Welcome to my first issue as editor of the CASA Quarterly! I hope that you enjoy this edition, which includes recaps from the Appellate Judges Education Institute’s 2012 Summit in New Orleans, a lively account of a New Orleans homicide case written by Frank Gibbard, and a farewell address from longtime CASA member—and my former supervisor—Joe Merling.

CASA’s Executive Board will meet on Saturday, February 9, 2013, at the ABA Midyear Meeting in Dallas. Watch for the spring edition of the CASA Quarterly for the minutes from the meeting and more information about the 2013 Summit in San Diego.

As always, we need articles for the CASA Quarterly! Have you taken an interesting vacation recently? Do you have an unusual hobby? Do you have any thoughts about appellate court procedures? We would love to hear from you!

I feel privileged and excited to embark on my year as Chair of CASA. And what a better way to begin than at the AJEI Summit in New Orleans. Those of us who were fortunate enough to attend enjoyed a variety of interesting sessions, heard wonderful speakers, and were able to spend time with our engaging colleagues. And let’s not forget the wonderful food and entertainment! The CASA dinner and t-shirt exchange was a great success: platters of delicious seafood and a host of coveted t-shirts. I hope you will all be able to join us at the Summit in San Diego next November. I think it will be another winner. And don’t forget that scholarship money is available to defray expenses—your CASA membership gives you priority for funding.

Speaking of membership, I’m happy to report that the discount membership fees for groups will continue for the foreseeable future. You can be a member of the ABA and the Judicial Division for only $105—a substantial savings from the individual rate. If you are not already part of a group, I strongly encourage you to join an existing one or create one for your court. It’s easy to form a group; the requirements are fairly minimal. A group can be comprised of any lawyers or judges who report to the same Chief Judge. It must contain a minimum of five people and, when it’s first formed, 50% of the people must be new ABA members (former members count as “new” members). If you’ve already paid your individual dues and you then join a...
group, you can get a partial refund of the dues you’ve already paid. One member of the group must serve as the administrator and be responsible for collecting all the dues and submitting them to the ABA, as well as keeping the ABA apprised of any changes in group membership. The group does not have to maintain the 50/50 split of old and new members in successive years, but it does have to maintain a minimum of five members. For more information on how to form or administer a group, please contact Jo Ann Saringer, at joann.saringer@americanbar.org.

I’m also happy to report that an updated version of CASA’s Directory of Courts has finally been completed and will soon be posted on CASA’s website if it isn’t already. Please take a moment to review the information for your court, and if you see anything that needs to be revised, please send the information to Christie Breitner at christie.breitner@americanbar.org. And please send any future updates to Christie as well. It took a yeoman effort to update this latest edition (many thanks to all who helped), and we hope to be able to keep it more current on an ongoing basis now that we can produce it in electronic format.

I look forward to a productive year. If you have any suggestions about how CASA can better serve its membership, please contact me at taye_sanford@ca10.uscourts.gov. CASA has lots of opportunities for its members to get involved, and I encourage all of you to do so. Submit an article to the CASA Quarterly, join a committee, or just send suggestions of what you would like see CASA do. We all benefit from your participation.

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**Minutes from CASA Annual Business Meeting**

**Hotel Monteleone**

New Orleans, Louisiana

Saturday, November 17, 2012

The meeting was called to order at 12:00 noon.

Chair Susan Dautel welcomed everyone. Present were Susan Dautel, Chair; Taye Sanford, Chair-Elect; Janice Irving, Secretary; and the following CASA members and guests: John Oliverer, Peter Stevens, Geoff Davis, Dalila Patton, Kembra Smith, Rachel Ekery, Frank Gibbard, Brenda Picione, LeShawn Turner, Michael Wakefield, Lee Ramsey, Karen Hornsby, Jeff Zagor, Paula Cardoza, Kin Spain, and Bill Lowe. Also present was Christie Breitner, ABA liaison.

Susan noted the great turnout in New Orleans and asked that anyone present who was not a CASA member consider joining. Seventy-two appellate staff attorneys registered for this Summit, and eleven received scholarships from the ABA/AJEI. Susan reminded scholarship recipients that it is a custom of scholarship recipients to “pay it forward” by writing an article on their experience for the CASA Quarterly.

Susan thanked all who contributed to the success of the Summit, especially Taye for arranging the CASA dinner, John for arranging and hosting the career panel for Tulane and Loyola Law students at the Louisiana Supreme Court, and Peter and Kembra for their work on the education committee. She acknowledged the long-term CASA members who were present: Bill Lowe, Kembra Smith, Lee Ramsey, and Paula Cardoza. Susan also noted the work of Naomi Godfrey as acting immediate past chair of CASA and as chair of the nominating committee. As a final note in recapping her year as chair, Susan mentioned that we continue to have issues with the membership directory, which we should be able to update online, and with the CASA website.

Copies of the minutes from the February 4, 2012, meeting in New Orleans were provided, having previously been submitted to the board members by email. With the correction of the spelling of Dalila Patton’s name, Kembra moved that the minutes be approved, John seconded, and all approved.

**Committee Reports:**

**Education:** Kembra and Peter, co-chairs, reported. They stressed the importance of CASA’s participation in the Summit planning so that our needs are represented — for example, it is through CASA’s efforts that Linda Elrod and Erwin Chemerinsky were asked to the 2012 AJEI Summit. Lee Ramsey, Frank Gibbard, and Greta Scodro will be the education committee for 2013.

**Publications:** Janice thanked all of the contributors for their articles and pictures and encouraged everyone to submit items to Rachel Zahniser, who will become the CASA Quarterly editor as incoming secretary.

**Membership:** Peter submitted a written report and also reported orally that CASA had sixty-six members in October 2012, com-
pared to seventy-three members in October 2011. Peter further reported that an email was sent to all CASA members, encouraging them to attend the AJEI Summit, but no letter was sent this year to encourage membership due to budgetary constraints. A question was directed to Christie regarding the continuation of the public service group membership, and Christie indicated that group memberships probably would continue to be available, although the rate could go up. Christie encouraged members to continue forming groups. Peter also reported that the directory has been updated with the information obtained in 2010. He encouraged members to check the directory in December to see if their court information is correct.

**Long Range Planning:** Rick Schickele chaired the long range planning committee. The long range goal for CASA continues to be to focus on increasing membership. Rachel Ekerly is the ex officio chair of the long range planning committee for 2013.

**New Business:** Lee Ramsey stood in for Naomi to present the candidates for election. The nominating committee was Naomi Godfrey, Taye Sanford, John Olivier, Elizabeth Ryan, and Susan Dautel.

The candidates for officers are as follows:

- Chair – Taye Sanford
- Chair-Elect – Rachel Ekery
- Immediate Past Chair – Susan Dautel
- Secretary – Rachel Zahniser

Nominees for Members At Large are Dalila Patton (2nd year), Geoff Davis (2nd year), Frank Gibbard (1st year), Helen Williams, and Christina Smith (1st year). [Note: Since the meeting, Helen Williams was appointed to the bench in California and was replaced by Karen Hornsby by vote of the Board.]

There were no nominations from the floor. John moved that the slate of officers be accepted, and Kin Spain seconded. There were no objections, and the officers and board members were elected by acclamation.

Chair Taye Sanford addressed the meeting, first thanking Susan for her service. Taye noted that she had attended a planning meeting of the Judicial Division and that the JD is proposing a number of initiatives including more webinars. One concern that Taye would like to address is to make CASA information on the ABA website more user friendly. Taye announced that she would like to form a committee to study and improve the website, and she asked that anyone interested in helping with that committee let her know. The November 2013 summit will be in San Diego, and CASA will possibly present career panels at a law school there and at UCI-Irvine. Taye requested CASA members to consider participating in the judicial clerkship program at the midyear meeting, which will be in Dallas in February 2013.

Justice Elizabeth Lang-Miers stepped in to introduce Justice Scott Bales of the Arizona Supreme Court to CASA members. Justice Bales is the program chair for the 2013 Summit.

Motion to adjourn by John, seconded by Geoff. The meeting adjourned at 12:46 p.m.

Respectfully submitted,

Janice Irving
CASA Secretary

Susan Dautel passes the gavel to Taye Sanford.

Kembra Smith, Janice Irving, Richard Schickele, and Rachel Ekery enjoy the AJEI reception at the Louisiana Supreme Court.
Reflections on the 2012 AJEI Summit

By Margaret L. Hussey
Chief Staff Attorney for the Twelfth Court of Appeals of Texas
Tyler, Texas

In 2010, I attended an AJEI Summit for the first time. When the Summit ended, my only regret was that I was unable to attend two sessions at the same time. This year I attended the 2012 Summit in New Orleans and experienced the same regret.

The 2012 Summit began with a panel on what effect the presidential election would have on the Supreme Court. This is always an interesting subject, particularly in a presidential election year. The three panelists were lawyers but also journalists who routinely cover the Supreme Court. This dual background gave them a unique, but varied, perspective, which resulted in a lively and informative discussion. The other presentation that day (the Summit began after lunch) was a panel discussion on what pleading standard will afford due process to litigants. The focus was the concept of “plausibility pleading” and the Supreme Court’s decision in *Ashcroft v. Iqbal*. One of the panelists was the senior justice on the Texas Supreme Court, and the moderator was a well-respected legal writer on all aspects of Texas civil law, including civil procedure. Needless to say, I listened carefully to learn what implications the current trends in this area might have for Texas.

The following day began with Dean Erwin Chemerinsky’s review of the Supreme Court’s civil cases. As usual, he used no notes, covered the cases in depth, took questions and comments from the audience, and ended at precisely the appointed time. Then the breakout sessions began, and I had to make some decisions. I chose Dean Chemerinsky’s criminal case review, which was equal in every way to his civil review, and then attended the energy litigation session. Since Texas is an oil and gas state, our court often decides energy issues. The presentation included a good review of basic oil and gas law, which was a good “refresher.” The discussion of emerging energy issues gave me an overview of what our court can expect in the near future.

That same day, I also attended “A Conversation with Justice Scalia.” The questions were posed by one of Justice Scalia’s former law clerks, who did an excellent job of making the conversation informal. Justice Scalia was candid about his judicial philosophy, his approach to deciding cases, and his relationships with the other justices. His answers to less serious questions revealed his quick wit, and it was obvious during the conversation that he thoroughly enjoys being a Supreme Court justice. For me, this presentation was one of the highlights of the Summit.

The next morning, I attended a panel discussion titled “Post-Disaster Issues: Lessons Learned From Katrina and the BP Oil Spill.” As expected, the panelists spoke about the legal issues and the difficulties in operating the courts as a result of these disasters. But the panel members also related personal experiences that showed the amazing resilience of the people of New Orleans. These accounts illustrated how the everyday lives of ordinary people were affected by these disasters and provided additional insight about the real cost, monetary and otherwise, of recovering from them. Two other sessions that day addressed legal writing. In the first, we were urged to “write softly” by exhibiting professionalism in our word choices. In the second, we were cautioned to avoid “default organizations” and provided an alternative to presenting facts in chronological order. Both speakers were excellent and gave practical explanations of how to implement their suggestions.

The other sessions I attended were updates on various areas of the law, which are always helpful. And in addition to the substantive presentations, I also met other staff attorneys from around the country. It was interesting to hear how other courts operate and how the law of other jurisdictions compares to Texas law. But most of all, I learned that we have much in common regardless of our geographic differences. So, for me, the 2012 Summit was a great success, and I’m looking forward to San Diego next year.
A Call for Substance Abuse Education in Law Schools

By Bevan J. Graybill
Staff Attorney
Oklahoma Court of Civil Appeals
Oklahoma City, Oklahoma

I anticipated the AJEI Summit would be an opportunity to get to know and learn from fellow staff attorneys, strengthen my writing skills, gain wisdom from Dean Chemerinsky and Justice Scalia, and explore the history, culture, and nightlife of New Orleans. I did not expect that while attending the Summit—only a few blocks from Bourbon Street—I would take pause to consider the drinking culture found within the legal community and examine my own drinking habits.

During the Summit, I had planned to attend a breakout session on appellate writing, but when I arrived, the room was overcapacity. I made my way down the hall to the alternative session, “Nightmare on Bourbon Street: When the Good Times Stop Rolling.” The purpose of this program was to learn how lawyers and judges can get and give help for substance abuse, depression, and other mental health issues affecting a lawyer or judge’s ability to perform his or her job. Beryl P. Crowley presented a film and moderated a serious and insightful discussion between the Honorable Robert N. Hunter, Jr. of the North Carolina Court of Appeals, Buddy Stockwell, Executive Director of the Louisiana Lawyers’ Assistance Program, and Sharonda Williams with the City of New Orleans.

The panelists discussed very bleak statistics. Lawyers are twice as likely to have substance abuse problems or suffer from depression than the general population. As a result, there is a higher rate of suicide among lawyers. Since the economic downturn, suicide is the leading cause of death in our profession. Attorneys are reluctant to seek help for their own substance abuse and mental health issues and are reluctant to confront or report colleagues exhibiting problems. One panelist mentioned that the legal profession attracts and breeds perfectionists and, unfortunately, perfectionists are more vulnerable to depression and anxiety. The session caused me to think about how our professional culture perpetuates substance abuse and mental health issues.

It begins in law school. In some ways law school is an extension of college. But for most, the first year of law school comes with a much higher level of stress. The drinking dynamics change. Many law students drink to relax after a long night at the library, to unwind on the weekends, or to celebrate the end of finals. Drinking is about “release” from the daily grind of preparing for class and the pressure of performing well on final exams. For many soon-to-be attorneys, drinking becomes a way to cope with stress and anxiety. It is during law school that these unhealthy drinking habits are formed and the “work hard, play hard” culture is established.

Most law schools are not educating students about the disproportionate incidence of substance abuse and depression among lawyers. High school students receive alcohol resistance education. College students are warned about the dangers of drinking and driving and binge drinking. At most, professional responsibility professors spend a few days warning law students about the relationship between substance abuse and ethics violations.

Why wait to take action until a lawyer’s substance abuse and mental health problems have become so severe that they affect his or her ability to practice law? Waiting until lawyers “hit bottom” is a disservice to the profession and a disservice to their clients. While lawyer assistance programs have undeniably served a remedial purpose, law schools and bar associations need to place a greater emphasis on prevention. Law schools need to face these bleak statistics and warn future lawyers about the substance abuse and mental health issues disproportionately affecting the profession. Law schools and bar associations need to educate students and new lawyers about alternatives to using alcohol to cope with stressful environments and encourage them to make a change before they “hit bottom.”

After the Summit, I came across the website Rethinking Drinking: Alcohol and Your Health, http://rethinkingdrinking.niaaa.nih.gov. The website is an excellent resource for anyone who wants to evaluate their drinking habits or learn strategies to cut down or stop drinking. For healthy men, drinking more than four drinks on any day or more than fourteen drinks in a week is considered “at-risk” or heavy drinking. For healthy women, drinking more than three drinks on any day and more than seven drinks in a week is considered “at-risk” or heavy drinking. According to Rethinking Drinking, about one in four people who exceed these limits already has alcoholism or alcohol abuse, and the rest are at greater risk for developing alcoholism or alcohol abuse.
A New Orleans Murder

By Frank Gibbard
Staff Attorney
U.S. Court of Appeals for the Tenth Circuit
Denver, Colorado

[Note: In honor of the 2012 Summit in New Orleans, I have researched and written up this account of a famous New Orleans homicide. This case is unusual because it involved multiple civil and criminal appeals to the Louisiana Supreme Court. — HFG.]

A Night at the Little Diamond Saloon

The trouble began one summer night, when three men stayed out drinking until dawn. It was only a Tuesday. But this was New Orleans, after all.

The trio devoted the wee hours of July 9, 1895, to imbibing at the Little Diamond Saloon located on the corner of Burgundy and Customhouse Streets. Two of the men are known to us by their surnames: Mr. Howard and Mr. McGrath. (Howard had a colorful nickname: “Kid Murphy.”) The third man, the one who later caused all the trouble, was named Daniel S. Carroll.

Mr. Carroll was no ordinary drunk. He was “the general auditor of the telephone company, with his office in the Telephone Building,” at a time when such a position signaled “trust and responsibility.” “He was a man of family and of means,” and he dressed accordingly. In true New Orleans style, as a tangible sign of his success, Carroll sported a diamond stud on his shirt front.

Imagine his mortification when, sometime during his drinking bout with friends at the Little Diamond Saloon, Carroll’s diamond stud disappeared. Inebriated as he was, he determined the jewel must have been stolen. He contacted the police. Two detectives showed up to interview him: Richard H. Kerwin and Ferdinand De Rance. They brought with them a police sergeant named Walsh, with whom Carroll was already well acquainted.

When the policemen found him, Carroll was much the worse for wear. In fact, the officers ended up taking him to jail and locking him up to dry out. At some point, though, he gave the detectives the names of five or six people with whom he had consorted at various times that night. One of the men he named was Lewis W. Lyons.

Lyons came from a respected family. He was also something of a barrly. A bartender at the Continental Saloon later testified at Lyons’s murder trial that Lyons came to the saloon “nearly every day. [He] would come in around 9 o’clock in the morning and stay awhile, then go off and get breakfast, and come later in the evening, and would perhaps play cards or dominoes, and stay until the saloon closed, at 11 p.m.” If “discussions and friendly disputes arose among the patrons of the saloon, Lyons, if there, would be called on to decide them” because “he was looked upon as a man who would give a just conclusion.” Until the theft of Carroll’s diamond stud set in motion a tragic sequence of events, Lyons was generally known as a rational and friendly man, a fact that, ironically, likely hurt him with the jury in his death penalty case.

The Investigation and Trial

The day after the theft, an officer brought Carroll before a recorder to swear out a statement. The recorder determined he was still too drunk to make an affidavit. Ashamed by now of the whole business, Carroll was ready to drop the matter. But the recorder pressed on. He directed the police officer who accompanied Carroll, an Officer Simone, to prepare the affidavit in lieu of Carroll.

The resulting affidavit nowhere mentioned Lewis W. Lyons by name, though it referred to unnamed parties using the term “et al.” The Louisiana Supreme Court later found this procedure quite irregular. Nor was any warrant issued for Lyons’s arrest. But irregularities aside, the wheels of justice had been set in motion.

Officers Kerwin and De Rance initially focused their investigation of the stolen stud on another of Carroll’s companions, Mr. McGrath. But they were unable to locate him. While looking for McGrath, though, they came across Lyons, and they began to interview him instead. As it happened, as they were speaking with Lyons in front of the Grand Opera House on Canal Street, Carroll walked by.

This was Carroll’s chance, presumably in a more sober state, to exonerate Lyons. But he did nothing of the kind. Instead, when Detective Kerwin asked him whether Lyons was one of the parties whom he suspected of involvement in the theft, Carroll answered “Yes.” Lyons, dumbfounded, protested his innocence. While it is not entirely clear how Carroll responded, he said...
something to the effect of, “Never mind, I will fix you,”(14) or “I will see you tomorrow in court,”(15) or perhaps both.

The officers arrested Lyons for the theft of Carroll’s diamond stud. They took him to jail, where he was held overnight, and released after posting $500 bail.(16) Lyons was tried on a larceny charge a couple of weeks later. At his trial, Carroll admitted that Lyons had not even been present at the time of the larceny, and Lyons was acquitted. Case closed.

Mr. Lyons’s Lawsuit

Except that things were far from over, from Lyons’s perspective. The false accusation and incarceration had sent the otherwise rational Lyons over the edge. The “filth and stench” in his cell had appalled him, and “his feelings were greatly humiliated.”(17) As a witness later explained: “Lyons was particularly outraged . . . because he had spent a night in the bull pen with Negroes and filthy white men who had been arrested during the night for vagrancy and similar charges. He never seemed able to forget that night.”(18)

To his credit, Lyons attempted (at first, anyway) to resolve his grievances through the legal system. He hired the respected Louisiana firm of Gurley & Mellon to represent him. They sued Carroll and Officers Kerwin and De Rance in civil district court for the Orleans Parish, seeking damages for Lyons’s unlawful arrest and imprisonment.

But Lyons’s suit did not go well. First, the presiding judge, Thomas C.W. Ellis, dismissed the officers before trial. He acted on the face of Lyons’s petition, meaning that Lyons received no benefit from the evidence later developed at trial.(19) Based on the petition alone, Judge Ellis found that the officers had probable cause to arrest Lyons, and therefore were not liable for the arrest or imprisonment.

The case against the remaining defendant, Carroll, then proceeded to a bench trial. The trial judge heard the testimony of several witnesses and determined, “in substance, that defendant Carroll did not accuse [Lyons] of the theft.”(20) He therefore granted judgment for Carroll.

All the defendants in Lyons’s suit had now been dismissed. Lyons blamed this adverse result on Delos C. Mellen, who had handled his case in trial court.(21) He persuaded Mellen’s partner, J. Ward Gurley, to appeal the judgments for Carroll and the officers to the Louisiana Supreme Court.

In 1899, the Supreme Court decided Lyons’s appeal against Carroll. Although it found the circumstances “unfortunate for the plaintiff,” it found no malice in Carroll’s failure to exonerate Lyons when the officers interviewed him on the street.(22) It explained that Carroll “did not know upon what information Lyons had been arrested, that he was a stranger to Lyons, and that for that reason [he] answered as he did, which was, in effect, that he would see him the next day before the court.”(23) The Supreme Court placed the blame, if any, for Lyons’s arrest on the police, who acted even though Carroll “was scarcely in a condition to be responsible for affidavits made and other steps taken in the matter.”(24)

Given the court’s statements about the police, Lyons perhaps had hope that his appeal from the dismissal of the officers would go better than his appeal against Carroll. Alas, this was not to be the case. When Lyons’s appeal of the officers’ dismissal came before it, the Louisiana Supreme Court focused on what Carroll had told the officers, including giving them Lyons’s name and failing to exonerate Lyons when officers interviewed him on the street. (25) Given what they knew, the court said, “it cannot be said the police officers acted without probable cause” or that they “transcended the reasonable limits of their duty in taking [Lyons] into custody.”(26) It therefore upheld the dismissal of Lyons’s suit against Officers Kerwin and De Rance.

Lyons’s suit had resulted in a Catch-22. The courts had determined that the officers had acted reasonably based on the information provided by Carroll, but that Carroll was not liable for the use the police had made of his information. The court’s decisions are certainly open to criticism, particularly their decision involving Carroll, which let him off the hook due to his drunkenness and gave him the benefit of the doubt concerning whether his fingering of Lyons was malicious, notwithstanding the fact that his false accusations had ruined Lyons’s life.

Lyons Lashes Out

Lyons was understandably upset. But what he did next was entirely unexpected and, indeed, shocking.

The Louisiana Supreme Court ruled against Lyons in favor of Carroll on June 12, 1899. It rendered its decision in favor of the officers on March 17, 1902. This meant Lyons had several years to stew over the dismissals, during which he became more and more infuriated, even monomaniacal, about the litigation. As angry as he must have been at Carroll, the officers, and the courts, Lyons blamed his attorneys most of all for his losses.
Lyons hectored Gurley at his law office nearly every day, in fact. Finally, Gurley appointed a panel of three lawyers to review the case. The attorneys determined “that Lyons’ attorneys had been without blame and that everything possible had been done.”

This did not satisfy Lyons. His actions now transcended the obsessive and ascended to the realm of the truly bizarre. One day in 1901, he sent a “second” to the offices of Gurley & Mellen, who challenged Gurley to a duel. While such an action might have been commonplace in the early nineteenth-century South, it had no place in modern New Orleans.

Gurley determined with the aid of friends that a gentleman in the newly-dawned twentieth century need not defend his honor by responding to such a challenge. So, he ignored it.

This only made Lyons angrier. He dispatched letters to his erstwhile attorney, asking why Gurley was refusing to fight. Gurley, who by this time had been appointed New Orleans district attorney but still maintained his offices with Mellen, ignored the letters. Lyons then visited him in person at his offices and told him he demanded satisfaction. Gurley, who had had enough of the harassment, told Lyons to get the hell out of his office.

Lyons left, as Gurley requested. But Lyons obsessively shadowed Gurley after that, hanging around outside of Gurley’s office and at the courthouse when Gurley was prosecuting cases.

The Murder

On July 20, 1903, Lyons again showed up at Gurley’s office. This time he was prepared for mayhem. In one pocket he carried a revolver; in another, and in his hat band, a large quantity of potassium cyanide. Lyons entered Gurley’s office and shut the door. A few minutes later, witnesses heard Lyons exclaim something to Gurley. Then they heard three shots. It was later determined that Lyons paused to reload, then fired a fourth shot into Gurley’s body as he lay on his office floor.

Lyons carried Gurley out into Gurley’s waiting room and dumped him into the arms of a witness. He then re-entered Gurley’s office, closed the door, and shot himself in the head.

After the shooting, once he had recovered enough that he was able to talk, Lyons behaved quite bizarrely. First, he denied having had any cyanide in his possession during the attack. Then, there was his colloquy with the parish coroner, M.V. Richard. Richard asked him whether he believed that “every man who has a case lost by his attorney should kill him?” Lyons responded, “Yes. I certainly do.”

But was Lyons insane?

The Trial

The state charged Lyons with murder. The prosecution sought the death penalty. At his trial, the defense focused on proving that Lyons had been insane at the time of the murder. It presented testimony from physician Dr. Y.R. LeMonnier, who testified that Lyons was “a maniac” who suffered from “delusions of persecution.” For its part, the prosecution asked many witnesses who knew Lyons, including a surgeon, a newspaper reporter, bartenders, a barber, and several of Lyons’s friends and drinking companions, whether he was known to behave irrationally, or whether they believed that he was insane. Almost uniformly they replied in the negative. In addition, medical witnesses for the prosecution expressed their opinion that Lyons was sane.

The case was then given to the jury. After deliberating for just thirty-five minutes, they found Lyons guilty as charged. Lyons’s reaction to the verdict was predictably off-kilter. Notwithstanding the verdict of death, he was thrilled that evidence had been presented at his trial that he believed finally exposed the legal malpractice Mellen & Gurley had committed in his suit against Carroll and the officers.

Lyons’s attorneys attempted to block his sentencing by the district court, arguing that he was too insane to be sentenced. The trial court appointed a “commission de lunatico inquirendo.” The commission carefully investigated the matter, and reported to Judge F. D. Chretien that Lyons was of sound mind.

The Appeal

Lyons appealed his conviction to the Louisiana Supreme Court. In his appeal, he raised numerous evidentiary objections. His principal objection was that numerous lay witnesses had been asked to give opinions concerning his sanity, or lack thereof. But the Court found no reversible error in this; it explained that the opinion of the nonexperts having been offered to prove or maintain the sanity of the accused, the only
facts necessary to be established in order to the admission of such opinions in evidence were normal intelligence in the witnesses, and adequate opportunities, considered with reference to the scope of the opinions sought to be elicited, for observation of the person whose mental condition was the subject of investigation; and from the recitals of [Lyons's bills of error], and the testimony brought up in connection with them, we think those facts were sufficiently established, and that the opinions were properly admitted.\(^{(42)}\)

Another interesting feature of this appeal involved the optical testimony. Lyons had presented evidence from an oculist that he suffered from “a ‘choked disc,’ [that is,] a swelling of the optic nerve; that the optic nerve is connected with the brain; and that in this instance the swelling was attributable to cerebral irritation, which rendered the accused a dangerous man, likely at any time to commit violence.”\(^{(43)}\) The prosecution, of course, called its own optical witness, who was permitted to testify about whether a choked disc was evidence of insanity. On appeal, Lyons asserted this was just more impermissible opinion evidence about his sanity. The Louisiana Supreme Court disagreed; it viewed the evidence as merely that of a professional testifying to “the pathology of a disease of the optic nerve” in response to that of Lyons’s own expert.\(^{(44)}\)

In the end, none of Lyons’s objections was successful. The same court that had ruled against him twice on his civil suit, beginning just five years earlier, now upheld Lyons’s conviction and death sentence. Perhaps in view of Lyons’s disdain for the representation he had received in the civil suit, the Louisiana Supreme Court finished by noting that his criminal counsel had “discharged their duty faithfully and diligently, and have secured to the defendant a trial such as the law entitled him to. He must now abide the result.”\(^{(45)}\)

**Lyons’s Execution**

After the Louisiana Supreme Court ruled against him on his direct appeal, Lyons’s attorneys tried again to halt the proceedings due to his alleged insanity. They presented a petition to Judge Chretien, arguing that because of Lyons’s current insanity, “the court should not certify the record to the Governor of the state for his approval and the issuance of the death warrant.”\(^{(46)}\) Counsel also requested the appointment of a physicians’ committee to examine Lyons’s mental condition. They argued that if he was found insane, he should be committed to the state insane asylum until he was cured.

The district court denied the petition. Counsel requested a “supensive appeal,” which the district court also denied. They then filed a petition for writ of mandamus with the Louisiana Supreme Court, requesting that it order the district court to permit them a suspensive appeal. The Louisiana Supreme Court ruled that only the warden or a court could take action to halt the execution of a prisoner based on his alleged present insanity, and that such an action, based “not [on] legal right, but [on] humanity,” lay within the court’s discretion.\(^{(47)}\) A writ of mandamus would not be available to challenge the court’s exercise of such a discretionary power.

The Louisiana Supreme Court issued its decision denying mandamus on February 11, 1905. The Board of Pardons denied Lyons’s request for commutation of sentence, and the governor scheduled his execution for March 24, 1905.\(^{(48)}\)

Lyons went to his death with courage and dignity. When told on the day of his execution to “be brave,” he responded, “There’s no dunghill in me. I’ll walk to the gallows as easily as I walk through that door.”\(^{(49)}\) He did, and when the executioner asked if he had anything to say, he replied, “No. Nothing at all.”\(^{(50)}\)

The chain of events set in motion ten years earlier by the loss of a diamond stud during a drinking bout had now reached its ultimate and tragic conclusion.

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1. The facts of the theft at the Little Diamond Saloon and the proceedings against Lewis W. Lyons are drawn generally from two opinions of the Louisiana Supreme Court: Lyons v. Carroll, 31 So. 760 (La. 1902), and Lyons v. Carroll, 26 So. 416 (La. 1899).
3. Lyons, supra note 1, 26 So. at 416.
4. Id.
6. Id.
7. New Orleans Jazz piano legend Jelly Roll Morton (1885—1941), for example, was famous for his diamond tooth. http://www.answers.com/topic/jelly-roll-morton.
8. Lyons, supra note 1, 26 So. at 417 ("He was, it appears, well acquainted with Sergeant Walsh.").
Dear Friends,

After thirty-two years proudly working as a staff attorney, I am retiring and moving to Avon, Colorado. It has been a pleasure and an honor to work with the wonderful staff of our office as we strive for our goal of helping the judges to achieve justice.

It has also been an honor to be associated with the Council of Appellate Staff Attorneys. At the many seminars I attended, I learned much and made many great friends. I am very happy that Rachel Zahniser of our office is secretary this year and is continuing the tradition of contributing to the education of staff attorneys.

At this point, I would like to give a few thoughts on justice. In the federal system, the time limit for a direct criminal appeal is established by rule and is not jurisdictional. On the other hand, the time limit for civil appeals is established by statute and is jurisdictional. I don’t think the civil time limit should be jurisdictional, either.

Pro se litigants, most of whom are prisoners, are not trained in the law and are the litigants most likely to miss time limits. Courts are experienced at addressing the issue of equitable tolling of statutes of limitations, and justice should require that the time limits for filing an appeal be subject to equitable tolling, too.
While no one doubts that a notice of appeal that is one year late should be dismissed, there is no reason that a one-day late notice of appeal should be dismissed. The nature of the calendar that we use causes many inexperienced persons to incorrectly count the thirty days when the period includes a month with thirty-one days. In the absence of bad faith, such a one-day late appeal should not be dismissed.

I would also like to provide some thoughts about sentencing. My experience is in the federal system, but I think that this idea has wider applicability. I believe that all sentences should be based on an anchor. That anchor, utilizing the normal sentence for second-degree murder, should be twenty years. Absent a death, no sentence should be longer than twenty years.

How would this anchor work? Bernie Madoff should only receive twenty years for his security fraud unless one of his victims committed suicide. Similarly, drug dealers should receive not more than twenty years unless someone overdosed or was murdered in drug turf war. Lastly, no one would receive more than twenty years for possession of a firearm while being a felon unless they or someone else used the gun and killed someone. Such an anchor would eliminate the disrespect the justice system receives for multiple-lifetime sentences.

Now I would like to switch topics. If you are ever in my native home town, be certain to catch a Cincinnati Reds or Cincinnati Bengals game, plus a University of Cincinnati or Xavier University basketball game. (I am a graduate of both fine schools.) Visit Fountain Square downtown and see our great fountain, *The Genius of the Waters*. Catch a play at the Playhouse in the Park. Visit the Underground Railroad Freedom Center. Stop by the Mercantile Library for a book group discussion. Catch a concert by the Cincinnati Symphony and hear a performance at the Christ Church’s Music Live at Lunch program. Lastly, be certain to enjoy the wonderful Cincinnati park system. The Ohio River overlook in Eden Park is one of my favorites for a great view of the river and the valley. Don’t forget to eat some ribs from The Ribs King (Montgomery Inn), some chili from Skyline Chili, and some Graeter’s ice cream.

On to my adopted state. In Denver, be sure to visit the Red Rocks State Park in the foothills. Head out I-70 to Idaho Springs where you can’t miss Beau Jeau’s pizza – save some crust and put honey on it! Just outside Idaho Springs, you can drive to the top of 14,000-foot Mount Evans. But watch the last 500-foot walk to the overlook – the altitude is a doozy. Visit Hanging Lake State Park; if you can make the hike, your reward is a wonderful set of multilevel pools that do seem to hang on the top of the world. Sidetrack off I-70 to Aspen and take the shuttle back to the Maroon Bells – a fantastic mountain range where the mountains do turn maroon in the afternoon sun. Follow I-70 all the way out to Colorado National Monument, where the southwestern vistas of mesas and plateaus are as good as any in the west. Then you will have traveled from the plains to the mountains to the deserts in one long fell swoop.

I would like to end with a pitch: write articles for Rachel! She will need volunteers to write about the CASA seminar. Pick a subject relevant to your work. Pay attention at the seminar and take good notes. Organize your article – begin with a hook and end with a punch. It will help you learn a topic in depth as I did many times in association with this wonderful organization. Make my CASA your CASA.

Sincerely,

Joe Merling

Joe Merling, wearing a hat signed by his fellow Sixth Circuit staff attorneys, prepares to cut the cake at his retirement party.
ANNOUNCEMENTS

2013 ABA MIDYEAR MEETING

The ABA Judicial Division will meet in Dallas, TX from Wednesday, February 6 through Sunday, February 10, 2013. Judicial Division meetings and events will take place at the Anatole Hotel.

For registration, schedules, event tickets, and details on the Judicial Clerkship Program, visit www.ambar.org/jdmidyear.

2013 AWARD CALL FOR NOMINATIONS

John Marshall Award

The John Marshall Award is named in honor of the fourth Chief Justice of the United States, who is credited with establishing the independency of the judiciary and enhancing its moral authority. It is presented annually at the Judicial Division’s Dinner in Honor of the Judiciary in conjunction with the ABA Annual Meeting.

Robert B. Yegge Award for Outstanding Contribution in the Field of Judicial Administration

Presented a current of former ABA member who has made an outstanding contribution to the field of judicial administration shall be eligible for the award, except current officers and members of the Executive Committee of the Lawyers Conference.

The Franklin N. Flaschner Award

Recognizes a judge in a court of limited jurisdiction who has an excellent reputation, a commitment to high ideals, exemplary character, leadership and competence in performing judicial duties.

The William R. McMahon Award

Presented to a judge, court employee or attorney who has made a significant implementation or development in the use of technological advances in a court of limited or special jurisdiction.

The Judicial Education Award

Awards a person or institution of judicial education/training for successful efforts in providing high quality judicial education and training for judges.

For rules, deadlines, and forms visit: http://www.americanbar.org/groups/judicial/awards.html