LOUISIANA BAR
JOURNAL
April / May 2019 Volume 66, Number 6

# Think Before You Sign:

## Notarial Liability in Louisiana

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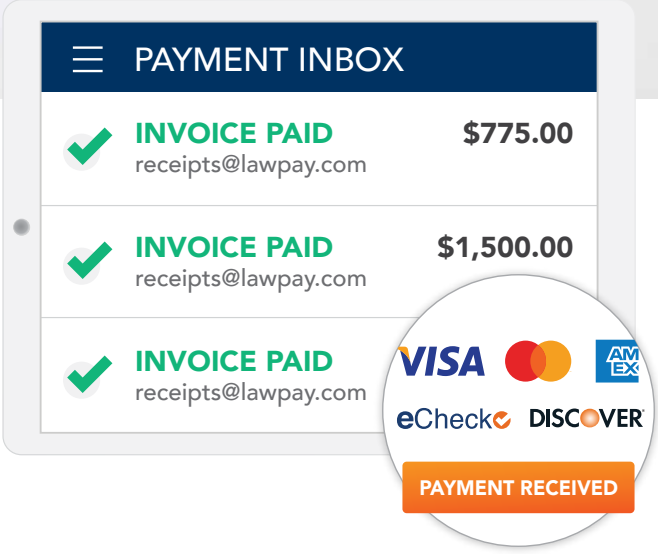


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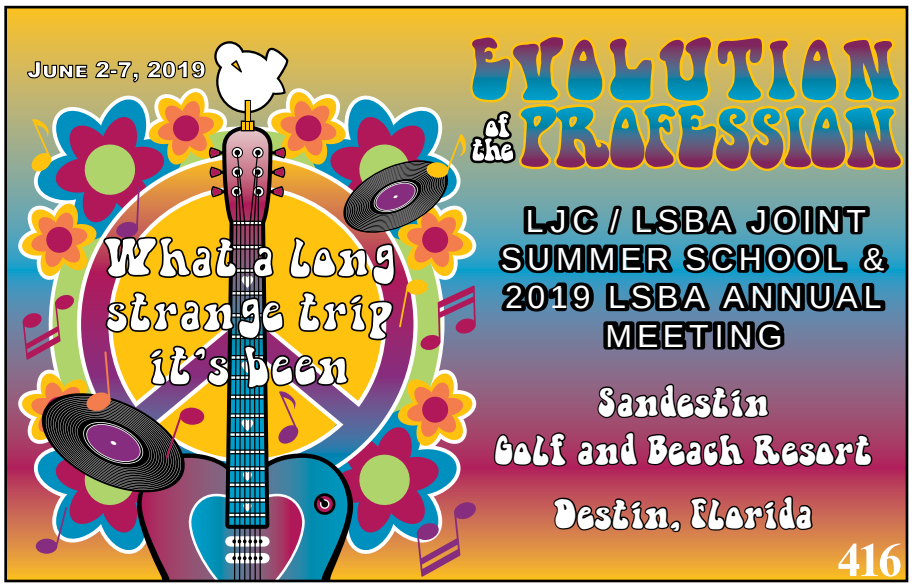

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# Guten Abend

*By John E. McAuliffe, Jr.*

This is it — the very last time you will hear from me as your editor. (I can hear the joy in Mudville tonight!)

I want to thank our members for allowing me to serve as secretary of the Louisiana State Bar Association (LSBA) and as editor of the *Louisiana Bar Journal*. The trust you have placed in me is humbling. I hope I have performed to your expectations. I know I am leaving the *Journal* in very good hands. Patrick A. Talley, Jr. will soon be your secretary and editor. Pat and I have known each other since we served on the Board of Governors together. He possesses the intelligence, judgment and energy to keep this *Journal* as a vibrant legal periodical.

I also must thank the many lawyers who have contributed articles over the past two years. It is only through their unselfish work that we are able to fill each issue with interesting and current features on the law and our lives as attorneys. I am sorry if I annoyed you or badgered you about submissions. (No, I am not.) Be warned, Pat may continue to send me out trolling for content.

The members of the *Journal* Editorial Board also deserve our continuing thanks. They are dedicated to this publication and to you, the membership. Many of our Editorial Board members have served for several years and have the experience to edit and polish submitted articles. They are all quick to volunteer to take on that one additional article. They also form the "collective" voice behind decisions on the submissions to be published in the *Journal*.

Of course, along with me, all of our members should thank the LSBA staff members who (behind the scenes) are most responsible for putting together each issue. They meet every deadline. They work several issues in advance. They keep every editor focused. They rein us in. They know their craft and their professionalism is evident in our "final product" every two months. They make the job of editor that much easier and enjoyable.

Finally, I want to thank my wife, Jean. Through my three years on the Board of Governors and the last two years as secretary, she has always supported me, the LSBA and, in turn, all of our members. Without complaint, she accompanied me to the various functions and meetings. She knows when to kick me under the table (or in public). I suspect (actually I know) that all members of the Board of Governors have tolerated me only because of her. She has been happily "editing" my life and those of our children for these many, but fast-moving, years.

## Letters to the Editor Policy

1. At the discretion of the Editorial Board (EB), letters to the editor are published in the *Louisiana Bar Journal*.

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

3. Letters should be no longer than 200 words.

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

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

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

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

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

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

# LETTERS

READER RESPONDS

## Remembering Attorney General Guste

I was saddened to learn of the passing of one of Louisiana's political icons, longtime Attorney General Billy Guste. The splendid article by his daughter Anne Guste recapping some of his major career accomplishments was enlightening and empowering (December 2018/January 2019 *Louisiana Bar Journal*, Louisiana's Legal Legends.)

The "General," as we his staff affectionately referred to him, used his office to promote the public interest across a broad spectrum of issues — in particular, matters involving Louisiana's fragile and disappearing coast.

When awareness of environmental affairs in Louisiana was just beginning to take root, he created within the Louisiana Department of Justice his Environmental Enforcement Section that successfully initiated and prosecuted litigation to stop shell dredging in Lake Pontchartrain and ban the rampant and indiscriminate discharge of toxic-produced water and drilling fluid into coastal waters.

Twenty-five years later, others have now picked up the baton from General Guste to hopefully, finally, make those entities and other responsible parties pay for our coastal land loss dilemma.

General Guste was a fearless and compassionate leader. He was a friend of Louisiana, its citizens and our environment. He may be gone, but his spirit and tenacity lives on in all who had the honor of serving with him. One of his many great gifts to Louisiana was his visionary action to save our coast.

**William W. Goodell, Jr.**
**Former Assistant Attorney General,**
**Environmental Enforcement**
**Lafayette**

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**Richard Arsenault**
**Seminar Chair**

**Richard Arsenault** has been recognized as one of America's Top 50 Influential Trial Lawyers by Trial Lawyer Magazine. He has been involved in over 25 Multidistrict litigation proceedings with the NY Times noting Arsenault has "repeatedly played a leading role in mass tort cases." As Actos MDL Lead counsel, a $9 billion verdict was followed by a $2.4 billion settlement. In the Pinnacle MDL where Arsenault serves on the Executive Committee and Trial Team, three trials have resulted in verdicts exceeding $1.75 billion. The Wall Street Journal has described Richard as having "national notoriety" and as a "big gun" amongst attorneys in competition for leadership roles. BusinessWeek described him as "a Dean of the Louisiana Tort Bar" and the NY Times described him as one of the "big players" in the legal community.

## 26TH ANNUAL LOUISIANA STATE BAR ASSOCIATION
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**Sept. 13th**

### Last year's speakers included:

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Hon. Jay Zainey • Hon. Richard T. Haik, Sr. (ret.) • Lindsey Cheek • Dustin Carter • Blake David
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## 19TH ANNUAL LOUISIANA STATE BAR ASSOCIATION
# COMPLEX LITIGATION SYMPOSIUM

**Nov. 8th**

### Last year's speakers included:

Hon. Ken Starr • Hon. Eldon Fallon • Hon. Sarah Vance • Hon. W. Royal Furgeson • Hon. Patrick Hanna
Hon. Mary Wiss • Hon. Glenn Norton • Hon. Lisa Page • Hon. Beth Hogan • Hon. James Stanton
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# "And Thanks..."

*By Barry H. Grodsky*


I had a feeling this would happen. I'm at my last President's Message and not sure what to write. This is at least the third draft, so here goes. At first I wanted to write about the unfounded attacks on our judiciary. This issue has been addressed by American Bar Association leadership and, as lawyers, we must uphold the integrity of our courts and always promote and enforce the Rule of Law. Then I wanted to write about the national challenges to mandatory bars. This is a real and ongoing concern of which all bar leaders are ever mindful but it is still a bit of a moving target. Then I wanted to write about my "56" professionalism speech. 56 cents is the daily amount it costs to be a member of the Louisiana State Bar Association (LSBA). Best bargain anywhere! Then I wanted to write about how the theme for my year as president, "Changes in Attitude, Changes in Latitude," played out. I am pleased to see so many programs develop and so proud that the amended Code of Professionalism is in place and the Long-Term Strategic Plan is being implemented, plus other goals which were met.

But that's just not it. Then it came to me and it was so simple. Thanks. Just thanks. I have been truly blessed and so fortunate to have had the opportunity to serve as president and there is so much I am thankful for. So my final message is truly simple — THANKS!

I am thankful to all who encouraged me to take on this challenge and for all of those, particularly past presidents, who gave me guidance and advice so patiently and kindly.

I am thankful for all my friends at the Bar, starting with Loretta Larsen, our outstanding executive director. Our near 23,000 members would be shocked to learn of the work the staff puts in to keep this organization running so smoothly and to be so successful.

I am thankful for our Executive Committee — Dona Renegar, Bob Kutcher, Eddie McAuliffe, Shayna Sonnier and recent additions Pat Talley and Alainna Mire. This is a great team of individuals who epitomize leadership and are dedicated to the Bar.

I am thankful for all of our committees and their chairs. So much is accomplished by these committees, generally with little fanfare. They create and implement programs which keep the LSBA out in front as Bar leaders.

I am thankful for our sections which, under the leadership of Val Exnicios, have stepped up to create leadership opportunities for our young lawyers — tomorrow's leaders — with their Section Scholarship Program and with sponsorships.

I am thankful for our Board of Governors and our House of Delegates — volunteers committed to the advancement of the Bar and ensuring that we are progressing forward. These members serve unselfishly and their role is vital to a successful Bar.

I am thankful for members of our judiciary, not just for the support and encouragement they give to the Bar but also for their direct participation and involvement in Bar programs. The collegiality shown by our judges in working with the LSBA is amazing and truly unique. I have been surprised at how many state Bars do not share such a wonderful relationship with their judiciary. This truly starts at the top and I appreciate the support and friendship of Louisiana Supreme Court Chief Justice Bernette Joshua Johnson.

I am thankful, as I set out in my last message, for all those people whose paths I've crossed. The friendships established this past year have been remarkable and I know many will be long-lasting. Without Bar involvement, this never would have happened. LSBA leadership is well-recognized with other Bars, particularly in our great relationship with the Southern Conference of Bar Presidents, of which I had the honor of serving as president this past year.

I am thankful for all of our affiliated groups, including the Louisiana Bar Foundation and the Judges and Lawyers Assistance Program (JLAP), as well as the strong continued relationship with our law schools. Reaching out to those not yet admitted is critical to promote professionalism and offers the LSBA the opportunity to introduce them to other exciting programs, such as the TIP mentoring program once they are admitted into practice.

I am thankful for all members of our Bar who have understood the importance of the balance of work and life and have taken a deep breath when dealing with the stress of our profession. Everyone needs a step away to recharge his/her batteries to even better appreciate what we as lawyers do. I actually finished a novel I was writing (anyone know a good agent?).

I am thankful for every one of our volunteers. Your efforts and participation are truly helpful and meaningful. Whether giving a CLE, serving at a self-help desk or participating in a law school program, the success of a Bar is dependent on its volunteers.

I am thankful for President-Elect Bob Kutcher and President-Elect Designee Alainna Mire whose dedication and knowledge will serve them to be the great leaders I know they will be.

On a personal note, I am thankful for my assistant Courtney. If you have ever dealt with me, you've no doubt dealt with her. She has been indispensable to me.

And, last, but certainly not least, I am so very thankful for my wife Cheri and daughter Caroline. They have had to put up with all of the duties and obligations of serving as president. I never could have done it without them.

So, as I now ride off into the sunset, I do so being very appreciative of all who have taken this ride with me. You've all made this trip so very special. And to all, I say: "Thanks."

Barry Grodsky

# Think Before You Sign:

# Notarial Liability in Louisiana

By Ryan K. French

Bar associations and practitioners do a fine job of warning new lawyers about the consequences of practicing law — the stressful tediousness of billable hours, the increased likelihood of substance abuse and the ethical pitfalls, among other things. What new lawyers are left woefully unprepared for, however, is their newfound power to notarize. Not only is this notarial authority a source of significant responsibility, but, to the surprise of many lawyers, it is also a source of significant liability.

## Attorney-Notary Authority

Louisiana attorneys are not automatically licensed as Louisiana notaries. But an attorney's bar admission *does* automatically exempt him or her from the notary public examination, the only substantive hurdle to a notarial commission.[1] Armed with a Louisiana bar admission, the only other things an attorney needs to do to become a licensed notary is to complete an "Application to Qualify," submit two oaths, submit a "Certificate of Good Standing" and pay $35 to the Louisiana Secretary of State's office.[2] Ironically, though excused from taking the formal notarial exam, an attorney-notary's statewide commission is far more expansive than the parish-based commission held by traditional notaries.[3]

As word of the attorney's notarial authority then spreads, friends and acquaintances — and sometimes people who are neither — suddenly begin to show themselves, papers in hand. Vehicle title certificates, professional certification applications and acts of donation appear from nowhere and in extraordinary numbers. If the attorney is feeling particularly loyal to a friend, he might even find himself sitting outside of a Bob Seger concert in another city, waiting for a certain concert patron to exit and execute a notarial act of correction.[4]

With respect to all of an attorney's professional and extracurricular notarial activities, he or she remains bound to "perform all the duties incumbent upon [him or her] as Notary Public."[5] Perhaps the most obvious notarial duty is the obligation to properly administer oaths and certify sworn statements.[6] A lesser known duty is the obligation to record any notarized act of sale, exchange, donation or mortgage of immovable property in the relevant parish records within 15 days unless excused in writing.[7] It is also notaries to whom the law exclusively entrusts the authority to pass an authentic act,[8] validate a donation[9] or substantiate certain wills.[10] In each of these contexts, the presence of a notary is meant "to ensure the validity of a signature on a document and that the person whose name appears thereon is the person who actually signed the document."[11]

Despite this most basic function of the notary public, notarization is often perceived to be a separate, stand-alone formality that can be satisfied at any time. Before or after obtaining all of the relevant signatures, a well-intentioned party will often present a document to an attorney for "independent notarization." While in the words of one court, "[s]uch a procedure would defeat the entire purpose of the [notarization] requirement,"[12] attorneys are often pressured to simply endorse the already-signed document for everyone's convenience. In the vast majority of cases, the signatures are ultimately authentic, no one is inconvenienced, and the attorney becomes a little more convinced of the meaninglessness of notarial acts. Every once in a while, however, something different happens.

## Notary Liability in Louisiana

Though it imposes various registration, bonding and other requirements, the Louisiana notary statute does not itself create a general cause of action against notaries public.[13] It, nonetheless, presupposes that a notary is liable "for the failure to perform his duties" by specifying that bonding does not affect a notary's liability for such failures.[14] Elsewhere, the notary statute provides prescriptive and peremptive periods for any action for damages "occasioned by [a] notary public in the exercise of the functions of a notary public."[15]

Filling the void left by the notarial statute, the Louisiana Supreme Court has articulated a "standard of care for a notary:"

> [S]o long as [a notary] exercises the precaution of an ordinarily prudent business man in certifying to the identity of the persons who appear before him, it may be doubted whether he has any other function to discharge.[16]

In light of the existence of a distinct legal standard and the pervasiveness of notarial acts, there are surprisingly few published judicial decisions considering the liability of a notary. What makes the absence of case law even more surprising is the willingness of courts, when given the chance, to hold notaries liable for failing to perform their duties. Generally speaking, these notarial negligence cases fall into two categories — (1) "imposter cases," in which a signatory is present, although the signatory is not who he claims to be; and (2) "absent-signor cases," in which the signatory is not physically present when the document is notarized.

## Imposter Cases: Negligence Liability

With respect to notarial liability in an imposter case, the Louisiana 5th Circuit's decision in *Collins v. Collins*[17] is illustrative. In *Collins*, the plaintiff alleged that his ex-wife had appeared at the notary's office with a man purporting to be the plaintiff; that the notary failed to confirm his identity; that the man forged the plaintiff's name on an act of sale; and that the plaintiff thereby lost property in which he had an interest.[18] Construing the "prudent notary" standard, the *Collins* court first explained, "[A] notary is liable both for deliberate misfeasance in the course of his official duties and for negligence in performing those duties."[19] Under this standard, the court then held a notary could certainly be liable for failing to confirm the identity of a signatory.[20]

In contrast to *Collins*, there are two decisions (*Howcott* and *Quealy*)[21] declining to hold a notary liable for notarizing a false signature. Like *Collins*, both of those decisions involved an "imposter"

who physically appeared before the notary.[22] In both of these decisions, however, the imposter was introduced and vouched for by someone with whom the relevant notary had a significant pre-existing relationship.[23] Where a notary is less familiar with someone, though, the notary's reliance upon an introduction has been found to be a "serious deviation from safe business practices" and, therefore, negligent.[24]

Another noteworthy decision is the Louisiana 2nd Circuit's opinion in *Webb v. Pioneer Bank & Trust Co*.[25] Indeed, the *Webb* court considered the liability of a notary in the circumstances arguably most likely to face a busy attorney — while a notarized signature was later shown to be forged, the notary simply could not remember the specific facts surrounding the transaction.[26] The notary's inability to offer an explanation (some five years after the transaction) was fatal; faced with only a forged signature, the court had to presume that the notary was negligent in certifying its authenticity.[27]

## Absent-Signor Cases: Fraud Liability

While it is one thing to fail to verify the identity of a signor that is physically present, it is an entirely different thing to notarize the signature of someone who was never seen. This distinction, it turns out, is the difference between a finding of negligence and a finding of fraud.

Squarely before the Louisiana 1st Circuit in *Summers Bros., Inc. v. Brewer* (1982) was an attorney's "independent notarization," or the certification of a signature that was not physically witnessed by the attorney-notary.[28] The notarized, forged document then served as the basis for various commitments of money and equipment, ultimately costing the aggrieved party more than $10,000.[29] Emphasizing the deception inherent in the notarization of an absent party's signature, the court stated:

> Even if [the attorney-notary] did not know that the signatures on the contract were forgeries, he knew that by authenticating the document, as notary, he was telling the world that the parties had appeared before him and affixed their signatures in his presence. Thus, he committed fraud in that he purposely let third parties rely on a document purporting to be genuine but actually without validity as an authentic act. The "proof" of validity he supplied was misleading to all who relied on the contract.[30]


The 1st Circuit reaffirmed this reasoning in *McGuire v. Kelly*, which also concerned an attorney's notarization of an absent party's signature.[31] Like the *Summers* court before it, the *McGuire* court determined that to notarize an absent party's signature is tantamount to falsely representing that a party personally appeared, presented identification and inscribed a signature.[32] In other words, the *McGuire* court explained, such a notarization is the definition of *fraud*:

> Regardless of whether [the attorney-notary] was aware of Kelly's scheme and his forgery of the plaintiffs' signatures, [the attorney-notary] knew that his acknowledgment was false . . . . Furthermore, [the attorney-notary] knew that the plaintiffs did not appear before him and acknowledge their signatures on the deed, nor did he require that they do so . . . . [By] signing the acknowledgment clause, [the attorney-notary]'s actions were a deliberate misrepresentation.[33]

Put another way, an attorney who notarizes a signature he or she did not witness commits fraud, *even if the signature is authentic*.

## Consequences of Notarial Malfeasance

The consequences of notarizing an illegitimate signature can be severe. The most obvious consequence, of course, is the potential liability for resulting damages. Where an aggrieved party can adequately demonstrate its reliance upon an illegitimate notarization, courts have not hesitated to attribute all resulting damages and expenses to the notary.[34]

Notarial malfeasance has the additional, unique consequence of exposing the notary to liability to anyone who might come to rely upon the tainted document. As the title notary *public* might suggest, the very function of a notary is

to "purposely let third parties rely on a document."[35] The improper discharge of notarial duties, therefore, permits the notary "to be held liable to *anyone* who may be thereby injured."[36]

For those who face fraud liability, the consequences of notarial misconduct are even more severe. In some cases, the mutual misrepresentations of the notary and the party submitting the false signature — even though the notary was not necessarily aware of the forgery — can constitute concerted action sufficient to make the notary solidarily liable for all resulting damages.[37]

Perhaps more practically damning is the effect of a fraud finding upon an attorney-notary's insurance coverage. Because many malpractice insurance policies exclude coverage for claims arising out of fraudulent or deceptive acts, an attorney sued over a notarial act could conceivably have no source of indemnity. Indeed, this is precisely what happened in *McGuire*, where the Louisiana 1st Circuit determined that the professional liability insurer owed no coverage to the attorney-notary who notarized the signature of an absent party.[38] From here, it is not difficult to argue that notarial malfeasance justifies piercing the corporate veil of the attorney-notary's law firm[39] and even creates a non-dischargeable debt.[40]

As if the legal consequences of notarial malfeasance were not enough, such conduct is also ripe for professional discipline. In fact, the notary statute expressly contemplates that attorney-notaries will at all times remain subject to "the authority of the Louisiana Supreme Court to regulate the practice of law."[41] In turn, Rule 8.4 of the Louisiana Rules of Professional Conduct makes it professional misconduct for an attorney to "engage in conduct involving dishonest, fraud, deceit or misrepresentation."

By definition, mere negligence in the course of notarial work should not constitute a violation of the Rules of Professional Conduct. If the legal analysis applied in *Summers* and *McGuire* is any indication, however, the notarization of an absent party's signature is not merely negligence. Given the sole purpose of notarial attestation, such an "independent notarization" certainly seems to be misrepresentative, dishonest and deceptive. For precisely these reasons, the Louisiana Supreme Court has ordered a range of disciplinary actions in response to similar conduct.[42]

## Conclusion

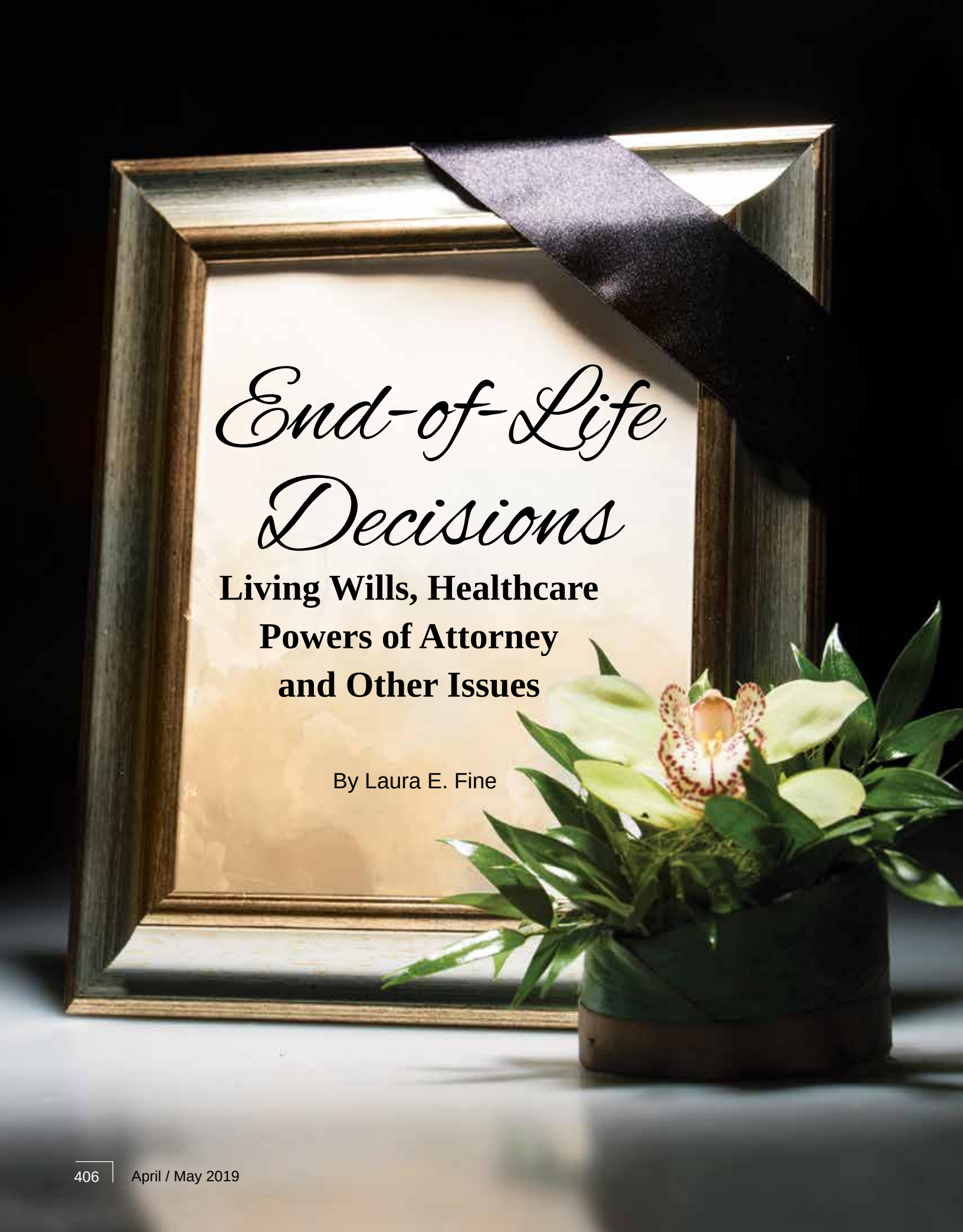
Like many articles, this one was inspired by real events and a very real lawsuit. Despite the shortage of litigation on the topic, the severity with which the law has punished careless notarial conduct is startling. To those attorneys who continue to serve as notaries, the Louisiana Supreme Court's 141-year-old statement in *Rochereau v. Jones* remains both remarkably relevant and the best summary of the responsibilities:

> High and important functions are entrusted to notaries; they are invested with grave and extensive duties . . . . Their responsibility is as high as their trust, and a notary who officially certifies as true what he knows to be false violates his duty, commits a crime, forfeits his bond, binds himself, and binds his sureties.[43]

## FOOTNOTES

1. *See,* La. R.S. 35:191(C)(3)(c).
2. *See generally,* La. R.S. 35:191.
3. *See,* La. R.S. 35:191(A), (F)-(O).
4. Yes, this happened.
5. *See id*.
6. La. R.S. 35:2, 35:3.
7. La. R.S. 35:199 (48 hours in Orleans Parish). The same statutory provision establishes a $200 penalty and a cause of action in favor of all parties to the instrument.
8. La. Civ.C. art. 1833.
9. La. Civ.C. art. 1541.
10. La. Civ.C. art. 1577.
11. *See,* Zamjahn v. Zamjahn, 02-871 (La. App. 5 Cir. 1/28/03), 839 So.2d 309, 315.
12. *Id*.
13. *See,* La. R.S. 35:1 *et seq*.
14. *See,* La. R.S. 35:198(A).
15. La. R.S. 35:201.
16. Howcott v. Talen, 63 So. 376, 379 (La. 1913); Quealy v. Paine, Webber, Jackson & Curtis, Inc., 475 So.2d 756, 761 (La. 1985) (quoting Howcott).
17. 629 So.2d 1274 (La. App. 5 Cir. 1993), *writ denied*, 635 So.2d 1110 (La. 1994).
18. *Id*. at 1276.
19. *Id*.
20. *Id*. at 1277.
21. Howcott v. Talen, 63 So. 376, 379 (La. 1913); Quealy v. Paine, Webber, Jackson & Curtis, Inc., 464 So.2d 930, 938 (La. App. 4 Cir. 1985), *aff'd in relevant part, revd in part on other grounds*, 475 So.2d 756 (La. 1985).
22. Quealy, 464 So.2d at 938; Howcott, 63 So. 376 at 379.
23. Quealy, 464 So.2d at 938; Howcott, 63 So. 376 at 379.
24. Levy v. W. Cas. & Sur. Co., 43 So.2d 291, 294 (La. App. 2 Cir.1949).
25. 530 So.2d 115, 118 (La. App. 2 Cir. 1988).
26. *Id*. at 117.
27. *Id*. at 118.
28. 420 So.2d 197, 201 (La. App. 1 Cir. 1982).
29. *Id*. at 203.
30. *Id*. at 204.
31. 2010-0562, 2012 WL 602366 (La. App. 1 Cir. 1/30/12).
32. *Id*. at *11-12.
33. *Id*. at *12.
34. *See, e.g.*, Summers Bros. v. Brewer, 420 So.2d 197, 204 (La. App. 1 Cir. 1982).
35. *Id*. at 204.
36. Harz v. Gowland, 52 So. 986, 987 (La. 1910) (emphasis added); *see also,* Summers, 420 So.2d at 204 ("A notary is responsible to all persons . . . .").
37. McGuire, 2010-0562, 2012 WL 602366 at *12.
38. *Id*. at *13-14.
39. *See,* Riggins v. Dixie Shoring Co., 590 So.2d 1164, 1168 (La. 1991).
40. *See,* 11 U.S.C. § 523(a)(6).
41. *See,* La. R.S. 35:604.
42. *See, e.g.*, In re Hollis, 2013-2568 (La. 3/14/14), 135 So.3d 596, 599 (ordering attorney discipline based, in part, on "notarizing [an] affidavit outside of the presence of the affiant"); In re Porter, 2005-1736 (La. 3/10/06), 930 So.2d 875, 876-77; In re Landry, 2005-1871 (La. 7/6/06), 934 So.2d 694, 699.
43. Rochereau v. Jones, 29 La. Ann. 82, 86 (La. 1877).

*Ryan K. French received his JD degree,* summa cum laude*, in 2012 from Louisiana State University Paul M. Hebert Law Center. He also earned an accounting degree from LSU. He passed the CPA exam and now focuses in commercial litigation at the law firm Taylor, Porter, Brooks & Phillips, L.L.P., in Baton Rouge. His practice includes the representation of plaintiffs and defendants in matters involving financial and economic damages, commercial torts, business valuation, complex contractual matters and closely-held business disputes. (ryan.french@taylorporter.com; 450 Laurel St., 8th Flr., Baton Rouge, LA 70801)*



# End-of-Life Decisions

## Living Wills, Healthcare Powers of Attorney and Other Issues

By Laura E. Fine

Discussing end-of-life planning with clients is a very difficult, but necessary, topic for any practitioners involved in estate planning. This is particularly true if a client is facing a life-threatening illness. Decisions regarding end-of-life care are deeply personal and clients should talk to loved ones, healthcare providers and advisors regarding their wishes as this is crucial to ensuring those desires are carried out. If a client does the appropriate planning, he or she will be able to focus on spending time with loved ones rather than dealing with unexpected issues.

## Powers of Attorney and Living Wills

The existence of a durable power of attorney can often mean that relatives will not have to institute interdiction proceedings if the individual becomes incapacitated, as durable powers of attorney will continue even if the individual is incapacitated. La. Civ.C. art. 3026. A person with a durable power of attorney (hereinafter the "agent") can act on the behalf of the individual (hereinafter the "principal") in legal and financial matters and can perform all acts incidental to or necessary for the performance of the power of attorney. La. Civ.C. art. 2995.

The power of attorney will terminate upon the death or interdiction of the principal. La. Civ.C. art. 3024. The principal may terminate the power of attorney at any time unless the parties agreed to its irrevocability. La. Civ.C. art. 3025. The agent may terminate the power of attorney by notifying the principal of the agent's resignation. At the termination of the power of attorney, the agent has an obligation to account for his or her performance to the principal unless the duty to account has been expressly dispensed with by the principal. La. Civ.C. art. 3032.

Some clients may be uncomfortable giving such broad authority to one or more individuals if it is immediately effective upon execution. It is not uncommon to have clients ask to have the power of attorney be a "springing" power. A springing power of attorney is one that becomes effective upon the occurrence of a condition, such as the principal's incapacity. There are many difficulties that can arise when using springing powers of attorney, with the most obvious being how to define and confirm incapacity. One common method of proving the principal is incapacitated is to require that such incapacity be certified by two physicians. A springing power of attorney also presents difficulties when the agent attempts to use the power of attorney, since the agent will have to prove to third parties that the principal is incapacitated.

It is often advisable to have more than one agent acting as power of attorney for the principal. The reasoning is that if one agent is unavailable, incapacitated or predeceases the principal, another individual can act as agent. Clients may have concerns regarding naming someone other than their spouse as agent, as the possibility of conflict increases when more than one person is authorized to act on behalf of the principal. The question is also whether the multiple agents should be required to act jointly, or whether they should be allowed to act independently. Requiring joint action complicates the actual use of the power of attorney since two signatures will be required. However, naming more than one agent, especially if those agents are children of the principal, may reduce family conflict since both agents will have access to financial information. The agents are also less likely to abuse the power of attorney if another agent is looking over their shoulder.

In the event that the principal is interdicted, the principal can designate his or her preference for a curator in the power of attorney. La. C.C.P. art. 4561(C)(1)(a) states that the court will first consider as curator a person designated in a writing by the proposed interdict when he or she still had sufficient ability to communicate a preference.

Some financial institutions, particularly large financial institutions, can be reluctant to accept powers of attorney prepared by someone other than their own legal department. The practitioner should advise his or her client to contact the financial institution and confirm that the power of attorney prepared by the practitioner will be accepted by the financial institution.

As a final note, clients should be advised to place the power of attorney with other important legal documents (or give them to the agent), but should not place the power of attorney in a safety deposit box as the agent will need the power of attorney to enter the safety deposit box.

## Medical Power of Attorney

While the power of attorney discussed above can include the power to make medical decisions on behalf of the principal, it is common for the medical power of attorney to be a separate document.

The medical power of attorney specifies the person or people the principal wishes to make his or her healthcare decisions in the event the principal is unable to make those decisions. If the principal wants to name more than one person as the agent, the drafter should consider how conflicts between the two (or more) agents will be resolved. It is advisable to name one person whose decisions will be binding on the healthcare professionals in the event of conflict among the agents. Unlike the durable power of attorney, the medical power of attorney will only be able to be used by the agent when the principal is incapacitated. The issues around "springing" powers of attorney do not apply with medical powers of attorney since the incapacity of the principal is easily ascertained by medical staff.

The medical power of attorney can be a blanket statement giving the agent the ability to act on the behalf of the principal for all medical decisions, but the medical power of attorney also can address the principal's desires in specific medical situations. For example, one of the most difficult decisions for an agent to make is whether to consent to a "Do Not Resuscitate" order. It is preferable for the principal to have considered this question prior to incapacity and to have stated his or her decision so that the children or a spouse cannot contradict the principal's desires.

In the absence of a medical power of attorney, La. R.S. 40:1159.4 states that

the people who can consent to medical treatment are (in this order): spouse (not judicially separated), adult child of patient, parent, patient's sibling, the patient's other ascendants or descendants, adult friend, person standing *in loco parentis* for a minor, person chosen by an interdisciplinary team, or person chosen by an ad hoc team assembled by an interested person.

## Living Will

A living will is a document wherein the client expresses his or her desires regarding continuing medical care in the event the client is in a permanent and irreversible coma. For loved ones, the decision to terminate life support is particularly difficult. The decision to terminate life support also must encompass the decision to terminate hydration and nutrition through the removal of a feeding tube. As wrenching as these decisions are, if the client has expressed his or her wishes in a living will, the family will be able to effect the decision knowing that they are acting in accordance with their loved one's wishes.

La. R.S. 40:1151.2 states that any adult person can make a written statement directing that life-sustaining procedures be withheld if that person is in a terminal and irreversible condition. The declaration must be signed in the presence of two witnesses. The declaration can be made orally or nonverbally after the diagnosis of the terminal and irreversible condition so long as the declaration is made in the presence of two witnesses. The statute also provides a sample form for the declaration. The declaration can be registered with the Secretary of State for a small fee.

## Directives Regarding Burial and Cremation

Many clients have specific desires for the disposition of their remains and those desires can be outlined in either the will or a notarized declaration. In the will, or notarized document, the client can specify desires regarding the type of service, music, etc. and also name the person they would like to be in charge of the funeral services. Having such a will or notarized document can prevent conflict among family members and give clear direction for the funeral home.

In speaking with multiple funeral homes in the New Orleans area, it became clear that the area of most conflict was the decision to cremate. La. R.S. 37:876 provides a long list of individuals authorized to serve as the agent for the deceased with regards to the decision to cremate and requires majority consent in the event that the deceased's surviving children or grandchildren are the individuals whose consent is required. If the required authorization cannot be obtained, *i.e.* if a majority of the surviving children or grandchildren won't consent to cremation, a final judgment from a court will have to be obtained.

## Long-Term Care Insurance, Medicare/Medicaid and Hospice Care

Planning for long-term care in the event a client becomes incapacitated or disabled is a vital part of end-of-life planning. The cost of long-term care can be astronomical and many clients are interested in purchasing insurance to cover those costs, as health insurance doesn't cover this type of care and Medicare only covers this type of care for a short period of time. Long-term care can meet a variety of patient needs, from help with everyday activities to skilled nursing care.

This type of insurance is generally not inexpensive, and the cost will climb the longer a client waits to buy a policy. The policies will offer different coverage options. Depending on the coverage options chosen by the client, the policy will pay for at-home care or care in an assisted living facility. Some policies also will pay for adult day care, care coordination, and modifying the client's home so the client can continue living there.

In order to start receiving benefits from the long-term care policy, the client will have to meet certain standards set out by the insurance company. Generally, the policy will be triggered when the client can no longer perform two or more activities of daily living, such as bathing, eating, dressing, using the bathroom and walking. Clients should make sure that the policy will be triggered by the onset of mental impairment, such as Alzheimer's or dementia.

While the statistics vary depending on the source, it is clear that the majority of people will need some form of long-term care after age 65. Women are more likely to need long-term care than men and to need it for longer.

Medicare does not pay for long-term care. It is intended to only pay for medically necessary care and acute care such as doctor visits, drugs and hospital stays. Medicare will cover short-term care in a skilled nursing facility for conditions which are likely to improve, such as physical therapy after a fall or a stroke.

Medicare will pay 100 percent of the costs for a 20-day stay at a skilled nursing facility, hospice or home health care if the patient had a recent hospital stay of at least three days, the patient was then admitted to a Medicare-certified nursing facility, and the patient requires skilled nursing or therapy. For days 21 through 100, the patient pays for the costs of the facility up to $164.50 per day, with Medicare paying for any costs that exceed $164.50 per day.

Medicare also will pay for part-time or intermittent skilled nursing care, physical therapy, speech therapy, occupational therapy, medical social services to help cope with an illness, medical supplies and durable medical equipment if such services are medically necessary. Medicare will continue to pay for these services indefinitely as long as the treating physician reorders the services every 60 days.

The vast majority of nursing home residents pay for their care through Medicaid. Qualifying for Medicaid can be a tricky business for clients who have assets or income in excess of the federal/state set limitations. While qualifying for Medicaid is often an important part of finding a nursing home, the topic is complex and beyond the scope of this article.


## Hospice

Hospice care is covered by most private insurance plans, Medicare and Medicaid. The focus of hospice care is to manage the pain of the patient and treat the symptoms of the terminal illness, rather than attempting to cure the illness. The patient can receive hospice care at home, a nursing home, a hospital or a stand-alone, Medicare-approved hospice care facility. Hospice will create an interdisciplinary team that consists of a nurse, hospice volunteer, social worker, home health aide and chaplain. The team will work with the family to create a plan of care for the patient.

## General Advice

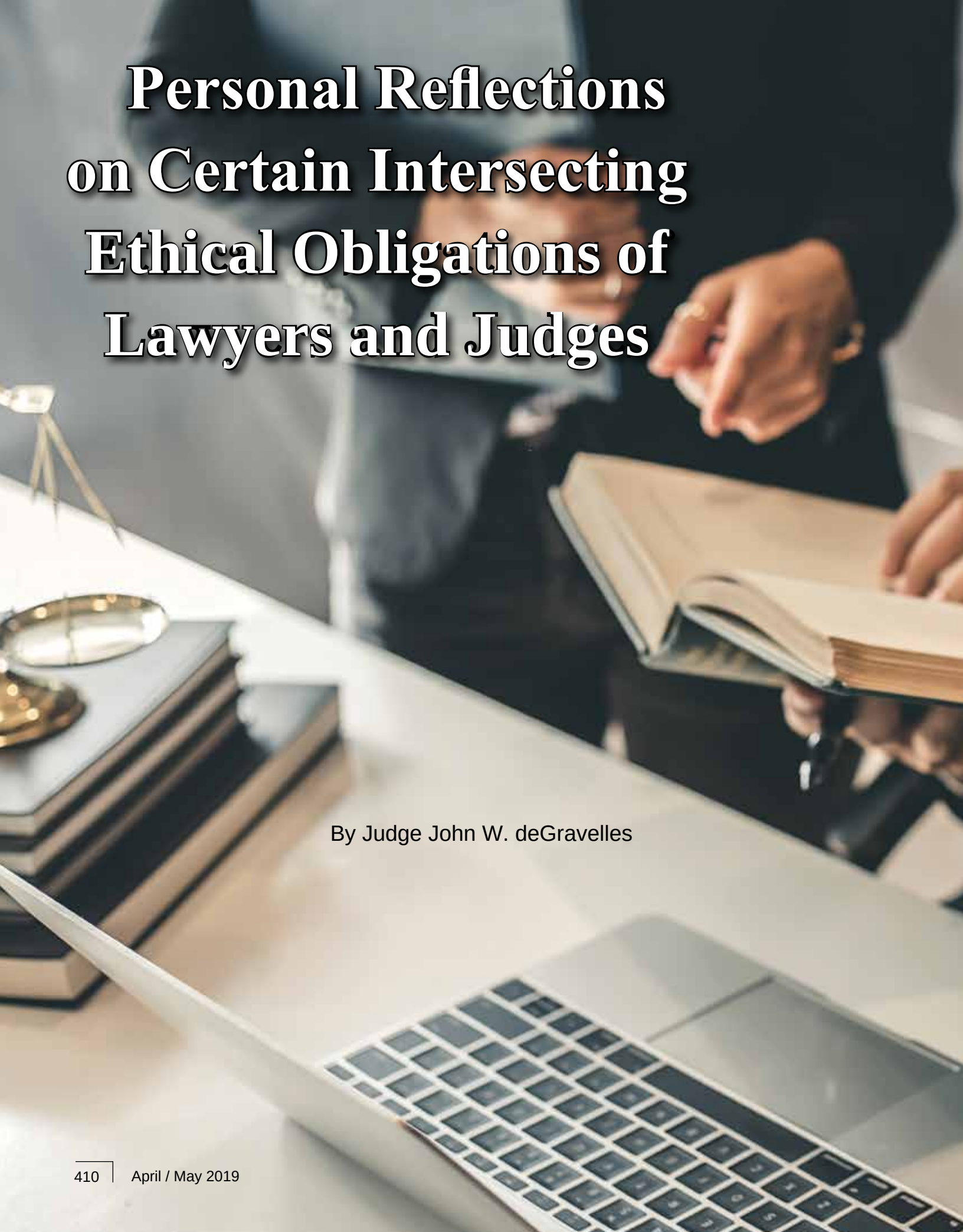
Each end-of-life planning discussion is different. The conversation with a young, healthy client is very different from a conversation with a client who has received a terminal diagnosis.

When a client has received a terminal diagnosis or has a life-threatening illness, the practitioner's first job is to review all documents currently in place to see if they still conform to the client's wishes. If the client is either new or new documents must be drafted, care must be taken to execute them while the client still retains capacity and is not adversely impacted by medications.

The client or the client's family also should start to gather important documents and information regarding the client's assets and debts. These documents will be invaluable when the succession is opened. The client or family should get information regarding all financial assets, including bank accounts, life insurance, retirement accounts, annuities, pensions (especially if the pension has survivorship benefits), real estate descriptions and all debts.

*Laura E. Fine is a partner in the New Orleans firm of Lehmann Norman & Marcus, L.C. She received her bachelor's degree in 2001 in psychology from Centenary College of Louisiana, her JD degree in 2006 from Thomas Jefferson School of Law in San Diego, Calif., and an LL.M degree in comparative and international law in 2007 from Tulane University Law School. She practices in estate planning, estate administration and business law and is admitted to practice in California and Louisiana. She is a member of the Louisiana State Bar Association's Access to Justice Committee. She is board-certified as a specialist in estate planning and administration by the Louisiana Board of Legal Specialization. She also is an accredited estate planner through the National Association of Estate Planners and Councils. (laura@lnmlaw.com; Ste. 2050, 400 Poydras St., New Orleans, LA 70130)*

# Personal Reflections on Certain Intersecting Ethical Obligations of Lawyers and Judges



By Judge John W. deGravelles

***Editor's Note:*** *The original article was first presented by the author in conjunction with the 2018 Tulane University Admiralty Law Institute's seminar. A shortened version of the article is published in this issue with permission from Tulane University and the Admiralty Law Institute.*

The federal court in which I practiced as a young lawyer was not a kind, gentle or forgiving place. As I approached the federal courthouse, even on some benign and unimportant matter, my stomach would churn and my palms would sweat. The judges seemed unnecessarily hostile and antagonistic, even when all "t's" were crossed and "i's" dotted. I felt my battle as a litigator was as much against the court as it was against my opponent.

My experience in state court was usually much different. Judges were generally friendly and accommodating. They went about their business of deciding issues and cases with no apparent hostility towards lawyers. Quite the opposite. So it was no surprise that when efforts were made to change Louisiana's judicial selection system from elected to appointed judges, I instinctively reacted against it. When asked to debate the issue in public fora, I always began by quoting Lord Acton: "Power tends to corrupt. Absolute power corrupts absolutely." Thus, I argued, lifetime appointments with little or no mechanism for accountability bred judges who were arrogant, rude and had no empathy for the demands made on busy law practitioners.

It is not without a certain irony, therefore, that after 39 years as a civil litigator, I was appointed for life to my present position. After confirmation, recalling my many days in the trenches, I vowed that I would never acquire that dreaded disease, "robe-itis," defined quite accurately as "an affliction suffered by some robed judges [who] assume a god-like attitude and power, forgetting that he or she is a servant to the law and the facts."[1] Rather, I would model myself on those judges who defied my early experience and treated all before them with dignity, fairness and respect. I would follow the advice of U.S. District Court Judge John L. Kane when he wrote: "The robe is black and unadorned to subordinate the personality of the person wearing it. It is not just a symbol of authority; it is a uniform of anonymity."[2]

This I have tried to do. Since becoming a judge, however, I have learned what Paul Harvey described as "the rest of the story." During my four years on the bench, despite my determination to remain constant to my pledge, I confess my eyes were opened to the kind of conduct that may have caused the judges before whom I practiced to be (putting it quite mildly) . . . grumpy. I have seen lawyer conduct that, while not justifying it, at least explains what I perceived as unnecessary harshness. Let's just say my perspective has broadened.

Judges and lawyers are part of an integrated system carefully designed to achieve justice, but they have very separate roles and goals. Sometimes those roles and goals clash. When they do, abiding by the ethical obligations applying to each profession helps maintain the smooth working of the system. It is the purpose of this article to discuss a few of these intersecting ethical, as well as professional, obligations of lawyers and judges — specifically, some selected instances where the ethical duties of the presiding judge interface with those of the lawyer practicing in his court. In doing this, I will try to alert you to some ethics rules about which you may be unaware, remind you of some rules about which you are likely aware but emphasize their importance and, finally, provide some tips and practical advice regarding ethics, professionalism and practice in federal court.

## Judicial Code of Conduct

Members of the federal judicial branch, including judges, clerks of court, other court personnel and public defenders, are bound by the Judicial Code of Conduct. Federal judges are specifically bound by the Code of Conduct for United States Judges. It begins with five straightforward canons:[3]

> Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary.
>
> Canon 2: A Judge Should Avoid Impropriety in All Activities.
>
> Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently.
>
> Canon 4: A Judge May Engage in Extrajudicial Activities That Are Consistent with the Obligations of Judicial Office.
>
> Canon 5: A Judge Should Refrain from Political Activity.

## Mechanism for Filing Complaints

The perception among some members of the Bar and public is that there is little, if any, accountability for federal judges who engage in unethical or unprofessional conduct. Complaints in the 5th Circuit are filed with the chief judge of the 5th Circuit Court of Appeals.

If a complaint is not dismissed by the chief judge (say, for example, as frivolous), "the chief judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the Judicial Council."[4] The Special Committee consists of "the chief judge and equal numbers of circuit and district judges,"[5] and "[a]ll actions by a special committee must be by vote of a majority of all members of the committee."[6] The Special Committee conducts an investigation it deems appropriate "in light of the allegations of the complaint and its preliminary inquiry," and it may hold hearings to receive evidence or hear argument. Both the subject judge and the complainant have certain rights during the process, including the right to notice and to present or provide evidence. The Special Committee then prepares a "comprehensive report of its investigation, including findings and a recommendation for council action."[7]

Within 21 days of the Special

Committee's report, the subject judge can file a written response to the Judicial Council, which must provide to the subject judge an opportunity to present argument. The Judicial Council may take certain discretionary actions, such as dismissing the complaint, concluding that "appropriate corrective action has been taken," referring the matter to the Judicial Conference with the Judicial Council's recommendation or taking remedial action, such as censuring or reprimanding the judge.[8] But, "[a] judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct that: (A) might constitute ground for impeachment; or (B) in the interest of justice, is not amenable to resolution by the judicial council."[9] If the Judicial Conference determines that consideration of impeachment may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives.

In those cases not referred to the Judicial Conference, the Judicial Council's decision may then be appealed to the Committee on Judicial Conduct and Disability, which reviews for "errors of law, clear errors of fact, or abuse of discretion." "Except in extraordinary circumstances, the Committee will not conduct an additional investigation," and, "[t]here is ordinarily no oral argument or appearance before the Committee," though written submissions "may" be allowed. After a decision from the Committee, "[t]he Judicial Conference may, in its sole discretion, review any such Committee decision, but a complainant or subject judge does not have a right to this review. … All orders of the Judicial Conference or of the Committee (when the Conference does not exercise its power of review) are final."[10]

## Intersection of Louisiana Rules of Professional Conduct and Federal Practice

The United States District Court for the Middle District of Louisiana adopted as one of its local rules Louisiana's Rules of Professional Conduct:

> This Court adopts the Rules of Professional Conduct of the Louisiana State Bar Association, as . . . may be amended from time to time by the Louisiana Supreme Court.[11] . . . [E]very attorney permitted to practice in this court shall be familiar with these Rules. Willful failure to comply with any one of them . . . shall be cause for such disciplinary action as the court may see fit, after notice and hearing.[12]

This means, in practical terms, that if a lawyer violates an ethical rule while practicing in the Middle District, the court is empowered, even obliged, to take action. Even without this formal adoption of Louisiana's ethical rules, "a federal court has the power to control admission to its bar and to discipline attorneys who appear before it."[13]

But, remember, even if a federal court chooses not to rely on Louisiana's Rules of Professional Conduct, federal courts have other tools at their disposal to ensure ethical and professional conduct, including Federal Rule of Civil Procedure 11, which states, in pertinent part:

> By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

A district court opinion neatly and with uncommon common sense summarizes the essence of Rule 11.

> Think before you speak. Look both ways before you cross the street. Haste makes waste. Measure twice, cut once. Countless maxims underscore a simple truth: action which precedes deliberation is both dangerous and potentially wasteful. The Federal Rules of Civil Procedure codify this truism in Rule 11. At its most basic premise, Rule 11 counsels attorneys to think before they act. Rule 11 requires that attorneys conduct a basic inquiry into the facts and law underlying the case before demanding the resources of other parties and the Court in resolving a dispute.[14]

But the inimitable Yogi Berra may have said it best: "Foresight is always better, afterward."

## Courtroom Etiquette

The obligations of the judge and lawyer sometimes arrive on a collision course in the courtroom. A lawyer must not "engage in conduct intended to disrupt a tribunal." While the judge "should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers," the canon also counsels that he or she "should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process."[15] The cited canon recognizes that the court must give attorneys some latitude "consistent with their role in the

adversary process," *i.e.*, the court must understand that lawyers are "not potted plants."[16] Discerning the line where zealous representation becomes disruptive behavior is not always easy. But it is the job of the judge to make that discernment and take the necessary steps to maintain the necessary courtroom decorum.

The Middle District's Local Rules require and prohibit conduct more specific than any of the above-quoted rules, listing 18 separate courtroom mandates. Among those sometimes forgotten by counsel in the heat of battle are "[a] ddress all remarks to the Court, not to opposing counsel," "avoid disparaging personal remarks or acrimony toward opposing counsel and remain wholly detached from any ill feeling between the litigants or the witnesses" and "admonish all persons at counsel table, including the client, . . . the client's representatives, witnesses, friends and family of parties that gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses, or at any other time, are absolutely prohibited."

When this kind of conduct occurs, it is the responsibility of the judge, with or without objection from the opposing lawyer, to correct this conduct. How this is done is obviously the product of the circumstances and the judge's discretion.

## Ethics of Motion Practice

Over the course of my 39 years as a litigator, the unmistakable and unfortunate trend has been for judges to supplant juries as the ultimate decision makers in civil cases. Noted procedural scholar Arthur R. Miller decries this development: "[P]rocedural changes . . . have resulted in earlier and earlier disposition of litigation, often eviscerating a citizen's opportunity for a meaningful adjudication on the merits of his or her grievance."[17] The "most unfortunate" result is that "[m]ost courtrooms in federal courthouses are empty much of the time as judges try fewer and fewer cases."[18] The primary procedural change to which Professor Miller refers is the ever-increasing disposition of cases by motion. Whether we like it or not, motion practice consumes the vast majority of the professional lives of both lawyers and judges.

Here I provide a few tips from a former litigator and current judge that I hope will help you avoid a show cause order or at least avoid the judge's ire. First, think before you file. A huge percentage of the hours in a typical day in the life of a judge is spent poring over seemingly endless pages of motions and memoranda. A significant number of these motions have no serious chance of success. Why, you ask, do lawyers file them? Is it ignorance of the issue? Is it the quest for billable hours? Is it to please a demanding client? Is it to harass the lawyer's opponent? This judge doesn't know the answer but can say this with certainty: no good can come of it.

The biggest area of abuse in filing unnecessary and non-meritorious motions, at least in my court, is in the realm of *Daubert*[19] and motions in limine. In almost every case involving experts, all sides challenge their opponent's experts under the *Daubert* rubric. Yet many, if not most, of these motions are not challenging the methodology or foundation used by the expert but are simply challenging the strength of the expert's opinion, a job rightly given to the jury.

As a judge in the Eastern District explained, "Notwithstanding *Daubert*, the Court remains cognizant that 'the rejection of expert testimony is the exception and not the rule.'"[20] The court noted that:

> [I]ts role as a gatekeeper does not replace the traditional adversary system and the place of the jury within the system. . . . As the *Daubert* Court noted, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." . . . The Fifth Circuit has added that, in determining the admissibility of expert testimony, a district court must defer to "'the jury's role as the proper arbiter of disputes between conflicting opinions. As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration."[21]

A second major area of motion abuse is in the area of motions in limine. My complaint is that some lawyers file these reflexively and without thought. A real example follows. In a motion in limine that contained 32 specific requests for the

Court's consideration, and without referring to a specific document or anticipated testimony, one party asked the court to prevent his opponent from "impeach[ing] . . . the plaintiff on any matters which are collateral to this lawsuit and which are not relevant to the claims of plaintiff or defenses alleged by the defendants without first demonstrating to the satisfaction of the Court a predicate for the relevancy of such matters."[22] The Court's ruling summarizes the obvious difficulty with such a request: "The motion is **DENIED**. The Court cannot issue a blanket ruling excluding all such impeachment material without knowing what the material is or the context in which it will be offered. The Court will rule on specific objections to particular impeachment material at trial."[23]

Another obvious matter of importance is the quality of briefing. Because we live in the motion age, lawyers should place special importance on writing effective and persuasive briefs. When I became a federal judge, I expected the quality to be high and, for the most part, my expectations were realized. But some briefs were surprisingly awful. While not rising to the level of an ethical violation, many briefs were, to say the very least, unhelpful.

Another not uncommon abuse is the misciting of cases. The reason lawyers do this may be easier to understand, but not forgive. Lawyers are busy. It may not be intentional deception but rather the path of least resistance. Why not, reasons the lawyer, pull a canned brief from the computer or a brief from an earlier case that involved similar issues? No need, thinks the lawyer, to reinvent the wheel.

This is a serious mistake since the judge and/or his clerk is actually going to read the cases cited. A judge is tempted to call on the Spanish law that once ruled Louisiana where "a lawyer who intentionally miscited the law could be sent to exile, and his property could be confiscated."[24] And while I've cited that passage tongue-in-cheek, the unhappiness that this practice provokes in the judge can only damage your chances and your reputation.

Another understandable but unwise practice is to engage in ad hominem attacks on your opponent in briefing or oral argument. As a practicing lawyer, many times I felt my opponent was engaging in unfair, unprofessional and perhaps even unethical behavior. On occasion, I could not resist the temptation to let the judge know about it in briefing. From my new perspective as a judge, my advice is to resist the temptation. The judge wants simply to solve the legal problem presented in the motion, not referee a fight. If the abuse is serious enough, report it through appropriate channels. If the conduct is sanctionable, file a motion for sanctions. If it isn't, don't make it a part of your argument as it could potentially be grounds for an ethical violation but, even when it isn't, it rarely helps your cause.

## Conclusion

Judges and lawyers share the solemn obligation to abide by the obligations set out in their respective ethical codes. While litigating cases will never be easy and without stress for lawyers or judges, following the rules allows lawyers to focus on representing their clients and judges to do their jobs in a respectful and dignified way.

## FOOTNOTES

1. *See,* Barry Popik, "Robe-itis," *The Big Apple* (Dec. 9, 2015), *https://www.barrypopik.com/index.php/new_york_city/entry/robeitis*; *see also,* John L. Kane, *"From the Bench: Judicial Diagnosis: Robeitis,"* 34 Litigation 3 (Spring 2008).

2. Kane, *supra* note 1, at 4.

3. Code of Conduct for United States Judges Canon 1-5 (2014).

4. 5th Circuit Judicial Council Rules for Judicial-Conduct and Judicial-Disability Proceedings, § 11(c), (f), available at: *http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/rules/localjudicialmisconductrules.pdf?sfvrsn=8*.

5. *Id.* § 12(a).

6. *Id.* § 12(g).

7. *Id.* § 17.

8. *Id.* § 20(b)(1).

9. *Id.* § 20(b)(2).

10. *Id.* § 21(a), (g).

11. M.D. La. LR 83(b)(6) (2015). The same is true in the Eastern and Western Districts of Louisiana. *See,* W.D. La. 83.2.4 (2016); E.D. La. LR 83.2.3(2014).

12. M.D. La. LR 83(b)(10) (2015).

13. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991); *see also,* United States v. Nolen, 472 F.3d 362, 371 (5 Cir. 2006) ("Courts enjoy broad discretion to determine who may practice before them and to regulate conduct of those who do.")

14. Deters v. Davis, Civil Action No. 3:11-02-DCR, (E.D. Ky. June 13, 2011), 2011 WL 2417055.

15. Code of Conduct for United States Judges Canon 3(A)(3) (2014).

16. In 1987, white-collar-criminal defense lawyer Brendan V. Sullivan, defending Oliver North in televised congressional hearings over the Iran-Contra scandal, was admonished for consistently objecting to questions put to his client. He famously responded, "Well, sir, I'm not a potted plant. I'm here as the lawyer. That's my job."

17. Arthur R. Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure," 88 N.Y.U. L. Rev. 268, 306 (2013).

18. *Id*. at 306-07.

19. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

20. Johnson v. Samsung Elecs. Am., Inc., 277 F.R.D. 161, 165 (E.D. La. 2011).

21. *Id.* (quoting Scordill v. Louisville Ladder Group, L.L.C. (E.D.La. Oct. 24, 2003), 2003 WL 22427981 at *3).

22. The case citation is omitted to prevent embarrassment of the lawyer involved.

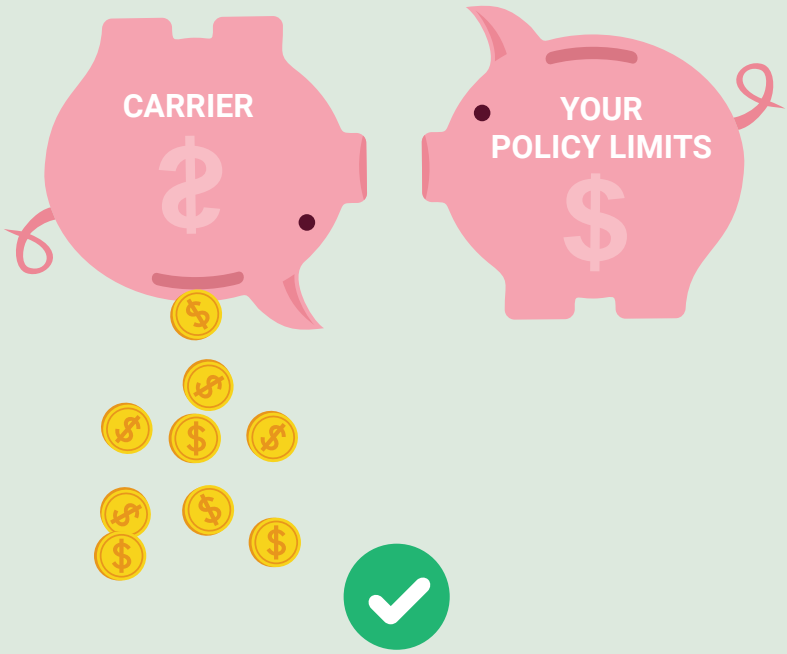
23. *Id*. A similar request from the same motion asked the court to exclude "[q]uestions calling for privileged information under the attorney and client, physician and patient, psychotherapist and patient, or counselor and client, or marital communications privileges."

24. A.N. Yiannopoulos, *The Civil Codes of Louisiana*, 1 Civ. L. Comment. 1, 7 (2008).

*John W. deGravelles currently serves as judge on the United States District Court for the Middle District of Louisiana. He received his BA degree in 1971 from Louisiana State University and graduated, with honors, in 1974 from LSU Law School (Order of the Coif). He has been a member of the adjunct faculty at LSU Paul M. Hebert Law Center since 1994, where he currently teaches Federal Courts. He has been a faculty member of Tulane Law School's Summer Session in Rhodes, Greece, since 1993, teaching Maritime Torts. In 2001, he was awarded a Fulbright Teaching Scholarship to teach American Maritime Private International Law at the Aristotle University of Thessaloniki Law School in Thessaloniki, Greece. (john_deGravelles@lamd.uscourts.gov; Ste. 355, 777 Florida St., Baton Rouge, LA 70801)*

DEFENSE EXPENSES

CLAIMS EXPENSES

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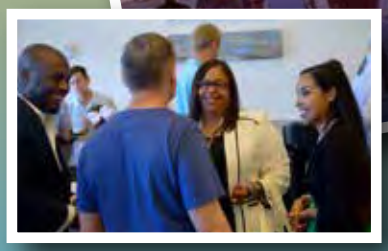
# EVOLUTION of the PROFESSION

## LJC / LSBA JOINT SUMMER SCHOOL & 2019 LSBA ANNUAL MEETING

**WWW.LSBA.ORG/ANNUALMEETING**

Destin, Florida — June 2-7, 2019



## A Greeting from Robert A. Kutcher, 2019-2020 LSBA President

Dear LSBA Members:

Welcome to the Louisiana State Bar Association's 78th Annual Meeting and the LJC/LSBA Joint Summer School: "Evolution of the Profession – What a Long Strange Trip it's Been." This year marks the 50th anniversary of Woodstock, a seminal event for my generation. Much like the world we live in, our profession has changed a lot since I was admitted to practice. It has, indeed, been a long, strange trip and to celebrate that fact we've incorporated the spirit of Woodstock into the 2019 conference theme!

This year's conference will be returning to the Sandestin Golf and Beach Resort in sunny Destin, Florida, allowing participants to enjoy six days of substantive programming, exciting social events and fascinating speakers in a relaxed setting.

For everyone who has been to Destin, you know the value of it. For those of you who have never been, I encourage you to consider joining us at this always interesting and informative convention. The Annual Meeting and Joint Summer School is our collective opportunity to meet, mingle, learn and share, to see old friends and hopefully make new ones.

I hope to see you in Destin for six days of learning, socializing and fun!

Sincerely,
Robert A. Kutcher, 2019-2020 LSBA President

# TO FIND OUT MORE, VISIT

## *www.lsba.org/AnnualMeeting*

# 5 GREAT REASONS TO SEE YOU IN DESTIN

## Strengthen your professional skills

**1** No matter your experience level, you will learn innovative new practice information at the LJC/LSBA Joint Summer School. Nationally recognized speakers make for an engaging, substantive Summer School. Multi-track CLE programming will focus on the latest updates in criminal law, civil law, family law and other practice areas, including AI and cybersecurity.

## Work and play with colleagues

**2** Destin is a beautiful setting with more than seven miles of sugar-white sand beaches and bay-front property, surrounded by championship golf courses, a pedestrian village and fine and casual dining, nightclubs and bars. Earn CLE hours during the mornings then sit back and enjoy the view at night! Join in the Annual Fun Run/Walk for exercise, fun and networking. If you're looking for a little friendly competition for an enjoyable change of pace, sign up for the popular golf tournament.

## Stay current

**3** The legal profession is changing faster than ever and new developments seem to emerge every day. Attending the LJC/LSBA Joint Summer School will help you and your legal practice stay ahead of the curve. The large Exhibit Hall gives attendees the chance to engage and interact with knowledgeable exhibitors presenting exciting new opportunities for your practice, no matter the size.

## Expand your professional connections

**4** The LSBA Annual Meeting and Joint Summer School is a great place to check in with others in the profession to discover best practices, new legal innovations and so much more! In this week-long, casual setting, renowned professionals of the bench and bar are not just speaking on stage but also available for informal chats throughout the conference. Through alumni association parties, bar committee meetings and lively social events, including the Beach Bash and Back to the Bay, the conference presents many opportunities to meet new people with shared professional interests.

## Let your voice be heard

**5** Meet the individuals in leadership positions on LSBA committees and sections and find out what is happening with your bar association. Watch the installations of the new bar officers of the Board of Governors and YLD Council. Network with the LSBA Award honorees before the General Assembly and weigh in on the debates at the House of Delegates Meeting.


# REGISTRATION OPTIONS

| Registration Options | April 30 | May 24 | On-Site |
|---|---|---|---|
| Lawyers | $825 | $875 | $925 |
| Lawyers 4-Day | $750 | $795 | $850 |
| Judges | $695 | $750 | $795 |
| Judges 4-Day | $650 | $675 | $695 |
| Legal Services/Gov't/ Academia/YLD member** | $695 | $750 | $795 |
| Legal Services/Gov't/ Academia/YLD member** 4-Day | $650 | $675 | $695 |

**In response to popular demand, a 4-day registration category is again offered this year!** This economical option allows you to attend only four days of the conference (your choice of days!) for a steep discount to the on-site fee.

*Registration is for LSBA member and spouse/guest when indicated on Registration Form.*

- includes seminar registration, programs, business meetings and admission to Lawyers' Expo;
- electronic version of the seminar materials for attendees to download;
- daily continental breakfast/coffee/refreshment breaks;
- up to two adult tickets to the receptions, dinners, installations and other events planned as part of the Annual Meeting & Joint Summer School. Check back on the website at *www.lsba.org/AnnualMeeting* for an up-to-date agenda.

* Spouse/guest name must be indicated on the Registration Form to receive tickets included in registration. Additional tickets for children and guests are available for purchase for the social functions.

*To purchase additional tickets for events, please contact: Bridget Berins, CLE Secretary, Louisiana State Bar Association, bridget.berins@lsba.org or call (504)619-0137 or call tollfree (800)421-LSBA, ext. 137.

***Special Pricing applies to judges, lawyers employed full-time by local, state, or federal government, and lawyers employed full-time by legal aid agencies or indigent defense agencies or those lawyers who are members of the LSBA Young Lawyers Division. Members of the YLD are considered: Every member of the Louisiana State Bar Association who has not reached the age of thirty-nine (39) years or who has been admitted to the practice of law for less than five (5) years, whichever is later, is by virtue thereof a member of the Young Lawyers Division. (Article I, Section 1, Bylaws of the Louisiana State Bar Association, Young Lawyers Division).*

# CANCELLATIONS, REFUNDS & COURSE MATERIALS

Cancellation of registration must be received in writing by the LSBA no later than Friday, May 17, 2019. Cancellations will receive a full refund, less a $30 administrative charge. Absolutely no refunds will be made after Friday, May 17, 2019. Requests should be mailed to the Louisiana State Bar Association, 601 St. Charles Ave., New Orleans, LA 70130-3404; faxed to (504) 598-6753; or e-mailed to aburas@lsba.org. Any questions, please contact Annette Buras, CLE Coordinator, (504)619-0102.

**ATTENTION! To access and view the written CLE materials for each CLE presentation for Summer School, check back here shortly before the event to save the materials to your electronic device. Please note that Internet access WILL NOT be available in the Conference Center. It is suggested that you download/print OR download/save prior to arriving in Sandestin.**

# 2019 Registration Form

□ Judge Bar Roll Number _____ First Name for Badge _____

□ Ms. □ Mr. Name _____

Firm Name _____

Address _____

City/State/Zip _____

Office Phone _____ Fax _____

□ I am a local bar association president. □ I am a local bar association officer. □ I am a first-time attendee.

□ Please register my spouse/guest for social events at no additional charge. *(Spouse/guest must be registered to receive tickets.)*

Spouse/Guest Name _____

First Name for Badge _____

**In response to popular demand, a 4-day registration category is again offered this year! This economical option allows you to attend only four days of the conference (your choice of days!) for a steep discount to the on-site fee.**

| Registration Options | April 30 | May 24 | On-Site | Subtotal |
|---|---|---|---|---|
| Lawyers | $825 | $875 | $925 | _____ |
| Lawyers 4-Day | $750 | $795 | $850 | _____ |
| Judges | $695 | $750 | $795 | _____ |
| Judges 4-Day | $650 | $675 | $695 | _____ |
| Legal Services/Gov't/ Academia/YLD member** | $695 | $750 | $795 | _____ |
| Legal Services/Gov't/ Academia/YLD member** 4-Day | $650 | $675 | $695 | _____ |

***Special Pricing applies to judges, lawyers employed full-time by local, state, or federal government, and lawyers employed full-time by legal aid agencies or indigent defense agencies or those lawyers who are members of the LSBA Young Lawyers Division. Members of the YLD are considered: Every member of the Louisiana State Bar Association who has not reached the age of thirty-nine (39) years or who has been admitted to the practice of law for less than five (5) years, whichever is later, is by virtue thereof a member of the Young Lawyers Division. (Article I, Section 1, Bylaws of the Louisiana State Bar Association, Young Lawyers Division).*

**Important Note: A link to the seminar materials will be emailed to you prior to the event; we suggest you print the materials in advance and bring them with you. The link will be sent to the email address of record you provided to the LSBA. If you choose to review the materials from your laptop, we strongly suggest you charge your laptop battery, as electrical outlets may be limited. Internet access will not be available in the meeting room.* ***PLEASE NOTE: Printed materials will not be available.***

| **Any questions? Contact** | **To purchase additional tickets for events, contact** |
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| Annette Buras, CLE Coordinator | Bridget Berins, CLE Secretary |
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□ Check here or contact the LSBA if you have a disability which may require special accommodations at this conference. The LSBA is committed to ensuring full accessibility for all registrants.

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# LSBA 50-, 60-, 70-Year Members Recognized at 2019 Midyear Meeting

Louisiana State Bar Association (LSBA) members who have reached half a century and beyond in their professional careers were honored during the LSBA's Midyear Meeting in January in Baton Rouge. During the reception, the honorees received medals presented by LSBA President Barry H. Grodsky. The honorees also posed for photos with Grodsky and Louisiana Supreme Court Chief Justice Bernette Joshua Johnson.

The following Bar members were recognized.

**Among the 50-year honorees attending the ceremony were, seated from left, Kenneth L. Riche, Sr.; Joseph W. Greenwald; Carol Anne Blitzer; Douglas L. Hebert, Jr.; Peter F. Brandt; Leon J. Reymond, Jr.; Ernest L. Jones; John J. Burke; Jack L. Simms, Jr.; Morton H. Katz; Thomas M. Young; Hon. Jerome J. Barbera III; and David M. Cambre. Standing from left, Richard J. Putnam, Jr.; John G. Poteet, Jr.; Sidney M. Blitzer, Jr.; Michael J. Uter; Guy A. Modica, Sr.; John F. Robichaux; Donald R. Abaunza; John H. Musser IV; Jim Ortego; Michael A. Britt; Hon. Don C. Burns; Hon. Eugene W. Bryson, Jr.; Henley A. Hunter; John C. Blackman IV; Octave (Henry) Deshotels III; David R. Lestage; and Richard R. Storms.** *Photo by Matthew Hinton Photography.*

### 50-Year Honorees Admitted in 1969

Donald R. Abaunza.....New Orleans
Elaine Durbin Abell.....Lafayette
W. Arthur Abercrombie, Jr. .....Baton Rouge
Jesse R. Adams, Jr. .....New Orleans
Roy Francis Amedee, Jr.....New Orleans
Alex L. Andrus III .....Opelousas
Bertrand F. Artigues.....New Orleans
Leroy J. Aucoin .....Belle Chasse
Walter M. Babst.....Mandeville
Robert E. Badger .....Bentonville, VA
William F. Banta.....New Orleans
Hon. Jerome J. Barbera III .....Thibodaux
Robert E. Barkley, Jr.....New Orleans
Homer E. Barousse, Jr. .....Crowley
James L. Bates, Jr. .....Slidell
Frank E. Beeson III .....New Orleans
Patrick J. Berrigan .....Slidell
John C. Blackman IV .....Baton Rouge
Carmack M. Blackmon .....Baton Rouge
John Michael Blanchard.....New Orleans
Carol Anne Blitzer.....Baton Rouge
Sidney M. Blitzer, Jr. .....Baton Rouge
Fred A. Book, Jr.....Lake Charles
Lloyd T. Bourgeois.....Thibodaux
James G. Boyle..... Austin, TX
Joseph Alison Brame.....Conroe, TX
Peter F. Brandt.....New Orleans
Richard E. Britson, Jr. .....Metairie
Michael A. Britt.....Metairie
Galen S. Brown .....New Orleans
Richard W. Brown..... Bogalusa
Henry B. Bruser III..... Alexandria
Hon. Eugene W. Bryson, Jr. .....Shreveport
John J. Burke .....New Orleans
Sean G. Burke.....Mandeville
Hon. Don C. Burns.....Grayson
Hon. Robert J. Burns, Sr.....Baton Rouge
Hon. Curtis A. Calloway .....Baton Rouge
David M. Cambre.....River Ridge
J. Norris Cantrelle..... Raceland
Charles R. Capdeville.....Mandeville
Paul J. Carmouche.....Shreveport
John W. Carpenter .....Orlando, FL
John O. Charrier, Jr.....St. Francisville
Hon. Alma L. Chasez ..... Robert
Richard E. Chaudoir.....Baton Rouge
Carl J. Ciaccio.....Metairie
Michael K. Clann ..... Houston, TX
Robert T. Cline.....Rayne
Edward B. Cloutman III.....Dallas, TX

Continued next page

**Among the 60-year honorees attending the ceremony were, from left, Hon. James E. Glancey, Jr.; Hon. Joseph F. Grefer; J. Peyton Parker, Jr.; Isaac E. Henderson; Hon. Steven R. Plotkin; N. Buckner Barkley, Jr.; Hon. Jerry A. Brown; Hon. William N. Knight; Kermit M. Simmons; Boris F. Navratil and Anthony J. Capritto.** *Photo by Matthew Hinton Photography.*

## Honorees continued from page 421

J. Reginald Coco, Jr. ..... Baton Rouge
James J. Coleman, Jr. ..... New Orleans
L.V. Cooley IV ..... Slidell
Charles C. Culotta, Jr. ..... Patterson
Robert J. David ..... New Orleans
Louis R. Davis ..... Lafayette
Howell A. Dennis, Jr. ..... Lafayette
Octave Henry Deshotels III ..... Kaplan
Ronald T. Duggan ..... Fort Lauderdale, FL
Lawrence J. Duplass ..... Metairie
R. Lee Eddy III ..... Metairie
Jack B. Edrington ..... Houston, TX
Richard L. Edrington ..... New Orleans
Calvin C. Fayard, Jr. ..... Springfield
Anthony A. Fernandez, Jr. ..... St. Bernard
Paul S. Fiasconaro ..... Harahan
L. Albert Forrest ..... New Iberia
Robert J. Fritz ..... Houston, TX
Theodore M. Frois ..... Houston, TX
James M. Funderburk ..... Houma
Servando C. Garcia III ..... Covington
Philip A. Gattuso ..... Gretna
Judith Arnette George ..... Gulf Breeze, FL
Richard E. Gerard, Jr. ..... Lake Charles
Robert S. Glass ..... New Orleans
William P. Golden, Jr. ..... Laplace
David B. Graham ..... Williamsburg, VA
Richard L. Greenland ..... Covington
Joseph W. Greenwald ..... Shreveport
L. Edwin Greer ..... Shreveport
Michael E. Guarisco ..... New Orleans
Wayne C. Guidry ..... Baton Rouge
Larry J. Gunn ..... Houston, TX
Ronald W. Guth ..... Goshen, IN
Theodore M. Haik, Jr. ..... New Iberia
W. Marvin Hall ..... Metairie
Charles E. Hamilton III ..... Keswick, VA
William J. Hamlin ..... Abita Springs
Dorothy Amman Hardy ..... Crowley
Jack R. Harger ..... Santa Fe, NM
Jonathan Curry Harris ..... Baton Rouge
Douglas L. Hebert, Jr. ..... Kinder
Carl E. Heck, Jr. ..... Thibodaux
Robert Henderson ..... Edmond, OK
M. Shael Herman ..... New Orleans
Allen C. Hope, Jr. ..... Washington, DC
Hon. Henley A. Hunter ..... Alexandria
Hon. L.J. Hymel, Jr. ..... St. Amant
Hon. Glen Allen James ..... Sulphur
Hon. Bernette Joshua Johnson .. New Orleans
J. Clayton Johnson ..... Baton Rouge
Ronald A. Johnson ..... New Orleans
Hon. Ernest L. Jones ..... New Orleans
M.L. Juran ..... Metairie
Morton H. Katz ..... New Orleans
Frank J. Kenner ..... Kenner
Kenneth W. Kennon ..... St. Francisville
John R. Keogh ..... Sulphur
Robert E. Kerrigan, Jr. ..... New Orleans
Hon. Jeannette Theriot Knoll ..... Marksville
John E. Koerner III ..... New Orleans
S. Allen Lackey ..... Houston, TX
T. Robert Lacour ..... Kenner
Hon. Ross P. LaDart ..... West Monroe
Frank E. Lamothe III ..... New Orleans
David R. Lestage ..... Deridder
W. Stanley Lockard ..... Shreveport
Albert E. Loomis III ..... Monroe
Thomas A. Lussen, Jr. ... Hot Springs Village, AR
George F. Madison ..... Monroe
John M. Madison, Jr. ..... Shreveport
Charles N. Malone ..... Baton Rouge
F. Barry Marionneaux ..... Plaquemine
Paul Marks, Jr. ..... Baton Rouge
Steven J. Mason ..... Nashville, TN
James D. Maxwell ..... Kenner
Charles B. Mayer ..... New Orleans
Kenneth P. Mayers ..... Lafayette
Michael L. McAlpine ..... New Orleans
John E. McFall ..... Dallas, TX
Patrick C. McGinity ..... Metairie
Blaine G. McMahon ..... Fayetteville, AR
David J. McMahon ..... Metairie
Michael Arthur McNulty, Jr. ..... Metairie
Steven O. Medo, Jr. ..... New Orleans
Dan E. Melichar ..... Alexandria
Anthony R. Messina ..... Covington
Eugene V. Meunier, Jr. ..... New Orleans
Conrad Meyer IV ..... Metairie
Joseph Meyer, Jr. ..... New Orleans
Jack H. Miller ..... Horseshoe Bay, TX
James M. Miller ..... Oak Grove
Martin O. Miller II ..... Metairie
Guy A. Modica, Sr. ..... Baton Rouge
Oliver S. Montagnet, Jr. ..... Pass Christian, MS
Steve J. Mortillaro ..... Metairie
Dean M. Mosely ..... Jena
Raymond J. Munna ..... Metairie
John H. Musser IV ..... Covington
Walter K. Naquin, Jr. ..... Thibodaux
Peter A. Nass ..... Gretna
Michael E. Nolan ..... New Orleans
William E. O'Neil ..... New Orleans
William D. O'Regan III ..... Laplace
W. James (Jim) Ortego ..... Phoenix, AZ
Raymond A. Osborn, Jr. ..... Harvey
Woodrow Lee Overton ..... Clinton
James Michael Percy ..... Alexandria
Calvin L. Perilloux ..... Laplace
Joseph A. Perrault, Jr. ..... Baton Rouge

Continued next page

**Louisiana Supreme Court Chief Justice Bernette Joshua Johnson, Hon. Steven R. Plotkin and Louisiana State Bar Association President Barry H. Grodsky posed for a photo at the LSBA's 50-, 60- and 70-year Honoree Reception. Chief Justice Johnson was recognized as a 50-year member as well.** *Photo by Matthew Hinton Photography.*

**Honorees** continued from page 422

Earl G. Perry, Jr. ..... New Orleans
Harvey P. Perry ..... Monroe
Norman A. Pettingill ..... New Orleans
Cpt. A. Richard Philpott ..... Honolulu, HI
William R. Pitts ..... Metairie
John G. Poteet, Jr. ..... Lafayette
Richard J. Putnam, Jr. ..... Abbeville
Hon. Thomas P. Quirk ..... Lake Charles
Paul E. Ramoni, Jr. ..... New Orleans
Gerard A. Rault, Jr. ..... New Orleans
Leon J. Reymond, Jr. ..... New Orleans
Kenneth L. Riche, Sr. ..... Baton Rouge
Philip Riegel, Jr. ..... Metairie
George F. Riess ..... New Orleans
Peter C. Rizzo ..... New Orleans
William M. Roach ..... Sherman Oaks, CA
Bradford R. Roberts II ..... Metairie
John F. Robichaux ..... Lake Charles
Robert E. Rougelot ..... Mandeville
L. Lane Roy ..... Lafayette
John E. Ruiz, Jr. ..... New Orleans
Rhett R. Ryland ..... Baton Rouge
Fred E. Salley ..... Covington
Donald M. Sarrat, Jr. ..... Metairie
Benjamin B. Saunders ..... Mandeville
Hon. John D. Saunders ..... Ville Platte
William J. Scheffler III ..... Gretna
Charles W. Schmidt III ..... Metairie
Earl J. Schmitt, Jr. ..... New Orleans
Karen M. Serwich ..... Chicago, IL
Hon. Jack L. Simms, Jr. ..... Leesville
Alvin D. Singletary ..... Slidell
J. Michael Small ..... Alexandria
Dudley P. Spiller, Jr. ..... Denver, CO
Sue A. Spilsbury ..... New Orleans
P. Brian Spurlock ..... Metairie
John E. Stephens, Jr. ..... Ft. Lauderdale, FL
Hon. Richard R. Storms ..... Ruston
Preston M. Summers ..... Abbeville
William E. Thoms II ..... Grand Forks, ND
Craig H. Tolbert ..... New Orleans
Ronald W. Tweedel ..... Covington
Michael J. Uter ..... Baton Rouge
W.W. van Benthuysen, Jr. ..... New Orleans
Rene W. Van Zanten ..... Austin, TX
Paul H. Waldman ..... New Orleans
Phillip K. Wallace ..... Mandeville
Charles S. Weems III ..... Alexandria
Truett Lynn West ..... El Dorado, AR
William G. Whatley ..... Marksville
Claudius E. Whitmeyer ..... Little Rock, AR
Norris S.L. Williams ..... New Orleans
Robert J.A. Williams ..... New Orleans
Rose Polito Wooden ..... Baton Rouge
Robert L. Yeager III ..... Allen, TX
R. Brent Young ..... Shreveport
Thomas M. Young ..... Metairie

**John W. Cox, left, and G. Harrison Scott, both 70-year members of the Louisiana State Bar Association, were recognized at the Midyear Meeting.** *Photo by Matthew Hinton Photography.*

## 60-Year Honorees Admitted in 1959

Hon. J. Donald Aaron, Jr. ..... Lafayette
Johnny X. Allemand ..... Thibodaux
N. Buckner Barkley, Jr. ..... Marrero
Hon. C. Thomas Bienvenu, Jr. ..... St. Martinville
Hon. Jerry Allen Brown ..... New Orleans
James G. Burke, Jr. ..... New Orleans
Peter J. Butler ..... Metairie
Hope H. Camp, Jr. ..... San Antonio, TX
Anthony J. Capritto ..... New Orleans
Oliver Provosty Carriere, Jr. ..... Metairie
Peter J. Casano III ..... Diamondhead, MS
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Joan Elaine Chauvin ..... New Orleans
Francis M. Coates, Jr. ..... Baton Rouge
Lillian M. Cohen ..... Slidell
James Joseph Cox ..... Lake Charles
John M. Currier ..... New Orleans
Robert G. Dawkins ..... Ruston
Harris Myron Dulitz ..... Metairie
James Farrier ..... Baton Rouge
Hon. Peter Anthony Feringa, Jr. ..... New Orleans
Marcel Garsaud, Jr. ..... New Orleans
James D. Garvey, Sr. ..... New Orleans
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Alvin B. Gibson ..... Covington
Twain K. Giddens, Jr. ..... Shreveport
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John P. Laborde ..... New Orleans
René Lehmann ..... New Orleans
Charles G. Merritt ..... New Orleans
G. Harrison Scott ..... New Orleans
James H. Stroud ..... Shreveport
Hon. Thomas C. Wicker, Jr. ..... Metairie

# Judge Pittman Receives Judge Benjamin Jones Judges in the Classroom Award

Orleans Parish Criminal District Court Judge Robin D. Pittman is the recipient of the Louisiana Center for Law and Civic Education's (LCLCE) Judge Benjamin Jones Judges in the Classroom Award. The award was presented by LCLCE President Judge Randall L. Bethancourt during the Louisiana State Bar Association's (LSBA) Midyear Meeting in January.

Judge Pittman has served as judge for Orleans Parish Criminal District Court, Section F, since 2009. She received a BA degree, *cum laude*, in sociology in 1991 from Loyola University New Orleans and earned her JD degree in 1996 from Loyola University College of Law.

Prior to taking the bench, she worked as an assistant district attorney, Orleans Parish District Attorney's Office; as a deputy disciplinary counsel, Office of Disciplinary Counsel; and as an associate, Baldwin Haspel Burke & Mayer, L.L.C.

She was appointed by the Louisiana Supreme Court to the Louisiana Judicial College's Board of Governors and is serving as president-elect of the Loyola University College of Law's board of directors.

She is a member of the American Bar Association, the National Bar Association, the Louisiana Judicial Council, the Louisiana State Bar Association's Criminal Law Section, the Louisiana District Judges Association, the National Association of Women Judges, the New Orleans Bar Association, the Fourth Circuit Judges Association, the Louis A. Martinet Legal Society, Inc. and the Association of Women Attorneys.

She is the recipient of the A.P. Tureaud Achievement Award, the YMCA Role Model Award, the *New Orleans City Business* Power Generation Award, the Community Action Hero Award for Total Community Action, Inc., the *City Business* Leadership in Law Award and the Hon. Michaelle Pitard Wynne Professionalism Award. She was commended by the Metropolitan Crime Commission for having the best overall judicial efficiency ranking for Criminal District Court. Court Watch NOLA commended her for consistently taking the bench in a prompt manner and running a transparent court.

**Louisiana Center for Law and Civic Education's President Judge Randall L. Bethancourt presented Orleans Parish Criminal District Court Judge Robin D. Pittman with the Judge Benjamin Jones Judges in the Classroom Award.** *Photo by Matthew Hinton Photography.*

**Amanda G. Hall, a teacher at Franklinton High School in Franklinton, is the recipient of the President's Award for Outstanding Law-Related Education Teacher, presented jointly by the Louisiana Center for Law and Civic Education and the Louisiana State Bar Association. Presenting the award was Robert A. Kutcher, 2018-19 LSBA president-elect**. *Photo by Matthew Hinton Photography.*

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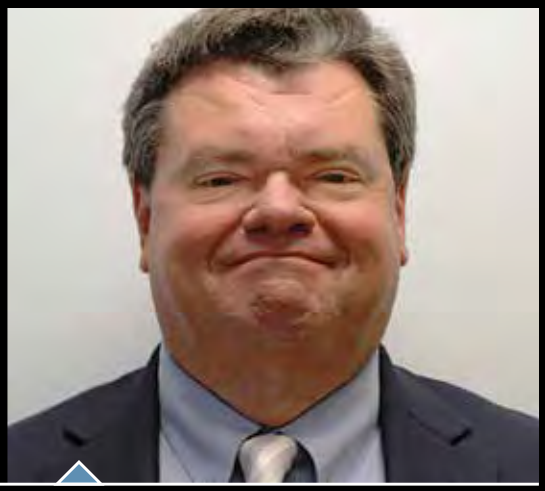
**JAMES R. "SONNY" CHASTAIN** brings nearly 30 years' experience as an intellectual property attorney and commercial litigator to our panel.

**REBECCA WISBAR** has successfully participated, both as an advocate and as mediator, in almost 500 mediations, and hosts *The Mediation Minute* podcast.



**DANIEL KNOWLES III** is a recently retired U.S. Magistrate Judge and has handled more than 7,500 settlement conferences across virtually every area of litigation.

**VINCENT P. FORNIAS** has over 40 years' experience as a litigator and neutral, including service as appeal panelist in the largest environmental damage settlement in U.S. history.

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# Access to Justice Topics Highlighted During LSU Apprenticeship Week

Louisiana State University Paul M. Hebert Law Center once again offered the Apprenticeship Week Program beginning on Jan. 7. Apprenticeship Week offers LSU Law Center upper-class students the opportunity to participate in hands-on mini-courses that provide them with focused, practical training intended to mirror the actual experience of practicing law. These courses are taught by master lawyers and judges.

This year, Marta-Ann Schnabel, managing director in the New Orleans law firm O'Bryon & Schnabel, P.L.C., and a former Louisiana State Bar Association (LSBA) president, taught "Serving the Public and the Profession," a course which asked the question, "What is Justice?" The course focused on the civil legal needs of Louisiana's most vulnerable populations and explored the challenge of representing those clients, serving justice and respecting the rule of law in today's legal system.

Schnabel, together with LSBA Access to Justice Director Monte T. Mollere, introduced the 2Ls to the intersection between poverty and justice. Discussions included how lack of economic resources can impact one's access to legal representation and the ways in which the LSBA is working with civil legal aid groups to increase access to free and affordable legal services.

Several guest speakers participated in the program, including Judge (Ret.) W. Ross Foote, Patterson Resolution Group; Christopher D. Kiesel, Office of Disciplinary Counsel; Amanda L. Hass, Law Office of William B. Most; Adrienne K. Wheeler, executive director of Louisiana Appleseed; and Talya J. Bergeron, directing attorney at Southeast Louisiana Legal Services.

New Orleans attorney Judy Perry Martinez, the American Bar Association president-elect, also spoke to the class. The class was dazzled by the depth of her knowledge about access to justice issues as evidenced in her presentation and discussion.

On the practical side, students spent a morning observing Judge Lisa M. Woodruff-White's courtroom in the East Baton Rouge Family Court. She explained procedures and laws impacting those who cannot afford counsel. Attorneys Samuel J. Ford, JaQuay M. Gray, R. Shane Bryant, Janell M. McFarland-Forges and Sherry A. Watters offered role-play in client simulation activities involving various practice areas. Each student learned the process of representing a "client" from the initial consultation to a hearing before the "court," courtesy of O'Bryon & Schnabel partner Kathleen E. Simon, who reviewed all the pleadings and presided as the "judge" over motion arguments.

**(Above) New Orleans attorney Judy Perry Martinez, the American Bar Association president-elect, discussed access to justice issues during the January Louisiana State University Paul M. Hebert Law Center's Apprenticeship Week.** *Photo by LSU Law Center/Real Life Photography.*

**Judge (Ret.) W. Ross Foote opened the Serving the Public and the Profession Apprenticeship Week class with a question for the students: "What is Justice?"**

Many students said the program was beneficial and inspiring. "Listening to you and other guest lecturers speak . . . provided a much bigger, more important, picture than just legal obligations, business entities, etc." "I originally went to law school because I wanted to do this type of work, helping real people to solve their problems. In the meantime, I feel like I've been pulled in other directions, have focused a lot on academics and theory, and have clerked for large firms with mostly business clients. This week gave me a lot to think about in terms of what I want to do and where I want to spend my time."

"I confess to some trepidation when I walked into the classroom. Law students are a tougher audience than juries and judges! But I soon re-discovered that those drawn to an education in the law hold a fundamental respect for justice. It was a privilege to have participated in the course," Schnabel said.

# PRACTICE Management

*By Elizabeth LeBlanc Voss*

## WORK CAN BE OUTSOURCED, RISK CANNOT

For busy law firms, legal outsourcing can be a welcome reprieve for over-burdened attorneys and staff. Legal process outsourcing is delegating work outside of the firm and ranges from purely administrative (copying services, payroll services, IT support and corporate records management) to legal work including document review, research and writing, and e-discovery compliance. Law firms of any size and corporate legal departments can benefit by strategically cutting specific time-intensive tasks while retaining clients.

Referring clients to an outside firm is an age-old practice among attorneys. But retaining the client and the representation while outsourcing portions of the legal work to be performed through legal process outsourcing (LPO) companies is a newer, growing trend. Outsourcing can be a way for firms to lighten the workload, handle complex or time-consuming projects on a budget and accept cases that would otherwise be too large to handle, or to make rates more competitive by subcontracting reduced-rate legal services. Outsourcing essentially provides the benefits of a larger team without hiring full-time employees.

A significant amount of legal work is now being performed by someone other than the attorney hired to do it. Guidance from the American Bar Association (ABA) reminds attorneys that, even when work has been delegated outside of the firm, ethical obligations to the client remain.

The duty to provide competent representation is a primary obligation for all attorneys in every representation. The delegation of work to an outside individual or firm does not sever obligations under Louisiana Rule of Professional Conduct 1.1. Commentary on the ABA model rule directs lawyers to obtain informed consent from the client before retaining or contracting with outside lawyers and further requires the lawyer to reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. (See Comment 6, ABA Model Rule 1.1.)

The reasonableness of the decision to retain or contract with outside lawyers depends upon the circumstances of each representation. It necessarily must include critical evaluation of the education, experience and reputation of the outside lawyers. It also demands a thorough review of the legal protections, professional conduct rules and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information. Before outsourcing work to lawyers outside the United States, carefully consider whether the legal education and training of those lawyers is comparable to domestic legal education and training, and whether there are adequate ethical safeguards governing lawyers in the jurisdiction where the work will be performed.

While competency is the baseline concern when outsourcing, keep in mind the obligation to supervise work under Louisiana Rule of Professional Conduct 5.1. Do not rely on the LPO provider to evaluate its own level of skill or work product. The lawyer must be able to critically and independently evaluate the work product received because the firm is ultimately responsible for the quality of its work.

When outsourcing, note the ongoing duty to maintain client confidentiality under Rule 1.6. In ABA Formal Ethics Opinion 08-451, the ABA writes: "Where the relationship between the firm and the individuals performing the service is attenuated, as in a typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client's informed consent."

Finally, the duty to avoid conflicts of interest demands the proper vetting of the LPO to confirm it is checking for conflicts. To satisfy the ethical obligation to provide competent representation while outsourcing, it is recommended that attorneys conduct reference checks when choosing an LPO; interview the principal lawyers and assess their suitability for the work; investigate the security of the provider's premises and computer network/system; assess the country to which services are being outsourced for legal training, judicial system, legal landscape, disciplinary system and core ethical principles; disclose the outsourced relationship and obtain informed consent; verify that the LPO is checking for conflicts; take steps to protect confidentiality and verify that the LPO is protecting client matters; supervise the work and thoroughly evaluate the final work product; communicate regularly with the LPO and with the client; charge a reasonable fee; and document due diligence efforts in writing.

Almost nothing brings more relief that knowing an onerous task can be delegated. As with most good things, there are tradeoffs. Carefully examine the benefits of outsourcing while keeping in mind the obligations that remain regardless of who actually does the work. As the client's attorney, the attorney and the firm remain duty-bound to fulfill all obligations under the Rules of Professional Conduct.

*Elizabeth LeBlanc Voss serves as loss prevention supervisor and loss prevention counsel for the Louisiana State Bar Association (LSBA) under the employment of Gilsbar, Inc. She received her BA degree in political science from Louisiana State University and her JD degree from South Texas College of Law-Houston. She is a member of the LSBA and the State Bar of Texas. She writes and presents ethics and professionalism CLE programs on behalf of the LSBA. Email: bvoss@gilsbar.com.*

By J.E. (Buddy) Stockwell | EMOTIONAL INTELLIGENCE

Are there people you will intentionally try to avoid in public because prior experience dictates that once a conversation starts with them it will be impossible to get a word in edgewise and painfully difficult to escape a long, drawn-out experience? These people may be very smart and well-intended but they seem oblivious to the non-verbal cues of others.

Good manners prevent most of us from interrupting someone. Instead, we rely on sending non-verbal cues such as looking at our watch and stepping back. But these people tend to ignore the routine, non-verbal cues most of us use in such situations. You ask, "Why are they like that?"

Even if they have a very high IQ, they could be suffering from a very low EQ (a.k.a., emotional intelligence).

Another example is a lawyer who spends more time talking about his/her successes and accomplishments with a prospective client than listening to *and watching* the non-verbal communications of the prospective client. Truly learning about and empathizing with the client is just as important, if not more so, than touting the lawyer's own accomplishments.

Paying attention to others is critical, but it's only half of the entire EQ puzzle. It is equally important to improve one's self-awareness and become more cognizant of one's own emotions and how those emotions can affect behaviors toward others.

The concept of emotional intelligence was first explored in the 1960s but was brought to the mainstream in author Daniel Goleman's book, *Emotional Intelligence: Why It Can Matter More Than IQ* (Bantam, October 1995).

Emotional intelligence refers to one's capability to recognize both one's own emotions and the emotions of others, discern between different feelings and label them correctly, and then use emotional information to productively guide thinking and behavior to adjust those emotions and successfully adapt to environments.

With the awakening of the legal profession to the benefits of wellness and mindfulness initiatives, there has been a fresh look at emotional intelligence as it specifically relates to the legal profession.

In an October 2017 *Persuasive Litigator* article, Dr. Ken Broda-Bahm explains that emotional intelligence helps lawyers: 1) see beyond logic and the law; 2) work better as a team; 3) use effective non-verbal communication; 4) navigate between assertiveness and aggressiveness: 5) create empathy with a judge or jury; 6) develop credibility; and 7) identify and empathize with clients' needs and interests.

Dr. Broda-Bahm offers three ways to boost emotional intelligence:

1) Recognize that law is about people, not just outcomes. The best way to humanize a case is to talk to the *humans* as often as possible. Use mock trials, poll juries, and communicate as much as possible within the bounds of ethics and learn to be more emotionally intelligent.

2) Be a renaissance person. Lawyers can benefit from broadening their understanding of human relationships by participating in art, culture and recreation *outside* of the legal profession. This provides a broader understanding of human motives and complexities.

3) Practice good reaction hygiene. Emotional intelligence comes down to how one reacts to ideas and others. Lawyers have "intellectual hair triggers" and, when they hear an argument, they often automatically generate a response. Dr. Broda-Bahm said it's better to pause, identify your emotions and how you are feeling, and ask others what they think before you take a position. "Take time to think and observe. Don't force yourself to react in the moment."

An in-depth book on emotional intelligence by Ronda Muir is available for lawyers, *Beyond Smart: Lawyering with Emotional Intelligence* (ABA Publishing, ABA Section of Dispute Resolution, 2017).[1]

According to Muir, "probably no other profession relies so heavily on cognitive intelligence as law. Law schools rely on LSATs to find the most logical applicants and then rigorously use the Socratic method in classrooms to ferret out any nonrational tendencies that remain. Law firms and law departments hire the top law school graduates and then enforce cultures of strict rationality. Emotion is what we in the law business have been intent on eliminating."

But Muir recognizes that lawyers are human beings and eliminating emotions may not always be the best approach. "While some lawyers flourish in their work, troubling data has been accumulating for years. Extremely high rates of suicide and substance abuse (both still underreported), divorce, and health issues among lawyers testify to a degree of personal dysfunction that is astonishing." According to Muir, emotionally intelligent lawyers become happier and they become better negotiators and litigators.

If you want to learn more or need confidential help with any type of mental health or addiction issue, contact the professional clinical staff at JLAP at (985)778-0571, email jlap@louisianajlap.com or visit the website at: *www.louisianajlap.com*.

## FOOTNOTE

1. *www.americanbar.org/products/inv/book/289815790/.*

*J.E. (Buddy) Stockwell is the executive director of the Louisiana Judges and Lawyers Assistance Program, Inc. (JLAP) and can be reached at (866)354-9334 or email jlap@louisianajlap.com.*

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# LSBA Presents 8 Citizen Lawyer Awards

The Louisiana State Bar Association (LSBA) presented eight members with Citizen Lawyer Awards on Jan. 19. The awards were presented by LSBA President Barry H. Grodsky at a ceremony during the LSBA Midyear Meeting in Baton Rouge.

The Citizen Lawyer Awards, originally named the Crystal Gavel Awards, were created in 2001 to recognize outstanding lawyers and judges who have been unsung heroes and heroines in their communities. Recipients are selected based upon service in their local communities and in local organizations.

Recipients included **Jasmine N. Brown**, New Orleans; **Steven J. Farber**, Denham Springs; **Judge Peter J. Garcia**, Covington; **Britney A. Green**, Shreveport; **G. Trippe Hawthorne**, Baton Rouge; **Elizabeth S. Sconzert**, Mandeville; **Scott L. Sternberg**, New Orleans; and **Judge Lisa M. Woodruff-White**, Baton Rouge.

**Jasmine N. Brown, right, received the Louisiana State Bar Association's (LSBA) Citizen Lawyer Award during the Midyear Meeting in January. Presenting the award was LSBA President Barry H. Grodsky.**

**Steven J. Farber, right, received the Louisiana State Bar Association's (LSBA) Citizen Lawyer Award during the Midyear Meeting in January. Presenting the award was LSBA President Barry H. Grodsky.**

**Jasmine N. Brown** practices in the Metairie office of Blue Williams, L.L.P. She received her JD degree in 2016 from Louisiana State University Paul M. Hebert Law Center. She is involved in community efforts targeting homelessness, women's empowerment and mass incarceration. She is the founder of a mentorship program, Beautifully You, for young women who have experienced homelessness, sexual trauma, gun violence and teen pregnancy. She co-led Project 300, an initiative feeding homeless men and women, and volunteered with other organizations serving the homeless, including Grace at the Greenlight, the New Orleans Mission and the Baton Rouge Dream Center. She has served as a facilitator of a street law class at the Orleans Parish Juvenile Detention Center and is a speaker at the Rivarde Juvenile Detention Center. She visits the Louisiana State Penitentiary once a month to minister to inmates.

**Steven J. Farber** is the deputy director of administration/general counsel for the Metropolitan Human Service District in New Orleans. He received his JD degree in 1998 from Southern University Law Center. He also has worked for the Office of Juvenile Justice and the Louisiana Department of Public Safety. He chairs the LSBA's Government and Public Law Section, serves in the LSBA House of Delegates and is a member of the LSBA Section Council and the Children's Law Committee. He also is a member of the Greater New Orleans Human Trafficking Task Force and the Greater New Orleans Labor Trafficking Prevention Committee. He provides notarial services at homeless outreach centers in East Baton Rouge, Livingston and Orleans Parishes. A licensed minister, he performs free marriage ceremonies for people who cannot afford a ceremony.

**Judge Peter J. Garcia** has served on the bench of the 22nd Judicial District Court for St. Tammany and Washington parishes since 1996. He received his JD degree in 1979 from Louisiana State University Paul M. Hebert Law Center. In 1998, the same year he started one of the first drug courts in Louisiana, he attended the first national training of Drug Court Judges at American University through the National Association of Drug Court Professionals. He presided over a division of drug court for 15 years and concomitantly over a division of juvenile drug court for three years. He started a Behavioral Health Court in 2011 to provide case management and judicial supervision of individuals with co-occurring mental health and addictive disorders within the criminal justice system. He is a former member of the St. Tammany board of directors of the National Alliance on Mental Illness. From 2015-16, he served as committee chair of the St. Tammany Parish Behavioral Health Task Force.

**Britney A. Green** is an assistant district attorney and chief of domestic violence in the 1st Judicial District in Caddo Parish. She received her JD degree from Florida International University College of Law.

Continued on page 432

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**Judge Peter J. Garcia, right, received the Louisiana State Bar Association's (LSBA) Citizen Lawyer Award during the Midyear Meeting in January. Presenting the award was LSBA President Barry H. Grodsky.**

**Britney A. Green, right, received the Louisiana State Bar Association's (LSBA) Citizen Lawyer Award during the Midyear Meeting in January. Presenting the award was LSBA President Barry H. Grodsky.**

**Elizabeth S. Sconzert, right, received the Louisiana State Bar Association's (LSBA) Citizen Lawyer Award during the Midyear Meeting in January. Presenting the award was LSBA President Barry H. Grodsky.**

She has served as a diversity trainer, educating lawyers and judges about issues of diversity and equal opportunity. She was a volunteer with the Justice Teaching Initiative, instructing high school students about the legal system. She provides pro bono legal services to homeless clients of HOPE Connections. She served as vice president of the National Association of University Women, commissioning and installing Mansfield's first and only Little Free Library, providing books to children. She organized and presented an Expungement Seminar for DeSoto Parish citizens to assist them with expunging criminal convictions and arrests.

**G. Trippe Hawthorne**

**G. Trippe Hawthorne** is a partner in the Baton Rouge office of Kean Miller, L.L.P. He received his JD degree in 1995 from Louisiana State University Paul M. Hebert Law Center. He works with Baton Rouge's homeless and near homeless population through Open Air Ministries, a collaboration of Baton Rouge area churches and nonprofit organizations, including the YMCA of the Capital Area and St. Vincent DePaul. In 2006, Open Air started a bike repair program where twice a month he and other volunteers set up a pop-up bike repair shop. He also collects donated bicycles to refurbish and distribute. Since 2006, he has assisted Open Air in repairing and distributing more than 1,000 bicycles. He also is a member of the Baton Rouge Symphony board of directors and is active with the Burden Museum and Gardens, particularly the LSU Rural Life Museum.

**Elizabeth S. Sconzert** is a partner in the Mandeville office of Blue Williams, L.L.P. She received her JD degree from Loyola University College of Law. She volunteers at James Store House, facilitating donations and advocating for families in preparation for court hearings. She serves on the Northshore Court Foundation board and works with judges, the bar association and the St. Tammany Parish executive counsel to identify nontraditional legal needs of individuals navigating the specialty court system. She assists the local hospital with mental health legal issues. In the past two years, she has served as counsel for two pro bono clients needing legal assistance in ensuring the wellbeing of their children who suffer with mental illness and disability. She also is working with the St. Tammany Parish executive counsel to devise a legal help desk at the Safe Haven Project.

**Scott L. Sternberg**

**Scott L. Sternberg** is a founding partner of the firm Sternberg, Naccari & White, L.L.C., with offices in New Orleans and Baton Rouge. He also is general counsel to the Louisiana Press Association and other media entities in the state. He received his JD degree from Louisiana State University Paul M. Hebert Law Center. His First Amendment practice has led him to spend hundreds of hours of contingent, "low bono" or pro bono work representing individuals whose rights have been violated by the government or who are seeking access to their government. He also represents individuals and media outlets in seeking government documents. As a board member of the Louisiana Center for Law and Civic Education, he counsels college journalists on legal and ethical issues. He has taught media law at LSU Paul M. Hebert Law Center and Loyola University College of Law. He was a key volunteer in the Federal Bar Association's first Court Camp and helmed its mock trial program.

**Judge Lisa M. Woodruff-White**

**Judge Lisa M. Woodruff-White** has served on the East Baton Rouge Parish Family Court bench since 2008. She received her JD degree from Southern University Law Center. She is the president of the Louisiana District Judges Association, chair of the Strategic Planning Committee and former chair of the Self-Represented Litigant Committee. In furtherance of her passion for ensuring court access to all citizens, she is a member of the Louisiana Access to Justice Commission. She is active on the National Board of Public Allies, a nationwide organization committed to advancing social justice and equity by galvanizing the leadership capacities of young people. Active in the protection and welfare of children, she chaired the Child Support Committee of the Louisiana State Law Institute and the Louisiana Child Support Guidelines Review Committee.

## The Louisiana State Bar Association (LSBA) Diversity Committee's Specialty Bars Subcommittee conducted the Natchitoches Lights CLE program on Dec. 14, 2018, in Natchitoches.

Natchitoches Session 3, "Social Security," was presented by Julia L. Deal with Ellen Cronin Badeaux, L.L.C., in Covington.

Natchitoches Session 1, "LADB Recent Decisions," was presented by Gregory L. Tweed, second from left, first assistant disciplinary counsel, Louisiana Attorney Disciplinary Board. Session 2, "Defending Disciplinary Action," was presented by, from left, Yolanda Cezar, deputy disciplinary counsel, Louisiana Attorney Disciplinary Board; William N. King, LSBA professional programs practice assistance counsel; and Richard P. Lemmler, Jr., LSBA ethics counsel.

Natchitoches Session 4, "LGBT Law: 2018 Year in Review," was presented by, from left, Andrea L. Rubin with Delaney, Robb & Rubin, L.L.C., Metairie; and J. Dalton Courson with Stone Pigman Walther Wittmann, L.L.C., New Orleans.

Natchitoches Session 5, "LSBA: Who We Are and How We Serve Our Members," was presented by, from left, Michael B. Victorian with Phelps Dunbar, LLP, Baton Rouge; and Patrick J. Harrington with Law Offices of J. Dhu Thompson, APLC, Shreveport.

## The Louisiana State Bar Association (LSBA) Diversity Committee's Pipeline to Diversity and Outreach Subcommittee hosted three CLEs on Jan. 17 in conjunction with the LSBA's Midyear Meeting in Baton Rouge — Part III of the Disabilities Series and the Women's Personal and Professional Development Workshop.

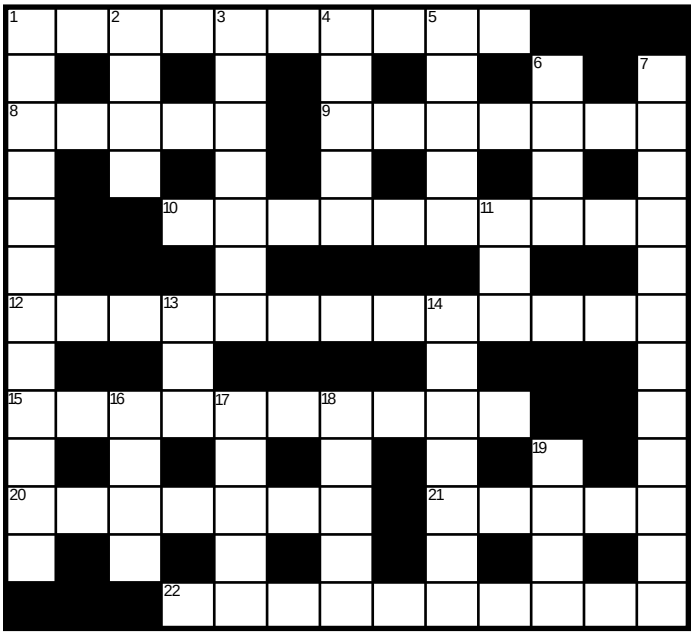
The Women's Personal and Professional Development Workshop Session 2, "Take Command, Be Empowered, and Own Your Future," was presented by, from left, Judy Perry Martinez, 2018-19 American Bar Association president-elect, Simon Peragine Smith & Redfearn, LLP, New Orleans; Baton Rouge Mayor-President Sharon Weston Broome; and Marta-Ann Schnabel, O'Bryon & Schnabel, PLC, 2006-07 LSBA president, New Orleans.


The Women's Personal and Professional Development Workshop Session 1, "Navigating the Storms," was presented by Jade Brown Russell, principal, The JBR Firm, New Orleans.

Part III of the LSBA Disabilities Series, "Social Security: Overview of the Law, Operating Terms and Procedure," was presented by, from left, Monica Ferraro and Suzette Tagesen Murphy, both with Workers' Compensation, LLC, Metairie.

# Crossword PUZZLE

*By Hal Odom, Jr.* | THE HIGHS AND THE LOWS



ACROSS

1 Crème de la crème (5, 5)
8 Legacy airline once based in Monroe (5)
9 Rabbi (7)
10 Avoiding petty or personal attacks (4-6)
12 With the latest, like a newsflash (2, 2, 3, 6)
15 Lincoln/Webster Parish town that sounds like a sad place to visit (10)
20 Very recent, as a baby (7)
21 Japanese ideographic writing system (5)
22 Like a private, or a rookie cop (3-7)

DOWN

1 Insufficient appropriations (12)
2 Survey of jury to confirm each member's vote (4)
3 Not an idealist (7)
4 Gag, as from nausea (5)
5 Hindu spiritual guide; mystic (5)
6 One of many hanging in Florida in 2000 (4)
7 Metric off personal finance, the higher the better (6, 6)
11 '60s war zone (3)
13 Hold title to (3)
14 Fancy fabric for a rain slicker (7)
16 Knocks their socks off (4)
17 Sports replay feature (3-2)
18 Not outer (5)
19 One against (4)

Answers on page 471.

## SOLACE: Support of Lawyers/Legal Personnel — All Concern Encouraged

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For more information, go to: *www.lsba.org/goto/solace.*

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## REPORT BY DISCIPLINARY COUNSEL

Public matters are reported to protect the public, inform the profession and deter misconduct. Reporting date Feb. 4, 2019.

### Decisions

**David W. Ardoin**, Thibodaux, (2018-B-1810) **Suspended by consent for a period of one year and one day, fully deferred, subject to probation**, by order of the Louisiana Supreme Court on Jan. 8, 2019. JUDGMENT FINAL and EFFECTIVE on Jan. 8, 2019. *Gist:* Commission of a criminal act.

**Gerald J. Asay**, Baton Rouge, (2018-B-2002) **Suspended by consent from the practice of law for a period of three years, retroactive to his interim suspension of July 21, 2015**, by order of the Louisiana Supreme Court on Jan. 18, 2019. JUDGMENT FINAL and EFFECTIVE on Jan. 18, 2019. *Gist:* Commission of a criminal act; and violating or attempting to violate the Rules of Professional Conduct.

**Michael A. Betts**, Denham Springs, (2018-B-1870) **Suspended for a year and a day by consent, fully deferred, subject to two years of supervised probation**, by order of the Louisiana Supreme Court on Jan. 14, 2019. JUDGMENT FINAL and EFFECTIVE on Jan. 14, 2019. *Gist:* Respondent mishandled the use of his client trust account.

**Paul E. Brown**, Houma, (2017-B-1930) **Suspended for one year and one day, with all but 90 days deferred, subject to a two-year period of probation**, by order of the Louisiana Supreme Court on Sept. 18, 2018. Rehearing denied on Dec. 5, 2018. JUDGMENT FINAL and EFFECTIVE on Dec. 5, 2018. *Gist:* Respondent pleaded no contest to first offense DWI, careless operation of a motor vehicle and vehicular negligent injuring.

Continued next page

**Discipline** continued from page 436

**Gregory Cook**, Baton Rouge, (2018-B-1076) **Suspended for six months, with all but 30 days deferred, subject to a one-year period of unsupervised probation**, by order of the Louisiana Supreme Court on Dec. 5, 2018. JUDGMENT FINAL and EFFECTIVE on Dec. 19, 2018. *Gist:* Respondent engaged in a conflict of interest.

**Connie M. Easterly**, Baton Rouge, (2018-B-2090) **Interimly suspended from the practice of law** by order of the Louisiana Supreme Court on Jan. 8, 2019. JUDGMENT FINAL and EFFECTIVE on Jan. 8, 2019.

**David Cartan Loker Gibbons, Jr.**, New Orleans, (2018-B-1793) **Suspended by consent for one year and one day, with six months deferred**, by order of the Louisiana Supreme Court on Jan. 8, 2019. JUDGMENT FINAL and EFFECTIVE on Jan. 8, 2019. *Gist:* Neglected a client's legal matters, some of which had prescribed; failed to communicate with his client and timely disclose his malpractice; and misled his client regarding the status of the matters.

**Ella C. Goodyear**, Abita Springs, (2018-B-2032) **Suspended by consent from the practice of law for a period of one year and one day** by order of the Louisiana Supreme Court on Jan. 28, 2019. JUDGMENT FINAL and EFFECTIVE on Jan. 28, 2019. *Gist:* Commission of a criminal act; and violating or attempting to violate the Rules of Professional Conduct.

**James Paul Johnson**, New Orleans, (2018-B-1660) **Disbarred by consent, retroactive to May 24, 2017, the date of his interim suspension**, by order of the Louisiana Supreme Court on Dec. 17, 2018. JUDGMENT FINAL and EFFECTIVE on Dec. 17, 2018.

**Kirby Dale Kelly**, Shreveport, (2018-B-2113) **Interimly suspended from the practice of law** by order of the Louisiana Supreme Court on Jan. 14, 2019. JUDGMENT FINAL and EFFECTIVE on Jan. 14, 2019.

**Sean P. Mount**, New Orleans, (2018-B-1823) **Suspended by consent from the practice of law for a period of one year and one day, fully deferred, subject to probation**, by order of the Louisiana Supreme Court on Jan. 8, 2019. JUDGMENT FINAL and EFFECTIVE on Jan. 8, 2019. *Gist:* Commission of a criminal act, particularly one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer.

**Brian P. Quirk**, New Orleans, (2018-B-1857) **Disbarred by consent from the practice of law** by order of the Louisiana Supreme Court on Jan. 14, 2019. JUDGMENT FINAL and EFFECTIVE on Jan. 14, 2019. *Gist:* Conduct involving dishonesty, fraud, deceit and misrepresentation; and violating or attempting to violate the Rules of Professional Conduct.

**Salvador R. Perricone**, New Orleans, (2018-B-1233) **Disbarred from the practice of law** by order of the Louisiana Supreme Court on Dec. 5, 2018. Rehearing denied on Jan. 30, 2019. JUDGMENT FINAL and EFFECTIVE on Jan. 30, 2019. *Gist:* Making extrajudicial statements by means of public communication that had a substantial likelihood of materi-

Continued next page

## DISCIPLINARY REPORT: UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

The following is a verbatim report of the matters acted upon by the United States District Court for the Eastern District of Louisiana, pursuant to its Disciplinary Rules. This information is published at the request of that court, which is solely responsible for the accuracy of its content. This report is as of Feb. 6, 2019.

| Respondent | Disposition | Date Filed | Docket No. |
|---|---|---|---|
| Chantell M. Boutte | [Reciprocal] Disbarment. | 12/17/18 | 18-9592 |
| Robert B. Evans III | [Reciprocal] Interim suspension. | 12/17/18 | 18-9260 |
| Ronald B. Manning | [Reciprocal] Disbarment. | 12/17/18 | 18-9416 |
| Neil Dennis William Montgomery | [Reciprocal] Suspension (fully deferred). | 11/23/18 | 18-9034 |
| Joseph Burchman Rochelle | [Reciprocal] Public reprimand. | 11/23/18 | 18-9033 |

**Discipline** continued from page 437

ally prejudicing an adjudicative proceeding and of heightening public condemnation of the accused; conduct prejudicial to the administration of justice; conflict of interest; and violating or attempting to violate the Rules of Professional Conduct.

**Michael S. Reid**, Lafayette, (2018-B-0849) **Disbarred, retroactive to Dec. 9, 2016, the date of his interim suspension, by order of the Louisiana Supreme Court on Dec. 5, 2018. Respondent shall provide accounting and make restitution to the clients who are the subject of the formal charges and/or to the Client Assistance Fund.** JUDGMENT FINAL and EFFECTIVE on Dec. 19, 2018. *Gist:* Respondent neglected legal matters; failed to communicate with clients; failed to refund unearned fees; allowed his trust account to become overdrawn on four occasions; and failed to cooperate with ODC in its investigations.

**Michael S. Sepcich**, Metairie, (2018-OB-1783) **Readmitted to the practice of law, with conditions**, by order of the Louisiana Supreme Court on Dec. 17, 2018. JUDGMENT FINAL and EFFECTIVE on Dec. 17, 2018. Mr. Sepcich has proven by clear and convincing evidence that he satisfies the criteria for readmission to the practice of law in the state of Louisiana.

**Bernadette L. Thomas**, Houston, Texas, (2019-OB-0002) **Transferred to disability/inactive status** by order of the Louisiana Supreme Court on Jan. 16, 2019.

**Shannon Jay Thomas**, Baton Rouge, (2018-B-2067) **Interimly suspended from the practice of law** by order of the Louisiana Supreme Court on Dec. 20, 2018. JUDGMENT FINAL and EFFECTIVE on Dec. 20, 2018.

**Rebecca Lynn Vishnefski**, Shreveport, (2018-OB-1801) **Reinstated to active status** by order of the Louisiana Supreme Court on Dec. 3, 2018. JUDGMENT FINAL and EFFECTIVE on Dec. 3, 2018.

**George Allen Roth Walsh**, Baton Rouge, (2018-B-1232) **Suspended for six months, with all but 30 days deferred, subject to one year of unsupervised probation and attendance at LSBA's Ethics School**, by order of the Louisiana Supreme Court on Dec. 3, 2018. JUDGMENT FINAL and EFFECTIVE on Dec. 17, 2018. *Gist:* Respondent practiced law for a significant period of time while he was ineligible to do so.

**Greta L. Wilson**, New Orleans, (2018-B-1800) **A disbarred attorney, adjudged guilty of additional violations warranting discipline, which shall be considered in the event she seeks readmission after becoming eligible to do so. It is further ordered that for the misconduct which occurred outside the time frame of *In Re: Wilson,* 17-0622 (La. 6/5/17), 221 So.3d 40, the minimum period for seeking readmission from her disbarment shall be extended for a period of two years**, by order of the Louisiana Supreme Court on Jan. 14, 2019. JUDGMENT FINAL and EFFECTIVE on Jan. 28, 2019. *Gist:* Failure to communicate and collect funds due a client; and failure to return unearned fees.

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

Violation of Rule 1.7(a) — Engaging in a concurrent conflict of interest among clients where the representation of one client was directly adverse to another client.

Violation of Rule 3.1 — A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

Violation of Rule 8.4(a) — Violating or attempting to violate the Rules of Professional Conduct.

# MEDIATION AND ARBITRATION *of* COMPLEX DISPUTES

Guy deLaup

Ross Foote

Phelps Gay

Thomas Hayes, III

Mike McKay

Mike Patterson

Larry Roedel

Marta-Ann Schnabel

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**Patrick Ottinger's** professional practice includes an emphasis on oil and gas. He has organized and spoken at numerous continuing legal education seminars on oil and gas in Louisiana and Texas and serves as Chair of the Advisory Council of the Institute on Mineral Law, Baton Rouge. He is the Reporter for the Mineral Law Committee of the Louisiana State Law Institute. He has also served as Chair of the Section on Mineral Law of the Louisiana State Bar Association. He is an experienced arbitrator and mediator in oil and gas matters, having completed formal training through the Straus Institute for Dispute Resolution, Pepperdine University School of Law.

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## CLIENT ASSISTANCE FUND PAYMENTS - SEPTEMBER & NOVEMBER 2018

| Attorney | Amount Paid | Gist |
|---|---|---|
| Raymond C. Burkart III | $12,848.38 | #1799 — Conversion in a personal injury matter |
| Raymond C. Burkart III | $2,500.00 | #1792 — Unearned fee |
| Kevin M. Dantzler | $2,730.00 | #1884 — Unearned fee in a child custody matter |
| Olita Magee Domingue | $1,250.00 | #1878 — Unearned fee in a child support matter |
| Harold D. Register, Jr. | $6,300.00 | #1886 — Unearned fee in a criminal matter |
| Harold D. Register, Jr. | $9,000.00 | #1863 — Conversion in a community property matter |
| Michael Sean Reid | $1,025.00 | #1760 — Unearned fee in a custody matter |
| Michael Sean Reid | $6,000.00 | #1780 — Unearned fee in a custody/child support matter |
| Michael Sean Reid | $1,500.00 | #1766 — Unearned fee |
| Roy J. Richard, Jr. | $3,800.00 | #1882 — Unearned fee in a criminal matter |

## Q&A LOUISIANA CLIENT ASSISTANCE FUND

**What is the Louisiana Client Assistance Fund?**
The Louisiana Client Assistance Fund was created to compensate clients who lose money due to a lawyer's dishonest conduct. The Fund can reimburse clients up to $25,000 for thefts by a lawyer. It covers money or property lost because a lawyer was dishonest (not because the lawyer acted incompetently or failed to take certain action). The fund does not pay interest nor does it pay for any damages done as a result of losing your money.

**How do I qualify for the Fund?**
Clients must be able to show that the money or property came into the lawyer's hands.

**Who can, or cannot, qualify for the Fund?**
Almost anyone who has lost money due to a lawyer's dishonesty can apply for reimbursement. You do not have to be a United States citizen. However, if you are the spouse or other close relative of the lawyer in question, or the lawyer's business partner, employer or employee, or in a business controlled by the lawyer, the Fund will not pay you reimbursement. Also, the Fund will not reimburse for losses suffered by government entities or agencies.

**How do I file a claim?**
Because the Client Assistance Fund Committee requires proof that the lawyer dishonestly took your money or property, you should register a complaint against the lawyer with the Office of Disciplinary Counsel. The Disciplinary Counsel's office will investigate your complaint. To file a complaint with the Office of Disciplinary Counsel or to obtain a complaint form, write to: Disciplinary Counsel, 4000 South Sherwood Forest Blvd., Suite 607, Baton Rouge, LA 70816-4388. Client Assistance Fund applications are available by calling or writing: The Client Assistance Fund, 601 St. Charles Ave., New Orleans, LA 70130-3427, (504)566-1600 or (800)421-5722. Applicants are requested to complete an Application for Relief and Financial Information Form.

**Who decides whether I qualify for reimbursement?**
The Client Assistance Fund Committee decides whether you qualify for reimbursement from the Fund, and, if so, whether part or all of your application will be paid. The committee is not obligated to pay any claim. Disbursements from the Fund are at the sole discretion of the committee. The committee is made up of volunteer lawyers who investigate all claims.


## Make-Whole Amount; Post-Petition Interest Rate

***Ultra Petroleum Corp. v. Ad Hoc Comm. of Unsecured Creditors (In re Ultra Petroleum Corp.)***, 924 F.3d 533 (5 Cir. 2019).

Ultra Petroleum Corp. and several affiliates filed for relief under Chapter 11 of the U.S. Bankruptcy Code following the crash of oil prices in 2015. Prior to filing, the debtors issued unsecured notes worth $1.46 billion to various noteholders and took out an additional $999 million in a revolving credit facility. Shortly after filing the petition in April 2016, oil prices rose again, resulting in a solvent debtor and allowing a plan wherein all creditors would be paid in full.

Under the note agreements, the note holders were entitled to a "Make-Whole Amount" to compensate them for lost future interest. The note agreements also provided that the Make-Whole Amount was triggered upon filing bankruptcy. Similarly, the credit facility had an acceleration clause that was also triggered upon filing bankruptcy. Both provisions in the note agreements and the credit facility provided for a contractual default interest rate that was above the federal judgment rate.

The plan proposed by the debtors did not include the Make-Whole Amount or the post-petition interest rate as set forth in the note agreements and the credit facility. Rather, the plan provided that the debtors would pay: 1) the outstanding principal; 2) pre-petition interest at a rate of 0.1 percent; and 3) post-petition interest at the federal judgment rate. The unsecured noteholders were labeled "unimpaired," thereby preventing them from objecting to the plan. The unsecured noteholders argued that because they were deprived of the Make-Whole Amount and the contractual default rate (as opposed to the judgment rate), they were "impaired" and would be "unim-

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• Or, mail your listing, photo, disk and check to the above address.

For more information, contact

**Darlene M. LaBranche**
***dlabranche@lsba.org***
**(504)619-0112 or (800)421-5722, ext. 112.**

paired" only if granted the Make-Whole Amount and post-petition interest at the contractual default rate.

The bankruptcy court concluded that unimpairment "requires that creditors receive all that they are entitled to under state law." *In re Ultra Petroleum Corp.*, 575 B.R. 361, 372 (S.D. Tex. 2017). Finding that New York law, which governed the contracts, allowed the Make-Whole Amounts, the bankruptcy court concluded that the unsecured noteholders were impaired by the plan and, thus, entitled to further payment to make them unimpaired. Additionally, the bankruptcy court held that the Bankruptcy Code did not limit contractual default interest rates and, therefore, post-petition interest would be awarded at the contractual interest rate and not the federal judgment rate.

The 5th Circuit granted the direct appeal and reversed the bankruptcy court's ruling that to be unimpaired under 11 U.S.C. § 1124(1), a creditor must receive all that it is entitled to under state law. Section 1124(1) states that a claim is not impaired if "*the plan* . . . leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest" (emphasis added). The 5th Circuit focused on the use of the term "the plan" and followed the 3rd Circuit's holding in *In re PPI Enterprises (U.S.), Inc.*, 324 F.3d 197, 207 (3 Cir. 2003), which held that when the Bankruptcy Code (or other statute) is the source of the impairment, as opposed to the plan itself, there is no impairment under § 1124.

Next, the court embarked on an extensive review of English bankruptcy law and the Bankruptcy Code's adoption of the same. Under English bankruptcy law, the "Solvent-Debtor Exception" allowed interest to continue to accrue on a creditor's claim post-commission (petition) where a contract providing for such interest and sufficient funds in the debtor's estate existed. The court concluded that § 726(a)(5) codified *a version* of the Solvent-Debtor Exception, but not an identical version to it. Under 11 U.S.C. § 726(a)(5), a creditor may receive "payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection." The court initially noted that under 11 U.S.C. § 1129(a)(7), the best-interest test, as outlined in § 726(a), is available only to *impaired* creditors in Chapter 11 cases, not unimpaired creditors, as the unsecured creditors were here. Thus, § 726 could not be used by these creditors. However, the court noted that the Code was otherwise silent as to interest on unimpaired claims in Chapter 11.

On remand, the court suggested that because the Make-Whole Amounts were only triggered upon filing bankruptcy and were intended to compensate the noteholders for the loss of future unmatured interest on the notes, they were themselves unmatured interest. Section 502(b)(2) disallows any claim "to the extent that . . . such claim is for unmatured interest." 11 U.S.C. § 502(b)(2). Thus, the Make-Whole Amounts would be unallowed by virtue of the Bankruptcy Code, not the plan. However, the court also noted the possibility that because the Code is otherwise silent on interest for unimpaired, unsecured creditors in Chapter 11, the Solvent-Creditor Exception may have survived in the penumbra of the modern Bankruptcy Code, in which case it would act as a carve-out to section 502(b)(2). This determination was left to the bankruptcy court on remand.

As to the post-petition interest rate, the court presented two possibilities. The rate could be based on the general post-judgment interest statute, 28 U.S.C. § 1961, or based on the bankruptcy court's inherent equitable powers, which would allow it to apply the contractual default interest rate if determined to be equitable. Because the bankruptcy court never reached this question, that too was left open on remand.

—**Michael E. Landis** and
**Cherie D. Nobles**
Members, LSBA Bankruptcy Law Section
Heller, Draper, Patrick, Horn & Manthey, L.L.C.
Ste. 2500, 650 Poydras St.
New Orleans, LA 70130


## Clean Water Act

On Dec. 13, 2018, the Assistant Secretary of the Army for Civil Works issued a policy directive memorandum to the Chief of Engineers for the Army Corps of Engineers establishing a 60-day default period in which states must act on requests for Water Quality Certifications (WQC) under Section 401 of the Clean Water Act (CWA) (33 U.S.C. § 1344). The memorandum also directs the development of guidance concerning the criteria district engineers should use in identifying reasonable timeframes for requiring states to act.

Section 404 of the CWA authorizes the Department of the Army through its Chief of Engineers to issue permits for the discharge of dredged or fill material into waters of the United States, including wetlands (404 permit). 33 U.S.C. § 1344. Before the Corps can issue a 404 permit, however, Section 401 of the CWA requires that the state in which the discharge originates grant a WQC. 33 U.S.C. § 1341(a)(1). According to the general permitting procedure outlined in the CWA and the federal regulations, after an application for a 404 permit is submitted to the Corps, the Corps then requests a WQC from the state. From receipt of the WQC request, the state has 60 days to act, unless the district engineer determines a shorter or longer period is reasonable. 33 C.F.R. § 325.2(b)(ii). This longer period cannot exceed one year from the date the state receives the request. *Id.* and 33 U.S.C. § 1341(a)(1). If the state does not act within the permitted timeframe, then the requirement for the state to issue a WQC is waived and the Corps may issue the 404 permit.

The Assistant Secretary acknowledges in the memorandum that it has become normal practice for the Corps to give the states one year to act on the WQC request. To remedy this practice, the memorandum establishes a default timeframe of 60 days in which the states must issue a WQC. The district engineer may still determine, however, that circumstances require a longer period. But to help district engineers determine what these circumstances should be, the memorandum directs the Corps to draft guidance immediately establishing criteria for identifying reasonable timeframes in which the states must act. The memorandum provides that the type of proposed activity and the complexity of the site that will be impacted are factors that may determine the reasonableness of the timeframe. Of further note is that a state's request for additional time will no longer be approved automatically. Requests by the state for a longer timeframe based on workload or resource issues or insufficient information will not be considered.

This memorandum is the latest effort to make the WQC process more predicable in light of WQC issues impacting recent projects under the jurisdiction of the Federal Energy Regulatory Commission. In addition, although with a more aggressive timeline, this memorandum is consistent with S. 3303 introduced by U.S. Sen. Joe Barasso titled the "Water Quality Certification Improvement Act."

## Clean Air Act

Luminant Generation Co. and Big Brown Power Co. have requested a rehearing en banc by the 5th Circuit Court of Appeals of matters that were the subject of an opinion issued on Oct. 1, 2018.

In *United States v. Luminant Generation Co.,* 905 F.3d 874 (5 Cir. 2018), the 5th Circuit examined two important issues on first impression — first, the court determined when a 42 U.S.C § 7475(a) violation accrues as a matter of law; and, second, the court considered whether the federal government's injunctive relief claims are subject to the five-year statute of limitations set by 28 U.S.C. § 2462.18 as it applies to an action to recover civil penalties for violation of the preconstruction requirements of § 7475(a).

On the first issue, the 5th Circuit rejected the United States' argument that a new five-year clock begins to run each day a modified facility operates without a permit. Finding that § 7475(a) relates to construction only and not to post-construction operation, the court joined the 3rd, 7th, 8th, 10th and 11th Circuits in holding that a violation of the § 7475(a) occurs during the construction period. More specifically, the court held that "any claim asserted under § 7475(a) accrues at the moment unpermitted construction commences. "*Id.* at 884.

On the second issue, the 5th Circuit joined the 10th and 11th Circuits in holding that actions brought by the government in its sovereign capacity are exempt from the application of the concurrent-remedies doctrine. In so reasoning, the court cited to the U.S. Supreme Court's holding in *E.I. Du Pont De Nemours & Co. v. Davis*, 44 S.Ct. 364, 366 (1924), that "an action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it." Finding no such congressional enactment, the 5th Circuit held that "the district court erred in dismissing the government's equitable-relief claims under Rule 12(b)(6) based on the concurrent-remedies doctrine."*Luminant* at 887. The decision does not address the merits of the government's injunction action.

Dissenting in part, Judge Jennifer Walker Elrod disagreed with the majority's ruling on the injunction issue, arguing that the forms of injunctive relief requested by the government in this case "are really just time-barred penalties in disguise." *Id.* at 891. Judge Elrod reasoned that "[b]ecause the statute is concerned only with the construction or modification of a facility, and not its subsequent operation, there is no ongoing or future unlawful conduct to enjoin." *Id.* at 889.

The United States and the Sierra Club as intervenor plaintiff have opposed the Texas power plants' request for rehearing in briefs filed on Feb. 12, 2018. The 5th Circuit has not yet ruled on the defendants' petition. Because of the importance of the issues at stake, this case warrants continued monitoring.

—**Alex P. Prochaska**
Secretary, LSBA Environmental Law Section
Jones Walker LLP
Ste. 1600, 600 Jefferson St.
Lafayette, LA 70501
and
**Elise M. Henry**
Member, Environmental Law Section
Jones Walker LLP
Ste. 5100, 201 St. Charles Ave.
New Orleans, LA 70170


## Custody

***Lewis v. Lewis***, 18-0378 (La. App. 4 Cir. 10/3/18), 255 So.3d 1216.

The trial court did not err in increasing Mr. Lewis' physical custody with the children to a 50/50 schedule, as he had retired and moved from Shreveport to Slidell, closer to Ms. Lewis' residence in New Orleans, such that he was able to ensure the children's attendance and participation at their school. The court confirmed that the time parents who have joint custody spend with their children is "physical custody," not "visitation." The court further found that his retirement from the military was forced, due to his medical condition, and, therefore, he was not voluntarily unemployed. The trial court did not err in reducing his child support, using Schedule B.

***O'Neal v. Addis***, 52,377 (La. App. 2 Cir. 9/26/18), 256 So.3d 493.

On the mother's rule to modify custody, the trial court found, and the court of appeal affirmed, that there had been no material change of circumstances. Although the father had moved 90 miles away, worked on weekends and left the child with his mother, and the parents had a record of poor communication, the trial court ordered that they maintain the alternating weekly schedule, attend parenting classes and use Our Family Wizard, a co-parenting app. Moreover, the court of appeal affirmed the trial court's setting a six-month review hearing to monitor the child's situation with the alternating-week custody. Although the trial court did not assign a domiciliary parent, the court of appeal found that, given the parties' communication issues, one should have been appointed and remanded to the trial court to name a domiciliary parent.

***E.R. v. T.S.***, 18-0286 (La. App. 5 Cir. 10/11/18), 256 So.3d 551, *writ denied*, 18-1843 (La. 2/18/19), ____ So.3d ____, 2019 WL 927614 (Mem).

Although, during the course of the matter, there were allegations of sexual abuse in different incidents against both children, the trial court did not err in maintaining joint custody, rather than awarding sole custody to the father, as it was in the children's best interest that the joint-custody arrangement remain, albeit with the father named as the domiciliary parent. The trial court made a credibility call, based on the parties' testimony, and discounting a report from DCFS validating a complaint that the mother had abused the parties' son, which the trial court found not to be accurate. Moreover, the complaint was not otherwise validated. Further, the other child's therapist testified that it was in the child's best interest that the joint-custody arrangement remain, as the child would benefit by having both parents in her life on a regular basis. Further, the trial court properly applied the *Bergeron* standard in

finding that, although there may have been a change of circumstances, it was not in the children's best interest to change the legal custody status as the changes as a whole did not rise to the *Bergeron* standard. The trial court also did not improperly prevent the parties from eliciting expert testimony, even allowing testimony regarding previous incidents that were part of a previous *res judicata* judgment.

## Interim Spousal Support

***Holly v. Holly***, 18-0207 (La. App. 3 Cir. 9/26/18), 255 So.3d 1158.

Because Ms. Holly did not have a motion for final spousal support pending at the time the judgment of divorce was granted, her interim spousal support terminated upon the granting of the judgment of divorce. La. Civ.C. art. 113. The court found that Ms. Holly's general prayer for relief "as law, equity or the nature of the case permit" did not constitute a pending claim for final spousal support under art. 113.

## Spousal Support Arrears

***Waites v. Waites***, 17-0499 (La. App. 4 Cir. 10/10/18), 256 So.3d 539.

After Ms. Waites filed a motion seeking spousal support arrears, Dr. Waites filed a motion to terminate his support obligation based on alleged extrajudicial agreements; and, in the alternative, alleged that he was entitled to a credit for accelerated payments he claimed to have made between 1993 and 1996. After the court granted his request for credit, she appealed, and the court of appeal affirmed. She claimed that he had made no additional payments at all during that period of time. He claimed that they had agreed that, while she was attending law school for these three years, he would provide her additional funds, but he had no written evidence of his payments. The trial court made a credibility decision, believing him and his current wife that payments had, indeed, been made. The court of appeal accepted the trial court's credibility determination. Further, she filed an exception of prescription in the court of appeal, claiming that his alleged credit was prescribed. However, the court of appeal found that even if the claim for credit were prescribed, under La. C.C.P. art. 424, a prescribed claim can be used as an offset or a defense.

## Paternity

***McLaren v. Foster***, 18-0136 (La. App. 3 Cir. 9/26/18), 256 So.3d 383.

Mr. McLaren filed a petition to disavow paternity, and the minor children filed a general denial as well as several exceptions, including a challenge to the constitutionality of La. Civ.C. arts. 185, 186, 187 and 189. After the trial court denied the children's exceptions and ordered DNA tests, the children appealed. The court of appeal found that, as the judgment was not a final judgment or an appealable interlocutory judgment, the court did not have appellate jurisdiction over the matter. Moreover, the court chose not to exercise its supervisory jurisdiction to convert the appeal to an application for supervisory writs because there was no evidence in the record, and, thus, the court could not determine the issues in any event. However, importantly, the court stated: "This does not preclude the minor children from asserting the same arguments in an appeal once a judgment on the disavowal of paternity claim is rendered."

**—David M. Prados**
Member, LSBA Family Law Section
Lowe, Stein, Hoffman, Allweiss & Hauver, L.L.P.
Ste. 3600, 701 Poydras St.
New Orleans, LA 70139-7735


## Notice of Claim by Certified Mail Required

***84 Lumber Co. v. Cont'l Cas. Co.***, 914 F.3d 329 (5 Cir. 2019).

In this case, a second-tier subcontractor (the claimant) provided labor and services to a subcontractor on two Louisiana public school projects. After completion of its work, the claimant filed two sworn statements of claims alleging that it had not been paid in full in connection with the two projects. The claimant sent two emails to the attorney for the general contractor. Attached to the emails were letters from the claimant to the respective project owners on the projects stating that it had not been paid. Thereafter, the claimant filed suit against the general contractor and the payment bond surety alleging unjust enrichment and nonpayment under the Louisiana Public Works Act (the LPWA).

In the lawsuit, the general contractor and surety filed a motion for summary judgment seeking dismissal of the claims asserted against them, arguing that the claimant did not provide the notice required under the LPWA. Specifically, the general contractor and surety argued that La. R.S. 38:2247 requires second-tier claimants to provide written notice of a claim to the general contractor within 45 days of the recordation of the sworn statement and mail such notice by registered or certified mail to the general contractor's Louisiana office. The district court granted the motion for summary judgment, concluding that the notice provided by the claimant was insufficient and dismissing the LPWA claim. The claimant appealed.

On appeal, the claimant contended that the general contractor had actual notice of its claim, which was sufficient to satisfy the requirements of La. R.S. 38:2247. In so arguing, the claimant relied on prior Louisiana appellate decisions including *Bob McGaughey Lumber Sales, Inc. v. Lemoine Co.*, 590 So.2d 664 (La. App. 3 Cir. 1991); *"K" Constr., Inc. v. Burko Constr., Inc.*, 629 So.2d 1370 (La. App. 4 Cir. 1993), *writ denied*, 634 So.2d 391 (La. 1994); and *Nu-Lite Electric Wholesalers, L.L.C. v. Axis Constr. Group, Inc.*, 17-1204 (La. App. 1 Cir. 4/9/18), 249 So.3d 10, *writ denied*, 18-0914 (La. 9/28/18), 253 So.3d 153.

The U.S. 5th Circuit Court of Appeals rejected the claimant's argument. It stated:

> Section 2247 prescribes a specific, two-prong method by which notice must be given: (1) by registered or certified mail (2) to the general contractor's Louisiana office. It says nothing about actual notice, much less email to the general contractor's

lawyer. Because the LPWA "must be strictly construed," and the notice requirements are "clear and unambiguous" and do not lead to absurd consequences, we must apply § 2247 as written.

The court acknowledged the conflicting Louisiana cases law, with some cases requiring a strict interpretation and others seemingly holding that actual notice was sufficient. However, the court stated that the claimants in the other cases were closer to complying with Section 2247 than the case here, and the issue of whether actual notice was received was disputed in this case. The court affirmed the judgment of the district court and held that an emailed notice to the prime contractor's lawyer was not sufficient notice under La. R.S. 38:2247.

**—Kaile L. Mercuri**
Member, LSBA Fidelity, Surety and Construction Law Section
Simon, Peragine, Smith & Redfearn, L.L.P.
1100 Poydras St., 30th Flr.
New Orleans, LA 70163


## United States

***U.S. EEOC v. Global Horizons, Inc.***, 915 F.3d 631 (9 Cir. 2019).

The U.S. 9th Circuit Court of Appeals issued a sweeping decision with potentially wide-ranging effects on employers using foreign seasonal labor. Many Louisiana agriculture and non-agriculture businesses use temporary foreign labor to satisfy acute seasonal labor needs. The sugar cane, rice, crawfish, shrimp, lawn care and hotel industries are just a few examples of Louisiana businesses that use seasonal foreign labor under either the federal H-2A (agriculture workers) or H-2B (non-agriculture workers) programs.

This case involves charges brought by the EEOC against a pair of Washington State fruit growers for racial and national origin discriminatory treatment of foreign workers under Title VII. The growers hired a labor contractor to supply temporary workers to assist with labor shortages in their orchards. The labor contractor recruited workers from Thailand and brought them to the United States under the H-2A visa program. The H-2A program imposes various requirements on employers, including the provision of housing, meals and transportation (non-wage benefits) to the foreign workers. The growers' contract with the labor contractor delegated to the contractor the responsibility for housing, transportation, food and wages.

The Thai workers complained of various discriminatory and exploitative behavior both during their recruitment in Thailand and at the orchards, including false promises of large wages, excessive recruitment fees for the opportunity to work, poor working conditions, uninhabitable housing, inadequate and dangerous transportation, and lack of food. The district court and circuit court of appeal divided the allegations into

"orchard-related" and "non-orchard related" matters. The labor contractor failed to appear to defend itself against the charges, and the district court entered a default judgment. The growers conceded responsibility for the orchard-related work condition allegations, but disputed responsibility for non-orchard-related matters involving housing, transportation and meals.

The district court granted the growers' motion to dismiss the non-orchard-related allegations because the EEOC had not plausibly alleged that the growers were joint employers of the Thai workers. The court found that non-orchard-related matters like housing, feeding, transporting and paying were outsourced to the labor contractor, and the growers' employment relationship with the workers extended only to orchard-related issues.

The 9th Circuit reversed the district court's finding that the growers were joint employers of the Thai workers for non-orchard-related matters. The 9th Circuit adopted the common-law agency test for determining joint employers under Title VII discrimination actions. The key element of the common-law agency test is control, and the 9th Circuit concluded that the growers were employers under the H-2A program.

In a typical employment relationship, the employer does not have control over non-workplace matters such as housing, meals, and transportation. Employees are usually expected to find their own housing, provide for their own meals, and arrange for their own transportation to and from work. Those matters ordinarily do not constitute terms and conditions of employment, so if an employee experiences discrimination in obtaining adequate housing, for example, the employer would not be liable for failing to stop that discrimination.

The H-2A program establishes a different relationship between an employer and the foreign guest workers it employs. As explained above, the H-2A regulations place on the shoulders of an "employer" (a defined term to which we will return in a moment) the legal obligation to provide foreign guest workers with housing, transportation, and either low-priced meals or access to cooking facilities. Under the regulations, these benefits constitute "material terms and conditions of employment," which must be stated in the job offer provided to all potential H-2A workers. The H-2A program thus expands the employment relationship between an H-2A "employer" and its workers to encompass housing, meals, and transportation, even though those matters would ordinarily fall outside the realm of the employer's responsibility.

*Id.* at 639-40 (citations omitted).

The terms of the contract between the growers and the labor contractor did not change the analysis. The 9th Circuit acknowledged the contractual delegation of non-orchard-related responsibility to the labor contractor, but the growers' legal obligations as "employers" under the H-2A program arise as a matter of law and cannot be contractually avoided. *Id.* at 640.

**—Edward T. Hayes**
Chair, LSBA International
Law Section
Leake & Andersson, L.L.P.
Ste. 1700, 1100 Poydras St.
New Orleans, LA 70163


## Courts Should Consider Rejected Settlement Offers When Deciding Attorney's Fees to Prevailing FLSA Plaintiff

The U.S. 5th Circuit Court of Appeals held that district courts may consider a plaintiff's decision to reject a Rule 68 settlement offer more favorable than the judgment she ultimately obtained at trial in determining the amount of attorney's fees that should be awarded. *See, Gurule v. Land Guardian, Inc.*, 912 F.3d 252, 255 (5 Cir. 2018). In doing so, the 5th Circuit joined a number of other federal appellate courts — including the 3rd, 4th, 6th, 7th, 9th and 10th Circuits — that have all adopted the same view. *See, Lohman v. Duryea Borough*, 574 F.3d 163, 167-69 (3 Cir. 2009); *Sheppard v. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332, 1337 (4 Cir. 1996); *McKelvey v. Sec'y of U.S. Army*, 768 F.3d 491, 495 (6 Cir. 2014); *Moriarty v. Svec*, 233 F.3d 955, 967 (7 Cir. 2000); *Haworth v. Nevada*, 56 F.3d 1048, 1052 (9 Cir. 1995); and *Dalal v. Alliant Techsystems, Inc.*, 182 F.3d 757, 761 (10 Cir. 1999).

In *Gurule*, four employees who worked at a Houston nightclub filed suit against their employer, alleging that the company had violated the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA). One of the employees settled his claims shortly after the case was filed, and two other plaintiffs' claims were later dismissed on summary judgment. This left only one employee who proceeded to trial on her FLSA claims. After a one-day trial, the jury returned a verdict in favor of the plaintiff and awarded her a total of $1,131.39 in compensatory damages, which the district court later doubled as liquidated damages. The employee then filed a motion seeking an award of $129,565 in attorney's fees pursuant to the FLSA's fee-shifting provision. *See,* 29 U.S.C. § 216(b). The district court awarded only $25,089.30 in attorney's fees, citing, *inter alia*, the fact that the damages awarded to the plaintiff were less than each of the four Rule 68 settlement offers she had received from the employer over the course of the litigation. An appeal followed.

The 5th Circuit affirmed. In its opinion, the court noted that the "degree of success" is commonly recognized as the most important factor in determining a reasonable attorney's fee. *Id.* at 261. "In measuring that success," the court continued, "a court should ask whether the party would have been *more* successful had his attorney accepted a Rule 68 offer instead of pressing on to trial." *Id.* In the case before it, the employee had spurned multiple Rule 68 offers ranging from $1,500 to $5,000 and decided to proceed to trial. Ultimately, however, she was able to recover only $1,131.39 in compensatory damages, meaning that her efforts in the lawsuit had actually been financially counter-productive. A court is not required to "close its eyes to the reality that plaintiff's post-offer legal work produce[d] a net loss," the panel concluded. *Id.* (quoting 12 Charles Alan Wright and Arthur R. Miller, Fed. Practice and Proc. § 3006.2 (3d ed. 2018)). Thus, because the district

properly considered the rejected Rule 68 offers in ordering a substantial reduction to the plaintiff's fee award, the 5th Circuit affirmed the district court's judgment.

**—Wm. Brian London**
Member, LSBA Labor and Employment Law Section
Fisher & Phillips, L.L.P.
Ste. 3710, 201 St. Charles Ave.
New Orleans, LA 70170


## LOWLA Lien; Mineral Servitude

***Marlborough Oil & Gas, L.L.C. v. Baker Hughes Oil Field Operations, Inc.***, ____ So.3d ____ (La. App. 1 Cir. 11/14/18), 2018 WL 5961770.

Marlborough Oil & Gas, L.L.C., owned a mineral servitude in the Baton Rouge area. Two wells were located on the property — the Marlborough No. 1 and the Marlborough No. 3 (wells). Northwind Oil & Gas, Inc. obtained a lease from Marlborough to operate the wells. In 2012, Baker Hughes provided certain labor, equipment, machinery and materials to Northwind in connection with its operation of the Marlborough No. 3 well (No. 3 well). Northwind failed to pay Baker Hughes more than $412,000 for services rendered.

Baker Hughes later filed a lien pursuant to the Louisiana Oil Well Lien Act (LOWLA, La. R.S. 9:4861-4873) in the mortgage records of West Baton Rouge Parish. It also filed a lawsuit and a notice of *lis pendens* regarding the lawsuit in the mortgage records. In 2013, Baker Hughes filed and prevailed on a motion for summary judgment against Northwind. Baker Hughes was awarded $412,415.54 in damages plus attorney's fees, interest and costs by the trial court.

Four years later, Marlborough sought a declaratory judgment that the Baker Hughes judgment did not affect or encumber Marlborough's servitude or any tubing, casing, equipment, pipelines or other constructions situated on the lease. Baker Hughes denied that Marlborough was entitled to this relief. In support of its position, Marlborough filed a motion for summary judgment. After a hearing, the trial court ruled in Marlborough's favor, finding that the Baker Hughes judgment did not have any effect as to: (1) Marlborough's successors, lessees and assigns; and (2) the mineral servitude owned by Marlborough affecting the leased property described in the judgment.

Baker Hughes appealed to the Louisiana 1st Circuit Court of Appeal. Baker Hughes enumerated four assignments of error, but only the first two assignments were considered by the appellate court. In its first two assignments of error, Baker Hughes contended that the trial court erred in granting summary judgment because the record showed that it fully complied with the requirements of LOWLA when it secured its lien and obtained the judgment at issue. In reviewing the statutory requirements set forth in LOWLA, the appellate court agreed and found that Baker Hughes *did comply* with all of the requirements of LOWLA — it filed its lien on time; its lien contained the proper lease description; etc. Thus, the appellate court ultimately found that the Baker Hughes judgment, in fact, did affect the lease as a whole, not just the well for which the services and materials were provided (here, the No. 3 well).

Marlborough argued that the Baker Hughes judgment should not have any effect on the Marlborough servitude because the operating interest giving rise to Baker Hughes' lien and judgment expired. The appellate court dismissed this argument, however, finding that Marlborough failed to produce any evidence showing that other wells (aside from the No. 1 and No. 3 wells) were not maintaining the lease. Because Marlborough failed to meet its burden of proof on the expiration of the lease, the appellate court refused to accept Marlborough's argument. The appellate court further found that Baker Hughes' lien and judgment affected only *the lessee's interests under the existing lease*, not any hydrocarbons owed to the lessor, nor would it affect any new lease that Marlborough might grant.

## Interruption of Prescription of Non-Use; Shut-In Well

***Gilmer v. Principle Energy, L.L.C.***, 52, 218 (La. App. 2 Cir. 9/16/18), 256 So.3d 1139.

In April 2008, plaintiff signed a royalty conveyance of 50 percent of 1/5th of 8/8ths interest in six tracts to Regal Energy, L.L.C., which later became Principle Energy, L.L.C. The conveyance provided that the deed "shall have a prescriptive period of three years," rather than the usual 10 years provided by Louisiana mineral law. It also provided that a shut-in well could perpetuate the deed.

Six months later, XTO Energy spudded the E.B. Brown No. 1 well on plaintiff's property. When the well was tested, it showed that it could produce 1,156 MCF of gas per day, but it was never put into production because a pipeline was not available. Thus, the well was shut-in. In May 2009, the Louisiana Commissioner of Conservation created a compulsory unit,

designating the Brown well as the unit well. The Davis well, a later-drilled producing well, was named as an alternate unit well.

Plaintiff attempted to have the operator release the deed on prescription grounds because more than three years had passed since the royalty deed was conveyed and there was no production. When that effort failed, plaintiff sued. The parties filed cross-motions for summary judgment based on prescription of non-use. The trial court found that *prescription had been interrupted* pursuant to La. R.S. 31:90-91 by the Commissioner's order creating a unit on which there existed a shut-in well capable of producing in paying quantities. Plaintiff appealed. The Louisiana 2nd Circuit Court of Appeal affirmed, holding that prescription of non-use had been interrupted on (and had commenced anew from) the date that the unit was created.

—**Keith B. Hall**
Member, LSBA Mineral Law Section
Director, Mineral Law Institute
Campanile Charities Professor
of Energy Law
LSU Law Center
1 E. Campus Dr.
Baton Rouge, LA 70803-1000
and
**Colleen C. Jarrott**
Member, LSBA Mineral Law Section
Baker, Donelson, Bearman,
Caldwell & Berkowitz, P.C.
Ste. 3600, 201 St. Charles Ave.
New Orleans, LA 70170-3600


## Competency of Expert Witnesses: Whose Rules Apply?

***Coleman v. United States***, 912 F.3d 824 (5 Cir. 2019).

In response to the defendant's motion for summary judgment, the plaintiff offered reports from two medical experts to support her claims under the Federal Tort Claims Act (FTCA). The magistrate judge disallowed one report but accepted the testimony of the other expert over the defendant's objection. The defendant argued that Texas law required medical experts in malpractice suits to be "practicing medicine" at the time of the testimony or at the time the claim arose; however, the magistrate judge determined that state law did not apply to a FTCA claim. The district judge disagreed, ruling that a federal court hearing a malpractice claim under the FTCA was required to apply Federal Rules of Evidence and state court rules of evidence when determining the competency of medical experts. Thus, both experts were stricken, and summary judgment was granted.

The appellate court noted that one section of Texas' requirements allowed courts to "depart from those criteria if, under the circumstances, the court determines that there is a good reason to admit the expert's testimony." Overall, the appellate court reasoned that not all contingencies had been considered and wrote:

> In summary, the district court was correct in its determination that Federal Rule of Evidence 601 requires that Coleman's proffered expert witness must satisfy the state law standards for expert witness competency in addition to the Federal Rule of Evidence 702 standards for the admissibility of expert witness testimony. However, because the district court erred in its determination that it was undisputed that Coleman's proffered expert failed to meet those state law standards, and also [because the district court] failed to consider whether there was "good reason" for excusing that requirement, we VACATE and REMAND for further proceedings consistent with this opinion.

## Prescription

***Mantiply v. Hoffman***, 18-0292 (La. App. 3 Cir. 1/16/19), ____ So.3d ____, 2019 WL 208738.

The patient appealed a jury verdict that found no standard of care had been breached. The defendant doctor's response to the appeal included the assertion that the trial court had erred in denying his exception of prescription, contending that the patient had sued his employer (VA Hospital) but did not name him as a defendant until years later. The prescription exception was denied prior to the trial, and the defendant's writ to the appellate court was denied. The appellate court noted, however, that the previous writ denial did not preclude reconsideration of the issue on appeal, nor did it prevent the appellate court from reaching a different conclusion.

The patient had been treated by the defendant at a VA hospital, and the hospital had been timely sued. The plaintiff did not learn until more than a year later that the defendant doctor was not an employee of the VA but instead was an independent contractor. However, the appellate court noted that when the patient presented to the VA, he was treated by the defendant, "who was wearing VA medical center attire," and that the VA defended against the patient's claims until advising him, more than a year after the claim was filed, that the defendant was not a VA employee. Considering that it would not be necessary to name the defendant doctor if he were a VA employee, the appellate court found that *contra non valentem* applied to stop the running of prescription, affirming the trial court's denial of the defendant's exception. Nevertheless, the appellate court then decided that the jury verdict was neither manifestly erroneous nor clearly wrong, and the jury's no-breach verdict was affirmed.

## Admissibility of Panel Opinions

***Sanderson v. Tulane Univ. Hosp. & Clinic***, 18-0588 (La. 6/15/18), 245 So.3d 1043.

The trial court disallowed the introduction into evidence of the panel opinion after deciding that there was a conflict of interest between a panel member and a defendant. In this 4-3 *per curiam* opinion, the Louisiana Supreme Court opined that, absent "allegations that the medi-

cal review panel superseded its statutory authority," the panel opinion is subject to "mandatory admission." The majority concluded that "[t]he mere fact that a member of the panel may not have disclosed a potential conflict of interest is not a ground for automatic exclusion of the panel's opinion," adding that the plaintiff would have "an adequate opportunity to explore any potential bias" at the trial during cross-examination, thus allowing the factfinder to assign appropriate weight to the panel opinion.

—**Robert J. David**
Gainsburgh, Benjamin, David,
Meunier & Warshauer, L.L.C.
Ste. 2800, 1100 Poydras St.
New Orleans, LA 70163-2800


## Steel: Further Processing Exclusion

***Arcerlor Mittal Laplace, L.L.C. v. St. John the Baptist Par. Sch. Bd..***, BTA Docket No. L00187 (1/8/19).

Arcerlor Mittal Laplace, L.L.C. (taxpayer) disputed the taxability of several transactions surrounding its production of low-carbon steel at its mill in LaPlace, La. The taxpayer raised three principle issues as detailed below. Based thereon, the taxpayer sought various refunds.

First, the taxpayer asserted that sales tax was excluded on its purchases of cylindrical carbon electrodes used to dissolve carbon into scrap metal under the further-processing exclusion provided by La. R.S. 47:301(10)(c)(i)(aa) (Further Processing Exclusion). The Louisiana Board of Tax Appeals (board) held that the carbon from the electrodes was a "recognizable, identifiable and beneficial component of the Taxpayer's end product." The board found the real issue was whether the electrodes were purchased for the purpose of inclusion into the taxpayer's end product. The board held that the taxpayer's use of the electrodes was to heat scrap metal, the taxpayer did not show the electrodes were purchased for the purpose of adding carbon to the taxpayer's steel, and thus the addition of carbon from the electrodes was incidental to the electrodes use as a heat source. Therefore, the board held the electrodes did not qualify for the Further Processing Exclusion.

Second, the taxpayer sought qualification under the Further Processing Exclusion for various chemicals that are injected into the scrap metal after the scrap metal melts into a liquid state, after the taxpayer hired the third party to remove these excess chemicals from the taxpayer's furnace (slag chemicals). Specifically, the issues raised were whether the slag chemicals were "actually produced for resale, and whether the Slag Chemicals were purchased for the purpose of inclusion in the Taxpayer's end-product." The board first determined that the agreement between the taxpayer and a third party was a sale for resale under Louisiana tax law because the taxpayer gave possession of the slag chemicals in exchange for valuable services. The taxpayer received a benefit in the form of cheap access to raw materials. Next, the board determined that the slag chemicals qualified for the Further Processing Exclusion as they were purchased for the purpose of inclusion in the slag because the evidence showed an intent to produce and exchange slag, and the taxpayer purchased the slag chemicals with the intention that they would "oxidize with impurities in molten scrap metal and form Slag."

Third, the taxpayer sought to classify the (1) electric-arc furnace, (2) natural-gas-fired furnace, (3) caster, (4) flocking tank and (5) truck scale located in the steel mill as immovable property so repairs to these items would be non-taxable services. First, the board concluded that it could not be determined whether the caster, flocking tank, natural-gas-fired furnace and truck scale were immovable because the photographs of the steel mill submitted as evidence did not show whether these things were connected to their surrounding structures or if the things could be moved without substantial damage to them. Based on the photographic evidence, the board concluded that the repairs to the electric-arc furnace were not taxable as the item was immovable because of its thorough connection to the mill and substantial damage would be caused by its removal.

—**Antonio Charles Ferachi**
Member, LSBA Taxation Section
Director, Litigation Division
Louisiana Department of Revenue
617 North Third St.
Baton Rouge, LA 70821

## Property Tax and Use Tax Developments Keep Things Interesting

In a property tax sale case, *Deichmann v. Moeller*, 18-0358 (La. App. 4 Cir. 12/28/18), ____ So.3d ____, 2018 WL 6823153, the 4th Circuit Court of Appeal held that a tax sale was an "absolute nullity," finding that the pre-sale tax-notification requirements were not met. The court of appeal was reviewing a district court holding declaring the sale a "nullity," without further comment. The district court also held that the tax-sale purchaser was entitled to recover taxes and costs paid as well as penalties and interest. Because the lower court's decision was premised on a finding that the property was being redeemed, the applicable penalty rate was 5 percent and 12 percent interest per year. As part of the lower court's decision, the sale would be null only if, within one year, the owner made full and complete payment to the purchaser.

The court of appeal, however, reversed the lower court's findings, specifically finding that the sale was an "absolute nullity" on the basis that the pre-tax sale publication requirements had not been satisfied, resulting in a violation of the owner's due process rights. As the sale was an absolute nullity, no penalty was applicable, and the interest rate was reduced to 10 percent. Finally,

the appellate court noted that there is no requirement under the circumstances that payment be made within one year as, unlike governmental liens that must be repaid within one year, there is no similar requirement under the law for a repayment period in connection with an absolute nullity.

For those following use-tax developments (generally, use taxes apply in those instances when sales taxes don't), *Frank's Int'l, L.L.C. v. Kimberly Robinson*, BTA Dkt. No. 10050D (12/11/18), stands for the proposition that there is no use tax on the importation of property if there is no "use" in the state. In *Frank's International*, the Louisiana Board of Tax Appeals held that manufactured or purchased tools stored in the state for use in customer jobs or for the taxpayer's own use in federal waters were entitled to a use tax refund because the tools were not stored for use or consumption within Louisiana. The board also concluded that there were alternative grounds for exempting the tools from use tax because the manufactured tools were manufactured for export outside Louisiana, the purchased tools were purchased for resale or lease to the taxpayer's customers, and the tools intended for use in federal waters were exempt because they were purchased or manufactured for first use offshore beyond the territorial limits of any state. In so holding, the board also noted that the Department failed to request or contest the taxpayer's supporting documentation related to the refund claim and that the Department apparently denied the refund claim solely because of the taxpayer's participation in a tax amnesty program.

**—Jaye A. Calhoun**
Member, LSBA Taxation Section
Kean Miller, LLP
Ste. 3600, 909 Poydras St.
New Orleans, LA 70112
and
**William J. Kolarik II**
Kean Miller, LLP
Member, LSBA Taxation Section
Ste. 700, 400 Convention St.
Baton Rouge, LA 70802


## Who Owns the Lift Station?

In *Fontenot v. Town of Mamou*, 18-0301 (La. App. 3 Cir. 12/19/18), 2018 WL 6630268, the 3rd Circuit analyzed the ownership of a lift station that was maintained by the Town that was located primarily on Fontenot's property. Although nothing was filed in the conveyance records regarding the lift station, the mayor stated he was unaware of any prior owner disputing the Town's ownership or denying access to the lift station. The trial court held the Town acquired ownership of the immovable property through 30-year acquisitive prescription because the Town possessed and maintained the lift station since 1982.

A precarious possessor is one who exercises possession with permission from the owner, and only possesses for himself after giving the owner actual notice of its intent to possess as owner. Acquisitive prescription does not run in favor of a precarious possessor. While evidence was presented that the landowners permitted construction of the lift station and did not interfere with maintenance or operation of it, there was no evidence presented that the Town gave actual notice of its intent to possess as owner; therefore, the Town's precarious possession never terminated. Accordingly, the 3rd Circuit held the Town was not the owner of the land beneath the lift station.

Fontenot also asserted ownership of the lift station on the grounds that buildings and other constructions permanently attached to the ground are presumed to be owned by the ground owner. If constructed on the land of another with his consent, the constructions belong to the person who constructed them only if that separate ownership is evidenced by an instrument filed for registry. The appellate record contained no recorded evidence of separate ownership. The 3rd Circuit remanded the case to the district court for further proceedings on this issue.

## How Much Incapacity Is Required to Be Forced Heir?

In *Succession of Heyd*, 18-0385 (La. App. 3 Cir. 12/6/18), 261 So.3d 74, a will was challenged on the grounds that a permanent incapacity rendered a child a forced heir. The will stated that the testator had no forced heirs. Appellant presented evidence that he was gored by a goat and had to undergo a craniotomy, which caused personality changes, cognitive impairment, seizures and a determination of disability by the Social Security Administration, the State of Louisiana and the insurer for his then-employer. Notwithstanding, the trial court held that the appellant was not a forced heir.

The appellant's doctor stated that the appellant had not refilled his seizure medication in years and had no medical limitations placed on him. The doctor further stated that appellant's "disability, if currently existent, is minimal and does not materially affect the handling of his affairs." Evidence was presented that appellant owned and operated an exotic animal breeding and sales business. Another doctor stated the appellant was incapacitated only during the time of a seizure. Consequently, the 3rd Circuit affirmed, finding that appellant was not a forced heir because of his ability to work.

**—Amanda N. Russo**
Member, LSBA Trusts,
Estate, Probate
and Immovable Property Section
Sher Garner Cahill Richter Klein &
Hilbert, L.L.C.
Ste. 2800, 909 Poydras St.
New Orleans, LA 70112

CHAIR'S MESSAGE

# This Has Been A Great Ride!

By Dylan T. Thriffiley


Dylan T. Thriffiley

It is hard to believe that another bar year has come and gone. This year was certainly the fastest, but I've been told that this will continue to be true. Preparing this message has prompted me to reflect on the past year and consider what our Young Lawyers Division (YLD) Council has accomplished.

We kicked off the year with a great first meeting at the Annual Meeting in Destin, Fla., and then promptly got to work. In July, we surveyed the membership and were able to ask questions specific to young lawyers, which provided us with incredible insight into the interests and needs of our members. Perhaps the most important takeaway for all of us was the significant lack of awareness among young lawyers of the depth and breadth of the benefits that the association and the YLD can provide.

In September, we held the first-ever LSBA Young Lawyers Division strategic planning session and, with the help of consultant Elizabeth Derrico, had a great time mapping out the plan for the next three years of the YLD. We developed four goals for the YLD to guide us through 2021, which are:

► provide young lawyers with an opportunity for meaningful service and engagement;

► foster young lawyers' professional and career development;

► be a respected and effective advocate on behalf of young lawyers; and

► strengthen our governance capacity to serve our members and our vision.

These four goals have been the driving force behind many of our actions this year, and we are grateful to the LSBA and Board of Governors for allowing us the opportunity to work with Elizabeth to map it out.

We spent most of the fall preparing for the Young Lawyers Conference in January. I won't bore you with my accolades about that event again but, suffice it to say, that I have never been prouder of the YLD Council than I was on that day. We will continue to refine and develop the conference in the years to come and I can't wait to see what it looks like in 2020 and 2021.

Our executive team has functioned as a true team this year and we have had a great time working together. Council meetings have been substantive and productive, our district reps and other council members have been engaged, and we have all benefitted from the momentum. As I pass the baton to Scott Sternberg, I know that this group of individuals is going places and I'm happy to have had the opportunity to play a very small part in it.

As many of you know, writing this message every other month has probably been my least favorite part of the job and I'm happy to see that responsibility come to an end. But I would be remiss to wrap up my last chair's message and not mention a few notes of gratitude. Thank you to Peter, Thompson and Margot for all your love and support this year. You may not always understand what I'm doing or why but thank you for having my back, no matter what.

Thank you to Brad Tate for setting the stage for this Council to become what you knew it was capable of being, for making the leadership transition so seamless and for being my best friend since law school visit day in 2004. Still can't believe you beat me to the finish line . . . .

Thank you to Kelly Ponder, our LSBA staff liaison and the backbone of this Council. Without your dedication (and organization!), we might not have made it past orientation this year. You have become one of my dearest friends and I have had so much fun working with you.

Thank you to Marsha McNulty, who might be the ONLY person in the state of Louisiana who actually reads my Chair's Message and who always makes my day when she sends her daughter a note to say, "I saw Dylan in the *Bar Journal*!"

Last, but certainly not least, thank you to Mike Patterson and Christine Lipsey for the encouragement back in 2008 to get involved with the LSBA.

This has been a great ride and I'm proud of what we have accomplished. Thank you all for the opportunity to serve.

## YOUNG LAWYERS SPOTLIGHT

### Stephanie Bond Hulett
### Denham Springs

Stephanie Bond Hulett

The Louisiana State Bar Association's Young Lawyers Division Council is spotlighting Denham Springs attorney Stephanie Bond Hulett.

Hulett has served as city attorney in Denham Springs since 2015. Her practice is varied, including drafting city ordinances and ensuring their enforcement, handling Civil Service discipline and appeals, and occasionally assisting in prosecution of the city's criminal cases. She is proud to serve her hometown and witness firsthand its recovery from the Great Flood of 2016.

She earned a BS degree in psychology in 2006 from Louisiana State University and her JD degree in 2010 from LSU Paul M. Hebert Law Center. Prior to serving as city attorney, she practiced with deGravelles, Palmintier, Holthaus & Fruge in Baton Rouge and clerked for Judge John W. deGravelles, U.S. District Court for the Middle District of Louisiana.

Hulett is passionate about serving her community through her work with Jefferson Baptist Church, where she is Missions Minister and Women's Minister. She leads mission teams around the globe, sharing the Gospel with people of all ages and nationalities. She enjoys teaching women's Bible studies and assisting her husband with the church's Student Ministry.

In her free time, she travels with her family and writes in partnership with her aunt. Their first children's book, *The Animals' Secret Krewe*, celebrates Louisiana wildlife and culture.

Hulett lives in Baton Rouge with her husband, Jeff, and their daughter.

## PUBLIC Ethics Advisory Opinions

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

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

Questions, comments or suggestions regarding the opinions, the publication process or the Ethics Advisory Service may be directed to Eric K. Barefield, Professional Programs Ethics Counsel, Louisiana State Bar Association, 601 St. Charles Ave., New Orleans, LA 70130; direct dial (504)619-0122; fax (504)598-6753; email ebarefield@lsba.org.

To review Published Opinions (to date) online, go to: *www.lsba.org/goto/EthicsOpinions*. Click on "Published Opinions."

## PUBLIC Opinion 19-RPCC-021[1]

## Lawyer's Use of Technology

*A lawyer must consider the benefits and risks associated with using technology in representing a client. When a lawyer uses technology in representing a client, the lawyer must use reasonable care to protect client information and to assure that client data is reasonably secure and accessible by the lawyer.*[2]

Technology is constantly evolving and changing the practice of law. Lawyers' practices and the tools they use have changed. Consider typewriters versus computers, or regular mail and fax machines as compared to email. Some reasons for a lawyer to consider the benefits of accepting technological changes and adopting different methods to practice law include "saving money, saving time, or improving quality."[3] Technology and the Internet can modify the way a lawyer practices, affecting communication, practice management, handling evidence and data storage. How a lawyer should handle various aspects of technology, including but not limited to email communication with clients or others and the handling of digital or electronic client files or information, has been discussed in ethics opinions and articles around the country.[4]

The consensus is that if a lawyer is going to use technology, that lawyer has a duty to comply with Rules 1.1, 1.3, 1.4, 1.6 and 1.15 of the American Bar Association (ABA) Model Rules of Professional Conduct. Lawyers must use technology competently and diligently. Lawyers have an obligation to protect client information and confidentiality. Lawyers also have an obligation to diligently weigh the use of potential technology considering variables such as risk and a client's individual capacity or availability to use that technology.

This Committee has considered the ethical ramifications stemming from a lawyer's use of technology when practicing law. In its consideration, the Committee believes that the Louisiana Rules of Professional Conduct most likely[5] implicated by a lawyer using technology are Rules 1.1(a),[6] 1.3,[7] 1.4[8] 1.6[9] 1.15(a)[10] and 5.3.[11]

### Competence and Diligence

When a lawyer contemplates the use of technology, that lawyer should remember Rules 1.1 and 1.3 of the Louisiana Rules of Professional Conduct requiring competence and diligence. The lawyer should carefully evaluate whatever technology is being considered and whether client information will be reasonably secure and retrievable by the lawyer. Whether it might be a disaster like a flood or fire or even a breach by a hacker, a lawyer using technology should evaluate risks to a client's files and information, as well as the lawyer's ability to practice without an incapacitating interruption. For instance, does the lawyer have "back-up" systems to retain/recover digital information in the event of a service interruption?

An article in *GPSOLO Magazine* quotes the Director of the FBI in 2012 when he stated at a conference that "I am convinced there are only two types of companies; those that have been hacked and those that will be."[12] As an example, in 2016, a District Attorney's office in Pennsylvania paid ransom to regain access to its computers. The criminals used malware to hold the

DA's office computer network hostage and were later arrested.[13] In 2012, the ABA amended Comment 8 to Rule 1.1 of the ABA Model Rules of Professional Conduct to add language requiring that competence included an expectation that a lawyer should be knowledgeable of both the benefits and risks of the use of technology.[14] While Louisiana does not have comments to its Rules, Rules 1.1(a) and 1.3 are straight-forward even without a specific technological competence/diligence requirement. If a lawyer is not comfortable working with technology, the lawyer should consider the benefits of obtaining advice from another lawyer or consultant knowledgeable about both technology and a lawyer's ethical and professional responsibilities. If relying on a non-lawyer, Rule 5.3 provides: *"With respect to a non-lawyer employed or retained by or associated with a lawyer: . . . (b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;. . ."* Accordingly, when a lawyer decides to use a non-lawyer technology service provider or computer consultant, that lawyer should take reasonable steps to ensure that ethical standards and responsibilities of the lawyer are met by the conduct of the service provider or consultant. Failure to use technology competently could put a law firm at risk both ethically and financially if the conduct falls below the applicable standard of care.

## Communication

Lawyers have a duty to communicate with clients. Rules 1.4(a)(2) and (3) of the Louisiana Rules of Professional Conduct state the communication obligations of a lawyer: *"*. . . *a lawyer shall* . . . *(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished . . .;"* and *". . . (3) keep the client reasonably informed about the status of the matter; . . . ."* How lawyers choose to communicate with clients is changing, with emails and text messages sometimes replacing phone calls and letters. Lawyers first should be cognizant regarding a potential client's capacity or ability to use technology. In some cases, use of advanced technology with an elderly, underprivileged, unknowledgeable or rural client with limited Internet access might not be reasonable. A lawyer may want to consider the benefit of advising clients regarding potential risks associated with using technology, such as having an inadequate password or other people being aware of their password, as compared to in-person consultations or traditional communication options. When very sensitive information is being communicated, it may be appropriate to consider encryption, as well as to provide the option of communicating by means of more traditional methods. If a lawyer elects to use technology, a lawyer has an obligation to use that technology in a manner that meets all reasonable ethical and professional standards, as well as to advise a client regarding potential risks. Many lawyers use computers to transmit email, pleadings or other documents. Whether using computers at the office or using a mobile device, a lawyer should always consider whether client information is reasonably secure and retrievable by the lawyer. Failure of a lawyer to use basic minimum standards for security, such as secure passwords, firewalls and encryption, may put a lawyer at risk of a potential violation of the Louisiana Rules of Professional Conduct. Strong passwords should be used on all computers and mobile devices, such as smart phones and tablets. When using mobile devices, a lawyer should consider how secure a network might be and whether the option to secure or delete data remotely will be available if the mobile device is misplaced or stolen. If a data breach of material client information were to occur, a lawyer would not only need to take reasonable steps to address the problem, but also to disclose the fact of the breach to the client.[15]

## Confidentiality

The modern practice of law is evolving with the use of technology, such as "cloud computing," allowing a lawyer to be more mobile and potentially reducing overhead costs. With Internet access, lawyers can access client data and/or store data practically anywhere. Cloud computing could be defined as using the Internet for the electronic transfer of data and/or storage on a computer or server that is not located in a lawyer's office but in an offsite location. As cited in Pennsylvania's ethics opinion, a *Maximum PC* magazine article described "cloud computing" as "a fancy way of saying stuff is not on your computer."[16] As client information is sent offsite using the "cloud," a lawyer has delegated to others some level of control and security of that data. As a result, the ABA modified its rules in recent years to address technological changes affecting the way lawyers practice. Louisiana, following the ABA's lead on this issue, amended Rule 1.6 of the Louisiana Rules of Professional Conduct in January 2015 specifically to add Part "c": *"A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."*[17] Rules 1.6 and 1.15 of the Louisiana Rules of Professional Conduct require a lawyer to protect client confidentiality and client property, stating: *"A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). . ."* and *". . .(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property . . . Other property shall be identified as such and appropriately safeguarded. . . ."*

While there are always risks with the use of technology, a lawyer needs to weigh the benefits of using technology versus any risks that are associated with its use. For example, sending digital files in a non-secure format could allow the inadvertent release of information a lawyer or client would not want shared by the unintentional disclosure

of "metadata," which is information embedded in electronic documents. The ABA issued an ethics opinion regarding those risks in 2006.[18] Additionally, email "web bugs" could track lawyer-client communications. An Alaska ethics opinion has suggested that a lawyer's surreptitious use of email "bugs" or tracking of opposing counsel's email communications with his or her client would be an ethical violation.[19] Irrespective of the wisdom of this conclusion, lawyers must be aware that email "opens" and "forwards" may be tracked and act accordingly. There is always a risk that a lawyer's computer system could be breached. Law firms face the same issues as other companies when it comes to defending against cyber-attacks or hacking and protecting confidential data. Additionally, lawyers have ethical rules that require confidentiality of client information. Thus, if a lawyer chooses to use technology in his/her practice, basic issues must be addressed. The onus is on the lawyer to have technological competence or competent assistance to make sure clients' confidential information or files are reasonably secure and readily accessible, asking questions such as: Are fundamental security measures being met? Are there redundant back-up methods for the storage and retrieval of digital data? Has due diligence research been conducted on prospective service providers?

## Supervision, Delegation or Outsourcing

Some lawyers are more comfortable working with and understanding technology than others. While a lawyer cannot relinquish the ultimate responsibility over a client's case, nothing prohibits a lawyer from receiving assistance with technology and related issues from a lawyer's staff or consultants. For example, a lawyer may need assistance regarding eDiscovery or prevention of the spoliation of evidence involving technology. However, if relying on a non-lawyer, Rule 5.3 provides: "*With respect to a non-lawyer employed or retained by or associated with a lawyer: . . . (b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;. . . .*" Accordingly, when a lawyer decides to use a non-lawyer technology service provider or computer consultant, that lawyer should take reasonable steps to ensure that ethical standards and responsibilities of the lawyer are also met by the conduct of the service provider or consultant.

## Issues to Consider When Using a Vendor

Technology continues to evolve, and a lawyer must use due diligence when considering various technological options or providers. For example, when using various technology vendors for things such as a cloud-based practice management system or for data storage, a lawyer must review and consider the service agreement. Some issues and questions a lawyer may want to consider were outlined in an ethics opinion from the Ohio State Bar:[20]

► What safeguards does the vendor have in place to prevent confidentiality breaches?

► Does the agreement create an enforceable obligation on the vendor's part to safeguard the confidentiality of data?

► Do the terms of the agreement purport to give "ownership" of the data to the vendor, or is the data merely subject to the vendor's license?

► How may the vendor respond to governmental or judicial attempts to obtain disclosure of your client data?

► What is the vendor's policy regarding returning your client data at the termination of its relationship with your firm?

► What plans and procedures does the vendor have in case of natural disaster, electronic power interruption or other catastrophic events?

► Where is the server located (particularly if the vendor itself does not actually host the data, and uses a data center located elsewhere)? Is the relationship subject to international law?

The questions listed above are examples for a lawyer to consider when deciding whether to use a particular type of technology, software or service provider. Updated information about various types of technology and a lawyer's practice can be found at the ABA's Legal Technology Resource Center. [21] Additional resources and information about technology can be found on the Louisiana State Bar Association's website.[22]

## Conclusion

A lawyer must consider the benefits and risks associated with using technology in representing a client. When a lawyer uses technology in representing a client, the lawyer must use reasonable care to protect client information and to assure that client data is reasonably secure and accessible by the lawyer.

## FOOTNOTES

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

2. In addition to confidentiality issues, a lawyer should consider what happens if a dispute arises with a service provider, what format the data is in, and who owns or retains the rights to the digital data.

3. *Cloud Computing for Criminal Lawyers: It's Not the Future Anymore (2016),* Dane S. Ciolino, Alvin R. Christovich Distinguished Professor of Law, Loyola University New Orleans College of Law.

4. Law Sites, *25 States Have Adopted Ethical Duty of Technology Competence* (March 16, 2015); ABA Formal Opinion 06-442, *Review and Use of Metadata*; Ethics Opinion 2011-200 from Pennsylvania; Ethics Opinion 2012-13/4 from New Hampshire; and Informal Advisory Opinion 2013-03 from Ohio.

5. A myriad of Louisiana Rules of Professional

Conduct could be implicated depending on the facts and situation, such as Rule 7.2, *et. seq.*, involving lawyer advertising or solicitation.

6. Rule 1.1(a) of the Louisiana Rules of Professional Conduct, in pertinent part, provides: *"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."*

7. Rule 1.3 of the Louisiana Rules of Professional Conduct, in pertinent part, provides: *"A lawyer shall act with reasonable diligence and promptness in representing a client."*

8. Rule 1.4 of the Louisiana Rules of Professional Conduct, in pertinent part, provides: *"Communication. (a) A lawyer shall: . . . (3) keep the client reasonably informed about the status of the matter;. . . (b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued . . . ."*

9. Rule 1.6(a) and (c) of the Louisiana Rules of Professional Conduct, in pertinent part, provides: *". . . (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b) . . . (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."*

10. Rule 1.15 of the Louisiana Rules of Professional Conduct, in pertinent part, provides: *". . . (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property . . . Other property shall be identified as such and appropriately safeguarded . . . ."*

11. Rule 5.3 of the Louisiana Rules of Professional Conduct provides: *". . . With respect to a non-lawyer employed or retained by or associated with a lawyer: (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; (b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."*

12. "What to Do When Your Data is Breached," *GPSOLO,* Jan./Feb. 2016, Nelson, Ries and Simek.

13. "Prosecutor's Office Paid Ransom to Regain Access to Computers; International Network Busted," *ABA Journal*, 12/6/16.

14. *"[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which a lawyer is subject."*

15. ABA Formal Opinion 18-483, *Lawyers' Obligations After an Electronic Data Breach or Cyberattack.*

16. Quinn Norton, "Byte Rights," *Maximum PC*, September 2010, at 12.

17. This provision was first adopted by the ABA after an Ethics 2020 report which considered changes in the practice due to technology.

18. ABA Formal Opinion 06-442, *Review and Use of Metadata*.

19. Alaska Bar Association Ethics Opinion No. 2016-1.

20. Ohio State Bar Opinion 2013-03, p. 4.

21. *www.americanbar.org/groups/departments_offices/legal_technology_resources.html*.

22. *www.lsba.org/PracticeManagement/TechCenter.aspx*.

# LBLS Accepting Requests for Certification Applications

The Louisiana Board of Legal Specialization (LBLS) is accepting applications for certification in the new specialty of health law through March 31, 2019. The LBLS will accept applications for business bankruptcy law and consumer bankruptcy law certification through Sept. 30, 2019.

In accordance with the Plan of Legal Specialization, a Louisiana State Bar Association member in good standing who has been engaged in the practice of law on a full-time basis for a minimum of five years may apply for certification. Further requirements are that, each year, a minimum percentage of the attorney's practice must be devoted to the area of certification sought, and the attorney must pass a written examination to demonstrate sufficient knowledge, skills and proficiency in the area for which certification is sought and provide five favorable references. Peer review is used to determine that an applicant has achieved recognition as having a level of competence indicating proficient performance handling the usual matters in the specialty field. Refer to the LBLS standards for the applicable specialty for a detailed description of the requirements: *www.lsba.org/goto/specialization.*

In addition to the above, applicants must meet a minimum CLE requirement for the year in which application is made and the examination is administered:

► Health Law — 15 hours of approved health law.

► Bankruptcy Law — CLE is regulated by the American Board of Certification, the testing agency.

With regard to applications for business bankruptcy law and consumer bankruptcy law certification, although the written test(s) is administered by the American Board of Certification, attorneys should apply for approval of the LBLS simultaneously with the testing agency to avoid delay of board certification by the LBLS. Information concerning the American Board of Certification will be provided with the application form(s) and can be viewed online at: *www.abcworld.org*.

Anyone interested in applying for certification should contact LBLS Specialization Director Mary Ann Wegmann, email maryann.wegmann@lsba.org, or call (504)619-0128. For more information, go to the LBLS website link listed above.

# JUDICIAL Notes

*By Trina S. Vincent, Louisiana Supreme Court* | NEW JUDGES... APPOINTMENTS

## New Judges

Walter I. Lanier III

**Walter I. Lanier III** was elected judge of the Louisiana 1st Circuit Court of Appeal, 1st District, Election Section 2, Division A. He previously served as judge of the 17th Judicial District Court, Division C, from 2002-18. He earned his BA degree in 1990 from Nicholls State University and his JD degree in 1993 from Louisiana State University Paul M. Hebert Law Center. From 1993-2002, he worked in private practice focusing on civil litigation including personal injury and insurance defense. From 1998 until his first election to the bench in 2002, he worked as an assistant district attorney handling felony, misdemeanor and juvenile matters. He was a Lafourche Parish Drug Court judge from 2013-18. He is a former president, vice president and secretary-treasurer of the Lafourche Parish Bar Association. He is a member of the Thibodaux Volunteer Fire Department and is a 2005 recipient of the Outstanding Judicial Award from Victims & Citizens Against Crime, Inc. Judge Lanier and his wife, Natalie Dufrene Lanier, are the parents of two children.

Darren M. Roy

**Darren M. Roy** was elected judge of the 34th Judicial District Court, Division D. He earned his BS degree in 1989 from Louisiana State University and his JD degree in 1993 from Loyola University College of Law. He worked as a law clerk for Judge Robert J. Klees of the Louisiana 4th Circuit Court of Appeal. From 1994 until his election to the bench, he worked with the St. Bernard District Attorney's Office. He serves as chair of the St. Bernard Council on Aging and has served as a board member or officer since 2016. Judge Roy and his wife, Megan Suffern Roy, are the parents of two children.

Omar K. Mason

**Omar K. Mason** was elected judge of Orleans Parish Civil District Court, Division E. He earned his BA degree in 1996 from Louisiana State University and his JD degree in 1999 from Loyola University College of Law. Prior to joining Lynn Luker & Associates, L.L.C., in 2003, he practiced law with Carter & Cates, A.P.L.C. From 2006-12, he practiced with Johnson DeLuca Kurisky & Gould, P.C., in Houston, Texas. In 2012, he returned to New Orleans practicing at the law firm Montgomery Barnett, L.L.P. He was recognized as a *Louisiana Super Lawyers* "Rising Star" in 2014 in business litigation and was selected for *Louisiana Super Lawyers* in 2016 and 2017 in business litigation. He serves as chair of the Philanthropy (Outreach) Committee of the New Orleans Chapter of the Federal Bar Association, is an adjunct faculty member at Louisiana State University Paul M. Hebert Law Center and Tulane University Law School, is a certified skills instructor with the National Institute for Trial Advocacy and is a diversity facilitator and CLE presenter for the Louisiana State Bar Association. Judge Mason and his wife, Carla Bringier-Mason, are the parents of two children.

**Christopher Hayden Hester** was elected judge of Baton Rouge City Court, Division A. He earned his BA degree in 2005 from Louisiana State University and his JD degree in 2008 from LSU Paul M. Hebert Law Center. From 2008-10, he worked as an associate attorney at Watson, Blanche, Wilson & Posner, L.L.P., in Baton Rouge. From 2009 until his election to the bench in 2018, he worked as assistant district attorney for the East Baton Rouge Parish District Attorney's Office, where he served as misdemeanor prosecutor from 2009-11, felony prosecutor from 2011-15, chief homicide prosecutor and section chief of the Violent Crimes Unit from 2016-17 and section chief from 2017-18. Judge Hester and his wife, Emily Hester, are the parents of one child.

Christopher Hayden Hester

Erin Wiley Lanoux

**Erin Wiley Lanoux** was elected judge of Ascension Parish Court. She earned her BS degree in 2000 from Louisiana State University and her JD degree in 2003 from LSU Paul M. Hebert Law Center. From 2003-07, she worked as an associate at Phelps Dunbar, L.L.P. She worked as city attorney in Gonzales from 2015 until her election to the bench. She has served on the board of directors of the Ascension Chamber of Commerce since 2014, was a member of the Baton Rouge Area Chamber board of directors from 2017-18 and was the 23rd Judicial District Bar Association president in 2017. Judge Lanoux is married to Jay Lanoux and they are the parents of three children.

Continued next page

## Appointments

► Retired Judge Charles L. Porter was appointed, by order of the Louisiana Supreme Court, to the Mandatory Continuing Legal Education Committee for a term of office which began Jan. 1 and will end on Dec. 31, 2020.

► Robert G. Pugh, Jr. was appointed, by order of the Louisiana Supreme Court, to the Mandatory Continuing Legal Education Committee for a term of office which ends on Dec. 31, 2019.

► Ron Christopher Stamps was appointed, by order of the Louisiana Supreme Court, to the Louisiana Judicial Campaign Oversight Committee for a term of office which began on March 1 and will end on Feb. 28, 2022.

## People Deadlines & Notes

**Deadlines for submitting People announcements (and photos):**

| | **Publication Deadline** |
|---|---|
| August/September 2019 | June 4, 2019 |
| October/November 2019 | August 2, 2019 |
| December 2019/January 2020 | October 4, 2019 |
| February/March 2020 | December 4, 2019 |
| April/May 2020 | February 4, 2020 |

Announcements are published free of charge for members of the Louisiana State Bar Association. Members may publish photos with their announcements at a cost of **$50 per photo**. Send announcements, photos and photo payments (checks payable to Louisiana State Bar Association) to: **Publications Coordinator Darlene M. LaBranche, *Louisiana Bar Journal*, 601 St. Charles Ave., New Orleans, LA 70130-3404 or email dlabranche@lsba.org.**

# PEOPLE

LAWYERS ON THE MOVE . . . NEWSMAKERS

## LAWYERS ON THE MOVE

Adams and Reese, L.L.P., announces that Timothy M. Brinks and L. Cole Callihan have been elected to the partnership in the firm's New Orleans office. Talbot M. Quinn has joined the New Orleans office as an associate. James T. Rogers III, a partner in the New Orleans office, has been appointed as the Litigation Practice Group leader. Lee C. Reid, a partner in the New Orleans office, has joined the firm's Executive Committee.

Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., announces that Captain Danielle M. Aymond has joined the firm's Baton Rouge office as of counsel. Nyka M. Scott returns to the firm as counsel in the New Orleans office.

Baldwin Haspel Burke & Mayer, L.L.C., announces that **Matthew P. Miller** has rejoined the firm's New Orleans office as a partner and **Mat M. Gray III** has joined the New Orleans office in the litigation section.

Barrasso Usdin Kupperman Freeman & Sarver, L.L.C., in New Orleans announces that **Lance W. Waters** has joined the firm as an associate.

Breazeale, Sachse & Wilson, L.L.P., announces that **Jacob S. Simpson** and **Jacob E. Roussel** were named partners in the firm's Baton Rouge office.

Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, L.L.C., announces that **Seth E. Bagwell** and **Brandon T. Darden** were promoted to partners in the firm's New Orleans office.

Chaffe McCall, L.L.P., announces that **Wade P. Webster** has joined the firm's New Orleans office as a partner.

Courington, Kiefer & Sommers, L.L.C., in New Orleans announces that the firm has changed its name to Courington, Kiefer, Sommers, Marullo & Matherne, L.L.C.

Daigle Fisse & Kessenich announces that **Brittany J. Walker** has joined the firm's Covington office as an associate in the trust and estate practice.

Deutsch Kerrigan, L.L.P., announces that five attorneys have been elevated to partner in the New Orleans office — **Sloan L. Abernathy**, **Andrew J. Baer**, **Megan P. Demouy**, **Marianne W. Fletchinger** and **Brian S. Schaps**. Also, **Caroline F. Bordelon** has joined the firm as an associate in the New Orleans office.

Domengeaux Wright Roy & Edwards, L.L.C., in Lafayette announces that **Kaliste Joseph Saloom IV** has joined the firm.

Continued next page


**Sloan L. Abernathy**


**Nicole S. Adler**


**W. Paul Andersson**


**Andrew J. Baer**


**Seth E. Bagwell**


**Caroline F. Bordelon**


**James R. Chastain, Jr.**


**Todd G. Crawford**


**Brandon T. Darden**


**Megan P. Demouy**


**Susan Fahey Desmond**


**Marianne W. Fletchinger**

Erlingson Banks, P.L.L.C., announces that **Emmanuelle L. (Emma) Rollo** has joined the firm's Baton Rouge office as an associate.

Irwin Fritchie Urquhart & Moore, L.L.C., announces that Troy L. Bell and Laura A. Leggette have joined the firm's New Orleans office as associates.

Jackson Lewis, P.C., announces that **Charles F. Seemann III** has been named office managing principal in New Orleans.

Johnson Yacoubian & Paysse, A.P.L.C., in New Orleans announces that **Denise M. Ledet** has joined the firm as special counsel and **Christopher B. Prudhomme** has joined the firm as an associate.

The Kullman Firm announces that **MaryJo L. Roberts**, **Nicole S. Adler** and **Jessica L. Marrero** have been elected as shareholders in the firm's New Orleans office.

Locke Lord, L.L.P., announces that Victoria M. de Lisle, a partner in its New Orleans office, has been elected co-chair of the firm's board of directors.

Lugenbuhl, Wheaton, Peck, Rankin & Hubbard announces that **Todd G. Crawford** has joined the New Orleans headquarters as of counsel. Crawford also manages the firm's newly opened office in Gulfport, Miss. Also, Tyler J. Arbour has joined the firm's New Orleans office as an associate.

McGlinchey Stafford, P.L.L.C., announces that Melissa M. Grand and C. Kieffer Petree have been promoted to members in the Baton Rouge office.

Perrier & Lacoste, L.L.C., announces that **Dustin L. Poché** and **Michael W. Robertson** have become members in the firm's New Orleans office.

Perry Dampf Dispute Solutions announces the addition of four mediators/arbitrators. **James R. (Sonny) Chastain, Jr.**, a partner in the Baton Rouge office of Kean Miller, L.L.P., has joined the mediation panel. **Rebecca K. Wisbar**, a founding partner in Akers & Wisbar, L.L.C., in Baton Rouge, has joined the mediation panel. **Vincent P. Fornias** has joined the group as an arbitrator and early neutral evaluator. **Daniel E. Knowles III**, a retired U.S. magistrate judge, has joined the mediation and arbitration panels.

Taylor, Porter, Brooks & Phillips, L.L.P., in Baton Rouge announces that **Barrye P. Miyagi** and **Jonathan A. Moore** have been elected partners in the firm.

## NEWSMAKERS

Blake R. David, Sr., founding partner in the Lafayette firm of Broussard & David, L.L.C., was elected secretary of the Louisiana Board of Regents and chair of the Regents' Finance Committee.

R. Andrew (Drew) Patty II and Mary H. Drabnis, both members in the Baton Rouge office of McGlinchey Stafford, P.L.L.C., were elected to leadership positions in the American Intellectual Property Law Association. Patty was installed as vice chair of the Chemical Practice Committee, and Drabnis was named vice chair of the Patent Cooperation Treaty Issues Committee. Both positions are for two-year terms.

Jeffrey E. Richardson, a partner in the New Orleans office of Adams and Reese, L.L.P., and Leigh Ann T. Schell, special counsel in the New Orleans office of Adams and Reese, L.L.P., earned the appellate practice specialist designation, as certified by the Louisiana Board of Legal Specialization.


**Vincent P. Fornias**


**Mat M. Gray III**


**Steven E. Hayes**


**Fred L. Herman**


**Daniel E. Knowles III**


**Frank E. Lamothe III**


**Steven J. Lane**


**Denise M. Ledet**


**Jessica L. Marrero**


**Conrad Meyer IV**


**Matthew P. Miller**


**Barrye P. Miyagi**

## PUBLICATIONS

***Best Lawyers in America* 2018 and 2019**

**Herman, Herman & Katz, L.L.C.** (New Orleans): **Steven J. Lane**.

***Louisiana Super Lawyers* 2018**

**Courington, Kiefer, Sommers, Marullo & Matherne, L.L.C.** (New Orleans): Kaye N. Courington, Scott B. Kiefer and Dawn D. Marullo.

**Herman, Herman & Katz, L.L.C.** (New Orleans): **Steven J. Lane**, Top 50 New Orleans.

***Louisiana Super Lawyers* 2019**

**Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.** (Baton Rouge, Mandeville, New Orleans): Edward H. Arnold III, Brian M. Ballay, Alton E. Bayard III, Craig L. Caesar, Laura E. Carlisle, Phyllis G. Cancienne (Top 25 Women), Meghan E. Carter, Roy C. Cheatwood, Matthew S. Chester, Katherine L. Cicardo, Robert C. Clotworthy, Christopher O. Davis, Nancy Scott Degan (Top 25 Women), Daniel J. Dysart, Katie L. Dysart, Matthew R. Emmons, Paula J. Estrada de Martin, Mark W. Frilot, Monica A. Frois, Steven F. Griffith, Jr. (Top 50 Louisiana, Top 50 New Orleans), Camalla K. Guyton, Christopher M. Hannan, Jan M. Hayden (Top 10 Louisiana, Top 50 New Orleans, Top 25 Women), Kristen L. Hayes, William H. Howard III, Benjamin West Janke, Colleen C. Jarrott, Matthew C. Juneau, Kenneth M. Klemm, Amelia Williams Koch, Kent A. Lambert, Jon F. Leyens, Jr., Elizabeth A. Liner, Alexander M. McIntyre, Jr., Patricia B. McMurray, Mark W. Mercante, Erin E. Pelleteri, Lacey E. Rochester, Tessa P. Vorhaben, Paul S. West, Matthew A. Woolf and Adam B. Zuckerman.

**Baldwin Haspel Burke & Mayer, L.L.C.** (New Orleans): David L. Carrigee, Lawrence R. DeMarcay III, Brodie G. Glenn, S. Beaux Jones, Joel A. Mendler, Jerome J. Reso, Jr., Leon H. Rittenberg III, John A. Rouchell, Stephen P. Schott, William B. Schwartz, Andrew T. Sullivan, Matthew A. Treuting, Jeannette S. Waring and Karl J. Zimmermann.

**Barrasso Udsin Kupperman Freeman & Sarver, L.L.C.** (New Orleans): Judy Y. Barrasso, Jamie L. Berger, Celeste R. Coco-Ewing, George C. Freeman III, John W. Joyce, Stephen H. Kupperman, Kelsey L. Meeks, Stephen L. Miles, H. Minor Pipes III, Andrea Mahady Price, Richard E. Sarver, Kyle W. Siegel, Steven W. Usdin and Charles-Theodore Zerner.

**Breazeale, Sachse & Wilson, L.L.P.** (Baton Rouge, New Orleans): Robert L. Atkinson, Thomas M. Benjamin, Jude C. Bursavich, Peter J. Butler, Jr., David R. Cassidy, Joseph J. Cefalu III, Carroll Devillier, Jr., Murphy J. Foster III, Alan H. Goodman, Druit G. Gremillion, Jr., Emily B. Grey, Scott N. Hensgens, Rachael A. Jeanfreau, Eric B. Landry, Eve B. Masinter, Christopher A. Mason, Van R. Mayhall, Jr., Richard G. Passler, Thomas R. Temple, Jr. and Sunny Mayhall West.

**Chaffe McCall, L.L.P.** (New Orleans): Walter F. Becker, Jr., G. Wogan Bernard, H. Michael Bush, Katharine R. Colletta, E. Howell Crosby, Alan R. Davis, Leah Nunn Engelhardt, Adelaida J. Ferchmin, Thomas D. Forbes, Edward N. George III, Douglas L. Grundmeyer, Douglas R. Holmes, Fernand L. Laudumiey IV, Julie D. Livaudais, David J. Messina, Corinne A. Morrison, Amy L. McIntire, Sarah Voorhies Myers, John F. Olinde, Robert S. Rooth, G. Phillip Shuler III, Phillip B. Sherman, Daniel A. Tadros, Brent A. Talbot and Derek A. Walker.

**Chehardy, Sherman, Williams, Murray, Recile, Stakelum & Hayes, L.L.P.** (Hammond, Metairie): **Steven E. Hayes**, **Fred L. Herman**, **Conrad Meyer IV**, **Patrick K. Reso**, **David R. Sherman**, **P.J. Stakelum III** and **James M. Williams**.

**Forman Watkins & Krutz, L.L.P.** (New Orleans, Jackson, MS): Charles

**Jonathan A. Moore**

**Dustin L. Poché**

**Christopher B. Prudhomme**

**Patrick K. Reso**

**MaryJo L. Roberts**

**Michael W. Robertson**

**Emmanuelle L. Rollo**

**Jacob E. Roussel**

**Kaliste J. Saloom IV**

**Brian S. Schaps**

**Kristi S. Schubert**

**Charles F. Seemann III**

H. Abbott, Mary R. Arthur, Melissa D. Fuller, Erin W. Latuso, Elizabeth R. Penn and T. Peyton Smith.

**Herman, Herman & Katz, L.L.C.** (New Orleans): **Steven J. Lane**, Top 50 New Orleans.

**Jackson Lewis, P.C.** (New Orleans): **Susan Fahey Desmond** and **René E. Thorne**, both on the Top 25 Women in Louisiana.

**Johnson Yacoubian & Paysse, A.P.L.C.** (New Orleans): Robert B. Acomb III, Edward S. Johnson and Alan J. Yacoubian.

**Lamothe Law Firm, L.L.C.** (New Orleans): **Frank E. Lamothe III** and **Kristi S. Schubert**.

**Leake & Andersson, L.L.P.** (New Orleans): **W. Paul Andersson**.

**Lugenbuhl, Wheaton, Peck, Rankin & Hubbard** (Baton Rouge, New Orleans): Tyler J. Arbour, Ashley L. Belleau (Top 25 Women), Joseph P. Briggett, Christopher T. Caplinger, Daniel B. Centner, Stanley J. Cohn, Todd G. Crawford, Celeste D. Elliott, Jay Farmer, Delos E. Flint, Jr., Meredith S. Grabill, Joseph P. Guichet, Benjamin W. Kadden, Rose McCabe LeBreton, Stewart F. Peck (Top 50 New Orleans), Seth A. Schmeeckle, Heather N. Sharp, David B. Sharpe, S. Rodger Wheaton and Kristopher T. Wilson.

**McGlinchey Stafford, P.L.L.C.** (Baton Rouge, New Orleans): Ricardo A. Aguilar, Stephen P. Beiser, Magdalen Blessey Bickford, Camille R. Bryant, Rudy J. Cerone, Mark J. Chaney III, Marshall T. Cox, Mark R. Deethardt, Sarah Edwards, Larry Feldman, Jr., Michael D. Ferachi, Zelma M. Frederick, Melissa M. Grand, Christine Lipsey, Kathleen A. Manning, Christopher S. Nichols, Colvin G. Norwood, Jr. (Top 50 New Orleans), Erin Fury Parkinson, Kristi W. Richard, Michael H. Rubin, Eric J. Simonson, Charles S. Smith and Stephen P. Strohschein.

**Morrow, Morrow, Ryan, Bassett & Haik** (Lafayette, New Iberia, Opelousas): Jeffrey M. Bassett, Taylor J. Bassett, Richard T. Haik, Sr., Richard T. Haik, Jr., Patrick C. Morrow, Sr., P. Craig Morrow, Jr., James P. Ryan and Kathleen E. Ryan.

***New Orleans Magazine* 2018 and 2019**

**Herman, Herman & Katz, L.L.C.** (New Orleans): **Steven J. Lane**, Top Family Lawyers.

**David R. Sherman**

**Jacob S. Simpson**

**P.J. Stakelum III**

**René E. Thorne**

**Brittany J. Walker**

**Lance W. Waters**

**Wade P. Webster**

**James M. Williams**

**Rebecca K. Wisbar**

UPDATE

# Centenary Signs Admissions Agreement with LSU Law Center

Centenary College signed a memorandum of understanding with Louisiana State University Paul M. Hebert Law Center on Jan. 23 to create a partnership that will provide Centenary students who meet LSU Law admission requirements and who are interested in public interest careers an opportunity for an expedited admissions review and notification process.

"This public/private partnership also links an institution located in south Louisiana — the LSU Law Center — with one in north Louisiana — Centenary College. Both schools have great traditions and bright futures," LSU Law Center Dean Thomas C. Galligan, Jr. said. "At the Law Center, we have had many wonderful students from Centenary over the years. We hope with this agreement that the number will grow."

With the agreement, graduating students from Centenary who complete an undergraduate minor in legal studies, have an interest in public interest work, submit their application by Dec. 1, and complete the LSU Law admissions requirements will receive priority consideration, automatic financial aid consideration, an early admissions decision for the following year's matriculating class, and will be presumptively admitted assuming they meet LSU Law's other admissions requirements. This arrangement offers a pathway to admission with expedited consideration and early decision, but it does not guarantee admission to all candidates who meet the basic requirements. The LSU Law Center's Admissions Committee still reviews each candidate and reserves the right to approve or deny admission.

Seven Centenary graduates currently are enrolled at the LSU Law Center, and more than 70 Centenary alumni have graduated from LSU Law since 1970.

**The Louisiana State Bar Association (LSBA) Diversity Committee's Specialty Bars Subcommittee met Jan. 19 with 2018-19 LSBA President Barry H. Grodsky to discuss how the LSBA can continue to support specialty bar initiatives. Attending, from left, Grodsky; Maria Pabon, president of the Hispanic Lawyers Association of Louisiana; Michael B. Victorian, co-chair, LSBA Outreach Committee; Ezra Pettis, Jr., president-elect of the Louis A. Martinet Legal Society, Inc. Lake Charles Chapter; Ebony S. Morris, vice president of membership, Greater New Orleans Louis A. Martinet Legal Society, Inc.; and Mary L. Jackson, president of the Shreveport-Bossier Black Lawyers Association.**

# La. District Judges Association Elects New Officers

The Louisiana District Judges Association elected 2018-19 officers at its October 2018 meeting. The officers will serve through Sept. 30, 2019. President is Judge Lisa M. Woodruff-White, East Baton Rouge Family Court; First Vice President Judge Guy E. Bradberry, 14th Judicial District Court; Second Vice President Judge Brady D. O'Callaghan, 1st Judicial District Court; Secretary Judge Piper D. Griffin, Orleans Parish Civil District Court; Treasurer Judge Scott U. Schlegel, 24th Judicial District Court; and Immediate Past President Judge C. Wendell Manning, 4th Judicial District Court.

## SEND YOUR NEWS!

The *Louisiana Bar Journal* would like to publish news and photos of your activities and accomplishments.

Email your news items and photos to:
LSBA Publications Coordinator
Darlene LaBranche at
dlabranche@lsba.org.

Or mail press releases to:
Darlene LaBranche,
Publications Coordinator
601 St. Charles Ave.
New Orleans, LA 70130-3404

**Members of the board of the New Orleans Chapter of the Federal Bar Association (FBA) include, seated from left, Erin K. Arnold, U.S. Bankruptcy Court; Megan M. Dupuy, U.S. District Court, EDLA; Chief Magistrate Judge Karen Wells Roby, U.S. District Court, EDLA; attorney Diana A. Mercer; attorney Steven F. Griffith, Jr.; attorney Kathryn M. Knight, 2018-19 president, FBA New Orleans Chapter; Chief Judge Nannette J. Brown, U.S. District Court, EDLA; Judge Susie Morgan, U.S. District Court, EDLA; Magistrate Judge Janis van Meerveld, U.S. District Court, EDLA; and Judge Mary Ann V. Lemmon, U.S. District Court, EDLA. Standing from left, attorney Lawrence J. Centola III; attorney Brian J. Capitelli; attorney Joelle F. Evans; attorney Claude J. Kelly III; attorney John T. Balhoff II; attorney Michael J. Ecuyer; attorney Alida C. Hainkel; attorney Stephen C. Myers; attorney Lesli D. Harris; attorney W. Raley Alford III, 2017-18 president, FBA New Orleans Chapter; attorney Donna P. Currault; attorney Bradley J. Schlotterer; attorney Andrea M. Price; Judge Carl J. Barbier, U.S. District Court, EDLA; attorney Diana C. Surprenant; attorney Stephen J. Herman; attorney Kelly M. Rabalais; and Judge Omar K. Mason, Orleans Parish Civil District Court.**

# Federal Bar Association New Orleans Chapter Conducts Annual Meeting

The New Orleans Chapter of the Federal Bar Association held its annual meeting and luncheon on Aug. 23, 2018, in New Orleans. Dean Erwin Chemerinsky, Berkeley Law/University of California, was the keynote speaker.

During the luncheon, Immediate Past President W. Raley Alford III presented several awards. Receiving 2018 President's Awards were Judge Omar K. Mason, Orleans Parish Civil District Court; Annie G. McBride, Stone Pigman Walther Wittmann, L.L.C.; and Paul M. Sterbcow, Lewis, Kullman, Sterbcow & Abramson.

Ashley L. Belleau, with the firm Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, received the John R. (Jack) Martzell Professionalism Award. David H. Williams with Southeast Louisiana Legal Services received the Camille F. Gravel, Jr. Public Service Award.

Following the presentation of awards, new officers were installed — Kathryn M. Knight, president; Judge Nannette J. Brown, president-elect; Steven F. Griffith, Jr., treasurer; Michael J. Ecuyer, recording secretary; Donna P. Currault, membership chair; and Sara A. Johnson, Young Lawyers Division chair.

**W. Raley Alford III, fourth from left, immediate past president of the New Orleans Chapter of the Federal Bar Association, presented several awards during the Chapter's annual meeting and luncheon. Award recipients, from left, Judge Omar K. Mason, President's Award; Ashley L. Belleau, John R. (Jack) Martzell Professionalism Award; Paul M. Sterbcow, President's Award; Alford; Annie G. McBride, President's Award; and David H. Williams, Camille F. Gravel, Jr. Public Service Award.**

The luncheon concluded with remarks from chapter President Kathryn M. Knight.

**From left, Kim M. Boyle, Phelps Dunbar LLP, Hidden Figure Award recipient; Dana M. Douglas, Liskow & Lewis, A.P.L.C., Outstanding Minority Partner in a Majority Firm recipient; Chief Judge Nanette J. Brown, U.S. District Court, Eastern District of Louisiana, Excellence in Judiciary Award recipient; and Sandra Diggs Miller, Entergy, Outstanding Corporate Counsel Award recipient.**

**Several Louisiana attorneys received National Bar Association awards during the association's Women Lawyers Division Achievement Awards Breakfast held in conjunction with the 93rd annual convention in July-August 2018 in New Orleans.**

**From left, Ashley J. Heilprin, Phelps Dunbar LLP, Outstanding Young Lawyer recipient; Royce I. Duplessis, Duplessis Law Firm, LLC, State Representative, District 93, YLD/Section of the Year Award recipient; and Dana M. Douglas, Liskow & Lewis, A.P.L.C., Outstanding Minority Partner in a Majority Firm recipient.**

# Greater Lafayette Martinet Chapter Celebrates 35th Anniversary

The Louis A. Martinet Legal Society, Inc. (LAMS) Greater Lafayette Chapter, formerly known as the Southwest Louisiana Lawyer Association, Inc., celebrated its 35th anniversary on Dec. 15, 2018, at a gala in Lafayette. The theme of the event was "Preserving our history, celebrating our present, and preparing for our future."

Keynote speaker was Dr. Adren O. Wilson, deputy chief of staff for programming and planning, Office of the Governor. Event Committee Co-Chairs Orida B. Edwards and Glenn M. Lazard, along with LAMS President Franchesca L. Hamilton-Acker, organized the event.

One of the organization's founders, Lloyd Dangerfield, was acknowledged for his vision and commitment to LAMS.

The anniversary celebration also included a Senior Awareness Summit/ Community Service event on Dec. 14, 2018, at the Clifton Chenier Community Center. The panel was moderated by McKinley B. James, Jr., Community Service chair. Panelists Franchesca L. Hamilton-Acker, Glenn M. Lazard and Orida B. Edwards discussed advanced directives important to seniors and information on how to avoid scams.

**The Louis A. Martinet Legal Society, Inc. (LAMS) Greater Lafayette Chapter celebrated its 35th anniversary on Dec. 15, 2018. Organizing the event were, from left, Orida B. Edwards, LAMS President Franchesca L. Hamilton-Acker and Glenn M. Lazard.**

The Southwest Louisiana Lawyer Association, Inc. was formed on May 13, 1983, with the purpose of promoting opportunities for professional affiliation for African-American lawyers. In 2005, after 22 years of existence, the association changed its name to the Louis A. Martinet Legal Society, Inc. Greater Lafayette Chapter.

LAMS is a recipient of the Louisiana Bar Foundation Jock Scott Community Partnership Panel Grant. Funds were used for the creation of an anniversary video commemorating the history of the organization.

**The Louis A. Martinet Legal Society, Inc. (LAMS) Greater Lafayette Chapter, formerly known as the Southwest Louisiana Lawyer Association, Inc., celebrated its 35th anniversary on Dec. 15, 2018. Lloyd Dangerfield, left, one of the organization's founders, was acknowledged for his vision and commitment to LAMS. LAMS President Franchesca L. Hamilton-Acker presented the award.**

**The New Orleans Bar Association's Young Lawyers Section partnered with the New Orleans Area Habitat for Humanity to hold its Bench and Bar Build in the Lower Ninth Ward of New Orleans in October 2018. Several judge and lawyer volunteers spent the day working on the house that a single mother would soon purchase and occupy with her children.**

**The Louis A. Martinet Legal Society, Inc. Southwest Louisiana Chapter held its first CLE seminar and scholarship dinner cruise on Aug. 3, 2018, in Lake Charles. Louisiana Supreme Court Associate Justice James T. Genovese was the guest speaker. Among those attending the event were, from left, Ezra Pettis, Jr., president-elect, Southwest Louisiana Martinet Chapter; Shayna L. Sonnier, treasurer, Louisiana State Bar Association; Chantell M. Smith, Louisiana Workforce Commission; and Derrick D. Kee, president, Southwest Louisiana Martinet Chapter.**

## President's Message

# Q&A with 2019-20 LBF President Amanda W. Barnett

*Interviewed by 2019-20 Secretary Alan G. Brackett*

**Brackett:** Tell us about yourself and your family.

**Barnett:** I am the youngest of four daughters. My father was an attorney and I spent many hours at his office, occasionally tagging along with him to court. He was a retired Army colonel and went to Louisiana State University Law School after retirement, graduating in 1970 and opening an office as a sole practitioner in Amite, La., where I grew up. Amite was a place that fostered inclusion and caring for, and knowing, your neighbor, values that have stayed with me.

I went to H. Sophie Newcomb College of Tulane University and then to Louisiana State University Paul M. Hebert Law Center, where I met my husband, Barry Barnett. Our first date was a packed lunch on the steps of the "old" law school building across from the parade grounds, and Professor Baier came and sat down with us — that was 34 years ago.

We have four children — Katherine, a PhD candidate at Harvard; Lee, a PhD candidate at Johannes Kepler University in Austria; Marcus, a recent graduate of LSU; and Lily, a freshman at Rhodes College in Memphis. In 1995, we moved from the New Orleans area, leaving firms there, to come to Alexandria, where we raised our children. I joined Gold, Weems, Bruser, Sues & Rundell. Alexandria is home now. Since 2010, I have been general counsel for Red River Bank and Red River Bancshares, Inc. I'm lucky to be a part of a company that truly believes in being a good corporate citizen. My commitment to the Louisiana Bar Foundation is welcomed and supported.

**Brackett:** How did you get involved with the Louisiana Bar Foundation (LBF)?

**Barnett:** In 2008, at the Gold firm, I was involved in complicated litigation representing children with special needs and the right to a free and appropriate public education. During that case, I heard about Louisiana Appleseed's project researching equitable funding for special needs school children in various Louisiana school districts and I volunteered to work on the project. At that year's Good Apple Gala, Mathile Abramson, a past LBF president and a former classmate at LSU, asked if I was a Fellow. She explained the LBF's role and mission and I became a Fellow, volunteering on the Central Community Partnership Panel. I am so glad I did. I love being a part of the LBF.

**Amanda W. Barnett**

**Brackett:** What role does the LBF play in promoting access to the justice system?

**Barnett:** The LBF's role in promoting access to the justice system is hard to overstate — the LBF is the largest funder of civil legal aid in Louisiana. The LBF supports non-profit organizations providing free, civil legal representation to the indigent, law-related education to the public and administration of justice projects. Since 1989, the LBF has distributed nearly $78 million to hundreds of Louisiana non-profit organizations. We serve as the fiscal administrator for Louisiana's Child in Need of Care Program which provides free legal representation to children in foster care. We also administer the Louisiana Supreme Court's Interest on Lawyers' Trust Accounts Program.

**Brackett:** The LBF strives to provide consistent funding for civil legal aid. Why is this the LBF's responsibility?

**Barnett:** The LBF's mission is to "Fund Civil Legal Aid and Promote Access to Justice." We have a concomitant responsibility to provide consistent funding to fulfill our mission. Much of our mission is carried out through our grantees. They desperately need consistent funding; without it, it is difficult for grantees to focus on providing civil legal aid and promoting access to justice. No entity can operate without reliable funding.

**Brackett:** So, you're in an elevator with a Louisiana lawyer who isn't an LBF Fellow. What do you say to that lawyer in a few floors to convince him/her of the need to support the LBF?

**Barnett:** I would recount how I became a Fellow, realizing that my time, efforts and contributions would have a greater impact as a Fellow. The LBF provides a platform to more easily provide legal assistance to the indigent than one can alone. We all have a duty to provide pro bono services in some way. Even if this duty is not always keenly felt, we recognize the responsibility.

I would mention the cost effectiveness of LBF donations. For every dollar invested in Louisiana's civil legal aid providers, the state receives $9.13 in immediate and long-term financial benefits, according to the LBF's 2018 Economic Impact and Social Return on Investment study.

Lastly, I would discuss the fellowship enjoyed when meeting members across the state. We meet with a singlemindedness of purpose, helping the vulnerable of our state, not as adversaries, litigants, legislators or judges. LBF volunteers work together.

**Brackett:** When you look back on your term as president of the LBF, what's the one thing that you hope stands out as the greatest achievement?

**Barnett:** After Katrina, I helped organize and staff legal help desks in the Alexandria FEMA shelters. I was struck by how difficult it was to get people in contact with available resources. Technology has advanced light years since 2005. It's time for the civil legal aid community to take advantage of the digital revolution. I hope in this next year the LBF can successfully bring about the use of innovative technologies and digital initiatives to improve the statewide delivery of civil legal aid services.

# LBF Study Results: Civil Legal Aid is a Good Investment

The "2018 Economic Impact and Social Return on Investment of Civil Legal Aid Services for Louisiana" is complete. The Louisiana Bar Foundation (LBF) engaged Community Services Analysis, L.L.C., to conduct the study. Community Services Analysis is the leading provider of Social Return on Investment Analysis (SROI) in the United States, having completed more than 220 economic impact and SROI studies for local and state agencies around the country, and serves as the exclusive provider of SROI services to the National Legal Aid & Defender Association.

SROI is an internationally standardized and accepted process for measuring and understanding the financial impact of a social services organization. While SROI is built on the logic of cost/benefit analysis, it measures both the immediate value and long-term consequential financial values created by the organization through its delivery of services to the community. More than 40 civil legal aid organizations providing services in Louisiana participated in this analysis.

The Social Return on Investment Analysis completed for Louisiana's civil legal aid organizations is a measurement of the values delivered during the fiscal year 2018. The Analysis revealed that the net economic impact value resulting from Louisiana civil legal activities during the year totaled $95,124,000. These values are based on the number of clients and types of legal matters handled during the period. In fiscal year 2018, Louisiana's civil legal aid organizations provided assistance in more than 100 types of civil legal problems, including family law, housing, healthcare, consumer protection, public benefits, employment and community support issues.

The total net social return on investment for Louisiana's civil legal aid programs during the 2018 fiscal year was 913 percent. Stated differently, for every $1 invested in Louisiana's civil legal aid services, these programs deliver $9.13 in immediate and long-term consequential financial benefits. The social return on investment for Louisiana's civil legal aid organizations is higher than comparative values for many other types of social service organizations based on the delivery of many types of legal services that result in significant future cost savings or additional income to the Louisiana and the number of volunteer, pro bono, hours of legal services delivered by attorneys in Louisiana.

Investing in civil legal aid is a powerful way to help people solve critical problems and prevent events that are personally harmful and expensive for society. As the Analysis illustrates, investing in civil legal aid causes a ripple effect, not only affecting the families served, but the community at large. Schools, businesses, government agencies and the state benefit from resolving civil legal problems.

The LBF is committed to serving all Louisiana households in poverty. Society improves when people understand the law and have equal access to justice. The LBF hopes this Analysis will better educate the public on the value of civil legal aid to both the indigent and the state's social, economic and health conditions, and will lead to restored funding of civil legal services for Louisiana's most vulnerable citizens. With Louisiana having one of the highest poverty rates, the time for restored civil legal funding is critical.

# More than $100,000 Awarded to Louisiana Non-Profits

The Louisiana Bar Foundation (LBF) granted funding to several non-profits identified by local panels throughout the state. The LBF has nine regional Community Partnership Panels (CCP) which identify areas of need. The CPPs foster collaboration, respond to arising community needs, and encourage local involvement in the designation of grant funds. Each panel has an annual budget of $15,000. Those CPPs that have not yet designated all of their funding will do so by June 30. Grantees are listed by region.

**Acadiana ..... $13,900**
Louis A. Martinet Society ..... $3,500
The Extra Mile ..... $10,400

**Bayou Region ..... $15,000**
CASA of Lafourche ..... $5,000
CASA of Terrebonne ..... $5,000
The Haven ..... $5,000

**Central Region ..... $15,000**
Teen Court of Avoyelles ..... $6,500
Children's Advocacy Network ..... $6,755
LBF Oral History Project ..... $1,745

**Greater Orleans ..... $15,000**
CrescentCare ..... $3,500
Justice and Accountability Center ..... $3,500
Lower 9th Ward
Homeownership Association ..... $7,000
Pink House ..... $1,000

**Northeast ..... $15,000**
Acadiana Legal Service Corp. ..... $4,500
Pine Hills Advocacy Center ..... $10,000
LBF Oral History Project ..... $500

**Northshore ..... $15,000**
Children's Advocacy Center -
Hope House ..... $9,000
Family Promise of St. Tammany ... $2,500
Southeast Louisiana Legal Services .... $3,000
LBF Oral History Project ..... $500

**Northwest ..... $11,575**
Volunteers for Youth Justice ..... $10,000
LBF Oral History Project ..... $1,575

## LBF Announces New Fellows

The Louisiana Bar Foundation welcomes the following new Fellows:

Hon. Marcus L. Hunter ..... Monroe

Adrienne M. Wood ..... Baton Rouge

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**The Metropolitan Council** of the City of Baton Rouge and Parish of East Baton Rouge is accepting résumés for the position of Parish Attorney. Prospective applicants may contact the Council Administrator-Treasurer's office at (225)389-3123 to obtain a copy of the job description if they desire. Résumés and cover letters must be submitted to the Council Administrator-Treasurer's Office (via courier or hand delivery to 222 St. Louis St., Room 364, Baton Rouge, LA 70802; or via mail P.O. Box 1471, Baton Rouge, LA 70821). It is the responsibility of the applicant to ensure delivery of the résumé by the deadline. Deadline for submission is 4 p.m. on Friday, May 17, 2019. No résumés will be accepted after this time. Contact Ashley Beck, Council Administrator-Treasurer, at (225)389-3123, or email abeck@brla.gov with any questions.

**Associate attorney**. Must have plaintiff personal injury litigation experience. Experience in jury trials, expert and witness depositions, pleading preparation (complaints/petition/motions), brief writing, party and third-party discovery (preparation, response), federal courts. Handle own caseload, minimal supervision. Work on percentage of recovery with draw. Location: Houston, TX. Contact Mary Kinsley, (713)344-0401, ext. 316, email om@dpdlawfirm.com.

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## SERVICES

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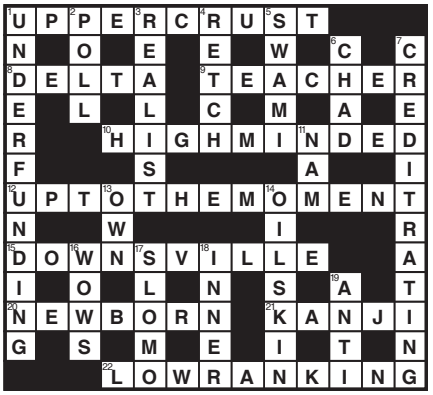
## NOTICE

**Notice is hereby given** that Jerome W. Dixon intends on petitioning for reinstatement/readmission to the practice of law. Any person(s) concurring with or opposing this petition must file notice of same within 30 days with the Louisiana Attorney Disciplinary Board, Ste. 310, 2800 Veterans Memorial Blvd., Metairie, LA 70002.

## INDEX TO ADVERTISERS



**ANSWERS** for puzzle on page 434.



# The Last WORD

*By Edward J. Walters, Jr.*

## IPSE DIXIT: SO, WHO DO YOU TRUST?

So back in the 1990s, Johnny deGravelles — now Federal Judge John deGravelles — is trying a case in Baton Rouge in front of 19th JDC Judge Kay Bates, who is now happily retired.

Johnny had gotten the court reporter to type up the testimony so that he could blow up portions of it in his closing argument. His opponent, Frank Gremillion, objected and argued that because depositions can't be taken into the jury room, and since the trial transcript is not available to the jury during deliberations, he shouldn't be allowed to use it during closing. His response was: "First, that this is not going into the jury room, it is argument, and, second, would you rather me tell the jury what I think the witness said or tell them what — verbatim — he actually said?"

Judge Bates takes a break to think about it.

She goes into her chambers and quietly calls someone she trusts who really knows a lot about evidence, or she thought he did. He was, after all, Professor George Pugh's research assistant for many, many years.

She asks about this thorny evidentiary question. She, of course, doesn't tell him who the lawyers are.

His response was that Professor Pugh addresses this very issue in his evidentiary course. He says, "Wigmore says no because, like the 'Golden Rule,' the jury, which must rely on its own memory, will tend to be misled by the belief that the typed testimony is superior to their own memory. Says Wigmore, the same recitation out of the advocate's mouth does not suffer that same risk. Plus, if one side introduces

some testimony, the other side will introduce some more, and ultimately the whole trial will be submitted TWICE to the jury."

She gets this opinion and goes back to court. We now peek into the courtroom where the following ensues (or something like it):

*Judge Bates: OK, we are back on the record. I spoke to someone whose judgment I trust on evidentiary issues, and he told me that this transcript is inadmissible, so, objection sustained, I will keep it out.*

*deGravelles: Your Honor, respectfully, who did you call who gave you this obviously erroneous opinion?*

*Judge Bates: Frank Holthaus.*

*deGravelles: Frank Holthaus? FRANK HOLTHAUS?!??? MY LAW PARTNER FRANK HOLTHAUS?!?!?!?!???*

In spite of the above, they remained partners for a very long time — until Johnny took the bench — and remain very good friends to this day. I'm sure they rarely speak about this evidentiary issue, since one of them is clearly wrong.

*Edward J. Walters, Jr., a partner in the Baton Rouge firm of Walters, Papillion, Thomas, Cullens, L.L.C., is a former Louisiana State Bar Association secretary and editor-in-chief of the* Louisiana Bar Journal. *He is a current member of the* Journal's *Editorial Board and chair of the LSBA Senior Lawyers Division. (walters@lawbr.net; 12345 Perkins Rd., Bldg. 1, Baton Rouge, LA 70810)*

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