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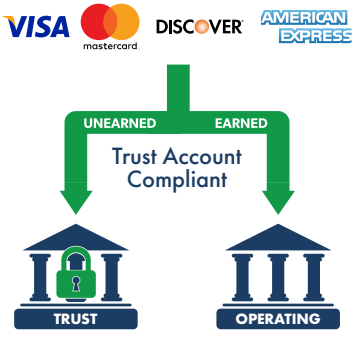

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2018 Judicial Interest Rate is 5%

Pursuant to authority granted by La. R.S. 13:4202(B)(1), as amended by Acts 2001, No. 841, the Louisiana Commissioner of Financial Institutions has determined that the judicial rate of interest for calendar year 2018 will be five (5%) percent per annum.

La. R.S. 13:4202(B), as amended by Acts 2001, No. 841, and Acts 2012, No. 825, requires the Louisiana Commissioner of Financial Institutions to determine the judicial interest rate for the calendar year following the calculation date. The commissioner has determined the judicial interest rate for the calendar year 2018 in accordance with La. R.S. 13:4202(B)(1).

The commissioner ascertained that on Oct. 2, 2017, the first business day of the month of October, the approved discount rate of the Federal Reserve Board of Governors was one and three quarters (1.75%) percent.

La. R.S. 13:4202(B)(1) mandates that on and after Jan. 1, 2002, the judicial interest rate shall be three and one-quarter percentage points above the Federal Reserve Board of Governors-approved discount rate on the first business day of October 2017. Thus, the effective judicial interest rate for the calendar year 2018 shall be five (5%) percent per annum.

La. R.S. 13:4202(B)(2) provides that the publication of the commissioner's determination in the Louisiana Register "shall not be considered rulemaking within the intendment of the Administrative Procedure Act, R.S. 49:950 et seq., and particularly R.S. 49:953." Therefore, (1) a fiscal impact statement, (2) a family impact statement, (3) a poverty impact statement, (4) a small business statement, (5) a provider impact statement, and (6) a notice of intent are not required to be filed with the Louisiana Register.

— John P. Ducrest, CPA
Commissioner of Financial Institutions
Date: October 5, 2017

Judicial Interest Rate Calculator Online!

Need to calculate judicial interest? Check out the Judicial Interest Rate Calculator (courtesy of Alexandria attorney Charles D. Elliott) on the Louisiana State Bar Association's website.

Go to: *www.lsba.org/Members/JudicialInterestRate.aspx.*

Judicial Interest Rates Through 2018

Date	Rate
Prior to Sept. 12, 1980	7.00 percent
Sept. 12, 1980 to Sept. 10, 1981	10.00 percent
Sept. 11, 1981 to Dec. 31, 1987	12.00 percent
Jan. 1, 1988 to Dec. 31, 1988	9.75 percent
Jan. 1, 1989 to Dec. 31, 1989	11.50 percent
Jan. 1, 1990 to Dec. 31, 1990	11.50 percent
Jan. 1, 1991 to Dec. 31, 1991	11.00 percent
Jan. 1, 1992 to Dec. 31, 1992	9.00 percent
Jan. 1, 1993 to Dec. 31, 1993	7.00 percent
Jan. 1, 1994 to Dec. 31, 1994	7.00 percent
Jan. 1, 1995 to Dec. 31, 1995	8.75 percent
Jan. 1, 1996 to Dec. 31, 1996	9.75 percent
Jan. 1, 1997 to July 31, 1997	9.25 percent
Aug. 1, 1997 to Dec. 31, 1997	7.90 percent
Jan. 1, 1998 to Dec. 31, 1998	7.60 percent
Jan. 1, 1999 to Dec. 31, 1999	6.73 percent
Jan. 1, 2000 to Dec. 31, 2000	7.285 percent
Jan. 1, 2001 to Dec. 31, 2001	8.241 percent
Jan. 1, 2002 to Dec. 31, 2002	5.75 percent
Jan. 1, 2003 to Dec. 31, 2003	4.50 percent
Jan. 1, 2004 to Dec. 31, 2004	5.25 percent
Jan. 1, 2005 to Dec. 31, 2005	6.00 percent
Jan. 1, 2006 to Dec. 31, 2006	8.00 percent
Jan. 1, 2007 to Dec. 31, 2007	9.50 percent
Jan. 1, 2008 to Dec. 31, 2008	8.50 percent
Jan. 1, 2009 to Dec. 31, 2009	5.50 percent
Jan. 1, 2010 to Dec. 31, 2010	3.75 percent
Jan. 1, 2011 to Dec. 31, 2011	4.00 percent
Jan. 1, 2012 to Dec. 31, 2012	4.00 percent
Jan. 1, 2013 to Dec. 31, 2013	4.00 percent
Jan. 1, 2014 to Dec. 31, 2014	4.00 percent
Jan. 1, 2015 to Dec. 31, 2015	4.00 percent
Jan. 1, 2016 to Dec. 31, 2016	4.00 percent
Jan. 1, 2017 to Dec. 31, 2017	4.25 percent
Jan. 1, 2018 to Dec. 31, 2018	5.00 percent

By John E. McAuliffe, Jr.

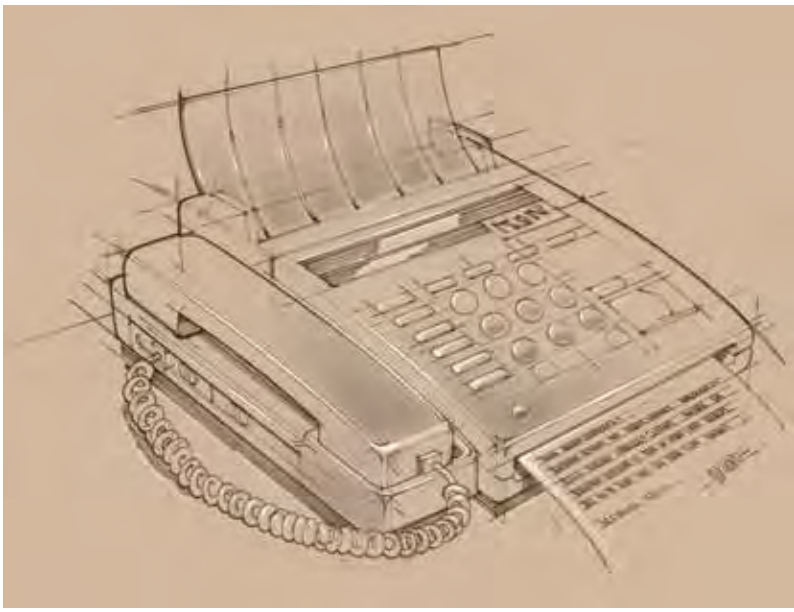
Facsimile and Other Evils

I will begin my complaining in an arbitrary manner — the facsimile machine. This evil invention spawned the expectation of a more-than-prompt reply. If you received it by fax, you were then expected to respond by fax. (I am sure the inventions of the telegraph, telephone and horseless carriage begot many complaints. But, I am not quite sure how those inventions would have affected the practice of law.)

In short order, the commercial, overnight delivery service was knocking at our respective doors. Pickup by early evening ensured delivery by mid-morning on the next business day. Never mind that your letter was transported halfway around the United States just to arrive at an address across the street from your office. We had the ability to send bulky things overnight — briefs, exhibit books, etc.

Now we have scanning and emails and texting and all sorts of other communication tools most of which are not known to me. One attorney shotguns suggested deposition dates by email. All other parties are then expected to IMMEDIATELY respond (by email). Wait, I have to find my calendar (the paper variety, of course). Many of the emails come with some type of electronic attachment which will automatically place an entry on your "electronic" calendar, *i.e.*, if you "accept." (I have NEVER hit "accept." You have no right to make an entry on my calendar.) Again, I have to first locate my calendar. It is probably on my secretary's desk.

With all of this progress, we now have paperless files. Yes, it is convenient with a laptop to access file material anywhere and anytime. I suppose one could download an entire file onto a thumb nail drive for convenience. (Bet you thought I had no notion that such a storage device existed. Of course, I have never had occasion to make any such download.) Yet, I continue to "print out" most everything I will need for a deposition. I refuse to scroll (or is it troll?) for medical records or photographs as I ask my questions. I have yet to come to grips with the paperless file.



And that e-filing virus has begun to spread — Federal Court, Jefferson Parish and now even in Orleans Parish. How often do attorneys actually go to a courthouse? I recently had the pleasure of introducing a young attorney into the Bar of the Eastern District. I was astonished to find an actual clerk's office with a "physical" filing desk. I was in heaven.

Perhaps, though, I am improving. I just e-filed a motion in federal court with a memorandum, four exhibits, a proposed pleading and a notice. I waited. I waited. NO error message. (My mother was right, holding a shamrock does work.)

I make these complaints knowing that my job as editor of this *Journal* would be much different if these innovations did not exist. Articles are submitted by email. Photographs are circulated electronically. I receive a "proof" of the *Journal* for review by the mystery of electronics. I cannot imagine how our editors from 20 and 30 years ago could produce the *Journal* in a timely fashion and with such a professional touch.

In the movie "Heartbreak Ridge," Gunny Highway (Clint Eastwood) constantly exhorted his troops to "improvise, adapt, overcome . . . ." I suppose this mantra must carry us (me) forward as technology continues to intersect with the practice of law. HOORAH!

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By Dona Kay Renegar

The Legal Profession: It Is in Our Hands

Over the past few months, I have had the pleasure of traveling our state, meeting a number of our members, and recognizing the creative and meaningful ways lawyers are supporting our profession and serving their communities. As the last self-regulated profession in Louisiana, we alone are responsible for the administration, regulation, and reputation of the legal profession in our state. I have written previously about the great responsibility that falls upon us as lawyers to serve our members and our communities. The last five months have given me the opportunity to see how so many of you are championing our profession and dedicating hours of time and effort to serve your communities.

Exemplary Pro Bono Efforts

Entergy Corporation's Legal Department, under the leadership of Executive Vice President and General Legal Counsel Marcus V. Brown, has committed to providing pro bono services to the communities it serves since 2012. For its tireless efforts, the Entergy Legal Department was honored in 2016 with the Corporate Pro Bono Partner Award presented by Corporate Pro Bono (CPBO), a partnership project of the Pro Bono Institute and the Association of Corporate Counsel. (Entergy received this award in partnership with Orleans Parish Civil District Court and the Louisiana Civil Justice Center.)

Hilarie Bass, 2017-18 president of the American Bar Association, recently traveled to New Orleans to recognize the dedication of the 79 lawyers at Entergy Corporation. In 2016, those lawyers donated more than 2,000 hours of pro bono service and had an 85 percent participation rate in the pro bono efforts. Specifically, Entergy's lawyers staffed the Self-Help Resource Center (SHRC) at Orleans Parish Civil District Court. This help desk assisted thousands of unrepresented low-income and vulnerable domestic court litigants in the Greater New Orleans area. The SHRC exemplifies the value and creativity of leadership by in-house legal departments in the area of pro bono service.

Entergy also hosted a pro bono fair and invited several pro bono partners to speak to its legal team about future opportunities to serve citizens who live below the Federal Poverty Guidelines. One of those partners is Southeast Louisiana Legal Services (SLLS). SLLS and Acadiana Legal Service Corporation (ALSC), together serving every parish in the state, provide free legal representation for individuals whose incomes fall below the Federal Poverty Guidelines.

SLLS is celebrating its 50th anniversary this year, recently commemorated by a ceremony and panel discussion at the Louisiana Supreme Court. SLLS is nationally known as an exemplary legal service provider within the Legal Service Corporation. Under the leadership of its Executive Director Laura Tuggle, SLLS continues to investigate innovative and efficient ways to provide legal representation to as many qualified citizens as possible. SLLS's and ALSC's dedication to providing access to justice for all Louisiana citizens is a shining example to which we all should strive.

Memorials and Legacies

The Shreveport Bar Foundation recently memorialized its members who have died this year and, at the same time, welcomed to its bar the newly admitted attorneys. I had the great pleasure of sharing in that ceremony with the members of the Shreveport Bar Association. I was struck by the tone of the ceremony. The association truly celebrated both the contributions to the profession each deceased member made and the unique personalities and styles they used to achieve those accomplishments. While tinged with sadness and nostalgia about the losses, the ceremony had a strong sense of hope for those young lawyers who are just beginning their professional journeys.

As I drove home from Shreveport,

I began thinking about what contributions I have made to the legal profession and how I would like to be remembered. While I have attended a number of memorial ceremonies in my years as a practicing lawyer, the Shreveport eulogies about successes and failures in and out of the courtroom and the humorous stories about each of their members touched me. I suspect that is a direct result of my increasing age which is easy to ignore. A young lawyer recently contacted me expressing that she was unhappy with her type of practice and asking for advice about making some changes. As much as I would like to think that I am young, her request for help made me realize that I have now been practicing for more than 25 years and am seen more as a "seasoned" attorney. In that moment, I recognized how I would like to be remembered — as a lawyer who supported the profession and her colleagues. As an experienced lawyer, my job is to reach back and lift up someone entering this honorable profession. We should reach out to our colleagues, young or "seasoned," who seek a mentor, advice, or support as they develop their practice or navigate the often rough waters of practicing law.

Become a Mentor!

The Louisiana State Bar Association (LSBA) offers a formal mentoring program for newly admitted lawyers, matching them with seasoned lawyers in their area who can offer advice or support. The voluntary Transition Into Practice (TIP) Program, created by the LSBA's Committee on the Profession, began in 2015 in New Orleans, Shreveport and Baton Rouge, per Louisiana Supreme Court order on May 15, 2013. In February 2017, the Supreme Court signed an order extending the program an additional two years and expanding the program to include new Bar admittees statewide. The LSBA conducts all mentor/mentee pairings and mentor training and is responsible for the administration of the program. We currently have a pool of 256 mentors and 126 mentor/mentee pairings. A reception is conducted at the Supreme Court where mentees receive their certificates at the conclusion of the program. Feedback has been extremely positive and the program is a resounding success. This program strengthens our profession and illustrates the LSBA's continued commitment to professionalism.

Years ago, many lawyers reached out to mentor me in the practice of law and, to every one of them, I am eternally grateful. I hope that I can return the favor extended to me and help the future legal leaders in Louisiana carry our noble profession onward and upward. I encourage all LSBA members to do the same.

Try a Little Less Tenderness

A Proposal for Presenting Expert Witness Testimony

By John H. Musser V and Tarryn E. Walsh

Expert testimony often carries a significant price tag.[1] However, if a party wins his case at trial, he is typically able to recover his expert fees.[2] Unfortunately, the uncertainty surrounding whether expert witnesses need to be formally tendered and accepted by the trial court in order to have those fees awarded as costs adds an unnecessary layer of confusion and expense to the litigation process.

While federal law and jurisprudence directs when to award expert fees,[3] Louisiana allows for the award of expert witness fees in addition to the ordinary witness fee in all civil cases.[4] Thus, a witness who testifies as an expert at trial is entitled to additional compensation based upon the value of her time, and the degree of learning or skill required. The compensation covers both the court appearance and preparatory work.[5] Admittedly, when "fixing expert witness fees, each case must turn on its own peculiar facts and circumstances."[6] But when does a witness become an expert?

The practice of introducing expert opinion varies noticeably by state.[7] While a few states expressly require that an attorney formally "tender" the witness as an expert, Louisiana has no formal rules on qualifying an expert.[8] Nonetheless, while Louisiana does not expressly *mandate* the formal tender and acceptance of an expert witness at trial, the *practice* within the state involves counsel "tendering" the witness as an expert, and the subsequent "acceptance" or "rejection" of the witness as an expert by the presiding judge.[9] Surprisingly, the subsequent award of expert fees as costs is often dependent on adhering to a practice that is only customary, not required. With no mandate, attorneys who do not adhere to the traditional procedure risk being unable to recover these litigation expenses.

All circuits within the state recognize — at least in principle — that "there is no requirement that a party formally tender an expert witness or that a court certify that a witness has been accepted as an expert."[10] Nonetheless, not all circuits take the same view as to whether the taxing of expert witness fees is appropriate when the expert has not been formally "tendered." The 3rd and 4th Circuits have no formal "tender" requirement and award expert witness fees freely.[11] However, in the 1st, 2nd and 5th Circuits, if a witness has not been formally qualified, tendered and judicially accepted as an expert, district courts generally refuse to tax the witness's fees as costs.[12] The Louisiana Supreme Court has yet to address the circuit split on this issue.

Is the Customary Practice the Best Method?

As a threshold matter, an award of expert witness costs inherently encompasses judicial consideration of an expert's qualifications and contributions to the case. The factors include: (1) the time to create reports; (2) the total fees charged; (3) the time spent preparing for trial; (4) the time spent in court; (5) the witness's expertise; (6) the difficulty of the expert's work; (7) the amount of the judgment; and (8) the degree to which the expert's opinion aided the factfinder in its decision.[13]

Considering that any witness who offers expert testimony has either gone through a *Daubert*-style hearing, or alternatively testified without objection, any Louisiana court that permits a witness to offer expert opinion testimony presumably contemplated these factors before allowing the evidence.[14] Consequently, the 3rd and 4th Circuit approach seems more reasonable. As Judge Wicker observed in her 2011 5th Circuit dissent, "where a witness renders expert opinion testimony without objection, that witness [should be able to] seek remuneration by way of an expert witness fee whether or not that witness has been formally qualified and tendered as an expert."[15]

Moreover, many authorities suggest that the process of declaring a witness an "expert" influences the jury to give unwarranted weight and credibility to the witness's testimony. The advisory committee notes to Fed.R.Evid. 702, on which La. C.E. art. 702 is based, caution *against* informing a jury that a witness is testifying as an expert for that reason.[16] The advisory notes further observe that "prohibit[ing] the use of the term 'expert' by both the parties and the court at trial . . . ensures that trial courts do not inadvertently put their stamp of authority on a witness's opinion, and protects against the jury's being overwhelmed by the so-called 'experts.'"[17] A judge's ruling that a witness is an expert "inordinately enhances the witness's stature and detracts from the court's neutrality and detachment,"[18] while refusing to accept a witness as an expert may "degrade" the opinion testimony given.[19]

The American Bar Association's recommendation on qualifying expert witnesses in its *Civil Trial Practice Standards* echoes the above concerns, suggesting that "[t]he court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so."[20] After acknowledging the common tactical purpose behind openly tendering an expert to the court, the comment to Standard 14 explains the consequences. First, "[b]ecause expert testimony is not entitled to greater weight than other testimony, the practice of securing what may appear to be a judicial endorsement is undesirable . . . . The prejudicial effect of this practice is accentuated in cases in which only one side can afford to, or does, proffer expert testimony."[21] Second, "[t]he use of the term 'expert' may appear to a jury to be a kind of judicial imprimatur that favors the witness," a concern that is interwoven through the commentary on this subject.

Professors Wright and Miller agree that the perception of court endorsement

is a problem when presenting expert testimony:

> In some jurisdictions, the practice is to proffer the witness as an expert after eliciting evidence as to his credentials. This proffer precipitates a ruling from the court as to whether the witness is qualified to testify as an expert. This procedure is not mandated by [Fed.R.Evid.] 702. *A trial court need not and often should not make a finding before the jury that a witness is qualified to testify as an expert since such a finding might induce the jury to give too much weight to the witness's testimony*.[22]

As Professor Stephen Saltzburg eloquently stated:

> If judges simply rule on objections to testimony by sustaining or overruling them and permitting lay witnesses to offer permissible opinions under Fed.R.Evid.701, expert witnesses to offer permissible opinions under Fed.R.Evid.702, and dual witnesses to offer both lay and expert opinions, *there is no reason for a trial judge to qualify a witness as an expert and no reason for the judge to instruct the jury on the dual rules that a witness plays.* If the jury is not told that a witness is an "expert," it can judge the totality of the witness's testimony for what it is worth . . . . *The reality is that the process of tendering a witness as an expert and having the court find the witness to be an expert is problematic in all cases* . . . .[23]

The secondary authorities agree that, as a matter of policy, lawyers and judges should refrain from using the term "expert" in front of a jury when referring to either a witness or his testimony. Rather, presentation of the witness's qualifications, along with *voir dire* and cross-examination by the opposing party, should allow the jury to assign the proper weight to the witness's opinions.

There is no direct guidance from the Louisiana Supreme Court on whether experts must, or even may, be tendered before giving their opinion testimony. However, in 2014, the Supreme Court issued its *Plain Civil Jury Instructions*, which anticipate that the jury will be informed if a witness is an "expert":

> Some of the witnesses that you will hear are called "expert witnesses." Unlike ordinary witnesses who must testify only about facts within their knowledge and cannot offer opinions about assumed or hypothetical situations, expert witnesses are allowed to express opinions because their education, expertise or experience in a particular field or on a particular subject might be helpful to you. You should consider their opinions, and give them the weight that you think they deserve. If you decide that the opinion of an expert witness is not based on sufficient education, expertise or experience or that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely — even though I permitted the person to testify.[24]

Does such an instruction, buried amongst many others, truly offset the weight previously assigned by the jury to the apparently judicially endorsed "expert" testimony?

An Alternative Proposal

The authors suggest that a new Supreme Court rule, prohibiting the court or the lawyers in a jury trial from using the term "expert" in referring to any witness, testimony or opinion in front of the jury, is preferable. The proponent of such opinion evidence would not ask the court to endorse the proposed expert by offering or tendering the witness as an "expert," or request the court to "accept" or "certify" that the witness is an expert. Similarly, a party objecting to such evidence on the basis that the witness is not qualified to render an opinion, or that a matter is not properly subject to expert testimony, would not be permitted to use the word "expert" in the presence of the jury.

Objections in the presence of the jury should simply be to either the "foundation" or the "admissibility" of the witness's opinion. The lawyers and judge can use the phrase "Article 702" in argument or a ruling before the jury, while omitting any reference to "experts." Such a restriction would not apply to *Daubert* hearings or other motions or rulings outside the presence of the jury.

The *Plain Civil Jury Instructions* themselves can be easily remedied to remove the undesirable references:

> ~~Some of the witnesses you will hear are called "expert witnesses~~." Unlike ordinary witnesses who must testify only about fact within their knowledge and cannot offer opinions about assumed or hypothetical situations, ~~expert~~ *some* witnesses are allowed to express opinions because their education~~,~~ ~~expertise~~ or experience in a particular field or on a particular subject might be helpful to you. You should consider their opinions and give them the weight that you think they deserve. If you decide that the opinion of ~~an expert~~ *a* witness is not based on sufficient education~~,~~ ~~expertise~~ or experience, or that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely — even though I permitted the person to testify.

As an example of the adverse conequences that can flow from formal tender-and-acceptance, consider the following: Only one party can afford to hire an expert for a jury trial. Team Expert tenders EW as an expert, and the court announces that EW's opinions are "EXPERT." The other party presents its case without any experts. The jury receives two viewpoints: one side with an "expert" supporting it, and the other with only "fact" witnesses in its corner. Unintentional jury bias favoring the party

with the judicial endorsement of its star witness as an "expert" would likely result.

All of the concerns enunciated by the commentators appear in this one brief hypothetical: *Influence on the jury?* Check. *Unnecessary step that compromises the court's appearance of impartiality?* Check. *Prejudice to the side that could not afford an expert?* Check.

Alternatively, assume one party had two experts, while the other only had one. The side with just one expert has the stronger case, but the smaller budget. That stronger case prevails at trial, thanks to the testimony of that one expert witness, but its counsel never formally tendered the witness as an expert.

In three of Louisiana's circuits, that omission would mean that the party whose expert won the case is not entitled to recover its expert witness fees. In two others, it is enough that the witness provided an expert opinion — the court can still weigh the testimony and, in its discretion, award expert fees.

Instead of allowing this uncertainty, the Supreme Court should adopt one uniform rule that also addresses these policy concerns. Eliminating formal "tender-and-acceptance" reduces the worry of "overwhelming" the jury or providing an inadvertent "stamp of authority," since a jury will not hear that a particular witness is an "expert" in a particular field. Rather, the court will simply advise that some witnesses are able to offer opinions. Considering that the tender-and-acceptance practice also prolongs the trial, it seems both prudent and reasonable to eliminate this process, resulting in less interruption and prejudice in the presentation of evidence.[25]

In short, perhaps a little less tenderness, by doing away with the requirement or custom of qualifying expert witnesses in front of the jury to be awarded expert fees as costs, will place all parties on a level playing field, regardless of whether they have an expert on their team.

FOOTNOTES

1. *See, e.g.*, Bd. of Supervisors of Louisiana State Univ. & Agric. & Mech. Coll. v. 1732 Canal St., L.L.C., 13-0976 (La. App. 4 Cir. 1/15/14), 133 So.3d 109, 113-30 (ruling on the award and reasonableness of expert witness fees of eight experts in an expropriation case).

2. La. C.C.P. art. 1920; La. R.S. 13:3666.

3. *See, e.g.*, Mary Jo Hudson, "Expert Witness Fees as Taxable Costs with Federal Courts: The Exceptions and the Rule," 55 U. Cin. L. Rev. 1207, 1211 (1987).

4. *See, e.g.*, La. R.S. 13:3666 (allowing for the award of expert fees at the trial judge's discretion); Coon v. Placid Oil Co., 493 So.2d 1236, 1248 (La. App. 3 Cir. 8/29/86), *writ denied,* 497 So.2d 1002 (La. 1986).

5. Coon, 493 So.2d at 1248.

6. Raymond v. Gov't Employees Ins. Co., 2009-1327 (La. App. 3 Cir. 6/2/10), 40 So.3d 1179, 1193-94 (citation omitted), *writ denied*, 10-1569 (La. 10/8/10), 46 So.3d 1268.

7. *E.g.*, Cotton v. State, 675 So.2d 308, 312 (Miss. 1996) (stating that it is reversible error where an expert is *not* formally qualified or tendered prior to giving testimony); *but c.f.* State v. White, 457 S.E.2d 841, 858 (N.C. 1995) (stating that tender is not required, as qualification is "implicit in the court's admission of the testimony in question"); *see also*, U.S. v. Bartley, 855 F.2d 547, 552 (8 Cir. 1988), *affirmed in part and remanded in part*, 487 U.S. 931 (1988) ("Although the practice is different in some state courts, the Federal Rules of Evidence do *not* call for the proffer of an expert after he has stated his general qualifications.").

8. *See, e.g.*, Gagnard v. Zurich Am. Ins. Co./ Assur. Co. of Am., 02-0019 at pp. 3-6 (La. App. 3 Cir. 6/12/02), 819 So.2d 489, 491-492 ("There is no requirement that a party formally tender an expert witness or that a court formally declare that a witness is accepted as an expert").

9. *See, e.g.*, La. C.E. art. 702 cmts. (2017 ed.); J. Michael Veron, "The Trial of Toxic Torts: Scientific Evidence in the Wake of *Daubert*," 57 La. L. Rev. 647 (1997) (describing the customary procedure for tendering and accepting an expert in Louisiana).

10. *E.g.*, Boudreau v. Boudreau, 10-347 (La. App. 5 Cir. 3/9/11), 62 So.3d 207; Square Deal Siding Co. v. Thaller, 08-0757 at p. 8 (La. App. 4 Cir. 12/30/08), 3 So.3d 71, 78; Dorsett v. Johnson, 34,500 (La. App. 2 Cir. 5/9/01), 786 So.2d 897, 901-02, *writ denied*, 01-1706 (La. 9/28/01), 798 So.2d 115; Darbonne v. Wal-Mart Stores, Inc., 00-0551 at p. 5, (La. App. 3 Cir. 1/2/00), 774 So.2d. 1022, 1028; Hebert v. Diamond M. Co., 385 So.2d 410, 415 (La. App. 1 Cir.), *writ denied sub nom.*, 390 So.2d 203 (La. 1980).

11. Darbonne, 774 So.2d at 1028; Square Deal Siding, 3 So.3d at 78.

12. Boudreau, 62 So.3d at 207; Dorsett, 786 So.2d at 901-02; Hebert, 385 So.2d at 415.

13. *See, e.g.*, 1732 Canal St., L.L.C., 133 So.3d at 120.

14. Cheairs v. State ex rel. Dept. of Transp. and Dev., 03-0680 (La. 12/3/03), 861 So.2d 536, 539-45, *on reh'g in part* (Jan. 16, 2004) (confirming that Louisiana follows the rule of *Daubert*, 113 S.Ct. 2786 (1993), as enunciated by the 11th Circuit in City of Tuscaloosa v. Harcros Chem., Inc., 151 F.3d 548 (11 Cir. 1998) (noting that a testifying expert must be qualified to testify competently; has a reliable methodology; and the testimony will assist the trier of fact)).

15. Boudreau, 10-347 at p. 1, 62 So.3d at 210 (Wicker, J., dissenting).

16. Fed. R. Evid. 702, 2000 Advisory Committee notes; *see also,* La. C.E. art. 702, cmt. (b).

17. Fed. R. Evid. 702, 2000 Advisory Committee notes (citing Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994) (internal quotations omitted)).

18. U.S. v. Johnson, 488 F.3d 690, 697 (6 Cir. 2007).

19. U.S. v. Ollison, 555 F.3d 152, 164 (5 Cir. 2009).

20. American Bar Association, *Civil Trial Practice Standards, Standard 14*, last updated August 2007, available at: *http://www.americanbar.org/content/dam/aba/migrated/2011_build/litigation/ctps.authcheckdam.pdf.*

21. *Civil Trial Practice Standards, Standard 14, supra*, note 20.

22. Wright and Miller, 29 Fed. Prac. & Proc. Evid. § 62-64.3 (2 ed.) (emphasis added).

23. "Dual Roles: Fact and Expert Witness," 25-Fall Crim. Just. 32, 34-35 (Fall 2010) (emphasis added).

24. La. S.Ct. Rule XLIV, *Plain Civil Jury Instructions*, effective Oct. 15, 2014. (No *Plain Criminal Jury Instructions* have been issued.)

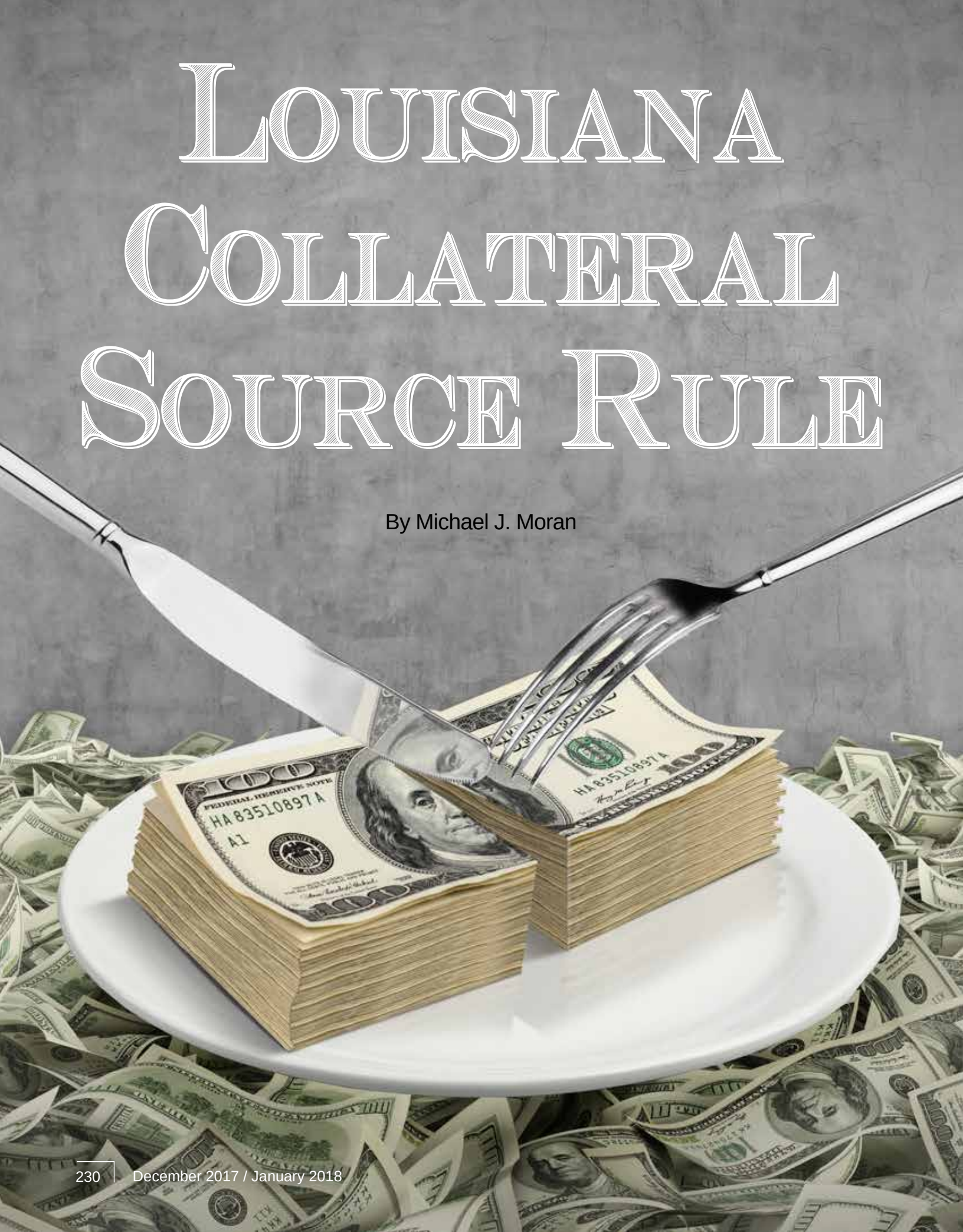
25. As one Texas state court judge pointedly declared, "There's no need in state court to tender a witness as expert or seek a ruling by the judge that the witness is an expert. Just ask the expert your questions." Hon. Randy Wilson, "From My Side of the Bench: Folklore and Myths," 44 The Advoc. (Texas) 153, 153 (Fall 2008).

John H. Musser V, a director in the law firm of Murphy, Rogers, Sloss, Gambel & Tompkins, A.P.L.C., earned his bachelor's degree from the University of Virginia and his JD degree from Tulane University Law School, with a Certificate in Environmental Law. He is a member of the Louisiana Bar Journal's *Editorial Board and the Louisiana State Bar Association's Client Assistance Fund and Practice Assistance Committees. (jmusser@mrsnola.com; Ste. 400, 701 Poydras St., New Orleans, LA 70139)*

Tarryn E. Walsh, an associate in the law firm of Murphy, Rogers, Sloss, Gambel & Tompkins, A.P.L.C., earned her bachelor's degree from Boston University and her JD degree from Tulane University Law School, with a Certificate in Sports Law. (twalsh@mrsnola.com; Ste. 400, 701 Poydras St., New Orleans, LA 70139)

Louisiana Collateral Source Rule

By Michael J. Moran



Guy walks into a bar and asks, "Why would a mediator be concerned with a substantive subject like collateral source?" Bartender says, "Because the participants think mediators should be treated like mushrooms — kept in the dark and fed manure." Ba da boom! From that witticism flows this effort.

Origin

The origin of the Collateral Source Rule dates back more than 150 years to the United States Supreme Court's decision in *The Propeller Monticello v. Mollison*, 58 U.S. 152, 15 L.Ed. 68 (1854). There, a steamship, The Propeller Monticello, was in a shipwreck with a schooner, The Northwestern. Both ships were carrying cargo; the schooner, which was insured, sank. The insurance carrier for the schooner paid for the losses sustained, including its cargo. Later, the schooner filed suit against the steamship, seeking to recover the value of the schooner's cargo. As a defense, the steamship argued that the payment by the private insurer effectively released the steamship from liability as it would be unfair to have the schooner collect twice for its cargo-related damages.

The Supreme Court disagreed and for the first time created the Collateral Source Rule, stating: "The contract with the insurer is in the nature of a wager between third parties, with which the trespasser has no concern. The insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others." 58 U.S. at 155. Ultimately, the Supreme Court concluded that the tortfeasor "is bound to make satisfaction for the injury he has done." *Id.*

In Louisiana, the seminal case is *Gunter v. Lord*, 242 La. 943, 140 So.2d 11 (1962), which established the plaintiff's right to fully receive benefits he has paid for (or those benefits paid for on his behalf) and to fully recover those same amounts from the tortfeasor.

Codification of the Rule

Today, the Collateral Source Rule is codified in both the Louisiana Code of Evidence and the Federal Rules of Evidence.

► **La. C.E. art. 409** provides, in pertinent part, "In a civil case, evidence of furnishing or offering or promising to pay expenses or losses occasioned by an injury to person or damage to property is not admissible to prove liability for the injury or damage nor is it admissible to mitigate, reduce, or avoid liability therefor."

► **Fed. R. Evid. Rules 407, 408 and 409** are similar and provide for the same Collateral Source Rule.

Jurisprudential Statement of the Rule

Today, the prevailing expression of the Collateral Source Rule, and its meaning, is found in *Bozeman v. State*, 2003-1016 (La. 7/2/04), 879 So.2d 692. There, the Louisiana Supreme Court stated: "Under the collateral source rule, a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies received by the plaintiff from sources independent of the tortfeasor's procuration or contribution." *Id.* at 693.

Theory and Purpose of the Rule

The Collateral Source Rule is most often placed at issue where insurance payments have been made in relation to a tort victim's damages. However, as discussed below, application of the Rule is not confined to tort cases only.

Still, the theory and purpose behind the Collateral Source Rule is best explained in terms of insurance proceeds or benefits in tort cases. That is, courts applying the Rule have emphasized that a tortfeasor should not be allowed to benefit or gain an advantage from a plaintiff's foresight and prudence in securing insurance and other outside benefits. A tortfeasor should pay an "insured" and an "uninsured" victim the same amounts for the damages resulting from the tortfeasor's actions.

Factors Guiding the Application of the Rule

Two primary considerations guide a court's determination with respect to the Collateral Source Rule:

(1) whether application of the Rule will further the major policy goal of tort deterrence; and

(2) whether the victim, by having a collateral source available as a source of recovery, either paid for such benefit or suffered some diminution in his patrimony because of the availability of the benefit, such that no actual windfall or double recovery would result from application of the Rule.

Contractual Adjustments or Write-Offs

In cases involving contractual adjustments or write-offs, the Supreme Court in *Bozeman* instructed that the proper focus of the inquiry should be on the nature of the write-offs vis-à-vis the tortfeasor, rather than vis-à-vis the tort victim. Additionally, courts typically ask whether the tort victim "incurred" the total charged amount for services provided. Stated otherwise, is the tort victim liable or legally obligated to pay for expenses exceeding the contractually adjusted, or written-off, amount?

Windfalls or Double Recovery

The purpose of tort damages is to make the victim whole. This purpose is thwarted, however, when the victim is allowed to recover the same element of damages twice. Nevertheless, the potential for double recovery does not necessarily bar application of the Collateral Source Rule. Thus, where application of the Rule is appropriate, a plaintiff will occasionally have insurance reimbursements for certain elements of damages and recover some of the same elements from the tortfeasor. In such cases, double recovery is justified because the tortfeasor should not receive the benefit of the victim's thrift, employment benefits, or special services rendered by a third party. Rather, in cases where double recovery might occur, courts must ensure that the

tortfeasor bears only the single burden for his wrong.

The Collateral Source Rule as an Evidentiary Rule

The Collateral Source Rule is not technically an exclusionary rule of evidence. However, where application of the Rule is placed at issue *(e.g.*, whether a jury may be presented evidence of contractual adjustments pursuant to health care insurance), parties typically file a motion in limine regarding introduction of evidence of payments made by the collateral source. *See, e.g., Asbahi v. Beverly Indus. L.L.C.*, 2011-2012 (La. App. 1 Cir. 5/23/12), 2012 WL 1922300, *writ denied*, 2012-1309 (La. 9/28/12), 98 So.3d 842 (upholding trial court's exclusion of evidence of amounts written off by health care providers as a result of their contract with tort victim's private medical insurance provider).

The Rule also is incorporated into the La. Code of Evidence, as Art. 409 makes evidence of "furnishing or offering or promising to pay expenses or losses occasioned by an injury to person or damage to property is not admissible . . . to mitigate, reduce, or avoid liability therefor." Further, a court may disallow introduction of evidence of collateral benefits because of the resulting prejudice. *See, e.g., Francis v. Brown*, 95-1241 (La. App. 3 Cir. 3/20/96), 671 So.2d 1041 (holding that trial court erred in allowing plaintiff to be cross-examined as to payment by her counsel of plaintiff's medical costs).

The Collateral Source Rule, as Applied

Private Health Insurance

The Collateral Source Rule applies, and a tortfeasor may not seek a reduction in the damages award for any written-off amounts procured by the tort victim's insurer. *See, e.g.*, *O'Connor v. Litchfield*, 2003-0397 (La. App. 1 Cir. 12/31/03), 864 So.2d 234, *writ not cons.*, 2004-0655 (La. 5/7/04), 872 So.2d 1069 (upholding application of Collateral Source Rule where defendant employer paid plaintiff's entire health care premium as part of plaintiff's employment contract with defendant); *Griffin v. Louisiana Sheriff's Auto Risk Ass'n*, 1999-2944 (La. App. 1 Cir. 6/22/01), 802 So.2d 691, *writ denied*, 2001-2117 (La. 11/9/01), 801 So.2d 376 (explaining that plaintiff's patrimony was continually diminished to the extent she had to pay premiums in order to secure the benefit of the insurance). Stated otherwise, a tort victim generally is entitled to recover the full amount of his medical expenses. Thus, in *Royer v. State, Dept. of Transp. & Dev.*, 2016-0534 (La. App. 3 Cir. 1/11/17), 210 So.3d 910, *writ denied*, 2017-0288 (La. 4/24/17), 221 So.3d 69, the 3rd Circuit upheld the trial court's denial of DOTD's motion in limine which sought credit for medical bills paid by injured plaintiff's workers' compensation insurer and explained that the Rule applies to a tortfeasor even if consideration — in the form of policy payments — is nonexistent.

But note: Where medical expenses are paid through workers' compensation coverage provided by the employer pursuant to Longshore and Harbor Workers' Compensation Act (LHWCA), an injured plaintiff may not recover from third-party tortfeasor for full amount of medical expenses billed but not paid. *Deperrodil v. Bozovic Marine Inc.*, 842 F.3d 352 (5 Cir. 2016).

Medicare Insurance Coverage

The Louisiana Supreme Court has not squarely addressed the issue of whether the Collateral Source Rule applies where a tort victim is insured through Medicare. Following *Bozeman*, the answer is likely: Yes, the Rule applies because Medicare is a form of insurance for which the insured pays premiums, thereby diminishing the insured's patrimony. Nevertheless, the Louisiana Courts of Appeal are split on the issue.

► 1st, 2nd, 3rd and 5th Circuits — The Rule applies. *Ketchum v. Roberts*, 2012-1885 (La. App. 1 Cir. 5/29/14), 2014 WL 3510694; *Johnson v. CLD, Inc.*, 50,094 (La. App. 2 Cir. 9/30/15), 179 So.3d 695; *Niles v. American Bankers Ins. Co.*, 229 So.2d 435 (La. App. 3 Cir. 1969), *writ ref'd*, 255 La. 479, 231 So.2d 394 (1970); *Kozina v. Zeagler*, 94-413 (La. App. 5 Cir. 11/29/94), 646 So.2d 1217.

Note: *Kozina* was based on a compromise settlement in which the tortfeasor defendant agreed to pay the plaintiff victim the full amount of medical bills, specifically including the difference between the total medical expenses billed and the amount paid by Medicare. Thus, the 5th Circuit emphasized that the compromise agreement was the law between the parties; the 4th Circuit has distinguished *Kozina* on this basis.

► 4th Circuit — The Rule does not apply, but the cases predate *Bozeman*. *Suhor v. Lagasse*, 2000-1628 (La. App. 4 Cir. 9/13/00), 770 So.2d 422 (holding that the Rule did not give a tort victim the right to recover medical expenses extinguished by operation of federal law governing Medicare); *Boutte v. Kelly*, 2002-2451 (La. App. 4 Cir. 9/17/03), 863 So.2d 530, *writ denied*, 2004-0071 (La. 5/21/04), 874 So.2d 172 (following the reasoning in *Suhor*).

Note: Tort victims must reimburse the Medicare Trust Fund to the extent they are awarded damages for the medical expenses paid by Medicare. 42 U.S.C. § 1395y(b).

Medicaid Program (Free Medical Care)

The Collateral Source Rule *does not apply*, and a tort victim who is a Medicaid recipient may not recover medical expenses that were written off by a health care provider pursuant to the Medicaid program. *Bozeman*, *supra* at 692; *see also, Benoit v. Turner Indus. Group, L.L.C.*, 2011-1130 (La. 1/24/12), 85 So.3d 629 (workers' compensation).

In *Bozeman,* the Louisiana Supreme Court discussed the nature of the Medicaid write-off process: "When an injured plaintiff is a Medicaid recipient, federal and state law require that the health care providers accept as *full payment,* an amount set by the Medicaid fee schedule, which, invariably, is lower than the amount charged by the health care provider." The Court reasoned that a tort plaintiff could not recover as damages those medical expenses written off under the Medicaid program, explaining: "Care of the nation's poor is an admirable social policy. However, where the plaintiff pays no enrollment fee, has no wages deducted, and otherwise provides no consideration for the collateral source benefits he receives, we hold that the plaintiff is unable to re-

cover the 'write-off' amount. This position is consistent with the often-cited statement . . . that '(i)t would be unconscionable to permit the taxpayers to bear the expense of providing free medical care to a person and then allow that person to recover damages for medical expenses from a tortfeasor and pocket the windfall.' After careful review, we conclude that Medicaid is a free medical service, and that no consideration is given by a patient to obtain Medicaid benefits. His patrimony is not diminished, and, therefore, a plaintiff who is a Medicaid recipient is unable to recover the 'write off' amounts. The operative words here are 'free medical care,' which, again, we hold is applicable to plaintiffs who receive Medicaid, not plaintiffs who receive Medicare or private insurance benefits." *Bozeman*, *supra* at 705.

Prior to *Bozeman*, the 2nd Circuit had similarly concluded that the Collateral Source Rule does not allow recovery of medical expenses in excess of Medicaid payments. *Terrell v. Nanda*, 33,242 (La. App. 2 Cir. 5/10/00), 759 So.2d 1026.

Note: A tortfeasor is liable to the State for the reduced amount of medical expenses paid by Medicaid. *See, Benoit v. Turner Indus. Group*, *supra*; *Terry v. Simmons*, 51,200 (La. App. 2 Cir. 2/15/17), 215 So.3d 410.

Other Kinds of Damage Claims

Application of the Collateral Source Rule is not limited to personal injury claims in tort cases. Nevertheless, courts applying the Rule with respect to other types of damage claims have drawn parallels between the policy concerns at issue in conventional tort cases and elsewhere. Additionally, a factor that courts have looked to when deciding whether to apply the Rule is whether the collateral source has a right to seek reimbursement (via conventional subrogation or otherwise) from the aggrieved party.

Environmental Property Damages; Federal Agency as Collateral Source

In *Louisiana Dept. of Transp. & Dev. v. Kansas City Southern Ry. Co.*, 2002-2349 (La. 5/20/03), 846 So.2d 734, the Supreme Court held that the Collateral Source Rule applied in cases arising under the Louisiana Environmental Quality Act (LEQA), "at least where a damaged party is seeking reimbursement only for remediation expenses." Thus, a former property owner could not seek a reduction in liability for the amount of environmental cleanup paid to plaintiff DOTD by the Federal Highway Administration (FHWA). The Court's holding was "commanded by the paramount public interest in ensuring that those persons or entities responsible for harming our environment and the welfare of our citizens be held fully responsible for the consequences of their actions, and deterred from committing future violations of the LEQA." There, the defendant railway's actions had caused the pollution, which was discovered during an Interstate construction project; FHWA had reimbursed DOTD 90 percent of the cleanup costs incurred by DOTD.

Property Damages (Hurricane); Recovery-Authority Grant Funds

In *Metoyer v. Auto Club Family Ins. Co.*, 536 F.Supp.2d 664 (E.D. La. 2008), the federal district court granted a motion in limine filed by plaintiff property owner in action seeking enforcement of insurance contract for losses sustained as a result of Hurricane Katrina; the motion sought to exclude evidence of Louisiana Recovery Authority (LRA) funds the plaintiff had received to rebuild his home. In finding that the Collateral Source Rule applied to the LRA funds, the district court explained that there was no danger of a double recovery or windfall as the LRA required that when it awards a grant (which was funded through a federal agency), it will be subrogated to the rights of the homeowner with regard to insurance payments.

Property Damages (Construction Defect)

In an indemnity action concerning a construction project, the federal district court concluded that the Collateral Source Rule precluded the defendant architect's attempt to rely on payments made by the plaintiff subcontractor's insurer to decrease the damages that the architect may owe to the subcontractor. *AFC Inc. v. Mathes Brierre Architects*, 2017 WL 2731028 (E.D. La. 2017). There, a prior arbitration proceeding ended after the subcontractor paid the project's contractor to settle the arbitration; some of the settlement payments came from the sub's insurer. For this reason, the architect sought a summary judgment that the amounts paid by the sub's insurer were not recoverable because they did not constitute actual losses to the sub. The district court disagreed, explaining that in Louisiana a wrongdoer may not "benefit from the victim's foresight in purchasing insurance and other benefits."

Legal Loan Broker

Magee v. ENSCO Offshore Co., 2013 WL 2389910 (E.D. La. 2013), involved maintenance and cure and unseaworthiness claims under the Jones Act and general maritime law against two defendants — the plaintiff's employer and the owner-operator of the vessel on which plaintiff was injured. After the parties negotiated a settlement, a dispute arose between the plaintiff and his employer about the payment of certain medical bills incurred by plaintiff and paid for by Diagnostic Management Affiliates (DMA). DMA, through various agreements it had with certain medical providers, was able to obtain medical services for plaintiff's back injuries at a discounted rate.

In opposing the plaintiff's motion to enforce the settlement agreement, his employer argued that, under the terms of the settlement, it should have to reimburse only the actual sums that DMA paid to the medical providers, not the full amount due (approximately $76,000). The employer claimed that it should not have to pay the additional amount that was billed because such amount merely represented a profit for DMA, not a "reasonable" medical expense.

The federal district court disagreed. Noting that the settlement agreement's plain language provided that the employer would "assume responsibility for all low back related cure," the court found the disputed medical bills constituted "necessary medical expenses" and thus "cure." The court deemed it significant that the plaintiff was only able to obtain the disputed medical services by contracting with DMA for their payment: the employer had refused to

pay for his medical care, and, as a result, plaintiff entered into an agreement with DMA by which DMA would provide his necessary medical care, and plaintiff in turn would repay the costs associated with testing and surgery to DMA. Accordingly, the court concluded that the full amount charged by DMA was the reasonable and necessary amount of cure and was covered by the settlement agreement. *See also, Howard v. Offshore Liftboats, L.L.C.*, 2016 WL 232252 (E.D. La. 2016), which applied the same rationale to another DMA claim.

Attorney-Related Payments

Hoffman v. 21st Century N. Am. Ins. Co., 2014-2279 (La. 10/2/15), 299 So.3d 702, held that the Collateral Source Rule does not apply to attorney-negotiated medical write-offs or discounts obtained through the litigation process. In adopting this "bright line rule," the Supreme Court explained: First, allowing the plaintiff to recover expenses he has not actually incurred himself, and for which he has no obligation to pay, is at cross purposes with the basic principles of tort recovery under Louisiana law. Second, plaintiff's argument that consideration is given for attorney-negotiated medical discounts by virtue of the contractual obligation of the plaintiff to pay attorney fees is based on the incorrect assumption that payment of an attorney fee is an additional damage suffered by the tort victim. Lastly, to hold that attorney-negotiated discounts fall under the Rule would invite a variety of evidentiary and ethical dilemmas for counsel.

Kie v. Williams, 2016 WL 6208692 (W.D. La. 2016), granted plaintiff's motion in limine, holding that evidence of the total amounts billed before attorney-negotiated discounts is irrelevant and inadmissible.

Francis v. Brown, *supra*, applied the Rule to a $500 *medical bill* paid by attorney on behalf of his client, an uninsured tort victim.

Woodard v. Andrus, 2007 WL 855360 (W.D. La. 2007), was a civil rights action alleging that state court clerks were overcharging filing fees; the court applied the Rule to a *filing fee* assessed against plaintiff and paid by plaintiff's counsel, noting that issue of reimbursement was a matter to be worked out between plaintiff and his attorneys.

Reduced Payments Negotiated by the Victim

Lockett v. UV Ins. Risk Retention Group, Inc., 15-166 (La. App. 5 Cir. 11/19/15), 180 So.3d 557, involved a nurse at East Jefferson General Hospital who incurred about $55,000 in medical expenses for treatment at Ochsner. Although she had health insurance available, she opted not to file an insurance claim; instead, she personally negotiated with Ochsner for a significant reduction of her bills in exchange for immediate payment of the reduced amount, a lump sum of $13,786. The trial court awarded her the full amount of the Ochsner bill, and the 5th Circuit affirmed. The plaintiff's payment of her own funds to Ochsner "clearly diminished her patrimony," and "thus, she was entitled to recover the full cost of her medical expenses, including the reduced or 'written-off' amount." Further, "it would be contrary to the purpose of the collateral source rule to allow Defendants to benefit from Plaintiff's bargain with Ochsner, which consisted of an early payment with no contribution by Defendants, that Plaintiff personally negotiated and paid for."

Jones v. Progressive Sec. Ins. Co., *supra*, noted that, under the Rule, defendants do not enjoy the benefits of reductions in plaintiff's medical costs which were the result of plaintiff's discount due to self-pay at a surgical hospital.

Gratuitous Services

Tanner v. Fireman's Fund Ins. Cos., 589 So.2d 507 (La. App. 1 Cir. 1991), *writs denied*, 590 So. 2d 1207 (1992), upheld award of hourly rate of *sitting services* rendered gratuitously by nonprofessional family and friends of tort victim who required 24-hour attention.

Johnson v. Neill Corp., 2015-0430 (La. App. 1 Cir. 12/23/15), 2015 WL 9464625, *writs denied*, 2016-0137, 0147 (La. 3/14/16), 189 So.3d 1068, 1070, upheld award which included expenses for medical services rendered to tort victim — an internist at the medical clinic where she received the treatment — as a professional courtesy. *Spizer v. Dixie Brewing Co.*, 210 So.2d 528 (La. App. 4 Cir. 1968), reached the same conclusion; *Asbahi v. Beverly Indus.*, *supra*, also addressed, in dicta, the Collateral Source Rule as applied to *professional courtesy* services rendered gratuitously by a fellow physician.

Summary

The Collateral Source Rule has proven fertile ground for some contentious discussions in mediation, bench conferences and settlement discussions.

The smoke has somewhat cleared recently regarding issues of plaintiffs' use of "funding agents" post-accident to secure medical treatment so that the bulk of authority is that the gross billing of such entities will be approved as a collateral source even though the funding agents paid discounted amounts to discharge the billing.

Also, just about any type of insurance or benefit for which a litigant *pays* will also be seen as a collateral source, *e.g.*, medical insurance, Medicare, workers' compensation.

Finally, if a litigant is so well positioned as to receive gratuitous services or grants of assistance, the tortfeasor cannot assert the value of these services as a credit against his damage exposure.

What clearly seems to be "out of bounds" as a collateral source are Medicaid-covered gross billing expenses, LHWCA gross billing expenses and medical bills discounted by a provider based upon a discount arrangement with the claimant's attorney.

Michael J. (Mike) Moran is a director, the vice president and a mediator for Mediation Arbitration Professional Systems, Inc. (maps.) He is engaged in the private practice of law with concentrations in litigation-personal injury, commercial, banking, real estate, bankruptcy and general civil experience over his 45-year career. He graduated from Loyola University Law School and is an adjunct professor for Tulane University Law School in negotiation/mediation. (mmoran@maps-adr.com; Two Lakeway Center, Ste. 400, 3850 N. Causeway Blvd., Metairie, LA 70002)

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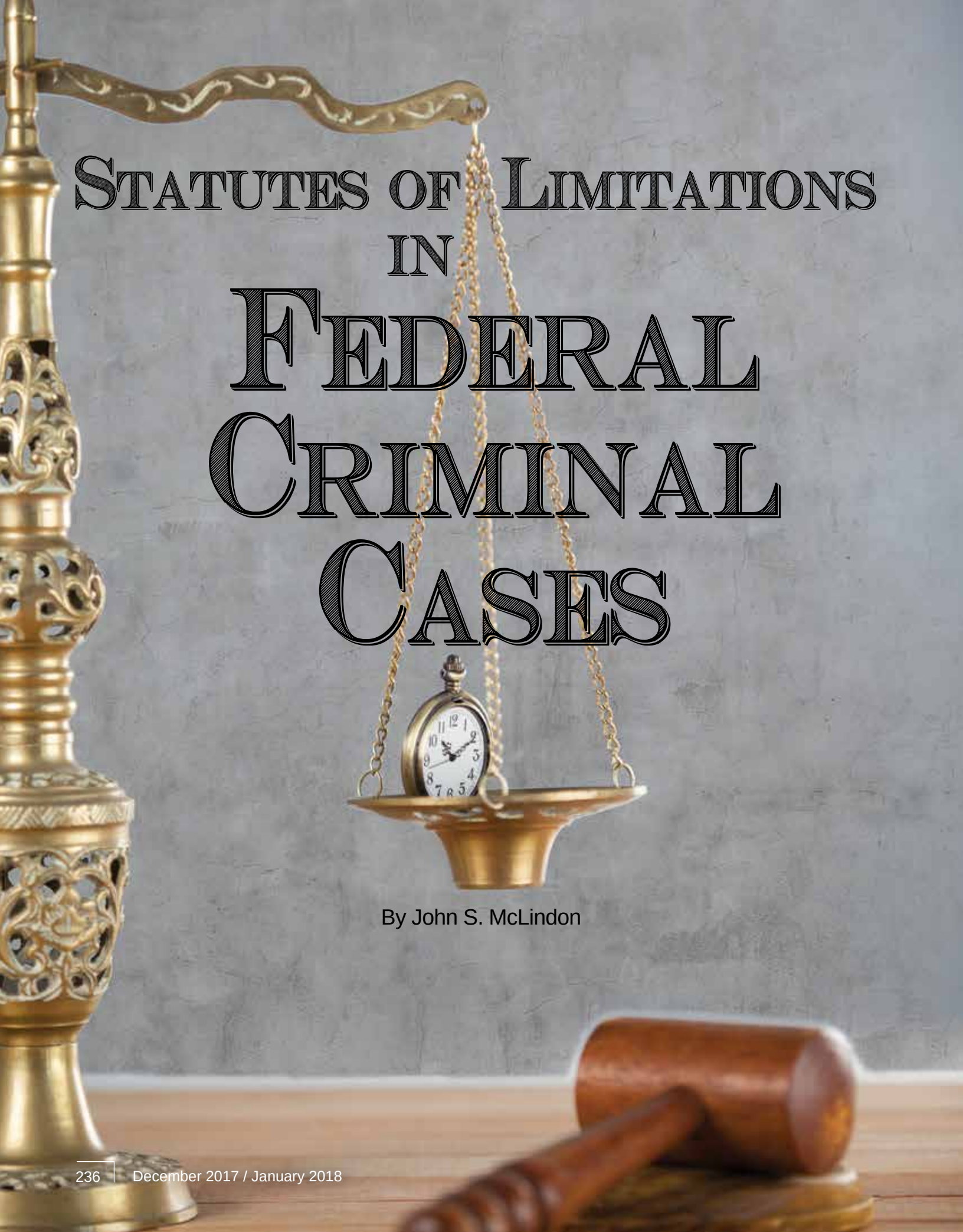


By John S. McLindon

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such an offense shall have been committed." 18 U.S.C. § 3282 (a).

When asked, "How long does the federal government have to prosecute me?," most defense lawyers cite the above statute and give an answer of five years. However, there are several statutes which provide for longer and shorter periods during which the government can bring charges against citizens.

A criminal statute of limitations is a law which sets forth time limits for instituting charges against a citizen. It forbids prosecutors from charging someone with a crime that was committed more than a specified number of years ago.

The main purpose of a statute of limitations is to keep citizens from having to defend themselves from charges that occurred so far in the past that it is difficult, if not impossible, to defend oneself. In many cases, evidence may no longer be available and memories have faded.

The statute of limitations is an affirmative defense. It should be filed pretrial pursuant to F.R.Cr.P. 12(b). This defense can be waived explicitly. A knowing and intelligent waiver of the statute of limitations is valid.[1] A plea of guilty without expressly reserving the statute of limitations has been held to waive later assertions of the defense.[2] Failure to raise the defense before trial will be considered a waiver of the defense.[3]

In *Musacchio v. United States*, 136 S.Ct. 709 (2016), the Supreme Court held that a defendant cannot raise the statute of limitation defense for the first time on appeal. The Court noted that statutes of limitations and other deadlines "ordinarily are not jurisdictional." The Court held that it would treat a time bar as jurisdictional "only if Congress has 'clearly stated' that it is."[4] As to 18 U.S.C. § 3282 (a), the Court held that Congress had not made such a clear statement.

No Limitations

There is no time limit to bring an indictment for an offense "punishable by death[.]" Under 18 U.S.C. § 3281, such an indictment "may be brought at any time, without limitation."

There are 91 federal crimes which call for the death penalty.[5] All of these crimes involve situations where a victim is killed.

In addition to these capital crimes, there is no statute of limitations for crimes which Congress has associated with terrorism, if they result in death or serious injury, or create a foreseeable risk of death or serious injury. *See,* 18 U.S.C. § 3286 (b). This statute references 18 U.S.C. § 2332b (g)(5)(B), which lists all of the terrorism offenses; there are 49 in all.

The last category of crimes that may be prosecuted at any time are various child abduction and sex offenses. *See,* 18 U.S.C. § 3299. This statute cross-references to other statutes; there are 19 such statutes.

In sum, there are 159 crimes for which there is no time limitation for the federal government to institute prosecution. These crimes can be broken down into three separate categories: (1) capital offenses — crimes in which a person's life has been taken; (2) crimes associated with terrorism, if they result in death or serious injury, or create a foreseeable risk of death or serious injury; and (3) various designated federal crimes dealing with child abduction and sex offenses.

Finally, no statute of limitations shall extend to any person fleeing from justice. 18 U.S.C. § 3290.

20 Years

There is only one law which has a 20-year statute of limitations. 18 U.S.C. § 3294 provides that no person shall be prosecuted for a violation of theft of major artwork (18 U.S.C. § 668) unless the indictment is returned within 20 years after the commission of the offense.

10 Years

Crimes which have a 10-year statute of limitations are identified in 18 U.S.C. §§ 3291, 3293, 3295, 3298 and 3300. These statutes cover (1) nationality, citizenship and passports, (2) crimes against financial institutions, (3) arson offenses, (4) crimes relating to trafficking and forced labor, and (5) recruitment of child soldiers. There are 38 total crimes subject to a 10-year statute of limitations.

18 U.S.C. § 3283 provides that for offenses involving the sexual or physical abuse or kidnapping of a child under the age of 18, the statute of limitations does not run during the life of the child, or for 10 years after the offense, whichever is longer.

Eight Years

18 U.S.C. § 3286 sets forth an eight-year statute of limitations for a variety of crimes, mostly terrorism-related offenses which are listed in 18 U.S.C. 2332b (g)(5)(B), when the commission of the offense did *not* result in, or create a foreseeable risk of, death or serious bodily injury to another person. Other crimes listed in § 3286 include 18 U.S.C. § 112 (protection of foreign officials and guests), 18 U.S.C. § 351 (assault on congressional, cabinet and Supreme Court members), 18 U.S.C. § 1361 (willful injury of government property or property being manufactured for the government), 18 U.S.C. § 1751 (assault on the President or presidential

staff), and 49 U.S.C. §§ 46504, 46505 and 46506 (certain crimes committed on airlines).

Seven Years

18 U.S.C. § 1031 is a statute that defines and criminalizes fraud against the United States. Section 1031 (f) provides that a prosecution under this section may be commenced at any time not later than seven years after the offense is committed, plus any additional time allowed by law. Other crimes with a seven-year statute of limitations include 18 U.S.C. § 247 (damage to religious property) and 18 U.S.C. § 249 (hate crime acts that do not result in death).

Six Years

18 U.S.C. § 3301 sets forth six securities fraud offenses which are subject to a six-year statute of limitations.

One Year

Criminal contempt actions brought under 18 U.S.C. § 402 are subject to a one-year statute of limitations. *See,* 18 U.S.C. § 3285.

Tax Offenses

Tax offenses have unique rules regarding the statute of limitations. Tax offenses have either a three- or six-year statute of limitations, depending on the type of offense charged.

Continuing Offenses

Generally, the statute of limitations begins to run when the offense is completed.[6] However, courts have held that some offenses are "continuing" in nature. For example, possession of contraband offenses are continuing offenses.[7] Most importantly, conspiracy offenses are usually continuing in nature. The general conspiracy statute consists of two elements: (1) an agreement to commit a federal crime or to defraud the United States, and (2) an overt act committed in furtherance of the agreement.[8] For a conspiracy, the limitations begin to run when the last overt act is committed.[9] If an individual withdraws from a conspiracy, the statute of limitations will start at the time of withdrawal.[10]

The statute of limitations under conspiracy statutes that have no overt act requirement runs from the accomplishment of the objectives of the conspiracy, or from its abandonment.[11]

Other continuing offenses include escape from federal custody,[12] flight to avoid prosecution,[13] failure to appear for sentencing,[14] possession of the skin and skull of an endangered species,[15] possession of counterfeit currency[16] and kidnapping.[17]

According to the *U.S. Attorneys' Manual*, the finding that an offense is a continuing offense is disfavored. It must

be found that "the explicit language of the substantive criminal statute compels such a conclusion, or that the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one."[18]

Suspension of Limitations

Congress has authorized the suspension of the statute of limitations in certain situations. For example, 18 U.S.C. § 3287 is known as wartime suspension. This law provides that when the United States is at war or Congress has enacted a specific authorization for the use of the armed forces, the running of any statute of limitations for certain crimes shall be suspended until five years after the termination of hostilities as proclaimed by presidential proclamation or by concurrent resolution of Congress. The crimes contemplated by this statute (though not specifically defined by cross-referencing other statutes) generally deal with fraud in the acquisition or negotiation of contracts connected with or related to the prosecution of the war.

The government can also suspend the statute of limitations for an offense in order to secure evidence held in foreign countries (18 U.S.C. § 3292), for cases involving child abuse (18 U.S.C. § 3283), for concealment of assets of an estate in bankruptcy (18 U.S.C. § 3284), for any fugitive (18 U.S.C. § 3290), or for cases involving the use of DNA evidence (18 U.S.C. §§ 3282 (b) and 3297).

Tolling Agreements

The running of a statute of limitations is tolled during periods when the defendant is a fugitive. *See,* 18 U.S.C. § 3290. Physical absence from the jurisdiction is not required to trigger this tolling provision.[19]

The running of a statute of limitations may also be tolled on application of the United States during the pendency of an official request to a foreign court or authority to obtain the evidence located in a foreign country. *See,* 18 U.S.C. § 3292.

RICO Violations

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, requires that state crimes used as predicate offenses be "chargeable under State law." The federal courts have uniformly held that regardless of the running of the state statute of limitations, a defendant is still "chargeable" with the state offense within the meaning of 18 U.S.C. 1961 (1)(A).[20] The reference to state law in the statute is simply to define the conduct and is not meant to incorporate state procedural law.

Superseding or Defective Indictments

If an indictment is dismissed because of a legal defect or grand jury irregularity, the government may return a new indictment within six months of the date of dismissal or within the original limitations, whichever is later.[21] After the original limitations period has expired, a superseding indictment may narrow, but may not broaden, the charges made in the original indictment. *See,* 18 U.S.C. §§ 3288-3289.[22]

Concealing Bankruptcy Assets

The statute of limitations on offenses which involve concealing bankruptcy assets does not begin to run until a final decision discharging or refusing the discharge of the debtor. *See,* 18 U.S.C. § 3284, which specifically deems the concealment of assets of a debtor in a case under Title 11 "a continuing offense until the debtor shall have been finally discharged or a discharge denied," at which point the period of limitations shall begin to run.

Conclusion

For the majority of crimes listed in the United States Code, there is a five-year statute of limitations. However, there are many other crimes that have longer, and some shorter, periods in which the government can institute prosecution. These statutes are spread throughout the United States Code and are occasionally amended. When representing a client charged under any statute, defense counsel should always check the applicable statute of limitations.

FOOTNOTES

1. United States v. Levine, 658 F.2d 113 (3 Cir. 1981).
2. *See,* U.S. Attorneys' Manual, 9-18.000; United States v. Doyle, 348 F.2d 715 (2 Cir. 1965), *writ denied*, 382 U.S. 843, 86 S.Ct. 89 (1965).
3. United States v. Wilbur, 674 F.3d 1160 (9 Cir. 2012); United States v. Hsu, 669 F.3d 112 (9 Cir. 2012); United States v. Flood, 635 F.3d 1255 (10 Cir. 2011).
4. 136 S.Ct. at 717.
5. Charles Doyle, "Statutes of Limitation in Federal Criminal Cases: An Overview," Congressional Research Serv. Report for Congress, Oct. 1, 2012.
6. Toussie v. United States, 397 U.S. 112, 90 S.Ct. 858 (1970).
7. Von Eichelberger v. United States, 252 F.2d 184 (9 Cir. 1958).
8. 18 U.S.C. § 371.
9. Fiswick v. United States, 329 U.S. 211, 67 S.Ct. 224 (1946).
10. United States v. Gonzalez, 797 F.2d 915 (10 Cir. 1986).
11. United States v. Nunez, 673 F.3d 661 (7 Cir. 2012); United States v. Therm-All, Inc., 373 F.3d 625 (5 Cir. 2004), *cert. denied*, 543 U.S. 1004, 125 S.Ct. 632 (2004).
12. United States v. Bailey, 444 U.S. 394, 100 S.Ct. 624 (1980).
13. United States v. Merino, 44 F.3d 749 (9 Cir. 1994), *cert. denied*, 514 U.S. 1086, 115 S.Ct. 1802 (1995).
14. United States v. Gray, 876 F.2d 1411 (9 Cir. 1989), *cert. denied*, 495 U.S. 930, 110 S.Ct. 2168 (1990).
15. United States v. Winnie, 97 F.3d 975 (7 Cir. 1996).
16. United States v. Kayfez, 957 F.2d 677 (9 Cir. 1992).
17. United States v. Denny-Shaffer, 2 F.3d 999 (10 Cir. 1993).
18. U.S. Attorneys' Manual 9-18.000.
19. U.S. Attorneys' Manual 9-18.000; United States v. Singleton, 702 F.2d 1159 (DC Cir. 1983).
20. U.S. Attorneys' Manual 9-18.000; United States v. Licavoli, 725 F.2d 1040 (6 Cir. 1984), *cert. denied*, 467 U.S. 1252, 104 S.Ct. 3535 (1984).
21. U.S. Attorneys' Manual 9-18.000.
22. United States v. Miller, 471 U.S. 130, 105 S.Ct. 1811 (1985).

John S. McLindon is a 1989 graduate of Louisiana State University Paul M. Hebert Law Center. He also is a graduate of the National Criminal Defense College. He practices primarily in the area of criminal defense in both state and federal court. He is of counsel to the firm Walters, Papillion, Thomas, Cullens, L.L.C. (mclindon@lawbr.net; 12345 Perkins Rd., Bldg. 2, Baton Rouge, LA 70810)

Gauging Pro Bono Activity in Louisiana

2016 Pro Bono Survey Results Are In!

By Rachael M. Mills

In 2016, Louisiana attorneys reported providing approximately 59,000 hours of volunteer legal services to ensure that poor individuals' legal problems were assessed and resolved. Pro bono services are an essential component in maintaining the rule of law, and the Louisiana State Bar Association (LSBA) appreciates those 880 attorneys who voluntarily reported their activities.

But, what about the remaining 21,000 Louisiana attorneys? If every one of Louisiana's 22,000+ attorneys provided the 50 hours of pro bono services recommended annually by Rule 6.1, we would have reported more than 1 million hours. Are attorneys not providing pro bono services? Or, are they simply not reporting those pro bono hours?

Earlier this year, Louisiana attorneys participated in a survey conducted by the American Bar Association's (ABA) Standing Committee on Pro Bono and Public Service as part of an effort to gauge pro bono activity across the country. Louisiana was one of 24 participating states. The goal of the survey was to quantify the amount of pro bono work provided in Louisiana, obtain the characteristics of recent pro bono service, and determine what factors encourage or discourage pro bono service. From January to March 2016, the survey was open to all active attorneys. Those who regularly participate in pro bono activities as well as those who have never provided pro bono assistance were encouraged to take the survey. About 1,800 attorneys participated in the survey and the results are in!

The survey was divided into four sections — 1) Amount and Type of Pro Bono Service in 2016; 2) Recent Pro Bono Experience; 3) Motivations and Attitudes; and 4) Other Public Service Activities.

WHAT TYPE OF PRO BONO SERVICES WERE PROVIDED IN LOUISIANA?

Among the types of pro bono services provided in 2016, limited scope representation was the most prevalent. Among those who provided pro bono in 2016, 46.1% provided only limited scope representation and 26% provided both limited scope and full representation. 27.5% had only provided full representation in 2016.

Service Type	Percent of Attorneys Providing this Type in 2016	Average Pro Bono Hours
Full and Limited Scope Representation	**26.0%**	**100.4**
Full Representation Only	**27.5%**	**77.0**
Limited Scope Representation Only	**46.1%**	**32.6**
Mediation Only	**0.4%**	**19.0**

***"Supporting Justice in Louisiana: A Report on the Pro Bono Work of Louisiana's Lawyers"* produced by the ABA Standing Committee on Pro Bono and Public Service, July 2017**

1) Amount and Type of Pro Bono in 2016.

The first two sections of the survey only applied to attorneys who provided pro bono services in 2016. Focusing these two sections on pro bono work provided in 2016 was significant to determine the most current pro bono statistics. Overall, more than half of the respondents (57.9%) indicated they provided pro bono in 2016, while only 19.3% said they did not. Among those attorneys who provided pro bono services in 2016, the average number of hours provided was 57.4 and the average number of legal matters was 12.

Here are some findings:

► Louisiana attorneys provided 33.2 hours of pro bono service as compared to 36.9 hours nationally.

► Male attorneys reported having done pro bono most recently in 2016 (62.8% compared to 50% of the female attorneys).

► While nationally there were little or no differences related to race or ethnicity regarding the number of hours, in Louisiana, Black (54.5) and Hispanic (74.7) attorneys provided more hours of pro bono.

► Private practice and non-profit attorneys reported doing significantly more pro bono than did attorneys in other practice settings. On average, private practice attorneys provided 31.1 hours and non-profit attorneys provided 150 hours of pro bono service in 2016. Comparatively, corporate attorneys provided 10.3 hours and government attorneys provided 10.7 hours.

Who received these pro bono services?

► Louisiana attorneys provided these services more often to individuals (91.3% of the time) and less often to organizations (26%), as compared to the national averages of 85.2% and 35.5%.

► The report identifies who the pro bono clients were and the types of attorneys more likely to represent them. For example, in Louisiana, 41.2% of the attorneys indicated having represented ethnic minorities, and Black attorneys were more likely to represent these type clients. Additionally, 17.2% of the respondents indicated having represented children or juveniles, and Hispanic attorneys were more likely to represent this group.

In general, a greater percentage of Louisiana attorneys indicated representing the various types of clients than attorneys did on the average. One exception (where fewer Louisiana attorneys indicated representation than the national average) was in immigration work.

2) Recent Pro Bono Experience.

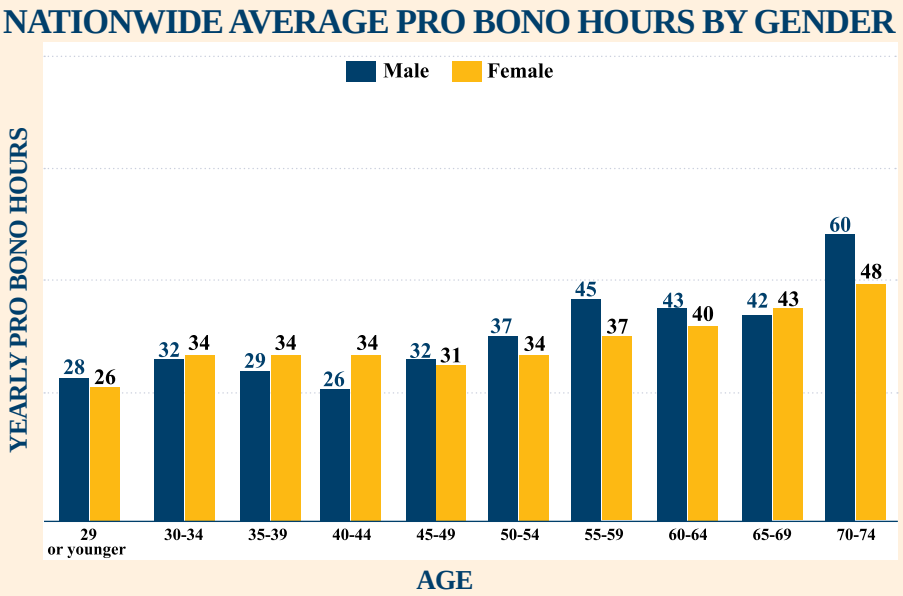
Here are some findings:

► 33.2% of the attorneys indicated that their most recent client came directly to them. The remaining 66.8% were referred from some specific source. The most common referral sources were legal aid pro bono programs, followed by family members or friends.

► The tasks performed were generally within the attorneys' area of experience. Specifically, 64.6% indicated that their recent pro bono experience was within their area of experience.

► Female, minority, younger and urban attorneys did pro bono work outside of their experience.

► On the average, attorneys in Louisiana spent less time (21.9 hours) on their most recent pro bono case as did attorneys nationally (29.1 hours).



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3) Motivations and Attitudes.

The third section of the survey, "Motivations and Attitudes," offered insight into what compels an attorney to provide pro bono services and what might encourage others to provide those services. The majority of the attorneys surveyed, 79.8%, believe that pro bono services are either somewhat or very important and very few surveyed attorneys indicated they did not believe pro bono to be important.

Here are some findings:

► Motivation for Louisiana attorneys was similar to attorneys nationally. The top three motivators for Louisiana attorneys providing pro bono were: 1) helping people in need; 2) ethical obligation; and 3) professional duty.

► Female, Hispanic and Asian attorneys in Louisiana also included "reducing social inequities" as a motivating factor.

► Answers were also different depending on an attorney's age. For example, younger attorneys (under 40) were most motivated primarily by helping people in need, followed by being a good person and social inequalities, before ethical obligations or professional duties.

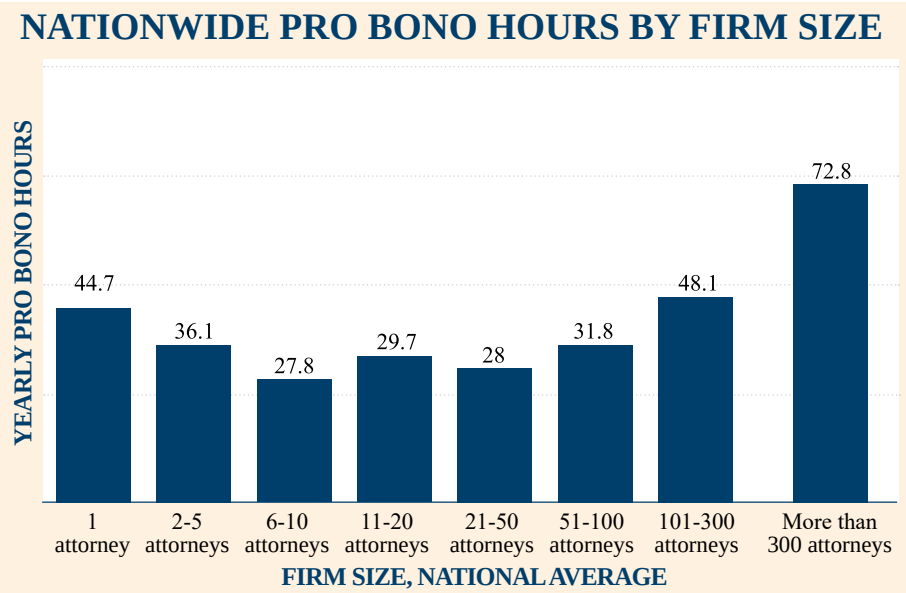
► To identify pro bono opportunities, just under half of the attorneys (41.6%) had reached out to some organization and 63.3% had been contacted by an organization. However, Louisiana attorneys were less likely to either contact or be contacted by a legal aid or pro bono organization than attorneys nationally.

► According to respondents, in order to engage more attorneys, pro bono programs should: 1) provide limited scope representation opportunities; 2) engage judges in soliciting participation; and 3) provide CLE credit for doing pro bono.

► According to the respondents, the top three discouraging factors were: 1) lack of time; 2) commitment to family or other personal obligations; and 3) lack of skills or experience in the practice areas needed by pro bono clients.

► Interestingly, of the 46.5% of respondents who provided pro bono services as a law student, more than half (61.3%) said that doing so made them more or far more likely to provide pro bono services after graduating from law school.

► Overall, 44.7% of the respondents indicated that they were either likely or



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WHAT PUBLIC SERVICE ACTIVITIES DID ATTORNEYS PROVIDE IN 2016?

The surveyed attorneys provided a range of public service activities in 2016. Approximately 25% of the attorneys reported that they had provided legal services for a reduced fee in 2016, with an average of 50.4 hours provided. See the chart below for more information.

NOTABLE TRENDS:
GENDER: Male attorneys were more likely to have provided reduced fee services in 2016 (27%) than female attorneys (21.7%).
PRACTICE SETTING: Private practice attorneys were significantly more likely to have provided reduced fee services in 2016 (30.8%) compared to attorneys in the corporate or government settings.

Public Service Activity	Percent of Attorneys Providing in 2016	Average Pro Bono Hours
Legal Services for a Reduced Fee	24.9%	50.4
Speaker at Legal Education Event for Non-Lawyers	13.2%	8.5
Trainer or Teacher on Legal Issues	12.6%	34.3
Grassroots Community Advocacy	8.3%	31.5
Policy Advocacy	6.3%	32.4
Supervising or Mentorship to Another Attorney Providing Pro Bono Representation	5.0%	24.0
Member of Bar Committee Related to Pro Bono or Access To Justice	4.5%	19.9
Member of Board of Legal Services or Pro Bono Organization	4.1%	86.4
Lobbying on Behalf of a Pro Bono Organization	2.8%	16.2
Member of Firm Committee Related to Pro Bono or Access to Justice	1.6%	66.0
Other	6.9%	
None of the above	34.0%	

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very likely to offer pro bono services in 2017, while only 19.8% indicated they were unlikely or very unlikely to do so.

4) Other Public Service Activities.

Pro bono legal services were not the only type of volunteer work examined by the survey. The fourth section asked the surveyed attorneys to detail additional public service activities they perform.

Importance of Reporting Pro Bono Hours to the LSBA

Quantifying the number of pro bono hours provided each year is instrumental to the LSBA's continued efforts to support Louisiana's civil legal aid network. Often when members of the Bar's leadership seek state or federal funding for civil legal aid, the first question is, "What are attorneys doing to help?" With this information, we can report that, in 2016, approximately 59,000 hours were provided by Louisiana attorneys equating to $7.35 million of donated services.

For the past several years, the LSBA has noticed a drop in the amount of pro bono hours reported. In 2010, 2,005 attorneys reported more than 134,000 hours; in 2016, the number of reporting attorneys dwindled to 878, reporting approximately 59,000 hours. Help the LSBA support your local public interest organizations by reporting your hours online at: *www.lsba.org/goto/pbreporting*.

How Do I Get Involved?

If you are interested in getting involved in pro bono, visit the LSBA's Access to Justice Pro Bono Resources web page to learn about the numerous pro bono opportunities throughout the state. Go to: *https://www.lsba.org/ProBono/*.

To read the full survey report, visit the ATJ Commission's home page at: *https://www.lsba.org/ATJCommission/*.

Rachael M. Mills is the Louisiana State Bar Association's Access to Justice projects counsel. She earned her JD degree in 2015 from Louisiana State University Paul M. Hebert Law Center and was admitted to practice in Louisiana the same year. (rachael.mills@lsba.org; 601 St. Charles Ave., New Orleans, LA 70130)

Attorneys Volunteer Talent for "Lawyers in Libraries" Service Programs

Attorneys Ruby A. Lewis, left, and Felicia H. Hamilton, right, presented a program in Caddo Parish (Shreveport). With them, librarian Wyolanda Hall.

By Michael W. Schachtman

Louisiana pro bono attorneys provided much-needed legal assistance to the public during the Louisiana State Bar Association's (LSBA) "Lawyers in Libraries" Week of Service Oct 23-28, 2017. A total of 142 attorneys volunteered for 76 events across the state, providing limited services to hundreds of Louisiana residents who likely would not otherwise have access to counsel. The Week of Service was scheduled to mark Louisiana's participation in "National Celebrate Pro Bono Week" (Oct. 23-28), but attorneys are encouraged to volunteer at their local libraries throughout the year. More information is available online at: *www.LouisianaLawyersinLibraries.org.*

"The event really took off this year. More than 70 people were served at Jefferson Parish libraries in just a three-hour period. The service is extremely valuable for people who can't afford a lawyer, and for those who come to the library because they simply don't know where else to go for help. Our patrons request this service throughout the year," said Chris Smith of the Jefferson Parish Library System.

Attorneys presenting the program at the Jefferson Parish East Bank Regional Branch were, from left, Wendy B. Vitter, Amber R. Gilbert and Donald G. D'Aunoy, Jr.

Attorney Meghan E. Notariano presented programs at the Hammond Library and Ponchatoula Library (Tangipahoa Parish).

Attorneys presenting a program in Rapides Parish were, from left, Robert G. Levy, Toni R. Martin and Paul J. Tellarico. With them, Debbie Smith with the Central Louisiana Pro Bono Project.

Attorneys presenting an Ask-a-Lawyer event in the Washington Parish Library (Bogalusa) were J. Norris Scott, left, and Bryan A. Harris, right. With them, branch manager Emmitt Guy.

Launched in 2014, "Lawyers in Libraries" is part of the Legal Education & Assistance Program (LEAP), an ongoing collaboration between the LSBA's Access to Justice Department, the Law Library of Louisiana and Louisiana public libraries statewide. The program includes training for library staff on how to help the public find an attorney and reliable self-help resources provided by courts and legal aid partners.

"The Louisiana State Bar Association is committed to making attorneys available to everyone in Louisiana with legal issues, regardless of financial circumstance. This includes the Lawyers in Libraries program, which enables attorneys to provide direct services to their communities at no cost. Public libraries are natural starting points for people in search of legal information and resources, and this type of innovative partnership is why Louisiana is considered a national leader when it comes to access to justice," said LSBA President Dona Kay Renegar.

"Librarians are natural partners in addressing the access to justice gap. Self-represented litigants (SRLs) will go to the library to seek information to solve their legal problems. Public librarians are traditionally taught to avoid helping SRLs because of the possibility of practicing law without a license. For two years, the Law Library of Louisiana, with the assistance of the LSBA's Access to Justice Department, Louisiana State University Paul M. Hebert Law Center and the Louisiana Library Association, has been offering training sessions to public librarians about how to locate legal information and resources for

Attorney Lisa Borne presented a program in St. Bernard Parish.

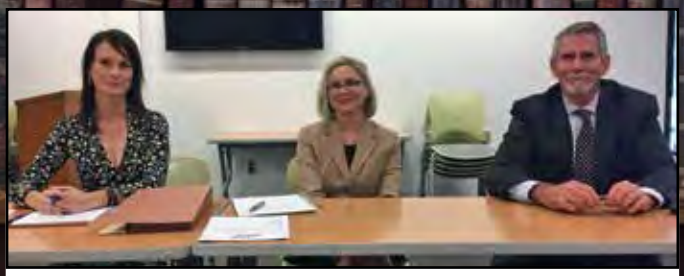
referrals. Public librarians are then able to assist people in their communities who otherwise would have little to no help. The Law Library demonstrates that the role of the librarian is the same with legal questions — showing people where to find information and then allowing them to help themselves," said Miriam Childs, director of the Law Library of Louisiana.

The LSBA would like to acknowledge Louisiana libraries, the LSBA members who volunteered in their communities, and the pro bono agencies and organizations helping to coordinate this annual event.

"Lawyers in Libraries" Attorney Volunteers

Acadia Parish: William J. Casanova.
Ascension Parish: Gregory L. Hughes.
Avoyelles Parish: Douglas L. Bryan, Emily L. Edwards and Charles A. Riddle III.
Beauregard Parish: John M. Welborn III.
Bienville Parish: Russell A. Woodard.
Bossier Parish: Aaron R. Wilson.
Caddo Parish: Monique I. Davis, Sherron P. Douglas, Shelvia R. Grant, Felicia M. Hamilton, Ruby A. Lewis, Terrell J. Myles and Edward A. Takara.
Calcasieu Parish: Gerald L. Brown.
Caldwell Parish: Benjamin J. Brown.
Cameron Parish: Jennifer A. Jones.
Catahoula Parish: Lewis M. Gladney.
Claiborne Parish: Jerry Edwards and Charles E. Tabor.
Concordia Parish: Harrece C. Gassery
DeSoto Parish: Nicholas E. Gasper and Aaron R. Wilson.
East Baton Rouge Parish: Joaquin M. Johnson and Carina E. Salazar.
East Carroll Parish: Laurie R. Brister.
East Feliciana Parish: Rodney B. Hastings.
Grant Parish: Walter P. McClatchey, Jr.
Iberia Parish: Loreal M. Jackson.
Iberville Parish: Perry W. Terrebonne.
Jackson Parish: J. Michael Rhymes.
Jefferson Davis Parish: Nicholas D. Cole.

Attorney Nicholas E. Gasper, left, presented a program in Mansfield (DeSoto Parish). With him is head librarian Doris Ross.



Attorneys presenting the program in Orleans Parish (Gentilly) were, from left, Margaret F. Swetman, Daya Naef Ellis and William B. Schwartz.

Attorney Michele C. Stross, far right, presented a program in St. Charles Parish. With her are library staff Lauren Pitz, Carol Johnson and Brenda Guillot.

Jefferson Parish: Donita Y. Brooks, Donald G. D'Aunoy, Jr., John Shea Dixon, Chester A. (Chip) Fleming III, Amber R. Gilbert, Lauren B. Griffin, Hester R. Hillard, Christy M. Howley, Peter M. Meisner and Wendy B. Vitter.

Lafayette Parish: Jeremy A. Bazile, Aaron P. Beyt, Caitlin Paige Beyt, Mandi Borne Bucher, Kyle N. Choate and Carolyn C. Cole.

Lafourche Parish: David C. Peltier.

LaSalle Parish: Rossanna Rahim Mcllwain.

Lincoln Parish: Krystin M. Frazier.

Livingston Parish: Joseph A. Booth, Markita S. Hawkins, Peter A. Ryan and Hon. Zorraine M. (Zoey) Waguespack.

Madison Parish: Angela L. Claxton.

Morehouse Parish: Jay Mitchell.

Natchitoches Parish: Lewis M. Gladney.

Orleans Parish: Andrea L. Agee, Dara L. Baird, Salvador I. Bivalacqua, Tessa L. Cluck, Thomas D. Dunn, Jr., Veleka Eskinde, Charlin S. Fisher, Leonard K. Fisher III, Chester A. (Chip) Fleming III, Julius Christopher Ford, Monique N. Green, Martha J. Griset, Robert A. Kutcher, James G. Maguire, Marcia S. (Suzy) Montero, Evian Mugrabi, Daya Naef Ellis, Leonor E. Prieto, William B. (Bill) Schwartz, Matthew S. Smith, Margaret F. Swetman, Gregory M. Thompson, Eric D. Torres and Elizabeth A. Widhalm.

Ouachita Parish: Dianne L. Hill and Dayna M. Ryan.

Plaquemines Parish: Danielle Clark Phillips.

Pointe Coupee Parish: John Lane Ewing, Jr.

Rapides Parish: Robert G. (Bobby) Levy, Toni R. Martin, Edward E. (Ted) Roberts III and Paul J. Tellarico.

Attorney John Van Robichaux, Jr. presented a program in St. Bernard Parish.

Red River Parish: Lewis M. Gladney.

Richland Parish: Myrt T. Hales, Jr.

St. Bernard Parish: Lisa Borne, Nicholas N. Cusimano, Sr., Samuel L. Fuller, Christopher S. Liuzza, Stacey LaGraize Meyaski, Daniel W. Nodurft, Brian D. Page and John Van Robichaux, Jr.

St. Charles Parish: Scott J. Falgoust, Stephanie V. Lemoine and Michele C. Stross.

St. Helena Parish: Sean P. Brady.

St. James Parish: Monique M. Edwards.

St. John the Baptist Parish: Monique M. Edwards.

St. Landry Parish: Kathleen E. Ryan and George F. Severson.

St. Martin Parish: Neal C. Angelle.

St. Mary Parish: Adolph B. Curet III.

St. Tammany Parish: Joseph P. Anderson, Jr., Rachel T. Anderson, William D. Cass, Jason M. Freas, Anne D. Guste, Joseph B. Harvin, Janet L. MacDonell, Lisa Paige, Cynthia M. Petry, Shawn Smith, Dorian L. Tuminello, Kim Vanderbrook, Elizabeth A. Widhalm and Sean E. Williams.

Tangipahoa Parish: Lauren A. Duncan and Meghan E. Notariano.

Tensas Parish: Joe McCaleb Bilbro.

Terrebonne Parish: Lakethia B. Bryant, Sarah A. Legendre, Teresa D. King, Joan M. Malbrough and John E. Sirois.

Vermilion Parish: Burton P. Guidry.

Vernon Parish: John K. (Mike) Anderson, Wesley R. (Wes) Bailey and S. Christie Smith IV.

Washington Parish: William H. Arata, Bryan A. Harris and J. Norris Scott.

Webster Parish: Angela M. Smith.

West Baton Rouge Parish: Parris A. Taylor.

West Feliciana Parish: Talya J. Bergeron and Rodney B. Hastings.

Winn Parish: James E. Mixon.

"Lawyers in Libraries" Organizations

Acadiana Legal Services Corp.
Baton Rouge Bar Association
Central Louisiana Pro Bono Project
Lafayette Volunteer Lawyers
Louisiana Civil Justice Center
Northshore Pro Bono Project
Pro Bono Project (New Orleans)
Shreveport Bar Association
Southeast Louisiana Legal Services Corp.
Terrebonne Parish Bar Association

Michael W. Schachtman is the Louisiana State Bar Association Access to Justice Department's self-represented litigation counsel. He works with Louisiana courts and legal aid partners, including libraries, self-help centers and similar access to justice-related programs. (michael.schachtman@lsba.org; 601 St. Charles Ave., New Orleans, LA 70130)

LSBA Honors Deceased Members of the Bench and Bar

The Louisiana State Bar Association (LSBA) conducted its annual Memorial Exercises before the Louisiana Supreme Court on Oct. 2, honoring members of the Bench and Bar who died in the past year. The exercises followed the 65th annual Red Mass held earlier that morning at St. Louis Cathedral in New Orleans. The Red Mass was sponsored by the Catholic Bishops of Louisiana and the St. Thomas More Catholic Lawyers Association.

LSBA President Dona Kay Renegar of Lafayette opened the memorial exercises, requesting that the court dedicate this day to the honor and memory of those members of the Bench and Bar who have passed away during the last 12 months.

LSBA President-Elect Barry H. Grodsky of New Orleans read the names of all deceased members being recognized.

Attorney Melissa L. Theriot, president of the Lafayette Bar Association and Foundation, gave the general eulogy. *(The eulogy begins on page 248.)*

Louisiana Supreme Court Chief Justice Bernette Joshua Johnson gave the closing remarks.

The Rev. James Brady with St. Landry Catholic Church in Opelousas gave the invocation and benediction.

Following the exercises, the Supreme Court was adjourned in memory of the deceased members of the Bench and Bar.

The members recognized included:

In Memoriam Members of the Judiciary 2016-17

Hon. Denis A. Barry
Mandeville, LA
February 28, 2017

Hon. Marcus A. Broussard, Jr.
Abbeville, LA
March 3, 2017

Hon. Robert Y. Butler
Arcadia, LA
December 7, 2016

Hon. Ernest G. Drake, Jr.
Baton Rouge, LA
June 7, 2017

Hon. John R. Joyce
Monroe, LA
May 5, 2017

Hon. Donald J. Launey, Jr.
Ville Platte, LA
May 24, 2017

Hon. John P. Mauffray, Jr.
Jena, LA
December 2, 2016

Hon. Clarence Elburn McManus
Metairie, LA
September 22, 2016

Hon. Charles R. Prevost
Maurice, LA
October 16, 2016

Hon. Fred C. Sexton, Jr.
Shreveport, LA
July 9, 2017

Hon. Diana P. Simon
Lafayette, LA
January 27, 2017

In Memoriam Members of the Bar 2016-17

William R. Aaron
Baton Rouge, LA
June 18, 2017

Patrick J. Araguel, Jr.
Columbus, GA
November 6, 2016

Blake G. Arata
New Orleans, LA
January 23, 2017

Daniel M. Barbato
Lafayette, LA
October 17, 2016

S. Price Barker
Shreveport, LA
May 13, 2017

Byford L. Beasley
Denham Springs, LA
June 23, 2017

J. Barrett Benton
Baton Rouge, LA
August 26, 2017

Marian Mayer Berkett
New Orleans, LA
June 4, 2017

Joseph E. Berrigan, Jr.
New Orleans, LA
May 12, 2017

Thomas W. Bishop
Tallulah, LA
October 9, 2016

Frank D. Blackburn
Baton Rouge, LA
September 28, 2016

James P. Bodenheimer
Shreveport, LA
October 19, 2016

Emmett J. Boudreaux
Baton Rouge, LA
February 20, 2017

William H. Boustead
Harvey, LA
July 27, 2017

Chester Hugh Boyd
Baton Rouge, LA
February 4, 2017

Huey H. Breaux
Lafayette, LA
September 29, 2016

Carole A. Breithoff
New Orleans, LA
April 11, 2017

Julian P. Brignac
New Orleans, LA
September 7, 2016

Armand J. Brinkhaus
Sunset, LA
February 12, 2017

William C. Broadhurst
Crowley, LA
May 22, 2017

Roger G. Broussard
Baton Rouge, LA
September 19, 2016

Patrick Walsh Browne, Jr.
New Orleans, LA
April 20, 2017

Frank M. Buck, Jr.
Gretna, LA
November 17, 2016

Steven Dennis Carby
Shreveport, LA
May 26, 2017

Leonard Cardenas III
Baton Rouge, LA
June 28, 2017

Joseph E. Ching
New Orleans, LA
June 26, 2017

William H. Cook, Jr.
Shreveport, LA
July 31, 2017

Monty C. Crosby
Shreveport, LA
December 3, 2016

Harold G. Daves
Baton Rouge, LA
October 11, 2016

Louis V. de la Vergne
New Orleans, LA
September 15, 2017

Continued next page

In Memoriam continued from page 247

Remi T. DeLouche, Jr.
Metairie, LA
November 8, 2016

Albert I. Donovan, Jr.
River Ridge, LA
September 18, 2016

Francis A. Dressler
Lake Charles, LA
September 17, 2016

Nora K. Duncan
Oakdale, LA
December 8, 2016

Lawrence A. Durant
Baton Rouge, LA
August 3, 2017

Sandra Louise Edwards
Baton Rouge, LA
November 1, 2016

C. Roan Evans
Lafayette, LA
February 14, 2017

Jack B. Files
Monroe, LA
February 18, 2017

Bobby L. Forrest
Baton Rouge, LA
July 9, 2017

Robert M. Foster
New Orleans, LA
November 10, 2016

Gene D. Fowler
Slidell, LA
August 13, 2017

Morgan J. Goudeau III
Lafayette, LA
September 23, 2016

John A. Gutierrez
Prairieville, LA
March 22, 2017

Marlise J. Harrell
Hammond, LA
June 14, 2017

Holt Benton Harrison
Baton Rouge, LA
March 14, 2017

Louis A. Heyd, Jr.
New Orleans, LA
January 27, 2017

Peter Anthony Ierardi IV
Covington, LA
July 10, 2017

Julie Deshotels Jardell
Lafayette, LA
June 9, 2017

Michael A. Jedynak
Monroe, LA
March 27, 2017

Frederick J. King, Jr.
New Orleans, LA
May 4, 2017

Richard Finley Knight
Covington, LA
October 11, 2016

Bennet S. Koren
New Orleans, LA
November 24, 2016

J. Marc Lampert
Alexandria, LA
August 13, 2017

Gary P. Landry
Mandeville, LA
October 16, 2016

Alfred S. Lippman
Morgan City, LA
October 17, 2016

Vincent T. LoCoco
New Orleans, LA
April 23, 2017

Robert Martin Louque, Jr.
New Orleans, LA
January 3, 2017

Seth Thomas Low
Arlington, VA
February 2, 2017

W. Eric Lundin III
Belle Chasse, LA
May 18, 2017

James R. Malsch
Shreveport, LA
September 13, 2016

Eric R. McClendon
Baton Rouge, LA
May 20, 2017

Kim D. McGuire
Naples, FL
September 14, 2016

Raymond A. McGuire
Metairie, LA
December 31, 2016

Ralph R. Miller
Norco, LA
March 30, 2017

Arthur P. Mitchell
River Ridge, LA
February 13, 2017

Aylmer E. Montgomery, Jr.
Metairie, LA
February 4, 2017

Justin Roy Mueller
Lafayette, LA
June 28, 2017

Brenda Sue Nation
Austin, TX
January 22, 2017

David L. Neeb
Metairie, LA
January 23, 2017

Hortence Mena Patterson
Hammond, LA
March 28, 2017

James F. Pinner
Metairie, LA
September 9, 2016

Anatole J. Plaisance
Baton Rouge, LA
December 19, 2016

Marcus J. Poulliard
New Orleans, LA
September 28, 2016

David W. Price
Baton Rouge, LA
July 27, 2017

G. Frank Purvis, Jr.
New Orleans, LA
April 20, 2017

Robert R. Rainer
Baton Rouge, LA
October 9, 2016

Betty G. Ratcliff
Baton Rouge, LA
February 2, 2017

Henry James Read
New Orleans, LA
October 19, 2016

Durinda L. Robinson
Baton Rouge, LA
March 28, 2017

Robert R. Roche
Baton Rouge, LA
August 29, 2017

Irwin R. Sanders
New Orleans, LA
June 29, 2017

Herman B. Schoenberger
Buras, LA
December 1, 2016

Robert Morlas Schoenfeld
St. Martinville, LA
July 16, 2017

James Larkin Selman II
New Orleans, LA
November 24, 2016

Randall A. Shipp
Baton Rouge, LA
January 6, 2017

Wilson F. Shoughrue, Jr.
Raleigh, NC
November 11, 2016

Edmond Wade Shows
Baton Rouge, LA
May 6, 2017

Thomas J. Sibley
Beaumont, TX
January 6, 2017

Edward Le Roy Smith, Jr.
Covington, LA
March 15, 2017

H. F. Sockrider, Jr.
Shreveport, LA
February 4, 2017

David Payne Spence
Alexandria, LA
June 3, 2017

Peggy D. St. John
Alexandria, LA
May 20, 2017

Thomas O. M. Stafford, Jr.
Alexandria, LA
September 29, 2016

Scott Christopher Stevens
Harvey, LA
June 14, 2017

William M. Stevenson
New Orleans, LA
July 10, 2017

Darrell J. Stutes
Mandeville, LA
April 19, 2017

Celeste M. Tanner
Hammond, LA
June 18, 2017

Vernon P. Thomas
New Orleans, LA
November 12, 2016

Allen J. Tillery
Metairie, LA
March 22, 2017

J. David Tufts III
New Orleans, LA
June 17, 2017

Evangeline M. Vavrick
New Orleans, LA
January 7, 2017

John G. Weinmann
New Orleans, LA
June 9, 2017

De Quilla Wayne White
Leesville, LA
June 19, 2017

W. P. Wray, Jr.
Baton Rouge, LA
February 2, 2017

General Eulogy: LSBA Memorial Exercises 2017

By Melissa L. (Missy) Theriot

Madame Chief Justice Johnson, Associate Justices, Judges, the distinguished President of the Louisiana State Bar Association, members of the Bar, and, most importantly, to the families and friends of our departed colleagues:

We gather here to pay tribute to and honor the lawyers and judges who have passed away over the course of this last year. You have all previously, among friends and families, celebrated the lives of our esteemed colleagues. Thank you for allowing us to do the same within the legal community.

We are honoring a group of men and women who had different backgrounds, different types of practices, different philosophies about the law, what is or isn't best for our profession, and its role in how the citizens of this nation choose to live together peacefully.

Continued next page

Eulogy continued from page 248

But what is true for every one of them, when we choose this profession, we also choose a certain type of life, not only for ourselves but also for our families. Here's what I mean.

A year and a half ago, a short essay was written by Sam Glover and published by lawyerist.com. The title caught my eye — "Why are Lawyers so Expensive? I'll Tell You Why." Here's what he said:

> After a client signs a retainer with me, I look them in the eye and tell them, "Okay, you don't have to worry about this any more. Your problems are now my problems." It is just a thing I say, but it is a *true* thing I say. My clients go home and sleep soundly for the first time in weeks or months. I go home and think about the legal issues all evening. At night, I dream about my client's case. Sometimes I wake up in a cold sweat. When I am at the playground with my kids, I check my email. When I go out to dinner with my wife, I talk about hearings and depositions. Lawyers are expensive because you get a lot for your money.

Lawyers are expensive because you get a lot for your money.

Lawyers give their clients A LOT, whether that lawyer is a judge, whose client is all citizens within her jurisdiction, and her client is also our most precious values of justice, impartiality, and fair and equal treatment of all who come before the court.

Lawyers give their clients A LOT whether the lawyer is employed by the government, either a prosecutor, a defender of the indigent, or an advisor to elected officials.

Lawyers give their clients A LOT whether the lawyer is a poverty lawyer whose professional calling is to be a champion for those with no voice; or, and no less noble, a lawyer in private practice who takes on the problems of another as his own whether it be corporate business, family business, or disputes between neighbors.

Lawyers give A LOT when simply doing their jobs. And we take this time and this moment to honor your loved ones because they lived their lives giving their energy, concern, time and attention to protecting the interests of others.

But we also honor you, their families. Their choice to pursue this calling defined not only their lives but also yours. Whether the colleague we honor today was your husband, wife, mother, father, sister or brother, your love, support, sympathy and willingness to put up with the hard parts were at the very heart of their lives. Their calling to serve the interests of others required sacrifice on your part as well and we thank you and honor you, as we mourn their loss with you.

I leave you with these words, which are from the parable of the talents in the Book of Matthew. In the parable, the master entrusted his servants with talents, which were a type of currency, while the master was away. The word "talent" has always signified more than simply money to me, and I've always read it more broadly to mean the precious gifts and talents that God bestows on us all. When the master returned, he went to the servants to evaluate their use of the talents. To the two servants who used and multiplied their talents — like the colleagues we honor today have used their talents for the good of others, multiplying the benefits of those talents — the master proclaimed: "Well done good and faithful servant. Enter into the joy of your master."

Thank you and may God bless each of you.

Melissa L. (Missy) Theriot is a partner in the law firm of NeunerPate in Lafayette and has been practicing law for more than 24 years. She served as the 2016-17 president of the Lafayette Bar Association and is a member of the Louisiana Attorney Disciplinary Board. (mtheriot@neunerpate.com; Ste. 200, 1001 W. Pinhook Rd., Lafayette, LA 70503)

Attorneys Apply for Certification as Legal Specialists

Pursuant to the Rules and Regulations of the Louisiana Board of Legal Specialization, notice is hereby given that the following attorneys have applied for certification as legal specialists. Any person wishing to comment upon the qualifications of any applicant should submit his/her comments to the Louisiana Board of Legal Specialization, 601 St. Charles Ave., New Orleans, LA 70130, c/o Specialization Director Mary Ann Wegmann, no later than Dec. 29, 2017.

It is also requested that any knowledge of sanctions or other professional action against an applicant be reported during this comment period.

Appellate Practice
John W. Waters, Jr. ..... New Orleans

Estate Planning & Administration
Leslie Erin Humphries Halle...Alexandria

Tax Law
Molly Leigh Stanga ..... New Orleans
Andrew T. Sullivan ..... New Orleans

Business Bankruptcy Law
Alicia M. Bendana ..... New Orleans

Health Law Specialty Approved; Standards Available Online

The Louisiana Supreme Court on Sept. 28 approved health law as a new specialty under the Louisiana Board of Legal Specialization (LBLS). To review the standards and more information online, go to: *www.lascmcle.org/specialization/*. Or, contact LBLS Specialization Director Mary Ann Wegmann, email maryann.wegmann@lsba.org or call (504)619-0128.

LBLS Sets Dates for Certification Applications

The Louisiana Board of Legal Specialization (LBLS) is accepting requests for applications for certification in six areas.

The application period for appellate practice, estate planning and administration, family law and tax law certification will continue through Feb. 28, 2018.

Applications for business bankruptcy law and consumer bankruptcy law certification will be accepted from Jan. 1, 2018, through Sept. 30, 2018.

In accordance with the Plan of Legal Specialization, a Louisiana State Bar Association (LSBA) 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, passing a written examination to demonstrate sufficient knowledge, skills and proficiency in the area for which certification is sought, and five favorable references. Peer review will be 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. LSBA members should refer to the LBLS standards for the applicable specialty for a more detailed description of the requirements for application.

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:

► Appellate Practice — 18 hours of appellate law.

► Estate Planning and Administration — 18 hours of estate planning law.

► Family Law — 18 hours of family law.

► Tax Law — 18 hours of tax 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 in order to avoid delay of board certification by the LBLS. Information concerning the American Board of Certification will be provided with the application form(s).

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: *www.lascmcle.org/specialization/*.

Attorneys Apply for Recertification as Legal Specialists

Pursuant to the rules and regulations of the Louisiana Board of Legal Specialization, notice is hereby given that the following attorneys have applied for recertification as legal specialists for the period Jan. 1, 2018, to Dec. 31, 2022. Any person wishing to comment upon the qualifications of any applicant should submit his/her comments to the Louisiana Board of Legal Specialization, 601 St. Charles Ave., New Orleans, LA 70130 or email maryann.wegmann@lsba.org, no later than Dec. 29, 2017.

It is also requested that any knowledge of sanctions or other professional action against an applicant be reported during this comment period.

Estate Planning & Administration

Theresa Ann Barnatt ..... Lake Charles
Valerie Van Matherne ..... Monroe
Steven Lynn McKneely ..... Hammond
W. Deryl Medlin ..... Shreveport
Sheila Leigh Moragas ..... New Orleans
Paul A. Rabalais ..... Baton Rouge
Ronald Joseph Savoie ..... Baton Rouge
Russell Joseph Stutes, Jr. ..... Lake Charles
John Gerhardt Toerner ..... Covington
Matthew Allen Treuting ..... New Orleans
Theodore David Vicknair ..... Alexandria
H. Gregory Walker, Jr. ..... Alexandria

Tax Law

Antonio Charles Ferachi ..... Plaquemine
David Michael Hansen ..... Baton Rouge
Benjamin Anthony Huxen II ..... Baton Rouge
Wayne Jollio James ..... New Orleans
Jean Kathryn Niederberger .. New Orleans
Russell Joseph Stutes, Jr. ..... Lake Charles
James Graves Theus, Jr. ..... Alexandria
John Gerhardt Toerner ..... Covington
Nicholas Charles Tomlinson New Orleans
Matthew Allen Treuting ..... New Orleans
Cherish Dawn Van Mullem ... Baton Rouge
Theodore David Vicknair ..... Alexandria
Michael Alan Walters ..... Alexandria

Family Law

Gay Lynn Babin ..... Lafayette
Teresa Culpepper Carroll ..... Jonesboro
Monique Babin Clement ..... Ruston
Nicole Roberts Dillon ..... Hammond
Lindsey M. Ladouceur ..... Abita Springs
Laurie Nelson Marien ..... Baton Rouge
James Ogden Middleton II ..... Alexandria
Nedi Alvarez Morgan ..... Plaquemine
Marc D. Winsberg ..... New Orleans

Business Bankruptcy Law

David J. Messina ..... New Orleans

Consumer Bankruptcy Law

Kevin R. Molloy ..... Shreveport
Robert W. Raley ..... Shreveport

By Nisha Sandhu

SAFEGUARDING CLIENT PROPERTY

Some of the most popular online file storage, sync and sharing sites for lawyers include Box, Dropbox, Google Drive and OneDrive. These services can be convenient, having integrations with word processing programs which enable the saving and sharing of documents for teams and clients alike. Unfortunately, what may be overlooked is the attorney's duty to safeguard client information and maintain confidentiality.

Rule 1.6 prohibits an attorney from disclosing confidential client information and sets out a specific duty to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Uploading a file to an unsecure file storage site can be disastrous if the file includes any privileged or confidential information and it falls into the wrong hands. Like leaving a file unattended in a public space, the consequences can be devastating, including malpractice claims and disciplinary sanctions.

In *Harleysville Ins. Co. v. Holding Funeral Home*, 2017 U.S. Dist. LEXIS 18714 (W.D. Va. Feb.9, 2017), confidential client communications and potentially privileged information were inadvertently shared during discovery. The underlying litigation involved an insurance claim on a fire loss. An investigator for the insurance company uploaded video surveillance footage to Box, a file sharing and storage site commonly used. He sent an email to personnel at the National Insurance Crime Bureau (NICB), with a hyperlink for access to the video. Later, the investigator uploaded the entire investigation and insurance claims files to the same site for plaintiff's counsel to access. Shortly afterwards, defense counsel issued a subpoena to NICB, requesting its entire file on the fire. In the production was the investigator's email to NICB, including the hyperlink to the saved file in Box. Defense counsel used the hyperlink, accessed the site and downloaded the plaintiff's entire claims file, including privileged and confidential information. The plaintiff moved to have defense counsel disqualified. Finding that neither plaintiff's counsel nor the client had taken any precautions to prevent the inadvertent disclosure of information, the court found that privilege had been waived and denied disqualification, but sanctioned defense counsel for intentionally accessing the information.

The facts are eye-opening for attorneys who store information in the cloud. Reasonable efforts must be taken to ensure that confidential and privileged information is safeguarded. Choosing a cloud service to store information must include verification of security and establishing processes to keep them private. Make sure synced and shared files include HIPAA standards, file encryption and security protocols.

HIPAA. Under the Health Insurance Portability and Accountability Act, attorneys may be considered "business associates" if they receive protected health information (PHI) from covered entities. Covered entities include healthcare plans and certain types of healthcare providers. Business associates are service providers who have access to the PHI of covered entities.

File encryption. Encryption scrambles data to prevent it from being read while transferred. Certain cloud storage and sharing sites offer "end-to-end encryption," which protects data so that it can be read only by the sender and recipient. It can protect against hackers and other third parties, such as Internet providers, from intercepting data. Even more secure are "zero-knowledge" platforms, where only the user has access to the encryption keys for service. For these platforms, the service provider cannot access the firm's files, ensuring an added level of security that client information will not be disclosed.

TLS. TLS, or "transport layer security," is a data and privacy protocol that creates secure communications over networks. TLS can provide secure communications between servers and web browsers. Accessing a file in the same manner as occurred in *Harleysville* leaves information open for prying eyes.

Password protection. Make sure the cloud service chosen allows password protection for file sharing. Some services allow the user to set expirations for files, permissions for users to "read only," and to revoke access to files.

Finally, it bears noting that some servers may be housed on unfriendly shores. The service you choose should list the country or countries where its servers are housed. If a server is located in a country where privacy laws are not strict, then the chances for a breach are even higher.

For many attorneys, storing files in the cloud is more than a convenience — it's a necessity. Twenty years ago, attorneys were learning to implement confidentiality standards in communications sent by facsimile and email. Communications have evolved. Reliance on the web and instant access to files and information require an understanding of the potential pitfalls in Internet-based file storage. Knowing the potential dangers of storing files in cloud-based servers and how to safeguard those files can keep your legal practice compliant with privacy standards and requirements for professional responsibility.

Nisha Sandhu is a contract attorney for Gilsbar, L.L.C., in Covington. She received a BA degree in history from the University of Chicago and her JD degree from Loyola University College of Law. Her practice includes appellate law, family law and criminal defense. Email her at firm@nsacla.com.

LAWYERS Assistance

By J.E. (Buddy) Stockwell | JLAP'S CONFIDENTIAL SERVICES

More and more people are taking advantage of the Judges and Lawyers Assistance Program, Inc.'s (JLAP) totally confidential mental health services. JLAP has discretely assisted hundreds of bar members (and some of their family members) in matters that have nothing to do with formal JLAP monitoring or disciplinary and bar admissions referrals.

In fact, confidential cases coming to JLAP cover the entire spectrum of mental health issues — from those who simply feel burned out and need to reduce stress in their lives, to cases involving serious mental health issues and threats of suicide. No matter what the wellness or mental health issues are, JLAP's professional clinical staff can provide real help.

Most people who JLAP confidentially assists must overcome: 1) fears about the reliability of confidentiality at JLAP; and 2) fears about stigmas associated with mental health issues.

As to the issue of confidentiality, JLAP's services are 100 percent privileged and confidential as a matter of law. Pursuant to La. R.S. 37:221, no one outside of JLAP will ever know anything about any of these confidential cases unless the person JLAP is assisting decides to reveal it. *JLAP never reports cases to discipline or anyone else.*

Here's some actual feedback from people who reached out to JLAP:

"I have complete confidence that the service JLAP provides is 100 percent confidential. Simply put, JLAP is unquestionably a trustworthy program."

"Today, I am indebted to JLAP for all of those good things that recovery brought to my life, and there are many."

"JLAP showed exemplary professionalism, kindness, excellence and dedication throughout all of my interaction with the program."

"JLAP saved my life and career. JLAP holds a very special place in my heart."

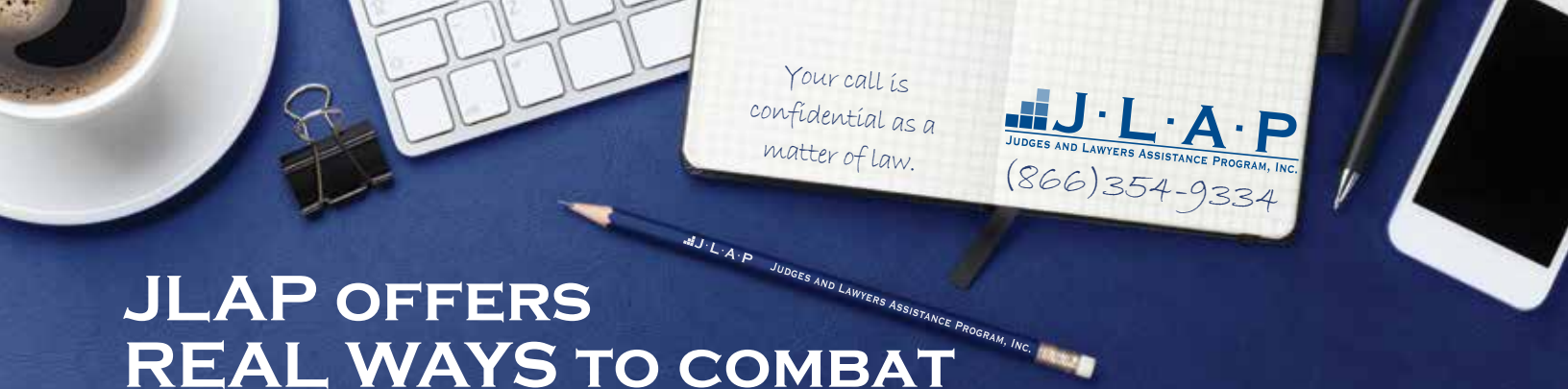
A person coming proactively to JLAP receives totally confidential assistance from JLAP and they decide if anyone else will ever know that they called JLAP. They also decide to follow or decline JLAP's advice and support.

As to the issue of stigmas surrounding mental health, the Mayo Clinic offers the following advice:[1]

Get treatment. You may be reluctant to admit you need treatment. Don't let the fear of being labeled with a mental illness prevent you from seeking help. Treatment can provide relief by identifying what's wrong and reducing symptoms that interfere with your work and personal life.

Don't let stigma create self-doubt and shame. Stigma doesn't just come from others. You may mistakenly believe that your condition is a sign of personal weakness or that you should be able to control it without help. Seeking counseling, educating yourself about your condition and connecting with others who have mental illness can help you gain self-esteem and overcome destructive self-judgment.

Don't isolate yourself. If you have a mental illness, you may be reluctant to tell anyone about it. Your family, friends, clergy or members of your community can offer you support if they know about your mental illness. Reach out to people



JLAP offers real ways to combat stigma around mental health through comprehensive services:

- **Licensed Professional Counselors on staff**
- **Appropriate referrals to individuals experienced in working with professionals**
- ***Love First* certified clinical interventionist on staff**
- **Helping individuals demonstrate a good record of recovery through monitoring**
- **Lawyer-only recovery support groups throughout the state**
- **MCLE Opportunities offered throughout the year**

you trust for the compassion, support and understanding you need.

Don't equate yourself with your illness. You are not an illness. So instead of saying "I'm bipolar," say "I have bipolar disorder." Instead of calling yourself "a schizophrenic," say "I have schizophrenia."

Join a support group. Some local and national groups, such as the National Alliance on Mental Illness, offer local programs and Internet resources that help reduce stigma by educating people who have mental illness, their families and the general public. Some state and federal agencies and programs, such as those that focus on vocational rehabilitation and the Department of Veterans Affairs, offer support for people with mental illness.

Get help at school. If you or your child has a mental illness that affects learning, find out what plans and programs might help. Discrimination against students because of a mental illness is against the law, and educators at primary, secondary and college levels are required to accommodate students as best they can. Talk to teachers, professors or administrators about the best approach and resources. If a teacher doesn't know about a student's disability, it can lead to discrimination, barriers to learning and poor grades.

Speak out against stigma. Consider expressing your opinions at events, in letters to the editor or on the Internet. It can help instill courage in others facing similar challenges and educate the public about mental illness.

At JLAP, we understand and acknowledge that fears about confidentiality and mental health stigmas are difficult barriers that can trap someone in a secret state of mental health suffering. All JLAP can do is encourage folks to break through the barriers and trust JLAP. If you or someone you know needs JLAP's help, reach out to JLAP! Call the helpline at (866)354-9334, email JLAP@louisianajlap.com, or visit the website at: *www.louisianajlap.com.*

FOOTNOTE

1. *www.mayoclinic.org/diseases-conditions/mental-illness/in-depth/mental-health/art-20046477.*

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.

Attorneys Attend August Specialty Bars Conference

Attorneys from across the state attended the annual Specialty Bars Conference on Aug. 26 in New Orleans. Five workshops covered the topics of Louisiana Justice Reinvestment, Immigration, Defending Disciplinary Action, Women as Agents of Change, and advances in legal technology.

"Defending Disciplinary Action" speakers were, from left, Richard P. Lemmler, Jr., Ethics Counsel, Louisiana State Bar Association; William N. (Billy) King, Professional Programs Practice Assistance Counsel, Louisiana State Bar Association; Susan R. Kalmbach, Deputy Disciplinary Counsel, Louisiana Attorney Disciplinary Board; and Damon S. Manning, Schiff, Scheckman & White, LLP.

"Women as Agents of Change in the Judicial Process" speakers were Judge Karelia R. Stewart, left, Section D, 1st Judicial District Court, Shreveport; and Judge Candice Bates Anderson, Section C, Orleans Parish Juvenile Court, New Orleans.

"The Future of the Legal Profession: Making Strides with Technology" speakers were Abid Hussain, left, Hussain Law, LLC, New Orleans; and Charles Vann, Charles Vann Consulting, Mobile, AL.

"Preparing for the Future: Louisiana Justice Reinvestment" speakers were Penya Marzula Moses-Fields, left, Caddo Section Chief, Special Victims Unit, District Attorney's Office, Shreveport; and Derwyn D. Bunton, Chief Defender, Orleans Public Defenders' Office, New Orleans.

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442 Europe Street, Baton Rouge, Louisiana 70802-6406

190+ Attorneys, Judges Participate in Law School Professionalism Orientations

For the 18th consecutive year, the Louisiana State Bar Association's (LSBA) Committee on the Profession hosted law school orientations on professionalism at Louisiana's four law schools. More than 190 attorneys and judges from across the state participated in the programs in August.

LSBA President-Elect Barry H. Grodsky (who also chairs the Committee on the Profession) and LSBA Past Presidents Darrel J. Papillion, Joseph L. (Larry) Shea, Jr. and Richard K. Leefe led an impressive list of speakers addressing first-year law students at the outset of the programs. Other speakers included Louisiana Supreme Court Justice Greg G. Guidry and Louisiana Supreme Court Justice John L. Weimer III; LSBA Committee on the Profession member Michael E. Holoway; and American Bar Association representative Stanley J. Cohn.

Also addressing students were Louisiana State University Paul M. Hebert Law Center Dean Thomas C. Galligan, Jr.; Loyola University College of Law Dean Madeleine M. Landrieu; Southern University Law Center Chancellor John K. Pierre and SBA President Arthur Williams; and Tulane Law School Dean David D. Meyer.

Following the opening remarks, the law students were divided into smaller groups, where they discussed various ethics and professionalism scenarios with attorney and judge volunteers.

This orientation program, inaugurated in August 2000, has been institutionalized as a yearly project for the LSBA and the law schools. The deans and admissions staffs of the law schools have been accommodating in assisting with the logistical challenges of putting this program together.

Attorneys and judges volunteering their services this year were:

Louisiana State University Paul M. Hebert Law Center

H. Kent Aguillard
Mary E. Arceneaux
Judge Jerome J. Barbera III (Ret.)
David L. Bateman
Ardney James Boland
Jay R. Boltin
Stephen F. Butterfield
Andrew M. Casanave
Amanda M. Collura-Day
Brian L. Coody
David C. Coons
Henry T. Dart
Donald G. D'Aunoy, Jr.
S. Guy deLaup
Diane D. Dicke
Monique M. Edwards
Jessica C. Engler
L. Paul Foreman
John Clay Hamilton
Michael S. Heier
Lila Tritico Hogan
E. Holden Hoggatt
Katherine L. Hurst
James Eric Johnson
Sheral C. Kellar
Heather L. Landry
Judge Luke A. LaVergne (Ret.)
Omega Genevieve Leslie
Randy B. Ligh
David A. Lowe
Timothy A. Maragos
Betty L. Marak
Amy L. McInnis

Louisiana State University Paul M. Hebert Law Center: Louisiana Supreme Court Justice John L. Weimer III, at the podium, addressed the students, joined by Louisiana State Bar Association (LSBA) Past President Joseph L. (Larry) Shea, Jr., LSBA Committee on the Profession member Michael E. Holoway and LSU Law Center Dean Thomas C. Galligan, Jr.

Loyola University College of Law: Louisiana State Bar Association President-Elect Barry H. Grodsky addressed the first-year students.

Tulane University Law School: First-year law students discussed ethics and professionalism scenarios with attorney and judge volunteers in break-out groups.

Southern University Law Center: Chancellor John K. Pierre spoke to the first-year law students at the orientation. *Photo by Steve Jarreau, M.Ed.*

Cary J. Menard
Pam P. Mitchell
Judge Pamela Moses-Laramore
Jennifer A. O'Connell
Victoria V. Olson
John B. Perry
Claire A. Popovich
Mary F. Quaid
Mary E. Roper
Sera H. Russell III
Rene I. Salomon
Robert E. Shadoin
Lawrence P. Simon, Jr.
Kristen Stanley-Wallace
Wayne T. Stewart
Judge John D. Trahan
Marsha M. Wade
B. Marianne Wise
Michael C. Wynne

Loyola University College of Law

K. Maryam Autry
Kay B. Baxter
Keith J. Bergeron
Benjamin J. Biller
Linda G. Bizzarro
R. Christian Bonin
Caitlin R. Byars
Judge John E. Conery
Sandra K. Cosby
Dan R. Dorsey
Ivana Dillas
Mary L. Dumestre
Judge Blair Downing Edwards
Daniel H. Edwards
Jason K. Elam
Judge Richard M. Exnicios
Val P. Exnicios
Clare D. Fiasconaro
Marc P. Florman
Darryl J. Foster
Lauren E. Godshall
Pablo Gonzalez
Demarcus J. Gordon
Judge John C. Grout, Jr. (Ret.)
Tasha Warino Hebert
Christy M. Howley
Jessica L. Ibert
Rachel E. Jeandron
Judge Carolyn W. Jefferson (Ret.)
Nahum D. Laventhal
Kathleen M. Legendre
Judge Ivan L.R. Lemelle
Judge Lynn L. Lightfoot
Judge Hans J. Liljeberg
Judge Diane R. Lundeen
Jennifer S. Martinez
John E. McAuliffe, Jr.
Lorraine P. McInnis
Matthew D. Moghis
Emily S. Morrison
Francis B. Mulhall
Michael M. Noonan
Julie O'Shesky
John K. Parchman
Leonor E. Prieto
Maurice C. Ruffin
Rachel M. Scarafia
Peter J. Segrist
Teva F. Sempel
Christopher B. Siegrist
Matthew S. Smith
Paul R. Solouki
John B. Stanton
Judge Raymond S. Steib, Jr.
Charles J. Stiegler
Elise M. Stubbe
Tina L. Suggs
Jerry W. Sullivan
Judge Max N. Tobias, Jr. (Ret.)
Jerome M. Volk, Jr.
Forrest Ren Wilkes
John S. Williams
Scott T. Winstead

Southern University Law Center

ReAzalia Z. Allen
Brett L. Bajon
Rashida Danielle Barringer
Virginia Gerace Benoist
J. Marc Bonin
Aneatra P. Boykin
Linda Law Clark
Rachal D. Cox
Rachel P. Dunaway
Steven J. Farber
Todd E. Gaudin
Eugene G. Gouaux III
Judge Roxie F. Goynes
Judge Todd W. Hernandez
Malinda Hills Holmes
Marcus L. Hunter
Terry C. Landry, Jr.
James H. Looney
Charles S. McCowan, Jr.
Charlotte C. McDaniel McGehee
Ryan M. Nolan
Lisa M. Parker
Kathleen E. Petersen
Barbara Pilat
Herman Robinson
Jimi C. Smith
Stacey B. Stephens
Judge Parris A. Taylor
Travis J. Turner
Marsha M. Wade
Judge Jewel E. Welch, Jr.
Shandrea P. Williams
Sirena T. Wilson

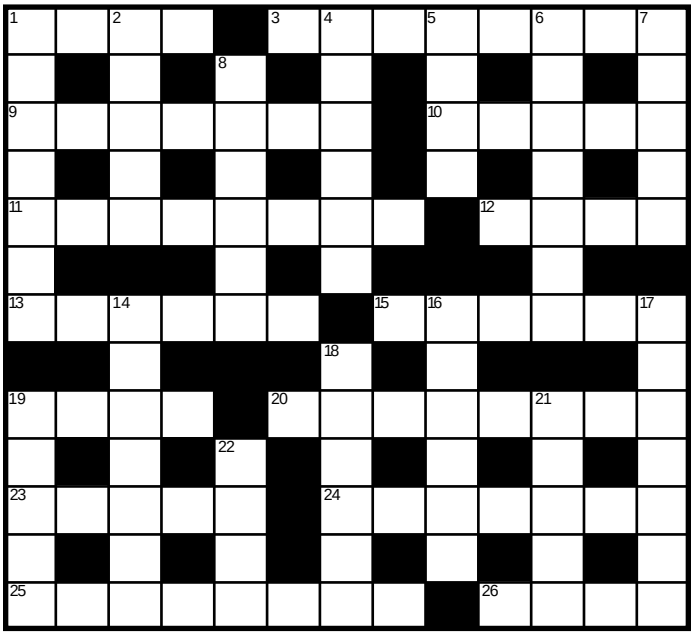
Tulane University Law School

Franklin D. Beahm
Judge Roland L. Belsome, Jr.
Alicia M. Bendana
Jack C. Benjamin, Jr.
John W. Bihm
Caroline G. Bordelon
Alan G. Brackett
Michael M. Butterworth
Thomas B. Calvert
Christopher E. Carey
Kevin J. Christensen
William J. Dutel
Judge Richard M. Exnicios
Val P. Exnicios
Judith A. Gainsburgh
Judge Piper D. Griffin
Judge John C. Grout, Jr. (Ret.)
Mark E. Hanna
Alan P. Jacobus
Megan C. Kiefer
Justin P. Lemaire
Terrence J. Lestelle
Judge Terri Fleming Love
Daniel Lund
Lauren T. Michel
Mark A. Myers
Frances M. Olivier
Jeff D. Peuler
Charles M. Raymond
Mark P. Seyler
Imtiaz A. Siddiqui
Matthew S. Smith
Adam J. Swensek
Christopher R. Teske
Lee Ann C. Thigpen
Judge Max N. Tobias, Jr. (Ret.)
Raymond T. Waid
Marshall G. Weaver
Harold M. Wheelahan III
Robert M. White
John G. Williams
Carlos Z. Zelaya II
Gary M. Zwain

Crossword PUZZLE

By Hal Odom, Jr.

HAIL TO THE (MUNICIPAL) CHIEF



ACROSS

1 Domesticated (4)
3 1990s-era Shreveport chief Bo (8)
9 Scoreless defeat (7)
10 Ferocious feline hybrid (5)
11 It's big in Jefferson Parish (8)
12 Stratagem (4)
13 1990s-era Monroe chief Bob (6)
15 1990s-era Baton Rouge chief Tom Ed (6)
19 Pleasant ___, battlefield near Mansfield (4)
20 One living nearby (8)
23 "Mein ___," infamous 1925 autobiography (5)
24 Acquired through adversity (4-3)
25 1990s-era Alexandria chief Ned (8)
26 Odds and ___ (4)

DOWN

1 Purpose of closing argument (2, 3, 2)
2 1990s-era Lake Charles chief Willie (5)
4 Maker of Quicken and TurboTax (6)
5 What "lis" means in "fleur de lis" (4)
6 Pulitzer Prize-winning poet Maya (7)
7 Go off course (5)
8 1990s-era New Orleans chief Marc (6)
14 The original Sony portable media player (7)
16 Cheroots and blunts (6)
17 1990s-era Thibodaux chief Warren, and family (7)
18 Send a second time (6)
19 Trail walker (5)
21 1990s-era Lafayette chief Kenny (5)
22 "In that event..." (2, 2)

Answers on page 293.

Alcohol and Drug Abuse Hotline

Director J.E. (Buddy) Stockwell III, 1(866)354-9334
1405 W. Causeway Approach, Mandeville, LA 70471-3045 • email jlap@louisianajlap.com

Alexandria	Steven Cook	(318)448-0082
Baton Rouge	Steven Adams	(225)921-6690
		(225)926-4333
	David E. Cooley	(225)753-3407
Lafayette	Alfred "Smitty" Landry	(337)364-5408
		(337)364-7626
	Thomas E. Guilbeau	(337)232-7240
	James Lambert	(337)233-8695
		(337)235-1825
Lake Charles	Thomas M. Bergstedt	(337)558-5032
Monroe	Robert A. Lee	(318)387-3872, (318)388-4472
New Orleans	Deborah Faust	(504)304-1500
	Donald Massey	(504)585-0290
	Dian Tooley	(504)861-5682
		(504)831-1838
Shreveport	Michelle AndrePont	(318)347-8532
	Nancy Carol Snow	(318)272-7547
	William Kendig, Jr.	(318)222-2772
		(318)572-8260 (cell)
	Steve Thomas	(318)872-6250

The Judges and Lawyers Assistance Program, Inc. provides confidential assistance with problems such as alcoholism, substance abuse, mental health issues, gambling and all other addictions.

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REPORT BY DISCIPLINARY COUNSEL

Public matters are reported to protect the public, inform the profession and deter misconduct. Reporting date Sept. 29, 2017.

Decisions

Andres H. Aguilar, Shreveport, (2017-B-1320) **Interimly suspended** from the practice of law by order of the Louisiana Supreme Court on Aug. 2, 2017.

Spencer Brimmer Bowman, Baton Rouge, (2017-B-1472) **Suspended 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 Sept. 22, 2017. ORDER FINAL and EFFECTIVE on Sept. 22, 2017. *Gist:* Commission of a criminal act, particularly one that reflects adversely on the lawyer's fitness; and violating or attempting to violate the Rules of Professional Conduct.

Sharon Y. Florence, Baton Rouge, (16-DB-059) **Publicly reprimanded** by a ruling from the Louisiana Attorney Disciplinary Board on Sept. 8, 2017. ORDER FINAL and EFFECTIVE on Sept. 22, 2017. *Gist:* Respondent violated the Rules of Professional Conduct including a concurrent conflict of interest; representing a client which resulted in violation of rules or other law; criminal act adversely reflecting on honesty, trustworthiness or fitness as a lawyer; conduct involving dishonesty, fraud, deceit or misrepresentation; and conduct prejudicial to the administration of justice.

Elbert L. Guillory, Opelousas, (2017-B-1128) **Publicly reprimanded** by order of the Louisiana Supreme Court on Sept. 6, 2017. JUDGMENT FINAL and EFFECTIVE on Sept. 6, 2017. *Gist:* Respondent neglected his client's legal matter.

Alvin A. Johnson, Jr., New Orleans, (2017-B-1011) **Suspended for one year and one day, fully deferred, with two**

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 Oct. 2, 2017.

Respondent	Disposition	Date Filed	Docket No.
Michael Langdon Cave	(Reciprocal) Interim suspension.	9/29/17	17-7762
Charles L. Dirks III	(Reciprocal) Suspension.	9/13/17	17-7200
James Paul Johnson	(Reciprocal) Interim suspension.	8/8/17	17-6005
Freddie King III	(Reciprocal) Suspension (fully deferred).	8/29/17	17-6842
Stacy Lynn Morris	(Reciprocal) Suspension.	8/8/17	17-6037
Michael J. Phillips	(Reciprocal) Suspension (fully deferred).	8/16/17	17-6651
Preston G. Sutherland	(Reciprocal) Suspension (fully deferred).	8/8/17	17-6162
Bradley J. Trevino	(Reciprocal) Suspension.	8/29/17	17-6843

Discipline continued from page 260

years of supervised probation, by order of the Louisiana Supreme Court on Sept. 6, 2017. JUDGMENT FINAL and EFFECTIVE on Sept. 20, 2017. *Gist:* Respondent failed to timely remit funds owed to a client, failed to account for funds belonging to a client, allowed his client trust account to become overdrawn, and took cash withdrawals from his client trust account.

Alexandra E. Mora, New Orleans, (2017-B-1318) **Suspended from the practice of law, on consent, for a period of six months, fully deferred, subject to a two-year period of supervised probation**, by order of the Louisiana Supreme Court on Sept. 15, 2017. JUDGMENT FINAL and EFFECTIVE on Sept. 15, 2017. *Gist:* Respondent mishandled her client trust account by commingling client funds with her personal funds.

Catherine L. Stagg, Lake Charles, (2017-B-1087) **Publicly reprimanded on consent, subject to a two-year period of unsupervised probation**, by order of the Louisiana Supreme Court on Sept. 6, 2017. JUDGMENT FINAL and EFFECTIVE on Sept. 6, 2017. *Gist:* Respondent failed to communicate with a client; and failed in her responsibilities regarding a non-lawyer assistant and scope of representation.

Randal Alandre Toaston, Baton Rouge, (2017-B-0702) **Permanently disbarred** by order of the Louisiana Supreme Court on Sept. 6, 2017. JUDGMENT FINAL and EFFECTIVE on Sept. 20, 2017. *Gist:* Respondent engaged in 26 counts of misconduct, including failing to update his primary registration address with the Louisiana State Bar Association, failing to provide competent representation to clients, providing services outside of the scope of the representations, neglecting legal matters, failing to communicate with clients, failing to refund unearned fees, withdrawing cash from his client trust account in excess of $50,000, overdrawing his client trust account, failing to maintain records of his client trust account, failing to fulfill his obligations upon termination of representation, failing to make reasonable efforts to expedite litigation, submitting duplicative or untimely pleadings to the courts, allowing a client's lawsuit to be dismissed as abandoned, practicing law while ineligible to do so, engaging in dishonest conduct, engaging in criminal conduct, and failing to cooperate with the Office of Disciplinary Counsel.

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

Violation of Rule 1.3 — Failing to act with reasonable diligence and promptness.

Violation of Rule 1.4 — Failing to reasonably communicate with client.

Violation of Rule 1.7(a) — Concurrent conflict of interest.

Violation of Rule 1.15(a) — Commingling; failure to maintain a trust account.

Violation of Rule 4.2(a) — Improper communication with a represented party.

CLIENT ASSISTANCE FUND PAYMENTS - NOVEMBER 2016, FEBRUARY & MAY 2017

Attorney	Amount Paid	Gist
Bruce C. Ashley II	$2,500.00	#1649 — Unearned fee in a criminal matter
Jade R. Blasingame	$11,250.00	#1698 — Conversion of insurance funds
Malcolm Brasseaux	$25,000.00	#1740 — Conversion in a succession
Raymond C. Burkart III	$500.00	#1753 — Unearned fee in a domestic matter
Olita Magee Domingue	$1,400.00	#1731 — Unearned fee in a domestic matter
Olita Magee Domingue	$2,000.00	#1686 — Unearned fee in a domestic matter
Olita Magee Domingue	$6,900.00	#1667 — Unearned fee in a criminal matter
Olita Magee Domingue	$1,500.00	#1683 — Unearned fee in a domestic matter
Roger W. Kitchens	$5,000.00	#1690 — Unearned fee in a criminal matter
Roger W. Kitchens	$1,000.00	#1717 — Unearned fee in a criminal matter
Kenota L. Pulliam	$6,000.00	#1155 — Unearned fee in a post-conviction matter
Michael Sean Reid	$2,192.55	#1770 — Unearned fee in a domestic matter
Michael Sean Reid	$3,225.00	#1771 — Unearned fee in a domestic matter
Michael Sean Reid	$1,125.00	#1781 — Unearned fee in a domestic matter
Michael Sean Reid	$1,220.00	#1782 — Unearned fee in a domestic matter
Michael Sean Reid	$2,312.50	#1787 — Unearned fee in a domestic matter
Michael B. Rennix	$320.00	#1756 — Unearned fee in a bankruptcy matter
Michael B. Rennix	$2,500.00	#1764 — Unearned fee in a bankruptcy matter
Michael B. Rennix	$325.00	#1759 — Unearned fee in a bankruptcy matter
Michael B. Rennix	$150.00	#1779 — Unearned fee in a property matter
Michael B. Rennix	$1,165.00	#1774 — Unearned fee in a bankruptcy matter
Randal A. Toaston	$2,000.00	#1744 — Unearned fee in a criminal matter
Kenneth M. Waguespack, Jr.	$25,000.00	#1688 — Conversion in a succession matter
Walter I. Willard	$10,000.00	#1599 — Unearned fee in a succession matter
Jermaine D. Williams	$1,500.00	#1743 — 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.

Comments and Post-Deadline Extensions of Time at the GAO

PennaGroup, L.L.C., B-414840.2, 2017 CPD ¶ 244 (Comp. Gen. Aug. 25, 2017), *https://www.gao.gov/assets/690/686788.pdf*.

On March 17, 2017, the Department of Homeland Security (DHS), U.S. Customs and Border Protection, issued two requests for proposals, Nos. HSBP1017R0022 and HSBP1017R0023, for border-wall prototypes. The first request was for design and construction of solid-concrete border-wall prototypes, and the second was for design and construction of other-than-solid-concrete border-wall prototypes. Both requests were issued under the two-phase design-build provisions of the Federal Acquisition Regulation subpart 36.3. These proposals concerned Phase I of the competition. Proposals submitted during Phase I were to be evaluated to determine whether an offeror would be allowed to participate in Phase II of the procurement.

The requests instructed potential offerors to acknowledge any issued amendments to the proposals by signing an accompanying Standard Form 30 and to submit the form with each proposal. Specifically, the requests stated, "Failure to acknowledge all Amendments issued by the Government may result in the proposal submitted in response to the solicitation being found non-responsive by the Government." DHS issued seven amendments to the requests. In response to the requests, PennaGroup submitted timely proposals; however, PennaGroup included a single Form 30 acknowledging only the seventh amendment in both of its proposals. Consequently, DHS determined

PennaGroup's proposals were non-responsive and excluded PennaGroup from Phase II of the competition. Following an agency protest, PennaGroup filed two protests with the Government Accountability Office (GAO) — one protest for each proposal exclusion.

A protest is a written objection by an interested party to a solicitation or other federal agency request for bids or offers, cancellations of a solicitation or other request, award or proposed award of a contract, or termination of a contract if terminated due to alleged improprieties in the award. *See,* FAR subpart 33.101. Three fora are available to hear these challenges, and reasons for protesting in each are litigation-strategy dependent. The fora are the federal agency soliciting the requirement, the Court of Federal Claims and the GAO. The GAO adjudicates protests under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56. The GAO hears the majority of reported protests, which is likely due to two unique characteristics of a GAO protest — the 100-day decision and the CICA automatic statutory-stay-of-contract award. *See,* 31 U.S.C. §§ 3553(c)-(d); FAR subparts 33.104(b)-(c), (f).

The Filings

After receiving PennaGroup's two protests, the GAO issued its standard acknowledgment notice that, among other things, set the due date for DHS's Agency Report for both protests on July 26, 2017. That report contains the agency's legal memo in opposition to the protest grounds, the contracting officer's statement in opposition to the protest grounds and documents relevant to the protest grounds. Further, the GAO advised PennaGroup, as it normally does, that its comments in response to the Agency Report were due shortly thereafter. Specifically, the GAO expressly warned that "[w]ritten comments *must be received in [the GAO's office] within 10 calendar days* of [PennaGroup's] receipt of the Agency Report — otherwise, [the GAO] will dismiss [PennaGroup's] protest." (Emphasis in original.)

On July 26, 2017, DHS filed its reports and PennaGroup acknowledged its receipt of the reports on the same day. That meant, barring any granted requests for extensions, PennaGroup's comments were due to the GAO by close of business on Aug. 7, 2017. PennaGroup did not file comments with the GAO by close of business on Aug. 7, 2017. On Aug. 8, 2017, the GAO asked PennaGroup to confirm whether it filed comments. In response, PennaGroup asserted that "[o]ur legal team has reviewed [DHS's] response and finds no new legal or factual arguments not fully set forth in length in our original Bid Protest." On Aug. 9, 2017, DHS filed two requests for dismissals of the protests, citing PennaGroup's failure to file comments.

In its response to the requests, PennaGroup acknowledged that its comments were not timely filed, but asserted its failure arose out of technical difficulties — an excuse not raised with the GAO on Aug. 8, 2017. Additionally, PennaGroup asserted that it did attempt to reach the GAO attorneys assigned to the protest regarding the late comments, but the GAO's phone records indicated PennaGroup's attorneys called on Aug. 8, 2017 — the day after comments were due — and did not leave any messages. Nonetheless, even if the GAO considered PennaGroup's post-hoc, inconsistent reasons for missing its deadline persuasive, it did not matter as the GAO cannot grant post-deadline extensions of time and subsequently dismissed the protests.

In reaching its decision, the GAO referred to its long-standing position that "[b]id protests are serious matters which require effective and equitable procedural standards to assure both that parties will have a fair opportunity to present their cases and that protests can be resolved in a reasonably speedy manner." *See, Reynolds Bros. Lumber & Logging Co.-Recon.*, B-234740.2, May 16, 1989, 1989 CPD ¶ 468 at 2-3. The GAO further noted that its bid-protest regulations require a protester

to file comments on an agency's report and that generally a protester's failure to file comments within 10 calendar days "shall" result in dismissal of the protest. *See,* 4 C.F.R. § 21.3(i). Lastly, the GAO reasoned that to the extent PennaGroup meant to request an extension of time, its bid-protest regulations "do not allow for post-deadline extensions" and that, unless an extension is granted prior to the deadline, a protest "will be dismissed." *Id*. Therefore, because PennaGroup had an opportunity to file its comments and request an extension prior to the deadline, the GAO concluded that allowing PennaGroup to file its comments late "would be inconsistent with [the GAO's] purpose of providing a fair opportunity for protesters to have their protests considered without unduly disrupting the procurement process."

—Bruce L. Mayeaux
Major, Judge Advocate
U.S. Army
Member, LSBA Administrative Law Section

Mediation in Campus Sexual-Assault Claims

Recent actions by the U.S Department of Education have sparked discussion about the use of mediation in campus sexual-assault cases. On Sept. 22, 2017, the Department rescinded two sets of Obama-era guidelines for campus sexual-assault investigations, with the stated purpose of making the campus justice system fairer in sexual-assault cases. The guidelines were replaced with new interim instructions giving schools more freedom to balance the rights of the accused while cracking down on misconduct. U.S. Secretary of Education Betsy DeVos intends to enact new rules after a period of public comment. Among the changes are new interim rules that lift the ban on the use of mediation in campus sexual-assault cases, which has caused some controversy. Stephanie Saul and Kate Taylor, "Betsy DeVos Reverses Obama-era Policy on Campus Sexual Assault Investigations," (*The New York Times*, Sept. 22, 2017). *www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html.*

In 2011, the Obama Administration issued a "Dear Colleague" letter to colleges detailing how to deal with sexual-assault complaints. The 19-page letter spoke specifically about the use of informal methods such as mediation for resolving sexual-assault issues. It stated that, although such mechanisms may be used for resolving some types of sexual-harassment complaints, "in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis." The letter also recommends that school grievance procedures clarify that mediation will not be used to resolve sexual-assault complaints. *www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.*

The 2011 letter was then followed by a 2014 question-and-answer document further explaining how schools were to handle

complaints of campus sexual assault and other Title IX issues.

The Department of Education, under the new administration, issued a "Dear Colleague" letter on Sept. 22, 2017, informing schools that the previously mentioned statements of policy and guidance were henceforth withdrawn, and that the Department will not rely on the withdrawn documents in its enforcement of Title IX. *www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.*

Along with the letter of withdrawal, the Department issued a "Q&A on Campus Sexual Misconduct" that addresses schools' Title IX responsibilities concerning complaints of sexual misconduct. Question 7 of the document addresses informal resolution of complaints and states, "If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution." *www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.*

This marks a distinct departure from the previously issued guidance that expressly denounced the use of mediation to resolve campus sexual-assault complaints.

Since the release of the new interim guidelines, advocates on both sides of the issue have spoken up about the changes allowing for the use of mediation in these disputes. As the use of informal resolution techniques would require the consent of both parties, some have applauded the Department's decision to permit mediations, explaining that some victims did not necessarily want a full-scale investigation and trial. *See,* Saul & Taylor, *supra.* Many others have expressed concern that mediation is inappropriate, as it may allow schools to sweep sexual-assault complaints under the rug by treating sexual violence as a mere miscommunication between students. There is also fear that victims may be unfairly pressured by schools to pursue informal resolution over formal investigation. Grace Watkins, "Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution," (*Motto*, Oct. 2, 2017). *motto.time.com/4957837/campus-sexual-assault-mediation/.*

In response to the interim policy changes, colleges around the country have begun to review their own policies regarding sexual assaults. Louisiana college and university leaders are now sifting through the new guidelines. According to the Louisiana Board of Regents, educators will decide what changes are needed in state law and policies once the new guidelines are finalized. Will Sentell, "State Colleges to Reassess Sexual Assault Policies in Wake of Federal Guideline Changes," (*The Advocate*, Baton Rouge, Oct. 1, 2017). *www.theadvocate.com/baton_rouge/news/education/article_8e744922-a3be-11e7-b49c-af06c705f212.html.*

Amidst the controversy over the Department's decision to withdraw the former guidelines, a group of Democratic lawmakers unveiled legislation at a press conference on Oct. 12, 2017, that would undo the changes. The legislation, called the Title IX Protection Act, would codify into law the Obama-era guidelines, as well as the Bush 2001 Guidance on Title IX. If these guidelines were to be codified, mediation would definitively be off the table for resolving sexual-assault complaints. Alanna Vagianos, "Democrats Introduce Bill That Would Turn Title IX Guidelines into Law," (*HuffPost*, Oct. 12, 2017). *www.huffingtonpost.com/entry/democrats-introduce-bill-that-would-make-title-ix-guidelines-law_us_59de8979e4b0fdad73b1db28.*

Although mediation is presently included as a viable option for schools to resolve campus sexual-assault claims, whether it will remain an option that American colleges and universities can effectively use is yet to be determined.

—Kiara Heath
2L Student, Student Mediator,
LSU Paul M. Hebert Law Center
Civil Mediation Clinic
Under the Supervision of
Paul W. Breaux
LSU Adjunct Clinical Professor
Past Chair, LSBA Alternative
Dispute Resolution Section
16643 S. Fulwar Skipwith Rd.
Baton Rouge, LA 70810

Three Bankruptcy Cases, Same Court

Cowin v. Countrywide Home Loans (Matter of Cowin), 864 F.3d 344 (5 Cir. 2017).

In *Matter of Cowin*, debtor Charles Cowin filed three bankruptcy cases in the same court: two consecutive individual Chapter 11 bankruptcy cases in 2010, which were dismissed, and a Chapter 7 case in 2013.

Cowin was involved in a scheme to deprive mortgage holders of excess foreclosure proceeds by using "tax-transfer" liens. Cowin and his co-conspirators purchased properties secured by first-lien mortgages at foreclosure sales and then entered into loan agreements with two of his companies to pay the property taxes. The lender companies received tax-transfer liens against the properties in return. Cowin then immediately defaulted on the payment obligations and instructed the deed trustee to foreclose on the properties.

Under Texas law, after foreclosure, tax-transfer liens take priority and junior liens are extinguished, leaving only the excess proceeds available to junior lienholders. However, the deeds of trust Cowin drafted in connection with the loan agreements omitted language requiring the deed trustee to distribute "any amounts required by law to be paid before payment to Grantor." Therefore, after foreclosure, the trustee paid the private lender's tax-transfer liens in full, leaving all excess funds to Cowin.

Two adversary proceedings were initiated by the mortgage lenders, asserting damages incurred in connection with the scheme and further asserting that those damages were not dischargeable under 11 U.S.C. §523(a)(4), which exempts from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny."

The bankruptcy court found that Cowin had committed larceny, intended to divert the excess proceeds from junior lienholders holding pre-existing mortgages on the properties. In both proceedings, the court found that the damages were nondischargeable debts. The district court affirmed.

On appeal, Cowin argued that the bankruptcy court erred by imputing the intent of his co-conspirators to him in determining nondischargeability. The 5th Circuit rejected this argument, finding that the evidence of Cowin's individual conduct described above was sufficient to justify nondischargeability. However, regardless of Cowin's own conduct, the conduct and intent of a debtor's co-conspirators alone is sufficient to support nondischargeability. The statute "excepts from discharge debts 'for . . . larceny.'" The character of the debt, not the character of the debtor, determines the issue, and Cowin did not dispute that the debt arose from larceny.

The larger of the two proceedings was initiated during Cowin's second Chapter 11 case; however, the bankruptcy court retained jurisdiction over the matter after the case was dismissed. Judgment was rendered after Cowin's Chapter 7 case had begun, but the court emphasized in the judgment that, while the proceeding may have arisen during the Chapter 11 case, the judgment applied in the Chapter 7 case. Cowin argued that this violated the automatic stay because no timely motion to lift the stay had been filed.

The 5th Circuit held that any error was harmless because a motion to lift the stay would have been granted anyway, resulting in the same outcome. Thus, Cowin was not prejudiced by the failure to lift the automatic stay.

—Tristan E. Manthey
Chair, LSBA Bankruptcy Law Section
and
Tiffany D. Snead
Heller, Draper, Patrick, Horn & Dabney, L.L.C.
Ste. 2500, 650 Poydras St.
New Orleans, LA 70130

Non-Competition Agreement Among LLC Members

Yorsch v. Morel, 16-0662 (La. App. 1 Cir. 7/26/17), 223 So.3d 1274.

This case considered a non-competition agreement between members of a limited liability company. Prior to 2008, certain Louisiana courts held that non-competition agreements unrelated to employment were outside the scope of the general prohibition on non-competition agreements contained in La. R.S. 23:921. *See, La. Smoked Prods., Inc. v. Savoie's Sausage & Food Prods., Inc.*, 96-0716 (La. 7/1/97), 696 So.2d 1373. However, the Louisiana Legislature amended La. R.S. 23:921 in 2008 to add subsection (L) to address non-competition agreements among a limited liability corporation and its individual members.

Yorsch recognized that the 2008 amendment brought non-competition agreements among members of an LLC under the purview of La. R.S. 23:921. In finding the non-competition agreement in question overly broad and unenforceable under La. R.S. 23:921, *Yorsch* rejected plaintiff's contention that the public policy considerations behind La. R.S. 23:921 "should not be applied 'as strictly' in the context of a bilateral agreement between sophisticated parties on equal footing." Rather, *Yorsch* found that the plain language of the statute mandated that La. R.S. 23:921 be strictly construed against the party seeking its enforcement — regardless of the bargaining power or sophistication of the parties.

Importantly for business and corporate practitioners, entity-formation documents frequently contain provisions regarding duties of loyalty, business opportunities, non-competition and non-solicitation. Practitioners should consider the strict requirements of La. R.S. 23:921 in drafting these provisions and advising clients on entity formation and preservation.

—David Logan Schroeder
Chair, LSBA Corporate and Business Law Section
Cook, Yancey, King & Galloway, A.P.L.C.
Ste. 1700, 333 Texas St.
Shreveport, LA 71101

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Procedure/Recusal

Dussouy v. Dussouy, 16-1316 (La. App. 4 Cir. 5/10/17), 220 So.3d 197, *writ denied*, ____ So.3d ____, 2017 WL 4546414.

The court of appeal granted Ms. Dussouy's writ and reversed the lower court, which had recused the sitting trial judge on the basis of avoiding "the appearance of impropriety." The matter arose from a status conference that the judge's law clerk attended after she had accepted employment with Ms. Dussouy's counsel's firm. The judge did not disclose the employment to Mr. Dussouy's counsel. The court of appeal found that Mr. Dussouy failed to show a "substantial factual basis" for "actual bias or prejudice." Moreover, he failed to present evidence that questioned the judge's impartiality. Finally, the court found that the Rules of Professional Conduct apply to attorneys, not to judges.

Custody

Lewis v. Hart, 17-0024 (La. App. 3 Cir. 5/17/17), 221 So.3d 152.

The trial court denied Lewis' exception of res judicata regarding the mother's reconventional demand, in which he had alleged that her custody claims had already been decided by a prior judgment. Lewis appealed, but the court found it was a prohibited appeal from an interlocutory judgment. As the case involved the custody of an infant, however, the court converted the appeal to a supervisory writ in order to address the assignments of error raised by both parties.

Although the custody judgment rendered by the trial court was a final judgment, the trial court erred in ruling on his exception prior to addressing the mother's motion for new trial. Further, the trial court's order vacating its earlier judgments was improper as not made under any al-

lowable procedure. Thus, the court of appeal reinstated the initial custody judgment and remanded for the court to hear the mother's motion for new trial.

Ferrand v. Ferrand, 16-0007 (La. App. 5 Cir. 8/31/16), 221 So.3d 909, *writ denied*, 16-1903 (La. 12/16/16), 211 So.3d 1164.

Vincent, a biological female who identified as male, and Paula had an extended relationship during which Paula gave birth to twins conceived through artificial insemination from a sperm donor. After the relationship dissolved, Vincent filed a petition for custody and for a court-appointed evaluator to be appointed. The trial court found that Vincent failed to show that the children would suffer substantial harm if Paula were awarded custody and denied his petition and his request for an evaluator. After an extensive review of the law and jurisprudence of the "southern states" and of Louisiana, the court of appeal found that Vincent was entitled to seek custody and was entitled to a court-appointed custody evaluation.

The court addressed the concepts of "*in loco parentis*, *de facto* parent, or psychological parent status in custody contests between a parent and a non-parent." It found that while those concepts did not apply in Louisiana, they helped define the issues. The court found that since the primary aim in Louisiana custody cases is to determine and protect the best interests of the child, a custody evaluation was warranted to determine whether substantial harm would occur to the children if Paula were granted sole custody. Needless to say, the facts were complex, as was the parties' relationship. However, the children were clearly bonded with Vincent and identified him as their father. The trial court had issued protective orders preventing Vincent from having any contact with Paula for the rest of her life and prohibiting him from contact with the children until they reached age 18. The court of appeal reversed the order regarding the children, as there were no allegations or evidence of harm by Vincent to the children.

Gary v. LeBlanc, 16-1054 (La. App. 3 Cir. 6/7/17), 222 So.3d 784.

Although the trial court found that both parties were fit to be the domiciliary parent, the article 134 factors favored the mother, and the court named her as the domiciliary parent. A change would have both affected the school the child attended and separated her from siblings. The trial court did not err in denying Gary's request to have the child's surname changed to his, since his action was not brought under the appropriate statutes; but the court reserved his right to file an amended petition under the proper procedures. The trial court did not err in denying a reduction of Gary's child support to account for the time the child spent with him as he failed to show that his financial burden had increased and the mother's financial obligation had decreased. Further, the court appropriately considered his bonuses in calculating his income for child support.

Relocation

Blake v. Morris, 51,402 (La. App. 2 Cir. 6/30/17), 222 So.3d 1277, *writ denied*, 17-1334 (La. 9/15/17), 225 So.3d 478.

The court of appeal reversed the trial court's decision that denied Blake's request to relocate to Pensacola, Fla., and allowed the relocation. Blake was completing her education, had a job offer in the Pensacola area, and was also engaged to be married to a man who lived and owned a business in that area. She was the child's primary caretaker, and the court found that she would be able to provide a stable and consistent living environment for the child. Morris, on the other hand, had no permanent home, but traveled often related to his work and spent most of his time in hotel rooms, even when visiting the child. His visits with the child were inconsistent due to his work and travel schedule. Notably, the court of appeal found that the trial court misapplied relocation factor La. R.S. 9:355.14(A)(3), finding: "All interstate visitations pose difficulties, but that factor cannot stand alone as the only consideration, especially in our mobile society." The trial court had found that the relocation would make it "difficult" on Morris to maintain a relationship with the child. The court of appeal, on the other hand, found that such "difficulty" was inherent in any relocation and if allowed to be a controlling factor "would in effect lead to a jurisprudential repeal of the relocation statute." Further, the trial court erred in finding that Blake thwarted Morris' access to the child, finding instead that it was Morris who did not make consistent efforts to see the child, and that Blake had attempted to accommodate him. The court remanded the matter for a custody and visitation schedule to be implemented.

—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

Insurance, Tort, Workers' Compensation & Admiralty Law

Principle of *Res Ipsa Loquitur*

Lyles v. Medtronic Sofamor Danek, USA, Inc., 871 F.3d 305 (5 Cir. 2017).

Mr. Lyles underwent anterior corpectomy and discectomy surgery. A Verte-Stack implant, a vertebral-body implant device, was placed in his cervical spine. An Atlantis Translations Anterior Cervical Plate System (Atlantis Plate) was also implanted to stabilize the Verte-Stack and to promote fusion. Sometime after surgery, the Atlantis Plate either broke or became displaced. Lyles brought suit against Medtronic, manufacturer of all devices used in the surgery, in Louisiana state court under the Louisiana Products Liability Act (LPLA). The district court granted Medtronic summary judgment on claims dealing with the Atlantis Plate.

Lyles returned to the hospital a week after his discharge, stating that he had not improved and had experienced two falls. X-rays showed slight displacement of the plate, but further tests indicated that it had not broken or became unstable. A second surgery was performed nine months after the first, leaving the Atlantis Plate in place. Ten months later, the Atlantis Plate still in place, Lyles' doctor examined him and found that the anterior and posterior cervical spine had maintained alignment. He opined that the Atlantis Plate never failed.

After defendant removed the case to federal court, Lyles, in his third amended complaint, brought defective construction claims under the LPLA against Medtronic for the Atlantis Plate, as well as claims under the Louisiana Unfair Trade Practices and Consumer Protection Law. Medtronic moved for summary judgment on the defective design and defective construction claims, arguing that Lyles could not show that the Atlantis Plate deviated from Medtronic's specifications or performance standards so as to make it unreasonably dangerous. Lyles conceded he could not show an alternative design, but argued for the first time that *res ipsa loquitur* applied to create a presumption that the Atlantis Plate contained a defect in construction. The district court granted summary judgment, and Lyles appealed.

The principle of *res ipsa loquitur* is "a rule of circumstantial evidence that infers negligence on the part of defendants because the facts of the case indicate that the negligence of the defendants is the probable cause of the accident, in the absence of other equally probable explanations offered by credible witnesses." *Montgomery v. Opelousas Gen. Hosp.,* 540 So.2d 312 (La. 1989). The Louisiana Supreme Court has held that *res ipsa loquitur* can be applied in products liability actions and used to "shift the burden of proof to the defendant-manufacturer." Plaintiff must meet three requirements:

> 1) The facts must indicate that the plaintiff's injuries would not have occurred in the absence of negligence;
> 2) The plaintiff must establish that the defendant's negligence falls within the scope of his duty to plaintiff; and
> 3) The evidence should sufficiently exclude inference of the plaintiff's own responsibility or the responsibility of others besides the defendant in causing the accident.

The court found that, in order to succeed on the theory of *res ipsa loquitur,* Lyles had to produce evidence excluding other reasonable explanations. Lyles argued there was no evidence for any other cause for the Atlantis Plate's breakage, but the court noted there was no evidence of a manufacturing defect either. The court stated the operative question in reviewing the trial court's decision as to the applicability of the *res ipsa loquitur* doctrine was not whether there was evidence to support other reasonable explanations for the Atlantis Plate's breakage, but whether Lyles has adduced evidence to exclude other reasonable explanations.

—John Zachary Blanchard, Jr.
Past Chair, LSBA Insurance, Tort, Workers' Compensation and Admiralty Law Section
90 Westerfield St.
Bossier City, LA 71111

United States

Ford Motor Co. v. United States, 254 F.Supp.3d 1297 (Ct. Int'l Trade 2017).

The United States Court of International Trade recently granted Ford Motor Co. a significant victory over United States Customs and Border Protection (CBP). The dispute involves the process of "tariff engineering" in order to avoid the still persistent consequences of the 1960s trade war between the United States and Europe. Back then, in a retaliatory tit-for-tat, the United States responded to Europe's increased import tariffs on U.S. chicken by implementing the infamous 25 percent "chicken tax" on trucks imported from Europe. The 25 percent retaliatory chicken tax tariff remained in place in 2009 when Ford was producing and importing certain trucks from Turkey. By contrast, the import tariff on passenger vehicles from Europe in 2009 was 2.5 percent.

Ford imports Transit Connect vehicles from Turkey. The vehicles are manufactured to serve as cargo vans. However, Ford adds second-row seating to the vehicle in order to classify the vehicles for Customs purposes not as trucks subject to the 25 percent chicken tax, but as passenger vehicles with the accompanying 2.5 percent tariff. Once the Transit Connect vehicles clear customs and before leaving port, Ford employs a subcontractor to remove the second-row seating in order to deliver the vehicle to its customers as a cargo van.

Ford's post-importation port activity raised the ire of CBP, which found that "the inclusion of the second row seat is an improper artifice or disguise masking the true nature of the vehicle at importation . . . ." *Id.* at 1302. CBP classified the Transit Connect as a truck subject to the 25 percent chicken tax despite the second-row seating indicative of a passenger vehicle. Ford lodged a timely protest contending that its conduct constitutes legitimate tariff engineering and that CBP's analysis should focus solely on the vehicle as presented at the border.

The court reviewed prior precedent on tariff engineering, noting affirmation of the principle as far back as 1881 by the U.S. Supreme Court. *Id.* at 1317. In short, manufacturers are entitled to manufacture goods in a way that avoids higher tariffs as long as the goods are truly invoiced and presented to CBP without fraud or deception. On the other hand, disguise or artifice is not allowed in order to avoid a prescribed rate of duty. *Id.* at 1318. The court reviewed the two competing tariff classifications (truck v. passenger vehicle) and focused its examination on *inter alia* design intent and structural and auxiliary design features. The court concluded that the vehicle presented to CBP at the border is properly classifiable as a passenger vehicle subject to the 2.5 percent tariff rate. There is a strong possibility that this decision will be appealed to the Court of Appeals for the Federal Circuit.

Office of the U.S. Trade Representative

Section 301 Investigation on China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property and Innovation, Docket No. USTR-2017-0016.

President Trump signed a Presidential Memorandum on Aug. 14, 2017, directing the Office of the United States Trade Representative (USTR) to investigate whether China may be "harming American intellectual property rights, innovation, or technology developments." USTR formally initiated the investigation on Aug. 18 to determine whether certain Chinese intellectual property practices are actionable under Section 301(b)(1) of the Trade Act of 1974. For years, U.S. industries and companies have complained about Chinese forced technology transfers and intellectual property theft. China allegedly uses domestic legal requirements (including joint venture requirements) to intervene in U.S. companies' operations in China in order to pressure the U.S. companies to transfer technology and intellectual property to Chinese companies. China also reportedly directs the acquisition of U.S. companies in order to obtain cutting-edge technologies and intellectual property in industries deemed critical to its overall industrial plan. Many observers believe that this investigation could be the most critical trade-policy investigation to date. Uncovering systematic measures to facilitate large-scale technology transfers not only runs contrary to World Trade Organization obligations, but could also pose significant national security risks. The USTR held a public hearing on Oct. 10, 2017.

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

Circuit Split over Legality of Class Action Waivers: Employers Await Supreme Court Decision

In its Aug. 7, 2017, decision in *Convergys Corp. v. NLRB*, 866 F.3d 635 (5 Cir. 2017), a divided three-judge panel of the U.S. 5th Circuit Court of Appeals held that the National Labor Relations Act (NLRA) does not protect an employee's right to participate in class and collective actions, whether a class-and-collective-action waiver stands alone or is included in an arbitration agreement.

At issue was Convergys' requirement that its job applicants sign an agreement including the following waiver:

> I further agree that I will pursue any claim or lawsuit relating to my employment with Convergys (or any of its subsidiaries or related entities) as an individual, and will not lead, join, or serve as a member of a class or group of persons bringing such a claim or lawsuit.

A Convergys employee who signed this agreement filed charges with the National Labor Relations Board (NLRB), alleging that Convergys interfered with the exercise of employee rights by maintaining and enforcing the class-and-collective-action waiver. Convergys settled the case with the individual employee, but the NLRB nevertheless issued a complaint against Convergys alleging that it violated Section 8(a)(1) of the NLRA by requiring job applicants to sign and by seeking to enforce the waiver. The NLRB ultimately ordered Convergys to cease and desist from requiring and enforcing the waiver. Subsequently, Convergys petitioned the 5th Circuit for review of the NLRB's decision, and the NLRB sought enforcement of its order.

In a 2-1 decision penned by Judge Elrod, the 5th Circuit reversed the NLRB decision. The court framed the issue as whether Section 7 of the NLRB, which guarantees employees the right "to engage in other concerted activities for the purpose of . . . mutual aid or protection," contemplates a right to participate in class-and-collective actions. The majority held that it was bound by the court's previous decision in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5 Cir. 2013), wherein the court considered a class-and-collective-action waiver included in an arbitration agreement. Because the waiver involved an arbitration agreement, the court in *Horton* analyzed whether the waiver was enforceable under both the NLRA and the Federal Arbitration Act (FAA). There, the court held that the NLRA and FAA did not conflict, and that "[t]he use of class action procedures . . . is not a substantive right" guaranteed to employees. *Id.* at 357.

Judge Higginbotham wrote a dissenting opinion in *Convergys*, in which he reasoned that *Horton* was distinguishable because it involved an arbitration agreement and thus implicated the special protections of the FAA. Judge Higginbotham concluded that class and collective actions that are not shielded by the protection of the FAA violate the NLRA. Accordingly, he would have enforced the NLRB's order. In a concurring opinion, Judge Higginson indicated he was persuaded by the dissent's conclusion that class-and-collective-action waivers standing alone violate the NLRA, but was constrained by circuit precedent to concur in the majority's judgment.

As the *Convergys* dissent acknowledged, circuit courts are split on whether class-and-collective-action waivers contained in arbitration agreements are enforceable. Specifically, the 2nd, 5th and 8th Circuits have held that such waivers are permissible, while the 6th, 7th, 9th and D.C. Circuits have disagreed. In January 2017, the Supreme Court granted certiorari in and consolidated cases from the 5th, 7th and 9th Circuits. 137 S.Ct. 809 (2017), granting cert. in *NLRB v. Murphy Oil USA, Inc.,* 808 F.3d 1013 (5 Cir. 2015); *Lewis v. Epic Sys. Corp.*,

823 F.3d 1147 (7 Cir. 2016); and *Morris v. Ernst & Young, L.L.P.*, 834 F.3d 975, 985-87 (9 Cir. 2016). The Court heard oral argument on the consolidated cases on Oct. 2, 2017.

The potential impact of the Supreme Court decision in the consolidated cases, which is expected to be published in early 2018, cannot be overstated. Class-and-collective-action filings against employers maintained their popularity in 2017, especially in the area of wage-and-hour litigation. The ability to bring wage-and-hour claims on a class-and-collective basis is especially important for plaintiffs because most individual claims involve fairly small amounts of money, and it can be difficult for a single employee to find a lawyer willing to take the case. Class-and-collective wage actions are also very attractive to the plaintiffs' bar, as they typically involve a relatively low investment, with potential for high return, in comparison to other types of employer class action litigation.

In sum, while it is difficult to anticipate how the Supreme Court might rule, it is certain that its ruling will be significant. If the Supreme Court decides that employers can avoid class-and-collective actions by simply requiring employees to sign waivers, the success of such actions against employers would dramatically decrease. However, if the Court gives deference to the NLRB's position and decides that such waivers violate the NLRA, class-and-collective action filings against employers will likely surge. While we await the Court's decision, employers and employment lawyers should stay tuned and be prepared to alter their practices for better or worse, depending on the outcome of the case.

—Allison A. Fish
Member, LSBA Labor and Employment Law Section
The Kullman Firm
Ste. 1600, 1100 Poydras St.
New Orleans, LA 70163

Royalty Dispute; Concursus Proceeding; Contract Interpretation

Glassell Producing Co., Inc. v. Naquin, 16-0549 (La. App. 1 Cir. 7/5/17), 224 So.3d 56.

Three siblings each inherited an undivided 1/3 interest in their father's 1/16th interest in property located in Lafourche Parish. At the time of the inheritance, a 1947 lease was in effect on the property. The lease contained a 1/8 royalty. The 1947 lease remained in production until 1998. In 1993, five years prior to the termination of the lease, two of the siblings (Junius and Dolores) conveyed to the third sibling (Carol) their right, title and interest to the royalty interest in the 1947 lease — a .00781255 interest.

In April 1998, the holders of the 1947 lease filed a release of the lease in the conveyance records. In May 1998, Carol entered into a new lease with Alfred Glassell, affecting a portion of the subject property (the 1998 lease). The 1998 lease contained a 1/6 mineral royalty, which was in favor of Carol only. Glassell did not seek a lease from Junius or Dolores.

In February 2015, the then-holders of the 1998 lease (Legacy Trust Co., N.A. and operating company, Glassell Producing Co., Inc.) filed a concursus proceeding against Junius, Carol and the heirs of Dolores. Legacy and Glassell claimed that there were conflicting claims to proceeds from production under the 1998 lease. The amount of $397,059.29 was deposited into the registry of the court pending the outcome of the lawsuit.

In April 2015, plaintiffs filed a motion to limit the time to file an answer pursuant to La. C.C.P. art. 4657. Junius did not file

his answer within the 10-day time period. Thus, the court struck Junius's answer and found that he could not assert any claims in the lawsuit. Carol and the heirs of Dolores timely filed their answers. In November 2015, plaintiffs filed a motion for summary judgment against the heirs of Dolores. Plaintiffs claimed that, pursuant to the 1993 conveyance, Dolores conveyed *all* of her right, title and interest in the royalty interest to Carol and thus did not have any claim to the monies in the registry of the court. Plaintiffs claimed that Dolores did not put any limitation on the royalty interest conveyed — it included the 1947 and 1998 leases. Plaintiffs maintained that Carol had the right to all of Dolores's royalty interest so long as the subject land remained under production without a lapse of 10 years. Dolores's heirs countered that the 1993 deed conveyed Dolores's portion of the royalty interest *in the 1947 lease only* and that the 1993 conveyance does not convey any future royalty interest.

The trial court, after a hearing, ruled that the 1993 conveyance transferred all of Dolores's interests to Carol, not just the interest in the 1947 lease. The heirs of Dolores appealed. On appeal, the 1st Circuit, performing a *de novo* review, reversed the trial court and found that the 1993 deed *conveyed only Dolores's royalty interest in the 1947 lease*, not any other lease. The appellate court was not persuaded by the argument that the language "ALL OF SELLER'S right, title and interest . . ." meant that Dolores conveyed *all* of her royalty interest in the property to Carol. The appellate court found that there was no language in the 1993 deed that conveyed *"any and all royalty interest"* of Dolores to Carol. Rather, the court found that the 1993 deed was a limited conveyance by Dolores to Carol. The appellate court concluded that this interpretation made sense because Louisiana law permits a royalty owner to dismember his/her royalty interest in any legal fashion, including transfer of a fractional interest. Thus, the trial court's ruling was reversed and the matter was remanded to the 17th Judicial District Court for further proceedings.

Timeliness of Claims Against Officer of Foreign Corporation

Salemi v. TMR Exploration, Inc., 16-0567 (La. App. 1 Cir. 6/13/17), 224 So.3d 14.

A plaintiff asserted that he was entitled to compensation because hydrocarbons were drained from beneath his land by a well that was bottomed within 330 feet of his property line, without the formation of a drilling unit, in violation of Louisiana's well-spacing rules.

The same facts also gave rise to *Hill v. TMR Exploration, Inc.*, 16-0566 (La. App. 1 Cir. 6/13/17), 223 So.3d 556. In *Hill*, several plaintiffs alleged that the well had been directionally drilled, and that it had been bottomed beneath their land without their knowledge or consent. They asserted that this constituted a subsurface trespass. In both cases, the president of the company that had drilled the well was one of the defendants.

In both *Salemi* and *Hill*, the district court dismissed the claims against the president on grounds of prescription, relying on La. R.S. 12:1502, which establishes time limits for suits against "business organizations formed under the laws of this state" or against certain persons associated with such organizations. The Louisiana 1st Circuit reversed the judgments of dismissal. The company that had drilled the well was a Texas corporation, and the court concluded that R.S. 12:1502 applies only to companies organized under Louisiana law.

—Keith B. Hall
Member, LSBA Mineral Law Section
Director, Mineral Law Institute
Campanile Charities Professor
of Energy Law
LSU Law Center, Rm. 428
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

Summary Judgment

Lee v. Quinn, 17-0070 (La. App. 1 Cir. 9/15/17), ____ So.3d ____, 2017 WL 4081883.

An infant died from an enlarged heart after being treated at a general hospital under the care of Dr. Boudreaux, a physician certified in pediatrics and emergency medicine. A medical-review-panel found no breach of the standard of care. The baby's mother filed a lawsuit against the hospital and Dr. Boudreaux, which was met with a motion for summary judgment filed by the defendants.

The mother's principal defense to the motion was an affidavit from Dr. Meliones, a board-certified pediatric cardiologist specializing in pediatric critical care, which stated that both defendants breached several standards of care.

The district court observed that Dr. Meliones held board certification in pediatric cardiology and was "specializing" in pediatric critical care. Dr. Boudreaux, however, was an emergency-room physician, "a recognized specialty," and the hospital was a general hospital. Thus, Dr. Meliones' affidavit failed "to show that he ha[d] the qualifications . . . to offer an expert opinion" about standards of care required of Dr. Boudreaux or the hospital. Once the motion to strike the affidavit was granted, no disputed issue of material fact remained, and defendants' motion was granted. The appellate court held that the district court had not abused its discretion in excluding the affidavit from evidence.

Hoston v. Richland Parish Hosp. Serv. Dist. 1-B, 51,362 (La. App. 2 Cir. 4/5/17), 218 So.3d 236.

Coward, an intoxicated 66-year-old man, was knocked unconscious in a bar fight and taken to Richardson Medical Center's (RMC) emergency room, where he was treated by Dr. Lifshutz. The hospital ran a CT scan, and the images were sent to an off-site radiologist for evaluation. Coward was discharged and walked out of the emergency room in police custody. The CT scan report, transmitted to the hospital 23 minutes after Coward's discharge, concluded: "Urgent Finding: Pneumocephalus." The discharge instructions made no mention of follow-up about the CT scan, and neither the physician nor any hospital staff member communicated with Coward or the jail following receipt of the CT report.

Four days after the discharge, Coward was transported from jail to another hospital where a second CT scan showed a skull fracture, subdural hematoma and extensive Pneumocephalus. He died two months later, an autopsy report revealing the cause of death as "Pneumonia Complicating Head Injury."

The first of two medical-review panels concluded that the hospital met the applicable standard of care but was unable to decide the material issue of fact as to whether the hospital was vicariously liable for any potential negligence by Dr. Lifshutz.

The hospital moved for summary judgment, submitting the panel opinion in support. The plaintiffs opposed with an affidavit from Dr. Sobel, an emergency-medicine physician who, *inter alia*, found fault on the hospital's part by virtue of its failure to inform jail personnel of the abnormal CT findings and Coward's need for additional medical care. Dr. Sobel identified 20 instances in which the hospital, its agents and/or Dr. Lifshutz were negligent, some or all of which increased Coward's "risk of harm or substantially contributed to his demise."

The trial court granted partial summary judgment on the direct negligence claims against the hospital, but denied the motion with respect to the hospital's vicarious liability for Dr. Lifshutz. The

plaintiffs appealed the court's finding that the hospital did not owe any duty to Coward to review the results of the CT scan or to contact the detention center. The hospital responded that Dr. Sobel's statements on causation were "conclusory" in that he did not link the breaches to the damages other than to claim that "some or all of [the] deviations" increased the risk of harm or substantially contributed to Coward's death. The hospital also argued that Dr. Lifshutz admitted that he knew the CT results before discharging Coward, rendering hospital procedures irrelevant.

The appellate court noted that RMC admittedly owed "some sort" of duty to Coward and that the plaintiffs' expert identified the specific duty that was breached concerning the CT scan results, whereas the first panel's opinion found no breach of any standard, thereby establishing a genuine issue of material fact.

The hospital also argued that causation was not supported by any evidence because of the "conclusory and unsupported" nature of Dr. Sobel's affidavit. The court observed that proof of causation requires either expert testimony or obviousness such that lay persons can infer causation. In this case, Coward's "death certificate lists the very injury he was being treated for as a complicating factor in his death." The court held:

> It is, therefore, obvious to a lay person that there may be some causal connection between Coward's death and the treatment and care he received from [the hospital] and Dr. Lifshutz. Even if Dr. Sobel's statement of causation is insufficient, his affidavit along with all of the other medical records creates a genuine issue of material fact regarding causation.

The court reversed the partial summary judgment in favor of the hospital.

Loss of a Chance of Survival

Deykin v. Ochsner Clinic Found., 16-0488 (La. App. 5 Cir. 4/26/17), 219 So.3d 1234.

One error of assignment by the plaintiffs, following an adverse jury verdict, was whether the failure to instruct the jury regarding loss of a chance of survival in a medical malpractice case created a fundamental error that mandated overturning the jury's verdict. The appellate court noted the following in its discussion about why the trial court committed no "plain and fundamental" error:

> Although a claim involving death is a necessary element of a loss of a chance of survival claim, not every malpractice claim involving death necessarily implicates the loss of a chance of survival doctrine, or necessitates the giving of a loss of a chance of survival instruction. Only in malpractice cases involving death where the evidence presented indicates that the loss of a chance of survival doctrine is applicable is it appropriate to give such an instruction.

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

Finality of Tax Assessment Precludes Use of Overpayment Refund Procedure

Majestic Medical Solutions, L.L.C. v. Sec'y, La. Dep't of Rev., No. 9449C (La. Bd. Tax App. 10/10/17).

Majestic Medical Solutions, L.L.C. (Taxpayer) appealed to the Board of Tax Appeals the Louisiana Department of Revenue's refusal to act on its request for a refund. On Dec. 13, 2013, the Department sent Taxpayer a Notice of Assessment for sales tax. The assessment informed Taxpayer it had 60 days from the date of the assessment to appeal to the Board, to pay the tax, or to pay the tax under protest in accordance with La. R.S. 47:1576. Taxpayer took none of these actions; and, pursuant to La. R.S. 47:1565(B), after 60 days, the assessment became final and was collectible by distraint. After issuing the proper notices, on April 1, 2014, the Department levied Taxpayer's checking account. On June 16, 2014, Taxpayer filed a refund request with the Department for the same matters at issue in the assessment. The Department neither allowed nor denied the Taxpayer's refund request, and on Aug. 20, 2015, Taxpayer filed an appeal with the Board. The Department responded by filing various exceptions, including an exception of no right of action.

The question before the Board was whether a taxpayer can seek a refund of tax through the administrative claim-for-refund procedure provided by La. R.S. 47:1621 if the taxpayer did not appeal the Department's Notice of Assessment concerning that tax, the assessment of that tax became final, and the assessment of that tax was later satisfied by levy.

The Board noted that Taxpayer neither alleged any procedural impropriety regarding its Notice of Assessment nor disputed that the assessment had become final. The Board reasoned that the right to seek a refund is specifically absent from the remedies available to a taxpayer aggrieved by an action of the Department in assessing the taxpayer pursuant to La. R.S. 47:1565. It was undisputed that the Taxpayer failed to timely pursue the remedies made available under La. R.S. 47:1565(C)(3). Therefore, the Board held that the claim-for-refund procedure set forth in La. R.S. 47:1621 was not available. The Board ruled that the finality of the assessment of the underlying tax at issue in the refund request served to preclude use of the La. R.S. 47:1621 refund procedure. Thus, the Board granted the Department's exception of no right of action.

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

La. Small Successions Act to Help Solve Heir Property Problems

On June 12, 2017, Gov. John Bel Edwards signed into law an amendment to Louisiana Code of Civil Procedure 3421 providing relief to thousands of Louisiana residents living in homes without proof of ownership. The Louisiana Small Successions Act, which took effect Aug. 1, 2017, was introduced by Rep. Paula Davis, with the help of Louisiana Appleseed, a law-related nonprofit, and its team of attorney volunteers, led by Patricia B. (Patty) McMurray of Baker Donelson. The amendment, which passed unanimously through the House and Senate, further expands the use of the heirship affidavit, a mechanism that allows the passage or transfer of ownership of inherited property to the legal heirs by placing legal title with them when the decedent's interest in the property does not exceed $125,000. Prior law capped use of the less expensive and easier process to estates valued at $75,000 or less. The new law also allows families to use the affidavit process for estates of any value in which the person died more than 20 years ago.

—**Christy F. Kane**
Louisiana Appleseed
Ste. 1000, 1615 Poydras St.
New Orleans, LA 70112
and
Patricia B. (Patty) McMurray
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
Chase North Tower
450 Laurel St., 20th Flr.
Baton Rouge, LA 70801

1st Circuit's Opinion on *Bergeron*

Andersen v. Succession of Bergeron, 16-0922 (La. App. 1 Cir. 4/12/17), 217 So.3d 1248.

In 2002, Ruffin Leon Bergeron, Jr. and five of his six children formed a family-owned limited liability company (LLC) with Bergeron as the initial managing member, with the intention that his children would each obtain an equal share of his property when he died. Bergeron was the only member to contribute property to the LLC. In 2009, Bergeron attempted to convince the other members to allow his sixth child to join the LLC, but the other children refused. Upon realizing his goal to equally split the property between his six children would not be accomplished under the LLC, Bergeron unilaterally removed all the property he contributed to the LLC and had the LLC dissolved. Bergeron promptly executed a will and testament to ensure his goal of providing an equal share to each child would be fulfilled. Bergeron's actions were not contested by any member of the LLC until two years after his death.

Roughly two years after Bergeron's death, one of his daughters sued his succession under multiple theories, including unauthorized removal of the LLC's property, invalid notarial correction, and improper dissolution of the LLC. Some of the other children intervened as defendants, and the case was tried in the 18th Judicial District Court. The district court granted defendants'/intervenors' involuntary dismissal of all the plaintiff's claims. The plaintiff appealed to the 1st Circuit Court of Appeal, alleging the following mistakes as grounds for overturning the 18th JDC's decision.

First, the appellant argued that under the LLC's Operating Agreement, Bergeron improperly transferred property of the LLC to himself because he did not obtain the approval of the LLC's other members. Here, the appellant pointed to a conflict between the LLC's Articles of Organization and the Operating Agreement for the LLC. Under the Articles of Organization, Bergeron was given the authority to transfer property from the LLC as he wanted, but according to the Operating Agreement, the managing member needed the consent of the LLC's other members to transfer property. The 1st Circuit applied La. Civ.C. art. 2049, among others, to conclude that a contract with conflicting provisions should be interpreted so that each provision is given a meaning. In order to give the Articles of Organization and the Operating Agreement meaning, the court interpreted the Articles of Organization as authorizing Bergeron to transfer property from the LLC as he wanted and the Operating Agreement as only applying to future managers of the LLC, not Bergeron. Although the Operating Agreement did not expressly exclude Bergeron from needing a majority of the LLC's members' consent before acting, the only way to give meaning to both the Articles of Organization and Operating Agreement's provisions was to interpret Bergeron as having the authority to transfer property under both without member approval.

Next, the appellant alleged Bergeron's attorney corrected not merely a clerical error but rather a substantive error, causing the notarial act of correction to be invalid. When drafting the act of transfer Bergeron requested to remove his property from the LLC, Bergeron's attorney inadvertently included a "less and except" section that prevented some of Bergeron's property from being transferred. The attorney's error went unnoticed for two and a half years. Upon noticing his error, the attorney executed a notarial correction to make the document conform to the true intent of Bergeron. The 1st Circuit acknowledged the attorney's purpose for correcting his mistake was to make the act of transfer conform to the true intent of Bergeron. Next, the 1st Circuit adopted the view taken in *In re Huber Oil of Louisiana, Inc.*, 311 B.R. 440 (Bankr. W.D. La. 2004), that a clerical error includes an inadvertent "cut and paste" function of a word processor. Therefore, the notarial correction was valid.

Last, the appellant contended the LLC should be reinstated because Bergeron had improperly dissolved the LLC. The 1st Circuit disagreed. The court acknowledged that even if Bergeron improperly dissolved the LLC, the former members of the LLC are not statutorily entitled to reinstatement of the LLC. The court also pointed out that the children failed to argue that the district court failed to reinstate the LLC, which was the only issue on appeal. The court refused to reinstate the LLC because it had no remaining assets and because there was intense discord among Bergeron's children. Ultimately, the 1st Circuit upheld the district court's ruling and affirmed the involuntary dismissal.

—**Sharon S. Whitlow**
and **Paul Mancuso**
Long Law Firm, L.L.P.
1800 City Farm Dr., Bldg. 6
Baton Rouge, LA 70806

CHAIR'S MESSAGE

Maintain Your Professional Reputation

By Bradley J. Tate

Just a few weeks ago, I had the pleasure of welcoming the newly admitted attorneys into our Louisiana State Bar Association. I again want to express my welcome to all of you into the profession!

It was in my preparation for that speech I was able to reflect on the experiences that I have gained as an attorney to this point in my career. It was then that I was reminded of the professional responsibilities we have as attorneys. On the second day of law school orientation, my classmates and I were told that our professional reputations began the day before. In the past almost 10 years since I graduated, I have seen this to be true many times.

Bradley J. Tate

In my comments, I encouraged the new admittees to have a great respect for themselves and to acknowledge their responsibilities to their fellow attorneys, their clients and the courts. Each of us could always use a reminder to maintain a respect for one another as we defend our clients in the best ways we know how. Show professional courtesy to your fellow attorneys as often as possible, as you never know when you may need that same courtesy returned to you.

Since the admission ceremony, I have seen quite a few headlines stating that an attorney committed a crime or was part of some misconduct. As attorneys, we do not get the benefit of being an ordinary citizen and fading into the background — the headline will always include the word "attorney" when describing the misconduct. There is tremendous public trust put in us as counselors and advisors to our clients. The public expects us as attorneys to hold ourselves out with a high moral character and to have better judgment because of the title we hold. This is why we should always have a second thought before sending an angry email, making an ethical misstep, or venturing into a situation where our personal and professional reputations can be at risk. I encourage all of you to remember the oath we took as attorneys and be proud of it as you conduct your practice every day.

On the YLD Schedule

The Young Lawyers Division is gearing up for an exciting spring full of programs. The high school mock trial problem has been released and preparations are underway. The Louisiana64 application is available and I would like to encourage you to participate and find out more about being involved in an active bar association at the state and local level. Our Barristers for Boards program will have spring events and Wills for Heroes will likely be in a city near you soon. We also will be accepting applications for young lawyer awards through Feb. 9, 2018.

Best wishes for a happy holiday season!

YOUNG LAWYERS SPOTLIGHT

S. Beaux Jones
New Orleans

S. Beaux Jones

The Louisiana State Bar Association's (LSBA) Young Lawyers Division Council is spotlighting New Orleans environmental attorney S. Beaux Jones.

Jones recently joined the New Orleans office of Baldwin Haspel Burke & Mayer, L.L.C., after working as an assistant attorney general for the Louisiana Department of Justice, where he worked his way up to environmental section chief. His practice is currently based in litigation and administrative matters, focusing on environmental, coastal and oil and gas law.

He has argued cases at every level of state and federal court in Louisiana. He has handled matters before the U.S. 6th Circuit and the D.C. Circuit Courts of Appeals. While with the State of Louisiana, he advised and represented numerous state agencies, including the Department of Natural Resources, the Department of Environmental Quality, the Office of Conservation, the Department of Wildlife and Fisheries, the Coastal Protection and Restoration Authority and the Governor's Office of Homeland Security and Emergency Preparedness.

Since leaving government practice, Jones has become an active writer and presenter on coastal and environmental issues around the state. He publishes periodic environmental law updates for his firm's blog. He writes the *Louisiana Bar Journal*'s Environmental Law Section Recent Developments article. He has several upcoming presentations including at the Mineral Law Institute and the Coastal Law Seminar in March and the State of the Coast Conference in May. He also serves as treasurer of the LSBA's Environmental Law Section.

Originally from Ruston, Jones received a BA degree from Davidson College in North Carolina, where he played football and threw the javelin. He received his law degree from Louisiana State University Paul H. Hebert Law Center. He moved back to Louisiana for law school specifically to get involved with the state's ongoing efforts to curb coastal land loss and to participate in the conversation about how Louisiana can move towards a more sustainable coastal existence. He believes that this conversation requires all hands on deck, including scientists, lawyers, government officials, business leaders, academics and artists.

In his community, he is an active member of the Faubourg St. John Neighborhood Association, as well as several active transportation and environmental organizations. When not in the office or the courtroom, he can be found leading kayak tours through the Maurepas Swamp or biking around New Orleans with his wife and son.

UPCOMING EVENTS

Check the Young Lawyers Division website at *www.lsba.org/YLD* for the most up-to-date listing of upcoming events.

Do you have an event to add to the list?

Email YLD Secretary, Scott Sternberg, at scott@snw.law.

► **Friday, January 19, 2018**

LSBA YLD • Professional Development CLE Seminar

The seminar is open to the first 175 young lawyers who register. Program organizers will apply for 4 hours of CLE credit (including 1 hour of ethics, 1 hour of professionalism and 1 hour of law practice management). The registration cost is $30 and includes electronic course materials and breakfast at the Renaissance Baton Rouge Hotel (7000 Bluebonnet Blvd., Baton Rouge). Online registration will close at 3 p.m. on Jan. 17; onsite registration will not be allowed unless space is available. Topics to be discussed include ethics, law practice management issues and professionalism. For more information and to register: *www.lsba.org/goto/YLDSeminar2018*.

► **Friday, January 19, 2018**

LSBA YLD • Louisiana64 Symposium

The goal of the symposium is to strengthen communication, resources and coordination among the young lawyers of Louisiana's 64 parishes, while increasing access to LSBA and local affiliate initiatives that serve the public and the profession. One young lawyer representative from each parish will be selected to participate. The program will include a roundtable discussion of issues and opportunities for Louisiana's young lawyers and insight from panelists. Louisiana64 will be held in conjunction with the LSBA's Midyear Meeting and the YLD Council meeting at the Renaissance Baton Rouge Hotel (7000 Bluebonnet Blvd., Baton Rouge). If you are interested in participating, go to: *www.lsba.org/YLD/la641.aspx*.

Deadline February 9, 2018: Young Lawyers Division Awards Nomination Form

The Young Lawyers Division is accepting nominations for the following awards:

- **Hon. Michaelle Pitard Wynne Professionalism Award.** This award is given to a young lawyer for commitment and dedication to upholding the quality and integrity of the legal profession and consideration towards peers and the general public.
- **Outstanding Young Lawyer Award.** This award is given to a young lawyer who has made outstanding contributions to the legal profession and his/her community.
- **Service to the Public Award.** This award is given to a young lawyer local affiliate organization that has implemented a program or provided a service to that local community by which the non-attorney public has been helped. The program or service must be sponsored by the young lawyer local affiliate organization.
- **Service to the Bar Award.** This award is given to a young lawyer local affiliate organization that has implemented a program or provided a service that has benefited and/or enhanced the attorney community in that area. The program or service must be sponsored by the young lawyer local affiliate organization.
- **YLD Pro Bono Award.** This award is given to a young lawyer for commitment and dedication to providing pro bono services in his/her community.

All entries must include a nomination form, which may not exceed 10 pages. In addition, entries should include a current photo and résumé of the nominee, newspaper clippings, letters of support and other materials pertinent to the nomination. Nomination packets must be submitted to **Kristi W. Richard, Chair, LSBA Young Lawyers Division Awards Committee, 301 Main St., Flr. 14, Baton Rouge, LA 70801.** Any nomination packet that is incomplete or is not received or postmarked on or before **Feb. 9, 2018**, will not be considered. Please submit detailed and thorough entries, as nominees are evaluated based on the information provided in the nomination packets. All winners will be announced at the combined LSBA Annual Meeting and LSBA/LJC Summer School in Destin, Fla., in June 2018.

1. Award nominee is being nominated for: (Individuals/local affiliate organizations may be nominated for more than one award. Please check all that apply. Candidates will only be considered for the award(s) for which they have been nominated.)

____ Hon. Michaelle Pitard Wynne Professionalism
____ Outstanding Young Lawyer
____ Service to the Public
____ Service to the Bar
____ YLD Pro Bono

2. Nominator Information:
Name _____
Address/State/Zip _____
Telephone/Fax _____
E-mail _____

3. Nominee Information:
Name _____
Address/State/Zip _____
Telephone/Fax _____
E-mail _____
Birth Date _____
Marital Status/Family Information _____

4. Describe the nominee's service to the public for the past five years (or longer, if applicable). Include details as to the nature of the service, value to the public, amount of time required, whether nominee's activities are a part of his/her job duties, and other pertinent information.

5. Describe the nominee's service to the Louisiana State Bar Association Young Lawyers Division for the past five years.

6. Describe the nominee's service to the legal profession for the past five years.

7. Describe the nominee's particular awards and achievements during his/her career.

8. Provide a general description of the nominee's law practice.

9. Describe what has made the nominee outstanding (answer for Outstanding Young Lawyer Award only).

10. Has the nominee overcome challenges (handicaps, limited resources, etc.)?

11. Why do you believe your nominee deserves this award?

12. Provide other significant information concerning the nominee.

For more information, contact Kristi W. Richard at (225)382-3704 or email krichard@mcglinchey.com.

Adult Civics Education Training to Be Offered at LSBA Midyear Meeting

Many Americans would like to learn more about the U.S. Constitution, the Bill of Rights and the judicial system. To address this need, the Louisiana District Judges Association, the Louisiana State Bar Association (LSBA) and the Louisiana Center for Law and Civic Education (LCLCE) have partnered to form ACE (Adult Civics Education). Modeled after The Florida Bar's successful "Benchmarks" program, ACE will provide legal professionals with the training and tools they need to present informative and interactive law-related education programs to adults in their communities.

The free ACE training session is set for 3-4:30 p.m. Friday, Jan. 19, 2018, at the Renaissance Baton Rouge Hotel, 7000 Bluebonnet Blvd. (The session is in conjunction with the LSBA's Midyear Meeting.)

Speakers are Richard H. Levenstein, member of The Florida Bar's Constitutional and Judiciary Committee and co-developer of the Bar's "Benchmarks" Program; and Annette Boyd Pitts, executive director of The Florida Bar's Law-Related Education Association, Inc. and co-developer of the "Benchmarks" Program.

LCLCE staff members are available to assist participants with setting up presentations in their communities.

Enrollment is limited. To register for the free program, contact LCLCE Executive Director Peggy V. Cotogno, (504)619-0134 or email peggy.cotogno@lsba.org.

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

The Louisiana State Bar Association/Louisiana Bar Foundation's Community Action Committee supports the SOLACE program. Through the program, the state's legal community is able to reach out in small, but meaningful and compassionate ways to judges, lawyers, court personnel, paralegals, legal secretaries and their families who experience a death or catastrophic illness, sickness or injury, or other catastrophic event. For assistance, contact a coordinator.

Area	Coordinator	Contact Info
Alexandria Area	Richard J. Arsenault rarsenault@nbalawfirm.com	(318)487-9874 Cell (318)452-5700
Baton Rouge Area	Ann K. Gregorie ann@brba.org	(225)214-5563
Covington/ Mandeville Area	Suzanne E. Bayle sebayle@bellsouth.net	(504)524-3781
Denham Springs Area	Mary E. Heck Barrios mary@barrioslaw.com	(225)664-9508
Houma/Thibodaux Area	Danna Schwab dschwab@theschwablawfirm.com	(985)868-1342
Jefferson Parish Area	Pat M. Franz patfranz@bellsouth.net	(504)455-1986
Lafayette Area	Josette Abshire director@lafayettebar.org	(337)237-4700
Lake Charles Area	Melissa A. St. Mary melissa@pitrelawfirm.com	(337)942-1900
Monroe Area	John C. Roa roa@hhsclaw.com	(318)387-2422
Natchitoches Area	Peyton Cunningham, Jr. peytonc1@suddenlink.net	(318)352-6314 Cell (318)332-7294
New Orleans Area	Helena N. Henderson hhenderson@neworleansbar.org	(504)525-7453
Opelousas/Ville Platte/ Sunset Area	John L. Olivier johnolivier@centurytel.net	(337)662-5242 (337)942-9836 (337)232-0874
River Parishes Area	Judge Jude G. Gravois judegravois@bellsouth.net	(225)265-3923 (225)265-9828 Cell (225)270-7705
Shreveport Area	Dana M. Southern dsouthern@shreveportbar.com	(318)222-3643

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

PEOPLE

LAWYERS ON THE MOVE . . . NEWSMAKERS

LAWYERS ON THE MOVE

Barrasso Usdin Kupperman Freeman & Sarver, L.L.C., in New Orleans announces that **Chloé M. Chetta** and **Catherine P. Thibodeaux** have joined the firm as associates.

Hannah, Colvin & Pipes, L.L.P., in Baton Rouge announces that Blaine T. Aydell has been promoted to partner.

Johnson, Yacoubian & Paysse, A.P.L.C., in New Orleans announces that **Gregory C. Fuxan** joined the firm as special counsel.

King, Krebs & Jurgens, P.L.L.C., announces that Jedd S. Malish has joined the firm's New Orleans office as of counsel and W. Spencer King has joined the firm's New Orleans office as an associate.

Ross F. Lagarde, A.P.L.C., announces that **Jeffrey G. Lagarde** has joined the firm's Slidell office as an associate.

Perrier & Lacoste, L.L.C., announces that **James H. Johnson** has joined the firm as an associate in the New Orleans office.

Phelps Dunbar, L.L.P., announces that six attorneys have joined the firm's New Orleans office — William R. Bishop and Daniel Lund III have joined the firm as partners; David D. (Beau) Haynes, Jr. has joined the firm as counsel; and Stuart G. Richeson, Alexander R. Saunders and Carys A. Arvidson have joined the firm as associates.

Stanley, Reuter, Ross, Thornton & Alford, L.L.C., in New Orleans announces that **Christian S. Chaney** has joined the firm as an associate.

NEWSMAKERS

Richard J. Arsenault, a partner in the Alexandria firm of Neblett, Beard & Arsenault, chaired the November HarrisMartin's MDL Conference in St. Louis, Mo., on opioid, Equifax and talcum powder litigation. He also was recognized as one of *America's Top 100 High Stakes Litigators* for Louisiana in 2017.

Judy Y. Barrasso, a member of the New Orleans firm Barrasso Usdin Kupperman Freeman & Sarver, L.L.C., is the recipient of the 2017 John R. (Jack) Martzell Professionalism Award, presented by the New Orleans Chapter of the Federal Bar Association.

Jaimmé A. Collins, a partner in the New Orleans office of Adams and Reese, L.L.P., and chair of the Diversity Committee, was named as one of the "Top 15 Business Women in Louisiana" by the National Women's Council.

Continued next page


W. Raley Alford III


Richard J. Arsenault


Judy Y. Barrasso


Christian S. Chaney


Chloé M. Chetta


Clay J. Countryman


Robert J. David


Stevan C. Dittman


Thomas M. Flanagan


Gregory C. Fuxan


James H. Johnson


Jeffrey G. Lagarde

Clay J. Countryman, a partner in the Baton Rouge office of Breazeale, Sachse & Wilson, L.L.P., and a member of the firm's Health Care Section, was appointed as a member of the American Bar Association's Commission on Veterans Legal Services. He is also on the Governing Council of the American Bar Association's Health Law Section and heads the Section's medical legal partnerships work group.

Nancy Scott Degan, managing shareholder of the New Orleans office of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., was elected to the American Law Institute.

J. Neale deGravelles, a partner in the Baton Rouge firm of deGravelles & Palmintier, was elected as chair of the American Association for Justice's Admiralty Practice Section.

Deutsch Kerrigan, L.L.P., associates Andrew J. Baer and Evan J. Bergeron, both working in the New Orleans office, were named to the Fall 2017 Class of the New Orleans Economic Development Ambassador Program.

The Louisiana Family Forum in Baton Rouge presented 2017 Kevin Kane Justice Awards to Judge Scott U. Schlegel, 24th Judicial District Court in Gretna, for his work on Angola's re-entry court program; and to E. Pete Adams, Jr., executive director of the Louisiana District Attorneys Association, for his work during the legislative session on bills recommended by the Criminal Justice Reinvestment Task Force.

Joanne P. Rinardo, a partner in the New Orleans office of Deutsch Kerrigan, L.L.P., was named vice president of the Cypress Academy Board.

James Parkerson Roy, senior partner and managing member of the firm Domengeaux, Wright, Roy & Edwards, L.L.C., in Lafayette, has become a Fellow of the American College of Trial Lawyers.

E. Paige Sensenbrenner, senior partner in charge of the New Orleans office of Adams and Reese, L.L.P., was named a sustaining member of the Product Liability Advisory Council.

New Orleans attorney Kim S. Sport received the 2017 Hannah G. Solomon Award, presented by the National Council of Jewish Women's (NCJW) Greater New Orleans Section to recognize a volunteer community leader who exemplifies the qualities of Solomon, NCJW founder.

Edward C. (Ed) Taylor, a partner in the Gulfport, MS, office of Daniel Coker Horton & Bell, P.A., was inducted into the American College of Trial Lawyers.

Robert S. Toale, founder of the Law Office of Robert S. Toale in Gretna, was re-elected to the board of directors of the National Association of Criminal Defense Lawyers. He also has been appointed vice chair of the Public Defense Committee and as a member of the Budget Committee. He will continue his service on the Death Penalty Committee.

PUBLICATIONS

***Best Lawyers in America* 2017**

Stanley, Reuter, Ross, Thornton & Alford, L.L.C. (New Orleans): **W. Raley Alford III, Lynn Luker**, **Thomas P. Owen, Jr.**, **Bryan C. Reuter**, **William M. Ross**, **Richard C. Stanley** and **Jennifer L. Thornton**.

***Best Lawyers in America* 2018**

Adams and Reese, L.L.P. (Baton Rouge, New Orleans): E. Gregg Barrios, Mark R. Beebe, Philip O. Bergeron, Charles A. Cerise, Jr., Robin B. Cheatham, V. Thomas Clark, Jr., Jaimmé A. Collins, Kathleen F. Drew, John M. Duck, Brooke Duncan III (New Orleans "Lawyer of the Year," Labor Law-Management), Richard B. Eason II, Mark S. Embree, Philip A. Franco, A. Kirk Gasperecz, William B. Gaudet, Charles F. Gay, Jr., E.L. Henry (Baton

Continued next page


Lynn Luker


Van R. Mayhall, Jr.


Gerald E. Meunier


Conrad Meyer IV


Walter C. Morrison IV


Thomas P. Owen, Jr.


Patrick K. Reso


Bryan C. Reuter


William M. Ross


James Parkerson Roy


David R. Sherman


Richard C. Stanley

Rouge "Lawyer of the Year," Government Relations Practice), Louis C. LaCour, Jr., Edwin C. Laizer, Leslie A. Lanusse, Francis V. Liantonio, Jr., Kellen J. Mathews, Don S. McKinney, Robert B. Nolan, Glen M. Pilié, Jane C. Raiford, Lee C. Reid, Robert L. Rieger, Jr., Edward J. Rice, Jr., Jeffrey E. Richardson (New Orleans "Lawyer of the Year," Mass Tort Litigation/Class Actions-Defendants), James T. Rogers III, Deborah B. Rouen, Elizabeth A. Roussel, E. Paige Sensenbrenner, Ronald J. Sholes, Mark J. Spansel, Martin A. Stern, Mark C. Surprenant, Roland M. Vandenweghe, Jr., Robert A. Vosbein, Lara E. White, David M. Wolf and J. Robert Wooley.

Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. (Baton Rouge, Mandeville, New Orleans): Alissa J. Allison, Edward H. Arnold III (New Orleans "Lawyer of the Year," Commercial Transactions/UCC Law), Alton E. Bayard III, Craig L. Caesar, Phyllis G. Cancienne, Roy C. Cheatwood, Robert C. Clotworthy, Christopher O. Davis, John B. Davis, Nancy Scott Degan, Warner J. Delaune, Jr., Robert S. Emmett, Sean L. Finan, Donna D. Fraiche, Mark W. Frilot, Monica A. Frois, Steven F. Griffith, Jr., Jan M. Hayden, William H. Howard III, Errol J. King, Jr., Kenneth M. Klemm (New Orleans "Lawyer of the Year," Transportation Law), Amelia Williams Koch, M. David Kurtz, Kent A. Lambert, Jon F. Leyens, Jr., Alexander M. McIntyre, Jr., Patricia B. McMurray, Mark W. Mercante, Kerry J. Miller, Christopher G. Morris, Anne E. Raymond, James H. Roussel, Margaret M. Silverstein, Danielle L. Trostorff, Paul S. West, Anne Derbes Wittmann, Matthew A. Woolf and Adam B. Zuckerman.

Baldwin Haspel Burke & Mayer, L.L.C. (New Orleans): David L. Carrigee, Thomas J. Cortazzo, Lawrence R. DeMarcay III, Joel A. Mendler, Jerome J. Reso, Jr., Leon H. Rittenberg, Jr., Leon H. Rittenberg III (New Orleans "Lawyer of the Year," Non-Profit/Charities Law), John A. Rouchell, William B. Schwartz, Matthew A. Treuting and Karl J. Zimermann.

Breazeale, Sachse & Wilson, L.L.P. (Baton Rouge, New Orleans): **Van R. Mayhall, Jr.** (Baton Rouge "Lawyer of the Year," Litigation and Controversy-Tax) and **Thomas R. Temple, Jr.** (Baton Rouge "Lawyer of the Year," Litigation-Insurance). Also, John T. Andrishok, Robert L. Atkinson, Thomas M. Benjamin, Robert T. Bowsher, Jude C. Bursavich, Peter J. Butler, Jr., David R. Cassidy, David M. Charlton, Cullen J. Dupuy, Murphy J. Foster III, Gregory D. Frost, Judith W. Giorlando, Alan H. Goodman, Emily Black Grey, Paul M. Hebert, Jr., Scott N. Hensgens, Michael R. Hubbell, Joseph R. Hugg, David R. Kelly, Van R. Mayhall III, Eve B. Masinter, Trenton J. Oubre, Richard G. Passler, James R. Raines, Claude F. Reynaud, Jr., Jerry L. Stovall, Jr., B. Troy Villa, Stephen R. Whalen and Douglas K. Williams.

Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, L.L.C. (New Orleans): Raymond G. Areaux (New Orleans "Lawyer of the Year," Litigation-Intellectual Property), Roy E. Blossman (New Orleans "Lawyer of the Year," Financial Services Regulation Law), M. Hampton Carver (New Orleans "Lawyer of the Year," Oil and Gas Law), M. Taylor Darden, William T. Finn, I. Harold Koretzky, Leann Opotowsky Moses, Philip D. Nizialek, Robert S. Stassi, Frank A. Tessier, Robert Paul Thibeaux (New Orleans "Lawyer of the Year," Equipment Finance Law) and David F. Waguespack (New Orleans "Lawyer of the Year," Litigation-Bankruptcy).

Chehardy, Sherman, Williams, Murray, Recile, Stakelum & Hayes, L.L.P. (Hammond, Metairie): **Conrad Meyer IV**, **Patrick K. Reso** and **David R. Sherman**.

Coats Rose, P.C. (New Orleans): Walter W. Christy, Clyde H. Jacob III, A. Kelton Longwell and Elizabeth Haecker Ryan.

Dué Guidry Piedrahita Andrews, L.C. (Baton Rouge): B. Scott Andrews, Kirk A. Guidry and Randolph A. (Randy) Piedrahita.

Gainsburgh, Benjamin, David, Meunier & Warshauer, L.L.C. (New Orleans, Ridgeland, MS): **Robert J. David**, **Stevan C. Dittman**, **Gerald E. Meunier**, **Walter C. Morrison IV** and **Irving J. Warshauer**.

Herman, Herman & Katz, L.L.C. (New Orleans): Leonard A. Davis, Soren E. Gisleson, Maury A. Herman, Russ M. Herman, Stephen J. Herman (New Orleans "Lawyer of the Year," Mass Tort Litigation/Class Actions-Plaintiffs), Brian D. Katz, James C. Klick (New Orleans "Lawyer of the Year," Medical Malpractice Law-Plaintiffs) and Steven J. Lane.

King, Krebs & Jurgens, P.L.L.C. (New Orleans): Len R. Brignac, Robert J. Burvant, J. Grant Coleman, Eric E. Jarrell, George B. Jurgens III, Henry A. King, Patricia A. Krebs, Robert J. Stefani, Jr. and David A. Strauss.

Lamothe Law Firm, L.L.C. (New Orleans): Frank E. Lamothe III.

Lugenbuhl, Wheaton, Peck, Rankin & Hubbard (New Orleans): Christopher T. Caplinger, Stanley J. Cohn, Elia Diaz-Yaeger, Celeste D. Elliott, Rose McCabe LeBreton, Stewart F. Peck, Seth A. Schmeeckle, David B. Sharpe and S. Rodger Wheaton, Jr.

Manion Gaynor & Manning, L.L.P. (Lake Charles, New Orleans, Hattiesburg, MS): David R. Frohn, Christopher O. Massenburg and G. Max Swetman.

Ogletree Deakins Nash, Smoak & Stewart, P.C. (Lafayette, New Orleans): Monique Gougisha Doucette, Gregory Guidry, Steven Hymowitz, Mark N. Mallery and Christopher E. Moore.


Jack M. Stolier


Edward C. Taylor


Thomas R. Temple, Jr.


Catherine P. Thibodeaux


Jennifer L. Thornton


Irving J. Warshauer

Stanley, Reuter, Ross, Thornton & Alford, L.L.C. (New Orleans): **W. Raley Alford III, Lynn Luker**, **Thomas P. Owen, Jr.**, **Bryan C. Reuter**, **William M. Ross**, **Richard C. Stanley** (New Orleans "Lawyer of the Year," Legal Malpractice Law-Defendants) and **Jennifer L. Thornton**.

Sullivan Stolier Schulze & Grubb, L.L.C. (New Orleans): **Jack M. Stolier.**

Taylor, Porter, Brooks & Phillips, L.L.P. (Baton Rouge): Robert W. Barton, John Stone Campbell III, Preston J. Castille, Jr., Robert L. Coco, Michael A. Crawford, Anne J. Crochet, Vicki M. Crochet, Bonnie J. Davis, Paul O. Dicharry, Nancy C. Dougherty, Richard B. Easterling, James L. Ellis, Brett P. Furr (Baton Rouge "Lawyer of the Year," Litigation-Real Estate), Eugene R. Groves, Ann M. Halphen, Mary C. Hester (Baton Rouge "Lawyer of the Year," Trusts and Estates), Edward D. Hughes, Amy C. Lambert, Amy Groves Lowe, Lloyd J. Lunceford, John F. McDermott, W. Shelby McKenzie (Baton Rouge "Lawyer of the Year," Insurance Law), John P. Murrill, J. Michael Parker, Jr., Harry J. Philips, Jr. (Baton Rouge "Lawyer of the Year," Litigation-Banking and Finance), John H. Runnels, Patrick D. Seiter (Baton Rouge "Lawyer of the Year," Health Care Law), Fredrick R. Tulley, Michael S. Walsh and T. Mac Womack.

Benchmark Litigation

Barrasso Usdin Kupperman Freeman & Sarver, L.L.C. (New Orleans): Michael A. Balascio, Judy Y. Barrasso, Kristin L. Beckman, Jamie L. Berger, George C. Freeman III, Craig R. Isenberg, Stephen H. Kupperman, David N. Luder, Stephen L. Miles, H. Minor Pipes III, Andrea Mahady Price, Richard E. Sarver and Steven W. Usdin.

Flanagan Partners, L.L.P. (New Orleans): **Thomas M. Flanagan**.

***Chambers USA* 2017**

Stanley, Reuter, Ross, Thornton & Alford, L.L.C. (New Orleans): **Richard C. Stanley**.

***Louisiana Super Lawyers* 2017**

Flanagan Partners, L.L.P. (New Orleans): Sean P. Brady, Andy J. Dupre, Harold J. Flanagan, Thomas M. Flanagan and Charles-Theodore Zerner.

***Louisiana Super Lawyers* 2018**

Stanley, Reuter, Ross, Thornton & Alford, L.L.C. (New Orleans): **Lynn Luker**, **Thomas P. Owen, Jr.**, **Bryan C. Reuter**, **William M. Ross**, **Richard C. Stanley** and **Jennifer L. Thornton**.

***Texas Super Lawyers* 2017**

Maureen Blackburn Jennings, Attorney at Law (Houston, TX): Maureen Blackburn Jennings.

IN MEMORIAM

Marian Mayer Berkett

Marian Mayer Berkett, a New Orleans lawyer whose career spanned seven decades, died June 4, 2017, at her home in New Orleans. She was 104. She practiced for 72 years with Deutsch Kerrigan, L.L.P. (formerly Deutsch, Kerrigan & Stiles). She was the first woman lawyer hired by the firm and later became a partner. She was recognized for her work in surety law, construction law, probate law, tax law and air law. She earned a bachelor's degree in 1933 in journalism from Louisiana State University and a master's degree in 1935 in political science from LSU. She graduated first in her class in 1937 from Tulane University Law School. She was a member of the People's League, an anti-Huey Long organization she helped found in the 1930s with a group of Tulane law students. She served on the State Civil Service Commission and the Louisiana Civil Service League and was appointed to the Jefferson Parish Charter Commission. She authored *Workmen's Compensation Law in Louisiana* (Louisiana State University Press, 1937). She received many awards during her career, including the 2010 American Bar Association Martin J. Andrew Award for Lifetime Achievement in Fidelity and Surety Law and the 2009 Federal Bar Association's Jack Martzell Professionalism Award. In 2013, she was inducted into the inaugural class of the Tulane Law School Hall of Fame. In 2016, she was named Tulane Law School's Distinguished Alumna. The wife of the late Dr. George David Bercovitz Berkett, she is survived by nieces, nephews and cousins.

People Deadlines & Notes

Deadlines for submitting People announcements (and photos):

Publication	Deadline
April/May 2018	Feb. 2, 2018
June/July 2018	April 2, 2018
August/Sept. 2018	June 2, 2018

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.**

Samuel S. Dalton, a lawyer who devoted his six-decade career to opposing the death penalty and representing the indigent, died Sept. 5, 2017, at his home in Harahan. He was 90. Born in Tuscumbia, Ala., he moved to Louisiana when his father was transferred to New Orleans. During World War II, he served in the Navy Air Corps as a Florida-based radio and radar operator and was assigned to a torpedo bomber squad patrolling the Gulf of Mexico. He attended Loyola University on the G.I Bill. After obtaining a law degree in 1954, he set up a solo practice. Throughout his career, he handled more than 300 capital cases. He received the Benjamin Smith Award, the American Civil Liberties Union of Louisiana's highest honor. The founding chair of the Jefferson Parish Indigent Defender Board, he received several awards over his career, including the Louisiana State Bar Association's Pro Bono Lifetime Achievement Award in 1988 and the National Association of Criminal Justice Lawyers' President's Commendation Award in 1987. The Sam Dalton Capital Defense Advocacy Award was established by the Loyola Death Penalty Resource Center in 1994, the same year in which he received an honorary doctorate from the law school. Also in 1994, an endowed scholarship bearing his name was founded at the law school. He is survived three daughters, a sister and a grandchild.

Samuel S. Dalton

Louis V. de la Vergne, an attorney, died Sept. 16, 2017, after a brief illness. Born on Sept. 21, 1938 in New Orleans, he received an undergraduate degree from Tulane University. He received his JD degree in 1965 from Tulane University Law School and was admitted to the Louisiana Bar. In 2015, he was honored as a 50-year member of the Bar. A lifelong world traveler, he enjoyed visiting countries with a civil law heritage. He was keenly interested in the contributions of his family to Louisiana history, particularly Louisiana legal history. He is a descendant of Gov. Jacques Villere, the first native-born governor of Louisiana; Hugues Lavergne, a 19th century lawyer and banker; and Gustavus Schmidt, a lawyer, scholar and Swedish transplant to New Orleans in the 1820s, who established the *Louisiana Law Journal* (the first legal periodical in Louisiana), authored the *Civil Law of Spain and Mexico* in 1851, founded the predecessor of Tulane Law School, and assembled an extensive library. In 2005, Mr. de la Vergne co-authored *Catalogue of Gustavus Adolphus Schmidt's Library 1877.* His family was known for the "de la Vergne Volume," a Louisiana legal text containing codifier Moreau Lislet's source notes for the *Digest of 1808*. Mr. de la Vergne worked with Professor Robert Pascal to have the volume reproduced in 1967 and reprinted in 2008 for the bicentennial of the *Digest*. He is survived by two brothers, cousins, nieces, nephews and other relatives.

Louis V. de la Vergne

NOTICE / Attorney Fee Review Board

2001 Louisiana Acts 208 created the Attorney Fee Review Board (AFRB). The Act allows for payment or reimbursement of legal fees and expenses incurred in the successful defense of state officials, officers or employees who are charged with criminal conduct or made the target of a grand jury investigation due to conduct arising from acts allegedly undertaken in the performance of their duties.

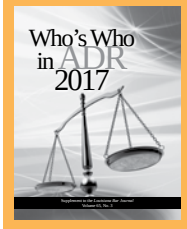
The AFRB is charged with establishing hourly rates for legal fees for which the State may be liable pursuant to R.S. 13:5108.3. Pursuant to R.S. 13:5108.4, the rates "shall be sufficient to accommodate matters of varying complexity, as well as work of persons of varying professional qualifications."

The AFRB met on Oct. 3, 2017. Requests for payment or reimbursement of legal fees should be evaluated on a case-by-case basis. As directed by statute, the AFRB set a minimum rate of $125 per hour and a maximum rate of $425 per hour. These rates will remain in effect through 2019.

Attorneys who represent state officials and employees should be prepared to provide their clients and the AFRB with sufficient information to enable the Board to assess the reasonableness of attorney fees and expenses.

Any questions regarding the AFRB should be addressed to Louisiana Supreme Court Deputy Judicial Administrator Richard Williams, 1600 N. 3rd St., 4th Floor, Baton Rouge, LA 70802.

ACCESSIBLE ANYTIME, ANYWHERE:



"Who's Who in ADR 2017" Directory Available Online and on LSBA App

Need to set up an arbitration/mediation session but your printed directory is back at the office? Go online!

The "Who's Who in ADR 2017" Directory, featuring profiles of arbitrators and mediators working throughout the state, is available 24/7.

Go to the LSBA's website: *www.lsba.org/goto/adrdirectory2017*.

Go to the free LSBA App. The app is available for iPad, iPhone and Android users. Search "Louisiana State Bar Association" in your devices' App Stores for the free download.

UPDATE

Southern University Law Center (SULC) Chancellor John K. Pierre, left, with Louisiana Supreme Court Chief Justice Bernette Joshua Johnson, with the portrait that will hang in the Judicial Hallway. The portrait was unveiled at SULC's Gala commemorating the Law Center's 70 years.

Attending the Southern University Law Center (SULC) gala were Judge Ramona L. Emanuel, right, deputy chief judge, 1st Judicial District Court (1986, JD SULC), and her sister, Dr. Rachel L. Emanuel (BA, 1977; MJ, 1991), who retired in December 2016 as SULC director of communications and development support. SULC Chancellor John K. Pierre announced the establishment of an endowed professorship in Dr. Emanuel's name.

SULC Celebrates 70 Years at Gala

Southern University Law Center (SULC) celebrated 70 years at its annual gala on Sept. 1, 2017, in Baton Rouge. This year's event honored Louisiana Supreme Court Chief Justice Bernette Joshua Johnson.

SULC commissioned a portrait of the Chief Justice that will hang in the Judicial Hallway along with other trailblazers such as Revius O. Ortique, Jr., Jesse N. Stone and alumni inducted in the SULC Judicial Hall of Fame.

SLLS Receives Grants

Southeast Louisiana Legal Services Corp. (SLLS) will receive a $250,515 Pro Bono Innovation Fund grant and a $68,119 Technology Initiative grant, Legal Services Corp. (LSC) President Jim Sandman announced.

The LSC's Pro Bono Innovation Fund is intended to encourage and expand robust pro bono efforts and partnerships to serve more low-income clients.

The LSC's Technology Initiative grants expand access to justice for millions of Americans who cannot afford a lawyer. The grants make legal information, court forms, video forms, video instruction and practical tips familiar to people who otherwise would have to navigate the legal system without help.

The Pro Bono Innovation Fund grant will go towards SLLS' Pro Bono Transformation Project. This project will enhance the organization's pro bono program by centralizing its lawyer volunteer program and undertaking an in-depth assessment of how the program engages in pro bono activities. The goal of the project is to increase the program's infrastructure capacity, promote better coordination of resources, increase positive volunteer experiences, facilitate greater collaboration, and expand pro bono services for clients. The grant also will allow SLLS to create web-based legal resources and upgrade volunteer communication strategies.

SLLS will use its Technology Initiative grant to improve its website, *LouisianaLawHelp.org*. The project will progress in three stages — a website evaluation phase, a site overhaul and redevelopment phase, and a site outreach and marketing phase. It will incorporate many of the recommendations from LSC's recent statewide website evaluation project with the goal of optimizing the website for use on mobile devices and increasing overall usability.

Martinez Receives New Orleans Bar's Presidents' Award

Judy Perry Martinez

Judy Perry Martinez, of counsel at Simon, Peragine, Smith & Redfearn, L.L.P., in New Orleans, is the recipient of the 2017 New Orleans Bar Association's Presidents' Award. The award, presented at a ceremony on Oct. 18, 2017, recognizes professional excellence, integrity and dedication to service in the highest ideals of citizenship.

Martinez previously served as senior partner at Simon Peragine. She later served as chief compliance officer for Northrop Grumman before pursuing a fellowship with Harvard's Advanced Leadership Initiative.

The award is the highest level of recognition from the Association and is named the "Presidents' Award" out of respect to the high ideals of community service and leadership displayed by all of the presidents of the New Orleans Bar Association.

The 22nd Judicial District Bar Association's Women in Law Section conducted a CLE meeting on Aug. 31, 2017, in Covington. Judge Allison H. Penzato with the Louisiana 1st Circuit Court of Appeal discussed various topics about practicing in the 1st Circuit. Seated from left, Michelle Mayne Davis, Michelle Blanchard, Judge Penzato, Kelly M. Rabalais (Section chair), Alison C. Bondurant and Christie H. Forrester. Standing from left, Suzanne M. Jones, Cynthia M. Petry, Anna K. Wong, Karlin L. Riles, Angel L. Byrum, Deborah S. Henton, Lou Anne Milliman, Rachael P. Catalanotto, Elizabeth S. Sconzert, Barbara T. Carter and C. deShea Richardson.

The Alexandria Bar Association hosted the annual Court Opening ceremony on Sept. 6, 2017. Chief Judge Patricia E. Koch, 9th Judicial District, opened the ceremony. Bar President Robert L. Beck III provided introductory remarks, and Allison P. Nowlin, criminal staff attorney, 9th JDC, welcomed 11 new attorneys. From left, Michael S. Koch; Judge Gary Hays, Pineville City Court; Judge Greg Beard, 9th Judicial District Court; and Judge F.A. Little, retired federal judge.

Judge Rebecca F. Doherty, center, U.S. District Court, Western District of Louisiana, was honored Aug. 24, 2017, for her nearly 26 years of service. A retirement reception was held at the U.S. District Courthouse in Lafayette. From left, Lafayette Bar Association President Melissa L. Theriot, Judge Doherty and Lafayette Bar Association Young Lawyers Section President-Elect Jaclyn B. Bacon.

Baton Rouge Bar Association President-Elect Linda Law Clark, from left, President Karli Glascock Johnson and Treasurer Amy C. Lambert attended the association's September Bar Luncheon on Sept. 12, 2017. *Photo provided by the Baton Rouge Bar Association.*

Attending the DeSoto Parish Bar Association's Law Day program were, front row from left, attorney Michael E. Daniel; Rev. Anna Morris-Jackson, Wesley United Methodist Church, Mansfield; attorney George Winston III; Judge Amy Burford McCartney, 42nd Judicial District Court, DeSoto Parish; program speaker Judge Jeffrey S. Cox, Louisiana 2nd Circuit Court of Appeal; and attorney Adrienne D. White, president, DeSoto Parish Bar Association. Back row from left, Dr. Thumper Miller, pastor, First Baptist Church, Mansfield; Marvin Jackson, City Clerk, Mansfield City Hall; attorney Dave Knadler, vice president, DeSoto Parish Bar Association; attorney Rhys E. Burgess; Judge Charles B. Adams, 42nd Judicial District Court, DeSoto Parish; Louisiana State Rep. Lawrence Bagley; DeSoto Parish District Attorney Gary V. Evans; and attorney Murphy J. White.

DeSoto Parish Bar Celebrates Law Day

The DeSoto Parish Bar Association hosted its annual Law Day program on May 5, 2017, in the DeSoto Parish Courthouse in Mansfield. Speaker for the program was Judge Jeffrey S. Cox, Louisiana 2nd Circuit Court of Appeal.

In addition to the legal community, program attendees included public officials and members of the community. The DeSoto Parish Bar Association, the DeSoto Parish Clerk's Office and the Louisiana State Bar Association sponsored the reception following the program.

The New Orleans Chapter of the Federal Bar Association (FBA) hosted its Annual Meeting and Awards Luncheon on Aug. 17, 2017. Louisiana Gov. John Bel Edwards, left, was the keynote speaker. Recipients of the President's Award, the Jack Martzell Professionalism Award and the Camille Gravel Pro-Bono/Public Service Award were recognized. The 2017-18 board and officers were elected. With Gov. Edwards are Kelly T. Scalise, center, outgoing FBA New Orleans president, and W. Raley Alford III, incoming president.

The 4th Judicial District Bar Association celebrated the annual Court Opening ceremony on Sept. 8, 2017, at the 4th JDC Courthouse in Monroe. Thirteen new attorneys were welcomed to the Bar. From left, 4th Judicial District Bar Association Immediate Past President G. Adam Cossey and President Margaret H. Pruitt.

LOUISIANA BAR FOUNDATION

LBF Seeking Nominations for 2018 Boisfontaine Award

The Louisiana Bar Foundation (LBF) is seeking nominations for the 2018 Curtis R. Boisfontaine Trial Advocacy Award. Nominations must be received in the LBF office by Monday, Feb. 5, 2018. The award will be presented at the Louisiana State Bar Association's Annual Meeting in Destin, Fla., in June. The recipient will receive a plaque and $1,000 will be donated to the recipient's choice of a non-profit, law-related program or association providing services in Louisiana.

Nominations should include the nominee's name, contact information, a brief written statement on the background of the nominee, as well as reasons why the nominee is proposed as the award recipient. Nominations should be forwarded by the deadline to LBF Communications Director Dennette Young, Ste. 1000, 1615 Poydras St., New Orleans, LA 70112, or emailed to dennette@raisingthebar.org.

This trial advocacy award was established through an endowment to the Louisiana Bar Foundation in memory of Curtis R. Boisfontaine, who served as president of the Louisiana State Bar Association and the Louisiana Association of Defense Counsel. Generous donations from Sessions, Fishman, Nathan & Israel, L.L.P., the Boisfontaine Family and friends established the fund. The award is given to a Louisiana attorney who exhibits long-standing devotion to and excellence in trial practice and who upholds the standards of ethics and consideration for the court, litigants and all counsel.

Louisiana Bar Foundation Announces New Fellows

The Louisiana Bar Foundation announces new Fellows:

Hon. Tammy D. Lee .....Monroe
Melissa T. Lonegrass ..... Baton Rouge
Barbara Bell Melton .....Alexandria
Alexandra G. White.....Houston, TX

President's Message

The Giving Season

By President Valerie Briggs Bargas

Soon, we'll be busy shopping for holiday gifts, spending time with family and friends, eating delicious food and, hopefully, reflecting on the spirit of the season — Giving. As the end of the year approaches, our personal and professional to-do lists grow increasingly long. Please remember to put the Louisiana Bar Foundation (LBF) on your list this year.

With your support, Louisiana's civil legal aid organizations provided assistance in 26,437 legal matters consisting of more than 100 types of civil legal problems, including family law, housing, healthcare, public benefits, consumer protection, community support issues, government and legal system issues in 2016.

Valerie Briggs Bargas

The LBF provides an opportunity for all lawyers to play a part in ensuring that every Louisiana citizen has equal access to the justice system. By working together, we can continue to provide free civil legal aid to Louisiana's most vulnerable citizens.

Please take the time during this busy holiday season to reflect on the blessings in your life and consider a tax-deductible gift to the LBF. Make your gift online at *www.raisingthebar.org/YearEnd* or mail directly to the LBF, Ste. 1000, 1615 Poydras St., New Orleans, LA 70112. If you have any questions, contact our Development Director Laura Sewell at (504)561-1046 or email laura@raisingthebar.org.

The Louisiana Bar Foundation (LBF) received a check for $30,000 from the Louisiana Workers' Compensation Corp. (LWCC), the proceeds from the 14th annual Kids' Chance Golf Tournament. From left, LBF Kids' Chance Committee Co-Chair Michelle M. Sorrells; LWCC President and CEO Kristin W. Wall; and LBF President Valerie Briggs Bargas. *Photo courtesy of the Louisiana Bar Foundation.*

LWCC Raises Funds for Scholarships

The Louisiana Bar Foundation (LBF) received a check for $30,000 from the Louisiana Workers' Compensation Corp. (LWCC). LWCC hosted the 14th annual Kids' Chance Golf Tournament on Sept. 25, 2017, in Baton Rouge. All proceeds from the tournament were donated to the LBF Kids' Chance Scholarship Program.

Scholarship applications for the 2018-19 school year are now available on the LBF's website. Application deadline is Monday, Feb. 19, 2018.

The Kids' Chance Program provides scholarships to dependents of workers who are permanently and totally disabled or killed in a work-related accident compensable under a state or federal Workers' Compensation Act or Law.

This year, the LBF awarded $59,000 to 20 students to help with their education. Since 2004, the program has awarded 275 scholarships totaling $604,600.

For more information about the LBF Kids' Chance Program, contact Dee Jones at (504)561-1046 or email dee@raisingthebar.org. Or visit the website, *www.raisingthebar.org/kidschance*.

Sponsors Sought for LBF Fellows Gala

The Louisiana Bar Foundation (LBF) will celebrate its 32nd Annual Fellows Gala on Friday, April 20, 2018. The gala will be held at the Hyatt Regency New Orleans, 601 Loyola Ave., New Orleans.

At the gala, the LBF will recognize its 2017 honorees — Distinguished Jurist James J. Brady, Distinguished Jurist W. Eugene Davis, Distinguished Attorney Kim M. Boyle, Distinguished Professor Oliver A. Houck, and Calogero Justice Award recipient Robert S. Noel II.

Gala sponsorships are offered at several levels — Pinnacle, Benefactor, Cornerstone, Capital, Pillar and Foundation. Individual tickets to the gala are $200. Young lawyer individual gala tickets are $150. To read more about the sponsorship levels and to purchase individual tickets, go online: *www.raisingthebar.org/gala*.

Discounted rooms are available at the Hyatt Regency New Orleans on Thursday, April 19, and Friday, April 20, 2018, at $239 a night. For more information, visit: *www.raisingthebar.org/gala*.

For more information, contact Laura Sewell at (504)561-1046 or email laura@raisingthebar.org.

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The judges of Municipal and Traffic Court of New Orleans are seeking a part-time attorney/law clerk to handle legal research, prepare memoranda and perform other legal work. Must be a member of Louisiana State Bar, have five-plus years of experience as a practicing attorney. Salary $35,232/year. Background check; drug screening; Orleans Parish domicile required. Send résumé to: Municipal & Traffic Court, Attn: Human Resources, 727 S. Broad St., New Orleans, LA 70119 or email scschnell@nola.gov.

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Minimum qualifications of defense attorneys for the Patient's Compensation Fund. In accordance with La. R.S. 40:1231.1, attorneys appointed to defend PCF cases must meet the following minimum qualifications as established by the Patient's Compensation Fund Oversight Board: (1) Must be a defense-oriented firm with at least 75 percent of practice dedicated to defense; (2) Defense firm appointed to PCF cases shall have **NO** plaintiff medical malpractice cases; (3) Defense firm must provide proof of Professional Liability coverage with a minimum limit of $1 million; (4) Defense attorney must have a minimum of five years' experience in the defense of medical malpractice cases; (5) Defense attorney must have completed three trials within the past three years. Presentation of five submissions

to a medical review panel may be substituted for each of two trials. However, the defense attorney must have tried at least one case in the past three years. Interested persons may submit written comments to Ken Schnauder, Executive Director, Patient's Compensation Fund, P.O. Box 3718, Baton Rouge, LA 70821.

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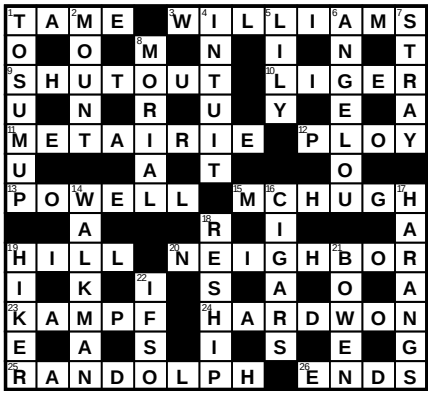
NOTICE

Notice is hereby given that Stephen J. Holliday intends to file a petition and application for reinstatement and readmission to the Louisiana State Bar Association. Anyone concurring with or opposing this petition and application for readmission must file notice of opposition or concurrence within 30 days with the Louisiana Attorney Disciplinary Board, Ste. 310, 2800 Veterans Memorial Blvd., Metairie, LA 70002.

ANSWERS for puzzle on page 258.



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INDEX TO ADVERTISERS

The Last WORD

By Michael A. Patterson

THE PARROT HEARD IT ALL

In 2015, a husband was found shot to death in his home. His wife was found with a gunshot wound to her head. The wife told the police that she could not remember anything from that night. The case went cold for over a year until a witness came forward with incriminating evidence against the wife.

The dead husband had a pet African grey parrot. African grey parrots are the most intelligent and talkative of the parrot family. They can develop a large vocabulary and can mimic a number of different voices.

After the husband's death, his first wife took Bud, the parrot, in. That's when things got interesting. The parrot started talking about the shooting. He was then recorded mimicking an argument between a man and a woman that included this line, "Don't f…ing shoot."

This led the police to investigate the wife further and they learned that the husband had run up a large gambling debt and the couple's house had gone into foreclosure.

The wife was arrested and finally tried and convicted for first-degree murder.

The parrot was not called to testify at the trial. Our evidence question is: Could the parrot have been called to testify at trial?

Obviously the statement is hearsay since it is a statement made by someone (the deceased husband) being offered into evidence to prove the truth of the statement. La. Code Evid. Art. 801.

But, can the statement be offered as an exception to the hearsay rule under La. Code Evid. Art. 804(A)(4) which allows a statement of a witness that is unavailable because of death? Probably not, since we really don't know if the statement the parrot made was the statement the dead husband made.

Is it admissible as an exception under La. Code Evid. Art. 804(B)(2) as a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death? Same problem as the other as we don't know if the statement the parrot made was the statement the dead husband made.

The biggest problem, of course, is the issue of the right to cross-examine a witness against you. How do you cross-examine a parrot?

The prosecuting attorney in this case elected not to try to produce the taped voice of the parrot, undoubtedly because he knew he could not satisfy the rules of evidence.

Nevertheless, the statements of the parrot got the police and prosecutor to focus on the wife which ultimately led to her conviction.

Be careful what you say in front of your parrot. He might turn out to be a stool pigeon.

Michael A. Patterson is a partner in the Long Law Firm, L.L.P., in its Baton Rouge office and a principal of the mediation/arbitration firm The Patterson Resolution Group. He is an adjunct professor of trial advocacy and evidence at Louisiana State University Paul M. Hebert Law Center. He served as Louisiana State Bar Association president in 2010-11. (map@longlaw.com; 1800 City Farm Dr., Building 6, Baton Rouge, LA 70806)

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