sarpy v. de la Houssave, 217 So.2d 783 (La. App. 4 Cir. 1968); Soloman v. Hickman 213 So.2d 96 (La. App. 1 Cir. 1968).
sufficient for a suspensive appeal. Before *Modicut*, the rule applied in eviction appeals had been or is that an affirmative defense is one which, if proven, will have the effect of defeating the rule for possession on its merits. To counter *Modicut*, one should plead the *Newport-Nicholls Enterprises* affirmative defense of judicial control of lease termination whenever possible.

### 5.3.2 Motion to Continue

A brief continuance of the eviction trial must be granted under La. Code Civ. Proc. art. 1602 if you are unable, with due diligence, to obtain evidence or witnesses material to the case. La. Code Civ. Proc. arts. 1602, 4831. In addition, due process requires that a tenant have a fair opportunity to present his case. *Pernell v. Southall Realty*, 416 U.S. 363, 385 (1974). Thus, subpoenas for witnesses and documents must be issued immediately so that the due diligence standard for an art. 1602 peremptory continuance will be met. Evictions involving federally subsidized tenants, the repair and deduct defense, or the abuse of right defense often require additional time to subpoena witnesses and documents.

Landslords and courts must accommodate the disabled and hospitalized. One court has held that the Fair Housing Act requires continuances where the tenant’s disability prevents his attendance. Other courts have found that the Americans with Disabilities Act may require a continuance as an accommodation.

A continuance should be granted in a public housing authority eviction where the authority has refused or failed to grant the pre-trial discovery required by federal law. See § 5.3.3, infra.

### 5.3.3 Pre-trial discovery

The trial of most residential evictions within 3 to 7 days of the filing of the rule for possession generally makes pre-trial discovery infeasible. However, in trial de novo appeals of justice of peace eviction judgments, there will often be 3 or more weeks before the trial date. This delay can provide sufficient time to notice a deposition. In addition, federal law creates a statutory right for public housing authority tenants to inspect any relevant documents, records or regulations directly related to the eviction before any grievance hearing or court trial. 42 U.S.C. § 1437d(l)(7); 24 C.F.R. § 966.4(m). The right to pre-trial examination of documents even applies to cases where the tenant does not have a right to a grievance hearing. 24 C.F.R. § 966.4 (m) expressly bars the housing authority from proceeding with eviction if it fails to make the documents available upon request by the tenant. Furthermore, federal law requires that the first notice of termination advise the tenant of the § 966.4 (m) right to pre-trial inspection. 24 C.F.R. § 966.4(k)(3)(ii). Thus, a court should continue or dismiss the eviction trial if the housing authority has failed to allow the required examination.

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25It also appears contrary to *Versailles Arms Apartments v. Granderson*, 377 So. 2d 1359 (La. App. 4 Cir. 1979), in which the 4th Circuit held that an allegation of timely tender of the rent due constituted an affirmative defense to an eviction for nonpayment of rent. See also *Gennaro v. Royal Oldsmobile Co., Inc.*, 37 So.3d 1109, 1113 (La. App. 5 Cir. 2010)(payment of rent is affirmative defense); *Liggy v. Judeh*, 446 So.2d 402 (La. App. 4 Cir. 1984)(denial of lease violation not an affirmative defense).

26See e.g., *Versailles Arms Apts. v. Granderson*, 377 So.2d 1359 (La. App. 4 Cir. 1979). The *Modicut* decision, if applied, could deny tenants the right to retain possession in many eviction appeals. As such, it arguably constitutes a denial of the state constitutional right to appellate review, or a denial of equal protection. See, Lindsey v. Normet, 405 U.S. 56 (1972); La. Const. arts. 1, §§ 19, 22.


5.3.4 Recordation of Testimony

A tenant has a state constitutional right to a verbatim recordation of the testimony in an eviction trial in a city, parish or district court. Also, you may require the Clerk of Court to take down the testimony in longhand. La. Code Civ. Proc. art. 2130.

A verbatim recordation of the testimony should always be obtained if you anticipate an appeal (other than an appeal which is trial de novo). Reliance on a narrative of facts is not advised because the judge or opposing counsel will often control the contents of the narrative of facts. In addition, the procedure for preparing and filing an approved narrative of facts by the return date of the appeal (typically, one week after the judgment when testimony was not recorded) is burdensome on appellant’s counsel. See La. Code Civ. Proc. art. 2131.

5.4 Appeals and Post-Judgment Remedies

5.4.1 Appellate Jurisdiction

A tenant may suspensively appeal an eviction judgment. La. Code Civ. Proc. art. 4735. To suspend the eviction, the appeal and appeal bond must be filed within 24 hours of rendition of the judgment. Id. Also, a tenant has the right to devolutorily appeal an eviction judgment. The devolutive appeal will not prevent execution of the eviction judgment. However, reversal of the eviction in a devolutive appeal will subject the landlord to a damages action for wrongful eviction. The delay period for a devolutive appeal of a city or parish court eviction judgment is 10 days. The delay period for a devolutive appeal of a justice of peace eviction judgment is 15 days.

Appeals of all eviction cases from city court or parish court are taken to the court of appeal in the same manner as an appeal from the district court. La. Code Civ. Proc. art. 5001; 2081 et seq.

Appeal from justice of the peace court is to the parish court or, if there is no parish court, to the district court of the parish where the justice of the peace is situated. La. Code Civ. Proc. art. 4924 (A). Appeals from justice of the peace court are tried de novo in parish or district court, and no further appeal is allowed. La. Code Civ. Proc. art. 4924 (B)-(C).

At a trial de novo in parish or district court, the whole case is open for decision and is retried as if there had been no prior trial whatsoever. A tenant may raise new defenses and present new evidence in the trial de novo. A district or parish court sitting as an appellate court in an eviction will also have supervisory jurisdiction over the justice of peace court.

Although no further appeals are allowed in “justice of peace” evictions, the court of appeal has supervisory jurisdiction over the parish or district court’s
appeal to an appellate judge. The appellate judge may reverse the eviction. La. Code Civ. Proc. art. 4924. A writ application to reverse an appellate decision by a parish or district court should be accompanied by a request for a stay of the eviction judgment.

5.4.2 Motion For Suspensive Appeal

5.4.2.1 Parish and City Court Evictions

Application must be made to the trial court for suspensive appeal by written motion or petition, filed within 24 hours after the rendition of a judgment of eviction. La. Code Civ. Proc. arts. 4735, 2121. Rendition of judgment means a signed written judgment, not when the judgment was orally announced. Note that the appeal may be premature if it is filed before the written judgment. La. Code Civ. Proc. art. 1911; but see Overmeir v. Traylor, 475 So.2d 1094 (La. 1985) (signing of final judgment cures defect). An appeal bond must also be filed within 24 hours of judgment, in an amount set by the trial court. La. Code Civ. Proc. art. 4735.

The return day of the appeal is 30 days from the date costs are paid (45 days if there is testimony to be transcribed), unless the trial judge fixes a lesser period. The trial judge may grant only one extension for no more than 30 days. La. Code Civ. Proc. arts. 2125-2125.1. Counsel for appellant should check with the Clerk’s office to ascertain if the record has been completed, and to pay the costs of filing an appeal, if an in forma pauperis order has not been obtained.

5.4.2.2 Justice of the Peace Court Evictions

La. Code Civ. Proc. arts. 4924-25 provide that appeals from judgments by a justice of peace require the filing of a suit for trial de novo in the district court or parish court. La. Code Civ. Proc. art. 4735 requires that suspensive appeals of evictions be applied for within 24 hours of rendition of an eviction judgment. The petition for appeal by trial de novo should include an order suspending the eviction. The order should be sent to the justice of peace and landlord. Cases decided under the prior justice of peace appeal statutes held that a motion for appeal must be filed with the justice of peace court. See Housing Authority of St. John the Baptist v. Butler, 405 So.2d 1252 (La. App. 4 Cir. 1981). After the 1986 amendments to art. 4924 and 5003, a district court has ruled that a motion for appeal no longer has to be filed with the justice of peace court.

Butler was decided before Act 156 of 1986 when the current La. Code Civ. Proc. arts. 4924 and 5003 were respectively arts. 5002 and 5004. Butler cited art. 5004 as authority for the proposition that art. 2121 governed and that therefore only the justice of peace court could grant the appeal. However, prior art. 5004 (now art. 5003) expressly applied to the chapter governing appeals of city, parish and justice of the peace court judgments.

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35 A sample writ application can be found for Bullins v. Covington Housing Authority in probono.net/la.

36 Housing Authority of City of Lake Charles v. Minor, 355 So.2d 270 (La. App. 3 Cir. 1977).

37 In other states, the courts have generally held that an appeal by “trial de novo” (without the requirement for any other court order) suspends the original judgment. We are unaware of any Louisiana cases on this issue. Therefore, it is strongly recommended that tenants comply with the Code Civ. Proc. art. 4735 requirements for a suspensive appeal. Note, however, that in a related Louisiana context, the judicial grant of a new trial suspends the original judgment. Wilson v. Compass Dockside, Inc., 635 So.2d 1171 (La. App. 4 Cir. 1994), writ denied 642 So.2d 1299 (La. 1994). Furthermore, the omission of suspensive appeals from La. Code Civ. Proc. art. 4924, the appeal procedure for justice of peace courts, strongly suggests that the art. 4924 statutory grant of a trial de novo suspends the original judgment.

38 A brief in opposition to a motion to dismiss appeal for failure to file a motion for appeal with the justice of peace court can be found at probono.net/la.
Act 156 of 1986 omitted justice of the peace courts from the chapter to which art. 5003 (previously art. 5004) applies while retaining the language of arts. 5002 and 5004 in the new arts. 4924 and 5003. The new chapter governing justice of the peace courts has no provision that makes art. 2121 applicable to appeals from justice of the peace courts. In addition, La. Code Civ. Proc. art. 2081 expressly states that art. 2121 is applicable to appeals to the courts of appeal and supreme court.

5.4.3 Appeal Bonds

Most judges fix the suspensory appeal bond in an amount equal to the rent that will accrue during the appeal. The motion for suspensory appeal should contain a provision for setting the amount of the appeal bond. In forma pauperis litigants are not exempted from the requirement of a suspensory appeal bond. La. Code Civ. Proc. art. 5185(B). However, the appeal bond may not include the costs of appeal.\textsuperscript{39}

A tenant may post a surety or cash bond. La. Civ. Code art. 3068.\textsuperscript{40} For subsidized tenants, ask for the bond to be the tenant’s share of the rent. Form appeal bonds may be provided by the court. The surety on the appeal bond must have net assets in excess of the amount of the bond, and must be a resident of the parish where the eviction is brought. La. Code Civ. Proc. art. 5122.\textsuperscript{41} The formalities of the bond must be strictly complied with, on penalty of subjecting the surety to possible false swearing charges.

Some trial judges will unlawfully seek to defeat a tenant’s appeal. Examples are:

- An order requiring payment of ongoing rents in addition to the posting of a suspensory appeal bond. \textit{A & J, Inc. v. Ackel Real Estate}, 831 So.2d 311 (La. App. 5 Cir. 2002).

- Including court costs for eviction and appeal in bond amount when tenant is in forma pauperis. La. Code Civ. Proc. art. 5181 (A); \textit{Johnson v. Sauer}, 2012-C-0022, (La. App. 4 Cir. 1/12/12) \textit{Fimilore Parc Apartments v. Howard}, 2004-1299, (La. App. 4 Cir., 7/30/04).\textsuperscript{42}

- A recall of the appeal once the tenant has posted the bond. \textit{Olivier v. Roland}, 2003-C-1916 (La. App. 4 Cir. 10/31/03); \textit{Vaughn v. American Bank & Trust Co.}, 66 So.2d 4 (La. 1953).

- An order increasing the bond or to test its sufficiency on the judge’s own motion. \textit{Estate of Helis v. Hoth}, 137 So.2d 472 (La. App. 4 Cir.1962).


\textsuperscript{39} \textit{Johnson v. Sauer}, 2012-C-0022, (La. App. 4 Cir. 1/12/12); \textit{Fimilore Parc Apartments v. Howard}, 2004-1299 (La. App. 4 Cir. 7/30/04).

\textsuperscript{40} \textit{Case v. Case}, 316 So.2d 418 (La. App. 2 Cir. 1975); \textit{Fimilore Parc Apartments v. Howard}, 2004-1299 (La. App. 4 Cir., 7/30/04). The tenant’s brief in \textit{Fimilore Parc Apartments v. Howard} can be found at probono.net/la.

\textsuperscript{41} The surety may be liable for damages from delay caused by appeal if the tenant loses the eviction appeal. Typically, damages include unpaid rent. The landlord has the burden of proving the delay damages. See e.g., \textit{Urban Homeowners’ Corp. v. Abrams}, 692 So.2d 673 (La. App. 4 Cir. 1997).

\textsuperscript{42} See also, \textit{Brownell v. Brownell}, 799 So.2d 587 (La. App. 3 Cir. 2001)(pauper can’t be ordered to pay court costs in installments); \textit{Urban Homeowners’ Corp. v. Abrams}, 692 So.2d 673 (La. App. 4 Cir. 1997)(appeal bond limited to damages sustained by landlord as result of delay from appeal); cf. \textit{Matheine v. Matheine}, 808 So.2d 571 (La. App. 1 Cir. 2001)(only appeal costs may be included in the notice of estimated costs for appeal); \textit{Johnson v. First National Bank}, 786 So.2d 84 (La. 2001)(awrits appropriate to reduce excessive estimated costs of appeal).

\textsuperscript{43} The tenant’s brief in \textit{Olivier v. Roland} can be found at probono.net/la.

Furthermore, the judge may illegally try to defeat appellate review of his illegal dismissal orders by taking ex parte action with little or no notice to the tenant. Sample writ argument inserts or briefs on such issues can be found at www.probono.net/la. If the landlord obtains an unlawful dismissal of a suspensive appeal of an eviction from a court, it may be liable for the damages caused by the tenant’s eviction.44

Under the jurisprudence, a trial court clearly loses jurisdiction to consider a motion to dismiss the suspensive appeal or convert to a devolutive appeal when the appeal bond is timely posted.45 Therefore, you should immediately file the appeal and bond. Also, it appears that a trial court is divested of jurisdiction to convert a suspensive appeal to a devolutive appeal in an eviction case when the bond is not timely filed.46

The landlord may test the sufficiency, solvency, or legality of the bond by a rule to show cause. La. Code Civ. Proc. art. 5123. If the surety is found insufficient or invalid, the tenant has 4 days to correct the deficiency by filing a new or supplemental bond. La. Code Civ. Proc. art. 5124; Hoerner v. Paul, 392 So.2d 191 (La. App. 4 Cir. 1981)(4 day rule applies to eviction appeals). The tenant has two opportunities to correct a deficient bond. La. Code Civ. Proc. art. 5126. The tenant may file a corrected bond at any time prior to the filing of a rule to test the original bond. La. Code Civ. Proc. art. 5124.

If your client is unable to obtain a surety bond, be prepared to file a motion for an alternative bond, e.g., payment of each month’s rent as due into the court registry. See, e.g., Steward v. West, 449 F. 2d 324 (5th Cir. 1971) (as long as the tenant continued to pay rent, it was very unlikely that the landlord would suffer any harm during the pendency of the appeal). Louisiana courts have authorized the use of such alternative bonds. See, e.g., Robinson v Ventures LLC v. Dowl, 901 So2d 587 (La. App. 4 Cir. 2005)(payment of $300 monthly rent into court registry); Lakewind East Apts. v. Poree, 629 So.2d 422 (La. App. 4 Cir. 1993)(payment of monthly rent). In Gross v. Williams, 99-C-1865 (La. App. 4 Cir. 1999), the appellate court reduced a subsidized tenant’s appeal bond to monthly payment of her share of the rent into the court registry where the housing authority continued the payment of rent subsidies to the landlord.47

Failure to move for the dismissal of a suspensive appeal within 3 days of the appeal record lodging may waive objections to the timeliness of a bond. La. Code Civ. Proc. 2161; Wright v. Jefferson Roofing, Inc. 630 So.2d 773 (La. 1994); but see Lakewind East Apts. v. Poree, 629 So.2d 422 (La. App. 4 Cir. 1993)(rule does not apply to “continuing” bond of monthly rental payments).

44 Harding v. Monjure, 1 So.2d 116 (O rl. App. 1941).
45 Robertson v. Aztec Facility Services, Inc., 20 So. 3d 492, 494 (La. App. 4 Cir. 2009).
47 The trial court had set the bond as monthly payments of the contract rent rather than the tenant's rent share.
5.4.4 Effect of Suspensive Appeal

A suspensive appeal stays the effect or execution of the eviction judgment. If the tenant’s eviction appeal is denied by the court of appeal, the judgment becomes final and executory in 30 days, unless the tenant applies for a writ of certiorari. Timely application to the Louisiana Supreme Court for a writ of certiorari precludes execution of the eviction judgment until the Supreme Court rejects the writ application or appeal.48 Note that tenants appealing justice of the peace decisions apparently do not have a statutory suspension (similar to art. 2166) when they seek supervisory review of a district or parish court appeal decision. However, the higher court’s supervisory jurisdiction allows them to stay the eviction pending review.

A final appellate judgment may be executed in the trial court without further notice after the landlord has filed a certified copy of the appellate judgment with the clerk of trial court. La. Code Civ. Proc. art. 2167.

The lease is not dissolved until the judgment decreeing cancellation becomes final. A suspensive appeal not only stays execution, it stays the “effect” of a judgment. Thus, the landlord’s and tenant’s obligations remain in effect during the suspensive appeal.49 If the landlord attempts to evict or eject a tenant in violation of the suspensive appeal or a stay order, he may be subject to a contempt action for violation of a court order or damages for lease violations.50

5.4.5 Rent obligation during pendency of appeal

One court has held that a suspensive appeal does not suspend a tenant’s obligation to pay rent as it becomes due during the appeal. Thus, failure to pay rent in a subsequent month can constitute a separate cause of action for which the landlord can sue to evict the tenant, despite the pendency of a suspensive appeal. Sarpy v. Morgan, 426 So.2d 293 (La. App. 4 Cir. 1983). Given Sarpy, a tenant should timely tender the rent as it becomes due during the appeal. Also, failure to timely pay rent to the court registry pursuant to an appeal bond could result in dismissal of the tenant’s suspensive appeal. Lakewind East Apts. v. Poree, 629 So.2d 422 (La. App. 4 Cir. 1993).

5.4.6 Motion to dismiss appeal

The following scenario threatens tenants with the loss of their constitutional rights of appellate review of eviction judgments:

- tenant’s suspensive appeal is dismissed because of lack of an affirmative defense, Modicut v. Brewer, supra, or inability to pay bond
- landlord executes the eviction judgment
- tenant moves out to avoid trespass charges, etc.
- the tenant’s devolutive appeal is then dismissed for mootness. See, Curran Place Apts. v. Howard, 563 So.2d 577 (La. App. 4 Cir. 1990).

49 Cf. Reed v. Classified Parking System, 324 So.2d 484, 490 (La. App. 2 Cir. 1975); but see, Smith v. Castro Brothers Corp., 443 So. 2d 660 (La. App. 4 Cir. 1983), writ denied 446 So.2d 1229, 1231 (La. 1984).
50 A suspensive appeal order suspends or stays the effect or execution of the judgment. La. Code Civ. Proc. art. 2123. Violation of a suspensive appeal order is punishable as contempt. See La. Code Civ. Proc. 224-27. Violation of a stay order is punishable as contempt. See La. Code Civ. Proc. art. 3611 (violations of injunctions punishable as a contempt of court; court may undo whatever was done in violation of an injunction and aggrieved party may recover damages).
How ard was incorrectly decided. In New Orleans Hat Attack, Inc. v. N.Y. Life Insurance Co., 665 So.2d 1186 (La. App. 4 Cir. 1995), the court held that an evicted tenant who takes a devolutive appeal does not acquiesce in the judgment when he vacates the premises and that, as a general rule, does not forfeit his right to a devolutive appeal by compliance with the judgment.

New Orleans Hat Attack distinguished Howard and similar cases by noting that they involved expired leases. Under New Orleans Hat Attack, the devolutive appeal of a tenant with an unexpired lease would not be mooted out by his vacating the premises. At trial, introduce the lease and evidence about the type of housing involved. Leases of public and certain subsidized housing do not expire at the end of their terms. Therefore, eviction appeals involving such leases should not become moot.

It is also important to demonstrate that the tenant is not acquiescing in the eviction judgment by moving out. One suggestion is to write a letter to the landlord or the landlord’s attorney saying that the tenant does not intend to forfeit his appeal rights, and that he is only moving out to avoid a trespass charge.

A landlord who evicts a tenant during a devolutive appeal is monetarily liable for wrongful eviction if the judgment is ultimately reversed. Ask the landlord to agree to defer execution of eviction pending appeal. It is imprudent for a subsidized landlord to evict during a devolutive appeal since he could lose his subsidies during the appeal. A tenant who moves out should record a notice of his devolutive appeal (notice of lis pendens) in the parish mortgage office under La. Code Civ. Proc. art. 3751 et seq. in order to protect his rights against third parties.

In addition, a devolutive appeal is not moot because the eviction judgment may be res judicata as to any subsequent suit for wrongful eviction. Note, however, that one court has held that ordinary claims asserted in defense of an eviction do not constitute res judicata to a subsequent ordinary action for damages. Another court has held that an eviction judgment is not res judicata to a subsequent suit for wrongful eviction since the tenant could not have asserted her claims in the eviction.

5.4.7 Supervisory Writs

If a tenant cannot comply with the requirements for a suspensive appeal, consider an application for supervisory writs and stay order. See, Uniform Rules - Courts of Appeal 4.4; Doullut v. Rush, 77 So. 110 (La. 1917). Both the court of appeal and the trial court have the discretion to stay the eviction pending the determination of the supervisory writ application.
A district or parish court hearing an appeal of a justice of peace court eviction also has supervisory jurisdiction incidental to its appellate jurisdiction. As such, the district or parish court should have discretion to issue a stay to prevent irreparable injury. Irreparable injury exists for evictions of indigents.

5.4.8 Motion for new trial

Sometimes, a tenant may come to you for help after judgment. A motion for new trial must be granted if the judgment is contrary to the law and evidence. La. Code Civ. Proc. art. 1972. A new trial may be granted for good cause. La. Code Civ. Proc. art. 1973. The denial of a new eviction trial was reversed on appeal where the notices of the hearing date were confusing.

As a practical matter, you should file immediately for a new trial since evictions are often executed within 24 to 48 hours of judgment. New trials in parish or city courts must be applied for within 7 days of the mailing or service of the notice of judgment. La. Code Civ. Proc. art. 4907. The delay for a new trial motion in a justice of peace court is also 7 days. La. Code Civ. Proc. arts. 4925, 4922, 4831. A motion for new trial does not extend the deadline for a suspensive appeal of an eviction. Therefore, it should include a motion for stay. If a new trial is granted, the original judgment is set aside or suspended.

5.4.9 Petition for nullity of judgment

If a motion for new trial or appeal is not available, the only other post-trial remedy is a petition for nullity of judgment. This remedy presents most commonly when a default judgment has been rendered against the client, and the client alleges nonreceipt of service of process, payment of the rent before the eviction judgment, or that the landlord told him not to attend the trial.

A petition for nullity of judgment may be appropriate if there are arguable grounds for nullification. See, La. Code Civ. Proc. art. 2001-2006; Hughes v. Sanders, 847 So.2d 165 (La. App. 2 Cir. 2003); CA One/Pam py's v. Brown, 982 So.2d 909 (La. App. 4 Cir. 2008); Joiner v. Housing Authority of New Orleans, 238 So.2d 196, 197 (La. App. 4 Cir. 1970).

Default judgments of eviction based only on tacking service of the rule could be subject to nullification because the United States Supreme Court has held that tacking service is constitutionally inadequate in eviction cases. Greene v. Lindsey, 456 U.S. 444 (1982); La. Code Civ. Proc. art. 2002; but see, French Quarter Realty v. Gambel, 921 So.2d 1025 (La. App. 4 Cir. 2005). The Constable of First City Court for the City of New Orleans must also serve Rules for Possession by regular mail pursuant to Sylvester v. Detweiler, USDC No. 84-3399 (E.D. La.) (class action consent judgment based on Greene).

Misrepresentations by the landlord that are material to obtaining the default judgment are grounds for nullification. Cf., Temple v. Jackson, 376 So.2d 972 (La. App. 1 Cir. 1979). The typical misrepresentations that occur in eviction defaults

57 La. Const. Art. 5, § 82 (B); In re Shintech, 734 So.2d 772 (La. App. 1 Cir. 1999), writ denied 746 So.2d 601 (La. 1999).
58 See e.g., Park Village Apartment Tenants Association v. Mortimer Howard Trust, 636 F.3d 1150, 1159 (9th Cir. 2011).
59 Housing Authority of City of Ferriday v. Parker, 629 So.2d 475 (La. App. 3 Cir. 1993). A denial of a new trial is an interlocutory order that may be reviewed in an appeal of a final judgment. Id.
60 Caveat: you must file the motion for suspensive appeal within 24 hours of rendition of the eviction judgment in order to preserve the right to appeal suspensively. See also, Castagna v. Gonnet, 4 Peltiers Orl. App. Dec. 574 (Orl. App. 1920), 1920 WL 3122. (granting new trial does not suspend eviction judgment).
61 Wilson v. Compass Dockside, Inc., 535 So.2d 1171 (La. App. 4 Cir. 1994) writ denied 642 So.2d 1299 (La. 1994); Oliver v. Oliver, 411 So.2d 596, 597 (La. App. 1 Cir. 1982).
are (1) that the lease is only month-to-month when the tenant has a written lease for a fixed term, which precludes no cause evictions, and (2) nonpayment of rent when the landlord has, in fact, accepted the rent.

Also, a judgment may be annulled where its enforcement would be unconscionable and inequitable and in impairment of one’s legal right, even if no intentional wrongdoing is found. Bradford v. Thomas, 499 So.2d 525 (La. App. 2 Cir. 1986), writ denied 503 So.2d 480 (La. 1987) (judgment placing universal legatee under will in possession of testator’s estate was properly annulled for legatee’s failure to present entire succession record to court, which would have informed court that legatee’s right to possess was under formal attack).

Default judgments in which the record itself discloses an insufficient notice to vacate, or a premature rule date, can usually be nullified since eviction court judges generally recognize that a default judgment should not have been entered. See generally, La. Code Civ. Proc. arts. 4732, 1701-03; Baham v. Faust, 382 So.2d 211 (La. App. 4 Cir. 1972), writ denied 259 So.2d 916 (La. 1972).

A petition for nullity of judgment and injunctive relief should generally be brought in the trial court that rendered the eviction judgment. La. Code Civ. Proc. art. 2006. The petition for nullity of judgment may be filed in the eviction case.

A petition for nullity of judgment is an ordinary proceeding and does not stay the execution of the allegedly null judgment. Therefore, such petitions should be verified and include an application for a temporary restraining order and preliminary injunction. The tenant may be able to obtain a stay pending an appeal of the preliminary injunction denial.62

The verified petition for nullity of judgment should include factual allegations which show that the tenant will suffer irreparable injury if a temporary restraining order is not granted. Irreparable injury is present in virtually all evictions involving indigents. See e.g., Park Village Apartment Tenants Association v. Mortimer Howard Trust, 636 F.3d 1150, 1159 (9th Cir. 2011); Jackson v. Jacobs, 971 F. Supp. 560, 565 (N.D. Ga. 1997). Irreparable injury is not required if the landlord has violated a prohibitory law. See e.g., St. Charles Gaming v. Riverboat Gaming, 648 So.2d 1310 (La. 1995).

A preliminary injunction requires irreparable injury and a “prima facie” case on the merits. Since irreparable injury generally exists in an eviction, the critical issue for a preliminary injunction is whether the tenant has a “prima facie” case on the merits. This is a relatively easy standard for a tenant to meet.63 Preliminary injunctions are often tried on affidavits. For an annulment at the trial on the merits, the tenant needs to prove a “fraud or ill practice” by a preponderance of evidence. The court may award attorney fees if the eviction judgment is annulled for fraud or ill practices.64

5.5 FEDERAL REMEDIES AND DEFENSES

5.5.1 Fair Housing Act

Eviction of tenants based on unlawful discrimination can be enjoined under the Fair Housing Act and 42 U.S.C. § 1982. See e.g, Bill v. Hodges, 628 F. 2d 844, 845 (4th Cir. 1980).65

62 See, e.g., Housing Authority of New Orleans v. Lee, 480 So.2d 998 (La. App. 4 Cir. 1985).
63 See, e.g., Continental Titles, Inc. v. U.S. Fire Insurance Co., 413 So.2d 216 (La. App. 4 Cir. 1982).
64 La. Code Civ. Proc. art. 2004 (C); Filson v. Windsor Court Hotel, 990 So.2d 63 (La. App. 4 Cir. 2008).
65 The Anti-Injunction Act does not prohibit a federal court from enjoining a landlord from filing a state court eviction lawsuit. However, the courts are split as to whether a federal court may enjoin a state court eviction lawsuit that was filed before the tenant obtained an injunction in a federal Fair Housing Act lawsuit.
Federal injunctive relief may not be feasible if the tenant’s entitlement depends on contested factual issues. See, e.g., Higbee v. Starro, 698 F.2d 945 (8th Cir. 1983) (injunction of retaliatory eviction denied because of difficulty of proving that retaliation was substantial motivating factor in decision to evict). Housing discrimination cases involving contested factual issues and a discriminatory eviction may be better litigated in state district court where lis pendens will require the eviction to be litigated in district court if the tenant’s affirmative lawsuit is filed first.66

5.5.2 Age Discrimination Act of 1975

The Age Discrimination Act of 1975 prohibits discrimination based on age in programs or activities that receive federal assistance.67 HUD regulations implement the ADA and provide examples of how it applies.68 A complainant must exhaust administrative remedies by first filing a complaint with HUD.69 A complainant may file a lawsuit to enforce the ADA only (1) after 180 days have passed since the complainant filed an age discrimination complaint with HUD or (2) after HUD issues a finding in favor of the federal assistance recipient.70 The ADA also prohibits retaliation for filing a complaint with HUD or advocating for rights protected under the ADA.71

5.5.3 Bankruptcy Code

Finally, evictions are automatically stayed by the filing of a bankruptcy petition. 11 U.S.C.§ 362 (a)(3).72 There are two exceptions to a § 362 bankruptcy stay of evictions: (1) the eviction judgment was obtained prior to bankruptcy filing and (2) an eviction based on “endangerment” of property or illegal drug use on the property by tenant within 30 days prior to the filing of the bankruptcy.11 U.S.C. § 362(b)(22)-(23).

A complaint to enforce the stay should be filed with the bankruptcy court in order to bar any attempted state court eviction. Violations of the stay create a private cause of action for damages.73 Bankruptcy petitions, particularly Ch. 13 reorganizations, can be a powerful remedy for public housing tenants who face eviction for nonpayment of rent.74

The landlord’s efforts to evict, seize tenant property or collect rent after the tenant has filed a petition in bankruptcy violates the automatic stay and justifies the award of damages and attorney’s fees. See In re Ozenne, 337 B.R. 214 (9th Cir. BAP 2006). Attorneys acting on behalf of landlords or other creditors may be personally held in contempt for their participation in stay violations.

However, the bankruptcy code provides relief from the automatic stay in certain cases. 11 U.S.C. § 362(d). Many housing issues will be litigated through opposition to relief from the stay or motions to vacate the stay.

56 Cf. Spallino v. Monarch Sign, 771 So.2d 784 (La. App. 3 Cir. 2000).
67 42 U.S.C. 6101 et seq.
68 24 C.F.R. § 146. For examples of the 4 part test for age discrimination, see 51 Fed. Register 45264-01 (Dec. 17, 1986).
69 See 24 C.F.R. §§ 146.33, 146.39, 146.45.
70 U.S.C. § 6104(f); 24 C.F.R. § 146.45; Parker v. Board of Supervisors, 296 Fed. Appx. 414 (5th Cir. 2008).
71 42 U.S.C. § 6103; 24 C.F.R. § 146.41.
72 In re Smith Corset Shops, Inc., 696 F.2d 971, 976 (1st Cir. 1982); In re Burch, 401 B.R. 153 (Bankr. E.D. Pa. 2008)
74 In re Stoltz, 315 F.3d 80 (2d Cir. 2002); contra Housing Authority v. Eason., 12 So.3d 970 (La. 2009) rev’d 9 So.2d 269 (La. App. 4 Cir. 2009); see M.Moreau, State Appellate Court Recognizes Bankruptcy as Public Housing Defense, 39 Housing Law Bulletin 137 (June 2009).
5.5.4 Violations of federal law

Occasionally, a tenant may be able to obtain a federal court injunction against an eviction. For example, execution of a default eviction judgment based only on tacking service should be enjoinable in federal court. Cf. Greene v. Lindsey, 456 U.S. 444 (1982); Porter v. Lee, 328 U.S. 246 (1946). Subsidized housing tenants may be able to enjoin evictions brought in violation of constitutional rights or federal regulations. See generally, National Housing Law Project, HUD Housing Programs, Ch. 14 (4th ed. 2012).

Under the Supremacy Clause, state courts must consider and apply any relevant federal law defenses to evictions. For public or subsidized housing, federal law may provide defenses which limit the grounds for eviction, prohibit non-renewal of lease or prescribe notice and other procedural prerequisites to eviction. Other violations of federal law in the subsidized housing context could include retaliatory evictions, failure to give pre-termination grievance hearings, pre-trial discovery or unequal treatment.

5.6 DEFENSES TO JUDICIAL EVICTION

5.6.1 Introduction

Your client’s eviction will be based on either (1) “no cause”, i.e., the expiration of the lease, (2) nonpayment of rent, or (3) “good cause”, i.e., a material violation of the lease. No cause evictions most commonly involve 10 day terminations of month-to-month leases.

Defenses vary according to the type of eviction. The most common defenses to the major types of eviction are discussed below. Procedural defenses, e.g., inadequate notice to vacate or premature rule for possession, apply to all evictions. See discussion below.

5.6.2 No Cause Eviction

5.6.2.1 Inadequate Notice to Vacate

A notice to vacate must be timely, written and properly served. La. Civ. Code art. 2728; La. Code Civ. Proc. art. 4701-03. An improper notice to vacate should result in the dismissal of the rule for possession. Versailles Arms Apartments v. Pete, 545 So.2d 1193, 1195 (La. App. 4 Cir. 1989). For public and subsidized housing, always check if any federal laws for notice and service have been met.

Termination of a month-to-month lease requires at least 10 days notice before the end of the rental month. La. Civ. Code art. 2728; Solet v. Brooks, 30 So.3d 96, 101 (La. App. 1 Cir. 2009). The notice to terminate a month-to-month lease for “no cause” may not be waived in advance. La. Civ. Code art. 2718. If the notice is untimely for a rental month, the landlord may not evict until the end of the next term.

76 If a premature exception is sustained for an improper notice to vacate, the premature lawsuit must be dismissed. La. Code Civ. Proc. art. 933 (A); Lichtentag v. Burns, 258 So.2d 211 (La. App. 4 Cir. 1972) writ denied 259 So.2d 916 (La. 1972); Leger v. Lancaster, 423 So.2d 88, 89 (La. App. 1 Cir. 1982). Prematurity of a lawsuit cannot be cured by an amended pleading. Duncan v. Duncan, 359 So.2d 1310 (La. App. 1 Cir. 1978). But see River Garden Apts. v. Robinson, __So.3d__, 2013 WL 264633 (La. App. 4 Cir. 2013) (eviction judgment not reversed where inadequate notice did not harm or prejudice tenant).
77 See also Doland v. ACM Gaming Co., 921 So.2d 196, 202 (La. App. 3 Cir. 2005); Houston v. Chargeos, 732 So.2d 71 (La. App. 4 Cir. 1999).
78 The written waiver of the notice required by La. Code Civ. Proc. art. 4701 (last paragraph) may not waive the 10 day notice required to terminate a month-to-month lease. La. Civil Code art. 2718 prohibits waiver of the 10 day notice.
rental month.\textsuperscript{80} Leases that have reconducted on a month-to-month basis have been held to require only a 10 day notice even where the lease specifies a longer notice period. \textit{May v. Alley}, 599 So.2d 459 (La. App. 2 Cir. 1992).\textsuperscript{81}

Under federal law, a tenant in foreclosed property can't be evicted unless at least 90 days notice is given. 12 U.S.C. § 5220; \textit{Bank of New York Mellon v. De Meo}, 254 P.3d 1138 (Ariz. App. 2011).\textsuperscript{82}

Untimely service of the notice to vacate is commonly accepted by the trial courts as a defense to a no cause eviction. The date of delivery of the notice to vacate should not be included in the computation of the 10 day period to terminate a month-to-month lease. La. Code Civ. Proc. art. 5059. The last day of the period should be included unless it is a legal holiday, in which case the period runs until the end of the next day which is not a legal holiday. La. Code Civ. Proc. art. 5059.

Service of the notice to vacate may be made by personal, domiciliary or tacking service. La. Code Civ. Proc. arts. 1231-34, 4703. In addition, a notice to vacate can sometimes be served by mail or fax.\textsuperscript{83} The notice to vacate may not be served by a justice of the peace. La. Atty. Gen. Op. 97-295, 97-349. If this happens, the judge may have to recuse himself since he acted as the landlord's agent.

Tacking service of the notice to vacate by the sheriff or landlord has been upheld by Louisiana courts.\textsuperscript{84} The sufficiency of tacking service of the notice to vacate is not altered by \textit{Greene v. Lindsey}, 456 U.S. 444 (1982) because the Supreme Court only invalidated tacking service of eviction lawsuits. However, tacking service is theoretically permissible only in limited circumstances, i.e., “if the premises are abandoned or closed, or if the whereabouts of the lessee or occupant is unknown.” La. Code Civ. Proc. art. 4703. Whether tacking service was properly used by a landlord is a factual question.\textsuperscript{85}

The defense of improper use of tacking service is difficult to prove because the sheriff’s return showing service is presumed to be correct. The burden is on the tenant to prove the incorrectness of the sheriff’s return by a preponderance of evidence. \textit{Hall v. Folger Coffee Co.}, 874 So.2d 90, 96 (La. 2004).

It should be noted that no presumption of correctness applies when the notice to vacate is served by the landlord rather than the sheriff. Here, service of the notice must be proven by competent evidence. Where the credibility of neither is attacked, contradictory testimony by the landlord and the tenant requires a decision in favor of the tenant. \textit{See Alphonso v. Alphonso}, 422 So.2d 210 (La. App. 4 Cir. 1982). If service was by regular mail, the landlord would probably be unable to establish the actual date of delivery.

The notice to vacate must be introduced into evidence for the court to consider it as part of the landlord’s prima facie case for eviction. \textit{Monroe Housing Authority v. Coleman}, 70 So.3d 871 (La. App. 2 Cir. 2011). For public or subsidized housing, always check if the federal rules for notice and service have been met.

\textsuperscript{80}\textit{Torco Oil Co. v. Grif-Dun Group, Inc.}, 617 So.2d 102, 104 (La. App. 4 Cir. 1993).
\textsuperscript{81}See also, La. Civ. Code art. 2724.
\textsuperscript{82}12 U.S.C. § 5220 expires on December 31, 2014 unless extended.
\textsuperscript{83}See \textit{Maxwell, Inc. v. Mack Trucks, Inc.}, 172 So. 2d 297 (La. App. 4 Cir. 1965), writ denied 174 So.2d 131 (La. 1965)(mail); \textit{Poydras Center LLC v. Intradel Corp.}, 81 So.3d 80 (La. App. 4 Cir. 2011) (fax).
\textsuperscript{84}\textit{Fairfield Property Mgt. v. Evans}, 589 So.2d 83 (La. App. 2 Cir. 1991); \textit{Ernest Joubert Company v. Tatum}, 332 So. 2d 553 (La. App. 4 Cir. 1976); \textit{Alaimo v. Hepinstall}, 377 So.2d 889 (La. App. 4 Cir. 1979).
\textsuperscript{85}\textit{Friedman v. Hofchar}, 424 So.2d 496, 498 (La. App. 5 Cir. 1982), writ denied 430 So.2d 74 (La. 1983).
5.6.2.2 Premature Rule for Possession

The landlord's rule for possession is premature if it is filed before the expiration of the applicable delay, 5 or 10 days, required for the notice to vacate. The landlord must allow the tenant a full 5 or 10 days from the date of service of the notice to vacate before filing a rule for possession in court. La. Code Civ. Proc. arts. 4701; 4731; Owens v. Munson, 2009 WL 3454507 (La. App. 1 Cir. 2009); Lichtentag v. Burns, 258 So.2d 211 (La. App. 4 Cir. 1972), writ denied 259 So.2d 916 (La. 1972). In addition, a rule may not be heard until the third day after valid service on the tenant. South Peters Plaza, Inc. v. PJ Inc., 933 So.2d 876 (La. App. 4 Cir. 2006).

A legal holiday is not included in the computation of the period for a 5 day notice to vacate or where it would otherwise be the last day of the notice period (whether 5 days or 10 days). La. Code Civ. Proc. art. 5059 (definition of legal holidays per parish or court); La. Rev. Stat. 1:55; Lichtentag v. Burns, supra (5 day notice); South Peters Plaza, Inc. v. PJ Inc. Bendana v. Stokes, supra (3 day delay for rule for possession).

5.6.2.3 Lease or Other Agreement

A lease or other agreement to lease can be a defense to a no cause eviction. Monroe Housing Authority v. Coleman, 70 So.3d 871 (La. App. 2 Cir. 2011)(eviction denied if unexpired lease and no proof of lease violation). A fixed term lease cannot be canceled for no cause by a 10 day notice to vacate (unless the lease has a “no cause” cancellation provision). La. Civ. Code arts. 2728, 1983; Shell Oil v. Siddiqui, 722 So.2d 1197 (La. App. 5 Cir. 1998). However, some eviction court judges mistakenly believe that any lease can be canceled for no cause on 10 days notice to vacate.

A lease may be either written or oral. La. Civ. Code art. 2681. Oral modifications or the parties’ course of conduct can change a written lease. Oral leases are binding if proved. A lease may be inferred from the facts, circumstances and acts of the parties. A lease agreement where the rent is the tenant’s repair work has been construed as a lease with a term sufficient for the tenant to realize the fair value of his repairs. See e.g., Wolf v. Walker, 342 So.2d 1122 (La. App. 4 Cir. 1976). An unsigned lease can be evidence of a lease agreement. A written or oral agreement to lease can be a defense to a no cause eviction even if the final agreement of lease has not been signed. However, in order to enforce the agreement to lease, the tenant must be able to prove that all of the details and conditions of the lease were agreed to and understood by the parties.

A third party beneficiary can use a third party beneficiary contract (stipulation pour autrui), that confers a continued right of occupancy, as a defense to a no cause eviction. La. Civ. Code arts. 1978, 1987; La. Code Civ. Proc. arts. 424,

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86 Karno v. Fein Caterer, 846 So.2d 105 (La. App. 4 Cir. 2003). The proponent of oral modifications of a written lease should introduce written or oral evidence of the modifications. Poydras Center LLC v. Intradel Corp., 81 So.3d 80 (La. App. 4 Cir. 2011)(e-mails not considered written lease amendments where not signed; proponent failed to introduce evidence of oral modifications).


88 Southern Treats, Inc. v. Titan Properties, LLC, 927 So.2d 677, 683 (La. App. 2 Cir. 2007).

89 Williams v. Bass, 847 So.2d 80 (La. App. 2 Cir. 2003).

90 See, e.g., City of New Orleans v. Cheramie, 509 So.2d 58 (La. App. 1 Cir. 1987), writ denied 512 So.2d 463; City of New Orleans v. Hautot, 185 So.2d 24 (La. App. 4 Cir. 1966); Auto-Lec Stores v. Quachita Valley Camp No. 10 W.O.W., 171 So. 62 (La. 1936).
4732; cf., Miller v. White, 162 So. 638 (La. 1935); Tri-Parish Heating & Air Conditioning v. Brown, 338 So.2d 126 (La. App. 1 Cir. 1976). For definitions of stipulation pour autrui and third party beneficiary contract, see Hargroder v. Columbia Gulf Transmission Co., 290 So.2d 874 (La. 1974); Logan v. Hollier, 699 F. 2d 758 (La. App. 5th Cir. 1983); Holbrook v. Pitt, 643 F. 2d 1261 (7th Cir. 1981); Free v. Landrieu, 666 F. 2d 698 (1st Cir. 1981) (Section 8 HAP contract is a third party beneficiary contract).

5.6.2.4 Federally Subsidized Housing Programs

Of course, tenants in federally subsidized housing programs often cannot be evicted for no cause. See e.g., Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969); 42 U.S.C. § 1437f(o)(7)(C) (Section 8 voucher housing); 24 C.F.R. § 982.310 (Section 8 voucher housing); 42 U.S.C. § 1437d(l)(5) (public housing); 24 C.F.R. § 966.4 (public housing); Rev. Rul. 2004-82 (low-income tax credit housing); 24 C.F.R. § 247.3 (§§ 202, 221, 236 multifamily projects); 7 C.F.R. §3560.159 (rural housing). State courts have a duty to enforce federal laws that prohibit no cause evictions. U.S. Const. Art. VI; see Testa v. Katt, 330 U.S. 386 (1947); Lee v. Florida, 392 U.S. 378, 385-86 (1968). The Section 8 housing voucher program now allows termination for “no cause” after the expiration of the initial lease term.

5.6.2.5 Acceptance of Rent

Acceptance of the rent after the required notice to vacate, but before the judgment of eviction, vitiates the notice to vacate, and prevents the landlord from obtaining judgment based on the notice.91 Acceptance of rent after a notice to terminate a month-to-month lease vitiates the notice and reinstates the lease.92 The notice to vacate may even be vitiates if the landlord delayed in returning the tenant’s rent payment.93 Acceptance of part of the rent vitiates the notice to vacate.94

5.6.2.6 Failure to prove expired lease

Failure to prove expiration of the lease will defeat the eviction. Monroe Housing Authority v. Coleman, 70 So.3d 871 (La. App. 2 Cir. 2011). Even a “no cause” eviction requires evidence of the landlord’s right to possession. Poydras Center LLC v. Intradel Corp., 81 So.3d 80 (La. App. 4 Cir. 2011).

5.6.2.7 Abuse of Right (Retaliatory Eviction)

An abuse of right is an act which objectively appears to be an exercise of an individual right, but which is not protected by the courts because it is exercised with a predominant intent to harm; or it is performed without a serious and legitimate interest; or it is contrary to good faith or moral rules. Cueta-Rua, Abuse of Rights, 35 La. L. Rev. 965 (1975). Retaliatory eviction is the refusal to renew a

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91 Billiot v. Hue, 2011 WL 1944120 (La. App. 1 Cir. 2011); Housing Authority of Town of Lake Providence v. Allen, 486 So.2d 1064 (La. App. 2 Cir. 1986); Passalaqua v. Mender, 388 So. 2d 1172 (La. App. 4 Cir. 1980); Mitchell v. V-6 Co., Inc., 372 So.2d 645 (La. App. 1 Cir. 1979).
94 Adams v. Dividend, Inc., 447 So.2d 80 (La. App. 4 Cir. 1984); Thompson v. Avenue of Americas Corp., 499 So.2d 1093 (La. App. 3 Cir. 1986); Housing Authority of Town of Lake Providence v. Burks, 486 So.2d 1068 (La. App. 2 Cir. 1986).
fixed term lease in retaliation for a tenant’s attempt to secure his rights under the lease or applicable law. The abuse of right defense has been expressly recognized as an eviction defense.95

The key to winning a retaliatory eviction defense is proving the landlord’s retaliatory motive. The proof of retaliatory intent is often difficult. Unless the landlord issues actual threats, the evidence of his intent may amount to no more than the juxtaposition of a threat of some kind followed by a notice to vacate.

Legislation in some states creates a presumption that a notice which follows soon after an act by the tenant to secure his rights is retaliatory. G. Armstrong, *Louisiana Landlord and Tenant Law* (1988). Louisiana currently requires the tenant to prove that the notice to vacate was issued in retaliation for a good faith attempt by the tenant to secure his rights. *Real Estate Services, Inc. v. Barnes*, 451 So.2d 1229 (La. App. 4 Cir. 1981).

If the landlord is a government agency, it may not retaliate by evicting a tenant for exercising constitutional rights such as First Amendment rights. *McQueen v. Druker*, 317 F. Supp. 1122, 1131 (D. Mass. 1970) *aff’d* 438 F.2d 781 (1st Cir. 1971).

5.6.2.8 Owner-Occupant Relationship

Occasionally, a no cause eviction can be delayed if it is brought as a rule to evict a tenant when there is an owner-occupant relationship, rather than a landlord-tenant relationship, between the litigants. A rule to evict a tenant may be subject to a defense of no cause of action if the defendant is an occupant rather than a tenant. See, e.g., *Edwards v. Edwards*, 439 So.2d 478 (La. App. 1 Cir. 1983); *Stroughter v. Shepard*, 207 So.2d 865 (La. App. 4 Cir. 1968). To evict, an owner must prove that the defendant is an occupant as defined by Code Civ. Proc. art. 4704 and that the purpose of the occupancy has ceased. *Moody Inv. Corp. v. Occupants of 901 East 70th St.*, 990 So.2d 119, 122 (La. App. 2 Cir. 2008).

5.6.3 Eviction for Nonpayment of Rent

5.6.3.1 Unauthorized use of summary proceedings and prematurity of eviction suit

Civil Code art. 2704 provides that if a tenant fails to pay rent, the landlord may seek dissolution in accordance with Civil Code art. 2013-24, and may regain possession in the manner provided by La. Code Civ. Proc. art. 4701-05, 4731-35. Significantly, the 2004 revisions to art. 2704 eliminated the landlord’s right under the repealed Civil Code art. 2712 to seek immediate eviction for non-payment of rent under the Code of Civil Procedure’s summary eviction procedures. If the lease does not have an express dissolution clause for non-payment of rent, the landlord must first serve the tenant with a notice to perform within a certain time before seeking eviction. *Solet v. Brooks*, 30 So.3d 96, 101 (La. App. 1 Cir. 2009). Since most leases have dissolution clauses, this defense or exception will most commonly present in oral leases, poorly drafted leases or where the written lease is not introduced into evidence.


5.6.3.2 Determination of Rent Due

Rent may not legally be increased during the term of a lease in the absence of a valid rent escalation clause. La. Civ. Code art. 1983. Escalation clauses can be invalidated if the price is not readily ascertainable, or is dependent on the landlord’s whim.\(^{97}\) A landlord cannot unilaterally increase a month-to-month tenant’s rent unless 10 days notice is given prior to the expiration of the current rental month. La. Civ. Code arts. 2728, 1983.

In the case of a federally subsidized tenant, the determination of the rent due may be a complex legal and factual question which could be dispositive of the eviction lawsuit.\(^{98}\) Public housing evictions can also be defeated by the defense of rent abatement. \textit{HANO v. Wilson}, 503 So.2d 565 (La. App. 4 Cir. 1987). In the public housing context, “rent abatement” means extinguishment of the rent obligation (not a mere suspension of the obligation) for the months that abatement was ordered.

Some judges will not allow an eviction for nonpayment of rent if the rent has been tendered, but refused because it was not accompanied by payment of nonrent charges, e.g., alleged late fees or property damage. \textit{Cf.} La. Civ. Code art. 2704.

5.6.3.3 Payment

This defense is self-explanatory. However, several issues merit investigation:


3. Are there any circumstances surrounding the nonpayment of rent which would persuade a court to exercise its equitable discretion not to evict?

4. Has the landlord accepted the rent prior to the eviction trial or delayed in returning a tenant’s rent payment? \textit{See Pasalaqua v. Mendez}, 388 So.2d 1172 (La. App. 4 Cir. 1980); \textit{Four Seasons, Inc. v. New Orleans Silversmiths, Inc.}, 223 So.2d 686 (La. App. 4 Cir. 1969).

5. Has the tenant paid the rent through an agreement to make repairs in lieu of rent? \textit{Wolf v. Walker}, 342 So.2d 1122 (La. App. 4 Cir. 1976).

Acceptance of the rent after the judgment generally does not vitiate the notice to vacate. \textit{Nathans v. Vuci}, 443 So.2d 690 (La. App. 1 Cir. 1983). \textit{But see, Deslonde v. O’Hern}, 1 So. 286 (La. 1887) (improper for landlord to execute judgment if acceptance of rent created a new lease obligation).

5.6.3.4 Tender

A landlord cannot evict a tenant for nonpayment of rent if he improperly refused the tenant’s tender of rent. A timely tender of rent constitutes payment. \textit{See} La. Civ. Code art. 1869.\(^{99}\) The tenant should take the necessary steps to perfect a valid tender. Generally, it is not necessary to deposit the rent in the court registry.\(^{100}\)

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\(^{99}\) \textit{Cantrell v. Collins}, 984 So.2d 738 (La. App. 1 Cir. 2008); \textit{Adams v. Dividend, Inc.}, 447 So.2d 80 (La. App. 4 Cir. 1984); \textit{Herman Investments, Inc. v. Lighthouse Club, Inc.}, 378 So.2d 515 (La. App. 4 Cir. 1979); \textit{Saxton v. Para Rubber Co. of Louisiana}, 118 So. 64 (La. 1928).

\(^{100}\) \textit{Adams v. Dividend, Inc.}, 447 So.2d 80, 83 (La. App. 4 Cir. 1984).
Under present Louisiana law, a private landlord has the right to evict a tenant who tenders the rent after the due date, even if the tender occurred prior to the notice to vacate or rule for possession (absent a rectification period clause, application of Civil Code art. 2013-15, or custom of late payment). Nonetheless, some courts will refuse to evict a tenant if the rent was offered prior to the notice to vacate, rule for possession, or trial.

5.6.3.5 Rectification Period

Payment of rent within a rectification or curative period provided by the lease agreement (oral or written), or other law, would bar an eviction for nonpayment of rent. Failure to give a proper “cease and desist” notice for an alleged lease violation bars the landlord from seeking eviction for that violation.

Civil Code art. 2704 and 2015 may require a reasonable rectification period for non-payment of rent if the lease does not have a dissolution clause for non-payment of rent. See Solet v. Brooks, 30 So.3d 96, 101 (La. App. 1 Cir. 2009). 7 C.F.R. § 3560.159(a) mandates rectification clauses for rural housing.

5.6.3.6 Custom of Late or Partial Payment

The untimely tender of rent may be a defense if a custom of accepting late or partial payment has developed. In this situation, the landlord is deemed to have waived his right to demand strict compliance with the lease without first putting the tenant in default, or otherwise giving notice that timely payment will be required in the future.103

However, there are cases that say that no custom of late payment is established if the landlord has made frequent and unsuccessful demands for punctual payment, or where acceptance of late payments is the result of unwilling indifference on the landlord’s part.104

5.6.3.7 Repair and Deduct

A tenant may use the repair and deduct provisions of Louisiana Civil Code art. 2694 as an affirmative defense to an eviction for nonpayment of rent. A detailed discussion of the requirements for proper utilization of the repair and deduct remedy is provided in § 7.3 infra. Because of the technical nature of the repair and deduct law, it is best to carefully plan this defense with the tenant before the rent is withheld and the repairs are made. If the tenant fails to prove one or more elements of a repair and deduct defense, it may be possible to avoid lease cancellation by convincing the court that he acted in good faith.106

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101 See, Noble v. Coleman, 423 So.2d 776 (La. App. 4 Cir. 1982); Dorsa v. Parent, 352 So.2d 258 (La. App. 1 Cir. 1977); Himbola Manor Apartments v. Allen, 315 So.2d 790 (La. App. 3 Cir.1975).
102 See, D & D Investment v. First Bank, 831 So.2d 488 (La. App. 5 Cir. 2002); Shell Oil v. Siddiqui, 722 So.2d 1197 (La. App. 5 Cir. 1998); Sands v. McConnell, 426 So. 2d 218 (La. App. 4 Cir. 1982); Ford v. Independent Bakers Supply, Inc., 385 So.2d 580 (La. App. 4 Cir. 1980).
103 See, e.g., Versailles Arms Apartments v. Pete, 545 So.2d 1193 (La. App. 4 Cir. 1989); Housing Authority v. Allen, 486 So.2d 1064 (La. App. 2 Cir. 1986); Housing Authority of St. John the Baptist Parish v. Shepherd, 447 So.2d 1232 (La. App. 5th Cir. 1984); Grace Apartments v. Hill, 428 So.2d 862 (La. App. 1 Cir. 1983)(partial rent). Delay in payment beyond the customary payment date may defeat the custom defense. Maestri v. Noll, 145 So. 128 (Orr. App. 1937).
104 Himbola Manor Apartments v. Allen, 315 So.2d 790 (La. App. 3 Cir. 1975); cf. Shank-Jevelia v. Diamond Gallery, 535 So.2d 1207 (La. App. 2 Cir. 1988) (acceptance of late payments involuntary). However, see Jones v. Paul, 254 So.2d 915 (La. App. 1 Cir. 1971), where the court held that a custom was established even if the landlord “involuntarily” accepted late rent.
105 Lake Forest, Inc. v. Katz & Besthoff No. 9 Inc., 391 So.2d 1286 (La. App. 4 Cir. 1980); Cameron v. Krantz, 299 So.2d 919 (La. App. 3 Cir. 1974).
106 Plunkett v. D & L Family Pharmacy, 562 So.2d 1048, 1052 (La. App. 3 Cir. 1990).
5.6.3.8 Equitable Discretion of Court or “Judicial Control”

Act 821 of 2004 may have broadened the court’s authority to judicially control an eviction for nonpayment of rent. Louisiana courts have always had equitable discretion not to cancel a lease. However, Act 821 substituted a new article 2704 for the prior article 2712 which governed evictions for nonpayment of rent. Article 2704 expressly incorporates the Civil Code articles on obligations and contracts as the manner for regaining possession. Civil Code article 2013 expressly allows the court to give the tenant additional time to perform.

A court has the equitable discretion to refuse to cancel a lease for nonpayment of rent in certain circumstances. A tenant’s failure to pay rent timely does not automatically require termination of the lease. The court’s equitable discretion is usually exercised in cases where the nonpayment of rent was not willful and where the landlord is immediately made whole. See, Athkinson v. Richeson, 393 So.2d 801 (La. App. 2 Cir. 1981) (tenant erroneously believed that his wife had paid rent and immediately attempted to cure default upon notice); Housing Authority of Lake Charles v. Minor, 355 So.2d 271 (La. App. 3 Cir. 1977) (tenant’s employment check bounced, but he immediately attempted to remedy the situation); Edwards v. Standard Oil Co. of La., 144 So. 430 (La. 1932) (rent check unduly delayed in mail); Belvin v. Sikes, 2 So.2d 65 (La. App. 2 Cir. 1941) (tenant’s good faith reliance on receipt that rent was paid); Rudnick v. Union Producing Co., 25 So.2d 906 (La. 1946) (legitimate dispute over additional rent payment claimed). It is also exercised in cases where the landlord’s acts or omissions have contributed to the delay in receiving the rent. See, e.g. Bordelon v. Bordelon, 434 So.2d 633 (La. App. 3 Cir. 1983); Silas v. Silas, 399 So.2d 778 (La. App. 3 Cir. 1981).

5.6.3.9 Public housing authority evictions–late payments or one-time defaults

Unlike private evictions, one-time failures to pay rent or late payments may not constitute “good cause” for eviction of a public housing tenant. The HUD regulations for eviction expressly state that the housing authority may only evict for serious or repeated violations of material terms of the lease such as “failure to make payments due under the lease.” 24 C.F.R. § 966.4(l)(2)(i)(A). The use of the plural for payments rather than the singular implies that a one-time default in payment of rent is insufficient to justify eviction.

5.6.4 Good Cause Eviction

5.6.4.1 Notice to Vacate

Due process requires that the notice to vacate specify the grounds for eviction. In addition, the lease or federal law may govern the contents of a notice to vacate. A notice to vacate which did not contain grounds for eviction would

107 Porter v. Miller, 782 So.2d 1123 (La. App. 3 Cir. 2001); Ergon, Inc. v. Allen, 593 So.2d 438 (La. App. 2 Cir. 1992); Housing Authority of Lake Charles v. Minor, 355 So.2d 271 (La. App. 3 Cir. 1977), writ denied 355 So.2d 1323 (La. 1978); Metzinger v. Baudrick, 503 So.2d 666 (La. App. 3 Cir. 1987), writ denied 505 So.2d 1142 (La. 1987).

108 Shreveport Neon Signs, Inc. v. Williams, 5 So.3d 977, 981 (La. App. 2 Cir. 2009).

109 See e.g., Maxton Housing Authority v. McLean, 328 S.E.2d 290 (N.C.1985)(PHA can’t evict for nonpayment where default was not tenant’s fault).

110 Flores v. Gondolier Ltd., 375 So.2d 400 (La. App. 3 Cir. 1979); Louisiana State Museum v. Mayberry, 348 So.2d 1274 (La. App. 4 Cir. 1977).

111 See e.g., Apollo Plaza Apts. v. Gosey, 599 So.2d 494 (La. App. 3 Cir. 1992) (notice to vacate did not specify grounds for termination with enough detail to prepare a defense); see also, Corpus Christi Housing Authority v. Love, 267 S.W.3d 222 (Tex. App. 2008)(housing authority eviction dismissed for failure to advise tenant of judicial eviction procedure to be used, as required by federal law).
deny the tenant the opportunity to present a defense. The landlord’s proof of
grounds for eviction should be limited to those stated in the notice to vacate.\textsuperscript{112}

A tenant in foreclosed property can’t be evicted unless at least 90 days notice is

\subsection*{5.6.4.2 Rule for Possession}

If the rule for possession states different grounds for termination, it should
be argued that this defect is fatal to a summary eviction action. \textit{Cf., J & R Enterprises-Shreveport, LLC v. Sarr}, 989 So.2d 235 (La. App. 2 Cir. 2008); \textit{Arbo v. Jankowksi}, 39 So 2d 458 (Orl. App. 1949). Issue switching between the mandatory
notices and the trial should be viewed as a due process violation.

\subsection*{5.6.4.3 Acceptance of Rent}

Acceptance of rent after the notice to vacate in an eviction for a lease viola-
tion cures the default and reinstates the lease. \textit{A & J, Inc. v. Ackel Real Estate},
831 So.2d 311 (La. App. 5 Cir. 2002)

\subsection*{5.6.4.4 Lease Violations}

Cancellation of leases is not favored in Louisiana.\textsuperscript{114} A lease will be dissolved
only when it is shown that the landlord is undoubtedly entitled to such cancella-
tion.\textsuperscript{115} The tenant’s dereliction of duty must be substantial and cause injury to
the landlord.\textsuperscript{116} You should argue that a lease should not be canceled unless the
violations of the terms of the lease are material and important.\textsuperscript{117} Civil Code article
2719 expressly authorizes the application of the rules in Civil Code articles 2013-
2024 to terminations based on lease violations.

In public and subsidized housing evictions, certain criminal activities may be
alleged as lease violations. The landlord has the burden or proving actual criminal
misconduct by a preponderance of evidence. Arrest records and police reports are
inadmissible. The fact of arrest alone, without some independent evidence of an
actual crime, is insufficient to prove a crime.\textsuperscript{118}

In \textit{Monroe Housing Authority v. Coleman}, 70 So.3d 871 (La. App. 2 Cir. 2011),
an eviction for an alleged lease violation or expiration was properly denied when
the landlord failed to introduce the lease into evidence.

\subsection*{5.6.4.5 Good Cause}

Some federally subsidized tenants can only be evicted for “good cause.” See
for example:

\textit{Public housing}. 42 U.S.C. § 1437d(l)(5); 24 C.F.R. § 966.4

\textsuperscript{112} \textit{Cf., J & R Enterprises-Shreveport, LLC v. Sarr}, 989 So.2d 235 (La. App. 2 Cir. 2008); \textit{Arbo v. Jankowksi}, 39 So.2d 458
(Orl. App. 1949).


\textsuperscript{115} \textit{Good v. Sata}, 967 So.2d 1161, 1172 (La. App. 4 Cir. 2007); \textit{Housing Authority of Town of Lake Providence v. Burks}, 486
So.2d 1068 (La. App. 2 Cir. 1986); \textit{Wahlder v. Osborne}, 417 So.2d 71, 73 (La. App. 3 Cir. 1982); \textit{Atkinson v. Richeson},
393 So.2d 654 (La. App. 1 Cir. 1978), rev’d on other grounds, 367 So.2d 773 (La. 1979).

\textsuperscript{116} \textit{Simmons v. Pure Oil Co.}, 124 So.2d 161, 166 (La. App. 2 Cir. 1960) aff’d 129 So.2d 786 (La. 1961).

\textsuperscript{117} \textit{See, e.g., Carriere v Bank of Louisiana}, 702 So.2d 648 (La. 1996); \textit{Karno v. Fein Caterer, Inc.}, 846 So.2d 105 (La. App. 4
Cir. 2003); \textit{Lillard v. Hulbert}, 9 So.2d 852 (La. App. 1 Cir. 1942), (overruled on other grounds); \textit{Bozman, Marrell & Webb
v. Acacia Found. of LSU}, 246 So.2d 323 (La. App. 1 Cir. 1971).

\textsuperscript{118} \textit{See e.g., Housing Authority of New Orleans v. Sylvester}, 2012-CA-1102 (La. App. 4 Cir. 2/27/13); \textit{Nashua housing Authority
1245 (La. App. 4 Cir. 1988).
Section 8 voucher housing. 42 U.S.C. § 1437f(o)(7)(C); 24 C.F.R. § 982.310  
Low income tax credit housing. Rev. Rul. 2004-82  
§§ 202, 221, 236 multifamily projects. 24 C.F.R. § 247.3  
Rural housing. 7 C.F.R. § 3560.159. 

The Louisiana appellate courts have not defined what constitutes “good cause” for the eviction of a federally subsidized tenant. You should argue that an isolated act of minor misconduct will not forfeit a lease. See 24 C.F.R. § 966.4 (public housing); 24 C.F.R. § 247.3(c) (§§ 202, 221, 236 multifamily projects); 24 C.F.R. § 982.310(d) (Section 8 voucher housing).

Other courts or HUD have held that the following do not constitute “good cause” for eviction of a federally subsidized tenant:

- Minor housekeeping problems
- Unauthorized pets
- Unauthorized guests
- Noise from apartment
- Profane language
- Disrespect for management (assuming no threats of bodily harm)
- Minor lease violations
- Violations of unreasonable rules or policies
- Late rent
- Minor damages to property
- Damages or misbehavior by children
- Tenant negligence that results in damage to property (but gross negligence could be problem)
- Actions protected by law (free speech, reports to government authorities)
- Immoral behavior (adultery, unwed children)
- Some reporting problems in lease application or recertification (that don’t rise to level of fraud)
- Minor crimes
- Good faith mistakes by tenant
- Behavior related to tenant’s mental or physical disabilities
- Pest or bed bug infestation (HUD memo)

5.6.4.6 Equitable Discretion or “Judicial Control”

Evictions are subject to judicial control and may be denied even if a lease violation exists. Carriere v Bank of Louisiana, 702 So.2d 648 (La. 1996); Newport-Nichols Enterprises v. Grimes, Austin & Stark, Inc., 463 So.2d 111 (La. App. 3 Cir. 1985) (failure to obtain insurance). See also, La. Civ. Code art. 2013-24.

5.6.4.7 Rectification Clause

A lease may allow a tenant to cure a default or lease violation after notice by the landlord. In such cases, failure to allow rectification would defeat the
eviction. The landlord must show a "notice to cure" before he has a right to evict. This defense can be raised as an exception of prematurity or no cause of action. In either case, the eviction should be dismissed since it can’t be cured by amended pleadings.

Without proof of a “notice to cure”, alleged lease violations are irrelevant. Therefore, you should object to evidence on alleged violations unless the landlord has first proved that a “notice to cure” was given and that violations occurred thereafter.

5.6.4.8 Res Judicata and Issue Preclusion

Res judicata and issue preclusion apply to eviction lawsuits. If a tenant wins on the merits of an eviction for a lease violation, all causes of action existing at the time of the 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. La. R. S. 13:4231 (2). Be sure to insist on a signed written judgment if the judge dismisses an eviction lawsuit. A notation of dismissal is insufficient to support a res judicata plea. A second suit barred by res judicata may give rise to a Fair Debt Collection Practice claim if the landlord or its attorney acts as a “debt collector.”

5.7 OTHER EVICTION RELATED ISSUES

5.7.1 Disaster Executive Orders

A Governor’s Executive Order may suspend all deadlines in the Civil Code and Code of Civil Procedure. Thus, an Executive Order applies to the deadlines in eviction suits and briefly delays the running of the time periods for notices to vacate and rules for possession.

The delays required by an Executive Order, which orders a 15 day suspension ending on Friday, September 12, are illustrated by the following examples:

Example 1–Notice to vacate issued

Rent due on September 1. Landlord files 5 day notice to vacate on September 2. The Executive Order suspends the running of the notice to vacate through Sunday, September 14. The 5 days would run from Monday, September 15 to Friday, September 19. The first day that a landlord could file the rule for possession would be Monday, September 22.

Example 2–Notice to Vacate waived

Rent due on September 1. Tenant waived notice to vacate in writing. Landlord files and serves rule for possession on September 2. A rule can’t be heard until the third day after service. This 3 day period can’t begin running until Monday, September 15. Thus, Wednesday, September 17 would be the first day the rule for possession could be heard.

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121 See, D & D Investment v. First Bank, 831 So.2d 488 (La. App. 5 Cir. 2002); Shell Oil v. Siddiqui, 722 So.2d 1197 (5 Cir. 1998); Meraux & Nunez v. Houck, 13 So.2d 233 (La. 1943); Rainforest Court Apts. v. Bailey, No. 98-C-1138 (La. App. 5 Cir. 1998).
123 Avenue Plaza LLC v. Falgoust, 676 So.2d 1077 (La. 1996); Housing Authority of New Orleans v. Riley, 691 So.2d 256 (La. App. 4 Cir. 1997).
124 Brown v. Boudreaux, 21 So.2d 44 (La. 1945).
5.7.2 Lease-Purchase Agreements and Bonds for Deed

5.7.2.1 Rights of bond for deed buyers

A bond for deed must be by authentic act or by act under private signature. But occupancy plus sworn admission by the seller can substitute for the lack of a written agreement.

A rule to evict may be used to evict the buyer in a bond for deed or lease-purchase agreement. Bennett v. Hughes, 876 So.2d 862 (La. App. 4 Cir. 2004). A contract may be a “bond for deed” even if it is styled as something else. The proper interpretation of a contract is a legal issue subject to de novo review. Montz v. Theard, 818 So.2d 181 (La. App. 1 Cir. 2002).

If an agreement is actually a “bond for deed”, the eviction can be defeated if the seller did not comply with the statutory requirements for cancelling a bond for deed. See La. R.S. 9:2945; Thomas v. King, 813 So.2d 1127 (La. App. 2 Cir. 2002); Tabor v. Wolinski, 767 So.2d 972 (La. App.1 Cir. 2000).

R.S. 9:2945 provides that a buyer has the right to cure a default within 45 days from the “mailing of the notice.” The notice must be by certified mail. Despite the literal language of R.S. 9:2945, it may be argued that the 45 days do not run when the buyer never receives the certified mail notice. Courts have held that similar language in other statutes means completion of service and that the right to cancel is defeated if the non-receipt of the notice is shown.

A Chapter 13 bankruptcy may be used to cure a default in a bond for deed and pay arrearages. If a bankruptcy reorganization is the best remedy for the buyer, it is important that the bankruptcy be filed before a judgment of possession or any cancellation of the buyer’s interests. A final eviction judgment may result in the loss of the § 362 bankruptcy automatic stay. Generally, a bankruptcy court can’t revive rights that have been finally terminated under state law. Also, the vendor may argue that the bond for deed is an executory contract or lease and that the remedies are limited to assuming or rejecting the contract pursuant to 11 U.S.C. § 365. However, the bankruptcy court should allow the buyer to treat the bond for deed as a secured debt that can be cured in a Chapter 13 bankruptcy.

A failed bond for deed is subject to certain adjustments:

1. The purchaser is entitled to return of all monies paid on the purchase price; and
2. The seller is entitled to the fair rental value for the buyer’s occupancy.

A waiver of the purchaser’s right to return the monies paid violates public policy and is unenforceable. Inclusion of such a waiver in a bond for deed contract may constitute an unfair trade practice.

126 Solet v. Brooks, 30 So.3d 96,100 (La. App. 1 Cir. 2009)
127 Upton v. Whitehead, 935 So.2d 746, 749 (La. App. 2 Cir. 2006).
128 See e.g., Bayou Fleet Partnership v. Phillip Family LLC, 976 So.2d 794 (La. App. 5 Cir. 2008); Tabor v. Wolinski, 767 So.2d 972 (La. App.1 Cir. 2000)(“lease-purchase agreement” was a bond for deed); Mooers v. Sosa, 798 So.2d 200 (La. App. 5 Cir. 2001)(“affidavit” was a bond for deed).
132 See footnote 128, supra.
133 Seals v. Sumrall, 887 So.2d 91, 96 (La. App. 1 Cir. 2004); Montz v. Theard, 818 So.2d 181, 187 (La. App. 1 Cir. 2002).
A buyer may sue for specific performance of the bond for deed and conveyance of title upon prepayment or payment of the price in full. *Lyons v. Pitts*, 923 So.2d 962 (La. App. 2 Cir. 2006)(buyer had right to prepay bond for deed where contract silent as to this issue).

### 5.7.2.2 How to determine if an agreement is a bond for deed

In a bond for deed, as defined by La. R.S. 9:2941, the purchase price is paid in installments and the seller agrees to transfer title on completion of the payments. Without a promise to transfer title, an agreement is not a “bond for deed.” A contract requiring the buyer to obtain financing to pay off a mortgage can be a bond for deed. An agreement can be a bond for deed even if it does not comply with statutory protections for the bond for deed buyer. A document’s title is not determinative of whether it is a bond for deed or another type of contract. The presence of a final nominal payment or a balloon payment does not prevent an agreement from being a bond for deed.

By comparison, Civil Code art. 2620 defines an option to buy as a contract whereby a party gives another the right to accept an offer to buy within a stipulated time. Thus, a document giving a term and varying purchase prices for an option to buy is not a bond for deed, but rather a lease with an option to buy. There is a 10 year limit on options to buy.

### 5.7.3 Eviction of “possessors” or usufructuaries

A possessor, whether in good faith or bad faith, may retain possession until he is reimbursed for expenses and improvements which he is entitled to claim. La. Civ. Code art. 592; *Broussard v. Compton*, 36 So.3d 376 (La. App. 3 Cir. 2010).

A usufructuary may retain possession until he is reimbursed for expenses and advances he is entitled to claim from naked owner. La. Civ. Code art. 627; *Barnes v. Cloud*, 82 So.3d 463 (La. App. 2 Cir. 2011). An exception of unauthorized use of summary proceeding should be filed against a rule to evict a usufructuary. Generally, a usufructuary does not occupy the property by permission or accommodation of the owner and would not be an “occupant” within the meaning of La. Code Civ. Proc. art. 4704. Therefore, La. Code Civ. Proc. art. 4702 and 4735 would not authorize the use of a rule for possession to summarily evict a usufructuary.

### 5.7.4 Eviction and rent claims by co-owners

A co-owner has the right to use co-owned property without payment of rent to other co-owners. An co-owner in exclusive possession may only be liable for

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135 La. R.S. 9: 2941; *H.J. Bergeron, Inc. v. Parker*, 964 So.2d 1075, 1076 (La. App. 1 Cir. 2007); *Lyons v. Pitts*, 923 So.2d 962, 963 (La. App. 2 Cir. 2006)(agreement to give warranty deed sufficient for bond for deed to exist).
137 *Cottingham v. Vliet*, 19 So.3d 26, 31 (La. App. 4 Cir. 2009).
139 *Montz v. Theard*, 818 So.2d 181, 187 (La. App. 1 Cir. 2002); *Bayou Fleet Partnership v. Phillip Family, LLC*, 976 So.2d 794, 796 (La. App. 5 Cir. 2008).
140 *Cottingham v. Vliet*, 19 So.3d 26, 31 (La. App. 4 Cir. 2009); *Tabor v. Wolinski*, 767 So.2d 972, 974 (La. App. 1 Cir. 2000); *Bennett v. Hughes*, 876 So.2d 862, 863-64 (La. App. 4 Cir. 2004).
141 *Bayou Fleet Partnership v. Phillip Family, LLC*, 93 So.3d 1112 (La. App. 5 Cir. 2012).
rent beginning on the date than another co-owner requests occupancy and has been refused. A co-owner may not evict another co-owner who is authorized to occupy the property as a co-owner.

5.7.5 Suit for money and eviction

Money for damages or rent are not recoverable in a summary proceeding instituted by a rule for possession. In addition, service of process by tacking does not subject a tenant to the requisite personal jurisdiction for entry of a money judgment. However, a tenant should file an exception of unauthorized use of summary proceedings to the rent claims. Garrett v. Cross, 935 So.2d 845 (La. App. 2 Cir. 2006) (judgment for rent upheld where tenant failed to file exception).

5.7.6 Sale or foreclosure of property

A lease does not bind or affect third parties unless (1) it is filed for registry in the office of the parish recorder for the parish where the immovable is located, or (2) assumed in the act of sale or purchase agreement, or (3) the third party is a creditor who foreclosed on the landlord. Also, an unrecorded lease may be ratified when the new owner allows the tenant to remain and accepts rent for a time. La. Civ. Code art. 1843. However, the tenant may have a damages action against the original landlord if he sells the property to a third party who then evicts prior to lease expiration. La. Civ. Code art. 2712.

The Protecting Tenants at Foreclosure Act, 12 U.S.C. § 5220 note, requires that at least 90 days written notice to vacate be given to tenant in foreclosed property. This federal law requires the foreclosing party or successor in interest to assume the leases of bona fide tenants, subject to a notice to vacate of at least 90 days or the duration of the lease, whichever is longer. This requirement even applies to oral leases, month-to-month leases and unrecorded leases. A misleading notice to vacate, e.g., a 5 day notice to vacate, may not be cured by the mere passage of time. Most courts have held that the landlord’s successor in interest (usually the foreclosing bank) bears the burden of proving that the tenant is not a protected “bona fide tenant” as defined by the PTFA. Also, the PTFA expressly states that tenants whose rents are reduced by a subsidy are protected

145 McCarron v. McCarron, supra at 1290.
146 Millaud v. Millaud, 761 So.2d 44 (La. App. 4 Cir. 2000) (jurisdiction lies with district court).
147 Friedman v. Hofchak, Inc., 424 So.2d 496, 499 (La. App. 5 Cir. 1982), writ denied 430 So.2d 74 (La. 1983); Himbola Manor Apartments v. Allen, 315 So.2d 790 (La. App. 3 Cir. 1975); Manor v. Hall, 263 So.2d 22 (La. 1972).
148 Friedman v. Hofchak, Inc., 424 So.2d at 499-500.
150 Means v. Comcast, Inc., 17 So.3d 1012, 1014 (La. App. 2 Cir. 2009); Restaurant Indigo v. Thompson, 733 So.2d 1271 (La. App. 4 Cir. 1999).
152 The 2005 adoption of Civil Code art. 2712 makes it clear that the lessee has a damages action against the landlord unless there was an agreement defeating the tenant’s rights. See also, Caballero Planting Co., Inc. v. Hymel, 713 So.3d 1277 (La. App. 1 Cir. 1998); High Plains Fuel Corp. v. Carto International Trading, Inc., 640 So.2d 609 (La. App. 1 Cir. 1994) writ denied 646 So.2d 402.
“bona fide tenants” even though they don’t pay fair market rent. A federal PTFA defense is not a basis for removal of the eviction to federal court, rather it is a state court eviction defense.156

Act 877 of 2004 enacts La. Code Civ. Proc. art. 2293 (B)(2)-(3) to require the sheriff to serve a written notice of seizure on tenants and occupants when the landlord’s property has been seized by a creditor. Act 127 of 2012 further extended the notice requirement to property sold in executory process. The sheriff’s failure to serve this notice shall prevent the purchaser of the property from using a La. R.S. 13:4346 ex parte writ of possession to evict or eject occupants or tenants. However, the sheriff’s failure does not affect the rights of the purchaser or foreclosing creditor to use the eviction procedures in La. Code Civ. Proc. art. 4701 et seq., which require a 5 day notice to vacate and a rule of possession to evict an art. 4704 “occupant,” (or the 90 day notice required by federal law).

5.7.7 Reconduct of Lease

A “reconducted lease” is a continuation of the lease under the same terms, except that the fixed term in the old lease is voided and the reconducted lease is considered to be month-to-month. La Civ. Code arts. 2721-24.157 In 2005, Civil Code art. 2724 was amended to make it explicit in the Civil Code that all provisions of the lease provisions, other than the term, continue in effect.158 Legal reconduction takes place when a fixed term lease expires, without opposition.159

The presumption of reconduction (when the lessee remains in possession of the premises beyond the terms of the lease) is not to be used to force a contract on parties who are unwilling to contract. Its purpose is merely to establish a rule of evidence, or presumption, as to intent when contrary intent has not been expressed. Therefore, any intent not to renew the lease on the same terms defeats reconduction.160 For example, no reconduction takes place where the tenant and landlord negotiate for a new lease prior to the expiration of the old lease, and such negotiations involve terms which differ substantially from the old lease.161

5.7.8 Landlord’s seizure of tenant’s property for unpaid rent

La. Civil Code art. 2707-10 grant the landlord a privilege on the tenant’s property located on the leased real estate to secure payment of rent and other lease obligations. Occasionally, a landlord will seize a tenant’s property for unpaid rent. However, a landlord may not use self-help to obtain possession of a tenant’s property on the leased premises except where the tenant clearly abandoned the premises.162 Enforcement of a lessor’s privilege requires judicial process, e.g., a writ of sequestration.163 Wrongful seizure will subject the landlord to damages and

156 Wells Fargo Bank v. Hines, 2012 WL 2467024 (E.D. Cal. 2012). However, a PFTA defense may arise as an issue in bankruptcy if the landlord’s forecloser seeks to lift the stay in order to evict.


159 Misie v. Dronet, 493 So.2d 271 (La. App. 3 Cir. 1986).

160 Divincenti v. Redondo, 486 So.2d 959 (La. App. 1 Cir. 1986).

161 Bunuel of New Orleans, Inc. v. Cigali, 348 So.2d 993 (La. App. 4 Cir. 1977).

attorney fees. Seizure of property exempt under La. R.S. 13: 3881 is a wrongful seizure. Most of a tenant’s property will be exempt from seizure under La. R. S. 13: 3881. Thus, a landlord who seizes property will often be liable for wrongful seizure.

5.7.9 Unpaid Rent and Attorney Fees

Generally, an obligation to pay rent is barred by a 3 year prescription, not a 10 year prescription for breach of contract. Starns v. Emmons, 538 So.2d 275 (La. 1989).


If the landlord terminates the lease, it forfeits the right to future rent under the lease. 1001 Harimaw Court East, LLC v. Blo, Inc., 66 So3d 1131, 1133 (La. App. 5 Cir. 2011). Lease provisions purporting to grant the landlord a right to future rentals after eviction or termination of the lease are unenforceable. Id.

La. R. S. 9:3534 (A) authorizes the award of attorney fees against a tenant in a suit for rent due under an oral lease. An incorrect statement of the amount due may be a defense to the attorney fee claim. Cf. Dutel v. Succession of Touzet, 649 So.2d 1084 (La. App. 4 Cir. 1995).

Attorneys or collection agencies who attempt to collect debts for landlords are subject to the Fair Debt Collection Practices Act. See Romea v. Heiberger Associates, 163 F. 3d 111 (2d Cir. 1998).

5.7.10 Unenforceable Lease Provisions

These lease provisions are unenforceable:

1. Waiver of repair of/or liability for serious defects in residential lease. La. Civ. Code art. 2699 (3); Shubert v. Tonti Development Corp., 30 So.3d 977, 985-86 (La. App. 5 Cir. 2009), writ denied 31 So.3d 393 (La. 2010).
5. Right to rent if eviction remedy elected. United States Leasing Corp. v. Keiler, 290 So.2d 427 (La. App. 4 Cir. 1974).
7. Certain prohibited lease provisions in public and subsidized housing. See e.g., 24 C.F.R. § 966.6 (public housing); 7 C.F.R. § 3560.156(d)(rural housing).

There is a distinction between liability for defects and who has the obligation to make repairs. Compare, Stuckey v. Riverstone Residential SC, LP, 21 So.3d 970 (La. App. 1 Cir. 2009), writ denied 24 So.3d 873 (La. 2010).

However, the 5 day notice to vacate required by La. Code Civ. Proc. art. 4701 may be waived for private tenants.

9. Forfeiture or penalty clauses in bonds for deed that purport to forfeit the funds paid by the purchaser if the bond for deed is cancelled.\footnote{Seals v. Sumrall, 887 So.2d 91, 96 (La. App. 1 Cir. 2004).}

Other provisions may be unenforceable if their object or cause is to circumvent the law or public policy. La. Civ. Code art. 1968; Bach Investment Co. v. Phillip, 722 So.2d 122, 1223 (La. App. 5 Cir. 1998).

5.7.11 Tenant’s Lease Cancellation Rights

Generally, absent contrary agreement, a month-to-month tenant may cancel his lease by giving the landlord written notice 10 days prior to the end of the current rental month. La. Code Civ. art. 2728. Tenants with fixed term leases may only cancel for reasons provided in the lease, Civil Code or other applicable laws. La. Civ. Code art. 2718.

Lease cancellation is not favored in Louisiana and, prior to 2005, could only be judicially ordered. This means that a canceling tenant runs the risk that his lease termination may ultimately be held invalid by a judge and thereby subject him to liability for rent. Act 821 of 2004 enacted Civil Code article 2719 to provide for extra-judicial means for canceling a contract, including a lease. A tenant who wants to extra-judicially cancel a lease should follow the procedures in Civil Code articles 2015 and 1991. However, according to the Revision Comments to article 2719, the tenant is still at risk that a court could find that the cancellation was improper.

Grounds for a tenant to cancel his lease may include:

- Landlord’s failure to maintain the apartment in a habitable condition. Freeman v. G.T.S. Corp., 363 So.2d 1247 (La. App. 4 Cir. 1978).
- Landlord’s failure to make necessary repairs, depending on each party’s fault or responsibility, the length of repair period and the extent of the loss of use. La. Civ. Code art. 2693, 2719.
- Landlord’s failure to maintain tenant in peaceable possession. Essen Development v. Marr, 687 So.2d 98 (La. App. 1 Cir. 1995) (other tenant’s barking dog rendered premises uninhabitable).
- Verbal agreement (despite written term lease) allowing tenant to cancel at any time. Harper v. Gorman, 694 So.2d 1094 (La. App. 5 Cir. 1997).
- Tenant’s disability which requires early termination. Samuelson v. Mid-Atlantic Realty Co., 947 F. Supp. 756 (D. Del. 1996). Early termination may be an appropriate remedy for other violations of the Fair Housing Act. If a disabled tenant can no longer use the apartment because it has become inaccessible, the landlord should allow early termination as an accommodation.
- Some federally subsidized housing programs may allow early termination for various grounds, e.g., loss of job, severe illness, victim of domestic violence.
6. LOCKOUTS AND UTILITY TERMINATIONS

6.1 NONJUDICIAL EVICTIONS UNDER ACT 821 OF 2004?

Civil Code article 2719, enacted by Act 821 of 2004, appears to authorize nonjudicial eviction of tenants for alleged failure to perform lease or codal obligations. Article 2719 states that a party may obtain dissolution of the lease pursuant to Civil Code articles 2013-2024. In particular, articles 2015-17 provide a mechanism for extra-judicial dissolution of contracts. However, a Louisiana Law Institute attorney who was on the committee to revise the lease code assured the author that the revised lease code does not authorize nonjudicial evictions. In addition, since 2005, courts have continued to hold that judicial process is required for evictions.

For extra-judicial dissolution for a party’s failure to perform, article 2015 requires that the other party serve a notice to perform, with a warning that, unless performance is rendered within that time, the contract shall be deemed dissolved. The time for performance allowed by the notice must be reasonable. The notice to perform must comply with Civil Code article 1991.

Any extra-judicial dissolution of a lease would be at the initiating party’s own risk. Revision Comment b, Civ. Code art. 2719. Revision Comment c notes that under Civil Code article 2014, a contract may not be dissolved when the obligor has rendered a substantial part of the performance and the part not rendered does not substantially impair the obligee’s interest. Comment c further states that prior jurisprudence on judicial dissolution of leases would be relevant for judging the propriety of extra-judicial dissolutions of lease. A landlord is liable for damages for a judicial dissolution that is reversed on devolutive appeal. Presumably, a landlord would also be liable for damages for an extra-judicial eviction that is later declared improper. Thus, a landlord would be foolish to evict a tenant by extra-judicial means.

This new law could result in an increase in extra-judicial evictions, which are already a serious social evil. A tenant who is extra-judicially evicted may have to resort to injunctions, declaratory judgment and damage actions to regain possession and to recover property that is thrown out.

6.2 LAW PRIOR TO 2005

Prior to 2005, a landlord could only evict a tenant through judicial process. See, e.g., Richard v. Broussard, 495 So.2d 1291, n.1 at 1293 (La. 1986). Lock-outs, removal of the tenant’s property, utility terminations or otherwise rendering the premises uninhabitable or inaccessible, are prohibited. The landlord cannot disturb the possession of the tenant in any way without first resorting to the judicial process. Weber v. McMillian, 285 So.2d 349, 351 (La. App. 4 Cir. 1973), writ denied 288 So.2d 357 (La. 1974). An eviction judgment after a self-help eviction does not cure the wrongful eviction. Pelletier v. Caspian Group, 851 So.2d 1230 (La. App. 4 Cir. 2003).

Even if the rent is overdue, a landlord cannot exclude the tenant from the apartment or terminate utilities without resort to the judicial process. Holmes v. DiLeo, 184 So. 356 (Orl. App. 1938); Vogt v. Jannarelli, 198 So. 421 (Orl. App. 1940).

Note that 24 C.F.R § 966.6 prohibits housing authority lease provisions that waive judicial eviction proceedings.

See e.g., Horacek v. Watson, 86 So.2d 766 (La. App. 3 Cir. 2012); Platinum City LLC v. Boudreaux, 81 So.3d 780 (La. App. 3 Cir. 2011).

Mangelle v. Abadie, 19 So. 670 (La. 1896).

(608)
Self-help or nonjudicial eviction is permissible if the landlord can prove that the tenant abandoned the premises.\textsuperscript{174} \textit{Ringham v. Computerage of New Orleans, Inc.}, 539 So.2d 864 (La. App. 4 Cir. 1989) (tenant having loaded the contents of part of the leased premises onto a moving van, and moving the contents from the remainder of the premises amounted to abandonment of the premises); \textit{Porter v. Johnson}, 369 So.2d 1141, (La. App. 1979) \textit{writ denied} 371 So.2d 615 (where various items of considerable value were left at a leased camp, there was no abandonment); \textit{Bunel of New Orleans, Inc. v. Cigali}, 348 So.2d 993 (La. App. 4 Cir. 1977), \textit{cert. den.}, 350 So.2d 1210 (La. 1977) (where leased premises were empty and there was no response to the landlord’s notices, the landlord could assume the premises were abandoned). A landlord may be liable if the wrongful eviction preceded the completion of the act of abandonment. \textit{Mansur v. Cox}, 898 So.2d 446 (La. App. 1 Cir. 2004).

6.3 DISASTERS AND WRONGFUL EVICTION

In the post-Katrina context, a court has found that a landlord was not liable for wrongful eviction where a natural disaster rendered the apartment uninhabitable and the landlord disposed of the tenant’s property after good faith efforts to contact him.\textsuperscript{175}

6.4 REMEDIES FOR WRONGFUL EVICTION

A tenant can enjoin or recover damages for a landlord’s nonjudicial eviction or termination of utility services prior to a final eviction judgment.\textsuperscript{176} Failure to comply with the statutory procedures for judicial eviction constitutes wrongful eviction and subjects the landlord to damages.\textsuperscript{177} Damages for wrongful eviction may be recoverable even if a landlord executes an eviction judgment that is subsequently reversed on devolutive appeal.\textsuperscript{178}

Damages for wrongful eviction may include mental anguish, humiliation, embarrassment, inconvenience, loss or detention of personal property, physical suffering, or loss of use of the apartment.\textsuperscript{179} A wrongful eviction may sound in tort and contract. Wrongful eviction has been held to constitute a bad faith violation of an obligation that subjects a landlord to both foreseeable and unforeseeable damages.\textsuperscript{180} A wrongful eviction may constitute an unfair trade practice in violation of La. R.S. 51: 1401 \textit{et seq.}.\textsuperscript{181}

\textsuperscript{174} Another exception may be if the lease has expired and the lease expressly waived any notice to vacate. \textit{Crawley v. Coastal Bridge Co., Inc.}, 871 So.2d 1271 (La. App. 5 Cir. 2004), \textit{writ denied} 883 So.2d 1036 (La. 2004).

\textsuperscript{175} Strickland v. Gordon, 33 So.2d 368 (La. App. 4 Cir. 2010).


\textsuperscript{177} \textit{White v. Board of Supervisors of Southern University}, 365 So.2d 583 (La. App. 1 Cir. 1978) (lock-out); \textit{Buchanan v. Daspit}, 245 So. 2d 506 (La. App. 3 Cir. 1971) (illegal entry and removal of property); \textit{Robinson v. Bonhaye}, 195 So. 365 (Orl. App. 1940) (removal of windows and doors).

\textsuperscript{178} See, e.g., \textit{Mangelle v. Abads}, 19 So. 670 (La. 1896); \textit{New Orleans Hot Attach, Inc. v. N.Y. Life Insurance Co.}, 665 So.2d 1186 (La. App. 4 Cir. 1995); see also \textit{Smith v. Shirley}, 815 So.2d 980 (La. App. 3 Cir. 2002) \textit{writ denied} 816 So.2d 308 (La. 2002).


\textsuperscript{181} \textit{Mosley & Mosley Builders v. Landin, Ltd}, 389 S.E.2d 576 (N.C. App. 1990). Louisiana courts have held that self-help repossessions without judicial process are unfair trade practices. See, e.g., \textit{Tyler v. RapiD Cash, L.L.C.}, 930 So.2d 1135 (La. App. 2 Cir. 2006); but see \textit{Pelletier v. Caspian Group}, 851 So.2d 1230 (La. App. 4 Cir. 2003)(found without explanation that the wrongful eviction, on the facts of this case, was not an unfair trade practice).
Tenants with fixed term leases, and federally subsidized tenants could be entitled to large damage awards for wrongful evictions. For example, a tenant with a fixed term lease, who has made leasehold improvements may be entitled to damages in the amount of the value of the improvements, pro rated over the remainder of the lease term. A federally subsidized tenant should be entitled to damages in the amount of the rental subsidy from the date of the wrongful eviction until he is actually restored to subsidized housing. Each person in the household could have a cause of a of action for damages. Damages should be proven with sufficient specificity.

In New Orleans, tenants may be entitled to notice of a landlord's termination of the landlord's water account under the consent judgment in the class action. Mathieu v. Brehm, U.S.D.C. No. 74-1521 (E.D. La. 1975). The Sewerage & Water Board may be liable for damages if it fails to give the required notice.

7. REPAIR AND DEDUCT: CIVIL CODE ARTICLE 2694

7.1 USES

The Louisiana Civil Code provides that if the landlord does not make necessary repairs to the premises after reasonable notice, the tenant can make the repairs himself and deduct their cost from the rent due. La. Civ. Code art. 2694. The repair and deduct provision may be used by tenant:

- to effectuate necessary repairs to the leased premises;
- as an affirmative defense to an eviction for non-payment of rent. Lake Forest, Inc. v. Katz & Besthoff No. 9, Inc., 391 So.2d 1286 (La. App. 4 Cir.1980); Cameron v. Krantz, 299 So.2d 919 (La. App. 3 Cir. 1974); Evans v. Does, 283 So.2d 804, 807 (La. App. 2d Cir. 1973); Leggio v. Manion, 172 So.2d 748 (La. App. 4 Cir. 1965);
- as a defense or set-off to an ordinary action for rent. Brignac v. Boisdore, 288 So.2d 31 (La. 1973) aff’g 272 So.2d 463 (La. App. 4 Cir. 1973); Degrey v. Fox, 205 So.2d 849 (La. App. 4 Cir. 1968)

The tenant must comply with the requirements of article 2694 in order to use these remedies and defenses.

7.2 CHECKLIST OF ARTICLE 2694 REQUIREMENTS

Prior to 2005, article 2694 of the Louisiana Civil Code stated:

If the lessor does not make the necessary repairs in the manner required in the preceding article, the lessee may call on him to make them. If he refuses or neglects to make them, the lessee may himself cause them to be made, and deduct the price from the rent due, on proving that the repairs were indispensable, and that the price which he has paid was just and reasonable.

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182 See, e.g. Provenzano v. Populis, 428 So.2d 556 (La. App. 4 Cir. 1983); Leake v. Hardie, 245 So.2d 729 (La. App. 4 Cir. 1971); Knapp v. Guerin, 81 So. 302 (La. 1919).
185 Platinum City LLC v. Boudreaux, 81 So.3d 780 (La. App. 3 Cir. 2011); Gennings v. Newton, 567 So. 2d 637, 642-43 (La. App. 4 Cir. 1990).
Act 821 of 2004 amended article 2694 to read as follows:

If the lessor fails to perform his obligation to make necessary repairs within a reasonable time after demand by the lessee, the lessee may cause them to be made. The lessee may demand immediate reimbursement of the amount expended for the repair or apply that amount to the payment of rent, but only to the extent that the repair was necessary and the expended amount was reasonable. (emphasis added).

The 2004 amendment restates article 2694 with the modifications of “reasonable time”, “immediate reimbursement”, deletion of “due” from “rent due” and the substitution of “necessary” for “indispensable.” The most significant change appears to be the “immediate reimbursement” clause. This change may allow a tenant to be paid for repairs that are greater than the rent due and to immediately demand and sue for reimbursement.\(^{186}\) Also, the 2004 amendments broadened the landlord’s repair obligations.

In summary, the requirements for the use of the “repair and deduct” remedy or defense are:

1. the repairs must be those that the landlord was obligated to make;
2. the tenant must call on the landlord to make repairs;
3. the landlord must refuse or fail to make these repairs after reasonable notice and demand;
4. the tenant must then make the repairs;
5. the cost of the repair is applied to the payment of rent;
6. proof that the repairs were necessary;
7. proof that the price paid for the repairs was reasonable.

Although the Code specifically permits the tenant to make repairs first and then deduct the cost, the Louisiana Supreme Court has held that a tenant may reverse the order of these actions. *Rhodes v. Jackson*, 109 So. 46 (La. 1926). The normal repair and deduct remedy would be of limited value to tenants with minimal excess cash if the law required them to perform and pay for the repairs before subtracting the cost from their rent.

Once the landlord has refused or neglected to correct a defect, the tenant may begin to withhold rent in anticipation of the expense of repair. *Rhodes, supra.* The tenant must intend to devote the sums withheld to the repair of the premises, and he must begin to remedy the defect within a reasonable time.\(^{187}\)

### 7.3 ANALYSIS OF ARTICLE 2694 REQUIREMENTS

#### 7.3.1 Repair Obligations and Warranties

Act 821 of 2004 changes and simplifies the language of Code articles relative to repair obligations and waiver. However, the revision comments state that the new articles have the same philosophy as the prior law.

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\(^{186}\) One purpose of this 2005 amendment to Civil Code art. 2694 was to permit tenants with little time left on their leases to seek immediate reimbursement from their landlords for expensive repairs made at the landlord’s expense. Marie Moore, *New Civil Code Lease Articles: New Words; New Rules; New Issues* (2004).

\(^{187}\) Leggio v. Manion, 172 So.2d 748 (La. App. 4 Cir. 1965); *New Hope Gardens, Ltd. v. Lattin*, 530 So.2d 1207 (La. App. 2 Cir. 1988).
Civil Code art. 2684 requires the landlord to deliver the leased property in “good condition suitable for the purpose for which it was leased.” Previously, the Code had required the property to be delivered in “good condition and free from any repairs.”

Civil Code articles 2691 and 2692 define the repair obligations for the landlord and tenant during the lease. The landlord must make most repairs. The landlord must make all repairs that become necessary to maintain the thing in a condition suitable for the purpose for which it was leased, except those for which the tenant is responsible.\(^\text{188}\)

Civil Code art. 2687 and 2692 limit the tenant’s repair duties to (1) deterioration from the tenant’s use that exceeds normal wear and tear and (2) damages caused by anyone who is on the premises with the tenant’s consent. In addition, Civil Code article 2688 requires a tenant to notify the landlord when the premises are damaged or require repairs. Failure to notify the landlord makes the tenant liable for damages sustained as a result.\(^\text{189}\)

Prior to the 2005 amendments, the Civil Code made the tenant responsible for necessary repairs to windows, shutters, partitions, doors, window glass (unless caused by hail storm or other inevitable accident), locks and hinges. Under the current Civil Code, a tenant would not be responsible for these repairs unless he or someone under his control damaged them or there was an agreement shifting the repair obligation.

Residential tenants cannot waive a landlord’s warranty as to (1) defects that affect health and safety and (2) defects of which the tenant did not know, but the landlord knew or should have known about. La. Civ. Code art. 2699. This statutory prohibition against waiver is new and was not recognized in prior jurisprudence. Other waivers are effective only if in clear and unambiguous language that is brought to the tenant’s attention. La. Civ. Code art. 2699.\(^\text{190}\)

Except as otherwise provided by Civil Code art. 2699, a landlord and tenant can broaden or restrict their repair obligations by agreement.\(^\text{191}\) Hence, a landlord could limit a tenant’s Article 2694 remedy by contractually shifting the obligations for many repairs to the tenant.

There are some methods for circumventing contracts that purport to relieve the landlord of his repair obligations under the Civil Code. First, it must be emphasized that it is the landlord’s duty to deliver the premises in good condition. La. Civ. Code art. 2684. If possible, argue that the defect existed at the commencement of the lease, and that the contractual clause concerning repair obligations is not applicable.\(^\text{192}\) The tenant is not responsible for repairs that were necessary prior to the inception of the lease. \textit{Wolf v. Walker}, 342 So.2d 1122, 1123 (La. App. 4 Cir. 1976). For subsidized tenants, waivers of the landlord’s repair obligations may be overridden by the HUD tenancy addendum.

\(^\text{188}\) The tenant’s repairs are exclusive and should be strictly construed. \textit{Brunies v. Police Jury of Parish of Jefferson}, 110 So.2d 732, 735 (La. 1959).


\(^\text{190}\) For a pre-2005 case on the necessity of bringing waiver to tenant’s attention, see \textit{Equilease Corporation v. Hill}, 290 So.2d 423 (La. App. 4 Cir. 1974).


In addition, a lease provision requiring the tenant to make all necessary repairs is not a valid disclaimer of the landlord’s statutory warranty obligation to the tenant against all vices and defects of the leased property which may prevent its use. *Pylate v. Inabet*, 458 So.2d 1378 (La. App. 2 Cir. 1984) (defective sewage system is covered by landlord’s obligation).

The burden of proving such a contract is on the landlord. The courts are generally willing to strictly construe any contract which modifies codal obligations and shifts severely onerous repair obligations to the tenant. If you can defeat the contract provision, the Civil Code will govern the repair duties of the landlord and tenant. Also, note that an alleged waiver of tenant’s rights under Articles 2684, 2691 and 2696-98 must be brought to the tenant’s attention, or explained to him.

Where a landlord fails to accomplish repairs specifically set out in the lease, the tenant is entitled to have the repairs made himself and apply the amount of the repair to the payment of rent.

### 7.3.2 Adequate Notice And Demand on Landlord

Proper notice and demand for the necessary repairs is absolutely essential to the perfection of a remedy or defense under Article 2694. See, *Larsen v. Otalvano*, 391 So.2d 1378 (La. App. 4 Cir. 1980). The problem of “adequate notice” should be handled carefully because the jurisprudence has not been clear.

If there is a written lease provision on the method of notice, that provision will govern the issue of whether adequate notice was given. See *Brignac v. Boisdore*, 272 So.2d 463, 465 (La. App. 4 Cir. 1973), aff’d 288 So.2d 31 (La. 1974). For example, in *Calderon v. Johnson*, 453 So.2d 615 (La. App. 1 Cir. 1984), the court held that although the landlord failed to receive notice of the repairs made by the tenant, that the tenant complied with the terms of the lease by mailing the notice, under a term of the lease stating that “notices shall be served by mailing of such notice.”

In the absence of a written lease provision or other agreement, one must decide on (1) the type of notice, (2) whom to notify, and (3) the length of delay before conducting repairs. Apparently, oral or written notice can be sufficient. However, there can be serious proof problems with oral notice. The tenant has the burden of proving adequate notice and demand. Contradictory testimony by the landlord and tenant on the issue of notice, where the credibility of neither is attacked, may require a decision in favor of the landlord.

Hence, one should use a method of notice which will insure independent evidence that notice was given. Written notice by the tenant’s attorney is certainly one method. See *Dickert v. Ruiz*, 231 So.2d 633 (La. App. 4 Cir. 1970). Competent evidence of the mailing and receipt of the letter will be required. See, e.g. *DiRosa v. Bosworth*, 225 So.2d 42 (La. App. 4 Cir. 1969), writ refused 227 So.2d 591 (La. 1969).

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194 See *Equilease Corporation v. Hill*, 290 So.2d 423 (La. App. 4 Cir. 1974).


Correction orders issued by a city’s division of housing improvements do not satisfy the tenant’s contractual obligation to give the landlord written notice of defects in order to recover the cost of repairs. *Lee v. Badon*, 487 So.2d 118 (La. App. 4 Cir. 1986).

The tenant should attempt to make a demand for repairs directly on the landlord. There are several cases which seem to require direct contact with the landlord. *Teekell v. Drewett*, 103 So.2d 525 (La. App. 2 Cir. 1958); *Ellis v. Brenner*, 34 So. 2d 633 (La. App. 2 Cir. 1948). To avoid the harsh consequences of *Teekell* and *Ellis*, the tenant should pursue all available methods of directly placing the landlord in default. There may be some duty to investigate alternative methods of giving the landlord direct notice of the required repairs. *See, e.g. Giraud v. Clark*, 354 So.2d 752 (La. App. 4 Cir. 1978).

*Teekell* and *Ellis* exacerbate the problem of notifying an absent or inaccessible landlord. The better rule is that the tenant be required to take reasonable steps to notify the landlord. *See, Barrow v. Culver Bros. Garage*, 78 So.2d 69 (La. App. 2 Cir. 1955).

It should be noted that many rent collection agents only have a limited mandate (or power of attorney) from the landlord. This limited mandate may only authorize the agent to collect rent, and not to make repairs. The agent may not even forward a demand for repairs to the landlord. To be on the safe side, one should contact both the agent and landlord. In a case where only the agent was notified, it can be argued that notice to the agent constituted notice to the principal.197

Article 2694 does not indicate how long a tenant must wait before commencing repairs after proper demand on the landlord. However, it is clear that the landlord must be given a reasonable period in which to make the repairs. 198 The determination of “reasonable period” is essentially factual and will depend on the individual circumstances of each case. Presumably, a “reasonable period” would vary according to the nature of the defect. 199

In *Davilla v. Jones*, the Louisiana Supreme Court found that a commercial landlord’s failure to repair substantial water leakage in the roof and walls, within 2 weeks of the tenant’s demand, did not justify the use of the repair and deduct remedy.200 The court found that the high cost of repairs ($30,000+), and the business need to obtain additional bids, justified the landlord’s delay in making the repairs. As such, there is a danger that courts will interpret *Davilla* to require a waiting period of more than 2 weeks before a tenant can make the repairs under Article 2694.

7.3.3 Application to Rent

The amount of repairs can be applied to the payment of rent. La. Civ. Code art. 2694. Under the pre-2005 law, deductions were limited to rent due after the landlord was properly put in default.201 However, the new law deleted the term “deduct from the rent due” from the language in art. 2694.

197 *Office Equipment, Inc. v. Hyde*, 145 So.2d 86 (La. App. 4 Cir. 1962); *see also Freeman v. G.T.S. Corp.*, 363 So.2d 1247, 1248-49 (La. App. 4 Cir. 1978).


If the tenant has a long term lease, he has a right to make deductions for repairs up to the amount due under the lease. Under the new Article 2694, a tenant may immediately sue for reimbursement of repair costs in excess of the rent. As a practical matter, a tenant with a month-to-month lease is probably limited to making repairs which do not exceed the monthly rent. *Evan v. Does*, 283 So.2d 804, 808 (La. App. 2 Cir. 1973). A landlord may respond to a repair and deduct remedy by issuing a 10 day notice to terminate a month-to-month lease. Louisiana does not have a statutory prohibition against retaliatory evictions.

### 7.3.4 Proof That Repairs Were Necessary And That Price Was Reasonable

Finally, the tenant must be able to prove (1) that the repairs made were necessary and (2) that the price of the repairs was reasonable. The "necessity of the repairs" should be established through the testimony of a qualified person. *See, e.g. Scott v. Davis*, 56 So.2d 187 (Orl. App. 1952) (production of receipted bill for automobile repairs, allegedly necessitated as the result of a collision, is not alone sufficient proof; there must be testimony); *Ernis v. Government Employees Insurance Co*, 305 So.2d 620 (La. App. 4 Cir. 1975) (damage claim based on bill for medical expenses from a clinic was not proven where no doctor from the clinic testified).

How much evidence is required to prove that the price of the repairs was reasonable? The courts are split on this issue. The actual price of the repairs should be provable by testimony of payment, corroborated by introduction into evidence of the bills paid, and identification of them as expenses incurred because of the landlord’s default.

However, the tenant must also prove that the price paid for repairs was reasonable. The reasonableness of the price should be proved through the testimony of a person qualified and knowledgeable in the assessment of the values of repairs. It may be difficult, if not impossible, to obtain this quality of evidence for an eviction defense. In that event, the only alternative is to produce the best available evidence or secure a continuance. *See Coleman v. Victor*, 326 So.2d 344, 348-49 (La. 1976), which suggests that the Louisiana Supreme Court may be willing to reject inflexible evidentiary rules commonly used by some Courts of Appeal.

If a repairman cannot be obtained for the trial, you should attempt to introduce other competent testimony on the nature of the defects, the amount of time spent on the repairs, and the costs of the labor and materials. You can attempt to introduce any estimates on the repair work. However, these estimates are ordinarily inadmissible as hearsay. Such estimates can probably be admitted without objection in those evictions which are prosecuted by a non-attorney.

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202 *Heirs of Merith v. Pan American Films*, 200 So.2d 398, 402 (La. App. 4 Cir. 1967); write refused, 203 So.2d 88 (La. 1967); *Lorenzon v. Woods*, 1 McGloon 373 (Orl. App. 1881); *see also Cameron v. Knuts*, 299 So.2d 919, 923 (La. App. 3 Cir. 1974).

203 *See, e.g. Dickert v. Ruiz*, 231 So.2d 633 (La. App. 4 Cir. 1970); *Trinity Universal Insurance Company v. Normand*, 220 So.2d 583, 586 (La. App. 3 Cir. 1969). *But see Ducote v. Allstate Insurance Company*, 242 So.2d 103, 107 (La. App. 1 Cir. 1970), write refused 243 So.2d 532 (La. 1971) and *Vezinat v. Marix*, 217 So.2d 416, 421 (La. App. 1 Cir. 1968) where it was held that a party’s testimony alone is insufficient to establish a claim for damages. *See also Freeman v. G.T.S. Corp.*, 363 So.2d 1247, 1251 (La. App. 4 Cir. 1978).


Finally, note that a tenant should be able to make a rent deduction for the value of his own labor, if properly proved. See, e.g., Lambert v. Allstate Insurance Company, 195 So.2d 698 (La. App. 1 Cir. 1967); Kopsco v. Allelo, 32 So.2d 99 (1 Cir. 1947). Again, the value of the tenant’s own repair work must be supported by competent testimony on the number of hours worked and the monetary value thereof. Lambert, supra at 700. The tenant should not make a claim greater than the price that a professional would have charged. See, e.g., Kopsco, supra.

7.4 PLEADING REQUIREMENTS FOR AN ARTICLE 2694 DEFENSE

All of the elements of an article 2694 defense should be pleaded. Several courts have strictly enforced the pleading requirements for an article 2694 defense. See, e.g. Miami Truck & Motor Leasing Co. v. Dairyman, Inc., 263 So.2d 110, 112 (La. App. 1 Cir. 1972); Duchein v. Ben Roumain, Inc., 176 So. 696 (La. App. 1 Cir. 1937).

7.5 ALTERNATIVE REMEDIES IN THE EVENT OF FAILURE UNDER ARTICLE 2694

7.5.1 The Defense of Good Faith

If the tenant fails to prove one or more elements of an article 2694 defense, he should avoid cancellation of the lease for nonpayment of rent by convincing the trial court that he acted in good faith. Plunkett v. D & L Family Pharmacy, 562 So.2d 1048, 1052 (La. App. 3 Cir. 1990)(eviction for withholding rent under art. 2694 reversed when tenant acted in good faith); Brewer v. Forest Gravel Co., 135 So. 372 (La. 1931). Good faith has been found where the tenant, relying on counsel’s advice, refused to pay more. Brewer, supra at 373.

7.5.2 The Right to Remove Improvements or to Be Reimbursed

What are the remedies of a tenant who is evicted before recouping the value of his improvements in rent? The tenant has the right to remove the improvements provided he restores the thing to its prior condition. La. Civ. Code art. 2695(1). Civil Code article 2694 expressly authorizes the tenant to sue for reimbursement. The tenant’s right to sue for reimbursement is not terminated by his breach or abandonment of the lease.

7.5.3 Damages

The landlord may be sued for damages for failure to maintain the apartment in habitable condition. See next section.

8. TENANT DAMAGE CLAIMS

Tenant damage claims may be ex delictu or ex contractu. Potter v. First Federal S & L, 615 So.2d 318 (La. 1993). Prescription is 1 year for torts and 10 years for contracts. Always file within 1 year if you can. The courts may classify what you think is a contractual claim as a tort claim and apply a 1 year prescription. See e.g., Saylor v. Villcar Realty, LLC, 999 So.2d 61 (La. App. 4 Cir. 2008).

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207 Riggs v. Lawton, 93 So.2d 543 (La. 1957); Leake v. Hardie, 245 So.2d 729 (La. App. 4 Cir. 1971); Pylate v. Inabet, 458 So.2d 1378 (La. App. 2 Cir.1984).

208 Leake v. Hardie, 245 So.2d 729 (La. App. 4 Cir. 1971).
8.1 WARRANTY OF HABITABILITY

The landlord must deliver the premises to the tenant in good condition, and free from any repairs. La. Civ. Code art. 2684. A tenant may sue and recover damages from a landlord for violations of the warranty of habitability, i.e., failure to maintain apartment in good condition. Assumption of risk is not a defense to a warranty of habitability lawsuit. However, under current law, a tenant’s damage claim may be reduced if the tenant failed to notify the landlord of a defect that the landlord did not know about. La. Civ. Code art. 2697, 2688. Written notice of the defects is not required where the landlord had actual notice.

Unlike tenants in many states, Louisiana tenants may not use the landlord’s violation of the warranty of habitability as an offset to their rent obligation. Evans v. Does, 283 So.2d 804 (La. App. 2 Cir. 1973). However, conventional public housing tenants have the remedy of rent abatement, which is an extinguishment of the rent obligation. See 24 C.F.R. § 966.4(h); Hano v. Wilson, 503 So.2d 565 (La. App. 4 Cir. 1987).

Courts are very reluctant to find a waiver of habitability. In the commercial leasing context, a court has held that the warranty of fitness may be waived only if clear and unequivocal language is used. Another court has held that although a tenant accepts leased premises "as is", he is still entitled to the implied warranty of fitness afforded him by law. Residential tenants may not waive defects that affect health and safety. La. Civ. Code art. 2699 (3).

If you intend to prove a housing code violation as part of a warranty of habitability lawsuit, you should introduce a certified copy of the ordinance into evidence. Cantelupe v. City of Bossier, 322 So.2d 344 (La. App. 2 Cir. 1975).

8.2 PEACEABLE POSSESSION

Failure to maintain a tenant in peaceable possession gives rise to a breach of contract. It may also give rise to a negligence claim if the landlord should have known of the disturbance. La. Civ. Code. art. 2682, 2700-01. Executory process and an order of seizure and sale is a disturbance of peaceable possession if there is an order to vacate or denial of tenant’s access. Landlords have an obligation to prevent their other tenants from disturbing a tenant’s peaceable possession. The warranty of peaceable possession may not be waived.

8.3 UNFAIR TRADE PRACTICES ACT

The Louisiana Unfair Trade Practices and Consumer Protection Law (LUTP), La. R. S. 51:1401 et. seq. may apply to leasing of residential property. LUTP pro-
hibits “unfair and deceptive” acts or practices in the conduct of any trade or commerce. La. R. S. 51:1405(A). The definition of “trade or commerce” includes the sale or distribution of any services and any property, corporeal or incorporeal, immovable or movable, and any other article or thing of value. La. R. S. 51:1402 (9). Suits, with unfair trade practices claims, should be filed within one year of the unfair practice since these claims are subject to a one year peremption exception.219

At a minimum, the victim of an unfair trade practice may recover actual damages and attorney’s fees. Knowing use of unfair or deceptive trade practices after notice by the attorney general subjects the violator to treble damages. McFadden v. Import One, Inc., 56 So.3d 1212 (La. App. 3 Cir. 2011).

There is a dearth of Louisiana jurisprudence on unfair trade practices in the landlord-tenant context. A lessee’s failure to remove equipment at the end of the lease has been held to be an unfair trade practice. Doland v. ACM Gaming Co., 921 So.2d 196, 202 (La. App. 3 Cir. 2005).

Louisiana courts have held that interpretations of the federal courts and the Federal Trade Commission relative to 15 U.S.C. § 45 should be considered to adjudge the scope and application of LUTP.220 15 U.S.C. § 45 has been interpreted to apply to various aspects of the leasing transaction.221 In addition, it should be noted that LUTP is identical or virtually identical to the unfair trade practices laws of many other states. Court decisions of other states on statutes identical, or similar to those of Louisiana are persuasive authority.222 Many states with identical or similar unfair trade practices laws have held them applicable to unfair or deceptive acts committed in the leasing of residential property.223

A practice is unfair when it offends established public policy, and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to customers. F.T.C. v. Sperry Hutchinson Co., 405 U.S. 233 (1972); Risk Management, LLC v. Moss, 40 So.3d 176, 184-85 (La. App. 5 Cir. 2010) writ denied 44 So.3d 683 (La. 2010). A practice is deceptive when it involves fraud, deceit or misrepresentation. Moss, supra at 185. Other state courts have held a variety of landlord abuses to be unfair or deceptive trade practices:

- lock-out 224
- disconnection of utilities to evict 225
- demand for money not owed under threat of eviction 226
- deceptive eviction notice 227
- routine filing of groundless evictions to collect debts 228

219 The courts of appeal have held that unfair trade practice claims are barred by a one year peremption. The Louisiana Supreme Court has not ruled on this issue.


221 See, e.g., In the Matter of Hallmark Group Companies, Inc., 84 F.T.C. 1 (1974); LaPegre v. F.T.C., 366 F. 2d 117 (5th Cir. 1966), aff’d in part 65 F.T.C. 799.


• retaliatory eviction\textsuperscript{229}
• violation of warranty of habitability\textsuperscript{230}
• failure to repair

For more examples of the application of unfair trade practice laws to landlord-tenant practices, see National Consumer Law Center, \textit{Unfair and Deceptive Acts and Practices} § 8.2 (8th ed. 2012). Note that some unfair trade practices may also violate the Federal Fair Debt Collection Practices Act if conducted by the landlord’s attorney or a third party collector.

8.4 **FEDERAL FAIR DEBT COLLECTION PRACTICES ACT**

The federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 \textit{et seq.}, does not apply to landlords who are attempting to collect from their own tenants. However, it does apply to attorneys and collection agencies who attempt to collect debts for landlords.\textsuperscript{231} Some unfair debt collection practices are:

• Demand for payment of amounts not due\textsuperscript{232}
• Suit for eviction and rent barred by res judicata\textsuperscript{233}
• Utility shutoffs and lockouts seeking to force a tenant to pay rent\textsuperscript{234}
• Seizure of tenant’s property without valid lien\textsuperscript{235}
• Telephone or phone harassment, entry of premises to collect rent\textsuperscript{236}
• Assertion of false claims as reason for withholding security deposit\textsuperscript{237}

8.5 **FEDERAL FAIR CREDIT REPORTING ACT**

Denial of a lease because of a credit report or a tenant screening report is adverse action under the Fair Credit Reporting Act. See \textit{Cotto v. Jenney}, 721 F. Supp. 5 (D. Mass. 1989). The tenant must be given notice of the adverse action and an opportunity to dispute inaccurate or incomplete information.

8.6 **INVASION OF PRIVACY AND TRESPASS**


8.7 **PROPERTY DAMAGE**

A tenant may recover damage to personal property which is caused by the landlord’s negligence, lease violation, or vices and defects in the premises. \textit{Green v. Hodges Stockyard, Inc.}, 522 So.2d 435 (La. App. 4 Cir. 1989) (corrosive damage to vending machines caused by a hole on the premises); \textit{Wilson v. Pou}, 436 So. 2d 599 (La. App. 4 Cir. 1983) (mildew damage due to air conditioning malfunction); \textit{Daspit v. Swann}, 436 So. 2d 606 (La. App. 1 Cir. 1983) (fire damage due to electrical malfunction).

\textsuperscript{229} Kendig \textit{v. Kendall Construction Co.}, 317 So.2d 138 (Fla. App. 1975).
\textsuperscript{231} Goldstein \textit{v. Hutton Ingram}, 374 F.3d 56 (2 Cir. 2004) (attorney’s 3 day notice demanding rent or departure); \textit{Romea v. Heiberger Associates}, 163 F.3d 111 (2 Cir. 1998) (rent demand notice by attorney as predicate to eviction).
\textsuperscript{237} Kraus \textit{v. Trinity Mgmt Servs.}, 67 Cal. Rptr.2d 210 (Cal. App. 1997).
8.8  THIRD PARTY CRIMES


9. HOUSING DISCRIMINATION

9.1  INTRODUCTION

The federal Fair Housing Act is codified at 42 U.S.C. §§ 3601-3619 and 3631. §§ 3604-3606 and 3617 contain the substantive prohibitions of the Act. A key provision, § 3604(a), makes it unlawful to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” § 3604(f)(1) also bans handicap discrimination. The phrase, “otherwise make unavailable or deny” has been broadly construed to include numerous housing practices unspecified in § 3604(a), e.g., redlining, steering, exclusionary zoning, etc. HUD regulations implementing the Act are codified at 24 C.F.R. § 100 et seq. The courts must generally defer to HUD’s interpretations of the Act. 238

42 U.S.C. §§ 1981 and 1982 also outlaw private and public racial discrimination in housing. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). They even apply to housing that is exempt under the Fair Housing Act. The Louisiana Open Housing Act, La. R.S. 51:2601 et seq., also prohibits housing discrimination. It is virtually identical to the FHA. Some advantages to filing in state court under the Open Housing Act would be an automatic lis pendens bar to subsequent eviction lawsuits and avoidance of res judicata, Anti-Injunction Act and Rooker-Feldman issues. 239 On the other hand, the Open Housing Act does not have a body of case law interpreting it. Also, the Open Housing Act has an attorney’s fee provision that might be interpreted as “loser pays” rather than the FHA standard that limits attorney fees to losing plaintiffs whose lawsuits were frivolous.

9.2  PROPERTIES COVERED BY FAIR HOUSING ACT

9.9.2.1  Dwellings

The Fair Housing Act prohibits discrimination in transactions involving “dwellings.” 42 U.S.C. § 3602(b). “Dwelling” includes any building occupied or intended to be occupied as a residence.

The courts have held the following properties, in addition to houses and apartments, to be dwellings:


239 Also, a state court lawsuit that only pleads a state law claim may defeat removal to federal court.


Boarding houses, dormitories and all other facilities whose occupants remain for more than a brief period are presumably covered as “dwellings” under the Act.

### 9.2.2 Exempted Dwellings

#### a. Owner’s direct sale or rental of his single family home. § 3603(b)(1). A four-plex is not a “single family home.” *Lincoln v. Case*, 340 F.3d 283 (5th Cir. 2003). The § 3603(b)(1) exemption only applies to § 3604(a), (b), (d)-(f). Also, the exemption has numerous exceptions. *See e.g., Dillon v. AFBIC Development Corp.*, 597 F.2d 556, 561 (5th Cir. 1979). An owner’s broker is not exempt.

#### b. Owner-occupied buildings with no more than 4 units. § 3603(b)(2).

#### c. Housing for “older persons” as to prohibition against familial discrimination. § 3607(b)(2)-(3). Other forms of discrimination are, however, prohibited.

#### d. Religious organizations’ noncommercial dwellings.

#### e. Private clubs’ incidental noncommercial lodgings.


### 9.3 PROHIBITED BASES OF DISCRIMINATION

#### 9.3.1 Race or color.

#### 9.3.2 National origin.


#### 9.3.3 Religion.

#### 9.3.4 Sex or Sex Harassment

#### 9.3.5 Handicap

The constitutionality of the FHA’s prohibition of handicap discrimination has been upheld by the courts. *See Groome Resources Ltd. v. Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000). Every legal services housing advocate should read the July 1999 Clearinghouse Review article, *Using Reasonable Accommodations to Preserve Rights of Tenants with Disabilities*.240

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240 33 Clearinghouse Rev. 131 (July-Aug. 1999). The article can be obtained from [www.povertylaw.org](http://www.povertylaw.org). See also the Bazelon Center fact sheets on housing discrimination at [www.probono.net/la](http://www.probono.net/la).
a. **Definition:** (1) a physical or mental impairment which substantially limits one or more major life activities; (2) a record of having such impairment, or (3) being regarded as having such an impairment. Definition is virtually identical to § 504 of the Rehabilitation Act definition. Congress intended interpretations that are consistent with interpretation under § 504. **Note:** List of “major life activities” in 24 C.F.R. 100.201 is not all-inclusive. *United States v. Borough of Audobon,* 797 F. Supp. 353 (D.N.J. 1991) *aff’d* 968 F. 2d 14 (3d Cir. 1992).

b. **Exceptions:** Transvestites and current illegal users of a controlled substance are excepted from the definition of “handicap.” Drug addiction is a “handicap” if not accompanied by current illegal use.

c. **Examples:** Covered handicaps include alcoholism, AIDS, high blood pressure, emotional problems, mental illness or retardation, learning disabilities, cancer, epilepsy, cerebral palsy and many disabilities associated with old age. *See e.g., Cason v. Rochester Housing Authority,* 748 F. Supp. 1002 (W.D. N.Y. 1990) (elderly); *Oxford House Inc. v. Town of Babylon,* 819 F. Supp. 1179 (E.D. N.Y. 1993) (recovering alcoholics and drug addicts); *United States v. Southern Management Corp.,* 955 F. 2d 914 (4 Cir. 1992) (former addicts).

d. Persons commonly “regarded as having an impairment” are the elderly, former substance abusers and HIV-positive persons.

e. The handicap discrimination provisions also protect persons residing or associating with the handicapped, e.g., parents, children, spouses, roommates, etc.

f. **Basic Prohibitions:** “Handicap” was added to all FHA prohibitions except 3604(a) and 3604(b). For the handicapped, the 3604(a)-(b) prohibitions are found in 3604(f)(1)-(2) with modifications to allow restriction of occupancy to the handicapped.

g. **Modifications Required:** Handicapped tenants must be allowed, at their own expense, to make any reasonable modifications necessary for full enjoyment of premises, i.e., the unit, lobbies, main entrances, common areas, etc. 24 C.F.R. § 100.201. Landlord does not have absolute right to reject modifications but may condition approval of unit modification on restoration agreement.

h. **Accommodation required:** Housing providers must make reasonable accommodations in rules, policies, practices or services necessary to afford handicapped persons “equal opportunity to use and enjoy a dwelling.” This means “feasible practical modifications” and is derived from case law and regulations interpreting § 504 of the Rehabilitation Act. Thus, the accommodation must be made unless it imposes an undue financial or administrative burden or requires a fundamental alteration in the nature of the provider’s program. HUD and the Department of Justice have issued a joint statement on reasonable accommodations that provides helpful guidance.\(^{241}\)

i. Examples of required accommodations include (1) allowing seeing eye dog for blind tenant, (2) reserving parking place for mobility-impaired tenant, (3) waiving rules to allow handicapped tenant to have nontenant do his laundry.

9.3.6 Familial Status

a. **Definition:** “Familial status” is defined as one or more individuals under the age of 18 living with a parent, a person having legal custody, or the designee of such parent or legal custodian. The definition includes a person who is pregnant or about to obtain custody of a minor.

b. **Basic Prohibitions:** All FHA prohibitions apply to familial status discrimination subject to the exemption for housing for older persons.

c. **Occupancy Standards:** 42 U.S.C. § 3607(b)(1) allows providers to comply with “reasonable” local, state or federal occupancy standards. HUD has declined to define “reasonable.” A “totality of circumstances” analysis is generally applied to an occupancy standard. A trailer park’s “3 person per unit” and an apartment complex’s one person/one bedroom, two person/two bedroom restrictions have been held to violate the FHA. *HUD v. Mountain Side Mobile Estates*, FH-FL Rptr. 25,492-93 (HUD Secy 1993); *United States v. Badgett*, 976 F.2d 1176 (8th Cir. 1992). Badgett referred to HUD’s rule of thumb that occupancy limits of two persons per bedroom are presumptively reasonable. HUD has provided guidance by memorandum that indicates factors which may warrant deviation from the two person per bedroom standard such as size and configuration of the bedroom and unit.

d. **Discriminatory Effects:** Familial status discrimination may apply to practices that have a disproportionate impact on families with children. **Note:** This could play a large role in familial status discrimination litigation.

e. **Exemption:** Housing for “older persons” is exempted from the FHA prohibitions against familial status discrimination. 42 U.S.C. § 3607(b)(1)-(3). Detailed HUD regulations on this exemption are found at 24 C.F.R. § 100.300.

9.4 DISCRIMINATORY PRACTICES

1. Refusal to rent or negotiate. *HUD v. Pheasant Ridge*, HUD ALJ 05-94-0845-8 (10/25/96), FH-FL Rptr. ¶ 25,123 (Section 8 landlord assessed $50,452 damages for failure to rent to mentally ill siblings).

2. False representation of availability.

3. Discriminatory terms, conditions, services:
   - Higher security deposits. 24 C.F.R. § 100.203(a).
   - Discriminatory maintenance or delays in repairs. 24 C.F.R. § 65(b)(2).

4. Eviction:
   - Eviction of minorities for late payment of rent discriminatory if landlord has not evicted other tenants who paid late. *Khamaja v. Wyatt*, 494 F.Supp. 302, 303 (W.D.N.Y. 1980)
   - Whites cannot be evicted for associating with blacks. *Woods-Drake v. Lundy*, 667 F. 2d 1198, 1201 (5th Cir. 1982); *Bill v. Hodges*, 628 F.2d 844 (4th Cir. 1980)($1982 also prohibits such evictions).
• Eviction because of request to have foster children. Gorski v. Troy, 929 F.2d 1183 (7th Cir. 1991).
6. Retaliation
7. Coercion, intimidation, threats, interference.
8. Discriminatory advertising.

9.5 EXAMPLES OF DISCRIMINATORY PRACTICES

This section provides more examples of specific discriminatory practices by type of discrimination:

9.5.1 Familial Status Discrimination
c. Refusal to rent one bedroom apartment to parent and child. HUD v. Properties Unlimited, FH-FL Rptr. 25009 (HUD ALJ 1991).
f. Limitations based on number of children are illegal. HUD v. Kelly, FH-FL Rptr. 25357-58 (HUD ALJ 1992) aff’d 3 F. 3d 951 (6th Cir. 1993); HUD v. Edelstein, supra. However, “reasonable” occupancy standards are allowed.
g. Families with children cannot be segregated within a complex. 24 C.F.R. 100.70 (c)(4).
i. Increase in rent or security deposit based on number of children. *HUD v. Alfaya*, No. HUD ALJ 09-89-0766-1.

j. Apartment rule prohibiting children from playing in common areas. 24 C.F.R. 100.65 (b)(4).


m. Oral statement that indicates preference or discrimination based on familial status. *White v. HUD*, 475 F.3d 898 (7th Cir. 2007).

9.5.2 Handicap Discrimination

a. Inquiries about handicap or nature/severity. 24 C.F.R. § 100.202(c); *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D.N.Y. 1990)(PHA can’t inquire into applicant’s ability to live independently).


c. Eviction of mentally ill tenants for criminal activity without individualized assessment of whether reasonable accommodations would acceptably minimize risk to others. *Boston Housing Authority v. Bridgewaters*, 898 N.E.2d 848 (Mass. 2009)(housing authority must show that no reasonable accommodation would minimize risk mentally ill tenant poses to others); *Housing Authority of City of Camden v. Williams*, 2011 WL 1261109 (N.J. App. 2011); but see *Housing Authority of the City of Lake Charles v. Pappion*, 540 So.2d 567 (La. App. 3 Cir. 1989)(§ 504 case).


h. Refusal to rent to disabled tenant unless she signed hold harmless agreement—a requirement not made of the non-disabled. *HUD v. Community Homes-Western Village*, HUD ALJ 10-90-0049-1 (7-10-91).


k. Refusal to give a disabled coop resident a ground floor parking space. *Shapiro v. Cadman Towers, Inc.*, 51 F. 3d 328 (2d Cir. 1995) (prelim. inj. grt’d).

l. Refusal to allow tenant with emphysema to have an air conditioner. *Aegean Investors v. Walker*, 27 Clearinghouse Rev. 808 (Nov. 1993).

m. HUD’s refusal to transfer disabled Section 8 tenants to housing for the disabled. *Lidder v. Cisneros*, 823 F.Supp. 164 (S.D.N.Y.) (HUD’s motion to dismiss denied).

n. Refusal to rent or negotiate. *HUD v. Pheasant Ridge*, HUD ALJ 05-94-0845-8 (10/25/96), FH-FL Rptr. ¶ 25,123 (Section 8 landlord assessed $50,452 damages for failure to rent to mentally ill siblings).

o. Refusal to allow an indigent person with AIDS to reside in an apartment rented for him by his financially qualified mother. *Giebeler v. M & B Associates*, 343 F.3d 1143 (9th Cir. 2003).

9.5.3 Sex Discrimination

a. Refusal to rent to single women or working mothers. *Morehead v. Lewis*, 432 F. Supp. 674 (N.D.Ill. 1977) aff’d 594 F. 2d 867 (7th Cir. 1979).


Note: Both “quid pro quo” and “hostile environment” sexual harassment are actionable.


9.5.4 Racial Discrimination


d. Showing blacks fewer units, quoting them higher rents and later dates of availability. United States v. Balestrieri, 981 F. 2d 916 (7th Cir. 1992), cert. denied 510 U.S. 812.

e. Requirements that minority applicants be approved or recommended by current tenants or other neighbors. Robinson v. 12 Lofts Realty, Inc., 610 F. 2d 1032 (2d Cir. 1979); Grant v. Smith, 574 F. 2d 252 (5th Cir. 1978).


g. Refusal to amend zoning ordinance to allow construction of multifamily housing outside of urban renewal area. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir.) aff’d per curiam 488 U.S. 15 (1988).

h. Closing private road to black neighbor but allowing whites to use it. Evans v. Tubbe, 657 F.2d 661 (5th Cir 1981).

i. Providing poorer services over time period when white tenants being replaced by black tenants. Concerned Tenants Ass’n v. Indian Trails Apts., 496 F.Supp. 522 (N.D. Ill. 1980).

j. Substandard conditions in housing projects. Durrett v. Housing Authority of the City of Providence, 896 F.2d 600 (1st Cir. 1990).


m. Vandalism of new black resident’s property by white neighbor. 42 USC § 3617; Stackhouse v. DeSatter, 620 F.Supp. 208 (N.D. Ill. 1985); see also Sofarelli v. Pinellas Cty., 931 F. 2d 718 (11th Cir. 1991)(neighbors’ threats, obscenities, spitting).


o. Neighbor’s verbal harassment of a Hmong who was inspecting next door house as a prospective tenant. 42 USC § 3617; HUD v. Weber, FH-FL Rpts 25041.

p. Operation of segregated public housing and Section 8 housing programs in metropolitan area. Walker v. HUD, 912 F.2d 819 (5th Cir. 1990).

q. Failure of PHA to locate replacement units in white areas. Christian Community Action, Inc. v. City of New Haven, Clearinghouse No. 52,438 (D.Conn. 1999).

9.6 PROCEDURE

9.6.1 Jurisdiction

Private plaintiffs may bring lawsuits pursuant to 42 U.S.C. § 3613 in any appropriate United States district court or state court of general jurisdiction. A federal court may hear related state law claims under supplemental jurisdiction. 28 U.S.C. § 1367(a).

9.6.2 Statute of Limitations


9.6.3 Standing to Sue

Standing to sue depends on the substantive law involved. Plaintiffs under the FHA have standing if they are injured in any way by the FHA violation and may even assert third party rights. Plaintiffs have been granted standing under the FHA for being deprived of the social and professional benefits of living in an integrated society. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 109 (1979).

9.6.4 Jury Trials


9.6.5 Interlocutory Injunction

Rule 65 of the FRCP governs temporary restraining orders. Preliminary injunctions may be consolidated with the trial on the merits. Evidence received at the preliminary injunction becomes part of record and need not be repeated at trial. You should, however, take steps to preserve your jury trial. Discriminatory housing practices constitute irreparable injury. Gresham v. Windrush Partners, Inc., 730 F.2d 1417, 1423-24 (11th Cir. 1984).

The Anti-Injunction Act bars federal courts from enjoining an already filed state court action except in certain cases. The courts are divided over whether the Anti-Injunction Act applies to FHA claims. Compare Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F. 2d 252 (1st Cir. 1993) with Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168 (N.D.N.Y. 1993). Note, however, the Anti-Injunc-

242 Many subsidized housing leases will have a contract provision whereby the landlord agrees not to unlawfully discriminate. Contract claims are subject to a 10 year statute of limitations in Louisiana. However, the courts will probably apply the shorter statute of limitations for fair housing act violations (1, 2 or 4 years as applicable), torts (1 year) and crimes of violence (2 years). See e.g., Sterling v. Urban Property Co., 562 So.2d 1120 (La. App. 4 Cir. 1990).
tion Act would not apply if the defendant is a “state actor” subject to suit under 42 U.S.C. § 1983. But, abstention under Younger v. Harris, 401 U.S. 37, may bar the federal injunction.243

9.6.6 Rule 68 Offers

Note that Marek v. Chesney, 473 U.S. 1 (1980), may not apply to attorney fees in cases brought under the FHA. Id. at 23-27 (Brennan, J., dissenting).

9.6.7 Issue Preclusion

Res judicata and collateral estoppel issues may arise when the landlord has obtained an eviction judgment. In Miller v. Hartwood Apts., 689 F.2d 1239 (5th Cir. 1982), the court held that a Mississippi eviction court judgment did not bar the federal court litigation of a § 1983 claim since these tenants’ constitutional claims could not have been litigated in the eviction lawsuit.244 Note that while tenants’ damage claims cannot be litigated in eviction lawsuits, discrimination can be asserted as a defense to possession in Louisiana. Mascaro v. Hudson, 496 So.2d 428 (La. App. 4 Cir. 1986). Failure to raise damage claims as a reconventional demand to an eviction brought as an ordinary action could, however, act as res judicata. Lafreniere Park Foundation v. Broussard, 221 F.3d 804 (5th Cir. 2000).

To avoid issue preclusion problems, you should file a housing discrimination lawsuit before the landlord files an eviction lawsuit and obtain a state court lis pendens or federal court injunction against any eviction.245

9.6.8 Rooker/Feldman Doctrine

The Rooker/Feldman doctrine deprives a federal court from jurisdiction to review state court judgments in cases brought by state-court losers complaining of injuries caused by a state court judgment rendered before the federal suit began. Rooker-Feldman does not apply to fair housing discrimination claims based on conduct that predates the state court judgment.246 However, some courts, including the Fifth Circuit, may apply Rooker/Feldman more broadly to bar actions that require review of validity of a state court eviction judgment.247

9.7 PROVING A VIOLATION

1. Overview: There are 2 types of claims under the FHA: (1) disparate treatment and (2) discriminatory impact or effect. The proof required depends on the type of claim.

243 For examples of housing cases (non-FHA) where tenants have defeated Younger v. Harris abstention, see Kemp v. Chicago Housing Authority, 2010 WL 2927417 (N.D. Ill. 2010)(termination of public housing assistance); Ayers v. Phila. Housing Authority, 908 F.2d 1184, 1195, n. 21 (3d Cir. 1990)(due process); McNell v. New York City Housing Authority, 719 F. Supp. 233, 255 (S.D. N.Y. 1989) (procedures for terminating rent subsidy).

244 Where a state court procedure permits counterclaims for equitable or monetary relief in an eviction, the eviction judgment may constitute res judicata. See e.g., Poindexter v. Allegheny County Housing Authority, 329 Fed Appx. 347 (3d Cir. 2009).

245 Caveat: It can be difficult to obtain appellate review of the second court’s improper denial of a lis pendens exception in a summary eviction proceeding. If the second court does not allow a brief period to apply for supervisory writs, you may be unlawfully forced to litigate the trial on the merits in the second court. A denial of lis pendens may be reviewed by supervisory writs. Dean v. Delacroix Corp., 853 So.2d 769 (La. App. 4 Cir. 2003).


247 See e.g., Illinois Central R. Co. v. Guy, 682 F.3d 381, 390-91 (5th Cir. 2012); Babalola v. B.Y. Equities, Inc., 63 Fed. Appx. 534 (2d Cir. 2003); Chambers v. Habitat Co., 215 F.3d 1329 (7th Cir. 2000).
2. Disparate Treatment (or Intentional Discrimination)

a. Pretext cases

This claim involves the housing provider treating a protected person differently. The issue is the provider's intent. The provider usually claims that there was a legitimate nondiscriminatory reason for his action. Evidence of discriminatory intent may be either direct or circumstantial.

Cases based on circumstantial evidence are guided by the “prima facie” concept. See e.g. HUD ex rel Herron v. Blackwell, 908 F.2d 864, 870-71 (11th Cir. 1990). To establish a prima facie case of disparate treatment, the plaintiff who has been denied housing must show:

(1) he is a member of a protected class
(2) he applied for and was qualified to rent/purchase the unit.
(3) he was rejected by the defendant
(4) the housing opportunity remained available thereafter.

The defendant must then show a legitimate nondiscriminatory reason for the adverse action. If this burden is met, the plaintiff must show that the “legitimate reasons were a pretext” for discrimination. Pretext may be proven with “testing” evidence. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

For information on testing services that may be available in your area, contact the Greater New Orleans Fair Housing Action Center, Ph. (504) 596-2100.

b. Mixed Motive Cases

Mixed motive cases involve housing decisions that are based only in part on a prohibited motive. All of the courts of appeals have held that the FHA is violated even if race is just one of the motivating factors. See e.g., Payne v. Bracher, 582 F.2d 17, 18 (5th Cir. 1978). In Price Waterhouse v. Hopkins, the Supreme Court held that a Title VII defendant could win if it could prove that the same decision would have been made if it had not taken race into account. The Civil Rights Act of 1991 partially overruled the Price Waterhouse standard for “mixed motive” Title VII cases; however, the Price Waterhouse standard still applies to Title VIII Fair Housing Act cases. See HUD v. Denton, FH-FL Rptr. 25,024 (HUD ALJ 1992).

3. Discriminatory Effect

The courts of appeals have unanimously held that the FHA covers practices that simply produce discriminating effect. See e.g. United Stated v. Mitchell, 580 F.2d 789, 791-92 (5th Cir. 1978). There have been 2 types of discrimi-
natory effect cases: (1) perpetuation of segregation (Town of Huntington) and (2) discriminatory impact (Betsey v. Turtle Creek Associates). The Supreme Court has never ruled on the issue of whether discriminatory effect is actionable under the FHA. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir.) aff'd 488 U.S. 15 (1988)(4-4). A good example of a discriminatory effects case is Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984) where a “no children” policy was found to have a discriminatory effect on minorities.

The key to proving a disparate impact claim is evidence that the defendant’s practice has a greater impact on the protected class than others. Proof of a prima facie case of disparate impact shifts the burden to the defendant to justify the challenged practice.

The courts of appeals have stated the defendant’s burden differently. Huntington said that there must be legitimate justifications with no less discriminatory alternative available. Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984) held that the defendant must show business necessity. It is, however, possible that defendant could now argue for the Wards Cove (490 U.S. 642) Title VII defense of “justification that serves its legitimate goals in a significant way.”

Note: Housing discrimination claims based solely on 42 USC § 1982 appear to be limited to discriminatory intent cases. Proof is generally governed by the same standards that apply in a FHA case.

9.8 RELIEF
9.8.1 Actual Damages

Tort principles apply to FHA damage suits. Curtis v. Loether, 415 U.S. 189 (1974). Damages vary from the nominal to $500,000 or more. Data on damages in FHA cases can be found at www.fairhousing.com. Generally, the major components of actual damages in FHA cases are humiliation, embarrassment and emotional distress. For a discussion of damage awards, see Maximizing Damage Awards in a Fair Housing Case, 26 John Marshall L.R. No. 1 (1993).

9.8.2 Punitive Damages

The 1988 amendments to the FHA eliminated the $1,000 cap for punitive damages. The 5th Circuit upheld a $55,000 punitive damages award where the actual damages were only $500. Lincoln v. Case, 340 F.3d 283 (5th Cir. 2003). The 8th Circuit recently used a multiplier of 4 in a sex harassment case. Quigley v. Winter, 598 F.3d 938 (8th Cir. 2010). The major Supreme Court case on punitive damages in civil rights cases is Smith v. Wade, 461 U.S. 30 (1983). At least 4 circuits have held that the Smith v. Wade standard for punitive damages applies to FHA claims. Lincoln v. Case, supra.

9.8.3 Equitable Relief

Under § 3613, the court may grant permanent and interlocutory injunctions. The courts are divided over whether the Anti-Injunction Act bars FHA injunctions of state court actions in progress. Compare Casa Marie, Inc. v. Superior Court of

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254 In 2011, the U.S. Supreme Court granted certiorari to review this issue. Magner v. Gallagher, 132 S.Ct. 548 (2011). However, the case has been dismissed. 132 S.Ct. 1306 (2012). At the time of publication, the Court has granted certiorari in another case presenting this issue. Township of Mt. Holly, New Jersey v. Mt. Holly Gardens Citizens in Action, 2012 WL 5289462 (2012).
Puerto Rico, 988 F. 2d 252 (1st Cir. 1993) with Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168 (N.D.N.Y. 1993). Given these uncertainties, it may be preferable to sue in state district court when a FHA plaintiff faces a state court summary eviction lawsuit.\textsuperscript{255} Lis pendens should bar the eviction action and force the litigation of said issues in the housing discrimination lawsuit.

9.8.4 Attorney’s Fees

The 1988 FHA Amendments strengthened the attorney’s fee provision and made it virtually identical to 42 U.S.C. § 1988. \textit{See} 42 U.S.C. § 3613(a). Attorney’s fees are also available under the Louisiana Open Housing Act. Note, however, that Act 687 of 1999 amended the LOHA to provide attorney’s fees to both the prevailing plaintiff and defendant. Although, the sponsors of Act 687 said that their intent was to adopt the same attorney’s fees standard as the FHA, it is possible that the courts will use a “loser pays” standard rather than the “frivolous” standard used in FHA cases.

10. SECURITY DEPOSITS

10.1 SUMMARY OF RENT DEPOSIT RETURN ACT

The Rent Deposit Return Act, La. R. S. 9:3251 \textit{et. seq.}, requires a landlord to return a tenant’s deposit, minus any portion which is necessary to remedy a tenant’s default, or to remedy unreasonable wear to the premises, within one month of the termination of the lease.

If any portion of the deposit is retained, the landlord must furnish the tenant an itemized statement accounting for the retained proceeds and giving the reason therefor, within one month after the tenancy terminates. The tenant must give the landlord a forwarding address to which the itemized statement may be sent.

If the landlord transfers his interest in the apartment during the lease term, he must transfer the security deposit to his successor in interest in order to be relieved of further liability with respect to the security deposit.

The statutory procedure created by La. R.S. 9:3251(A) for the return of security deposits does not apply if the tenant abandons the premises without giving the required notice or abandons it prior to the termination of the lease. La. R.S. 9:3251(C). Presumably, midterm cancellation of the lease for legal cause would relieve the tenant from the notice requirements of R.S. 9:3251(C).

Willful failure to comply with the Rent Deposit Return Act subjects the landlord to an additional penalty of $200 (or actual damages if greater) and attorney’s fees. The $200 penalty is in addition to the security deposit refund. \textit{See} La. R. S. 9:3252 (A). \textit{Miller v. Eeung}, 676 So.2d 656 (La. App. 3 Cir. 1996) ($1,000 in attorney’s fees); \textit{Vinson v. Henley}, 864 So.2d 894 (La. App. 2 Cir. 2004) (additional $1,250 attorney’s fees for appeal). Note that some small claims courts may deny attorney’s fee to a prevailing tenant or award an unreasonably low amount.

10.2 PRE-LITIGATION PLANNING

A tenant who seeks the return of a security deposit should always (1) give a timely notice of lease termination, (2) make a written demand for return of the deposit and (3) retain proof of the notice and demand.

\textsuperscript{255} Note that a different situation would be presented if you also had a 42 U.S.C. § 1983 action against a governmental FHA defendant since a 1983 action is a recognized exception to the Anti-Injunction Act. But, you should also consider whether \textit{Younger v. Harris} abstention applies.
Under La. R.S. 9:3251, a tenant must give the landlord notice of his intent to terminate the tenancy, as required by the lease or law. The lease (or other agreement) will normally govern the amount and type of notice. *Saladino v. Rault Petroleum Corp.*, 436 So.2d 714 (La. App. 4 Cir. 1983). In the absence of a lease provision (or other agreement) as to the required notice, Louisiana Civil Code article 2728 requires that the tenant give 10 days written notice of termination prior to the end of the current rental month. Thus, as a matter of course, the tenant should be advised to give timely notice of termination in writing and to retain a copy for proof at trial.

In order to maximize leverage for negotiation and litigation of a security deposit claim, a written demand for the refund should always be made on the landlord upon termination of the tenancy. This demand should include a “forwarding address” to which the landlord’s itemized accounting of the damages and retained security deposit may be sent.

The written demand for refund will provide a basis for the court to impose an additional $200 penalty plus attorney’s fees on the landlord if he fails to remit within 30 days after the written demand. La. R. S. 9:3252-53. Several courts have held that the failure to make a written demand for refund bars the tenant from recovering the $200 penalty and attorney’s fees from the landlord. 256

### 10.3 MAJOR ISSUES IN LITIGATION

#### 10.3.1 Introduction

The common issues in security deposit litigation involve the various landlord defenses and whether the tenant is entitled to the additional $200 penalty.

#### 10.3.2 Landlord Defenses

##### 10.3.2.1 Adequacy of Tenant’s Notice of Termination

A tenant must give the landlord timely notice of termination as required by the lease or law. Notice by mail should be sufficient unless otherwise precluded by the lease. *Moore v. Drexel Homes, Inc.*, 293 So.2d 500 (La. App. 4 Cir. 1974), writ denied 295 So.2d 812 (La. 1974). Testimony by the tenant (or the mailer), that he personally mailed the notice, postage prepaid, properly addressed, and that the letter was not returned, creates a presumption that the landlord received the notice. See, e.g. *Moore, supra* at 502-04.

Prior to the enactment of La. R. S. 9:3251(C), an inadequate notice of termination was merely viewed as a breach of a lease obligation. It would not preclude recovery of a security deposit unless the landlord incurred actual damage from such default. See, e.g., *Garb v. Clayton-Kent Builders, Inc.*, 307 So.2d 813, 814-15 (La. App. 1 Cir. 1975) (failure to give 30 day notice required by lease did not forfeit security deposit). However, the courts generally interpret La. R. S. 9:3251(C) to bar recovery of a security deposit if the tenant did not provide proper notice of termination. *Low v. Bologna*, 11 So.3d 1246 (La. App. 1 Cir. 2009); *Mays v. Alley*, 599 So.2d 459 (La. App. 2 Cir. 1992). 257 In *Bologna*, the court found that the ten-
ants gave notice in December, but that it only terminated the lease for January. Since the tenants vacated in December, the court declined to order the refund of their security deposit. However, the court applied it as a credit toward the unpaid January rent.

Timeliness, form (written vs. oral) and method of service or delivery are the most common grounds for challenging the adequacy of a tenant’s notice of termination. An arguably defective notice of termination may be overcome in certain circumstances. For example, waiver of a notice requirement or mutual cancellation of the lease, if provable, should remove any La. R. S. 9:3251(C) bar to recovery. Presumably, midterm cancellation of the lease for legal cause, e.g., violation of the warranty of habitability or constructive eviction, would also relieve the tenant from the notice requirements of La. R. S. 9:3251(C). Cf. Nash v. LaFontaine, 407 So.2d 783 (La. App. 4 Cir. 1981); see also La. Civ. Code art. 2714-19. Surrender of possession to the landlord at “the time at which the notice of termination shall be given under Article 2728” shall constitute sufficient notice. See La. Civ. Code art. 2729. Thus, for example, if a month-to-month tenant surrenders possession 10 calendar days before the end of the rental month, the surrender shall constitute adequate notice.

10.3.2.2 Abandonment

Abandonment of the apartment prior to lease expiration may be argued as a defense to a security deposit lawsuit. Hood v. Ashby Partnership, 446 So. 2d 1347 (La. App. 1 Cir. 1984) (court said that the statute simply required a tenant to abide by the lease terms). In Curtis v. Katz, 349 So.2d 362 (La. App. 4 Cir. 1977), writ denied 351 So.2d 179 (La. 1977), the court held that living at a new apartment prior to the expiration of the lease did not constitute abandonment where the tenant retained the key, and kept some property at the old apartment until the lease expired. The court defined “abandonment” as the voluntary relinquishment of the apartment with the intent of terminating possession, and without vesting ownership in any other person. Curtis v. Katz, supra at 363. See also, Preen v. LeRuth, 430 So.2d 825 (La. App. 5 Cir. 1983). Where a tenant gives the landlord notice of his intention to terminate the lease, but leaves the premises prior to the termination, and fails to pay rent for the remainder of the lease period, the tenant is not entitled to the return of his security deposit. Borne v. Wilander, 509 So.2d 572 (La. App. 3 Cir. 1987).

What if a tenant places a deposit, but does not move in? In Barnes v. Smith, 2007 WL 142920 (La. App. 2 Cir. 2007), the landlord testified that she had a policy of retaining half the deposit if tenants changed their minds and did not move in. The tenant disputed any discussion of this policy. The court treated the case as a R.S. 9:3251 security deposit case and ordered the return of entire deposit upon finding that the landlord failed to prove any damages when the tenants placed their deposit on Saturday, changed their minds on Monday, and the apartment was not available to anyone until Friday.

258 Cf., Bradwell v. Carter, 299 So. 2d 853 (La. App. 1 Cir. 1974) (waiver of time requirement for notice); Cantelli v. Tonti., 297 So.2d 766, 768 (La. App. 4 Cir. 1974) (midterm cancellation of lease); Audrey Apartments v. Kornegay., 255 So.2d 792, 793 (La. App. 4 Cir. 1972); Colix v. Whitson, 306 So.2d 62, 64 (La. App. 4 Cir. 1974) (subsequent oral agreement to terminate at any time upon notice and payment of pro rata rent); see also La. Civ. Code arts. 1983, 2045-46.
10.3.2.3 Rent Due

If the tenant did not vacate by the lease expiration date, the landlord will claim an additional month’s rent as an offset on the theory that the lease has reconducted for one month. *Ball v. Fellom*, 406 So.2d 781 (La. App. 4 Cir. 1981). The landlord would have the burden of proving reconduction in this situation. *Talambas v. Louisiana State Bd. of Education*, 401 So.2d 1051 (La. App. 3 Cir. 1981). Occupancy of the apartment for one week or less after the expiration of the lease would not constitute reconduction. A tenant’s continued occupancy after lease termination would presumably entitle the landlord to the fair market rental value of the actual holdover period under an unjust enrichment theory.

The landlord should not be able to claim rent for the period after a tenant vacates the apartment pursuant to an eviction notice or after the issuance of a notice to vacate. *Sciacca v. Ives*, 952 So.2d 762 (La. App. 4 Cir. 2007); *McGrew v. Milford*, 255 So.2d 619 (La. App. 4 Cir. 1971). Landlords also claim an additional month’s rent if the tenant does not return the keys prior to the lease expiration date. *See e.g., Simkin v. Vinci*, 215 So.2d 404 (La. App. 4 Cir. 1968).

10.3.2.4 Damages to Premises

A landlord may retain the portion of the security deposit which is reasonably necessary to remedy unreasonable wear to the premises. La. R. S. 9:3251(A); see also La. Civ. Code art. 2683(3). The tenant is not responsible for reasonable wear, pre-existing damage, damage that was not his fault, or repairs that are the landlord’s responsibility. *See generally, Provosty v. Guss*, 350 So. 2d 1239 (La. App. 4 Cir. 1977) (tenant not liable for certain cleaning, replastering and painting, a broken cabinet drawer, grease spots on the carpet, and dents in the threshold of the apartment); *Lugo v. Vest*, 336 So.2d 972 (La. App. 4 Cir. 1976) (tenant not liable for replacement of a few light bulbs or the patching of a couple of small holes in the screens). “Reasonable wear and tear” is a factual determination for the trial court. *Provosty v. Guss, supra; Lugo v. Vest, supra.*

A landlord’s defense that a carpet had to be replaced due to damage from the tenant’s smoking was rejected based on the tenant’s evidence that the smoke damage could be repaired for $50. The court ordered the deposit, minus $50, refunded to the tenant. *Vinson v. Henley*, 864 So.2d 894 (La. App. 2 Cir. 2004).

The doctrine of res ipsa loquitur cannot be used to prove that the damage was caused by the tenant’s negligence. *Calix v. Whitson*, 306 So.2d 62 (La. App. 4 Cir. 1977). Once the landlord has established proof of damage, the tenant has the burden of showing that the damages occurred prior to the lease’s commencement or occurred without his fault during the lease. *Daigle v. Melancon*, 442 So.2d 657 (La. App. 1 Cir. 1983). The burden then shifts back to the landlord to show that the damage was caused by the fault of the tenant.261

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259 *Ball v. Fellom*, 406 So.2d 781 (La. App. 4 Cir. 1981); *Misse v. Dronet*, 493 So.2d 271 (La. App. 3 Cir. 1986); *Baronne Street Ltd. v. Pisano*, 526 So. 2d 345 (La. App. 4 Cir. 1988).

260 The inventory rule in prior Civil Code article 2720 (Rev. 1984) has been deleted in the 2004 revisions to Civil Code articles on lease. The new Code articles that are relevant to rent deposits are articles 2683 and 2692. They eliminate any reference to inventory and presumption of receipt of premises in good condition.

261 *Perroncel v. Judge Roy Bean’s Saloon, Inc.*, 405 So.2d 626 (La. App. 3 Cir. 1981), *rev’d on other grounds 410 So.2d 745* (La. 1982) (statement of burden of proof specifically upheld by Supreme Court); cf. *Spierer v. McIntosh*, 342 So.2d 238 (La. App. 4 Cir. 1977); *Diaz v. Edward Levy Metals, Inc.*, 384 So.2d 581 (La. App. 4 Cir. 1980) (there must be a showing of some fault on tenant’s part).
10.3.3 Adequacy of Landlord's Itemization

La. R. S. 9:3251 requires that the landlord provide a written itemization which includes (1) an accounting for the retained proceeds and (2) a statement of reasons. An oral explanation or itemization will not suffice absent exceptional circumstances such as “bad faith” litigation. If the landlord’s itemization is found to lack specificity, there will be a “willful failure” under La. R.S. 9:3252, and penalties will be appropriate. An adequate itemization must include a categorical specification which reasonably apprises the tenant of the nature of the elements of wear and tear, separately lists each aspect of wear and tear, and relates the damage to “unreasonable wear.”

The landlord’s written itemization must be sent to the tenant or his duly authorized agent. Altazin v. Pirello, 391 So.2d 1267 (La. App. 1 Cir. 1980). Noncompliance with the written itemization requirement subjects the landlord to the additional $200 penalty and fees. Nwokolo v. Torrey, 726 So.2d 1055 (La. App. 2 Cir. 1999).

A bona fide dispute as to the security deposit, or lease obligations, will not exculpate the landlord from strict compliance with the written itemization requirement. Specious or unjustified reasons for retaining a deposit, regardless of their specificity, can never satisfy La. R. S. 9:3251. Altazin v. Pirello, 391 So.2d 1267 (La. App. 1 Cir. 1980); Calix v. Whitson, 306 So. 2d 62 (La. App. 4 Cir. 1974).

10.3.4 Amount of Tenant’s Recovery

A tenant is entitled to his security deposit, and an additional statutory penalty of $200 or actual damages and attorney’s fees if the landlord willfully fails to comply with the Rent Deposit Return Act. La. R. S. 9:3252.

The 1st and 4th Circuits have held that failure to make a written demand for refund bars the tenant from recovering the $200 statutory penalty and attorney’s fees. This holding is unsupported by the statutory language of La. R. Stat. 9:3252 and contravenes prior jurisprudence. Properly construed, La. R. S. 9:3252 only creates a conclusive presumption that the landlord’s failure to remit after a written demand for a refund, constitutes the “willful failure” which triggers the statutory penalty. La. R. S. 9:3252 conditions the statutory penalty on willful non-compliance with La. R. S. 9:3251 (duty to return deposit and provide written itemization). It does not limit the statutory penalty to cases where the tenant has made a written demand for a refund.

Nonetheless, it would behoove the tenant to make a written demand for refund in order to ensure the landlord’s liability for the $200 statutory penalty.

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263 Ball v. Fellom, 406 So.2d 781 (La. App. 4 Cir. 1981); Flynn v. Central Realty of Louisiana, Inc., 338 So.2d 774 (La. App. 4 Cir. 1976), writ denied 341 So.2d 417 (La. 1977).
264 See, e.g., W oodery v. Smith, 527 So.2d 389, writ denied 532 So.2d 178 (La. App. 4 Cir. 1988); O’Brien v. Becker, supra (no itemization, and the receipts, primarily for painting materials, could not be considered “unalusual wear” after four years of occupancy); Provosty v. Guss, 350 So. 2d 1239 (La. App. 4 Cir. 1977) (sufficient specificity); Garb v. Claymont-Kent Builders, 307 So.2d 813 (La. App. 4 Cir. 1975) (landlord’s written statement that he was retaining a tenant’s $50 deposit to “clean and vacuum the apartment” was held to be sufficient).
266 Trapani v. Morgan, 426 So.2d 285, 291 (La. App. 4 Cir. 1983), writ denied 433 So.2d 165 (La. 1983); Ball v. Fellom 406 So.2d 781, 783 (La. App. 4 Cir. 1981); Altazin v. Pirello, 391 So.2d 1267 (La. App. 1 Cir. 1980).
267 See e.g., Cantelli v. Tonti, 297 So.2d 766, 769 (La. App. 4 Cir. 1974); Nwokolo v. Torrey, 726 So.2d 1055 (La. App. 1999).
269 Cf. Ball v. Fellom, 406 So.2d 781, 783 (La. App. 4 Cir. 1981); Altazin v. Pirello, 391 So. 2d 1267 (La. App. 1 Cir. 1980); Curtis v. Katz, 349 So.2d 362 (La. App. 4 Cir. 1977), writ denied 351 So.2d 179 (La. 1977); Provosty v. Guss, 350 So.2d 1239 (La. App. 4 Cir. 1977).
The landlord can be liable for the $200 statutory penalty if his retention of any portion of the security deposit is unjustified. See, e.g., Lugo v. Vest, 336 So.2d 972 (La. App. 1 Cir. 1976) ($72.30 of $100 deposit withheld for replacement of a few light bulbs and for patching a couple of small holes in the screen). However, in Provosty v. Guss, supra, a landlord who properly retained less than one-third of the security deposit escaped the statutory penalty imposed by La. R. S. 9:3252. As previously indicated, a landlord who does not provide a timely itemization can be liable for the statutory penalty even if he had a valid dispute as to the amount that is returnable. See, e.g., Altazin v. Pirello, 391 So.2d 1267 (La. App. 1 Cir. 1980).

10.4 MISCELLANEOUS ISSUES
10.4.1 Venue
A security deposit lawsuit may be filed in the parish in which the landlord is domiciled or in the parish where the property is situated. La. R. S. 9:3252 (B).

10.4.2 Prescription
Security deposit claims are not governed by any specific prescription statute. Presumably, they are only limited by the 10 year prescriptive period established for claims based on contracts or a personal action. See La. Civ. Code art. 3499.

10.4.3 Burden of Proof
A security deposit is the tenant’s property. Matter of Universal Sec. and Protection Service, Inc., 223 B.R. 88, 93 (E.D. La. 1998). cf. La. Civ. Code art. 2926. Therefore, the burden of proof is on the landlord to show cause for the retention of the tenant’s deposit (property).

10.4.4 Security deposit claims against bankrupt landlord
In a Chapter 13 bankruptcy, the tenant’s security deposit claim should be a priority claim. Guaracino v. Hoffman, 246 B.R. 130 (D. Mass. 2000). Generally, all priority claims must be paid in a Chapter 13 bankruptcy. A tenant should consider filing an objection to a Chapter 13 plan if it proposes to pay him less than 100% of his claim.

In a Chapter 7 bankruptcy, the tenant should argue that the security deposit is not part of the landlord’s bankruptcy estate and that the deposit belongs to the tenant. Matter of Universal Sec. and Protection Service, Inc., 223 B.R. 88, 93 (Bankr. E.D. La. 1998). If the security deposit no longer exists, the tenant should file a proof of claim. This may be filed without the payment of any court costs. A chapter 7 bankruptcy will discharge the debt. However, it is possible that a tenant’s judgment lien, if any, will survive the bankruptcy.

11. INTERNET RESEARCH
The primary legal services websites for housing advocates are:

- Louisiana ProBono.net www.probono.net/la
- Clearinghouse Review www.povertylaw.org
- National Housing Law Project www.nhlp.org
- National Consumer Law Center www.consumerlaw.org

(637)
Helpful government websites for housing advocates include:

- HUD Laws [www.hudclips.org]
- HUD [www.hud.gov]
- USDA Rural Housing [www.rurdev.usda.gov]

Fair housing cases and information can be found at:

- National Fair Housing Advocate [www.fairhousing.com]

12. OTHER TREATISES OR PUBLICATIONS

G. Armstrong, *Louisiana Landlord and Tenant Law*
V. Palmer, *The Civil Law of Lease in Louisiana*
R. Schoshinski, *American Law of Landlord and Tenant*
J. Relman, *Housing Discrimination Practice Manual*
R. Schwemmm, *Housing Discrimination: Law and Litigation*
National Housing Law Project, *Housing Law Bulletin*, back issues on-line at nhlp.org

13. SAMPLE EVICTION ANSWER

_____________________________ COURT FOR THE PARISH OF ____________________
STATE OF LOUISIANA

CASE NO. ____________________

______________________________________________
Petitioner (or Plaintiff)

vs.

______________________________________________
Defendant

SWORN ANSWER TO RULE FOR POSSESSION

1. My name is _________________________________. I am a defendant in this Rule.
2. I admit my domicile and deny all other allegations in the Rule for Possession.
3. Petitioner (or Plaintiff) is not entitled to possession of my apartment or home for the reasons checked below:
   **Tenancy Not Properly Terminated and/or Rule Not Properly Brought**
4. ☐ No Notice to Vacate was sent to me.
5. ☐ The Notice to Vacate was untimely. A longer notice period is required to end my lease.

(638)
6. I am a bona fide tenant, whose lease may not be terminated by Petitioner under the Protecting Tenants at Foreclosure Act, 12 U.S.C. § 5220 note, except on 90 days advance written notice or the duration of my lease, whichever is longer.

7. The Notice to Vacate was not served in the manner required by the lease or law.

8. The Notice to Vacate and/or Rule for Possession are too vague for me to respond to. They do not state sufficient grounds to terminate the lease. La. Code Civ. Proc. art. 4731; Louisiana State Museum v. Mayberry, 348 So.2d 1274 (La. App. 4 Cir. 1977).

9. The Rule for Possession and the Notice to Vacate state inconsistent reasons for eviction.

10. The Rule for Possession was filed before the Notice to Vacate ran out. Thus, the Rule for Possession must be dismissed. La. Code Civ. Proc. art. 4701, 4731; Lichtentag v. Burns, 258 So.2d 211 (La. App. 4 Cir. 1972); Owens v. Munson, 2009 WL 3454307 (La. App. 1 Cir. 2009).

11. The Rule for Possession was not served on me in the way the law requires. La. Code Civ. Proc. art. 4732. [Note: Rules for Possession on the Eastbank of Orleans Parish must be served by mail in addition to tacking service. Sylvester v. Detweiler, U.S.D.C. No. 84-3399 (E.D. La. 1985) (class action judgment)].

12. I am living temporarily outside of Louisiana due to a recent natural disaster. I have not abandoned my apartment. The Rule for Possession must be served on me through the Long-Arm Statute, La. R.S. 13: 3204. Also, no trial can be held on the Rule for Possession until 30 days after service of the Rule. La. R.S. 13: 3205. Therefore, the Rule must be re-set for trial.

13. My lease requires a Notice to Cure before an eviction can be brought. The landlord did not give a Notice to Cure before filing this Rule for Possession.

14. The landlord accepted or held rent from me after the Notice to Vacate. Adams v. Dividend, Inc., 447 So.2d 80, 83 (La. App. 4 Cir. 1984).

15. I have a lease that has not ended. I cannot be evicted for “no cause” before the end of my lease. La. Civil Code art. 1983, 2678, 2728.

16. The person who filed the Rule for Possession is not my landlord or the owner and cannot legally file this Rule.

17. I am a co-owner of the premises and cannot be evicted by this Court or the plaintiff.

18. I own a usufruct over the property in question. The Petitioner may not seek a termination of my usufruct by a Rule for Possession or summary proceeding.

19. I am a possessor or usufructuary of the property in question. I have made the following improvements or paid the following expenses for this property: ______________________________________________________.

Under the law, I have the right to retain possession of this property until I am fully reimbursed by the Petitioner for my improvements and/or expenses. See Civil Code art. 592 (possessor) or Civil Code art. 627 (usufructuaries).
20. My lease has a mediation or arbitration clause and this clause has not been complied with prior to the filing of this eviction lawsuit. Therefore, the suit is premature and must be dismissed.

**Eviction for Non-Payment of Rent Should Not Be Granted in My Case**

21. I paid the rent owed or offered to pay the rent on time or within the grace period or custom for payment of rent. *Cantrell v. Collins*, 984 So.2d 738, 740-41 (La. App. 1 Cir. 2008); *Adams v. Dividend, Inc.*, 447 So.2d 80, 83 (La. App. 4 Cir. 1984).

22. The rent claimed is not owed because my apartment was partially destroyed or substantially impaired by a recent natural disaster or fire. La. Civil Code art. 2715.

23. I do not owe the rent because my landlord is making repairs to my apartment which entitle me to a reduction or abatement of rent. La. Civil Code art. 2693.

24. The rent claimed is not owed because I properly or in good faith made repairs to the apartment. These repairs were made under the tenant’s “repair and deduct” remedy provided by La. Civil Code art. 2694.

25. The rent claimed is not owed because the landlord does not have the right to increase the rent:
   1. My lease does not allow him to increase the rent.
   2. My landlord’s increase of the rent was untimely and therefore ineffective for the period claimed.
   3. The increase violates the Louisiana price gouging statute, La. R.S. 29: 732 et seq.

26. My lease states that I must be given a notice to cure or correct an untimely payment of rent. My landlord did not give me this notice.

27. This Court has equitable discretion not to terminate my lease for non-payment of rent. My alleged non-payment of rent was not willful or in bad faith. I am willing to make the landlord whole by paying the landlord the rent owed as determined by the courts. Under the equities and circumstances of my case, this Court should not terminate my lease for the non-payment of rent allegedly by my landlord. *See e.g, Porter v. Miller*, 782 So.2d 1123 (La. App. 3 Cir. 2001); La. Civil Code art. 2013.

**Special Rent Liability Defenses for Public and Subsidized Housing Tenants Only**

28. My apartment is either:
   - public housing, or
   - subsidized housing,

and termination of tenancy is governed by federal laws for these programs.

29. The housing authority is responsible for its share of the rent. I am only responsible for my share of the rent. I cannot be evicted for its failure to pay the rent when I have paid or offered to pay my share of the rent. 24 CFR § 982.310 (b).
30. The housing authority stopped payments of rent to the landlord because repairs were not made. In this case, the landlord cannot evict for a problem that his negligence created.

31. The landlord has charged me rent in excess of the amount allowed by the housing authority/agency, federal law or my lease.

32. I am a public housing tenant. The housing authority has failed to repair serious defects in my apartment within the required time after my notice of the defects to the housing authority. Therefore, my rent is abated or extinguished under federal law. [Housing Authority of New Orleans v. Wilson, 503 So.2d 565 (La. App. 4 Cir. 1987)].

Other Defenses for Public and Subsidized Tenants Only

33. I am a tenant in public or subsidized housing and:
   a. The landlord did not terminate my tenancy as required by the lease, program rules or federal law.
   b. I am a Section 8 tenant and the landlord did not provide a copy of the Notice to Vacate to the public housing agency. 24 CFR § 982.310(e).
   c. The landlord does not have good cause to evict me or refuse to renew my lease as required by my lease, program rules or federal law.
   d. The landlord did not give me my right to a grievance hearing or conference as required by the lease, program rules or federal law.
   e. I am a public housing tenant and the grievance decision on my proposed eviction was in my favor. Thus, my eviction is barred.
   f. I am a public housing tenant and the housing authority failed to respond to my discovery requests as required by 42 U.S.C. § 1437d(e)(7) and 24 C.F.R. §966.4(a). For this reason, the housing authority is barred from proceeding with this eviction at this time.
   g. Domestic violence was committed against me and federal law, 42 U.S.C. § 3604(b), 42 U.S.C. § 1437f (c)(9), or 42 U.S.C. § 1437f(o)(7)(D)(i). prohibits my eviction for domestic violence committed against me.

Defenses to Alleged Lease Violations–All Tenants

34. I did not commit the lease violations claimed by the landlord. The landlord has failed to prove that I did things that were serious enough to end my lease.

35. Evictions are subject to judicial control and may be denied even if a lease violation is proved. [Carriere v. Bank of Louisiana, 702 So.2d 648 (La. 1996); Ergon v. Allen, 593 So.2d 438 (La. App. 2 Cir. 1992)]. Under the circumstances of my case, this Court should exercise its equitable discretion not to terminate my lease.

Other Defenses

36. The landlord may only evict for total destruction of the premises by a natural disaster or fire. My apartment is only partially destroyed. Thus, the landlord may not evict me for this reason. La. Civil Code art. 2714-15.
37.☐ This eviction is in violation of a disaster-related Governor’s Executive Order or rule issued by the Supreme Court under La. R.S. 29: 721 et seq. in that minimum legal delays for evictions were suspended by the Executive Order or Supreme Court rule.

38.☐ I filed for bankruptcy on _______________________. A bankruptcy stay order prohibits my landlord from seeking my eviction at this time. A copy of the bankruptcy order is attached.

39.☐ I have a bond for deed for the premises. I have not been given my 45 day notice to cure. Thus, this eviction is barred. La. R.S. 9: 2945; Thomas v. King, 813 So.2d 1127 (La. App. 2 Cir. 2002).

40.☐ I have a bond for deed for the premises. An agreement between the parties requires that termination of the bond for deed or eviction be resolved by arbitration. Therefore, this judicial eviction must be dismissed or stayed.

41.☐ The landlord/owner cannot sue me for rent or damages in this Rule for Possession.

42.☐ This eviction is barred by res judicata and should be dismissed with prejudice. The Petitioner sued me for eviction in a prior lawsuit based on the same facts and claims. A copy of the judgment in the prior lawsuit dismissing or denying the eviction is attached. I further request that the court take judicial notice of the prior judgment and lawsuit in its records and admit a copy of the judgment into evidence herein.

43.☐ In addition to any of the defenses checked above, my landlord should be denied possession of my apartment for the following reasons (state the reasons below):

 Relief Requested

Defendant requests that this Court:

1. Dismiss the Rule for Possession at Petitioner’s costs, and

2. Grant all other relief that is just and proper.

Defendant or Defendant’s Attorney
Address:
VERIFICATION

STATE OF LOUISIANA

PARISH OF ________________________

BEFORE ME, the undersigned Notary, personally came and appeared the Defendant, _____________________________, who after being duly sworn, did say that s/he has read the foregoing Answer (or had it read to her/him) and all of the allegations of fact therein are true and correct to the best of her/his information and belief.

_______________________________________
Defendant’s Signature Only

Sworn to and subscribed before me this ______
day of ________________________________, 20___.

_______________________________________
NOTARY PUBLIC
No.
My commission is for life.
About The Author

David H. Williams is the Litigation Director for Southeast Louisiana Legal Services. For the twenty years before assuming that position his primary focus was on public benefits litigation and advocacy, with Legal Services, in a private practice, and in collaboration with the state’s Protection and Advocacy system. His litigation practice has included successful injunctive class actions, defense of the constitutionality of the Fair Housing Act in the U.S. Fifth Circuit Court of Appeals, and successful constitutional challenges and defenses to Louisiana unemployment statutes in the Louisiana Supreme Court. He is a 1986 magna cum laude graduate of Harvard Law School and 1979 summa cum laude graduate of Duke University with a degree in Public Policy Studies and Economics.

Acknowledgments

My thanks to Southeast Louisiana Legal Services and the Gillis Long Poverty Center and their funders for their support of work on behalf of the poor, to Mark Moreau for reviewing, commenting on, and improving the ideas I have tried to convey, to Jane Perkins and the National Health Law Program for having made and taught so much of this law, to Laurie Peller for encouraging and sharing in all my work, and to the stream of lawyers and law students who have volunteered their time to Southeast Louisiana Legal Services clients relying on editions of this Manual.
1. INTRODUCTION

The underlying structure of the federal Medicaid program is complex. But it often provides rights and protections for clients with dire needs for services that have been denied.

Central state staff making Medicaid program decisions are often unaware of, forget, or misunderstand the applicability of the federal requirements. Other program staff are usually never privy to federal statutes, regulations, or other guidance, especially the staff who interact with the claimants. This creates an important role for lawyers and other trained advocates in reviewing and challenging state actions for not conforming to federal rights. Challenges can be appropriate regarding both denials of eligibility, and also denials of services for those who have Medicaid cards.

Importantly, as set out below, often other routes are more likely to obtain relief for the client than requesting a fair hearing.

This chapter describes eligibility, the limitations periods and best forums for seeking relief, how to find the standards governing Medicaid issues, and sets out Medicaid rights most frequently at issue for impoverished clients.

The chapter deals with Medicaid, not Medicare. (Clients can have either, or both.) Medicaid eligibility is currently shown either by a plastic card that says “Health Network of Louisiana” or for some recipients, a paper printout that is good for no more than three months. The Medicare eligibility and coverage that elderly and some individuals with disabilities get from the Social Security Administration is very different. Medicare recipients get a red, white, and blue card.

2. ELIGIBILITY FOR MEDICAID

To be eligible for Medicaid, one has to be in one of the categories of persons eligible for assistance, meet the income and resource limits for that category, and not be disqualified by some other eligibility conditions. This Chapter will look at these issues from a problem-solving perspective: first for a person denied as over-income, than as over-resource. After that disqualifications will be discussed.

If you are determining whether a client is eligible who has not yet been denied, look through the categories listed in § 2.1.4 and then consider the resource limit for the categories that might apply (§ 2.2.1) and skim the headings concerning disqualifications (§ 2.4) to spot any other issues that might need to be developed.

2.1. CLIENT HAS BEEN DENIED AS OVER-INCOME.

Persons with disabilities or who are elderly often can qualify for Medicaid with income over the SSI amounts. Children can sometimes qualify with income over the CHIP limit (200% of poverty). And many parents can qualify even if not pregnant and ineligible for FITA P (the state’s TANF program for families).

A frequent situation where recipients run into income problems occurs for SSI recipients at age 62. If the recipients were SSI-only, then at age 62, Social Security will require that they take early retirement in order to access Title II benefits, which reduces or ends their SSI payments. If the retirement benefits exceed the maximum SSI benefit amount by more than $20, the recipient will lose their SSI, and potentially the Medicaid that comes with it. A similar problem
occurs for people initially certified for disability. They will often initially be certified for SSI, but if their Title II disability exceeds the SSI amount, lose their SSI and potentially their Medicaid. For clients in this particular situation, there is no universal way to extend Medicaid. There may or may not be a way to extend their Medicaid eligibility, from following the process described below.

2.1.1. Interview questions
If income eligibility is at issue, always find out:

* What is all the income of household members, including which income is for which members?
* Are income figures client is giving you gross or net (including whether any Medicare premiums have been deducted)?
* Did the client receive SSI in the past? If so, when was the last time and why did it end?
* Do they receive Social Security?
* If they do not think they received SSI in the past, how did they first receive Social Security? Was it for disability? Did they get a lump sum? About when? Did they have a lot of assets then, that would have made them ineligible for SSI? (People who received a disability backpayment usually are paid SSI initially and are often treated legally and by the computer systems as having been on SSI even if they do not know it, and this can be a gateway to eligibility for Medicaid categories that would not otherwise be open to them.)
* Is the recipient’s SS check (if any) on their Social Security number (top right corner of notices), or is it based on the earnings of a parent (deceased, disabled, or retired) or former spouse?
* Is the person needing medical coverage living with minor children, and if so, how is he or she related to those children?
* What is the person’s age?
* Does the person have medical bills nearing the amount of their income over three months, for services within the three calendar months before they applied for Medicaid (or if they have not applied, in the three most recent calendar months)?

The answers to these questions may determine whether clients qualify under some eligibility categories that the agency may have overlooked.

As to all Medicaid intakes that cannot be resolved on the spot, always get a HIPAA compliant release addressed to the Department of Health and Hospitals. If information from the Social Security Administration may be needed get one directed to SSA as well.

2.1.2. Overview of reviewing income eligibility
In reviewing the cases of those who appear to be income-ineligible, the following sequence can simplify the problem:

* Check if the client can qualify under one of the highest income limit eligibility categories providing full or nearly full Medicaid coverage.
* Check if the client can qualify under any other eligibility categories.
* Check the appropriate income exclusions and deductions were applied.
* Check the special Medicaid rules on treatment of income and resources.
* Usually it is inappropriate to get distracted by “medically needy” eligibility.

The sections below elaborate on these steps.

2.1.3. Check if the client can qualify under one of the highest income limit eligibility categories providing full or nearly full Medicaid coverage

The following categories are among the most likely refuges for persons who are elderly or have disabilities but are over income for the most commonly considered Medicaid categories. They are more fully described, with all the other categories, in § 2.1.4 below.

If a category’s higher income limit seems to solve the client’s income problem, be sure the client meets the other specific requirements for the category, like its resource limit (if any).

**Medicaid Purchase Plan (up to 500% of the federal poverty line):** Eligibility for persons meeting the SSI disability criteria, aged 16 – 64, and working at least part time for wages.

**“Pickle” eligibility:** For former recipients of SSI who transitioned to solely Title II benefits. All Social Security cost of living adjustments since the loss of SSI are excluded from income. If the person lost SSI long enough ago, income can be several times the current SSI maximum.

**Early Widows/Widowers or “SGA” Disabled Widows:** For former recipients of SSI who lost it because of eligibility for Widow(er)’s benefits, and are not yet eligible for Medicare because they are not yet age 65. If eligible for SSI but for the receipt of the Widow(er)’s benefits, they are eligible for Medicaid.

**Home and Community Based Services “Waivers”:** These provide eligibility for those with incomes up to at least three times the SSI maximum (and sometimes higher), for those who qualify as needing a “facility level of care.” (Those in facilities can qualify with this much income or more.) Most of the waivers have multi-year waiting lists. Sometimes there are emergency slots for persons for whom the waiver will preclude institutionalization.

**PACE -Program of All-inclusive Care for the Elderly:** For persons aged 55 or above who would otherwise qualify for a nursing facility level of care. On enrolling, all of the recipient’s medical services will be through PACE, rather than through other medical providers. Services are centered at a particular location, so the program is only available living near a PACE center. Income can be up to three times the maximum SSI benefit.

2.1.4. Check if client can qualify under any of the other eligibility categories

Tables listing the income eligibility lines for most Medicaid programs are found at §§ Z-200 (poverty-based lines), Z-300 (Medically Needy), and Z-700 (three times the maximum SSI benefit, used for facility care and many waiver recipients) of the Medicaid Eligibility Manual. (These are the lines governing countable income. Since not all income is countable, recipients’ income can actually be over those lines.) Categories giving less than “full” Medicaid coverage are identified in § 8.1, infra, if not below.
Those charts do not encompass other categories that are not based on the poverty lines or medically needy lines. The categories not covered include LIFC, for Low Income Families with Children, the various LIFC extensions (based on earnings or having child-support income), or the categories that make certain people who have lost SSI still eligible for Medicaid.

The following is a list of all the Medicaid categories Louisiana covers as of late 2012.

### 2.1.4.1. SSI recipients and former SSI recipients

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>SSI</td>
<td>SSI recipients qualify for Medicaid coverage, except to the extent that they are subject to a Medicaid disqualification. Disqualifications are usually related to trusts or transfers of resources, and usually affect only eligibility for Long Term Care services. <em>If a recipient has put assets into an annuity, Louisiana often judges the annuity under the trust and transfer rules.</em> persons over age 65 need not be disabled to qualify for SSI, and over half their earned income is not counted against income limits.</td>
</tr>
<tr>
<td>SSI (no check)</td>
<td>Persons not receiving SSI because of recoupment or because the SSI payment would be less than $10 remain eligible for Medicaid.</td>
</tr>
<tr>
<td>SSI (appeal)</td>
<td>Persons appealing termination of SSI. Medicaid can make its own determination of eligibility until all timely SSI administrative appeals are exhausted, even if the SSI has stopped.</td>
</tr>
<tr>
<td>SSI (PASS)</td>
<td>Persons with disabilities but income or resources over SSI standards. Under a Plan for Achieving Self Support (PASS) approved by SSA, some income and/or assets are disregarded, to allow recipient to accumulate enough for a purchase that will facilitate economic independence. (These recipients get certified for SSI by SSA.)</td>
</tr>
<tr>
<td>Disability Medicaid</td>
<td>Person who meets all eligibility requirements for SSI, but not receiving SSI. Usually these are people who apply directly for Medicaid while their SSI application is still being processed or is on administrative appeal.</td>
</tr>
<tr>
<td>§1619</td>
<td>Former SSI recipient, who still has the impairment that made him or her eligible for SSI disability and is working but not earning enough to compensate for the loss of Medicaid coverage. Eligibility must be determined by SSA. In 2012, eligibility extends to $30,157 per year, and can be higher if the individual can prove it is not enough to make up for his or her loss of SSI and Medicaid.</td>
</tr>
</tbody>
</table>

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2. As noted in § 8.3.1, infra, the Social Security Administration does not certify for the potential retroactive Medicaid period, three and a fraction months before the SSI application. Sometimes Medicaid staff must be prompted to do the certification. See also MEM § H-700.
3. See § 2.3, infra.
| Medicaid | Pickle eligibility | Former recipients of SSI who receive Title II (non-SSI Social Security) benefits. All Social Security cost of living adjustments since the loss of SSI are excluded from income. The person is eligible for Medicaid if the amount of their Title II benefit the month after they lost SSI is within current SSI eligibility limits. They must have lost SSI since April, 1977.  

--- | Early or Disabled or SGA Disabled Widows/ Widowers and Disabled Surviving Divorced Spouses | Former SSI recipients who are widows, widowers, or surviving divorced spouses age 50 or over, receiving Social Security under their deceased spouse’s Social Security number, not yet eligible for Medicare. Any income other than from Social Security must be under the SSI income limits.  

--- | Extended Disabled Adult Child | Former SSI recipients who receive Social Security checks under a parent’s Social Security number and became disabled before age 22. Any income other than from Social Security must be under the current maximum SSI amount.  

--- | Section 4913 Child | Child under age 18 who was on SSI 8/22/96 and later terminated because of revised children’s disability standards. These children are entitled to Medicaid as long as they would have received SSI under the pre-1996 (“Zebley”) disability standard. The child’s disability is irrefutably presumed to be continuing, without reviewing medical records.  

--- | PSP | Prohibited SSI Provisions-person ineligible for SSI because of a provision that does not apply under the Medicaid statute, e.g., deeming of step-parent income or resources, or treatment of proceeds from hemophilia blood products litigation, Walker v. Bayer. See §§ 2.1.6 & 2.2.5, infra, for other provisions that do not apply in Medicaid, such as requirements that resources be available and reasonably evaluated, etc.  

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5 The person must have been entitled to both Title II (non-SSI Social Security) and SSI benefits in the month before losing SSI. But the two programs count which months the payments are for differently. This requirement is usually met, as long as Title II checks began the month after the last SSI check. See MEM, §H-610.

Persons who received a Social Security lump-sum payment that was at any time designated as being at least partly for SSI, and those who never got an SSI check because it would have been less than $10 are treated as having been SSI recipients. It may be necessary to check Social Security computer coding to know if the client is deemed to be a former SSI recipient.

SSIs need not have been lost because of a cost-of-living adjustment. Many people eventually qualify for Pickle who lost SSI because their Social Security amount was always above SSI levels. An annual update with the figures needed to calculate Pickle eligibility is posted on the internet. The 2013 update is currently posted at http://www.nsclc.org/index.php/table-helps-calculate-medicaid-eligibility-under-pickle-amendment. Calculations may be more complicated if more than one Social Security recipient is in the household. 42 C.F.R. § 435.135(b).

Persons receiving Aid to the Aged, Blind, or Permanently and Totally Disabled (the predecessors to SSI) in 1972 can have still another cost-of-living increase disregarded. 42 C.F.R. § 435.134.

6 As set out in 42 C.F.R. § 435.138(a)(3), the Social Security benefits can be early retirement benefits, not just disability benefits, as long as the widow(er) is disabled. The regulation’s description of these categories is incomplete. For example, the statute does not include a requirement that the widows be age 60, and based on SSI program changes made in 1991, they can be any age over 50. 42 U.S.C. §§ 1383c(d), 1396v(a)(2)(B).

7 MEM §§ 1-1415, 1-1416.

8 MEM § 1-1415.1; this may be based on the federal regulations concerning situations where the original SSI records cannot be accessed. 20 C.F.R. 416.994(a)(e).
State retirees | State government retirees who lost SSI because of cost of living adjustments to state retirement benefits. This coverage, described in §X of the state’s Medicaid Eligibility Manual, is state-funded, and not really federal Medicaid.

### 2.1.4.2. Other categories related to SSI eligibility

| Medicaid Purchase Plan (MPP) | For persons meeting SSI disability criteria, aged 16 – 64, and working, with countable income under 250% of poverty. (Because the SSI income disregards are applied, this can allow income over 500% of the poverty line.) Work must be at least part-time (undefined), and must be paid. Work can be sheltered work, provided through the generosity of an organization or friend. Those with countable incomes over 150% of poverty pay a monthly premium well below market rates. The recipient must take advantage of any no cost health insurance available to him or her.\(^9,10\) The MEM policy states that the impairment must meet a Listing.\(^11\) The author has not seen this policy applied, and there is no basis for it in the federal statute.\(^12\) |
| Breast or cervical cancer (B/CC) | Individuals with breast or cervical cancer as determined by the Centers for Disease Control’s early detection program, under age 65 and without health insurance that will currently cover treatment for their breast or cervical cancer.\(^13\) Income must be under 250% of poverty. |
| TB | TB-infected, and income and resources low enough to qualify for SSI. This eligibility only covers certain TB services. |

### 2.1.4.3. Partial coverages for those eligible for Medicare

| Qualified Medicare Beneficiary (QMB) | Medicare eligibles with countable income under poverty lines. The annual Social Security cost of living adjustment (added to check in January) does not count against eligibility until the new year’s poverty lines are in effect (usually in April).\(^14\) QMB covers almost everything that full Medicaid covers except non-emergency medical transportation, dentures,\(^15\) personal care services, and some home health services/supplies/equipment. Not limited by Medicaid’s 12 physician visits per year limit, etc. Unlike other Medicaid, there is no three month retroactive coverage period for QMBs.\(^16\) |

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\(^10\) It is possible the category should not apply if the individual has unearned income exceeding the SSI limits, but state policy has no such limitation. See 42 U.S.C. § 1396a(a)(10)(A)(ii)(XV).
\(^11\) MEM § H-2120.2.
\(^12\) Compare 42 U.S.C. § 1396a(a)(10)(A)(ii)(XV).
\(^15\) But see Law v. DHH, 43,417 (La.App. 2 Cir. 8/13/08), 989 So.2d 871 (holding that state statute requires DHH cover dentures for QMB recipient).
\(^16\) 42 U.S.C. 1396d(a).
<table>
<thead>
<tr>
<th>Specified Low-Income Medicare Beneficiary (SLMB)</th>
<th>Medicare eligibles with countable income under 120% of poverty. The annual Social Security cost of living adjustment (added to check in January) does not count against eligibility until the new year’s poverty lines are in effect (usually in April). The coverage only pays the cost of Medicare Part B premiums and entitles one to the Medicare “Extra Help” for prescription coverage. No services are covered through Medicaid for SLMBs.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Qualified Individual (“QI-1”)</td>
<td>Medicare eligibles with countable income under 135% of poverty and no other Medicaid coverage. Coverage (and exclusion of the annual cost of living adjustment) is the same as for SLMBs. The statutory authorization for the program periodically expires, but so far has been renewed each time the date is reached.</td>
</tr>
<tr>
<td>Qualified Disabled &amp; Working Individuals (QDWI)</td>
<td>Working Medicare eligibles with incomes up to 200% of poverty, and not otherwise eligible for Medicaid. Medicaid will cover their Medicare Part A premiums.</td>
</tr>
<tr>
<td>“Extra Help”</td>
<td>Assistance through Social Security, with Medicare Part D prescription plan premiums and cost sharing, for Medicare recipients with incomes under 150% of poverty and resources under $11,570 ($23,120 for couples) in 2012. (This is not Medicaid.)</td>
</tr>
</tbody>
</table>

### 2.1.4.4. Women who are pregnant or of child-bearing age

**CHAMP-PW**

Woman who while pregnant had an income under 200% of poverty. The woman remains eligible to the end of the month in which the sixtieth day after the end of the pregnancy falls. Income increases during this period do not end the eligibility. The unborn is counted as a person in determining household size.

**LaCHIP Phase IV**

Pregnant low income uninsured woman not eligible for most Medicaid because of citizenship restrictions, with countable income under 200% of poverty. Application must be made while still pregnant.

**Take Charge**

Woman ages 19 to 44 (inclusive) who can bear children, not insured or otherwise eligible for Medicaid, with countable income at or under 200% of poverty. Benefit package is limited to family planning services only, including physical examinations and lab tests, family planning education and counseling, medications and supplies, and voluntary sterilization procedures. Certification is for 12 months regardless of income changes.

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18 See 42 U.S.C. § 1396a(a)(10)(E)(iv), currently listing a December 2012 end date. Even before a statutory extension is enacted, the provision could be extended in an appropriations bill. So if an extension is not apparent in the statute, check back-up center Websites for information, such as www.healthlaw.org, www.nscic.org, and www.medicareadvocacy.org.
19 The resource limit increases with inflation. For current limit see https://secure.ssa.gov/apps10/poms.nsf/lnx/0603030025.
20 42 U.S.C. § 1396a(e)(5,6).
21 DHHS announced in July 2012 that it would reduce the eligibility standard to 133% of poverty. http://www.dhh.louisiana.gov/index.cfm/newsroom/detail/2550. Through mid-October 2012 no policies, regulations, or web pages have been changed to implement such a change.
22 MEM § H-2200.
### 2.1.4.5. Children under age 21

| Continuous Eligibility | Child under age 19 who was determined eligible for Medicaid within the last 12 months in any category but Medically Needy remain eligible for the full 12 months regardless of changes in circumstances, with only very limited exceptions. As an example of the effect of this, children in families certified for six months of FITAP, who did not go in for a FITAP redetermination at the end of the six months, remain eligible for the full 12 months of Medicaid. If a client needing this 12 months of coverage was certified as Medically Needy, check whether they should have been certified in another Medicaid category within the last 12 months.

| Deemed Eligible Child | Child under the age of 1, whose mother is certified for Medicaid for the child’s date of birth. The child is deemed eligible until age 1, regardless of changes in income or the mother’s Medicaid eligibility, unless the mother surrenders or unequivocally abandoned the child. (Usually no application has to be filed; a form gets filed by the hospital or Bayou Health plan reporting the birth, which results in certification.)

| LaCHIP | Uninsured children under age 19, not in a public institution or institution for mental disease, with family income at or below 200% of Federal poverty lines.

| CHAMP-QC | Child under age 6, under 133% of poverty. Child age 6 – 18 (inclusive), with family income at or below 100% of Federal poverty lines.

| Family Opportunity Act | Child with a disability in a family with gross income under 300% of Federal poverty lines (plus an $85 income disregard). Child is required to accept (& pay for) health insurance if employer pays at least 50% of the cost. For families with incomes over 200% of poverty, premiums must be paid to Medicaid.

| LaCHIP Affordable Plan | Uninsured child under age 19 (who has not dropped employment based health insurance in last 12 months without good cause), with family income between 200 and 250% of Federal poverty lines.

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23 MEM § H-1910. A change published in the Louisiana Register purported to rescind this eligibility for children with disabilities. 34 La. Reg. 253 (February 2008). But there is no authority in federal law for excluding children with disabilities, and the MEM was later revised to withdraw the exclusion. See 42 U.S.C. § 1396a(e)(12).

24 If so, the other category trumps the Medically Needy eligibility, since Medically Needy is only for persons ineligible under other categories. 42 C.F.R. § 435.4.

25 MEM § H-580.
2.1.4.6. Families with children under age 19, including caretaker relatives and other children living with them.

For these categories, the family must meet most of the requirements of the now-repealed AFDC program, except as noted in the category description or elsewhere in this Chapter. The most significant requirement is that the family must include at least one child (under age 18, or 18 years old and expected to complete secondary or vo-tech school before age 19) who is living with a caretaker relative within the “fifth degree of relationship” or must include a woman in her third trimester of pregnancy. (A second-cousin is at the fifth degree of relationship.) The old AFDC “deprivation” requirement is considered met if the family meets other program requirements.29

Once a child meets the modified AFDC criteria, their parent(s) and full- and half-siblings living with them must be included in the assistance unit (unless on SSI or a child with excess income or resources), and all other children living with them can be included on the card (as “essential persons” under the state’s old AFDC standards). If the child is not living with a parent, their caretaker relative can optionally be included. Including more people gets Medicaid for more unless they have income or resources that make the assistance unit ineligible. (References below to the “family” are actually to the assistance unit.)

<table>
<thead>
<tr>
<th>Family Type</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>F, I, O, or V</td>
<td>Foster children and children with special needs receiving adoption assistance. Children for whom federal foster care maintenance payments or adoption assistance payments are being made under the Social Security Act are automatically eligible for Medicaid. So too are foster children placed in child care institutions by or through OCS/OYD or for whom OCS/OYD has financial responsibility, children of foster children, and children receiving state adoption subsidies. Some children in foster care are solely state-funded. They, too, are given Medicaid cards, but it may not be true Medicaid, but a state-funded surrogate.27</td>
</tr>
<tr>
<td>Youth Aging Out of Foster Care</td>
<td>Individual under age 21 who was in foster care on his or her 18th birthday. There is no income or asset test, and no application is required if the youth was in foster care in Louisiana. Children whose foster care was in other states are eligible by applying if they become Louisiana residents.</td>
</tr>
<tr>
<td>Louisiana Behavioral Health Partnership</td>
<td>Children found to need community behavioral health services to reduce psychiatric hospitalizations, with income up to three times maximum SSI amount (not counting their family’s income). The child’s countable resources must be under $2000.28</td>
</tr>
</tbody>
</table>

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26 OCS has been delegated responsibility to certify many of these children. That does not relieve DHH, the Medicaid “single state agency” of responsibility when there is a problem. See 42 C.F.R. § 431.10.
27 This is category “O.” MEM, §E-340.
28 MEM, §§ H-900 (eligibility for children not already on Medicaid), H-2700 (description of the Louisiana Behavioral Health Partnership more generally).
29 MEM § 1:510.
**LIFC**

The family meets the AFDC rules and income standards in effect on July 16, 1996, plus some liberalizations (like no resource limit).[^30]

**LIFC-Transitional Medicaid**

The family stopped meeting requirements based on the July 16, 1996 AFDC requirements (but slightly liberalized) due to an increase in earned income in the past twelve months. The family must have received LIFC coverage for 3 of the 6 months before the increase in income. Because Louisiana staff do not offer clients their “choice of category” as required by a federal regulation[^31], a family that could have qualified for LIFC that received any kind of Medicaid should be deemed to meet the requirement of having received LIFC. To be eligible the seventh through 12th month, the family must meet certain reporting requirements (or have good cause not to), and have income under 185% of the poverty line. There is a divergence of opinion as to whether three months of retroactive Medicaid, preceding the application date, fulfill the 3 of 6 months requirement.[^32] Because FITA P has higher eligibility standards and different earned income disregard than Medicaid, some families on FITA P may not be eligible for Transitional Medicaid for the full 12 months. The provision is currently set to expire December 2012 (reverting to a four month extension of Medicaid)[^33] but has been repeatedly extended at past sunset dates. Because an extension can occur through an appropriations act or continuing resolution that would not be reflected in the U.S. Code, check organizational websites, such as www.healthlaw.com, if the provision seems to have expired.

**LIFC-Child Support Continuance[^34]**

The family stopped meeting the slightly liberalized July 16, 1996 AFDC requirements in the past four months due to an increase in child support income. Must have received LIFC for 3 of the 6 months before the month in which the family became ineligible due to child support income. The divergence of opinion as to whether the three months of retroactive Medicaid fulfill the “three months” requirement.[^35] As explained in MEM § H-1520, this extension should rarely be needed, because of the PAP rules set out in the category just below.[^36]

[^30]: The state’s AFDC replacement program, FITAP, has income thresholds $50 above the LIFC threshold for each household size. All FITAP recipients are certified for Medicaid. For all but a one person assistance unit, persons with incomes between the FITAP and LIFC lines should be Medically Needy. Some of the one-person assistance units certified for FITAP should not even be Medically Needy. Because FITAP adults receive this liberalized treatment, those applying directly through the Medicaid agency should be entitled, as well. 42 U.S.C. §1396a(a)(10)(C)(i)(III).

[^31]: 42 C.F.R. § 435.404; see also 42 C.F.R. § 435.905.

[^32]: See 42 U.S.C. § 1396u-1(b)(1) (defining “receiving” assistance under the old AFDC plan as being eligible for it). Louisiana, however, does not usually certify recipients for the three months of retroactive Medicaid unless there were medical expenses in the period at issue. See 42 C.F.R. § 435.914(a)(1).

[^33]: See 42 U.S.C. 1396a(e)(1)(B) and 1396r-6(d).

[^34]: MEM § H-1510; 42 U.S.C. §§ 1396a(a)(10)(A)(i)(I), 1396u-1(c)(1); 42 C.F.R.§ 435.115(f)-(h).

[^35]: See 42 U.S.C. 1396u-1(b)(1) (defining “receiving” assistance under the old AFDC plan as being eligible for it).

[^36]: MEM § H-1520 points out that since child support income only counts against the child, the intended recipient should usually be placed in a higher income eligibility (CHAMP or CHIP) and the custodial parent would continue to be eligible for LIFC, rather than the time-limited child support extension.
2.1.4.7. Coverage for persons needing a facility level of care

To qualify under these categories the individual must still be aged, blind, disabled, a child, pregnant, or in families with children meeting the “fifth degree” relationship requirement.

**Long Term Care facilities** usually are nursing facilities or an Intermediate Care Facility for the Developmentally Disabled (“ICF/DD”). The latter includes group homes as well as larger facilities. But a hospital stay exceeding 30 days is also Long Term Care. Medicaid does not cover care in “Institutions for Mental Diseases” (certain psychiatric facilities) unless the recipient is under age 21 or age 65 or older.

For all eligibilities below, as part of the application process the agency must certify that a facility-level of care is required. An agency notice denying such a level of care is needed is, of course, appealable.

DHH is using various assessment tools and algorithms to give the level of care eligibility determination the appearance of rigor and incontestability. But often judgment calls are buried in the codings assigned to a client. The advocate should do his or her own assessment of how the client should score on the pertinent part of the instrument that determines eligibility. If it seems to the advocate that the client should have qualified, obtain DHH’s instruction manuals and determine if the interviewer developed all the facts in the manner suggested by the guides. Also, if the client has been certified for a facility level of care in the past, obtain the prior results, and use them to question the inconsistency. Some condi-

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**Prohibited AFDC Provisions**

Person is ineligible under the July 1996 AFDC standards (plus liberalizations adopted by Louisiana Medicaid) because of income or resources that are not their own, their spouse’s, or their natural parent’s. Medicaid law allows “deeming” of income and resources only parent-to-minor-child and spouse-to-spouse. Usually at issue are child support or Survivor’s Benefits of a minor child, or income of a step-parent, Minor Unmarried Mother’s parent, or alien sponsor. Other extended family members with problematic income or resources should already be excluded as not being part of the “AFDC” assistance unit. If non-parental or non-spousal income or resources exist and the applicant is not eligible in this “PAP” category, all other Medicaid categories should be considered as well, disregarding non-parental, non-spousal income in assessing every Medicaid eligibility.

**Regular Medically Needy**

For persons not eligible for Medicaid on another basis and with countable monthly income under the Medically Needy Income Level (a little higher than the old AFDC income standards) in families with a child under age 19 within required degree of relationship.

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37 A consent decree prohibited the Department from denying or terminating Medicaid to persons who would be eligible for AFDC but for that program’s step-parent, sibling, and half-sibling deeming rules. The decree should still apply with respect to Medically Needy assistance. Thomas v. Robinson, M.D.La. CA No. 85-0717, Consent Decree (12/12/85), ¶¶ 4, 5.
tions do not improve. As to others, if the client scored as eligible before, a differing result on a current administration should at least create a duty of inquiry to explore what seems to have changed and whether it is realistic and appropriate to consider the client’s condition to have improved.\textsuperscript{38}

<table>
<thead>
<tr>
<th>LTC/SSI-related</th>
<th>Disabled adult or child, or person age 65 or above, in or expected to be in an LTC over 30 days with \textit{gross income} under 3 times the maximum SSI payment amount.</th>
</tr>
</thead>
<tbody>
<tr>
<td>LTC/MNP</td>
<td>Disabled adult or child, or person age 65 or above, in or expected to be in an LTC over 30 days whose income, after medical expenses (including premiums and facility costs), $20 disregard, and any other applicable disregards, is under the Medically Needy Income Level ($92 rural, $100 urban). In essence this extends LTC eligibility to persons whose incomes are near the cost of facility care.</td>
</tr>
<tr>
<td>C-LTC</td>
<td>Child or caretaker relative of a minor child in or expected to be in Long Term Care facility 30 to 90 days with countable income under the LIFC levels.\textsuperscript{39}</td>
</tr>
<tr>
<td>Home and Community based “Waiver” services\textsuperscript{40}</td>
<td>Qualifies for a level of care equivalent to nursing facility or ICF/DD level of care for at least 30 days. Gross income can reach to at least 3 times the maximum SSI payment amount.\textsuperscript{41} The normal deductions from income are not allowed. The applicant is treated as if in an institution, so parents’ income and resources are not counted against a child; spousal impoverishment rules are applied as to spouses. The state is permitted to limit how many people receive these services, so there are usually multi-year waiting lists for service. But sometimes emergency slots can be accessed if necessary to avoid institutionalization.\textsuperscript{42}</td>
</tr>
</tbody>
</table>

\textsuperscript{38} See e.g. Weaver v. Colorado Department of Social Services, 791 P.2d 1230 (Colo. App. 1990), where the court found instrument scoring results were inconsistent from administration to administration, even though the claimant’s physician had stated there had been no changes in his condition. The court found that such arbitrary action violated due process standards.

\textsuperscript{39} MEM. § H-820.1. As to the higher income coverage for facility residents with incomes up to 3 times the SSI rate, the implementing federal regulation describes this coverage as being for only aged, blind, or disabled individuals, 42 C.F.R. § 435.236, as does the state plan. The statute does not.

\textsuperscript{40} See MEM. § H-900. But it may not be immediately updated if DHH adds new waivers.

\textsuperscript{41} The State has amended the Community Choices and ADHC waivers to allow income over 3 times the SSI maximum, though recipients may have to contribute some or all income at that level to their cost of care. It is in the process of amending the other waivers to allow this same eligibility for persons with higher incomes.

\textsuperscript{42} The Medicaid statute requires that those likely to soon need a facility level of care be advised of their options to receive waiver services. 42 U.S.C. § 1396n(c)(2)(C); \textit{but see Grant v. Gilbert}, 324 F.3d 383, 388 (5th Cir. 2003)(holding the provision only protects persons already applying for Waiver services; the court leaves open the possibility that a separate statutory provision may offer relief, only to nursing facility residents). Louisiana usually only tries to do the advising by requiring that those applying for LTC Medicaid (for nursing home care) sign a Freedom of Choice form, stating that they have been advised of the option to receive HCBS. Those applying for Medicaid through other channels usually do not even get informed about the HCBS Waiver services, much less get put on the waiting list. (Even those who do get put on the waiver waiting lists may not get on the \textit{correct} list. The decision as to which waiting list someone is put on is either made by the agency during a phone call, with no notice of the state’s other waivers, or by checking off an option on a form that omits many pertinent considerations.)

Someone in serious need of waiver services and too low on the waiting list, may have a claim for an earlier application/waiting-list date: for example, the date a regular Medicaid application was denied or ruled on (without putting the person on the waiting list) or the date of any request to be put on any other waiver waiting list.
2.1.4.8. Coverage for other persons who are aged, blind, disabled, or in families with children

<table>
<thead>
<tr>
<th>Home and Community based “Waiver” services (continued from previous page)</th>
<th>Most of the waivers include services not ordinarily covered by Medicaid, like home modifications to allow the recipient to remain in the home or additional in-home attendance. Waiver recipients also get full Medicaid coverage, including EPSDT services for those under age 21.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Program of All-inclusive Care for the Elderly (PACE)</td>
<td>For persons aged 55 or above who would otherwise qualify for a nursing facility level of care, and income up to three times the maximum SSI benefit. Like a Health Maintenance Organization, PACE takes over responsibility for all medical care for the individual, with the goal of keeping participants out of nursing facilities. Services are centered at a particular location, so the program is only available for those living near a PACE center.</td>
</tr>
<tr>
<td>Coverage for Medicare Skilled Nursing Coinsurance</td>
<td>The state’s Medicaid Eligibility Manual describes two rubrics to get coverage for the very high Medicare Part A Long Term Care co-insurance costs that can be charged recipients who go into a nursing facility after a hospitalization. Clients need to actively seek certification for this coverage (which costs Medicaid nothing, since it essentially zeroes out the patient portion of the bill). But it is not described under separate categories in this Chapter since the income guidelines are the one used for LTC/SSI related (three times the monthly SSI maximum) or for medically needy eligibility (medical costs, including facility costs, nearly consume all income). Nursing facilities have a financial interest in not having recipients certified for this coverage, and the Medicaid coverage for persons with incomes over three times the SSI maximum is comparatively new and a complex certification, which could be missed by agency staff.</td>
</tr>
</tbody>
</table>

2.1.4.8. Coverage for other persons who are aged, blind, disabled, or in families with children

<table>
<thead>
<tr>
<th>Spend-down Medically Needy</th>
<th>For persons not eligible for Medicaid on another basis who are aged, blind, disabled, or in a family with minor children whose recently incurred medical expenses nearly consume all of their countable quarterly income. This “spend-down” is like an insurance deductible—the expenses used to satisfy it do not get paid by Medicaid, only other, additional expenses in a three month period.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Emergency Medical Services^{45}</td>
<td>Coverage for medical care after sudden onset and acute symptoms that could be expected to jeopardize health or organs (including labor and delivery) for persons ineligible for Medicaid because of citizenship requirements. (The recipient would be eligible under one of the other Medicaid categories if he or she were a citizen.) Certification is retrospective, only for the past services; no card is issued.</td>
</tr>
</tbody>
</table>

^{43}42 U.S.C. § 1396u-4; see § 8.7.9, infra.

^{44}MEM §§ H-840, H-1030.

^{45}MEM § I-315; § 2.4.6, infra.
LBHP MNP
The Louisiana Behavioral Health Partnership makes persons eligible for Medicaid if community care is likely to prevent psychiatric hospitalizations. Adults must meet the financial rules of the medically needy program, requiring that their recently incurred medical expenses must consume nearly all of their quarterly income. This “spend-down” is like an insurance deductible—the expenses used to satisfy it do not get paid by Medicaid, only other, additional expenses in a three month period. For mental health services the benefit will work most readily for those with incomes under $112 a month (rural) or $120 a month (urban).

Greater New Orleans Community Health Connection (GNOCHC)
Not actually under the Affordable Care Act, but a precursor, this Medicaid (§ 1115) waiver provides primary care (clinic) coverage only for persons with incomes under 200% of poverty, who have been uninsured at least 6 months, and are not eligible under the traditional Medicaid categories. Recipients must reside in Orleans, St. Bernard, Jefferson, or Plaquemines Parishes. The waiver originally promised to cover prescription drugs, but this was phased out, supposedly after opportunity for public input, but it was not well publicized.

Refugee Medical Assistance
Refugee, asylee, Cuban Haitian entrant, Iraqi or Afghan Special Immigrant, or severe trafficking victim not otherwise eligible for Medicaid, within 8 months of arrival or of grant of asylum. Covers full range of Medicaid services. Newborns borne to mother are eligible through the end of the mother’s 8 months. Income must be under the Medically Needy Income Level, with or without deducting recent medical expenses (“spend-down”).

Pre-Existing Condition Insurance Plan (PCIP)
Not Medicaid, but under the Affordable Care Act, persons who have been without health coverage for at least six months who have a pre-existing conditions can purchase deeply subsidized coverage. The monthly premium varies by age and which of three plans are selected. The low cost plan is currently $296 a month for persons age 45-54 and $411 for those over age 55.

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46 MEM, § H-1060.
47 See MEM § Z-300.
48 MEM § H-2600.
2.1.5. Check if the appropriate income exclusions and deductions were applied.

Especially if a client is close to an income limit or if there is earned income (for which there are large disregards), deductions and disregards can be as important as the income limits. The deductions and disregards that apply depend on whether an applicant is considered part of a family with minor children (“C-related”) or instead as an aged, blind, or disabled individual (“SSI-related”). If an applicant fits both characterizations, then he or she gets to take advantage of whichever rules are more favorable.

As an example, until 2014 for someone being evaluated under the C-related categories, the first $50 a month of child support the family receives gets excluded.

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Affordable Care Act Medicaid expansion

Under the health care reform act (“Affordable Care Act”), if not repealed, as of January 1, 2014 states can cover non-disabled, non-pregnant adults under age 65 who are not eligible for Medicare or otherwise eligible for Medicaid, with incomes up to 138% of the federal poverty line. This coverage was to be mandatory, and was to be 100% federal funded for 2014 through 2016 and at least 90% federally funded thereafter. Under the Supreme Court’s decision in National Federation of Independent Business v. Sebelius, the federal Medicaid agency cannot cut off funding for states that do not offer this coverage. Louisiana’s Governor has announced he intends to decline the option. Income counting rules for the new eligibility will be based on modified adjusted gross income (IRS rules) rather than traditional Medicaid rules. The state can make a set of services available to the group that is less than under traditional Medicaid.

Subsidized coverage through insurance “exchanges”

Unaffected by the Supreme Court’s decision in National Federation of Independent Business v. Sebelius, beginning in 2014 (unless repealed) the 2009 Patient Protection and Affordable Care Act also provides subsidies in the form of refundable tax credits for private insurance purchased for persons with incomes from 100-400% of poverty. These credits are also available for legal immigrants with incomes below 100% of poverty and not eligible for Medicaid.

Prescription assistance programs

Pharmaceutical companies may offer assistance with drug costs based on individual showing of need or sometimes more generally to Medicare recipients.

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3 See § 8.7.1.8, infra.

51 42 U.S.C. § 1396a(r)(2); 42 C.F.R. §§ 435.401(c), 435.601(a, b). The Medicaid regulations repeatedly refer to some states as using more restrictive Medicaid standards than are used in the SSI program. Such states are often called “209(b) states.” They do not give Medicaid to all SSI recipients, but only persons who would have qualified under their program for the aged, blind, and disabled that preceded the SSI program. Louisiana is not a 209(b) state.

53 42 C.F.R. § 435.404.
from consideration, and the first $90 in earned income is excluded. (After 2014, income tax rules will be used for determining C-related income.) But a child who is also disabled can, as an alternative, qualify under an SSI-related category. SSI rules would exclude: one third of its child support income, the first $85 and one half of the family’s remaining earned income; and additional income is based on the number of family members the parents’ income supports. Different income limits are available in the SSI-related and C-related categories.

Also, because of the differing rules, for someone certified as Medically Needy, who is both C-related and SSI-related, the amount of their spend-down may differ depending on whether he or she is certified as C-related or SSI-related.

2.1.5.1. Income rules for those who qualify as aged, blind, or disabled

Louisiana, like most states, has agreed to follow Social Security Administration rules for determining eligibility of applicants or recipients who are aged (aged 65 or older) or blind or disabled.

Those who are aged, blind, or disabled are termed “SSI-related.” They are SSI-related even if their income or resources make them ineligible for the SSI program. For these individuals, the most important income deductions and exclusions are:

• the first $20 a month of income (of any type) and
• the first $65 a month in earned income plus half of their remaining earned income. The rules also allow subtraction of many medical expenses of people who returned to work while still disabled.54

But any other income exclusions and disregards from the SSI program also apply. So the SSI regulations on income should be checked, as the best list of exclusions and disregards.55

For married individuals living with their spouse, the rules require both that the individual’s countable income be below the individual SSI amount, and that the income when combined with the spouse’s be below the couple’s SSI amount.

State Medicaid programs have the option to liberalize most income and resource rules.56 Louisiana has chosen not to count “in-kind support and income” against SSI-related applicants.57

As to their Medicaid eligibility, SSI-related couples who are in the same medical or long-term care facility can be treated as a couple or as individuals, whichever is to their advantage.58 (If only one spouse of a couple is in or expected to be in a facility for at least 30 days, income eligibility is judged under the normal rules. But in determining how much income they must contribute to their “patient liability” or “cost of care,” spousal impoverishment rules allow certain amounts of income to pass out to the “community spouse.”)

2.1.5.2. Income rules for those who qualify as being child-related or in a family

The rules that apply at least until 2014 to eligibility categories designed for families with children (who may or may not have disabilities) come from the federal Aid to Families with Dependent Children program (AFDC), which was

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55 20 C.F.R. Part 416, Subpart K.
56 42 U.S.C. § 1396a(r)(2).
58 MEM § H-831.4(B); 42 U.S.C. § 1382(e)(3).
repealed in 1996. Absent change, beginning in 2014 (with different dates for different individuals) this will change, to use IRS concepts in determining the income of these individuals (except children in foster care or receiving IV-E adoption assistance and for Medically Needy assistance).

The AFDC rules exclude or deduct:

- The first $90 a month of earned income per working individual. For the first 12 months of earnings, an additional $30 of earned income is disregarded. For the first four months of employment disregard still another 1/3 of the remaining earned income. (Do not use FITAP’s $900 earned income disregard; this disregard did not exist under the AFDC program.)
- Dependent care costs needed for employment or employment-related education or training (up to $200 a month for child care for children under 2; $175 a month for those who are older, this can include for care for elderly dependents in the household).
- The first $50 a month in child support the family receives.
- Child support paid outside the home.
- Educational grants and loans.
- SSI recipients and their income and resources from the household.

A notable exception to application of the AFDC rules is that under the old AFDC rules, an unborn child was not counted as a member of the household until the third trimester. Louisiana now counts the unborn as a household member from conception, at least when there are other children in the household. This increases the maximum income level the household can have.

Under the IRS rules that may apply in 2014 and thereafter, countable income is based on “Modified Adjusted Gross Income” (MAGI), taking Adjusted Gross Income (the bottom line of the first page of the IRS 1040 tax form), and adding back in foreign income, tax exempt interest, and Social Security income that was excluded. There will continue to be no resource test for eligibility, as is already the case for these categories in Louisiana. The biggest changes are loss of the AFDC disregards set out in the paragraph above and that the following types of income will no longer count against eligibility, since not included in IRS Adjusted Gross Income: child support received, alimony received, pre-tax contributions to retirement and health insurance cafeteria plans and flexible spending accounts. In addition, the IRS rules create a standard filing unit of persons whose income is determined together, using a single MAGI figure. This will also presumably trump Medicaid protections that have prevented deeming income against eligibility in the past except spouse to spouse and from parent to minor child. In addition, by adopting the tax household, sometimes income of additional people will be counted against eligibility, like that of students over age 19.

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60 42 CFR § 435.603(a).
61 42 CFR § 435.603(j). Language in the regulation also suggests the new rules may not apply as to persons seeking or receiving Personal Care Services or Home Health Services (which includes medical equipment and supplies for use in the home, misnomered “Durable Medical Equipment” in Louisiana.). § 435.603(j)(4). Since these services can be received by persons in almost any eligibility category, the implication is unclear.
63 See 42 C.F.R. § 435.603(e).
64 See 42 C.F.R. § 435.603(f).
States are to come up with income thresholds that use the new rules that continue the eligibility of about the same number of individuals who were eligible under the old standards. But this does not require that every individual eligible under the old rules also qualify under the new thresholds.

### 2.1.6. Other Medicaid provisions that trump the AFDC and SSI methodologies

#### 2.1.6.1. Deeming prohibitions

The Medicaid statute prohibits counting income or resources available to only some household members against other people not entitled to it, except from spouse to spouse, and parent to minor child. Therefore, income of step-parents, most minors, and grandparents cannot be counted against other household members’ Medicaid eligibility, unless actually made available to them in cash. The qualification about income being made available “in cash” is important. Often the benefit that other household members receive from another’s income is in-kind: food, bills paid, etc. And spending can often be re-arranged in this manner if this is not already occurring. Under the AFDC-linked rules, in-kind income usually is not counted against eligibility. Louisiana has also opted to not count “in-kind support and maintenance” as to categories for which it can exempt the income.

Louisiana’s Medicaid agency has created separate categories partially recognizing the eligibility created by the deeming prohibitions (“PAP” and “PSP”), but the deeming prohibitions apply program-wide and are not limited to the categories with the lowest income limits, as might be implied by those particular two categories.

As mentioned in the immediately preceding section, these protections may end for most recipients and applicants in 2014, when IRS rules will govern most eligibility for persons under age 65.

#### 2.1.6.2. Children are entitled to 12 months of Medicaid at a time, even if the circumstances causing them to qualify end.

As referenced in § 6.4, Louisiana has opted to provide “Continuous Eligibility” for a full twelve month period any time a child is determined eligible for any kind of Medicaid other than Medically Needy coverage. Once a child is determined eligible for Medicaid, by any agency (DHH, DCFS, or SSA) they are entitled to a full 12 months of coverage, regardless of changes in circumstances. So if a family fails to attend their six-month FITAP redetermination appointment, the children remain entitled to Medicaid without any break until 12 months after when they were last recertified. Disabled children certified for a short period of SSI (such as while in a hospital, when their parents’ income is not counted against their eligibility), are entitled to the full 12 months of Medicaid. This provision might also effectively extend a four month eligibility certification (for children losing LIFC eligibility due to child support) or six month certification (for LIFC Transitional Medical Assistance based on earnings) to 12 months of eligibility.

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66 42 U.S.C. § 1396a(a)(17)(D); 42 C.F.R. § 435.602(a).
67 MEM § 1-1524 (“In-Kind Income”).
68 MEM § 1-1534 (“In-Kind Income” and “In-Kind Support and Maintenance (ISM)”; 30 La. Reg. 2489 (November 20, 2004).
2.1.6.3. Only the spouse's income and resources count against the eligibility of a family member living in a facility or seeking waiver services

The income of family members (and resources, other than those of the spouse) do not count against the Medicaid eligibility of family members in or expected to be in a facility (including hospitals, nursing facilities and ICF/DDs) for 30 days. The same rule is applied to those receiving or applying for Home and Community Based “Waiver” Services. Eligibility rules posted on the internet show that at least some states apply the rule to hospice services, too.

But for non-disabled children, the agency counts their family’s income and assets against their eligibility for the first 90 days they are in a facility. This is based on the state’s 1996 AFDC policy, and may be challengeable.

2.1.6.4. Blood products litigation settlements

The Medicaid statute exempts the settlement received by hemophiliacs as part of litigation against blood products manufacturers from being counted against any Medicaid eligibility. This applies to all Medicaid eligibilities. It applies to the original settlement; income the assets earn is not protected, unless otherwise shielded under Medicaid law. The settlement proceeds also do count against SSI eligibility; most people affected will be former SSI recipients.

2.1.6.5. Only counting income and resources that are available and reasonably evaluated

The Medicaid statute also requires that only income and resources that are actually available and reasonably evaluated be taken into account. Surprisingly, though, courts have held that Medicaid agencies can nonetheless count income as “available” even though the applicant is required to pay it out to others as child support.

As to income, this protection may be superseded for most applicants and recipients in 2014, when IRS rules will govern. See § 2.1.5.2, supra.

2.1.6.6. Other exceptions that the state may develop over time

States are permitted to make liberalizations from the rules of the SSI and AFDC programs, as long as no individuals are disadvantaged. Louisiana’s Medicaid agency has done this many times. As a result, rules may change still further after publication of this Manual. Most or all liberalizations would be promulgated using in the Louisiana Register.

2.1.6.7. Other possible protections

The statutory section setting out these last requirements and the deeming prohibition is 42 U.S.C. § 1396a(a)(17). In dealing with special income or resource situations with sound equities but not favored under the rules set out by the agency or this Chapter, review this statute again to consider whether it may protect the client. It has language that might have implications for a client’s particular situation. For example, it requires that standards be “reasonable,” “comparable,” and “consistent with the objectives of” the Medicaid Act.

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72 Peura By and Through Herman v. Mala, 977 F.2d 484 (9th Cir. 1992); Emerson v. Steffen, 959 F.2d 119 (8th Cir. 1992); Tarin v. Commissioner of the Div. of Medical Assistance, 424 Mass. 743, 678 N.E.2d 146 (Mass. 1997).
73 42 U.S.C. § 1396a(r)(2).
2.1.6.8. In extreme situations, where the individual is under age 65, consider use of an “income trust”

Individuals who meet the Social Security disability standards and are under age 65 are allowed to transfer their own resources or income into a “pooled trust” run by a non-profit on behalf of persons with disabilities.74 If they have forms of income that are transferable,75 it may be possible to assign excess income to a pooled trust in order to qualify for Medicaid. The recipient can then receive the benefit of the income in forms that do not count against Medicaid eligibility, notably in-kind. Most pooled trusts will not handle such frequent transactions, and the costs of administration are not inconsiderable. But if a person needs health coverage to access life-saving medications, this avenue can be considered.

2.1.7. Usually it is inappropriate to get distracted by Louisiana’s very limited “medically needy” eligibility.

Looking to Medically Needy eligibility last benefits claimants, since Medically Needy coverage is not as broad as standard Medicaid coverage. First, there is usually a deductible (discussed immediately below). Secondly, Louisiana never covers some services for the Medically Needy (though some of its restrictions are illegal).76

There are two kinds of Medically Needy eligibility: “Regular Medically Needy” and “Spend-Down Medically Needy.” The Regular Medically Needy are those whose incomes are under the income eligibility limits (called the MNIES, for Medically Needy Income Eligibility Standard). The MNIES in urban parishes is $100 monthly for a single person, and goes up by less than $100 per additional person.77 The lines are slightly lower for rural parishes. Those who are Regular Medically Needy get certified for six months of Medicaid.

Few in Louisiana qualify as Regular Medically Needy. Because of the configuration of Louisiana’s categories, it is nearly impossible for people in SSI-related categories to be Medically Needy without a spend-down.78 Adults in families with income slightly over the “LIFC” limits can qualify as Regular Medically Needy.

“Spend-down” eligibility is for those whose income is above the MNIES, but have recent medical bills that, when deducted from their income, bring their income under the MNIES. The federal Medicaid statute requires that states deduct from the income of persons seeking medically needy assistance costs they have incurred for medical care.79 This is called the “spend-down.” It will be explained more fully below. Medicaid certifications for spend-down recipients are for up to three months at a time.

Both Medically Needy groups (Regular and Spend-down) must also meet all other Medicaid eligibility requirements (like any resource limit for the SSI-related) and requirements to be either aged, blind, disabled (under the SSI standards) or

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75 Compare 42 U.S.C. § 407, preventing assignment of Social Security Title II income.
76 For Louisiana’s Medically Needy service limitations, see 24 La.Reg. 955 (May 1998). The list is no longer entirely accurate and of course, particular limitations may be illegal, such as its not covering all EPSDT services for recipients under age 21, as noted in the EPSDT discussion, infra.
77 The limits are set out at DHH’s MEM, §Z-300. They are based on the income limits of the state’s old AFDC program. 42 C.F.R. §§ 435.811(c), 435.1007(b). The precise methodology for determining them was changed somewhat by the enactment of 42 U.S.C. § 1396u-1(b).
78 Someone with nearly no income, but ineligible for SSI because of assets that Medicaid or the state does not count could qualify. An example would be someone with over $2000 in assets because of the cash surrender value of a life or burial insurance policy. As stated above, Louisiana does not count such policies, with a face value of $10,000 or less, against the Medically Needy resource limit.
child-related (children, pregnant women, and certain caretakers living with children or pregnant women). Persons who do not fit within those groups will not qualify as medically needy, regardless of the degree of their medical need.80

2.1.7.1. The “spend-down”

The spend-down amount is like a flexible insurance deductible. The size of the deductible depends on the applicants’ income. *Importantly, like an insurance deductible, the bills that make the spend-down amount do not get paid by Medicaid.*81

The “Spend-Down Medically Needy” have their eligibility reviewed in three month increments. To “spend-down” for three months of eligibility, the applicant needs bills equal to the amount of their countable income in the three month period, after subtracting three times the monthly MNIES from that income.82 (In determining countable income, disregard all income that would be disregarded under SSI or AFDC rules, depending on whether the person is C-related or Aged, Blind, or Disabled.83)

As an example of how the spend-down works, a single elderly or disabled person’s countable income may be $820 a month. If they are in an urban parish their MNIES is $100 a month, and SSI rules disregard the first $20 a month in income. The remaining income is $700 a month, $2,100 for three months. If the person has at least $2,100 in useable medical bills, he or she can qualify for a three month Medically Needy Medicaid card. But the $2,100 in bills will not be covered by Medicaid.84 If he or she had a recent hospitalization that generated a $9,000 bill, all of that bill but the $2,100 deductible can be covered by Medicaid.

2.1.7.2. Special Medically Needy rules for persons in long-term care facilities

Louisiana has adopted a federal option to use a shorter spend-down period for persons in long term care. This enables them to qualify for Medicaid based on a smaller spend-down: they need spend-down only one month’s income (minus the MNIES) instead of three months’ income (minus the MNIES).

Louisiana’s other Long Term Care category covers persons with monthly incomes under three times the SSI rate (around $2,100 in 2012). But the cost of nursing facility care is far higher—even Medicaid pays facilities approximately $2,500 a month per person. This had the potential to create a tremendous inequity. Those with an income of $2,000 a month can commit all but $38 a month of their income and receive full Medicaid coverage. But those with an income of $2,500 are over the income line and could commit their whole income to the facility cost, and still be at least $400 short. The medically needy coverage with a one month spend-down bridges this gulf.

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80 See e.g., 42 C.F.R. § 435.4, defining medically needy as “families, children, aged, blind, or disabled individuals, and pregnant women” meeting certain additional requirements. See also 42 U.S.C. § 1396(d)(a)(i-xi)(listing groups who can qualify as Medically Needy).
81 42 C.F.R. § 435.831(i)(5).
82 For an example of how to perform the spend-down calculations, see *Brandenburg v. Office of the Secretary, DHH*, 98-163 (La. App. 3 Cir. 6/3/98), 716 So.2d 100.
83 42 C.F.R. § 435.831(b)(1&2). As examples: families with children can deduct child care expenses they pay to enable an individual to work or get training, since this was an aspect of the AFDC program; elderly individuals can deduct the first $65 in earnings, and half of any remaining earned income, since this is part of how the SSI program treats income.
84 If the bills that make the spend-down occur on the same day as other services, the agency worker must submit a form to Baton Rouge clearing which bills make up the spend-down and which others are eligible for payment before any of the bills for that first coverage date will be paid by Medicaid.
However, there still is a gap or problem for people whose incomes (minus the MNIES) are over the rate Medicaid pays facilities, but less than the private pay cost of a facility. The federal regulations permit states to project long term care expenses for applicants, but in such projections must use the Medicaid facility rate.\textsuperscript{85} For expenses that are not projected, but have already been incurred, there is no such limitation (and such a limitation would be an illegal limitation on what incurred expenses are taken into account).

The result is that those with incomes under the rate Medicaid pays nursing facilities (after deductions and subtracting the MNIES) get a Medicaid card all month and can be certified for six months at a time. Those with higher incomes are eligible only after they have incurred enough bills to be eligible. The Medicaid Eligibility Manual instructs staff to hold these applications until the person is eligible.\textsuperscript{86} There are a host of legal claims if the application is instead denied.

2.1.7.3. What bills count towards the spend-down

Medical bills (and insurance premiums, including for Medicare) can be applied towards the spend-down if they are for services received within, or were paid during, the three months for which coverage is sought or the three months before applying.\textsuperscript{87}

\textit{This means any procedural denial of an application may need to be strenuously challenged or negotiated out.} If the applicant instead reapply, bills that previously were countable may no longer be within the three months before the new application date, and so would no longer count toward the spend-down.

Bills cannot be counted if they were applied towards a previous spend-down that was approved.\textsuperscript{88} Nor can they be included if a third party, such as Medicaid or an insurance company, is required to pay them.\textsuperscript{89}

Medical bills voluntarily paid by third parties who are not legally obligated to pay them (like relatives) can be applied to the spend-down.\textsuperscript{90}

Bills can be counted once they are “incurred” even if they have not been paid. This allows Medically Needy applicants to have income that is more than the MNIES amount to live on. Conversely, older bills can be counted if paid within the three month period for which coverage is sought.\textsuperscript{91} This provides a way to increase one’s countable expenses.\textsuperscript{92}

Possibly illegally, Louisiana no longer allows bills within the three months before applying to be used for additional sequential periods determined off the application. Formerly, applicants could elect not to get coverage for the three months before applying (meaning if they came in with a large hospital bill, they could forego coverage of the hospital bill), and that bill would be enough to qualify the applicant for a year of Medicaid (because one year is the maximum period that can be determined off a single application).

\textsuperscript{83} 42 C.F.R. § 435.831(g)(1).
\textsuperscript{84} MEM § H-1041.
\textsuperscript{85} 42 C.F.R. § 435.831(f).
\textsuperscript{86} See 42 C.F.R. § 435.831(f).
\textsuperscript{87} 42 C.F.R. § 435.831(d). “Financially responsible relatives” are not treated as a third party. 42 C.F.R. § 435.831(e) (2 & 3).
\textsuperscript{89} 42 C.F.R. § 435.831(f)(5).
\textsuperscript{90} Clients who are nearly eligible may become eligible, by paying on a medical debt just before applying. But because the “spend-down” amount does not get covered by Medicaid, paying on a bill in order to qualify makes sense only if one is seeking a card for a different service, to be received in the time the card will cover.
That procedure seemed correct, since federal law provides that once the applicant is certified, any amounts incurred in the original three month period, that Medicaid does not pay, can be applied to subsequent three month periods covered by the same application.\footnote{42 C.F.R. § 435.831(f)(6).} Louisiana Medicaid staff now may not give the option to extend one’s eligibility additional months this way. They may instead automatically pay all bills subsequent to those needed to meet the spend-down amount.

Regardless of whether the new limitation is legal, the agency cannot certify applicants for only a single-spend down period and then force them to reapply. (On reapplying, the bills preceding the first application would no longer be recent enough to be counted.) Because the federal regulations require that the state agency “Continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible,” the agency must review for additional periods of eligibility without reapplication.\footnote{42 C.F.R. § 435.930(b); see also 42 C.F.R. § 435.916(f)(1) (effective Jan. 1, 2014). A Medically Needy application covers up to a year of eligibility, as long as there is no break in eligibility. MEM, §§G-1700, H-1011.3.}

2.1.7.4. What bills can be covered once spend-down eligibility is established

To get Medicaid to pay a bill, it must be within the coverage period, which cannot extend further back than three calendar months before the month in which the client applied.\footnote{42 U.S.C § 1396a(a)(34).} (For someone who applies May 15th, bills back to February 1 can be counted towards the spend-down and can be paid to the extent that they exceed the spend-down.) And as noted above, bills used in meeting the “spend-down” do not get covered by Medicaid.

The state plan specifies that in meeting the spend-down the agency first applies charges for health insurance, then medical expenses not covered under the Medicaid plan, then expenses that Medicaid would cover.\footnote{Louisiana’s Medicaid state plan, Attachment 2.6-A, p. 14; see also 42 C.F.R. § 435.831(h).} If the client has bills Medicaid cannot cover, and if done correctly, this maximizes using those bills in the spend-down, and maximizes Medicaid payment towards bills the program can cover.

2.2. CLIENT HAS BEEN DENIED MEDICAID BASED ON EXCESS RESOURCES.

The most frequent avenues for relief for persons who have been denied Medicaid for having too many resources follow, sequenced from easiest to more time consuming.

2.2.1 Check the correct resource limit was applied.

There is no single income and resource limit that determines eligibility for Medicaid. Instead, a person must be pigeon-holed into one of more than forty Medicaid discrete eligibility categories in order to qualify for the program. The forty-plus categories have been created through efforts over time to make it easier for some within the groups to qualify. Different categories have different resource limits. (The categories for non-disabled children and their parents currently have no resource limit.)

As a result, the first step is to confirm that the correct resource limit was applied to a client denied for excess resources.
The agency’s resource limits for various eligibility categories are listed in charts at §§ Z-900 and Z-2200 of the Medical Eligibility Manual. The limits set out in Z-2200, for the Medicare Savings Categories (QMB, SLMB, and QI) should escalate annually if there have been cost of living increases. The eligibility categories not listed (including all those based on pregnancy or having children in the household) have no resource limit.

**Use the SSI rules in determining what counts against the limits**

In determining what counts against the resource limit, the SSI rules are followed. (Medicaid relies on either SSI or the old Aid to Families with Dependent Children Program ("AFDC") rules in determining financial eligibility. 

The AFDC rules would apply to non-disabled children, pregnant women, and families with children. Because Louisiana does not currently apply a resource test to these groups, only SSI rules are followed in determining what counts against the limits, except to the extent that Medicaid law specifically trumps the SSI rules. If the Patient Protection and Affordable Care Act is implemented in 2014, this will continue, because an implementing regulation provides that resource limits can apply only for SSI-related groups and the Medically Needy.

For example, a property the client lives on is exempt as their home or residence. Even if the client is not living on the property but intends to return to it when able, it is exempted as their home. Per SSI rules, the home exemption can also reach any property adjacent to the property the client lives in (even if across the street). Finally, if a spouse or child is living in the home, it is exempt, even if the Medicaid applicant or recipient is not intending to return to it. And SSI rules hold that where it would take litigation to access the value of a property, the value is not countable.

**But** there is a special Medicaid rule that if the client is in a facility over 30 days or on a waiver, only up to $525,000 of the home’s value can be exempted. This is the 2012 figure; the amount may increase annually. The amount over the excluded amount counts as a resource.

**2.2.2. Check if the client can qualify for all services needed under a different category, with a higher or no resource limit.**

If the client was in fact over-resource for the category originally considered, then the first and easiest solution is to consider whether the client can qualify for Medicaid under another category, which has a high enough resource limit to make them eligible and which will cover the type of services the client needs.
As set out above in §§ 5.1 and 6.1, *infra*, any Medicaid application is a gateway to any Medicaid for which the applicant is eligible. And before terminating Medicaid, the agency is required to consider whether the client is eligible under any other category. As a result, if the client was eligible under any category, it was the agency’s duty to certify the client.

The Z-900 and Z-2200 of the Medical Eligibility Manual charts should be consulted for additional and up-to-date limits. But the usual resource limits one can consider are:

- No resource limits if one can qualify under the rubrics for children that do not require establishing disability (CHAMP, LaCHIP, etc). This also applies for pregnant women and parents qualifying as the caretakers of dependent children.
- $6,940, ($10,410 for a married couple) in 2012 and escalating annually, for Medicare recipients receiving coverage that covers only their Medicare premiums, deductibles, or coinsurance, rather than the usual range of Medicaid services. These Medicaid categories are called “Medicare Savings Programs” (MSP), Qualified Medicare Beneficiary (QMB), Specified Low Income Beneficiary (SLMB), or Qualified Individual (QI). These categories do not cover most nursing facility care and cover no waiver services.
- $25,000 in countable resources for working persons with disabilities (Medicaid Purchase Plan).
- Over $113,640 (for 2012 and escalating with inflation), when one member of a married couple is in a nursing, ICF/DD or other medical facility (for over 30 days) or receiving “waiver” services, and the other is not. (“Spousal impoverishment” rules), discussed in § 2.2.3, *infra*.
- $2000 for one, $3000 for two, and $25 per additional person, for Medically Needy eligibility of those who are subject to resource limits.
- $2000 ($3000 for a couple) for most other categories based on age or disability. For children qualifying based on disability, before measuring resources against the limit, $3,000 worth of parents’ countable resources are excluded in two-parent households (and $2,000 in a single parent household). This makes the resource limit for most disabled children in two parent households $5,000.

The advocate’s analysis should not stop with the consideration of other categories, if the category covers less than “full Medicaid”, and the client needs omitted services. As set out below, other options may be able to retain Medicaid within a category offering full services. The categories that cover less than all services are the Medicare Savings Programs (QMB, SLMB, QI), Medically Needy, QDWI, Taking Charge, TB, Greater New Orleans Community Health Care Connections, Long Term Care (in facilities), and those eligible for only the Louisiana Behavioral Health Partnership.

Ironically, even if the state picks up the expansion of Medicaid that Congress had required occur in 2014, as part of the Affordable Care Act (which the Supreme court’s decision in National Federation of Independent Business v. Sebelius, made optional), it will not eliminate the problem of persons who have too many resources to qualify for

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104 MEM § Z-2200.
105 MEM § Z-900.
Medicaid. It creates a new eligibility group, but requires that the persons in the group be, among other things, under age 65, not on Medicare, not in any of Medicaid’s mandatory groups, and have income under 138% of the poverty level.\textsuperscript{107} Not all persons with resource problems will fall into the new eligibility group.

2.2.3. Quick options to consider in dealing with excess resources.

2.2.3.1. Caution: first moment of the month rule applies

As to all resource issues, since Louisiana currently only applies resource limits to eligibility categories that are built on the SSI program rules, SSI’s “first moment of the month” rule always applies. Whether one is resource-eligible for the whole month is based on the client’s situation at the first moment of the month (midnight on the first of the month). So a client who makes a change to his or her resources does not become eligible until the next month. And if a client fails to fully implement a change by the first of the month, it will be another whole month before he or she client is eligible.

2.2.3.2. Convert resources to an exempt form: like a car, home, or a burial account.

Even if over the resource limit, few legal services clients are going to have resources of great value. If the assets are liquid or can easily be liquidated, the client may be able to put them in a form that is exempt. If the client needs a car and could afford ongoing maintenance and insurance, purchasing (or even repairing) a car may advance their situation for a long time, while ending their Medicaid resource problem. If the resource is larger and they can afford ongoing payments and insurance, purchasing a residence would put the funds in an exempt form. If they already own a residence, repairs to it or reducing any mortgage should be considered. Investing up to $10,000 in a burial account is a universally available option and often recommended by DHH staff.\textsuperscript{108} (Clients must be sure not to tap such accounts for other uses.) Amounts under $2,000 can be spent on “personal goods”: furniture, appliances, etc.\textsuperscript{109}

Clients taking any of these paths should be sure to keep receipts, to be able to prove to the agency that none of the funds were transferred away for less than fair market value. Such transfers cause a severe penalty, discussed at § 2.4.1, infra. The Medicaid recipient who had excess assets must be an owner of the car, home, or burial account, to avoid these transfer of asset penalties.

2.2.3.3. Pooled trust

For recipients under age 65 and who meet SSI’s disability standards, another option is to place funds in a “pooled trust” managed by a non-profit corporation. These recipients are permitted to transfer even their own funds to such trusts without penalty.\textsuperscript{110} The recipient loses control over the funds, but the trustee will spend them for the recipient’s benefit, on items or services they would not otherwise be able to obtain, in order to improve their lifestyle or health care. This can legally shelter thousands of dollars in assets. There are at least three such trusts willing to serve Louisiana residents, with differing cost structures.

\begin{flushleft}
\textsuperscript{108} MEM § I-1634 “Burial Contracts.”
\textsuperscript{109} MEM § I-1634 “Property: Household Goods and Personal Effects.”
\textsuperscript{110} 42 U.S.C. §139p(d)(4)(C).
\end{flushleft}
Third parties can place other funds, that are not the recipient’s, into other forms of Special Needs Trusts. But where the funds are already the recipient’s, only the pooled trust avoids transfer of asset penalties.

2.2.3.4. One spouse in a facility (or on a waiver), the other not: “spousal impoverishment”

Special Medicaid resource limits and rules apply when a member of a married couple receives Waiver services (including PACE) or is expected to be in a medical facility (hospital, nursing facility and ICF/DD) for over 30 days.\(^{\text{111}}\) Congress does not intend that the other ("community") spouse’s assets be completely depleted in order to qualify for Medicaid.\(^{\text{112}}\) Louisiana’s implementation of the provision exempts more than $113,640 of a couple’s resources from counting against eligibility.\(^{\text{113}}\) The figure is for 2012 and escalates with inflation. The rule applies during all of a facility stay; there is no requirement that the first 30 days be judged under normal rules.

The spouse not in the facility will be required to take some assets out of the name of the spouse in a facility, within a year of certification for Medicaid, in order to retain eligibility.\(^{\text{114}}\) The assets can be transferred into the name of the community spouse without creating a transfer of assets problem.

Particularly with regard to a long hospitalization, agency staff may forget to apply the spousal impoverishment protection.

2.2.3.5. Occupied by a co-owner?

Among the more frustrating situations is that of a client who owns a share of “heir” property, which cannot be exempted as his or her home, because he or she is not living in it, and cannot exempt it as intending to return to it because they live in another property they own. SSI rules though do exempt property occupied by a co-owner who does not own other property they could move into.\(^{\text{115}}\) The provision is not echoed in Louisiana’s Medicaid Eligibility Manual. But the state office has been convinced to recognize and apply the exemption.

2.2.3.6. Leasing (even to a friend) or gardening can cover $6,000 in property value.

Another technique to help a client who owns a small share of heir property can be a lease. Up to $6,000 in value of a property can be excluded if it produces a 6% annual return or profit.\(^{\text{116}}\) So if a client has a vacant property worth $8,000 or less, $6,000 of the equity value can be excluded by a friend renting it for $40 a month; the remaining $2,000 is under most Medicaid resource limits. If the property is worth less than $6,000, the rent needed is less. Note that the owner has to obtain the 6% return on their whole share of the property, not just the $6,000 in value that you are seeking to exempt. Also, if the owner has any costs, like taxes, the amount needed to get the 6% return is higher, since recovery of their taxes is not a profit.

\(^{\text{111}}\) MEM §§ I-1537, I-1661.

\(^{\text{112}}\) 42 U.S.C. § 1396r-5.

\(^{\text{113}}\) MEM § Z-800. This figure should be updated annually; if not, the Manual section may be out of date.

\(^{\text{114}}\) MEM § I-1665.

\(^{\text{115}}\) 42 U.S.C. § 1382a(b)(2)(A); 20 C.F.R. § 416.1245(a).

\(^{\text{116}}\) MEM § I-1634 “Property: $6,000/6% rule.”
If someone’s medical needs are great enough, a friend or relative is sometimes willing to chip in the $40 a month to make the person Medicaid eligible. Note that the income will count against eligibility if the client is on SSI or in a facility to which they must pay a share of the cost of care.

The SSI regulations similarly exempt up to $6,000 in property used for “self-support”, like gardening to help feed oneself.117

2.2.3.7. Sell under Bond for Deed

The Medicaid Eligibility Manual provides that if property is sold under a Bond for Deed, it no longer counts as a resource.118 Any net income from a Bond for Deed may count against eligibility if the client is on SSI or in a facility to which they must pay a share of the cost of care. The Bond for Deed should preferably comply with statutory requirements and should be registered in the mortgage or conveyance records.119

The advantage of selling through a bond for deed is that it does not immediately create another resource to have to deal with, unlike a sale for cash.

All sales must be for at least the proper value of the property or the agency will charge a penalty for transferring assets without fair compensation, as discussed in § 2.4.1, infra.

2.2.3.8. Allocate shared account to the true owner, if not the client.

If the client’s name is on a shared bank account or other financial instrument, but only to help with access, or most of the resource really belongs to someone else, the SSI rules provide relief. The SSI POMS provide that while co-ownership of the funds is presumed, it can be rebutted, through proof of how the money got into the account.120 As explained above, Louisiana Medicaid must follow SSI financial methodologies. So even though this rebuttal procedure is not set out in Louisiana’s Medicaid Eligibility Manual, state office has been willing to abide by it.

2.2.3.9. Be sure to not transfer resources for less than fair market value if the client may need “long term care” (including waiver or PACE services) within the next 5 years.

The penalty for transferring resources for less than fair market value is discussed in § 2.4.1 of this Chapter. Recipients usually make themselves ineligible for critical services for up to five years by transferring away their resources without receiving fair value in return. Legislation enacted in 2006 tightened the rules considerably. Common ways around the penalty were eliminated.

One nuance is that the agency often uses property tax assessments for property value if that makes someone ineligible for Medicaid. But if a recipient sells property for the tax assessed value, the agency can still decide that was less than the “fair market value” for the property, and impose a disqualification.121

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117 20 C.F.R. § 416.1224. This exemption is not set out in the MEM.
118 MEM § 1-1634 “Bond for Deed.”
120 https://secure.ssa.gov/poms.nsf/lnx/0501140205.
121 MEM § 1-1634 Property: Verification of Value of Real Property.
2.2.4. Delve into the rules of the SSI program.

The richest source for finding favorable guidance is the POMS. As has been mentioned in some of the examples above, the state Medicaid agency has repeatedly been convinced to respect rules set out in the SSI POMS, even when not in any Medicaid guidance.

2.2.5. Specific Medicaid liberalizations of the cash assistance rules.

2.2.5.1. Cash surrender value of life and burial insurance policies.

For the persons who are elderly or disabled (the SSI-related categories), in addition to the resources excluded under the federal SSI rules, state Medicaid regulations and plan amendments exclude the cash surrender value of life insurance and burial policies with a combined face value up to $10,000 from counting against the SSI-related resource limit.122

Because of the way the federal Medicaid statute is written, this state-enacted disregard does not apply to the following categories (the common factor being that the Medicaid statute deems these individuals to be SSI recipients): Pickle recipients, Disabled Widows and Widowers, Affected Children, Disabled Adult Children, Qualified Severely Impaired Individuals, and Prohibited SSI Provisions. Each of these categories are of individuals who would qualify for SSI “but for” a particular circumstance.

As noted below, for the Medicaid Purchase Plan category, none of the value of life insurance policies counts against eligibility.

2.2.5.2. Numerous exclusions for the Medicaid Purchase Plan (MPP) eligibility.

For MPP eligibility all value of life insurance policies, medical savings accounts, and the spouse’s share of community property and separate property are not counted against the $25,000 resource limit that applies to this category.123

2.2.5.3. See § 2.1.6 regarding Medicaid rules that trump AFDC and SSI methodologies.

That separate section of this Chapter details some Medicaid rules that over-ride the AFDC or SSI methodologies that would ordinarily apply. While set out in the income section of the Chapter, some of the rules also apply with regard to resources.

2.2.6. Advocacy-DHH can liberalize resource rules.

The Medicaid statute allows states to adopt more liberal eligibility rules, by creating additional “disregards.”124 There are some complicated and difficult to understand limitations on this authority based on the “comparability” requirement of 42 U.S.C. § 1396a(a)(17). The federal Medicaid agency will not approve some disregards if it finds them particularly unusual, or arguably inconsistent with the design of the Medicaid categories. There are though no fixed interpretations of the comparability requirement, so the agency may relent with enough effective advocacy.

123 MEM § H-2120.4(B).
124 42 U.S.C. § 1396a(r)(1).
A change in the disregards would presumably be generated by a change to DHH regulations. Legal Services programs are restricted in requesting that agencies engage in rule-making. They can though litigate or negotiate to try to change a rule that would lead to litigation, and they can use non-LSC funds to comment in a public rule-making proceeding. Programs can, however, point out and challenge situations where current regulations violate laws, such as the Americans with Disabilities Act, etc. And clients can be referred to other organizations that can request changes to regulations. Two statewide non-profits that can are the Advocacy Center and the Health Law Advocates of Louisiana.

2.3. WHEN MUST LOUISIANA MEDICAID REJECT AN APPLICATION BECAUSE THE APPLICANT WAS DENIED SSI FOR BEING “NOT DISABLED”?

Federal regulations authorize, with limited exceptions, denial of Medicaid based on disability if SSI has been denied for not being disabled within twelve months prior to applying for Medicaid. (This regulation might not preclude Medicaid eligibility if the applicant is also in a family with minor children, since there are other categories through which a person may qualify for Medicaid if residing with children, without regard to disability.)

But the regulation predates an amendment to the Medicaid statute that allows states to not follow an SSI decision that is still being administratively appealed. Louisiana’s state plan adopts the option to make these independent determinations. Because statutes trump regulations, states have the discretion to not follow SSI decisions that are being administratively appealed, even though the federal regulation does not provide for this.

The state cannot however, make an independent disability determination when an applicant has only applied with the Social Security Administration, even though the notice of the application will be forwarded to the State for consideration of Medicaid eligibility. Applicants should file a separate application directly with Medicaid if they want to pursue Medicaid before their SSI application is favorably decided.

Louisiana policy divides applicants into two categories: those who appeal the denial and those who do not. For those who can show they timely appealed the SSI denial, the agency will make its own decision as to whether they qualify as “disabled.” Applicants who do not appeal the SSI denial will be rejected unless they meet one of the exceptions set out in MEM § G 1610.2. Those exceptions allow an independent disability determination by Medicaid if the applicant is claiming a deterioration in a medical condition following the adverse SSI decision, a new medical condition, or the applicant is both employed and applying for Medicaid Purchase Plan (MPP) coverage.

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125 45 C.F.R. § 1612.3(b), (e), § 1612.2(d)(1).
128 State plan, §2.5. http://hfsweb.dhh.la.gov/onlinemamaspUBLIC/STATEPLAN/COVERAGE/SECTION%202.5.PDF. See also MEM § G 1610.10-12
129 The federal regulation and MEM at § G 1610.12 appear to say that the exception for appeals applies only if the applicant is over-income for SSI. But the later enacted statute does not have this limitation, and governs.
130 MEM § H-1720, p. 3.
131 MEM §§ G-1610.11-12.
132 MEM § G-1610.12.
133 MEM §§ G-1610.11 & G-1610.13.
134 MEM § G-1610.13.
2.4. DISQUALIFICATIONS.

Certain problems result in a disqualification from Medicaid eligibility, unrelated to the applicant's degree of current need, but as a sanction Congress has imposed against certain behaviors. Notable disqualifications are for non-cooperation with child support, not being a state resident, for not having a Social Security number, for alienage, and for transfers of resources made to qualify for Medicaid.

2.4.1. Transfer of assets for less than fair market value

If the agency discovers any, there will be penalties for transferring resources before or while on Medicaid. There are exemptions to the rule, including for transfers not made with the intent of qualifying for Medicaid. But it is difficult to get the agency to honor the exemptions. Whether a penalty should be imposed is very fact-dependent and only applies to eligibility for certain long term care, home health, personal care (attendant), and Waiver services. Transfers up to 60 months before the Medicaid application may be considered. (For transfers before February 8, 2006, the period was three years, unless the transfer was to a trust.) The disqualification period is set based on the amount of the transfer that was not fairly compensated.

Transfers to preserve assets or hasten Medicaid eligibility remain possible, but they require careful advance planning. Purchasing an exempt asset (house, car, repairs to either, etc.) should usually be considered first. Where the assets are already owned by the Medicaid recipient, the clearest option is available for recipients who have been found disabled and are under age 65. They can self-settle assets into a pooled trust run by a non-profit on behalf of disabled individuals. Persons dealing with other types of trusts must be extremely careful about which party puts the assets in trust and other concerns; some of the statutory language is extremely subtle. Multiple interpretive materials outside the statute should definitely be consulted.

Good cause exceptions to the penalty can be available. States are required to allow hardship exceptions. Louisiana's Medicaid Eligibility Manual does not currently set out these exceptions. It is unknown whether this is inadvertent. But

135 42 U.S.C. § 1396p(c). See also Cox v. Secretary, Louisiana Dept. of Health and Hospitals, 41,391 (La.App. 2 Cir. 8/25/06), 939 So.2d 550 (holding purported loan was a transfer because the promissory note was not an accessible asset and court found timing and terms support ALJ's credibility decision that it was not a good faith loan).

136 MEM, § I-1674; Bueche v. Dept of Health & Hospitals, 2000-1473 (La.App. 1 Cir. 6/21/02), 822 So.2d 25 (finding transfer not to be disqualifying, because intention was not to qualify for Medicaid but to avoid legal action against the assets and because of recipient's age); Burckett v. State Department of Health and Hospitals, 30082 (La.App. 2 Cir. 12/10/97), 704 So.2d 1266 (transfer to compensate for relative's prior services not disqualifying, even though services had not been documented); Breston v. State Dept. of Health and Hospitals, 06-804 (La.App. 5 Cir. 3/13/07), 956 So.2d 15 (contract to pay relative for future services was not a transfer since it covered services a nursing facility would not provide, like managing finances, maintenance and sale of home, attending facility conferences, visiting resident, making purchases, attending medical appointments, and dealing with Medicaid); Carpenter v. State, Dept. of Health and Hospitals, 2005-1904 (La.App. 1 Cir. 9/20/06), 944 So.2d 604 (rejecting DHH's unevinced conclusion that personal care contract did not predate services, and finding it acceptable that facility resident did not pay under contract until on the verge of institutionalization; no uncompensated transfer); Wild v. State Department to Health and Hospitals, 2008-1056 (La.App. 1 Cir 12/23/2008), 7 So.3d 1 (evidence was sufficient to support finding that transfer of property to trust was for estate planning purposes (avoiding future interdiction) rather than with any intent to qualify for benefits); Pacente v. Jindal, 99-0601 (La.App. 4 Cir. 12/29/99), 751 So.2d 343 (finding transfer to annuity to benefit wife fell within statutory exceptions to transfer penalties).


138 See e.g. POMS SI 01120.203 http://policy.ssa.gov/poms.nsf/lnx/0501120203. As noted in the POMS, not all of the provisions it sets out apply with regard to Medicaid eligibility.

139 42 U.S.C. § 1396p(c)(2)(D).

140 See § 1-1674.
the hardship provisions can still be found in the Louisiana Administrative Code. The agency has always been very restrictive in allowing exceptions. For example, the regulations allow no exceptions if a resource is transferred within the family, unless done under one of the explicit statutory authorizations. Yet family members frequently will not return assets, even though Medicaid is jeopardized.

A more exhaustive treatment of transfer of asset issues is posted on Probononet.

2.4.2. Parent-only sanctions for not cooperating with child support

A non-pregnant parent who has failed to cooperate with Child Support Enforcement requirements may be cut off Medicaid until they again cooperate (if they were given the requisite warnings, conciliation procedures, etc.). Case-workers can forget that the sanctions can apply only against non-pregnant parents, and not the rest of the household, causing improper termination or denial of the whole household.

2.4.3. Other TANF/FITAP sanctions

Other TANF/FITAP disqualifications do not carry over to Medicaid eligibility unless they were part of the federal AFDC statute or regulations in 1996, and the client has no basis for Medicaid eligibility other than through LIFC, PAP, or C-related Medically Needy eligibility. Examples of TANF sanctions that do not apply to Medicaid include the work participation ("STEP") sanctions, the two and five year time limits, and the requirements regarding drug testing, immunizations, school attendance.

2.4.4. Residence

To get coverage from the state’s Medicaid program, the individual must be a "resident" of the state. There are limited provisions for persons receiving care out of state to be able to get coverage from their own state’s Medicaid program. Special rules apply to determine the residence of persons in institutions, like nursing facilities, children, and other special situations. “Intent to return” to the state is the touchstone of residence determinations. After Hurricane Katrina the state wanted to cut off recipients who had been out of state for six months, but refrained on being advised that this would be an improper way to judge residence.

2.4.5. Not having a Social Security number

Applicants are required to have, or apply for, a Social Security number. However, if eligibility is sought only for a child, their parent’s Social Security number cannot be required.

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141 50 LA C Part III, § 10905.
142 The explicit authorizations are at 42 U.S.C. § 1396p(c)(2).
143 http://www.probono.net/la/civillaw/search/download/157719
144 42 U.S.C. § 1396k(a)(1) and 42 C.F.R. § 433.148 require that a parent’s Medicaid be terminated for not cooperating with child support enforcement. CMS’s State Medicaid Manual §3905 excludes pregnant women from this requirement. At least one court has limited the child support pregnancy exception to women whose only basis for Medicaid eligibility is under the CHAMP-PW category. Douglas v. Babcock, 990 F.2d 875 (8th Cir. 1993), cert. denied 510 U.S. 825.
145 See 42 U.S.C. § 1396u-1(a), (b)(1).
147 42 C.F.R. § 435.403.
149 42 C.F.R. § 435.403.
150 42 C.F.R. § 435.901.
2.4.6. Non-citizens

Louisiana has exercised the federal option to cover all of the following persons, if they otherwise qualify under a Medicaid category: (1) SSI recipients; (2) Legal Permanent Residents who were in the country before August 22, 1996, or have been here five years since, or are veterans, or have 40 quarters of creditable earnings (which they or certain relatives earned); (3) refugees, asylees, and persons whose deportation is formally withheld by the INS (each eligible for Medicaid for the first five years); and (4) certain battered immigrants.\(^{152}\)

Other non-citizens are eligible for “emergency services” (including for labor and delivery, and excluding organ transplants) if they, apart from citizenship and not having a Social Security number, would qualify for Medicaid.\(^{153}\) (Note that there can be a separate issue of whether persons with no intent to reside in the United States or Louisiana meet Medicaid’s state-residence requirement.\(^{154}\)) Louisiana DHH’s interpretation has been that aliens qualify for emergency hospital services, which requires an after-the-fact Medicaid application and review for “emergency.” This limitation to hospital services (as opposed to kidney dialysis, chemotherapy, and other needs which could present chronic emergencies) has no discernible basis in the statute.

3. PROCEDURE- DEALING WITH LIMITATION PERIODS AND CHOOSING THE CORRECT FORUM FOR SECURING RELIEF FOR THE CLIENT

3.1. LIMITATION PERIODS

You are looking at an unfamiliar Medicaid issue. The first question is how soon do I have to take action? Here are the most common situations.

3.1.1 Denial notice (applicant not previously certified)

The period to appeal for a fair hearing is treated as 30 days from the date stated on the notice, unless the notice specifies that the 30 days run from receipt.

The period should be tolled if the agency has not notified the claimant of the need to appeal within 30 days.\(^{155}\)

The current fair hearing process and subsequent state court judicial review (limited to the hearing record) provide less than optimal results in many cases. Most ALJs who decide the cases are former Department of Health and Hospital employees, who are extremely deferential to the agency and fail to analyze and accept legal arguments presented to them. Judicial review, in turn, is deferential to the ALJs. So most issues that involve legal or policy disputes, and not simply a failure of the client to establish some required facts are better dealt with outside the fair hearing process.

Therefore, except possibly as to factual disputes, one should determine within the 30 days whether the matter can be resolved outside the fair hearing process, by: completing negotiations; or determining that you will not need to pur-

\(^{152}\) 8 U.S.C. §§ 1611, 1612(b)(1)(A), 1613(b), 1641; 24 La.Reg. 1119 (6/20/98); CMS’s State Medicaid Manual § 3211, et seq. DHH’s list of who is covered by its rule is set out at 24 La.Reg. 601 (4/20/98). This list includes one category not mentioned in the preamble to the original Notice of Intent. Compare 24 La.Reg. 389 (2/20/98).


\(^{154}\) CMS’s State Medicaid Manual, § 3211.10.

\(^{155}\) Accord 42 C.F.R. § 231.206(b)(2).
sue a fair hearing, because the client has a right to go to federal court if negotia-
tions are unsuccessful; or determining that the case will not go to court, either
for lack of a federally enforceable right, weak equities, uncertain facts, etc.

If a federal issue is presented (such as violation of Medicaid Act provision
that is privately enforceable or a state policy is in direct conflict with federal law),
suit can be pursued in federal court within a year of the denial if a case or contro-
versy continues, but no retroactive benefits are likely to be available. If another
federal statute is violated, such as the Americans with Disabilities Act, federal
rights may survive for even longer than a year.

Clients can, of course, file a new application, to start periods running again.
Applications for the Medicaid card (as opposed to requests for approval of specific
services) can usually cover services received in the three calendar months before
the application was filed. This is not true as to applications for QMB Medicaid, and
does not work for months in which the client did not meet the Medicaid eligibility
requirements (for example if the client had too much in resources to be eligible).

3.1.2. Denial of “prior approval” for a particular service (applicant not pre-
viously certified for it)

If the denial is of a service that Medicaid must “prior authorize” coverage
for, the above considerations as to obtaining higher review all apply. But there is
one additional alternative that can often extend the periods for review and improve
the record that is subject to review. The Medicaid provider can submit for “recon-
sideration” of the request, by submitting additional documentation, even after the
30 day fair hearing appeal period. This option is not stated on the notices, and
will result in a new written, appealable agency decision.

Reconsideration requests are submitted through the prior approval provider
and get reviewed by the same decision makers as initial requests. Reconsideration
allows one to address procedural reasons (usually problems with documentation)
for a denial, or get a quick review of additional information. This can ensure an
adequate administrative record if subsequent review will be sought directly in
court. But do not assume that if the procedural reasons given in a first denial are
addressed, a decision on the merits will be obtained. The prior approval unit often
denies a claim with new procedural denial codes on reconsideration. The recon-
sideration decision will usually be issued within about ten days from resubmission.

Note though, that procedures may differ for recipients placed under Bayou
Health. If the recipient is under one of the Bayou Health plans, one should confirm
with the particular plan whether a reconsideration like this is an option.

3.1.3. Denial of “prior approval” for a particular service by one of the
Bayou Health “Prepaid” plans

Currently, three of the Bayou Health plans Louisiana assigns Medicaid recip-
ients to are “Prepaid” plans, where the plan gets a flat payment in exchange for
providing any covered services a recipient needs. These three are Amerigroup
Louisiana, Inc., LaCare, and Louisiana Healthcare Connections, Inc.

When these plans deny services, recipients must exhaust the plan’s internal
appeal procedure before they are able to access the state fair hearing system.
(Under Bayou Health, the term “grievance” includes appealable actions like
denials, but also general complaints about how one is treated by a plan, etc. Advo-
cates seeking to reverse a denial are cautioned to avoid all use of the word “grievance” and not to have clients phone in appeals, since they may get confused and agree that they wish to file a “grievance,” which might not get the access to a reversal of the denial of services.

The recipient has a right to proper notice of the reason for action, to an in-person hearing on the internal appeal, to review the record before the hearing, and to a decision by a medical professional with “appropriate clinical expertise” and not previously involved with the denial as to medical issues.¹⁵⁶

If requested, an appeal can be expedited, to usually be decided within three days. (There are contradictory statements about whether an expedited appeal can be requested orally, or must be in writing. So a written request should be used.) The advocate should try to include all evidence that should be considered regarding such appeals with the original appeal paperwork. If the plan decides that the 30 day delay of a normal appeal would not jeopardize the recipient’s health, it can convert the expedited appeal to non-expedited.

Under these prepaid plans, continued benefits pending appeal are less than we have had under Medicaid. They are only available if “the original period...has not expired” and end when the period previously authorized ends.¹⁵⁷

The regulations refer to the Prepaid plans collecting from recipients for the continued benefits from service appeals that the clients lose.¹⁵⁸ So collections could get more aggressive and could involve, in some instances, civil suits. For those in the plans, Medicaid pays a monthly fee, regardless of what services the client uses. The recipient may be liable for the fee, not just the particular services he or she received.

³.¹ .⁴.  Termination notice (eligibility or services received until the notice)

For most services, if a fair hearing request is filed before the services are actually cut off, services should continue at least until the hearing. Exceptions to the right to continued benefits are discussed in § 6.⁵.¹, infra. Perhaps the most notable exception regards services prior approved through a Coordinated Care Network (Bayou Health).¹⁵⁹ If the appeal is filed more than 10 days after the notice date, yet before services are cut off, the advocate may have to point out that 42 C.F.R. § 431.230(a) requires the continued benefits pending appeal.¹⁶⁰

The period to appeal for a fair hearing is nonetheless limited by the 30 day period discussed above.

If the recipient was not issued a notice giving at least ten days to appeal with continued benefits, he or she should be able to get continued benefits pending appeal through any timely appeal based on the agency’s failure to give notice of the separate deadline for continued benefits.¹⁶¹

¹⁵⁷ 42 C.F.R. § 438.420(b)(4),(c).
¹⁵⁸ 42 C.F.R. § 438.420(d); 50 LAC Part I, §§ 3711(B), 3735(D).
¹⁵⁹ 42 C.F.R. § 438.420(b)(4), providing that services continue only until the end of the period that had already been approved.
¹⁶⁰ A DHM memorandum accessible to agency staff clarifies this. Medicaid Administrative Memorandum Number 2011-5.
¹⁶¹ The regulations permit such reinstatements. 42 C.F.R. 431.231(a). But they also require reinstatement if an appeal is filed within the first ten days, 431.231(c), and require notice of this right, 431.210(e); 431.211. A prudent step to take where there is no notice of the right to continued benefits might be to contact the agency before filing the appeal to obtain an assurance that continued benefits will be granted, or obtain agreement that a new notice will be issued, giving the ten day right. If neither assurance can be obtained, a federal suit and TRO (or state court stay) could enjoin the termination of assistance for failure to give proper notice.
As noted throughout this chapter, most issues are better dealt with outside the fair hearing process. But where a client has a right to continued benefits pending appeal, if not resolved before the deadline for maintaining continued benefits, it is almost always to the client’s benefit to request the fair hearing. The client’s medical care is protected during the usually 90 day period while the fair hearing request is under consideration. And the claim that there will be “irreparable injury,” a required element in obtaining a federal temporary restraining order or preliminary injunction, is undermined if the client has this access to continued benefits.

Nonetheless, because many central agency staff are not intimidated by the fact that a fair hearing is pending, one’s hand in negotiating relief may be stronger before you request a fair hearing, if it is unclear you will commit to a fair hearing rather than go straight to court.

Two situations in which it is reasonable to forego the continued benefits are when benefits would not continue the whole time the appeal pends (discussed in § 6.5.1.1, infra; usually these are appeals where there is no factual dispute), and some cases where it can be determined that the recipient will probably lose the appeal and would need to pursue relief in federal court thereafter, in which case they will face a period without assured benefits anyway.

In either case, taking advantage of the continued benefits may give the attorney more time to prepare TRO pleadings before a cutoff occurs.

If the client has missed the period for continued benefits pending appeal, filing a federal suit and for a TRO/preliminary injunction (and advising the agency credibly of the intention to do so) can sometimes be a faster way to restore services than waiting through the 90 day fair hearing process.

3.1.5. Relief if the client missed the appeal period by a day or two

The “state plan” filed with and approved by the federal government currently states that Louisiana runs the 30 days for appeal from receipt of the notice. Most DHH notices state otherwise, that the period runs from issuance of the notice. But the state plan should govern rather than the language on the notice, extending the client’s period to appeal.

3.1.6. Appellant missed the hearing

Federal law requires that if an appellant misses their Medicaid fair hearing, the appeal not be closed until the agency has given a chance for the appellant to claim good cause for having missed the hearing. The Division of Administrative Law recently implemented procedures to respect this right. Currently, if the hearing is missed the ALJ will issue a “Conditional Order of Dismissal of Hearing Request,” allowing the claimant ten days to provide good cause. The Division of Administrative Law is requiring the responses be in writing, and the ALJ will rule on whether good cause is stated. So it is prudent to assist clients with these requests rather than leave them unassisted.
3.1.7. Adverse fair hearing decision

It may not be stated on the notices, but petition for rehearing or reconsideration can be filed with the Division of Administrative Law within ten days of the date it mailed out the decision.

The petition should specify the grounds on which the decision should be reconsidered, and should be styled a “petition for rehearing or reconsideration.” The petition for “rehearing” explicitly extends the period for judicial review. “Reconsideration” is more likely to be granted, since it does not require conducting an additional hearing. In cases of clear error this route is much faster and less expensive than judicial review for the client, and involves less work by the attorney, since it does not require making a general docket judge who is unfamiliar with Medicaid law comfortable enough with the issues so that he or she feels comfortable reversing the agency. But all reasons for reversal should be set out in the petition within the ten days. Do not usually count on getting an opportunity to supplement. If you feel you need to hear the audio track from the hearing in order to draft this, with a client release and Division of Administrative Law form, the audio track can be obtained by email and listened to on a PC.

The same decision maker reviews the petition as issued the decision you are seeking reconsideration of.

A petition for judicial review of the fair hearing decision can be filed in District Court within 30 days of its issuance. Venue is in Baton Rouge or the claimant’s domicile. Unlike unemployment compensation decisions, the suits are not free, so it should be accompanied by an *in forma pauperis* application, if appropriate.

Demand letters, to the Secretary of DHH, Director of the Bureau of Health Services Financing (the Medicaid program), or the DHH Legal Unit do not suspend the period for judicial review. But they may get attention from the agency, by persons more familiar with the program, who are free to delve into policy issues, and can review more than the evidence in the administrative record.

If there is a federal claim that meets the tests for federal jurisdiction, a federal suit can obtain review of the hearing decision. There is a year to seek federal review. This period though may run from the initial adverse action, rather than the date of the hearing decision. Res judicata does not bind the federal court to defer to the ALJ’s factual or legal findings. In addition, in federal court there will be an open record, not limited to what was established at a brief fair hearing.

As noted below, it is often complicated and hotly contested in litigation whether particular Medicaid provisions are enforceable in federal court using the civil rights statute, 42 U.S.C. § 1983. The federal Administrative Procedure Act does not apply to actions by state agencies. (And state Administrative Procedure Act claims cannot be raised against the state in federal court.) If a state policy is in conflict with federal law, there is currently clear jurisdiction over a

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165 La.R.S. 49:964(B); La.R.S. 46:107(C).
Supremacy Clause” claim in federal court. This may change. Other federal statutes such as the Americans with Disabilities Act, or the due process clause, may provide a claim based on specific violations.

No retroactive benefits are likely to be available from the federal action. As to Medicaid issues, clients are often without care when not certified, so retroactive coverage may be of limited value anyway.

3.1.8. If the recipient did not get notice, it might not be the agency’s fault.

Louisiana’s agency now issues permanent, plastic eligibility cards for all but a few categories. Further, Louisiana’s Medicaid agency often does annual renewals of eligibility through review of information in other agencies’ databases. As a result, recipients can easily forget to notify the agency when they move, which in turn can result in their not receiving the notice that is mailed when adverse action is taken on their case. Until they need to use their Medicaid card, they may not know it is no longer active. And by the time they do know, their right to take an administrative appeal within 30 days of the adverse action may have expired.

3.2. FIRST STEPS

3.2.1. Obtain HIPAA releases

Be sure to obtain from the client a “HIPAA” compliant release before any contacts with the agency in which you want the agency to discuss or assess the client’s specific facts and information, or if information will be needed from medical providers. One that DHH will accept is posted on its website.

3.2.2. Choose the forum relief will be pursued in carefully.

The fact that a fair hearing (administrative appeal) is available to the claimant does not mean that this is the avenue for relief that should always be pursued. Obtaining a fair hearing decision usually takes about 90 days; often there are faster ways to obtain relief. Some in the agency who could grant relief will let a fair hearing play out rather than get involved once a hearing has been requested. And yet Administrative Law Judges will not touch some issues that others in the agency could address. They often will not seriously entertain or analyze legal challenges to agency policies. They also will not reverse a legal exercise of agency discretion, whether this involves a worker choice among possible options, or an agency policy choice.

And as set out below, starting on the administrative route can limit a client’s access to federal court, which is sometimes the fastest, most powerful, or otherwise most appropriate forum.

169 Planned Parenthood of Houston and Southeast Tex. v. Sanchez, 403 F.3d 324, 331-35 (5th Cir. 2005) (Medicaid case finding jurisdiction, because the claim was for preemption under the Supremacy clause rather than under § 1983).
170 A five vote majority remanded for reconsideration on other grounds a case raising this issue. Douglas v. Independent Living Center of Southern California, Inc., 132 S.Ct.1204 (2012). The four dissenters strongly argued that the Supremacy claim should not be allowed. The remand suggested that once the federal Medicaid agency approves a state plan, recourse may have to be against the federal Medicaid agency through the federal Administrative Procedure Act.
171 “Spend-down” Medically Needy recipients usually will have received a paper proof of eligibility within the last three months. SLMB and QI and recipients do not get an eligibility card; for them, Medicaid only pays their monthly Medicare premiums.
172 See 45 C.F.R. 164.500 et. seq.
The client should be advised of the options and implications before a choice is made about how to pursue a claim, even if the law office the client has consulted would not or could not pursue other avenues for relief.\textsuperscript{174}

Usually the source of law will constrain the choice of forum, or determine which is most hospitable. For example, rights that are not sourced in the federal statutes can usually be enforced only through a fair hearing request, followed possibly by judicial review in state court. (An exception discussed below is that if a state policy is inconsistent with, and therefore pre-empted by a federal regulation, that currently gives rise to a federal Supremacy Clause claim.)

At other times, the type of relief needed (fast, retroactive, individual, equitable, etc.) determines which forum is best.

3.3. **WORK DIRECTLY WITH THE AGENCY, RATHER THAN WAITING FOR RESOLUTION BY A COURT OR ALJ.**

Overwhelmingly, most of the favorable dispositions of Louisiana Medicaid fair hearing requests occur through the agency staff, rather than the ALJ, rescinding the adverse agency action. About 30% of Medicaid actions under appeal are “reversed” by agency staff after an appeal request is filed. (In contrast, the ALJs reverse on only about 7% of the appeals.)

This positive outcome through a review by agency staff can be sought through calls, demand letters, or both, without a hearing request and without subjecting the client to a 90 day delay (though one should not let a ten or 30 day time limit for appealing pass while awaiting informal resolution).

Also, even though there is a 30 day limit for requesting an appeal, the agency staff can at nearly any time go back and correct an improper decision by “reopening” it.\textsuperscript{175} (While not stated in state policy, reopenings might have to occur within one year after an action.)

But as already noted, agency staff are often unaware of the governing law. So the advocate should distill the claim and present it to the agency, rather than just ask for another review. Central agency staff in Baton Rouge can access the Louisiana Register notices, state plan, Code of Federal Regulations, and statutes. Few others in the agency can or have the authority to take action based on these. So any claim involving these should be conveyed to staff in Baton Rouge.\textsuperscript{176} If legal analysis by the agency will be needed, DHH’s Legal Unit will necessarily be involved and so usually should be called, written, or copied on correspondence from the outset.

3.4. **REAPPLYING**

Particularly where there are documentation problems or other factual issues that may resolve with a new application, the client may be advised to reapply, even while other relief is being pursued. This will often give the agency additional reason to moot an appeal in the client’s favor (and the appeal gives the agency reason to

\textsuperscript{174}Louisiana Rules of Professional Conduct, Rules 1.2(a, c), 1.7(b)(2). This is true whether or not the attorney knows of other attorneys who would pursue the matter, who do not have the same limitations.

\textsuperscript{175}MEM §G-1700.

\textsuperscript{176}The top Medicaid staff in Baton Rouge are currently listed at http://new.dhh.louisiana.gov/index.cfm/page/226. Advocacy is often more effective when directed to the lowest level decision maker who has authority to resolve a problem, unless that person is wedded to current practice. A good place to begin is often the program specialist for the region, listed at http://new.dhh.louisiana.gov/assets/docs/Making_Medicaid_Better/Resources/Med_CustService.pdf.
try to resolve the new application in the client’s favor). But if there are system issues the client does not want mooted, or gray issues not developed regarding the prior application, which would complicate the appeal, reapplying may be against the client’s interests. And if agency policy precludes the client’s eligibility, there is no reason to put the client through the unnecessary work of a new application.

Some clients should reapply while pursuing relief through an appeal or court, because the application under review only covers a specific period of time. A request for prior approval services or Medically Needy eligibility is only for specific months; most other applications for Medicaid are effective for a one year period. Especially if the recipient wants reimbursement or corrective payment from the agency for services not covered while the matter is being adjudicated, the recipient may need to reapply for each successive period of services that could have been covered, and possibly even appeal each denial (depending on the forum in which relief is pursued), in order to preserve a claim for all periods that pass by the time a judicial decision occurs.

3.5. OFTEN FASTER AND MORE EFFECTIVE THAN FAIR HEARING REQUESTS: ESCALATING POLICY ISSUES TO STATE LEVEL DECISION MAKERS

Especially where relief depends on changing a policy, the agency is best approached through means other than a fair hearing request. The approach to the agency should not usually be one of questioning, but assertive, with one’s case already thought through and presented in a way that will prevent the agency from getting distracted by either minor or adverse issues.

Requesting a fair hearing puts the claimant on a 90-day slow track to resolution of his or her issue. But in cases where local or regional level agency staff are not eager to participate in fair hearings, some will resolve the underlying issue in the client’s favor to avoid the hearing, if this can occur without a violation of agency policy. But where relief requires a re-examination of agency policy, higher level staff would need to authorize action in the client’s favor. These staff persons are not intimidated by the agency’s need to defend a fair hearing. (As discussed within § 3.7.3, below, they have the ability to, in essence, veto adverse hearing decisions.)

State level staff persons are often more willing to reconsider policy when the issue has not already been put into the fair hearing context: by being approached either with a goal of problem-solving, or to avoid becoming involved in federal litigation over the issue.

Accessing the discretion that the policy-makers may have can be an even more important consideration when one is dealing with an unusual or unanticipated effect of agency policy. For the Appeals Bureau, policy is policy; rarely will an ALJ go against it, even if the policy is legally infirm or equitably problematic.

The other possible decision makers who can authorize relief from agency policies are state court judges, who will occasionally, in a compelling case, be willing to exercise their equitable powers to preclude untoward policies or harsh applications of policy.177

177 See, e.g., Labbie v. Robinson, 544 So.2d 734 (La. App. 3 Cir. 1989) (the opinion’s author is now Justice Knoll of the state Supreme Court); see also Jurisch v. Jenkins, 99-0076, (La. 10/19/99), 749 So.2d 597.
In situations where there are state law claims, one must not let the period for appealing prescribe while the matter is being considered by agency staff. After approaching state office staff, if one needs to preserve access to state judicial review (or continued benefits pending appeal), one can explain that a fair hearing request will be filed, but that is just to preserve later state court remedies, and that you are counting on state agency staff to resolve the issue, if willing, before a fair hearing is held.

3.6. **AS TO “BAYOU HEALTH” ISSUES, CAN THE RECIPIENT WITHDRAW FROM BAYOU HEALTH, SWITCH PLANS, OR SWITCH PRIMARY CARE PHYSICIAN TO SOLVE THE PROBLEM.**

There are additional layers of complication where issues stem from a Bayou Health plan’s denial of access to services. As explained in § 8.4, Louisiana has contracted to have services delivered to about two-thirds of the state’s Medicaid recipients through private plans, which are like private insurance companies responsible for providing the recipients’ care, within certain Medicaid parameters.

As recommended above, problems often can be solved by escalating the issue to higher decision makers. If a Bayou Health recipient faces a service denial, the question before one can do so is who has jurisdiction over the service. Some services are “carved out,” meaning they are not under the control of the new plans, but access continues to be determined by traditional Medicaid mechanisms. If it is not obvious from the client’s fact situation, a chart setting out which entity is responsible for which services is posted on probononet. If the plan has jurisdiction, member handbooks with contact information are posted on the MakingMedicaidBetter.com website.

A second route is not always available but has a large payoff when it is. Some recipients either should have been excluded from Bayou Health or are voluntary or optional participants in Bayou Health. If you can get your client into one of the excluded categories they should immediately be let out of Bayou Health. If your client is in one of the optional categories or can be moved into one, then experience so far has been that DHH has been willing to let the optional recipients out of Bayou Health when faced with problems. The excluded and optional groups are not listed here, because which groups are in or out may change after publication of the Desk Manual. They are listed at 50 LA C Part I, § 3103(B,D); Louisiana Registers should be checked for any changes since the LA C was last codified.

A third option may be to switch plans or switch primary care physician (PCP) within the plan if the PCP is not being a strong enough advocate for the recipient’s needs. One can switch plans and PCPs at will during the first 90 days of each annual enrollment period. After that one is “locked in” under the DHH regulations. But the plans may be willing to allow PCP changes even after the lock-in.

A fourth option is to appeal, discussed in § 3.1.3. supra.

3.7. **PARTICULAR RIGHTS AND PROCEDURES WITH FAIR HEARING REQUESTS.**

The availability of continued benefits pending appeal, and exceptions, is discussed in § 6.5. infra.

178 http://www.probono.net/la/civilaw/library/attachment.224105
3.7.1. **Right to an additional medical assessment**

One possible advantage of a fair hearing over quick court action in cases involving disputes about medical conditions or needs is that the Medicaid state plan provides that the Department will pay for a second medical assessment “if the Hearing Officer or the claimant considers this necessary.”\(^{179}\) (The Department has procedures under which it can pay for medical assessments to establish eligibility directly, through providers it contracts with, instead of as a visit on one’s Medicaid card.) It should not be assumed that ALJs are familiar with this requirement, which is more favorable than federal regulations require.\(^{180}\)

3.7.2. **Few ALJ decisions are favorable**

Since requesting a fair hearing can both delay and prejudice the right to seek other forms of relief, fair hearing requests should not be routinely filed or recommended without having considered the client’s alternatives. As noted above, only about 7% of appeals result in ALJs reversing the action under appeal.

3.7.3. **Limitations on ALJs’ ability to issue decisions adverse to the Department.**

DHH has the ability to veto ALJ decisions that would be adverse to it. If an ALJ’s decision would be adverse to the Department, the ALJ’s Recommended Decision is forwarded to a representative of the Department, who has 35 days to repudiate the decision.\(^{181}\) If the decision is repudiated, DAL currently simultaneously sends both the original recommended decision and the final DHH decision to the appellant.

Since this is an ex parte and totally one-sided procedure, it is subject to a due process challenge.\(^{182}\) In addition, since the ultimate decision maker did not hear the live testimony this may reduce the deference due the agency’s decision under the APA.\(^{183}\)

Especially since their decisions are subject to veto, ALJs may question whether they have the authority to invalidate agency policies. Under the state’s APA, the ALJs do have authority to rule on the legality of agency policies.\(^{184}\) But an ALJ questioning such authority may look hard for reasons not to exercise it, and incline them to find other reasons to rule against appellants who are challenging agency policies.

3.7.4. **Theoretical availability of discovery**

All discovery tools are theoretically available within the fair hearing proceeding.\(^{185}\) But because fair hearing proceedings must usually be concluded within 90 days, if the opposing party does not promptly cooperate, the tools may have limited usefulness unless the ALJ agrees to expedited time frames and takes an active role on enforcement motions.

\(^{179}\) Attachment 4.2-A p. 2.
\(^{180}\) Compare 42 C.F.R. § 431.240(b).
\(^{181}\) Memorandum of Understanding between La. DHH and La. DAL, Oct. 1, 2010, §§ 3.3(C),(E); 4.1.
\(^{182}\) The federal regulations do allow for agency review of decisions before their issuance. See 42 C.F.R. § 431.244 (referring repeatedly to hearing officers’ decisions or recommendations). But they do not endorse DHH’s procedure of conducting the reviews with input from only one party.
\(^{183}\) La. R.S. 49:964(G)(6); accord Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 493 (1951). As to problems with DHH’s previous procedures for repudiating or adopting ALJ decisions see Doc’s Clinic, APMC v. State ex rel. Dept. of Health and Hospitals, 2007-0480 (La.App. 1 Cir. 11/2/07), 984 So.2d 711, writ denied, 2007-2302 (La. 2/15/08) 974 So.2d 665.
\(^{184}\) Accord La.R.S. 49:963(D), 49:958. The ALJs’ civil service job descriptions probably continue to describe them as responsible for ruling on questions of law.
\(^{185}\) La.R.S. 49:956(S, 6); costs are not to be charged if the client is indigent. La.R.S. 46:107(B).
3.7.5. The hearing record should not be limited to facts that were before the agency at the time of the adverse decision

DHH ALJs and agency staff sometimes contend that the issue at the fair hearing concerns whether the agency made the correct decision based on the facts it had when it originally acted.

The state Administrative Procedure Act specifies that appellants are permitted to add evidence to the administrative record and argue all issues of law. And the state Administrative Procedure Act allows reopening of a fair hearing decision even after a hearing if “The party has discovered since the hearing evidence important to the issues which he could not have with due diligence obtained before or during the hearing; [or]…There is a showing that issues not previously considered ought to be examined in order properly to dispose of the matter.” A DHH ALJ has been reversed for denying a “fair hearing” for limiting the record to what was before the Medicaid agency at the time of its original decision. In a federal consent agreement dealing with prior approval issues, DHH agreed to include on adverse prior approval decisions a statement that at the fair hearing “the claimant or his or her medical provider(s) may submit additional evidence.” Courts in other jurisdictions have made similar rulings. And CMS’s State Medicaid Manual allows reopening of a fair hearing decision even after a hearing “because new evidence concerning the determination has been submitted which may alter that determination.” So certainly additional evidence should be accepted at the hearing, too.

3.7.6. Date of appeal is determined by earliest action, including postmark

An appeal is treated as filed the day it is postmarked, orally requested, or phoned in. The date the agency receives a written copy of an appeal request should not replace these dates.

Though notices specify the appeals need to be mailed (or phoned in) to the Division of Administrative Law, any request made to DHH staff must be honored, as well.

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186 La.R.S. 49:955(C)(“Opportunity shall be afforded all parties to respond and present evidence on all issues of fact involved and argument on all issues of law and policy involved and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”) At worst, this provision should authorize the appellant to evidence facts other than those initially before the agency as part of an argument that review should not be limited to what was originally before the agency.


188 Bell Oaks v. DHH, 96-1256 (La. App. 1 Cir. 1997) 697 So.2d 739, 749. Bell Oaks deals with agency scoring of Requests for Proposal—essentially private bids to do business with DHH. An argument that agency review should be limited to the prior record is particularly strong in that context, but the agency attempt to do this was not upheld. See also State plan, Attachment 4.2, p. 2 (discussing submission of additional evidence at claimants’ fair hearings).

189 McField v. Forrest, Stipulation and Order of Dismissal, E.D.La. No. 93-4094 (Oct. 22, 1996), ¶2. McField was filed as a class action, but the class was never certified. The Stipulation has language intending to convey its benefits to non-parties.

190 CMS State Medicaid Manual §2904.1 (emphasis added).

191 Medicaid Administrative Memorandum Number 2011-5.

192 Memorandum of Understanding between La. DHH and La. DAL, Oct. 1, 2010, §§ 3.3. The federal regulations define a “Request for a hearing” as “a clear expression by the applicant or recipient, or his authorized representative, that he wants the opportunity to present his case to a reviewing authority.” There is no requirement it be in writing. CMS guidance elaborates further: “Oral Inquiries about the opportunity to appeal should be treated as requests for appeal for purposes of establishing the earliest possible date for an appeal.” CMS State Medicaid Manual § 2902.1.

193 42 C.F.R. § 431.220(a)(1-2)(hearing required for any claimant that requests it); 42 C.F.R. § 431.221 (b)(“The agency may not limit or interfere with the applicant’s or recipient’s freedom to make a request for a hearing.”). Memorandum of Understanding between La. DHH and La. DAL, Oct. 1, 2010, §§ 3.1, 3.2.
3.7.7. 90 day time limit for decision

Federal regulations require that the agency’s final action on administrative fair hearing requests usually occur within 90 days of their filing.\textsuperscript{194} For almost ten years, beginning in 1997 there was a court order in place providing that claimants were to receive the benefit at issue in their hearing if a final decision was not implemented within the 90 days.\textsuperscript{195} The Order has been sunsetting, and the relief obtained was available only as a result of the Department’s being in contempt of an earlier order requiring timely adjudications (which has also been sunsetting). As a result, there is no penalty for the Department’s not meeting the 90 day time line.

Nonetheless, the ALJs may require consent to extend the 90 days in conjunction with any requests for a continuance. Counsel should willingly consent to these extensions. (As noted above, DHH gets 35 days to review any Recommended Decisions that would overturn its action. Without the extension, if a hearing pends over 55 days, the ALJ may think he or she has authority to find in favor of the Department, but not against it (because the 35 day for DHH to review adverse decisions has not been reserved).

3.7.8. Appeals improperly dismissed

Louisiana’s agency illegally dismisses appeals:

- as moot or resolved, based on documents transmitted to the ALJ or DAL by DHH staff, without confirming with the claimant or counsel that the matter is in fact fully resolved;
- as “withdrawn” without ensuring that the appellant’s right to appeal was not interfered with by agency staff;\textsuperscript{196}
- in the past, as untimely filed without any hearing to determine whether the facts as to timeliness assumed by the Appeals Bureau are true.\textsuperscript{197}

In such cases, the agency currently also fails to notify the appellant of their right to judicial review.\textsuperscript{198}

If the DAL attempts to disallow an appeal because there is no adverse action notice to appeal, that would improperly give staff who take action adverse to the appellant control over access to appeals. The federal fair hearing statute does not even require that there have been a “decision” in order to appeal.\textsuperscript{199}

3.7.9. Agency duty to comply with appeal decisions and issue corrective payments

State agencies are required to adhere to and implement favorable fair hearing decisions.\textsuperscript{200} (Otherwise, the client’s statutory opportunity for a fair hearing is meaningless.)

\begin{footnotesize}\textsuperscript{194} 42 C.F.R. § 431.244(f); see also Richard M. Dickson v. George Fischer et al., E.D. La. CA No. 81-563, June 3, 1981, ¶114.
\textsuperscript{196} Compare 42 C.F.R. § 431.221(b).
\textsuperscript{197} Compare Memorandum of Understanding between La. DHH and La. DAL, Oct. 1, 2010, §§ 3.3(C)(providing for such decisions to be reached through dispositive motions).
\textsuperscript{198} Compare 42 C.F.R. § 231.245(b).
\textsuperscript{199} 42 U.S.C. § 1396a(a)(3)(requiring appeals for “any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness”).
\textsuperscript{200} CMS’s State Medicaid Manual, §2903.3.A. ALJ decisions in favor of the client are binding unless agency rehearing procedures are invoked within ten days. See La.R.S. 49:959. This is because the APA does not define agencies as “persons” and they are therefore not entitled to judicial review of ALJ decisions. La.R.S. 49:964(A)(1,2) and 49:951(5).
\end{footnotesize}
The federal regulations require “corrective payments” after a favorable hearing decision or settlement of an appeal. This has been interpreted to include direct payments to recipients reimbursing them for costs they incurred, as well as payments to providers. In this state the opportunity for retroactive coverage usually begins with an agency notice, included as part of the local office’s certification notice, allowing 30 days for the recipient to claim payment for bills they already paid in the period covered by their certification.

The agency’s reimbursements to recipients are made at the Medicaid rate. If recipients paid for their services, they will usually have paid more, often about double this amount. Recipients therefore do better to request refunds from the providers, and have the providers obtain payment from Medicaid. This way the provider, rather than recipient, takes the loss. But nothing requires most providers do this. (Nursing facilities, doctors accepting QMB Medicaid, and hospitals built with Hill-Burton funds would be required to.)

3.8. POSSIBILITY OF GETTING A STATE COURT STAY WHILE A FAIR HEARING IS PENDING.

A stay can be sought from state court in conjunction with a state court judicial review proceeding. The state court proceeding can be filed immediately if a non-final agency ruling (such as the decision to terminate continued benefits) will otherwise inflict irreparable injury. Such a proceeding could be concurrent with an ongoing fair hearing proceeding.

Most state courts will want all administrative remedies exhausted before injecting the court into an agency proceeding, so it is prudent to have exhausted as many as possible before seeking such relief. Even so, getting a court to issue the stay while other proceedings are still pending and with little record to rule on is bound to be an uncertain proposition. When there is a viable federal claim a federal TRO would likely be easier to obtain.

The agency, too, can issue a stay, in lieu of the court’s doing so. Since a stay is not exactly a preliminary injunction, there is no automatic requirement that security be posted in order for the relief to issue.

3.9. STATE COURT JUDICIAL REVIEW OF HEARING DECISIONS.

3.9.1. Beginning suit and time limitations

Appellants can file for judicial review under the state Administrative Procedure Act within 30 days of an adverse fair hearing decision. As noted above, a timely filed petition for rehearing extends the period. A two page, non-substantive form petition is usually used to start the proceeding. Petitions are often styled “in re” the claimant, or the Office of the Secretary of DHH can be named as defendant. The Division of Administrative Law is not named as a party in cases avail-

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201 42 C.F.R. § 431.246.
202 Sometimes this is on the certification notice, other times as a separate “Form 1-crpr.” The form was created to comply with the requirements of Blanchard v. Forrest, 71 F.3d 1163, 1167-68 (5th Cir.), cert. denied 518 U.S. 1013 (1996).
203 La.R.S. 49:964(C); Division of Administration v. Department of Civil Service, 345 So.2d 67 (La. App. 1 Cir. 1977)(granting stay of administrative order); Summers v. Sutton, 428 So.2d 1121, 1125 (La App. 1 Cir. 1983) (denying stay of administrative order).
205 La.R.S. 49:964(C).
206 La. R.S. 49:964(B); 46: 107(C). As noted above, a timely filed petition for rehearing extends the period.
able on Westlaw (seeking review of adverse actions by other agencies). This is consistent with La. R.S. 49:992(B)(3). Service of the petition on DHH must be arranged.

Judicial review is of the existing administrative record, including hearing transcript. Though not permitted by statute, the defendant often takes 75 days or longer to answer. Court review cannot take place until the record is received. But the petitioner can file a motion to stay the adverse action in the meantime, if enough evidence can be presented to the court to justify this, or other sanctions can be ordered by the court for transcript delays.

If the petition is filed in Baton Rouge (as well as some other parishes), the Local Rules require that the plaintiff’s attorney “immediately notify” the Judge that a judicial review proceeding is pending. On receiving this notice, the judge often schedules a status conference to set a briefing schedule.

3.9.2. Venue

Unlike most Administrative Procedure Act suits, the plaintiff can choose between Baton Rouge venue and the parish of his or her domicile. But if the proceeding will seek a declaratory judgment that an agency rule or policy is invalid or inapplicable, exclusive venue may be in Baton Rouge.

3.9.3. Limitations on judicial review

Judicial review is limited to the record from the fair hearing. The governing statute does not require that courts accept agency fact-findings, but just give them “due regard,” which is lessened when the hearing was not conducted in person. There is a split as to whether the Court of Appeal should defer to the District Court as to the facts. The First Circuit has noted that an ALJ’s disbelief of the recipient or applicant does not create sufficient evidence to support an agency ruling.

The closed records of APA judicial review cases will not usually evidence the broad-scale system facts which can be dispositive under Medicaid case-law. Judi-

207 “Nothing in this Section shall affect the right to or manner of judicial appeal in any adjudication, irrespective of whether or not such adjudication is commenced by the division or by an agency.”
208 La. R.S. 49:964(B).
209 Compare La. R.S. 49:964(D).
210 Id.
211 La. R.S. 49:964(C).
212 In re Forgione, 36130 (La. App. 2 Cir. 6/12/02), 821 So. 2d 673, 677; Bruce v. State, Department of Health and Hospitals, 95-1175 (La. App. 3 Cir. 3/6/96) 670 So.2d 680.
213 See e.g., Louisiana Rules for District Courts, Appendix 9.14, 19th JDC, “Judicial Reviews and Appeals.”
216 La. R.S. 49:964(F).
217 La. R.S. 49:964(G)(6).
218 Carpenter v. State, Dept. of Health and Hospitals, 2005-1904 *8 (La.App. 1 Cir. 9/20/06), 944 So.2d 604, 610 (approving District Court’s reversal of AL credibility decision, and holding that appellate court need not defer to District court in APA proceedings); Wild v. State, Dept. of Health and Hospitals, 2008-1056 *6 (La.App. 1 Cir. 12/23/08), 7 So.3d 1, 4-5 (Court of Appeal’s review is plenary, without deference); Compare Bueche v. Dept’ of Health & Hospitals, 2000-1473 (La.App. 1 Cir. 6/21/02), 822 So. 2d 25 (Court of Appeal defers to the District Court on facts in APA proceeding); Multi-Care, Inc. v. Multi-Care, Inc. v. State, Dept. of Health & Hospitals, 2000-2001 *4 (La.App. 1 Cir. 11/9/01), 804 So.2d 673, 675 (deference runs to the District Court, not the agency); St. Martinville, L.L.C. v. Louisiana Tax Com’n, 2005-0457 *4 (La.App. 1 Cir. 6/10/05) 917 So.2d 38, 41-42; but see Feliciana Consultants, Inc. v. State, Dept. of Health & Hospitals, 2009-1098 *5 (La. App. 1 Cir. 12/23/2009) 2009 WL 4981283 (concurrence articulating this position, but majority not).
219 Carpenter v. State, Dept. of Health and Hospitals, 2005-1904 *8 (La.App. 1 Cir. 9/20/06), 944 So.2d 604, 610, quoting Stroik v. Ponseti, 97-2897, p. 11 (La. 9/9/97), 699 So.2d 1072, 1080, citing New Orleans & R.R. Co. v. Redmann, 28 So.2d 303, 309 (La.App. 4 Cir. 1946))
cial review is therefore best for dealing with state agency failure to adhere to its own policies or its own regulations or for seeking reversals based on the equities of a particular case.

An absence of relevant facts in the record can defeat the legal claim for relief or can reduce the judge’s comfort level (that he or she understands everything he or she needs to in order to avoid making a mistake), thus increasing deference to the agency, which will argue that its decision is based on important policy concerns. Such policy concerns are not usually raised at the fair hearing level. Because the record is closed, there may be no evidence or opportunity to disprove the agency’s policy claims. For example, the agency often asserts in court that if current policy were not adhered to, federal funding for the program would be lost or jeopardized. Unless evidence on the issue was introduced at the administrative hearing, courts are left in the difficult position of having to deal with this concern without proof one way or another, and often defer to the agency on it.220 In a federal suit with an open record, such an assertion can be challenged.

In addition, it is unlikely that class-wide relief can be sought in an APA proceeding.221 However, declaratory relief, which can be sought in a Baton Rouge APA proceeding,222 may benefit others. In one case, including a request for an injunction in the petition and obtaining it thwarted the state’s attempt to suspensively appeal a favorable District Court judgment.223 Nonetheless, because the Eleventh Amendment bars federal court jurisdiction over non-federal claims against a state, state court will usually be the only forum for pursuing issues regarding APA rule-making requirements, agency compliance with its own policies (like the state plan or Medicaid Eligibility Manual), claims that actions violate “public policy,” or are arbitrary and capricious, and state statutory or constitutional requirements.224

3.10. CIVIL RIGHTS ACTIONS UNDER 42 U.S.C. §1983225

Federal-question suits are available for persons who have been denied “any rights, privileges, or immunities secured by the Constitution and [federal] laws” under color of state law.226 This authorizes suit if a federal statutory provision which conveys “rights” (discussed infra) or a constitutional requirement has been violated, but not for violations of regulations.227

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220 See e.g., Case of Hamner, 427 So.2d 1188, 1191-1192 (La. 1983) in which the state Supreme Court describes actions that occurred when the appellant’s application was supposedly submitted to the federal Medicaid agency for review—most likely a misunderstanding by the Court of the application processing procedure, and then basing its decision on the supposed inevitability of the federal agency’s position on the matter.

221 But see D’Agostino v. City of Baton Rouge, 504 So.2d 1082 (La.App. 1 Cir.,1987)(allowing class action on a mandamus claim).

222 La.R.S. 49:963.

223 Feliciana Consultants, Inc. v. State, Dept. of Health and Hospitals, 2009-0379 (La.App. 1 Cir. 5/20/09), 16 So.3d 379. The case does not discuss whether this might have been an improper cumulation of actions.

224 But see Women’s and Children’s Hosp. v. State, Dept. of Health and Hospitals 2008-946 p. 15(La. 1/21/09), 2 So.3d 397, 407 (stating the state plan is not even enforceable in state court, since not an APA rule).


As set out below, there are numerous technical challenges available to defendants and to court for challenging a federal court Medicaid action. Some advocates may be averse to a federal suit because of the chances that it gets dismissed without reaching a decision on the merits.

What should be remembered and explained to the client is that a win is a win and a loss is a loss. The chance of a procedural dismissal in federal court is worth taking if the overall chance of a favorable decision is higher there. In specific cases the chance of procedural loss is more than outweighed by factors below, like getting access to an open record, more clerk power available to the federal court, and usually a vision that the court is at least equal in the constitutional scheme to the agency being reviewed.

3.10.1. Correct defendant(s)

The state agency is not an appropriate defendant in a §1983 action. Instead, the Secretary of DHH should be sued, in his or her “official” capacity.

The proper relief to seek against such officials is injunctive relief: ordering the officials to comply with federal law. (Sometimes this can result in “ancillary” benefits with retroactive effect, such as declaratory relief that can be used to claim corrective payments in later state administrative proceedings (if no time limit has passed for invoking such proceedings), or correction of the Medicaid file, which can result in providers being able to claim payment for past services.)

Damages can be available in an action against an individual worker (named as defendant in his or her “individual capacity”) if he or she has violated a *clearly established* constitutional right of the client. This type of claim should be supportable, for example, based on a denial of due process if a Medicaid application was denied though the agency had information to establish that the client was clearly eligible, or if Medicaid was terminated without a realistic review of whether the recipient qualifies under categories other than the one previously certified. Claims against workers must be pleaded carefully: they are susceptible to dismissal or interlocutory appeal for not adequately pleading that the constitutional violation was one a reasonable official should have known was illegal.

Damages are unlikely to be available for violations of the Medicaid regulations or statute, even as to clearly established rights. The Fifth Circuit has held that spending clause legislation (like the Medicaid Act) does not create a right of action for damages against individuals.

3.10.2. More than 30 day filing period.

The §1983 cause of action picks up the analogous state law prescriptive period, which in Louisiana should be the general one year tort period. It should *not* be the 30 day administrative appeal or judicial review period, since less preparation is needed to file those actions. But to avoid an argument that rights lapsed with the passage of the 30 days, suit should be filed within that period if possible.

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231 *Sossaman v. Lone Star State of Texas*, 560 F.3d 316, 328-29 (5th Cir. 2009), aff’d on other grounds 131 S.Ct. 1651 (2011).
3.10.3. Open record

Use of §1983 also allows discovery and the introduction of new facts. In many states, facts that were decided by an Administrative Law Judge after full and fair procedures are binding, and if a fair hearing was requested, issues which could have been introduced at the hearing, but were not, may be precluded. But based on a state Supreme Court decision, that should not be the case in Louisiana.

3.10.4. Lack of jurisdiction over state-law and state-plan claims in federal court

State-law claims cannot be raised in federal court, since the Eleventh Amendment has been interpreted to preclude federal courts from enforcing state-law claims against states and state officials sued in their official capacity. This includes claims for violations of the Louisiana Administrative Procedure Act. Since Louisiana’s Medicaid agency often fails to follow APA rule-making requirements, the loss of this claim can be significant.

Sometimes the same actions that violate the state APA can still be brought in federal court, not as APA violations, but as denials of due process, if improved procedures could have prevented the harm.

There is a reasonable argument that a suit seeking to make the state adhere to details set out in its state plan is not a suit enforcing requirements of federal law, but obligations the state has imposed on itself. Like other state law claims this would not present a claim enforceable in federal court.

3.10.5. Federal “enforceable rights,” that meet standards under the Wilder and Blessing Supreme Court cases, must be at issue

The remedy for violations of law by state and local officials under 42 U.S.C. § 1983 is for deprivation of “rights...secured by the Constitution and laws.” The Supreme Court has ruled that for a provision to be enforced against states, Congress must have deliberately and clearly imposed a duty on states.

Previous Medicaid cases in the Fifth Circuit and one by the Supreme Court have held that the 3 part Wilder or Wilder-Blessing test determines whether a right is enforceable under 42 U.S.C. § 1983. The test has been tightened by the 2003 Supreme Court Gonzaga decision, discussed infra. The requirements for enforceability under Wilder and Blessing are generally stated as being that the statutory provision at issue:

1) was intended to benefit the plaintiff;
2) specifies a binding obligation, rather than a Congressional preference or goal; and

235 Wooley v. State Farm Fire and Cas. Ins. Co., 2004 CA-82 p. 36 (La.1/19/05) 893 So.2d 746, 771 (ALJ decisions not entitled to res judicata in Louisiana).
3) is not vague and amorphous, so that it would be beyond the competence of
the judiciary to enforce.\footnote{Wilder v. Virginia Hospital Association, 496 U.S. 498, 509 (1990); Frazar v. Gilbert, 300 F.3d 530, 538 (5th Cir. 2002), rev'd on other grounds sub nom Fire v. Hawkins, 540 U.S. 431 (2004); Resident Council of Allen Parkway Village v. HUD, 980 F.2d 1043, 1051 (5th Cir.), cert. denied 510 U.S. 820 (1993).}

As an important additional gloss on these requirements, the Supreme Court and Fifth Circuit have held that statutory requirements that are clearly meant to impose specific and binding obligations on the states and to benefit persons like the plaintiff do not create a “right” if they require only particular efforts or only that certain percentages of persons be helped, affected, or protected. The reasoning is that even if the state complies with the statutory obligation, any particular plaintiff could be within the percentage as to which compliance is not required—so Congress has enacted no requirement that the particular plaintiff has a right to the service.\footnote{Blessing v. Freestone, 520 U.S. 329, 343 (1997); see also Frazar v. Gilbert, 300 F.3d 530, 545 (5th Cir. 2002), rev'd on other grounds sub nom Fire v. Hawkins, 124 S. Ct. 899 (2004).}

To deal with these requirements, it is crucial for the plaintiff to plead the specific statutory provision(s) supporting the relief sought.\footnote{See Blessing v. Freestone, 520 U.S. 320, 342-46 (1997).} The National Health Law Program maintains, and is willing to share with Legal Services staff, a comprehensive table of holdings as to Medicaid provisions that have been found judicially enforceable and unenforceable.

Avoid relying on vague Medicaid mandates, like the one requiring states to have safeguards as “necessary to assure that eligibility for care and services...will be determined....in a manner consistent with simplicity of administration and the best interests of recipients.”\footnote{42 U.S.C. §1396a(a)(19). Compare Stewart v. Bernstein, 769 F.2d 1088, 1093 (5th Cir. 1985)(holding the provision unenforceable).} If one has to rely on one of the less specific statutory mandates, to the extent possible cite regulations that have added more specificity to the statutory requirement.\footnote{See Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987)(majority holding that in light of the interpretive federal regulations, the statutory mandate at issue was specific enough to be enforceable). Wright was the first case in the Wright-Wilder-Suter trilogy concerning rights enforceable under §1983.}

For eligibility and service denials, cite a violation of 42 U.S.C. § 1396a(a)(8), which requires that “assistance shall be furnished with reasonable promptness to all eligible individuals.” This language is parallel to now-repealed AFDC statutory language that the Supreme Court has cited as model language for creating enforceable rights.\footnote{Pennhurst State School and Hospital v. Halderman, 465 U.S. 1, 17-18 (1981).}

3.10.6. Meeting the Wilder-Blessing test may no longer be enough: Gonzaga and state sovereignty issues

In Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002), the Supreme Court held that even though § 1983 explicitly provides a private right of action for violation of enforceable rights, the determination of whether such rights exists is as stringent a test as must be met in implying a private right of action, where Congress has provided none. There were at least several strong grounds on which the lower court opinion could have been reversed by the Supreme Court. So perhaps the Gonzaga language may be akin to dicta that did not get close scrutiny. Even so, it presents a potential threat to most §1983 actions based on statutory rights, and the Court’s composition has become still more conservative since the decision.\footnote{Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17-18 (1981).}
Separate from Gonzaga’s possible change to the standard used to apply §1983 are concerns raised by the Supreme Court’s ongoing state sovereignty case law. Supreme Court cases in and since the 1990s hold that Congress’ powers under Article I of the Constitution cannot infringe on states’ sovereignty. Most of the cases have been damages actions, but the initial case, Seminole Tribe of Florida v. Florida, was not. The Court has stated that these state sovereignty cases do not preclude official capacity suits seeking injunctive relief against state officials, and do not infringe on Congress’ power to impose enforceable rights against the states under the “spending clause” (which is the basis for Medicaid legislation). But the line preserving official capacity actions and spending clause legislation involves only a policy choice, and enjoys no secure Constitutional distinction from the other types of congressional authority that have been invalidated.

Since Gonzaga, some Medicaid provisions have been found not to support a private right of action, and others to support one. Any adverse ruling threatens not just parties to the suit but Medicaid litigation across the nation. The precedents in all Circuits need to be checked as to any provision relied on before filing a federal suit. If a serious Gonzaga or state sovereignty challenge is made in a suit, the National Health Law Program and/or the author may be willing to assist with strategizing or briefing on the issue.

3.10.7. Avoid relying solely on regulations or interpretive materials

The Supreme Court has held that rights of action must be created by Congress, and so cannot be created by regulations alone. Using §1983 for a right of action, plaintiffs must still source their federally enforceable “right” to an enactment by Congress.

As a result, care should be taken to use regulations, manuals, regulatory materials, or case-law not as the basis for any claims, but as setting out guidance as to the requirements imposed by a statutory mandate that meets the three criteria for a right of action under Wilder/Blessing.

3.10.8. Include constitutional claims, if possible

To help minimize the “enforceable rights” issue, include any available claims based on violations of constitutional rights, since the enforceable rights analysis does not pose a problem for these claims. The presence of the constitutional violation can help make the court more comfortable with a statutory claim that it might otherwise be hesitant to entertain.

Many denials of Medicaid assistance are accompanied by denials of a property interest (in the assistance) without due process of law. To make the due process claim cognizable, the plaintiff needs to avoid the Parratt/Hudson line of


In Seminole, in response to the plaintiff’s argument that injunctive relief should be available, the Court found that application of such a §1983 remedy had been displaced by another comprehensive remedial scheme enacted by Congress. 517 U.S. 44, 71. See also Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743, 765 (2002) (”sovereign immunity applies regardless of whether a private plaintiff’s suit is for monetary damages or some other type of relief”).


cases, which hold that due process is not violated by random and unauthorized acts of state actors. Plead and be prepared to evidence that the violation could be prevented by proper pre-deprivation process.

3.10.9. Complications from requesting a fair hearing before going to federal court

If relief under 42 U.S.C. §1983 is available, other administrative or judicial remedies need not be exhausted first. In fact, when another administrative or judicial proceeding has been invoked, abstention and other jurisdictional issues arise that can complicate or defeat the §1983 claim.

Under Younger v. Harris a federal court is to abstain from entertaining a case if “important” state interests are at issue in the proceedings, and there is a pending state proceeding which is judicial in character. In Ohio Civil Rights Commission v. Dayton Schools, the Supreme Court denied jurisdiction based on the doctrine even though the state proceeding was administrative and could not rule on all the legal claims being raised in federal court.

There are at least two recent federal Medicaid precedents explicitly finding jurisdiction for the federal suit to go forward even though a fair hearing request is pending before the state agency. Those suits distinguish Ohio Civil Rights Commission v. Dayton Schools, 477 U.S. 619 (1986). But the distinctions between the cases in which Younger abstention is ordered or denied are not clear; so abstention remains a risk if another proceeding is pending. And at least one Federal Circuit has ruled that an administrative proceeding remains “ongoing” if remaining remedies have not been exhausted, which could nearly always preclude federal jurisdiction. Some courts have also rejected jurisdiction over a federal court proceeding when a fair hearing request was pending, for lack of ripeness. Even after a fair hearing has resulted in a decision, having invoked the state administrative proceeding can cloud federal jurisdiction to seek further review.

There is an argument that some or all of the hearing officer’s factual findings are conclusive and that claims not raised in the fair hearing are precluded. But a Louisiana Supreme Court decision states that Louisiana does not accord res judicata to administrative decisions. The claim preclusion accorded a decision is supposed to be decided based on the law of the forum of the earlier decision. So the state

253 See Zinermon v. Burch, 424 U.S. 113, 128 (1990); but see Johnson v. Louisiana Department of Agriculture, 18 F.3d 318, 322 (5th Cir. 1994).
258 Compare e.g., Hudson v. Campbell, 663 F.3d 985 (8th Cir. 2011) (ordering abstention in Medicaid case).
259 Hudson v. Campbell, 663 F.3d 985, 988 (8th Cir. 2011).
260 McGehee v. Director, Department of Mental Health and Hygiene, 153 F.3d 721, 1998 WL 403329 (4th Cir. 1998) (table); Tommy W. v. Hardy, 681 F.Supp.2d 732 (S.D.W.Va.,2010). It appears the latter was likely proceeding on a Supremacy Clause theory rather than under §1983.
261 University of Tennessee v. Elliott, 476 U.S. 788 (1986); Astoria Federal S. & L. Ass’n. v. Solimino, 501 U.S. 104 (1991); see Lawler and Vera, “The Limits of the Elliott Doctrine: Preserving Civil Rights Claims in the Wake of a State Agency Decision” 24 Clearinghouse Review, 194 (July 1990); see also Medina v. INS, 993 F.2d 499, 503-04 (5th Cir. 1993), rehearing denied 1 F.3d 312; Olson v. Morris 188 F.3d 1083 (9th Cir. 1999) (Judge Skagg, of the Western District of Louisiana was a member of the panel); see also Hughes v. Arveson, 924 F.Supp. 735 (M.D.La. 1996) (federal suit precluded by administrative proceeding unsuccessfully appealed into state court).
Supreme Court decision should be dispositive. In addition, one can argue that a court suit should not be precluded by a hearing decision issued after a hearing that may have been preceded by no discovery, often slotted for one hour, and resulted in a brief written decision. But discovery is available and the hearings can take more than a day, so the arguments are not necessarily dispositive. (Requesting discovery before the fair hearing may help show that the court case should not be predeterm ined by the fair hearing, if the ALJ refuses to compel responses.)

There is also some chance that problems may be raised as to federal jurisdiction after a fair hearing under other equitable rubrics, like “election of remedies,” ripeness, or Younger abstention. The Supreme Court ruled in Monroe v. Pape that a § 1983 plaintiff need not exhaust state court remedies before filing a § 1983 action. That may be a sufficient reply, but there is no guarantee.

3.10.10. State court §1983 actions

In state court, a § 1983 claim may be cumulated with an APA summary proceeding. If the cumulation is timely challenged, the worst outcome should be that the plaintiff would get to elect which form of proceeding he or she wants to pursue. There is a strong argument that the plaintiff should not have to choose between the two remedies (but just have them severed for trial), since the state Administrative Procedure Act remedy is not supposed to limit other rights.

But to establish the § 1983 claim, specific underlying facts that justify the claim for relief must be pled, rather than just adding §1983 citations to a boilerplate judicial review petition that says nothing about the facts. Otherwise, especially since Louisiana courts traditionally require “fact pleading”, the § 1983 claim is subject to dismissal in state court for no cause of action.

Combining the two forms of action may confuse the differing standards of review. Along a similar vein, while the § 1983 action can be filed directly in state court, without exhausting state administrative remedies, many judges would attempt to require exhaustion, because of their greater familiarity with Administrative Procedure Act suits, where exhaustion is required.

If state law claims are combined with federal claims, the whole suit may be removed to federal court. This poses some risk of losing review of the state law claims, though the federal court could either remand the latter or find that the removal itself waives the state’s Eleventh Amendment sovereign immunity.

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262 Wooley v. State Farm Fire and Cas. Ins. Co., 2004-CA-882 p. 36 (La. 1/19/05) 893 So.2d 746, 771; see also La. R.S. 49:964(A)(providing that the Louisiana state administrative procedure act does not limit any other remedies).
263 Accord Burnett v. Grattan, 468 U.S. 42 (1984)(the short period for filing administrative employment discrimination complaints should not be borrowed as the deadline for filing a § 1983 action, given the more comprehensive preparation that should precede filing of court suit).
264 See Moore v. City of Asheville, N.C. 396 F.3d 385, 395-96 (4th Cir.) cert. denied 546 U.S. 819 (2005)(applying Younger abstention even though the state judicial remedy had not been exercised after adverse hearing decision, and no longer could be); Hudson v. Campbell, 663 F.3d 985 (8th Cir. 2011)(holding the unexercised chance to administratively appeal, followed by judicial review, adequate to merit Younger abstention).
266 Louisiana adopted a res judicata standard like that of common law states in La. R.S. 13:4231; but see C.C.P. 462.
267 C.C.P. 464, and 926.
269 La. C.C.P 927(4).
272 See Lapides v. Bd. of Regents, 535 U.S. 613 (2002)(holding state waived sovereign immunity by removing suit to federal court); but see Meyers ex rel. Benzing v. Texas, 410 F.3d 236, 255 (5th Cir. 2005)(Texas waived its immunity from suit in federal court by removing, but may retain a separate immunity from liability).
3.10.11. State court inability to grant relief if agency certifies no funds are available

State codal provisions may preclude a state court from issuing an injunction or mandamus if the agency head certifies that it would cause a deficit.\(^{273}\) Especially if relief for the client would require relief for others as well, this may be an issue.

3.10.12. Precluding removal to federal court by avoiding federal claims

If judicial relief is sought primarily on state grounds, removal can usually be precluded by pleading the case as a straight state-law APA suit, naming the Department of Health and Hospitals or the “Office of the Secretary” of DHH as the defendant (since the decision is issued over that title). Under the Eleventh Amendment there should then be no federal court jurisdiction over either the claim or the defendant.\(^{274}\) The state could attempt to get around these limitations by attempting to join the federal Medicaid agency as a party, which would then as a matter of course attempt removal to federal court. There are open issues as to whether a third party defendant can remove the original action, to which it is not actually a party.

3.11.  FEDERAL COURT JURISDICTION BASED ON THE SUPREMACY CLAUSE MAY BE AVAILABLE IF A STATE POLICY IS IN CONFLICT WITH FEDERAL LAW.

While many Medicaid statutory provisions are no longer considered to convey “enforceable rights” needed for a §1983 action, there is often an alternative. The Fifth Circuit (and all Circuits that have ruled on the issue) have recognized federal jurisdiction over suits alleging that state or local laws or policies are preempted by federal laws they conflict with.\(^{275}\) Such a suit requires not just that the state Medicaid agency’s action on the individual case violates federal law, but also that there is a policy that violates federal law.

In these cases the “Supremacy clause”\(^{276}\) of the U.S. Constitution provides the cause of action. Such a suit is maintainable even where the state or local policy conflicts with a federal regulation.

The suit should clearly challenge the state or local policy as in conflict with, and preempted by, federal law. It would also be prudent to choose at the outset between a claim under §1983 and under the Supremacy clause, so that the Supremacy clause claim does not seem like an attempt to save a failing §1983 claim.

A Supremacy clause claim is injunctive only; damages cannot be claimed. In addition, it does not support a claim for attorney fees.\(^{277}\)

\(^{273}\) La. C.C.P. Art. 3601, 3862; La. R.S. 13:4062; Evergreen Presbyterian Ministries, Inc. v. Louisiana Dept. of Health and Hospitals, 2000-0852 (La.App. 1 Cir. 6/22/01), 808 So.2d 681 (denying plaintiff right to traverse the affidavit). The provisions presumably implement the state constitution’s balanced budget requirements. But if a state constitutional provision or federal requirement has been violated, application of the Legislature’s ban may be precluded by countervailing constitutional requirements.


\(^{275}\) Planned Parenthood of Houston and Southeast Tex. v. Sanchez, 403 F.3d 324, 331-35 & n. 46 (5th Cir. 2005)(Medicaid case finding Gonzaga inapplicable, because the claim was for preemption under the Supremacy clause rather than §1983, citing precedents from other Circuits).

\(^{276}\) Article VI, clause 2.

\(^{277}\) For an overview of the theory and limitations, see Saunders, “Preemption as an Alternative to Section 1983,” 38 Clearinghouse Review 705 (March-April, 2005).
Perhaps most importantly, because there has not been much litigation in the public assistance context over the past forty years, many issues that have been favorably resolved under § 1983 can be relitigated by defendants in the Supremacy clause context. A notable example is whether exhaustion of administrative remedies is required.

No position commanded a clear majority in a 2012 U.S. Supreme Court case concerning the viability of using the Supremacy clause to enforce Medicaid requirements.\footnote{Douglas v. Independent Living Center of Southern California, Inc. 132 S.Ct.1204 (2012).}

3.12. Complications if the federal agency is made a party to any court proceeding

In any court case, if the defendant starts claiming that the federal government must be brought into the suit, this would mean tremendous procedural complications. If not already in federal court, the federal agency will attempt to remove the suit to federal court and once removed by the federal agency, the client may lose access to retroactive relief and claims based on state law.\footnote{But if it is the state that files for (as opposed to having caused the removal) the removal, then by filing for removal, the state may have waived the Eleventh Amendment bars to relief that is retroactive or based on state law. See Lapides, cited seven footnotes above.} (As noted above, there are open issues as to whether a third party defendant can remove the original action, to which it is not actually a party.)

Unless joinder is absolutely necessary, it should be strenuously opposed, to avoid these complications and the attendant delays and work.\footnote{See Perkins, "Dispensing With The Dispensable: Rule 19 Motions in Medicaid Cases," 22 Clearinghouse Review 488-491 (October 1988).}

4. FINDING THE GOVERNING LAW

4.1. OVERVIEW

One of the most important mistakes in considering Medicaid issues is to rely on common sense as the basis for coming to a conclusion. The result will often be wrong.

Similarly, if questioning an agency decision, one of the most unlikely sources for finding out whether an agency decision is correct is to go to the agency personnel who made it.\footnote{Accord Goldberg v. Kelly, 397 U.S. 254, 269 (1970)("since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him").} Relying on agency personnel for an evaluation of its correctness would also be derelict, since, as noted above, they are usually unfamiliar with all or most federal requirements governing their actions.

4.2. THE EASY CASE: VIOLATION OF LOUISIANA'S MEDICAID ELIGIBILITY MANUAL STANDARDS

The easiest source for determining the state agency's policies on most eligibility matters is Louisiana’s Medicaid Eligibility Manual (MEM), which is now maintained on-line.\footnote{http://bhsfweb.dhh.la.gov/onlinemanualspublic/} As of 2012, the agency is keeping the Manual up to date; there have been times in the past when that has not been the case. Agency updates had often been issued and distributed outside of the Manual, through memoranda and emails.
The MEM deals mostly with eligibility for the Medicaid card (as opposed to dealing with what services one gets with the card). There are a few other lettered sections dealing with other issues.

When the Medicaid Eligibility Manual policy favors the client, relief should usually be available quickly from DHH agency staff, usually without the need for a fair hearing (by seeking relief from higher-ups in the supervisory chain) since the Medicaid Eligibility Manual is a source all agency staff are familiar with. Always bear in mind, however, the deadlines for seeking relief through court or a fair hearing.

Unfortunately, even when the Manual favors the client, it is not necessarily dispositive. For example, the agency may have issued instructions superseding the Manual’s through emails. But under federal law, governing policies must be accessible to the public at agency offices. Since this manual is the only format in which policy is available for public inspection at agency offices, there is a strong argument that its policies should trump those issued in less formal ways. In addition, much of the Manual parallels rules that have been formally promulgated under the state Administrative Procedure Act. If instructions supposedly superseding the Manual have not been promulgated, they should be legally trumped by any promulgated policies.

4.3. IS THE MEDICAID ELIGIBILITY MANUAL LEGALLY BINDING WHEN ADVERSE?

One can be tempted to think that if a policy set out in the Medicaid Eligibility Manual is adverse to the client, the case is without merit. But as set out below, relief may be available. In fact, challenges to the Manual’s policy provide the opportunity to provide relief for other similarly situated individuals, not just the client.

First, if inconsistent with federal statutes, federal regulations, or other state law, the Manual provisions are invalid. Thus the need to research beyond the Manual to the underlying federal law.

Secondly, provisions of the Manual are invalid if they determine substantive policy issues, but have not been properly promulgated.

The agency purported to promulgate the Manual under the state Administrative Procedure Act in 1995. This purports to give the August 1995 Manual the force of law.

Changes to the Manual since 1995 may not have that same validation, if not promulgated in the Louisiana Register. If not formally promulgated, they do not have the force of law to displace the 1995 provisions, unless required by federal law.

As to provisions in remaining in the Manual since 1995, the rule purported to adopt the Manual merely by reference, without notifying Register readers of what “Rule,” policy choices, and fiscal impacts it purported to promulgate. (Thus,

283 42 C.F.R. § 431.18(c & d).
284 If one identifies a particular email or memorandum, the local agency may be able to make those available. But this does not give the consumer or advocate the chance to review all policies and determine their applicability. The author does not believe that the availability of a policy after it has been specifically identified, fulfills the purposes and mandate of the accessibility requirements in § 431.18(c). And the emails and memoranda certainly are not provided to libraries and other entities, as set out in § 431.18(d).
advocates can raise questions about the validity of such generalized notice; but the agency should be estopped from disavowing the 1996 policies, when advocates seek to rely on them.\(^{288}\) The final rule did not even specify which version of the manual was ultimately promulgated: the policies in effect when the Rule was proposed (including those superseded by the time the Rule was issued) or the changed one in effect when the rule was finalized.

In addition, if the Medicaid Eligibility Manual policies are inconsistent with federal guidance (regardless of whether such guidance is set out in the federal regulations) or with the state plan, these federally recognized sources would trump the Manual.

4.4. AS TO ELIGIBILITY ISSUES FOR PERSONS WHO ARE AGED, BLIND, OR DISABLED: THE SOCIAL SECURITY ADMINISTRATION POMS

As will be explained more fully infra, in determining the eligibility of persons who are aged, blind, or disabled, the Medicaid program must adhere to the policies of the SSI program.\(^{289}\) Those policies, as set out in the “Program Operations Manual System” (POMS),\(^{290}\) have details and favorable interpretations on many issues that are either never reached in the Louisiana Medicaid Eligibility Manual, or are even inconsistent with those of the MEM. Based on the cited regulation, the policies set out in the POMS should displace those of the MEM.

Local office personnel are likely to be unfamiliar with this, but state-level staff in DHHS’s policy section are familiar with it and will authorize adherence to the POMS. Administrative Law Judges reviewing Medicaid appeals may not be familiar with this and may be unwilling to do the legal analysis to recognize that the POMS should bind.

4.5. FEDERAL STATUTES, REGULATIONS, AND OTHER REGULATORY MATERIALS

If the client’s case is not resolved favorably by provisions of Louisiana’s Medicaid Eligibility Manual or the POMS, the next most relevant standards to review are usually the federal ones, both because they are readily accessible, and because if favorable they will preempt any contrary state policies.

Advocate manuals

If they address the point, the best place to start for determining federal law would be the National Health Law Project’s *The Advocate’s Guide to the Medicaid Program*, June 2011 ed.,\(^{291}\) or because it is addressed specifically to Louisiana’s program, this Desk Manual section.

\(^{288}\) In promulgating regulations, the agency’s Notices of Intent continually refers to the MEM promulgation as authoritative. See e.g., 30 La.Reg. 1088 (May 20, 2004); 29 La.Reg. 1884 (Sept. 20, 2003). Courts have repeatedly held it arbitrary and capricious for an agency to disregard its own policies. *Washington-St. Tammany Elec. Co-op., Inc. v. Louisiana Public Service Com’n*, 1995-1932 p. 11, n. 3 (La. 4/8/96); 671 So.2d 908, 915 ("it is arbitrary and capricious for the Commission to fail to apply its own rules in an adjudication before it"); *Central Louisiana Electric Co. v. Louisiana Public Service Com’n*, 377 So.2d 1188, 1194 (La.1979)("If a public agency is not required to abide by its own rules and procedures, then the standard of review for ‘arbitrary and capricious’ action is without meaning."); *Carpenter v. Dept. of Health and Hospitals*, 2005-1904 p. 14 (La.App. 1 Cir. 9/20/06); 944 So.2d 604, 613 (agency rejection of document that met the terms of agency’s published policies presented an “unwarranted exercise of discretion”); *Doc’s Clinic v. Dept. of Health and Hospitals*, 2007-0408 p. 36-37 (La.App. 1 Cir. 11/2/07); 984 So.2d 711, 726 (agency issuance of decision through procedures that did not conform to its own policies found “arbitrary and capricious and based on improper procedure”).

\(^{289}\) 42 C.F.R. § 435.601(b).

\(^{290}\) [https://secure.ssa.gov/apps10/poms.nsf/partlist!OpenView](https://secure.ssa.gov/apps10/poms.nsf/partlist!OpenView)

\(^{291}\) [http://www.medicaidguide.org](http://www.medicaidguide.org) (paid subscription required).
Federal regulations

If not covered there, the federal Medicaid regulations are often the best starting place because they are well-organized and relatively clear. But they are terribly out of date and therefore cannot be relied on if adverse. As an example of how out of date they are, in 1989 Congress amended the statute to require that states cover all Medicaid services necessary to correct or ameliorate health conditions of recipients under age 21, even if they would normally be “optional” services. Yet the federal regulations governing this “EPSDT” benefit inaccurately say, based on prior law, that such coverage is optional. Regulations implementing the statutory change were proposed in 1993, but still have not been promulgated. Similarly, eligibility for Disabled Adult Children, enacted in 1986, is still not described in the mandatory categories. Other changes are also absent from the regulations.

Federal agency’s “State Medicaid Manual,” on the CMS website

The federal agency responsible for overseeing Medicaid is the “Centers for Medicare and Medicaid Services,” and is given the acronym CMS.

Even before regulations are published, it passes official interpretations to the states as part of its “State Medicaid Manual.” This is a unified body of federal guidance, organized much like the federal regulations, but more current and detailed. Its interpretations are treated as authoritative and binding on the states by the federal and state agencies. This Manual can be accessed on the internet.

Other interpretive guidance that can be searched on the CMS website.

Other CMS interpretive materials are available by searching the CMS website. Particularly important, when they apply are the “Letters to State Medicaid Directors” or “Letters to State Officials.” These letters are typically 2-4 pages in length and often contain guidance helpful to beneficiaries. The interpretation in such a letter has been the basis for the Supreme Court’s vacating a Second Circuit decision for reconsideration by the Circuit.

Other memoranda and transmittals, particularly from the Regional Offices to their respective states, may be available through the National Health Law Program or Public Record, Freedom of Information Act, or discovery requests.

Federal Medicaid statutes

Though obviously the most authoritative source, the Medicaid statutes are so long and disorganized that direct reference to them is usually imprac-
ticable without some lead-in as to where to look. A helpful source laying out most program categories, citing the relevant statutes, regulations and case law, is *The Advocate’s Guide to the Medicaid Program*. Officially published explanations of the regulations. If interpretation is needed regarding matters covered by the regulations, background is usually published in the Federal Register as part of the promulgation process: when the proposed rule is first announced, and then responses to comments and criticisms from the public and interest groups are published with the final rule making notice. These materials can often clarify the meaning of regulations or how they apply to certain controversial situations.

4.6. **OTHER STATE-LEVEL MATERIALS.**

Even if an action is permissible under federal law, the Louisiana agency must also comply with:

- how it has promised to administer the state’s program,
- state statutes that bind it, and
- regularity – treating each recipient consistently with how others are treated.

The State plan, which can be searched on the internet

The state plan reflects how the state has assured the federal Medicaid agency that its program will be run, particularly with respect to options it has chosen. The plan does not reach the level of detail at issue in most clients’ claims, but occasionally it assures that the agency will apply a particular, favorable standard, which has not been fully implemented by the state agency. Often, the plan, federal or state regulations, and state policies are not in accord with respect to what standard governs. The state plan is available by subscription to legal services offices. It can also be searched or browsed on the internet.

Challenging a failure to comply with the state plan may require state proceedings (fair hearing and judicial review) rather than a federal court suit. The author does not encourage challenges to state plan compliance that amount to a “race to the courthouse” – where one knows that the state will amend the state plan to incorporate a policy one is challenging, but simply has not done so yet. Courts have held that the state’s failure to submit a state plan amendment for CMS’s review and approval may invalidate a pro-
gram change. Material changes to a State’s Medicaid program effected without CMS approval are supposedly invalid. But there is no clear deadline for the state to submit the plan amendment. As to reductions, the federal regulation merely provides that CMS may make the plan amendment effective on a date requested by the state.

The absence of any requirement that changes be submitted and approved in advance makes it difficult to claim that a client’s rights have been violated if the state makes changes before submitting a plan amendment or getting its approval.

Administrative Regulations

The Medicaid agency announces most changes in federal “options” it is exercising and new federal mandates the state is implementing in the Louisiana Register, through rulemaking notices.

Unfortunately, there is no up-to-date codification of the promulgated provisions. Some, but not all promulgated regulations have been codified. Even as to those codified, one needs to check recent Louisiana Registers to be sure no amendments have been made, by either Rule or temporary Emergency Rule. (Emergency rules can be in effect for four months.) The Louisiana Register editions since 1997 can be searched on the internet, though closely focusing the searches is not easy. Also, each December Louisiana Register has a cumulative year-to-date index, but the index poorly labels the rules and notices issued.

In Westlaw, one can simultaneously search the codified rules and the Louisiana Registers by designating the database as “la-adc; la-adr”.

The rules promulgated often are not very detailed. The lack of published details could make even the announced program changes vulnerable, for failure to effectively invite public input on agency policy choices.

State statutes

Relevant statutory provisions are scattered within La.R.S. 46: 53-160.11. The legislature has left program details to the agency, so the statutes are rarely helpful or dispositive.

Internet materials describing the services Louisiana offers

For the most complete single listing of what services Medicaid currently covers for recipients, see the “Medicaid Services Chart,” developed to comply with Medicaid “informing” requirements dealt with in the Chisholm litigation. The Chart lists services, eligibility and access requirements, and even staff contact numbers.

The search function on DHH’s website can also often locate descriptions of particular services.

308 Oregon Association of Homes for the Aging, Inc. v. Oregon, 5 F.3d 1239 (9th Cir. 1993) (invalidating State’s temporary regulation reclassifying certain nursing home services into lower rate categories, because State failed to submit a plan amendment on this for federal approval).

309 42 C.F.R. § 430.20(b)(5).

310 See the discussion of §1983 and enforceable rights, supra.

311 <http://doa.louisiana.gov/osr/lac/50/50.doc>


313 <http://new.dhh.louisiana.gov/assets/docs/BayouHealth/Medicaid_Services_Chart2012.pdf>

Instructions to providers, especially about fairly new policies, are posted on a separate internet site by DHH’s contractor in charge of provider relations. When materials are on the site, this is a much faster way to obtain them than through calls or public record requests to the agency. The training manuals distributed at annual trainings for most types of providers are included on the site. These focus mostly on billing issues, but also address some more substantive issues, like the state agency’s general rules governing eligibility for or appropriateness of services.

Contracts governing Managed Care offerings

Both Bayou Health and the Louisiana Behavioral Health Partnership (sometimes called Magellan, CSoC, or Coordinated System of Care) are administered through private entities. In addition to being governed by state and federal regulations, the contract governing the offerings consist of a state “Request for Proposals” and Q&As clarifying the proposals, contracts with the contracting entities, as well as policy Guides, made binding by reference in the contracts, and later issued addenda to the Requests for Proposals. Most of these are currently accessible through the MakingMedicaidBetter.com website. The Request for Proposals include many more requirements than the regulation, such as the access standards. In addition, the contracting entities have their own materials, such as member handbooks, posted.

Public record requests

The state circulates other types of administrative memoranda and manuals to its staff, including but not limited to E-mail messages that sometimes go out state-wide.

Under state law, agencies must respond to requests for copies of public records within 5 days. Usually the offices in Baton Rouge return a response within weeks. Advocacy concerning the client’s situation can be included, since the request will usually be answered by someone with authority over the issue. An attorney from the agency’s Legal Unit is usually involved in developing any agency response.

For issues regarding the proper scope of a service, in addition to memoranda, there are “Medical Services Manual” sections for each type of Medicaid provider that can be requested. (The sections are not combined into a single Manual; many but perhaps not all are available at lam edicaid.com.) Like the annual training materials mentioned above, these focus mostly on billing issues, but also address some issues of eligibility for or appropriateness of the service.

4.7. CASE LAW

Case law can provide additional grounds for entitlement, not explicitly developed in the above regulatory materials. As one example, there is a strand of cases suggesting that recipients cannot be denied “medically necessary” services.

Case law can also help one identify pertinent statutory provisions.

315 http://www.lamedicaid.com. (Most of the site is publicly accessible; another part allows providers to access confidential recipient information.)

316 La.R.S. 44:1, 32, 33, 35.

317 See e.g., Hope Medical Group for Women v. Edwards, 63 F.3d 418, 421 (5th Cir. 1995), cert. denied, 517 U.S. 1104 (1996); but see Curtis v. Taylor, 625 F.2d 645, 651 (5th Cir. 1980)(noting that the limitation it found not to violate federal law would deny some recipients medically necessary treatment).
But case law is not a primary source to look to in establishing recipients’ rights. Because case law is sparse, one is almost always dealing with persuasive authority rather than binding authority. In addition, rights established only by case law are challengeable as not creating “enforceable” rights.  

4.8. DRAW NO ADVERSE CONCLUSIONS

Even if you find no authority, and therefore make an appropriate decision to decline a case, it is unwise to conclude or advise that the client has no entitlement. Because Medicaid involves the interplay of diverse policy strands, it can take just one additional perspective to turn a seemingly “dead” claim into a clear entitlement.

5. APPLYING FOR MEDICAID

The Medicaid agency has an obligation to assist applicants with its application process, and cannot deny applicants who fail to comply with its procedural requirements because of disabilities.  

5.1. THE AGENCY MUST ASSESS EVERY APPLICATION FOR ALL ELIGIBILITIES, EVEN IF IT IS A SHORTENED APPLICATION.

There are at least forty different categories under which a person can qualify for Medicaid in Louisiana. DHH has folded multiple categories within the categories set out in its Medicaid Eligibility Manual setting out categories: § H Eligibility Determinations. Unless the details of the “sub”categories have been committed to memory, one cannot just skim the titles of the major categories in considering whether a client is eligible.

Yet Medicaid is a single federal program, and any application entitles the applicant to assistance if eligible under any of the categories. It is not up to the client to identify which obscure category he or she should be considered for. As a result, if the client is eligible for any type of Medicaid, it is error to deny the application. The client’s application is for Medicaid, not just a particular category of Medicaid.

Similarly, even if an applicant’s Medicaid application starts through the health insurance “exchanges” that should be in place in 2014, the Medicaid agency cannot re-verify information already verified by the exchange unless there are clear problems with it or the insurance exchange had relied on an unverified self-attestation.

Also, as discussed in § 6.1 below, once certified the recipient remains eligible for Medicaid until ineligible under every category.

In order to reduce its and applicants’ paperwork, the Louisiana Medicaid agency now relies heavily on shortened applications aimed at collecting the information needed to assess particular eligibility categories that include the largest numbers of recipients (“Medicare Savings”, LaChip, LaMoms, etc.).

318 See Harris v. James, 127 F.3d 993 (11th Cir. 1997) (holding that even entitlements supported by the federal regulations are not enforceable unless there is a statute establishing the same requirement).

319 MEM. §§ G-810, 1100-1150.

320 See 42 C.F.R. §§ 435.404 (“The agency must allow an individual who would be eligible under more than one category to have his eligibility determined for the category he selects.”) While this may seem to support making the applicant choose the category he or she will be evaluated for, the applicant is only required to choose among categories for which he or she is eligible. Selecting among eligible categories has little significance in Louisiana, except in certain households with both children and SSI recipients it can affect how many household members get Medicaid or the amount of any “spend-down.”


322 The shortened applications and a general application can currently be found at http://new.dhh.louisiana.gov/index.cfm/page/220/ii/20.
DHH has stripped the questions from most of the short applications from which it could determine eligibility under other categories. It has also stopped using the screening form that had been required under a Blanchard v. Forrest consent agreement,\textsuperscript{323} to make sure all eligibilities were assessed. As a result, it is up to the workers to, before denying an application or certifying recipients for only a limited form of Medicaid, solicit and review the facts relevant to other possible eligibilities. This is fertile ground for staff errors.

The agency’s use of the “Medicare Savings” shortened application is particularly problematic. This is meant to get the Medicare-supplement coverage to elderly and disabled people receiving Social Security retirement or disability insurance and with incomes under 135% of poverty, not currently receiving SSI. Most in this group will not be eligible for other Medicaid. But any in the group who used to receive SSI should be assessed for “Pickle” and other coverages for former SSI recipients. \textsuperscript{324} Similarly, LaCHIP children may be living with parents whose eligibility should be assessed, etc.

Attorneys who find applicants who have not been assessed for all eligibilities should not simply have the client reapply, because if the local office did not assess all eligibilities for one client, it is likely not doing so for others, as well. Many of those applicants would not know to or make the effort to contact an attorney. Potential clients in this situation should be advised of the possibility of pursuing class-wide relief through law offices able to represent classes, to help others who are similarly situated.\textsuperscript{324}

5.2. INFANTS BORN TO A MEDICAID MOTHER NEED NOT APPLY

Infants born to a mother on Medicaid need not file an application. They are automatically eligible for Medicaid for a year,\textsuperscript{325} and the hospital is responsible for submitting information to the agency to prompt this certification.

5.3. SOME OTHER CHILDREN GET CERTIFIED WITHOUT APPLYING, AS WELL

Louisiana has opted to provide “Express Lane Eligibility” through the end of the year 2013.\textsuperscript{326} This is a federal option allowing the agency to certify children for Medicaid without requiring an application, based on information available through nine other federal programs. But if the information from the other agency appears to be adverse, the Medicaid agency cannot rely on it, but must instead develop its own information.\textsuperscript{327}

5.4. THE RIGHT TO APPLY FOR MEDICAID WITHOUT DELAY

In most parishes Medicaid applications are now taken by mail and by “Application Centers”—usually by employees of a hospital or clinic. Applications can also be submitted on-line.\textsuperscript{328} Some parishes no longer have Medicaid offices. (Those that do are still supposed to accept walk-in applicants, but some may not.)

\textsuperscript{323} \textit{Blanchard v. Forrest}, E.D.La. C.A. No. 93-3780, Rec. Doc. 124, Consent Judgment, entered September 30, 1996, ¶II.A. All consent judgments in the case have been sunsetted.

\textsuperscript{324} Louisiana Rules of Professional Conduct, Rules 1.2(a, b), 1.7(b)(2).

\textsuperscript{325} \textit{See} the discussion of Deemed Eligible Children in the eligibilities section of this Chapter.

\textsuperscript{326} 50 LA C Part III, § 1101-1107.

\textsuperscript{327} 50 LA C Part III, § 1103(D).

\textsuperscript{328} https://bhsfweb.dhh.louisiana.gov/OnlineServices/(X(1)S(mOsshayfprljpu3ioqmbbg2))/Welcome.aspx?AspxAutoDetectCookieSupport=1
The date that the application is “filed” is important both in establishing the date by which the agency should issue a decision on the application, and what months can be covered by the application.\textsuperscript{329}

The federal regulations require that the agency afford applicants “the opportunity to apply for Medicaid without delay.”\textsuperscript{330} If an applicant goes to the parish office and is sent elsewhere to apply or is given a list of places where they might possibly be able to apply (but depending on the schedules of the particular staff there who take applications), then an opportunity to apply without delay is not provided. The agency used to take steps to protect the application date of persons it sent elsewhere, but policy no longer includes this.\textsuperscript{331}

5.5. \textbf{MEDICAID ELIGIBILITY UNDER ALL CATEGORIES SHOULD BE EXPLORED AFTER ANY FITAP OR SSI APPLICATION IS FILED}

Louisiana automatically provides Medicaid to those certified for FITAP, the state’s federally funded cash assistance welfare program for families, and to almost all certified for SSI. As a result, the Medicaid agency is also obligated to review for Medicaid eligibility when applications for FITAP or SSI are denied.

Under federal instructions, the state must choose whether to make the FITAP application also a Medicaid application, and if those certified for cash assistance are given Medicaid, those denied must be fully checked for Medicaid eligibility under \textit{all} categories.\textsuperscript{332} Most households denied FITAP would have children eligible for Medicaid; some would also have adults who qualify.

The Medicaid agency’s procedures in conducting such a review should not unnecessarily require applicants to resubmit information and verification they already submitted with respect to the application.\textsuperscript{333}

5.6. \textbf{45 OR 90 DAYS FOR THE AGENCY TO REVIEW APPLICATIONS}

The Medicaid agency has 45 days from the date of application to rule on it, unless the Medicaid agency will have to assess whether the applicant is disabled (in which case 90 days are allowed) or the applicant needs more time to collect documents.\textsuperscript{334} The agency’s failure to meet the deadlines cannot be used as a reason to deny an application.\textsuperscript{335}

Destitute families with minor children may be able to get a faster Medicaid certification by applying for cash assistance under the state Department of Social Services “FITAP” program. Families and children certified for FITAP also get certified for Medicaid, and the Department of Social Services requires that FITAP applications be certified within \textbf{30} days from the date a signed application is received in the DSS local office.\textsuperscript{336}

\textsuperscript{329}See \textit{42 C.F.R.} §§ 435.911(a) and 435.914.

\textsuperscript{330}42 C.F.R. § 435.906.

\textsuperscript{331}See \textit{MEM} § G-700; 50 LA C Part III § 503 (application date is the date completed application is filed).


\textsuperscript{333}42 C.F.R. 435.948(a)(6); 42 C.F.R. 435.930(a). \textit{But see} 42 U.S.C. § 1320b-7(a)(4)(C)(“no State shall be required to use such information [exchanged with other agencies] to verify the eligibility of all recipients”).

\textsuperscript{334}45 C.F.R. § 435.911.

\textsuperscript{335}42 C.F.R. § 435.911(e)(2).

\textsuperscript{336}67 LA C Part III § 1205.
6. FREQUENT ISSUES IN MEDICAID TERMINATIONS

6.1. RECIPIENTS REMAIN ELIGIBLE UNTIL FOUND INELIGIBLE UNDER EVERY CATEGORY

When a person loses eligibility for the type of Medicaid he or she has been receiving, the agency is required to review whether he or she is eligible for Medicaid on any other basis before terminating Medicaid; they do not have to re-apply to have eligibility for other types of Medicaid reviewed.\(^{337}\) Medicaid eligibility on other grounds is particularly likely for children (through Continuous Eligibility, CHIP, or CHAMP) and for persons losing SSI, but can exist in almost any situation. The state’s categories are set out in § 2.1.4, supra.

Relying on the regulations and the requirements of procedural due process, courts have issued strong opinions reversing or enjoining agency terminations of assistance not preceded by such a redetermination.\(^{338}\)

6.2. CLIENT FAILURE TO RESPOND TO AGENCY PAPERWORK MAY BE IMMATERIAL IF AGENCY COULD HAVE OBTAINED THE NEEDED INFORMATION FROM ON-LINE DATABASES

Even if the agency mailed paperwork to the claimant’s last known address and it was not returned, the agency cannot rely on non-receipt of paperwork as a basis for not reviewing the information already available to it. The agency must review information accessible to it in computer databases from the food stamp, SSI, and other programs before deciding to terminate Medicaid. This is based on the due process case law just discussed, as well as Louisiana Medicaid Eligibility Manual policy.\(^{339}\)

6.3. IF CLIENT HAS MISSED THEIR 30 DAYS TO ADMINISTRATIVELY APPEAL, OTHER OPTIONS MAY BE AVAILABLE

A termination decision can be administratively reopened for agency error (such as failing to do a full redetermination) up to a year after it occurred. As discussed in § 3.1. regarding limitations periods, supra, suit under § 1983 can be available for at least that same period.

6.4. CHILDREN REMAIN ELIGIBLE FOR MEDICAID FOR A FULL YEAR FROM THE LAST TIME THEY WERE FOUND ELIGIBLE

Louisiana has opted to provide continued Medicaid eligibility for a twelve month period for all children except the Medically Needy. Once a child is determined eligible for Medicaid, they get 12 months of coverage, regardless of changes in circumstances, and regardless of which agency did the certification that found

\(^{337}\) 42 C.F.R. § 435.930(b); 42 C.F.R. §435.916(c); 42 C.F.R. 435.1003(b); see also 42 C.F.R. §435.916(f)(1) [effective Jan. 1, 2014]; Jackson v. Guissinger, 589 F.Supp. 1288, 1301 (W.D.La. 1984); MEM § K100, ¶4; State Medicaid Directors letter of April 7, 2000, <https://www.cms.gov/smdl/downloads/smd040700.pdf>.


them eligible (DHH, DCFS, or SSA). The only common exception is Medically Needy eligibility, which can be for three months or less. A few other exceptions are specified in the Medicaid Eligibility Manual.\textsuperscript{340}

6.5. **RIGHT TO CONTINUED MEDICAID SERVICES WHILE A REQUEST FOR A FAIR HEARING IS PENDING**

There are three ways to administratively maintain Medicaid services while appealing a termination of those services:

- **for persons who have lost or been denied SSI, by administratively appealing the SSI decision** within the Social Security Administration. (This is addressed in a separate subsection, a few pages below.)
- by filing a fair hearing request \textit{within the ten days} of the notice date on the decision;\textsuperscript{341}
- by filing a fair hearing request \textit{within the 30 day appeal period and before the agency’s proposed effective date for the adverse action}. Such an appeal needs to very noticeably seek the agency’s immediate attention to the fact that federal regulations require continued services in this circumstance. Agency notices terminating eligibility typically do so effective the next or second following calendar month. The federal regulations require that services be continued “If the recipient requests a hearing \textit{before the effective date of the action}.”\textsuperscript{342} Louisiana Medicaid has been advised by the federal Medicaid agency to respect the longer deadline,\textsuperscript{343} and recently issued a formal memorandum advising staff of the issue.\textsuperscript{344} Nonetheless, all or most notices incorrectly advise recipients that continued benefits are only available if an appeal is filed within 10 days of the adverse notice.

6.5.1. **Exceptions to the right to continued benefits pending appeal:**

Agency policy recognizes some exceptions to the right to continued benefits, discussed below. In some instances due process may require continued services when the regulations do not. But advocates of such a claim must carefully work within the governing Supreme Court cases.\textsuperscript{345}

6.5.1.1. **Absence of any factual dispute**

The agency can terminate services as of the hearing date (earlier than the decision on the appeal) if there is a determination, at the hearing and confirmed in writing by the ALJ, that the appeal involves only issues of policy, and no factual dispute.\textsuperscript{346} For this reason, \textit{if the client is receiving continued benefits, it is important to clearly establish any factual dispute between the appellant and the agency, even in appeals that primarily challenge policy.}

\textsuperscript{340} MEM § H-1910. Though the rule as set out in the LAC and Louisiana Register has different restrictions, the cited MEM section was amended to remove the restriction on applying this to SSI recipients, and should bind. In addition, the prior restriction against allowing this coverage to SSI recipients was probably illegal under § 504 and the Americans with Disabilities Act. Compare 34 La.Reg. 253 (Feb. 20, 1998); 50 LAC Part III § 2525.

\textsuperscript{341} C.F.R. 431.230(a).

\textsuperscript{342} C.F.R. § 431.230(a).

\textsuperscript{343} July 12, 1991 letter (designated ME 46-0) from Don Hearn, USDHHS, to Carolyn Maggio, Director Louisiana Bureau of Health Services Financing. (Copy available from the author.)

\textsuperscript{344} Medicaid Administrative Memorandum Number 2011-5.

\textsuperscript{345} See Atkins v. Parker, 472 U.S. 115 (1985)(general notice that food stamps were being reduced because of a change in law, without details, did not violate due process); American Manufacturers Mutual Insurance Co. v. Sullivan, 119 U.S. 977 (1999)(acknowledging claimant’s property interest in workers’ compensation payments, but denying that the property right extends to the disputed payments)(dicta).
6.5.1.2. Sole issue is a mass change required by law

Secondly, the state agency and CMS regulations do not respect a right to either a hearing or continued services during appeal with regard to “mass changes” caused by changes in state or federal law. \(^{347}\)

Again, the key is to establish that other issues exist beside the change in state or federal law, and to do so in a manner that will immediately obtain the agency’s attention. \(^{348}\) This can include a factual dispute as to whether the claimant is properly subject to the policies at issue, or as to whether procedural rights have been violated, such as the right to have eligibility reviewed under all Medicaid categories before a termination or reduction. The “mass change” regulation only exempts changes that are required by federal or state “law.” \(^{349}\) This is distinct from the standard in other Medicaid fair hearing regulations, speaking to actions required by “law or policy.” \(^{350}\)

6.5.1.3. Other exceptions in the regulations

The regulations do not require advance notice (which brings the right to continued benefits pending appeal) if:

- the agency confirms the recipient is dead or his or her whereabouts are unknown;
- the recipient is in an institution where Medicaid does not fund services, or is receiving Medicaid in another state;
- the agency has a clear written statement signed by the recipient that he or she no longer desires services or is knowingly giving information resulting in ineligibility;
- the treating physician prescribed the reduction in care;
- a nursing facility resident fails preadmission screening required under the Act;
- facts show probable fraud;
- specific exceptions for nursing facility residents (who otherwise must be notified 30 days before a discharge), usually involving the health or safety of other facility residents; or
- services have been prior authorized by one of the Bayou Health plans, and the period for which they been approved has ended. \(^{351}\)

6.5.1.4. Some denials of prior authorization services?

Louisiana Medicaid did not give continued benefits pending appeal with respect to prior approval services, even if the agency had previously approved similar services, until a court stipulation reached in 1996. The agency’s position had been that each prior approval period is discrete and independent, so a denial is like a denial of a new application, instead of being a termination of eligibility. However, the federal regulations exempt service reductions from advance notice

\(^{346}\) 42 C.F.R. §§ 431.230(a), 431.231(b).
\(^{347}\) 42 C.F.R. § 431.220(b).
\(^{348}\) The federal regulations recognize this in requiring that adverse action notices include, even “[i]n cases of an action based on a change in law, the circumstances under which a hearing will be granted.” 42 C.F.R. § 431.210(d)(2). See also CMS State Medicaid Directors Letter, April 22, 1997, <https://www.cms.gov/smdl/downloads/SMD042207.pdf>.
\(^{349}\) 42 C.F.R. § 431.220(b).
\(^{350}\) 42 C.F.R. §§ 431.222(b), 431.230(a)(1), 431.231(b), (c)(3).
and continued benefits only if the treating physician has prescribed a changed level of care or where the prior approval was from a Bayou Health plan.\(^{352}\)

Except with regard to requests for enteral formula, the agency can end the effect of the 1996 consent order by following certain procedures.\(^{353}\) If the agency does avail itself of the procedure, nothing in the agreement precludes relitigation of the issues by other affected Medicaid recipients.

### 6.6. RIGHT TO CONTINUED MEDICAID FOR PERSONS WHO ARE APPEALING SSI TERMINATIONS WITH SSA

Persons terminated from SSI and persons previously certified for Medicaid based on disability and appealing a denial of SSI are entitled to continued Medicaid benefits while their SSI administrative appeal is pending. If the recipient did not appeal the SSI termination during the fifteen day period for continuing their SSI, their later appeal, filed within the 65 day administrative appeal period, still entitles the SSI appellant to continued Medicaid benefits, even though they are no longer on SSI.\(^{354}\) No separate appeal with the Medicaid agency should be necessary.

#### 6.6.1. Louisiana prematurely cuts off Medicaid, during the SSI appeal period

Louisiana’s policy clearly differs from the federal policy in one respect. The federal instruction is that, because any timely appeal continues the Medicaid, state agencies should wait out Social Security’s sixty[five] day administrative appeal period before terminating Medicaid.\(^{355}\) Thus, Medicaid is continued both during a timely appeal and during the period in which the appeal can be filed.

In contrast, Louisiana’s instructions are to only continue the Medicaid if there is an SSI appeal already pending; there is no instruction to allow the client the sixty[five] day administrative appeal period to file their SSI appeal. While the worker should reopen the case if he or she becomes aware that an appeal has been filed, nothing requires that the worker re-check to see if an appeal has been lodged.

### 6.7. MEDICAID THAT WAS BASED ON DISABILITY SHOULD NOT BE TERMINATED WITHOUT APPLYING THE SSI “MEDICAL IMPROVEMENT” STANDARDS

Where Louisiana Medicaid is making its own determination of whether a recipient is disabled, it is required to apply SSI standards.\(^{356}\) To date the agency’s practice has been to simply collect medical records and run them by its Medical Eligibility Determinations Team for a determination of whether the client meets a Listing or grids out as disabled. But under the SSI regulations, a different eight-step sequential evaluation applies to termination decisions.\(^{357}\) Issues of whether the recipient is performing substantial gainful activity and how they grid should not usually reach unless there are signs, symptoms, and laboratory findings showing medical improvement in the recipient’s condition that is related to the ability to work.\(^{358}\)

\(^{352}\) 42 C.F.R. §§ 431.213(f), 438.420(b)(4); compare 45 C.F.R. 205.10(a)(4)(ii)(I) (1974) (which exempted from continued benefits requirements time-limited special allowances, but was not made part of the Medicaid regulations which were later separately codified).

\(^{353}\) See McField v. Forrest, Stipulation and Order Of Dismissal, E.D.La. No. 93-4094 (Oct. 22, 1996). As of this writing, the notices required to terminate the effect of the consent order have not been issued.

\(^{354}\) MEM § G-1610.12; CMS State Medicaid Manual § 3272.2 (general policy).

\(^{355}\) “Medicaid is continued during the 60-day period within which an SSA appeal may be filed.” CMS State Medicaid Manual § 3272.2.

\(^{356}\) 42 U.S.C. §§ 1396d(a)(vii), 1396a(v)(both explicitly requiring that the standards of 42 U.S.C. § 1382c be applied, which includes a separate standard for terminations).

\(^{357}\) 42 C.F.R. § 416.994(b)(5).

\(^{358}\) Id.; see also Romano v. Greenstein, CIVA. 12-469, 2012 WL 1745526 (E.D.La., May 16, 2012). The case is on appeal to the Fifth Circuit, not as to these issues but as to jurisdictional issues.
7. DUTY TO REPAY MEDICAID FOR CERTAIN SERVICES RECEIVED AFTER AGE 55

Federal law requires that states recover the costs for nursing facility, ICF/DD facility, and Home and Community Based services, and “related hospital and prescription drug services.” Federal law requires that states recover the costs for nursing facility, ICF/MR, and Waiver services paid for recipients age 55 or over, from the individual’s estate, even though the person was eligible when he or she received Medicaid.\(^{359}\)

States are allowed to also recover the costs of Medicaid paid to others over age 55, and are allowed to impose liens on homes of persons in long term care facilities, so as to collect if the property is sold.

The legislature has expressed a continuing state policy in favor of performing estate recovery to the minimum extent allowed by federal law, (1) allowing the inheritance of family homes, (2) exempting $15,000 of homestead or 1/2 the local parish’s median home value from seizure, (3) establishing “undue hardship” if the heir’s income is under 300% of the federal poverty guidelines, and (4) authorizing the state agency to grant waivers and compromises on good cause shown.\(^{360}\) The law is expressed as requiring this to the extent allowed by federal law. Since federal law does recognize an “undue hardship” exception, as to which no federal standards have been promulgated, advocates may be able, on a case by case basis, to protect most of what the state statute attempts to protect.

The agency’s implementing regulations can be read expansively, since they purport to protect heirs from “undue hardship.”\(^{361}\) The regulations also exempt property that is the heir’s only income-producing property.

Though federal law terms the claim on the estate a “lien,” Louisiana recognizes it as a “privilige.”\(^{362}\)

There is a form and procedure for administratively appealing an agency decision regarding estate recovery.\(^{363}\) If trying to clear the status of an estate where the agency has not yet issued a determination, contact DHH Legal staff.

8. WHAT MEDICAID COVERS

The state’s current services offerings are described in a variety of materials, discussed in § 4.6, above. The most complete single source of information is the “Medicaid Services Chart.”\(^{364}\) But even it is not entirely accurate as to what the state is offering, and as set out below, the current offerings may not fulfill the agency’s legal obligations.

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\(^{359}\) 42 U.S.C. § 1396p(b)(1)(B). According to the CMS State Medicaid Manual home and community based services mean only services under the New Opportunities Waiver (NOW), Community Choices or other waivers through which the Department offers expanded services to persons who would be eligible for care in a facility. In Louisiana, persons receiving waiver services usually have to go through a waiting list before receiving them. “Related hospital and prescription drug services” mean those received while receiving the other specified services. CMS State Medicaid Manual § 3810(A)(2).

\(^{360}\) La.R.S. 46:153.4

\(^{361}\) 50 LAC Part I, §§ 8101-8105.

\(^{362}\) La.R.S. 46:153.4(D); 50 LAC Part I, § 8103(E).

\(^{363}\) 50 LAC Part I, § 8105.

8.1. SOME MEDICAID CATEGORIES COVER LESS THAN THE FULL RANGE OF MEDICAID SERVICES.

The same services are currently covered, regardless of the category the recipient is in, except for certain categories. The categories with more limited coverage are: QMB, SLMB, QI, QDWI, the TB coverage, Take Charge, State Retirees’ category, Greater New Orleans Community Health Connection, and Medically Needy coverage. Eligibility through the “Home and Community Based Waivers” or PACE includes additional services, depending on the specific Waiver the client is receiving under.

The services covered for the Medically Needy are, for most recipients, indistinguishable from “full” Medicaid. But there are numerous restrictions (though some are illegal). 365

Persons who need to use the institutional deeming rules (not counting other family members’ income and resources) or the medically needy “spend-down” to qualify for the Louisiana Behavioral Health Partnership are not eligible for any Medicaid services other than the mental health services. 366

Louisiana currently covers the same services for pregnant women as other Medicaid recipients. Under federal law, it need only cover “pregnancy-related” services for pregnant women with incomes over the LIFC income levels. But states choosing to restrict services to higher income women must justify this to the federal Medicaid agency. 367

For Medically Needy and coverage for residents of facilities, the client will usually be responsible to cover the cost of large portions of their care.

8.2. MEDICAID AS PAYMENT IN FULL

For whatever services are covered, the provider’s accepting a client as a Medicaid client relieves the client of all liability for the services, except: waiver and residential facility services (as to which there may be a “patient liability”), copayments charged for prescriptions, and the medically needy “spend-down” (which is like a deductible). The federal regulation’s payment in full protection is a requirement on the state, which in turn passes the obligation through to providers through its contracts and enrollment agreements with providers. 368

8.2.1. Providers cannot pick and choose which services they bill to Medicaid.

While providers other than Hill-Burton hospitals can generally choose to refuse to take Medicaid as payment for services, there are a few restrictions. First, providers are prohibited from accepting Medicaid for particular services for a client (which they find remunerative) and then privately charging the same client in the same encounter for other services (as to which they do not like the Medicaid rates). 369

8.2.2. QMB providers cannot refuse to accept Medicaid.

Also, Medicare providers cannot refuse to accept a recipient’s “QMB” coverage. QMB is a form of Medicaid that covers a recipients’ Medicare premiums.

365 For the list of Louisiana’s Medically Needy service limitations, which has not been updated by the agency to reflect changes since, see 24 La.Reg. 935 (May 1998).
368 42 C.F.R. §§ 447.15; 447.20(a)(1)(latter regarding persons with other insurance coverage).
deductibles, and coinsurance. Medicare providers may want to refuse the QMB coverage because Medicaid pays substantially less than Medicare, and providers will generally be paid nothing towards the 20% coinsurance. But federal law requires they accept the patient’s QMB coverage. This leaves the recipient liable for none of the bill.

8.2.3. **The agency and providers cannot discriminate against recipients for having other medical coverage.**

Some clients have had difficulty receiving Medicaid services because they have other medical coverage in addition to Medicaid: either through Medicare or a private provider. For most services, Medicaid pays towards the balance after the other medical coverage pays. But because Medicaid’s rates are low, the provider may actually receive no additional payment, but lose the chance to bill the patient for deductibles or coinsurance. This causes some providers to refuse to provide services to affected recipients. But the Medicaid statute prohibits Medicaid providers from denying services to recipients because they have other medical coverage.

8.3. **GETTING COVERAGE FOR OLD BILLS**

8.3.1. **Eventual retroactive coverage for those certified for SSI.**

The Medicaid statute requires coverage for medical expenses incurred “in or after the third month before” an application was filed. An SSI certification can begin no earlier than the month after the SSI application was filed. Medicaid for the four months covered by the Medicaid application but not the SSI application (the month of SSI application plus the three months prior to that) is not barred; these months are routinely extended as “retroactive Medicaid,” and properly so, as benefits barred by the SSI program, but not by the Medicaid program. (All certified for SSI should be assessed for this retroactive coverage by the state Medicaid agency. If this does not happen, it may be because the applicant said they had no medical expenses in the last three months when they applied for SSI, or because of improper inaction by the local office.)

This Medicaid coverage remains called for even if the client is later notified by Social Security that on calculation of his or her Title II benefits, he or she is no longer eligible for retroactive SSI, and that the money originally paid as SSI will be treated as a Title II payment. Under the Medicaid program only income that is “available” can be counted. The Social Security income was not available during the retroactive period, and therefore cannot be unrealistically attributed back in time so as to deny Medicaid eligibility.

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371 42 U.S.C. § 1396a(a)(25)(D); see also 42 C.F.R. § 447.20(b).
372 42 U.S.C. 1396a(a)(34); 1396d(a).
373 42 U.S.C. 1382(c)(7).
374 42 C.F.R. 435.122 requires that the agency “must provide Medicaid to individuals who would be eligible for SSI or optional State supplements except for an eligibility requirement used in those programs that is specifically prohibited under title XIX.”
375 The SSI application’s question about whether there were medical expenses in the prior three months is no longer enough to properly relieve the state agency of reviewing for retroactive Medicaid eligibility. Medicaid should be available for any expenses in the month of application, and the retroactive SSI certification no longer covers that month.
376 51 Fed.Reg. 12326 (April 10, 1986; see also the correspondence available from Clearinghouse Review, under Accession No. 43,365.
378 42 U.S.C. 1396a(a)(17)(C) requires a “reasonable evaluation” of income and resources.
8.3.2. For services in the 3 months before the month in which an application is filed

An application covers not only the period while the application pends, but also the three calendar months before the application was filed, if the applicant was otherwise eligible during this period. This retroactive coverage is not available for QMBs. Thus, if an application was filed December 15, it readily covers bills from September 1 forward.

Medically needy spend-down coverage is limited to this same period, but bills before the date in which the spend-down was met do not get covered. (The spend-down is like a deductible amount.)

One reason the agency may fail to certify a recipient for this retroactive coverage period is that the Medicaid or SSI application may have asked if the applicant received medical services in the previous three months. If the applicant responded “No”, then the agency is not to explore whether the applicant would have been eligible in those months.

Another reason can be agency failure to pay attention to a positive response on the application. In addition, a client, particularly SSI applicants, may have no bills in that three month period, but may have incurred other bills since then and before having been certified.

8.3.3. Is there something earlier that should have been treated as an application?

If the client is seeking coverage for still earlier bills, one should look carefully for any other activity that should be regarded as the filing of an application. Remember, as discussed in the section of this Chapter regarding applications, that SSI and FITAP applications should be counted as Medicaid applications. Thus, if the above applicant who applied for Medicaid on December 15 had, before filing the Medicaid application, applied for and been denied SSI or FITAP in April, that other application could result in coverage for medical services received any day of the year, provided other eligibility requirements were met.

This is particularly helpful if the client ever filed for SSI, since SSI applications pend so long before resulting in a final decision. Medicaid is not immediately notified of the SSI application, and it may be that even once an SSI denial was issued, no worker at Medicaid took steps to develop whether the client should be certified for Medicaid despite the SSI denial. In these cases, there can be quite a bit of retroactive coverage available to the applicant, which the agency has never even reviewed. Even if the SSI application was coded to say the client had no bills in the three months before the application, if that is not the case, the agency might be persuaded to look past the response. The client has no incentive to deliberately lie about this. It should not be important to determine whether the error was by the client or by someone else assisting with the application (like agency staff).

379 42 U.S.C. § 1396a(a)(34); 42 C.F.R. § 435.914. The three month retroactive period is not available for QMB eligibility. SLMB and Qualified Individuals coverage only covers payment of Medicare premiums, and will not cover old bills at all.
380 42 U.S.C. 1396d(a), first parenthetical.
381 See 42 C.F.R. § 435.914(a)(1).
382 Compare MEM § H-710.
### 8.3.4. Was there an earlier, improper Medicaid termination?

Another way to extend coverage backwards is to look for a termination in the last year that can be reopened, possibly for failing to conduct an adequate redetermination (see § 6.1). One may be able to go back only one year in looking at improper terminations, because there agency policies probably allow re-opening of old improper actions for only a year. In parallel to this, a § 1983 suit regarding the improper termination has a one year statute of limitation. See § 3.10.2.

In contrast, the agency’s failure to fully develop an earlier application is more like a continuing tort: there has never been any final action taken or appealable notice issued.

### 8.3.5. Client has been retroactively certified for Social Security Disability over the SSI amount; does that preclude eligibility for retroactive Medicaid?

If the client had medical bills and applied for SSI and Social Security, but was certified for Social Security at a monthly amount that exceeds the SSI maximum, does that preclude him or her from getting retroactive coverage for the medical bills? It is likely in this situation that there are no other Medicaid categories the person would qualify under, with a higher income eligibility line. Nonetheless, there are two reasons why back-coverage for the bills should be available (assuming they were incurred within the three calendar months before the month of SSI/SS application). First, there is a five month waiting period for Social Security Title II Disability. No Title II check gets issued for these months. As a result, if the applicant is not over-resource and lacks other income, they should be certified for SSI for these first five months (unless they failed to respond to SSA requests to “complete” their SSI application). Except in the rare case where someone does not apply for SS/SSI until after the five months have passed, this five months of SSI eligibility may already be certified on the system, and as discussed above, Medicaid should then develop whether the eligibility should extend back still further. Second, and more fundamentally, though retroactively certified for SSDI, the applicant had no income at the time they incurred their medical bills. Medicaid law requires that state agencies take “into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient.”

The Title II income that was later retroactively awarded was not available to the applicant at the time they incurred the bills, and so does not make them over-income for those months.

### 8.3.6. Mechanics of getting the old bills paid, once certification has been issued

Once certified, the applicant can present their Medicaid card to providers to ask that they submit for bills already incurred during their eligibility period. In order to submit for payment, the providers are first required to refund to the Medicaid recipient any payments the recipient already made. Providers may not be willing to do this, based on the fact that Medicaid will pay them less or the risk that Medicaid will find some reason to deny payment (usually based on flaws in the paperwork the provider submits). Only nursing homes, Hill-Burton hospitals, and disproportionate share hospitals, are required to refund and submit. Pharmacies are often willing to refund and submit.

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Providers can submit for payment through normal means for up to a year after services were rendered. Where the services were received even further back, the payment may have to be mailed in to designated staff at the Bureau of Health Services Financing in Baton Rouge for “manual processing.”

The agency also notifies the applicant that they can submit to the agency for reimbursement for bills within their retroactive coverage period that they already paid. Usually the notice allows 30 days to submit. This may be on the certification notice or on a separate notice mailed with the certification notice. Because Medicaid will only reimburse the applicant at Medicaid rates, the recipient does best if he or she can get the provider to fully refund any money already paid; the provider can then submit for Medicaid’s payment.

States’ policies of reimbursing recipients at only the rate that Medicaid would have paid, and only for services received from Medicaid providers have been challenged, with mixed results. Cases in other states are similarly mixed with regard to recipients’ entitlement to full compensation. Some CMS guidance also says that reimbursement should be for what recipients actually paid.

Persons with applications pending should maintain their proof of payment of medical bills and should be ready to submit for repayment by Medicaid within 30 days of being certified for Medicaid if they cannot get their medical providers to refund their payments and submit to Medicaid. This is particularly important for SSI recipients, as their applications pend the longest.

Providers cannot refuse to take the Medicaid because private insurance has paid part of the claim and they want full payment from the recipient on the balance.

8.4. BAYOU HEALTH –“COORDINATED CARE” THROUGH PRIVATE COMPANIES FOR MEDICAID RECEPIENTS

In 2012, Louisiana transitioned about two-thirds of the state’s Medicaid recipients to have most of their care paid for and coordinated through private health plans. The plans are called coordinated care networks and the Louisiana implementation is called “Bayou Health.” There are two types of Bayou Health plans.

Recipients in the “shared” plans (“CCN-S”) can use any Medicaid providers, except that their primary care physician (PCP) must be in their particular plan. The plan also controls prior approval of most services that are subject to prior approval. (If it is not obvious from the client’s fact situation, a chart setting out which entity is responsible for which services is posted on probononet. Currently, the shared plans are those whose names do not begin with Louisiana or “Ameri”: Community Health Solutions of America, Inc., and UnitedHealthcare of Louisiana, Inc.)

384 MEM §G-2100.
385 Compare Riley v. Cerise, 19th JDC No. 514,830 , Judgment, December 16, 2004 (requiring Louisiana Medicaid reimburse the full amount the recipient paid); and Vessier v. Office of Secretary of Louisiana Dept. of Health and Hospitals, 2010-0847 (La.App. 1 Cir. 10/29/10) 2010 WL 4273100(affirming agency decision denying such relief). The rates issue was reserved without prejudice in the Blanchard class action requiring that DHH cover bills recipients have paid. “Stipulation of the Parties Regarding the Defendant’s Use of Medicaid Rates”, E.D.La. CA No. 93-3780, June 18, 1996; Order entered July 22, 1996.
388 42 U.S.C. § 1396a(a)(25)(D); see also 42 C.F.R. § 447.20(b).

(720)
Recipients in the “prepaid” plans (“CCN-P”) must receive all services except a few that are not yet wrapped into Bayou Health (see chart referenced above), through providers who are enrolled with their particular plan. In addition, prior approval for those services must be through the plan. Currently, the prepaid plans are those whose names begin with Louisiana or “Ameri”: Amerigroup Louisiana, Inc., LaCare, and Louisiana Healthcare Connections, Inc.

8.4.1 Plans must provide at least what other Medicaid offers, and can provide more

The Bayou Health plans are required to cover services of at least the amount, duration, and scope that Louisiana provides recipients not in Bayou Health. But the plans are also permitted to provide more. For example, Louisiana covers 12 physician visits per year. All the plans have announced that they will not apply this limit to visits with the Primary Care Physician. If you can convince a plan that providing an additional service would save it money in the long run, the plan can exceed Medicaid’s other service limitations.

8.4.2 Plans are obligated to provide recipients with increased access to services

The “Prepaid plans must make provision for obtaining urgent care 24 hours per day, 7 days per week.” Requirements are specified as to how fast patients must be seen, like 24 hours for “urgent care,” 72 hours for non-urgent sick care, etc. These plans are also subject to requirements as to proximity of providers, and must make any needed specialists available. (The plan can pay enhanced rates to draw particular providers in as needed.)

Even under the Shared plans, because the PCPs are to coordinate other care, they remain responsible to “strive to achieve ...Specialty care consultation within one... month of referral or as clinically indicated.”

8.4.3 Coordinating with other private insurance

Recipients who also have private insurance may have difficulties complying with the network and PCP requirements of both their Bayou Health plan and their other private insurance plan.

As to CCN-S, there will be little additional problem, since a late 2012 Emergency Rule provides that, “Members for whom a CCN is the secondary payor will not be assigned to a PCP by the CCN, unless the members request that the CCN do so.” Since the PCP is the only provider that CCN-S recipients have to use in-plan, this leaves only the problem of needing prior approval from both Bayou Health and the private plan. Coordinating these two prior approvals is not necessarily any worse than the problem outside of Bayou Health, of needing prior approval from both Medicaid and the private plan.

But for those in CCN-P, all medical providers for all services that are under Bayou Health must be in the recipient’s particular Bayou Health plan. This is likely to be most or all services that are covered under their private insurance plan. As a result, to get full coverage, they are limited to providers who happen to be in both their particular private plan and their Bayou Health plan.

389 http://www.probono.net/la/civillaw/library/attachment.224105
391 Prepaid, Request for Proposals, § 7.5.2.
392 Shared Request for Proposals, § 8.6.2.
8.5. **“ALL MEDICALLY NECESSARY” SERVICES FOR CHILDREN, AND SOMETIMES ADULTS**

The Supreme Court has stated “the benefit provided through Medicaid is a particular package of health care services, such as 14 days of inpatient coverage[,...]not adequate health care.” \(^{394}\) This was the basis for denying a §504 handicap-discrimination challenge to a uniform numerical limit on Medicaid services, in a 9-0 opinion written by Justice Marshall,

There are, however, limited contexts in which all medically necessary services must be provided, and other claims that can bring relief, even when there is no right to all medically necessary services. Therefore, situations in which all medically necessary services must be covered will be discussed, then other legal requirements that may require services beyond those the state is covering will be discussed.

**8.5.1. Right to all medically necessary services for recipients under age 21**

All Medicaid recipients under age 21 are eligible for “early and periodic screening, diagnosis, and treatment” (EPSDT) services. \(^{395}\) This requires that state Medicaid agencies provide:

Such... necessary health care, diagnostic services, treatment, and other measures described in [42 U.S.C. §1396d(a)] to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan. \(^{396}\)

This permits states to deny services to EPSDT eligibles on a rationale that they are “not a covered service” only if the services are not medically necessary or are not federally reimbursable at all (except under waivers) under the federal Medicaid statute. \(^{397}\) The breadth of services that are federally reimbursable is enormous, extending to “any...remedial services... recommended by a physician... for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level” \(^{398}\) and “any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice.”

In Louisiana the EPSDT provision has been used to obtain coverage for an organic “ketogenic” diet prescribed to reduce seizures, and to obtain “medical foods” (low in protein) for children with PKU, among many other services.

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\(^{394}\) Alexander v. Choate, 469 U.S. 287, 303 (1985)(emphasis added); see also Curtis v. Taylor, 625 F.2d 645, 651 (5th Cir. 1980)(noting that the limitation it found not to violate federal law would deny some recipients medically necessary treatment).  

\(^{395}\) Though the state’s service list for Medically Needy recipients does not recognize this, Medically Needy recipients under age 21 are entitled to all EPSDT services. Louisiana Medicaid state plan, Attachment 3.1.B., pp. 1, 2. See also 58 Fed. Reg. 51288, 51291 (1993)(once some EPSDT services are provided to a group, all must be). Compare 24 La. Reg. 277, 278 (Feb. 20, 1998)(listing among covered services for the medically needy “EPSDT (KidMed) screening services,” but nothing regarding exceeding normal service limits for recipients under age 21).  

\(^{396}\) 42 U.S.C. § 1396d(r)(15).  


\(^{398}\) 42 U.S.C. § 1396d(a)(6); but see Texas v. Health and Human Services, 61 F.3d 438 (5th Cir. 1995)(prohibiting payment for the board and care component of any facilities not specifically identified in the Medicaid statute).
In addition to the tools listed under “Finding the governing standards,” § 4, supra, to find out if a service is within those that can be funded, and therefore within those that must be covered for recipients under age 21, the state plans approved by the federal Medicaid agency can be searched.\footnote{Plaintiff’s reliance on these state plan materials to establish what is within the scope of the EPSDT mandate was upheld by the Fifth Circuit in S.D. v. Hood, 391 F.3d 581 (5th Cir. 2004).}

Nowhere is Louisiana’s implementation of the EPSDT entitlement limited to needs “discovered by the screening services.” (The federal statute does include this “discovered by” language. But federal guidance considers any encounter with a physician to qualify as a screen, so a condition needs only be confirmed by any physician.) Because there are sound reasons for such an unlimited implementation, and it has been chosen by the state, the state cannot selectively deny service requests on the basis that there has been no formal EPSDT screen.

To get coverage of services available only through EPSDT, recipients usually must have the potential provider of the service send in a request for prior approval of the service.

A Handbook describing most current EPSDT offerings and how to access them was drafted by the \textit{Chisholm} class counsel and has been maintained since by DHH.\footnote{EPSDT – Targeted Population Support Coordination Training/Handbook.}

\section*{8.5.2. Medically necessary home health services, which include medical equipment and supplies}

Home health services are a mandatory service, at least for persons who would qualify for nursing facility services.\footnote{42 U.S.C. § 1396a(a)(10)(D); 42 C.F.R. § 440.210 (referring to home health services under §440.70 as mandatory for the categorically needy), § 440.220(a)(3)(referring to home health services as mandatory for any medically needy recipients entitled to skilled nursing facility services, but note that since the statutory provision requires the services for all who qualify for any nursing facility services, its broader coverage governs).} The federal Medicaid agency has specified that state Medicaid agencies cannot limit the home health equipment and supplies to particular lists of items; the state agency must make individualized determinations of whether the recipient needs any requested supply.\footnote{403 Dear State Medicaid Director letter of September 4, 1998, <http://www.cms.gov/smdl/downloads/SMD090498.pdf>; 76 Fed. Reg. 41032, 41034 (7/12/2011)(reiterating the policy); Sleekis v. Thomas, 525 U.S. 1098 (1999)(Mem)(remanding in light of the HHS guidance); Esteban v. Cook 77 F.Supp.2d 1256, 1260 (S.D.Fla. 1999)(citing and enforcing the policy); T.L. v. Colorado Dept. of Health Care Policy and Financing, 42 P.3d 63, 67 (Colo.App.,2001)(reversing based on the policy).} All or almost all supplies provided by the state’s “durable medical equipment” providers are home health services.\footnote{404 See Hunter v. Chiles, 944 F.Supp. 914, 919 (S.D.Fla. 1996).}

\section*{8.5.3. Medically necessary outpatient hospital services}

Louisiana’s Medicaid state plan provides that all medically necessary outpatient hospital services other than emergency room visits, clinic services, and physical, occupational, and speech therapies are covered, “with no limit imposed other than the medical necessity for the service.”\footnote{405 State Plan, Attachment 3.1-A, Item 2a, p. 1}

\section*{8.5.4. Medically necessary services for pregnancy}

Federal law allows coverage for all services needed to deal with complications of pregnancy.\footnote{406 E.g., 42 C.F.R. 440.250(p).} The state’s plan provides that “There is no service limitation for medically necessary follow-up prenatal care once the pregnancy is medically

\footnote{400 Plaintiff’s reliance on these state plan materials to establish what is within the scope of the EPSDT mandate was upheld by the Fifth Circuit in S.D. v. Hood, 391 F.3d 581 (5th Cir. 2004).}
established." 407 The Fifth Circuit has ruled that states must provide all federally fundable and medically necessary services for terminating pregnancy; 408 the same should presumably apply for other pregnancy-related services.

8.6. REQUIREMENTS GOVERNING LIMITS PLACED ON OTHER SERVICES

8.6.1. Caveat — if the service is an optional service under federal law, & you win a contested case, would the state choose to drop the option?

Each state develops a “plan” describing the Medicaid services it will provide. The state must cover:

• inpatient hospital services (other than in an institution for mental diseases);
• outpatient hospital, certain rural health clinic, and federally qualified health clinic services;
• physician services (and dental services that could be performed by a physician);
• laboratory and Xray services;
• nursing facility services for those over 21;
• “EPSDT” services for children, discussed above;
• family planning services;
• nurse midwife services if legal under state law;
• certified pediatric nurse practitioner and family nurse practitioner services if legal under state law;
• free standing birth center services; and
• home health care services (for those eligible for skilled nursing services). 409

Any other services described in the federal statute (§1396d(a)) are optional, and need not be covered by the state or listed in its plan.

Even though the state must meet requirements discussed in sections below with regard to optional services, if it does not want to fund services won through advocacy, it can decide to withdraw funding entirely for the service in question. This is unlikely with regard to mainstay services, like prescription drug coverage, but quite possible with more incidental services. Thus, in Ledet v. Fischer, 410 the plaintiffs succeeded in tremendously expanding the number of recipients who were eligible for eyeglasses under Louisiana’s Medicaid program. But the result was that the state stopped funding eyeglasses entirely, except as required for EPSDT children.

8.6.2. Any service a state covers must be provided in a way that is sufficient to achieve the purpose of the service (for most recipients)

Federal regulations require that any service a state supplies must be “sufficient in amount, duration, and scope to reasonably achieve its purpose.” 411 Based on this language, the Fifth Circuit invalidated restrictions in Texas’ Medicaid den-

409 42 U.S.C. §§1396a(a)(10)(A), 1396d(a)(1-5),(17),(21),(28), 1396a(a)(10)(D); 42 C.F.R. 440.210. (The categorically needy are all recipients other than those certified as medically needy. In Louisiana, the medically needy receive a paper card good for up to three months.)
411 42 C.F.R. § 440.230(b).
tal program for children, finding that program restrictions to save funds failed to meet the services’ purpose of preventing tooth decay.\(^{412}\) However, it has also been held that any numerical, etc., limitations on a service need only be adequate to meet the needs of most of the state’s Medicaid recipients.\(^{413}\)

This “amount, duration, and scope” requirement can be used to challenge a totally unreasonable limit on the amount or type of a service the state will cover or the incompleteness of what the state provides, because it is not covering some crucial component.\(^{414}\) For example, the state used to cover insulin for diabetics, but not the syringes needed to inject it and testing strips and devices needed to monitor its provision. As to children, the restrictions were challenged based on the EPSDT requirements set out above. As a follow-up, the state agency was advised that a similar challenge would be brought on behalf of adults, under the amount, duration, and scope requirement, and because the failure to cover needed complements in effect assessed an illegally high “copay” on recipients. In response, the agency extended coverage to adults, as well.\(^{415}\)

The amount, duration, and scope regulation can be seen as based on either the statutory “comparability” requirement or the “reasonable standards” requirement, both discussed below.\(^{416}\)

**This requirement nonetheless falls short of covering all services medically necessary.** Under the Medicaid statute some courts have supplied a liberal interpretation that a state must supply any “medically necessary” services within a category the state covers.\(^{417}\) Similarly, there is some legislative history that treating physicians are to decide what care Medicaid recipients need.\(^{418}\) But there is no statutory basis for either requirement, which poses a problem under the *Wilder-Blessing-Gonzaga* line of cases previously discussed.

One regulation can be read to support a medical necessity doctrine.\(^{419}\) But the federal agency does not interpret it this way.\(^{420}\) In cases with strong equities, the medical necessity jurisprudence may give the Court room to exceed the strict

\(^{412}\) *Mitchell v. Johnston*, 701 F.2d 337 (5th Cir. 1983).

\(^{413}\) *Curtis v. Taylor*, 625 F.2d 645 (5th Cir. 1980) (upholding the denial of Medicaid funding for more than three non-emergency physician visits per month). But see “State Medicaid Directors” letter of September 4, 1998, posted at <http://www.cms.gov/smdl/downloads/SMD0909498.pdf> (holding the test inapplicable to home health services because it would undermine coverage).

\(^{414}\) See also *Atkins v. Rivera*, 477 U.S. 154, 157 (1986) (“AFDC and SSI assistance are intended to cover basic necessities, but not medical expenses. Thus, if a person in this category also incurs medical expenses during that month, payment of those expenses would consume funds required for basic necessities.”)

\(^{415}\) As to copays, see 42 U.S.C. § 1396o(a); 42 C.F.R. §§ 447.50-56.

\(^{416}\) The comparability requirement uses the same phrase: “amount, duration, or scope.” 42 U.S.C. 1396a(a)(10)(B)(i & ii).


The Fifth Circuit has given a conservative gloss to the medical necessity doctrine in dicta of *Rush v. Parham*, 625 F.2d 1150, 1155-58 & n. 9 (5th Cir. 1980), but leaves plaintiffs ground to work with, especially if prevailing medical opinion would favor the treatment in question. But see *Curtis v. Taylor*, 625 F.2d 645, 651 (5th Cir. 1980) (noting that the limitation it found not to violate federal law would deny some recipients medically necessary treatment).

\(^{418}\) S.Rep. No. 404, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. and Admin. News 1943, 1984 (“The Committee’s bill provides that the physician is to be the key figure in determining utilization of health services - and provides that it is a physician who is to decide upon admission to a hospital, order tests, drugs, and treatments, and determine the length of stay.”). But see *Rush v. Parham*, 625 F.2d 1150, 1154-55 (5th Cir. 1980) (state can define medical necessity and can review appropriateness of prescribing physician’s medical necessity determination).

\(^{419}\) 42 C.F.R. § 440.230(d).

\(^{420}\) See *Curtis v. Taylor*, 625 F.2d 645, 652-53 (5th Cir. 1980).
grounds of the amount, duration, and scope regulation. But since it has no explicit statutory basis, the claim is probably not enforceable using 42 U.S.C. 1983, which provides the right of action for most federal Medicaid claims.421

Also, the EPSDT statutory provisions, noted above concerning children’s services, create a two-edged sword for medical necessity arguments. If the state is approving for children services like those your adult client needs, then cross-examination as to why the service is being approved should be able to establish medical necessity. But the explicit requirement to cover all “necessary” services of the 42 U.S.C. § 1396d(r)(5) EPSDT provision seems superfluous if coverage of all medically necessary services is already required for all Medicaid recipients. Yet some courts have invalidated aged-based restrictions that limited particular services to recipients under age 21.422

8.6.3. The agency must not deny a service to persons who need it more than those for whom it covers the service (“comparability”)  

The Medicaid statute requires that Medicaid services available to any recipient who is receiving Medicaid under a category other than as ‘Medically Needy’ “not be less in amount, duration, or scope than” those provided any other recipient whether or not Medically Needy.423 This is termed a “comparability” requirement. It has been said to require that those other than the Medically Needy get “first call on the limited supply of public funds for medical assistance.”424 It does not apply to the partial coverages for Medicare recipients (the “Medicare Savings Programs: "QMB, SLMB, and QI.

The comparability requirement can be used as a means for broadening who gets services the state is already providing to some recipients. If the assistance a non-medically needy client seeks is adequately provided to any Medically Needy recipients whose need for the service is no greater, it can be proven that those Medically Needy recipients receive a greater scope of services than your client, violating comparability.

EPSDT, case management, Waiver, Medicare buy-in services and some other services expressly mandated for specific groups are exempted from the comparability requirement.425

The language cannot reasonably be interpreted to mean that just because the state chooses to provide a hearing aid to one recipient, it must provide one to every other Medicaid recipient in the state who is not medically needy. Instead, the mandate is necessarily understood as meaning that services shall be equal among those of equivalent medical need426 and as prohibiting the state from

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421 See Blessing v. Freestone, 520 U.S. 329, 342-46 (1997); Harris v. James, 127 F.3d 993 (11th Cir. 1997).
422 Fred C. v. Texas Health and Human Services Commission, 988 F.Supp. 1032, 1036 (W.D. Tex. 1997), aff’d 167 F.3d 537 (5th Cir. 1998); Esteban v. Cook, 77 F.Supp.2d 1256, 1261-62 (S.D.Fla. 1999); Hunter v. Chiles, 944 F.Supp. 914, 920 (S.D.Fla. 1996); Salgado v. Kirschnner, 179 Ariz. 301, 878 P.2d 659 (1994)(the Fifth Circuit has rejected the Salgado court’s exposition of the EPSDT requirements, which differs from the EPSDT explanation set out above in this Chapter, and finds no support in any other cases, administrative interpretations, or legislative history. S.D. ex rel. Dickson v. Hood, 391 F.3d 581, 593 (5th Cir. 2004).
424 White v. Beal, 555 F.2d 1146, 1151 (3d Cir. 1977)(invalidating the state’s allowing eyeglasses to one group and not another, since those in the favored group were not necessarily the ones with the greatest medical need for the glasses). See also Clark v. Exer, 758 F.Supp. 572, 580 (E.D. Cal. 1990)(reimbursement rate making services more available in some counties than other violated comparability); King by King v. Fallon, 776 F.Supp. 645, 653-54 (D.R.I. 1991), later opinion 801 F.Supp. 925, 934 (1992); Curtis v. Taylor, 625 F.2d 645, 652 (dicta).
imposing eligibility requirements for services that are not based on either degree of medical need or requirements set out in the statute.\textsuperscript{427} For example, the agency agreed in a consent order not to require tube-feeding as a condition for recipients to receive enteral formula (including Ensure), even though Medicare imposes such a requirement.\textsuperscript{428} The premise for the litigation was that some persons not tube-fed need the formula as much as persons who are tube fed.

Nor can the comparability provision be interpreted to merely forbid the Medically Needy from being treated more favorably, as a group, than others. (Under this view, as long as the same set of policies applies to all groups, services are comparable for all.) Existing Fifth Circuit case law is inconsistent with such a narrow reading.\textsuperscript{429}

8.6.4. For mandatory services, lines drawn must not arbitrarily discriminate by diagnosis or condition—for example, surgery cannot be denied because it is to deal with obesity

The Medicaid regulations provide that the state “may not arbitrarily deny or reduce the amount, duration, or scope of a required service...solely because of [an individual’s] diagnosis, type of illness, or condition.”\textsuperscript{430} A Louisiana federal court has reasonably found that this discrimination provision applies only to the “mandatory” services, listed above.\textsuperscript{431}

This regulation is probably based on either the statutory “comparability” requirement, discussed above, or the “reasonable standards” requirement, discussed below.\textsuperscript{432} Any relief an advocate seeks using this regulation might also be pursued directly as a comparability challenge.

This provision was violated by Louisiana’s past practice of severely restricting access to surgery when the diagnosis is obesity. Hospital services are a mandatory service, and obesity is a diagnosis or condition. As a result, surgery to correct this condition should be as available as other surgeries.

8.6.5. Standards must be “reasonable” and designed to achieve the goals of the program.

The Medicaid Act also requires that states have “reasonable standards...for determining eligibility for and the extent of medical assistance under the plan which...are consistent with the objectives of” the Medicaid Act.\textsuperscript{433} All the Circuits that have reviewed this provision since \textit{Gonzaga} have found it fails to create privately enforceable rights.\textsuperscript{434} Nonetheless, where there is a formal state policy that violates the provision, a Supremacy clause claim can currently be brought, to establish that it is preempted by the federal statute.\textsuperscript{435}

\begin{flushright}
\begin{small}
\textsuperscript{428}McField v. Forrest, Stipulation And Order Of Dismissal, E.D.La. No. 93-4094 “M” (5).
\textsuperscript{430}42 C.F.R. 440.230(c).
\textsuperscript{432}Alternatively, it might be based directly on the requirement in 42 U.S.C. § 1396a(a)(10)(A) that certain services are mandatory.
\textsuperscript{433}42 U.S.C. § 1396a(a)(17)(D).
\textsuperscript{434}Watson v. Weeks, 436 F.3d 1152, 1162-63(9th Cir. 2006); Lankford v. Sherman, 451 F.3d 496, 509 (8th Cir. 2006); Hobbs ex rel. Hobbs v. Zenderman, 579 F.3d 1171, 1182-83 (10th Cir. 2009).
\end{small}
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8.6.6. **ADA and §504 claims to extend services.**

The Americans with Disabilities Act prohibits discrimination in public services against persons on the basis of their having a disability, and requires reasonable accommodations be made on behalf of those with disabilities.\(^{436}\) The implementing regulations require that public services be made available in the most integrated setting appropriate.\(^{437}\) Section 504 of the 1974 Rehabilitation Act imposes similar requirements on recipients of federal funding, which includes both state Medicaid programs and possibly the providers participating in them.\(^{438}\)

This means that a recipient should not have to move into a medical institution to receive services that could be made available in the community.\(^{439}\) But it does not mean that the Medicaid program has to be reconfigured to meet all the needs of disabled persons or that it must always design its services packages around their needs.\(^{440}\)

8.7. **SPECIFIC SERVICE OFFERINGS:**

8.7.1. **Prescription drug coverage**

Covering prescription drugs is optional under the federal Medicaid statute.\(^{441}\) But once the state opts to cover drugs, the federal statute sets out extensive requirements regarding what drugs are covered.\(^{442}\)

8.7.1.1. **Medicare, not Medicaid covers drugs for recipients who also have Medicare**

Medicaid recipients who also have Medicare are not eligible for prescription coverage through Medicaid.\(^{443}\) They must receive their prescriptions through the Medicare Part D benefit. Medicaid will pay their monthly premium to get the Part D coverage.

Under Part D, a private carrier, which the recipient can choose during “open enrollment,” near the end of each calendar year, provides the prescription coverage. Which drugs are covered varies depending on which particular plan the recipient signs up with. Medicare has appeal procedures to seek approval for a drug not on the carrier’s list.

8.7.1.2. **No Medicare prescription copays for full benefit Medicaid recipients in facilities or on waivers**

Under the Affordable Care Act, “full benefit” Medicaid recipients have no Medicare prescription copays if they are in a facility or on a home and community based waiver.\(^{444}\) This just ends the co-pays, not the monthly premiums to get the Medicare Part D coverage. But Medicaid should be paying the Part D premiums. See § 8.1 for a list of the current categories not providing the full benefit. The most important ones are the “Medicare Savings” categories of QMB, SLMB, and QI. (But QMB’s may have full Medicaid along with their QMB coverage.)

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\(^{436}\) 42 U.S.C. § 12132.
\(^{437}\) 28 C.F.R. § 35.130(d); \(\)\(\)\(\)Olmstead v. L. C., 527 U.S. 581 (1999)\(\)\(\).
\(^{439}\) Olmstead v. L. C., 527 U.S. 581, 603 (1999). But the Court held that states have an affirmative defense to this ADA liability if they have in place a plan for successfully reducing their waiting lists for community services. Id. at 603-06.
\(^{440}\) See Alexander v. Choate, 469 U.S. 287, 303-04 (1985). This case and proposition is cited favorably in the legislative history to the Americans with Disabilities Act.

\(^{442}\) 42 U.S.C. § 1396r-8(d).
\(^{443}\) 42 U.S.C. § 1396u-5(d).
\(^{444}\) 42 C.F.R. § 423.782(a)(1)(ii).
8.7.1.3. Federal law requires access to nearly all FDA approved drugs

As set out below the state has issued a “formulary” of drugs it prefers to cover. Similarly, the Bayou Health “Prepaid” plans are authorized to issue their own formularies. Medicaid and the plans can place some hoops in front of recipients, which must be run to obtain other drugs. But ultimately, federal law requires coverage of almost all FDA approved drugs, even if they are not on Medicaid’s or a plan’s formulary.445

8.7.1.4. Getting prescriptions exceeding the monthly limit

Louisiana limits the number of prescriptions recipients can receive per month without meeting additional criteria. The number of prescriptions that can be obtained without meeting the additional restrictions has varied over time, generally going down.446 The current limit should be obtainable with the following search in the Louisiana Register database or site: Medicaid and “prescription limit.”447 If the most current result is an emergency rule, be sure to check subsequent Registers to confirm it has not been legislatively overridden.

The limit can be harsh for recipients with multiple chronic conditions, because Louisiana only allows recipients to get a month’s supply of a prescription at a time. This is true of all prescriptions, even though the prescription may be longstanding and for a chronic need.448

Some recipients are exempt from the limit

The prescription limit currently does not apply to:

- recipients under age 21 (because of the EPSDT mandate discussed above),
- pregnant women (the prescription should note they are pregnant), and
- residents in long-term care facilities (nursing facilities and ICF/DDs).449

The fact that it applies to persons in the community, but not those in nursing homes may make it subject to challenge under the Americans with Disabilities Act, because it allows fewer services to those in the most community-integrated setting.450 The availability in long term care facilities may also violate the comparability requirement, discussed above, since “medically needy” recipients in facilities can receive more prescriptions than “categorically needy” recipients outside facilities. But given the exceptions to the limit discussed below, any challenge may be difficult and unnecessary.

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445 42 U.S.C. § 1396r-8(d)(4)(C, D)(allowing exclusion of drugs if drug compendia show they have no significant, clinically meaningful benefit over approved drugs, there is a written explanation of the exclusion available to the public, and the drug can nonetheless be obtained through prior approval procedures). Certain classes of drugs like weight loss drugs are excluded from Medicaid coverage regardless. 42 U.S.C. § 1396r-8(d)(2, 3). And drugs can be excluded if the manufacturer will not enter rebate agreements with the federal government. 42 U.S.C. § 1396r-8(a)(1).


447 In Westlaw the database is la-adr. The Register site is http://doa.louisiana.gov/osr/reg/register.htm.

448 For persons with chronic conditions this one-month limit might be challenged as beyond the authorization of the federal statute, which permits limits on the maximum quantities per prescription “necessary to discourage waste… or abuse.” 42 U.S.C. § 1396r-8(d)(6).


450 Fisher v. Oklahoma Health Care Auth., 335 F.3d 1175 (10th Cir. 2003).
Even for those not exempt, prescriptions exceeding the limit can be filled

The limit can be exceeded unless a drug is prescribed for off-label use. The physician must endorse the prescription with the words “Medically necessary override” and gives a “valid ICD-9-CM diagnosis.” The pharmacist keys these in to a Medicaid-linked computer, which approves payment if the diagnosis code is an approved match for the drug. Even prescriptions which have been prior authorized by Medicaid (see below) must comply with these requirements.

Because obtaining the override depends on computer approval of the validity of the prescription, if a drug is prescribed for any off-label or non-standard use, the recipient should have the prescription filled before they turn in any prescriptions exceeding the monthly limit. Recipients needing prescriptions above the monthly limit should be advised to ask that the doctor put the information needed for an override on their prescriptions.

The needed information can be given by the prescriber even with a phoned-in prescription. So if originally omitted, phoning the information can get a problem resolved.

There is a secure web page on which Medicaid providers can determine what other drugs have been received by a recipient. But rarely would a prescribing professional check the internet during an appointment or consultation. Pharmacists might be more likely to access this information if they receive an “over-limit” message when trying to fill the prescription. But by that time, the information needed for an override will likely not have been provided, complicating the process.

If Medicaid denies the override, the recipient will get no notice of this besides being told by the pharmacist, and no appeal rights. But since problems may be easily correctable, the state has a possible argument that this may not deny due process. Presumably, if an error was made by the prescriber, the pharmacist, who gets the denial message by computer, can explain the problem to the recipient and/or prescriber. Unfortunately, if an error was made by the pharmacist in failing to properly key information in that could get the override, he or she may not understand the problem and may be unable to explain this to the recipient. Many recipients may not even be told that there is a way to exceed the prescription limit.

8.7.1.5. Even within the monthly prescription limit, some require special approval.

Louisiana Medicaid has also enacted what is known as a “preferred drug list” (PDL). This requires that Medicaid’s prior approval be obtained by the prescriber for certain prescription drugs. The drugs restricted are more expensive ones for

451 37 La.Reg. 3270 § 113(C) (Nov. 20, 2011).
452 This can be accessed by providers through http://www.lamedicaid.com.
453 Accord Mathews v. Eldridge, 424 U.S. 319, 346 (1976) (holding that pretermination hearings were unnecessary for disability recipients because they had “full access to the information relied on by the state agency,… the reasons underlying its tentative assessment, and … an opportunity to submit additional arguments and evidence”). But see Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980)(en banc)(due process denied by failure to give notice of available exemptions to garnishment); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 n.14 (1978)(word of mouth notice of availability of procedures denies due process)
454 Recipient’s dependence on provider actions makes access to their medical assistance dependent on a third party, somewhat akin to the situation challenged in Blanchard v. Forrest, 71 F.3d 1163 (5th Cir.), cert. denied 518 U.S. 1013 (1996)(finding “comparability” violation in recipients’ voluntary action by providers determining whether recipients obtain the benefit of Medicaid’s three month retroactive coverage provision). In most cases it would be much faster and easier to find another provider than to litigate this.
which alternatives are supposedly available.\textsuperscript{455} The intent is that most prescribers
will follow the path of least resistance, by prescribing drugs they do not have to
complete prior approval paperwork on. A minority of Justices on the U.S. Supreme
Court has stated that “curtailing the State’s Medicaid costs…would not provide
a sufficient basis for upholding the program if it severely curtailed Medicaid recip-
ients’ access to prescription drugs.”\textsuperscript{456} Early on, Department records show that
some pharmacists were telling recipients that these drugs were not covered by
Medicaid, instead of advising about the prior approval process.\textsuperscript{457}

Newly introduced drugs are not initially subject to the prior approval process.
State law requires that the Medicaid formulary include (exempting them from
prior approval) new drugs as soon as they are approved by the federal Food and
Drug Administration.\textsuperscript{458}

If prior approval is needed, the prescribing doctor must request it. If he or
she forgets, the pharmacist alone is unable to request and obtain the prior
approval. (The pharmacist could, though, by phone obtain a prescription for a
replacement drug that does not need prior approval.)

The prescribing doctor can seek prior approval by phone, fax, or mail,
explaining why the prescription drugs that do not need prior approval would not
be adequate.\textsuperscript{459} (This unit is not the one that does most of Medicaid’s other prior
approvals.) The unit is then to phone or fax their decision to the prescribing doctor
within 24 hours.\textsuperscript{460} The 24 hour delay imposes an additional barrier that may dis-
courage use of these drugs, since it complicates the process for the recipient to
get a prescription filled.

Pharmacists can release a 72 hour supply of a drug without prior approval if
they or the prescriber determine and endorse that it is an emergency situation.
(They might decline to do so for fear that Medicaid may not pay if it does not agree
it was an emergency.) Emergencies can occur not only because of the 24 hour
delay but also because Medicaid’s pharmacy prior approval unit is only open Mon-
day through Saturday, 8-6.\textsuperscript{461}

Prescribers may not realize that a drug they prescribe is on the restricted
list, especially since Louisiana continues to expand the list.

A list of restricted drugs, updated about every six months, is on the LaMed-
dicaid.com website.\textsuperscript{462}

Louisiana Medicaid revises the restricted drug list without doing rule making
under the state Administrative Procedures Act. This may make the list invalid
since changes to the Preferred Drug List clearly meet the Act’s definition of a
rule, and are therefore invalid unless promulgated through rulemaking.\textsuperscript{463} The
only relevant exception would be if a judge (or ALJ) felt that a drug’s restriction
is merely an “agency… requirement… regulating only the internal management
of the agency.”\textsuperscript{464}

\textsuperscript{455} Which drugs get off the restricted list may be affected by whether the manufacturer agrees to make give Medicaid a
higher rebate for the purchases than is otherwise required under federal law.
\textsuperscript{456} PHARMA v. Walsh, 538 U.S. 644, 664-65 (2003), citing 42 U.S.C. 1396a(a)(19)(requiring that Medicaid be provided in
a manner “consistent with… the best interests of the recipients”).
\textsuperscript{457} See e.g., <http://www.lamedicaid.com/RAMessages/2_18_03.htm>.
\textsuperscript{458} R.S. 46:153.3(D)(5)(c).
\textsuperscript{459} Id.; 42 U.S.C. § 1396r-8(d)(5); La.R.S. 46:153.3(B)(2); 50 LA C Part XXIX, § 107(C).
\textsuperscript{460} <http://www.lamedicaid.com/proweb1/Pharmacy/rxa/instructions.htm>.
\textsuperscript{461} <http://www.lamedicaid.com/proweb1/Pharmacy/rxa/instructions.htm>.
\textsuperscript{462} <http://www.lamedicaid.com/proweb1/Pharmacy/preferred_list.htm>
\textsuperscript{463} La.R.S. 49:954(A).
\textsuperscript{464} La.R.S. 49:951(6)(emphasis added).
The state statute prohibits requiring prior approval on certain HIV, Hepatitis C, and anti-psychotic medications that the recipient was already receiving for six months before they were placed on the restricted list.\footnote{La.R.S. 46:153.3(C).}

If approval is denied, written notice is faxed or mailed to the prescriber. The doctor can invoke a phone conference with the pharmacy prior approval staff. A new decision is issued to the doctor within 48 hours of the phone conference.\footnote{http://www.lamedicaid.com/provweb1/Pharmacy/rxpa/instructions.htm}

No notice of the denial is sent to the recipient, and no appeal rights (or even access to a conference call) is provided to the affected recipient. The lack of recipient notice and appeal rights may deny due process.

For prescriptions within a recipient’s retroactive eligibility period, the prior approval requirement does not apply. Instead, the pharmacist must submit for Medicaid payment by hard copy, instead of electronically.\footnote{<http://www.lamedicaid.com/provweb1/Pharmacy/rxpa/instructions.htm> .}

8.7.1.6. Exemptions from copayments for prescriptions

Most Louisiana Medicaid recipients are charged “copayments” of up to $3 per prescription. Pregnant women, children under age 18, and those applying their income towards the cost of facility care are exempt, as are prescriptions for family planning and sudden emergencies.\footnote{42 C.F.R. § 447.53(b).}

Payment is not required at the time of service if the recipient is unable to pay; the Department’s State Plan provides that inability to pay is established by the recipient’s statement.\footnote{State plan, Attachment 4.18-A, p. 2, http://bhsfweb.dhh.la.gov/onlinemanualspublic/stateplan/gpa/attachment 4.18.pdf.} But the recipient remains liable to pay the amount that was not collected.\footnote{42 C.F.R. § 447.15; State plan, Attachment 3.1-A, Item 12.a, p. 6, http://bhsfweb.dhh.la.gov/onlinemanualspublic/stateplan/services/attachment 3.1-a item 12a.pdf.} (Remember, though, that for recipients who also have Medicare, drug coverage is through that other program and Medicaid rules like this do not apply.)

8.7.1.7. Challenge to the multiple levels of administrative barriers, all trying to accomplish the same thing?

Consider the levels of administrative barriers that recipients must overcome in order to obtain needed prescription drugs, all of which are aimed at preventing excess Medicaid costs:

1. most recipients have been assigned to a primary care physician through “Bayou Health,” who controls prescriptions directly or indirectly by controlling what other providers the recipient is referred to;
2. Medicaid’s prior approval is required to fill prescriptions not on the state’s preferred drug list, including that drugs are not purchased from manufacturers unless they agree to give the state rebates, essentially regulating their pricing;\footnote{42 U.S.C. § 1396r-8 (a-c).}
3. only a one month supply is provided each time prescription is filled;
4. mechanized prior approval must be obtained for each prescription filled in excess of the monthly limit;

5. Drug use is subject to review by state computers, both at the point of sale and periodically over time, which can invoke counseling and other measures.\footnote{42 U.S.C. § 1396r-8(g)(2).}

7. Recipients whose drug use patterns indicate inappropriate use of drugs are placed under “lock-in”, allowing only one physician to prescribe for them.\footnote{See 42 C.F.R. § 431.54(e).}

8. Most recipients are obligated for a copayment when they have the prescription filled.

At some point, a recipient hurt by these hurdles may be able to make a claim that there are too many hurdles set up in the name of preventing over-use of services, and that arbitrary effects of one particular hurdle should be overridden by an ALJ or state court.\footnote{See 42 U.S.C. § 1396a(a)(19) ("eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients"—this provision has been held not privately enforceable by the Fifth Circuit, but was cited in the Supreme Court’s plurality opinion in \textit{PHARMA v. Walsh}; 42 U.S.C. § 1396a(a)(30)(A) (requiring “methods and procedures relating to the utilization of, and the payment for, care and services… to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and \textit{quality of care}… (emphasis added)”—this provision, too, has been held not privately enforceable by the Fifth Circuit. Therefore, recourse is most likely in state court.)}

8.7.1.8. Non-Medicaid avenues for prescription drug assistance

\textbf{Medicare “Extra Help” (formerly called the Low Income Subsidy)}

Medicare recipients with incomes or resources exceeding the Medicaid limits can receive subsidized coverage for their Medicare Part D, which covers prescription drugs. Applications are made through the Social Security Administration. To qualify one must:

- be a Medicare recipient;
- have \textit{countable} income under 150\% of poverty. This limit for March 2012, and for at least a year thereafter is $16,755 for an individual ($1,396.25 a month) or $22,695 for a married couple living together ($1,891.25 a month).\footnote{42 U.S.C.A. § 1395w-114(a)(3)(C)(i).} Most earnings and some money to support other family members who live with the recipient are excluded. SSI rules are followed, except that payments occasioned by the death of another person are exempted.\footnote{See \textit{e.g.} \texttt{http://www.pparxla.org}; \texttt{http://www.pparx.org}; \texttt{http://www.rxassist.org/patients/default.cfm}; \texttt{http://www.pfizerhelpfulanswers.com/pages/misc/Default.aspx}.}
- have resources under the program limit. The limit for March 2012, and for at least a year thereafter is 2012 $13,070 for an individual or $26,120 for a married couple. (These figures can get adjusted for inflation each Spring.)\footnote{Updated figures may be at \texttt{http://ssa.gov/pubs/10525.html#a0=0}.}

\textbf{Other prescription assistance programs}

Pharmaceutical manufacturers have been offering low income recipients various routes to obtain their drugs at discounts that are sometimes extraordinary. Some possible referral sources are in the footnote.\footnote{Updated figures may be at \texttt{http://ssa.gov/pubs/10525.html#a0=0}.}
8.7.2. Dental services for pregnant women

Louisiana covers a specific list of dental services for pregnant women. A referral from the doctor monitoring the pregnancy is required, on a specific Medicaid form. This service is not available for those whose only eligibility is through the Medically Needy eligibility, QMB, SLMB, and QI categories.

8.7.3. Prosthetic dentures

A state statute requires that the state’s Medicaid program cover prosthetic dentures needed by Medicaid recipients.

Federal law makes denture coverage a state option, for those with “full” Medicaid coverage and the Medically Needy. The federal government pays most of the cost of covered services.

There is no federal option to cover dental care for the “Medicare Savings” eligibilities (QMB, SLMB, QI-1, etc.) or for the Qualified Disabled Working Individual (QDWI) categories. For each of these, the services covered are determined by Medicare, not Medicaid rules.

Nonetheless, Louisiana’s Second Circuit has ruled that the language of the state statute is universal, and does not exclude individuals in these categories. DHH is not applying the decision to other individuals, so appeal to either the Division of Administrative Law or state court is probably needed to extend the decision to other clients.

8.7.4. Payment for private health insurance premiums

Most Medicaid recipients can have any Medicare premiums they owe paid by Medicaid. But coverage is also available in limited instances for private insurance premiums, if the agency determines that paying the private insurance premiums would be cost-effective for it: meaning that Medicaid would save more than the cost of the premiums.

If this determination is made, the agency reimburses for premiums the family pays. This may be to the recipient’s advantage: (1) if the covered recipient wants to stay out of Bayou Health (persons whose private health insurance premiums are covered by Medicaid are exempt); (2) if the insurance policy covers additional services; (3) if different doctors participate under the policy; or (4) if the family wants to maintain the policy for later when they may be off of Medicaid. The agency staff administering this benefit may be unreceptive, even to meritorious requests that will save the state money. They have in the past taken the position that if the family would pay the premiums even if Medicaid does not, it is not cost-effective for Medicaid to pay them. So the help of an advocate, as well as persistence, may be required in order to get enrolled.

Louisiana calls this coverage the Louisiana Health Insurance Premium Payment (LAHIPP) Program. Applications are processed through staff in Baton Rouge.

479 50 LAC Part XV, §§ 16101-161005.
480 50 LAC Part XV, § 16103.
481 See 42 C.F.R. § 435.404 (recipient eligible under more than one category can choose which category they are certified under).
482 La.R.S. 46:157
484 Law v. Department of Health & Hospitals, 43,417 (La.App. 2 Cir. 8/13/08), 989 So.2d 871.
485 50 LAC Part III, § 2311; see also 42 U.S.C. § 1396e.
8.7.5. Psychological services for children needing them:

The *Chisholm* case is a class action seeking all medically necessary services for Medicaid children on waiting lists for DHHS’s “Home and Community Based Services” waivers. The court found that the state’s failure to cover psychological services needed by class members with autism violated the EPSDT obligation to provide all coverable services necessary to correct or ameliorate their autism.\(^{486}\)

After the state failed to obtain enough treatment teams to provide the services under an agreed-upon plan, the Court ordered the state to cover psychologists’ services. Services are available to recipients under age 21 who meet certain functional criteria; there is no requirement that one be a class member.\(^{487}\)

If a Medicaid recipient under age 21 needs psychological services not covered under this and the state’s offerings, or if he or she does not meet the functional criteria to qualify for services, they would nonetheless be entitled to any services state Medicaid programs can cover, under the EPSDT mandate.\(^{488}\)

8.7.6. Louisiana Behavioral Health Partnership

Louisiana has currently restructured its Medicaid (and some non-Medicaid) mental health offerings under the “Louisiana Behavioral Health Partnership.”\(^{489}\) The goal is to take fuller advantage of Medicaid match, and enhance community services balancing the cost with reduced payments for psychiatric hospitalizations. One part of the initiative is the “Coordinated System of Care” (CSoC), bringing under one umbrella the behavioral health offerings for at risk youth of the justice, education, Medicaid and foster care systems. The contractor managing many aspects of the LBHP is Magellan. So the terms CSoC, Magellan, and LBHP are sometimes used interchangeably, though they are differing aspects of a single initiative.

Even Medicaid recipients must have specific authorization to receive services under the LBHP. (For individuals in the community over age 21 their individual income must be under 150% of poverty. For those under 21, their individual income must be under three times the maximum SSI payment, and they must be in one of the categories receiving “full” Medicaid.\(^{490}\) Authorization involves a finding as to the necessity of the services.

For recipients under age 21, all medically necessary services must be provided.\(^{491}\) In addition, specific services are available for recipients under age 22 who are in or at risk of out of home placement.\(^{492}\)

In addition to the added services under existing programs, a new eligibility group with full Medicaid coverage has been established for children and a new eligibility group has been established for adults with limited Medicaid coverage which will pay for behavioral health services only.\(^{493}\) Children meeting a level of care for placement in a nursing facility or psychiatric hospital and not eligible under other full Medicaid programs should be considered for the CSoC-SED HCBS


\(^{487}\) 50 LA C Part XV, § 7701.

\(^{488}\) 42 U.S.C. § 1396d(r)(5).

\(^{489}\) The state plan amendment implementing the change is found at http://bhsweb.dhh.la.gov/onlinemanualspublic/stateplan/services/attachment%203.1-g.pdf.

\(^{490}\) MEM § H-2710.

\(^{491}\) 42 U.S.C. §§ 1396d(a)(4)(B), 1396d(r)(5).

\(^{492}\) MEM NH-2710.

\(^{493}\) MEM NH-2720.
waiver. The waiver is for full Medicaid coverage with additional behavioral health services. Adults not otherwise eligible for full Medicaid qualify only if they meet the very low Medically Needy Income Levels.

At the time of publication, the LBHP is fairly new and experience under it is still developing.

8.7.7. “Personal care services” to assist with transferring, bathing, feeding, and similar care in the home:

“Personal care services” are to help with activities such as transferring, bathing, feeding, medication reminders, food preparation, and some housekeeping in the home that the recipient is unable to perform for him or herself. But there are eligibility criteria for the services, based on certain specific needs of the recipient. While a personal care services worker can do all of these activities if approved to be on site, a recipient does not qualify just because at least one of the forms of assistance is needed.

Under federal guidance, the services can involve “cueing” to remind persons with cognitive impairments of activities they need to perform. But these aspects are not central to the service, and so presumably need not be covered by the state, unless necessary for an EPSDT recipient (under the age of 21). Louisiana’s regulations do not recognize cueing as part of the service.

Louisiana conceives personal care services as dealing with the physical aspects of these activities, and requires that the recipient or their representative be able to direct the personal care worker. For recipients under age 14 and older children not able to direct their care, Louisiana Medicaid requires that another caretaker (usually a parent) be on-site at all times to direct the worker.

Louisiana’s personal care services offerings differ based on a recipient’s age. For recipients under age 21 service is through “EPSDT-PCS.” For recipients over age 21 service is through “LT-PCS.” LT stands for “Long Term.” The two offerings are very different, both as to eligibility standards and services.

State policy used to put a 4 hour a day limit on the services for EPSDT recipients. States cannot place numerical limits on services for EPSDT recipients. The limit has been rescinded, but few recipients receive over 4 hours a day.

One seeks EPSDT-PCS by finding a provider, which submits paperwork to the state, including a form from the recipient’s physician, seeking prior approval of the service.

The LT-PCS for non-EPSDT recipients currently allows up to 32 hours a week of the service. The Department has repeatedly been reducing the maximum over time, as a budget-saving measure. Reductions may have Americans with Dis-

495 MEM §§ H-2720.
497 See Rodriguez v. City of New York, 197 F.3d 611 (2d Cir.), cert. denied 531 U.S. 864 (1999). Rodriguez preceded the CMS “cueing” guidance. But in Rodriguez the Court left it to the state to define the purpose of a service, so the federal guidance might not affect the outcome. The author believes that the purpose of a service is a matter of federal law, not state discretion. See Ledet v. Fischer, 638 F.Supp. 1288, 1291 (M.D.La. 1986).
498 LAC, title 50, part XV, § 7305(A)(4).
499 Providers can be found through http://www.lamedicaid.com/provweb1/provider_demographics/provider_map.aspx
500 38 La.Reg. 329 (February 2012), § 12915(A).
abilities Act implications if they result in recipients having to move into a nursing facility to get the care they need.\textsuperscript{501}

In fact, Louisiana originally implemented LT-PCS as part of the settlement of a suit challenging the state’s not covering services in the community, which are covered in facilities.\textsuperscript{502}

One seeks LT-PCS by calling a corporation that has contracted to do evaluations of eligibility.\textsuperscript{503} (The state has created a bottlenecked system for arranging services. Federal law requires that services be available with reasonable promptness.\textsuperscript{504})

Louisiana’s eligibility criteria require that recipients over age 21:\textsuperscript{505}

A. qualify for nursing facility care under the Department’s standards and need assistance with at least one or more specified “activities of daily living,”

B. be age 65 or older or meet the SSI disability criteria, and

C. be in a nursing home, or likely to be placed in one within 120 days, or have a caregiver (usually a relative living with them) who is disabled or over age 70.

Currently, an obtuse scoring instrument is used to determine if the recipient meets the nursing facility level of care, and to determine the number of hours for which the applicant will be certified.

If others, denied services have a greater need for the service than some who are certified, they too should be entitled, because of Medicaid’s comparability requirement.\textsuperscript{506} In particular, persons with no caregiver living with them are at least as needy as those whose caregiver is disabled or over age 70, and so should not be denied coverage on that basis.

In challenging a denial of services, realize that only the "late loss ADLs" determine whether one qualifies for LT-PCS. (These are transferring, toileting, bed mobility, and eating). The answers to other questions on the survey instrument, establishing other needs, are not gateways to eligibility.

In challenging denials of services it can be important to obtain the current copy of the state’s surveying manual. There are at least two problems with the recorded responses. The first is that they are subjective. Terms like moderate difficulty are subjectively determined. The manual has examples that can be used to help question whether the number assigned in characterizing a response is correct. Secondly, the manual instructs workers to “drill down” behind certain responses, rather than accept statements at face value. This can help in both cross-examining the surveyor and in developing contrary client testimony. If used, include portions of the manual in the hearing record.

\textsuperscript{501} See e.g., \textit{Pitts v. Greenstein}, 2011 WL 1897552 (M.D. La., 5/18/2011); Med & Med Guide (CCH) P 303,789, 43 NDLR P 71 (denying state’s motion for summary judgment in suit alleging that reductions violate the ADA integration mandate).

\textsuperscript{502} \textit{Barthelemy v. Louisiana Department of Health and Hospitals}, E.D. La. Civil Action No. 00-1083.

\textsuperscript{503} Currently 1 (877) 456-1146.

\textsuperscript{504} 42 U.S.C. § 1396a(a)(8); 42 C.F.R. § 435.930(a).

\textsuperscript{505} 42 U.S.C. § 1396a(a)(10)(B), discussed elsewhere in this Chapter.

\textsuperscript{506} LA C Title 50, Part XV §§ 12901 et. seq., as amended through Louisiana Register notices.
In challenging terminations of services, obtain the reporting sheets (including narrative notes) from all past times the client’s eligibility was reviewed. Determine if any relevant “better” scores on the current report make sense. If the recipient has a chronic condition, the presence of improved scores should be a cause for further questions; it does not necessarily mean there has been improvement. 507

8.7.8. “Hospice care” for persons with terminal illnesses:

Louisiana Medicaid currently covers the optional service of hospice care. Instead of continuing aggressive (and all other) attempts to cure a condition that has been determined incurable, hospice offers comfort care, to make the end of life easier and more comfortable. Under Louisiana Medicaid, the services added include additional in-home nursing (for non-EPSDT recipients, Louisiana usually covers only 50 visits a year), case management, counseling, and additional and more promptly arranged personal care services. In essence, the hospice provider takes over most care for the recipient, which should mean that care is coordinated better with a special eye to the needs of one who is dying.

To receive hospice services, the recipient must elect to have them replace other “related” Medicaid services they would otherwise receive. 508 As a practical matter, Louisiana Medicaid seems to block payment for nearly all other Medicaid services during a hospice period. But recent federal guidance takes the term “related to” more seriously. Guidance states that even though hospice includes personal care services, the hospice provider is only responsible for the additional personal care services needed as a result of the hospice decision; previously approved personal care services should continue. 509

Another route for reducing the loss of other services concerns the election the recipient signs. It is likely to just mirror the statutory language. As a result, the electing recipient may have no idea that he or she is giving up eligibility for, as an example, home and community based waiver services. In addition, at the current time no clear notice goes out to the recipient and their other providers advising of this consequence. This raises due process issues.

Who is liable for the services is important because the hospice provider may not be paid enough to be able to replace a recipient’s prior services that need to continue. The hospice provider is compensated on a flat rate basis, with the rate set by which of several tiers is found to represent the recipient’s needed level of care.

Under the federal statute, in addition to being able to opt to cover hospice services, states can also cover an additional eligibility group: granting Medicaid to persons receiving hospice care, if their resources are under the SSI resource level and their income is under 300% of the maximum SSI federal benefit amount. 510 Louisiana has not chosen this option – it covers hospice as a service, but does not at this time recognize the additional eligibility group.

8.7.9. Programs for All-inclusive Care for the Elderly ("PACE")

If a PACE non-profit health center is available in their area, recipients over age 55 who meet the agency's standard to receive services of a nursing facility can elect to receive their care from a Program for All-inclusive Care for the Elderly.\textsuperscript{511} To qualify, the PACE services must be able to maintain the recipient's health and safety in the community. By enrolling, the PACE center takes over responsibility for meeting all of the recipient's medical needs, and the recipient can get neither Medicaid (nor Medicare, if eligible) services from other providers. All non-emergency services must be authorized by an interdisciplinary team. The PACE receives a flat payment from Medicaid and Medicare, depending on which the recipient is eligible for. (If the recipient does not have Medicaid, they will be liable for a prohibitive copayment. Not having Medicare is not a problem, though at least one PACE center has claimed otherwise.)

There are two advantages for recipients. The first is that receiving PACE can make one eligible for Medicaid though having income over the usual income limits. Those in PACE qualify for Medicaid if their income is under 300% of the federal SSI benefit amount (and have resources under the SSI resource limits). The second advantage is that the PACE can provide care exceeding the Medicaid state plan limitations, like social workers, physical, occupational and speech therapies, glasses, hearing aids, and additional and greater or more promptly arranged in-home care. The intent is that by providing additional services, recipients can continue to live in the community, instead of entering long term care facilities.

8.7.10. Obtaining services beyond normal limits, with Medicaid's prior approval

The agency can, in its discretion, make exceptions to numerical limits on some services. For example, the physicians’ section of the Medical Services Manual includes a form for requesting payment for visits beyond the normal limit of 12 physician visits per calendar year for recipients over age 21; requests are supposed to be approved if medically necessary.\textsuperscript{512} The Bayou Health plans will likely let recipients exceed this limit, at least for visits to the primary care physician, without any paperwork. They also have authority to waive any other limit and are likely to if convinced it would be cost-effective. (As to recipients who also have Medicare or private health insurance, the cost-effectiveness argument is hard to make. Medicaid pays almost nothing towards services when these other sources are also paying.)

Other services do not have fixed numerical limits, but recipients must obtain case-by-case prior approval of the services. One such service is hospital stays; the length of stay is approved in advance, subject to approved extensions. (No notice of the prior approval decision as to hospital stays or extensions on stays is sent to the affected recipient. Nor is the recipient given a right to appeal a denial. But providers are given certain rights.\textsuperscript{513} The lack of recipient notice and appeal rights may deny due process, as well as denying the statutory right to a fair hearing.\textsuperscript{514})

\textsuperscript{511} 30 La. Reg. 244 (Feb. 20, 2004); 42 C.F.R. Part 460; 42 U.S.C. § 1396u-4; 42 U.S.C. § 1396d(a)(26). As noted in the section above regarding personal care services, qualifying for a nursing facility level of care is largely dependent on needing assistance with some “late loss ADLs.”

\textsuperscript{512} State Plan, Attachment 3.1-A, Item 5, p. 1; the Department’s medical necessity criteria are at 50 LAC Part I, § 1101. A major problem with this provision is that the Department decides whether to pay after the visit, and many physicians will not schedule the visit without assurance of payment.

\textsuperscript{513} 50 LAC Part V, § 30120, especially at H.

\textsuperscript{514} 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.206(c)(2), 431.201.
For those outside of Bayou Health, requests for prior approval must be submitted by the medical provider that would be supplying the service (who must be enrolled as a Medicaid provider). Bayou Health procedures may vary plan to plan.

8.7.11. Prior approval denials outside of Bayou Health are usually because of documentation problems, and often do not mean the recipient is ineligible for the service.

There is not yet enough experience under Bayou Health to know how well its plans’ prior approval systems work.

Requests outside of Bayou Health occur both for recipients who are exempt from Bayou Health and for some “carved out” services, not covered by the Bayou Health processes. Once a prior authorization request with documentation from a physician is submitted, most denials are technical or hyper technical, regarding what documentation has been submitted or even what particular words or acronyms were included. Such procedural denials may violate Medicaid requirements, including requirements that medical assistance be furnished to all eligible individuals or be furnished “without any delay caused by the agency’s administrative procedures.”

Protections against such denials have been established for Medicaid recipients under age 21 who are on the waiting lists for the state’s waivers for persons with mental retardation or developmental disabilities. These are the class members in the Chisholm lawsuit. One of its consent agreements prohibits denying prior approvals for its class members unless:

- the service is beyond the scope of what EPSDT can cover (discussed in § 8.5.1, supra),
- the service is not medically necessary, or
- Medicaid notified the recipient of what specific additional information is needed and the type of provider from whom it can be obtained, but the recipient failed to notify Medicaid that an appointment had been set.

The relief in Chisholm is limited to those on the MR/DD waiting lists only because that was the scope of the class, not because there is some reason that other Medicaid recipients should not get the same protection. Both the hyper-technical grounds for denial, and the poor notices sent to non-Chisholm recipients continue to present ripe grounds for litigation.

8.7.12.  Prior approval requests for medical equipment, appliances and supplies are “automatically approved” if not ruled on within 25 days, and other procedural rights.

Under a class action consent decree the Department has entered, the decision granting or denying a non-emergency request for prior approval for any medical equipment, appliances, or supplies must be ruled on within 25 days of a recipient’s making the request, and emergency requests not ruled on within a working day

515 42 U.S.C. § 1396a(a)(8); 42 C.F.R. § 435.930(a).
516 Chisholm v. Jindal, No. 97-3274 (E.D. La. 1998), Stipulation and Order of Partial Dismissal, July 19, 2002, ¶20.d. Violations of these requirements should be brought to the attention of the class counsel.
are supposed to be automatically approved. All requests where a 25 day delay would jeopardize the health of the recipient are to be treated as emergency requests.

Denials for lack of sufficient information must identify the information needed to process the request. The medical reviewers are supposed to be accessible to recipients, medical professionals, and facility staff by telephone to discuss requests.

Many of the current prior approval procedures and mechanisms are not the ones incorporated in the consent order governing the Department’s prior approval procedures for equipment, appliances, and supplies. As a result, attorneys with clients with significant prior approval problems may want to examine the consent decree and consider contempt sanctions (including any actual damages caused the client) or may be able to use the violations of the decree as additional reason for the Department to focus more attention on the client’s request.

As discussed in the section of this Chapter regarding forum options, if a prior approval request is denied, in addition to other options, the recipient can request reconsideration within at least 30 days of the denial. This is not stated on the notices.

8.7.13. Few limitations on coverage for emergency room visits

Louisiana has traditionally limited (non-EPSDT) recipients to three emergency room visits a year. But federal laws prevent Medicaid managed care plans from regulating Bayou Health participants’ access to emergency rooms.

For those under Bayou Health or, as to mental health needs, those under the “Behavioral Health Partnership,” any ER visits should be covered that were appropriate under a “prudent layperson” standard, meaning that a prudent layperson would have thought that without immediate medical attention the health, bodily functions, or any bodily organ was in serious jeopardy.

If services not meeting that standard were performed, the recipient may be able to claim the protection of Medicaid’s “payment in full” provision against the provider. By accepting the recipient’s Medicaid card (evidenced by its swiping the card, not having stated and put in writing any other payment arrangement, and having submitted the bill to the agency or Bayou Health plan for approval or payment), the provider has committed to take Medicaid as the payment in full. Before Bayou Health, Louisiana’s state agency did not take this position. Instead, as to ER visits with a low level of care, if there was not an after-the-fact approval that the services met the prudent layperson standard, the agency’s position was that the client is liable for the bill.

518 Id., ¶ 3.
519 Id., ¶8.
520 Id., ¶11.
521 Legal Services attorneys are not barred from filing contempt charges on behalf of individual class members under a class action judgment. 45 CFR § 1617.2(b)(2) (“Initiating or participating in any class action does not include representation of an individual client seeking to withdraw from or opt out of a class or obtain the benefit of relief ordered by the court ...”).
526 42 C.F.R. § 447.15
It is very clear these federal protections intend to make sure no advance referral from the health plan is needed to obtain Emergency Room services.

8.7.14. For certain facility residents, a way to pay for needed services not usually covered by Medicaid

Medicaid recipients residing in medical facilities (nursing facilities, ICF/MRs, and hospitals) are required to contribute nearly all of their income towards payment for the facility services. 527

Federal law requires that in computing the amount of income a recipient must contribute to the facility, the recipient must also be allowed to deduct amounts they have incurred for medical expenses not covered by Medicaid. 528 The primary uses for this “incurred medical expense option” are to cover glasses, hearing aids, and some dental care Louisiana Medicaid does not cover.

The state issued a regulation to partially recognize the option. 529 But CMS denied approval of the state’s proposed details, so the state has never issued instructions to implement the regulation. The state has implemented the option more liberally than set out in the regulation, which is appropriate, since any limitations have to be approved by CMS. 530

To use the option, one must be paying part of one’s income to the facility and be on Medicaid. Those whose only income is SSI and those on Medicare skilled care do not pay part of their income to the facility, and so cannot use this option.

The recipient’s liability to the facility is reduced by the amount incurred for the services not covered by Medicaid; Medicaid’s contribution to the facility is increased by that same amount. If the item costs more than one month of the patient’s share of the cost of care the reduction can be extended for more than one month.

The state’s position is that the incurred medical expense option does not apply for ICF/MR residents, because the state requires that the facilities cover all care needed by their residents.

8.7.15. Dealing with inability to find a willing provider

8.7.15.1. Children under age 21

Recipients under age 21 can call the “KidMed” line (1-877-455-9955) for assistance finding providers that take Medicaid. DHH “Program Operations” (1-225-342-5774) will provide additional assistance where there are not already providers. 531

8.7.15.2. The Bayou Health plans

The three “prepaid” Bayou Health plans have an obligation to provide access to any type of specialist the recipient needs, as to services covered by the state plan; this includes contracting with the needed provider, even if not already in the plan. 532 The other two Bayou Health plans have an obligation to help a recipient find services, but no obligation as to services for which there are no providers that accept Medicaid.

527 42 C.F.R. § 435.725(a).
528 42 U.S.C. § 1396a(r)(1)(A)(ii); 42 C.F.R. § 435.725(c)(4); Louisiana eligibility policies recognize the health insurance deduction set out at (i), but not the provision for other medical costs in (ii) of each of these provisions.
530 CMS State Medicaid Manual, §3703.8.
531 http://new.dhh.louisiana.gov/index.cfm/page/322
532 50 LAC Part I, § 3505(B). The prepaid plans are Louisiana Healthcare Connections, LaCare, and Amerigroup.
Recipients not excluded from Bayou Health may be able to prevail on Medicaid (through Maximus, its “enrollment broker”) to move them into one of the pre-paid plans, if not already in one. The regulations allow recipients to switch plans for “good cause,” including inability to obtain a service. Ideally, one would ask to switch to a plan that has the needed provider. Plans’ lists of providers are supposed to be accessible on the internet. If one cannot identify a plan already having the needed provider, one would seek to switch to one of the three “prepaid” plans, which has the obligation to enlist needed providers.

8.7.15.3. Limited requirements that providers must accept Medicaid.

In general, providers are not required to accept Medicaid as a payment source from their patients. There are some notable exceptions. One exception is that hospitals built with Hill-Burton funds are required to accept Medicaid as a payment source. This includes most hospitals built or added to in the 1950s and 1960s. These hospitals' obligations to give free services (“uncompensated care”) have been cleared by now. But the obligation to accept Medicaid patients continues indefinitely.

Finally, laws prohibiting discrimination may preclude a provider from refusing to take Medicaid patients. (This may include prohibiting a provider from refusing to take new Medicaid patients, even if he or she will take Medicaid from those who used to be its private-pay or privately insured patients.) Such refusals may result in disparate effects against minorities, and so run afoul of regulations implementing Title VI of the federal civil rights acts. (Since this aspect of Title VI is no longer considered privately enforceable, relief from such disparate impact claims may have to either be negotiated or sought through an administrative filing with the HHS federal civil rights office.)

Apart from these obligations, providers are not generally required to take Medicaid.

8.7.15.4. Litigation

The state Medicaid agency, however, is required to fund a system that provides reasonable access to providers. The statutory provision has been found not to convey a private right of action. It remains an open question whether it might preempt a state law that prevents adequate access, such as a rate reduction. The federal Medicaid agency is in the process of promulgating regulations to give more teeth to the statutory requirement. They seek to have the states develop proof on factual issues related to the adequacy of access. These regulations are unlikely to give a private right of action (except possibly a federal Administrative Procedure Act suit against the federal Medicaid agency for approving a bad plan amendment).

533 50 LAC Part I, § 3103(D). Recipients receiving Medicare is the largest group of persons not eligible to participate in Bayou Health.
534 50 LAC Part I, §§ 3105(C), 3107 (A)(C),(D), especially (D)(i)(iii).
535 42 C.F.R. § 124.603(c).
536 For those who do not have access to an older list of these hospitals, from when uncompensated care obligations were being claimed for patients, the National Health Law Project has a list of all Hill-Burton hospitals.
In dealing with budget crunches, the state has repeatedly cut payment levels to providers (though often increasing them later, in response to problems this causes). Recipients who cannot access a service because not enough providers are willing to participate in the program may have legal claims under the just-discussed provisions to the effect that the state or federal agency is violating its adequate access obligations. Evidencing such a suit is usually a massive undertaking, because there is usually no violation in a single provider’s unwillingness to take Medicaid; instead a systemic lack of access needs to be evidenced. Perhaps some instances may be so stark that they can be more readily evidenced.

In the *Chisholm* suit, to deal with shortages of home health providers and personal care services (PCS) providers, a court enforceable stipulation requires that if a class member cannot find a home health or Personal Care Services provider who will promptly provide services by calling the KidMed line, DHH will find a provider for them. The class members are Medicaid recipients under age 21 on the waiting lists for the state’s MR/DD waivers. Class counsel have been able to resolve all identified problems.

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CHAPTER 11

SOCIAL SECURITY DISABILITY PRACTICE IN LOUISIANA

Elena Perez
About The Author

Elena Perez is a Staff Attorney for the Employment and Public Benefits Unit at Southeast Louisiana Legal Services. She has served as a staff attorney since July 2009. She has been the Chair for the Louisiana Public Benefits Taskforce since October 2010. Elena Perez has handled numerous Social Security cases at every level of the administrative process and in federal district court. She has a law degree from Loyola University New Orleans School of Law and two B.S. degrees in Human & Organizational Development and Child Development from Vanderbilt University. Ms. Perez has also practiced in the areas of family, successions, and criminal law.

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1. INTRODUCTION

The Social Security Administration operates two disability benefits programs. Supplemental Security Income (SSI), also known as Title XVI, provides income to individuals that are indigent that have either attained age 65, are blind, or disabled. Social Security Disability Insurance Benefits (SSDI), also known as Title II, provides income to blind or disabled people who have contributed sufficient payroll taxes to the Social Security system.

2. THE DIFFERENCE BETWEEN SSI AND SSDI

The rules governing how to prove disability are the same for Supplemental Security Income (SSI) and for Social Security Disability Insurance (SSDI). However, the financial eligibility rules and the amount of benefits paid are quite different.

An SSI recipient must be indigent, meeting certain income and resource rules. SSI benefits are paid to the claimant only, and not to his dependents. SSI has no earnings requirement. In contrast, in order to receive SSDI, a person must have worked long enough, paid sufficient payroll taxes to SSA and recently enough under Social Security to qualify for SSDI. If a person qualifies for SSDI, SSDI is available regardless of indigence. There are certain circumstances where a spouse, widow/widower, children and even parents of a person who has paid sufficient payroll taxes may also be able to get benefits from a worker that has become disabled under SSDI rules, has retired or is deceased, see infra Section 2.2.

The source of payment for SSI benefits is general revenue. The SSI monthly benefit is a standard federal benefit rate set by Congress ($710 for a disabled individual in 2013, with the possibility of an annual cost-of-living increase). The benefit amount paid may be decreased if the recipient has other income and based on his or her living arrangement. The amount of SSI is also affected by the income of a spouse (even if the spouse's income is SSI).

The SSDI source of payment is the Social Security trust fund. The monthly benefit amount is based on how much the worker earned. An individual may receive both SSDI and SSI benefits if the SSDI benefits are low enough and SSI eligibility requirements are met. When an individual receives both kinds of benefits the total amount paid is the SSI benefit amount plus $20 ($730 for a disabled individual in 2013).

2.1 SUPPLEMENTAL SECURITY INCOME

2.1.1 SSI Eligibility Rules

There are five types of eligibility criteria for SSI: 1) categorical, 2) residence, 3) citizenship and alien status, 4) resources, and 5) income. Categorical eligibility means being elderly (age 65 or older), blind or disabled. The residence eligibility requirement is that the applicant must be a resident of the United States for at least 30 days. The citizenship/alienage, resource, and income requirements will be addressed immediately below. Establishing disability as a means to meet the categorical requirement will be addressed extensively further in Section 4.

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1 Blind is defined as having corrected vision no better than 20/200 or limited to a visual field of 20 degrees in the better eye.
3 The laws and regulations governing SSDI can be found at 42 U.S.C. § 401 et seq.; 20 C.F.R. Part 404.
5 See 20 C.F.R. §416.1603 for definition of U.S. resident and acceptable types of evidence to prove residency. 20 C.F.R. §416.1610 provides acceptable types of evidence to prove citizenship or a national of the United States.
2.1.2 Citizenship and Alien Status Eligibility Rules

The citizenship and alien status eligibility rules state that an SSI recipient must be a citizen or national of the United States or have an alien status required by the Social Security Act. Not everyone with a green card is eligible for SSI under current law. SS eligibility rules restricting certain immigrants is complex. It is strongly suggested that if you have a client that is an immigrant you should review POMS SI 00501.400, POMS SI 00502.1007 and 20 C.F.R. § 416.1610-416.1618. The following is a general list of people who may be eligible for SSI:

1. Citizens or nationals of the United States8; or
2. an alien lawfully admitted for permanent residence in the United States9; or
3. an alien permanently residing in the United States under one of the qualified alien categories found in POMS SI 00502.100; or
   1. an alien who meets the definition of a resident of the U.S. under color of law (PRUCOL) prior to August 22, 1996 and who was considered to have been receiving SSI benefits on August 22, 1996 as stated in SI 00502.150B.1; or
   2. an alien who is lawfully present in the U.S. pursuant to Section 203(a)(7) (Refugees-conditional entry) if admitted prior to April 1, 1980; or
   3. an alien who is paroled under Section 212(d)(5) of the Immigration and Nationality Act and the parole status is issued for a minimum of one year (see POMS SI 00501.450),10 or
   4. an Iraqi or Afghan Special Immigrant admitted to the U.S. pursuant to Section 101(a)(a)(27) of the INA; or
   5. an alien who is deemed to be a Victim of Severe Forms of Human Trafficking who was admitted to the U.S. pursuant to Section 101 (a)(15)(T) of the INA.11

2.1.3 SSI Resource Rules

2.1.3.1 Definition of resource:

A “resource” is defined as cash or other liquid assets or any other personal property or real property that the SSI recipient (or his spouse) has an ownership interest in and right or power to convert to cash for his/her support and maintenance.12 If an individual lacks legal capacity to convert the resource, it nonetheless counts unless litigation would be needed to access its value.13

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8 Since August 22, 1996 most aliens must meet 2 requirements to be eligible for SSI: 1) must be a qualified alien and 2) meet an exception condition for qualified aliens. Aliens who are lawfully admitted for permanent residence must have worked long enough to have at least a total of 40 qualifying quarters of work. An alien may get the 40 quarters of work himself. Also, work done by a spouse or parent (during the periods the alien was under 18) may count toward the 40 quarters of work for getting SSI only. Any quarter of work acquired after December 31, 1996 cannot be counted if the alien or the worker received certain types of federally funded assistance during that quarter. See, POMS SI 00502.135, POMS SI 00502.100A(2) and POMS SI 00502.100A(3).

9 The POMS are Social Security's manual of policies used by its District Office staff. The URL for accessing them is given in § VII., Resources For The Advocate, infra.

10 Id.
11 See, POMS SI 00501.400. 
13 POMS SI 01120.010 B.2, C.2., C.7.b.
2.1.3.2 Resource limit:

The SSI resource limit is $2000 in countable resources for an individual and $3000 for an eligible couple. If the applicant’s resources exceed the limit, he is ineligible for SSI. He may become eligible again the month after he “spends down” his resources below the limit. Similarly, if a couple’s combined resources exceed the resource limit they would be ineligible for SSI until the month after resources fall below the limit.

2.1.3.3 Valuation:

Resources are valued at the amount of the SSI recipient’s equity in the property. Equity value is the amount at which the item reasonably can be expected to sell for on the open market in the recipient’s geographic area, minus any encumbrances such as liens.

2.1.3.4 When resources are counted:

Resource determinations are based on the resources the individual has at the first moment of the first day of the month for which eligibility is being determined. This means that if an individual receives something of value, it may be considered “income” in the month in which he receives it. If he still has any of it at the first minute of the first day of the following month, whatever he has will then be considered a “resource.” If an individual is over-resource at the beginning of the month, the individual cannot be eligible for the rest of the month.

2.1.3.5 Excluded resources:

Examples of excluded resources are: 1) the home in which the applicant lives, and the land on which it sits (including all adjoining land he owns); 2) one car used to provide necessary transportation, regardless of value; 3) personal or household goods valued at under $2000 for an individual or $3000 for a couple; 4) life insurance policies owned by an individual (or spouse) with face values under $1500; 5) burial funds of $1500 or less, if the person does not own any excluded life insurance. (These funds must be identified as burial funds and kept in a separate bank account. Interest which accumulates in the account is not treated as income, even if it results in the account exceeding $1500. If funds are mixed with resources not intended for burial the exclusion is lost. If any portion of the funds are withdrawn and used for other purposes, SSA will reduce monthly benefits by a penalty equal to the amount of the withdrawal, unless burial account exclusion was immaterial to the recipient’s eligibility; 6) burial plots or spaces; 7) property used in a trade or business which is essential to the means of self-support for the applicant. Social Security excludes as essential to self-support up to $6000 of an individual’s equity in income-producing property if it produces a net annual income to the individual of at least 6% of the excluded equity. If the individual’s equity is greater than $6000 SSA counts only the amount that exceeds $6000 toward

14 20 C.F.R. § 416.1205.
15 20 C.F.R. § 416.1201(c)(2).
16 20 C.F.R. § 416.1207.
17 20 C.F.R. § 416.1207(d).
19 20 C.F.R. § 416.1212.
20 20 C.F.R. § 416.1231.
the allowable resource limit if the net annual income requirement of 6% is met on the excluded equity. If the activity produces less than a 6% return due to circumstances beyond the individual's control, and there is a reasonable expectation that the individual's activity will again produce a 6% return, the property is also excluded. If the individual owns more than one piece of property and each produces income, each is looked at to see if the 6% rule is met and then the amounts of the individual's equity in all of those properties producing 6% are totaled to see if the total equity is $6000 or less. The equity in those properties that do not meet the 6% rule is counted towards the allowable resource limit.24 8) non-business property essential for an individual's self-support that is used to produce goods or services essential to daily activities (e.g., land for a vegetable garden used solely to feed the applicant's household). Property is excluded if the individual's equity in the property does not exceed $600025; 9) proceeds from the sale of a home, if they are used within 3 months to purchase another residence26; 10) retroactive lump sum payments of SSI or SSDI for nine months after receipt27; 11) resources deemed necessary to fulfill a Plan to Achieve Self Support (PASS)28; 12) assistance received under the Disaster Relief and Emergency Assistance Act or other assistance provided under a Federal statute because of a catastrophe which is declared to be a major disaster by the President of the United States or comparable assistance received from a State or local government, or from a disaster assistance organization. Interest earned on the assistance is also excluded from resources.29

2.1.3.6 Disposing of Resources:

An individual who disposes of assets for less than fair market value for the purpose of establishing SSI within a 36-month “look back” period will be penalized.30 The penalty is SSI ineligibility for the number of months equal to the uncompensated value of the transferred asset, divided by the maximum monthly SSI benefit payable to that individual after considering his living arrangement. The penalty begins to run at the date of the transfer (unless the person is already under another penalty).

The penalty does not apply in the following circumstances:

1) The individual or her spouse disposed of the resource exclusively for a purpose other than qualifying for SSI; or

2) The individual or her spouse intended to sell the asset for fair market value; or

3) All transferred assets have been returned to the individual; or

4) Denial of eligibility would result in undue hardship. The POMS limits “undue hardship” to situations where the individual would be deprived of food or shelter and where his total available funds (income and liquid resources) are less than the federal benefit rate.

2420 C.F.R. § 416.1222.
2520 C.F.R. § 416.1224.
2620 C.F.R. § 416.1212.
2720 C.F.R. § 416.1233.
2920 C.F.R. § 416.1237.
3042 USCA § 1382b(c) and POMS SI 01150.110.
The SSA presumes that the following transfers are for fair market value:

1) spending of cash for goods or services unless there is evidence to the contrary;

2) property sold on the open market even if it is sold for less than the asking price;

3) contract for the prepayment of food and shelter if amount is reasonable;

4) contract for prepayment of services if current market value is corroborated.

2.1.4 SSI Income Rules

2.1.4.1 Basic eligibility rule:

To calculate eligibility for SSI, first add all income received during the current month. Second, subtract all applicable income exclusions ($20 a month exclusion is always available) and income deductions to arrive at countable monthly income. Finally, deduct countable monthly income from the maximum benefit amount ($710 for an individual in 2013). If the amount is $0 or less, the individual is not income-eligible. However, if income drops enough in subsequent months, eligibility may be reestablished.

2.1.4.2 Calculating the amount of benefits due:

Payment amount determinations are based on the monthly income received two months prior to the payment month. During the first two months of entitlement, special rules apply. To calculate the amount of benefits due, follow the procedures described above for determining income eligibility: 1) add all income received during the month in question; 2) subtract all applicable income exclusions and deductions to arrive at countable income; 3) deduct countable income from the maximum benefit amount. The final number is the amount of the monthly benefit.

Money received is counted as income in the month in which it is received. If it is retained, it is then counted as a resource in the following month. If an individual is ineligible for SSI during one month because of high income, she may reestablish income eligibility the following month if her income drops sufficiently.

2.1.4.3 Definition of income:

Income is anything the applicant receives in cash or in-kind that could be used directly, or by converting it to cash, to meet basic needs for food and shelter. Almost all income is countable, but there are certain deductions and exclusions. Countable income reduces the amount of the SSI check. If income is large enough, the individual is not entitled to SSI.

2.1.4.4 Countable income

1) Earned income as well as unearned income (alimony, child support, SSDI, veterans benefits, long-term disability benefits, workers compensation, etc.).

2) In-kind income (the value of food, clothing or shelter received for free or at a reduced charge counts as income). SSA does not count the value of free or low-cost services which are not food, clothing or shelter (e.g., medical supplies, entertainment). HUD housing subsidies do not count as income.

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31 20 C.F.R. § 416.1102.
32 20 C.F.R. § 416.1104.
33 20 C.F.R. § 416.1110-12.
35 20 C.F.R. § 416.1121.

(751)
3) Garnished income (even though it is not available to the SSI applicant);\textsuperscript{36}  
4) Overpayment recovery (money withheld to recover an overpayment of SSDI or other benefits is counted as if the individual actually received it).\textsuperscript{37}

2.1.4.5 In-Kind Income Rules:  
SSA has two rules for valuing the in-kind support and maintenance:

1) \textbf{1/3 reduction rule}\textsuperscript{38}: When an SSI recipient lives in the household of another person who provides both food and shelter without charge; the SSI grant is reduced by one-third of the federal benefit rate.\textsuperscript{39} This reduction does not apply, however, to food or shelter that a homeless claimant receives from a soup kitchen or homeless shelter.\textsuperscript{40} This rule also does not apply to children who are fed and sheltered by their parents.\textsuperscript{41}

2) \textbf{Presumed maximum value}: This rule applies when an SSI recipient lives in the household of another person and that person provides a) free food but not free shelter, or b) free shelter but not free food, or c) food and/or shelter at a rate which is less than a pro rata share of the expenses. In such cases, the SSI grant is reduced by the actual value of the in-kind income or by 1/3 the federal benefit rate plus $20 (the presumed maximum value), whichever is less.\textsuperscript{42} This rule does not apply if every member of the household receives public income maintenance benefits.\textsuperscript{43}

\textbf{PRACTICE TIP}: It may be advantageous for your client to enter into a loan agreement while her application is pending, if she is living in another person’s home and is unable to pay her pro rata share of room and board. If your client can show that she is expected to pay retroactive rent once her benefits are received, SSA will not consider this advance as income. If the latter arrangement applies, encourage your client to put the agreement in writing and to report it to SSA. Loans of in-kind maintenance or support are not considered income for purposes of calculating SSI. No interest need be charged but the loan must be subject to repayment. The claimant must show that there is a bona fide loan agreement.\textsuperscript{44} While it is preferable to have written proof of a loan arrangement, an oral one is equally valid and can be accepted.\textsuperscript{45} If the loaned payment is sufficient, this can prevent the client’s back benefits from being reduced by one-third based on the “in-kind income.”

2.1.4.6 Excluded Income\textsuperscript{46}:

Examples of excluded income include: 1) income tax refunds; 2) proceeds of a loan; 3) bills paid directly to supplier by others for goods or services that are not

\textsuperscript{36}20 C.F.R. § 416.1123.  
\textsuperscript{37}20 C.F.R. § 416.1123.  
\textsuperscript{38}20 C.F.R. §§ 416.1131-33.  
\textsuperscript{39}20 C.F.R. § 416.1131.  
\textsuperscript{40}See POMS SI 00835.060 and 20 C.F.R. § 416.1132 and 20 C.F.R. § 416.1102.  
\textsuperscript{41}20 C.F.R. § 416.1132.  
\textsuperscript{42}20 C.F.R. § 416.1140.  
\textsuperscript{43}20 C.F.R. § 416.1142.  
\textsuperscript{44}SSR 92-8p, \textit{Hickman v. Bowen}, 803 F.2d 1377 (5th Cir. 1986). SSRs are policy decisions published in the Federal Register which are binding on all SSA adjudicators.  
\textsuperscript{45}See POMS SI 00815.350, SI 00835.480 and SI 01120.220 regarding Social Security’s process of reviewing loans.  
food or shelter; 4/7 4) any portion of a grant, scholarship or fellowship, payable on or after June 1, 2004, used for paying tuition, fees, or other necessary educational expenses are excludable for 9 months from receipt; 5) 1/3 of child support paid by an absent parent; 6) assistance based on need from a state or local government, including rent subsidies; 7) in-kind income based on need provided by nonprofit organizations; 8) payments for impairment-related work expenses; 9) domestic commercial airline tickets received as gifts, so long as they are not cashed in; 10) food stamps; 11) weatherization assistance; 12) medical and social services; 13) assistance received under the Disaster Relief and Emergency Assistance Act and assistance provided under any Federal statute because of a catastrophe which the President of the United States declares to be a major disaster; and 14) payments by credit life or credit disability insurance made on the recipient’s behalf.

2.1.4.7 Income deductions:

An income deduction is a partial deduction of a type of income from countable income. Examples of income deductions are:

1) General/unearned income deduction: $20 of income is deducted per month. If this exclusion is not used up on unearned income, then it may be used to exclude earned income.

2) Earned income deduction: Subtract $65 plus one-half of the remainder of gross monthly earned income. (For example, if an individual earns $565 in gross monthly wages, his earned income deduction is $65 plus $250, totaling $315. That results in countable income of $250.)

2.1.4.8 Income deeming:

Income deeming is the process of considering income received by another person as the income of an SSI recipient. The deemed income is considered countable income, whether or not it is actually available to the SSI recipient. The income of an ineligible spouse or parent of a minor child is deemed to the SSI recipient if they live in the same household, and a sponsor’s income is deemed to an alien.

2.2 SOCIAL SECURITY DISABILITY INSURANCE (SSDI) ELIGIBILITY

SSDI is available to disabled wage earners who have worked the required number of quarters in covered employment (employment which paid payroll or self-employment taxes into the Social Security trust fund). An SSDI claimant must be both “fully insured” and “currently insured.” To be fully insured, a wage earner must usually have 40 quarters of covered employment (employment which paid payroll taxes). Quarters of coverage are calculated as follows:

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47 An example of an excluded service would be paying for lawn services.
48 20 C.F.R. § 416.1250.
49 20 C.F.R. § 416.1124.
50 20 C.F.R. § 416.1124.
51 20 C.F.R. § 416.1103(a),(b). Also see, POMS SI 00815.050.
52 20 C.F.R. § 416.1124(c)(5). See 20 C.F.R. § 416.1150 for a detailed discussion of assistance and how in-kind support and maintenance are treated.
53 20 C.F.R. § 416.1103(c).
55 20 C.F.R. § 416.1121(c)(5) & (7).
57 20 C.F.R. § 416.1160.
58 Id.
59 20 C.F.R. § 404.110 and 20 C.F.R. § 404.130.
1. Before 1978, a worker was credited with one quarter of coverage for each calendar quarter in which $50 was earned.60

2. After 1978, the worker is credited with one quarter of coverage for a certain dollar amount earned during each year, ranging from $260 in 1979 to $1,160 in 2013.61 A maximum of four quarters can be credited in a year.

To be “currently insured,” an individual generally must meet the “20/40 rule,” which requires the wage earner to have 20 quarters of coverage in the 40 calendar quarters immediately preceding the onset date of disability. This translates generally into a rule of thumb that the wage earner must have worked five years in covered employment during the 10 years before becoming disabled.62 There are several exceptions to the 20/40 rule.63 For example, the 20/40 rule does not apply at all to the statutorily blind, who need only be fully insured.64

A worker can request his earnings record to determine his quarters of coverage and the date he was last insured. If the earnings record is incorrect, e.g., it does not include an employer, the claimant can request a correction of the earnings record.65

SSDI is also available to certain dependents or survivors of these wage earners:

1. Dependent children66 of the wage earner who younger than 18, or between 18-19 years old and a full-time student, whether or not the child is disabled. The wage earner must be disabled, retired, or deceased.67

2. The spouse, in certain circumstances.68

3. Disabled widows and widowers (between age 50 and 60) of wage earners.69 The wage earner must be deceased and be fully insured.70

4. Widow and widowers age 60 and over (the widow and widower does not have to disabled). The wage earner must be deceased and fully insured.

5. Disabled adult children of wage earners if:
   a. the son or daughter's disability began before age 22 and
   b. the wage earner is disabled, retired or deceased.71

6. Adult parent that is at least 62 years old, has not married since wage earner died, and the parent was receiving at least one-half of his/her support from the deceased wage earner.72

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60 20 C.F.R. § 404.141.
61 For updated information go to www.ssa.gov and in the search box put COLA and the year you are looking for.
62 20 C.F.R. § 404.130.
63 Id.
64 20 C.F.R. § 404.130(e).
66 This also includes adopted children.
69 20 C.F.R. § 404.335.
70 20 C.F.R. § 404.336.
71 20 C.F.R. § 404.350.
72 20 C.F.R. § 404.370.
3. THE APPLICATION AND APPEALS PROCESS

3.1 STAGE ONE: THE INITIAL DECISION ON THE APPLICATION

The SSA has moved away from having paper files for disability claims to an electronic system. A claimant can apply for an SSDI claim online, but not for SSI. Claimants can also call SSA to make an appointment with a local office. After the applicant files her application at the nearest SSA office, the SSA first determines whether, regardless of disability, she meets the other eligibility rules for SSI and SSDI.

Once non-disability eligibility is determined, if a claim has a high degree of probability that the individual is disabled, the application will go through a process called a quick disability determination (QDD). The determination is based only on the medical and nonmedical evidence in the file. If the QDD examiner cannot make a determination that is fully favorable, or there is an unresolved disagreement between the disability examiner and the medical or psychological consultant, the claim will be adjudicated using the regular process.

In 2008, SSA started a Compassionate Allowance program. Just like QDD, CAL was created to expedite the disability determination process. CAL includes a list of diseases that would trigger the CAL process. Examples of some of the diseases on this list are: early-onset Alzheimer’s disease, Esophageal Cancer, Gallbladder Cancer, Inflammatory Breast Cancer, Liver Cancer, Pancreatic Cancer and Salivary Tumors. The most recent list can be found in POMS DI 11005.604. If a CAL claim is denied, it continues to have priority status at all levels of adjudication. Note that even ODAR can reclassify a claim as falling under the CAL process.

Practice Tip: If a client comes in and he/she has applied and there has been no initial determination in the case, during your interview with the client determine whether he/she may meet one of the CAL listings or whether it could be processed under the QDD process. If so, write a letter to the SSA field office that is processing the claim and request that the claim be processed under CAL or QDD and explain and produce any evidence that supports either process.

If a claim does not qualify for the expedited processes, QDD or CAL, then SSA will send the case to the Disability Determinations Service (DDS) of the Louisiana Department of Children and Family Services, for development of the medical evidence and a decision on whether the claimant is disabled. DDS is required to obtain medical records for the 12 months prior to the application. Typically DDS also sends the claimant to a physician paid by the SSA to conduct a “consultative examination.” If she is found not disabled, the claimant will receive a notice informing her of her appeal rights. In Louisiana, the overwhelming majority of applications are denied at this stage, so representatives should inform their clients to expect to have to appeal a negative initial decision.

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75 See POMS DI 11005.604 and DI 23022.017 for similarities and differences between QDD and CAL.
76 Id.
77 Id.
78 20 C.F.R. §§ 404.1512(d) and 416.912(d).
79 20 C.F.R. §§ 404.1519(a) and 416.919(a).
3.2 **STAGE TWO: THE HEARING**

After receiving a decision denying benefits, the claimant has 60 days in which to request a hearing before an Administrative Law Judge (ALJ), assuming that their case—like most—no longer utilizes the reconsideration stage. The SSA assumes that the claimant received the notice five days after the date written on the notice unless the claimant shows otherwise. This means that, in the absence of good cause for late filing of an appeal, the claimant ordinarily has 65 days from the date written on the notice denying benefits in which to file an appeal at a SSA office. The appeal must be in writing. A claimant may go in person to the local SSA office to appeal, or she may fax or mail the appeal to the local SSA office. If possible, in order to ensure processing and to avoid delays, a request for a hearing should be made on the SSA’s form. The form used is number H A-501. However, if a form is not available, a letter requesting a hearing before an Administrative Law Judge may be sent. This letter should include the claimant’s name, social security number, statement of additional evidence to be submitted and briefly state the reason the claimant disagrees with the decision.

The local SSA office then sends the claims file to the Office of Disability Adjudication and Review (ODAR) where the case is eventually assigned to an ALJ and scheduled for a hearing. See Section 5 for advice on handling a hearing. Once the file has been sent to ODAR a client or representative can request a copy of the file, which is usually a CD. If a representative has signed up for electronic access to a claimant’s records, the representative will have access to the claimant’s electronic file once the request has been processed by the ODAR office. A CD or electronic access to the file should be obtained early on in order to determine what records may be missing and to see Social Security’s analysis of why the Claimant was initially found not to be disabled.

**Practice Tip:** At all stages of the decision-making and appeal process, the SSA often neglects to send copies of decisions to the claimant’s representative. Therefore, it is recommended that you advise your client to call you whenever he receives correspondence from the SSA and that you periodically contact whichever entity of the SSA is currently handling the case to determine if a decision has been made.

3.3 **STAGE THREE: APPEALS COUNCIL REVIEW**

If the ALJ issues a decision adverse to the claimant, she is ordinarily entitled to request review by the Appeals Council, which is located in Falls Church, Va. Again, unless there is good cause for late filing of an appeal, the claimant has 60 days after receipt of written notice of the decision to request review by the Appeals Council, and the SSA assumes that the notice is received five days after the date appearing on the notice. Requests for review can be made by letter or by use of a form, and can be filed either with the local SSA office or the Appeals Council.
The Appeals Council can also decide to review cases on its own motion, although this is rarely done, and must decide whether to do so within 60 days after the date of the notice.\textsuperscript{88}

The Appeals Council decides cases based on the record and any additional information submitted by the claimant. Evidence submitted must be “new and material” and must relate to the period on or before the date of the ALJ decision.\textsuperscript{89} Whether reviewing on its own motion or by request of the claimant, the Appeals Council has the power to review the entire case, not just the aspect complained about by the claimant. The Appeals Council may affirm, modify, reverse or remand an ALJ decision.\textsuperscript{90} This includes portions both favorable and unfavorable to a claimant, so if your client has a partially favorable decision (such as one granting a later onset date or a closed period of benefits) this risk should be discussed with her before any appeal is filed.

The Appeals Council has instituted a triage system to screen cases immediately. As a result, it is a good idea to include with the request for review a brief summary of the errors made by the ALJ, noting that additional arguments and briefing will be forthcoming at a later time if that is the case. If your office did not handle the hearing below, you probably will want to include a request for a copy of the hearing transcript, audio file (this used to be a cassette tape it is now a CD), and the exhibits and request that you be given 30 days after receipt of these materials in which to submit a brief. Furthermore, during an initial interview with a client that you did not represent in the hearing below, ask him/her if they know whether all medical records were submitted and whether their condition has worsened; if so obtain those medical records and include them with your request for review and mention these records in the summary that is submitted.\textsuperscript{91} Since you should reserve your client’s right to supplement the arguments initially presented to the Appeals Council, you can later on submit these records. Additionally, ask your client to bring in the CD (copy of the record) that they were given at the hearing level below. This will help you start analyzing and determine what is missing from the record while you wait for the audio of the hearing.

Be aware, however, that requests for a copy of the record and audio will delay the decision-making on the case.\textsuperscript{92} If you request a copy of the hearing transcript, audio file, and/or the exhibits, you should be notified, at the time they are sent, of a deadline for submitting additional materials. This will often be less than the time that had you requested, so it is important to always check and make sure of exactly how much time you have.

**Important Note:** The Social Security Administration has tested whether to eliminate Appeals Council review. Initially this experiment included many claimants whose initial application were filed between Jan. 1, 2000 and July 31, 2000; however, according to the regulations this experiment may still be ongoing.\textsuperscript{93}

\textsuperscript{88}20 C.F.R. §§ 404.969 and 416.1469.
\textsuperscript{89}20 C.F.R. §§ 404.976 (b)(1) and 416.1476(b)(1).
\textsuperscript{90}20 C.F.R. §§ 404.979 and 416.1479.
\textsuperscript{91}If you did not represent the client at the hearing below, remember to submit the Appointment of Representative Form, also known as the 1696 form with your request for review and summary. http://www.socialsecurity.gov/online/ssa-1696.html.
\textsuperscript{92}While time frames for Appeals Council review have improved, it still generally takes from six months to a year for a case to be reviewed. Occasionally (especially where Appeals Council does own-motion review), this can be faster. It is also sometimes slower.
\textsuperscript{93}20 C.F.R. §§ 416.1466 and 404.966.
The cases are randomly selected. The claimant will receive a Notice of Decision which informs them that if they wish to appeal, they must do so by filing a complaint in federal court and not by requesting review at the Appeals Council. Although most of these cases have already worked through the system, some may still be in the pipeline due to remands or the severe delays in the Social Security adjudication process. It is critical, in every case, to read carefully the claimant’s Notice of Decision which is attached to the ALJ decision because the Notice informs the claimant whether to appeal to the Appeals Council or by filing a complaint in federal district court.

As of July 28, 2011, claimants can no longer have a new application adjudicated while their appeals are pending at the Appeals Council.94 Note that this does not apply if a claimant subsequently files a claim under a different title (SSI versus SSDI), different benefit type, a Continuing Disability Review or age 18 redetermination, or in federal court or was remanded from federal court to the hearing office or AC.95 There is also a limited exception. When a claim is pending at the appeals council, the claimant may file a new application if: 1) the claimant has additional evidence of a new critical or disabling condition with an onset after the date of the hearing; 2) the claimant wants to file a new disability application based on this evidence; 3) and the appeal council agrees the claimant should file a new application before the appeals council completes its action on the request for review.96

If the protective filing date for the subsequent claim is prior to July 28, 2011, but the claim appointment is after July 27, 2011 these rules do not apply.97 If you have a case that does not fall under the new rules, should a claimant be certified for SSDI or SSI while their appeal is pending, you should inform the Appeals Council of this decision. While technically not relevant to the claimant’s disability during the earlier time period, such a certification will often carry the implication of an error in the old decision, especially if the claimant’s condition has not changed dramatically. If a claimant case falls under the new rules and his condition has worsened, the claimant should still go ahead and file even though his new claim may not be processed. This will allow the claimant to preserve his/her application date.

3.4 STAGE FOUR: FEDERAL COURT REVIEW

If the Appeals Council denies review or issues an unfavorable decision, the claimant has exhausted her administrative remedies and may proceed to U.S. District Court. The federal court complaint must be filed within 60 days of receipt of the notice of the Appeals Council’s action.98 If there is good cause for late filing, the advocate immediately should contact the Appeals Council by phone, fax, and certified mail, and request additional time in which to file the federal court petition.99

95EM-11052 REV2.
96Id.
97Id.
4. PROVING DISABILITY: THE SEQUENTIAL EVALUATION

4.1 ADULT CASES

The Social Security Act defines “disability” as “the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” \(^{100}\)

The SSA has adopted a five-part sequential evaluation to determine whether an adult claimant is disabled. A finding that the claimant is disabled or is not disabled at any point in the five-step evaluation is conclusive and terminates the analysis. \(^{101}\) (A significantly different sequential evaluation applies as to whether someone who was previously found disabled no longer is.)

Step One: Is the claimant employed in substantial gainful activity? If yes, he is found not disabled. If not, go on to Step Two.

Step Two: Does the claimant have an impairment or a combination of impairments which are severe? If no, he is found not disabled. If yes, go on to Step Three.

Step Three: Does the claimant have an impairment or combination of impairments which meets or equals an impairment listed in Appendix 1, 20 C.F.R. Part 404, Subpart P? If yes, he is found disabled. If no, go on to Step Four.

Step Four: Is the claimant capable of performing work which he performed in the 15 years prior to his application for disability benefits? If yes, he is found not disabled. If no, go on to Step Five.

Step Five: The burden of proof shifts to the Commissioner. A claimant is found not disabled if the Commissioner can prove that the claimant can engage in work existing in significant numbers in the national economy considering his residual functional capacity, age, education, and work experience. If the commissioner cannot meet this burden of proof, a claimant is found disabled.

On September 13, 2011 SSA filed a proposed action that would give adjudicators the discretion to skip to Step Five of the process if there is insufficient information about a claimant’s past relevant work history to make a finding under Step Four. If the adjudicator at Step Five finds that the claimant may be unable to adjust to other work existing in the economy, the adjudicator would return to the fourth step to develop the claimant’s work history and make a finding about whether the claimant can perform his/her past relevant work.\(^{102}\)

Under this sequential evaluation, in order to be disabled, a claimant must either:

- Not be performing “substantial gainful activity” and have an impairment that: meets or equals a “Listed Impairment”

Or

\(^{100}\) 20 C.F.R. §§ 404.1505 and 416.905.

\(^{101}\) 20 C.F.R. §§ 404.1520 and 416.920.

• Not be performing “substantial gainful activity,” AND have a non-minimal (severe) impairment, AND be unable to do the work they have performed in the last 15 years AND be unable to perform other work available in significant numbers.

4.1.1 Step One: SGA

At Step One, the SSA automatically denies disability benefits to a claimant if he is engaged in “substantial gainful activity” (SGA). At Step One, the SSA presumes SGA if the claimant is earning more than $1010 in gross monthly wages, whether or not his work is full-time.\(^{103}\) This amount is changed every year to account for inflation; $1010 is the figure for work done in 2012. There are three major exceptions to this rule: 1) if the earnings include a subsidy (the employer is paying an employee more than the reasonable value of his services or someone else is performing some of the employee’s work), thereby reducing the actual earnings to $1010 or less;\(^{104}\) 2) if the individual's impairment caused him to stop working within three to six months;\(^ {105}\) and 3) if the claimant has unreimbursable impairment-related work expenses, such as medications or counseling services, that reduce monthly wages to $1040 or less.\(^ {106}\) These exceptions also include when a claimant is in a supportive or sheltered work environment (for example, if he requires a job coach or rehabilitation counselor to work, or if reduced output is accepted). A statement from a claimant’s supervisor or counselor can be helpful in proving that their work does not constitute SGA.

The SSA presumes that all work at or under the $1040 threshold is not SGA.\(^ {107}\) Note, however, that this presumption has no applicability at Step Five. Any employment or volunteer work, no matter how little the earnings, can be used as evidence tending to show an ability to work at Step Five. For example, a person working a half-time, minimum-wage job as a cook would survive Step One but his ability to handle the exertion and stressors of that job could be used against him at Step Five.

4.1.2 Step Two: Severity

Step Two is intended to be only a de minimis test to screen out groundless claims, yet some claims are still wrongly denied at Step Two. An impairment is to be found “non-severe” only if it is a slight abnormality having such minimal effect that it would not be expected to interfere with a claimant’s ability to work even if she were of advanced age, had minimal education and limited work experience.\(^ {108}\) SSA must take into consideration the combined effect of all impairments at Step Two.\(^ {109}\)

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\(^ {103}\) See POMS DI 10501.015 for SGA Table for other years. There is a higher SGA level for those who meet the statutory definition of blindness. The SGA level is adjusted every year by multiplying the current SGA level by the ratio of the national average wage index for the two previous years; that figure becomes the new SGA level if it is greater than the current SGA level. 65 Fed. Reg. 82905 (Dec. 29, 2000).

\(^ {104}\) 20 C.F.R. §§ 404.1574 and 416.974.

\(^ {105}\) Id. and SSR 84-25. SSA generally considers work which was terminated because of the impairment in less than three months to be an “unsuccessful work attempt” (IWA). Work attempts terminated after six months may qualify as UWAs in certain circumstances.

\(^ {106}\) 20 C.F.R. §§ 404.1576 and 416.976.


\(^ {108}\) Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000), reaffirming Stone v. Heckler, 752 F.2d 1099 (5th Cir. 1985).

Historically, Social Security has failed to properly apply this very low standard, and will frequently wrongly deny cases at step two. This problem grew so endemic during the mid-'80's that the Fifth Circuit went to far as to demand that one of its opinions explaining step two—Stone v. Heckler, 752 F.2d 1099 (5th Cir. 1985)—be specifically cited in every ALJ decision. This requirement still exists, and ALJs will occasionally forget to cite Stone. Although an ALJ may forget to cite Stone it is not reversible error unless there is an indication that the ALJ did not apply the correct standard in his opinion. The 5th Circuit in Hampton v. Bowen, 785 F.2d 1308, 1310 (5th Cir. 1986), clarified the decision in Stone by stating that “a case will not be remanded simply because the ALJ did not use ‘magic words.’ [The Court would] remand only where there is no indication the ALJ applied the correct standard.” Recently, the 5th Circuit in Taylor v. Astrue, 2012 WL 2526921 (5th Cir. June 28, 2012), held that although the ALJ did not identify the specific applicable legal standard, there was substantial evidence in the record to support that the proper standard had been used.

4.1.3 Step Three: Meeting or Equaling a Listing

The listed impairments are specifically described physical or mental conditions of such severity that SSA has determined that persons suffering from those impairments are disabled without considering any vocational factors, including whether they can return to past work or do other work. An impairment or combination of impairments is medically equivalent to the listings if its causes the same degree of limitations and duration that a listed impairment would.\(^{110}\) The listings for adults are generally arranged by body system: musculoskeletal, special senses and speech, respiratory, cardiovascular, digestive, genitourinary, hematological disorders, skin disorders, endocrine disorders, impairments that affect multiple body systems, neurological, and mental disorders\(^{111}\).\(^{110}\) 20 C.F.R. §§ 404.1526 and 416.926.

4.1.4 Step Four: Ability to Do Past Relevant Work

At Step Four, the SSA determines the claimant’s physical and mental Residual Functional Capacity (RFC), or what he can still do despite the limitations imposed by all of his or her impairments.\(^\text{112}\) The claimant’s RFC is compared with the functional requirements of his past work performed during the last 15 years.\(^\text{113}\)

4.1.5 Step Five: Ability to Do Other Work

To determine whether the claimant can do other work that exists in significant numbers in the regional or national economy, the SSA first looks at the Medical Vocational Guidelines, known as the “Grids.”\(^\text{114}\) The Grids are a set of three charts, based on RFCs for sedentary, light, and medium work, designed to match the availability of jobs with the claimant’s age, educational level, and the type of work he has done.\(^\text{115}\) They are generally not helpful for people under 50 years of age.\(^\text{116}\)

\(^{110}\) 20 C.F.R. §§ 404.1526 and 416.926.

\(^{111}\) Child listings also include growth impairment, endocrine disorder, immune disorders and malignant neoplastic diseases.

\(^{112}\) 20 C.F.R. §§ 404.1545 and 416.945.

\(^{113}\) 20 C.F.R. §§ 404.1546, 404.1565, 416.946 and 416.965.


\(^{115}\) 20 C.F.R. §§ 404.1563-1568, 416.963-968. The exertion levels for sedentary, light, medium, heavy and very heavy work are defined at 20 C.F.R. §§ 404.1567 and 416.967.

\(^{116}\) But see 20 C.F.R. Part 404, Subpart P, Appendix 2, § 201.00(h), giving examples in which a finding of disabled is appropriate when an individual under 45 years of age cannot perform the full range of sedentary jobs.
If the claimant’s impairments are exertional only, i.e., interfering with the strength demands of the job, the Grid rules are determinative. If the claimant’s impairments are non-exertional only (e.g., pain, fatigue, mental impairments, skin and sensory impairments), then the grid rules cannot be used and SSA must conduct an individualized assessment at Step Five. If the claimant’s impairments are both exertional and non-exertional, the SSA must first determine if he can be found disabled on a Grid rule based on his exertional impairments alone. If not, the SSA must determine if his occupational base is significantly eroded because of his non-exertional impairments. If non-exertional impairments significantly erode the occupational base, then the SSA must perform an individualized assessment at Step Five. At hearings of cases requiring individualized determinations, the testimony of a vocational expert is usually considered necessary.117

4.2 CHILDREN CASES

As of Aug. 22, 1996, Congress adopted a more restrictive disability standard for children in the SSI program than had been in effect. The 1996 “welfare reform” law amended the Social Security Act to define disability in a child under 18 as “a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”118 The SSA has adopted a different sequential evaluation process for determining whether a child is disabled.119 The evaluation contains three steps:

Step One: Is the child engaging in substantial gainful activity? If yes, the child is found not disabled. If no, go on to Step Two.

Step Two: Does the child have a medically determinable impairment or combination of impairments that is severe? If no, the child is found not disabled. If yes go to Step Three.

Step Three: a) Does the child’s impairment(s) meet or medically equal the requirements of a listed impairment in Appendix 1, Part A or B 20 C.F.R. Pt. 404, Subpart P, or

b) Are the functional limitations caused by the impairments the same as the disabling functional limitations of any listed impairment and therefore functionally equivalent to that listing?

If yes to either question, the child is found disabled. If no to both questions, the child is found not disabled.

Under this sequential evaluation, the functional equivalence assessment provides the greatest flexibility for finding a child disabled. SSA takes a “whole child” approach by evaluating how the impairments functionally limit a child in 6 differ-

117 SSR 85-15.
118 42 U.S.C. § 1382c(a)(3)(C)(i) (emphasis added). Under the previous standard mandated by Sullivan v. Zebley, 493 U.S. 521(1990), a child was found disabled if his impairment was of “comparable severity” to that which would disable an adult. The 1996 law eliminated Step Four of the Zebley sequential evaluation, in which an individualized functional assessment (IFA) determined the extent of a child’s limitations in seven domains.
119 20 C.F.R. § 416.924. For other considerations in evaluating disability see 20 C.F.R. § 416.924a (medical, educational and parental sources), § 416.924b (age as a factor), and § 416.929 (evaluation of symptoms).
ent domains. Domains are broad areas of functioning intended to capture all of what a child can and cannot do. If the child does not meet or medically equal a listing in either Part B of Appendix 1 (the children’s listings) or Part A (the adult listings), look at the 6 domains and see if you your client’s condition has similar functional limitations. The child’s impairment must be medically determinable, but it need not be medically related to the listed impairment to which it is being compared. What matters is that the functional limitations it causes are the same as those of the listed impairment. The regulations set forth examples of functional equivalence. Additionally, if a child suffers from marked limitations in two or more specific functional spheres, or an extreme limitation in one such area, they will be found disabled based upon functional equivalence. A marked limitation is defined as more than moderate, but less than extreme. An extreme limitation means complete inability to function. These areas vary with the age of the child. For more information on these functional spheres, see 20 C.F.R. §416.926a. In preparing a child’s case, you should review SSR 09-01p through SSR 09-08p for SSA interpretation of their policy.

The 1996 statute also imposed restrictions on use of the child’s retroactive SSI payments. If the retroactive payments are more than six times the monthly benefit, the retroactive payments must be placed in a dedicated bank account. The monthly benefits must not be kept in the same account. Monthly benefits may be used for rent, food or clothing. However, retroactive payments are reserved for allowable expenses to benefit the child. Allowable expenses are medical treatment, education, job skills training, personal needs assistance, special equipment, housing modification, therapy or rehabilitation, and other items or services such as personal aids, special dietary needs, special items of clothing, electric bills related to mechanical devices meeting special needs, and day care or recreation not included in a special education program. If a representative payee wishes to spend the retroactive payment on anything not squarely included in the foregoing list, advise her to request the SSA’s written approval. If the request is denied capriciously, she should appeal. Frequent uses for back benefits include tutoring, computers with educational software, and modifications to homes to accommodate mobility limitations (wheelchair ramps, rails for bathtubs or beds, etc.), among others. Each year SSA will require the representative payee, usually the parent, to complete a report on the use of the funds as well as the regular monthly benefits received on a child’s behalf. It is very important that the representative payee maintain a record of the expenses in the account. He/she should keep all receipts and bank statements. A representative payee must be able to provide SSA with an explanation of any expenditure and how it relates to the child’s disability.

SSR 09-1p, "The whole Child approach recognizes that many activities require the use of more than one of the abilities described in the first five domains, and that they may also be affected by a problem that we consider in the sixth domain. A single impairment, as well as a combination of impairments, may result in limitations that require evaluation in more than one domain. Conversely, a combination of impairments, as well as a single impairment, may result in limitations that we rate in only one domain." See, Hodges ex rel. M.H. v. Astrue 2011 WL 4736312 (E.D. La. 2011).

SSR 09-01.

The 6 domains are: 1) acquiring and using information; 2) attending and completing tasks; 3) interacting and relating with others; 4) moving about and manipulating objects; 5) caring for yourself; and, 6) health and physical well-being.

See 20 C.F.R. § 416.926a.

20 C.F.R. § 416.926a(m).


POMS GN 00602.140.
4.3  **TERMINATION OF BENEFITS**

SSA is supposed to redetermine the disability eligibility of most recipients at least once every three years.\(^{126}\) Frequently, it will do so even more regularly than this. Those recipients deemed permanently disabled are reviewed less frequently. There is a great deal of variation in how regularly Social Security will opt to review a case. Often, ALJs will recommend times for review in their decisions, but these are not always followed. Recipients will not be reviewed if engaged in a work incentive program called Ticket to Work and Self-Sufficiency.\(^{127}\) Children turning 18 will receive a redetermination under the adult disability standard.\(^{128}\) Benefits may be terminated if the recipient is found to have medically improved and no longer to be medically disabled. There are different sequential evaluations used for continuing disability review (CDR) for adults\(^{129}\) and children.\(^{130}\)

A recipient whose SSI or SSDI is terminated because of medical improvement is entitled to an appeal. If benefits are terminated because the claimant is engaged in substantial gainful activity (SGA), the termination also can be appealed by requesting reconsideration, if the case is eligible for this stage of review. Whatever the reason for termination, denials on reconsideration—or initial denials for cases that do not go to reconsideration—can be appealed by requesting a de novo hearing before an Administrative Law Judge.\(^{131}\)

The SSA will continue benefits during the pendency of the appeal if the request for reconsideration or the request for administrative law judge hearing is filed within 10 days of receiving the termination notice or shows good cause for failing to meet the 10 day deadline.\(^{132}\)

**4.3.1  The Martinez Settlement and the Clark Case—denials and terminations for “fleeing felons” and Parole/Probation violations**

Social Security used to suspend individuals with outstanding warrants. Its initial application of the “Fleeing Felon” rule broadly applied it; a claimant did not have to be actually fleeing or even know that there was an outstanding warrant. In 2008, Rosa Martinez et. al. filed a class action suit against the SSA for its policy of denying or suspending benefits to individuals with an outstanding felony arrest warrant, and not permitting people with outstanding warrants to serve as representative payees.\(^{133}\)

As a result of the Martinez Settlement, effective April 1, 2009 SSA will suspend or deny a claimant’s SSA benefits based only on any of the following outstanding felony arrests: 1) escape from custody; 2) flight to avoid prosecution or confinement; and, 3) flight-escape.\(^{134}\) There are two Classes: post 2006 group and pre-2007 group. To determine whether a client is eligible for either group see POMS GN 02613.860 to GN 02613.885.

\(^{127}\) 20 C.F.R. § 411.160 and 411.165.
\(^{128}\) 20 C.F.R. § 416.987.
\(^{130}\) 20 C.F.R. § 416.994a.
\(^{131}\) 20 C.F.R. §§ 404.913 and 416.1413.
\(^{132}\) 20 C.F.R. §§ 404.1597a and 416.996.
\(^{134}\) POMS GN 02613.860.
The *Martinez* Settlement did not address warrants due to probation and parole violations. In March 2011 the District Court for the Southern District of New York certified a nationwide class in *Clark v. Astrue*, 274 F.R.D. 462 (S.D.N.Y., 2011). SSA issued Emergency Message EM-11032, with an effective date of May 9, 2011. The Emergency Message stated that based on the class certification SS should no longer suspend or deny benefits or payments solely on a probation or parole violation. On April 13, 2012 an order of relief was signed by the District Court for the Southern District of New York.\(^\text{135}\) It ordered SSA to pay individuals retroactive benefits to the date when the benefits were suspended because of the probation or parole violation. Note that benefits that were also suspended on another basis would not be paid back. An example would be if someone was in prison for a period of time during the retroactive period. SSA was also ordered to process all initial claims that were denied because of a probation or parole violation. If the person is eventually found disabled the date of disability would go all the way back to the initial date of application and not to the date SSA begins to process the claim. If overpayments were paid by an individual in this class, SSA is to pay back the entire overpayment amount that it collected. Additionally, an individual can avoid from getting his/her benefits suspended or terminated if they can show good cause.\(^\text{136}\) This area of law continues to develop and representatives should check for new developments when faced with a claimant affected by these policies.

### 4.4 OVERPAYMENTS

**Notice**: SSA is required to issue a written notice of a decision that a recipient has been overpaid. The notice must explain the reasons for the overpayment, the amount overpaid, the time period covered by the overpayment, repayment options, and appeal rights.\(^\text{137}\)

**Appeal procedure**: A request for reconsideration (challenging whether there was an overpayment or whether the amount was correctly calculated)\(^\text{138}\) must be received by SSA within 60 days of receipt of the notice of overpayment.\(^\text{139}\) A request for waiver (eliminating any obligation to repay the overpayment) can be requested at any time, even after the overpayment has been recouped. Waiver and reconsideration may be requested at the same time.\(^\text{140}\) If a request for reconsideration and/or waiver is made within 30 days of notice, it is SSA policy to continue benefits without any deduction until a decision is reached on reconsideration after a personal conference. Even if waiver is not requested until more than 30 days after notice, SSA policy is to stop any recoupment until a decision is made on reconsideration after a personal conference.\(^\text{141}\)

To receive a waiver, the recipient must show 1) that she was not at fault or that she appealed a termination of benefits with a good faith belief of continuing eligibility, and 2) that recovery would deprive the recipient of income needed for necessary living expenses or that recovery would be against equity or good conscience.

\(^{135}\) http://www.socialsecurity.gov/clark_relief_order/.

\(^{136}\) See, POMS GN 02613.025; SS has a list of “mental disability diagnostic codes” that if applicable would indicate a person’s lack of mental capacity to resolve a warrant. See, POMS GN 02613.910.


\(^{138}\) 20 C.F.R. §§ 404.522 and 416.582 and POMS GN 02201.025.

\(^{139}\) 20 C.F.R. §§ 404.521 and 416.581.

\(^{140}\) POMS GN 02201.017.

\(^{141}\) 20 C.F.R. §§404.506 and 416.558.
In SSI cases, recoupment by deduction from the monthly benefit check is limited to the total monthly SSI benefit, or 10 percent of total monthly income, whichever is less. Where the individual cannot meet “current ordinary and necessary living expenses,” recoupment may be reduced to less than 10 percent.\textsuperscript{142} The 10 percent rule does not apply if fraud is involved.\textsuperscript{143} SSA can also withhold the lesser of the entire overpayment balance or the entire amount of past due benefits.\textsuperscript{144}

SSI overpayments can be recouped from SSDI benefits. Unless the overpayment was caused by fraud, recoupment of an SSI overpayment from an SSDI check is limited to 10 percent of the SSDI check.\textsuperscript{145} In addition, SSI and SSDI overpayments can be recovered by intercepting tax refunds and also garnishing wages, if an individual is working.\textsuperscript{146} If there is an SSDI overpayment there is no 10% rule. SSA will request full repayment; however, an individual can file a “Request for Waiver of Overpayment Recovery or Change in Repayment Rate.”\textsuperscript{147}

\textbf{PRACTICE TIP}: Proving that your client is not at fault is an essential element of requesting a waiver. In proving that your client was not at fault, be sure to point out any mental, physical, educational or linguistic limitations she has, and whether she understood the reporting requirements. If your client is currently a recipient of SSI or welfare, it will be presumed that recovery would deprive her of needed income. Review the many SSRs which discuss overpayment.

\textbf{PRACTICE TIP}: If waiver cannot be achieved, consider requesting a settlement. SSA has detailed rules for handling overpayment settlements, including how much can be accepted, by what level of the SSA, and under what circumstances. The POMS relevant to compromises are SI 02220.030, GN 02215.105-02215.125. The SSA may be encouraged to settle because discharging the overpayment in bankruptcy would normally eliminate the possibility of recouping any part of the debt (unless there are auxiliary beneficiaries receiving benefits on the account of the bankrupt person). However, a discharge can be defeated if the recipient engaged in fraud.

\section*{5. HOW TO HANDLE A DISABILITY HEARING}

Prepare well in advance of an administrative hearing in order to maximize your client’s chances of getting all the benefits to which he/she is entitled. Winning a disability case is far easier at the hearing stage than it is in a subsequent appeal to the Appeals Council or in an action in federal court. The Appeals Council’s review power is limited, and that of the federal courts is more limited still.

\subsection*{5.1 DEVELOP THE EVIDENCE}

\subsubsection*{5.1.1 Obtain and review records.}

After accepting the case, immediately request a copy of the file and review the client’s medical records (and school or rehabilitation records, if relevant). You should also inquire into the claimant’s legal history. Records from prisons can be

\begin{footnotes}
\item[142] 20 C.F.R. § 416.571; see also 20 C.F.R. §§ 416.572 and 416.573.
\item[143] 20 C.F.R. § 416.571.
\item[144] 20 C.F.R. § 416.573.
\item[145] 20 C.F.R. §§ 416.571 and 416.573.
\end{footnotes}
useful, especially if a prisoner received treatment or accommodations while incarcerated. Additionally, even the fact of some arrests or convictions can serve as evidence of symptoms in cases of mental illness (a prime example of this is a schizophrenic with arrests for disturbing the peace). Send a letter and appointment of representative form to the ODAR office to obtain a CD that contains the client’s Social Security record or if it is in paper form set up a time to go to the ODAR office to copy the file. Additionally, if you have access to Online Services for representatives when you enroll in the case advise the ODAR office that you have access to Online Services so a CD will not be sent. By interviewing your client and reviewing his electronic file you can determine whether your client made prior applications which could be reopened in order to obtain additional back benefits (see the practice tip on reopening prior claims in Part 11.6.8. If prior applications exist which could be reopened, request in writing that the local SSA office obtain the prior claims folders.

5.1.2 Develop a theory of the case.

Decide at an early stage how you plan to win the case. Begin by reviewing the sequential evaluation used in disability cases.

5.1.2.1 Review all relevant listings in the Listing of Impairments.

Decide if there is a realistic possibility of winning the case at Step Three by proving that your client’s condition meets or equals a listing. Determine what additional evidence you will need in order to prove this. Try to show that your client meets or equals a listing if at all possible. In a child’s case, you must win at Step Three, as there are no further steps.

5.1.2.2 For adults, prepare for the possibility that you may not win at Step Three.

If you do not win at Step Three, you must win at Step Five by showing that the claimant’s impairments prevent him from continuing to do the work he did during the past 15 years and that his impairments prevent him from doing any other work which exists in significant numbers in the national economy.

5.1.2.3 Prepare a detailed job duty description of the jobs your client held in the 15 years prior to application.

This is necessary in order to show that your client cannot return to past relevant work.

5.1.2.4 Review the Grid rules (Medical-Vocational Guidelines).

If there is any Grid rule which would require a finding of “disabled” for your client, be prepared to show why it is applicable (for example, why the medical evidence justifies a residual functional capacity for “sedentary” rather than “light” work). If there is a Grid rule which seems to require a finding of “not disabled” for your client, determine how you can show it is inapplicable. Grid rules apply only if all the criteria in a rule match the characteristics of the claimant, and there

149 If you often handle Social Security cases at the ALJ level and have not been invited by SS to enroll to the Online Services, contact the ODAR office that you go to most often and request that you be enrolled with the Online Services. Once enrolled, you will have access to the claimant’s ODAR file. You can upload evidence or fax it to a designated fax number using bar codes that are provided by Social Security that are specific to each case. You do not have access to Online Services if you are at the Appeals Council level or prior to an initial determination.
is substantial evidence of the individual’s ability to perform sustained work activity at the exertional level of the grid rule. Most commonly, advocates will be trying to avoid application of a Grid rule mandating a finding of “not disabled.” Common limitations to examine for this purpose include concentration, persistence, or pace, drowsiness caused by pain medications, the need for frequent breaks, a need for extra supervision, and others.

5.1.2.5 Determine how to evidence client’s actual mental and physical residual functional capacity.

Get permission from your client to talk to his/her social workers, case managers, or family members. Testimony from a person other than the claimant is very useful in cases regarding mental impairments, such as schizophrenia. ALJs will usually only allow one witness, at most 2, to testify at a hearing. Pick the best witness that sees and/or interacts with the claimant the most. Determine what testimony will be needed from the client. If people with relevant information are unable or unwilling to testify, having them at least complete questionnaires is helpful. Even written statements from teachers, social workers, employers and others can be very compelling to Social Security.

5.1.3 Determine what onset date can be proved.

You may wish to discuss with your client amending the onset date to a date either earlier or later than what the claimant claimed when making the application, depending on what the evidence reasonably shows. The reason why you need to determine this prior to a hearing is because an ALJ may want to change the date to a later date and the representative will have to be able to argue and provide evidence in the record why he/she disagrees with the date proposed by the ALJ.

5.1.4 Request a letter or an evaluation form from a treating physician or psychologist spelling out how the claimant’s condition meets or equals a particular listing or prevents him from holding a full-time job.

The letter should be addressed to the Administrative Law Judge or to the Social Security Administration. If the treating physician refuses to write such a letter (or speak with you so that you can prepare a draft based on what they say) or complete a form, a letter from a social worker, nurse or other medical or mental health professional can be helpful (although under the Social Security regulations their opinions will not be entitled to controlling weight). Many doctors have the mistaken belief that if they write a note stating that they think a patient is disabled, Social Security will accept this as proof of disability. This is incorrect. Disability is a legal conclusion, not a medical one. Thus, it is much more useful to have a doctor list specific conditions and limitations—even if only on a checklist prepared by the claimant’s representative—than to have a note that just makes a conclusory statement that a person is disabled. Explaining this to a treating physician can make all the difference in the world.

5.1.5 If the record evidence clearly shows the claimant meets a listing, submit a brief requesting a decision on the record.

Submit exhibits consisting of additional medical records and letters from treating physicians or other professionals. If the ALJ decides to issue a favorable decision based on the brief and exhibits, no hearing will be necessary.
5.2 PREPARE FOR THE HEARING.
5.2.1 Request rescheduling if necessary.

You are entitled to have the hearing rescheduled if there is good cause. Good cause for rescheduling exists, for example, if counsel was appointed less than 30 days before the hearing and needs additional time to prepare. See 20 C.F.R. § 404.936 for the definition of good cause. ALJs are usually willing to grant extensions if they are requested as far in advance as possible. Do not wait for the last minute to ask for an extension! Even if granted, it aggravates the ALJ and can make them negatively disposed towards both the case and to an individual representative with a reputation for requesting last-minute continuances. ALJs tend to be more understanding about initial requests for a continuance than if a representative seeks additional ones on the same case. Thus, once a continuance has been granted, make sure that you are ready to proceed on the new date if at all possible.

5.2.2 Submit updated medical records, letters from treating sources, and pre-hearing briefs at least 10 days before the hearing if at all possible.

Because of the “hearing process improvement” procedures, most ALJs now strongly prefer (and often issue pre-hearing orders requiring) that briefs and new evidence be submitted at least ten days before the hearing. In order to maintain a good relationship with the ALJ and avoid the possibility of a continued hearing, it is wise to abide by the requirements of any reasonable pre-hearing orders. However, if you do not receive the evidence in time, you should submit it as soon as you get it.

5.2.3 Become thoroughly familiar with the medical evidence.

You need to know the evidence in order to effectively examine your witnesses, cross-examine the vocational expert and medical expert, and argue the case to the judge.

5.2.4 Write a pre-hearing brief. A good pre-hearing brief will greatly improve your chances of success.

It influences the ALJ’s perception of the case and makes it easier for the ALJ to write a favorable decision. The brief can be written in the form of a letter to the ALJ. Summarize the record evidence. Show how your client’s condition meets or equals a listing, or show that her residual functional capacity precludes her from doing any full-time work. Explain why any negative consultative examinations or reports by SSA should be disregarded or given little weight. Address any important legal issues such as alleged substantial gainful activity (SGA), drug addiction and alcoholism, good cause for failure to comply with prescribed medical treatment, or why prior claims should be reopened.

5.2.5 Try to line up at least one witness who could testify on client’s behalf.

A witness could be a social worker, case manager, family member, minister, neighbor, friend or former co-worker who can testify about symptoms, activities of daily living, social functioning, problems with concentration and pace, episodes of pain, and/or the claimant’s problems in school, in past jobs or in work-like situations. In some cases, physicians or psychologists may be willing to testify in person or by telephone. Avoid repetitive testimony. No more than two witnesses
in addition to the claimant should be necessary. If possible, let the judge’s staff know in advance how many witnesses are planned. You can arrange with the judge’s staff for testimony by phone by treating physicians.

5.2.6 **Prepare the witnesses.**

Meet with the witnesses a few days before the hearing to go over the questions you plan to ask. Also prepare him/her for questions the judge may ask and how he/she may be interrupted by the judge.

5.2.7 **Prepare your client.**

Arrange to have your client come in a day or two before the hearing to go over the questions you plan to ask. Prepare them not only for questions the judge may ask. Prepare the client to elaborate when they answer questions. Judges, often ask yes and no questions, especially when it comes to whether there is an improvement of impairments with medications or other treatment; if the client is not 100% better he/she should be able to explain any improvement and the limitations he/she is still having even with treatment. Furthermore, the ALJ will ask whether the client can carry 10, 15, 25 lbs. Become familiar with regular household items that may weigh this much. For example, ask your client if he can carry a bag of flour (5 pounds), a gallon of milk (8 pounds), small car tire (15 pounds), or whether he/she can carry a large bag of potatoes (25 pounds). Prepare the client for possible interruptions by the ALJ. Make sure the client knows about how long he/she can sit and stand for. How far he/she can walk (use blocks and not distances since a client will likely not know how far a quarter of a mile is). If they do not know, tell him/her to pay attention to this since this will come up at the hearing.

5.3 **THE HEARING**

5.3.1 **Request a new hearing if client fails to show up.**

Explain the possible reasons why client may have failed to appear, including those caused by his disabilities. If the reason that the client failed to appear was likely on account of his disabilities, request a new hearing as an accommodation of his disabilities under Section 504 of the Rehabilitation Act (which requires federal agencies to accommodate disabilities).

5.3.2 **Tape the Hearing.**

You may want to request that the ALJ allow you to tape the hearing (with your own recorder). The primary reason for doing so is to avoid having to ask the Appeals Council for a recording of the hearing because such a request considerably lengthens the time period for an AC decision, or to avoid a remand if the Appeals Council loses the official recording. You can also use the recording to assist in summarizing the testimony in a post-hearing memo. Additionally, it is not unusual for an ALJ to go “off the record” during a hearing, stopping the official tape to discuss some additional matter. If you tape the hearing yourself, these discussions will be preserved. Not all judges will allow taping, however, so you should check in advance to see if this will overly upset the judge hearing your case.

5.3.3 **Opening statement.**

Make a brief opening statement explaining that you are waiving your fee as per the policy of your office and explaining why your client is entitled to disability benefits. Ask that your memorandum and any medical records or doctor’s letters be
included as exhibits in the record of the case. Request an onset date. If you want prior claims reopened, explain why your client is entitled to have them reopened. Some judges simply begin without offering the opportunity to make an opening statement; you may need to interrupt to tell them that you wish to have one.

5.3.4 Ask to examine your witnesses, if possible. In order to elicit the responses you want and present your case in the most favorable light, it is usually best to examine your own witnesses.

If you do not take the initiative, many judges will take the testimony themselves, relegating you to asking follow-up questions. Some judges always insist on first taking the testimony themselves.

5.3.5 Point out any non-verbal behaviors that support your case.

Note out loud for the record if the client is crying, rocking, pacing, unable to sit throughout the hearing, using assistive devices, or engaging in any other non-verbal behaviors that support the case for disability. If the ALJ is hostile and engaging in non-verbal behaviors which demonstrate bias or intimidate the client, you should point out these behaviors as well.

5.3.6 Prepare for cross-examination of the vocational expert (VE) and the medical expert (ME).

The Notice of Hearing will inform you whether a VE or ME is being called to testify at the hearing. The file should contain a statement of the qualifications of any expert being called to testify.

5.3.6.1 The ME’s testimony.

The ME is a physician or mental health professional who has not examined the claimant before. Many ALJs do not regularly call MEs to testify, but some ALJs do. The ALJ will typically ask the ME whether she has examined all of the medical evidence in the file, whether the claimant’s impairment meets or equals the listings, and what functional limitations are caused by these impairments.

If the ME’s testimony is unfavorable, the best way to combat it is to have obtained a statement from the claimant’s treating physician, to which the ALJ generally must defer. Object on the record if the ME attempts to testify on matters outside his specialty or on non-medical matters, such as what jobs the claimant can perform. Cross-examine the ME about favorable medical evidence he is ignoring. Ask the ME what further testing would be useful to more fully document the claimant’s impairments, then request a consultative examination to conduct such testing.

Keep in mind that the ME is there to interpret the opinions and findings of examining doctors, not to substitute his own. Any opinion that they have based upon the claimant’s behavior during the hearing, for example, is inappropriate and should be pointed out as such.

5.3.6.2 The VE’s testimony.

VEs are called to testify on whether a client’s work skills are transferrable and the specific occupations in which they can be used. If the ALJ agrees that the claimant meets a listing or that a grid rule is applicable, the VE’s testimony is irrelevant. However, in the majority of hearings, the VE will testify and the representative should always be prepared for this.
The ALJ typically will pose hypothetical questions to the VE, asking what jobs the claimant can do based on specific assumptions about the effects of her impairments. Example: “Assume that the claimant can stand and walk for approximately four hours and lift 25 pounds. Can he return to his past employment or, if not, transfer his skills to perform other work?”

Note whether the ALJ’s hypothetical has addressed all of the claimant’s impairments and limitations and make sure your questions on cross-examination include all such impairments and limitations. The strategy for cross-examination should be to eliminate all possible employment based on evidence of all impairments from the medical records or testimony.

Example:

Counsel: Assume that the claimant also has restricted movement in his left arm which prevents him from lifting over 10 pounds. Would that limit the number of jobs he could perform?

VE: Yes, he could not perform the Sanitation Attendant job, since it involves lifting over 10 pounds.

Counsel: Assume that the claimant also suffers from major depression which causes him to have difficulty concentrating. Would that limit the number of jobs he could perform?

VE: Yes, but he could still perform the Porter I and II jobs and the Uniform Supply Cleaner jobs.

Counsel: Assume that the claimant’s major depression causes him to be unable to attend work regularly and to miss two to three days a month. Would that eliminate any jobs?

VE: Yes, that would eliminate all the jobs.

5.3.7. Make closing statement.

Very briefly summarize why your client meets the SSA’s definition of disability. You may wish to ask that the record remain open for 15 days or another specified period of time in order for additional medical records to be received or in order to file a post-hearing brief (if no pre-hearing brief was submitted or if additional issues were raised by the judge during the hearing which you wish to address). The post-hearing brief should summarize the record evidence and the testimonial evidence and explain why the claimant is disabled under the law. If your client agrees, request the appointment of a representative payee in cases where the client is unable to manage his own funds due to mental impairments or substance abuse. Even if your client does not want a payee, however, ALJs will almost always order one appointed in cases involving mental disabilities or if the claimant has a history of substance abuse.

6. PRACTICE TIPS

6.1 CITE SOCIAL SECURITY RULINGS (SSRS), HALLEX POLICIES, & POMS POLICIES WHERE FAVORABLE.

SSRs are policy decisions published in the Federal Register which are binding on all SSA adjudicators. They do not have the force or effect of law but the courts generally defer to them. They can be found on the SSA’s website and in West’s Social Security Reporting Service.
The Hearings, Appeals, Litigation and Law manual (HALLEX) contains instructions for ALJs and the Appeals Council. HALLEX does not have the force or effect of law but is binding on ALJs and the Appeals Council. The courts generally have given effect to HALLEX instructions. A copy of the HALLEX policies can be viewed online.

The Program Operations Manual Systems (POMS) is a massive policies and procedures manual for the field offices of the SSA. POMS does not have the force or effect of law. POMS provisions are not binding on ALJs but since the SSA argues that the POMS are consistent with the Social Security statutes and regulations, favorable POMS should be cited to the ALJ. The POMs can be accessed online.

### 6.2 IF RELEVANT, REMIND THE ALJ THAT A PERSON IS DISABLED IF UNABLE TO WORK FULL-TIME.

Social Security policy has defined the ability to work at Step Five as the ability to work 40 hours per week.150 This also includes following a regular schedule and should take into account if a claimant would have frequent absenteeism due to doctor’s appointments, treatments, etc.

### 6.3 TO SHOW THAT YOUR CLIENT CANNOT DO LIGHT OR SEDENTARY WORK, REMIND THE ALJ HOW THE DICTIONARY OF OCCUPATIONAL TITLES DEFINES “OCCASIONALLY” AND “FREQUENTLY.”

Under the SSA regulations, “sedentary” jobs include those that require “occasional” walking and standing and “occasional” lifting or carrying of objects like docket files and small tools. “Light” jobs involve “frequent” lifting or carrying of objects weighing up to 10 pounds. “Medium” jobs include “frequent” lifting or carrying of objects weighing up to 25 pounds.151 The regulation also cites the Dictionary of Occupational Titles as the source of its exertional definitions. Point out to the ALJ (and treating doctors giving residual functional capacity assessments) that the DOT defines “occasional” as up to one-third of the work day, and defines “frequent” as one-third to two-thirds of the work day.

### 6.4 LESSEN THE IMPACT OF UNFAVORABLE NON-TREATING MEDICAL OPINION.

Explain why the opinion of the Consultative Examiner (CE) as to the nature and severity of the claimant’s impairment should be disregarded (if it is unfavorable). Point out that the CE did not have the benefit of seeing later-acquired medical records or letters you have obtained from treating physicians. If the CE makes no mention of having reviewed medical records or if it is apparent that he did not read key medical records available at the time of his consultation, point this out. Point out the inadequacy of the CE’s supporting explanation for his opinion. If the consultative examination was very brief or cursory, have the claimant testify to this. Under SSR 96-2p, the opinion of a medical source which did not treat the claimant is never entitled to controlling weight, although it may nevertheless be adopted if there is good cause.152

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150 SSR 96-8p.
6.5 EXPLAIN WHY THE TREATING SOURCE’S OPINION SHOULD BE ADOPTED.

The regulations provide that more weight generally will be given to opinions from treating sources than opinions of doctors who have not treated the claimant. The regulations note that a treating physician is likely to be “most able to provide a detailed, longitudinal picture” of the nature and severity of the impairments.\(^{153}\) Emphasize the length of time and frequency with which the treating physician has treated the claimant and the type of treatment and tests he has provided. Show how the treating source’s opinion is supported by the bulk of the record evidence. A treating source’s medical opinion as to the nature and severity of impairments must be adopted by the ALJ if it is 1) well-supported by medically acceptable clinical and laboratory diagnostic techniques and 2) not inconsistent with the other substantial evidence in the record. Even if the treating source’s opinion does not meet these two criteria for being given controlling weight, it is still entitled to deference if there is some reasonable support for the opinion.\(^{154}\) If the facts on which the treating source’s opinion is based are not evident in the record, ask the ALJ to recontact the source, or allow you to recontact the source, to clarify the reasons for the source’s opinion. The ALJ is required to make every reasonable effort to recontact the source in such situations.\(^{155}\)

6.6 INFORM THE ALJ OF THE CORRECT STANDARD FOR EVALUATING CLAIMANTS WHO ABUSE SUBSTANCES.

Always be prepared for the possibility that the ALJ may ask your client about substance abuse. If the medical records reflect substance abuse, be sure to explain in your brief why the drug addiction and alcoholism (DAA) regulations do not bar your client from receiving benefits.

Some ALJs are under the mistaken impression that all claimants who abuse substances are ineligible for disability benefits, and some ALJs are simply biased against such claimants. Substance addiction is no longer a basis for getting disability benefits. However, disabled claimants who abuse substances can get benefits. Typically, those entitled to benefits are dually diagnosed with mental illness in addition to substance abuse, or they are disabled by irreversible impairments such as liver disease or dementia which were caused by their substance abuse but would likely remain even if they stopped abusing substances.

The legal standard: A person cannot receive benefits if drug addiction or alcoholism (DAA) is “a contributing factor material” to the disability determination. Drug addiction or alcoholism is “material” only if the claimant would not be disabled were he to stop using substances.\(^{156}\) To determine whether DAA is material to the disability determination, SSA must follow a three-step analysis: \(^{157}\)

Step One: Is the claimant disabled? If yes, go on to the next step. It is improper for SSA to address DAA issue until it first finds that the claimant is disabled.\(^{158}\)
Step Two: Is there medical evidence from acceptable medical sources that the claimant suffers from a substance abuse disorder? Statements by the claimant about his substance abuse, even if included in a physician’s notes, are insufficient in and of themselves to establish drug addiction or alcoholism. Also, keep in mind that many treating sources will continue to diagnose substance abuse or dependence even after a person has stopped actually abusing alcohol or drugs. If there is not acceptable medical evidence of a substance abuse disorder, the claimant is entitled to benefits.\(^{159}\) If there is acceptable medical evidence of such a disorder, go on to Step Three.

Step Three: Does the evidence establish that the claimant would not be disabled were he to stop abusing substances? If yes, benefits must be denied. If the evidence does not establish this, the claimant is eligible for benefits.

SSA has issued a policy statement indicating that DAA is not material if it is not possible to determine whether a person would still be disabled were he to stop using substances. “[W]hen it is not possible to separate the mental restrictions and limitations imposed by DAA and the various other mental disorders shown by the evidence, a finding of ‘not material’ would be appropriate.”\(^{160}\)

Under the materiality definition, DAA obviously is not material where there are irreversible impairments caused by DAA, such as brain damage or HIV. Those conditions do not disappear when DAA stops. In the case of a dual diagnosis of DAA and mental illness, point out that the person’s mental problems did not disappear during any periods of sobriety, if there were any such periods. Ask the treating psychiatrist to render an opinion as to whether the person’s mental illness would continue were DAA to end.

If your client has a substance abuse problem and will agree to the appointment of a representative payee, particularly a non-profit organization such as the Louisiana Guardianship Service, asking the ALJ to order that a representative payee be appointed often facilitates a favorable disability determination. In addition, use of a non-profit representative payee in this situation increases the likelihood that the client’s benefits will be used to provide him with the necessities of life.

6.7 **IF YOUR CLIENT HAS FAILED TO FOLLOW PRESCRIBED TREATMENT, BE PREPARED TO GIVE A GOOD REASON WHY.**

If a treatment is prescribed by a treating physician and can restore the ability to work, a claimant must follow the treatment unless there is good cause.\(^{161}\) If the prescribed treatment would not restore the ability to work, then a claimant’s failure to follow it will not preclude a finding of disability. A claimant’s mental impairment and the impact it may have on his ability to understand and cooperate with treatment must be considered in determining whether there is good cause.\(^{162}\)

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\(^{159}\) POMS DI 90070.050.
\(^{160}\) Emergency teletype [EM 96-94], issued by the Office of Disability, SSA, 8/30/96, answer to question 29. The policy statement in the SSA teletype states that the SSA carries the burden of proof to show that drug addiction and alcoholism is material. But see Brown v. Apfel, 192 F.3d 492 (5th Cir. 1999) (apparently unaware of the SSA policy, the court held that the claimant bears the burden of proving that drug addiction and alcoholism is not material).

\(^{161}\) 20 C.F.R. §§ 404.1530 and 416.930; Lovelace v. Bowen, 813 F.2d 55 (5th Cir. 1987).

\(^{162}\) Lucas v. Sullivan, 918 F.2d 1567 (11th Cir. 1990).
Additionally, failure to follow treatment should be excused if the claimant did not know of available free medical care, if they could not afford recommended treatment or drugs, if the treatment has substantial risks, or if they have had a history of unsuccessful treatment.

6.8 **ALWAYS LOOK FOR PRIOR CLAIMS THAT CAN BE REOPENED IN ORDER TO MAXIMIZE YOUR CLIENT’S RECEIPT OF BACK BENEFITS.**

The SSA has liberal res judicata rules and allows reopening of prior claims in several situations. Following are some of the most significant grounds for reopening.

a. **Mental Impairments:** If a pro se claimant failed to appeal an unfavorable decision because his mental impairments rendered him incompetent to do so or made him unable to understand his appeal rights, the claim may be reopened no matter how long ago.\(^{163}\)

b. **Within 12 months of initial determination:** Prior claims may be reopened for any reason within 12 months of the date of the notice of an initial determination.\(^{164}\)

c. **Good cause reopenings.** Prior Title II claims may be reopened within four years of the initial determination if good cause is found. Prior SSI claims may be reopened within two years if good cause is shown.\(^{165}\) Good cause may be established in at least three circumstances: 1) new and material evidence is provided; 2) a clerical error was made; and 3) the evidence used in making the prior decision clearly shows that an error was made.

7. **COMPREHEND OF FIFTH CIRCUIT CASE LAW**

7.1 **ONSET AND DURATION OF DISABILITY**

Retrospective medical diagnoses uncorroborated by contemporaneous medical reports but corroborated by contemporaneous lay evidence can be used to establish disability onset date. *Likes v. Callahan*, 112 F.3d 189 (5th Cir. 1997).

SSR 83-20 requires that the claimant’s stated onset date be used as the established onset date when it is consistent with available evidence. In some cases, it may be possible to reasonably infer that the onset of a disabling impairment occurred sometime prior to the date of the first recorded medical examination. In cases involving slowly progressive impairments, when the medical evidence regarding the onset date of a disability is ambiguous, it is grounds for remand if the ALJ failed to use a medical advisor to assist in making an informed judgment as to the onset date. The ALJ also must obtain all available evidence to determine the onset date. *Spellman v. Shalala*, 1 F.3d 357, 361-362 (5th Cir. 1993).

Where contemporaneous medical records are not available to show onset date, information may be obtained from family members, friends and former employers regarding course of condition, and non-contemporaneous medical records may be relevant to show onset date. *Ivy v. Sullivan*, 898 F.2d 1045 (5th Cir. 1990).

\(^{163}\) SSR 91-5p.
\(^{164}\) 20 C.F.R. §§ 404.988 and 416.1488.
\(^{165}\) 20 C.F.R. §§ 404.988-.989 and 416.1488-.1489.
A claimant is required to show that her impairment has lasted or is expected to last for 12 months, but need not show that it disabled her for 12 months or that it prevented her from working for 12 months. Moore v. Sullivan, 895 F.2d 1065 (5th Cir. 1990).

A claimant’s impairment must last for 12 continuous months but there is no requirement that he be unable to work during the entire 12-month period. A claimant with a mental impairment does not have to show a 12-month period of impairment unmarred by any symptom-free interval. Singletary v. Bowen, 798 F.2d 818, 821 (5th Cir. 1986).

When finding a closed period of disability, SSA must make a finding of medical improvement and otherwise treat the end of the closed period as though it were a cessation on an ongoing disability review. Waters Barnhart, 276 F.3d 716 (5th Cir. 2002).

7.2 SEQUENTIAL EVALUATION

A finding that a claimant is disabled or not disabled at any point in the five-step process is conclusive and terminates the analysis. The burden of proof is on the claimant for the first four steps but shifts to the SSA at Step Five. Bowling v. Shalala, 36 F.3d 431, 435 (5th Cir. 1994).

7.3 STEP TWO: SEVERITY

An impairment is “non-severe” only if it is slight abnormality having such minimal effect that it would not be expected to interfere with claimant’s ability to work, irrespective of age, education, or work experience. Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000), reaffirming Stone v. Heckler, 752 F.2d 1099 (5th Cir. 1985).

7.4 STEP FOUR: RETURN TO PAST WORK

The ALJ must analyze the claimant’s past job duties in order to determine whether he can return to past work. Abshire v. Bowen, 848 F.2d 638, 641 (5th Cir. 1988).

7.5 STEP FOUR AND FIVE: RESIDUAL FUNCTIONAL CAPACITY (RFC)

The ALJ is not at liberty to make a medical judgment regarding the ability of a claimant to engage in gainful activity where such inference is not warranted by clinical findings. Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000).

When making a Step Four finding that a claimant can return to his prior work, ALJ must compare claimant’s remaining functional capacities with the physical and mental demands of his previous work, and the ALJ must make clear factual findings on this issue. ALJ may not rely on generic classifications of previous jobs. Latham v. Shalala, 36 F.3d 482, 484 (5th Cir. 1994).

An RFC assessment that claimant could sit for six hours of an eight-hour work day was not supported by substantial evidence when it was based only on the opinion of a non-treating medical consultant and directly conflicted with the opinion of the claimant’s treating physician. Smith v. U.S. R.R. Retirement Bd., 85 F.3d 224 (5th Cir. 1996).

A claimant must be able to maintain employment in order to be found not disabled, regardless of whether the impairment is mental or physical or both. Watson v. Barnhart, 288 F.3d 212 (5th Cir. 2002), citing Singletary v. Bowen, 798 F.2d 818.
However, there must be a factual basis for any maintenance of employment issue in each particular case. A claimant’s impairments must be shown to be episodic for this issue to apply. Frank v. Barnhart, 326 F.3d 618 (5th Cir. 2003).

7.6  **STEP FIVE: VOCATIONAL-MEDICAL GUIDELINES (“GRID RULES”)**

An ALJ must use a vocational expert and may not rely on a grid rule if the claimant suffers from non-exertional impairments, such as pain, swelling and the inability to stand or sit for limited periods of time. Newton v. Apfel, 209 F.3d 448, 458 (5th Cir. 2000); see also Carey v. Apfel, 230 F.3d 131 (5th Cir. 2000).

Denial of benefits based on the “Grid Rules” is appropriate if the claimant suffers only from exertional impairments, or if the claimant’s non-exertional impairments do not significantly affect his residual functional capacity. Where a claimant suffers from incontinence and side effects of medications, exclusive reliance on the Grid Rules is error. Crowley v. Apfel, 197 F.3d 194, 199 (5th Cir. 1999).

A grid rule may be used to establish that a claimant is not disabled only if the rule’s evidentiary underpinnings coincide exactly with the record evidence of the impairments. Where a claimant was not capable of performing a full range of any particular category of work, a grid rule cannot be used to deny benefits. Bowling v. Shalala, 36 F.3d 431, 435 (5th Cir. 1994).

When claimant’s back injury required her to alternate between sitting and standing as needed, her exertional capabilities did not fit within the definition of sedentary work, and grid rules were inapplicable. Scott v. Shalala, 30 F.3d 33 (5th Cir. 1994).

If the testimony of the VE as to a job’s requirements conflicts with the Dictionary of Occupational Titles, the ALJ may nonetheless rely on the VE’s testimony provided that the record reflects an adequate basis for doing so. Claimants should not be permitted to scan the record for implied conflicts between the VE testimony and the DOT when they failed to cross-examine a VE about such conflicts. Carey v. Apfel, 230 F.3d 131 (5th Cir. 2000).

In determining whether claimant could perform other work existing in the national economy, the SSA was not required to take into account a downturn in local economy or whether jobs were actually available to the claimant. Harrell v. Bowen, 862 F.2d 471 (5th Cir. 1988).

To be capable of performing sedentary work under the guidelines, claimant must have some reasonable chance in the real world of being hired and, once hired, of keeping the job. Wingo v. Bowen, 852 F.2d 827 (5th Cir. 1988).

A VE need not consider the specific working conditions of jobs in determining whether a claimant can perform those jobs. Vaughan v. Shalala, 58 F.3d 129, 132 (5th Cir. 1995).

If an individual’s medical treatment significantly interrupts the ability to perform an eight-hour work day, the ALJ must determine whether the effect of treatment precludes work. The ALJ’s failure to consider the effect on the ability to work of frequent medical appointments and hospital visits, and of treatment causing the claimant to sleep for several hours a day, is grounds for remand. Newton v. Apfel, 209 F.3d 448 (5th Cir. 2000).
ALJ used the Guidelines (also referred to as Grids) at step 5 to find claimant disabled without first determining whether claimant’s non-exertional limitations would preclude claimant from performing light work. Court found that this was harmless error since the claimant’s substantial rights have not been affected. January v. Astrue, 400 Fed. Appx. 929, 931-32 (C.A.5 Ia. 2010).

7.7 DISABILITY TERMINATIONS

The ultimate burden of proof lies with the SSA in proceedings to terminate disability benefits. The SSA must provide substantial evidence that 1) there is medical improvement related to the ability to work and 2) the individual is now able to engage in substantial gainful activity. Griego v. Sullivan, 940 F.2d 942, 943-944 (5th Cir. 1991).

7.8 CHILDREN’S DISABILITY EVALUATION

The ‘comparable severity’ standard required by Sullivan v. Zebley, 110 S.Ct. 885 (1990), is more lenient than the ‘marked and severe functional limitations standard’ established by federal statute in 1996, which applies to child claimants whose claims are subject to final adjudication on or after Aug. 22, 1996. Any case that would have been denied under the Zebley standard would also be denied under the new standard. Harris ex rel. Harris v. Apfel, 209 F.3d 413, 418-419 (5th Cir. 2000).

7.9 MENTAL ILLNESS

When information suggests a mental impairment exists and medical findings do not substantiate the existence of physical impairments capable of producing alleged pain and other symptoms, the ALJ must investigate whether a mental impairment is the basis of the symptoms. Latham v. Shalala, 36 F.3d 482, 484 (5th Cir. 1994).

In any case where there is evidence that indicates the existence of a mental impairment, the ALJ may not make a determination that the claimant is not disabled unless the ALJ has made every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed a residual functional capacity assessment. Bowling v. Shalala, 36 F.3d 431 (5th Cir. 1994).

A mentally ill claimant who is capable of performing work is nonetheless disabled if his impairments prevent him from remaining employed for a significant period of time. Occasional symptom-free periods and sporadic ability to hold a job are symptomatic of a claimant’s mental disability. Leidler v. Sullivan, 885 F.2d 291 (5th Cir. 1989).

A finding that a mentally ill claimant is able to engage in substantial gainful activity requires a determination that the claimant can hold whatever job he finds for a significant period of time. Singletary v. Bowen, 798 F.2d 818 (5th Cir. 1986).

7.10 PAIN AND OTHER NON-EXERTIONAL IMPAIRMENTS

An ALJ cannot ignore altogether a claimant’s subjective complaints of pain but has a duty to develop testimony and other evidence of pain and of the adverse effects of pain medication. Bowling v. Shalala, 36 F.3d 431, 438 (5th Cir. 1994).

An ALJ’s unfavorable credibility evaluation of a claimant’s complaints of pain will not be upheld on judicial review where the uncontroverted medical evidence
shows a basis for the complaints, unless the ALJ weighs the objective medical evidence and assigns articulated reasons for discrediting the complaints. *Abshire v. Bowen*, 848 F.2d 638, 642 (5th Cir. 1988).

Pain constitutes a disabling condition when it is constant, unremitting, and wholly unresponsive to treatment. An ALJ must articulate reasons for rejecting the claimant’s complaints of pain. *Falco v. Shalala*, 27 F.3d 160, 163-164 (5th Cir. 1994) (affirming denial of benefits where claimant’s activities of daily living inconsistent with his pain allegations).

An ALJ is required to consider the type, dosage, effectiveness, and side effects of any medication the claimant takes to alleviate pain or other symptoms. *Crowley v. Apfel*, 197 F.3d 194, 199 (5th Cir. 1999).

Incontinence is a non-exertional impairment which may significantly limit a person’s ability to perform sedentary work; remand is appropriate if an ALJ fails to determine the effect of a claimant’s incontinence on his ability to work. *Crowley v. Apfel*, 197 F.3d 194, 198-199 (5th Cir. 1999).

Remand is required where an ALJ ignores evidence of non-exertional impairments such as fatigue, weakness, swelling and pain and rejects claims of these impairments without citing any contrary evidence in the record. *Newton v. Apfel*, 209 F.3d 448, 459 (5th Cir. 2000).

### 7.11 Failure to Follow Prescribed Treatment

An otherwise remediable condition may be considered disabling if claimant is unable to pay for prescribed treatment. *Tamez v. Sullivan*, 888 F.2d 334 (5th Cir. 1989).

### 7.12 Treating Physician Rule

Absent reliable medical evidence from a treating or examining physician controverting the claimant’s treating physician, an ALJ may reject the opinion of the treating physician only if the ALJ performs a detailed analysis of the treating physician’s views under the criteria set forth in 20 C.F.R. § 404.1527(d)(2) and gives good reasons for the weight given to the treating physician’s opinion. Additionally, if the ALJ determines that the treating physician’s records are inconclusive or otherwise inadequate to receive controlling weight, absent other medical evidence based on personal examination or treatment of the claimant, the ALJ must seek clarification or additional evidence from the treating physician in accordance with 20 C.F.R. § 404.1512(e). *Newton v. Apfel*, 209 F.3d 448 (5th Cir. 2000).

An ALJ may not rely on the conclusory and unsubstantiated opinion of a non-treating, non-examining physician that a claimant is not disabled. An ALJ’s conclusion that a claimant could perform sedentary work based on such an opinion is not supported by substantial evidence. *Newton v. Apfel*, 209 F.3d 448, 457 (5th Cir. 2000).

The ALJ may diminish the weight accorded a treating physician’s opinion relative to that of other experts where the treating physician’s opinion is unsupported by medically acceptable clinical, laboratory or diagnostic techniques or where it is otherwise unsupported by the evidence. *Paul v. Shalala*, 29 F.3d 208 (5th Cir. 1994).166

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166 The U.S. Supreme Court partially overruled *Paul v. Shalala* in *Sims v. Apfel*, 530 U.S. 103 (2000), holding that a claimant who exhausted her administrative remedies, was not required to also exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues.
An opinion of a specialist generally will be accorded greater weight than a non-specialist in a disability proceeding. *Paul v. Shalala*, 29 F.3d 208 (5th Cir. 1994).

When good cause is shown for diminishing reliance on a treating physician’s opinion, that opinion may be given less weight, little weight, or even no weight. *Greenspan v. Shalala*, 38 F. 3d 232 (5th Cir. 1994), *cert. denied*, 514 U.S. 1120 (1995).

A treating physician’s opinion that a claimant is “totally disabled” may be rejected if it is inconsistent with substantial evidence in the record. *Spellman v. Shalala*, 1 F.3d 357, 364 (5th Cir. 1993).

A treating physician’s opinion that a claimant is disabled is not entitled to controlling weight where he failed to provide a medical explanation for his opinion and where his opinion is inconsistent with the opinions of examining physicians which were based on clinical test results. *Martinez v. Chater*, 64 F.3d 172, 176 (5th Cir. 1995).

The opinion of a treating physician is generally given “considerable weight in determining disability”. However, this rule does not apply when a treating physician’s testimony is “brief or conclusory, not supported by medically acceptable clinical laboratory diagnostic techniques, or otherwise unsupported by the evidence.” *Foster v. Astrue*, 410 Fed. Appx. 831 (C.A.5 Tex., 2011) citing, *Perez v. Barnhart*, 415 F.3d 457 (5th Cir. 2005).

### 7.13 EFFECT OF OTHER STATUTORY DEFINITIONS OF DISABILITY AND OTHER AGENCIES’ DETERMINATIONS OF DISABILITY

A ruling that a claimant has been found disabled by the Department of Veterans Affairs is evidence entitled to great weight and constitutes grounds for a remand. *Latham v. Shalala*, 36 F.3d 482, 483-484 (5th Cir. 1994).

SSA must consider the findings of other agencies that claimant is disabled but is not bound by them. *Kinash v. Callahan*, 129 F.3d 736 (5th Cir. 1997).

When the SSA determines disability, it does not take into account the possibility that an employer might make a “reasonable accommodation” of an employee’s disability, thereby allowing him to work. *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999).

A vocational expert should not base his determination of the availability of jobs on the assumption of employer compliance with the ADA and accommodation of a disability. Assessment of jobs available must be based on broad vocational patterns rather than on any individual employer’s practices. However, it is not reversible error for a VE to testify as to whether allowing an employee to alternate sitting and standing is a prevalent workplace accommodation. *Jones v. Apfel*, 174 F.3d 692, 693-694 (5th Cir. 1999).

### 7.14 DRUG ADDICTION OR ALCOHOLISM

The claimant bears the burden of proving that drug or alcohol addiction is not a contributing factor material to disability. *Brown v. Apfel*, 192 F.3d 492 (5th Cir. 1999). (Note that the court apparently was not informed of SSA’s own policy which states that the burden is on the SSA; the SSA failed to brief the issue of the burden of proof in this case.).
Substance addiction is material to disability if the ALJ would not find the claimant disabled if she stopped using drugs or alcohol. The fact that substance abuse exacerbated the claimant’s depression is not sufficient to imply the reverse: that if she ceased using narcotics and alcohol, her depression would be abated. Brown v. Apfel, 192 F.3d 492 (5th Cir. 1999)(dicta).

7.15 ALJ’S DUTY

A Social Security hearing is investigatory rather than adversarial, and it is the duty of the ALJ to investigate the facts and develop the arguments both for and against granting benefits. Sims v. Apfel, 530 U.S. 103 (2000) (plurality opinion).

ALJ has duty to adequately develop the record. Brock v. Chater, 84 F.3d 726 (5th Cir. 1996).

When claimant is not represented by counsel, ALJ has heightened duty to scrupulously and conscientiously explore all relevant facts. Brock v. Chater, 84 F.3d 726 (5th Cir. 1996).

When a claimant is not represented, the ALJ has the duty to ensure that the claimant’s relevant questions to the VE are answered. Bowling v. Shalala, 36 F.3d 431, 437-438 (5th Cir. 1994).

An ALJ’s denial of the opportunity to cross-examine an adverse witness violates constitutional due process. When reports are received after an administrative hearing, the claimant’s waiver of the right to cross-examine must be clearly expressed or strongly implied from the circumstances. When the claimant objects to post-hearing interrogatories to a vocational expert, the ALJ may not rely on the VE’s responses to those interrogatories without giving the claimant an opportunity to cross-examine the VE. Tanner v. Secretary of Health and Human Services, 932 F.2d 1110 (5th Cir. 1991).

By requesting a subpoena, a claimant has the right to cross-examine an individual who submitted a report about the claimant’s condition. Lidy v. Sullivan, 911 F.2d 1075 (5th Cir. 1990).

ALJ must order consultative examination when it is necessary to the determination of disability. No examination is necessary to evaluate an impairment which was alleged for the first time after the hearing and for which claimant never sought treatment. Brock v. Chater, 84 F.3d 726 (5th Cir. 1996).

When the record contains sufficient medical and non-medical evidence upon which to base a determination of the severity of a claimant’s mental problems, an ALJ’s decision not to order a consultative examination is within his discretion. Sims v. Apfel, 224 F.3d 380, 381 (5th Cir. 2000).

An ALJ’s statement that a treating physician’s opinion that his patient was disabled was an attempt “to help [her] get benefits because of his relationship with her” does not support a bias or partiality challenge because it does not reveal “such a high degree of favoritism or antagonism as to make fair judgment impossible”. Brown v. Apfel, 192 F.3d 492, 500 (5th Cir. 1999) citing Liteky v. United States, 510 U.S. 540, 555 (1994).

Remand is appropriate where an ALJ fails to address the inconsistencies in the evidence. Myers v. Apfel, 238 F.3d 617 (5th Cir. 2001).
7.16 LEGAL EFFECT OF SOCIAL SECURITY RULINGS AND HALLEX POLICIES

Social Security Rulings are binding on all components of the SSA. Spellman v. Shalala, 1 F.3d 357, 360 n.7 (5th Cir. 1993).

Social Security Rulings are not binding on federal courts, but the courts frequently rely on them when the statute at issue provides little guidance. Myers v. Apfel, 238 F.3d 617 (5th Cir. 2001).

SSA procedures set forth in HALLEX must be followed, even where they are more rigorous than would otherwise be required. Newton v. Apfel, 209 F.3d 448, 459 (5th Cir. 2000).

The Fifth Circuit has expressed a strong preference for requiring the SSA to follow its own internal procedures such as HALLEX; however, the claimant must make a showing that he was prejudiced by the agency’s failure to follow a particular rule before relief from the agency decision will be granted. Shave v. Apfel, 238 F.3d 592 (5th Cir. 2001).

7.17 APPEALS COUNCIL

The Appeals Council must follow its own procedures, set forth in HALLEX, that require it to specifically address additional evidence or legal arguments or contentions submitted in connection with the request for review. Newton v. Apfel, 209 F.3d 448, 459 (5th Cir. 2000).

7.18 FEDERAL COURT REVIEW

A Social Security claimant can raise issues in federal court even if they were not raised at the Appeals Council. Sims v. Apfel, 530 U.S. 103 (2000) (overruling contrary holding of McQueen v. Apfel, 168 F.3d 152 (5th Cir. 1999)). The Supreme Court left open the possibility that a federal court may be barred from considering issues which could have been raised, but were not, at the ALJ hearing.

Federal court review of SSA’s denial of disability benefits is limited to determining whether 1) final decision is supported by substantial evidence and 2) the SSA used the proper legal standards to evaluate the evidence. The federal court may not reweigh evidence or try issues de novo. “Substantial evidence” needed to support denial of disability benefits is such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. It is less than a preponderance but more than a scintilla. Newton v. Apfel, 209 F.3d 448, 452 (5th Cir. 2000).

The substantial evidence test does not involve a simple search of the record for isolated bits of evidence which support the SSA’s decision. The court must consider the record as a whole, including contrary evidence. Singletary v. Bowen, 798 F.2d 818, 823 (5th Cir. 1986).

A federal court will reverse an ALJ’s decision because of legal error only if a claimant shows that he was prejudiced as a result of the error. Bowling v. Shalala, 36 F.3d 431, 437 (5th Cir. 1994).

A federal court may reverse the SSA’s judgment and award disability benefits in the absence of good cause to remand. Where the SSA failed to make a finding necessary to deny benefits and nothing in the record would support such a finding, reversal rather than remand is appropriate. McQueen v. Apfel, 168 F.3d 152 (5th Cir. 1999).
ALJ’s decision denying benefits will be reversed for failure to develop the record only if claimant shows prejudice as result of the failure. *Bowling v. Shalala*, 36 F.3d 431 (5th Cir. 1994).

If the court is unable to determine if the ALJ used the correct legal standard in denying benefits, the case should be remanded. *Hughes v. Shalala*, 23 F.3d 957 (5th Cir. 1994).

A civil action must be instituted in federal court within 60 days after the Appeals Council’s notice of decision or notice of denial of request for review is received by the claimant. There is a rebuttable presumption that the date of receipt of the notice is five days after the date of such notice. *Fletcher v. Apfel*, 210 F.3d 510, 512-513 (5th Cir. 2000).

The deadline for filing an action in federal court is tolled during a delay in stamping a complaint “filed” in a case in which *forma pauperis* status is eventually granted. *Fletcher v. Apfel*, 210 F.3d 510, 513 (5th Cir. 2000) (declining to decide the question of whether the limitations period is tolled during the pendency of an unsuccessful IFP application).

Only two kinds of federal court remands to the SSA are permissible: 1) “sentence four” remands, in which a court issues a judgment affirming, modifying or reversing the agency’s decision “with or without a remand,” and 2) “sentence six” remands, in which there is new evidence and good cause for the failure to present the evidence in the earlier proceeding. A remand order to allow the SSA to perform a consultative examination is improper if the court makes no substantive ruling and no explicit findings of good cause to consider new evidence. *Istre v. Apfel*, 208 F.3d 517 (5th Cir. 2000).


A federal court may review the SSA’s refusal to reopen a claim only if there is a colorable constitutional claim. There is no constitutional violation when res judicata is applied to dismiss a claimant’s request for a hearing on a subsequent claim in which medical reports show a degeneration of the claimant’s condition since the prior unfavorable SSA decision. Nor is application of res judicata unconstitutional simply because the tape recording of the prior hearing was lost. *Torres v. Shalala*, 48 F.3d 887, 890 (5th Cir. 1995).

A federal court has no jurisdiction to review an ALJ’s dismissal of a request for a hearing where there is no colorable constitutional claim and where the ALJ dismissal was authorized by the regulations and the claimant was given the required notice. *Brandyburg v. Sullivan*, 959 F.2d 555 (5th Cir. 1992).

### 7.19 FEDERAL COURT REVIEW-CONSIDERATION OF NEW EVIDENCE

Remand is appropriate when there is a showing of 1) new and material evidence, 2) good cause as to why the new evidence was not incorporated into prior proceedings, and 3) a reasonable possibility that the new evidence would have changed the outcome of SSA’s determination. *Ripley v. Chater*, 67 F.3d 552 (5th Cir. 1995).
New evidence must pertain to the time period for which disability benefits were denied and not merely concern subsequently acquired disability or deterioration of a condition that was not previously disabling. *Legett v. Chater*, 67 F.3d 558 (5th Cir. 1995).

Evidence of a back surgery conducted after the SSA’s denial of benefits was material in that it provided objective basis for claimant’s previous complaints of back pain. *Ripley v. Chater*, 67 F.3d 552 (5th Cir. 1995).

Remand is inappropriate where new evidence submitted in federal court does not relate to the time period for which benefits were denied. *Falco v. Shalala*, 27 F.3d 160, 163 (5th Cir. 1994).

### 7.20 OVERPAYMENTS

When a claimant was overpaid benefits as a result of signing an application form which she failed to read and which erroneously stated that she was unmarried, an ALJ’s decision that she was negligent and thus “not without fault” is supported by substantial evidence. *Austin v. Shalala*, 994 F.2d 1170, 1174 (5th Cir. 1993).

The limited education of a claimant can affect the determination of whether she is at fault in a request for waiver of an overpayment. *United States v. Phillips*, 600 F.2d 535, 540 (5th Cir. 1979).

### 7.21 OTHER SSI/SSDI RULES

An individual may apply for a disability determination, even if he does not meet the non-disability eligibility rules, in order to extend his insured status by eliminating from the “20/40 rule” quarters during which he was unable to work because of disability. However, a person cannot apply for SSDI benefits or a disability determination more than 12 months after his disability has ended. *George v. Chater*, 76 F.3d 675, 677 (5th Cir. 1996).


Under 42 U.S.C. § 407, SSDI benefits are not transferable or assignable. However, this provision does not bar deeming a child’s SSDI benefits as available to support the child’s family in determining eligibility for welfare and food stamps. *Williams v. Rafterd*, 976 F.2d 942 (5th Cir. 1992).


Good cause does not exist for an ALJ to reopen a favorable finding of disability and change it into a closed period where there is a later discovery of possible substantial gainful activity after the original decision. *Cole ex rel. Cole v. Barnhart*, 288 F.3d 149 (5th Cir. 2002).
8. RESOURCES FOR THE ADVOCATE

8.1 SOURCES OF LAW

- Old-Age, Survivors, and Disability Insurance Benefits (Title II benefits) 42 U.S.C. § 401 et seq.; 20 C.F.R. § 404.1 et seq.
- West’s Social Security Laws: Selected Statutes and Regulations. Includes the Listings of Impairments and the Medical-Vocational Guidelines, both of which are appendices following 20 C.F.R. § 404.1599.
- www.ssa.gov Social Security Administration’s own website includes statutes, regulations, emergency bulletins and SSRs.

8.2 REPORTING SERVICES, NEWSLETTERS, TREATISES AND MANUALS

- West’s Social Security Reporting Service. Includes the Code, Topical Index, Digest Index, Rulings, Regulations, and Cases. Updated annually.
- NSCLC Washington Report (published by the National Senior Citizens Law Center). Summary of new judicial, legislative, and regulatory developments in Social Security, Medicaid and Medicare law. NSCLC also has a website where you can sign up for alerts and other newsletters: http://www.nsclc.org

8.3 ELECTRONIC RESOURCES

Social Security Administration www.ssa.gov

Contains SSA forms, including Appointment of Representative and appeal forms, which you can download. Also contains the complete Social Security regulations, proposed regulations, Social Security Rulings and Acquiescence Rulings, the Social Security Handbook, and general information indexed by subject. You can access the Social Security Bulletin, a research journal, or subscribe to an on-line SSA newsletter (www.ssa.gov/enews).
HALLEX
HALLEX stands for Hearings, Appeals, Litigation and Law manual. It is the manual of policies and procedures governing the Office of Disability Adjudication and Review and Appeals Council. The HALLEX is now on SSA's website http://www.ssa.gov/OP_Home/hallex/hallex.html

POMS
POMS stands for Program Operations Manual System. It is a manual of policies and procedures governing the field offices of the SSA. It can be found on SSA's website. https://secure.ssa.gov/poms.nsf/home!read-form

Louisiana Pro Bono and Public Interest Web Page www.probono.net/la
This web page includes useful information in most areas of practice.

National Organization of Social Security Claimants’ Representatives (NOSSCR) www.nosscr.org
Contains Advocate Alerts (recent developments) and links to related sites, including access to the Code of Federal Regulations and the Federal Register.

National Immigration Law Center www.nilc.org
NILC is a good source of information about immigrants’ eligibility for SSI.

Bazelon Center for Mental Health Law www.bazelon.org

8.4 MEDICAL INFORMATION ON-LINE
The Merck Manual of Diagnosis and Therapy. www.merck.com
The entire Merck Manual, the most widely used medical text in the world, is online with a search engine. You can also search the Merck Manual of Medical Information - Home Edition, which translates medical language into plain English.

Pharmaceutical Information Network Pharminfo.com
Contains “DrugDB,” a searchable database of medications. Explains what diseases they are used to treat and the side effects.

MEDLINE is the database of academic articles which is maintained by the National Institutes of Health. Searchable by key word. This website also contains MEDLINEPlus, a consumer version of Medline, medical dictionaries, and links to other resources.

National Institutes of Health http://search.info.nih.gov/
The search engine for the NIH.

Electronic ICD (Yaki Technologies) www.eicd.com
Explains the meaning of the numerical diagnostic codes of the ICD-9-CM. Also contains a hospital locator.

Journal of the American Medical Association www.jama.com
Can search archives of JAMA and several other medical journals.
Stanford University MedWorld www.med.stanford.edu/medworld/home
This is an excellent site, sponsored by the Stanford Medical Alumni Association and maintained by Stanford Medical School students, with many links to medical information. Can Search MEDLINE. Contains links to and a comprehensive list of all medical journals available online, including the New England Journal of Medicine.

American Medical Association Doctor Finder www.ama-assn.org
Get background information on a physician.

School Psychological Resources Online www.schoolpsychology.net
This site is maintained by the Office of Psychological Services of the Baltimore County Public Schools. Can search for information on childhood illnesses and disorders.

American Psychological Association www.apa.org

American Psychiatric Association www.psych.org
CHAPTER 12

SUCCESSIONS IN LOUISIANA

Paul Tuttle
About The Author

Paul Tuttle in the Managing Attorney of the Title Clearing Project of Southeast Louisiana Legal Services. He has been an attorney with Southeast Louisiana Legal Services since 1996, working in successions, title clearing, public benefits, family, housing and foreclosure law. Since 2006, Mr. Tuttle has focused primarily on succession and title clearing matters that arose out of the Katrina and Rita disasters. He has been a lecturer on succession law. Mr. Tuttle is a 1996 cum laude graduate of Tulane Law School.
1. INTRODUCTION

In Louisiana, probate law is called succession law. The terms succession and estate are often used interchangeably to refer to the property that the decedent owned at death. This chapter outline discusses Louisiana succession law and procedures for intestate and testate successions.

Sources of Louisiana Probate or Succession Laws

Louisiana probate or succession laws include:

- Substantive Probate Law: La. Civil Code art. 870-1429
- Community Property Law: La. Civil Code art. 2325-2437

Treatises and Practice Manuals on Louisiana Probate Law

- C. Neff, Louisiana Estate Planning, Will Drafting and Estate Administration, (2d ed. LexisNexis 2004)
- Louisiana Probate Laws (West 2012)

2. WHAT IS A SUCCESSION?

"Succession" is transmission of the deceased’s estate or rights to his successors. Transfer of ownership to the heirs occurs immediately upon death. La. Civ. Code art. 935. An heir may exercise rights of ownership for his interest in an asset of the estate and the estate as a whole before the qualification of an executor or administrator. La. Civ. Code art. 938. Indeed, many indigent clients will take physical possession of succession property, including immovable property, without completing the succession. Nonetheless, a succession must be opened and completed in order to exercise important legal rights as to the deceased’s property.¹

The estate of the deceased includes the property, rights, and obligations that he had at death. The estate also includes all rights and obligations that have accrued since death. La. Civ. Code art. 872.

The complexity of a succession depends on the value and type of property involved, the decedent’s debts, and whether there is conflict among family members. Often, indigent clients either have never heard of or are unfamiliar with the procedures for opening a succession. They are simply told by the bank, mortgage company or an attorney that they had to “open a succession” before they could have access to the deceased’s bank account, obtain a home improvement loan, or cash the deceased’s settlement check.

A surviving spouse may use a La. R.S. 9: 1513 affidavit to withdraw up to $10,000 from a checking account, savings account or certificate of deposit.

¹ In estates less than $75,000, a simpler succession procedure, called “heirship affidavit”, may suffice. See La. Code Civ. Proc. art. 3431-34.
2.1 WHY IS IT IMPORTANT TO OPEN A SUCCESSION?

A succession is opened to get legal possession of immovable and movable property, and to gain access to bank accounts, pensions or insurance proceeds for the successors. The legal possession of immovable property that results from a succession will give the successors the power to sell the property, refinance, and qualify for the homestead exemption. In the wake of Hurricanes Katrina and Rita, many successions had to be completed in order for Louisiana homeowners to access state and federal rebuilding funds.

2.2 WHEN SHOULD A SUCCESSION BE OPENED?

A succession should be opened as soon as practicable after the decedent’s death. Sometimes, it is necessary to immediately open successions to use the decedent’s bank accounts or assets to pay funeral or medical bills.

Delay in opening a succession may cause problems. Often, successors wait many years to open a succession. As a result, they may run into problems such as lost documents or wills or face tax sales of homes for unpaid taxes. Also, waiting too many years to open a succession may make a succession more complicated and expensive. This is especially true with the passing of generations when the co-heirs lose contact with each other or die.

Judgments of Possession in Succession cases are considered “prima facie” evidence of the rights of the heirs of the Decedent. La. Code of Civ. Proc. art. 3062 The right to assert an inheritance rights is subject to a 30 year prescription, which runs from the decedent’s death. See La. Civ. Code art. 3502, 934. After this, the Judgment of Possession would be final and conclusive. However, heirs should act quickly to protect their inheritance rights since heir property may be lost if transferred to a third party.

2.3 SMALL AND LARGE SUCCESSIONS

Procedurally, many successions can be handled by the filing of an ex parte petition for possession with a district court. If the gross value of the estate at the decedent’s death is less than $75,000, it may be possible to complete the transfer of property by recording an affidavit in the public records, rather than filing a court succession. See La. Code Civ. Proc. art. 3431-3434.

3. BASIC LAWS OF SUCCESSIONS

Successions are either intestate or testate. La. Civ. Code art. 873-876

1. Intestate successions occur when the decedent dies without a will, the will is invalid in whole or in part, or the will does not dispose of all of the decedent’s property.

Intestate successors are called “heirs.”

2. Testate successions occur when there is a valid will.

Testate successors are called “legatees.”

When the succession is intestate, the Louisiana Civil Code determines who inherits the decedent’s estate. If the decedent died testate, the will governs who inherits the decedent’s estate, assuming the will is valid.
4. INTESTATE SUCCESSION

4.1 CLASSIFYING PROPERTY FOR INTESTATE SUCCESSIONS

Determining who inherits property in an intestate succession involves determining whether the property itself is community or separate under Louisiana law. Louisiana is a community property state, meaning that most property obtained by married persons is considered to be community property and each spouse owns an undivided one-half (1/2) share in that property.

The following community property rules apply to property acquired after 1979:

Property of married persons is either community or separate. La. Civ. Code art. 2335. Property acquired during a marriage is presumed to be community. La. Civ. Code art. 2340. In most cases, property acquired during a marriage will be community property. The major exceptions are property acquired by donation or inheritance to a single spouse. That property is the spouse’s separate property.

The community property regime begins upon marriage and terminates with death or divorce. In a divorce, the community property regime is generally terminated retroactive to the filing date of the divorce petition upon which the divorce was granted. This means that the community property converts to separate property on that date. Sometimes property will be divided between a divorcing couple, either in the divorce proceeding, a separate partition proceeding, or by private agreement. It is not unusual, however, for divorcing couples to not address property issues in their divorce. In that case, the divorced spouses continue as co-owners, with each owning a one-half (1/2) undivided share of the former community property, which is now classified as separate property. You should include the case name, docket number, court and divorce date for any relevant divorces for inclusion in the succession pleading.

Louisiana community property laws apply to spouses domiciled in Louisiana regardless of their domicile at time of marriage. La. Civ. Code art. 2334.

Immovable property in Louisiana is generally governed by Louisiana law regardless of the acquiring spouse’s domicile at time of acquisition. La. Civ. Code art. 3524. The nature of immovable property in another state acquired during the marriage is determined by reference to the Louisiana Civil Code Articles on Conflicts of Law, Articles 3523 et al.

Community property includes:
- property acquired during the marriage through work or effort of either spouse or with community property or with community or separate property
- property donated jointly to the spouses
- fruits of community property
- fruits of separate property (Civ. Code art. 2339)
- damages awarded for loss of community property
- all other property not classified by law as separate property.

Separate property includes:

- property acquired by spouse before establishment of community regime (unless changed by subsequent act)
- property acquired by a spouse by inheritance or donation to him individually
- property acquired by spouse with separate property or with separate property and community property where the value of the community property is inconsequential compared to the value of the separate property.
- damages for personal injuries sustained by a spouse during the community.


Note: For property acquired before 1979, wives were allowed to declare property as separate property without the concurrence of the spouse. This declaration was usually made in the act of sale. Before 1989, men were allowed to manage community property without the consent of their wives. So, sales may only have signature of husband but still be classified as community property. Make sure you know the dates of the marriage so you can determine whether property is community or separate in these older cases.

Use of community property to improve separate property or pay a mortgage may give rise to a community property claim or liability for reimbursement. La. Civ. Code art. 2364. For example, a spouse may own separate immovable property bought before a marriage, but the mortgage is paid with community funds after the marriage. Similarly, satisfaction of a community obligation with separate property gives rise to a claim for reimbursement. La. Civ. Code art. 2365. These claims for reimbursement do not confer automatic ownership rights or change the classification of the property. Spousal reimbursement claims prescribe in ten years.²

The above rules are “default” rules in the absence of any matrimonial agreement. Matrimonial agreements or spousal donations may affect the classification of property as community or separate. La. Civ. Code art. 2328, 2343, 2343.1. Be sure to ask about matrimonial agreements, donations of community property, or transfer of separate property to the community.

4.2 WHO INHERITS COMMUNITY PROPERTY BY INTESTACY?

When a married spouse dies, the surviving spouse has full ownership of his/her own one-half (½) share of the community property, which is instantly converted to separate property. The devolution of the decedent’s one-half (1/2) share of the property goes according to the following rules:

a. If the deceased died with descendants, they share the decedent’s ½ share of community property subject to the surviving spouse’s usufruct. This intestate usufruct over community property terminates when the surviving spouse dies or remarries. La. Civ. Code art. 890. The descendants are considered to be “naked owners” during the period of the usufruct. Security is generally required from the usufructuary to protect the rights of the naked owners.

² Birch v. Birch, 55 So.3d 796 (La. App. 2 Cir. 2010).
La. Civ. Code art. 571. This requirement is waived in most situations, including when a surviving spouse obtains the usufruct through the operation of La. Civ. Code art. 890. La. Civ. Code art. 573. Two important exceptions are when the naked owner is not the child of the usufructuary or he is the child of the usufructuary and a forced heir. La. Civ. Code art. 573 (A)(2). A seller or donor of property under reservation of usufruct is not required to give security. La. Civ. Code art. 573(B).

b. If the deceased died with no descendants, the deceased’s ½ interest goes to the surviving spouse. Thus the surviving spouse owns the entire property outright as separate property. There is no usufruct in this situation. This is the main difference between the devolution of community and separate property.

### 4.3 WHO INHERITS SEPARATE PROPERTY BY INTESTACY?

Separate property devolves by law in favor of the heirs. Heirs are divided into five classes and, as to separate property, they inherit in the following order of priority under La. Civ. Code art. 880 et seq. If there are no heirs in one class, the property goes to all the heirs in the next class.

a. descendants

b. parents and siblings (sisters or brothers) and their descendants (grandchildren)
   i. If there are siblings (or their descendants) and a surviving parent or parents, the siblings inherit subject to a joint and successive usufruct in favor of the parents
   ii. If there are siblings and no surviving parents, siblings inherit free of usufruct
   iii. If there are no siblings (or their descendants), the surviving parent or parents inherit.

c. surviving spouse (in the case where the decedent was married at the time of death but had separate property.

d. more remote ascendants (grandparents, aunts, uncles)

e. more remote collaterals

Relatives in the most favored class inherit to exclusion of other classes. The nearest relation in a class, determined by counting degrees, inherit to the exclusion of more distant relatives in that class. It may be useful to draw a “family tree” diagram to clearly determine who inherits, if there are many heirs.

### 4.4 A CLOSER LOOK AT THE 5 CLASSES OF HEIRS

The order for inheritance of separate property is:

a. **Descendants:**

   The descendants are the children (including adopted or illegitimate but formally acknowledged or timely established filiation), or their representatives. The children (or their descendants) take to the exclusion of other heirs.

   Children who were adopted through a formal adoption proceeding are entitled to full rights as legitimate children. An adopted child may also inherit from his natural parents and relatives. However, natural persons and
A stepchild does not inherit unless he or she was formally adopted by the
decedent.

Illegitimate children (born outside of marriage) inherit to the same
extent as legitimate children only if they are formally acknowledged by the
father’s name on the birth certificate, by a later formal acknowledgment (by
juridical act or by a written acknowledgment which is signed and notarized),
or by a judgment in a timely established filiation proceeding. See La.Civil

Generally, the right of illegitimate children to inherit is not an issue with
the Succession of a mother, as the birth certificate will be accepted as evi-
dence of maternity. A red flag is raised, however, in the Succession of a
father, if any of the children do not have the last name of the father. This
most likely means that the father does not appear on the birth certificate.
The attorney should investigate further to see if the child is illegitimate, and
whether he/she has the right to inherit.

If the child is illegitimate and the father’s name is not listed on the birth
certificate, ask the family whether the father was ever ordered by a court to
pay child support. Such child support proceedings often involve an acknow-
ledgment of paternity by the father. Acknowledgments may also occur in
divorce or succession proceedings filed by the father. If an acknowledgment
cannot be found in a court proceeding, ask whether the father signed a nota-
rized acknowledgment of paternity or if the child filed a filiation action in
court.

Under Act 192 of 2005, eff. June 29, 2005, unacknowledged illegitimate
children have up to 1 year after their father’s death to file a filiation action.
Acts of informal acknowledgment by the father could be used as evidence in
a civil proceeding to establish filiation.

Prior to Act 192 of 2005, the time period for filing a filiation action was
very limited, either 1 year after the parent’s death or 19 years after the child’s
birth, whichever first occurs. Unacknowledged children’s filiation claims that
were time-barred before Act of 2005, are not revived by Act 192 according
to several circuits.3 Basically what this means is that no matter when the
parent died, if the child was over 19 on June 29, 2005, he or she cannot ini-
tiate a filiation claim. This issue, however, has attracted several votes for
certiorari in the Supreme Court and it is possible that the prior law, Civil
Code art. 209, may be ruled unconstitutional based on advances in DNA test-
ing for paternity.

b. Parents and siblings:

If the deceased leaves no descendants but is survived by a father, mother,
or both, and by a brother or sister, or both, or descendants from them, the
brothers and sisters or their descendants succeed to the separate property of
the deceased subject to a usufruct in favor of the surviving parent or parents.

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3 In re Succession of Faget, 938 So.2d 1003 (La. App. 1 Cir. 2006), writ denied 941 So.2d 40 (La. 2006); Succession of
McKay, 921 So.2d 1212 (La. App. 3 Cir. 2006), writ denied 929 So.2d 1252 (La. 2006).
If both parents survive the deceased, the usufruct shall be joint and successive. A parent, for purposes of devolution of separate property, includes one who is legitimately filiated to the deceased or who is filiated by legitimation or by acknowledgment under La. Civ. Code art. 203 or by judgment under La. Civ. Code art. 209. If there are no parents surviving, the entire estate goes to the siblings (or their descendants) to the exclusion of all others. La. Civ. Code art. 892.

**Siblings and their descendants:** If more than one, all siblings share equally.

If a sibling predeceases the decedent, his share goes to his descendants by representation.

**Siblings related by half-blood:** The property that devolves to the brothers or sisters is divided among them equally, if they are all born of the same parents. If they are born of different unions, it is equally divided between the paternal and maternal lines of the deceased: brothers or sisters fully related by blood take in both lines and those related by half-blood take each in his own line. If there are brothers or sisters on one side only, they take the entirety to the exclusion of all relations in the other line. La. Civ. Code art. 893.

**Parents:** If there are no siblings (or their descendants), the parents inherit the separate property.

d. **Surviving spouse:**

If the deceased does not leave descendants, parents, siblings or descendants from them, his spouse, if not judicially separated from him, shall succeed to his separate property to the exclusion of other ascendants and collaterals. La. Civ. Code art. 894.

e. **Grandparents or Other Ascendants:**

If a deceased does not leave descendants, siblings or their descendants, a spouse not judicially separated, his other ascendants succeed to his separate property. If the ascendants in the paternal and maternal lines are in the same degree, the property is divided into two equal shares, one of which goes to the ascendants on the paternal side, and the other to the ascendants on the maternal side, whether the number of ascendants on each side be equal or not. In this case, the ascendants in each line inherit by heads. La. Civ. Code art. 895.

f. **Remote Collateral Relatives**

If the deceased has no surviving descendants, parents, siblings (or their descendants), surviving spouse not judicially separated, or ascendants, his other collaterals succeed to his separate property. The nearest in degree to the deceased among more remote relations in each class, is called to succeed. La. Civ. Code art. 899. Among collateral relatives, the nearest in degree excludes all others. If there are several in the same degree, they share equally and by heads.

If there are no heirs, in default of blood, adopted relations, or a spouse not judicially separated, the estate of the deceased belongs to the state. La. Civ. Code art 902. This situation is extremely rare.
5. TESTATE SUCCESSIONS

5.1 DONATIONS

1. There are two kinds of donations:
   b. Donation mortis causa (in prospect of death): an act to take effect, when the donor shall no longer exist, by which he disposes of the whole or a part of his property, and which is revocable. La. Civ. Code art. 1469.

A donation’s validity depends on whether:
   a. one has the capacity to give and receive,
   b. the requisite formalities are followed, and
   c. substantive limits are not violated.

2. Who can make donations?
   a. A minor under the age of sixteen years does not have capacity to make a donation either inter vivos or mortis causa, except in favor of his spouse or children.
   b. A minor who is sixteen years or older has capacity to make a donation, but only mortis causa. The minor may make a donation inter vivos in favor of his spouse or children.
   c. A person of the age of majority can give via donation inter vivos and mortis causa.
   d. To have capacity to make a donation inter vivos or mortis causa, a person must also be able to comprehend generally the nature and consequences of the disposition that he is making. See e.g., La. Civ. Code art. 395, 1471, 1477.

   Note: The person who challenges the capacity of a testator must prove by clear and convincing evidence that the testator lacked capacity when the will was executed. If the testator was judicially declared “mentally infirm” at the time the will was executed, the proponent of the challenged testament must prove by clear and convincing evidence that the testator had capacity. La. Civ. Code art. 1482.
   e. The capacity to donate mortis causa must exist at the time the testator executes the testament. La. Civ. Code art. 1477.

3. Who has the capacity to receive a donation?
   a. All persons have capacity to make and receive donations inter vivos and mortis causa, except as expressly provided by law. La. Civ. Code art. 1470.

   When a donation depends on fulfillment of a suspensive condition, the donee must have capacity to receive at the time the condition is fulfilled. La. Civ. Code art. 1473.
   b. A person must be in existence at the time the donee accepts the gift for donation inter vivos or at the time of the testator’s death for donation mortis causa.
To be capable of receiving by donation *inter vivos*, an unborn child must be in utero at the time the donation is made. To be capable of receiving by donation *mortis causa*, an unborn child must be in utero at the time of the death of the testator. In either case, the donation has effect only if the child is born alive. La. Civ. Code art. 1474.

4. **Who can accept a donation?**
   a. If the donee is of full age, the acceptance may be made by him, or in his name by his attorney in fact having special power to accept the donation which is made, or a general power to accept the donations that have been or may be made.

   b. Gifts to minors, not emancipated, must be accepted by tutors or the trustee if given in a trust. Either a parent of the minor, any ascendant of the minor, whether the minor is emancipated or not, or the tutor of the minor, may accept the donation for the minor whether such parent or ascendant is the donor, or the tutor of the minor or both. And a donation to be held in trust for the minor may be accepted by the trustee alone. La. Civ. Code art. 1546.

   c. Donations made for the benefit of a hospital, of the poor of a community, or establishments of public utility, shall be accepted by the administrators of such communities or establishments. La Civ. Code art. 1549. However, the charitable organization must exist at the time the donation takes effect.

   d. If a donee, being of full age, is under interdiction, the acceptance is made for him by his curator. La. Civ. Code art. 1547.

   e. A deaf individual, knowing how to write, may accept for himself or by an attorney in fact. If he does not know how to write, the acceptance shall be made by a curator appointed by the judge for that purpose. La. Civ. Code art. 1548.

5. **What May Nullify a Donation:**
   - Donation impoverishes donor (La. Civ. Code art. 1498)
   - Lack of authentic act or donee’s failure to accept\(^4\)
   - Duress
   - Fraud
   - Undue Influence (La. Civ. Code art. 1480)
   - Person who is incapable of receiving
   - Property to come in a future event, the property must exist at the time of the donation (La. Civ. Code art. 1528)
   - Donation conditional on will of the donor (La. Civ. Code art. 1529)
   - Condition of paying other debts and charges than those that existed at the time of the donation (La. Civ. Code art. 1530)
   - Where the witnesses and notary signed the document attesting to a party’s signature hours before the party actually signed.\(^5\)

\(^4\) In re Succession of Jones, 86 So.3d 25 (La. App. 2 Cir. 2012).
The elderly and donations of naked ownership—a warning:
Children often talk their parents into donating them a naked ownership with reservation of a usufruct to the parents. How does this affect the parents? As the usufructuaries, they lose the homestead exemption and are responsible for paying taxes. They no longer have the power to sell or mortgage their home. They remain responsible for ordinary repairs. They can’t make major repairs to their home without the naked owners’ consent. If the reservation of the usufruct is not timely recorded, they may even face loss of their usufruct if the naked owners transfer the home to another person or entity.

In order to annul a donation on the basis of undue influence, one must show that the donee’s influence was so substantial that the donee substituted his or her own volition for that of the donor. However, if the evidence shows that the execution of the testament was well within the description of the testator, the court should not find that the testator’s volition has been replaced by the donee’s volition.6

Any person who, whether alone or with others, commits fraud or exercises duress or unduly influences a donor, or whose appointment is procured by such means, shall not be permitted to serve or continue to serve as an executor, trustee, attorney or other fiduciary pursuant to a designation as such in the act of donation or the testament or any amendments or codicils thereto. La. Civ. Code art. 1481.

5.2 WILLS (TESTAMENTS)
A will is the voice of the deceased (i.e., testator, the deceased who made the will). It speaks for the deceased and carries out his wishes of whom he wants to inherit his separate or community property. If a person makes a will, his succession is testate. Prior to 1999 there were seven different types of wills. In 1999, the Louisiana legislature narrowed the list to only two types: olographic and notarial testaments. Wills that were drafted before 1999 and were valid under those rules, are still valid. A will executed in another state and valid under that state’s law will be recognized by Louisiana if the will was in writing and subscribed by the testator. La. R.S. 2401.

The two kinds of wills have specific rules and forms that MUST be followed. Failure to follow the formalities for a will may invalidate the will, causing the succession to go intestate. If an invalid will has been probated, a petition to annul the testament may be filed. La. Code Civ. Proc. art. 2931. Only one person may execute a testament in the same instrument. La. Civ. Code art. 1571.

1. Olographic Testaments
a. Requirements for olographic testaments
An olographic will is one entirely written, dated and signed in the testator’s handwriting. La. Civ. Code art. 1575. The date may appear anywhere in the testament. The testator must sign his name at the end

6 Succession of Tanner, 836 So. 2d 1280 (La. App. 4 Cir. 2003).
of the testament. The date is sufficiently indicated if the day, month, and year are reasonably ascertainable from information in the testament, as clarified by extrinsic evidence, if necessary. Additions and deletions on the testament may be given effect only if made by the hand of the testator. If anything is written by the testator after his signature, the testament shall not be invalid for that reason. Such writing may be considered by the court as part of the testament. La. Civ. Code art. 1575. The olographic testament is subject to no other requirement as to form.

Over the years, the courts have lessened the formalities of olographic wills, i.e., accepting slash dates instead of writing out the date. Succession of Boyd, 306 So. 2d 687 (La. 1975). An olographic will may be written in part pencil and ink. The entire olographic will does not have to be written on the same date. But, the basic formal requisites have remained in place, i.e., a valid olographic testament must be entirely written, dated and signed in the handwriting of the testator. In Succession of Angele, 546 So. 2d 262 (La. App. 1 Cir. 1989), writ denied, 550 So. 2d 656 (La. 1989), the court held that a will typewritten and signed by the testator was not valid, rejecting the argument that the term “written” was broad enough to include “typewritten” wills.

b. **How to probate an olographic will or testament**

To probate an olographic will, two witnesses must testify that the testament was entirely written, dated and signed in the testator’s handwriting. The jurisprudence interpreting La. Code Civ. Proc. art. 2883 has held that the phrase “credible witness” includes persons who are familiar with the testator’s handwriting, as well as handwriting experts. Thus, proof that an alleged olographic will was entirely written, dated and signed in the testator’s handwriting is not limited to handwriting experts. A credible individual familiar with decedents’ handwriting may serve as a credible witness.

**Note:** Wills must be probated within 5 years of the *judicial* opening of a succession. La. Code Civ. Proc. art. 2893.

c. **Possible Problems with Olographic Testament:**

1. **Preprinted extraneous material such as a personal or business letterhead**

   A letterhead will not defeat the formal requisites of an olographic will provided that the testament itself is entirely written, dated and signed in the handwriting of the testator. However, courts have ignored those printed words whose presence on the document is incidental. An exception has evolved with respect to partially printed dates. To uphold a will where a portion of the date

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7 In re Succession of Aycock, 819 So. 2d 290 (La. 2002).
8 Succession of Smart, 36 So.2d 639 (1948).
9 Oroszy v. Burkard, 158 So.2d 405 (La. App. 3 Cir. 1963).
11 In re Succession of Jones, 356 So. 2d 80, 82 (La. App. 1 Cir. 1978), writ denied, 357 So.2d 1168 (La. 1978).
12 Succession of Lirette, 5 So. 2d 197 (La. App. 1 Cir. 1941).
was printed, the handwritten portion of the date must be sufficient to be certain of the date when the printed numbers are ignored.\textsuperscript{13} In other words, the ignored numerals are not essential to a determination of the date.

2. A document that does not contain the intent to make actual bequests of the testator’s assets.

   A testator can name the beneficiaries to act on his behalf after his death. The testator can direct them to sell his home, but if he does not bequeath the sale proceeds, the will is invalid. The testator can direct heirs to divide the contents of a home among themselves, to use the life insurance money for the testator’s funeral, and to pay debts from the estate. The testator can also grant the beneficiaries the power to manage the testator’s debts and “full usage of the money” in an account “to solve what problems they encounter.” Nevertheless, if the bequest is unclear, the will is invalid.

   Although a document has expressions which reflect a testator’s intent to direct the division of his or her property upon his death, his words must signify bequests, the necessary \textit{animus testandi}.\textsuperscript{14}

3. Having a notary or attorney sign for the testator will invalidate a will.

   Louisiana courts have held an olographic testament must be entirely written, dated and signed by the testator and is subject to no other form. \textit{Arnold v. Fenno}, 652 So. 2d 1078 (La.App. 4 Cir. 1995).

2. Notarial Testaments

   a. The notarial testament shall be in writing, dated and executed as follows:

      1. Done before a notary and two competent witnesses
      2. The testator shall declare or signify that the instrument is his testament
      3. The testator must sign each page and at the end of the testament,
      4. In the presence of the testator and each other, the notary and the witnesses shall sign the following declaration, or one substantially similar: “In our presence the testator has declared or signified that this instrument is his testament and has signed it at the end and on each other separate page, and in the presence of the testator and each other we have hereunto subscribed our names this _____day of ________, 200__” (This is called an attestation clause). La. Civ. Code art. 1577.

   There are slightly different procedures and declaration clauses for (1) persons who are physically unable to sign their names, (2) persons unable to read, (3) persons who are blind, and (4) persons who are deaf or deaf and blind. \textit{See La. Civ. Code art. 1578-1580.1.}

\textsuperscript{13}\textit{Succession of Heinemann}, 136 So.2d 51 (La. 1931).
\textsuperscript{14}\textit{In re Succession of Plummer}, 847 So.2d 185 (La. App. 2 Cir. 2003).
b.  **Who can witness a Notarial Testament?**

1.  A person is not competent as a witness if he is:
   a.  Insane
   b.  Blind
   c.  Under the age of sixteen
   d.  Unable to sign his or her name
   e.  Unable to perform the special duties of a witness under the La. Civil Code Articles 1578 *et al.* These articles cover notarial testaments when the testator suffers from a physical infirmity or is illiterate.

2.  Persons should not be witnesses if they are legatees since their legacies will be invalidated. The fact that a witness or the notary is a legatee does not invalidate the entire testament. A legacy to a witness or the notary is invalid, but if the witness would be an heir in intestacy, the witness may receive the lesser of his intestate share or the legacy in the testament. La. Civ. Code art. 1582. Also, a spouse of a legatee may not be a witness to any testament. The fact that a witness is the spouse of a legatee does not invalidate the testament; however, a legacy to a witness’ spouse is invalid. La. Civ. Code art. 1582.1.

3.  Attorneys and executors as witnesses

   An executor or attorney may be a witness if he has not otherwise been named as a legatee. The designation of a succession representative or a trustee, or an attorney for either of them, is not a legacy. La. Civ. Code art 1583. The notary may be named as attorney, executor, or trustee under the will, and still be the officiating notary. If the testator, in the will, names the attorney to handle his or her succession, the executor or heirs are not required to use that attorney.\(^\text{15}\) The executor or heirs can choose to use another attorney. The attorney named in the will is under no obligation to handle the succession for the testator.

### 5.3  **REVOCATION OF WILLS**

A testator may revoke his will at anytime. The right of revocation may not be renounced. Revocation may be express or tacit. Express revocation is when a testator executes a new will, adds a codicil or change, thereby revoking a prior will or particular disposition. Tacit revocation is when a testator disposes of his particular property during his or her life, i.e., selling home or car that is left to legatees in a will. La. Civ. Code art. 1695.

1.  **Revocation of a will**

   Revocation of an entire testament occurs when the testator does any of the following:
   a.  Physically destroys the testament, or has it destroyed at his direction.

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\(^\text{15}\) Succession of Wallace, 574 So.2d 348 (La. 1991).
b. Declares a revocation in one of the forms prescribed for testaments or in an authentic act.
c. Identifies and clearly revokes the testament by a writing that is entirely written and signed by the testator in his own handwriting.
d. Destroys one of multiple wills. *Succession of Talbot*, 530 So.2d 1132 (La. 1988).
e. Destroy or revokes a second will which revives the first will, if the first will was not destroyed. La. Civ. Code art. 1607.

2. **Revocation of an olographic will**
   Revocation of an olographic will may also occur by erasures, physical destruction and drawing lines through or deleting portions of the will.

3. **Revocation of a legacy or other testamentary provision**
   Revocation of a legacy or other testamentary provision occurs when the testator:
   a. So declares in one of the forms prescribed for testaments.
   b. Makes a subsequent incompatible testamentary disposition or provision.
   c. Makes a subsequent *inter vivos* disposition of the thing that is the object of the legacy and does not reacquire it.
   d. Clearly revokes the provision or legacy by a signed writing on the testament itself.
   e. Is divorced from the legatee after the testament is executed and at the time of his death, unless the testator provides to the contrary. (testamentary designations or appointments of a spouse are revoked under the same circumstances).

4. **When revocations may be revoked**
   Revocations of testaments, legacies or other testamentary provisions may be revoked prior to a testator's death unless the revocation was made by physical destruction, subsequent inter vivos donation or divorce. La. Civ. Code art. 1609.

5.4 **OTHER ISSUES RELATED TO TESTAMENTS**

5.4.1 **Forced Heirship**
   Forced heirship is one of the legacies of Louisiana’s civil law history. For many years, all children, of whatever age, were forced heirs, meaning that they could not be deprived of their legacies, even if a testator/parent did not mention them in a testament. The Louisiana Legislature attempted to change the forced heirship laws several times in the early 1990’s, but these changes were declared unconstitutional by the Louisiana Supreme Court, reviving the former laws. The forced heirship rules were successfully changed on January 1, 1996, putting restrictions on who could be considered a forced heir. Now, forced heirs are descendants of the first degree who, at the time of the decedent’s death, are:
   1. twenty-three years of age or younger, (i.e., right up to the twenty-fourth birthday), or
2. are permanently incapable of taking care of their persons or administering their estates at the time of the decedent’s death because of a physical or mental infirmity, or they have an inherited, incurable condition, supported by medical records, that may cause them to be incapable of taking care of their persons or estates in the future.

This last clause seems to be an open invitation to litigation. Certainly, heirs with mental illness would seem to be natural beneficiaries of this clause, even if they are not completely disabled at the time of the decedent’s death.

For pre-January 1, 1996 deaths, there is a possibility that any child, regardless of age, will be a forced heir. There are complex rules for determining whether the new laws or prior laws govern. If the decedent died before January 1, 1996 or executed his last will before January 1, 1996 and had children over 23 years old, you should review the discussion in L. Carman, *Louisiana Successions* at §§ 2.49-50.

For pre-January 1, 1996 wills where the decedent died in 1996 or later, it appears that the testator’s intent as to a forced heir portion is determined on an ad hoc basis. These older children may qualify as forced heirs if the pre-January 1, 1996 law governs, or a pre-January 1, 1996 will is interpreted to give a forced portion.

**Note:** A will that does not give the required portion to a forced heir will be partially invalid

When a descendant of the first degree predeceases the decedent, representation takes place for forced heirship only if (1) if said descendant was younger than 24 years at the decedent’s death or (2) if the child of said descendant, because of mental incapacity or physical infirmity, is permanently incapable of taking care of his person or administering his estate at the time of the decedent’s death, or they have an inherited, incurable condition, supported by medical records, that may cause them to be incapable of taking care of their persons or estates in the future, regardless of the age of the descendant of the first degree at the time of the decedent’s death. La. Civ. Code art. 1493.

### 5.4.2 Exceptions to forced heirship

A forced heir may not be deprived of the portion of the decedent’s estate reserved to him by law, called the legitime, unless the decedent has just cause to disinherit him. La. Civ. Code art. 1494.

### 5.4.3 Amount of forced portion and disposable portion

Since 1982, donations *inter vivos* and *mortis causa* may not exceed three-fourths of the property of the donor if he leaves, at his death, one forced heir, and one-half if he leaves, at his death, two or more forced heirs. La. Civ. Code art. 1495. Be sure to apply the forced heirship law in effect at the time of the decedent’s death. See La. Civ. Code art. 870. Prior to 1982, the forced heirship portions were ¼ for 1 child, ½ for 2 children and ⅔ for 3 or more children. The portion reserved for the forced heirs is called the forced portion, or legitime, and the remainder is called the disposable portion. La. Civ. Code art. 1495.
Nevertheless, if the fraction that would otherwise be used to calculate the legitime is greater than the fraction of the decedent’s estate to which the forced heir would succeed by intestacy, then the legitime (portion due forced heir) shall be calculated by using the fraction of an intestate successor. When calculating the forced portion, all donations made by the decedent within the last three years of his life are included in his property. La. Civ. Code art. 1495.

5.4.4 Permissible burdens on legitime

No charges, conditions, or burdens may be imposed on the legitime except those expressly authorized by law, such as a usufruct in favor of a surviving spouse or the placing of the legitime in trust. La. Civ. Code art. 1496. Therefore, a usufruct to the surviving spouse is a permissible burden on the legitime.

The decedent may grant a usufruct to the surviving spouse over all or part of his property, including the forced portion, and may grant the usufructuary the power to dispose of nonconsumables as provided in the law of usufruct. The usufruct shall be for life unless expressly designated for a shorter period, and shall not require security except as expressly declared by the decedent or as permitted when the legitime is affected. La. Civ. Code art. 1499. Security can be demanded from the surviving spouse, however, by a forced heir who is not the child of that spouse. La. Civ. Code art. 1514. This statute says the forced heir “may request” such security, and the court “may order” such security as is necessary. So it appears that the court has discretion in whether to order security and how that security can be satisfied.

A usufruct can extend to movables, including cash, which would be classified as a “consumable thing.” La. Civ. Code art. 536. If so, the usufructuary has the right to spend those funds and the usufruct extends to the items purchased. La. Civ. Code art. 538. It is easy to see that such “consumable” movables may be completely consumed by the usufructuary, and the naked owner has little recourse except a possible claim against the usufructuary or his/her succession when the usufruct ends. La. Civ. Code art. 538. “Nonconsumable things” include land, houses, and furniture. La. Civ. Code art. 537. The usufructuary has the right to use and possess these things but not to alienate them. La. Civ. Code art 539. Such nonconsumable things can be sold with the permission of the naked owner(s), and the usufruct would extend to the proceeds of the sale unless the parties agree otherwise. La. Civ. Code art. 616. A usufruct may be terminated for non-use or abuse of enjoyment and duties. La. Civ. Code art. 621, 623.

5.4.5 The disposable portion in absence of forced heirs

If there is no forced heir, donations inter vivos and mortis causa may be made to the whole amount of the property of the donor, unless they are prohibited dispositions of the entire patrimony under La. Civ. Code art. 1498. See La. Civ. Code art. 1497. A donation inter vivos cannot divest the donor of all his property, he must reserve to himself enough for subsistence. La. Civ. Code art 1498. This article reflects the public policy of not allowing donors to impoverish themselves so as to become wards of the state. Such restrictions do not apply to “mortis causa” donations, for obvious reasons.

5.4.6 The Different types of Testamentary Dispositions or Legacies

There are three types of testamentary dispositions, namely, the universal, the general, and the particular. La. Civ. Code art. 1584.
a. A universal legacy is the disposition of all of the estate, or the balance of the estate that remains after particular legacies. La. Civ. Code art. 1585.

b. A general legacy is a disposition by which the testator bequeaths a fraction of a certain proportion of the estate, or a fraction of certain proportion of the balances of the estate that remains after particular legacies. La. Civ. Code art. 1586.

c. A legacy that is neither general nor universal is a particular legacy. La. Civ. Code art. 1587.

These classifications become important if a legacy lapses under La. Civ. Code art. 1589, or if one of the legatees renounces his/her inheritance, or if there are insufficient assets to satisfy all legacies. La. Civ. Code art. 1601. If the property remaining after payment of the debts and satisfaction of the legitime proves insufficient to discharge all particular legacies, the legacies of specific things must be discharged first and then the legacies of groups and collections of things. Any remaining property must be applied toward the discharge of legacies of money, to be divided among the legatees of money in proportion to the amounts of their legacies. When a legacy of money is expressly declared compensation for services, it shall be paid in preference to all other legacies of money.

5.4.7 Lapsed Legacies

A legacy may lapse for several reasons including, inter alia, (1) the legatee dies before the testator, (2) the legacy is renounced (but only to extent of renunciation), and (3) the legacy is declared invalid. La. Civ. Code art. 1589.

The will controls the disposition (or “accretion”) of a lapsed legacy. La. Civ. Code art. 1590. In the absence of a governing will provision, the following rules (which became effective on July 1, 1999) will determine to whom a lapsed legacy goes:

1. The lapsed legacy goes to descendants of the legatee, joint or otherwise, if the legatee is the testator’s child or sibling, or a descendant thereof. La. Civ. Code art. 1593. The general rules of testamentary accretion do not apply to these relatives.

2. Joint Legacy. A legacy is “joint” if made to more than 1 person without assigning shares. For example, “I give my immovable property to A and B.” If a joint legatee dies before the testator, his share goes to the other joint legatees equally. La. Civ. Code art. 1592, 1588.

3. Particular or General Legacy. When these legacies lapse, they go to the successor who, under the will, would have received the thing if the legacy had not been made. La. Civ. Code art. 1591, 1586-87.


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16 A will with the language “share and share alike” or “to share equally” is not a joint legacy. Each party will own a specific portion without a right of survivorship in favor of co-legatees.
### 5.4.8 Proving the Existence of a Will When the Original is Lost

The attorney, in all cases, shall present the original testament to the court to be filed and executed. If it is a testament other than a statutory testament, notarial testament, or nuncupative testament by public act, then the testament must also be proven, or probated. **La. Code Civ. Proc. art. 2852.** An olographic will would fall under this statute. The petitioner must present the testament to the court even if he/she doubts the validity of the testament. **La Code Civ. Proc. art. 2853.**

If the petitioner cannot locate the original will, then the attorney should search for the original. If it was a notarial will, the attorney should try to contact the notary to see if there is an original will in the notary's possession. The Secretary of State has a central registry of wills. If the testator registered his will, information about the will can be obtained from the Secretary of State. **See La. R.S. 9:2446-47.** Also, some parishes allow wills to be registered with the clerk of court or notarial archives. In Orleans and other parishes there are will “books” and in your petition you can reference at which book and page a will is located without presenting an original. In Jefferson Parish, and possibly others, the clerk of court stores wills and releases them with a proper petition. Nevertheless, the registration of wills is rare.

If the original cannot be located, then the attorney has additional hurdles to overcome when proffering a copy. In the event that the original copy of a will is lost, where the will was duly executed, and in possession of, or readily accessible to, the testator, there is the legal presumption of revocation by destruction. Where there is the legal presumption of revocation by destruction, the onus of rebutting this presumption is cast upon those seeking to establish the will, by clear proof (1) that the testator made a valid will, (2) of the contents or substance of the will, and (3) of the fact that the will, though it could not be found at the testator's death after diligent search, was never revoked by him. This is most usually done by an affidavit of the client with personal knowledge that the original will existed after the death of the decedent, but was lost or destroyed by some other force, such as a house fire or natural disaster.

The attorney should also petition the Court, asking that the Court direct that a search be made for the testament by a notary of the parish. **La. Code Civ. Proc. art. 2854.** This requirement most likely stems from the prior system in which notaries were required to keep files of their notarized documents. Presumably, the notary who notarized the missing testament would be the one charged with finding it, although this is not stated in the statute. Although the statute does say that the notary must be appointed by the court, experience has shown that many courts will accept an affidavit from the notary who prepared the document, stating that they possess a copy of the testator’s testament, and that the proffered copy is the same as the one in his/her records. This affidavit, along with an affidavit from persons with knowledge about the loss of the will after the decedent’s death, should be sufficient to probate the copy.

If the will is not a notarial document, or the notary is unknown, the attorney should have the court appoint a notary to search the public registries for the missing will. If the notary fails to find the original will, then the client can submit his

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17 *Succession of Talbot*, 530 So.2d 1132 (La. 1988).
18 *Succession of Nunley*, 224 La. 251, 69 So.2d 33, 35 (1953).
19 See *La. Code Civ. Proc. Form 810a (West).*
copy with an affidavit. If it is an olographic will, the affidavit of the client should include allegations that the affiant knows the handwriting of the decedent and that the affiant believes the olographic will was written by the decedent.

If the client knows that there was a will, but does not have a copy, there is case law supporting the proof of the contents of a will by parol evidence. Nevertheless, the parol evidence is acceptable only if the witness actually read the testament and remembered its contents. Statements by the decedent are not enough.

If the client does not have sufficient evidence to prove the contents of a will, or to overcome the presumption of revocation, then the petition should state these facts and pray that the court find that the succession should proceed under the laws of intestacy.

6. OTHER LEGAL ISSUES RELATED TO ALL SUCCESSIONS

6.1 CAPACITY TO INHERIT

To inherit property, a successor must exist at the decedent’s death. La. Civ. Code art. 939. However, an unborn child conceived at decedents’ death and born alive is considered to have existed at the decedent’s death and therefore can inherit from the decedent. La. Civ. Code art. 940. Age and mental capacity are irrelevant to capacity to inherit. La. Civ. Code art. 939.

Notwithstanding any contrary laws, a child conceived after the decedent’s death, shall be deemed the child of such decedent with the capacity to inherit from the decedent if:

- the decedent specifically authorized in writing his surviving spouse to use his gametes, and
- the child was born to the surviving spouse, using gametes of the decedent, within three years of the decedent’s death.

6.2 ACCEPTANCE AND VOLUNTARY EXCLUSION FROM AN INHERITANCE

1. Heirs have three options when the decedent dies:
   a. accept that succession unconditionally,
   b. accept with benefit of inventory; or
   c. renounce the succession.

Acceptance may be either formal or informal. Formal acceptance is where the successor expressly accepts in writing or assumes the quality of successor in a judicial proceeding. Informal acceptance is where the successor does some act that clearly implies his intent to accept. La. Civ. Code art. 957. Acceptance obligates the successor to pay estate debts up to his share of the estate. La. Civ. Code art. 961; 1416.

A creditor of a successor may, with judicial authorization, accept succession rights in the successor’s name if the successor has renounced them in whole or in part to the prejudice of his creditor’s rights. In such a case, the renunciation may be annulled in favor of the creditor to the extent of his claim against the successor, but remains effective against the successor. La Civ. Code art. 967.

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20Succession of Davis, 347 So.2d 906, 907 (La. App. 3 Cir. 1977).
### 6.3 RENUNCIATION

Renunciation is voluntary and involves the successor “giving up” his/her right to inherit from the decedent. Renunciation must be express and in writing. La. Civ. Code art. 964. A pre-bankruptcy renunciation (other than a “donative” renunciation) may prevent a creditor from seizing the renouncing heir’s share. Further, the Fifth Circuit has held that a pre-bankruptcy renunciation of an inheritance is not a fraudulent transfer that would deny discharge. An heir may revoke his renunciation if no other heir has accepted.

In the absence of a renunciation, a successor is presumed to accept succession rights. Nonetheless, for good cause the successor may be compelled to appear in court to specifically accept or renounce. La. Civ. Code art. 962.

The rights of an intestate successor who renounces accrete to those persons who would have succeeded to them if the successor had predeceased the decedent. A renunciation produces a result similar to representation of the successor by his descendants. La. Civ. Code art. 964. In the absence of a governing testamentary disposition, the rights of a testate successor who renounces also accrete to those persons who would have succeeded to them if the legatee had predeceased the decedent. La. Civ. Code art. 965. This was a major change from the law existing previous to July 1, 1999.

For renunciations prior to July 1, 1999, a renouncing heir’s share went to the co-heirs of the same degree. The law is unsettled as to which law applies to decedents who died before July 1, 1999, when a successor renounces after July 1, 1999. See C. Neff, *Louisiana Estate Planning, Will Drafting and Estate Administration*, II-1.2.2.2A. We are not aware of any case law on the applicability of the pre-July 1, 1999 renunciation rules. However, note that Civil Code art. 870 states that succession rights are governed by the law in effect on the date of the decedent’s death.

Prior to July 1, 1999, renunciation had to be done by authentic act, i.e., a written act before notary and 2 witnesses. Civil Code art. 1017. This is no longer required but would be advisable.

Care must be taken in planning renunciations. In some instances, an heir who renounces may end up getting a share of the inheritance if another heir subsequently renounces. For example, a decedent is survived by 3 children, A, B and C, and the goal is to concentrate title in A. B renounces, but B has no descendants. B’s share will go to A and C. If C later renounces and has no descendants, his inheritance will go to A and B. This devolution to B after his renunciation can be prevented by having B also renounce any accretions in his original renunciation. See Official Revision Comment to Civ. Code art. 964.

Co-heirs in an intestate succession will often tell the attorney that they wish to renounce a succession so that another heir may inherit the entire property. Children will often want to do this, thinking the estate will then go to a surviving parent. The attorney should counsel such clients as to the effect of a true renun-

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22 See e.g., *Matter of Simpson*, 36 F.3d 450 (5th Cir. 1994); *In re Brumfield*, 1998 WL 834999 (M.D. La. 1998). One district court has opined that *Simpson* is no longer good law after *Drye v. United States*, 528 U.S. 49, 52 (1999). See e.g., *In re Schmidt*, 362 B.R. 318, 321-23 (Bankr. W.D. Tx. 2007). However, the Fifth Circuit recently considered *Drye* and reaffirmed *Simpson* as to both Louisiana and Texas, holding that a pre-petition renunciation of an inheritance is not a fraudulent transfer that would deny discharge under 11 U.S.C.§ 727 (a)(2). See *In re Laughlin*, 602 F.3d 417 (5th Cir. 2010).

23 *In re Laughlin*, 602 F.3d 417 (5th Cir. 2010).
ciation, namely, that the property will often devolve to their own children, creating an even more fractious ownership scheme. The co-heir may then wish to donate their share to another specific co-heir in the succession, who would not otherwise inherit through a renunciation. This is possible, and is called a “donative renunciation.” Note that Civil Code art. 960 states that a donative renunciation is deemed to be an acceptance, since the renouncer is really accepting the succession and then directing it to another person. This factor may be important when considering whether the donating heir will be held liable for succession debts up to his share of the estate or if the acceptance of the succession may affect a person’s eligibility for public benefits such as SSI or Medicaid.

Note: A donative renunciation must be by authentic act since it is in substance a donation rather than a renunciation.

6.4 REPRESENTATION

Representation is a fiction of the law, the effect of which is to put the representative in the place, degree, and rights of the person represented. La. Civ. Code art. 881. Representation does not take place in favor of ascendants. Representation is only permitted in the descending and collateral lines. La. Civ. Code art. 882, 884. Representation can take place in both intestate and testate successions.

If representation is permitted, the partition is made by roots. If one root has produced several branches, the subdivision is also made by roots in each branch, and the members of the same branch inherit by heads. La. Civ. Code art. 885. Descendants inherit by one share per each descendant, so that multiple descendants in the same degree do not necessarily divide the decedent’s estate per capita, but do split pro rata the share of the predeceased ancestor whom they represent. La. Civ. Code art. 885.

If the owner of immovable property dies, and then one or more of the successors dies before a succession can be filed for the original owner, it is not necessary to file a succession for each deceased person in order clear the title to that immovable property. Representation can be used to substitute the second generation for those who are deceased in the first generation of heirs/legatees, and so on. In fact, it is prohibited for a deceased person to inherit in a succession La. Civ. Code Art. 58. In this case, the succession attorney would lay out the path of succession in the petition, ending with the still living successors.

This is true because the intermediate generation of successors never came into legal possession of the immovable property during their lifetime, and thus the immovable property should not be considered part of their separate estates. Although these successors may have had corporeal possession of the property during their lifetime, they would not have been listed as legal owners in the parish land records, and would not have had the rights that go along with legal possession. (If, however, this intermediate successor had his own immovable property, vehicles, bank accounts, etc, then it would be necessary to open his succession in order to transfer that property.)

24 In re Succession of Parker, 882 So.2d 748 (La. App. 2 Cir. 2004).
6.5 GROUNDS FOR INVOLUNTARY EXCLUSION FROM AN INHERITANCE

6.5.1 Unworthiness

Unworthiness is an involuntary termination of inheritable rights that must be declared by the court. When an heir is declared unworthy, he is deprived of the right to inherit. La. Civ. Code art. 941. The grounds for a successor to be declared unworthy are:

a. conviction of a crime involving the intentional killing, or attempted killing, of the decedent, or

b. judicial determination of participation in the intentional, unjustified killing, or attempted killing, of the decedent. La. Civ. Code art. 941.

Reconciliation or forgiveness will cure the grounds of unworthiness. A declaration of unworthiness deprives a heir of his right to inherit from the decedent. For other consequences, see La. Civ. Code art. 945.

An action to declare a successor unworthy may be brought only by a person who would succeed in place of or in concurrence with the successor to be declared unworthy, or by one who claims through such a person. When a person, who may bring the action, is a minor or an interdict, the court may appoint an attorney to represent the minor or interdict for purposes of investigating and pursuing an action to declare a successor unworthy. La. Civ. Code art. 942.

An action to declare a successor unworthy is subject to a liberative prescription of five years from the death of the decedent as to intestate successors and five years from the probate of the will as to testate successors. La. Civ. Code art. 944.

6.5.2 Devolution of succession rights of successor declared unworthy

If the decedent died intestate and the successor is declared unworthy, the successor’s rights devolve as if he had predeceased the decedent. However, if the decedent died testate, then the succession rights devolve under the provisions for testamentary accretion as if the unworthy successor had predeceased the testator. La. Civ. Code art. 946.

When the succession rights devolve upon a child of the successor who is declared unworthy, the unworthy successor and the other parent of the child cannot claim a legal usufruct upon the property inherited by their child. La. Civ. Code art. 946.

6.6 SUCESSION DEBTS

If the debts of the succession are not partitioned, each heir remains liable for his share of the succession. Nevertheless, in order to equalize the shares, those heirs who take the largest allotments may be charged with the payment of a larger portion of the debts. La. Civ. Code art. 1371.

In any case, a successor, who accepts the succession, is obligated by succession debts to the extent of the value of the property received by him, valued as of the time of receipt. La. Civ. Code art. 1416.

The heirs or legatees may be sent into possession of the decedent’s estate on an ex parte petition if the succession is “relatively free from debt.” La. Code
Civ. Proc. art. 3001(A). A rough rule of thumb would be that the debts should not surpass one-quarter of the gross value of the succession. Mortgages and other secured debts are not considered in this calculation, as the creditor is protected by the fact that the debt is secured by the assets.

6.7  MARITAL PORTION

When a spouse dies rich in comparison with the surviving spouse, the surviving spouse is entitled to claim the “marital portion” for the estate of the deceased spouse. La. Civ. Code art. 2432. There is no definitive test to determine when a surviving spouse is entitled to a marital portion.\(^{25}\) However, the marital portion usually should be awarded when the comparison of assets show a ratio of 1 to 5 in favor of the deceased spouse.\(^{26}\) Earnings or earning capacity of the surviving spouse are not factors in determining whether a marital portion is due.\(^{27}\)

The marital portion is 1/4 of the succession in ownership if the deceased spouse died without children, the same fraction in usufruct for life if he is survived by 3 or fewer children, and a child’s share in such usufruct if he is survived by more than 3 children. La. Civ. Code art. 2434. The marital portion is reduced by any legacy to the surviving spouse and payments due her as a result of the death, e.g., life insurance or social security. La. Civ. Code art. 2435. The surviving spouse’s right to claim the marital portion is personal and nonheritable. This right prescribes three years from date of death. La. Civ. Code art. 2436. A formal claim within a succession or lawsuit is the safest way for a surviving spouse to enforce her claim for a marital portion.

For indigent clients, the marital portion will often be an issue when the family home was the separate property of the deceased spouse. Establishing the right to a marital portion may be essential to preventing the eviction of the surviving spouse from the family home.

6.8  EFFECT OF INHERITANCE ON PUBLIC BENEFITS

You should know inheriting the assets of a succession may have a negative effect on any public benefit received by an heir or legatee. Many public benefit programs have an asset limit, and exceeding that limit can create ineligibility for the assistance, at least for a period of time. For example, inheriting a share in a family home worth only a few thousand dollars can endanger the receipt of SSI and Medicaid benefits for disabled or elderly persons, unless the recipient or a co-heir (who does not own another residence) is residing in the property. This is a particular concern for nursing facility residents since their care must usually be financed by Medicaid. Housing assistance can also be affected by a succession. There are exceptions to the asset limit rules and the attorney should look at the regulations for the specific program or consult an attorney extremely conversant with those rules in order to advise the client about the effects of the succession. Note that this issue will almost always arise in the situation where a forced heir inherits due to permanent disability. Ironically, the forced heirship laws designed to protect such disabled persons could end up creating a period of ineligibility for their health care programs.

\(^{25}\) Succession of Zilfe, 378 So.2d 500 (La. App. 4 Cir. 1980).
\(^{26}\) Succession of Adams, 816 So.2d 988, 990 (La. App. 3 Cir. 2002).
\(^{27}\) Succession of Thumfart, 289 So.2d 850, 853 (La. App. 4 Cir. 1974).
Unfortunately, donating inherited assets to others or renouncing a succession will also affect a heir’s eligibility for SSI, Medicaid payments for nursing home care, and other public assistance. There are some options for establishing a Medicaid trust to protect a heir’s eligibility for Medicaid and SSI. Often this must be done as part of a will to avoid all adverse consequences. We believe that establishing a Medicaid trust with a reputable company is the best option for clients who are interested in a Medicaid trust.

7. PROCEDURAL ISSUES IN SUCCESSION CASES

7.1 SMALL SUCCESSIONS BY AFFIDAVIT

Formerly, small successions, which were defined as a succession valued at less than $50,000, could be handled by affidavit, without the necessity of filing a court succession. Immovable property, however, could not be transferred by this process. Any succession involving immovable property had to be filed in court in order to obtain a Judgment of Possession signed by a judge and recorded in the parish Conveyance Office. This process involved the filing of several separate documents, including the Petition for Possession, the Affidavit of Death, Heirship, and Jurisdiction, and a Descriptive List of the Decedent’s Assets and Liabilities. To complete this process, the successors had to pay for court costs and for an attorney to prepare and file these documents.

Unfortunately, these requirements often discouraged people, especially low income persons, from completing the legal work necessary to clear the title of their inherited property. Such people may have had corporeal possession of the property, but they did not have legal possession, and could not sell the property, use their property as collateral for loans, or take advantage of the homestead exemptions for owners. Hurricanes Katrina and Rita in 2005 exposed this problem in the southern parishes of Louisiana as thousands of homeowners could not access federal and state rebuilding funds because of unresolved succession issues. The problem, however, was statewide in nature. The onerous requirements of a court succession to transfer immovable property also lay in stark contrast to the ability to transfer unlimited amounts of funds through insurance policies by a simple signature on a contract.

In 2009, the Legislature enacted Act 81 which simplified the process of transferring certain immovable property. Immovable property that met the definition of “small succession property” contained in the statute could be transferred to the heirs simply by drafting an “Affidavit of Small Succession” and recording it in the Parish Conveyance Office. In fact, this statute formalized a process that had been used for many years in the rural parishes of the state.

The original Act 81 of 2009 had several restrictions on the property that could be transferred, including that the property could not be worth more than $50,000, that it had to be the Decedent’s primary residence, and that it had to be transferred by the laws of intestacy. The new statute proved to be such a great success, however, that in both 2011 and 2012, the Legislature revised the statute to broaden the definition of “small succession property” and to expand the use of this simplified process.
7.2 QUESTIONS FOR SMALL SUCCESSION CASES

WHAT CONSTITUTES A “SMALL SUCCESSION PROPERTY?”

The new statutes on small succession affidavits are found at La. Code of Civil Procedure, art. 3421 et al. Immovable property can now be transferred by Affidavit if the following two conditions are met:

a. The value of the decedent’s estate in Louisiana was worth $75,000 or less at the time of death, or any value if the death occurred 25 years before the recording of the Small Succession Affidavit.

b. The Succession is intestate or the decedent was domiciled outside of Louisiana and his/her testament was probated by the Court of another state.

Note that the property does not have to be the decedent’s primary residence anymore, and does not even have to be residential property. Generally, those who own property in Louisiana and leave a testament must have that testament reviewed by a judge in a court succession, but there is an exception for out of state residents whose testaments have already been probated.

Due to the fact that many people own partial shares of property, such as husband and wives, and siblings, the $75,000 limit still encompasses a great many estates.

WHAT INFORMATION MUST BE CONTAINED IN THE AFFIDAVIT?

The required information is set out in the statute and is generally the same information that would be contained in the documents of a court succession. The decedent’s date of death, his last residence, his spouse and family information, and the names and last known residences of all the heirs should be listed. There should also be a listing of the decedent’s estate, along with the values of the property. The legal description of any immovable property must be included.

There are also several stock paragraphs that should be contained in every Affidavit, which are listed in the statute. The heirs must accept the succession without administration, and they should also state that they are aware that filing false information in the Affidavit could incur civil and criminal penalties.

Also, a certified death certificate must be attached to the Affidavit.

WHO CAN SIGN THE AFFIDAVIT?

At least two persons, including the surviving spouse, must sign the Affidavit. If there is no surviving spouse, then at least two heirs must sign. Although this situation is not covered by the statute, those rare successions that have only one heir should presumably be signed by a second person who knew the decedent and can personally attest to the facts in the Affidavit.

If there are any heirs who do not sign the Affidavit, the statute states that the completed Affidavit must be mailed to their last known address, and they must be given at least 10 days to object. If any heir could not be located after a diligent search, then that fact can be stated in the Affidavit. Since heirs are presumed to accept, the Affidavit can still be recorded in that situation.
OTHER ISSUES WITH SMALL SUCCESSIONS BY AFFIDAVIT

The Affidavit should be recorded in every parish where the decedent owned immovable property. Affidavits should be recorded immediately so that the heirs will get notice of any adverse actions (e.g., code enforcement or tax sales) by the local parish governments. Certified copies of the Affidavit can be used as presumptive proof by any third party that the property has been transferred to the named heirs.

The statute does not limit the use of the Small Succession Affidavit to persons who died after the enactment of the statute. Old successions that have never been opened can be resolved by the new Affidavit process. If any of the heirs died intestate without being put into legal possession of the property, include their information in the Affidavit and name the still living heirs who inherit through representation.

A natural tutor may also execute the affidavit on behalf of a minor child without the necessity of filing a tutorship petition under art. 4061 of the Code of Civil Procedure.

Heirs who have not been recognized as an heir in a recorded Small Succession Affidavit have two years from the date of the recordation of the Affidavit to assert an interest in immovable succession property against a third person (or his successors in title) who acquired an interest in the immovable succession property. La. Code Civ. Proc. art. 3434 (C)(3).

7.3 FILING A COURT SUCCESSION

If a succession is testate, or is valued above $75,000, then a succession proceeding must be filed in court. Creditors of the succession or co-owners of succession property who are not heirs/legatees of the decedent may also file to open a succession.

7.3.1 EX PARTE SUCCESSIONS

Many successions for indigent clients may be handled by an ex parte petition for possession when the decedent’s estate is “relatively free from debt.” In such cases, a petition for possession is filed on behalf of the surviving spouse and/or competent heirs. For procedures to place the surviving spouse and/or heirs in possession without an administration, see La. Code Civ. Proc. art. 3001-08 (intestate successions) and La. Code Civ. Proc. art. 3031-35 (testate successions). In uncontested testate successions, the petition for probate and possession can be combined into one pleading.

In Louisiana, jurisdiction for a succession lies in the judicial district court for each parish, and the Civil District Court in Orleans Parish. Venue is controlled by the decedent’s domicile at the time of death. A petition for possession must be brought in the district court for the parish where the decedent was domiciled at the time of his death. La. Code Civ. Proc. art. 2811-12. If the decedent was not domiciled in Louisiana at the time of his death, his succession may be opened in the district court of the parish where his movable property is located. If the property is immovable property, then the succession should be opened in the parish where the immovable property is located. For non-residents, there may be more than one possible venue if the decedent owned property in more than one parish.

In an intestate succession, a petition for possession may send the heirs into possession by the *ex parte* petition of:

1. All the competent heirs if all competent heirs accept the succession and the succession is relatively free of debt. La. Code Civ. Proc. art. 3001, 3004; or
2. The surviving spouse in community with the decedent if all the heirs are incompetent and no legal representative has been appointed for some or all of the heirs. La. Code Civ. Proc. art. 3004; or
3. The legal representative of the incompetent heirs, if all of the heirs are incompetent and a legal representative has been appointed. La. Code Civ. Proc. art. 3004.

Also, a surviving spouse in community of an intestate decedent can use an *ex parte* petition for possession to be recognized as the owner of his undivided one-half of the community and of the other one-half to the extent he has the usufruct (similar to “life estate”) thereof. La. Code Civ. Proc. art. 3001.

Technically, it only requires the signatures of two heirs to file a court succession, the petitioner and a second person to sign the Affidavit of Death, Jurisdiction, and Heirship. In the absence of a written renunciation, a successor is presumed to accept succession rights. La. Civ. Code art. 962. For these reasons, many attorneys in Louisiana will file ex parte succession proceedings with the signatures of two persons, unless they have knowledge that a successor wishes to renounce, or a successor is absent and cannot be located.

In an intestate succession, if a competent heir can’t be located, the other heirs, including the absentee heir, can be sent into possession after appointment of an attorney to represent the absentee and a contradictory rule against the absentee’s attorney. La. Code Civ. Proc. art. 3006.

In a testate succession, a petition for probate and possession may send the legatees into possession on the *ex parte* petition of all legatees if:

1. Each legatee is competent or acting through a legal representative;
2. Each legatee accepts the succession; and
3. None of the creditors has demanded administration.


A surviving spouse in community of the testator may be recognized by *ex parte* petition as entitled to possession of the community property as provided in Code. Civ. Proc. art. 3001. See La. Code Civ. Proc. art. 3031 (B).

If the will named a succession representative, that person must join in the petition for possession in order for judgment to be rendered *ex parte*. La. Code Civ. Proc. art. 3033. A simple solution to this requirement is to have the succession representative sign the verification of the Petition for Possession or an affidavit that she declines the appointment.
7.4 SUCCESSION PLEADING FORMS

The attorney must file the necessary petitions in the court that has jurisdiction and venue. The goal of opening a succession is to obtain the Judgment of Possession.

1. The attorney must file the following documents:
   - Petition for Possession
   - Affidavit of Death, Domicile and Heirship
   - Sworn, Descriptive List of Assets and Liabilities
   - Renunciations or donations (if applicable)
   - Judgment of Possession

2. Petition for Possession includes:
   Allegations establishing the decedent’s date of death, his domicile at the time of death, whether the succession is testate or intestate, and identifying the legal heirs or legatees,
   The original testament should be attached (if there is one) and proof of the testament, if necessary.
   Technically, you only need one person to sign the Petition for Possession, along with another person who personally knew the decedent to sign the Affidavit of Death, Domicile, and Heirship. The Petition should allege that all the successors accept the succession if not all of them are signing the verification. You should have written consent from the other heirs that they have accepted the succession.

3. Affidavit of Death, Domicile and Heirship:
   The affidavit is the evidence to prove the allegations of the Petition for Possession. La. Code Civ. Proc. art. 2821-22. It must be signed by at least two competent affiants who personally knew the decedent and have personal knowledge of the facts. The Affidavit echoes the facts alleged in the Petition for Possession. The affidavit must state the decedent’s death, marriages and all other facts necessary to establish jurisdiction and decedent’s relationship to the heirs. It is good practice to cite the case name, docket number, court name and divorce judgment date of the decedent’s divorces.
   The law does not require proof by death certificate. An affidavit of jurisdiction, death and heirship signed by 2 witnesses is sufficient proof for the court. It is, however, good practice to ask the client for a death certificate, an obituary or funeral program to ensure that all heirs are included in the Petition for Possession.

4. A Sworn, Descriptive List of Assets:
   The sworn descriptive list must list all assets of the decedent, or that the decedent owned an interest in, at the time of death. The descriptive list does not have to show the estate’s debts. But, some practitioners do. The values reported for the decedent’s property is the fair market value at the time of death. The list must be sworn to by any heir, legatee or other interested party. La. Code Civ. Proc. art. 2952. For a married decedent, this usu-
ally consists of his separate property and one-half of the community property. Divorced decedents may also co-own former community property that has not been partitioned.

One of the more common assets is real estate. Put the legal description of the property in the Descriptive List, street addresses alone are not adequate. Make sure to copy the legal description exactly from previous deeds. Changes in the legal description of immovable property can cause confusion about which property is being identified and create a “cloud” over the title.

This sworn descriptive list must also include: the amount of money in bank or credit union accounts, stocks, bonds, cash, mortgages, notes, and other miscellaneous property of significant value (jewelry, household goods and personal effects, such as jewelry, automobiles, boats, livestock, farm products and growing crops, farm machinery, royalties, rights, claims, debts due the decedent, interest in partnerships, interests in business, cash surrender value of insurance on the life of another, accrued dividends at date of death, returned premiums of insurance policies).

The value of the heirs’ naked ownership of their share of community property can be reduced by the value of the surviving spouse’s usufruct over their share. Use the valuation tables at R.S. 47: 2405 to value the naked ownership.

There are also other types of assets that are distributed “outside” of the succession and are not included in the Descriptive List:


2. Annuities payable to a named beneficiary. La. R.S. 22: 647 (B). **But, an annuity acquired during the existence of a community property regime is includable in the decedent’s estate to calculate the interest of the surviving spouse in community.** Only non-retirement annuities are subject to forced heir claims. La. Civ. Code art.1505(c).

3. IRA and Simplified Employee Pension Plan (SEP). These plans are exempt from Louisiana inheritance tax unless payable to the estate. La. R.S. 47: 2404 (c). **But, if a non-participant spouse has a community property claim to the surviving spouse’s IRA or SEP, said claim should be listed in the sworn descriptive list.**

4. Retirement or pension plans. These plans are generally payable to a beneficiary, don’t pass through the estate and are exempt from Louisiana inheritance tax. La. R.S. 47: 2404(c). If the plan directs the proceeds to the estate, the pension plan would become an asset of the estate.

5. U.S Savings Bonds. Ownership is determined by federal law, not Louisiana law.

6. Bank account with co-depositor. Don’t include in estate if these funds were actually the property of the co-depositor.

If a client does not know where the assets are or can’t get access to information from banks, he may need to file a petition to be appointed as the administrator.

(819)
L iabilities can also be listed: expenses incidental to the last illness of the decedent that were due and unpaid at the time of death (can be shown as net after anticipated insurance reimbursement), property taxes accrued prior to the date of the decedent’s death, notes unsecured by a mortgage or other lien, and any income taxes accrued and unpaid at date of death. If a community regime existed at the time of death, these debts are considered community debts and are only one-half deductible.

5. **Judgment of Possession:**

The Judgment of Possession will declare that the decedent’s heirs or legatees are entitled to be placed in possession of all of the property belonging to the decedent. The Judgment should lay out the assets of the estate (including the legal description of any immovable property), name each successor, and list the proportion that each successor inherits. If any usufructs have arisen from the succession, they should be listed also. The Judgment will recognize the successors as the owners of the property they inherit and can be relied upon by third parties in determining ownership. The Judgment of Possession is the only succession document that is recorded in the public record, so it should include all the necessary information needed to determine ownership of all property of the succession.

For testate successions, there must also be an order from the Judge that probates the testament. Some attorneys include this language in the Judgment of Possession. Since recordation fees in the public records are often determined by the number of pages, other attorneys like to create a separate probate order so that the Judgment of Possession can be kept to a minimum of pages. After July 1, 1999, notarial and statutory wills are self-proving. An olographic will still needs proof, which can be done by an affidavit unless the judge orders oral testimony. La. Code Civ. Proc. art. 2883.

The Judgment of Possession must include the last known address of at least one of the heirs, legatees or surviving spouse.

A judgment of possession may place the heirs into possession even if there are liens, including tax liens, on the real estate. The heirs take the estate subject to liens.

Neither the clients nor attorney has to appear before a judge to present all of the required documents to open a succession. The Judgment can be presented to a judge and signed on the same day that the succession documents are filed.

If the succession included immovable property, a certified copy of the signed Judgment of Possession must be recorded in the Conveyance Office in the parish where the immovable property is located. If the Judgment contains properties in different parishes, it must be recorded in each one. Judgments obtained in Orleans Parish must also be recorded with the Notarial Archives and a copy of the judgment of possession must also be sent to the board of assessors. La. R.S. 9: 1425. This must be done within 15 days of the judgment of possession under penalty of fine. Most Conveyance Offices automatically send each judgment to the Assessor, but it is best to follow up anyway, and to advise your client to check with the Assessor to make sure that he has the names and addresses of the new owners.
Advise the clients as to their possible rights to the $75,000 homestead exemption from real estate and the procedures for applying for the same. Currently, any heir who occupies the home is entitled to a pro rata share of the homestead exemption. See La. Const. art. 7, § 20(A)(6). For example, if 2 of the 3 heirs live in the home, they would be entitled to two-thirds of the $75,000 homestead exemption from real estate taxation. A surviving spouse, who is the owner of any interest or a usufructuary, is entitled to a full homestead exemption. See La. Const. art. 7, § 20(A)(2).

Legatees should be entitled to the homestead exemption from the decedent’s death. La. Atty. Gen. Op. 91-262. Some assessors wrongly deny the homestead exemption until there is a judgment of possession. This error should be correctable by negotiation or lawsuit.

8. ADMINISTERED SUCCESSIONS

If there are immediate debts, legal proceedings, or other financial matters to attend to at the time of death, it may be advisable to open a succession and have one person appointed as an administrator of the succession. The law on succession representatives is derived mostly from statute, particularly from the Louisiana Code of Civil Procedure, articles 3081 et al. Successions for low income persons with relatively small estates do not usually require administration, so this topic will not be explored in depth. The following is a short summary of the relevant statutes.

A Succession representative that has been named in the decedent’s testament is called an executor (male) or executrix (female). In a will, the testator may appoint the succession representative, but if he or she does not do so or if the named representative refuses to serve, the court will pick the representative from among the heirs or legatees, according to law. An Independent Administrator is empowered to sell, lease, mortgage, transfer, and otherwise deal with immovable property just as an owner would, without leave of court. This would be the cheapest method of estate administration since the administrator does not have to file motions for court approval for such transactions. This can be done in testate successions if the will provides for independent administration or if all the legatees agree to allow the appointment of an independent administrator. In intestate successions, consent of all heirs is required for independent administration.

The succession representative will be responsible for collecting all of the assets of the decedent, determining what debts are owed by the succession and seeing that they are paid, and initiating the court proceedings to resolve any questions that brought about the need for an administration. The succession representative is a fiduciary to the succession. Lastly, a succession administrator is responsible for ultimately closing the succession and putting the successors in possession of their property. The Succession Administrator will have to provide an accounting of the administration, unless this requirement is waived by all the successors. Note that time periods for opposing proposed actions by a Succession Administrator are generally very short. See e.g., La. Code Civ. art. 3335 (ten days to oppose homologation of account).
9. INHERITANCE TAXES

9.1 STATE INHERITANCE TAXES

The State of Louisiana previously taxed the decedent’s estate and the Inheritance Tax return had to be submitted to the Louisiana Department of Revenue (LDR) along with any tax due before a succession could be filed in court. The LDR would issue a certificate which had to be attached to the petition for possession.

Recent legislative changes have mostly done away with the Louisiana inheritance tax. Act No. 822 of 2008 repealed the state inheritance tax laws previously provided by La. R.S. 47:2401-2426 effective January 1, 2010. The Act also provided that the inheritances taxes due to the state for deaths occurring before July 1, 2004 shall be considered due on January 1, 2008 if no inheritance tax return was filed before January 1, 2008. Furthermore, all inheritance taxes shall prescribe three years from December 31st of the year they were due as provided by the Louisiana Constitution, Article 7, Section 16. The result of all these legislative changes is that on December 31, 2011, all previously due inheritance taxes will prescribe. Therefore, in most situations, it will no longer be necessary to file an Inheritance Tax Form or obtain a certificate from the LDR. The only exception would be for extremely old successions, where the decedent died before July 1, 1969. In this situation, you must file a contradictory rule against the LDR and prove that the inheritance taxes have prescribed.

9.2 ESTATE TRANSFER TAXES

Previously, La. R.S. 47: 2436 required that an estate transfer tax return be filed by or on behalf of the heirs or legatees in every case where the value of the deceased’s net estate was $60,000 or greater. Internal Revenue Service Rule 2011 determined the calculation of the estate transfer tax, which involved the calculation of the assets attributable to Louisiana in relation to the total federal estate. Federal Legislation called The Economic Growth and Tax Relief Reconciliation Act of 2001, however, phased out the state estate tax credit between 2002 and 2005 and replaced the credit with a deduction for state estate taxes for deaths that occur after December 31, 2004. Because La. R.S. 47: 2432 only imposes the estate transfer tax if a state death tax credit is allowed against the federal estate tax, no state estate transfer tax is due for deaths after December 31, 2004. The Economic Growth and Tax Relief Reconciliation Act of 2001 was originally set to sunset on January 1, 2011, but has since then been extended to January 1, 2013.
CHAPTER 13

TEMPORARY ASSISTANCE FOR NEEDY FAMILIES IN LOUISIANA

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About The Author

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1. INTRODUCTION

The Family Independence Temporary Assistance Program ("FITAP") and Kinship Care Subsidy Program ("KCSP") provide cash assistance to needy families and are Louisiana’s primary implementation of the federal Block Grant for Temporary Assistance for Needy Families ("TANF"). These two programs are designed on the state level as entitlement programs: all who qualify are to receive the assistance.\(^1\) The state also uses TANF funds to fund other programs that do not provide cash assistance and under which there is no assurance of assistance for all who meet their eligibility criteria. The latter are called “TANF Initiatives.”

This Chapter focuses on FITAP, KCSP, and the work participation requirements to receive FITAP (called Strategies to Empower People, or “STEP”).

The TANF initiatives are set out at Louisiana Administrative Code (hereafter, LAC) Title 67, Part 3, Chapter 55. For an initiative to be a proper use of TANF funds, it must: 1) provide assistance to needy families, or 2) promote job preparation, work, or marriage of needy parents, or 3) prevent or reduce out-of-wedlock pregnancies, or 4) encourage the formation and maintenance of two-parent families.\(^2\) Recipients of the assistance need only be indigent with respect to the first two goals. The state’s TANF initiatives are fluid rather than static: the state is free to and does end some and start new ones, at its discretion, exercised through rulemaking in the Louisiana Register.

The federal TANF program is a block grant. In Louisiana all of its aspects, thus far, are administered by the Department of Children and Family Services (“DCFS”). Though the state must act within federal constraints, all rules are set at the state level. The federal requirements may help in interpreting the state provisions, and the need to comply with the federal requirements can inform policy arguments about program design. But the requirements placed on recipients are determined by state law and policy.

2. DEALING WITH ADVERSE ACTIONS: REAPPLYING, NEGOTIATION, ADMINISTRATIVE APPEALS, AND JUDICIAL REVIEW

Most TANF program parameters are decided only as a matter of state law; federal statutory or regulatory law rarely determines an issue. (For example, even where compliance with federal “work participation” requirements is at issue, those requirements do not require 100% compliance. So it is not federal law that requires a client be sanctioned.) As a result, unless a denial of due process or violation of the Americans with Disabilities Act or other federal statute occurs, if the fair hearing decision is not favorable, the only formal relief available is through state court “judicial review.” As a result, the decision as to how to preserve the client’s rights is very straightforward, unlike under some other programs, where direct resort could be made to federal court based on violation of federal law.

This also means that the administrative appeal must be utilized before court review is possible, unless there is a federal statutory or due process claim. The state court review will be based exclusively on the record created at the hearing.

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\(^1\) See Due Process section, infra.

2.1 REAPPLYING

If the issue is one where the outcome could change by reapplying, the applicant should usually be advised to reapply, even if a fair hearing is requested. The reapplication decision may come faster than a hearing decision. If the adverse action was for a failure to return paperwork, the applicant may be able to avoid the problem coming back up on the new application. Sometimes agency staff will use the information obtained in reviewing the new application to favorably resolve an appeal the client files.

Where the termination was caused by a STEP sanction, reapplying will not help resolve the matter. Fortunately, continued benefits pending appeal may be available in appeals from STEP sanctions.

2.2 FILING A FAIR HEARING REQUEST

Recipients have a right to a fair hearing and access to state court regarding denials, terminations or reductions of assistance, or delays in obtaining it. Fair hearing requests are to be filed with DCFS, as stated on the notice under appeal. But the fair hearings are now conducted by a separate state agency, the Division of Administrative Law (DAL). There are no federal statutory or regulatory requirements regarding TANF fair hearings. Even food stamp issues (which are often present along with TANF issues in a TANF appeal) can be heard by the outside agency.

An appeal sent or made directly to the DAL is not considered docketed. DAL will instead forward the appeal to DCFS. Filing with the DAL therefore risks both that the appeal may be mislaid and an uncertain filing date.

A person whose FITAP or KCSP assistance has been denied, terminated, or reduced, or who is contesting a STEP sanction has 30 days to file an administrative appeal from the agency decision. If the recipient is certified and contesting the amount of their assistance, they can appeal at any time during their current certification period. The administrative appeal is a required step before being able to go into court, unless the client has a claim under a federal statute.

Appeals can be requested orally or in writing. An appeal is treated as filed the day it is postmarked, orally requested, or phoned in. If the agency receives the request by U.S. mail and there is no postmark, it is treated as mailed the previous working day before received by the agency.

If the 30 day period for requesting a fair hearing has passed and there is no federal claim (such as denial of due process or violation of the Americans with Disabilities Act), the recipient is left to re-apply, and client will lose the benefits at issue for the period before filing the new application.

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4 La.R.S. 49:992(D)(2). While La.R.S. 46:107(A)(4) & (B) state that hearings are conducted by the Department of Children and Family Services, 49:992 provides that it overrides all but federal requirements.
5 7 C.F.R. § 273.15(m)(1)(ii).
7 LAC Title 67, Part 3 §§ 307(A)(1).
8 LAC Title 67, Part 3 §§ 307(A)(2).
10 LAC Title 67, Part 3, § 307(B).
11 Id.
2.3 ATTEMPT TO WORK ISSUES OUT WHILE AWAITING A FAIR HEARING

The administrative appeals can pend 90 days (60 if food stamps are also at issue). Particularly when the recipient is without assistance pending appeal, consideration should also be given to attempting to work the issue out with the agency worker before the hearing, except where showing one’s cards in advance of the hearing would instead weaken the case.

In addition, as noted in the section on STEP sanctions, infra, the agency Manual requires that “good cause” be asserted within 30 days after the advance notice period, so that leaving a case inactive may prejudice the client.

Many compliance issues can be resolved by submitting additional paperwork to the agency, reaching agreement with the client’s worker, or by re-applying for assistance. Reapplying is especially likely to be fruitful if actions or omissions of the client, agency, or third parties resulted in the denial, and might not recur with respect to the new application. But if there are system issues the client does not want mooted, or gray issues not developed regarding the prior application, which would complicate the appeal, reapplying may be against the client’s interests. And if agency policy precludes the client’s eligibility, there is no reason to put the client through the unnecessary work of a new application.

It is often particularly advantageous to pursue this other relief soon after filing a fair hearing request. Resolving the matter can end the need for the worker to prepare a Summary of Evidence for the hearing, as well as avoid the need to attend a hearing. The more work that remains available at the point a potential resolution is available, the more likely many workers may be willing to end the whole matter, fully in favor of the client.

2.4 PROCEDURAL RULES GOVERNING THE FAIR HEARING

The appeals are governed by a public assistance statute, La.R.S. 46:107, the Administrative Procedure Act, La.R.S. 49:951, 955-964, and the Division of Administrative Law statute, La.R.S. 49:991-999. (Be careful, the copy of the DAL statute posted on its website is not necessarily up to date. For instance, as of December 2012, it does not reflect legislative changes from 2010.)

The Division of Administrative Law also has its own set of procedural regulations. The applicable regulations were last updated in 2012, though as of the publication of this Manual, the version linked on the DAL website has not been updated.

DCFS has its own set of hearing policies, in its Administrative Procedures Manual, “Chapter 7.” These policies certainly still govern the DCFS staff. Since DAL staff that hear DCFS cases are used to operating under them, they, too, will likely continue for at least the immediate future to defer to these DCFS policies when invoked.

12LaC. Title 67, Part 3, § 309.
13LaC. Title 1, pt. III, § 101 et seq.
14LaC. Title 1, pt. III, § 305.
15https://stellent.dss.state.la.us/LADSS/outlineSections.do?partID=88&agency=OFS&chapterID=5
These rules require that the DAL send a “summary of evidence” with exhibits the agency anticipates using, and policy cites, with or before the hearing notice. Notice of a hearing date and time is to be sent out at least 10 days before the hearing. These policies assure access to the client’s file (except in some instances confidential parts, which cannot be used at the hearing) in advance of the hearing.

2.4.1 Theoretical availability of discovery

All discovery tools and subpoenas are theoretically available within the fair hearing proceeding. Because fair hearing proceedings must usually be concluded within 90 days, if the opposing party does not promptly cooperate, the tools may have limited usefulness.

Clients and their representatives are to have access to the agency file in advance of any hearing. As a result, the most likely application for discovery would be if an application has been denied because of non-cooperation by, or misinformation from a third party, such as an employer.

2.4.2 The hearing should not be limited to consideration of what was before the agency at the time of the adverse decision

ALJs sometimes contend that the issue at a fair hearing concerns whether the agency made the correct decision based on the facts that were before the agency when it took the adverse action. The state Administrative Procedure Act specifies that appellants are permitted to add evidence to the administrative record and argue all issues of law. Another agency’s ALJ has been reversed as having denied a “fair hearing” for limiting the record to what was before the Medicaid agency at the time of its original decision. Other states’ courts have made similar rulings. And the state Administrative Procedure Act allows reopening of a fair hearing decision even after a hearing if “The party has discovered since the hearing evidence important to the issues which he could not have with due diligence obtained before or during the hearing; [or]... There is a showing that issues not previously considered ought to be examined in order properly to dispose of the matter.” So certainly additional evidence should be accepted at the hearing, too.

2.4.3 Improper dismissal of appeals

If an appellant misses their hearing without having advised the ALJ of good cause, the appeal will be dismissed; later requests to re-schedule the hearing based on good cause should be entertained. But given appeals are now being decided by a different agency, it cannot be assured that this procedure will be followed.

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10 LAC Title 67, Part 3, § 301 (definition), §321. Due process and the state Administrative Procedure Act, La.R.S. 49:955(B), would require the same as to at least some elements of the summary of evidence.
11 LAC Title 67, Part 3, § 319(A).
13 La.R.S. 49:956(5, 6); costs are not to be charged if the client is indigent. La.R.S. 46:107(B).
14 LAC Title 67, Part 3, § 315(A)(2, 5).
15 La.R.S. 49: 955(C)(“Opportunity shall be afforded all parties to respond and present evidence on all issues of fact involved and argument on all issues of law and policy involved and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”) At worst, this provision should authorize the appellant to evidence facts other than those initially before the agency as part of an argument that review should not be limited to what was originally before the agency.
16 Bell Oaks v. DHH, 96-1256 (La. App. 1 Cir. 1997), 697 So.2d 739, 749. Bell Oaks deals with agency scoring of Requests for Proposal—essentially private bids to do business with DHH. An argument that agency review should be limited to the prior record is particularly strong in that context, but the agency attempt to do this was not upheld.
18 LAC Title 67, Part 3, § 325(A)(2).
The agency will also dismiss appeals if resolved in advance of the hearing in the client’s favor.25 But due process requires that DAL not simply take a worker’s word that this has occurred without confirming with the adverse party or their representative.

Appeals may also be dismissed if the DCFS decides there is no jurisdiction over the appeal or that the request is untimely, or that the only thing at issue is an automatic adjustment to benefits required by state or federal law.26 This decision is often made ex parte, based on input only by the agency, denying due process.27

2.4.4 Right to an in-person hearing

The Division of Administrative Law is set up to conduct its hearings by phone. This enables tighter scheduling and reduces transit costs. Its staff have said they cannot do hearings from sites other than a few DAL offices, because of the size of the equipment to digitally record the hearings.28

But the FITAP/KCSP regulations assure the right to an in-person hearing, unless the record reflects that the applicant/recipient consented to a hearing conducted by phone.29 The regulations also inaccurately state that the DCFS will conduct the hearing, whereas a statute has moved the hearings to DAL.30

It is likely that if an applicant requests an in-person hearing DAL will agree to this. Even if the hearing has already been scheduled to be by phone, DAL is likely to accommodate by re-setting for an in-person hearing. But DAL will usually set the hearing in Baton Rouge, or possibly in one of its few offices outside of Baton Rouge.

The state regulation does not assure the hearing will be held in the local parish. Because the regulation can be characterized as only applying if DCFS conducts the hearing (which it no longer does), because the regulation can be changed through rulemaking, and because nothing assures that an in-person hearing must occur in the parish, an effort to get the agency to conduct local in-person hearings would probably be best pursued with a client challenging an action which also affects their food stamps. There may be other, federal guidance to draw on requiring that food stamp hearings be conducted locally and in-person. For example, the food stamp regulations require that “The time, date, and place of the hearing shall be arranged so that the hearing is accessible to the household.”31

2.4.5 Review of proposed ALJ decisions by the DCFS

Though DAL conducts the hearing, the ALJ writes only a recommended decision, which it then forwards with the exhibits and audio track to DCFS for review. DCFS then has 35 days reject, modify, or approve the recommended decision.32 If it does not take action within that period, the recommended decision becomes the final decision.33

26LAC Title 67, Part 3, § 305(B); Memorandum of Understanding between LA. DCFS and La. DAL, Dec. 21, 2010, § 3.3.
27Accord Georgia Gulf Corp. v. Board of Ethics for Public Employees, 96-1907 (La. 5/9/97), 694 So.2d 173 (holding that prosecuting counsel’s drafting administrative opinion denies due process).
28The advocate can point out that the hearing can still be recorded by phone, using that digital equipment, even if the ALJ is present with the parties in a local parish.
29LAC Title 67, Part 3, § 319(B).
317 C.F.R. § 273.15(l).
32Id, at § 4.1.
33Id, at § 4.2.
If the actual decision maker at DCFS has not reviewed the entire record, then a proposed decision must be served on the applicant or recipient.34

Even if DCFS has rejected the DAL ALJ's decision, that decision should remain part of the record and its rejection should be explicit in the final decision.35

*Because DCFS has reserved 35 days to review the ALJ decision, and 25 days to get paperwork to DAL after the hearing is requested, the DAL may only have 25 days to actually set and hear the case and write its recommended decision.*36

**2.4.6 Rare access to continued benefits pending appeal**

When the recipient is eligible for continued benefits pending appeal, there are thirteen days to appeal and maintain continued benefits pending appeal.37

But because DCFS usually certifies FITA P and KCSP cases for benefits for a specific time period, continued benefits pending appeal usually are not available on most FITA P issues. The recipient is only entitled to continued benefits if the agency takes an adverse action that cuts benefits for a period that was previously approved, and then only for the remainder of the period previously approved.38

Usually the agency instead takes its adverse action when the recipient is nearing the end of a certification, and makes the action effective at the end of the certification period.

The state statutes discussed in the due process section of this Chapter, *infra*, may create a property right in continued FITA P and KCSP assistance. That could provide a basis for invalidating the state’s regulation that FITA P assistance is only granted for periods of a number of months, and that each application for a new set of months is separate and independent. This regulation is relied on to deny any pre-deprivation hearing or continued benefits pending appeal when benefits are cut or ended at redetermination.39

But there is federal precedent even in a program recognized as creating a property interest, for holding that continued benefits are not a required element of due process when a certification for a set number of months has ended.40

A notable exception is STEP violations. These can come to the agency’s attention at any time, and so are more likely to be imposed during a certification period. As a result, agency policies require advance notice of the sanction, meaning that the recipient has the right to continued benefits pending appeal (but only through the end of their certification period).41 That right includes the right to continued supportive services.42 But because the agency can review for “good cause” for a STEP violation (possibly only in advance of the hearing, as discussed in the STEP section *infra*), other advocacy steps should be taken in addition to appealing for STEP violations.

37LAC Title 67 Part 3, § 313(A).
38LAC Title 67 Part 3, § 313(B).
39See LAC Title 67 Part 3, §§ 1207(A), 1209(A)(9); see also §313(B)(benefits continued at the prior level only through the end of the certification period).
41FAM4 § P-550-STEP.
42FAM4 § P-610-STEP.
2.4.7 Substitute for continued benefits: possibility of getting a state court stay while a fair hearing is pending

A stay can be sought from state court in conjunction with a state court judicial review proceeding. The state court proceeding can be filed immediately if a non-final agency ruling (such as the decision to terminate continued benefits or the underlying action at issue) will otherwise inflict irreparable injury. The judicial request for a stay could be concurrent with an ongoing fair hearing proceeding.

Most state courts will want all administrative remedies exhausted before injecting the court into an agency proceeding, so it is prudent to have exhausted as many as possible before seeking such relief. Even so, getting a court to issue the stay while other proceedings are still pending and with little record to rule on is bound to be an uncertain proposition.

The agency, too, can issue a stay, in lieu of the court’s doing so. Since a stay is not exactly a preliminary injunction, there is no automatic requirement that security be posted in order for the relief to issue.

2.5 AFTER AN ADVERSE HEARING DECISION, 10 DAYS TO REQUEST ADMINISTRATIVE RECONSIDERATION

If the client has a hearing decision that is less than ten days old and a fairly clear legal claim has been missed by the agency, a petition for reconsideration or rehearing and/or demand letter to the agency are the fastest ways to seek relief. During the first ten days, a petition for reconsideration or rehearing can be filed with the DAL. Even though a new hearing is not usually expected or needed, it is prudent to label the request as a petition for “reconsideration or rehearing.” This is because the statutes refer to the latter as extending the time period for judicial review, even if not granted by the agency.

There are no specific format requirements (it can even be a letter memo), but the petition must be specific as to the grounds under which rehearing is sought, including the specific statutory reason for seeking review.

Theoretically, rehearing can be requested even later where challenging fraud, use of perjured testimony, or fictitious evidence. But the author is unaware of such requests having been granted.

The rehearing or reconsideration decision will be made by the same person that made the original decision. If a DAL ALJ is at issue, the ALJ will consider the petition for rehearing or reconsideration. If DCFS overrode the ALJ, then DCFS will consider the petition, though the petition must be filed with DAL.

The agency does not usually hold a supplemental evidentiary hearing. However, sometimes, where there is a very strong argument against the hearing decision, relief will be granted, with shorter delays than in going to court, without exposure to court fees, and with less work needed to explain the issue, since the ALJs are more familiar with the program than district court judges.

43 La.R.S. 49:964(C); Division of Administration v. Department of Civil Service, 345 So.2d 67 (La. App. 1st Cir. 1977)(granting stay of administrative order); Summers v. Sutton, 428 So.2d 1121, 1125 (La App. 1st Cir. 1983)(denying stay of administrative order).
45 La.R.S. 49:964(C).
49 La. R.S. 49:959(B); CMS State Medicaid Manual §2904.1(D & E)(allowing reopening within a year for various reasons, including new evidence, and without time limit for fraud).
2.6 **NON-COURT REVIEW AFTER THE 10 DAYS FOR ADMINISTRATIVE RECONSIDERATION OF APPEAL DECISIONS**

Even after the ten day period for rehearing or reconsideration, demand letters or other approaches to the Secretary of DCFS or DCFS Legal Unit can be effective, especially if made within the period for seeking judicial review. Such requests do not suspend the period for judicial review. But they may get attention from the agency, by persons more familiar with the program, who are freer to delve into policy issues, and can get a review that goes beyond the evidence in the administrative record.

2.7 **STATE COURT JUDICIAL REVIEW OF HEARING DECISIONS**

1. **Beginning suit and time limitations**

   Appellants can file for judicial review under the state Administrative Procedure Act within 30 days of an adverse fair hearing decision. As noted above, a timely filed petition for rehearing extends the period. A two page, non-substantive form petition is usually used to start the proceeding. Petitions are often styled “in re” the claimant, or the Office of the Secretary of DCFS can be named as defendant. The Division of Administrative Law is not named as a party in cases available on Westlaw (seeking review of adverse actions by other agencies). This is consistent with La. R.S. 49:992(B)(3).

   Service of the petition on DCFS must be arranged. Judicial review is of the existing administrative record, including hearing transcript. Court review cannot take place until the record is received. But the petitioner can file a motion to stay the adverse action in the meantime, if enough evidence can be presented to the court to justify this, or other sanctions can be ordered by the court for transcript delays.

   If the petition is filed in Baton Rouge (as well as some other parishes), the Local Rules require that the plaintiff’s attorney “immediately notify” the Judge that a judicial review proceeding is pending. On receiving notice, the judge often schedules a status conference to set a briefing schedule.

2. **Venue**

   The plaintiff can choose between Baton Rouge venue and the parish of his or her domicile. But if the proceeding will seek a declaratory judgment that an agency rule or policy is invalid or inapplicable this request should be explicit in the petition and exclusive venue may be in Baton Rouge.

3. **Limitations on judicial review**

   Judicial review is limited to the record from the fair hearing. The governing statute does not require that courts accept agency fact-findings, but

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51 The Division of Administrative Law is only empowered to reverse for legal errors, though this can include arbitrary and capricious action.
52 La.R.S. 49:964(B); 46:107(C). As noted above, a timely filed petition for rehearing extends the period.
53 “Nothing in this Section shall affect the right to or manner of judicial appeal in any adjudication, irrespective of whether or not such adjudication is commenced by the division or by an agency.”
54 La.R.S. 49:964(B).
55 Compare La. R.S. 49:964(D).
56 La.R.S. 49:964(C).
57 In re Fongione, 36130 (La. App. 2 Cir. 6/12/02), 821 So. 2d 673, 677; Bruce v. State, Department of Health and Hospitals, 95-1175 (La. App. 3rd Cir. 3/6/96) 670 So.2d 680.
58 See e.g., Louisiana Rules for District Courts, Appendix 9.14, 19th JDC, ”Judicial Reviews and Appeals.”
60 See La.R.S. 49:963(Al)(1); Star Enterprises v. State, Department of Revenue, 95-1980 (La. App. 1st Cir. 6/28/96), 676 So.2d 827, 833.
61 La.R.S. 49:964(F).
just give them “due regard,” which is lessened when the hearing was not conducted in person.\textsuperscript{62} There is a split as to whether the Court of Appeal should defer to the District Court as to the facts.\textsuperscript{63} The First Circuit has also noted that an ALJ's disbelief of the recipient or applicant does not create sufficient evidence to support an agency ruling.\textsuperscript{64}

A paucity of relevant facts in the record or of explanations of the legal context can defeat the legal claim for relief or can reduce the judge’s comfort level (that he or she understands everything he or she needs to in order to avoid making a mistake), thus increasing deference to the agency, which may argue that its decision is based on important policy concerns.

It is unlikely that class-wide relief can be sought in an APA proceeding, since it is a summary proceeding and class actions are ordinary proceedings. However, declaratory relief, which can be sought in a Baton Rouge APA proceeding,\textsuperscript{65} may benefit others.

\section*{2.8 IS THERE A FEDERAL QUESTION IF DUE PROCESS HAS BEEN DENIED?}

The Eleventh Amendment bars federal court jurisdiction over non-federal claims against a state.\textsuperscript{66} This leaves state court as usually the only forum for pursuing issues unless there has been a violation of due process or the Americans with Disabilities Act. The presence of a federal claim could allow one to file a federal civil suit, not bound by an administrative hearing record or the short time limitations for administrative appeals or judicial review.\textsuperscript{67}

As noted throughout the text, one of the few possible federal claims under the TANF program would concern denials of due process. But an agency’s use of improper procedure is not enough to state a due process claim. Due process protects property and liberty interests. If the assistance at issue does not qualify as property, then the agency is not obligated under federal law to provide due process.

The federal TANF statute explicitly attempts to avoid creating any entitlement that could be enforced through litigation.\textsuperscript{68} But state statutes pre-dating and surviving the enactment of the state’s FITAP program do create or recognize an entitlement. La.R.S. 46:233 provides that “Assistance \textit{shall be granted} to or on behalf of any child found to be in necessitous circumstances as defined by” state agency regulations.\textsuperscript{69} La.R.S. 46:231.2 also repeatedly uses the term “shall”
in describing the FITAP assistance to be provided. La. R.S. 46:108 provides that assistance amounts can be changed if the Department finds a change in the recipient’s circumstances and that assistance can be revoked, canceled, or suspended “for cause.” Other statutes are to the same effect.\textsuperscript{70}

Because of the state statutes cited above and because of the objective standards used to determine who does and does not get assistance, the state has established an interest that can only be removed “for cause.” Interests that can only be removed “for cause” qualify as “property,” protected by the Fourteenth Amendment’s due process clause.\textsuperscript{71} As noted above, La. R.S. 46:108 explicitly provides that assistance cannot be canceled, revoked, or suspended except “for cause.” At least one court has ruled, based on the existence of state standards and policies governing who gets assistance, that its state’s TANF benefits are protected by due process, even though the state’s legislation, like the federal statute, purported to create “no entitlement.”\textsuperscript{72} Due process coverage creates rights to fair process, to adequate notice of the reason for actions, to advance notice of actions, and to continued benefits pending appeal, and possibly to notice of exemptions and policies that could protect the recipient from adverse action.\textsuperscript{73}

Nonetheless, no federal claim lies for a denial of property that was protected by due process if the loss was due to a random and unauthorized action, unless improved procedures could prevent such losses.\textsuperscript{74}

Even if there is a federal claim, the Eleventh Amendment bars a federal court from granting retrospective relief that will impact the state Treasury (back-benefits).\textsuperscript{75} The TANF program is set up so that states are required to put up a block of money (“maintenance of effort”) and then can draw down federal TANF funds, up to a specified amount. Some states might then spend more, which would come solely from state funds. Louisiana does not. It could be argued that because the state must pay the same share regardless of how much federal money is spent,  

\textsuperscript{70}See La.R.S. 46:106(A)(providing that FITAP assistance amounts are binding until modified or vacated); La.R.S. 46:115 (making the public assistance statutory requirements mandatory on parishes).

\textsuperscript{71}Morgan v. Georgia, \textit{408 U.S.} 542 (1972); Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593, 600-603 (1972)(holding that expectations created by agency guidelines, and existing rules and understandings could create an interest protected by due process); Ridgely v. Federal Emergency Management Agency, 512 F.3d 727, 739-40 (5th Cir. 2008)(court refusing to foreclose possibility of a property interest on a limited record, since it can “arise from ‘rules or understandings’ created by an agency’s policies or practices, even in the absence of explicitly mandatory statutory or regulatory language,” citing \textit{Perry} v. \textit{Sinderman}, 408 U.S. 593, 601-02, (1972). \textit{See also L.S.A. C.C. Art. 3} (custom can have the force of law in Louisiana); \textit{but see Coghlan v. Starkey}, 845 F.2d 566, 570 n. 3 (5th Cir. 1988)(court, in dicta, stating it is improper to review a charter and other sub-statutory sources in looking for a property interest in continuing to receive free water hook-up).

\textsuperscript{72}Weston v. Hammons, 37 F.3d (Colo. App. 2001)(requiring class-wide reinstatements because deficient notices of work-participation sanctions violated due process). \textit{Compare, State ex rel. K.M. v. West Virginia Dept. of Health and Human Resources}, 575 S.E.2d 393, 409, 212 WVa. 783, 799 (WVa. 2002) (seeking to hold no property interest, but nonetheless enjoining the state agency’s policy precluding appeals from denials of extensions to 60-month TANF limit, as inconsistent with due process). \textit{See also Kapp v. Wing}, 404 F.3d 105, 114 (2d Cir. 2005)(funds provided under federal block grant qualified as property based on assurances in state regulations and statute).

\textsuperscript{73}As to the latter, see \textit{Memphis Light, Gas & Water Division v. Craft}, 436 U.S. 1, 14 & n. 14 (1978)(holding that termination of public utility services with notice of the pretermination protections only through “the vagaries of word of mouth referral” denied due process); \textit{Turner v. Rogers}, 564 U.S. ___, 131 S.Ct. 2507, 2519 (2011)(notice of legal defense, eliciting relevant information and explicitly addressing the issue in judgment could provide due process); \textit{Bliek v. Palmer}, 102 F.3d 1472, 1476 (8th Cir. 1997)(holding that food stamp recoupment notices that fail to advise of agency’s power to settle the claim for a reduced amount violate due process); \textit{Pinberg v. Sullivan}, 634 F.2d 50 (3d Cir. 1980)(en banc)(holding that debtor’s bank account could not be garnished without notice of the state-law exemptions from garnishment and procedures for claiming them); \textit{Hill v. O’Dannon}, 554 F.Supp. 190 (E.D.Pa. 1982)(holding that termination notices to General Assistance recipients must describe the eight potential exemptions to termination in order to satisfy due process).


the funds at issue are exclusively federal funds. A court is likely to reject that characterization. Even if it does not, it is an open question in the U.S. Fifth Circuit whether the funds at issue being solely federal funds can avoid the Eleventh Amendment bar. If this theory is pursued the attorney should be careful not to let the suit remain inactive. If it becomes too late for the state to claim TANF funds, this reasoning will not apply.

3. SOURCES OF LAW

Federal statutory and regulatory TANF requirements are found at 42 U.S.C. 601, et seq., and 45 C.F.R. Parts 260-286. They rarely dictate the outcome of any particular client’s case. They are more relevant in shaping state programs and program options. For example, the federal statute seems to require that assistance be terminated if an adult has received it for “60 months (whether or not consecutive)” in a lifetime. But there are numerous ways for months not to be counted or to continue to assist families within the TANF program.

The federal TANF statute was set to expire in 2010. It is currently being extended for short time periods until Congress reauthorizes or reworks the statutes. Program rules could change once reauthorization occurs.

The law and policy governing clients’ cases is more often based on state statutes and regulations.

- The governing statutes can be found in Title 46 of the Revised Statutes, §§ 52.1-52.2, 54-59, 101-116, 230.1-235, 447, 450.1, and 460.1-460.10.
- The regulations can be found in Chapter 67 of the Louisiana Administrative Code, especially LAC 67, Part 3, § 901 (FITAP), et seq., § 5301 et. seq. (KCSP), and § 5701 et. seq. (STEP). These LAC provisions can be found on the state website, or accessed through the Department’s policy page, as well as through electronic research services. These legally operative regulations are fairly well-organized and succinct.
- Department policies are currently found on-line, in the Family Assistance Manual, abbreviated as “FAM 4.” The site with the Manual does not come up by searching the Department’s website. (The website currently remains at http://www.dss.state.la.us, reflecting the Department’s prior acronym.) Nor can global searches of the Manual be performed at this time. Care must be taken to look at “FITAP” policy sections, rather than “SNAP” (food stamp) policies, which can be accessed the same way.
- The “TANF state plan,” submitted to the federal government for approval, has assurances the state has made to the federal government as to the configuration of elements of its program that must meet federal requirements.

76 See Cronen v. Texas Dept. of Human Services, 977 F.2d 934, 938 (5th Cir. 1992). The case does, though, make clear that if a federal suit is filed, it needs to be as an official capacity action against an individual officer, rather than against the agency itself. As to other Circuits, see Robinson v. Block, 869 F.2d 202 (3d Cir. 1989); Foggs v. Block, 722 F.2d 933 (1st Cir. 1983); GNOFHAC v. HUD, 639 F.3d 1078, 1084 (D.C. Cir. 2011) (collecting other cases).
79 The regulations posted as part of the Louisiana Administrative Code (“LAC”), can be found at <http://www.state.la.us/osr/lac/67v01/67v01.pdf> and are updated periodically. Subsequent changes can be found using the Louisiana Register.
82 http://stellent.dss.state.la.us/LADSS/outlineParts.do?agency=OFS&chapterID=3.
83 www.dss.state.la.us/assets/docs/searchable/OFS/TANF/TANFStatePlanAmended1209.pdf

(835)
Importantly, the Department’s published regulations are often extremely terse. Any additional specifications included in the Family Assistance Manual but not included in the regulations have not been legally promulgated, and therefore should be unenforceable. Consequently, because the regulations set out only very general standards, any other written agency standards have effect only to the extent that they have the “power to persuade,” leaving the courts to apply the promulgated terms in a fair fashion appropriate to the claimant’s circumstances (in the same way that courts, rather than the agency, give content to the unemployment compensation statute’s “misconduct” and “good cause” standards).

It also merits note that ALJs’ citing and relying on policies in their decisions is improper, with regard to policies that have not been formally promulgated and were not made part of the hearing record.

Unless the family is already certified for Food Stamps and Medicaid, a Louisiana FITAP application is also an application for Food Stamps and Medicaid assistance. When trying to challenge procedural steps the agency took on an application, the federal food stamp regulations may produce a basis for a challenge. To the extent that the state agency has not promulgated different standards for dealing with TANF assistance, the food stamp protections may carry over to protect the TANF aspects of the application, as well.

If favorable to the client, the state is also bound to comply with its internal TANF policies, like those published in its FITAP and FAM-STEP manuals. (Much in the Manuals has been submitted to the federal government as the agency’s “state plan” under which assistance is provided.) It would be arbitrary and capricious for the agency not to conform to its own policy pronouncements. State equal protection law, too, may preclude the agency from departing from a standard it applies to others.

The federal TANF program is also explicitly subject to other general federal laws, especially those governing recipients of federal funds, like the prohibition against discrimination and actions that have a disparate impact based on race, color, national origin, disability, age, and sometimes gender or religion. The TANF statute explicitly requires that program activities comply with the requirements of the Age Discrimination Act of 1975 (unlike the Age Discrimination in

84 L.R.S. 49:951(6) (“each agency...requirement...implementing or interpreting...substantive...policy” is a rule) and L.R.S. 49:954(A) (excluding enforcement of eligibility qualifications that are not promulgated under the APA). See also L.R.S. 49:963(E).


86 See La. R.S. 49:956(2,3)(documents must be offered at the hearing); L.R.S. 49:966(C)(authorizing courts to take judicial notice only of properly promulgated regulations); Labbie v. Robinson, 544 So.2d 734, 735, n. 1 (La. App. 3 Cir. 1989)(in the absence of policies or regulations in the record that support the agency’s action, the action would not be upheld).

87 www.dss.state.la.us/assets/docs/searchable/OFSTANF/TANFStatePlanAmended1209.pdf

88 Washington-St. Tammany Elec. Co-op., Inc. v. Louisiana Public Service Com’n, 1995-1932 p. 11, n. 3 (La. 4/8/96); 671 So.2d 908, 915 (“it is arbitrary and capricious for the Commission to fail to apply its own rules in an adjudication before it”); Central Louisiana Electric Co. v. Louisiana Public Service Com’n, 377 So.2d 1188, 1194 (La.1979) (“if a public agency is not required to abide by its own rules and procedures, then the standard of review for ‘arbitrary and capricious’ action is without meaning.”); Carpenter v. Dept. of Health and Hospitals, 2005-1904 p. 14 (La.App. 1 Cir. 9/20/06); 944 So.2d 604. 613 (agency rejection of document that met the terms of agency’s published policies presented an “unwarranted exercise of discretion”); Doc’s Clinic v. Dept. of Health and Hospitals, 2007-0408 p. 36-37 (La.App. 1 Cir. 11/2/07); 984 So.2d 711, 726 (agency issuance of decision through procedures that did not conform to its own policies found “arbitrary and capricious and based on improper procedure”).

89 Religion and sex discrimination (including on the basis of pregnancy) are covered under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., which only governs all aspects of employment relationships.

Employment Act, this Act’s protections are not limited to persons over age 40, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and Title VI of the Civil Rights Act of 1964. Other laws that can apply include Title IX (prohibiting gender discrimination in education), the Age Discrimination in Employment Act, and anti-discrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA). The regulations make it clear that federal minimum wage, occupational safety and health, minimum wage and other federal non-discrimination laws apply.

The requirements of these laws may invalidate actions that would be permissible if one just considered the TANF law. For example, if program staff or contractors refer men to particular training opportunities that receive federal funding (including TANF funds) and women to others, instead of making the same opportunities available to all qualified recipients, this violates the anti-discrimination provisions. Or if both men and women are admitted into the training programs, post-training placement activities that favor one gender are illegal. If these results occur not as a matter of official policy, but through case managers exercising their discretion and pairing applicants to the opportunities they think make the best “match,” that may not excuse the system’s discriminatory impact.

Similarly, the agency may illegally discriminate if it or some of its staff always exempt individuals with recognized disabilities from work and training requirements, instead of offering them the chance to participate, with accommodations, if they want to. And the agency may discriminate by accepting employers’ job descriptions and the capabilities they say they are seeking in employees, when reasonable accommodations to the position description could make a job accessible to a person with disabilities. The agency also impermissibly discriminates if it requires different or additional verification of citizenship from Hispanic person than from others, or if it fails to provide foreign language interpreters, requiring that persons with limited English proficiency supply their own. In a similar vein, the agency must provide accommodations if persons with a mental or emotional disability are unable to deal with the agency’s application paperwork or procedures.

There is an uncertain line as to when damages actions against states are properly authorized by the ADA. However, the Supreme Court has ruled that Congress’ separate authority to impose conditions in exchange for states taking

91 42 U.S.C. § 6101 et seq.
93 42 U.S.C. § 12101 et seq.
96 29 U.S.C. § 621 et seq.
98 45 C.F.R. § 260.35.
99 There may not be a federal statutory ban on gender discrimination apart from in education, except through Title VII’s coverage of private employment actions.
100 See Shipes v. Trinity Industries, 987 F.2d 311, 316 (5th Cir. 1993); Carpenter v. Stephen F. Austin State University, 706 F.2d 608 (5th Cir. 1983).
102 Id.
103 Id.
104 Compare The University of Alabama at Birmingham Board of Trustees v. Garrett, 531 U.S. 356 (2001) (equal protection clause did not provide Congress with the authority to unilaterally impose liability on the states through the Americans with Disabilities Act, precluding damage action for employment discrimination) and Tennessee v. Lane, 541 U.S. 509 (2004) (the Fourteenth Amendment’s due process clause does allow Congress to impose damages liability on states who violate the ADA on court access issue).
federal funds presumably remains unimpaired.\textsuperscript{105} Obligations to accommodate disabilities were imposed under § 504 of the Rehabilitation Act of 1973, and so may authorize damages actions.

To the extent that § 504 and ADA obligations or interpretations may differ, since the federal TANF act requires compliance with the Americans with Disabilities Act in exchange for accepting TANF funds,\textsuperscript{106} even if the ADA is ruled unconstitutional as a unilateral regulation on the states, states may remain obligated to comply with respect to TANF funds.

4. THE KINSHIP CARE SUBSIDY PROGRAM: MORE GENEROUS BENEFITS TO CHILDREN NOT LIVING WITH THEIR PARENTS

Assistance under the Kinship Care Subsidy Program ("KCSP") is more generous, and there are fewer financial and other requirements than under FITAP. The basic difference between the two programs is that for KCSP the needy child or children are living with a relative other than a parent. (But the caretaker relative must be within the fifth degree of relationship to the child).\textsuperscript{107}

The KCSP payment is currently $222 per month for each eligible child. (It had been $280 a child from 2006 until December 2011.\textsuperscript{108} Although no assistance is paid on behalf of the adult caretaker relative, the KCSP assistance comes out much higher than FITAP’s.

To qualify:\textsuperscript{109}

- The needy child must be living with a relative within the fifth degree of relationship, \textit{but not with either parent}.
- The relative caring for the child must obtain legal custody or guardianship of the child within a year of being certified. DCFS has a detailed chart setting out the requirements that must be met, including which parents must give the custody by mandate, depending on familial circumstances.\textsuperscript{110}
- The child must be under age 18.
- The household must have countable income under under 150% of the federal poverty line for a family size including the caretaker, children to be assisted, and any other children in the home that the caretaker is financially responsible for (foster care and SSI payments are not considered in the calculation). No earned income disregard is applied in determining this.\textsuperscript{111}
- The child’s own income must be less than the grant amount (currently $222 a month).\textsuperscript{112}


\textsuperscript{106} 42 U.S.C. § 608(d)

\textsuperscript{107} L.a.R.S. 46:237(A); LAC Title 67, Part 3, § 5327(A).

\textsuperscript{108} Executive Bulletin, E-2470-00 (November 10, 2011).

\textsuperscript{109} Unless otherwise noted, these requirements are set out at LAC Title 67, Part 3, §§ 5321-5345.

\textsuperscript{110} FA34 § M211-1-KCSP.

\textsuperscript{111} FA34 § M310-KCSP.

\textsuperscript{112} LAC Title 67, Part 3, § 5329(C.D).
The following requirements from the FITAP program also apply:

- Household members must have Social Security numbers ("Enumeration").
- Assignment of child support rights and payments to the state and cooperate with Support Enforcement Services (if amounts received exceed the assistance amount, it should be forwarded to the child and assistance terminated).  
- Louisiana residence.
- U.S. Citizenship or “qualified alien” status.
- Child is current on immunizations.
- If the minor is pregnant or a parent, they must go through parenting skills education.
- If the minor is pregnant or a parent, they must be attending high school, GED, or other approved educational program.  
- The child is not receiving SSI or foster care payments.  
- The child must not be fleeing to avoid prosecution or confinement for a felony or violating a condition of probation or parole.
- Ineligibility for one year after the latter of conviction or release from incarceration for conviction of possession, use, or distribution of a controlled substance. Children cannot be paid and caretakers cannot be the payee if within the year.  

The Domestic Violence protections are available for KCSP recipients, including ability to waive rules that would usually apply.

The family must apply for the kinship care assistance through the state’s FITAP program.

If a child qualifies under both the FITAP and kinship care rules, the caretaker needs to elect the one that is more advantageous (usually KCSP).

If anyone in the household receives KCSP, the whole household is considered “categorically eligible” for food stamps, with rare exceptions specified in the regulation. This means the household does not have to meet the food stamp program resource limits, or its gross and net income caps.

If a child loses eligibility for KCSP, the agency must make sure they do not qualify for FITAP before terminating their assistance.

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113 For appointments other than court appearances, two must be missed to qualify as non-cooperation. Good cause is that cooperation would endanger the child or the caretaker’s ability to care for the child, the child having been conceived through incest or rape, or adoption proceedings are in court or specified steps are being taken to consider surrendering a child for adoption. LAC Title 67, Part 3, § 5337(B)(4).  
114 FAM4 §§ M212-STEP; B1900-FITAP.  
115 FAM4 § M211-STEP.  
116 FAM4 § M211-STEP.  
117 LAC Title 67, Part 3, § 5301.  
118 FAM4 §§ M-110-KCSP; M-111.1-KCSP.  
119 LAC Title 67, Part 3, §1987. Those ineligible for categorical eligibility are persons serving out a food stamp intentional program violation, work sanction (LaJET), ineligible aliens, ineligible students, institutionalized persons, and strikers.  
120 FAM4 § M-111-2-KCSP.
5. BASIC FITAP ELIGIBILITY REQUIREMENTS

Louisiana’s FITAP program replaced the New Deal “Aid to Families with Dependent Children” (AFDC) program with a new form of welfare, with time limits, strict work participation requirements, and sanctions for various types of proscribed conduct. Its work component is now called STEP (Strategies to Empower People).

There are three basic types of hurdles a family must meet to qualify for FITAP:

- It must include a child living with relative of the proper degree of relationship, or woman in her third trimester.
- Its income must be within the program limits.
- It is not disqualified by other technical requirements, like needing to be a resident of the state, U.S. citizen (with certain specific exceptions), presenting a Social Security number, complying with verification requirements, and not sanctioned for being on the program too long, failing the work participation requirements, or failing to comply with other behavioral requirements.

At this time the program has no resource limits.

The child also need not be “deprived of parental support or care” as had been the case under the long-standing AFDC program. The death, absence, incapacity, or technically defined un- or under-employment of a parent is no longer required. So, in theory at least, the program is just as available for two-parent families as for single-parent families. But, unless incapacitated, both parents will be required to register for work or participate in work activities\(^{121}\) (educational attendance for those who have not completed high school and lack a GED).

As set out in the “Sources of Law” section above, the agency’s governing legal regulations are accessible on-line and fairly brief. This Chapter will not set out all the details specified by those regulations, like the types of income that are exempt. Instead, it will identify major types of issues clients face and areas in which the governing law has subtleties or complexities that may not be apparent on the face of those regulations.

5.1 A CHILD MUST BE LIVING WITH A RELATIVE WITHIN THE FIFTH DEGREE OF RELATIONSHIP

To receive assistance a family must include a minor child who is living with a relative within the fifth degree of relationship\(^{122}\) (As examples, this extends to great-great aunts, and great-great-great grandparents, and the child of a first cousin.) Relationships created by adoption qualify, as long as within the appropriate degree of relationship\(^{123}\). Relationships are recognized even after divorce or death of one of the relatives in the chain of relationship\(^{124}\). Custody decrees do not create a qualifying relationship\(^{125}\). If the relationship cannot be documented within 30 days but is expected within three months, the agency can certify for the three months\(^{126}\).

\(^{121}\)FAM4 § B-1410-FITAP.
\(^{122}\)La.R.S. 46:231(4)(b); FAM4 § B-810-FITAP.
\(^{123}\)Id.
\(^{124}\)Id.
\(^{125}\)FAM4 § B-840-FITAP.
\(^{126}\)FAM4 § B-840-FITAP.
The child or caretaker relative can be temporarily absent without reducing the assistance, for up to 45 days. The period can be extended to 180 days if the Department agrees to “good cause.”\(^{127}\)

Assistance is to be denied adult caretakers who fail to notify the agency within 5 days of when it becomes apparent a child’s absence should result in a reduction of assistance (i.e., usually an absence of over 45 days, but 180 days for good cause).\(^{128}\) The state’s implementation allows defenses, by requiring notice within 5 days of when it becomes clear the child will be absent 45 days, but exempting absences meeting its good cause definitions.\(^{129}\)

Joint custody: a child is considered to be living with a relative if living there “at least one-half of the time.”\(^{130}\) If the child splits time evenly between two parents, only one can claim FITAP assistance. The other will become the subject of a child support enforcement action.\(^{131}\)

5.2 TO BE CONSIDERED A “CHILD” ONE MUST BE UNDER AGE 18, BUT WOMEN PAST FIFTH MONTH OF PREGNANCY QUALIFY WITHOUT A CHILD

FITAP benefits can be paid on behalf of eighteen year olds only if they are in secondary school or something considered equivalent.\(^{132}\)

Women in the sixth or later month of pregnancy qualify for assistance without a child. The unborn is not counted in determining the assistance unit size.\(^{133}\)

5.3. PERSONS WHO CANNOT BE EXCLUDED IN DETERMINING INCOME ELIGIBILITY AND WORK PARTICIPATION REQUIREMENTS

Persons with the following relationships to the child must be included in the assistance unit for determining eligibility, if living in the household:

- parents,
- siblings,
- half-siblings,
- the parent of any half-sibling
- a child’s legal step-parents and
- the step-parents’ children.

If the child has a minor, unmarried parent, the following must also be included if living in the household:

- Parents of the minor unmarried parent,
- siblings of the minor unmarried parent, and
- children of the minor unmarried parent.\(^{134}\)

\(^{127}\) LAC Title 67, Part 3. § 1227(A).


\(^{129}\) LAC Title 67, Part 3. § 1506.

\(^{130}\) FAM 4 § B-511-FITAP.

\(^{131}\) Id.


\(^{133}\) Id.

\(^{134}\) LAC Title 67, Part 3, § 1203.
(As noted in the section, infra, about Minor Unmarried Parents, they usually will not qualify for the program unless living with an adult relative.) 135

If the required persons have income, it usually reduces assistance to the family, often totally precluding it. No more of the income of these relatives gets disregarded than of a parent’s. Their inclusion also makes them subject to the work participation requirements, unless age 60 or above, disabled or incapacitated, caring for a family member who is disabled or incapacitated, or a minor who is not a parent of an included child. 136 SSI and Kinship Care Subsidy Program recipients are not counted as part of the assistance unit: the person and their income and resources are excluded from all financial eligibility calculations. 137

5.4. RULES CAN BE WAIVED FOR VICTIMS OF DOMESTIC VIOLENCE

State statutes provide that “any” program requirements “shall” be waived, “as long as necessary, pursuant to a determination of good cause, if it would create obstacles for a victim of domestic violence to escape a domestic violence situation” or “penalize that victim for past, present, and potential for abuse.” Rules that can be waived explicitly include time limits, work or education requirements, and residency requirements. 138 This would also excuse compliance with the Family Success Agreement. 139 The state statute, DCFS regulations, and FAM4 Manual do not include a definition of domestic violence. Advocates should therefore draw on either the state domestic violence statutes or federal TANF statute’s definitions if necessary. The federal definitions do not directly govern what the state must do and are not explicitly incorporated in any of the state TANF laws, but the language of the federal statute is very similar, making it likely the state intended to adopt the federal standard. Under the federal definition, domestic violence includes being physically battered, sexual abuse, or threats or attempts at either, sexual activity involving a dependent child, mental abuse, medical neglect, or “being forced as the caretaker relative of a dependent child to engage in nonconsensual sexual acts or activities.” 140

A regulation provides that a worker may grant the exemption even without corroboration of the domestic violence, but corroboration is to be pursued, and discusses the types of records or statements that can substantiate the exception. 141 Another statute specifically recognizes that having to move to a protective shelter or other protected environment may temporarily preclude meeting job or training attendance requirements. 142 The statute also includes a privacy protection. 143

Under the statute, the agency and domestic violence victim must develop a specific plan that may enable her or him to become free from a domestic violence situation and incorporate such plan into the Family Success Agreement. 144

135 LAC Title 67, Part 3, § 1227(B).
136 LAC Title 67, Part 3, § 5705 (definition of “work-eligible recipient”); FAM4 §P-411-STEP.
137 LAC Title 67, Part 3, § 1203
139 Temporary Assistance for Needy Families (TANF) State Plan, § D-130.
141 LAC Title 67, Part 3, § 1213(C).
142 La. R. S. 46:460.8(B).
143 La. R. S. 46:460.9(B).
144 La. R.S. 46:460.9(A); LAC Title 67, Part 3, §1213(A).
The domestic violence exception is not specifically referenced in the Department's time limit regulation, minor unmarried parent regulation, or other regulations dealing with specific situations except STEP participation, and is not prominent in the FAM-4 Manual.\textsuperscript{145} A STEP regulation seems to limit the domestic violence exception to 6 months a year, which in some circumstances could violate the statute.\textsuperscript{146} Though many of these other regulations include good-cause exceptions, the statutory domestic violence protection is broader, prohibiting sanctions based on either current need, or to avoid penalizing victims for past, present, and potential abuse. Department staff are more likely to be guided by the FAM4 Manual than the formal regulation. Advocacy may be necessary to access the broader regulatory and statutory domestic violence protections.

\section*{5.5 Earned Income Disregards}

Income rules and disregards are set out at LAC Title 67, Part 3, § 1229. For recipients already on assistance (not applicants) they include for each earner in the family a time-limited $900 per month earned income disregard, as well as an unlimited disregard of the first $120 a month in earned income.

The $900 disregard is available to recipients for only six months in their lifetime.\textsuperscript{147} Under the Department's regulations, the months need not be consecutive.\textsuperscript{148}

Under the state statute, the $900 disregard only applies if the "work activity...has been \textit{approved by the department} as part of his work participation requirement under TANF."\textsuperscript{149} This limitation is not in the promulgated regulation or FAM4 Manual.\textsuperscript{150} Because the Department gets federal work-participation credits for having recipients who are working, if the job is contemporaneously reported, the disregard should be allowed.

A state statute provides that the months when the family receives the $900 earned income disregard do not count against the state-imposed 24 month time limit on receiving FITAP.\textsuperscript{151}

The cost of dependent care can be deducted from earned income, if needed for an incapacitated adult or a child age 13 or older so that a household member can work.\textsuperscript{152} Children in certified households who are under age 13 can get child care assistance paid for by the agency. The formal regulations state that if their child care provider charges more than the maximum provided under the child care program schedule, the family can get a deduction of the excess from their earned income.\textsuperscript{153}

All earned income of children complying with school attendance requirements is disregarded.\textsuperscript{154}

\textsuperscript{145} There is a mention of domestic violence in FAM4 §P500-STEP, regarding STEP, and §B-1744-FITAP regarding time limits.  
\textsuperscript{146} Compare LAC Title 67, Part 3, § 5715.  
\textsuperscript{147} La.R.S. 46:460.5(A),(B).  
\textsuperscript{148} LAC Title 67, Part 3, § 1229(C)(2).  
\textsuperscript{149} La.R.S. 46:460.5(A)(1).  
\textsuperscript{150} LAC Title 67, Part 3, § 1229(C); FAM4 § B-651-3-FITAP.  
\textsuperscript{151} La.R.S. 46:460.5(C).  
\textsuperscript{152} FAM4 § B-651-2-FITAP; LAC Title 67. Part 3, § 1229(C)(3).  
\textsuperscript{153} LAC Title 67, Part 3, § 1229(C)(3)(c). This is not replicated in the FAM4 § B-651-2-FITAP, so may require advocacy to access.  
\textsuperscript{154} LAC Title 67, Part 3, § 1229(A)(2); FAM4 B-620.9-FITAP.
5.6 OTHER INCOME EXEMPTION RULES

A long list of specific types of income are exempted from counting against eligibility.\textsuperscript{155} It should be reviewed when representing a client with an unusual type of income. Most exemptions are either required by other federal statutes or simply carry over an exemption that existed under the old AFDC program. Examples include earned income tax credits or refunds, education assistance, foster care payments, energy assistance, HUD payments and subsidies, and “Developmental Disability payments.” Several types of exempted income merit discussion.

Importantly, the Department’s regulations exempting these and other types of income are extremely terse. Additional specifications included in the FITAP Manual are not included in the regulation. As a result, if a client’s income could fit within the promulgated exemption, there is a claim that it should be exempted, even if the unpromulgated FITAP Manual specifies otherwise.\textsuperscript{156}

Lump sums are not counted as income at all.\textsuperscript{157}

In-kind income does not get counted against eligibility.\textsuperscript{158} But where an employer makes certain third party payments instead of paying salary, those count as income.\textsuperscript{159}

Bona fide loans do not count as income.\textsuperscript{160}

Income that is designated by law for a particular beneficiary (“restricted income”), who is outside the household is not counted against eligibility or benefits.\textsuperscript{161} For example, if someone in the household is the representative payee of an SSI check for someone outside the household, the SSI check will not count against the household’s eligibility. Court-ordered support payments and Veterans Administration benefits received for a person outside the assistance or income unit are also recognized as restricted income.

5.7 INDIVIDUAL DEVELOPMENT ACCOUNTS

Louisiana’s program recognizes “individual development accounts”, in which TANF recipients can accumulate up to $6,000 from earned income for three specific qualified uses (education, buying a home, or starting a business), subject to some very specific conditions.\textsuperscript{162} Only one Individual Development Account is allowed per household. Federal law allows states to authorize that TANF Individual Development Accounts, which cannot be counted against eligibility for any federal means tested program.\textsuperscript{163}

Louisiana’s FITAP, KCSP, and food stamp (for all but very unusual households) programs, and its Medicaid eligibility for families, have no resource limits. This makes the Individual Development Accounts of limited relevance unless the recipient gets the benefit of matching funds from the state or a non-profit to deposit into the account. There might be some households with an SSI recipient and earned income that the exempt status of the account could benefit.

\textsuperscript{155} See generally LAC Title 67, Part 3, § 1229.
\textsuperscript{156} See La.R.S. 49:951(6) (“each agency...requirement...implementing or interpreting...substantive...policy” is a rule) and La.R.S. 49:954(A) (precluding enforcement of eligibility qualifications that are not promulgated under the APA). See also La.R.S. 49:963(E).
\textsuperscript{157} LAC Title 67, Part 3, § 1229(A)(15).
\textsuperscript{158} LAC Title 67, Part 3, § 1229(A)(12).
\textsuperscript{159} FAM4 § B-620-22-FITAP.
\textsuperscript{160} FAM4 § B-620-22-FITAP.
\textsuperscript{161} LAC Title 67, Part 3, § 1229(A)(19); FAM4 § B-620-26-FITAP.
\textsuperscript{162} LAC Title 67, Part 3, § 1229(A)(27); FAM4 § 620-40-FITAP.
\textsuperscript{163} La. R.S. 46:460.6; LAC Title 67, Part 3, § 5555; 45 C.F.R. § 263.20-23.
\textsuperscript{164} 42 U.S.C. § 604(b)(4).
6. TIME LIMITS FOR PARENTS CARING FOR THEIR CHILDREN

6.1 OVERVIEW

Two time limits apply to receiving assistance from the state’s FITAP program. The state has adopted a 60 month lifetime limit on receiving assistance, and a separate limit for families that have received assistance in 24 of the last 60 months.

As discussed above, the state’s domestic violence protection exempts victims of domestic violence from either time limit, as necessary to escape domestic violence or to avoid penalizing them for being victims of domestic violence.

Clients terminated from FITAP because of the time limits or requesting to terminate FITAP to avoid hitting the time limits should continue to receive Medicaid independently, without the FITAP assistance. Any request to end assistance should specify the family no longer wishes to receive “cash assistance.” Their Medicaid should continue without break, though an intervention may be needed to assure the result.

Also consider whether clients terminated from FITAP because of the time limits may have a claim to unemployment compensation that can replace the lost income. One or more STEP placements with private employers may have qualified as “employment” under the unemployment compensation statute. The employer may not have recognized this and may not have paid wages or unemployment taxes on the placement. To prevail in claiming unemployment benefits, the recipient may have to establish: that the placement met the standards for an employment relationship, that wages were paid (by the TANF agency), or should have been paid by the employer, and that the recipient left the last placement under non-disqualifying circumstances. The recipient may also have a minimum wage claim for back-wages.

6.2 DISADVANTAGE OF RECEIVING FITAP IF CHILD SUPPORT IS NEARLY THE AMOUNT OF THE ASSISTANCE

As currently structured, all months that the family receives any FITAP funds on its electronic benefits card count against the 24 and 60 month time limits (except as exempted under the state’s domestic violence protection or otherwise discussed below). This is true regardless of the amount of FITAP assistance the family receives. If the family is receiving only a small amount of FITAP assistance, or if most of that assistance is being reimbursed by child support collections, the family may do better to save their remaining months, for times when child support is not available.

It is therefore important for families to be aware of whether the state is collecting child support on their behalf. Families should be sent monthly or quarterly written statements regarding the amount of child support collected on their behalf. The state also has a toll-free number that families can access to see the amount of child support being collected on their cases: 1-800-256-4650.

164 If the family would have been eligible to continue to receive FITAP, they remain eligible for Medicaid under the “Low Income Families Category”, Louisiana Medicaid Eligibility Manual § H 200.1. This is true even though La.R.S. 46:231.6(A) seems to apply the time limits to Medicaid, too. But the provision is preempted by 42 U.S.C. §1396u-1(b)(1)(A).
165 Louisiana Medicaid Eligibility Manual § K 100.
167 45 CFR § 260.35(b)(minimum wages laws apply, too).
168 45 C.F.R. § 302.54.
6.3 DISADVANTAGE IN APPLYING FOR FITAP LATE IN THE MONTH

If they have the wherewithal to avoid doing so, families should avoid applying extremely late in the month for FITAP assistance, because the agency will pay a prorated fraction of a month’s assistance for the days remaining in the month after the application was filed.\(^{169}\) Systemic advocacy may be able to stop such partial months from being counted as months of receiving assistance, especially because in most instances the pro-rated assistance is received in the next month, which is a month already being counted against the time limit.\(^{170}\)

6.4 BOTH TIME LIMITS APPLY ONLY TO MONTHS WHEN AN ADULT OR MINOR UNMARRIED PARENT IS ON THE GRANT (EVEN IF THE ASSISTANCE AMOUNT IS ZERO)

Only months when someone was an adult, or a minor unmarried parent, when receiving assistance count against the limit.\(^{171}\) Once the parent reaches the time limit, assistance to both the parent and the children living with the parent stops.

The state counts some months against the limits even if no FITAP assistance was received: months when no payment was made because the amount would have been under $10.\(^{172}\)

Non-parental caretakers need not be subject to the time limits, unless they make a serious mistake, because they need not be on the grant. The limits apply to months when an adult (or minor unmarried parent) received assistance, and disqualifies any children in his or her care along with the adult. Only parents and step-parents need be included in the FITAP assistance unit. Any other relative should avoid the serious mistake of receiving 60 months of assistance, or assistance in 24 of the last 60 months, thereby losing assistance for both themselves and the children in their care. Under the Kinship Care Subsidy Program, children with non-parental caretakers receive higher grants through the KCSP, and the caretaker adult is not on the KCSP grant. Taking advantage of that program makes it easy for children living with a non-parent to not reach the limit.

6.5 THE 24-MONTH LIMIT ON ASSISTANCE TO FAMILIES THAT INCLUDE PARENTS

The 24-month limit prohibits receipt of assistance more than 24 of the last 60 months, unless certain exceptions are met.\(^{173}\) Each five years, the family can qualify for another 24 months of assistance, even without meeting an exception to the 24-month limit. (They must, however, meet all other program requirements, including the 60-month lifetime limit on receiving assistance.)

6.6 THE 60-MONTH LIMIT ON ASSISTANCE TO FAMILIES THAT INCLUDE PARENTS

Louisiana’s 60-month limit is based on a 60-month limit set out in the federal TANF statute.\(^{174}\) Federal law allows states to exempt from the limit 20% of the cases on assistance at any one time for “hardship,” or because of domestic vio-

\(^{169}\) LAC Title 67, Part 3, §§ 1201, 1229(E).
\(^{170}\) Compare 7 CFR § 273.24(b)(1)(iv)(partial months of assistance do not count against the against the Supplemental Nutrition Assistance Program (food stamp) time limit for able bodied adults without dependents to receive assistance).
\(^{171}\) LAC Title 67, Part 3, § 1247(E); 42 U.S.C. § 608(a)(7).
\(^{172}\) PAM4 §§ B-1721-FITAP; B-1731-FITAP.
\(^{173}\) LAC Title 67, Part 3, § 1247(A); La.R.S. 46:231.6(A)(1).
lence, discussed in an earlier part of this Chapter.\(^{175}\) (Also, months living in “Indian country” or in an Alaskan native village with over 50% unemployment \emph{cannot} be counted against the federal sixty month limit.\(^{176}\))

The federal limit only applies to cases receiving federal TANF funds. The federal agency has promulgated regulations recognizing that months can be excepted from the limit if the state funds the cases with only state maintenance of effort funds.\(^{177}\)

The state is required to contribute about $60 million a year to the TANF program as its “maintenance of effort” requirement. It is not required to mix these funds with the federal money. The state maintenance of effort funds could pay for the “checks” of approximately 25,000 families, thus exempting far more cases than the 20% exemption can cover. It would be particularly equitable to direct the state maintenance of effort funds to families receiving less than the maximum assistance amount or largely supported by child support. Louisiana has not taken advantage of this.

Assistance to still other cases could be continued if they had been put on solely state funds earlier. That would keep them from reaching the 60 month time limit, for the number of months they were on state-only funds.

Still other options are available under the federal TANF statute once the 60 months are reached, such as providing the family with TANF-subsidized employment or supportive services other than income-supports, or in-kind assistance under Title XX (and transferring TANF funds to Title XX for that purpose).\(^{178}\) Louisiana does not provide these options, however.

### 6.7 Extensions Available to Both Limits

Agency policy makes extensions to both limits available. Local staff can give extensions up to six months at a time.\(^{179}\) The following grounds are available for extensions of both time limits, if present at the time the extension is sought: \(^{180}\)

- factors relating to job availability are unfavorable (which can include education, training, literacy level, skills, and the unavailability of jobs for which the recipient is qualified\(^{181}\));
- an individual loses his or her job as a result of factors not related to his or her job performance;
- other hardships which affect the individual’s ability to obtain employment (see below);

The “other hardships” which affect the individual’s ability to obtain employment include:

- a parent or caretaker is under treatment for a serious addiction and the treating organization recommends against working,
- adequate child care or transportation is not available,

\(^{175}\) 42 U.S.C. § 608(a)(7)(C).

\(^{176}\) 42 U.S.C. § 608(a)(7)(D).

\(^{177}\) See 45 C.F.R. §§ 264.1(b)(2); see also 45 C.F.R. § 263.2.

\(^{178}\) See e.g., 45 C.F.R. §§ 260.31(b)(2,3).

\(^{179}\) FAM\(^{4}\) §§ B-1741-1-FITAP; B-1741-2-FITAP; B-1751-1 (disability).

\(^{180}\) LAC Title 67, Part 3, § 1247(C,D); FAM\(^{4}\) §§B-1744-FITAP.

\(^{181}\) FAM\(^{4}\) §§ B-1744-FITAP.
a temporary family crisis such as death of a family member, eviction, serious illness or accident,

- domestic violence situations,
- the parent(s) is/are disabled or incapacitated,
- a parent is required to provide full-time care to an incapacitated or disabled household member.\textsuperscript{182}

Because these hardship examples are not set out in promulgated rules, they are subject to change without notice. One should consult a current FITAP manual before advising a client.

6.8 \textbf{ADDITIONAL PROTECTIONS AVAILABLE FROM THE 24 MONTH LIMIT}

In addition, the following grounds are available for extension, only for persons who have reached the 24 month limit:

- family is in compliance with their Family Success Agreement\textsuperscript{183}
- the parent(s), or a child is disabled or incapacitated. (The extension where a child is incapacitated is just for that particular child’s assistance.\textsuperscript{184})

And the following months, occurring earlier, should not count against the 24 months:

- months in which the family received the $900 earned income disregard, and possibly any earned income disregard;\textsuperscript{185}
- months in which a parent has been certified by the Department as disabled or incapacitated.\textsuperscript{186}

\textit{As to incapacity or disability exceptions}, the state statute provides that the 24 month limit shall not “shall not apply to an incapacitated or disabled individual…”\textsuperscript{187} If the person with a disability is one of the children, only their assistance continues.\textsuperscript{188} If all parents in the household have a disability, then assistance for the whole household continues.

The “incapacity” of a child in the household is rarely pertinent to families’ FITAP or food stamp eligibility in other circumstances. As a result, the Department may fail to identify and protect assistance for such individuals. In addition, the FAM4 Manual does not list the ability to continue the child’s benefits with the other extensions.\textsuperscript{189}

\begin{itemize}
  \item a temporary family crisis such as death of a family member, eviction, serious illness or accident,
  \item domestic violence situations,
  \item the parent(s) is/are disabled or incapacitated,
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  \item a temporary family crisis such as death of a family member, eviction, serious illness or accident,
  \item domestic violence situations,
  \item the parent(s) is/are disabled or incapacitated,
  \item a parent is required to provide full-time care to an incapacitated or disabled household member.\textsuperscript{182}
\end{itemize}

Because these hardship examples are not set out in promulgated rules, they are subject to change without notice. One should consult a current FITAP manual before advising a client.

6.8 \textbf{ADDITIONAL PROTECTIONS AVAILABLE FROM THE 24 MONTH LIMIT}

In addition, the following grounds are available for extension, only for persons who have reached the 24 month limit:

- family is in compliance with their Family Success Agreement\textsuperscript{183}
- the parent(s), or a child is disabled or incapacitated. (The extension where a child is incapacitated is just for that particular child’s assistance.\textsuperscript{184})

And the following months, occurring earlier, should not count against the 24 months:

- months in which the family received the $900 earned income disregard, and possibly any earned income disregard;\textsuperscript{185}
- months in which a parent has been certified by the Department as disabled or incapacitated.\textsuperscript{186}

\textit{As to incapacity or disability exceptions}, the state statute provides that the 24 month limit shall not “shall not apply to an incapacitated or disabled individual…”\textsuperscript{187} If the person with a disability is one of the children, only their assistance continues.\textsuperscript{188} If all parents in the household have a disability, then assistance for the whole household continues.

The “incapacity” of a child in the household is rarely pertinent to families’ FITAP or food stamp eligibility in other circumstances. As a result, the Department may fail to identify and protect assistance for such individuals. In addition, the FAM4 Manual does not list the ability to continue the child’s benefits with the other extensions.\textsuperscript{189}
The FITAP incapacity/disability standard is a much more liberal standard than use by Social Security for SSI and Disability Insurance Benefits. It requires a condition supported by competent medical evidence; of such a debilitating nature so as to substantially reduce or eliminate the parent’s ability to support or take care of the child; and expected to last for at least 30 days.190

6.9 DUE PROCESS REQUIRES NOTICE TO THE FAMILIES OF THE GROUNDS FOR EXEMPTION

Specific notice to the recipient of the possible bases for exemption may be required by due process.191 The Department has agreed to provide it to recipients approaching or exceeding the 24 month limit.

7. THE WORK PARTICIPATION REQUIREMENTS

Federal law requires that states “[e]nsure that parents and caretakers receiving assistance engage in” specified types of work activities.192 The statute later stipulates that only specific percentages of the adult recipients must participate for states to avoid fiscal sanctions.193 Advocates should understand that there is no federal requirement that all families be engaged in work activities at all times.

The federal statute does separately mandate that states participating in the program require parents and caretakers receiving TANF assistance to do work once “ready to engage in work, or” once they have received 24 months of assistance “whichever is earlier.”194 This is a different 24 month requirement than the time limit.

The exceptions to the work participation requirement differ from the exemptions to the time limits, though many are similar. Care must be taken in analyzing the client’s potential defenses, since it is easy to confuse time limit exceptions and work participation exceptions or excuses.

The FAM4 manual exempts from federal participation calculation rates only those FITAP cases where parents or caretaker relatives are providing care for a child under age one (limited to a total of 12 months per individual), cases where a parent is providing support for a disabled family member, and cases where families do not have an adult parent, caretaker relative, or minor parent head of household included in the FITAP certification.195 Exemption from the participation rate calculation does not necessarily exempt the individual from STEP requirements.196

190 FAM-4 § B-1751-FITAP
191 Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 14 & n. 14 (1978)(holding that termination of public utility services with notice of the pretermination protections only through “the vagaries of ‘word of mouth referral’” denied due process); Turner v. Rogers, 564 U.S. __,131 S.Ct. 2507, 2519 (2011)(notice to defendant in child support proceedings of critical issue and eliciting information as to same would satisfy due process); Biek v. Palmer, 102 F.3d 1472, 1476 (8th Cir. 1997)(holding that food stamp recoupment notices that fail to advise of agency’s power to settle the claim for a reduced amount violate due process); Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980)(en banc)(holding that debtor’s bank account could not be garnished without notice of the state-law exemptions from garnishment and procedures for claiming them); Hill v. O’Bannon, 554 F.Supp. 190 (E.D.Pa. 1982)(holding that termination notices to General Assistance recipients must describe the eight potential exemptions to termination in order to satisfy due process).
193 42 U.S.C. § 607(a)
195 FAM-STEP Manual, § P-441-STEP.
196 LAC Title 67, Part 3, § 5713; FAM4 § P-441-STEP.
The **participation requirements** are as follows:

<table>
<thead>
<tr>
<th>Type of family</th>
<th>Hours required</th>
<th># of the hours that must be met with “basic” activities</th>
<th>% of the families that supposedly must meet the requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>state’s whole caseload</td>
<td>30</td>
<td>20</td>
<td>50</td>
</tr>
<tr>
<td>single parent with a child under age 6</td>
<td>20</td>
<td>20</td>
<td>NA</td>
</tr>
<tr>
<td>total hours from two-parent families</td>
<td>35 or 55</td>
<td>30 or 50</td>
<td>90</td>
</tr>
</tbody>
</table>

The “basic” hours must come from private-sector or public-sector employment, whether subsidized or not; work experience; on-the-job training; job search and job readiness assistance (for limited amounts of time); community service programs; vocational educational training; or providing child care services to an individual who is participating in a community service program.

The following three activities may count as participation beyond those “basic” hours: job skills training directly related to employment; education directly related to employment; and satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence.

Note though that the “basic activities” hours can be met by a lower number of hours in Community Service Employment and Work Experience Employment, which must be determined case by case, by dividing the amount of the family’s FITAP and food stamp assistance by the federal minimum wage.

Because case managers may be required or expected to meet the fourth column’s percentages within their caseload, including that 90% of the two-parent families must meet the work participation requirement, there can be a strong incentive for caseworkers to find reasons to deny assistance to two-parent families. This incentive can be countered by documenting that one family member meets the “incapacity criteria” — this gets the family treated as a single-parent household with regard to work participation requirements — or by requiring that the agency develop systems to protect the rights of two-parent households.

Recipients can be sanctioned for not meeting the requirements of the employment-related Family Success Agreement that they sign with the agency, even if it requires *more* than the hours set out above. Clients therefore need to pay attention to the requirements of the Plan, and negotiate a realistic one, since noncom-

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198 Louisiana gets a credit against these percentages for having a reduced number of families receiving assistance. See 42 U.S.C. § 607(b)(3).
199 42 U.S.C. § 607(c)(2)(B); FAM 4 § P-442-2-STEP.
200 The higher requirement must be met if a two parent family receives federally funded child care assistance and neither parent is incapacitated or caring for a severely disabled child. If one parent is incapacitated, the family is treated as a one-parent household. 42 U.S.C. § 607(b)(2)(C); FAM 4 § P-443-STEP.
201 The higher requirement must be met if a two parent family receives federally funded child care assistance and neither parent is incapacitated or caring for a severely disabled child. If one parent is incapacitated, the family is treated as a one-parent household. 42 U.S.C. § 607(b)(2)(C); FAM 4 § P-443-STEP.
202 45 CFR § 261.31(d)(1); 45 CFR § 261.32(d)(1), (f)(1); FAM 4 §§ P-425-STEP, P-426-STEP.
203 FAM 4 § P-443-STEP.
204 FAM 4 § P-442-STEP, et.seq.
pliance with it provides an independent basis for sanctions. If a sanction has been proposed even though the client met the hourly requirements set out above, advocates should consider trying to re-negotiate the agreement.

The strong push is towards work, but school attendance and vocational training can in some instances be counted as the required work participation. Most hours (those designated in the third column above) must be met with “basic” activities. Any hours exceeding the number in that column can be met with either basic activities or others.

The state’s regulations, based on the federal statute, specify the basic work activities: employment, unpaid work experience, on-the-job training, short-term job search or job readiness preparation, community services, providing child care to a participant in community service, and up to 12 months of vocational education. The non-basic, but countable activities are job skills training, employment-related education, GED course work, or high school attendance.\(^{205}\)

Teenagers who are heads of a FITA P household must attend high school or GED training and must participate in employment education for an average of 20 hours per month.\(^{206}\)

Because the work participation requirements have to be met by only a specified percentage of the caseload, the agency could meet the percentages while allowing particular clients to participate solely in non-basic activities. But the state regulations are not structured to allow this; they require that every STEP participant put in the hours in “basic” activities set out above.\(^{207}\) The amount of work required of clients under this structure, as discussed below, may also violate minimum wage requirements.

If a case manager will not agree that a particular client need not meet the hourly requirements, the next best option for a client seeking education or skills training is to commit to the required number of basic hours, and press vigorously to obtain educational or training activities in his or her remaining hours.

### 7.1 WORK PARTICIPATION SANCTIONS

#### 7.1.1 STEP sanctions

Under the Department’s regulations, sanctions for noncompliance with the STEP program requirements shall only be imposed as a last resort and is to be rescinded if it is determined that the client had good cause.\(^{208}\) The first sanction results in the family’s removal from assistance for one month, or until compliance, whichever is longer.\(^{209}\)

Second and third violations will result in a loss of benefits for a minimum of two and three months, respectively.\(^{210}\) These increased future penalties make it important to try to get any first penalty completely reversed or rescinded, even if the client has already served the penalty by the time of a hearing or other review.

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205 The regulations describe all of the above-listed activities as “work activities.” LAC Title 67, Part 3, § 5713. The STEP manual indicates that those in the last sentence are non-basic, and do not count towards meeting the threshold limits.

206 LAC Title 67, Part 3, § 5709(B); FAM 4 § P-442-1.

207 LAC Title 67, Part 3, § 5713(A).

208 LAC Title 67, Part 3, § 5717; FAM 4 § P-530-STEP.

209 LAC Title 67, Part 3, § 5717(B)(1); FAM, § P-540-STEP.

210 LAC Title 67, Part 3, § 5717(B)(2)–(3); FAM 4 § P-550-STEP.
The client can get a sanction reversed or rescinded for having “good cause” for noncompliance (defined in the regulation)\textsuperscript{211} or by establishing that he or she should be exempt from STEP participation or the particular requirement at issue.

The agency is required to send clients subject to FITAP sanctions an Advance Notice of Adverse Action 13 days before imposing a sanction.\textsuperscript{212} After notification, the client is expected to contact the agency before the 13-day period ends to claim a good cause reason for noncompliance or to claim a temporary exception.\textsuperscript{213} If a STEP sanction is imposed, two weeks of compliant participation are usually required to determine that noncompliance has ended.\textsuperscript{214} It is important to realize that the 13-day period after notice of adverse action is sent is the only pre-termination opportunity to prevent a sanction. The client can, however, request a fair hearing at any time, which can include seeking a determination of good cause. (Note, though that a FAM4 policy purports to require that good cause be reported within 30 days after the end of the 13 day period.\textsuperscript{215})

Once a sanction is imposed after the 13-day advance notice period ends, the case is closed. Benefits cease beginning the first month following case closure. If the client subsequently wins on appeal, then corrective payments are to be made. The client will not get continued benefits pending appeal if they miss the 13-day period to request continuance of FITAP benefits pending a fair hearing.\textsuperscript{216}

7.1.2 Food stamp sanctions for STEP violations

In addition to sanctioning a family’s FITAP assistance for noncompliance with the STEP requirements, the agency may attempt to reduce or end the family’s food stamp assistance. The Food Stamp sanction structure that would apply with respect to a TANF sanction is complex. The advocate should review food stamp materials and state regulations before advising or attempting to assist the client. The food stamp program is beyond the scope of this Chapter, but the reason for carefully consulting food stamp materials is that there are several different types of sanctions that the agency could try to invoke, and there are important arguments for precluding the worst one.

The food stamp sanction if a “non-exempt head of a household” does not comply with “employment and training” requirements is to terminate all food stamps to the household for a minimum of 3 months for the first infraction and 6 months for subsequent infractions.\textsuperscript{217} For infractions by non-exempt household members other than the head of household, the allotment is reduced by one household member for those same minimum time periods, causing a loss of over $100 in food stamps per month.

An important goal is therefore to either establish that the client is exempt from food stamp employment and training requirements, or that a different sanction should be imposed, rather than the food stamp employment and training sanction. Numerous groups of food stamp recipients are exempt from employment and training requirements, including persons caring for children under age 6, per-

\textsuperscript{211} LAC Title 67, Part 3, § 5717(C); FAM4 § P-530-STEP
\textsuperscript{212} LAC Title 67, Part 3, § 1209(A); FAM4 § P-530-STEP
\textsuperscript{213} FAM4, § P-530-STEP
\textsuperscript{214} FAM4, § P-570-STEP
\textsuperscript{215} FAM4 § P-530-STEP
\textsuperscript{216} FAM4 §§ P-550-STEP, P-620-STEP
\textsuperscript{217} See LAC Title 67, Part 3, § 1938(A)(2,3).
sons over age 60, various types of students, and persons with physical or mental incapacities. In fact, all FITAP recipients are exempt from food stamp employment and training requirements as long as they are compliant with STEP. As a result, it can be argued that any STEP violation that occurred was not a food stamp violation at the time it occurred, but thereafter subjects the client to the food stamp employment and training regime, prospectively.

In addition, the Food Stamp program has a different conciliation procedure than FITAP, which may take up to 30 days and does not require a full two weeks of compliance to end a violation. If any conciliation that occurred did not comply with the food stamp requirements, it may be improper to impose the food stamp sanction.

Finally, as Louisiana construes penalties narrowly, one can argue that the more appropriate Food Stamp sanction is not the employment and training sanction, but the one that is set out in the food stamp regulations specifically for a STEP violation. There is a Food Stamp sanction that refuses to increase food stamps in response to a client’s decreased income caused by sanctions for program violations in another program. The purpose of that sanction is “to reinforce sanctions imposed by the public assistance programs.” Imposing multiple penalties for the same offense should be disfavored unless unequivocally intended and announced for public review by the Department’s regulations. The sanction of not increasing the food stamps is less harsh, and lasts only through the end of the client’s current food stamp certification period.

7.2 PERMANENT AND GOOD CAUSE EXEMPTIONS FROM STEP SANCTIONS

Families are not subject to the work participation requirements unless they include a “Work-Eligible Recipient.” This is a FITAP recipient (even if not receiving assistance because their benefit would be less than $10) who is an adult under age 60 or a teen head of household who is not disabled or incapacitated, or who is not caring for a family member who is disabled or incapacitated as documented by a medical professional.

The Department has recognized the following as good cause exemptions from sanctions:

- Temporary illness or injury;
- Situations related to the treatment of a mental or physical illness, including substance abuse, when participation in required activities would impede such treatment.
- Temporary care of a family member who is ill;

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218 LAC Title 67, Part 3, § 1941(A)(2); see also FAM 4 § B-1420-FS, exempting from food stamp employment and training requirements persons who are “complying with STEP or who have met the minimum work registration requirement through STEP within the past 12 months” (emphasis added).

219 LAC Title 67, Part 3, § 1941(C)(4).


221 LAC Title 67, Part 3, § 1978.

222 FAM 4 § E-410-FS.

223 LA. R.S. 46:231(14); LAC Title 67, Part 3, §§ 5705, 5709, 5713; FAM 4 § P-410-STEP.

224 LAC Title 67, Part 3, § 5717(C).
• Unavailability of appropriate child care or transportation within a reasonable distance from a participant’s home or worksite. (See below);
• Temporary emergency or crisis (such as fire, homelessness, accident, or a natural disaster);
• Domestic violence.

7.3 TEMPORARY EXCEPTIONS TO STEP REQUIREMENTS

Recipients may also be excepted from required work and participation activities under STEP in certain situations. However, such temporary exceptions shall not exceed six months in a twelve-month period. These temporary exceptions include:

• Inability to obtain appropriate child care;
• Status as a domestic violence victim.

The child care exception is mandated by federal law for a single custodial parent of a child under age six, though the state statute does not place an age limit on the child. The state agency is required to inform parents of this exception when there is a child under age 6, and the criteria and procedures for meeting it. The good cause exemptions to sanctions (discussed in the Section B, immediately above) and the temporary exceptions to work requirements have much overlap. It is possible for good cause reasons to become temporary exceptions and vice versa. The Department specifies that good cause should only be explored when a recipient fails to meet program requirements whereas temporary exceptions should be explored when a situation necessitates that a recipient be excused from STEP participation for a period of two to six months.

7.4 EXEMPTIONS NOT EXPLICITLY RECOGNIZED

This section addresses situations not explicitly recognized by the Department’s regulations, but which should be recognized by the Department as good cause, or the Department would be approving the imposition of sanctions that violate the law.

7.4.1 Disability accommodations

The Americans with Disabilities Act and § 504 of the Rehabilitation Act of 1974 require that the Department not discriminate against persons with disabilities, make reasonable accommodations that will allow them to participate in its programs, and prohibit segregating persons with disabilities from other program participants. Examples of what these could require include: allowing recipients with disabilities or caretakers for children with disabilities to put in fewer than the normally required hours; allowing them to continue in STEP and continue to receive FITAP assistance even if they cannot meet the participation requirements; designing special placements for them, rather than just offering what the market offers; or requiring that private employers make reasonable accommodations needed by the individual with a disability.

225 LAC Title 67, Part 3, § 5715.
226 Id.
227 42 U.S.C. § 607(e)(2); LAC Title 67, Part 3, § 5715.
228 45 C.F.R. § 261.56(c).
229 FAM 4 § P-532-STEP.
7.4.2 Failure to comply with the minimum wage

If the client’s STEP placement significantly benefits the party that supervises the placement, and the client has not been paid minimum wage for the placement, then the placement may be illegal. The TANF statute does not include a provision exempting work experience placements from minimum wage requirements.230 The federal Department of Labor has issued guidance setting out the factors to be considered in determining whether an employment relationship exists; minimum wage must be paid for most relationships that are not purely training.231

If minimum wage requirements apply, the hours the agency is requiring of the client would not pay at least minimum wage, then its illegality should bar the agency from imposing a sanction. The FITAP grants do not pay minimum wage for the number of hours required of recipients. At the current $7.25 an hour minimum wage, a 20 hour work placement would require wages of $145 per week; a 30 hour placement would require $217.50 per week; and 55 hours in a two-parent placement would require $398.75 per week. Additionally, if any child support is being collected by the state, that must be deducted in determining the amount of assistance that can be counted as wages.

Louisiana has adopted a “Simplified Food Stamp Program.”232 This allows the state to count both food stamps and the FITAP benefits in determining whether minimum wage has been complied with as to “Community Service Employment” and “work experience” placements.233 In this state food stamps and FITAP together would rarely pay the amounts set out above, so if clients in these placements are working the full number of hours usually expected, the math would usually make the placement illegal.

For “Community Service Employment” and “work experience” placements, the maximum hours should be determined by dividing the combined monthly FITAP and food stamps by the the Federal minimum wage. Clients who participate in a work experience or community service activity for the maximum number of hours per month are deemed to have participated for twenty hours a week. This in turns allows those families to fulfill participation with fewer hours than would regularly be required.

Older federal guidance, no longer posted on the internet, interpreted minimum wage laws to apply to more activities and imposed additional compliance requirements, which would make many of the state’s placements illegal.234

If there is what qualifies as an employment relationship, it is the employer that is liable to pay the STEP participant (not the STEP agency). If minimum wage requirements have been violated, the recipient also has a claim to back-payments, which can be pursued administratively, through the Department of Labor’s Wage and Hour Division, through a suit and injunction brought by the Secretary of Labor, or in court through private suit.

230 See 45 C.F.R. § 260.35(b).
233 45 CFR § 261.31(d)(1), 45 CFR § 261.32(d)(1), FAM4 §§ P-425-STEP, P-426-STEP.
8. OTHER SANCTIONS

Almost all sanctions result in case closure for at least one month. If a family is work-eligible and the requirement is also mandated by STEP, then the STEP sanction is the one that is applied.

As to the rare sanctions that apply to the individual, rather than the household, once the grant is reduced for one sanction it cannot be reduced still lower by a second sanction against the same individual. So, for example, if someone is excluded from the grant for having a drug conviction within the last year, his or her share of the family’s assistance is terminated, and no additional sanction can be imposed for his or her being a fleeing felon.

No sanction should apply if waiving it is necessary to escape domestic violence (broadly defined, as discussed above), or to avoid penalizing the family for domestic violence.

None of the sanctions should affect children’s Medicaid. And only one of the sanctions can affect parent’s Medicaid: for not adequately cooperating with child support enforcement requirements. There is a split in authority as to whether a child support sanction can be applied against a pregnant woman under Medicaid. Louisiana Medicaid no longer applies TANF work sanctions in the Medicaid program. Other TANF/FITAP disqualifications do not carry over to Medicaid eligibility unless they were part of the AFDC statute or regulations in 1996, and the client has no other basis for Medicaid eligibility.

8.1 NON-COOPERATION WITH CHILD SUPPORT ENFORCEMENT

If a parent does not cooperate in establishing paternity or with child support enforcement, all FITAP assistance to the family ends, unless the family establishes good cause. Good cause is defined as: a reasonable anticipation of physical or emotional harm to the child or to the caretaker if affecting their ability to care for the child; conception was through incest or rape; or that legal adoption proceedings are pending or the client has been assisted for at least three months by a licensed or private social agency to resolve the issue of whether to keep the child or relinquish him for adoption. For a non-cooperation finding for missing out-of-court appointments, the client must have missed two consecutive appointments.

Non-cooperation determinations are made by Support Enforcement, rather than the FITAP case manager.

As a condition of eligibility, FITAP recipients assign their rights to receive child support to the state. If the amount received for current support exceeds their grant amount, then the recipient should receive the excess and is likely to be terminated.

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235 The federal Medicaid agency’s State Medicaid Manual § 3905 excludes pregnant women from this requirement. But at least one court has limited the child support pregnancy exception to women whose only basis for Medicaid eligibility is under the poverty-level pregnant women category. Douglas v. Babcock, 990 F.2d 875 (8th Cir.), cert. denied 510 U.S. 825 (1993).


237 See 42 U.S.C. § 1396u-1(a), (b)(1).

238 LAC Title 67, Part 3, § 1239(B)(3).

239 LAC Title 67, Part 3, § 1239(B)(2).

240 LAC Title 67, Part 3, § 1239(B)(4)(a).
from the program.\textsuperscript{241} (If an absent parent has failed to make support payments in the past, part of his or her payments may be for arrearages, rather than current support; this usually goes to the state to reimburse past TANF payments.)

If the recipient receives a payment directly while receiving assistance, the agency considers the child support to have been overpaid. The agency is to obtain a repayment agreement from the recipient. The agency’s regulations consider it “non-cooperation” with Support Enforcement Services if the recipient will not enter, or does not comply with, a repayment agreement.\textsuperscript{242} This should result in closure of the FITAP case.\textsuperscript{243}

8.2 SPECIAL REQUIREMENTS ON MINOR UNMARRIED PARENTS

FITAP parents who are under age 18 must be in school or training and live in an adult-supervised setting.

The supervised setting can be with an adult relative within the fifth degree of relationship or legal guardian, or in a foster home, maternity home, “or other adult-supervised supportive living arrangement.”\textsuperscript{244} The latter can include the home of an adult non-relative.\textsuperscript{245} The adult supervisor must usually be the payee.\textsuperscript{246}

A variety of exceptions to the adult-supervised setting requirement are allowed, under the domestic violence standard, for the death or unwillingness of the adult relative, or if the minor parent lived apart from relatives for over a year before the birth of their child or a year before applying for FITAP, or other “good cause,” many instances of which are set out in the FAM-4 manual, and others left to be decided case by case.\textsuperscript{247}

See the discussion above, in “Persons who cannot be excluded in determining income eligibility and work participation requirements,” as to who must be included in the assistance unit when there is a minor unmarried parent.

8.3. SCHOOL ATTENDANCE REQUIREMENT

FITAP recipients who are required to participate in STEP must participate in their children’s school conferences and see to their children’s school attendance (and homework).\textsuperscript{248} As mentioned above, minor unmarried parents are ordinarily to complete high school or obtain a GED. For work-eligible minor unmarried parents who do not have a high school diploma or GED, attending school or GED classes is the “primary work activity.”\textsuperscript{249}

Recipients must agree in the FSA to actively participate in their child’s education through parent-teacher conferences, homework assistance, or other activities and provide documentation to the department that they are ensuring school attendance and are engaged in the child’s learning.\textsuperscript{250}

\textsuperscript{241} LAC Title 67, Part 3, § 2514.
\textsuperscript{242} LAC Title 67, Part 3, § 1285(C).
\textsuperscript{243} LAC Title 67, Part 3, § 1239(B)(3); see also § 5385(B)(2)(a), though it cites a federal regulation which has been repealed. The current federal regulation is 45 CFR § 264.30(c).
\textsuperscript{244} LAC Title 67, Part 3, § 1227(B).
\textsuperscript{245} FAM4 § E-312.
\textsuperscript{246} FAM4 § E-312.
\textsuperscript{247} LAC Title 67, Part 3, § 1227(B); FAM4 §E-312.
\textsuperscript{248} LAC Title 67, Part 3, §§ 1237; 5709.
\textsuperscript{249} LAC Title 67, Part 3, § 5709(B).
\textsuperscript{250} LAC Title 67, Part 3, § 5709(A).
8.4 PARENTING SKILLS TRAINING REQUIREMENT

FITAP recipients who are pregnant or who have a child under one year of age must attend parenting skills education, and doing so counts as the primary work activity if they are required to participate in STEP. The statute requires that transportation and child care shall be provided to enable participation.\(^{251}\)

8.5 IMMUNIZATION REQUIREMENT

The family’s grant also can be closed for at least one month if a recipient fails to get required immunizations for minor children. Noncompliance is allowed for medical contraindications and religious reasons. The statute provides that the sanction can only be imposed after advance written notice of the requirement.\(^{252}\) The promulgated regulation adds that the sanction can only be imposed if noncompliance is without “good cause.”\(^{253}\) If the child is on a schedule for coming into compliance, that suffices.\(^{254}\)

This regulation does not just require shots during infancy or before school entry. Immunizations must be updated through the teen years. Because records may be scattered among different providers, clients may have documentation problems, even if their child has had all required immunizations. Again, defenses may be available under the statute (such as whether the immunization schedule has been properly promulgated by the state’s Department of Health and Hospitals).\(^{255}\) When there are difficulties assembling the documentation, if the child has always lived in-state, consider requesting Medicaid’s records of payments made on behalf of the recipient to prove the shots were obtained.

8.6 REFUSING A FULL TIME JOB

State law also applies a sanction if an adult recipient declines or refuses to take full time employment as specified in their STEP agreement.\(^{256}\)

The sanction does not apply with regard to actions of a disabled or incapacitated parent.\(^{257}\) As with the state’s 24 month time limit, under the statute assistance should continue for any disabled or incapacitated household member(s) other than the parent, even if the sanction is applied. This is not set out in the regulations and may not be set out in the FAM4Manual.

In addition, the the sanction applies only to those required to participate in STEP (“work eligible”), which excludes still others from the sanction.\(^{258}\)

The Department’s STEP policies allow a sanction for refusing any job.\(^{259}\) The Department may have authority to impose that wider sanction if specified as a condition of the recipient’s STEP agreement. But it can be argued that the statute’s specification of “full-time employment” eliminates the agency’s discretion to require more in the agreement. One should argue that “full time” means employment that is approximately 40 hours a week and that has some longevity (the latter since the Department can take 30 days to re-initiate assistance\(^{260}\)).

\(^{251}\) La.R.S. 46:231.5.
\(^{252}\) La.R.S. 46:231.4(B).
\(^{253}\) LAC Title 67, Part 3, § 1231.
\(^{254}\) La.R.S. 46:231.4(A).
\(^{255}\) La.R.S. 46:231.4(A) and (D); LAC Title 67, Part 3, § 1231(A).
\(^{256}\) La.R.S. 46:231.6(A)(2).
\(^{257}\) La.R.S. 46:231.6(B).
\(^{258}\) La.R.S. 46:231.6(A)(2); La.R.S. 46:231(14); LAC Title 67, Part 3, §§ 1241.
\(^{259}\) FAM4 § P-520-STEP
\(^{260}\) LAC Title 67, Part 3, § 1205.
8.7 DRUG SCREENING AND TREATMENT

The state has also imposed a requirement that adult recipients be screened for possible drug abuse, be tested if they fail the screen, and comply with a drug treatment program if they fail the test.261 Under the promulgated regulation a sanction can only be imposed if noncompliance is without “good cause.”262 The appropriate STEP sanction applies for a work-eligible family, and for those exempt from STEP the sanction is case closure for at least one month and until compliance.263

If a recipient has been through the treatment program, and is again found to be using illegal drugs, their portion of the family’s grant is not paid, but the rest of the family can continue to get assistance as long as the offender is in an education and rehabilitation program.264

A number of federal challenges may exist to these requirements, such as whether there is reasonable cause for the “search” involved in drug testing, and whether it is permissible for the drug treatment center to release information back to the welfare agency under any federal drug treatment funding it receives. Even the state statute specifies that “No participant shall be tested if such testing is prohibited by federal law,” and requires that the constitutional rights of participants be protected.265

8.8 INTENTIONAL PROGRAM VIOLATIONS

FITAP recipients can be disqualified from eligibility for benefits as a result of conviction or administrative hearing findings that they committed an intentional program violation. The grant is reduced by the portion attributable to the offender. The recipient is disqualified 6 months for the first intentional program violation, 12 months for the second, and barred forever for a third offense.266 The Department’s staff is required to give written notice of this the first time an individual applies for FITAP267.

8.9 ONE-YEAR DRUG CONVICTION BAN

Louisiana bans persons from receiving FITAP (and food stamps) for a year after a conviction for use, possession, or distribution of illegal drugs, or a year after release from incarceration, whichever is later.268 According to the Department’s regulation, the bar applies only with respect to offenses that occurred after August 22, 1996.269

8.10 PROBATION AND PAROLE VIOLATORS, AND PERSONS FLEEING PROSECUTION OR CONFINEMENT

Persons in violation of their parole obligations, or fleeing prosecution or confinement for a felony are also disqualified for FITAP (unless they have been pardoned by the President).270 Presumably this provision should be given the same narrowing interpretation established through litigation as to Social Security assistance, discussed in another Chapter of this Manual.

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262 LAC Title 67, Part 3, § 1249(E).
263 LAC Title 67, Part 3, § 1249(F).
264 LAC Title 67, Part 3, § 1249(F).
265 LAC Title 67, Part 3, § 1249(E).
266 See also, Please Leave Your Constitutional Protections at the Door: A Challenge to Louisiana’s Mandatory Drug Testing Statutes, Tina L. Wilson, 60 La. L. Rev. 585 (2000).
269 LAC Title 67, Part 3, § 1255.
8.11 STRIKERS
The families of caretaker relatives or stepparents who strike are ineligible. As to other strikers in the household, the portion of the grant attributable to their needs is not paid. 271

8.12 CONVICTIONS FOR CLAIMING BENEFITS IN TWO STATES
Persons convicted for fraudulently receiving TANF, Food Stamp, Medicaid or SSI assistance are disqualified from receiving federally funded TANF for ten years after the conviction. 272

9. CONTINUED ASSISTANCE FOR RECIPIENTS EARNING THEIR WAY OFF ASSISTANCE, ESPECIALLY MEDICAID
Recipients who become ineligible for FITAP because of earnings can qualify for six months of “Transitional Medicaid,” as long as reporting requirements are met and can qualify for an additional six months if income remains under 185% of the federal poverty levels. 273

There are over 30 categories of Medicaid eligibility, dealt with in a separate Chapter of this Desk Manual. So still others may be eligible for Medicaid, even if denied FITAP.

But persons denied on the following grounds are especially likely eligible for Medicaid:

- Work participation requirements.
- Support enforcement.
- State-engrafted requirements: time limits, school attendance, parenting skills, and immunization requirements and job refusals, drug screening, drug convictions, intentional program violations.

Employed former recipients also qualify for child care assistance on a sliding fee scale. 274

Transportation assistance and “other supportive services” for twelve months after recipients earned their way off the program were terminated in 2011. 275

271 LAC Title 67, Part 3, § 1253.
272 42 U.S.C. § 608(a)(8); LAC Title 67, Part 3, § 1501(B)(3)(the regulation does not make it clear that convictions with respect to the other programs invoke the penalty).
274 LAC Title 67, Part 3, § 5103(B).
10. PROTECTION FROM GARNISHMENT AND DEBIT CARD TRANSFER FEES

Under state law, FITAP income cannot be assigned by the recipient and is exempt from levy and execution.\textsuperscript{276}

In addition, retailers are prohibited from charging recipients more than their usual check-cashing fee for accessing cash for them from their electronic benefits cards. They cannot charge at all if the cash is accessed in conjunction with a purchase.\textsuperscript{277} The retailers cannot cap the amount that can be withdrawn per transaction.\textsuperscript{278}

11. CONCLUSION

In sum, the complexity of the state’s TANF program creates opportunity for error by agency case managers, and a need for careful analysis by client advocates. In addition, many of the program policies and practices are subject to legal challenge.

\textsuperscript{276} La.R.S. 46:111.
\textsuperscript{277} La.R.S. 46:231.13; LAC Title 67, Part 3, § 407.
\textsuperscript{278} La.R.S. 46:231.13.
CHAPTER 14

TAX LAW FOR LEGAL SERVICES AND PRO BONO ATTORNEYS

Mark Moreau
About The Author

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Mr. Moreau is a member of the Louisiana and New York bars. He has been the 1992-93 Chairman of the Louisiana State Bar Association Consumer Protection, Lender Liability and Bankruptcy Section and has served on the Advisory Subcommittee on Lease for the Louisiana State Law Institute. Mr. Moreau is the recipient of the ABA Section of Taxation Janet Spragens Pro Bono Award, the National Taxpayer Advocate’s Award, Louisiana State Bar Association’s Career Public Interest Award, the New Orleans CityBusiness Leadership in Law Award, and the Louisiana Coalition Against Domestic Violence’s Into Action Award.

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1. INTRODUCTION

Tax law issues arise in most areas of a poverty law practice. This guide covers federal and state tax issues that a general legal aid attorney needs to know. It is not a guide for the legal aid or pro bono attorney who specializes in tax law. This guide will help you identify and understand tax issues that affect low-income taxpayers.

The first part of this guide covers federal tax issues. The second part covers real estate taxes and tax sales. Citations to “I.R.C.” are to the Internal Revenue Code. Citations to “I.R.M.” are to the Internal Revenue Manual.

2. FEDERAL TAXES–HOW TO SCREEN CASES

2.1 OVERVIEW OF FEDERAL TAX PROBLEMS

The Internal Revenue Service is a powerful creditor whose collection actions can affect an indigent’s economic welfare. Collections, failure to file tax returns, debt cancellation income, the Earned Income Credit, innocent spouse relief and identity theft are the most common tax problems faced by legal aid clients. Beginning in 2014, failure to comply with the Affordable Care Act may create many tax law problems for our clients.

The Internal Revenue Service administers the Earned Income Credit, the largest federal anti-poverty program. The Earned Income Credit is a tax refund for qualified low-income workers—even those who did not pay any income taxes or have children. An income tax return must be filed to obtain this tax refund.

The Earned Income Credit substantially increases the annual income of many legal aid clients. Denial of this tax refund can lead to huge tax debts and financial crisis for a taxpayer. Clients often lose their homes to eviction or foreclosure when they are denied the Earned Income Credit. Audits of an Earned Income Credit claim almost always occur when divorcing couples both claim the Earned Income Credit.

2.2 NOTICES FROM THE IRS — HOW TO ASSESS WHAT YOUR CLIENT FACES

Many low-income taxpayers do not fully understand the status of their tax liabilities, the notices or demands issued by the IRS. Your goal is to figure out what the taxpayer faces, their deadlines and options.

2.3 NOTICES FROM THE IRS

The taxpayer should have a notice from the IRS. Each IRS notice can be identified by its CP number. This number should be in the upper right of the first page of the notice. You can find information on how to understand and respond to many IRS notices at “Understanding Your IRS Notice” in www.irs.gov/taxpros.

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1 The tax specialist should consult Effectively Representing Your Client Before the IRS (ABA 5th ed. 2011).
2 The Internal Revenue Service regularly revises and reorganizes the Internal Revenue Manual, which IRS staff generally follow in processing taxpayer cases. IRM citations may have changed since the revision of this Chapter. The Internal Revenue Manual can be found at www.irs.gov in the Tax Pros section as Reference Materials under Basic Tools for Tax Professionals.
3 In Louisiana, a federal tax controversy with the IRS may be referred to the Low-Income Taxpayer Clinic at Southeast Louisiana Legal Services (see www.slls.org for more information). In addition, there is a Low-Income Taxpayer Clinic at Southern University Law Center (Baton Rouge) that may be able to help. Other states also have Low-Income Taxpayer Clinics.
4 The www.litctoolkit.com web page (password protected for LITCs) also has a list of IRS notices and letters that are commonly sent to taxpayers.
The common IRS notices are:

- Notice of proposed changes to tax return, CP-2000 Notice (30 days to reply).
- Penalty and interest notices (30 days to reply).
- An examination or audit notice (by correspondence or at office).

**Practice Tip:** Deadlines to reply to IRS examination notices can generally be extended. Call the IRS for an extension to reply to a CP-2000 notice. (IRS phone numbers may be staffed until about 8 p.m. on week days). *However, deadlines to appeal or file suit should be strictly complied with.*

- Examination Report, Form 4549 or 886-A. (30 days to reply or appeal).
- The 30 day letter notifying taxpayer of right to appeal. Must appeal by protest letter within 30 days of date on letter. Taxpayer should not sign the Form 870 since it will waive right to petition Tax Court.
- Notice of tax deficiency or “the 90 day letter” (check the notice for last day to file Tax Court Petition—current law requires that the IRS specifically state the last day to file in Tax Court).
- Notice of determination on collection due process appeal (30 days to file petition with Tax Court)
- Notice and Demand for Payment, CP-14
- Notice of Federal Tax Lien (30 days to appeal by Form 12153)
- Final Notice Before Levy on Social Security Benefits, CP-91/298 (30 days to reply)
- Final Notice of Intent to Levy, CP-90/CP-297, (30 days to appeal by Form 12153, if bank account levy, 21 days before bank remits funds to IRS)
- Seizure (10 days to appeal by Form 9423; about 60 days to sale)
- Denial of Installment Agreement (30 days to appeal by Form 9423)
- Termination of Installment Agreement, CP-523 (30 days to appeal by Form 9423)

### 2.4 OTHER TAX DOCUMENTS

Some taxpayers may come to you with IRS Forms 1099. These forms report income to the IRS. Forms 1099 are generally issued by employers for compensation and by lenders or other creditors who have cancelled a taxpayer’s debt. The forms may also be issued by an opposing party in personal injury litigation for the portion of a settlement that may be income, e.g., lost wages or attorney fees.

If the Form 1099 is from an employer, there may be an issue as to whether the client is an employee or contractor. If the taxpayer is a contractor, he will be responsible for payment of Social Security taxes and estimated taxes.

If the Form 1099 is from a lender or creditor, the issue will be whether the debt cancellation can be excluded from income. Failure to report Form 1099 income on one’s tax return usually leads to an audit in which one must justify why the debt cancellation is not income.
2.5 ACCESS TO TAXPAYER INFORMATION

Have the client sign a Form 2848 (Power of Attorney) for the tax years in dispute. This will enable the designated attorney to get access to taxpayer information on file with the IRS. For Louisiana taxpayers, the Form 2848 must be faxed to the IRS Memphis CAF Unit at 855-214-7519. Low-Income Taxpayer Clinic attorneys may get quick electronic access to the taxpayer’s income as reported by W-2 forms and Forms 1099, IRS account transcripts and tax return transcripts once the Form 2848 has been processed by the IRS.

2.6 COMMUNICATIONS WITH THE IRS ON NOTICES AND CORRESPONDENCE

A few tips for more effective communications with IRS employees:

1. Keep copies of any documents sent to the IRS
2. Reference or include the IRS notice or letter to which you are responding
3. Write the client’s Social Security Number on each submitted document
4. Only use certified mail when necessary to protect a deadline, e.g., amended return, an election, or where there would be an adverse action if no taxpayer response
5. Generally, limit contents of a mailed submission to one tax year
6. When citing “law” to IRS employees, it is more effective to cite to the Internal Revenue Manual (“I.R.M.”) or IRS Publications rather than case law

2.7 CRITICAL DEADLINES

Significant rights can be lost if certain deadlines in IRS notices are not met. You should identify all critical deadlines that affect taxpayer rights for IRS appeal, judicial review or avoidance of collection action.

3. IRS APPEALS

3.1 30 DAY NOTICES OF RIGHT TO ADMINISTRATIVE APPEAL

The IRS must issue a 30 day notice of right to appeal a proposed adjustment to the client’s taxes, notices of federal tax liens, notices of intent to levy, denial or termination of installment agreement, or denial or termination of an Offer in Compromise. To obtain an appeal with the IRS Appeals Office, the taxpayer must file his appeal within 30 days of the notice. If this appeal deadline is not met, the taxpayer may face unnecessary levies. Also, the taxpayer’s remedy may be limited to a Tax Court petition, which entails additional costs and delays beyond an appeal to the IRS Appeals Office.

For initial determinations of tax liability or innocent spouse relief, the taxpayer can still obtain successful Tax Court review under the “de novo review” standard. An appeal to the IRS Appeals office is not a requirement for Tax Court review.

However, for collection disputes, the failure to timely take an administrative appeal will, as a practical matter, preclude successful Tax Court review under the “abuse of discretion” standard and the general limitation of judicial review to issues raised at the appeal hearing.5

5 The “abuse of discretion” standard governs judicial review of collection due process appeal determinations on lien, levy, installment agreement or offer-in-compromise decisions unless tax liability or innocent spouse relief issues are involved. Murphy v. Comm’r, 125 T.C. 301, 307 (2005) aff’d 469 F.3d 27 (1st Cir. 2006). Absent special circumstances, the Tax Court will not consider new evidence in an “abuse of discretion” case that is not related to an issue raised in the appeal hearing. Giamelli v. Comm’r, 129 T.C. 107 (2007).
3.2 HOW DO I APPEAL TO AN IRS APPEALS OFFICER?

A protest letter or appeal letter should be filed within 30 days of the adverse action by the IRS. See IRS Publication 5 for information on how to appeal. Your letter should unequivocally state that you are appealing and request a conference with an Appeals Officer.

Appeals Officers are usually senior IRS employees. They are instructed to settle cases. 85% of appeals cases are settled. The Appeals Officers are aware of the law on common issues. They want to know the facts of your case. They are not supposed to develop the facts themselves. Rather, their role is to adjudicate facts and evaluate “hazards of litigation.” Procedures for appeals conferences are described in I.R.M. 8.6.

Convincing the Appeals Officer that there are hazards of litigation will enhance the probability of a favorable settlement. The Internal Revenue Manual states that settlements resolve each issue based on the probable result in litigation or involve mutual concessions of issues based upon the relative strength of the opposing positions when there is substantial uncertainty as to the outcome in litigation. I.R.M. 8.6.4.1. Appeals Officers have broad authority to settle cases. Their settlement authority is, however, restricted if there is a judicial or revenue ruling directly on point.

4. TAX COURT

4.1 TIME LIMITS FOR TAX COURT REVIEW

The Tax Court petition generally must be filed within 90 days of the mailing date of the Notice of Deficiency or the determination of innocent spouse relief. Review of these cases is de novo. Tax Court petitions to review collection due process appeal decisions must be filed within 30 days of the notice of determination. Review of collection due process appeals is for “abuse of discretion.”

The IRS notice of deficiency must tell the taxpayer the last date to file a petition with the Tax Court. That date will be deemed to be timely (even if it is wrong). I.R.C. § 6213(a). Look for the date on the IRS notice of deficiency or determination.

The taxpayer may have additional time if she received the deficiency notice while a bankruptcy action was pending or if a bankruptcy was filed during the 90 day delay for filing a petition in Tax Court to contest the deficiency. In such cases, the time for filing the Tax Court petition is suspended until 60 days after the bankruptcy discharge. A bankruptcy debtor is stayed from filing a Tax Court petition unless the bankruptcy stay is lifted by the bankruptcy court. In such cases, the bankruptcy may control whether bankruptcy court or Tax Court decides the tax liability issue.

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6 Appeal Officers are prohibited from ex parte communications with the auditors. Rev. Proc. 2000-43, 2000-43 IRB 404; Adomowicz v. United States, 531 F.3d 151 (2d Cir. 2008); Robert v. United States, 364 F.3d 989 (8th Cir. 2004); Drake v. Comm’r, 125 T.C. 201 (2005)(case remanded with order that a new, independent Appeals Officer be assigned to case).
7 I.R.C. §§ 6213, 6015(e). It is 90 days even if the taxpayer didn’t receive her notice until many days after the notice date. A notice properly mailed to the taxpayer at her “last known address” is valid even if not received. United States v. Ahrens, 530 F.2d 761, 785 (8th Cir. 1976). For judicial review of a denial of innocent spouse relief or separate liability election, a taxpayer may file her petition at any time after 6 months of filing her election provided the 90 day period has not run. I.R.C. § 6015(e)(1)(A).
9 I.R.C. § 6330(d); McCune v. Comm’r, 115 T.C. 114 (2000).
Practice Tip: Be sure to ask a prospective Tax Court petition filer if he has a pending bankruptcy action.

The petition in a deficiency or innocent spouse relief case must be received within 90 days or mailed in a properly addressed envelope with an official U.S. Post Office postmark or by certain designated private delivery services within the 90 day limit. I.R.C. § 7502 (a). You must be able to prove a timely postmark. This means that you should use certified or registered mail and secure an official postmark if you are relying on a mailing date to meet the 90 day deadline. Make sure that the Post Office gave you a correct postmark date. Currently, the Tax Court does not allow electronic or fax filing of the initial Tax Court petition.

Don’t use privately metered mail for the filing of Tax Court petitions. This delivery method only qualifies for the timely filed rule if the petition is actually received by the Tax Court within the normal delivery delay. If it is not received within that delay, it will be difficult to prove that the petition was timely mailed. See Reg. § 301.7502-1 (c)(1)(iii)(b). The filing fee is $60, but may be waived for indigents. You must be admitted to the Tax Court before filing the petition or have a Tax Court member sign the petition and other initial pleadings. If you don’t have a Tax Court member in your law firm, you can help the client file pro se if the filing deadline is imminent.

Caution: If the 90 day limit for Tax Court review is missed, the taxpayer’s only judicial remedy is to pay the tax and sue for refund–usually in United States District Court. This is not a realistic option for most indigents. If the 90 day limit has been missed, you may want to try an audit reconsideration or an Offer-in-Compromise to eliminate the taxpayer’s liability if there is “doubt as to liability.” See Reg. § 301.7122.

4.2 HOW TO FILE A TAX COURT PETITION

Check the current rules at the Tax Court’s webpage, www.ustaxcourt.gov. The initial filing requirements are an original of:

- Petition
- Statement of Taxpayer Identification Number
- Notice of Deficiency
- Designation of Place of Trial (Tax Court is held in most major cities, including New Orleans and Shreveport for about 1 to 2 weeks every year)
- Application for Waiver of Filing Fee and Affidavit (or check for $60)

13 Federal Express and UPS. See www.ustaxcourt.gov. If you use these companies, make sure that you use the type of delivery recognized by the IRS. Gibson v. Comm’r, 264 Fed. Appx. 760 (10th Cir. 2008) (petition untimely because UPS store sent by US mail rather than approved UPS delivery service).

14 Treasury Regulations are found in title 26 of the Code of Federal Regulations.

15 I.R.C. § 7451; Tax Court Rules 20(b), 173(a)(2).

16 Note, however, it may be meaningful in Earned Income Credit cases since the taxpayer often does not owe any tax. Rather, the IRS has denied her the EIC before ever paying it to the taxpayer. Also, consider audit reconsideration as a remedy. If the taxpayer’s claim is disallowed in an audit reconsideration, he may appeal to an IRS appeals officer.

17 Only the signed original has to be filed. Tax Court Rule 35(e).

18 Tax Court Rule 20(b). The application form for waiver of filing fees may be found in the forms section of www.ustaxcourt.gov.

19 Check Tax Court Rule 23. Motions and pleadings (other than petition) generally require 4 copies in addition to original.
Send the signed original to:
Clerk, U.S. Tax Court
400 Second St., NW
Washington, D.C. 20217

4.3 SHOULD THE CASE BE FILED UNDER SMALL TAX CASE OR REGULAR TAX CASE PROCEDURES?

The client must decide whether to elect to proceed in Tax Court under the Small Tax Case or Regular Tax Case procedures.

Election of the Small Tax procedure (available for cases under $50,000 per year) waives the right to appeal the judge’s decision. However, most tax cases are decided on factual issues where the right of appeal does not make much difference.

Trial may be sooner under the Small Tax Case procedures. Also, small tax cases are heard in more cities than regular tax cases are. In Louisiana, regular tax cases are only heard in New Orleans whereas small tax cases are heard both in New Orleans and Shreveport.

Interest does run on taxes while the case is pending in Tax Court. On the other hand, 90% of all cases are settled without a trial. Most cases are referred back to the IRS Appeals Officer for review and possible settlement.

4.4 HOW DO I DRAFT A TAX COURT PETITION?

The form and contents of the Petition in a regular case are specified in Tax Court Rules 34, 23 and Form 1 of Appendix I to the Tax Court Rules. For Small Tax Court cases, see Rules 173-79 and Form 2 of Appendix I.

On the Tax Court website, there is a Simplified Tax Court petition which can be used for both regular and small tax cases. Form 1 in the appendix of the Tax Court rules can be used and adapted for more complex deficiency cases.20

The petition should clearly state every issue the taxpayer intends to litigate. Tax Court Rule 34 (b)(4). Tax Court review of collection due process appeals is limited to “abuse of discretion.” Therefore, a petition to review a collection due process determination should specify each error committed by the IRS.21 The petition is an opportunity to provide the judge with a structured blueprint of your case. See Rule 41 if you need to amend the Petition to add issues.

Caution: Affirmative defenses, such as an innocent spouse defense or the statute of limitations, should be pleaded in the Petition to avoid waiver.22

If the taxpayer lives in a community property state and seeks § 66(c) innocent spouse relief, pleading this claim as an affirmative defense to a deficiency may be essential for Tax Court jurisdiction. 23

20 Tax Court Rule 34(b).
21 Tax Court Rule 331. By comparison, review of tax liability, innocent spouse relief and employment status is de novo. The pleading rules for these de novo review cases are more liberal. See e.g., Tax Court Rules 31-32, 320-21.
23 The Tax Court does not have jurisdiction to review an IRS denial of a “stand alone” request for equitable relief under I.R.C. § 66(c). Bernal v. Com'rs, 120 T.C. 102 (2003); see also Christensen v. Com'rs, 523 F.3d 957 (9th Cir. 2008). Thus, a taxpayer may only obtain Tax Court review of a § 66(c) claim by raising the issue in a collection due process appeal or as a defense to a 90 day notice of deficiency. Felt v. Com'rs, T.C. Memo 2009-245, n. 15 at 45.
4.5 WHAT IF IT IS THE LAST DAY TO FILE A TAX COURT PETITION?

Get the Tax Court petition filed to protect the taxpayer’s rights.

If you don't have time to draft a detailed Tax Court petition, simply use Tax Court Form 2 (the Simplified Form). All the required forms are included in one fillable Adobe document at www.ustaxcourt.gov. The forms are designed for use by pro se litigants. Simply answer the questions on the form and check the appropriate boxes. This Simplified Petition form can be quickly completed by someone with no knowledge of Tax Court procedures or tax law.

The Tax Court petition can be amended later if necessary. There are few pleading traps in Tax Court procedure. But, you should plead any innocent spouse or statute of limitation claims as affirmative defenses in the petition.

4.6 WHAT HAPPENS IN A TAX COURT CASE AFTER THE PETITION IS FILED?

About 90% of the cases are settled without the necessity of a trial. If the taxpayer didn’t appeal before, the Appeals Office will consider the case.24 Cases are usually at the Appeals Office for about 6 months. You should participate in the Appeals Office conference. Most cases are settled with an IRS Appeals Officer. If settlement is not reached with the Appeals Officer, local IRS district counsel will also work to settle the case. If a settlement is reached with the Appeals Office or District Counsel, District Counsel will prepare a Stipulated Tax Court Decision for signature by all counsel and the judge.

4.7 HOW IS TAX COURT LITIGATION DIFFERENT FROM OTHER LITIGATION?

Significant differences are the mandatory duty to stipulate to the greatest extent possible and the requirement that the parties engage in informal discovery before initiating formal discovery. Also, evidentiary rules are relaxed for Small Tax cases.

The Pre-Trial Order requires you to prepare written stipulations and to exchange witness lists and documents at least 15 days before trial. Tax Court Rule 91 mandates that the parties stipulate to the fullest extent to which complete or qualified agreement can be fairly reached. This rule is mandatory, not aspirational. Failure to comply with stipulation, disclosure and consultation rules can result in dismissal of the petition for lack of prosecution.25 Work cooperatively with the IRS attorney and document your efforts to stipulate.

Normally, discovery by the taxpayer is unnecessary. However, if you need discovery, you should proceed promptly with consultation and discovery given tight Tax Court deadlines. Under Branerton Corp. v. Comm’r, 61 T.C. 691 (1974), the parties should make reasonable informal efforts to obtain information voluntarily before seeking formal discovery. See also Tax Court Rule 70(a).

5. REFUNDS

5.1 REFUND CLAIMS AND LAWSUITS

A refund claim is generally made by filing an original or amended tax return. The refund claim must be filed within 3 years of the April 15 due date of the original return. If the client is eligible for the Earned Income Credit, an original or amended tax return should be filed immediately for each of the last 3 years. If you are close to the 3 year time limit, be sure to get a proof of postmark or mailing or hand deliver the returns to an IRS office and get a receipt for the refund claims.

The denial of a refund claim may be appealed to an IRS appeals officer. The rules for a refund lawsuit in United States District Court are complex. A client who has been denied a refund claim should be immediately referred to a tax lawyer.

Generally, a refund suit is barred unless filed within 2 years after the date of mailing by certified or registered mail of a notice of disallowance of the claim by the IRS. I.R.C. § 6532(a). Absent a notice of disallowance, there is no time limitation for filing a refund lawsuit. However, a taxpayer should not delay the filing of a lawsuit. Several courts have ruled that the 6 year limitation in 28 U.S.C. § 2401 applies as an outer limit.

Warning: The taxpayer may have signed a waiver of the notice of claim disallowance when the IRS originally denied the refund. Many low-income taxpayers do not know if they signed such a waiver or may forget to tell you. The 2 year period for a refund lawsuit begins running on the date the waiver is filed. If you are faced with a waiver, you should determine whether it is valid.

I.R.C. § 7422(a) and § 6511(a) allow the filing of a refund lawsuit within 2 years of the payment of taxes. This opens up potential rights to a refund lawsuit that are more than 3 years after the original tax return was due.

For example, when a taxpayer pays the last payment on an installment agreement with the IRS, his right to sue for a refund accrues and the 2 year time limitation begins running. I.R.C. §§ 7422(d), 6511(a). If the taxpayer finally pays off a 2003 tax obligation in 2012, she will then be able to sue for a refund of the 2003 “overpayment.”

A taxpayer may win an Earned Income Credit for a recent tax year examination. The IRS will offset that refund against taxes owed for prior years, sometimes 5 to 10 years earlier. If that offset extinguishes the prior year tax liability, the taxpayer then has the right to sue for a refund. The date that the IRS applies the offset is considered the date of payment.

I.R.C. § 6513, which deems withholdings and credits to have been paid on the April 15th return deadline, does not apply to situations in which the refund claim arises from the application of an overpayment from one tax year to an outstanding tax liability for another tax year. In such situations, IRC § 7422(d) applies and the date of offset is considered the date of payment. Therefore, the taxpayer will have the right to seek refund for the amount of taxes paid within 2 years of the IRS offset.

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26 Consolidated Edison Co. of NY v. United States, 135 F. Supp. 881 (Ct. Cl. 1955); IRS CN Chief Counsel-2012-012, 2012 WL 2029785.
28 See Reg. § 301.6532-1(c)(1)-(4); IRS National Office Service Center Advice, Assistant Chief Counsel Memorandum, No. 200202069 (Release date 1/11/2002).
29 See e.g., Dresser Industries v. United States, 73 F. Supp. 2d 682 (N.D. Tex. 1999) aff’d 238 F.3d 603 (5th Cir.2001).
31 Favret v. United States, supra.
32 Payment of taxes by IRS offset can be determined from the offset notice or a transcript of the taxpayer’s account.
The §§ 7422(a) and 6511(a) rules can open up many past years for litigation. For example, you win a 2011 Earned Income Credit. The IRS uses offset to apply the refund to a 2003 tax obligation. You sue for and win the 2003 refund, which is then applied to and pays off another tax year’s deficiency and sets up the taxpayer for a refund lawsuit for another tax year.

5.2 MISSED THE TAX COURT DEADLINE? CAN’T PAY THE TAXES FOR A DISTRICT COURT REFUND LAWSUIT? WHAT CAN BE DONE?

Most refund claims for legal aid clients involve the Earned Income Credit. If you can win the Earned Income Credit for an “open” year, the taxpayer will receive a refund. The IRS will then seize the refund to pay the prior year tax deficiency. This payment, if the entire tax is paid, will give the taxpayer his “ticket” to District Court refund litigation.

However, the most practical remedy for a taxpayer, who has missed his Tax Court deadline, is audit reconsideration. Audit reconsideration is available to:
1. Reevaluate a prior audit where the taxpayer disagrees with the original determination by providing information that was not previously considered.33
2. Contest a “Substitute for Return”determination by filing an original delinquent return; or
3. Contest the denial of a tax credit as a result of an examination.34


To request an audit reconsideration, the taxpayer must have filed a tax return and the assessment remains unpaid or the IRS has reversed tax credits that the taxpayer disputes. I.R.M. 4.13.1.4. If the taxpayer has paid the tax, he should file a formal claim by using a Form 1040X.

The IRS does not have a form for audit reconsideration requests. Audit reconsideration may be requested by a Form 1040X or letter. Some IRS offices request both a Form 1040X and a cover letter for audit reconsideration. If the taxes have not been paid, a letter requesting audit reconsideration may be written. If a Form 1040X is used, state the request for audit reconsideration in the cover letter.

The letter requesting audit reconsideration should include:
1. Taxpayer’s name, Social Security number, and tax year at issue.
2. Clear statement of issues and adjustments disputed.
3. Relief or action desired.
5. Additional information not considered during the original audit. Your letter should identify the new information. (Attach new documentation. You should provide information on each disputed issue since the IRS considers your request issue by issue).

The request for audit reconsideration should be filed with the IRS Service Center where the taxpayer’s return was filed. IRS Pub. 3598.

33 This may also include new information or information that was not viewed in the proper light.
34 Thus, audit reconsideration will often be available to review the correctness of an Earned Income Credit denial.
In a partially paid assessment, be careful not to miss the time limits for refund claims. The Taxpayer Advocate Service can help expedite an audit reconsideration. I.R.M. 4.13.1.5. If a case is accepted for audit reconsideration, and the taxpayer's request is disallowed in full or part, the taxpayer may request an appeal. I.R.M. 4.13.6.1.

6. COLLECTIONS—HOW TO DEAL WITH IRS COLLECTIONS

6.1 HOW LONG DOES THE IRS HAVE TO COLLECT TAXES?

The IRS has 10 years after a timely assessment to collect taxes. I.R.C. § 6502. An “assessment” is the timely recording of a taxpayer's liability in accordance with IRS rules. I.R.C. § 6203. The taxpayer has a right to the IRS's record of assessment. Id. Transcripts of a taxpayer's records may be ordered by tax professionals from the Practitioner’s Priority Service, 866-860-4259. You should always order an account transcript to determine the expiration date for collections.\(^{35}\)

The 10 year limit on collections is referred to as the Collection Statute Expiration Date (CSED). The IRS Practitioner Priority Service (866-860-4259) will tell you the CSED. It is common for the IRS to miscalculate the collections statute of limitation. Therefore, do not rely on the IRS calculation of the collections statute of limitations. If the IRS collection employee won't review and decide a collection statute of limitation defense, request a Taxpayer Assistance Order by a Form 911 from your Taxpayer Advocate Service office.

The limitation periods may be extended by deficiency notices, Tax Court proceedings, collection due process hearings, innocent spouse relief, installment agreements, Offers in Compromise, bankruptcy, Taxpayer Assistance Orders, wrongful levies or liens.\(^{36}\) If the suspension action was taken by a separated spouse, determine whether that action also suspends the limitation period as to your client. Also, if your client lived in a federally declared disaster area, it is possible that the limitation periods may have been extended by the IRS under its I.R.C. § 7508 (A) authority. For example, in Hurricane Katrina, the IRS deadlines for collection were extended for one year.\(^{37}\)

Caution: If the 10 year statute of limitations is close to expiration, be careful about taking action which may extend the statute of limitations.

Generally, assessments must be made within 3 years. I.R.C. § 6501. If the taxpayer omitted more than 25% of his gross income from his return, the assessment period is extended to 6 years. I.R.C. § 6501(e)(1). The 3 or 6 year limit on assessment is referred to as the Assessment Statute Expiration Date (ASED). This period may be waived by the taxpayer. The assessment period does not begin if a tax return was fraudulent or not filed. I.R.C. § 6501(c). There is no statute of limitation for assessment and the subsequent filing of a non-fraudulent return does not avoid the unlimited statute of limitation for the original fraudulent

\(^{35}\) See Effectively Representing Your Client before the IRS (ABA 5th ed. 2011), Ch. 17 (how to spot statute of limitation issues). The IRS account transcripts will use code 150 to designate the assessment date. See Transaction Codes, Pocket Guide, IRS Document 11734 (Rev. 5-2012), available at www.irs.gov.

\(^{36}\) I.R.M. 5.1.19.3. Note that some cases may involve several actions that suspend the statute of limitations. See e.g. I.R.M. 5.1.19.3.6.3 for the IRS view on how to calculate the suspension periods that result from an innocent spouse claim made within a collection due process appeal.

\(^{37}\) IRS Notice 2006-20 (extending limitation periods to August 28, 2006 for Katrina victims).
However, even when the original failure to file is fraudulent, a subsequent return triggers the 3 year limit on assessment. Substitute returns filed by the IRS under I.R.C. § 6020(b) do not start the assessment or collection periods. I.R.C. §§ 6020, 6501(b)(3).

6.2 WHAT ARE THE MOST COMMON IRS COLLECTION ACTIONS? 
Levies, liens and offsets.

The IRS will file liens against real estate when a taxpayer owes $10,000 or more in taxes.

Other IRS collection efforts focus primarily on levies of bank accounts, wages and federal payments, e.g., Social Security, tax refunds, etc. Current IRS policy discourages levies on principal homes and retirement plans even though they are not exempt from seizure. The IRS will seize and offset a taxpayer’s tax refund to pay prior taxes owed to the IRS.

6.3 WHAT SHOULD I LOOK FOR AS DEFENSES TO A COLLECTION ACTION?

The taxpayer’s general goals in a collection action are:
1. Is the lien or levy valid?
2. Can the levy be suspended or avoided?
3. What are the collection alternatives and how do you get them?

6.4 WHAT IS A “SUBSTITUTE FOR RETURN” AND WHAT CAN BE DONE ABOUT IT?

Your client may receive a notice from the IRS saying that he owes an unbelievable amount of taxes. What is going on? The taxpayer has failed to file a tax return. So, the IRS has filed a “Substitute for Return” (SFR) and assumed that he had certain income based on either W-2s or Forms 1099, or income reported on prior tax returns. In a “Substitute for Return”, the IRS does not give the taxpayer any credit for exemptions, deductions, business expenses or tax credits. Generally, the alleged tax deficiencies can be substantially reduced if a correct original tax return is filed. Tax returns subsequent to a SFR should be filed with the IRS’s Fresno office.

Correct original tax returns for the years in question should be filed. This is necessary to lower the tax deficiency and to start the statutes of limitations for assessment and collection running. For the purposes of starting the statute of limitations, a SFR under I.R.C. § 6020(b) is not considered a tax return. In a § 6020(b) substitute for return, the IRS will normally assess a deficiency after the taxpayer fails to respond to the 90 day “notice of deficiency” letter. An assessment after the expiration of the 90 day period to contest the deficiency in Tax Court will start the collection statute of limitations. On the other hand, a SFR under I.R.C. § 6020(a) may qualify as a “return” for the purposes of starting the statutes of limitations. Also, a SFR may stop the running of the delinquency period for additional penalties for failure to file and failure to pay amounts due on the return.
Outside the 10th Circuit, a taxpayer may file a tax return despite an IRS deficiency assessment by a Substitute for Return. The SFR can't deny the taxpayer's right to contest the deficiency and the IRS's choice of filing status in a Tax Court proceeding.44

Also, taxpayers who seek a discharge in a Ch. 7 bankruptcy must file a return. They can't rely on SFRs. In many circuits, a taxpayer is also barred from a bankruptcy discharge of taxes if his related tax return was filed late. Several courts have denied bankruptcy discharges where the related tax return was filed late despite the IRS's position that late filed tax returns don't always bar bankruptcy discharge.45

6.5 WHAT CAN THE IRS SEIZE FROM A TAXPAYER IN A LEVY?

The IRS may seize property or income through the levy process once proper notice is given. A levy reaches every species of property owned by the taxpayer unless exempted by federal law.46 Essentially, the IRS steps into the taxpayer's shoes and can reach the taxpayer's interest in the property. The IRS will use offset to seize tax refunds and apply them to prior tax debt. Homes and vested retirement accounts are not exempt from seizure. Unemployment benefits, worker's compensation, a modest amount of wages, furniture, household effects, and tools of a trade are exempt.47

6.6 HOW CAN A LEVY BE RELEASED?

The grounds for release of a levy include:

- the liability is satisfied or becomes unenforceable
- the release will facilitate collection
- the taxpayer enters an installment agreement
- economic hardship
- the fair market value of the asset exceeds the liability and release will not hinder collection48

6.7 WHAT IF AN IRS COLLECTION ACTION WILL CAUSE A SIGNIFICANT FINANCIAL HARDSHIP?

IRS seizure of income and assets may cause a taxpayer to either default on other debt, suffer eviction or foreclosure, or lose his business or the means to make a living. If this is the taxpayer's situation, you should act quickly to resolve the seizure or levy.

The Taxpayer Advocate (an IRS ombudsman) may issue Taxpayer Assistance Orders (TAO) to stop collection activity. A TAO may be issued if the taxpayer is suffering or about to suffer a significant hardship as a result of IRS action or inaction or for circumstances set forth in IRS regulations. I.R.C. § 7811(a).

TAOs are most commonly used where an actual or threatened seizure of a bank account, pension plan, car or wages will cause a taxpayer to lose his home (including eviction), car necessary for work, medical care, education, or leave him

45 Compare In re McCoy, 666 F.3d 924 (5th Cir. 2012) with Chief Counsel Notice CC 2010-016 (Sept. 2, 2010).
47 I.R.C. § 6334; Reg. § 301.6334-1.
48 I.R.C. § 6343(a); I.R.M. 5.11.2.2.1.
without enough money for basic necessities. A Form 911 is used to apply for a TAO. The Louisiana Taxpayer Advocate can be reached at 504-558-3001 (Ph.) and 504-558-3348 (Fax). For more information on TAOs, see IRS Publication 1546, Internal Revenue Manual 13.1.7.2, and Reg. § 301.7811.

6.8 HOW DO I DEAL WITH A WAGE LEVY NOTICE?

The IRS uses a Form 668-W to levy wages. If the taxpayer has a levy notice, determine what stage he is at in the levy process. Generally, the taxpayer will receive 3 statutory notices before the actual levy, including the final Notices, which are CP-90/297 or CP-91/298:

- 10 day notice and demand for payment [I.R.C. § 6331(a)]
- Final notice before levy [I.R.C. § 6331(a)]
- Final Notice of intent to levy and CDP hearing opportunity at least 30 days before proposed levy [CP-90/297 or CP-91/298 Notices, I.R.C. §§ 6330(a), 6331(d)]

Generally, levy cannot be made on wages or property until the IRS has given the taxpayer a 30 day written notice of intent to levy required by I.R.C. § 6331 (d).

The primary ways to deal with a wage levy are:

1. **Claim the highest exemption possible.** Generally, the IRS will levy based on 1 exemption and single filing status. If a taxpayer is married or has children, he may claim a higher exemption amount and a more favorable filing status. The amount the taxpayer pays for support established by court order is exempt from levy. If the taxpayer or his spouse is at least 65 years old or blind, an additional standard deduction is available. Use Form 668-W. See IRS Pub. 1494.

2. **Ask for a reduction of the levy based on economic hardship.** If the levy will cause economic hardship, file for a reduced levy. The IRS will require the taxpayer to complete a Form 433-A on his income and expenses.

3. **File for “Currently Not Collectible” status.** Many legal aid clients can be placed in “Currently Not Collectible” status if collection would cause undue hardship by leaving them unable to meet necessary living expenses. The taxpayer will need to provide the IRS with the financial information required by Form 433-A or 433-F. The IRS must release a levy upon a determination of “Currently Not Collectible” status.49

4. **File a collection due process appeal on Form 12153.** A collection due process appeal will generally stop the IRS from making a levy while the appeal is pending. Collection alternatives and other defenses can be pursued in a collection due process appeal.50

5. **Ask for a brief suspension of the levy if the taxpayer can pay the liability.** The IRS has authority to suspend collection activity for up to 120 days for individuals to allow the taxpayer to gather the funds to pay the liability.51

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49 I.R.C. § 6343(e).
50 The taxpayer has 30 days to appeal a levy to an IRS Appeals Officer. I.R.C. § 6330(b), Reg. § 301.6330-1(b)(1). If a taxpayer timely requests an appeal, the IRS may not levy while the appeal is pending. I.R.C. § 6330 (e). Use Form 12153 to appeal.
51 I.R.M. 5.14.5.5.
6. **Submit a proposal for an Installment Agreement or Offer-in-Compromise.**

Levies are suspended while an Installment Agreement or Offer-in-Compromise is under consideration or in effect. The suspension of levy continues if denial of the Installment Agreement or Offer-in-Compromise is appealed to an IRS appeals officer.

6.9 **CAN AN EMPLOYER FIRE FOR A WAGE LEVY?**

If an employer fires an employee because of an IRS wage levy, he may have violated 15 U.S.C § 1674.\(^{52}\) This violation is punishable by a $1,000 fine and up to 1 year in prison. The U.S. Department of Labor enforces employer violations of 15 U.S.C § 1674. The taxpayer does not have a private cause of action to enforce this law.\(^{53}\) However, the Department of Labor may seek reinstatement and back pay for the employee.\(^{54}\)

6.10 **HOW DO I HELP SOMEONE WITH A BANK ACCOUNT LEVY NOTICE?**

A bank levy is a one-time levy that reaches the deposits at the time of the levy. I.R.C. § 6332(c) only requires banks to hold funds subject to levy for 21 days. So, a taxpayer or a joint account holder must act quickly to prevent the levy from being executed. The IRS may ask the bank to hold the funds longer than 21 days if another person claims ownership of the funds.\(^{55}\)

The IRS may seize a taxpayer’s bank account even if it includes exempt wages or exempt Social Security benefits.\(^{56}\) The IRS may even seize an account that the taxpayer does not own, but has the right to withdraw funds from. When this happens, the owners of the account must act quickly to convince the IRS that they own the funds, not the taxpayer. If the bank transfers the levied funds to the IRS, the non-liable account holder will need to use the wrongful levy procedures to recoup their funds from the IRS. A third party has 9 months to file for return of his money. A Form 4528 is used for administrative recoupment of a wrongful levy. Suit should be filed within the 9 month period if you can’t secure the return of the funds within 9 months.\(^{57}\)

6.11 **HOW DO I HELP A TAXPAYER WITH A SOCIAL SECURITY LEVY?**

The IRS may issue a continuous levy which takes 15% of a taxpayer’s Social Security check on a monthly basis.\(^{58}\) The IRS has decided not to levy on SSI benefits even though the law allows this. Ask for release of the levy based on economic hardship or seek Currently Not Collectible status based on hardship.\(^{59}\) The IRS will require Form 433-A collection information statement from the taxpayer and will conduct the analysis of hardship based on its financial standards. If the taxpayer’s only income is Social Security, a collection information statement may

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\(^{55}\) I.R.M. 5.11.4.2.1.2.

\(^{56}\) Reg. § 301.6334-2(b); I.R.M. 5.11.4.5.

\(^{57}\) I.R.C. § 7426(a)(1); EC Term of Years Trust v. United States, 550 U.S. 429 (2007). There may be a due process exception to the 9 month rule in some circumstances. See Scheafnocker v. Comm’r, 642 F.3d 428 (3d Cir. 2011).

\(^{58}\) I.R.C. § 6331(b).

\(^{59}\) Reg. § 301.6343-1(b)(4); I.R.M. 5.11.2.1.1.4; 5.11.2.1.2 (example).
not be required for the hardship determination. The IRS may not deny a release for hardship because the taxpayer has failed to file tax returns. You may need to enlist the help of the Taxpayer Advocate Service if the IRS refuses to release a levy on the ground of the taxpayer’s failure to file returns. Social Security levies continue after an Offer in Compromise settlement.

6.12 THE IRS OFFSETS A TAX REFUND—WHAT ARE THE TAXPAYER’S RIGHTS?

Under I.R.C. § 6402, the IRS may offset tax refunds to satisfy unpaid federal taxes. In addition, a taxpayer’s tax refund may be offset for child support, state taxes or past due federal debts.

If the refund was offset for federal taxes, the taxpayer may claim and sue for a refund if he disputes the tax. If the refund was offset for debts other than federal tax, the taxpayer must dispute the offset with the agency or creditor that initiated the offset. There is no right to sue the IRS for recovery of a refund erroneously paid to another agency. The name, address and phone number of the other agency should be on the IRS notice of offset. If it is not, this agency information may be obtained from Treasury’s Financial Management Services at 800-304-3107. What if the federal tax refund is later determined to be incorrect? The IRS does not have to recover the erroneous offset payment from the agency that received the offset payment.

6.13 HOW DO IRS LIENS WORK?

A federal tax lien is the IRS’s legal claim to property as security or payment for a tax debt. The claim arises “automatically” under I.R.C. § 6321 and attaches to every interest in property and rights owned by a taxpayer without regard to its location. This statutory lien is often referred to as a “secret lien” because it arises even if not publicly recorded. The lien attaches to after-acquired property (unless property acquired after bankruptcy where taxes discharged). Federal tax liens even attach to property exempt from seizure under state law. Draye v. United States, 528 U.S. 49 (1999). This statutory lien is often referred to as a “secret lien” because it arises even if not publicly recorded. The lien attaches to after-acquired property (unless property acquired after bankruptcy where taxes discharged). Federal tax liens even attach to property exempt from seizure under state law. Draye, supra; Medaris v. United States, 884 F.2d 832 (5th Cir. 1989). Exemption from levy under federal law does not bar a lien on the exempt or non-exempt property. Matter of Sills, 82 F.3d 111 (5th Cir. 1990). The IRS may seek to enforce the lien against exempt property by a foreclosure lawsuit under I.R.C. § 7403, but this is unlikely.

If a taxpayer does not pay a bill, the IRS will generally send a Notice of Federal Tax Lien which demands payment within 10 days. The Notice will threaten the filing of a tax lien in the public records office if the bill is not paid. A tax lien is not self-enforcing. The IRS must administratively levy on property or income or bring a foreclosure suit under I.R.C. § 7403.

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60 I.R.M. 5.16.1.2.9.
61 Vinatieri v. Comm. 133 TC. 392 (2010); IRS Notice CC-2011-005, I.R.M. 5.11.2.2.1 and 5.19.1.7.1.5.
62 If the offset refund exceeded the amount of child support owed, there is an administrative procedure for correcting the error. See e.g., 31 C.F.R. § 285.3.
63 I.R.C. § 6402(f).
64 IRS National Office Field Service Advice Memorandum No. 199938004 (Sept. 24, 1999).
65 IRS Chief Counsel Memorandum, 200634012 (June 23, 2006).
66 IRS personnel are directed to file liens for tax debts that are $10,000 or more and may file for lesser debts.
67 Note that the filing of a lien on a taxpayer’s home may trigger a technical default if the mortgage has a “no lien” clause.
6.14 DOES A LIEN ATTACH TO INHERITED PROPERTY?

Yes. Renunciation of an inheritance won't defeat the lien. It will still attach to the property despite Louisiana succession law that allows for renunciation that defeats creditors' claims. 68

6.15 CAN A NOTICE OF FEDERAL TAX LIEN BE APPEALED?

Yes. A taxpayer may appeal a Notice of Federal Tax Lien by filing a Form 12153 within 30 days. See Reg. § 301.6320-1. Grounds for appeal include:

• Whether the law or administrative procedures were followed 69
• Spousal defenses
• Challenges to appropriateness of collection actions
• Collection alternatives
• Tax assessed and lien filed while bankruptcy stay in effect
• Time to collect tax expired before lien filed
• Taxpayer did not have opportunity to dispute asserted liability
• Taxes fully paid before lien filed

An Offer in Compromise is a “collection alternative” which can be heard by the Appeals Officer. Practitioners report higher success rates on Offers that are raised in collection due process (CDP) appeals. Offers in Compromise raised in a CDP appeal can be judicially reviewed by the Tax Court. 70

Lien appeal decisions by the IRS Appeals Officer are reviewable under an abuse of discretion standard by the Tax Court. The petition for judicial review must be filed within 30 days.71

6.16 HOW CAN IRS LIENS BE REMOVED?

Liens may be released, withdrawn, discharged, subordinated or non-attached:

6.16.1 Release—I.R.C. § 6325(a)

A recorded lien can be released if the tax liability is satisfied or becomes legally unenforceable. I.R.C. § 6325. Since the 1980s, the IRS has used “self-releasing” liens which contain the date that the lien ends or is released. Surprisingly, taxpayers often don’t know whether the lien has been satisfied or expired. The IRS lien staff will have information on the lien’s payment status.

A lien becomes unenforceable upon expiration of the statute of limitations for collection unless the IRS brings timely suit and wins judgment. 72 The IRS has 10 years after timely assessment to collect taxes. I.R.C. §§ 6502(a), 6322.

The IRS must issue a certificate of release within 30 days after the lien is paid or becomes legally unenforceable. See IRS publication 1450 for how to request a certificate of release.

69 In a “CDP” appeal, check for compliance with all applicable I.R.M. procedures. See Murphy v. Comm’r, 125 T.C. 301, 307 (2005).
70 A “stand alone” Offer in Compromise decision can’t be judicially reviewed by the Tax Court.
71 I.R.C. §§ 6320 (c), 6330 (c)-(e). Joint Committee on Taxation, Summary of the Conference Agreement on H.R. 2676, 132 (June 24, 1998).
72 I.R.C. § 6322; Markham v. Fay, 74 F.3d 1347, 1353 (1st Cir. 1996).
6.16.2 Withdrawal—I.R.C. § 6323(j)

The IRS may withdraw a lien if the filing was premature or in violation of administrative procedures, or the liability is being paid through an installment agreement or an Offer in Compromise. 73 A “withdrawal” is as though the lien never existed. If these conditions are met, a Certificate of Release of Lien (Form 668Z) may be obtained from the IRS and filed in the public records office. If the lien was filed in error, the IRS Certificate of Release should so state to minimize damage to the taxpayer’s credit rating. I.R.C. § 6326(b). Use Form 12272 to request a withdrawal of a lien. Inquiries about routine lien releases and current payoff amounts can be made to IRS customer service unit, 800-913-6050.

6.16.3 Discharge—I.R.C. § 6325(b)

A discharge may be sought by a taxpayer when he seeks to sell or dispose of a specific property. A certificate of discharge is commonly issued in these circumstances:

- taxpayer’s other property has value double of unpaid balance secured by lien;
- taxpayer pays the value of interest IRS has in property;
- agreement that proceeds of sale will be substituted for the property (while parties sort out priorities of their claims)

Use Form 14235 to discharge a lien on a specific asset.

6.16.4 Subordination—I.R.C. § 6325(d)

Liens may be subordinated to a lender or another creditor. Subordination is a process whereby the IRS allows a lender to move ahead of the IRS’s lien position. IRS Publication 784 sets forth the procedures for the subordination of federal tax liens to other creditors’ claims. To obtain a certificate of subordination, contact the IRS Advisory Group Manager for your area. The addresses can be found in IRS Publication 4235. The request for subordination is made on a Form 14134 to the Advisory Group Manager along with supporting documents.

6.16.5 Nonattachment—I.R.C. § 6325(e)

A certificate of non-attachment states that the lien does not attach to the property of a person. This procedure is used when your client is not the person who owes the taxes, but is being hurt by the lien because he has the same or similar name. See IRS Publication 1024.

6.17 WHEN CAN THE IRS TAKE A TAXPAYER’S HOME?

A taxpayer’s principal residence is exempt from seizure for tax debts less than $5,000. The IRS must obtain a federal court order to sell a principal residence for tax debts greater than $5,000. Possible defenses include (1) IRS non-compliance with the laws and procedures applicable to levy and (2) whether reasonable collection alternatives exist. There may be other defenses if the home is jointly owned and the other owner is not liable for the tax debt. 74

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A taxpayer does not have to move out of his house after a levy. The IRS will not evict a taxpayer after the sale. The buyer at the sale must bring a state court eviction lawsuit. The buyer does not have full title to the house. After the sale, the taxpayer has 180 days (not 6 months) to redeem his property by paying the full bid price plus interest at 20% per annum. I.R.C. § 6337. If the taxpayer plans to redeem, it may be possible to rent from the purchaser.

7. COLLECTION ALTERNATIVES

7.1 WHAT ARE A TAXPAYER’S OPTIONS WHEN FACED WITH IRS COLLECTION ACTIONS?

The primary collection alternatives for a taxpayer in collection are:

- Currently Not Collectible Status
- Installment Agreement
- Offer in Compromise
- Innocent Spouse Relief

See discussion in sections below.

7.2 CURRENTLY NOT COLLECTIBLE HARDSHIP–IMMEDIATE RELIEF FOR MANY LEGAL AID CLIENTS

Most legal aid clients will be candidates for “Currently Not Collectible” status. A taxpayer may be placed in “Currently Not Collectible” status if collection would cause undue hardship by leaving her unable to meet necessary living expenses. A levy on wages must be immediately lifted if the taxpayer is placed in “Currently Not Collectible” status. A taxpayer may receive CNC status even if there are unfiled tax returns.

CNC status suspends collection, but does not forgive or compromise the tax or release liens. Also, interest and penalties accrue during CNC status. The IRS will also offset future refunds to collect the tax debt. However, the 10 year statute of limitation for collection continues to run. CNC status does not toll the collection limitation period.

The financial analysis for CNC status focuses on 3 types of necessary living expenses: national standards, local standards and other expenses. The individual taxpayer’s financial information generally must be compiled on a Form 433-A.

National standards are automatically used for clothing, food, housekeeping, personal care and out of pocket health care expenses. If a taxpayer claims more than the national standards, she must substantiate and justify each separate expense of the total national standard.

For housing and transportation, taxpayers are allowed the local standard or the amount actually paid, whichever is less. On-line access to the national and local standards can be found at I.R.M. 5.15.1-2.

75 I.R.M. 5.16.1.1, 5.16.1.2.9.
76 I.R.C. § 6343(e); I.R.M. 5.16.1.2.9 (7).
77 Vinatieri v. Comm’r, 133 T.C. 392 (2009); I.R.M. 5.16.1.2.9; 8.22.7.7 (4).
78 I.R.M. 5.15.1.7.
79 I.R.M. 5.16.1.2.9.
80 I.R.M. 5.15.1.8.
81 I.R.M. 5.15.1.9.
“Other expenses” may be considered if they meet the necessary expense test. The issue is whether they provide for the health and welfare of the taxpayer and/or his family or are for the production of income.\textsuperscript{82} Examples of “other expenses” found necessary by the IRS include taxes secured debt and court ordered payments.\textsuperscript{83}

### 7.3 INSTALLMENT AGREEMENTS

#### 7.3.1 Overview

A taxpayer may make monthly payments through an installment agreement if he is not financially able to pay his tax debt immediately. The IRS generally will not take collection actions while an installment agreement is being considered, in effect, or on appeal.

The minimum monthly payment on an installment agreement is $25. The time periods for the installment agreement vary. Generally, the installment agreement should not extend beyond the time remaining on the collection statute of limitation. Low income taxpayers who pay a small monthly payment may not be reducing their principal tax debt given the interest rates charged on the taxes owed. The fees for setting up installment agreements vary. Most low-income taxpayers will qualify for a $43 set up fee. Use Form 13844 to apply for the reduced $43 fee charged to low-income taxpayers.

If a taxpayer can pay the full amount owed within 120 days, he may want to apply for a 120 day suspension of collection activity to gather the funds.\textsuperscript{84} In cases of financial hardship, a longer suspension of collection activity may be possible.\textsuperscript{85} This procedure allows the taxpayer to avoid the fees for setting up an installment agreement.

Partial installment agreements are now authorized.\textsuperscript{86} Taxpayers who request partial installment agreements will be asked to address how equity in assets can be used to pay off the tax debt.

Once the installment agreement is approved, the IRS and the taxpayer are bound by the agreement unless the taxpayer misses a payment, fails to file tax returns, provided inaccurate information during the negotiations or his financial condition changes. Denials or terminations of installment agreements may be appealed using Form 9423, and later reviewed in Tax Court under the abuse of discretion standard. The IRS will allow an installment agreement to be reinstated one time, but will require a reinstatement fee. If a taxpayer is in danger of default on an installment agreement, he should contact the IRS.

Taxpayers who owe less than $50,000 may apply for an installment agreement (guaranteed or streamlined) by several methods: (1) apply online (2) call the phone number on the IRS notice or bill or (3) complete and mail a Form 9465, Installment Agreement Request. If a taxpayer owes more than $50,000, he will have to complete a Form 433-F which requires certain financial information from the taxpayer.

The major types of installment agreements are (1) guaranteed, (2) streamlined and (3) regular, discussed below:

\textsuperscript{82}\textsuperscript{82}I.R.M. 5.15.1.10.
\textsuperscript{83}\textsuperscript{83}I.R.M. 5.15.1.10.
\textsuperscript{84}\textsuperscript{84}I.R.M. 5.14.5.5
\textsuperscript{85}\textsuperscript{85}I.R.C. § 6161(a)(1); Reg. § 1.6161-1(a).
\textsuperscript{86}\textsuperscript{86}I.R.C. § 6159; I.R.M. 5.14.2.1.
7.3.2 Guaranteed installment agreements

A taxpayer will qualify for a "guaranteed" installment agreement without a financial analysis if:

- he owes less than $10,000;
- has been in tax compliance for the 5 prior years; and
- can fully pay the tax within 3 years

7.3.3 Streamlined installment agreements

An individual taxpayer may now apply for a streamlined installment agreement if the aggregate unpaid balance is less than $50,000 and can be fully paid within 72 months. Full compliance (i.e., filing of tax returns) is required for a streamlined installment agreement. A streamlined installment agreement can be granted without submission of a collection information statement to the IRS.

7.3.4 Regular installment agreements–financial analysis required

If a taxpayer does not qualify for a guaranteed or streamlined installment agreement, he will have to apply for a regular installment agreement. This procedure requires completion of (1) a Form 9465-FS and (2) a Form 433-F collection information statement. The Form 433-F is used to analyze the taxpayer's ability to pay based on IRS collection financial standards. The IRS generally does not grant regular installment agreements if the taxpayer can fully pay the liability from assets and disposable income.

7.3.5 Options for paying installment agreements

Taxpayers may pay installment agreements by check or money order, direct debit from a checking account (Form 433-D), payroll deduction (Form 2159), Electronic Federal Tax Payment system, or credit card. A direct debit installment agreement may qualify a taxpayer for withdrawal of a lien after 3 months of probation.

7.4 OFFERS IN COMPROMISE

You have heard the TV ads about settling IRS debt for pennies on the dollars? These tax debt settlement firms are peddling help with filing "Offers in Compromise." An Offer in Compromise can provide substantial relief to a qualified taxpayer. Indigent and disabled taxpayers, with no assets, can settle tax debt for very small amounts.

Tax lawyers at legal aid programs help taxpayers with Offer in Compromise applications for free. Some of the private firms scam taxpayers by taking fees as high as $3,000 and then doing very little to get the Offer in Compromise approved by the IRS. They fail to provide the back-up documents and negotiation required for a successful Offer in Compromise. Some firms take fees from taxpayers who have no chance of getting an Offer in Compromise, e.g., a taxpayer with substantial retirement accounts or real estate holdings.

An Offer in Compromise may be submitted on the basis of (1) doubt as to collectibility, (2) doubt as to liability or (3) effective tax administration. Most offers are submitted for doubt as to collectibility.

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89 I.R.C. § 7122.
An Offer in Compromise is initiated by filing a Form 656 which requires information and supporting documentation from the taxpayer on his income, assets and expenses. The filing fee for an Offer is a non-refundable $150. However, the fee may be waived for a taxpayer whose income is below 250% of poverty. Use Form 656A for waiver of the fee. A taxpayer must file all required tax returns in order for his Offer in Compromise to be considered.

The purpose of the Offer in Compromise program is to settle tax debts for the maximum amount that the taxpayer can pay out of his net current assets and future income potential. The amount of the offer is computed as the sum of (1) net realizable assets\(^{90}\) and (2) gross income minus necessary living expenses. Even if the computed “offer” amount is zero, the taxpayer should still offer at least $1. The Internal Revenue Manual has extensive rules on how the maximum collection potential is determined.\(^{91}\) After the filing of the Offer, an attorney will often need to advocate with the IRS for the proposed offer amount. The Internal Revenue Manual rules are useful in this advocacy since the IRS is supposed to follow them.\(^{92}\) IRS requests for additional information should be timely responded to.

Levy is suspended while an Offer-in-Compromise is pending or in effect. I.R.C. § 6331(k). The IRS is not required to release a prior levy upon the taxpayer’s filing of an Offer in Compromise. However, it will usually release the levy if the taxpayer shows economic hardship. “Rejections” of Offers in Compromise may be appealed to the IRS Appeals Office. I.R.C. § 7122(e). Levy is suspended pending an appeal. I.R.C. § 6331(k). If the IRS “rejects” an Offer-in-Compromise, the taxpayer may be able to appeal the collection action under I.R.C. §§ 6320, 6330 or under the Collection Appeals Program. Rev. Proc. 2003-71.\(^{93}\)

Possible disadvantages to an Offer in Compromise include an extension of the 10 year statute of limitation by the pendency of the offer plus 1 year, forfeiture of certain tax refunds, filing of tax liens to protect the IRS’s interests, adverse impact on bankruptcy options and reinstatement of the full debt, plus penalties and interest, if the taxpayer defaults on the offer.\(^{94}\) Also, an Offer in Compromise will preclude a subsequent innocent spouse claim for a tax year covered by the Offer. I.R.M. 25.15.5.15.

The IRS may allow the taxpayer to pay off the debt in a lump sum payment or in installments over a period of time, not to exceed the time remaining on the statutory period for collection.\(^{95}\) The taxpayer will be given a fixed monthly payment amount if an Offer in Compromise is accepted. Be sure to structure a realistic compromise that provides the taxpayer with adequate means for basic living expenses.

If an Offer in Compromise is accepted, a taxpayer must file tax returns and pay her taxes for the next 5 years. Non-compliance could result in a default and enforcement of the compromised taxes by the IRS. Be sure to advise your client of her duty to file and pay taxes per the Offer in Compromise agreement. Document your advice in writing.

\(^{90}\) “Net realizable assets” equals the Quick Sale Value of an asset (generally 80% of fair market value) minus the first encumbrance, fix-up costs, broker fees, etc.

\(^{91}\) I.R.M. 5.8.5; 5.15.

\(^{92}\) *Fairamb v. Comm’r*, T.C. Mem 2010-22.

\(^{93}\) Returns of offers for additional information are not “rejections.”


\(^{95}\) I.R.M. 5.8.1.10.4.
If an Offer in Compromise is rejected, the taxpayer may appeal the rejection to an IRS Appeals Officer. If the Offer in Compromise was submitted as part of a collection due process hearing, the rejection may be appealed to Tax Court under an abuse of discretion standard.

8. BANKRUPTCY

8.1 YOU SHOULD ORDER A TAX TRANSCRIPT FROM THE IRS IN ALL BANKRUPTCIES

Always order an account record or tax transcript from the IRS. This information will help you to determine what taxes are owed and whether they are dischargeable. Without accurate information on the assessment dates and tax return filing dates, you may file a bankruptcy before a tax becomes dischargeable and saddle the debtor with tax debt that he could have discharged. Also, a tax transcript or account record will enable you to verify that your client has filed all required tax returns.

8.2 ALL BANKRUPTCY DEBTORS MUST PROVIDE THE TRUSTEE WITH THEIR MOST RECENT TAX RETURN

At least 7 days before the first date set for the creditors meeting, the debtor must provide the trustee with a copy of the federal income tax return (or tax transcript) for the most recent year ending before the commencement of the case if a return was required for that year. Also, creditors must be given a copy of the tax return or tax transcript if the creditor makes a timely request, which is defined as 15 days before the first date set for the creditors meeting. If the debtor fails to file a required return or transcript, his bankruptcy may be dismissed. An interested party may move for dismissal. If such a motion is filed, the debtor must show that his failure was due to circumstances beyond his control.

If a taxpayer has lost his return, he can usually get a copy from his tax preparer. Most low-income taxpayers use professional tax preparation services. Also, low-income tax clinic attorneys have immediate electronic access to IRS tax transcripts provided the client signs a Form 2848 authorizing the low-income tax clinic attorney to represent him in tax matters for the relevant years. If these options are not available, you should immediately file an IRS Form 4506-T to obtain a record of account, tax transcript or “account transcript.”

8.3 POST-BANKRUPTCY TAX RETURNS MUST BE TIMELY FILED

For all bankruptcies, a debtor must file any tax return that becomes due after the commencement of the bankruptcy case or obtain an extension for filing the return before the due date. If the debtor fails to timely file required returns or extensions, a taxing authority may request that the court dismiss the bankruptcy or convert it to another chapter of the Bankruptcy Code. If the debtor does not file the required return or obtain an extension within 90 days after the taxing authority’s request, the court must dismiss or convert the case. You should advise bankruptcy clients of their duties to file tax returns and insure that they comply.

96 I.R.M. 5.8.7.6.5.
98 11 U.S.C § 521(e)(2)(a).
8.4 CHAPTER 13 DEBTORS MUST FILE ANY REQUIRED TAX RETURNS FOR THE LAST 4 YEARS

Chapter 13 debtors must file all required tax returns for tax periods ending within 4 years of the debtor’s bankruptcy filing. Prior year tax return forms can be found at www.irs.gov. The required returns must be filed with the IRS before the first meeting of the creditors. A debtor may request that a trustee hold the creditors meeting open for an additional 120 days to enable the debtor to file the required returns. The failure to file the required returns will prevent confirmation of a Ch. 13 bankruptcy plan and will result in the dismissal of the Ch. 13 case or conversion to Ch. 7.

8.5 THE FILING OF A BANKRUPTCY–TIMING OF TAX REFUNDS–REPORT TO TRUSTEE

A tax refund attributable to pre-petition income is property of the bankruptcy estate.101

Generally, a trustee will pro-rate a tax refund by the days prior to the bankruptcy filing and treat the pro-rated part of a post-petition tax refund as a pre-petition asset available to satisfy pre-petition debts.102 For example, if the debtor filed his bankruptcy 73% of the way through the year, the trustee will claim 73% of the tax refund under the “pro rata by days” method. If the taxpayer is able to file earlier in a year, he will be able to protect more of a tax refund from the trustee and creditors.

A child tax credit differs from the earned income credit in several respects. The child tax credit has both refundable and non-refundable portions. The child tax credit may not accrue until the end of the tax year. Bankruptcy courts have held that the refundable portion of the child tax credit is property of the estate, but that the non-refundable portion is not.103 One court has held that no part of the child tax credit is property of the bankruptcy estate since the earliest accrual date of a child tax credit is January 1 of the next year.104

In Louisiana, and many other states, large portions of a low-income taxpayer’s tax refund may be exempt from seizure.105 For example, in Louisiana, the earned income credit is exempt from seizure. However, the child tax credit is not exempt in Louisiana.106 Thus, in Louisiana, the issue will be how much of the child tax credit portion of the tax refund (generally about $1,000) qualifies as pre-petition assets subject to turnover to the trustee.

Many bankruptcy courts have standing orders for debtors to turnover tax refunds to the trustee. Entitlement to the refunds can be litigated by motion should the trustee to decide to claim all or part of the refund.
8.6 **HOW TO LITIGATE TAX ISSUES WITH THE IRS IN A BANKRUPTCY**

If the debtor owes federal taxes, name the IRS as a creditor. Use the following address for your bankruptcy schedule: Internal Revenue Service, c/o Centralized Insolvency Operations, P.O. Box 7346, Philadelphia, PA 19101-7346. The telephone number for this IRS unit is 800-913-9358.

Be sure to claim the earned income credit portion of any tax refund claim as exempt if this credit is exempt under your state law.\(^{107}\) List any pending tax refund claims as assets.

Priority tax debt should be listed on Schedule E unless secured by a lien.\(^{108}\) Non-priority tax debt should be listed on Schedule F. Be careful to list dischargeable non-priority tax debt on Schedule F so as to avoid an admission of non-dischargeability.

An adversary proceeding is not required to discharge a tax debt. However, a debtor can only be certain that a tax has been discharged by filing an adversary proceeding and obtaining a judicial determination of the dischargeability of the debt. Before you file an adversary proceeding, call the IRS attorneys. They may be willing to abate the tax. Adversary proceedings and motions against the IRS should be served on the Attorney General, local United States attorney and the designated IRS office.\(^{109}\)

If you dispute a proof of claim by the IRS or its “secured” status, first try to resolve the matter with the IRS insolvency advisor. Resolution at this level could obviate the need for litigation of your issue.

A bankruptcy court may also have jurisdiction to determine a tax liability where the taxpayer has not fully paid the tax. For example, you may persuade the bankruptcy court to determine whether the taxpayer should have received an Earned Income Credit. This can be done by filing an 11 U.S.C. § 505 motion to determine tax liability.\(^{110}\) Tax refund claims may be heard by the bankruptcy court even where the taxpayer has not met the jurisdictional requirements for district court litigation, i.e., full payment of the tax deficiency, and has missed the deadlines for Tax Court review.

Ch. 13 bankruptcy debtors, unlike Ch. 7 debtors, have the right (or standing) to litigate any refund lawsuits in their own names.\(^{111}\) The trustee will seek to recover tax refunds won by the Ch. 13 debtor as “disposable income” that must be included in the plan. However, there may be challenges to the trustee’s action depending on your jurisdiction and the facts of the debtor’s financial situation.\(^{112}\)

8.7 **TAXES THAT MAY BE DISCHARGED IN BANKRUPTCY**

Certain income tax debts may be discharged in bankruptcy. A Chapter 7 or Chapter 13 bankruptcy may provide some tax debt relief. If most of the client’s debt is federal tax, an Offer in Compromise (IRS Form 656) may provide the client with better relief from his tax debt than a bankruptcy. In some cases, an Offer in Compromise may be the only option if the taxpayer filed his tax return after the IRS assessed the tax by a substitute for return.

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\(^{107}\) In Louisiana, the earned income credit is exempt from seizure under La. R.S. 13: 3881(A)(6).

\(^{108}\) See 11 U.S.C. § 507. Secured debt is listed on Schedule D.

\(^{109}\) Bankruptcy Rule 7004(d)(4).

\(^{110}\) Bankruptcy Rule 9014, *In re Luongo*, 259 F.3d 323 (5th Cir. 2001); *Matter of Taylor*, 132 F.3d 256 (5th Cir. 1998).

\(^{111}\) See *e.g.*, *Cable v. Ivy Tech State College*, 200 F.3d 467, 472-74 (7th Cir. 1999).

\(^{112}\) See *e.g.*, *In re Freeman*, 86 F.3d 478 (6th Cir. 1996).
In a bankruptcy, you should always evaluate whether any of the income tax debt can be discharged. The analysis should be done for each tax year. The rules for determining whether an income tax is dischargeable are very complex. Income taxes are only dischargeable if all of these tests are met:

- **The 11 U.S.C. § 523(a) timely filed return test—a new bar to discharge?**
  
  In a 2010 Chief Counsel notice, the IRS held that a late filed tax return would not bar bankruptcy discharge of the related tax unless the return was filed after an assessment pursuant to § 6020(b) substitute for return. However, despite this favorable IRS notice, many courts have held that a late filed return [with the possible exception of a return filed pursuant to I.R.C. § 6020(a)] can never be a "return" for bankruptcy discharge purposes. The IRS notice had rejected the reasoning of several courts that found that a late filed return barred discharge. If you have this issue, you should check to see if the IRS has changed its 2010 position in light of recent court rulings that bar discharge.

- **The 3 year tax return due date test**
  
  Tax return was due at least 3 years before bankruptcy filed. Tax return was due at least 3 years before bankruptcy filed. For example, if a 2007 tax return was due on April 15, 2008, the bankruptcy petition must be filed after April 15, 2011, for the 2007 income tax to be dischargeable. The 3 year look back period may be suspended by bankruptcy and collection due process appeals. Offers in compromise don’t suspend the 3 year period.

- **The 2 year tax return filing date test**
  
  Tax return must have been filed at least 2 years before the bankruptcy was filed. This test will exclude debtors with unfiled returns and certain late filed returns. For example, if a 2007 tax return was not filed until April 15, 2009, the bankruptcy could not be filed until after April 15, 2011, if the debtor seeks to discharge the 2007 income taxes. Note that the "filing date" in the IRS records may be weeks or even months after the debtor mailed the return to the IRS. The only way to know the IRS filing date is to obtain the tax transcript or account record from the IRS.

I.R.C. § 6020 (b) authorizes the IRS to prepare a “substitute for return” for a taxpayer who fails to make or file a return. A substitute for return filed by the IRS without the taxpayer’s participation and consent will not qualify as a tax return for the two year tax return filing date test. Furthermore, the IRS maintains that a tax can't be discharged if the taxpayer filed his tax

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113 See National Consumer Law Center, Consumer Bankruptcy Law and Practice (9th ed. 2009), § 15.4.3.1; Effectively Representing your Client Before the New IRS (ABA 5th ed. 2011), Ch. 21; M. King, Discharging Taxes in Consumer Bankruptcy Cases (2012).
114 Chief Counsel Notice, CC 2010-016 (Sept. 2, 2010).
115 See e.g., In re McCoy, 666 F.3d 924 (5th Cir. 2012) (interpreting post-2005 language of 11 U.S.C. § 523(a)(1)(B)(i)).
116 For an example of the interplay between the look back periods, see Severo v. Comm’r, 129 T.C. 160 (2007), aff’d 586 F.3d 1213 (9th Cir. 2009).
117 See In re Loving, 2011 WL 3800042 (Bankr. S.D. Ala. 2011)(taxes not dischargeable because debtor filed on April 8, 3 years after she filed her tax return, but less than 3 years after due date of the return).
118 I.R.C. §§ 507(a)(8).
119 Chief Counsel Advice 2004-04-049 (Jan. 5, 2004).
return after the IRS assessed a tax deficiency when the taxpayer failed to respond to the 90 day deficiency letters based on the IRS’s preparation of a “substitute for return.”

- **The assessment date test (at least 240 days before bankruptcy filed)**
  For the assessment date test, the IRS must have assessed the tax against the tax debtor at least 240 days before the bankruptcy petition was filed. You can only determine the assessment date by reviewing the IRS tax transcript or account record. Generally, assessment is made within 3 years of the tax return’s due date. You don’t want to file a bankruptcy petition before 240 days (with extensions) has run from the assessment.

  The 240 day assessment test may extended if the taxpayer filed a prior bankruptcy. The length of the bankruptcy plus 6 months must be added to the time periods. Offers in Compromise, collection due process appeals and Taxpayer Assistance Orders may also toll or increase the time requirements.

- **No fraud or willful evasion**
  A fraudulent return or a willful attempt to evade or defeat tax will deny the debtor the right to discharge the tax debt. The IRS bears the burden of proof on fraud or evasion.

- **Timely notification test**
  To discharge a tax, the debtor must notify the IRS of the bankruptcy in time for the IRS to file a timely proof of claim.

### 8.8 WHAT TAXES MUST BE PAID IN A CHAPTER 13 BANKRUPTCY?

In Ch. 13 bankruptcies, the plan must provide for priority and secured tax debts. Older taxes may be “non-priority” and therefore dischargeable. In some cases, you can prevent a tax debt from becoming “secured” by filing the bankruptcy before the IRS files its lien.

### 8.9 ARE THERE ANY TAX ADVANTAGES TO A CHAPTER 13 BANKRUPTCY?

For the most part, the 2005 bankruptcy legislation eliminated the so-called Chapter 13 “superdischarge” of taxes. However, Ch. 13 can still be used to discharge priority taxes paid with money from loans and credit cards, tax penalties and post-petition interest on certain taxes.

A Ch. 13 bankruptcy may secure a more favorable repayment plan for taxes than an installment agreement.

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122 See Effective Representing Your Client Before the IRS, § 17.2 (ABA 5th ed. 2011)(information on how to ascertain assessment date).

123 *Severo v. Comm’r*, 129 T.C. 160 (2007), aff’d 586 F.3d 1213 (9th Cir. 2009).


125 *See e.g., Matter of Bruner*, 55 F.3d 195 (5th Cir. 1995).


127 *United States v. Hairepoulos*, 118 F.3d 1240 (8th Cir. 1997).

(890)
8.10 EFFECT OF BANKRUPTCY ON LIENS

Discharge of a tax debt in bankruptcy will not extinguish a pre-petition lien.\textsuperscript{128} It only extinguishes the personal liability. Generally, liens recorded before the bankruptcy will not be canceled.\textsuperscript{129} If they survive, the IRS will be able to seize the liened asset. This puts debtors with homes and retirement plans at risk of future tax collection.\textsuperscript{130} However, sometimes the IRS does not bother enforcing liens after a bankruptcy. A tax lien will not attach to property acquired after a bankruptcy if the underlying tax liability was discharged in the bankruptcy.\textsuperscript{131}

8.11 BANKRUPTCY STAY OF TAX COLLECTIONS AND LITIGATION

A bankruptcy stay will apply to IRS collection actions. A Chapter 7 bankruptcy will even stay collection of nondischargeable taxes for a few months. The IRS can be sued for violating the 11 U.S.C. § 362 (a) stay or the 11 U.S.C.§ 524 discharge injunction. Generally, collection activity in violation of the stay will be void.\textsuperscript{132} A § 362(a) bankruptcy stay will also stay the commencement or continuation of a Tax Court proceeding.\textsuperscript{133}

During a stay, the IRS may take these actions without violating the stay:
• set-off a pre-petition tax refund against pre-petition income tax debt
• intercept an income tax refund for payment of past due child support
• assess the tax
• issue a notice and demand for payment of an assessment
• issue a notice of deficiency while a stay is in effect.\textsuperscript{134}
• conduct an audit to determine a tax liability

8.12 EFFECT OF BANKRUPTCY ON COLLECTION STATUTE OF LIMITATIONS

The time period to collect taxes is extended by the filing of a bankruptcy that does not discharge all of the taxes. The balance on the 10 year statute of limitations is extended by the length of the bankruptcy plus 6 months. I.R.C. § 6503 (h).

9. FAMILY LAW AND TAX ISSUES

9.1 TAX COLLECTION REMEDIES AGAINST SPOUSES

If Louisiana spouses are jointly liable for federal taxes because they filed a joint tax return, the IRS may collect taxes from either spouse’s separate property or any of their community property.\textsuperscript{135}

In some cases, only one spouse may owe the tax liability. This situation may arise when:
• one spouse incurred a pre-marital tax debt
• the spouses did not file a tax return

\textsuperscript{128} In the Matter of Orr, 180 F.3d 656 (5th Cir. 1999); In re Isom , 901 F.2d 744 (9th Cir. 1990).
\textsuperscript{129} Generally, a lien will be valid until the 10 year statute of limitations has run. I.R.C. §§ 6322, 6502(a).
\textsuperscript{130} Generally, the IRS will not seek to levy retirement plans unless there has been “flagrant misconduct” by the debtor. I.R.M. 5.9.17.4.3; 5.11.6.2.
\textsuperscript{131} I.R.M. 5.17.2.5.6.
\textsuperscript{134} 11 U.S.C. § 362(b)(9), In re Luongo, 259 F.3d 323 (5th Cir. 2001)(IRS right to offset); I.R.M. 5.9.2.5.
\textsuperscript{135} I.R.M. 25.18.4.1.
the spouses filed separate returns  
• one spouse qualified for innocent spouse relief  
• one spouse incurs self-employment tax liability  

The IRS may collect a liable spouse’s pre-marital tax debt from all of the liable spouse’s separate property. Louisiana is a 100% community property state for tax collection purposes. In Louisiana, the IRS can collect a liable spouse’s pre-marital or post-marital tax debt from 100% of the community property. Generally, in Louisiana, the IRS is not limited to collection from the liable spouse’s 50% share of community property. In community property states, the IRS may seize part of the non-liable spouse’s wages to satisfy the liable spouse’s separate tax debt if the wages are community property. Generally, this could not happen in states that are not community property states (unless state law allows seizure of the non-liable spouse’s property).

Currently, a spouse’s wages, even if the spouses are separated, are community property in Louisiana and may be levied against by the IRS for federal tax debt. However, a wage levy against a non-liable spouse’s wage is not a “continuous levy” under I.R.C. § 6331(e). A separate levy must be issued for each pay check. A non-liable spouse may claim the exemptions for levied wages.

Jointly owned property can be seized by the IRS. However, the IRS must compensate the nondebtor for her share. The district courts have some discretion under I.R.C. § 7403 to deny a foreclosure sale where the IRS holds a lien on only part of the house.

9.2 INJURED SPOUSE RELIEF—NON-LIABLE SPOUSE’S RIGHTS TO TAX REFUND

Under I.R.C. § 6402, the IRS may offset tax refunds to satisfy certain unpaid debts. Thus, a taxpayer’s tax refund may not be paid to her if her spouse was delinquent on child support, state taxes or past due federal debts. Typically, the IRS seizes part or all of the tax refund to pay to the qualified creditor that invoked the § 6402 offset procedures.

In Louisiana, the IRS may seize or offset 100% of the spouses’ tax refund to collect one spouse’s unpaid federal tax debt. However, the rights of other creditors to an offset of a non-liable spouse’s tax refunds are more limited. These creditors may not offset against the non-liable spouse’s share of community property. Note, however, that the State of Louisiana may offset against a state tax refund, that is community property, to satisfy one spouse’s separate debt.

\[ \text{References:} \]
- Rev. Rul. 2004-72, I.R.B. 2004-30; I.R.M. 25.18.4.6. In states that are “50% community property” states, the IRS may be limited to collection against 50% of the community property.
- I.R.M. 25.18.4.3.
- I.R.M. 25.18.5.8.
- La. Civ. Code art. 2345 (a spouse’s separate obligation may be satisfied from community property during the community); Price v. Secretary, 664 So.2d 802 (La. App. 3 Cir. 1995), writ denied 669 So.2d 405 (La. 1996) (wife’s wages garnished to satisfy husband’s separate tax obligation). In Louisiana, child support that accrues during a second marriage is viewed as a community obligation. Gill v. Gill, 895 So.2d 807 (La. App. 2 Cir. 2005). The State of Louisiana will offset a community tax refund to collect child support owed by one spouse for children of a prior marriage, whether it accrues during the second marriage or is for arrearages that pre-date the second marriage.
If a joint return was filed and both spouses had income and tax payments on the return, the non-liable spouse may request her portion of the tax refund by filing a Form 8379. Residents of community property states may apply for injured spouse relief if they were not required to pay the past due amount that was offset by the IRS at the request of a qualified creditor. Overpayments are allocated according to state law in community property states.

9.3 MARITAL DISPUTES OVER TAX REFUNDS

Ownership of tax refunds is governed by state law. In community property states, division of a tax refund may require an analysis of the community and separate nature of the underlying income earned. In Louisiana, the classification of property as community or separate is fixed at the time of acquisition. By comparison, ownership of the stimulus refund payments may be owned 50-50 and not depend on the parties’ respective incomes.

For most low-income taxpayers, the Earned Income Credit accounts for most of their tax refund. Federal law deems the Earned Income Credit tax refund to be the separate property of the spouse who was entitled to this tax refund—even in community property states. Thus, the other spouse does not have a community property claim for any portion of the Earned Income Credit. Furthermore, one-time tax refunds are not “income” for the purposes of La. R.S. 9:315 child support calculations.

9.4 TAX LIABILITY IN COMMUNITY PROPERTY STATES

9.4.1 Income Tax in Community Property States

What are a spouse’s tax liabilities after separation, but before divorce?

If separate tax returns are filed by a married couple in a community property state, each spouse must report one-half of the community income. The higher income spouse will want this community property law to apply, whereas the lower income spouse will want to argue that an exception to this rule exists. In a community property state, each spouse should be limited to 50% of any cancellation of debt income claimed by the IRS.

The Internal Revenue Code § 66 establishes 4 exceptions to the rule that a spouse has to report one-half of community income:

1. The spouses lived apart for the entire year, filed separate returns and did not transfer more than a de minimis amount of earned income between them.

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144 Robinson v. Robinson, 778 So.2d 1105 (La. 2001).

145 See e.g., In re Thompson, 396 B.R. 5 (Bankr. N.D. Ind. 2008).


150 I.R.C. § 66(a); Reg. § 1.66-2. I.R.C. § 66(a) relief is automatic if the requirements are met. For purposes of § 66 (a), any amount of income transferred for the benefit of the spouses’ child is not treated as a transfer to the spouse. Reg. § 1.66-2(c).
(2) The taxpayer was not notified by the other spouse of the nature and amount of the income before the due date (including extensions) for the filing of the taxpayer’s return and the spouse acted as if solely entitled to the income.\(^{151}\) Only the IRS may invoke this exception which arises under § 66(b).\(^{152}\)

(3) Traditional innocent spouse relief\(^{153}\) from community property laws under I.R.C. § 66(c) for an item of community income if:

(a) the requesting spouse did not file a joint return for the tax year;

(b) the income item omitted from the gross income of the requesting spouse’s income would be treated as the other spouse’s income under I.R.C. § 879(a) (Note: the other spouse’s wages or income from a trade and business he operated as a sole proprietor are the most common examples);

(c) the requesting spouse proves that she did not know of, and had no reason to know of, the item of community income; and

(d) taking into account all of the facts and circumstances, it is inequitable to include the item of community income in the requesting spouse’s individual income.

(4) Equitable relief under the “flush language” of I.R.C. § 66(c) for spouses who don’t meet the requirements for traditional innocent spouse relief under I.R.C. § 66(c). See Rev. Proc. 2003-61, I.R.B. 2003-32; IRS Notice 2012-8.\(^{154}\)

**Warning:** The time limitation for requesting traditional innocent spouse relief under I.R.C. § 66 (c) is different from the time limitations for I.R.C. § 6015 innocent spouse relief or I.R.C. § 66(c) equitable innocent spouse relief. Reg. § 1.66-1(j) states that traditional innocent spouse relief under I.R.C. § 66(c) must be requested no later than 6 months *before* the statute of limitation on assessment expires for the non-requesting spouse. By contrast, equitable innocent spouse relief under § 66(c) must be claimed within 2 years of the first collection activity against the electing spouse.\(^{155}\)

Some community property income may be excluded from a spouse’s income by other laws. Examples include:

- pension distribution in a community property state is taxable to non-employee spouse even when the employee spouse received distribution and turned funds over to non-employee spouse for her property interest in pension as required by a state court judgment. *Powell v. Comm’r*, 101 T.C. 489 (1993); *see also Mitchell v. Comm’r*, 131 T.C. No. 15 (2008)(QDRO distribution taxable to non-employee spouse in community property state).\(^{156}\)

\(^{151}\) I.R.C. § 66(b); Reg. § 1. 66-3. The IRS may deny a spouse the federal income tax benefits of community property law on items of community income. Under the regulations, a spouse will not have acted as solely entitled if the income was “used or made available for the benefit of the marital community.” Reg. § 1.66-3(a). It is not clear whether a small amount of funds paid for family support would bar the IRS from invoking I.R.C. § 66(b) against a taxpayer.

\(^{152}\) *Hardy v. Comm’r*, 181 F.3d 1002 (9th Cir. 1999).

\(^{153}\) If a married couple filed a joint return, I.R.C. § 6015 would govern requests for innocent spouse relief. I.R.C. § 66(c) does not apply to joint filers.

\(^{154}\) Note that the “absence of significant benefit” test is different for equitable relief under I.R.C. § 66(c), than for traditional relief under I.R.C. § 66(c)(4). *See Felt v. Comm’r*, T.C. Memo 2009-245. It is easier to meet the § 66(c) “absence of substantial benefit” test.


\(^{156}\) A different outcome may result when the employee spouse pays the non-employee spouse with his separate wages rather than the pension distribution. *Comm’r v. Dunkin*, 500 F.3d 1065 (9th Cir. 2007).
• the spouse who does not receive an IRA distribution is not taxed on her community property share of the IRA distribution.\textsuperscript{157} Similarly, this spouse would not be liable for the I.R.C. § 72(t) additional tax on an IRA distribution.\textsuperscript{158}

9.4.2 Self-Employment Tax in Community Property States

Net self-employment income is community property income. Generally, community property rules will govern regular income tax liability and require the non-earning spouse to include one-half of the earning spouse's income in her separate tax return. However, even in a community property state, self-employment income will be allocated entirely to the self-employed spouse for the purposes of self-employment tax.\textsuperscript{159} In other words, community property law is disregarded for the purposes of calculating self-employment taxes. This rule can provide significant tax relief for the non-earning spouse since self-employment tax is often about 60% of the tax liability faced by low-income taxpayers.

9.5 INNOCENT SPOUSE RELIEF

Innocent spouse relief cases are complex. Both federal and Louisiana law have provisions for relieving innocent spouses from tax deficiencies or understatements. You should be able to identify when a client may have a potential innocent spouse relief claim. Appropriate claims should be filed with both the IRS and the Louisiana Department of Revenue. Innocent spouse relief often arises in a domestic violence case. It is recommended that these cases be referred to a low-income tax clinic lawyer or other tax law specialist.

The IRS has a spousal tax relief eligibility explorer on its web page to assist with evaluating eligibility for innocent spouse relief. For a comprehensive discussion of § 6015 innocent spouse relief, see R. Nadler, \textit{A Practitioner's Guide to Innocent Spouse Relief: Proven Strategies for Winning Section 6015 Tax Cases} (ABA 2011).

The Internal Revenue Code provides 3 forms of relief to innocent spouses: (1) innocent spouse relief, (2) separation of liability and (3) equitable relief. These 3 forms of relief are discussed below:

9.5.1 Innocent Spouse Relief—§ 6015 (b)

§ 6015 (b) innocent spouse relief can’t be used for an underpayment.\textsuperscript{160} Generally, a taxpayer may be eligible for innocent spouse relief if she:

• did not know or have reason to know about the unreported income or erroneous items, and
• did not receive benefits from the unreported income or erroneous items.

If the requesting spouse knew or had reason to know of the understatement, innocent spouse relief is not available. Reg. § 1.6015-2(a)(3). The reason to know standard considers all the facts and circumstances (including the nature of the item, the requesting spouse’s education and business background, and the extent of that spouse’s participation) and inquires whether a reasonable person in similar circumstances would have known of the understatement. Reg. § 1.6015-2(c).

\textsuperscript{158}\textit{Morris v. Comm’r}, T.C. Memo 2002-17.
\textsuperscript{159}\textsc{I.R.C.} § 1402 (a)(5); Reg. § 1.1402(a)(8); IRM § 25.18.2.2; \textit{Chariton v. Comm’r}, 114 T.C. 333; \textit{Davis v. Comm’r}, T.C. Memo 1989-46; \textit{Gilliam v. Comm’r}, 60 Fed. Appx. 720 (10th Cir. 2003).
9.5.2 Separation of Liability — § 6015(c)

A separate tax liability election under § 6015(c) is available for a taxpayer who, at the time of election, is no longer married to or has been living apart for at least 12 months from the person with whom the taxpayer originally filed a joint return.

The separate liability treatment may be elected by the taxpayer who qualifies for such treatment under I.R.C. § 6015(c). To get this relief, the taxpayer must prove that a portion of the understatement was attributable to her spouse. A taxpayer can’t use § 6015(c) for an underpayment of tax liability. The determination of separate liability is made without regard to community property rights. Thus, the electing taxpayer is basically taxed on her own income as though she were filing a separate married return. If she did not have income, her tax liability will be zero.

Taxpayers are often successful under § 6015(c). Relief is easier to obtain under §6015(c) than § 6105 (b) since the IRS must prove actual knowledge of an erroneous item, as distinguished from “reason to know”, to deny apportioned liability under § 6015(c).

9.5.3 Equitable Relief—§ 6015(f) and § 66(c)

Legal aid clients, particularly domestic violence victims, often qualify for equitable relief under § 6015(f) or § 66(c).

The IRS may relieve an individual of liability if relief is not available under the innocent spouse rule [6015(b)] or the separate liability election [6015(c)] if it would be inequitable to hold the individual liable for any unpaid tax or deficiency. I.R.C. § 6015(f). The IRS automatically considers a taxpayer for equitable relief if innocent spouse and separate liability relief are denied. Note, unlike I.R.C. § 6015(b) and (c), §§ 6015(f) and 66(c) permit equitable relief from an underpayment of income tax. §§ 6015(b) and (c) only permit relief from understatements or proposed deficiencies. Rev. Proc. 2003-61, §4.04 may even allow refunds to the requesting spouse in some circumstances.

Even if relief is unavailable under § 6015(b) and (c), the IRS may relieve a spouse from liability under §§ 6015(f) and 66(c) if it would be inequitable to hold the spouse liable for any unpaid tax or liability. I.R.C. § 66 (c) provides equitable relief in community property states where a joint return was not filed. I.R.C. § 6015(f) applies if a joint return was filed (even in community property states).

On January 5, 2012, the IRS issued Notice 2012-8 which sets forth a proposed revision of Rev. Proc. 2003-61 which governs the evaluation of equitable innocent spouse relief. The IRS has stated that it will apply the factors in Notice 2012-8 until a new revenue procedure is adopted. However, until a new revenue procedure is adopted, Notice 2012-8 allows a taxpayer to elect for her case to be evaluated under Rev. Proc. 2003-61 if treatment under any of the Rev. Proc. 2003-61 factors would be more favorable to the taxpayer. Also, the Tax Court still applies Rev. Proc. 2003-

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162 Generally, the burden of proof is on the taxpayer for innocent spouse relief with the exception of the requirement that the IRS must prove actual knowledge to deny apportioned liability under § 6015(c); see e.g., Culver v. Comm’r, 116 T.C. 189 (2001).
61, but is not bound by IRS guidelines.\textsuperscript{165} IRS Chief Counsel has directed its attorneys to apply Notice 2012-8 and not to argue against relief based on the factors set forth in Rev. Proc. 2003-61.\textsuperscript{166} Therefore, you should evaluate the taxpayer’s case under both Notice 2012-8 and Rev. Proc. 2003-61 until a new revenue procedure is finally adopted. Pay particular attention to the new 2012 rules on abuse, financial control, economic hardship and the weighting of the factors.

The IRS revenue procedure for § 6015(f) and § 66(c) equitable relief is Rev. Proc. 2003-61, 2003-2 C.B. 296, which is being revised by the IRS as announced in Notice 2012-8. An analysis of Rev. Proc. 2003-61 and the jurisprudence is set forth below. Under Rev. Proc. 2003-61, the requesting spouse must satisfy 7 threshold conditions for § 6015(f) relief. See Rev. Proc. 2003-61, § 4.01. Conditions 1 and 2 below don’t apply for a § 66(c) equitable relief request. The threshold conditions are:

1. Filing a joint return
2. Relief denied under § 6015(b) and (c)
3. Application within 2 years of first collection activity\textsuperscript{167}
4. No transfer of asset as part of fraudulent scheme
5. No transfer of disqualified assets
6. Requesting spouse did not file or fail to file with fraudulent intent
7. Item resulting in deficiency or underpayment is attributable to non-requesting spouse, unless:
   - Attribution is due to operation of community property laws
   - Item is only nominally owned by requesting spouse
   - Non-requesting spouse misappropriated funds and the requesting spouse had no knowledge or reason to know of the misappropriation, or

If a case involves an underpayment on a joint return, the IRS will ordinarily grant § 6015(f) equitable relief if the taxpayer meets the 3 “safe harbor” conditions in § 4.02 of Rev. Proc. 2003-61, marital status, no knowledge of underpayment and economic hardship.\textsuperscript{168} In some cases, the marital status factor may be met even if the spouses lived separately in the same house.\textsuperscript{169} Equitable relief under § 4.02 is available to all joint return taxpayers with underpayments, including taxpayers in community property states.

A taxpayer may qualify for equitable relief under § 4.03 of Rev. Proc. 2003-61 if he filed a joint tax return, but does not qualify for “safe harbor” relief under § 4.02. Also, if partial relief is granted under § 4.02, a taxpayer may be eligible for total relief under § 4.03.\textsuperscript{170}

\textsuperscript{165} Sriram v. Comm’r, T.C. Memo 2012-91, n.7.
\textsuperscript{166} IRS CC-2012-004 (Jan. 5, 2012).
\textsuperscript{167} However, the IRS has recently decided not to impose the 2 year time limit for § 6015(f) equitable relief claims. Notice 2011-70, 2011-32 I.R.B. 135. The IRS has not made a similar pronouncement that the Rev. Proc. 2003-61 time limits for § 66(c) equitable relief claims are invalid.
\textsuperscript{168} Gonce v. Comm’r, T.C. Memo 2007-328.
\textsuperscript{169} Nihiser v. Comm’r, T.C. Memo 2008-135
\textsuperscript{170} Cf. Bruen v. Comm’r, T.C. Memo 2009-249.
Equitable relief is available under § 4.03 for the following taxpayers:

1. A “community property state” taxpayer who did not file a joint return, who requested relief under I.R.C. § 66(c) and met the applicable threshold conditions of § 4.01, i.e., conditions 3 to 7.

2. A spouse who filed a joint return, who met the § 4.01 threshold conditions, but did not qualify for “safe harbor” relief under § 4.02.

Under § 4.03, no single factor is determinative. All factors must be considered and weighed appropriately. The Tax Court now reviews IRS denials of § 6015(f) equitable relief under a de novo standard of review and a de novo scope of review. The Tax Court regularly reverses IRS denials of equitable relief. If the Tax Court finds that the IRS abused its discretion in denying equitable innocent spouse relief, it must decide the appropriate relief and may not remand the case to the IRS.

9.6 LOUISIANA STATE TAX INNOCENT SPOUSE RELIEF

The primary laws for innocent spouse relief from state taxes are La. R.S. 47:101(B)(7) and 47:1584. These laws are similar to the IRS rules for innocent spouse relief and are retroactive to all tax years. If possible, file the innocent spouse claim with the State within two years of the first collection activity directed to the innocent spouse. Guidelines for filing state innocent spouse relief claims are found in Louisiana Department of Revenue Technical Advisory Memorandum 99-003. Innocent spouses may also be relieved from suspension of driver’s licenses for failure to pay state taxes greater than $1,000.

9.7 DEPENDENCY EXEMPTIONS

Dependency exemptions reduce taxable income. However, they generally have little impact on a low-income taxpayer’s tax liability or refund. The real money comes from the Earned Income Credit and child care credits. In some cases, a separated, but married spouse may need the dependency exemption to qualify for the head of household filing status and the Earned Income Credit.

If a parent’s dependent is not a “qualifying child”, check to see if the dependent qualifies as a “qualified relative.” Receipt of Social Security, food stamps and rental subsidies may affect an indigent taxpayer’s ability to claim a dependency exemption for a “qualifying relative” as distinguished from a “qualifying child.”

9.8 DIVORCED OR SEPARATED PARENTS AND DEPENDENCY EXEMPTIONS

In most cases, a child of divorced or separated parents is the “qualifying child” of the custodial parent. The “custodial parent” is the parent with whom the child lived for the greater part of the year.

However, under I.R.C. § 152(e), the child may be treated as the qualifying child of the non-custodial parent if:

174 La. R.S. 47:101 establishes a two year limit for assertion of innocent spouse relief. However, La. R.S. 47:1584 (B)(4) provides authority for the Secretary to grant innocent relief after the expiration of the two years.
175 La. R.S. 47: 296.
176 I.R.C. § 152(c)(1)(B).
1. The parents are divorced or legally separated, separated under a written separation agreement, or lived apart at all times during last 6 months of the year, and
2. The child received over half of his support from the parents, and
3. The child is in the custody of one or both of the parents for more than half the year, and
4. Either (a) the custodial parent signs a Form 8332 or a written declaration that conforms to the substance of Form 8332, that she will not claim the dependency exemption, and the non-custodial parent attaches the declaration to his return, or (b) a pre-1985 divorce or maintenance decree or separation agreement that applies to 2008, states that the non-custodial parent can claim the child as a dependent, and the non-custodial parent provides at least $600 of the child’s support during the year.

These rules also apply to parents who never married.

9.9 Can a Divorce or Custody Decree Meet the Requirement of a Signed Form 8332?

Yes, if it is an unambiguous and unconditional release that is actually signed by the custodial parent herself. The decree must state that the custodial parent will not claim the dependency exemption. Armstrong v. Comm’r, 139 T.C. No. 18 (2012). Ambiguity as to the tax years for release of the exemption can be fatal.

A divorce decree that has a contingent release of the dependency exemption can’t conform to the substance of Form 8332. For example, a decree that makes reallocation of the dependency exemption contingent on payment of child support won’t be accepted by the IRS. Also, a divorce decree won’t conform to the substance of Form 8332 unless it has the actual signature of the custodial parent. The signature of the custodial parent’s attorney on the consent judgment is insufficient to claim the dependency exemption.

9.10 May a Family Court Reallocate a Dependency Exemption?

Generally, the custodial parent is entitled to the dependency exemption under I.R.C. § 152(e). Louisiana law states that there is a presumption that the domiciliary parent has the right to claim dependency exemption deductions and the earned income credit. However, Louisiana law also provides that a court may order a reallocation of the dependency exemption deduction upon proof:
1. that no child support arrearages are owed; and
2. that reallocation to the non-domiciliary parent will substantially benefit the non-domiciliary parent without significantly hurting the domiciliary.

Federal law also allows restrictions, e.g., timely payment of child support, to be placed on the reallocation of an exemption. Under federal law, the parent who meets the relationship, age and residency tests should still get the Earned

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177 Boltinghouse v. Comm’r, T.C. Memo 2003-134.
178 Thomas v. Comm’r, T.C. Memo 2010-11.
182 La. R.S. 9:315.18 (B)(1)(b); State, Dept. of Social Services v. Mason, 44 So.3d 744, 749 (La. App. 5 Cir. 2010).
183 See e.g., Flatt v. Comm’r, T.C. Memo 1986-495.
Income Credit, and federal law deems this credit to be the taxpayer’s separate property. Note that Louisiana statutory law does not purport to authorize reallocation of the earned income credit.

9.11 DOMESTIC VIOLENCE AND TAX ISSUES

Many legal services clients are domestic violence victims. What are some of the tax issues and considerations for them?

1. Stop Filing Joint Returns

The economic advantages of a joint return will probably be outweighted by the economic disadvantages and the threat to your client’s security. A joint return makes the victim jointly liable for taxes. She is unlikely to have access to the financial information necessary to sign a joint return.

If your client has been separated for the last 6 months of the year, she may be able to claim the favorable head of household tax rates and the Earned Income Credit. The additional tax refunds could help the victim’s plan for financial independence.

Resolution of divorce and custody litigation before the end of a tax year may strengthen a victim’s rights to head of household tax rates, the Earned Income Credit and dependency exemptions. A court decree allowing the victim use of the marital home may help her qualify for these tax benefits.

2. Assess a victim’s needs for innocent spouse relief

Domestic violence victims often find themselves saddled with large tax debts due to their spouse’s concealment of income (self-employment and gambling are easy to conceal), failure to file tax returns or pay taxes. We regularly see domestic violence victims assessed with $30,000 to $40,000 in tax debt for their spouse’s income.

Ask a victim if she knows whether prior tax returns have been filed or whether she has received any notices from the IRS about their taxes. Abusers forge the victim’s signature or may force the victim to sign a return without seeing it. After separation or relocation, a victim should file a Form 8822 with the IRS to receive deficiency notices relative to prior joint returns.

A victim may be able to avoid or minimize liability for a past tax return through either innocent spouse relief, separate liability limitation or equitable relief. Abuse and threats of violence are factors that may strengthen a Form 8857 application for innocent spouse or equitable relief. A divorce decree requiring the other spouse to pay the tax helps a claim for equitable relief. Rev. Proc. 2003-61.

Innocent spouse relief may be applied for by filing a Form 8857. Unfortunately, due to a quirk in the law, judicial review of “stand alone” § 66(c) equitable relief determinations does not exist for spouses in community property states filing separate returns. However, Tax Court review may be obtained if the innocent spouse claim is raised in a collection due process appeal or as an affirmative defense to a deficiency notice. In addition, a

184 Rev. Rul. 87-52, 1987-1 C.B. 347 (Earned income credit is separate property).
188 Felt v. Comm’r, T.C. Memo 2009-245.
victim may ask for an appeal to the IRS Appeals Office\textsuperscript{189} or for reconsideration for denied innocent spouse determinations.\textsuperscript{190} The reconsideration option is available for victims who have missed their appeal deadlines and is similar to the audit reconsideration process.

The IRS protects domestic violence victims who apply for innocent spouse relief. A domestic violence victim who fears that filing a claim for innocent spouse relief would result in retaliation should write "Potential Domestic Abuse Case" at the top of the Form 8857. If the IRS has notice of domestic violence, it will not release to a current or former spouse information relative to a new name, employer phone number or other information that could endanger the safety of domestic violence victims. If in Tax Court, ask that records be sealed to prevent victim’s address from being released.

3. Threats or theft by batterer

A batterer may threaten to hurt a victim in order to get her to forgo a dependency exemption or other tax benefits. An abusive intimate partner may steal from a taxpayer’s account and said theft may support a theft loss deduction.\textsuperscript{191} Explore these issues with your client. If she has been threatened, advise her of any available civil or criminal remedies. If a spouse establishes that she signed a joint return under duress, the return is not a joint return.\textsuperscript{192}

10. CONSUMER DEBT AND TAX ISSUES

10.1 DEBT CANCELLATION INCOME

Generally, income from debt cancellation is includible in gross income. I.R.C. § 61(a)(12). Generally, the amount of income is the difference between the face value of the debt and the amount paid in satisfaction of the debt. Income is recognized in the year the debt cancellation occurs.\textsuperscript{193} Debt cancellation often occurs in a foreclosure sale.\textsuperscript{194}

Cancellation of a large debt may result in taxability of Social Security benefits for a low income taxpayer or loss of Earned Income Credits.\textsuperscript{195}

Typically, debt cancellation income arises when a lender forgives debt or a government waives an overpayment. Examples of potential debt cancellation income are:

- reduction or forgiveness of personal credit card debt or loans\textsuperscript{196}
- personal vehicle repossession
- loan workout agreement or modification
- mortgage foreclosure, quit claim or reconveyance to creditor, short sale, abandonment\textsuperscript{197}

\textsuperscript{190} I.R.M. 25.15.17.1.
\textsuperscript{191} Herrington v. Comm’r, T.C. Memo 2011-73.
\textsuperscript{192} Reg. §1.6013-4; Rev. Proc. 2003-61, 2003-2 C.B. 296, §2.03.
\textsuperscript{194} But, if local law provides a right to redeem a foreclosure sale, the sale is generally not final for tax purposes until the right to redeem expires. Great Plains Gasification Associates v. Comm’r, T.C. Memo 2006-276.
\textsuperscript{196} The Tax Court has ruled that a reduced payment in settlement of a credit card debt constitutes debt cancellation income. Payne v. Comm’r, T.C. Memo 2008-66 (purchase price adjustment exclusion denied); Plotinsky v. Comm’r, T.C. Memo 2008-244 (gift exclusion denied). Because no exclusions applied in Payne and Plotinsky, the write-off of the credit card debt was income to the taxpayer. See also, Hill v. Comm’r, T.C. Memo 2009-101 (debt cancellation income where credit card judgment and debt written off after Ch. 13 bankruptcy dismissed).
Creditors defined as “applicable entities” by I.R.C. § 6050P(c)(2), are required to issue a Form 1099-C reporting debt cancellation income to the IRS when they reduce a debt by at least $600. The duty to issue a Form 1099-C is triggered when there is a discharge of debt, which is deemed to occur when there has been an “identifiable event” as defined in Reg. § 1.6050P(b)(2)(I). The IRS will argue that a discharge of debt occurred when the “identifiable event” occurred. But, the IRS may be wrong. In some cases, the “identifiable event” may not constitute a discharge of the debt for determining (1) when debt cancellation income occurred, or (2) whether it actually occurred.

A Form 1099-C does not establish that a debt was discharged or the date of discharge. Sims v. Comm’r, T.C. Summ. Op. 2002-76. A Form 1099-C is not dispositive. If the taxpayer asserts a reasonable dispute with respect to reported income, I.R.C. § 6201(d) may shift the burden of production to the IRS, requiring it to produce reasonable and probative evidence in addition to the Form 1099-C. Unjustified reliance on Forms 1099-C by the IRS have led to attorney fee awards for taxpayers.

The issuance of Forms 1099-C has skyrocketed in recent years. In 2005, debt buyers were, for the first time, required to issue Forms 1099-C. Most buyers of credit card debt have no idea or records as to what the original creditor’s pre-charge off amount was. This ignorance produces inaccurate Form 1099-C reports of debt cancellation income. Often, debt buyers don’t know where the debtors live. So, many taxpayers never receive the Forms 1099-C.

Many low income taxpayers don’t understand Forms 1099-C or their potential tax liability. It is difficult for a taxpayer to determine if he has debt cancellation income or rights to exclude such income from taxation. A taxpayer should review Form 1099-C (or Form 1099-A) for accuracy and request correction by the lender/creditor if inaccurate. If the debt was transferred to a debt buyer, it is likely that the discharged debt is wrong if reported by the debt buyer. IRS Publication 4681 explains how to read Forms 1099-A and C. If the taxpayer erroneously paid taxes on cancellation of debt income, he may be able to amend his tax return to claim a refund.

**10.2 WAS THERE A DISCHARGED DEBT?**

Debt cancellation income is income from the discharge of a debt. To evaluate the tax liability, first determine whether (1) there was a “debt” (2) whether cancellation of the “debt” creates an accession to wealth and (3) if and when the debt was “discharged.”

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199 See e.g. Waterhouse v. Comm’r, T.C. Memo 1994-467 (waiver of VA overpayment creates debt cancellation income). On the other hand, the IRS has privately ruled that the VA’s discharge of a veteran’s mortgage due to hardship was not taxable when the VA intended to reduce the veteran’s future benefits for the amount of the debt forgiveness. PLR 8839026 (June 29, 1988). Also, cancellation or waiver of an overpayment due to economic hardship should be excluded from income under the general welfare exclusion doctrine. See e.g., Rev. Rul. 78-46, 1978-1 C.B. 22.
201 See e.g., Owens v. Comm’r, 67 Fed. Appx. 253 (5th Cir. 2003).
202 Unfortunately, debt buyers are now “applicable entities” and are required to report debt cancellation. See Debt Buyers’ Association v. Snow, 481 F. Supp.2d 1 (D.D.C. 2006).
If there is a dispute as to the debt, a compromise may not give rise to a discharge of a “debt.” Furthermore, a creditor may not need to report debts that are cancelled by operation of law.\(^{203}\) A settlement or “forgiveness” of a disputed or unenforceable debt does not result in income to the taxpayer. See e.g., Zarin v. Comm’r, 916 F.2d 110, 115 (3d Cir. 1990). In Zarin, no taxable income resulted from the settlement since the amount of the discharged debt was void ab initio due to the underlying illegality or fraud. See also Estate of Smith v. Comm’r, 198 F.3d 515 (5th Cir. 1999)(unliquidated claim for contribution or restitution is not a “debt” that creates debt cancellation income). Refinancing of a debt may also provide an exception to debt cancellation income. See Zappo v. Comm’r, 81 T.C. 77, 85-86 (1983).

To win a Zarin argument, there must be evidence of a dispute of the amount or enforceability of the debt. A settlement alone does not prove that a good faith dispute existed. McCormick v. Comm’r, T.C. Memo 2009-239. The taxpayer has the burden of proof. Rood v. Comm’r, T.C. Memo 1996-248, aff’d 122 F.3d 1078 (11th Cir. 1997). If the taxpayer raises a reasonable dispute as to the amount of debt cancellation income on the Form 1099-C, the IRS must produce reasonable and probative information as to the amount of debt cancellation income, and can’t rely on the Form 1099-C. McCormick, supra.

To avoid tax consequences to the debtor, the settlement should include an agreement by the parties that the settlement agreement reflects settlement of disputed claims, does not represent a discharge of indebtedness for purposes of I.R.C. § 61(a)(12) and that the lender will not report the transaction as resulting in income to the debtor to any taxing authority. Lenders rarely agree to the last of these conditions, but that disagreement does not make the debt cancellation taxable income.

What are the tax consequences if the taxpayer successfully rescinds a transaction pursuant to the Truth-in-Lending Act or another consumer protection law? The IRS will argue that the difference between the loan principal and the amount paid by the taxpayer for rescission is debt cancellation income. See Schlifke v. Comm’r, T.C. Memo 1991-19. The taxpayer can argue that there was no debt cancellation income under Zarin v. Comm’r, supra, since the debt was disputed. This may be a successful argument, at least to the extent the taxpayer did not deduct interest in prior tax returns.

However, if the taxpayer took deductions for interest in prior tax years, the IRS will argue that recovery of the same is taxable income under the tax benefit rule. In Schlifke v. Comm’r, the Tax Court ruled that there was income from a rescission under the tax benefit rule to the extent that the taxpayer had taken deductions for interest on the rescinded mortgage.

10.3 WHEN IS A DEBT DISCHARGED?

A debt is discharged when it is clear that the debt will never have to be paid.\(^{204}\) Recourse debt is not discharged to the extent that there is a deficiency judgment or an unpaid deficiency that survives the foreclosure judgment.\(^{205}\) In some cases, the debt may not be discharged until the statute of limitations has


\(^{204}\) Friedman v. Comm’r, 216 F.3d 537 (6th Cir. 2000); Cozzi v. Comm’r, 88 T.C. 435 (1987).

\(^{205}\) See e.g., Azawa v. Comm’r, 99 T.C. 197 (1992) aff’d 29 F.3d 630 (9th Cir. 1994); Webb v. Comm’r, T.C. Memo 1995-486.
expired. See Coburn v. Comm’r, T.C. Memo 2005-283 (abandonment of collateral on recourse liability, alone, did not extinguish underlying liability). The applicable statute of limitations may be a complex issue. A creditor who sells credit card debt to a “debt buyer” may write off the debt and issue a Form 1099-C. However, in such cases, the debt is not discharged since the debt buyer owns the debt and often sues to enforce the debt.

10.4 EXCLUSION OF DEBT CANCELLATION INCOME FROM INCOME

10.4.1 Insolvency, bankruptcy, mortgage restructuring or foreclosure

The most common exclusions of “debt cancellation income” from income are the debt cancellation in (1) a bankruptcy, or (2) when the taxpayer is insolvent or (3) the debt is “qualified principal residence indebtedness.” I.R.C. § 108(a)(1)(A)-(B), (E). The bankruptcy exclusion may not apply if the taxpayer fails to obtain a bankruptcy discharge granted by the bankruptcy court or under a plan approved by the bankruptcy court. “Insolvent” means that the liabilities exceed the fair market value of the assets. I.R.C. § 108(d)(3). Income in excess of insolvency is includible in a partially insolvent taxpayer’s income. I.R.C. § 108(a)(3). The insolvency exclusion won’t apply to a discharged debt to which the § 108(a)(1)(E) exclusion for “qualified principal residence indebtedness” applies unless the taxpayer elects the § 108(a)(1)(B) insolvency exclusion. Cancellation of a debt that would have been deductible if paid, e.g., mortgage interest, is excluded from income. I.R.C. § 108(e)(2).

The Tax Court has held that exempt assets, e.g., a homestead exemption for the family home, must be included in determining whether a taxpayer is “insolvent.” Carlson v. Comm’r, 116 T.C. 87 (2001). Some consideration should be given to challenging Carlson since it has been criticized.

Another issue is whether a separated spouse’s assets must be included in the insolvency analysis. Prior to Carlson, the IRS had issued a private letter ruling that a spouse’s separate assets should not be considered in determining whether the other spouse is insolvent for the purposes of the § 108 exclusion.

The Mortgage Forgiveness Debt Relief Act of 2007, P.L. 110-142, allows the exclusion of debt cancellation income from mortgage restructuring or mortgage foreclosure on a taxpayer’s home for debts forgiven for the years, 2007-2013. See I.R.C. § 108(a)(1)(E). The exclusion is limited to $2 million ($1 million if filing as married filing separate). The Act applies only to forgiveness or cancellation of debt to buy, build or substantially improve a “principal residence”, or to refinance debt incurred for these purposes. Refinanced home mortgage debt may include acquisition indebtedness and home equity debt. The home equity debt is not eligible for the qualified principal residence exclusion. I.R.C. § 108(h)(4). Lenders’ principal reductions pursuant to the National Mortgage Settlement may qualify for exclusion from income under I.R.C. § 108(a)(1)(E) if the debt was acquisition debt and the cancellation occurred before January 1, 2014 or any extended date of P.L. 110-142.

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206 See e.g., Portfolio Recovery Associates, LLC v. King, 14 N.Y.3d 410 (N.Y. 2010).
207 The other § 108 exclusions, qualified farm debt, qualified real property business debt, deductible debt and certain student loans, do not commonly arise in low-income taxpayer cases.
209 PLR 8920019 (Feb. 14, 1989).
210 Check to see if the Mortgage Forgiveness Debt Relief Act of 2007 is extended beyond 2013.

Income excluded under I.R.C. §§ 108(a)(1)(A)-(C) must be applied to reduce the debtor’s “tax attributes.” As a practical matter, this reduction of basis in an indigent taxpayer’s assets will have little or no effect on his ultimate tax liability. See J. Pierce, Tax Consequences of Debt Forgiveness (Spring 2010).

10.4.2 HAMP tax issues

The government’s Pay for Performance Success payments that reduce the principal balance on a home mortgage under the Home Affordable Mortgage Modification Program (HAMP) are not taxable. They are excluded from income under the general welfare exclusion in each year of payment.211 If the holder of the loan reduces the Principal Reduction Alternative Forebearance Amount by more than the government’s Principal Reduction Alternative investor incentive payments, the taxpayer may have cancellation of debt income from the lender’s reduction of principal. However, the exclusions for qualified principal residence indebtedness and insolvency may apply to allow the taxpayer to exclude the cancellation of debt income.


10.4.3 Other reductions in principal

A seller’s reduction in the price of the property does not give rise to cancellation of debt income.212 Instead, the buyer reduces his basis in the property. If a lender reduces the principal for an early payout or as part of a loan modification, the amount of cancelled debt is cancellation of debt income. However, if the debt is non-recourse and the owner retains the collateral, the owner does not have cancellation of debt income.

10.4.4 Foreclosures and tax consequences—how to calculate

A foreclosure is treated as a sale. Repossessions, quit claims, reconveyances, short sales or abandonments to the lender in lieu of foreclosure may also be treated as sales for tax purposes.213

Income from a sale is computed as the difference between the amount realized and the taxpayer’s basis in the asset.214 The amount realized by the debtor generally includes the liabilities from which the debtor is released because of the sale.215 An exception exists for “recourse” debt.216 Most low income taxpayers have recourse mortgage debt. Gain for “recourse” debt is bifurcated into (1) capital gain (or ordinary income) or loss from the sale and (2) ordinary income from debt

212 I.R.C. § 108(e)(5).
215 Forgiveness of a non-recourse loan resulting from a foreclosure does not result in debt cancellation income. But, there may be gain or loss from the “sale.” Reg. § 1.1001-2(c).
216 Recourse debt is a loan where the debtor is personally liable for the entire amount of the debt, not just the amount of the collateral. All other debt is non-recourse debt. But, it is arguable that recourse liability could be “non-recourse” in states that prohibit deficiency judgments. J. Pierce, Tax Consequences of Debt Forgiveness, 17-18 (Spring 2010).
Cancellation. Here, the amount realized is the fair market value of the asset.\textsuperscript{217} The difference between the fair market value and the house’s basis will be a capital gain or a nondeductible loss. In addition, the debtor has ordinary income from the debt cancellation computed as the difference between the debt and the fair market value of the asset.\textsuperscript{218}

Bifurcated income from a foreclosure where the taxpayer had personal (or recourse) liability can be computed as follows:

**Cancellation of debt income**

1. Amount of debt immediately before the property transfer reduced by any amount for which taxpayer remains liable immediately after the property transfer

2. Fair market value of transferred property (generally the sale price at foreclosure absent contrary evidence)

**Cancellation of debt income upon foreclosure**

3. Subtract line 2 from line 1. If less than zero, enter zero (Income may be excludable under I.R.C. § 108 or other law)

**Gain or loss from foreclosure**

4. Enter smaller of line 1 or 2 from above

5. Enter any funds taxpayer received from foreclosure

6. Add line 4 and 5

7. Adjusted basis of transferred property

**Gain or loss from foreclosure.**

8. Subtract line 7 from line 6 (Gain may be excludable under I.R.C. § 121, Mortgage Forgiveness Debt Relief Act, I.R.C. §108(a)(1)(e), or other law)

Income from cancellation of debt is reported as “Other Income” on the Form 1040 whereas gain from the foreclosure sale is generally reported as capital gains on Schedule D of Form 1040.

Under I.R.C. § 108, the taxpayer may exclude all or part of the debt cancellation income if he is insolvent when the foreclosure occurs.\textsuperscript{219} The § 108 insolvency exclusion can only be used to exclude income from debt cancellation. The insolvency exclusion does not offset the capital gains portion of income from a sale. *Estate of Delman v. Comm’r*, 73 T.C. 15 (1980). Was the house the taxpayer’s principal residence for 2 years in the 5 years prior to the sale?\textsuperscript{220} If yes, he may be able to elect the I.R.C. § 121 lifetime exclusion of $250,000 ($500,000 for joint filers) from the income treated as capital gains income from a sale. The I.R.C. § 121 exclusion can’t be used to offset the portion of income that arises from debt cancellation.


\textsuperscript{217} The sale price of property at a foreclosure sale is presumed to be its fair market value. This presumption can be rebutted by clear and convincing evidence. See e.g., *Marcaccio v. Comm’r*, T.C. Memo 1995-174; *Community Bank v. Comm’r*, 79 T.C. 789, 792 (1982) aff’d 819 F.2d 940 (9th Cir. 1987).


\textsuperscript{220} Some circumstances, e.g., a loss of employment, may allow the taxpayer to qualify for the § 121 principal residence exclusion even he did not meet the 2 year/5 year rule. See Reg. 1.121-3(e)(2)(iii)(C).
10.4.5 Disaster relief legislation

Discharge of nonbusiness debt between August 24, 2005 and January 1, 2007 may be excluded from income for taxpayers whose primary homes were located in the Katrina disaster zone. See Katrina Emergency Tax Relief Act of 2005, P.L. 109-73, § 403. Exclusion of non-business debt may be available for disaster victims in Midwestern states. See Heartland Disaster Tax Relief Act of 2008, P.L. 110-343.

10.4.6 Gifts

Under I.R.C. § 102, a gratuitous release of a debt (something for nothing) may exclude debt cancellation from income. The issue is whether the creditor had a donative intent. See Plotinsky v. Comm’r, T.C. Memo 2008-244. Proving a § 102 exclusion is difficult in consumer or commercial debt cases.

10.5 Allocation of Cancellation of Debt Income Among Co-Obligors

Often, there are co-obligors for discharged debt. Examples include: spouses, co-owners of real estate, a principal and a surety on a loan, and household recipients of public assistance overpayments. When the debt is discharged, the liable parties may no longer live together. What share of the cancellation of debt income is attributed to each of the liable parties?

In a community property state, each spouse should have 50% of the cancellation of debt income. The discharge of a joint and several obligation by a creditor should not be treated as income to each co-obligor in the full amount of the discharged obligation. Where there are co-obligors, you should argue for an appropriate reduction of the amount of cancellation of debt income attributable to your client.

10.6 How to Claim That Cancellation of Debt Income Should Be Excluded

A Form 982 should be used to claim the insolvency, bankruptcy or Mortgage Forgiveness Debt Relief Act exclusions from income. IRS Publication 4681 can be helpful to a correct preparation of a Form 982.

10.7 Identity Theft

Identity theft is the theft of a person’s identifying information to commit fraud or other offenses. Tax related identity theft is generally related to tax refunds, earned income credits or employment. The reporting of the identity thief’s income to the victim’s social security number can cause the victim to lose social security, public housing and other public assistance. Tax related identity theft may also cause the victim to have a host of consumer problems, e.g., damage to credit rating, denial of housing due to poor credit, suits by creditors for money the victim never borrowed, etc. For guidance on how to resolve tax related identity theft, see Ch. 22 of Effectively Representing Your Client before the IRS (ABA 5th ed. 2011).

Note that there is a difference in how the IRS processes identity theft and return preparer fraud. Identity theft involves a third party using a taxpayer’s identity to obtain a refund. “Return preparer fraud” is when the taxpayer’s preparer

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uses a routing number to misappropriate the taxpayer’s direct deposit refund. To facilitate resolution of your client’s problem, be sure to file the proper form. Use Form 1409, Identity Theft Affidavit, for identity theft and Form 14157, Complaint: Tax Return Preparer, for return preparer fraud or embezzlement.

11 HOUSING LAW AND TAX ISSUES

11.1 RENTAL OR OTHER HOUSING ASSISTANCE

Rental subsidies are excluded from income under the general welfare exclusion doctrine. However, fraudulently obtained public assistance is taxable income. Therefore, a rental subsidy fraudulently obtained could be taxable income to a subsidized housing tenant. Subsidized housing tenants are required to authorize the public housing agency to access their tax return information from the IRS.

Other examples of housing assistance excluded from income by the general welfare exclusion doctrine are:

• Relocation payments to move from a damaged home
• Temporary housing assistance for disaster victims
• Replacement housing for people displaced from their homes
• Assistance with the purchase of homes
• Home improvement grants
• Forgiveable loans

11.2 LITIGATION RECOVERIES IN FEDERAL HOUSING CASES

Relocation payments under the Uniform Relocation Act are not considered income for federal tax purposes. Utility allowance refunds for federally subsidized tenants should not be taxable income since they are a recovery or refund of non-taxable public assistance that should have been granted to the tenant. Be sure to advise clients that the assistance is not taxable and that they need to timely respond to any IRS audit notices. Also, discuss the tax treatment of payments with the payors to avoid improper issuances of Forms 1099 to your clients and provide them with legal authority for the non-taxability of the payments. If the housing agency wrongly reports the litigation recovery as income to the IRS, contact your local Taxpayer Advocate for systemic relief to prevent IRS audits of your clients.

11.3 RETURN OF CAPITAL OR PROPERTY DAMAGE

Compensation for property damage or breach of contract by a home improvement contractor is not income unless it exceeds the basis in the property. No economic gain results from a recovery of basis in a capital asset.

225 Rev. Rul. 74-205, 1974-1 C.B. 20
I.R.C. § 1016(a)(1) provides that a proper adjustment shall be made for receipts and expenditures properly chargeable to the capital account of the damaged property. The homeowner should reduce his basis by the recovery and then increase it by the costs incurred for repairs or restoration.

Recovery of attorney fees may trigger income tax liability unless the recovery is excluded from income, deductible or chargeable to the capital account of an asset. A recovery of attorney fees for damage to a home should be tax neutral. Such attorney fees should be capitalized rather than deducted. Adjustments to the home’s basis from recovery and payment of attorney fees should offset each other—resulting in no immediate or deferred recognition of income.

12. PUBLIC BENEFITS AND TAX ISSUES

12.1 WAIVER OF GOVERNMENT OVERPAYMENTS DUE TO ECONOMIC HARDSHIP

Cancellation or waiver of an overpayment of government assistance may constitute debt cancellation income. However, waiver of an overpayment due to economic hardship should be excluded from income under the general welfare exclusion doctrine.

12.2 UNEMPLOYMENT COMPENSATION

Unemployment compensation is subject to income tax, but not to FICA or self-employment tax. If there is no withholding on unemployment compensation, taxpayers may face under payments and penalties when they file their next tax return. To avoid these problems, a taxpayer can pay quarterly estimated tax payments or file a Form W-4V to have 10% of their unemployment compensation withheld for taxes.

12.3 SSI AND SOCIAL SECURITY BENEFITS

SSI benefits are not subject to income tax (except possibly in cases of fraud). However, lump sum Social Security benefits and ongoing Social Security benefits may be subject to income tax. After 1983, even Social Security disability benefits are subject to tax. Generally up to 50% of Social Security benefits are taxable to low-income taxpayers. Additional income from employment, retirement and gambling are common reasons for Social Security benefits becoming taxable. Cancellation of a large debt could make Social Security taxable in the year of cancellation if the debt cancellation income can’t be excluded from income.

Social Security benefits are included in gross income for the tax year in which the benefits are received. The taxpayer may make an election to attribute a portion of the lump sum benefits to prior tax years. I.R.C. § 86(e). See IRS Publication 915 for a detailed explanation of the election and worksheets. This election should lower the tax impact of a lump sum Social Security benefit. The taxpayer’s attorney fees for the disability appeal may be deducted from income to the same extent that Social Security is taxed. Rev. Rul. 87-102. This limited deduction is a Schedule A deduc-

231 See e.g., Waterhouse v. Comm’r, T.C. Memo 1994-467 (waiver of VA overpayment creates debt cancellation income); see also IRS Chief Counsel Opinion CC: Pa: 01: RJGoldstein, PRESP-109087-12 (Mar. 9, 2012).
233 I.R.C. § 85.
tion and subject to the 2% of adjusted gross income limit on certain itemized deductions. If the taxpayer uses all or part of a Social Security lump sum to reimburse his long term disability carrier, special tax relief may be available under I.R.C. § 1341. If the repayment to the LTD carrier is under $3,000, the taxpayer gets a deduction on the current year’s return. If the repayment is over $3,000, the taxpayer chooses either the deduction or a tax credit for the excess tax paid in the prior year.

12.4 DISASTER ASSISTANCE

Generally, public disaster assistance will be excluded from income under I.R.C. § 139 or the general welfare exclusion doctrine. Waiver of FEMA overpayments under the 2011 Disaster Assistance Recoupment Fairness Act will not create debt cancellation income. See IRS Chief Counsel Opinion CC:PA:01: RGGoldstein, PRES-109087-12 (Mar. 9, 2012).

12.5 WELFARE AND OTHER PUBLIC ASSISTANCE

Under the general welfare exclusion doctrine, most welfare payments will be excluded from income. The criteria for exclusion under this doctrine are (1) payment from a government general welfare fund, (2) promotion of general welfare, i.e. payment is based on need, and (3) the payment is not made for services. Fraudulently obtained public assistance is taxable income. Cancellation of an overpayment of public assistance may create debt cancellation income unless excluded by the Internal Revenue Code or the general welfare exclusion doctrine.

12.6 IMPACT OF EARNED INCOME CREDITS ON WELFARE

The Earned Income Credit (EIC) does not count as income for Medicaid, food stamps, SSI or federally subsidized housing. See I.R.C. § 32(l). States can set their own rules for how the EIC is treated for TANF eligibility. So far, no state has counted EIC refunds as income for TANF eligibility.

By federal law, states are prohibited from counting the EIC refund as an asset for Medicaid, SSI, food stamps or federally subsidized housing unless it is unspent by the end of the month after the month of receipt. A state may have rules that are more favorable than the minimum federal rule against counting EICs as assets.

12.7 LEVIES AGAINST SOCIAL SECURITY AND WELFARE BENEFITS

Immediately before a levy of Social Security benefits, the taxpayer should receive a CP-91 or CP 298, Final Notice Before Levy on Social Security Benefits. The CP 91/298 notices should have been preceded by a Notice of Intent to Levy and notice of the right to a collection due process (CDP) appeal. The taxpayer has 30 days to respond to the Final Notice and may still appeal through the Collection Appeal Program even though his rights to a collection due process (CDP) appeal have expired. Also, he may have a right to an “equivalent hearing” before an IRS appeals officer if he missed the 30 day period for requesting a collection due process (CDP) appeal, but is still within 1 year of the notice that advised him of his right to a CDP appeal. 

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236 For a list of revenue rulings and court cases applying or denying exclusion under the general welfare exclusion doctrine, see I.R.M. 4.88.1, Exhibit 4.88.11.3.
238 See e.g. Waterhouse v. Comm’r, T.C. Memo 1994-467 (waiver of VA overpayment creates debt cancellation income).
239 I.R.M. 5.11.7.2.4; 5.10.1.7.3; 8.24.1.2.
240 I.R.C. § 6330 (b). Unlike the CDP appeal, a decision in an “equivalent hearing” or Collection Appeal Program appeal may not be reviewed by a court.
Under the Federal Payment Levy Program, the IRS may continuously levy 15% of monthly Title II Social Security benefits and most welfare benefits other than SSI. The IRS no longer levies against Social Security benefits that are less than $750 per month. Levies against Social Security benefits greater than $750 can often be prevented or removed by applying for Currently Not Collectible status. It is important to respond promptly to a proposed notice of levy on Social Security benefits. Once the levy is imposed, it can take time to get the levy removed and wrongfully levied amounts refunded. If the IRS levies in excess of what is allowed by law, you have a time limit of 9 months in which to request a return of the excess amount.241

Beginning February 2011, the IRS may exclude Social Security recipients with income less than 250% of poverty from the Federal Payment Levy Program if Social Security is their sole source of income.242 However, low-income taxpayers still receive Social Security levies since the IRS has refused to apply the 250% poverty filter to non-filers. If a low-income Social Security recipient gets a levy notice, he may be a non-filer and need assistance with filing his delinquent returns.

13. EMPLOYMENT LAW

13.1 TAXATION OF SETTLEMENTS

Clients generally receive a Form 1099 (or a Form W-2) for the receipt of settlements and attorney fees in personal injury and employment law cases. Many clients say they were informed by their attorney that the settlement proceeds would be tax-free. Unfortunately, this information may be incorrect and subject a taxpayer to a large tax debt.

Settlement of employment law claims are taxable income unless the taxpayer proves an exclusion from income. Under I.R.C. § 104(a)(2), settlements or judgments on employment claims generally may be excluded if (1) the underlying cause of action is based upon tort or tort-type rights and (2) damages were received on account of personal physical injury or physical sickness.243

To determine the income and employment tax consequences of a settlement, one must break the settlement down into its various elements. The IRS Chief Counsel has issued a helpful memorandum on how the IRS analyzes settlements to determine tax liabilities.244

Generally, back pay and emotional distress damages are taxable income.245 Stomach aches and headaches may be viewed as symptoms of emotional distress rather than physical injury.246 Emotional distress incurred as a result of physical injury may be excluded.247 Exacerbation of a physical injury by a hostile and stressful work environment may be excludable.248 Payments for medical care to treat emotional distress may be excluded from income up to the amount of medical expenses relative to the emotional distress if not previously deducted under I.R.C. § 213.249

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241 I.R.C. § 6343 (b) and (d); I.R.M. 5.11.2.3.3.1 (8-24-10). See also, M. O'Connor, The IRS's Authority to Garnish a Disabled Person's Social Security Benefits to Collect Unpaid Taxes.

242 I.R.M. 5.11.7.2.2.3.

243 Espinoza v. Comm'r, 636 F.3d 747 (5th Cir. 2011).


246 See e.g., Gibson v. Comm'r, T. C. Memo 2007-224.

247 House Committee Report, P.L. 104-188.

248 See e.g., Domeny v. Comm'r, T. C. Memo 2010-9.

249 Wells v. Comm'r, T.C. Memo 2010-5.
Legal fees in employment law actions should not be taxable since they can now be deducted as an adjustment to gross income. However, the deduction for legal fees should not exceed the taxable amount of the settlement. Also, if the entire settlement is excludable under I.R.C. § 104(a)(2), the taxpayer may not deduct his attorney fees. The part of a settlement allocable to attorney fees does not constitute "wages" for the purposes of employment taxes.

If the settlement agreement fails to specify that parts of the settlement were for physical injury or physical sickness, the client may be liable for income and employment taxes on the settlement. Legal fees, interest, physical injury and emotional distress damages are not subject to employment taxes. The IRS considers "front pay" to be wages. However, the 5th Circuit has held that "front pay" is not wages for the purposes of employment tax. To avoid employment taxes, a settlement should clearly indicate the amount for wages, the nature of the wages and the amount for other payments.

The courts look first to the language of the settlement agreement to determine the purpose of the settlement payments. However, the settlement’s characterization or division of the settlement amounts does not bind the IRS or courts. The courts will look at the economic realities of the settlement. If the settlement lacks express language of purpose, the courts look beyond the agreement for other evidence of the payor’s intent as to the purpose for the settlement payments. The complaint and details surrounding the litigation may shed light on the purpose of the settlement.

The IRS now considers severance pay to a terminated employee as income subject to both income and employment taxes. However, it is unclear whether severance pay is subject to employment tax.

### 13.2 EMPLOYEE OR INDEPENDENT CONTRACTOR?

Many employers take advantage of low-income workers by treating them as independent contractors rather than employees. How can improper classification as an independent contractor hurt an "employee?" Besides additional tax burdens and operating costs, an “employee” may lose the right to unionize, unemployment compensation, worker’s compensation and protections under many laws, e.g., National Labor Relations Act, Fair Labor Standards Act, Americans with Disabilities Act, Family Medical Leave Act, ERISA, Title VII of the Civil Rights Act, etc. Recently, employers have been hit with substantial fines for work models that misclassify employees as independent contractors.

You can file a Form SS-8 with the IRS to get a determination as to whether the taxpayer is an employee or independent contractor. For a detailed discussion of the tests for employee status, see Effectively Representing Your Client Before the IRS (ABA 5th ed. 2011), Ch. 20.

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250 I.R.C. § 62 (a)(20) & (e).
251 I.R.C. § 265 (a)(1).
253 *Dotson v. United States*, 87 F.3d 682, 689 (5th Cir. 1996).
256 *Espinoza v. Comm'r*, 636 F.3d 747 (5th Cir. 2011).
An IRS Form 4852 can be used to report employment income and pay payroll taxes if the employer won’t issue a Form W-2. Once the employee has paid his payroll taxes, he should file for a correction of his wage earnings with the Social Security Administration. See 20 C.F.R. § 404.801 et seq. This should be done promptly since there is a time limit for correcting earnings records. 20 C.F.R. § 404.802.

In some states, there may be a tort claim against the employer for failure to correct an information return. See, e.g., Clemens v. USV Pharmaceutical, 838 F.2d 1389, 1395 (5th Cir. 1988) (tort action under Louisiana law). I.R.C. § 7434 creates a private cause of action for fraudulent filing of information returns. § 7434 specifies damages as the minimum of $5,000 or actual damages.

14. LEGAL FEES AS INCOME

In a private letter ruling, the IRS has ruled that statutory attorney fees paid directly to a legal aid or pro bono program are not taxable to the client since the client had no obligation to pay attorney fees. In class action lawsuits, a class member does not have to report the attorney fees as income.

However, statutory attorney fees for other attorneys may trigger tax liability for the client. In Commissioner v. Banks, 543 U.S. 426 (2005), the Supreme Court held that attorney fees are included in the taxpayer’s gross income even though she never receives the fees. Before Banks, the circuits were split on this issue. Thus, Banks exposed many taxpayers to significant new liabilities. The attorney fees may be partially deducted (i.e., the amount in excess of 2% of adjusted gross income) on Schedule A of the Form 1040 if the taxpayer can itemize. For large attorney fee awards, the taxpayer may even suffer alternative minimum tax liability.

In the American Jobs Creation Act, Congress responded to Banks by amending the Internal Revenue Code to preclude taxation of attorney fees in most civil rights and employment law actions. However, the AJCA only applies to fees and costs paid after October 22, 2004 with respect to any judgment or settlement after such date. In cases governed by the AJCA, the taxpayer takes an above the line deduction for attorney fees rather than a Schedule A deduction. It appears that attorney fees under consumer protection laws and in personal injury cases (contingency fees) are still taxable to the client unless there is a theory for exclusion.

15. DISASTER TAX LAW

For a discussion of tax issues that arise in a disaster, see Ch. 24 of Effectively Representing Your Client before the IRS, (ABA 5th ed. 2011).

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259 P.L.R. 135328-09 (Jan. 5, 2010). Note that private letter rulings may not be used or cited as precedent unless otherwise authorized by Treasury Regulations. I.R.C. § 6110(k)(3). However, letter rulings provide some guidance as to how the IRS might view a tax law issue under the facts assumed in the letter ruling.

260 GCM PRENO-111606-07 (May 18, 2007).

261 The 5th, 6th, 9th and 11th Circuits had held that attorney fees were not included in the client’s gross income. Banks did not resolve the taxability of statutory attorney fees to a plaintiff who obtains equitable relief only.


263 For example, the attorney is a legal aid, pro bono or class action attorney.
16. EARNED INCOME CREDIT

1. Overview

Generally, the Earned Income Credit (EIC) is a tax credit for workers who have earned income and adjusted gross income (AGI) below the applicable limits for the tax year in question. The Earned Income Credit is the largest anti-poverty program in the United States.

Those who qualify for the EIC pay less federal tax, no tax or even get a tax refund. Currently, the average EIC refund is about $2,100. In 2012, the maximum EIC is $5,891.

The EIC can result in a tax refund even if the worker paid no tax whatsoever. A taxpayer who did not apply for an EIC in any of the last 3 years may be eligible for EIC payments by filing amended returns for those years.

2. Eligibility Rules for Earned Income Credit

I.R.C. § 32 provides the statutory rules for the EIC. The easiest way to understand all the EIC rules is to consult IRS Publication 596, chapters 1 to 3. This IRS publication cogently summarizes the various EIC rules in 3 sets of rules:

- Rules for Everyone
- Rules If You Have a Qualifying Child
- Rules If You Do Not Have a Qualifying Child

Chapter 4 of IRS Publication 596 explains the income limits for the EIC. You can quickly assess your client’s EIC eligibility by reference to Publication 596. If you are preparing a tax return, you should also consult Form 8867, Paid Preparer EIC Checklist.

That said, the basic rules for the EIC are the income limits, earned income, ineligibility of persons who legally must file as “married filing separately”, and the relationship, age and residency tests for a qualifying child.

3. Income Limits

For each tax year, there will be AGI limits for the EIC by family size and filing status.

Historically, the AGI limits have increased each year. In 2012, the AGI limits will range from $36,920 to $50,720 for families with children.

4. Earned Income

Beginning in 2002, “earned income” includes wages, salaries, tips and other employee compensation, if includible in gross income\(^{264}\), plus net earnings from self-employment\(^{265}\). Earned income may also include an employer’s disability retirement plan benefits until the worker reaches minimum retirement age.

Earned income does not include pensions, annuities, unemployment compensation, social security, welfare, alimony, child support, inmate compensation, nontaxable workfare payments, scholarship or fellowship grants

\(^{264}\) Prior to 2002, earned income included nontaxable earned income, e.g. voluntary salary reductions, 401(k) contributions, mandatory contributions to a state or local retirement plan, etc.

\(^{265}\) Compensation paid by a third party for damages due to lost self-employment income will not constitute “earned income” for the purposes of the Earned Income Credit.
not reported on a Form W-2, or, in community property states, income earned by the spouse of a married taxpayer who is qualified to file as head of household. I.R.C. § 32(c)(2). Proof of “earned income”, e.g., W-2 or 1099 Forms, may be required.

5. **Filing status cannot be “married filing separately”**

   Taxpayers who are married on December 31 of the tax year and who cannot file as “married filing jointly” face special problems. These taxpayers will not qualify for the EIC unless they meet the requirements for head of household filing status.266

   Many EIC errors involve married taxpayers who could not legally file as single or head of household. If a taxpayer was married on December 31 of the tax year, review the taxpayer’s proof of separate residences and the 50% support test for head of household filing status.

   If married taxpayers incorrectly filed as head of household or single, they may be able to file an amended tax return to get the allowable EIC for their income level. However, they are precluded from filing a joint return after a notice of deficiency has been issued and a Tax Court petition filed.267 Therefore, a joint return claiming an EIC should be filed before either spouse files a Tax Court petition if this is a feasible option.

   If a married taxpayer did not live with her spouse at any time in the last 6 months of the year, she may be able to file as the head of household if she furnished more than half of the cost of maintaining the household. I.R.C. §§ 2(b)(1); 7703(b). Unmarried taxpayers do not have to be the head of household in order to get the EIC.

6. **Relationship, Age and Residency Tests for Qualifying Child**

   Only taxpayers with a “qualifying child” get the large EICs. A “qualifying child” must meet 3 tests: relationship, age and residency. Beginning in the 2009 tax year, the definition of “qualifying child” will also require (1) that the child must be younger than the person claiming the child and (2) that the child has not filed a joint return.

   A qualifying child is a child who is the taxpayer’s:

   **Relationship**

   1. Child, stepchild, adopted child, foster child268 or a descendant of any of them, or
   2. Sibling, step-sibling, half-sibling or a descendant of any of them

   **Caveat:** The definition of “eligible foster child” has changed several times since 1991. Make sure you have the right definition for the tax year in question. The history of the changes is set forth below:

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266I.R.C. § 32(d), Mischel v. Comm’r, T.C. Memo 1996-553.
268An eligible foster child is a child placed by an authorized placement agency, i.e., a court, state or local government agency or a tax exempt organization licensed by the state. Hegwood v. Comm’r, T.C. Summ. Op. 2002-156.
Tax Years | Definition
---|---
2002 | Residency requirement decreased from 1 year to 6 months.
2005 | Placement can also be by court order. Also eliminated the “cared for as own child” requirement.

### Age

**AND** was at the end of the tax year:

1. Under the age of 19, or
2. Under the age of 24 and a “full-time” student, or
3. Permanently and totally disabled at any time during the year, regardless of age.

### Residency

**AND** who lived with the taxpayer in the United States for more than half of the tax year.

### Issues That Arise Under Qualifying Child Tests

#### A. Cared for as Her Own Child

The Working Families Tax Relief Act of 2004 eliminates the “cared for as own child” requirement for tax years beginning 2005. Before 2005, this was a commonly litigated issue.269

#### B. Residency Test

The majority of issues that arise under the “qualifying child” definition involve the residency test. Generally, the contested issues involve documentation of the child’s residency, and not legal issues.

The child must have lived with the taxpayer in the United States for more than half of the year.270 If a child was born or died in the tax year, she is considered to meet the residency test if she lived with the

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269 A taxpayer, other than a parent, step-parent or grandparent, must prove that she treated the child as her own. *Domingo v. Comr.*, T. C. Memo 1998-442. A household resident who financially contributed to the household, but did not play a significant role in the child’s day-to-day life did not qualify for the EIC. *Mares v. Comr.*, T. C. Memo 2001-216; *Smith v. Comr.*, T. C. Memo 1997-544. However, even relatively little time acting as a parent may qualify. See e.g., *Barajas v. Comr.*, T. C. Summ. Op. 2002-59; see also, *Gilmore v. Comr.*, T. C. Summ. Op. 2004-38 (19 year old held to care for his nieces as his own children even where children’s mother and grandmother also lived in the house).

IRS Publication 596 alternatively refers to the statutory test, “cares for as her own child” as acting as a parent or sharing in parental responsibilities. Taxpayers may meet the relationship test for some children in the household, but not for others.

Publication 596 suggests that a parent’s child may also be an “eligible foster child” of the parent’s same sex relatives or friends who live with her. A taxpayer was held to care for his younger siblings as his own children even though their mother lived with them and also performed some parental duties. See e.g., *Barajas v. Comr.*, T.C. Summ. Op. 2002-59; see also *Gilmore v. Comr.*, T.C. Summ. Op. 2004-38.

270 Prior to 2002, an “eligible foster child” had to live with the taxpayer for the whole year in order to be a qualifying child for the taxpayer’s EIC claim.
taxpayer for the entire time she was alive in that year. Note that for the EIC, there is no “support” or “household maintenance” test if the taxpayer can properly file as single or married filing jointly.

A home is anywhere the taxpayer regularly lives and can include nontraditional homes such as homeless shelters. A taxpayer can meet the residency test even if the other parent has custody under a court decree and provided more than \( \frac{1}{2} \) the support. *Webb v. Comm'r*, T.C. Memo 1990-581.

Temporary absences can count toward the half year or whole year requirements if the taxpayer or child is away from home due to special circumstances such as:

- Illness
- School attendance\(^\text{271}\)
- Business or military service
- Vacation
- Detention in juvenile facility
- Kidnapping (if not committed by family member)
- Disaster displacement

Although not listed in IRS Publication 596, pre-conviction detention in a jail and custody agreements where the child is absent for less than 6 months may also count. *Cf.* Reg. § 1.2-2 (c)(1) (temporary absence pursuant to custody agreement is “special circumstance”); *Rowe v. Comm'r*, 128 T.C. 13 (2007). In *Rowe*, the taxpayer was eligible for the Earned Income Credit even though she was absent from the household for the last 7 months of the year due to her confinement in jail.

EIC legislative history indicates that determinations of an individual's principal abode should be made under rules similar to those for the head of household filing status. H.R. Conf. Rept. 964, 101 Cong. 2d Sess. 1037 (1990).

**Note:** Tax preparation services often counsel a taxpayer not to claim her resident child if someone else has already filed for the EIC based on that child. The IRS will deny an electronic return where someone else has already filed for the EIC. The tax preparation service counsels the taxpayer to file an incorrect return so the taxpayer can get a quick refund through an electronic return. Then, the tax preparation service can make a hefty profit on a refund anticipation loan. In this situation, the proper procedure is to file a paper return which will prompt an IRS examination to determine which taxpayer is entitled to claim the child for the EIC, or file an electronic return without using a tax preparation service. This conduct by tax preparation services may necessitate an amended return, Form 1040X, which correctly reports the taxpayer’s qualifying children.

\(^\text{271}\)If the child has a residence in her college's city and does not intend to return, her college attendance cannot count as a “temporary absence.” *Schatz v. Comm'r*, T.C. Memo 1981-341.
C. AGI Tiebreaker

Sometimes, a child is the “qualifying child” of more than one person. However, only one taxpayer (or a married couple filing jointly) can claim the EIC for the child.


Under current law, if 2 eligible persons claim the EIC, the following tie breaker rules apply:

1. Parent wins over non-parent
2. Where parents lived apart, but each lived with child for at least 6 months, parent who lived with child longer wins
3. Where child lived with each parent same amount of time, parent with higher AGI wins
4. If neither parent is eligible claimant, caretaker with highest AGI wins

These 2002 tiebreaker law changes present new planning opportunities for unwed parents who live together, but cannot file as “married.” If both unwed parents are the biological parents of a child, they can decide who claims the child for the EIC. If they have more than 1 child together, they can split their children. If both claim a child, the first tie breaker favors the parent who lived longer with the child. If residency is equal, the parent with the higher AGI wins.

8. IRS Audits of the EIC—What to Expect

The IRS audits many Earned Income Credit (EIC) returns due to the high error rates. Audits occur when more than 1 taxpayer claims a child for the EIC. Only 1 taxpayer may legally claim a child for the EIC. Correspondence audits are used to examine EIC claims.

Typically, an EIC disallowance will be accompanied by a disallowance of the head of household filing status, dependency exemptions and child tax credit.

To get an EIC for a child, the taxpayer must claim a child who meets certain residency, relationship and age tests.

In the past, income or filing status errors were responsible for about half of EIC erroneous payments. Qualifying child errors also accounted for many EIC errors. The vast majority of qualifying child errors occur because the residency test is not met.

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272 Prior to 2002, only the “eligible individual” with the higher modified AGI could claim the EIC. I.R.C. § 32(c)(1)(C); Jackson v. Comr., T.C. Memo 1996-54. Under the prior rules, relatives or friends with a higher modified AGI, but no earned income and therefore ineligible for the EIC, could defeat the parent's EIC claim.

273 A parent should win over a "step-parent."

274 The EIC rules are complex. This complexity leads to errors by both the IRS and taxpayers. In prior years, the estimated EIC error rate has been about 30%. Compliance Estimate for Earned Income Tax Credit Claimed on 1999 Returns (IRS, Feb. 28, 2002). The error rate remains high despite the fact that many low-income workers have their tax returns prepared by paid tax return preparers. The IRS error rate in its audits of EIC claimants is also high. You will find that some IRS auditors do not follow fairly basic EIC rules that are published on the IRS webpage.

275 Often, paid tax preparers erroneously tell taxpayers that they cannot file for the EIC because someone else already filed for their children. While it is true that the IRS won't accept an electronic return, the taxpayer can file a paper return claiming the EIC for his child. The IRS will then review the tax returns of both taxpayers and determine which taxpayer, if any, is entitled to the EIC.

Common reasons for disallowance of the EIC are:

- The child’s residency with taxpayer was not documented
- The child’s relationship with taxpayer was not documented
- The taxpayer incorrectly filed as head of household, and legally could have only filed as married filing separately
- For tax years prior to 2002, the qualifying child was also the qualifying child of another person with a higher AGI
- The taxpayer’s EIC was reduced or denied by the IRS for 1997 or a later year and a Form 8862 has not been filed
- The taxpayer was not a U.S. citizen or resident alien for the entire year
- Denial of self-employment income claimed

Documentation of the child’s residency and relationship is essential to defending the taxpayer’s EIC claim. Many indigent taxpayers find the IRS demands for documentation daunting and are unable to satisfy the IRS without a tax professional’s assistance.

9. Documentation and Proof of Residency and Relationship

A. Tax Return Preparation or Review

In the past, low-income taxpayers and their paid tax preparers have not developed documentation to support EIC claims as part of the tax return preparation. If the tax return is selected for audit, the IRS will demand documentation. It can be more difficult to obtain such documentation when the audit occurs. Taxpayers throw out or lose documentation. Agencies, that may have documentation, go out of business, have a difficult time locating older records, or are unwilling to cooperate. Witnesses may move. Therefore, if you have the opportunity to prepare the return, you should advise the taxpayer to obtain and maintain documentation of residency, household and dependent support, as relevant to the return.

Remember to review the tax return with the taxpayer if the Earned Income Credit is being contested. Tax preparation services often counsel taxpayers to omit qualifying children, who live with them, if someone else has already incorrectly claimed the child for the Earned Income Credit.

B. How to Document and Prove an EIC Claim in an Audit or Appeal

Residency is commonly contested in an EIC audit. The key is to provide third party records that show the names, common addresses and dates of common addresses of the taxpayer and any qualifying children. Low-income people frequently change apartments. This can make the documentation quite burdensome. Nonetheless, the taxpayer can generally find some records to establish her own address, e.g., leases, rent receipts, subsidized housing records, utility bills, other bills, food stamp records, public assistance notices, medical records, driver licenses, pay stubs, etc.

On the other hand, it can be difficult to find third party records that establish the address of a child, particularly a young child. The IRS suggests school records, day care records, medical records and social serv-
ice agency or community based organization records to establish the children's addresses. Records submitted to the IRS should show a common residency of more than 6 months. For example, get a record in the beginning of the year and a record at least 6 months later that has the same address.

If these records do not exist, the taxpayer should try to get a letter on official letterhead from the child's school, medical provider, child care provider, or the taxpayer's clergy, employer, or landlord. If possible, the letter should state that the taxpayer and children lived at the same address for 6 months or more during the tax year in question. This can be difficult since these third parties may not know the exact duration of the common residency.

IRS examiners are less impressed by letters and affidavits from relatives, friends and neighbors. You should try to get another letter or some corroborating documents if the taxpayer must rely on letters from relatives, friends and neighbors. As a practical matter, relatives, friends, neighbors, school bus drivers, or lawyers handling divorce or custody matters are often more competent witnesses on the issue of common residency than the affiants preferred by IRS auditors. Fortunately, the IRS Appeals officers and the Tax Court, unlike the IRS examiners, can and do give weight to affidavits or testimony by such witnesses.

Tax Court judges can and do rule in favor of the taxpayer based primarily or exclusively on a taxpayer's credible testimony. Of course, testimony by other credible witnesses is also helpful. As a practical manner, the IRS generally will not have any witnesses on the EIC issues with the possible exception of a competing claimant. The Tax Court has even ruled in taxpayers' favor when the testimony as to the child's address is contrary to the address in school records. The taxpayer's credible testimony can be given more weight than "official" records.277

Never send original documents to the IRS. They routinely lose documents. You should write the taxpayer's Social Security number on each document that you send to the IRS.

If a married taxpayer needs head of household status to qualify for the EIC, she will need to document expenses for the household and dependents.

10. Defense of an EIC Claim—Know The Big Picture

There are several "big picture" principles that you should know for the defense of a typical EIC audit or disallowance.

For most low-income taxpayers, the disallowance of the EIC will account for most, if not all, of the tax adjustment or deficiency proposed by the IRS. Therefore, your primary goal is to protect the EIC. The child tax credit can also be large.

The taxpayer can get a large EIC even if she has 1 qualifying child. The IRS wrongly denies the entire EIC claim when it finds that a claimed child does not meet the residency, relationship and age tests. Claiming children who are not "qualifying children" can result in large tax liabilities.

Single and head of household filers get the same EIC. The amount of the EIC is based on the taxpayer’s AGI. Therefore, the head of household filing status and dependency exemptions generally don’t affect the amount of the EIC.

In 2011, even “married filing jointly” taxpayers would get the same EIC as a “single or head of household” taxpayer until their adjusted gross income (AGI) exceeds $16,700. For higher income taxpayers, the “married filing jointly” status generally increases the EIC by less than $1,000.

For many low-income taxpayers, the head of household filing rate does not lower their taxes. For example, a 2011 EIC taxpayer’s tax refund or tax owed will be virtually the same for single or head of household for incomes below $16,700. Loss of the head of household filing status (versus single filing status) would only lower the tax refund of an EIC taxpayer with an AGI of $20,000 by a few hundred dollars. By comparison, the EIC provides a refund of about $2,561 (single, 1 child) to $5,751 (married filing jointly, 3 children) for 2011 taxpayers with $20,000 AGI. The EIC is the same for taxpayers who file as single or head of household. The head of household status does not increase an EIC eligible taxpayer’s EIC amount.

In summary, the head of household filing status can be irrelevant for income tax purposes. It may not be worth fighting over the head of household filing status or dependency exemptions if those items have little or no effect on the taxpayer’s tax refund.278 Run a tax return for the taxpayer without the head of household filing status to see how much money is at issue.

An unwed or divorced taxpayer can qualify for the EIC since she can legally file as “single.” It is amazing how many IRS agents and paid tax preparers do not know this. Instead, they take the position that a single taxpayer has to meet the head of household filing status to get the EIC. They are wrong.

The head of household status is, however, absolutely crucial for taxpayers who are married on December 31 of the tax year and who cannot file as “married filing jointly.” These taxpayers will not qualify for pre-2005 EICs unless they meet the requirements for head of household filing status as to at least 1 child.279

For such low-income taxpayers, who are married on December 31, the major EIC audit issues are whether:

- their spouse lived with them during the last 6 months of the year280
- they paid more than half the cost of maintaining the household

For years before 2005, another major audit issue was whether such married taxpayers qualify for a dependency exemption as to at least 1 child.281 Fortunately, most pre-2005 EIC claims do not depend on winning the head of household filing status and dependency exemption issues. A single or married filing jointly taxpayer does not have to meet the various support tests for head of household filing status or dependency exemptions to qualify for the EIC. After 2005, the dependency exemption is not a prerequisite for a married, but separated taxpayer to receive an EIC.

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278 Each tax year stands on its own. A concession in one year does not bind the taxpayer in another year. Pekar v. Comm’r, 113 T.C. 158, 166 (1999).
280 Married, but separated taxpayer denied EIC because husband lived in household at some time during last 6 months of year. Becker v. Commr, T.C. Memo 1995-177.
281 Beginning with the 2005 tax year, the dependency exemption requirement has been eliminated by the Working Families Tax Relief Act of 2004.
Many low-income taxpayers receive money from third parties, e.g., Social Security, welfare or subsidized housing assistance. These funds do not count as support by the taxpayer. Therefore, they may not qualify for the head of household filing status if their earned income is less than their income from third parties.

11. A Taxpayer May Be Eligible for an EIC Even If He Does Not Have a Qualifying Child

The IRS seems to deny any EIC when it finds that the taxpayer does not have a qualifying child. However, a taxpayer without a qualifying child may qualify for an EIC as to herself if her income is low enough. *Chandler v. Comm'r.*, T.C. Summ. Op. 2002-74. The other EIC requirements for taxpayers without a qualifying child are:

- Taxpayer or spouse, if filing jointly, is at least 25 but under 65.
- Taxpayer is not dependent or qualifying child of another person.
- Taxpayer lived in the United States more than half of the year.

12. A Form 8862 Is Required for Taxpayers Who Have Been Denied an EIC

A taxpayer, whose EIC was reduced or denied by the IRS for 1997 or a later year, must file a Form 8862 with a subsequent return in order to claim the EIC. Reg. § 1.32-3.

13. IRS Disallowance Procedures For Fraud or Reckless Disregard of EIC Rules

If the EIC was denied for tax returns (beginning in 1997) and the IRS determines that the error was due to reckless or intentional disregard of the EIC rules, the taxpayer cannot claim the EIC for the next 2 years. If the error was due to fraud, the taxpayer cannot claim the EIC for 10 years. I.R.C. § 32(k). Such disallowance could cost the taxpayer several thousand dollars per year in tax refunds. IRS determinations of reckless disregard or fraud are reviewable through the Tax Court deficiency procedures. I.R.C. § 6213(g)(2). The EIC 10 year ban is often asserted with a civil fraud penalty.

14. Death and the EIC

A representative may file for the EIC refund if the decedent was eligible at the time of his death. If a child was born or died in the tax year, she is considered to meet the residency test if she lived with the taxpayer for the entire time she was alive in that year.

15. Earned Income Credits and Bankruptcy

State law determines whether an earned income credit is exempt from seizure by creditors. Some states exempt earned income credits; others don't. In Louisiana, the earned income credit is now exempt from seizure by creditors. La. R.S. 13:3881(A)(6). In states where the credit is not exempt, the timing of the tax return and bankruptcy can be critical to maximizing the amount of credit that the client may retain.

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283 See e.g., *In re Collins*, 170 F.3d 512 (5th Cir. 1999). *Collins* found that the Earned Income Credit was not exempt under Louisiana law. In 2004, the Louisiana legislature amended La. R.S. 13:3881 to exempt Earned Income Credits.
17. LOUISIANA REAL ESTATE (OR AD VALOREM) TAXES

17.1 INTRODUCTION

17.1.1 Screen homeowners for real estate tax issues
You can help preserve home ownership for low-income clients by a simple check-up of their real estate. Check for the following:

- is the homeowner listed as the homeowner in the assessor and conveyance records?
- is his address in the assessor records correct?
- has there been a tax sale, blight adjudication or other adverse government action?
- is he getting the correct homestead exemption?
- if permanently disabled, a disabled veteran with a 50% disability rating (or a surviving spouse, 45 or older or with minor children) or a senior citizen (65 or older or if a surviving spouse, 55 or older), does he have an special assessment level freeze?

17.1.2 Importance of updated ownership records
If the owner's name and correct address is not listed with the assessor, he won't get notices of tax sales, code enforcement and other adverse government actions. If the assessor's records list another person as the owner, there may have been a tax sale.

17.1.3 Homestead exemption
A Louisiana taxpayer is entitled to a $75,000 homestead exemption from ad valorem taxes on his primary home which he lives in. For co-owned homesteads, the owners who occupy the homestead are entitled to a homestead exemption prorated for their ownership. Disabled veterans with a 100% service connected disability qualify (or their surviving spouses) for a $150,000 homestead exemption in most parishes.

The homestead exemption should be timely applied for each year. If a home- owner has forgotten to file the homestead exemption application, the assessors will generally process retroactive homestead exemptions for the last 3 years. A homestead exemption may be granted to an heir without the opening of a judicial succession. However, if there is a will, an assessor may decline to grant a homestead exemption.

17.1.4 Special Assessment Level Freezes
Disabled persons and senior citizens (i.e., 65 or older) may be entitled to a special assessment level freeze which freezes the assessment on their home. These freezes should be applied for immediately when the owner becomes eligible. The freeze is limited to those with income below a certain level. Failure to timely

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284 Under pre-2009 law, a taxpayer could obtain a judgment recognizing his homestead exemption retroactively for more than 3 years, or an assessor's determination. However, if taxes were erroneously paid on exempt property, the taxpayer's refund claims must be made within 3 years. *LaNasa v. City of New Orleans*, 855 So.2d 404 (La. App. 4 Cir. 2003) *writ denied* 861 So.2d 578 (La. 2003); La. Atty. Gen. Op. 07-0228 (Sept. 4, 2007); La. Atty. Gen. Op. 04-0221 (Sept. 23, 2004).


286 For the 2012 year, the taxpayer must have an AGI of $69,463 or less. This level is adjusted annually for inflation.
apply for the freeze will force the owner to wait another year for the freeze. A Social Security disability award letter is generally sufficient for a disability freeze. For senior citizen freezes, the assessor generally requires proof of annual income for the prior tax year. If the owner is employed, the assessor may ask for a copy of the owner’s federal income tax return.

17.1.5 Partial payment of ad valorem taxes

Some parishes may allow partial payment of ad valorem taxes. Check your local parish’s practice. If a parish does allow partial payment, it will still sell the property at the next tax sale if the taxes have not been fully paid.

17.2 TAX SALES

17.2.1 How clients with tax sale problems present

Ad valorem taxes are an in rem obligation of the land. So, a client will not be sued for real estate taxes. Rather, the property is sold at a tax sale subject to a right of redemption. A client may come to you whose property has been sold at a tax sale for failure to pay ad valorem taxes. In such cases, there will be a “tax deed” to the tax deed purchaser in pre-2009 sales or a “tax sale certificate” in post-2009 sales. Or if no person bid on the property, there will be a deed adjudicating the property to the city or parish.

A client may still be within the period to redeem the tax sale or adjudication sale. Or, he may face a post-sale notice of tax sale, a petition to quiet title, a monition proceeding or even a judgment confirming tax title.

A tax debtor may have the right to redeem a tax sale or annul a tax sale. In either case, the client ultimately will have to pay the tax purchaser or the tax collector the taxes and other amounts due under law.


17.2.2 Overview of tax sale laws

Tax sales in Louisiana are authorized by the state Constitution, Article 7, section 25. Act 819 of 2008 comprehensively revised and restated the statutory law governing tax sales. These new laws are codified at La. R.S. 47: 2121 et seq.

Act 819 states "This Act shall become effective on January 1, 2009." The new laws presumably apply to tax sales after January 1, 2009. The law is still unsettled as to how the new laws, or which parts thereof, apply to tax sales before January 1, 2009. 288

In addition to the statutes, there is considerable jurisprudence on the due process requirements for tax sales. See e.g., Lewis v. Succession of Johnson, 925 So.2d 1172 (La. 2006).

287 State v. Liberto, 181 So.2d 822, 825 (La. App. 4 Cir. 1966).
288 One court has applied the Act 819 judicial procedures for attacking a tax sale to a 2009 action to annul a 1993 tax sale. In re Davis, 59 So.3d 452 (La. App. 1 Cir. 2011).
17.3 REDEMPTIONS

17.3.1 The right to redeem tax sale property

There is a constitutional right to redeem property sold at a tax sale by paying the delinquent taxes, accrued taxes, interest and penalties within the prescribed time period. La. Const. art. 7, § 25 (B).

An action for redemption does not require proof of irregularity or defect in notice. It is merely a return of property to the tax debtor on demand upon payment of the back taxes. Harris v. Estate of Fuller, 532 So.2d 1367, 1368 (La. 1988). Louisiana law favors redemption of property sold at tax sales. ACORN Community Land Association of Louisiana v. Zeno, 936 So.2d 836 (La. App. 4 Cir. 2006).

17.3.2 The time to redeem

**General rule**: Property may be redeemed within 3 years of the recordation of the tax deed in the public records. La. Const. Art. 7, § 25 (B)(1). Hamilton v. Royal International Petroleum Corp., 934 So.2d 25 (La. 2006). A “tax sale certificate” is now considered a “tax deed” for redemption purposes. So, immediately check the recordation date to determine how much time is left for redemption. In some parishes, there is significant delay between the tax sale and the recordation of the tax deed.

While redemption must be initiated within the 3 year redemption period, there may be cases where it need not be completed within that time period. Harris v. Guardian Funds, Inc., 425 So.2d 1322 (La. App. 4 Cir. 1983) (lawsuit to redeem filed within 3 years); Becnel v. Woodland, 628 So.2d 89, 91 (La. App. 5 Cir. 1993), writ denied 634 So.2d 374 (La. 1994) (oral request to redeem within 3 years is sufficient); Mississippi Land Co. v. S & A Properties II, Inc., 817 So.2d 1200, 1204 (La. App. 3 Cir. 2002) (erroneous payment within 3 year redemption period held sufficient effort to redeem); S.A. Mortgage Service, Co. v. Lemoine, 800 So.2d 1015 (La. App. 5 Cir. 2001), writ denied 807 So.2d 851 (La. 2002) (redemption timely where insufficient amount paid because city gave tax debtor the wrong redemption amount).

**Practice Tip**: A tax debtor should preserve evidence to prove a timely redemption effort and act promptly to complete the redemption. The request for redemption should be in writing and sent by certified mail. The safest course of action in response to a refusal to grant redemption may be a timely suit against the tax collector or tax deed purchaser, as appropriate. Also, in a disputed or delayed redemption, a tax debtor should file an appropriate document in the public records to provide notice of his rights to third parties.

**Orleans blighted property exception**: In Orleans Parish, there may be a shorter period for redemption of blighted property sold at a tax sale. The Constitution provides that must be redeemed within 18 months. La. Const. art. 7 § 25(B)(2). The Court of Appeal has held that this 18 month redemptive period only applies when the tax sale occurred under the statutory authority for sales of blighted property. Padilla v. Schwartz, 11 So.3d 6 (La. App. 4 Cir. 2009). However, at least one Orleans district judge has ignored Schwartz and denied redemptions made after 18 months, but within 3 years, when the property has been adjudicated as “blighted.”

Note that under Act 819 of 2008, liens may be added to the tax bill to create a basis for a sale of the property pursuant to a tax sale. See R.S. 47: 2128.
Adjudication sales exception: If the property is not bought at the tax sale by a third party, it is adjudicated to the city or parish. In “adjudicated sales”, La. R.S. 47:2246 (Rev. 2008) now provides that the property may be redeemed beyond the 3 year period until any of the following occurs:

1. later of 60 days or 6 months as applicable after the notice required by R.S.47:2206 (notice of potential sale or donation), or the filing of the sale or donation transferring the property from the political division pursuant to R.S. 47:2201 et seq.;

2. the granting of the order of possession pursuant to R.S. 47:2232 (suit by political subdivision to obtain possession of adjudicated property);

3. 60 days or 6 months as applicable after the notice required by R.S. 47:2236 (declaration of political subdivision by ordinance of its intent to acquire property).

The Comment to this Act 819 amendment notes that it codified pre-2009 practices.290

Interruption of redemption period? The 3 year (or 18 month) redemption period is peremptive and cannot be interrupted. La. R.S. 47:2241; Harris v. Estate of Fuller, 532 So.2d 1367 (La. 1988). Yet, a period of military service shall not be included in computing period for redemption of property sold at a tax sale. Conroy v. Aniskoff, 507 U.S. 511 (1993).

17.3.3 Options when redemption period expired?

- Negotiate: It pays to contact the tax sale purchaser even if the redemption period has passed. Many tax deed purchasers are investors (both small and large) who are not interested in owning the property, but seek the redemption interest and penalties as profit. Also, a petition to quiet tax title can be expensive and protracted, and the tax title property may not qualify for title insurance.291 The tax sale purchaser may agree to allow you to redeem the property even after the official redemption period has passed.

- Pursue annulment remedy: If a co-owner did not receive sufficient notice prior to the tax sale, or there are other qualifying procedural defects, consider lawsuit to annul tax sale. See § 17.4, infra. An annulment suit may be possible even if there is a default judgment in a tax-title confirmation suit. Chase Bank USA, N.A. v Webeland, Inc., 98 So.3d 823 (La. 2012).

17.3.4 Who can redeem?

It is now settled that any person may redeem.292 However, the redemption is in the name of the tax debtor, and for his benefit.293

La. R.S. 13: 2575(C), as adopted by Act 209, § 2 of 2004, purports to revoke the constitutional right of redemption for Orleans property owners who have had their property sold at a tax sale for unpaid blight liens. R.S. 13: 2575 (C) is unconstitutional. If you have a redemption lawsuit for a tax sale involving blight liens, be sure to specially plead the unconstitutionality of R.S. 13: 2575 (C) and serve the pleadings and all hearing notices on the Attorney General.


291 In Orleans and St. Bernard Parishes, Sutter v. Dune Investments, Inc., 985 So.2d 1263 (La. App. 4 Cir. 2008) makes it difficult to obtain title insurance on tax sale properties.

292 La. R.S. 47:2242 (tax sale); 47: 2246 (adjudication sale); Hebert v. Hollier, 976 So.2d 1256 (La. 2007) (interpreting pre-2009 law).

293 La. R.S. 47:2242; ACORN Community Land Association of Louisiana v. Zeno, 936 So.2d 836 (La. App. 4 Cir. 2006).
17.3.5 How to redeem

Before Act 819 of 2008, there were administrative and judicial procedures for redemption of the property. Act 819 now provides that redemptions shall be made through the applicable tax collector. La. R.S. 47:2243. The Comment to § 2243 states that redemptions may no longer be made through or by negotiation with the tax deed purchaser. The Comment further states that this change eliminates potential abuse by tax deed purchasers who ask for “costs” as part of the redemption.

The basic redemption price is the delinquent tax, accrued taxes since the tax sale, a 5% penalty, costs, and interest at 1% per month. For each year of taxes paid by the tax deed purchaser, simply multiply the number of months between the tax purchaser’s payment and redeemer’s payment by 1% to get the cumulative interest owed.

R.S. 47:2244, as amended by Act 819, allows the tax collector to require the payment of all amounts accrued under other government liens at the time of the redemption payment. For properties with blight liens, grass cutting liens, etc., the requirement to pay these liens as part of the redemption could put the redemption beyond the tax debtor’s reach.\(^{294}\) (We have seen cases where the blight liens are significantly greater than the delinquent taxes, which may be very modest). The inclusion of liens as part of the redemption is within the political subdivision’s discretion.

Upon payment of the redemption costs, the tax collector shall issue a redemption certificate to the name of the tax debtor and file it in the appropriate conveyance records. R.S. 47: 2245.

If the tax collector improperly refuses redemption or asks for an incorrect amount, the redeemer will need to file suit for redemption of the property. If there was improper notice of the tax sale, the suit should also plead a claim for annulment.

The City of New Orleans continues to ask for penalties, interest and attorneys fees under City Ordinance 18,637 even though the ordinance was declared unconstitutional in Fransen v. City of New Orleans, 988 So.2d 225 (La. 2008).\(^{295}\) You should be able to get these items removed from the redemption price.

**Practice Tip:** The new redemption procedures may present problems to tax debtors. Sometimes, it is easier and quicker to work with tax deed purchasers. Also, tax deed purchasers are often willing to allow “redemption” after the redemptive period has expired. In this case, you may need to also style the redemption as a quit claim deed.

**Advocacy Alert:** Prior to Act 819 of 2008, most tax assessors (or collectors) would deny the homestead exemption to the tax debtor on the theory that he no longer owned the property. Act 819 now clarifies that a tax sale does not transfer or terminate the tax debtor’s property interest in the tax sale property until the redemptive period has expired and he has lost his redemption or annulment rights. R.S. 47: 2121(B). Thus, the new law appears to provide a tax debtor with a claim for the homestead exemption during the redemptive period (particularly in adjudication sales where the property remains assessed in the tax debtor’s name). The

\(^{294}\) See R.S. 47:2121(D)(5) for definition of “governmental liens” for purposes of tax sales and redemptions.

\(^{295}\) Check to see if the City has enacted a new ordinance in an attempt to circumvent Fransen for future years.
Attorney General has issued an opinion that the homestead exemption is lost when the home is sold in a tax sale, but continues when the home was sold in an adjudication sale. La. Atty. Gen. Op. 09-0161 (April 23, 2010). The Attorney General’s non-binding opinion may be incorrect as to loss of homestead exemption in tax sales.

The tax deed purchaser’s failure to pay taxes: Tax deed purchasers are required to pay the taxes for future years. They often fail to pay the taxes. The property can then be sold again at tax sale. Does the redemption period begin to run anew after each successive tax sale? One court has held that each successive tax deed purchaser has a right to redeem their inchoate title within 3 years after each respective tax sale and that the original redemption period does not begin to run anew. Virtocom Financial v. Palo Verde, 869 So.2d 194 (La. App. 5 Cir. 2004). The original tax debtor’s redemption of the second tax sale may only inure to the benefit of the tax deed purchaser. However, his purchase of his own property at the second tax sale may make him the new tax deed purchaser subject to the original tax deed purchaser’s right to redeem. A tax deed purchaser’s failure to pay subsequent taxes may defeat his petition to quiet title or subject his petition to an exception until he has paid all the subsequent taxes as required by La. R.S. 47:2161.

17.4 SUIT TO ANNUL TAX AND ADJUDICATION SALES

17.4.1 Introduction:

If it is too late to redeem, a tax debtor’s only legal remedy is a lawsuit to annul the tax or adjudication sale or to negotiate a settlement with the tax deed purchaser. The most common grounds for annulment are failure to give notice, a "redemption nullity", redemption or payment. If an action to annul is successful, the tax debtor must still pay the redemption amount to reclaim the property, unless the ground for nullity is that the taxes were paid and current at the time of the tax sale. Under the Constitution, interest for the taxes in a suit to annul is 10% per year rather than the 12% required for redemptions. See also, La. R.S. 47: 2290 (A)(1)(c).

17.4.2 Constitutional due process

Historically, the government’s failure to provide a pre-sale notice, as required by due process, renders the tax sale an absolute nullity. Act 819 of 2008 appears to state that a failure of notice is a relative nullity, i.e., one that can be cured. See R.S. 47: 2286 and Comments-2008. However, courts appear to view a failure to give pre-sale notice as an absolute nullity.

The most common due process violations are:

1. Failure to give each co-owner a pre-sale notice. Lewis v. Succession of Johnson, 925 So.2d 1172 (La. 2006). One co-owner may annul the tax sale in its entirety, not just the tax sale as to his fractional interest. C & C Energy, LLC v. Cody Investments, LLC, 41 So.3d 1134 (La. 2010).

296 Commercial National Bank in Shreveport v. Dance, 661 So.2d 551 (La. App. 2 Cir. 1995)(a tax sale is a nullity if the taxes were paid to time of tax sale).


298 Orleans Dist. Redevelopment Corp. v. Ocen Loan Servicing LLC, 83 So.3d 105 (La. App. 4 Cir. 2011) writ denied 85 So.3d 96 (La. 2012); Quantum Resources Mgt. LLC v. Pirate Lake Oil Corp., 98 So.3d 394 (La. App. 5 Cir. 2012).
2. **Failure to send post-sale notice?** The Supreme Court has ruled that failure to send a post-sale notice does not void a tax sale. However, this ruling has been abrogated by Act 819 of 2008 and Act 836 of 2012, which require the tax collector to issue a post-sale notice of right of redemption and provide a statutory remedy for this “redemption nullity.”

3. **Failure to send notice by regular mail to co-owners after certified mail is returned unclaimed.** *Lewis v. Succession of Johnson*, 925 So.2d 1172 (La. 2006); *Wilson v. Smith*, 2010 WL 4273091 (La. App. 1 Cir. 2010); *Jones v. Flowers*, 547 U.S. 220 (2006).

### 17.4.3 Time for suit to annul tax sale

Under pre-2009 law, there was no time limit for an action to annul other than time limits to respond to a petition to quiet title by filing a reconventional demand. However, under post-2009 law, a tax debtor may receive a notice or a lawsuit that could trigger his time limits to redeem, sue or reconvene for annulment of the tax sale. Unsophisticated clients are less likely to respond to a letter from someone than a lawsuit.

Act 819 of 2008, codified at R.S. 47:2287, now provides for time limits for an action to annul based on a “redemption nullity.” A “redemption nullity” is defined a right to annul a tax sale under R.S. 47:2286 because the tax debtor was not duly notified at least 6 months before the redemptive period. Thus, Act 819 does the following: (1) creates a statutory remedy to annul for the tax collector’s failure to provide a post-sale notice and (2) tries to cure the nullity of a failure of a pre-sale notice by providing for post-sale notices before the expiration of the redemption period.

Under the new R.S. 47:2287, the action for nullity must be brought within 6 months or 60 days after the person has been “duly notified.” Unfortunately, “duly notified” has been defined by R.S. 47:2121 (D)(4) to include a bewildering array of various notices by private persons and public officials, and includes certain post-sale notices. Under the statute, these notices which may meet the statutory definition of “duly notified” include:

- R.S. 47: 2156 post-sale notice (within redemptive period)
- R.S. 47: 2157 post-sale notice (after redemptive period)
- R.S. 47: 2206 political subdivision’s notice of potential sale or donation
- R.S. 47: 2236 political subdivision’s claim of ownership by ordinance
- R.S. 47: 2275 notice pursuant to monition proceeding
- R.S. 47: 2266 notice pursuant to petition to quiet title

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299 *Hamilton v. Royal International Petroleum Corp.*, 934 So.2d 25 (La. 2006).

300 See La. R.S. 47:2286, 2122(10), 2122(4). Also the *Hamilton* case was wrongly decided. See *Stopping Short of Justice: Hamilton & Notice Requirement for the Redemption Period of Tax Sales*, 68 La. L. Rev. 263 (2007). Also, most states have held that tax sales that fail to comply with post-sale notice requirements are voidable. See *e.g.*, *Johnson v. Ferguson*, 58 So.3d 711 (Miss. App. 2011).

301 See *e.g.*, *Pardon v. Moore*, 908 So.2d 1253, 1258-59 (La. App. 2 Cir. 2005); see also *Sutter v. Dane Investments, Inc.*, 985 So.2d 1263 (La. App. 4 Cir. 2008).

You need to determine which time limit applies to the client’s case. This may be tricky since a tax deed purchaser can trigger these time limits by sending a notice, rather than the old method of suing to quiet title. There may be future litigation issues for a tax deed purchaser’s failure to notify all co-owners. Cf. Lewis v. Succession of Johnson, 925 So.2d 1172 (La. 2006)(pre-sale due process requirements).

1. For notices sent between the end of the redemptive period and 5 years after the recordation of the tax sale certificate, the tax debtor has 6 months to sue. The post-sale notice required in R.S. 47:2156 can’t count as the notice for this 6 month period.

2. For notices sent more than 5 years after the recordation of the tax sale certificate, the tax debtor has 60 days to sue.

If a client receives a petition to quiet title, he must sue or reconvene to annul the tax sale within either 6 months or 10 days. (Please be aware that the court citation may incorrectly state the delay period to sue). The shorter 10 day period applies if the petition has been filed after quieting of title by 5 years prescription. The longer 6 month period applies if the petition to quiet is filed after the redemptive period, but before the 5 year prescription. See La. R.S. 47:2266; La. Const. art. 7, § 25(D). One court of appeal has strictly enforced the 6 month time limit for filing a proceeding (lawsuit or reconventional demand) to annul the tax sale. However, the Supreme Court reversed upon a finding that there was no notice to the owner and that he should be allowed to raise a constitutional due process claim by an answer or an reconventional demand that was filed more than 6 months after the suit to quiet tax title. An owner served with a petition to quiet tax title should always file responsive pleadings that include a timely reconventional demand to annul the tax sale. You must file more than an answer to protect the owner’s rights.

Note that the shorter 10 day period, if applicable to non-residents, is extremely unfair. It is also doubtful that service on a curator could ever result in actual notice (or due process notice) to a tax debtor within the 10 day period to sue for annulment. A 10 day limit appears unreasonable for both residents and non-residents in a petition to quiet title where a curator is appointed for the defendants.

Note: A suit to annul a default judgment quieting tax title may be brought if the original tax sale was null for a failure of notice. Chase Bank USA, N.A. v Webe-land, Inc., 98 So.3d 823 (La. 2012).

Act 819 of 2008 also clarified the rules for monition proceedings by tax deed purchasers. See R.S. 47:2271-75. Monition can now be brought after the expiration of the redemptive period. There is no need to wait 5 years from recordation of the deed or tax sale certificate.

17.4.4 Bankruptcy

A tax sale is also voidable if it was made while a bankruptcy stay was in effect. Joshua Inv. Corp. v. Home Sales Consulting, Inc., 892 So.2d 151 (La. App. 2 Cir. 2005), writ denied 901 So.2d 1066 (La. 2005); Bertini v. Britton, 635 So.2d 712 (La. App. 1 Cir. 1994).

303 Smith v. Gulf South Shrimp, Inc., 77 So.3d 1012 (La. App. 1 Cir. 10/19/11), rev’d 94 So.3d 750 (La. 2012).
17.4.5 Judgments in nullity action

Act 819 of 2008 does clarify prior law by setting a 1 year period from the date of nullity judgment for a tax debtor to pay the “costs” owed to the tax deed purchaser. R.S. 47:2291. Nullity judgments don’t become effective until the “costs” have been paid. R.S. 47:2290. The prior law was unclear as to what a tax deed purchaser could do if a tax sale was annulled, but the “costs” never paid. R.S. 47:2291 also provides a litigation procedure to fix “costs” when the court has made a preliminary order to declare the tax sale a nullity. Act 275 of 2011, codified at R.S. 47: 2161, allows tax title purchasers of blighted property in New Orleans to seek reimbursement for the costs of improvements to bring the property into compliance with municipal code ordinances. However, the allowable costs are limited to $1,500 per year for abandoned property and $3,000 per year for blighted property. The owner’s failure to pay these improvement costs does not terminate or impair his right to redeem.

18. TAX LAW RESEARCH

See Ch. 25 of Effectively Representing Your Client Before the IRS (ABA 5th ed. 2011) for a comprehensive guide to tax law research.

IRS web page has great resources for tax practitioners at www.irs.gov/taxpros. Here, you can find:

- Tax forms and publications
- IRS contact information
- Internal Revenue Manual (www.irs.gov/irm)
- Weekly Internal Revenue Bulletin (new regulations, Revenue rulings, Revenue Procedures)
- Private letter rulings, technical assistance memoranda

Other Web pages
www.litctoolkit.com
Resources for Low-Income Taxpayer Clinics (password protected)
www.ustaxcourt.gov
Tax Court rules, forms and searchable opinions
www.abanet.org/tax/sites.html
American Bar Association, Section of Taxation’s tax links index

Treatises
Effectively Representing Your Client Before the IRS (ABA 5th ed. 2011)
M. King, Discharging Taxes in Consumer Bankruptcy Cases (2012).
R. Nadler, A Practitioner’s Guide to Innocent Spouse Relief: Proven Strategies for Winning Section 6015 Tax Cases (ABA 2011)
CHAPTER 15

LANGUAGE ACCESS

Luz M. Molina, Maria Pabon Lopez and Natasha Ann Lacoste
About The Authors

**Luz M. Molina**, Jack Nelson Distinguished Professor of Law, acquired her J.D. from Tulane University in 1979. She joined the faculty of Loyola University College of Law New Orleans permanently in 1990. Professor Molina is the Director of the Clinical Externship program at the College of Law, serving as the faculty responsible for students’ placement, supervision and instruction. She also works with student practitioners in a labor and employment law practice as part of her Workplace Justice Program. An extensive portion of this chapter was taken from her excellent and informative article, *Language Access to Louisiana Courts: A Failure to Provide Fundamental Access to Justice*, published in the Fall 2008 edition of the Loyola Journal of Public Interest.

Dean **María Pabón López**, Dean and Judge Adrian G. Duplantier Distinguished Professor of Law, obtained a B.A. from Princeton University in 1985 and her J.D. from the University of Pennsylvania Law School in 1989. Dean López is an expert in immigrants’ rights and immigration law. She currently serves on both the Diversity Committee of the Louisiana State Bar Association and on the Diversity Committee of the National Conference of Bar Examiners. Additionally, Dean López has served on the Indiana State Board of Law Examiners from 2008 to 2011 and was an appointed member of the Indiana Supreme Court’s Court Interpreter Certification Advisory Board. For the year 2010-11 she was appointed to the Editorial Advisory Committee of the National Conference of Bar Examiners. Also, in 2010, Dean López was elected to the American Law Institute (ALI).

**Natasha Ann Lacoste** attained a B.A. from Hollins University in 2002, a Masters in Criminal Justice from Loyola University New Orleans in 2007, and her J.D. from Loyola University College of Law New Orleans in 2011. She is currently working with Dean María Pabón López as her Research Associate. Ms. Lacoste is a member the Louisiana Bar and the New Orleans Bar Associations.
1. INTRODUCTION

National and local demographic trends point to a growing immigrant population in the United States.\(^1\) Louisiana is no exception.\(^2\) With such growth comes the inevitable challenge of providing a variety of government services,\(^3\) including court interpreters, to a population which may not be able to fully understand the English language.\(^4\) According to a report compiled by the Southern Poverty Law Center, Latinos indicated that among schools, hospitals, and courtrooms—a courtroom was the place where they were least likely to encounter an interpreter.\(^5\)

The issue of court interpreters is particularly challenging for Louisiana Courts, due to little legislative guidance or judicial consensus concerning interpreter qualifications, appointments, and appropriation of costs. These Limited English Proficient (LEP) persons can face grave consequences when they are drawn into judicial proceedings, civil or criminal, where they are unable to meaningfully participate or defend themselves because they lack English proficiency. However, the presence of a qualified interpreter can give a LEP individual the opportunity to participate in a meaningful way in the legal process and to contribute rich detail and essential information because effective communication has been established.

2. THE RIGHT TO AN INTERPRETER IN LOUISIANA COURTS

2.1 HOW TO APPLY FOR AN INTERPRETER

Articles 192.2 and 25.1, of the codes of civil and criminal procedure mandate that a judge appoint a foreign language interpreter when requested by a “principal party in interest” or a “witness.”\(^6\) An adequate showing of a party’s inability to understand the proceedings in English or be understood in English should establish the right to an interpreter.\(^7\) The right to an interpreter applies to the entire proceeding, not just to the non-English speaking person’s own testimony.\(^8\)


\(^2\) According to the 2010 census conducted by the U.S. Census Bureau, Louisiana had 4,533,372 inhabitants, with 8.7% of the inhabitants over the age of five speaking a language other than English at home. This would mean that approximately 394,403 individuals in Louisiana speak a language other than English at home, State & Country QuickFacts, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/22000.html (last visited Apr. 2, 2011).

\(^3\) Agencies that receive federal money must comply with Title VI of the Civil Rights Act of 1964 and President Clinton’s Executive Order 13166 dealing with LEP individuals, which is titled, “Improving Access to Services for Persons with Limited English Proficiency.” Language Portal: A Translation and Interpretation Digital Library, MIGRATION POLICY INST., http://www.migrationinformation.org/integration/language_portal/ (last visited June 25, 2012) & Overview of Executive Order 13166, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/oc/13166.php (last visited June 25, 2012) [hereinafter Overview of Executive Order]. Executive Order 13166 directs federal agencies “to examine the services they provide, identify any need for services to those with limited English proficiency (LEP), and develop and implement a system to provide those services so LEP persons can have meaningful access to them.” Overview of Executive Order. In addition, the order “requires that the Federal agencies work to ensure that recipients of Federal financial assistance provide meaningful access to their LEP applicants and beneficiaries.” Id.

\(^4\) A term that has gained currency to describe non-English speaking individuals is “Limited English Proficient” (LEP) person. Muneer I. Ahmad, Interpreting Communities: Lawyering Across Language Difference, 54 UCLA L. REV. 999, 1001 n.s. (2007). A good description of LEP persons defines them as “those who ‘cannot speak, read, write or understand the English language at a level that permits them to interact effectively with’ service providers.” Id. (quoting Policy Guidance on the Prohibition Against National Origin Discrimination as It Affects Persons With Limited English Proficiency, 67 Fed. Reg. 4968, 4969 (Feb. 1, 2002)).

\(^5\) Under Siege: Life for Low-Income Latinos in the South, S. POVERTY LAW CTR. 38 (Apr. 2009) [hereinafter Under Siege]. Forty-six percent of Latinos who had prior court experience reported there was no court interpreter. Id.

\(^6\) LA. CODE CIV. PROC. ANN. art. 192.2 (2008); LA. CODE CRIM. PROC. ANN. art. 25.1 (2008).

\(^7\) State v. Mondragon, 01-35,178 (La. App. 2 Cir. 04/19/01); 804 So. 2d 657.

\(^8\) LA. CODE CIV. PROC. ANN. art. 192.2 (2008).
In 2002, the Louisiana Supreme Court mandated that, in accordance with the Americans with Disabilities Act, in all criminal and civil proceedings a court-provided foreign language interpreter should be made accessible through simply filling out the form found in its Appendix 5.1B. Thus, it is the responsibility of the person or his/her attorney to request an interpreter by completing this Interpreter Request and Order Form. This applies to all proceedings, both criminal and civil.

2.2 WHO BEARS THE COST OF AN INTERPRETER?

Louisiana Code of Civil Procedure Article 192.2 clearly states that the cost of an interpreter for a court proceeding is taxed as a court cost. However, the costs may not be taxed to a prevailing pauper. Also, in many domestic violence cases, the costs must be paid by the abuser. Note that art. 192.2 deals strictly with those who are not deaf or severely hearing-impaired.

Louisiana law imparts more rights to persons who are deaf and severely hearing-impaired than to LEP individuals. The right to an interpreter applies to the taking of depositions and the court proceedings. For the deaf and hearing-impaired, the Louisiana Code of Civil Procedure specifically states that “[t]he costs of such interpreters shall be borne by the court.” These individuals not only have a right to have an interpreter appointed for the proceeding itself, but in cases where it is the practice or policy of the courts to appoint counsel for indigent parties, they also have a right to have a “qualified interpreter/transliterator”

9 LA. SUP Ct. R. 5.1. “Rules for Proceedings in District Courts, Family and Domestic Relations Courts, and Juvenile Courts, Title I, Rule 5.1 ‘Accessibility to Judicial Proceedings’ (a) The facilities, services, and programs of the court shall be readily accessible to persons with disabilities. Attached as Appendix 5A is a form that may be used to request reasonable accommodations extended under the ADA. Attached as Appendix SB is a form that may be used to request an interpreter.” Id. See Appendix B for a copy of this form.

10 LA. SUP Ct. R. 5.1.

11 LA. CODE CIV. PROC. ANN. art. 192.2 (2008) states in full “A. If a non-English-speaking person who is a principal party in interest or a witness in a proceeding before the court has requested an interpreter, a judge shall appoint, after consultation with the non-English-speaking person or his attorney, a competent interpreter to interpret or to translate the proceedings to him and to interpret or translate his testimony. B. The court shall order reimbursement to the interpreter for his services at a fixed reasonable amount, and that amount shall be taxed by the court as costs of court.” Id. Louisiana Code Criminal Procedure Article 25.1 has the same language in Part A as Article 192.2 of the civil code. However, Part B of Article 25.1 states “[t]he court shall order reimbursement to the interpreter for his services at a fixed reasonable amount.” LA. CODE CRIM. PROC. ANN. art. 25.1 (2008). Note there is no mention in Article 25.1 of the cost of an interpreter being taxed as a court cost. Thus, a criminal defendant could ultimately be responsible for the cost under Louisiana Code Criminal Procedure Article 887(A). Article 887(A) states in full “[a] defendant who is convicted of an offense or is the person owing a duty of support in a support proceeding shall be liable for all costs of the prosecution or proceeding, whether or not costs are assessed by the court, and such costs are recoverable by the party or parties who incurred the expense. However, such defendant or person shall not be liable for costs if acquitted or if the prosecution or proceeding is dismissed. In addition, any judge of a district court, parish court, city court, traffic court, juvenile court, family court, or magistrate of a mayor’s court within the state shall be authorized to suspend court costs.” LA. CODE CRIM. PROC. ANN. art. 887(A) (2008). See also State v. Lopes, 01-1383 (La. 12/07/01); 805 So. 2d 128 (the court recognized a need for an interpreter as a function of due process, but did not hold that the obligation to provide an interpreter at the State’s cost was unconditional) and discussion infra p. 9. See also Judge William J. Burris, The Impact of Language Barriers to Access to Justice, 56 LA. B.J. 416, 417 (2009) (“if the criminal defendant is convicted and is not indigent, the cost of an interpreter is assessable to him under La. C.C.P. art. 887”).

12 LA. CODE CIV. PROC. ANN. art. 5186 (1997); Snowton v. Snowton, 09-0600 (La. App. 4 Cir. 1/27/10), 22 So.3d 1111.


15 LA. CODE CIV. PROC. ANN. art. 192.1(C)(2) (2008). Discussed supra p. 3, the costs for an interpreter under Article 192.2 is to be taxed as court costs. LA. CODE CIV. PROC. ANN. art. 192.2 (2008).
appointed and paid for “to assist in communication with counsel in all phases of the preparation and presentation of the case.”

2.3 WHAT QUALIFICATIONS MUST AN INTERPRETER HAVE?

The qualifications of court interpreters are governed by the Louisiana Code of Evidence Article 604, which states “[a]n interpreter is subject to the provisions of this Code relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.” Thus, Louisiana, like many other states, designates interpreters as “expert witnesses.” Yet nothing in the law sets forth any interpreter standards, nor is there any guidance for judges or lawyers to follow when considering the use and evaluation of an interpreter other than Code of Civil Procedure art. 192.2 which requires the interpreter to be competent.

A recent civil case, *Thongsavanh v. Schexnayder*, did set forth general standards regarding the qualification of interpreters. The court stated “[a]n interpreter of foreign-language testimony must be competent and qualified by virtue of knowledge, skill, experience, training, or education, have no substantial interest in the proceedings, and be sworn to give a true bilateral translation of the questions and answers during testimony.”

3. HOW TO COMMUNICATE WITH LEP CLIENTS

Another issue, which ties into legal ethics, is the importance of clear communication between an attorney and his/her client. For representation of a client to comport with ethical requirements of competence, it is imperative that counsel be able to communicate fully with his/her client. Thus, before interviewing a client, an attorney should determine what particular and special needs the future

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16 LA. REV. STAT. ANN. § 46:2364(A)(F) (2008). This statute is broadly titled “Louisiana Interpreter’s Law.” *Id. See also* State v. Mondragon, 01-35,178 (La. App. 2 Cir. 04/19/01); 804 So. 2d 657 and discussion infra p. 9. The pertinent parts of Louisiana Revised Statute § 46:2364 are: “A. Whenever a hearing-impaired person is a party or witness at any stage involving direct communication with hearing-impaired persons or his legal representative or custodian during any judicial or quasi-judicial proceeding in this state or in its political subdivisions, including but not limited to proceedings of civil and criminal court, grand jury, before a magistrate, juvenile, adoption, mental health committee, and any proceeding in which a hearing-impaired person may be subjected to confinement or criminal sanction, the appointing authority shall appoint and pay for a qualified interpreter/transliterator to interpret or transliterate the proceedings to the hearing-impaired person and to interpret or transliterate the hearing-impaired person’s testimony. E. (1) Whenever a hearing-impaired person is arrested for an alleged violation of a criminal law, including a local ordinance, the arresting officer shall procure and the court with jurisdiction over the alleged violation shall pay for a qualified interpreter/transliterator for any interrogation, warning, notification of rights, or taking of a statement. F. Where it is the policy and practice of a court of this state or of its political subdivisions to appoint counsel for indigent persons, the appointing authority shall appoint and pay for a qualified interpreter/transliterator for hearing-impaired indigent people to assist in communication with counsel in all phases of the preparation and presentation of the case.” *Id.*


20 *Thongsavanh v. Schexnayder*, 09-1462 (La. App. 1 Cir. 05/7/10); 40 So. 3d 989.

21 *Id.* at 997. *See also* discussion infra p. 11.

22 The authors would like to thank Rebeca E. Zuniga-Hamlin, Outreach Assistant to the Workplace Justice Project, for her insight and contribution to this section of the chapter.

23 *See* LA. RULES OF PROF’L CONDUCT R. 1.1. The pertinent section of this rule governing attorney competence states “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” *Id.*
client might have; and this determination ought to include language access and cultural awareness. A lawyer must be able to understand the story the client is telling. All clients present with a story—that is the basis for his/her problem and why he/she is seeking the advice of a lawyer. Therefore, the lawyer must be able to ask questions and elicit responses from his/her client. If an attorney is unable to fully comprehend the underlying issues surrounding a client’s problem, then representation of the client may not be competent.

Thus, be aware that if a LEP person comes to your office you must be able to communicate fully with them. If language access is a problem you may be required, under the Rules of Professional Conduct, to use an interpreter.24 A lawyer should always strive to use a qualified interpreter, and in the event a trained and qualified interpreter is not available, the attorney may request that the client bring an interpreter with him or her. Attorneys should never use a family member or a child to interpret. This would violate confidentiality and there is a clear conflict of interest. Additionally, using family members, especially children, is unadvisable and dangerous due to the trauma it may cause to the family member or child. In many cases lawyers do not have a trained qualified interpreter they know or can reach. In some cases it may be possible for counsel to use a staff member in his/her office who is bilingual, but that staff member should be trained to at least a minimal level. As mentioned previously, being bilingual does not qualify a person as an interpreter; interpretation is a profession that requires skill and training.25

Another tool which lawyers may use is language lines. Although these services do not guarantee full meaningful communication, they can be helpful. For example, at Language Line Services, which offers interpretation services for over 170 languages, an attorney simply calls the 800 number and requests over-the-phone interpretation.26 The interpreters at this service must sign a confidentiality agreement and are bound by a code of ethics.27 The call to the number is free and usage is billed in one-minute increments when the interpreter comes on the line.28 Thus, this may be an option for counsel if a qualified interpreter is not available.

Additionally, lawyers should take into consideration the location of the interview. In many cases, the client is a person that is held in detention or is serving a sentence of some sort. Therefore, it is important for counsel to determine what language access facilities are available at the location. If the attorney has to bring an interpreter, the attorney should make inquiries about the facility’s requirements for the use of interpreters and their access to the facility. Nevertheless, lawyers should be prepared for the contingency that the interpreter is not allowed into the facility, even after counsel has comported with all requirements.

24 See id.
25 See discussion supra pp. 4-6.
28 Id. The service may be used by either a pay-as-you go option or by establishing an account. If a lawyer uses the service on a pay-as-you go basis, the rate is $3.95 per minute. If an account is established, the rate varies between two and six dollars, depending on the languages used and how many calls per month the account handles. Interview with a Language Line Service representative (June 25, 2012).
4. HOW DO I DECIDE WHETHER A CLIENT NEEDS AN INTERPRETER?

The issue is whether your client can adequately understand English and be understood in English. A LEP client’s lack of sufficient English proficiency should be clear in many cases. However, there may be close cases where you need to carefully decide whether an interpreter is needed or not. A LEP client’s testimony may not be as strong in a translation as in his English. Also, if the judge perceives that a LEP witness is “hiding” behind an interpreter when his English is good enough for him to understand and be understood, this may affect your client’s credibility.

5. USE OF INTERPRETERS AT DEPOSITIONS

Depositions of LEP clients may be even more challenging than courtroom testimony. First, there is no right for a LEP client to have a free interpreter in a deposition in a civil case. Generally, in most legal services cases, the opposing counsel takes the deposition and the legal services attorneys defends the deposition. Thus, the qualifications and costs of the interpreter will always present as an issue since legal services clients lack the funds to pay interpreters. You should argue that the party seeking the deposition must pay for the cost of interpretation for your LEP client.29 As a practical matter, if you don’t speak the client’s language, you will also need another interpreter to speak confidentially with your client at the deposition and to check the official interpreter’s translations.

One challenge of interpreted depositions (if you don’t speak the client’s language), is that the client’s testimony will be recorded before you have an opportunity to object or intervene. Thus, there is an enhanced risk that a witness may reveal confidential information before the attorney can intervene.

Never waive the reading and signing of the deposition of a LEP client. If mistakes were made due to inaccurate translations, this will be your opportunity to correct them. Given the difficulties of interpreted testimony, the deposition presents the danger of setting a LEP client up for inconsistent testimony which will undercut his credibility at the ultimate trial.

If your client can afford it, real time depositions of LEP witnesses’ testimony will facilitate easier and more accurate translations by the interpreter. An audio or video recording would also allow you to check the accuracy of translations after the fact.

6. HOW TO WORK WITH AN INTERPRETER

You should help the interpreter understand the case. Provide the interpreter with a copy of the complaint and a summary of the case and issues. For a deposition interpreter or an interpreter appointed by the court for the trial, you should seek the opposing counsel’s approval of any case summary that you want to provide to the interpreter. If opposing counsel will not approve your case summary, seek authorization from the court for the proposed communication with the interpreter. A better interpretation should result if the interpreter is provided in advance with the names of witnesses and any technical terms that may be used.

in the witnesses’ testimony. But remember that the interpreter is an officer of the court and communications with the interpreter outside the court should not be conducted without the court’s authorization.

Ideally, the interpreter should be able to meet and briefly speak with the non-English speaking party or witness prior to his testimony. This will help the interpreter and witness understand differences in accents, dialects, pronunciation and speaking styles. Remember to warn your client that communications with the interpreter are not confidential and that they should talk about things other than the case to get used to each other’s speech.

To make the interpreter’s translation more accurate, examining attorneys should use short and simple questions. Pause between sentences or segments to allow the interpreter to interpret. Don’t use complex legal terms, acronyms or refer to people by their titles, rather than their names. Remember that you should always direct your questions to the witness in the first person, not to the interpreter. For example, say “did you see the car accident?” rather than “ask him whether he saw the car accident.” Generally, it is not wise to have an interpreter translate a document on the spot or through a witness. If important documents need to be translated into English or another language, this should be done by a qualified translator before the trial or deposition.

Translations are tiring to interpreters and require focus. Thus, it is important for the court or deposing attorneys to allow an interpreter to take frequent breaks from translating testimony. This will promote greater accuracy in the translations. If possible, it is better to work with one interpreter for consistency. But, if a trial is long, it may be necessary to employ more than one interpreter given the need for interpreters to rest and remain fresh.

If you don’t speak the language of your client or a witness, you should bring an interpreter to check on the accuracy of the court appointed interpreter’s translations. As a practical matter, you need an interpreter with you to communicate confidentially with your client during the trial. This interpreter can also advise you if the court interpreter has inaccurately translated the examiner’s question or the witness’ answer. Use tact in challenging the official interpreter’s translations.

A serial interpretation is easier and more accurate than simultaneous interpretation. In serial interpretations, the interpretation is given after the entire question or answer. In simultaneous interpretations, the interpreter translates as the witness, lawyer or judge is speaking. Some courts may require simultaneous interpretations.

7. PREPARATION OF YOUR LEP CLIENT FOR TESTIMONY

You should prepare your LEP client on how to work more effectively with an interpreter. Advise your client to speak slowly and clearly, and not to speak when another person is speaking. Clients should be counseled to use short sentences and avoid slang.

If your client does not understand a question or the words used by the interpreter, he should say so and wait for the attorneys or court to resolve the matter before answering.
Advising your client that anything he says to the court interpreter will be translated word for word and that the interpreter is required to tell the court everything he says. Tell your client that the interpreter is not allowed to explain the client’s answers. Your client should avoid asking the interpreter how to answer a question or revealing any confidential information to the interpreter. Such mistakes can seriously prejudice your client’s case.

8. INTERPRETER ETHICS

Interpretation requires knowledge, skill, and ethics. The fact of being bilingual does not qualify an individual for court interpreting, even if the person is fluent. For example, officials in Arkansas

[D]iscovered that the Spanish-language rights waiver signed by a man pleading guilty to driving while intoxicated stated that he was charged with ‘a murder’ and that his penalty was ‘1 anus in jail and a $1,000 fine.’ A court clerk who spoke Spanish but wasn’t certified by the state had translated the waiver form into Spanish several years earlier.30

An interpreter’s competence can be “defined as the congruence between task demands (performance standards) and qualifications;”31 thus, interpreters should be considered professionals within the judicial system.32 The conceptualization of interpreters as “professionals,” which incidentally, is also supported by their designation in the Louisiana Code of Evidence as “experts,”33 is essential to the understanding that “interpreters,” like experts, require specialized knowledge and training.

Thus, since interpreters are professionals, they have established professional responsibilities and must ascribe to a code of ethics. Codes of ethics for interpreters may vary from jurisdiction to jurisdiction, but generally accepted canons exhort interpreters to uphold the standards of the profession by understanding the need for “accuracy,” “impartiality and conflicts of interest,” “confidentiality,” “limitations of practice,” “protocol and demeanor,” “maintenance and improvement of skills and knowledge,” “accurate representation of credentials” and “impediments to compliance” in particular instances.34

30 Under Siege, supra note 5, at 39.
31 FRANZ PÖCHHACKER, INTRODUCING INTERPRETING STUDIES 166 (Routledge 2004).
32 Id. (“For a practice or occupation to be acknowledged as a profession, it must be perceived to rest on a complex body of knowledge and skills, mastery of which can only be acquired by specialized training.”).
Although Louisiana does not have a code of ethics for interpreters, interpreters must take an oath.\textsuperscript{35} This oath embodies many of the important ethical considerations found in the accepted canons—accuracy, competency, and impartiality.\textsuperscript{36} Moreover, the oath requires interpreters to make a true interpretation.\textsuperscript{37}

### 9. LOUISIANA LEGAL ISSUES RELATIVE TO INTERPRETERS

#### 9.1 OVERVIEW

Legal problems faced by LEP individuals in Louisiana as a result of the failure of the courts to understand, apply, and uphold interpreter standards impinge on the right to full access to the courts and the fairness of the proceeding. The courts have themselves expressed frustration with the lack of legislative guidance on the matter, leading at least one court to opine that the “issue concerning an interpreter should be addressed by the Legislature and not this Court.”\textsuperscript{38} Yet another court specifically referred to the lack of statutory interpreter qualifications in its attempt to otherwise craft a juridical answer to the question of interpreter bias on appellate review.\textsuperscript{39} Further, Louisiana courts, in the absence of statutory standards, have not otherwise developed a greater understanding of the issue through jurisprudence, and at least one court has bemoaned the “dearth of case-law on the issue of foreign-language interpreters” and the fact that as late as the year 2002, the main case on the issue of interpreter bias remained one decided in 1912.\textsuperscript{40}

Specific problems may be gleaned from a review of the sporadic Louisiana jurisprudence relating to interpreters.\textsuperscript{41} Although there are not an overwhelming number of interpreter cases, especially civil cases, the nature of the problems are not surprising given the absence of clear interpreter standards, and in fact, are typical of problems found in other jurisdictions facing similar legal circumstances. A scrutiny of Louisiana decisions reveals that appellate review of interpreter issues has centered mostly on:

1. the refusal or failure to appoint an interpreter;
2. interpreter error—accuracy;
3. interpreter qualifications—competency;
4. interpreter bias—impartiality;
5. timeliness of the objection to interpreter errors (accuracy) and qualifications (competency); and
6. the standard of review under which these issues will be considered.

\textsuperscript{35}See LA. CODE EVID. ANN. art. 604 (2006). As previously noted, Article 604 states “[a]n interpreter is subject to the provisions of this Code relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.” Id.

\textsuperscript{36}LA. DIST. CT S. R. 5.1, Interpreter’s Oath, available at http://www.lasc.org/rules/dist.ct/COURTRULESAPPENDIX1C.PDF The oath reads in part “accurately, completely and impartially make a true interpretation.” Thus, competency is implied by the requirements that the interpretation be complete and the interpreter make a true interpretation. For a copy of the oath see Appendix C.

\textsuperscript{37}LA. DIST. CT S. R. 5.1.

\textsuperscript{38}Segui v. Anthony, 86-4770 (La. App. 4 Cir. 06/06/86); 487 So. 2d 616, 618.

\textsuperscript{39}State v. Tamez, 506 So. 2d 531, 533 (La. Ct. App. 1987).

\textsuperscript{40}State v. Nguyen, 02-0410 (La. App. 3 Cir. 10/02/02); 827 So. 2d 1248, 1252 (referring to State v. Lazarone, 57 So. 532 (La. 1912)).

\textsuperscript{41}This review dates back to 1871. See State v. Lemodelio, 23 La. Ann. 16 (La. 1871).
9.2 THE REFUSAL OR FAILURE TO APPOINT AN INTERPRETER

Courts may be reticent or unwilling to appoint an interpreter. However, the general exception to the courts’ hesitance to provide interpreters has been the criminal proceeding, where courts almost always conclude that regardless of who is responsible for payment of the interpreter’s fees, the appointment of an interpreter is mandated as a matter of constitutional due process for a criminal defendant who is obviously unable to understand and meaningfully participate in a process which may result in loss of liberty.

The right to an interpreter in civil proceedings has not been articulated in Louisiana, although at least one civil case held “[i]f a litigant cannot fully understand or read and write the English language, he is entitled to an interpreter.” 42 Although the case does not discuss the basis for such entitlement, it is noteworthy because it was made in the context of a civil matter, and seems to imply a constitutional basis. 43 However, a review of other cases does not reveal any further discussion of this notion, nor whether it would be supported constitutionally. Moreover, there is no discussion as to who would be responsible for the cost of the interpreter, an issue which is not well settled given the lack of specific legislative mandate or clearly articulated and supported jurisprudence.

Note the following case law in this section is all derived from criminal cases. Thus, counsel may be able to find a criminal argument that is analogous to his/her civil one. More importantly, if a problem arises in a civil case where the judge refuses to appoint an interpreter counsel must rely on Article 192.2. 44 Under 192.2(A) if the LEP person is a “principal party in interest” or a “witness,” it is mandatory that a judge appoints an interpreter if so requested. 45 There may be several approaches available if a judge refuses to appoint an interpreter. The approaches mentioned are not exclusive; the practitioner may have other ideas or may be able to ascertain what needs to be done in that particular situation.

Counsel may proceed to hire an interpreter and pay for the use of that interpreter. Or, if appropriate, counsel may wish to file a motion seeking appointment of an interpreter. If this motion is denied, then counsel may determine that the issue is qualified for an interlocutory appeal. However, interlocutory judgments are generally not appealable unless expressly provided by law. 46 Thus, a court might deem an appeal regarding the refusal of a court to appoint an interpreter a nonappealable interlocutory judgment. 47 Therefore, counsel may determine that seeking supervisory writ of the matter is the proper course of action. 48 Nevertheless, if counsel feels that none of the preceding suggestions have merit, he/she may decide the wisest course of action is to preserve an objection on the record for an appeal at a later date.

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42 Kim v. Kim, 563 So. 2d 529, 530 (La. App. 5 Cir. 1990).
43 See id.
44 LA. CODE CIV. PROC. ANN. art. 192.2 (2008).
45 Id.
46 LA. CODE CIV. PROC. ANN. art. 2083 (c) (1984). Interlocutory judgments are types of judgments that do not determine the merits of the case, but rather address preliminary matters, and are appealable only if irreparable injury can result from granting the judgment. See LA. CODE CIV. PROC. ANN. art. 1841 (2011) & LA. CIV. CODE PROC. ANN. art. 2083 cmt. a (1984).
47 In the past, courts have found that judgment’s maintaining exceptions of nonjoinder and no cause of action are nonappealable interlocutory judgments. See LA. CODE CIV. PROC. ANN. art. 2083 cmt. a (1984).
48 Interlocutory orders are reviewable under an appellate courts’ supervisory writ procedure, “which is a review mechanism separate and distinct from an appeal.” BLAINE LECESNE, LOUISIANA CIVIL PROCEDURE: CASES AND MATERIALS 422 n. 1 (2010). According to Article 2201, “[s]upervisory writs may be applied for and granted in accordance with the constitution and rules of the supreme court and other courts exercising appellate jurisdiction.” LA. CODE CIV. PROC. ANN. art. 2201 (2011).
Courts, when considering the refusal or failure to appoint an interpreter, have found that there is no error in failing to appoint an interpreter when the interpreter and the accused spoke English at the same level, or when the interpreter was not requested prior to or during the trial. Also, no error has been found when there is evidence of the defendant’s ability to speak and understand the English language. For example, in *State v. Castro* the defendant was not entitled to a court appointed interpreter because there were numerous examples of his ability to speak, write, and understand the English language; as evidenced by his many written pro se filings made in the trial court. However, in *State v. Tamez* the court found an interpreter should have been appointed when the lower court was on notice that the defendant had difficulties with English “severe enough to require the services of an interpreter.” In that case, the trial court had a co-defendant translate the proceedings into Spanish for the defendant.

In *State v. Lopes* the Louisiana Supreme Court addressed the issue of whether a LEP individual had a right to an interpreter in a criminal case at the expense of the court. The Court found the “need for a foreign (non-English) language translator should not be conditioned upon a defendant’s financial status,” and recognized the need of a LEP defendant.

[T]o understand the charges leveled against him and the criminal proceedings in which he is involved, the importance of a defendant’s ability to communicate with counsel, the ability of a defendant to effectively confront and cross-examine witnesses, and the defendant’s understanding needed to exercise his constitutional right to testify in his own behalf in a meaningful manner.

In short, the Court recognized the need for an interpreter as a function of due process. However, it shied away from holding that the obligation to provide an interpreter at the State’s cost was unconditional, suggesting instead that the costs of the interpreter could be later charged to a convicted defendant as costs pursuant to the Louisiana Code of Criminal Procedure.

Interestingly, the appellate court in *State v. Mondragon* reasoned that it saw “no distinction between those persons, whose need for assistance arises from physical limitations [the deaf or severely hearing-impaired], and the needs of those which arise from linguistic limitations [LEP persons].” A full extension of the statutory rights of the deaf and severely hearing-impaired to LEP individuals by virtue of *Mondragon*, would require not only the appointment of a court paid interpreter for LEP persons, but in those instances where the individual is indigent, an interpreter to assist with the attorney-client communication as necessary. However, this is not yet the law in Louisiana.

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49 *State v. Danna*, 129 So. 154, 155 (La. 1930).
50 *State v. Thinos*, 390 So. 2d 1281, 1287 (La. 1980).
51 *Id.* “[D]efendant’s testimony at trial reflects his unquestionable ability to speak and understand the English language.”
52 *State v. Castro*, 09-887 (La. App. 5 Cir. 5/25/10); 40 So. 3d 1036, 1049.
53 *State v. Tamez*, 506 So. 2d 531, 534 (La. App. 1 Cir. 1987).
54 *Id.* at 533.
55 *State v. Lopes*, 01-1383 (La. 12/07/01); 805 So. 2d 124.
56 *Id.* at 128.
57 *Id.* at 128-29; see also LA. CODE CRIM. PROC. ANN. art. 887(A) (2008) and supra note 9.
58 *State v. Mondragon*, 01-35,178 (La. App. 2 Cir. 04/19/01); 804 So. 2d 657, 658.
59 In Colorado, a defendant made the argument that an interpreter should have been appointed to facilitate communication with his own lawyer. *State v. Cardenas*, 62 P.3d 621, 622-23 (Colo. 2002). The court disagreed and rejected this argument. *Id.*
9.3  INTERPRETER ERROR—ACCURACY

Again, the majority of the case law in this section is derived from criminal cases. Thus, counsel may be able to find a criminal argument that is analogous to his/her civil one. More importantly, if a problem arises in a civil case dealing with the accuracy of an interpretation, counsel must rely on Article 192.2, which states that an interpreter must be competent. If counsel has doubts as to the interpreter’s competency, there are several tactics that may be available. The approaches mentioned are not exclusive, and counsel may intuitively know what to do in a particular situation or may have other ideas. Counsel may proceed to hire an interpreter and pay of the use of that interpreter. Or, if appropriate, counsel may wish to file a motion challenging the competency of the interpreter, stating that the interpretation lacks accuracy. If the motion is denied, counsel may then object to the interpreter’s competency; thereby preserving the objection on record for an appeal at a later date. An objection can be made under Article 192.2, stating that the interpreter is not fulfilling his/her oath because he/she is failing to make a complete and true interpretation under Louisiana District Court Rule 5.1.

 Parties complain of interpreter error, complaints which manifest themselves in a variety of ways given the complexities involved in interpreting. Segui v. Anthony is a civil case where the plaintiff complained that some quality of the testimony was lost in translation. “The essence of plaintiff’s argument is that ‘something was loss [sic] in the translation’ of plaintiff’s testimony and therefore the trial judge could not properly assess her credibility.” The court found “very few errors” in the translation and held unless the errors were prejudicial it believed “the issue concerning an interpreter should be addressed by the Legislature and not this Court.”

 The remaining cases discussed in this section are all criminal cases. Regarding the issue of interpreter error, courts have held that the comment of a “bystander” to the effect that the interpretation was not accurate was harmless and that the failure of the interpreter to offer a literal translation instead of one which “paraphrased” the testimony made no difference. In this latter instance, the court also found since “[t]here was no contemporaneous objection during or after this alleged irregularity and defendant’s right to complain on appellate review is therefore waived.”

 Also, parties complain of the quality of the interpretation, asserting, for example, that the interpretation was inept because it failed to adequately communicate the defendant’s “emotions and passions.” In this particular case, the court noted the interpreter “was stipulated to by both State and Defense and recognized by the Court as a qualified interpreter in the Spanish language,” and the

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60 LA. CODE CIV. PROC. ANN. art. 192.2 (2008).
62 Id.
63 Id.
64 State v. Constanza, 102 So. 507, 508-09 (La. 1925).
65 State v. Cushenberry, 407 So. 2d 700, 702 (La. 1981). See also State v. Gonzalez, 07-0532 (La. App. 4 Cir. 11/28/07); 973 So. 2d 115, 117 (appellant complained of not being provided the specifics of the communications between the State and the judge).
66 Cushenberry, 407 So. 2d at 702.
67 State v. Rodriguez, No. 93-0461 (La. App. 4 Cir. 3/29/94); 635 So 2d 391, 396.
defendant failed to show that the translation was inaccurate; thus, the assignment of error had no merit.\textsuperscript{68} As the above cases indicate, Louisiana courts have not found much merit in arguments dealing with the accuracy of the interpretation.

9.4 INTERPRETER QUALIFICATIONS—COMPETENCY

Courts considering interpreter qualifications generally find that interpreters are competent. A recent civil case sheds some light on interpreter qualifications. In \textit{Thongsavanh v. Schexnayder} the court noted “[n]either the legislature nor the judiciary has yet adopted objective standards for certification and qualification of foreign language interpreters for legal proceedings.”\textsuperscript{69} It then set forth general standards for qualification of interpreters: “[a]n interpreter of foreign-language testimony must be competent and qualified by virtue of knowledge, skill, experience, training, or education, have no substantial interest in the proceedings, and be sworn to give a true bilateral translation of the questions and answers during testimony.”\textsuperscript{70} The court went on to conclude that the trial court did not commit manifest error or abuse its discretion when it accepted the interpreter’s qualifications.\textsuperscript{71}

In \textit{Thongsavanh v. Schexnayder} counsel was able “to conduct an extensive voir dire examination” of the interpreter.\textsuperscript{72} Although the voir dire examination was to establish potential interpreter bias,\textsuperscript{73} this gives a practitioner an opportunity to extend a voir dire examination to interpreter qualifications. If a judge objects to a voir dire to determine the competency of an interpreter, counsel has several options. Again, these options are not exclusive, and the practitioner may have other ideas or may be able to ascertain what needs to be done in that particular situation. If counsel has serious doubts concerning the interpreter’s qualifications, he/she may proceed to hire and interpreter and pay for the use of that interpreter. Another option is to object to the competency of the interpreter, stating that the interpreter is not qualified. It might also be suggested that counsel take the additional action of requesting to file a motion and memorandum explaining the objection. This action ensures the objection is fully set out for a later appeal.

The majority of the remaining cases in this section are criminal. Thus, counsel may be able to find a criminal argument that is analogous to his/her civil one. As mentioned above, most courts find interpreters to be competent. For example, in \textit{State v. Nguyen} the defendant argued he had suffered prejudice because he was unable to confront the victim due to the non-qualified interpreter; the interpreter had only been working for two months prior to his trial in traffic court.\textsuperscript{74} The court stated this issue had not been properly preserved for review.\textsuperscript{75} It went on to note the defendant had “not claimed any specific prejudice arising out of the interpreter’s translations” and “there is nothing in the record to suggest that any of the testimony at trial was improperly translated.”\textsuperscript{76} Thus, the defendant failed to show any substantial rights were violated.\textsuperscript{77}

\textsuperscript{68}Id.
\textsuperscript{69}Thongsavanh v. Schexnayder, 09-1462 (La. App. 1 Cir. 05/7/10); 40 So. 3d 989, 997.
\textsuperscript{70}Id.
\textsuperscript{71}Id.
\textsuperscript{72}Id.
\textsuperscript{73}Id.
\textsuperscript{74}State v. Nguyen, 11- 229 (La. App. 5 Cir. 12/28/11); 2011 WL 6821500, 9-10.
\textsuperscript{75}Id. at 10.
\textsuperscript{76}Id. The court also noted that the defendant spoke both Vietnamese and English; therefore, the defendant did not seem to be unable “to confront his accuser at trial because of some language barrier.” Id.
\textsuperscript{77}Id.
There are some instances where courts will find that interpreters were qualified, even in the absence of any record to that effect. In *State v. Gonzalez* the appellate court noted it seemed as if the interpreter’s qualifications would have been reviewed at the preliminary hearing, which was the first time the interpreter was utilized. “However, whether this was done is unknown because the transcript form the hearing is not part of the record on appeal. The minute entry from that day does not show that his qualifications were addressed, nor does it reflect an objection regarding his qualifications.” The appellate court ultimately found no merit in the defendant’s argument that the interpreter was unqualified. Furthermore, in another case, *Segui v. Anthony*, the court stated “[a]lthough the record is unclear as to what were the credentials of the interpreter utilized by the Court, the trial judge was satisfied with her abilities.” In this case, the court found there was “very few errors pointed out by her [plaintiff’s] attorney,” and held that the interpreter was qualified.

However, there are some instances where courts do not find interpreters to be competent. For example, “the use of an unqualified, unsworn interpreter who was the co-defendant with the accused and also has a substantial interest in the outcome of the proceedings, renders the plea itself questionable” and was enough to vacate the accused’s guilty plea.

### 9.5 INTERPRETER BIAS—IMPARTIALITY

By far, the most complaints associated with interpreters relate to interpreter bias. Courts, however, are reticent to find bias. Recently, in *Thongsavanh v. Schexnayder*, the Louisiana First Circuit Court of Appeals upheld the trial court’s ruling allowing a social acquaintance of the plaintiff passenger to serve as interpreter. The court quoted Professor Luz Molina’s article, noting that “being bilingual does not qualify an individual for court interpreting, even if the person is fluent” and “even ‘[t]he appearance of bias’ on the part of an interpreter ‘should be of concern to the courts of the administration of justice.’” However, the court went on to note that although the interpreter may not have been:

‘[A]bsolutely disinterested’ according to the strict standard of the Lazarone case . . . there was no showing of clear bias or prejudice, and defendant’s counsel had a full opportunity to conduct an extensive voir dire examination of Ms. Sourkidhdy [the interpreter] on the issue of potential bias. On this point, we note that a witness is not disqualified from qualification as an expert witness simply because he is a party or the employee of a party to the lawsuit. In such a case, the party opposing qualification may cross-examine the expert regard-

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78 See *State v. Gonzalez*, 07-0532 (La. App. 4 Cir. 11/28/07); 973 So.2d 115, 117; *Segui v. Anthony*, 487 So.2d 616, 618 (La. App. 4 Cir. 1986).
79 *Gonzalez*, 973 So. 2d at 117.
80 Id.
81 Id. at 117-18.
82 *Segui*, 487 So. 2d at 618. The court also commented on the fact that plaintiff’s attorney was “fluent in both Spanish and English.” Id. Note that this is a civil case.
83 Id.
84 *State v. Tamez*, 506 So. 2d 531, 533 (La. App. 1 Cir. 1987).
85 *Thongsavanh v. Schexnayder*, 09-1462 (La. App. 1 Cir. 05/07/10); 40 So.3d 989.
ing potential bias and argue that point to the trier of fact. Because La. C.E. art. 604 equates the qualification of an interpreter with the qualification of an expert, the same general rule should apply by analogy.\textsuperscript{87}

The following cases in this section are criminal. Thus, counsel may be able to find a criminal argument that is analogous to his/her civil one. A few approaches may be possible if counsel has doubts as to the interpreter’s impartiality. Yet again, these suggestions are not exclusive, and the practitioner may have other ideas on how to proceed. Counsel could hire an interpreter and pay for the use of that interpreter. Or counsel could file a motion challenging the competency of the interpreter. If the motion is denied, counsel may then object to the interpreter’s competency, stating that the interpreter is not impartial. This objection would preserve the record for an appeal at a later date.

In 1908, the Louisiana Supreme Court took an extreme position and found the fact that the interpreter “was a witness did not disqualify him from acting as interpreter [in a grand jury hearing], though his alleged activity as a deputy sheriff might suggest a doubt as to the propriety of his selection, were it not for the fact that he acted as interpreter satisfactorily. . . .”\textsuperscript{88} The court noted the defendant had made no complaint to the interpreter at the time and “there is no proof whatever in support of the allegations” the interpreter had a bias against the defendant or the interpreter had made any suggestions to witnesses to prejudice the defendant.\textsuperscript{89}

In \textit{State v. Nguyen} the court found that a law enforcement official is not per se biased when acting as an interpreter, placing the onus entirely on the opposing party to prove bias.\textsuperscript{90} Note however, the court determined it “need not resolve the issue of bias of the translator because” if there was an error, it would be harmless. In this case, “the defendant spoke enough English that the interpreter was not needed.”\textsuperscript{91}

Claims asserting the appearance of impropriety have gone nowhere. In this regard, courts have found that the appearance of impropriety is not enough, especially in the absence of any proof of any mistranslation or incompetence.\textsuperscript{92} For example, in \textit{State v. Davis} the trial court’s use of court appointed, state-paid translators did not warrant a mistrial.\textsuperscript{93} Here, the defendant did not claim any specific prejudice arising out of the interpreter’s translations.\textsuperscript{94} Rather, he alleged there could “appear some impropriety” as to whether the translations or interpretations were colored to favor the State’s case because the interpreter was employed by the State.\textsuperscript{95} The appellate court observed that there was nothing in the record to suggest the testimony was improperly translated, the defendant did not request any assistance from the interpreter, and the interpreter was not a party or witness.\textsuperscript{96} Furthermore, the court noted that the interpreter was sworn by the trial court.\textsuperscript{97}

\textsuperscript{87}Id. (citations omitted).
\textsuperscript{88}State v. Firmatura, 46 So. 691, 693 (La. 1908).
\textsuperscript{89}Id.
\textsuperscript{90}State v. Nguyen, 02-0410 (La. App. 3 Cir. 10/02/02); 827 So. 2d 1248, 1252.
\textsuperscript{91}Id.
\textsuperscript{92}State v. Davis, No. 07-544, 975 (La. App. 5 Cir. 12/27/07); 975 So. 2d 60, 69.
\textsuperscript{93}Id.
\textsuperscript{94}Id.
\textsuperscript{95}Id.
\textsuperscript{96}Id.
\textsuperscript{97}Id.
Another case that dealt with impropriety of the interpreter was *State v. Lai*. Here, the defendant complained that the court failed to appoint an impartial and neutral “translator” because the “translator” was paid by the State and was used by the State to talk to State witnesses. The court found defendant had made no use of the interpreter whatsoever; and thus, his substantive rights were not violated. In *State v. Gonzalez* the defendant observed the interpreter speaking to a police officer. The appellate court noted the trial court had “resolved this matter by questioning” the interpreter and presumably accepting the interpreter’s explanation that he was not “derelict in his duty to the defendant, and . . . any conversation that he may have had with a police officer was strictly on a friendly basis and did not deal with the case.” Because the defendant did not assign any “specific prejudice arising out of” the interpreter’s “translations, he has not shown that his substantial rights were violated.”

Although it is difficult to win an argument regarding interpreter bias; the defendant in *State v. Lazarone* was successful. Here, the Louisiana Supreme Court reversed the defendant’s conviction because the trial court erred in choosing as an interpreter a prosecution witness who “had contributed to a fund for the prosecution of the” defendant. The Court stated “[t]he person chosen to interpret into English testimony given in a tongue not understood by jury, court, or counsel must be absolutely disinterested, unprejudiced, and unbiased.” Note, this case was decided in 1912; thus, it has been many, many years since a Louisiana court has found merit in the argument that an interpreter was biased.

### 9.6 TIMELINESS OF THE OBJECTION TO INTERPRETER ERRORS (ACCURACY) AND QUALIFICATIONS (COMPETENCY)

Generally, appellate review of the lower courts’ failure or refusal to appoint interpreters, as well as interpreter qualifications and performance, will only occur when there is a contemporaneous objection. In fact, courts have refused to review many of the interpreter cases previously discussed on the basis that the attorney failed to timely object. Note that again, these cases are criminal. However, a practitioner in a civil case must be sure to object timely, meaning contemporaneously, to any issue dealing with interpreter appointment, error or qualifications of the interpreter.

In *State v. Lemodelio* the court held the appellant’s challenge to the competency of a “translator,” to use the Court’s words, was too late when raised in a motion for new trial. In another case, the court noted that the defendant failed to complain or object at the time of the use of the interpreter. In *State v. Thucos* the complaint was not timely because “no motion requesting the appointment of an

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98 *State v. Lai*, No. 04-1053 (La. App. 5 Cir. 4/26/05), 902 So. 2d 550.
99 *Id.* at 557.
100 *Id.*
101 *State v. Gonzalez*, 07-0532 (La. App. 4 Cir. 11/28/07); 973 So. 2d 115, 117.
102 *Id.* at 118.
103 *Id.* at 534.
104 *Id.* at 118.
105 *State v. Lazarone*, 57 So. 532 (La. 1912).
106 *Id.* at 534.
109 *Firmatura*, 46 So. at 692-93.
interpreter was filed by the defense prior to or during the trial.”\textsuperscript{110} The court in \textit{State v. Cushenberry} noted that an objection must be timely and contemporaneous.\textsuperscript{111} In that case “[t]here was no contemporaneous objection . . . and defendant’s right to complain on appellate review . . . [was] therefore waived.”\textsuperscript{112} In \textit{State v. Nguyen} the defendant failed to raise the issue of confrontation at trial and “defense counsel did not question the interpreter about his qualifications and mentioned a perceived lack of experience only once during the testimony of the victim.”\textsuperscript{113}

This issue remains unexplored by the courts, especially since this is likely to occur because the attorney does not possess the knowledge necessary to even make the objection. It stands to reason that if the attorney is not bilingual, and does not retain an independent interpreter to manage his/her communications with the client (a very expensive proposition), the lawyer is in the dark regarding the English proficiency of his/her client and cannot evaluate whether the client is in fact actively participating in the court proceeding. Moreover, the attorney may be in no position to evaluate the court interpretation absent some access to means by which to judge it.

\section*{9.7 THE STANDARD OF REVIEW USED FOR INTERPRETER ISSUES}

Louisiana appellate courts’ have reviewed interpreter issues under various standards; namely, “abuse of discretion,”\textsuperscript{114} “manifest error,”\textsuperscript{115} and “patent error.”\textsuperscript{116} These standards place a high burden on a party to prove any of the interpreter issues discussed above, absent some statutory or judicial guidelines which can clearly point attorneys and judges to the complexities of interpreting as a means of judging the trial error or abuse of discretion. Further, a common thread in many of these decisions is the fact that the appellate courts allude to records which are incomplete and unclear as to the particulars relating to the interpreter in a given case, and rely on conclusions in the record without benefit of the court’s own judgment.\textsuperscript{117} In the absence of an understanding of the legal implications of the use of interpreters, appellate courts will continue to make decisions regarding interpreter issues based on records where the facts attendant the appointment, accuracy, competency, and impartiality of the interpreter have not been properly developed in the lower court.

\section*{10. FEDERAL LAW REGARDING INTERPRETERS}

Unlike in Louisiana, federal courts have recognized the juridical problem posed by the LEP individual in civil and criminal matters, and have mandated the appointment of interpreters for LEP persons through the Federal Court Interpreters Act, which also sets forth specific criteria for interpreter training, selection, and payment.\textsuperscript{118} Though the Act mandates appointment of interpreters for those indi-
viduals solely “in judicial proceedings instituted by the United States,” the Act can be instructive to states developing appropriate statutory guidelines which would guide local courts in the selection, appointment, and payment of interpreters.

The federal interpreter program clearly acknowledges the complexity inherent in language interpretation. However, it also leaves open the possibility that non-certified interpreters are qualified to interpret and thus could be appointed. Understanding those complexities is essential to assessing the qualifications of potential interpreters who may not be certified. It states

The professional knowledge, skills, and abilities required of a federal court interpreter are highly complex. Communication in courtroom proceedings may be more complex than that in other settings or in everyday life. For example, the parties involved may use specialized and legal terminology, formal and informal registers, dialect and jargon, varieties in language and nuances of meaning.

It notes that interpreter skills include:

Highly proficient in both English and the other language. Impartiality. Able to accurately and idiomatically turn the message from the source language into the receptor language without any additions, omissions or other misleading factors that alter the intended meaning of the message from the speaker. Adept at simultaneous interpretation, which is the most frequent form of interpretation used in the courtroom, and in consecutive interpretation and sight translation. Able to communicate orally including appropriate delivery and poise. Demonstrates high professional standards for courtroom demeanor and professional conduct.

11. FURTHER DISCUSSION OF INTERPRETATION AND INTERPRETERS

At its most basic function, interpretation is simply the oral translation of the words of a person speaking a different language. This definition, however, belies the complexity of that function as performed by the interpreter and as understood by those dependent on the interpreter for communication in a courtroom. As stated previously, under the section dealing with interpreter ethics, the fact of being bilingual does not qualify an individual for court interpreting, even if the person is fluent. Thus, for example, professional interpreters understand and are able to appropriately use the various forms of interpretation; namely, simultaneous, consecutive, or summary.

122 Many lawyers use the words “interpretation” and “translation” interchangeably. However, “[w]ithin the conceptual structure of Translation, interpreting can be distinguished from other types of translational activity most succinctly by its immediacy: in principle, interpreting is performed ‘here and now’ for the benefit of people who want to engage in communication across barriers of language and culture.” PÖCHHACKER, supra note 22, at 11. Thus, interpreting can be defined as “a form of Translation in which a first and final rendition in another language is produced on the basis of a one-time presentation of an utterance in a source language.” Id. at 10.
123 This definition is widely accepted and generally used by courts and agencies.
Simultaneous interpretation “involves the interpreter’s rendering into the foreign language whatever is being said in English, involving no pauses on the part of the English speaker.”\textsuperscript{124} This mode is mandated in federal courts for use with the parties to the litigation.\textsuperscript{125} Consecutive interpretation, on the other hand

[I]nvolves a speaker’s pausing at regular intervals to allow the interpreter to render his or her speech into the target language, aloud for everyone in the courtroom to hear. Thus, the speaker and the interpreter take turns, and no overlapping speech should be heard. This mode of interpreting is typically used for foreign language witness testimony, the interpreter rendering the testimony in English for the court, and then interpreting the attorney’s and judge’s questions into the foreign language for the benefit of the witness. Everything rendered in English by the interpreter is recorded for the court, whereas none of the foreign language testimony or questions rendered by the interpreter in the foreign language is recorded by the court reporter.\textsuperscript{126}

This mode of interpreting is mandated in federal court for use with witnesses.\textsuperscript{127} Summary interpretation, the third mode of interpreting

[I]nvolves distilling or condensing what has been said in the source language into the target language. This mode of interpreting is to be kept to a minimum in court interpreting, and is restricted to interpreting highly technical legal language, language that would be difficult to follow even for a native speaker of English.\textsuperscript{128}

An additional mode of interpreting “sight translation,” refers to the oral translation of a document for the benefit of the court or the parties.\textsuperscript{129}

Additionally, interpreters must have a high level of skill in using English and the foreign language. Thus, the interpreter must understand, for example, the four varieties of spoken legal language generally found in court. These four varieties include: formal legal language; standard English; colloquial English; and other sub-cultural varieties.\textsuperscript{130} The significance of the methodology used by the

\textsuperscript{124} SUSAN BERR-Seligson, THE BILINGUAL COURTROOM, 38 (Univ. of Chicago Press 2002) (1990). “This is the mode used at the counsel table, whereby the interpreter interprets for the defendant or litigant what the attorneys, judge, and English-speaking witnesses are saying.” Id.


\textsuperscript{126} BERR-Seligson, supra note 122, at 38.


\textsuperscript{128} BERR-Seligson, supra note 122, at 39.

\textsuperscript{129} Id. “Typical of the types of texts that require sight translation in court are police reports or the reports of other expert witnesses (e.g., physicians, psychologists, and so on), formal documents such as birth certificates, wills, and contracts, and transcriptions of oral statements, such as depositions.” Id.

\textsuperscript{130} BERR-Seligson, supra note 122, at 19. Formal Legal Language is “[t]he variety of spoken language used in the courtroom that most closely parallels written legal language; used by the judge in instructing the jury, passing judgment, and speaking to the record; used by lawyers when addressing the court, making motions and requests, etc.; linguistically characterized by lengthy sentences containing much professional jargon and employing a complex syntax.” Id. Standard English is “[t]he variety of spoken language typically used in the courtroom by lawyers and most witnesses; generally labeled CORRECT English and closely paralleling that taught as the standard in American classrooms; characterized by a somewhat more formal lexicon than that used in everyday speech.” Id. (emphasis in original). Colloquial English is “a variety of language spoken by some witnesses and a few lawyers in lieu of standard English; closer to everyday, ordinary English in lexicon and syntax; tends to lack many attributes of formality that characterize standard English; used by a few lawyers as their particular style or brand of courtroom demeanor.” Id. Subcultural Varieties include the “language spoken by segments of the society who differ in speech style and mannerisms from the larger community . . . .” Id.
interpreter and skill level displayed is, of course, the accuracy of the interpretation, which gives new “ears” to the LEP individual and in turn also shapes and informs the most fundamental and basic function of the courts—ascertaining facts and making credibility determinations based on those facts.

12. CONCLUSION

The real import of the dearth of Louisiana case law on foreign-language interpreters, and lack of clear statutory law on interpreters themselves, not just experts in general, is that the absence of standards makes it difficult for counsel to know how to proceed generally, since there are no set rules. However, the discussion above will hopefully set forth several guidelines if any problems arise in the areas of interpreter appointment, error (accuracy), qualifications (competence), and bias (impartiality).
APPENDIX A

Quick Reference

How to request an interpreter:

– Fill out form 5.1B (see Appendix B for a copy of this form)
– Client is a Limited English Proficient (LEP) individual
  ◦ Mandated judge appointment if requested by a “party in interest” or a “witness” under Article 192.2\textsuperscript{131}

Costs:

– Client is a LEP individual
  ◦ Assessed as court costs under Article 192.2\textsuperscript{132}

Potential Problems:

– Court fails to appoint an interpreter
  ◦ Possible solutions:
    • Hire own interpreter
    • File motion to seek an appointment of an interpreter
    • If appropriate, file an interlocutory appeal or seek supervisory writ
    • Object timely to preserve the record for a later appeal
– Issue with interpreter error (accuracy), qualifications (competence) or bias (impartiality)
  ◦ Possible solutions:
    • Hire own interpreter
    • File motion challenging the competence of the interpreter (e.g. the interpreter is not accurate, not competent or is biased)
    • Object timely to preserve the record for a later appeal

Case law dealing with interpreters in the civil context:

– Thongsavanh v. Schexnayder, 09-1462 (La. App. 1 Cir. 05/7/10); 40 So. 3d 989

\textsuperscript{131}\textit{La. Code Civ. Proc. Ann.} art. 192.2 (2008) states in full “A. If a non-English-speaking person who is a principal party in interest or a witness in a proceeding before the court has requested an interpreter, a judge shall appoint, after consultation with the non-English-speaking person or his attorney, a competent interpreter to interpret or to translate the proceedings to him and to interpret or translate his testimony. B. The court shall order reimbursement to the interpreter for his services at a fixed reasonable amount, and that amount shall be taxed by the court as costs of court.” \textit{Id.}

\textsuperscript{132}\textit{Id.}
APPENDIX B

APPENDIX 5.1B
REQUEST FOR INTERPRETER AND ORDER

_______ JUDICIAL DISTRICT COURT
DOCKET NO. ___________________________
______________________________________

VERSUS __________________________________

PARISH OF ___________________________

STATE OF LOUISIANA

*******************************************************************************

REQUEST FOR INTERPRETER AND ORDER

Name of Individual Needing Interpreter: _______________________________________

This person is: ______ Witness ______ Party Other: ______

Name of person submitting request: ___________________________________________

Telephone number of person submitting request: ________________________________

Address of person submitting request: ________________________________________

If the person submitting request is not the individual in need of an interpreter, please state your relationship (i.e., attorney, party, etc.) _____________________________

Address and telephone number of individual needing interpreter (if different from person submitting request) _____________________________________________________

Judge presiding in case: _____________________________________________________

1. Type of proceeding: ___ Criminal ___ Civil

2. Proceedings to be covered (e.g. bail hearing, sentencing hearing, trial, etc.): __________________________

3. Dates interpreter needed (specify): _______________________________________  

4. Reason for requesting interpreter: _______________________________________

__________________________________________________________________________
APPENDIX B, continued

APPENDIX 5.1B

5. Type of interpreter needed:
   ___ Language
   ___ French
   ___ Spanish
   ___ Vietnamese
   ___ Other: _________________________________

   ___ Deaf/Hearing Impaired
   ___ Sign Language
   ___ Other: _________________________________

6. Special requests or anticipated problems (specify): ______________________
   ____________________________________________________________________
   ____________________________________________________________________

I declare under penalty of perjury under the laws of the State of Louisiana that
the foregoing is true and correct.

____________________________________
(Date) (Signature of Person Submitting Application)

____________________________________
(Type or Print Name)

____________________________________
(Signature of Individual Needing Interpreter)

____________________________________
(Type or Print)

____________________________________
(Date) (Signature of Judge)

http://www.lasc.org/rules/dist.ct/COUSTRULESAPPENDIX5.1B.PDF
APPENDIX C

Appendix 5.1C (RULE 5.1) INTERPRETER’S OATH

Do you solemnly swear or affirm that you will accurately, completely and impartially make a true interpretation to the person needing interpretation services of all the proceedings of this case in the language understood by said person, and that you will repeat, in as literal and exact manner as possible, said person’s answers and statements to the court, counsel or jury, to the best of your skill and judgment?

http://www.lasc.org/rules/dist.ct/COUHRULESAPPENDIX5.1C.PDF
APPENDIX D

National Association of Judiciary Interpreters & Translators

Code of Ethics and Professional Responsibilities

Preamble
Many persons who come before the courts are non- or limited-English speakers. The function of court interpreters and translators is to remove the language barrier to the extent possible, so that such persons’ access to justice is the same as that of similarly-situated English speakers for whom no such barrier exists. The degree of trust that is placed in court interpreters and the magnitude of their responsibility necessitate high, uniform ethical standards that will both guide and protect court

Applicability
All NAJIT members are bound to comply with this Code.

Canon 1. Accuracy
Source-language speech should be faithfully rendered into the target language by conserving all the elements of the original message while accommodating the syntactic and semantic patterns of the target language. The rendition should sound natural in the target language, and there should be no distortion of the original message through addition or omission, explanation or paraphrasing. All hedges, false starts and repetitions should be conveyed; also, English words mixed into the other language should be retained, as should culturally-bound terms which have no direct equivalent in English, or which may have more than one meaning. The register, style and tone of the source language should be conserved.

Guessing should be avoided. Court interpreters who do not hear or understand what a speaker has said should seek clarification. Interpreter errors should be corrected for the record as soon as possible.

Canon 2. Impartiality and Conflicts of Interest
Court interpreters and translators are to remain impartial and neutral in proceedings where they serve, and must maintain the appearance of impartiality and neutrality, avoiding unnecessary contact with the parties. Court interpreters and translators shall abstain from comment on matters in which they serve. Any real or potential conflict of interest shall be immediately disclosed to the Court and all parties as soon as the interpreter or translator becomes aware of such conflict of interest.

Canon 3. Confidentiality
Privileged or confidential information acquired in the course of interpreting or preparing a translation shall not be disclosed by the interpreter without authorization.

Canon 4. Limitations of Practice
Court interpreters and translators shall limit their participation in those matters in which they serve to interpreting and translating, and shall not give advice to the parties or otherwise engage in activities that can be construed as the practice of law.
Canon 5. Protocol and Demeanor
Court interpreters shall conduct themselves in a manner consistent with the standards and protocol of the Court, and shall perform their duties as unobtrusively as possible. Court interpreters are to use the same grammatical person as the speaker. When it becomes necessary to assume a primary role in the communication, they must make it clear that they are speaking for themselves.

Canon 6. Maintenance and Improvement of Skills and Knowledge
Court interpreters and translators shall strive to maintain and improve their interpreting and translation skills and knowledge.

Canon 7. Accurate Representation of Credentials
Court interpreters and translators shall accurately represent their certifications, accreditations, training and pertinent experience.

Canon 8. Impediments to Compliance
Court interpreters and translators shall bring to the Court’s attention any circumstance or condition that impedes full compliance with any Canon of this Code, including interpreter fatigue, inability to hear, or inadequate knowledge of specialized terminology, and must decline assignments under conditions that make such compliance patently impossible.

Standards for Performance and Professional Responsibility for Contract Court Interpreters in the Federal Courts

Preamble
Federally certified court interpreters are highly skilled professionals who bring to the judicial process specialized language skills, impartiality, and propriety in dealing with parties, counsel, the court, and the jury. All contract court interpreters, regardless of certification, are appointed to serve the court pursuant to 28 U.S.C. § 1827. When interpreters are sworn in they become, for the duration of the assignment, officers of the court with the specific duty and responsibility of interpreting between English and the language specified. In their capacity as officers of the court, contract court interpreters are expected to follow the Standards for Performance and Professional Responsibility for Contract Court Interpreters in the Federal Courts.

1: Accuracy and Completeness
Interpreters shall render a complete and accurate interpretation or sight translation that preserves the level of language used without altering, omitting, or adding anything to what is stated or written, and without explanation. The obligation to preserve accuracy includes the interpreter’s duty to correct any error of interpretation discovered by the interpreter during the proceeding.

2: Representation of Qualifications
Interpreters shall accurately and completely represent their certifications, training, and pertinent experience.
3: Impartiality, Conflicts of Interest, and Remuneration and Gifts

Impartiality. Interpreters shall be impartial and unbiased and shall refrain from conduct that may give an appearance of bias. During the course of the proceedings, interpreters shall not converse with parties, witnesses, jurors, attorneys, or with friends or relatives of any party, except in the discharge of their official functions.

Conflicts of Interest. Interpreters shall disclose any real or perceived conflict of interest, including any prior involvement with the case, parties, witnesses or attorneys, and shall not serve in any matter in which they have a conflict of interest.

Remuneration and Gifts. Court interpreters shall accept remuneration for their service to the court only from the court. Court interpreters shall not accept any gifts, gratuities, or valuable consideration from any litigant, witness, or attorney in a case in which the interpreter is serving the court, provided, however, that when no other court interpreters are available, the court may authorize court interpreters working for the court to provide interpreting services to, and receive compensation for such services from, an attorney in the case.

4. Professional Demeanor

In the course of their service to the court, interpreters shall conduct themselves in a manner consistent with the dignity of the court and shall be as unobtrusive as possible.

5: Confidentiality

Interpreters shall protect the confidentiality of all privileged and other confidential information.

6: Restriction of Public Comment

Interpreters shall not publicly discuss, report, or offer an opinion concerning a matter in which they are or have been engaged, even when that information is not privileged or required by law to be confidential.

7: Scope of Practice

Interpreters shall limit themselves to interpreting or translating, and shall not give legal advice, express personal opinions to individuals for whom they are interpreting, or engage in any other activities which may be construed to constitute a service other than interpreting or translating while serving as an interpreter.

8: Assessing and Reporting Impediments to Performance

Interpreters shall assess at all times their ability to deliver their services. When interpreters have any reservation about their ability to satisfy an assignment competently, they shall immediately convey that reservation to the appropriate judicial authority.

9: Duty to Report Ethical Violations

Interpreters shall report to the proper judicial authority any effort to impede their compliance with any law, any provision of these Standards, or any other official policy governing court interpreting and legal translating.

(960)