LOUISIANA BAR
JOURNAL
October / November 2016 Volume 64, Number 3

ALTERNATIVE DISPUTE RESOLUTION

- Uses of ADR Techniques in Louisiana
- How Confidential is Your Mediation?

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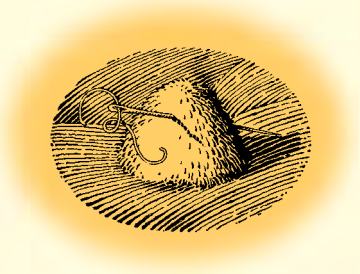
- Book Review: *La. Mineral Leases*
- Ethics Opinion

The Needle *In A* Haystack



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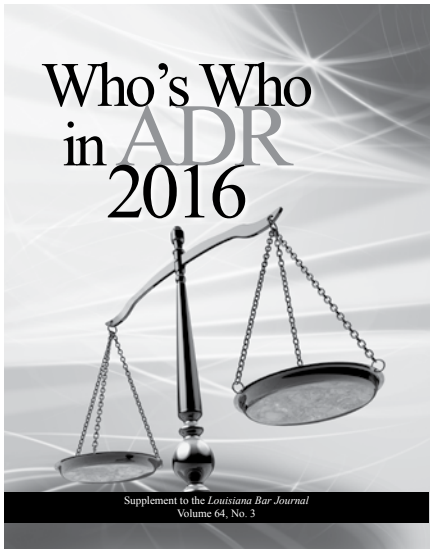

Who's Who in ADR 2016
Check out the separate supplement mailed with this issue!

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Lessons Come in Many Forms

By Alainna R. Mire

Think about it. As lawyers, we learn something new every day, whether we've been in practice for two months or 50 years. An incident also reminded me that lessons can come in many forms, not always in the package expected, but it's a lesson, nonetheless.

I was confronted by a non-lawyer whose behavior was very unprofessional. The reactions by those who witnessed the incident were mixed. Most were appalled by the behavior, but a few actually said that he should be forgiven because he was older. I initially was shocked and disgusted and the questions began tumbling in my head.

When confronted with behavior that is directed towards you that is unprofessional, how do you handle it? Do you say something about it? Do you confront the person? Do you just forgive and forget? What does it mean to forgive? What does it mean to accept someone's apology? Do you do these things because they ask or do you do them because you want to?

Of course, answers to these queries will vary depending on an individual's philosophical and/or theological viewpoints. But, here's my takeaway.

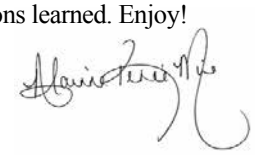
I daresay most of us have been the target of some unprofessional (maybe unethical) behavior at least once during our legal careers. Many of us also may have experienced that initial shock and disgust. But, if you take a moment to flip the experience around, you will soon realize — as I did — that viewing the behavior as a lesson in what not to do and how not to act will be more beneficial than plotting revenge or payback. Chalk it up as a "professionalism note to self," file it away and move on as quickly as possible to the next task.

There's been a lot written about professionalism and ethics. For me, ethics is the law practice's foundation. If it isn't strong at the get-go, the practice may have difficulty growing. To continue the analogy, professionalism is added brick-by-brick — competent representation, good client service, attention to detail — transforming the practice into one with success and longevity.

Bottom line…Every attorney, at every age, at every skill level, has something to contribute to the legal profession. From the young lawyer, who provides energy and innovation, to the seasoned lawyer, who offers wisdom and insight, every opinion deserves to be heard.

Carrying forward the idea of "lessons learned," this issue of the *Journal* offers instructive articles on arbitration and mediation topics, including the many uses of ADR techniques in Louisiana and confidentiality in mediation proceedings. There's also another Ethics Opinion provided by the Rules of Professional Conduct Committee discussing "Communication Regarding Potential Malpractice."

Lessons learned. Enjoy!



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

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

3. Letters should be no longer than 200 words.

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

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

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

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

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

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- No required minimum or maximum amount on gifts.
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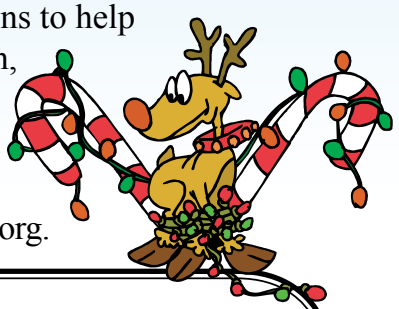
- More details about gift-wrapping, drop-off, etc., will be included in the informational packet.

The Secret Santa Project also welcomes monetary donations to help buy gifts for children not adopted. For more information, visit *www.lsba.org/goto/SecretSanta*.

For more information or questions about the Project, contact Krystal Bellanger Rodriguez at (504)619-0131 or secretsanta@lsba.org.



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By Darrel J. Papillion

Despite Challenges, This Profession Will Prevail . . . The Public Needs Us

On a cool November day in 1990, just a few weeks before my college graduation, I exited a classroom building in the LSU Quadrangle. I walked underneath the famed stately oaks and broad magnolias that shade inspiring halls. As I walked past the historic Campanile and down the steps of its plaza, I tried not to be nervous or afraid. I marched across the vast Parade Ground, crossed Highland Road, and probably muttered a silent prayer as I walked past the imposing entrance of the LSU Law Center. I was carrying an envelope full of dreams.

In my nervous hands that day was my law school application. Back then, it represented my life's work, so to speak — all of the data the LSU Law Center needed to decide whether I should be allowed to follow my dream of becoming a lawyer.

I do not remember when I knew I would be a lawyer. It was a long time ago. I was probably in elementary school. In those days, growing up in St. Landry Parish, most of the heroes in the history books I read were lawyers. Our nation, I had been taught, was a nation of laws, not of men. History taught me we are all equal in the eyes of the law. I wanted to be a lawyer. And, within a few years of that cool, crisp November day, I graduated from law school, passed our state's bar examination, and, like most of you reading this, was granted a license to practice law by the Louisiana Supreme Court.

For more than 20 years, I have toiled in the vineyards of our profession. Have I righted wrongs, achieved justice, or reversed misfortune? Maybe I have. As seasoned lawyers say, "I've won some, and I've lost some," and hopefully I have many more cases to argue. Like you, I am just one lawyer, doing his or her best. But, regardless of what any one of us has "won" or "lost" in our days of lawyering, together we have accomplished much. Ironically, the legal profession is, in an odd sense, a team sport. While we correctly understand that ours is an adversarial system, it is a *system*, and we are all a part of it. When one considers our work as a whole, we have done much to improve the lives of many in the fight against injustice and to provide equal access to justice for all. And, yet, we have much still to do.

Ours is a noble and distinguished profession. Lawyers and the courts have been essential to all aspects of American life — from the Declaration of Independence, to the drafting of the United States Constitution, to civil rights, to the regulation of interstate commerce, the war on drugs, the war on terror, privacy, technology and the Internet.

Lawyers and judges have been there every step of the way. It is hard to imagine a world without lawyers. If we look to television or social media, however, the phrase, "imagine a world without lawyers," might be the punch line of a lawyer joke, a smear or a clever meme.

Too many ordinary citizens think of us — all of us — only when they think of "quick checks" or "big rigs," the "talking-head" former lawyers who serve as "legal consultants" on television, or of "justice" dispensed by a celebrity judge in a 30-minute daytime television show. We are so much more than this. We do so much more than this. We are better than all of this.

"What do you do?" says the person at the cocktail party or a child's soccer game. We say, "I'm a lawyer," but what comes to that person's mind? Do they think of a fearless advocate who works as part of a system that protects life, liberty, property? Do they think of the prosecutors who keep us safe? Do they think of the child welfare advocates? Do they think of criminal defense lawyers fighting to ensure due process and fair trials? Do they think of hard-working, fair, honest judges — often working at less pay than they could earn in the private sector — grappling with law, facts and evidence to make the right decision? Do they think of careful counselors who analyze the tax code, Code of Federal Regulations, or complex business and commercial rules and regulations to help people start, maintain and grow their businesses?

Do they think of hard-working trial lawyers who carefully analyze the law, the facts and all the legal and medical issues related to liability, causation and damages to properly prosecute or defend a complex

personal injury or wrongful death case? Or, do they think of what they see on TV?

Do they think of a professional who provides a service they cannot afford? Do they think of a profession that is no longer relevant to them?

Do they think of someone who works in an outdated industry that can be replaced by a fancy new app, a Google search, a friend who works as a paralegal, or some forms they can buy on the Internet?

"What do you do?" they ask. "I am a lawyer," we say.

Our profession is facing challenges from every corner — an undereducated citizenry, too easily influenced by television and social media; venture capitalists who view "the legal profession" as a new market that needs to be deregulated so that law firms can be bought, sold, merged or consolidated into other businesses owned by non-lawyers; and non-lawyers who believe one does not need to be a lawyer to deliver legal services.

There are some who believe it is a given that legal services in the future will have to be provided by non-lawyers because our clients cannot find, or cannot afford, lawyers to take their cases. Meanwhile, many in the legal profession cannot find work, while others cannot build and grow their practices, causing a decline in law school applications and a decline in the prestige and value of our profession in society.

Despite these challenges, this profession will prevail. It must — for the sake of the public. As we move at warp speed into a new world of even greater technological advances — instant access to information, robots that perform surgery and drive our cars — legal issues will become more complex. But, as with every other significant change in American life, lawyers and judges will be in the thick of it.

Whether an uninformed, or possibly misinformed, public actually understands what we do as part of the system of justice — or whether the public has momentarily confused us with those who play us on TV — the public needs us. Our public needs skilled, ethical and professional lawyers. They need well-trained, organized, efficient and effective courts.

Our role, as the men and women of the legal profession and the judiciary, is to work to ensure access to equal justice for all. The public is best served when legal services are performed by lawyers who are properly educated and trained, licensed, carefully regulated, receive appropriate continuing legal education, and adhere to the Rules of Professional Conduct and traditional standards of professionalism.

The Louisiana State Bar Association (LSBA) and you — its members — are critical to this important goal, and my goal as LSBA president is to work to keep the LSBA focused on improving our profession and helping ensure equal access to justice for all the citizens of our state.

I am happy I walked across the Parade Ground that day. I am proud of our profession. I am proud of what you — what we — have done for the public. There's more to do.

FROM FAMILY LAW TO LEGACY DISPUTES:

The Many Uses of Alternative Dispute Resolution Techniques in Louisiana

By Bobby M. Harges and Ilijana Todorovic

The use of alternative dispute resolution (ADR) techniques to resolve disputes in Louisiana has exploded in recent years in several areas, such as mediation in family law cases and arbitration in the securities industry. The use of arbitration has particularly gained momentum in the resolution of disputes in the mobile homes industry. Perhaps the most well-known ADR method in Louisiana is the proliferation of mediation to resolve civil disputes. ADR techniques also have been used effectively to resolve disputes in the health care industry. Moreover, while Louisiana state courts are utilizing special masters to resolve complex and highly technical disputes, Louisiana federal district courts are using magistrate judges as neutral mediators in cases that could occupy weeks of the court's time through lengthy trials. Finally, mediation could potentially prove to be an efficient dispute-resolution method in legacy disputes — lawsuits arising out of historical oil and gas exploration and production activities. This article discusses the varied uses of ADR procedures in the state.

Mediation in Family Law Cases

In family and divorce cases in Louisiana, judges have many options to assist them in resolving the thorny issues that arise in family and divorce cases. Judges may assign family law cases to domestic commissioners[1] and hearing officers[2] for processing. Family court judges can *sua sponte* (even over a party's objection)[3] order parties in child custody and visitation cases to meet with a family mediator for resolution of their dispute.[4] Some family courts have formal programs whereby they resort to a roster of trained mediators for assistance in resolving issues presented in child custody and visitation cases.[5] Because of the existence of these programs and the fact that mediation provides a private, cost- and time-friendly resolution of highly personal matters, family mediation is being utilized in an increasingly large number of cases in Louisiana.

An Internet search for family mediators in Louisiana reveals that many of these mediators are family lawyers who, along with their services as attorneys and advocates, offer mediation services for litigants in Louisiana family courts. Additionally, many family mediators in Louisiana are mental health professionals, such as psychiatrists, psychologists, social workers, marriage and family counselors, and professional counselors. Further, the Louisiana Child Custody and Visitation Mediator Registry, a registry of family mediators maintained by the Louisiana State Bar Association's ADR Section, contains listings from several mediators[6] who, by expanding their services to offer family mediation, are responding to the increased need for mediators in family law cases.

Arbitration in the Securities Industry

When a customer has a dispute against a broker or financial advisor, the appropriate place to file the claim is not a Louisiana district court but an arbitral forum such as the Financial Industry Regulatory Authority, Inc. (FINRA). This is because virtually all broker-dealers include a pre-dispute arbitration agreement in the agreements with their customers that would cover almost any subsequent dispute.[7] These pre-dispute agreements were not accepted by Louisiana courts until 1987 when the United States Supreme Court decided *Shearson v. MacMahon*[8] which provided for the enforceability of such agreements, thereby setting in motion the nearly universal use of arbitration in customer-broker disputes. Nevertheless, in the context of securities, the obligation to arbitrate does not stem solely from the customer-broker contract but also from the contracts that all brokers and brokerage firms have by virtue of their registrations with FINRA.[9]

After a claim is filed with FINRA, the parties engage in the selection process to choose either one or three arbitrators to preside over their case, depending on the dollar amount of the claim. In securities cases, customers generally sue broker-dealers for losses in their investments. Typical claims include allegations of breach of fiduciary duty, churning, failure to diversify, material misrepresentation, negligence, unsuitability and unauthorized trading. Discovery in FINRA arbitrations is limited. Thus, after an initial pre-hearing conference where the arbitrator resolves any preliminary matters, a hearing date is set. The arbitrator is the sole judge of evidentiary and procedural issues at the hearing, which is usually recorded on audio devices that constitute the official record of the hearing. Within 30 days of the last hearing date, or of the submission of post-hearing briefs, the arbitrator renders a final and binding award which can be appealed only on extremely limited grounds.[10]

Arbitration of Disputes in the Mobile Homes Industry

Occasionally, purchasers of mobile homes in Louisiana may bring claims against sellers and/or manufacturers in state court, alleging contract, tort and/or redhibition damages. In response, the seller or manufacturer may file an exception of prematurity due to the purchaser's failure to submit to binding arbitration as required by the purchase agreement.[11] Purchase agreements contain arbitration clauses that are broadly construed and cover arguably any dispute that could arise between a purchaser of a mobile home and a seller/manufacturer. Although the Louisiana 3rd Circuit Court of Appeal invalidated such arbitration agreements on several occasions,[12] the general stance of the Louisiana jurisprudence is that these agreements *are* enforceable regardless of whether the buyer actually read the agreement and understood its effects; therefore, all contractual claims, including breach of warranty claims, and the tort claims, such as negligent manufacture and negligent repair, must be submitted to binding arbitration.[13] With 11 percent of housing units in Louisiana being mobile homes,[14] one would expect a significant percentage of sales documents to contain arbitration agreements. This fact is also evidenced by the large number of reported decisions where Louisiana courts have granted exceptions of prematurity when the purchasers initially opted to file a claim in a district court rather than in arbitration.[15]

Mediation of Civil Disputes

Perhaps no use of ADR techniques has grown as quickly as the use of mediation, which, over the last 25 years in Louisiana, is fast replacing jury trials as the most common method for resolving disputes in civil cases. The "Who's Who in ADR 2015," an annual directory published in the *Louisiana Bar Journal*, shows listings and biographies of 177 mediators and seven ADR firms, two of which have rosters containing more than 40 mediators.[16] Many of the biographies state that the mediators have conducted thousands of mediations, with one mediator conducting more than 10,000 mediations.[17] One ADR firm has handled more than 55,000 cases since 1987. While many of the mediators are attorneys who mediate full-time, others actively practice law with mediation being adjunctive to their law practices.

In many jurisdictions, state district court judges have the unilateral power to order litigants in civil cases to mediation. That is not the case in Louisiana for, under the Louisiana Mediation Act, the trial judge cannot order the referral of a case to mediation without a party's motion.[18] If a party objects to the order, the trial judge is required to rescind the order.[19] As a result of this law, civil mediations are not commonly court-ordered in Louisiana.[20] Consequently, this burgeoning mediation market in Louisiana is apparently thriving because litigants in civil cases are realizing that expensive and timely litigation is substantially outweighed by cost- and time-effective mediations that enable them to retain greater autonomy, flexibility and control over the process.[21] Litigants also may prefer mediation because it is nonbinding (unless otherwise agreed),[22] and because all oral and written communications made during mediation, with certain exceptions, are confidential and cannot be used as evidence in any subsequent judicial or administrative proceeding.[23]

ADR in the Health Care Industry

Louisiana, a state that just recently completed its transition from a charity-care system to different public-private partnerships,[24] is facing a national trend of moving away from arbitration towards mediation and other interest-based options such as fact finding, early neutral evaluation or case assessment. Louisiana also established an ombudsman program whereby long-term-care ombudsmen investigate and resolve complaints received by people with developmental disabilities residing in state-licensed facilities.[25] However, of all ADR mechanisms, mediation is most regularly used for settling any variety of disputes that might emerge in the health care system, including but not limited to, treatment decisions (malpractice) and risk management.[26] Whether the issues relate to the aging process (elder mediation), end-of-life choices (bioethics mediation) or quality of care (physician co-mediation),[27] mediation is a productive ADR technique for their resolution because it allows the parties to maintain direct control over the process and informally settle the dispute.

Health care professionals, as a group, are arguably experiencing more conflicts than any other profession.[28] Since little formal dispute-resolution training is available to health care professionals and role models for collaboration and negotiation are far and few between in their profession, ADR is a unique option to provide health care professionals with a hope to successfully resolve challenges present in the clinical environment.[29] Bearing in mind that mediation processes and their hybrids will only further evolve as health care disputes expand, the opportunities for mediating and providing ADR training in the Louisiana health care industry are very widespread and lucrative for many legal professionals, business officials, agency administrators, as well those working in the health care industry.

Special Masters

Louisiana judges today often preside over complex and highly technical matters and find themselves in need of assistance in order to reach fair decisions. The Louisiana Special Masters Statute, based on Fed. R. Civ. P. 53, was enacted almost 20 years ago and it empowers the court to appoint a special master in any civil action involving a complicated issue or exceptional circumstances.[30] Issues which, over time, have been appointed to special masters include: mass tort cases, complex litigation, and overseeing environmental restoration projects. However, because the consent of the parties is the foundational basis of the statute, the appointment of a special master will be void in the lack thereof or if a party timely challenges the appointment.[31] If the order of appointment contains specifications or limitations regarding the special master's powers, the special master is bound by such limitations and the court, absent the parties' consent, cannot expand them.[32] While special masters generally issue recommendations and prepare reports on the matters submitted to them,[33] any party may challenge the special master's ruling by filing a written objection within 10 days.[34] However, the biggest problem the parties face is that special masters, unless so ordered by the court, are not required to prepare a report. The party wishing to challenge the special master's ruling can hardly, without a report, draft a sufficiently proper argument for attacking it. Therefore, party-litigants should ensure that the court's order of appointment requires special masters to prepare a report for each action taken.

Mediation in Legacy Disputes

Legacy lawsuits are claims filed by landowners for pollution or contamination of their property or groundwater caused by oil and gas operations.[35] Hundreds of legacy lawsuits have been filed since the 2002 Louisiana Supreme Court decision,[36] which allowed landowners to collect damages greatly in excess of the uncontaminated value of the property without imposing any legal obligation on landowners to spend the money for remediation.

In 2015, the Louisiana Legislature enacted La. R.S. 30:29.2, which allows any party to a legacy lawsuit to compel mediation after the earlier of the close of discovery or 550 days after commencement of the action, whichever comes first.[37] The payment of the mediation fees will be based on the parties' agreement or, in the absence thereof, will be borne by the party that moved to compel mediation.[38] Any mediator appointed pursuant to La. R.S. 30:29.2 must qualify as a mediator pursuant to La. R.S. 9:4106(A)(1)(a) or (2) of the Louisiana Mediation Act.[39]

Mediation in Louisiana Federal Courts

The Alternative Dispute Resolution Act of 1998 requires each U.S. District Court to authorize the use of ADR in all civil actions,[40] thus allowing parties to pursue mediations or settlement confer-

ences before someone who has experience both as a judge and a mediator. Mediations in federal courts are usually very brief and are conducted by magistrate judges who may only mediate cases as a neutral third-party and must not render decisions and impose solutions upon the party-litigants. Having practical experience as judges helps magistrate judges to be effective mediators as they can share with the parties their knowledge of the litigation process, the relevant substantive law, and how the parties' theories of the case may resonate with the fact-finder.

Prior to the mediation, each party must provide to the magistrate judge, in confidence, a brief position paper describing any liability disputes, the key evidence the party expects to produce at trial, the damages at issue in the case, the party's settlement position, and any other special issues that may have a material bearing upon settlement.[41] This requirement focuses the parties on the issues to be negotiated and gives them the chance of resolving their disputes before a trial on the merits. During the mediation, the parties must be prepared to enter into meaningful and good-faith settlement negotiations.[42] If a party appears at the mediation without authority to negotiate, or without the ability to contact a client with ultimate settlement authority readily throughout the mediation, that party may be sanctioned.[43]

Conclusion

The use of ADR techniques to resolve disputes has become a standard procedure in many areas of the law. Considering that the use of ADR may expand into other legal areas in the future, it is always prudent for Louisiana attorneys to remain up-to-date on ADR techniques and be aware of changes in statutes and court procedures.

FOOTNOTES

1. *See, e.g.*, La. R.S. 13:711-718.
2. La. R.S. 46:236.5.
3. Branton, Breedlove and Harges (October/November 2014), "Mediating Family and Divorce Cases in Louisiana," 62 La. B.J. 186.
4. La. R.S. 9:332.
5. *See,* CDC Family Mediation Handbook: Custody and Visitation — A Manual for Judges and Mediators, available at: *http://mediationtrainingcompany.com/wp-content/uploads/2013/05/CDC-FINAL-MEDIATION-MANUAL.pdf.* (The site contains the Orleans Parish Civil District Court's Family Mediation Handbook for judges and mediators.)
6. Louisiana Mediator Registry, available at: *http://files.lsba.org/documents/Committees/louisianamediatorregistry.pdf* .
7. S. Urban (2012), "Securities Arbitration of Investor Disputes: A Primer for the Unwary Practitioner," 59 The Advocate 11, 11.
8. Shearson v. MacMahon, 482 U.S. 220 (1987).
9. *See,* M. Astarita (2010), "Overview of the Securities Arbitration Process," available at: *http://www.seclaw.com/securitiesarbitration.php*.
10. *Id.; see also,* S. Urban (2012), note vii *supra*; J. Burge and L. Richards (2013), "Defining 'Customer': A Survey of Who Can Demand FINRA Arbitration," 74 La. L. Rev. 173.
11. *See*, *e.g.,* Snyder v. Belmont Homes, Inc., 899 So.2d 57 (La. App. 1 Cir. 2/16/05).
12. *See,* Quebedeaux v. Sunshine Homes, Inc., 941 So.2d 162, 2006-349 (La. App. 3 Cir. 10/11/06) (agreement invalid because buyers' consent was vitiated by error); Rodriguez v. Ed's Mobile Homes of Bossier City, La., 889 So.2d 461, 2004-1082 (La. App. 3 Cir. 12/8/04) (agreement invalid due to its adhesionary nature).
13. Snyder v. Belmont Homes, Inc., 899 So.2d 57 (La. App. 1 Cir. 2/16/05).
14. "Percent of Housing Units that are Mobile Homes by State," available at: *http://www.statemaster.com/graph/hou_per_of_hou_uni_tha_are_mob_hom-housing-percent-units-mobile-homes.*
15. *See,* Snyder v. Belmont Homes, Inc., 899 So.2d 57 (La. App. 1 Cir. 2/16/05); and Fontenot v. Southern Energy Homes, Inc., 978 So.2d 549 (La. App. 3 Cir. 3/5/08).
16. *Louisiana Bar Journal*, "Who's Who in ADR" (2015), Volume 63, No. 3, available at: *https://www.lsba.org/Public/DirectoryArbitratorsMediators.aspx.*
17. *Id.*
18. La. R.S. 9:4103.
19. *Id.*
20. The exception is in child custody and visitation cases where the trial judge can order the litigants to mediate their disputes under La. R.S. 9:332.
21. B. Harges (2011), *The Handbook on Louisiana Alternative Dispute Resolution Laws*, p. 7 (discussing the benefits of ADR procedures).
22. La. R.S. 9:4110.
23. La. R.S. 9:4112.
24. C.R. Martin (October/November 2014), "Effective Dispute Resolution in the Health Care Industry: Progress and Opportunities," 62 La. B.J. 182, 183.
25. La. R.S. 28:453.1.
26. R.D. Benjamin, *Mediation and Conflict Management Services: Conflict Management in Health Care Systems.*
27. Martin (2014), *supra* note 24 at 184, 185.
28. D. Gerardi (November 2003), "Conflict Management Training for Health Care Professionals," ACResolution, Spring 2003.
29. *Id.*
30. La. R.S. 13:4165(A).
31. *Id.*
32. La. R.S. 13:4165(B)
33. La. R.S. 13:4165(C)(1).
34. La. R.S. 13:4165(C)(3).
35. Senate Resolution No. 84, available at: *http://www.legis.la.gov/Legis/ViewDocument.aspx?d=845550.*
36. Corbello v. Iowa Production, 02-0826 (La. 2/25/03), 850 So.2d 686. *See also,* Loulan Pitre, Jr., "Legacy Litigation and Act 312 of 2006," 20 Tul. Envtl. L.J. 348 (2007).
37. Acts 2015, No. 448, of the Louisiana Legislature; Keith B. Hall and Colleen C. Jarrott, 63 La. B.J. 230 (2015).
38. *Id.*
39. La. R.S. 30:29.2(E)(2).
40. 28 U.S.C. §§ 651 *et seq.*
41. *See, e.g.*, Settlement Conference Guidelines of U.S. Magistrate Judge Michael B. North, available at: *http://www.laed.uscourts.gov/judges-information/judge/honorable-michael-b-north.*
42. *Id.*
43. *Id.*

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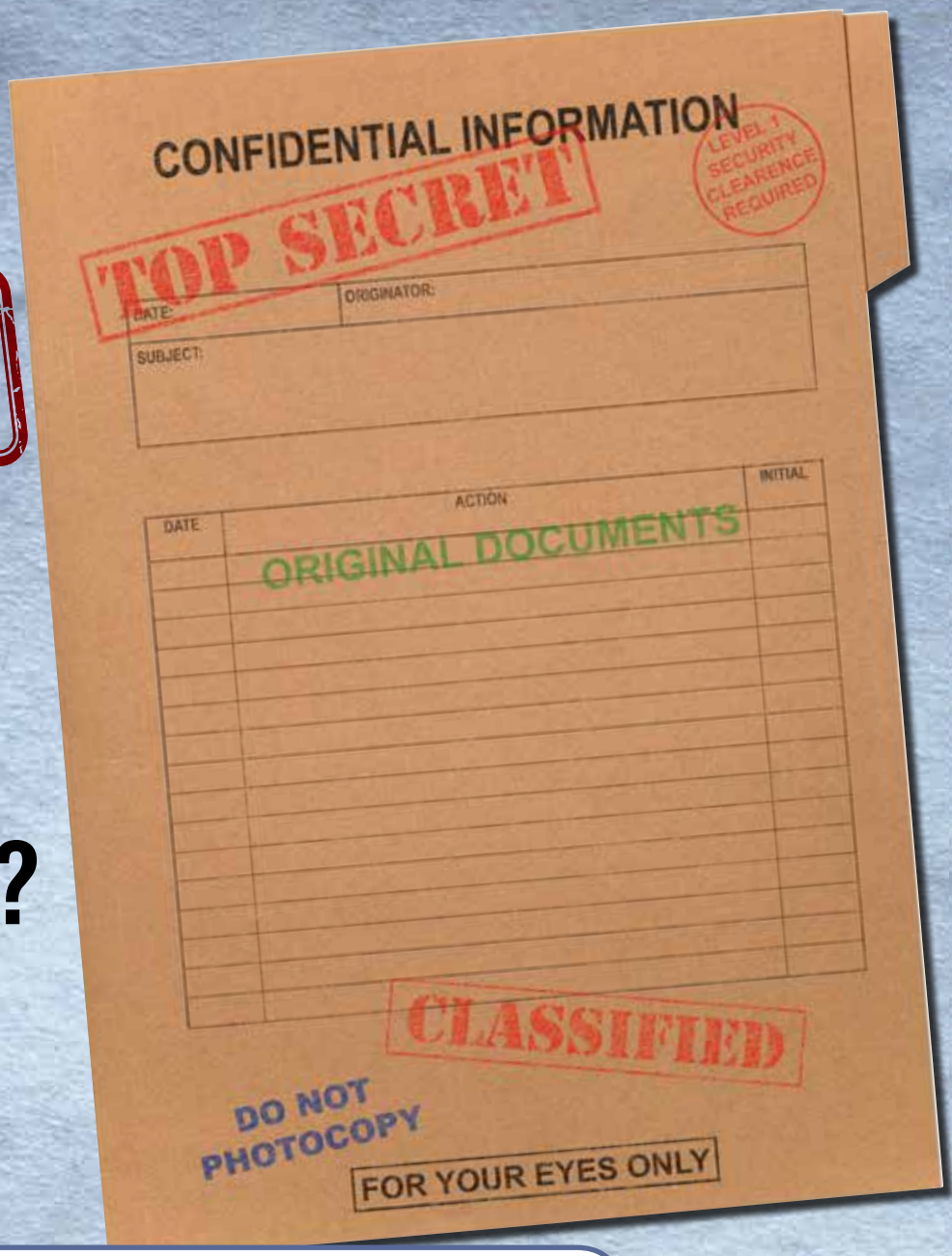
HOW CONFIDENTIAL IS YOUR MEDIATION?



By Lara E. White

The need for confidentiality in mediation proceedings is understood and appreciated by most attorneys, clients and mediators. Confidentiality allows participants to speak freely, creates an atmosphere of trust among the parties and the mediator, and opens the lines of communication without the concern of future disclosure. But just how confidential is your mediation and the written and verbal communications that take place related to it? This article provides an overview of current Louisiana and federal law addressing this issue in civil litigation and suggestions for ensuring your next mediation is as confidential and protected as you need it to be.

Louisiana State and Federal Law

Every state has a statute or rule protecting mediation communications from disclosure to different degrees. The Louisiana Mediation Act[1] (the Mediation Act) includes a confidentiality provision that applies whether or not the mediation is conducted pursuant to it.[2] The confidentiality language states that "all oral and written communications and records made during mediation . . . are not subject to disclosure, and may not be used as evidence in any judicial or administrative proceeding."[3] This confidentiality provision, however, is not absolute. Several exceptions to this provision provide for limited disclosure of information in certain circumstances: (1) if pursuant to a court's order, the mediator may report on whether the parties appeared at the mediation and if they reached a settlement; (2) to support a motion for sanctions for noncompliance with the court's order to mediate; and (3) to determine the meaning or enforceability of the settlement agreement reached during mediation in order to prevent fraud or manifest injustice.[4]

In addition, the Mediation Act makes clear that this confidentiality protection does not extend to evidence that is discoverable or otherwise admissible if the evidence is "based on proof independent of any communication or record made in mediation."[5] Furthermore, if the mediation confidentiality protection conflicts with other disclosure requirements, a court may review the relevant information in camera to determine whether it is subject to disclosure or whether it warrants a protective order.[6] Finally, the parties and the mediator may waive confidentiality under the Mediation Act if everyone agrees to the waiver in writing.[7]

The Mediation Act does not define many terms used, such as what is included in mediation "communications," or what is encompassed by the phrase "during mediation." The Act does not address when a mediation officially begins or when it ends. This leaves open for argument the scope of confidentiality protection provided and whether information or communications related to the mediation, but exchanged before or after the actual mediation session occurs, is included.

One Louisiana state court noted that the "during mediation" language created an issue regarding the scope of the confidentiality protection. In *Broussard v. Brown's Furniture of Lafayette, Inc.*, the Louisiana 3rd Circuit Court of Appeal refused to apply the Mediation Act's confidentiality provision to strike a receipt and release of claims executed after the mediation had concluded.[8] The court did affirm the trial court's decision to strike evidence of the mediation agreement itself under the Mediation Act, finding the trial court did not err in refusing to consider it as extrinsic evidence.[9] However, the court distinguished the subsequent receipt and release, noting that the confidentiality provision of the Mediation Act "provides that 'all written and oral communications and records' made during a mediation are exempt from disclosure except in specific circumstances. Those circumstances are not present here. The receipt and release was executed after the mediation, so the statute does not even arguably apply."[10]

Two federal courts in Louisiana have looked at the exceptions to the confidentiality rule in the Mediation Act.[11] In *Cleveland Constr., Inc. v. Whitehouse Hotel Ltd. P'ship*,[12] U.S. Magistrate Judge Joseph C. Wilkinson, Jr., of the Eastern District of Louisiana, determined disclosure of a settlement agreement was not barred by the Mediation Act.[13] The court first noted that the Mediation Act only applies to "all oral and written communications made during mediation" and that the party seeking a protective order for a prior settlement agreement between the parties had "not borne its burden of showing specifically, rather than making a conclusory statement, that the settlement agreement falls within this definition."[14] Next, the court noted that "the Mediation Act does not impose an absolute bar against discovery of documents otherwise protected by its provisions."[15] Because the court found the document was subject to disclosure as the confidentiality protections conflicted with other legal requirements for disclosure of the information, it ordered the settlement agreement to be produced subject to a protective order.[16]

In contrast, another federal court applied the Mediation Act confidentiality provisions strictly, even after reviewing the exceptions, based on the fact there was no clear waiver. In *Thrasher v. Metropolitan Property and Cas. Ins. Co.*,[17] Judge James T. Trimble, Jr. granted the defendant's motion in limine to exclude evidence of oral or written communications made during mediation because the plaintiff had presented no evidence of waiver of the confidentiality provision.[18] The plaintiff had argued the defendant's request was overly broad in excluding the evidence, as the plaintiff did not intend to introduce "evidence specifically regarding the mediation and settlement negotiations," but rather wanted to provide evidence "that defendant's behavior and conduct during mediation of the claim constituted further violation of defendant's affirmative duties under Louisiana law."[19] The court did not find that these mediation communications fell within the confidentiality exceptions.

Although the 5th Circuit Court of Appeals has refused to recognize a federal mediation privilege,[20] Louisiana federal district courts each have a nearly identical local rule addressing confidentiality in alternative dispute resolution conducted pursuant to these local rules, including mediation.[21] In the U.S. District Court for the Eastern District of Louisiana, Local Rule 16.3.1 provides, in pertinent part, that, "All alternative dispute resolution proceedings are confidential." The Middle District of Louisiana Local Rule 16(b) provides, "All alternative dispute resolution proceedings shall be confidential." Finally, the Western District of Louisiana Local Rule 16.3.1 provides, "All ADR proceedings shall be confidential."

Only one federal court has applied a local rule in a published opinion to date. In *Benson v. Rosenthal*, U.S. Magistrate Judge Joseph C. Wilkinson, Jr., of the Eastern District of Louisiana, noted that the court "encouraged and endorsed" the private mediation efforts of the parties.[22] The court further found the confidentiality provision of Local Rule 16.3.1 to be "unequivocal."[23] Therefore, after an in-

camera review of certain materials withheld from production, the court ruled that because they were produced and exchanged for use in mediation, they were protected from discovery, and plaintiff's motion to compel was denied as to these documents.[24] It should be noted that the documents did not indicate on their face that they were produced as part of the mediation, but, rather, an affidavit submitted with the materials established this fact.[25]

In addition to the Louisiana Mediation Act and Louisiana Federal Rules of Court, parties also may rely on Louisiana Code of Evidence art. 408[26] and Federal Rule of Evidence 408[27] to protect settlement negotiations and offers to compromise conducted during mediation from discovery. Under both rules, offers or promises to compromise a claim are not admissible to prove liability, including any statement or admissions of fact made during settlement negotiations.[28] Exceptions exist under both rules when the evidence is sought to be admitted for another purpose.[29] No specific rule, statute or agreement is needed for Rule 408 to apply to a mediation.

Practical Considerations

The mediator and the parties should discuss confidentiality issues before the mediation begins so that everyone understands and agrees on the scope of the protection, no one is misled, and the mediation process is not damaged. Like most statutes, the protections provided by the Louisiana Mediation Act are limited. As the confidentiality protections provided by statutes and rules are qualified, and the exceptions and terms are often vague and undefined, they may not be sufficient for the parties' interests and needs.

Due to the uncertainty, parties may choose to contract for confidentiality protection beyond what is provided by statute and rules.[30] The parties may want to: (1) define the scope of when the mediation process officially begins and ends; (2) agree on what documents will be included within the mediation confidentiality provisions; and (3) consider including on each document produced in mediation a notation that it is subject to the confidentiality agreement. Many private mediation providers include confidentiality statements in their rules or agreements, which should be carefully reviewed and considered.

Finally, it can be unclear which state's laws apply to a mediation confidentiality issue. A situation may arise where a statement made in mediation in one state may be sought in another state, information from a state court mediation may be sought in federal court, or the mediation sessions could take place electronically, by telephone conference or over the Internet, where the parties and the mediator are not located in the same state. By also including a choice of law provision in the mediation agreement, one can hopefully avoid a conflict down the road.

FOOTNOTES

1. La. R.S. 9:4101, *et seq*. The Louisiana Mediation Act went into effect on Jan. 1, 1998, and applies to all civil cases pending in state court or filed on or after that date. "The purpose of the Act is to provide encouragement and support for the use of mediation to promote settlement of legal disputes." Hon. Max N. Tobias, Jr. *et al.*, La. Prac. Civ. Pretrial § 15:76 (Thomson Reuters 2015-2016 ed.).
2. La. R.S. 9:4112.
3. *Id*. at 9:4112(A).
4. *Id*. at 9.4112(B)(1).
5. *Id*. at 9:4112(C).
6. *Id*. at 9:4112(D).
7. *Id*. at 9:4112(E).
8. Broussard v. Brown's Furniture of Lafayette, Inc., 128 So.3d 640, 641 n.1 (La. App. 3 Cir. 2013), *writ denied*, 138 So.3d 605 (La. 2014).
9. *Id*. at 641 and 644.
10. *Id*. at 641 n.1.
11. Federal courts will usually apply relevant state law when hearing a diversity claim under Fed. R. Evid. 501 (unless the disputed evidence involves the amount-in-controversy requirement under 28 U.S.C.A. § 1332(a)). Federal courts will apply federal law if there is federal question jurisdiction or the matter involves both pendant state and federal law claims. Sarah R. Cole *et al.*, 1 Mediation: Law, Policy and Practice § 8.3 (Thomson Reuters 2016).
12. Cleveland Constr., Inc. v. Whitehouse Hotel Ltd. P'ship, No. Civ.A. 01-2666 (E.D. La. Feb. 25, 2004), 2004 WL 385052.
13. *Id.* at *2.
14. *Id.*
15. *Id.*
16. *Id.*
17. Thrasher v. Metro. Property and Cas. Ins. Co., No. Civ.A. 06-2317 (W.D. La. Dec. 18, 2007), 2007 WL 4553605.
18. *Id*. at *2.
19. *Id*. at *1 & *2.
20. In re Grand Jury Subpoena Dated Dec. 17, 1996, 148 F.3d 487, 49 Fed. R. Evid. Serv. 1308 (5 Cir. 1998). *See also,* Solorzano v. Shell Chemical Co., 83 Fair Empl. Prac. Cas. (BNA) 1481, 2000 WL 1145766 (E.D. La. 2000) (rejecting the creation of a federal ombudsman privilege); Smith v. Smith, 154 F.R.D. 661 (N.D. Tex. 1994). For more information on the federal mediation privilege, see Sarah R. Cole *et al.*, 1 Mediation: Law, Policy and Practice § 8:18 (Thomson Reuters 2016).
21. The Alternative Dispute Resolution Act of 1998 required federal courts to adopt a local rule to protect ADR program confidentiality. 5 U.S.C. § 574 (2000).
22. Benson v. Rosenthal, No. Civ. A. 15-782 (E.D. La. May 25, 2016), 2016 WL 3001129, *9.
23. *Id*.
24. *Id*. at *1 & *9.
25. *Id*. at *9.
26. La. C.E. art. 408 (A).
27. Fed. R. Evid. 408.
28. La. C.E. art. 408 (A) and Fed. R. Evid. 408.
29. *Id*.
30. Of course, confidentiality can never be 100 percent absolute, as certain information disclosed at mediation is required to be reported based on the law or the code of ethics. "Examples of matters that must or should be disclosed under applicable circumstances include: child abuse, La. R.S. 14:403; elder abuse, La. R.S. 14:403.2; possession, manufacture or distribution of drugs or alcohol on school campuses, La. R.S. 14:403.1; certain burn injuries or wounds to control arson, La. R.S. 14:403.4; knowledge that a person intends to commit a crime that is likely to result in reasonably certain death or substantial bodily harm, La. Rules Prof. Conduct Rule 1.6; and attorney misconduct, La. Rules of Prof. Conduct Rule 8.3." Hon. Max N. Tobias, Jr. *et al.*, La. Prac. Civ. Pretrial § 15:71 (Thomson Reuters 2015-2016 ed.).

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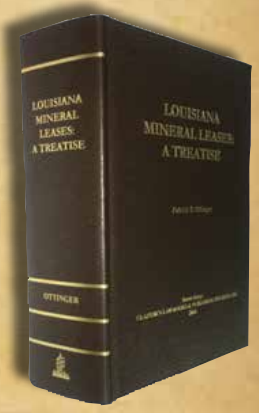
Book Review

Louisiana Mineral Leases: A Treatise

By Patrick S. Ottinger

Reviewed by Lawrence P. Simon, Jr.

Patrick S. Ottinger



Patrick S. Ottinger has made a significant contribution to the field of mineral law, and all people interested in this field will want to review his superb new book, *Louisiana Mineral Leases: A Treatise* (Claitor's Law Books & Publishing Division, Inc. 2016).

Whatever you want to know about Louisiana mineral leases, you will find in this Treatise or make a substantial start on finding it. The book is a remarkable achievement and will be a source for mineral law research for years to come for scholars, students and practitioners. Ottinger's credentials are impressive and his vast experience is reflected throughout the work, offering sound legal analysis and practical advice on the full range of legal issues surrounding mineral leases.

The book contains numerous references to Ottinger's own scholarly Law Review articles and to papers delivered at the Institute on Mineral Law and other respected seminars, as well as citations to many cases in which he himself was an advocate. He has given Louisiana an invaluable work on mineral law and mineral leases. The book deserves close attention and detailed analysis, and, in that regard, this writer has four principal observations.

Observation #1

The scope of the work includes virtually every issue affecting mineral leases. It also treats numerous "non-legal" areas that are helpful, if not necessary, to understanding the practice of mineral law. A review of the table of contents is instructive in demonstrating the broad array of subjects covering nearly every topic that an oil and gas lawyer could encounter in practice. There are chapters that strike this writer as legal background and foundational material, *e.g.* Chapters 1, 6, 7, 8 and 9. Several chapters have great practical import and should serve as a guide in the practice of mineral law, *e.g.* Chapters 4, 5 and 11. Finally, there are a group of chapters that present the core issues and their pertinent legal analysis. These would constitute the essence of mineral law practice for any serious practitioner: Chapter 2, Freedom of Contract and Principles of Contract Interpretation; Chapter 3, Louisiana Laws Pertinent to Mineral Leases; Chapter 10, Transfers of Mineral Leases; Chapter 12, Secured Interests; and Chapter 13, Remedies for Breach. These three classifications are very broad and parts of each chapter could easily be considered in one of the other two classes.

The thoroughness of Ottinger's treatment of the subject is evident. He intends to both lead the reader through the many aspects of the subject matter of mineral leases and provide a clear path by which the reader can gain a grasp of the fundamental issues. He has provided a helpful Index, a Table of Cases, and a Table of References to the Mineral Code articles, which makes locating specific issues quick and easy.

Because of the broad scope of Ottinger's treatment and his own extensive experience in mineral law, many of his observations, conclusions and statements will provide guidance as to industry custom and practice, as well as the state of the law. The one caveat noted by this writer is that some of the statements are only the author's opinion or personal conclusion and, as such, should not necessarily be treated as established industry custom and practice. But, the differences are fairly easy to distinguish and reconcile.

Ottinger has organized this vast material into useful groupings. For example, he devotes a single chapter to an all-inclusive treatment of common clauses in oil and gas leases. A non-practitioner will want to study this area extensively when dealing with mineral leases because it gives excellent guidance and insight and is very thorough in terms of the listing and treatment of these various clauses. He also gathers a complete listing and consideration of all forms of relief relevant for breach of a lease into the last chapter (Chapter 13). For the practicing litigator, he has saved the best for last, and this chapter is where many practitioners will spend much of their time when reviewing the Treatise. The gathering of the forms of relief available — and unavailable — for breach of a lease is an extremely valuable addition to the book.

Finally with respect to scope and organization, the reader will note that the book constitutes an excellent update on all pertinent law, including the history of that law, an exposition of recent cases and footnotes to numerous authorities that accompany discussion of the law.

Observation #2

Ottinger's scholarship and the solid legal methodology he employs are evident throughout the Treatise. He shows himself to be a true civilian scholar in those areas where a code applies, such as the Louisiana Civil Code or the Louisiana Mineral Code. He always starts with the basics, *i.e.* what are the words of the statute. He is also a textualist in that his statutory construction is precise and consistent. He looks to the specific words of the statute and gives meaning to each word and clause. His resulting analyses are consistently thorough, and sometimes arresting. At times, this writer ceased reading for purposes of a review, and simply became an entertained student of the law under the author's tutelage.

The same is true of his treatment of lease clauses, evident in the comprehensive analysis of the printed forms and the comparison of those forms, and by his original research in the public records to help explain or understand individual cases.

This is not to say that the reader should merely accept on face value all of the conclusions drawn or even the analyses in the treatment of cases. In some instances, Ottinger does not treat a couple of the trickiest issues, and, in other instances, he provides his own conclusion, sometimes without extensive discussion. The latter is most frequent where there simply is not sufficient authority on which to base a reasoned discussion. Nevertheless, it is always instructive to see the manner in which he articulates his disagreement with a court, accomplished in a clear and nuanced way that allows the reader to understand his specific point of disagreement with the treatment of the law within the case. There also are open questions in mineral law where he, as a scholar, shows respect for the state of the debate, including the understanding of the penalty provisions for nonpayment of royalties and the date of the dissolution of a lease.

Observation #3

There are numerous instances where Ottinger offers tips or "soundbites" that are reminders to the experienced mineral lawyer and give keen insight to the neophyte. Examples are the fact that an operator's lien under a JOA is unenforceable, or the distinction between lease dissolution and lease cancellation. Further, he states more or less matter-of-factly that no notice is required under Article 137 of the Mineral Code for a lawsuit seeking payment of underpaid or nonpayment of royalties, and the plaintiff or lessor is not seeking any of the penalty provisions that might be afforded by the Mineral Code as a form of relief for nonpayment of royalties. Another example is that, as a matter of law, the assignment of state leases without Mineral Board approval is not valid. Still another is the paragraph in which he explores the rule of contractual interpretation that words that are stricken from a contract are "deemed not written,"

which has profound effects in contract interpretation. These, and many others, will assist any practitioner in escaping avoidable errors.

Observation #4

The many useful aspects of the book and the "tips," while valuable, all take a secondary position to the keen core insights and overall organization of the Treatise. The underlying premise of the work is that the mineral lease is a contract, and Louisiana law affords contractual freedom to lessors and lessees. He devotes a full section to the principles of contract interpretation, and the sequencing of the application of those principles envisioned by the Civil Code. He discusses extensively the distinction between real and personal rights and the role and effect of the public records doctrine. He likewise provides a complete catalog of the laws affecting or pertinent to mineral leases. It is highly valuable to the reader to have these collections of cases organized by subject matter and presented together in single chapters.

Some of the most impressive and helpful chapters are those dealing with the transfer of interests in leases, secured interests in leases, and remedies for breach. All three of those areas require a broad understanding of the law and Ottinger successfully collects and explains the rules and the law pertaining to each of those subjects. This writer recommends the review of those chapters to any practitioner or student of mineral law for background, explanation and insight.

Conclusion

It is difficult to be thorough about a work that is itself so thorough. The points of disagreement by this reviewer with the Treatise are few, and its weaknesses are even fewer. Ottinger has given the Louisiana Bar an invaluable work on mineral law and mineral leases. It is a major work and a significant achievement in the study of Louisiana law. This reviewer highly recommends the Treatise to all who have an interest in Louisiana mineral law and particularly Louisiana mineral leases.

The Treatise is available for purchase at Claitor's and at *www.amazon.com*. It is noteworthy that Ottinger is donating 100 percent of the royalty proceeds from the sale of the book to the Alzheimer's Association.

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SPONSORED BY THE LOUISIANA STATE BAR ASSOCIATION

Disney's Grand Floridian Resort and Spa

Lake Buena Vista, Florida

FEB. 27–MARCH 1, 2017

This program has been approved for CLE credit, including ethics and professionalism.

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DAZZLING DISNEY—the Louisiana State Bar Association's Continuing Legal Education Program Committee will sponsor its tenth CLE Seminar at the Walt Disney World® Resort.

This Multi-Topic seminar qualifies for 13 hours of CLE credit, including 2 hours of ethics and 2 hours of professionalism, and will feature speakers well-versed in their respective areas. The topics are intended to be of general interest to all practitioners and are addressed with sufficient detail to be informative, interesting and useful.

Escape the madness of Mardi Gras and bring your family and friends on a magical gathering at the Walt Disney World® Resort. Make your destination Disney!

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Disney's Grand Floridian Resort & Spa is a Victorian-style Disney Deluxe Resort distinguished as the flagship hotel of the Walt Disney World® Resort and offering world-class dining, entertainment and luxurious accommodations in its 6 striking red-gabled buildings. This magnificent hotel sits along the white-sand shores of Seven Seas Lagoon.

ORLANDO

Outside of the *Walt Disney World*® Resort, attractions abound. Universal Orlando® Resort is more than a theme park. It's an entire universe of action and thrills featuring TWO spectacular theme parks unlike anything else in Orlando.

- ► Universal Studios Florida® Theme Park
- ► Universal's Islands of Adventure® Theme Park - now including The Wizarding World of Harry Potter™

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Register Online at *www.lsba.org/cle*

MCLE Committee, LBLS Approve Hardship CLE Exemption for Flooding Victims

Because of the unprecedented rain and flood events that have impacted many Louisiana attorneys, the Louisiana Supreme Court's Committee on Mandatory Continuing Legal Education (MCLE) and the Louisiana Board of Legal Specialization have agreed that an exemption for hardship caused by the flooding is justified for impacted attorneys for the year 2016.

Access the flood exemption form online at: *https://www.lascmcle.org/pdf/2016_Flood_Exemption.pdf*.

Attorneys who have had substantial flood damage to their homes and/or offices must complete the form to get the CLE exemption. The MCLE Committee is not requiring documentation of damages, only the signature of the attorney filing for the waiver.

"It is not necessary to wait until the end of the year to file this exemption and attorneys are strongly encouraged to file as soon as possible," said MCLE Committee Chair Franchesca L. Hamilton-Acker.

The signed exemption form may be mailed, emailed or faxed; filing methods are included on the form. Acknowledgment of receipt and confirmation of the exemption will be sent via email and it will be reflected on the attorney's online transcript.

The MCLE Committee also can offer assistance to attorneys who have encountered a serious hardship in 2016 unrelated to the flood. Attorneys needing assistance in obtaining CLE hours or who may be unable to satisfy the requirements should contact MCLE Director Kitty Hymel by mail or email: kittyh@lascmcle.org. Requests unrelated to the rain and flood events will be handled through the three-person Exemptions, Extensions and Substituted Compliance Subcommittee and are privacy-protected.

For LBLS information, contact Executive Director Barbara M. Shafranski at (504)619-0128 or email barbara.shafranski@lsba.org.

House Resolution Deadline is Dec. 15 for 2017 Midyear Meeting

The Louisiana State Bar Association's (LSBA) Midyear Meeting is scheduled for Thursday through Saturday, Jan. 19-21, 2017, at the Renaissance Hotel in Baton Rouge. The deadline for submitting resolutions for the House of Delegates meeting is Thursday, Dec. 15. (The House will meet on Jan. 21, 2017.)

Resolutions by House members and committee and section chairs should be mailed to LSBA Secretary Alainna R. Mire, c/o Louisiana Bar Center, 601 St. Charles Ave., New Orleans, LA 70130-3404. All resolutions proposed to be considered at the meeting must be received on or before Dec. 15. Resolutions must be signed by the author. Also, copies of all resolutions should be emailed (in MS Word format) to LSBA Executive Assistant Mindi Hunter at mindi.hunter@lsba.org.

Reminder: CLE Compliance by Dec. 31 for Board-Certified Specialists

In accordance with the requirements of the Louisiana Board of Legal Specialization (LBLS), as set forth in the individual Specialty Standards for each field of legal specialization, board-certified attorneys in a specific field of law must meet a minimum CLE requirement for the calendar year ending Dec. 31, 2016. The requirement for each area of specialty is:

► Appellate Practice — 18 hours of appellate practice law.

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

► Family Law — 18 hours of family law.

► Tax Law — 20 hours of tax law

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

CLE credits will be computed on a calendar year basis and all attendance information must be delivered to the Supreme Court Committee on Mandatory Continuing Legal Education (MCLE) no later than Jan. 31, 2017. Failure to earn and/or timely report specialization CLE hours will result in a penalty assessment.

Preliminary specialization transcripts will be mailed in November to all specialists who are delinquent in their specialization CLE hours. Specialists should satisfy all specialization CLE requirements by Dec. 31, 2016.

To obtain copies of specialization transcripts, go to the LBLS's website: *https://www.lascmcle.org/specialization/*.

For more information, contact LBLS Executive Director Barbara M. Shafranski at (504)619-0128 or email barbara.shafranski@lsba.org.

La. Board of Legal Specialization Sets Dates for Certification Applications

The Louisiana Board of Legal Specialization (LBLS) will soon be accepting requests for applications for certification in six areas — business bankruptcy law, consumer bankruptcy law, appellate practice, estate planning and administration, family law and tax law.

The application period for appellate practice, estate planning and administration, family law and tax law certification is Nov. 1, 2016, through Feb. 28, 2017.

Applications for business bankruptcy law and consumer bankruptcy law certification will be accepted from Jan. 1, 2017, through Sept. 30, 2017.

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 Law — 18 hours of estate planning law.

► Family Law — 18 hours of family law.

► Tax Law — 20 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 Executive Director Barbara M. Shafranski, email barbara.shafranski@lsba.org or call (504)619-0128. For more information, go to the LBLS website: *https://www.lascmcle.org/specialization/*.

Attorney Volunteers: Register with *LA.FreeLegalAnswers.org*!

A new website that connects low-income individuals with attorneys, *LA.FreeLegalAnswers.org*, was launched on Aug. 22. Through the website, attorney volunteers are able to log in whenever and wherever they like to anonymously respond to legal questions submitted by individuals who could not otherwise afford to consult an attorney. Volunteers will be covered by malpractice insurance provided by the American Bar Association for any legal advice given through the site.

La.FreeLegalAnswers.org is not only an incredibly convenient way for attorneys to do pro bono, but also it will help expand pro bono access throughout Louisiana, especially to those in rural areas where few pro bono resources are currently available.

To learn more about *LA.FreeLegalAnswers.org*, go to the LSBA's Access to Justice webpage, *www.lsba.org/atj*. Or contact Rachael Mills with the Access to Justice Department at (504)619-0104 or email rachael.mills@lsba.org.

By Elizabeth LeBlanc Voss

PEACEFUL AND ORDERLY TRANSITIONS

On June 21, the Louisiana Supreme Court amended the Louisiana Rules of Professional Conduct to permit the sale of a law practice or area of practice, including good will, and includes firms where the attorney is deceased or has disappeared. There are a handful of conditions set out in Louisiana Rule of Professional Conduct 1.17.

Lawyers who have not been disbarred or resigned from the practice to avoid formal discipline, and who plan to permanently cease the practice of law or an area of practice, may sell their entire law practice or area of practice to another lawyer admitted and currently eligible to practice in the state, if proper notice is provided to all affected clients.

A careful review of the rule is necessary, as client confidentiality must be protected while still affording prospective purchasers enough information to conduct a conflicts check. Client fee agreements will remain in force and must be honored. Clients will retain the right to seek other representation or to take possession of their files. However, consent will be presumed if the client fails to take action within 90 days of notice.

There are dual notice requirements to sell a law practice in Louisiana.

First, at least 90 days prior to the transfer date, clients must be given actual notice, either by in-person consultation confirmed in writing or by U.S. mail. The written notice must contain the following information:

(1) the proposed sale of the law practice;

(2) the identity and background of the purchasing lawyer or law firm, including principal office address, number of years in practice in Louisiana, and disclosure of any prior formal discipline for professional misconduct, as well as the status of any currently pending disciplinary proceedings in which the lawyer or law firm is a named respondent;

(3) the client's right to choose and retain other counsel and/or take possession of the client's file(s); and

(4) the fact that the client's consent to the transfer of the client's file(s) will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of the notice.

Second, at least 30 days prior to the transfer date, the selling lawyer must place an announcement or notice of the sale of the law practice, with sufficient specificity as set forth in the rule: 1) in the *Louisiana Bar Journal*; and 2) once a week for at least two (2) consecutive weeks in a newspaper of general circulation in the city or town (or parish if located outside a city or town) in which the principal office of the law practice is located.

The right to sell a law practice in Louisiana is a welcome change. All attorneys should plan for transitioning out of practice. Sadly, many attorneys die without such a plan in place. Now selling a law practice is a viable option that will provide some measure of security to those left behind as well provide continuity for clients.

While selling a law practice is a good option, the best way to provide security to those left behind and continuity for clients is to create a formal succession plan. Much of a lawyer's working life is spent troubleshooting problems and planning for contingencies. From a risk management perspective, a contingency plan is a course of action designed to help an organization, such as a law firm, respond effectively to a significant future event or situation that may or may not happen. Because death is a certainty, it is recommended that attorneys meticulously plan for separation from practice.

The ethics rules in most states, including Louisiana, do not require attorneys to create a succession plan. But in all states, lawyers have duties of competence and diligence, which, according to ethics opinions, form the basis of a "duty to plan." Lawyers are encouraged to plan for the inevitable to protect their firms and their clients.

CNA, the Louisiana State Bar Association-endorsed carrier, has drafted a comprehensive guide to creating a succession plan. Visit *GilsbarPro.com* to access a copy of CNA's "Expecting the Unexpected: Succession Planning for Lawyers," *https://www.gilsbarpro.com/gilsbarpro/media/GilsbarPro/NewsUpdates/Expecting-the-Unexpected-Gilsbar.pdf*.

CNA/Gilsbar Resources

"Expecting the Unexpected: Succession Planning for Lawyers"
www.GilsbarPro.com

https://www.gilsbarpro.com/gilsbarpro/media/GilsbarPro/NewsUpdates/Expecting-the-Unexpected-Gilsbar.pdf.

Elizabeth LeBlanc Voss serves as loss prevention supervisor and loss prevention counsel for the Louisiana State Bar Association under the employment of Gilsbar, L.L.C., in Covington. Before joining Gilsbar, she was in-house counsel and regulatory compliance officer for a Louisiana community bank, worked as a civil litigator in New Orleans, served with the Harris County District Attorney's Office in Houston, Texas, and was a tax examiner for the U.S. Department of Treasury in Atlanta, Ga. She received her BA degree in political science from Louisiana State University and her JD degree from Houston College of Law. She presents ethics and professionalism CLE programs on behalf of the LSBA. She can be emailed at bvoss@gilsbar.com.

LAWYERS Assistance

By J.E. (Buddy) Stockwell

SAVING A FAMILY

Day in and day out, behind the scenes, the Judges and Lawyers Assistance Program, Inc. (JLAP) is continuously immersed in assisting law students, lawyers, judges and their family members through all sorts of mental health challenges. Under the protection of La. R.S. 37:221, all information received by JLAP is strictly privileged and confidential.

The paths to JLAP are diverse. There is an unfortunate misperception in some quarters that JLAP only offers help in disciplinary or bar admissions cases, and where the person is under scrutiny from a third party. On the contrary, JLAP is a restorative and compassionate entity at its core and operates independently and confidentially.

JLAP is not part of the disciplinary or bar admissions systems. JLAP's primary mission is to promote and provide completely confidential and proactive clinical mental health assistance to the impaired law student, lawyer or judge (or family member of any lawyer or judge) ***before*** the situation escalates from a personal health issue into a professional licensure issue.

In recent years, JLAP has expended great effort toward increasing the profession's awareness of its true mission and services. It is a serious challenge because it is not possible for JLAP to advertise the numerous, confidential success stories.

Historically, virtually everything published about JLAP's outcomes appeared in the form of Disciplinary Board and Supreme Court opinions wherein the person had run afoul of the disciplinary system. Thus, it is no wonder that many people are unaware that JLAP offers free and confidential mental health services that have nothing whatsoever to do with discipline.

In the past five years, the *Louisiana Bar Journal* has been invaluable in helping JLAP promote its confidential services. JLAP recently received a heartwarming "thank you" letter from a family that learned of JLAP as the direct result of JLAP's article in the *Louisiana Bar Journal*. JLAP received permission to publicize the letter so it may serve to encourage other families to reach out to JLAP and take advantage of its services.

Dear JLAP,

This letter may be unique in that it is written from the perspective of family members of a wonderful person, who is an attorney and a recovering addict. However, our story is not unique in that the effect of an active addiction within this family unit was baffling, confusing and destructive. It is our hope that these words will encourage anyone or any family member to contact the Judges and Lawyers Assistance Program (JLAP) if you are living with addiction in your family and are searching for help.

Briefly, we were attempting to cope with the struggles of addiction on our own, by controlling, fixing and blaming the addict for a disease that was clearly destroying his life and those around him. While stating that all was well and there was no need to worry, the downward spiral of a law practice and personal life was evident. However, we simply did not understand what was happening and we were powerless to do anything that would genuinely help.

JLAP came to our attention through a mutual friend who had read an article in the Louisiana Bar Journal. *Having no other viable options, JLAP was contacted and, without delay, the long and difficult road to recovery began. This work on recovery was not only for the addict, but surprisingly became recovery work for the family as well. During the intensive inpatient treatment program supported by JLAP, we were also supported and encouraged by JLAP to receive help for ourselves through a Structured Family Recovery Program. As our loved one diligently worked and received treatment based on the 12-Step Program, we simultaneously met and worked as a family group to address our individual needs, taking the focus off of the addict and providing a venue for individual recovery using the principles of the Al Anon program as the foundation.*

Without the direct support, guidance and understanding of JLAP, specifically Buddy Stockwell and Leah Rosa, this family would not be experiencing the indescribable benefits of treatment and the recovery process of addiction. It is true that addiction is a family disease, impacting many. However, just as there are no words to describe the pain of an active addiction, there are no words to adequately describe lives lived in the recovery process, both for the addict and the family that loves and supports each other.

Sincerely,
A Grateful Family

If you or someone you know is suffering with any mental health issue, do not wait. Make the confidential call to JLAP at (985)778-0571, email jlap@louisianajlap.com, or visit us at *www.louisianajlap.com*. Together, we are confidentially saving lives, families and careers. And that is the pure essence of what JLAP is all about!

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.

By Darleene D. Peters | SUPPORT FOR SUIT UP

Strengthening the Pipeline to the Legal Profession

As the parent of two participating students, I must admit that the 2016 Suit Up for the Future High School Summer Legal Institute and Internship Program is one of my most memorable events from this year — for many reasons.

This program — the collaborative effort between Just the Beginning: A Pipeline Organization, the Louisiana Bar Foundation and the Louisiana State Bar Association (LSBA) —was implemented in 2011. Since then, I have ensured that our firm has hosted student interns every summer. The three-week-long program is designed for high school juniors and seniors interested in pursuing a career in the legal profession. The obvious and ultimate goal of most of the student interns is to become a lawyer and/or judge. The student interns learn the steps to becoming a law student, and visit college campuses and local courts for further exposure to the profession.

The students also spend time listening to lectures from judges, law school professors and other legal professionals on a myriad of topics. They prepare their résumés, review and discuss cases and statutes to develop analytical and critical-thinking skills, and participate in exercises to sharpen their oral and written presentation skills. The culminating event is the submission of a memorandum on the issue of a change of venue and their corresponding oral argument before a panel of judges who grill them throughout their presentation. No holds barred.

I did not realize the full impact this program can have on those aspiring to be the next generation of jurists. I became more fully aware this year after "encouraging" my two sons to participate. This program embodies not only the true meaning of making a difference in our community and profession but of embracing and learning

Attorney Darleene D. Peters, counsel in the New Orleans office of Irwin Fritchie Urquhart & Moore, L.L.C., with her two sons, Dillon, left, and Gary.

the importance of diversity. The 19 student interns in the 2016 program were from various schools, diverse backgrounds and cultures; some had legal professionals in their families while others had no connections with anyone in the legal community. Their differences did not define them, but rather brought them together, as they were all united for a common goal — to learn what it takes to become a successful legal professional.

During the three weeks, I heard nothing less than positive reports from my sons about their fellow interns. I witnessed firsthand "positive" peer pressure. They were impressed with their peers' accomplishments and aspirations and were supportive of their efforts throughout the entire program. My sons had an "Aha! Moment" as they finally grasped *and* applied one of my mantras — "Look your best, do your best, and be your best." They were concerned that if not dressed in a suit jacket and tie on a daily basis they would not be taken seriously by their fellow interns and visiting legal professionals. As a result, along with their homework assignments, they carefully planned each day's attire and made sure they were impeccably groomed before heading out the door. The transformation was unbelievable. They became fully vested in the idea that they were now young professionals and wanted to convey that same impression.

My favorite part of the program is the "shadowing" assignments, which further strengthen the pipelines for diversity and our profession. The student interns are paired and provided with the opportunity to visit legal settings, such as a legal agency, law firm or court, for a one- to two-day period. The purpose of the shadowing opportunity is for the interns to meet, interact and observe — to be a human sponge — soaking in all that they can in a short period of time. This may mean attending a conference, deposition, hearing, trial, mediation, interoffice meeting, or even going on a court run. In partnering with this program, the host law offices do not need to provide the interns with any assignments or tasks while they are shadowing as the interns are simply there to observe.

Although we can all become overburdened and overwhelmed with requests for our time, talents and money, the Suit Up Program requires so little of all these that it should be next to impossible to decline a request to serve as a shadowing site. No office is too big or too small for this educational opportunity. In our firm's five-year history of hosting interns, we have been extremely impressed with the determination of the students and their level of professionalism. The interns bring with them a wonderful sense of curiosity, eagerness, willingness and gratitude that they have been allowed to spend time in settings that serve as wonderful examples of who and what they can be.

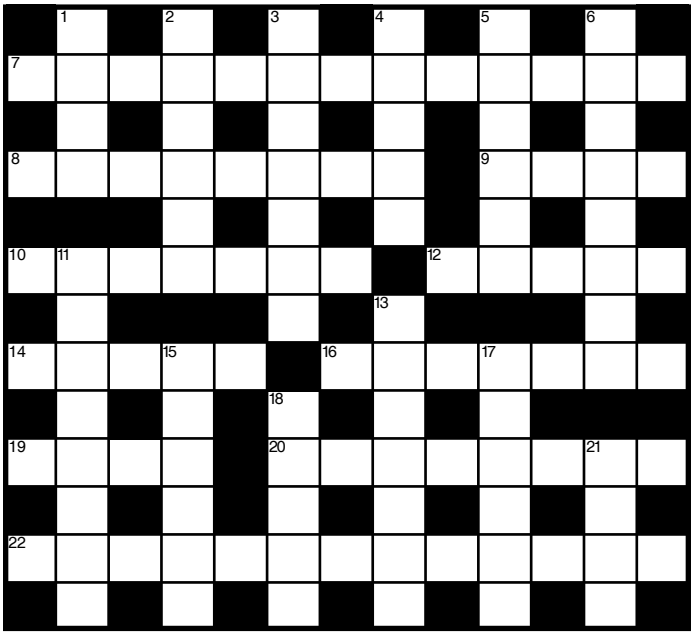
Didn't someone reach back and help you along the way? These students are the future of our profession and we have an obligation to ensure that we are doing all that we can to engage and encourage our successors and to pay it forward.

The LSBA looks forward to you accepting its request to serve as a shadowing site next summer and beyond.

Crossword PUZZLE

By Hal Odom, Jr.

AN OLD (MATRIMONIAL) REGIME



ACROSS

7 Judicial approval, e.g., to sell property of the former community (13)
8 Property, e.g., owned by spouse before marriage (8)
9 Common evidence of debt (4)
10 Marital ___, one-fourth of decedent's estate (7)
12 Brief filed by appellee (5)
14 Right ___ is a limited personal servitude (2, 3)
16 Pertaining to matrimony (7)
19 Plaintiff and defendant in seminal 1978 case with an allocation formula (4)
20 Sell, lease or mortgage (8)
22 Claim to recover separate assets that enriched the community (13)

DOWN

1 Certain (4)
2 Hinder or frustrate (6)
3 Giving aid and comfort to the enemy (7)
4 Noted Central American empire (5)
5 Position, as on an issue (6)
6 Central American flatbread (8)
11 Stepping over the line before the ball is snapped (8)
13 Having the most commerce or activity (7)
15 Seed on a bun (6)
17 ___ one is to give an example (2, 4)
18 Measure of worth (5)
21 Minuscule (4)

Answers on page 247.

By Rules of Professional Conduct Committee | PUBLIC OPINION 16-RPCC-020

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

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

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

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

PUBLIC Opinion 16-RPCC-020[1]

Communication Regarding Potential Malpractice

During the representation of a client, when a lawyer commits a significant mistake or error that may materially affect a client's case, the lawyer is obligated to follow Rule 1.4 of the Louisiana Rules of Professional Conduct, which requires disclosure of that information to the client. Additionally, where a lawyer desires to take steps to correct that error, written notice and a waiver from the client is required under Rule 1.7(b) for continued representation. If a lawyer seeks to attempt to settle a potential legal malpractice claim with a client, Rule 1.8(h) requires that the lawyer first provide written notice to the client of the desirability of obtaining the advice of independent legal counsel, and the client should be afforded a reasonable opportunity to seek and obtain that advice.

Lawyers, unfortunately, make mistakes. The issue of how a lawyer should handle communications with a client after the lawyer makes a mistake or has potentially committed malpractice has been discussed in ethics opinions issued by bar associations in Colorado and North Carolina.[2] Those opinions make clear that a lawyer has a duty, pursuant to Rule 1.4 of the ABA Model Rules of Professional Conduct, to disclose potential errors or mistakes to the client.

The Committee has evaluated the ethical ramifications stemming from an error made by a Louisiana lawyer that results in a potential legal malpractice claim. In its consideration, the Committee believes that Rules 1.4,[3] 1.7[4] and 1.8(h)[5] of the Louisiana Rules of Professional Conduct are most relevant.

Disclosure

When an error is made, what does a lawyer need to disclose to the client? If the mistake is minor, insignificant or irrelevant to a client's case, there may be no need to disclose the error. However, where a mistake materially affects the case, the lawyer must inform the client. For example, a calendaring error could cause a lawyer to miss a prescription date. Rule 1.4 requires a lawyer to ". . . *keep the client reasonably informed about the status of the matter*. . ." and to provide ". . . *sufficient information*. . ." to the client so that the client can ". . . *participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued*. . . ." Thus, the lawyer must inform the client about missing the prescription date even if making that disclosure is uncomfortable.

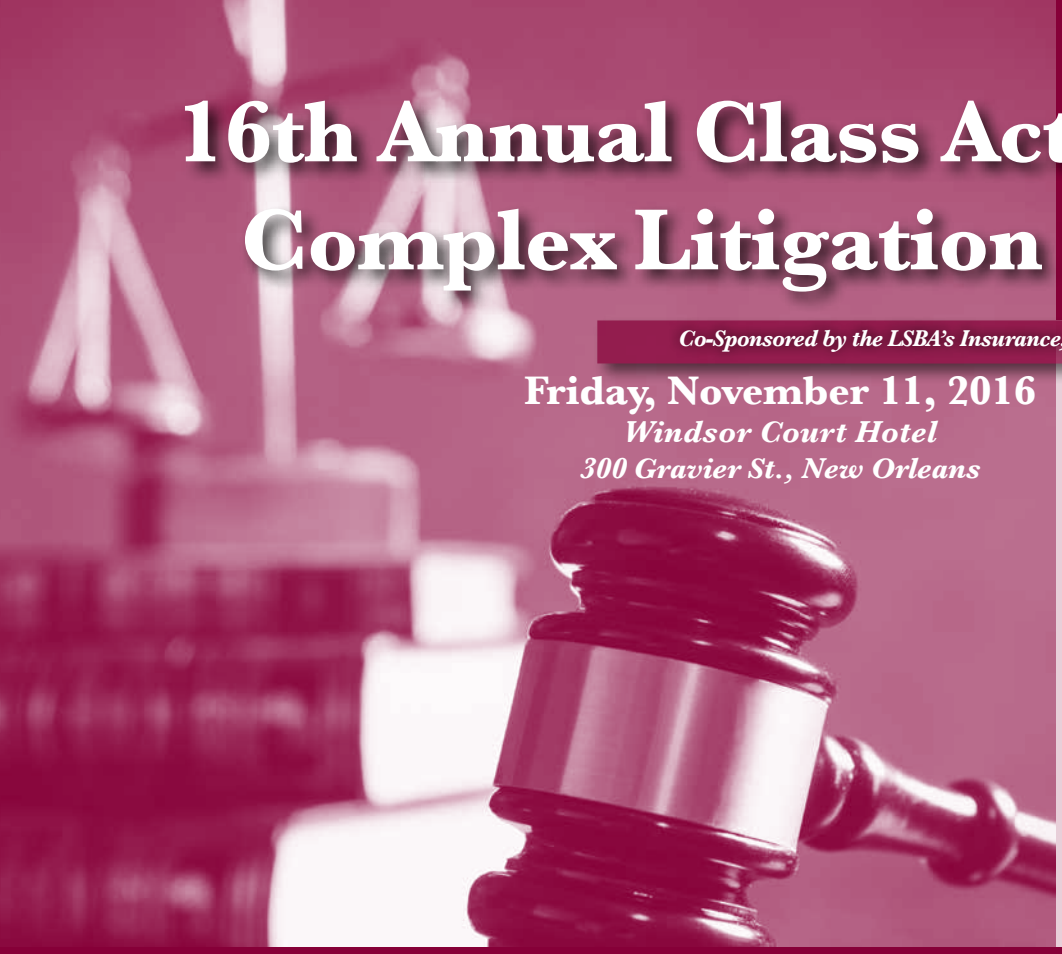
The Louisiana Supreme Court reiterated the obligation to disclose lawyer errors in the *Lomont*[6] case, stating that, pursuant to Rule 1.4, "*there was a duty to speak*." When something significant happens in a case, sufficient information should be provided to the client to enable the client to participate intelligently in any decision-making necessitated by the event. While a lawyer may not have to admit liability, the lawyer must disclose sufficient details as to what happened and should, at least, explain that mistakes may give rise to legal claims against lawyers. Depending upon the circumstances — and in light of Rule 1.8(h) — the lawyer may even wish to consider advising the client of the opportunity to seek advice from independent legal counsel. Best practices dictate that the lawyer should document that conversation in writing. The Louisiana Supreme Court in the *Lomont* case expected an experienced lawyer to have documentation of necessary disclosures to a client.

Continued on page 214

16th Annual Class Action/ Complex Litigation Symposium

Co-Sponsored by the LSBA's Insurance, Tort, Workers' Comp & Admiralty Section

Friday, November 11, 2016
Windsor Court Hotel
300 Gravier St., New Orleans



Complex litigation presents high stake challenges and demands creative thinking. RICHARD J. ARSENAULT, seminar chair, brings together power hitters from around the country to explore critical developments and new trends. Speakers include Law School deans, along with the nation's leading complex litigation academicians, jurists and members of the bar from both sides of the "V". These are the folks that are writing about, presiding over and actually litigating the most significant cases in the country. They are the who's who of the complex litigation bench and bar. Topics will include the key game changing disputes which have arisen during the past year. We will explore the challenge of processing our 21st century needs while still preserving fundamental principles of equity, justice, and fairness. And join us for lunch and a keynote presentation on "Confessions of an Unprofessional Lawyer". During the symposium, you'll also earn both the required professionalism and ethics hours. **This is a program you don't want to miss!**

Registration Fees*, Cancellations and Refunds

Section Members .....$295 / $320 after Nov. 4 Non-Section Members ..... $320 / $345 after Nov. 4

**Registration fee includes electronic course materials, seminar attendance and coffee/refreshment breaks.*

Proposed Agenda

8:30 – 8:45 a.m. (.25 credits)
Program Overview
Richard J. Arsenault, Symposium Chair
Neblett, Beard & Arsenault • Alexandria

8:45 – 9:45 a.m. (1 credits-Ethics)
Ethics, Ethics, and More Ethics: Does Complex Litigation Complicate Ethics? Exit Strategies/Aggregate Settlements; Challenges Associated with Defending and Representing Large Groups of Plaintiffs; Someone Online Hates You – Ethical Responses to Negative Online Feedback; Quid Pro Quo – We'll Settle With You but You're Out of the Suing Us Business; Why Tech Skills Are Your Ethical Duty; Ethical Communication Fundamentals for High Stake Litigation
Moderator: Prof. Lynn Baker • University of Texas • Austin, TX
Panelists: Teny Geragos • Geragos & Geragos • Los Angeles, CA
John Sherk • Shook, Hardy & Bacon • San Francisco, CA
Leslie Schiff • Schiff Scheckman & White • Opelousas
Jane M. Lamberti • The Cochran Firm • Atlanta, GA
Rachel Lanier • Belluck & Fox • New York, NY

9:45 – 10:15 a.m. (.5 credits)
Federal State Coordination: Peacefully Co-existing in Parallel Universes
Moderator: Prof. Jaime L. Dodge • Emory University School of Law • Atlanta, GA
Panelists: Prof. Thomas Galligan, Jr. • LSU Law Center • Baton Rouge
Hon. Eldon E. Fallon • U.S. District Court, Eastern Dist. of LA • New Orleans
Hon. Carl J. Barbier • U.S. District Court, Eastern Dist. of LA • New Orleans
John Sherk • Shook, Hardy & Bacon • San Francisco, CA
Aimee H. Wagstaff • Andrus Wagstaff • Lakewood, CO
Stephen J. Herman • Herman, Herman & Katz • New Orleans

10:30 – 11:15 a.m. (.75 credits)
Women Lawyers in the Complex Litigation Courtroom; Tips and Views from Inside the Well
Moderator: Jennifer M. Hoekstra • Neblett, Beard & Arsenault • Alexandria
Panelists: Aimee H. Wagstaff • Andrus Wagstaff • Lakewood, CO
Yvonne M. Flaherty • Lockridge Grindal Nauen • Minneapolis, MN
Ginger Susman • Providio MediSolutions • Greenwood Village, CO
Shannon Pennock • Pennock Law Firm • New York, NY
Lori Cohen • Greenberg Traurig • Atlanta, GA

11:15 a.m. – 12:00 p.m. (.75 credits)
Pros/Cons of State MDLs: Complex Litigation Rules of Professional Responsibility
Moderator: Stephen J. Herman • Herman, Herman & Katz • New Orleans
Panelists: Val P. Exnicios • Liska, Exnicios & Nungesser • New Orleans
Prof. Lynn Baker • University of Texas • Austin, TX
Prof. Margaret S. Thomas • LSU Law Center • Baton Rouge
Prof. Jaime Dodge • Emory University School of Law • Atlanta, GA

12:00 – 1:30 p.m. (1.5 credits-PROF.)
Luncheon with Keynote Speaker:
Confessions of an Unprofessional Lawyer
J. Michael Veron • Veron Bice Palermo & Wilson • Lake Charles

1:45 – 2:05 p.m. (.33 credits)
Struggling with the Production and Discovery of Electronically Stored Information; Predictive Coding vs. Search Terms
Panelists: Joe Thorpe • International Litigation Services • Laguna Hills, CA
Jennifer M. Hoekstra • Neblett, Beard & Arsenault • Alexandria
Dustin C. Carter • Neblett, Beard, & Arsenault • Alexandria

2:05 – 2:20 p.m. (.25 credits)
Lien Obligations (and risks) for Parties on Both Sides of the "V"
Panelists: Matt Garretson • Garretson Resolution Group • Cincinnati, OH
Joe Juenger • Garretson Resolution Group • Cincinnati, OH

2:20 – 3:00 p.m. (.66 credits)
Document Destruction; Spoliation; Litigation Holds; Preservation Obligations; Privilege
Moderator: Vance R. Andrus • Andrus Wagstaff • Lakewood, CO
Panelists: Brian Devine • Seeger Salvas • San Francisco, CA
Nicholas Drakulich • The Drakulich Firm • San Diego, CA
Jeffrey M. Bassett • Morrow, Morrow, Ryan & Bassett • Opelousas
Shannon Pennock • Pennock Law Firm • New York, NY

3:15 – 4:00 p.m. (.75 credits)
Bellwether Selection Process; Consolidation and Multi-Plaintiff Trials; Apex Depositions; Live Testimony via Contemporaneous Satellite Transmission; Video Taping Trials for Perpetuation upon Remand; Trial Time Limits/Chess Clock
Moderator: Eric D. Holland • Holland Groves Schneller & Stolze • St. Louis, MO
Panelists: Robert Drakulich • The Drakulich Firm • San Diego, CA
Lori Cohen • Greenberg Traurig • Atlanta, GA
Shean Williams • The Cochran Firm • Atlanta, GA
Tony Clayton • Attorney at Law • Port Allen
Gary J. Russo • Jones Walker • Lafayette, LA
Douglas Marvin • Williams & Connolly • Washington, DC

4:00 - 5:00 p.m. (1 credit)
MDL Steering Committee Appointments; Structure and Leadership; What's the Plan B? – MDL Alternatives
Moderator: Richard J. Arsenault • Neblett, Beard & Arsenault • Alexandria
Panelists: Eric D. Holland • Holland Groves Schneller & Stolze • St. Louis, MO
Kimberly Lambert Adams • Levin Papantonio • Pensacola, FL
A.J. DeBartolomeo • Gibbs Law Group LLP • Oakland, CA
Dawn Chmielewski • Neblett, Beard & Arsenault • Alexandria
Hadley Matarazzo • Faraci Lange • Rochester, NY

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Ethics Opinion Con't from page 212

Correcting the Problem

After an error occurs, can the lawyer attempt to correct the problem? When potential legal malpractice has occurred, a conflict of interest with the client is oftentimes created. The lawyer has a personal financial interest in avoiding, minimizing and/or defending against any claim that may be raised and/or filed against the lawyer. The lawyer also may want to minimize or limit any publicity regarding the error or mistake. In many instances, there is a natural inclination for the lawyer to try to correct the error or mistake. However, once a material error occurs, a concurrent conflict of interest often exists. If a lawyer desires to take steps to correct the problem, a written waiver from the client is required by Rule 1.7(b) of the Louisiana Rules of Professional Conduct. Rule 1.7 basically provides that a lawyer cannot represent a client if ". . . *the representation is materially limited by a personal interest of the lawyer*. . . ."

However part (b) of Rule 1.7 provides an exception to that basic rule:

> *. . . (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing. . . .*

Thus, even when there is a concurrent conflict of interest as a result of the personal interests of the lawyer, the lawyer may continue to work on the client's case so long as the factors of Rule 1.7(b) are met, such that: 1) it is reasonable to do so; 2) the representation is not otherwise prohibited by law; 3) the lawyer is not representing one client against another client in the same matter; and 4) the client is advised of the circumstances and risks associated with the continued representation and provides informed consent in writing to that continued representation. As part of the "informed consent," the lawyer should disclose that there is a conflict of interest between the lawyer and client and, depending on the circumstances, the lawyer might consider including: a description of the lawyer's mistake; the fact that the mistake may give rise to a legal claim against the lawyer; the peremptive period applicable to the claim; the lawyer's plan to address the problem; and perhaps, depending upon the circumstances, advice that the client may wish to consider the desirability of seeking the advice of independent legal counsel.[7] It should be noted that not every situation is appropriate for continued representation with the informed consent of the client in writing, as the lawyer's error may have no remedy, or the lawyer's interests may significantly outweigh those of the client. Any evaluation as to the reasonableness of continued representation should be made from the perspective of a reasonable, disinterested lawyer.

Settling Liability

What if the lawyer who made an error wants to settle with the client regarding any liability for the lawyer's actions? Rule 1.8(h) of the Louisiana Rules of Professional Conduct provides:

> *. . . A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith . . . .*

Dunn[8] and other decisions from the Louisiana Supreme Court make clear that, under Rule 1.8(h), prior to attempting to settle a potential legal malpractice claim with a client, the lawyer must advise the client in writing of the desirability of seeking — and give the client a reasonable opportunity to seek — the advice of independent legal counsel.[9] In Dunn, the Louisiana Attorney Disciplinary Board was "*. . . concerned that Respondent settled a malpractice claim without advising his client to seek independent counsel, which creates a conflict of interest regardless of how fair the settlement terms appear. . . .*"[10] Thus, no matter how even-handed a proposed legal malpractice settlement might be, a lawyer seeking to limit his or her own professional liability must first advise the client in writing that the client should seek the advice of an independent lawyer regarding any proposed settlement, and give that client a reasonable opportunity to seek such advice before proceeding with any settlement attempts.

Conclusion

During the representation of a client, when the lawyer commits a significant mistake or error that may materially affect the client's case, the lawyer is obligated to follow Rule 1.4 of the Louisiana Rules of Professional Conduct, which requires disclosure of that information to the client. Additionally, where a lawyer desires to take steps to correct that error and continue with the representation, notice and a written waiver from the client is required under Rule 1.7(b). If a lawyer seeks to attempt to settle a potential legal malpractice claim with a client, Rule 1.8(h) requires that a lawyer first provide written notice to the client of the desirability of obtaining the advice of independent legal counsel, and the client should be afforded a reasonable opportunity to seek and obtain that advice.

FOOTNOTES

1. The comments and opinions of the Committee — public or private — are not binding on any person or tribunal, including, but not limited to, the Office of Disciplinary Counsel and the Louisiana Attorney Disciplinary Board. Public opinions are those which the Committee has published — specifically designated thereon as "PUBLIC" — and may be cited. Private opinions are those that have not been published by the Committee — specifically

Continued on page 215

designated thereon as "NOT FOR PUBLICATION" — and are intended to be advice for the originally-inquiring lawyer only and are not intended to be made available for public use or for citation. Neither the LSBA, the members of the Committee or its Ethics Counsel assume any legal liability or responsibility for the advice and opinions expressed in this process.

2. Formal Ethics Opinion 113 from Colorado and 2015 Formal Ethics Opinion 4 from North Carolina.

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

4. Rule 1.7 of the Louisiana Rules of Professional Conduct, in pertinent part, provides: ". . . .*(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:. . . . (2) there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer . . . .*"

5. Rule 1.8(h) of the Louisiana Rules of Professional Conduct, in pertinent part, provides: ". . . A lawyer shall not:. . . . *(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith . . . .*"

6. Lomont v. Myer-Bennett, 172 So.3d 620 (La. 2015).

7. Rule 1.7(b) of the Louisiana Rules of Professional Conduct does not expressly require that a lawyer advise a client of the desirability of seeking the advice of independent counsel, but it does require that a lawyer seeking to continue with representation in the face of a concurrent conflict of interest seek and obtain the client's informed consent to the continued representation despite the existence of that concurrent conflict of interest. One of the examples of concurrent conflicts of interest noted specifically within Rule 1.7 is when there is a significant risk that the representation of the client will be materially limited by the lawyer's own personal interest. A lawyer's own personal interest in downplaying or minimizing the effect(s) of the lawyer's mistakes with the representation, depending upon the circumstances, may materially limit that lawyer's representation of the client. Hence, Rule 1.8(h)(1) clearly prohibits a lawyer from making an agreement prospectively limiting the lawyer's liability for legal malpractice where the client is not independently represented in making such an agreement. Rule 1.8(h)(2) prohibits a lawyer from settling a claim or potential claim for professional liability unless the client is first advised in writing of the desirability of seeking — and is given a reasonable opportunity to seek — the advice of independent legal counsel in connection with the claim or potential claim for professional liability. Thus, depending upon the circumstances, in order for the client to provide informed consent and/or in order for the lawyer to meet "best practices," it may be prudent and appropriate for a lawyer to advise a client of the desirability of seeking independent legal advice.

8. In Re Dunn, 713 So.2d 461 (La. 1998).

9. *See*, In Re Thompson, 712 So.2d 72 (La. 1998) and In Re Petal, 972 So.2d 1142 (La. 1998).

10. *Supra*, footnote 8.

REPORT BY DISCIPLINARY COUNSEL

Public matters are reported to protect the public, inform the profession and deter misconduct. Reporting date Aug. 5, 2016.

Decisions

Daniel E. Becnel, Jr., Reserve, (2016-OB-1145) **Placed on disability inactive status** by order of the court on June 24, 2016. JUDGMENT FINAL and EFFECTIVE on June 24, 2016.

Chester Quinton Bell, New Orleans, (2016-B-0988) **Interimly suspended from the practice of law** by order of the court on June 15, 2016. JUDGMENT FINAL and EFFECTIVE on June 15, 2016.

Richard J. Brazan, Jr., Baton Rouge, (2016-B-0817) **Suspended through consent discipline for six months, fully deferred, and placed on unsupervised probation for a period of one year,** by order of the court on June 17, 2016. JUDGMENT FINAL and EFFECTIVE on June 17, 2016. *Gist*: Respondent advised his client to improperly obtain documents from an opposing party for use in preparing discovery.

Ericka Schexnayder Brignac, St. James, (2016-B-0952) **Consented to a one-year-and-one-day suspension, fully deferred, with two years' supervised probation,** by order of the court on June 3, 2016. JUDGMENT FINAL and EFFECTIVE on June 3, 2016. *Gist*: Respondent failed to maintain adequate documentation to ensure that her client trust account was handled properly, resulting in the misuse, commingling and conversion of funds therein.

David Kent Buie, New Orleans, (2016-B-0863) **Consented to a public reprimand** by order of the court on June 3, 2016. JUDGMENT FINAL and EFFECTIVE on June 3, 2016. *Gist*: Respondent knowingly failed to promptly return a client's file and failed to cooperate with the Office of Disciplinary Counsel in its investigation.

Julie Ann Fusilier, Baton Rouge, (2016-B-0016) **Suspended from the practice of law for a period of 18 months** by order of the court on May 27, 2016. JUDGMENT FINAL and EFFECTIVE on June 10, 2016. *Gist*: Commission of a criminal act; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and violating or attempting to violate the Rules of Professional Conduct.

Patrick Henry, Baton Rouge, (2016-B-0455) **Suspended from the practice of law for nine months, with all but 60 days**

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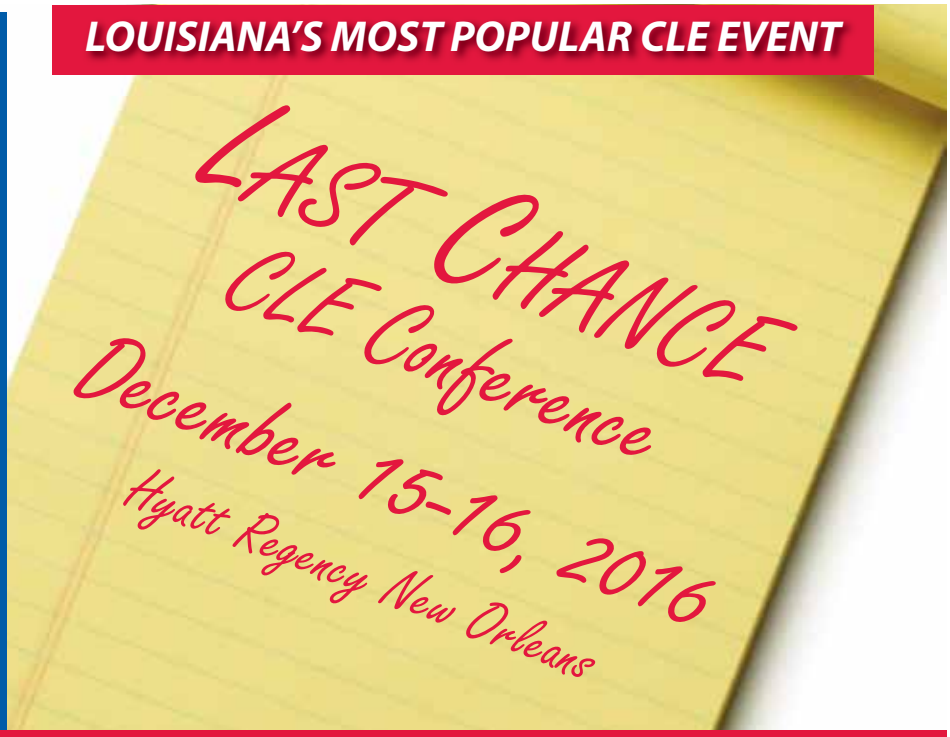

Review of Louisiana Law to include:

Judge Roland L. Belsome Jr.
Louisiana 4th Circuit Court of Appeal; New Orleans

Judge John W. deGravelles
U.S. District Court Middle District of Louisiana; Baton Rouge

Judge James T. Genovese
Louisiana 3rd Circuit Court of Appeal; Opelousas

Dean Thomas C. Galligan Jr.
LSU Paul M. Hebert Law Center; Baton Rouge

David J. Barczyk, D.C.
Barczyk Biomechanics Institute; Lafayette

Lawrence J. Centola III
Martzell, Bickford & Centola, APC; New Orleans

J. Lee Hoffoss Jr.
Hoffoss Devall, LLC; Lake Charles

Robert E. Kleinpeter
Kleinpeter & Schwartzberg, L.L.C.; Baton Rouge

Matthew E. Lundy
Lundy, Lundy, Soileau & South LLP; Lake Charles

Donald W. Price
Attorney at Law; Baton Rouge

J. Michael Veron
Veron, Bice, Palermo & Wilson, LLC; Lake Charles

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Garretson Resolution Group; Charlotte, N.C.

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Michael J. Leizerman
EJ Leizerman & Associates, LLC; Toledo, Ohio

Zoe Littlepage
Littlepage Booth; Houston, Texas

Randi McGinn
McGinn, Carpenter, Montoya & Love, P.A.; Albuquerque, N.M.

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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 Aug. 2, 2016.

Respondent	Disposition	Date Filed	Docket No.
Gregory Thomas Akers	Suspension (reciprocal).	6/27/16	16-3672
Keith Michael Couture	Public reprimand (reciprocal).	6/27/16	16-3747

Discipline continued from page 216

deferred, subject to probation, by order of the court on May 13, 2016. JUDGMENT FINAL and EFFECTIVE on May 27, 2016. *Gist*: Conduct involving dishonesty, fraud, deceit or misrepresentation.

Stephen James Holliday, Baton Rouge, (2016-0686) **Suspended through consent discipline from the practice of law for a period of one year** by order of the court on May 27, 2016. JUDGMENT FINAL and EFFECTIVE on May 27, 2016. *Gist*: Commission of a criminal act.

Mark James, Franklinton, (2016-B-0764) **Suspended through consent discipline from the practice of law for a period of one year** by order of the court on May 27, 2016. JUDGMENT FINAL and EFFECTIVE on May 27, 2016. *Gist*: Respondent was arrested for driving while intoxicated; he later pled guilty to second offense DWI.

Jan Maselli Mann, New Orleans, (2016-OB-1010) **Transferred to disability inactive status** by order of the court on June 3, 2016. JUDGMENT FINAL and EFFECTIVE on June 3, 2016.

Christopher S. Maxwell, Alexandria, (2016-B-0989) **Suspended from the practice of law by consent for one year and one day, fully deferred, subject to probation,** by order of the court on June 3, 2016. JUDGMENT FINAL and EFFECTIVE on June 3, 2016. *Gist*: Commission of a criminal act (DWI), particularly one that reflects adversely on the lawyer's honesty, trustworthiness or fitness in other respects; and violating or attempting to violate the Rules of Professional Conduct.

Walter P. Reed, New Orleans, (2016-B-0871) **Interimly suspended from the practice of law** by order of the court on June 3, 2016. JUDGMENT FINAL and EFFECTIVE on June 3, 2016.

Baron Maurice Roberson, Baton Rouge, (2016-B-0859) **Consented to a six-month suspension, fully deferred, with one year of supervised probation,** by order of the court on June 3, 2016. JUDGMENT FINAL and EFFECTIVE on June 3, 2016. *Gist*: Respondent failed to act with reasonable diligence and promptness in representing his client and failed to maintain reasonable communication with his client.

Edward Duane Schertler II, Larose, (2016-B-0951) **Interimly suspended by consent from the practice of law** by order of the court on May 25, 2016. JUDGMENT FINAL and EFFECTIVE on May 25, 2016.

Douglas M. Schmidt, New Orleans, (2016-B-0584) **Public reprimand (reciprocal)** ordered by the court on May 27, 2016. JUDGMENT FINAL and EFFECTIVE on June 10, 2016. *Gist*: Failure to provide competent representation; failure to abide by client's decisions concerning objectives of representation and to consult with client in pursuit of same; making extrajudicial statement lawyer knows or should know will be disseminated by means of public communication and having substantial likelihood of materially prejudicing adjudicative proceeding in matter; engaging in conduct prejudicial to the administration of justice; and violating or attempting to violate the Rules of Professional Conduct.

Kelly P. Ward, Dixon, IL, (2016-B-0742) **Suspended for a period of two years in a reciprocal discipline** order issued by the court on June 17, 2016. JUDGMENT FINAL and EFFECTIVE on July 1, 2016. *Gist*: Mr. Ward's reciprocal discipline is the result of an act, especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; engaging in conduct that is prejudicial to the administration of justice; and failure to abide by the probationary terms imposed by the Illinois Supreme Court.

Walter I. Willard, New Orleans, (2015-OB-2145) **Transferred to disability inactive status** by order of the court on June 16, 2016. JUDGMENT FINAL and EFFECTIVE on June 16, 2016.

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

No. of Violations

Failure to keep client reasonably informed about the status of the matter (violation of Rule 1.4).....1

Failure to comply with the minimum requirements of CLE as prescribed by Louisiana Supreme Court Rule (violation of Rule 1.1(b)) and violation of Rule 1.1(c) regarding payment of bar dues, payment of disciplinary assessment, timely notice of address change.....1

TOTAL INDIVIDUALS ADMONISHED.....2

Restrict Procurement Competition to Veteran-Owned Businesses

Kingdomware Techs., Inc. v. United States, 136 S.Ct. 1969 (2016).

Around January 2012, the Department of Veterans Affairs (Department) sought to procure an Emergency Notification Service. To do this, the Department sent a request for quotes (RFQ) to a non-veteran-owned company through the General Services Administration's (GSA) Federal Supply Schedule (FSS). The FSS consists of pre-negotiated contracts for supplies or services between private vendors and the GSA for the benefit and use of various federal agencies. These contracts are usually for supplies or services in bulk; this usually gives the agency using the FSS economy-of-scale pricing.

The company that was sent the RFQ responded to the Department with a favorable price quote. On Feb. 22, 2012, the Department subsequently entered into an agreement with the company to supply the emergency notification service and concluded the contract in May 2013. At some point after the award, Kingdomware Technologies, Inc. filed a post-award bid protest with the Government Accountability Office (GAO).

A protest is a written objection by an interested party to a solicitation or other (federal) agency request for bids or offers, cancellation 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 33.101 (2014). Three fora are available to potential protestors to hear these challenges — (1) the federal agency soliciting the requirement; (2) the Court of Federal Claims (COFC); and (3) the GAO. The GAO adjudicates protests under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56.

In its protest, Kingdomware alleged

that the Department procured multiple contracts through the FSS without restricting competition to veteran-owned small businesses as required by the "rule of two" under 38 U.S.C. § 8127(d). In general, section 8127 provides that the secretary of the Department of Veterans' Affairs "shall award" contracts by restricting competition for the contract to veteran-owned small businesses. The rule is derived from section 8127(d), which generally provides that the contracting officer must: (1) reasonably expect that at least two of these businesses will submit offers/bids/quotes, and that (2) the award can be made at a fair and reasonable price that offers the best value to the United States.

Here, Kingdomware alleged that the Department could not award the subject contract without researching to see if the rule applied. The GAO agreed with Kingdomware and made corrective recommendations. The Department did not follow the GAO's recommendations. Subsequently, Kingdomware filed suit in the COFC and sought declaratory and injunctive relief. The COFC granted summary judgment in favor of the Department. *See, Kingdomware Techs., Inc. v. United States*, 107 Fed. Cl. 226 (2012). The parties then raised the issue to the Court of Appeals for the Federal Circuit, and a divided panel affirmed the COFC decision. *See, Kingdomware Techs., Inc. v. United States*, 754 F.3d 923 (2014). The Supreme Court granted cert.

The question before the Court was whether section 8127(d) requires the Department to apply the rule in all procurements, or whether the statute gives the Department some discretion in applying the rule. In looking at the language of the statute, the Court found that section 8127(d) unambiguously requires the Department to use the rule before contracting under the competitive procedures. In making this finding, the Court focused on the use of the term "shall" in section 8127(d) and contrasted that with the use of the term "may" in sections 8127(b) & (c). Specifically, the Court found that "Congress' use of the word 'shall' demonstrates that § 8127(d) mandates the use of the Rule of Two in all contracting before using competitive procedures. Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."

The Federal Circuit and the Department afforded several arguments for an alternative reading of section 8127(d). The Federal Circuit reasoned that the section's prefatory clause, which declared that the purpose of the rule, to meet the annual contracting goals that the Department is required to set under section 8127(a), made section 8127(d) discretionary. The Supreme Court did not find this reasoning sound and, citing to established precedent, found that the prefatory clause has no bearing on, nor does it change, the plain meaning of the operative clause of the section, citing *Yazoo & Mississippi Valley R. Co. v. Thomas*, 10 S.Ct. 68 (1889). Further, the Court found that the Federal Circuit's reasoning would produce an anomaly that would render sections 8127(b) & (c) inapplicable after the prefatory clause's goals were met.

The Department made three arguments. First, the Department argued that the mandatory provision under section 8127(d) did not apply to "orders" under "pre-existing FSS contracts." The Court found this argument unpersuasive noting that "orders" under the FSS were still contracts under the Federal Acquisition Regulation. Second, the Department argued that the Court did not appreciate the distinction between FSS orders and contracts; specifically, that FSS orders were only for simplified acquisitions and that applying the rule to those acquisitions would hamper mundane purchases. The Court also found this argument unpersuasive and corrected the Department's "understated" explanation of the FSS. The Court pointed out that the FSS was not just for simplified acquisitions and that the Department itself had used the FSS for acquisitions "well above simple procurement." Lastly, the Department asked the Court to find the FSS were "orders" and not "contracts" in accordance with its interpretation. The Court refused to apply the *Chevron* deference here, citing to the unambiguous nature of the statute. *See, Chevron U.S.A. Inc. v. Natural Resources*

Defense Council Inc., 1046 S.Ct. 2778 (1984).

Consequently, the Court determined that the subject statute was clear, and reversed and remanded the case.

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

LLC Statute Trumps General Discovery Rules

Channelside Services, L.L.C. v. Chrysochoos Group, Inc., 15-0064 (La. App. 4 Cir. 5/13/16), 194 So.3d 751.

A judgment creditor obtained a charging order against a judgment debtor's interest in a Louisiana limited liability company (LLC). Seeking enforcement of its rights against the judgment debtor's property, the judgment creditor issued the LLC a notice of records deposition and subpoena duces tecum for production of the LLC's business and financial records. The LLC moved to quash the deposition and subpoena, arguing that the requested discovery was unduly burdensome, not supported by a showing of good cause and restricted under the specific provisions of the LLC Act, La. R.S. 12:1301 *et seq.* The judgment creditor opposed the motion to quash and moved to compel, arguing that the requested discovery was necessary for enforcement of the charging order and that Louisiana statutes pertaining to judgment debtor examinations permit a creditor to examine any third party upon any matter relating to a judgment debtor's property. *See*, La. C.C.P. arts. 1421-1472, art. 2451. The court ruled in favor of the LLC, holding that the specific statute relating to inspection of a LLC's business records governed over general discovery rules.

In weighing the right of a judgment creditor to obtain information in execution of its judgment against the right of the LLC to be free from harassment, undue burden and financial loss, the court noted that a creditor's exclusive remedy against the member's interest is to apply to a court of competent jurisdiction for a charging order, whereby "the court may charge the membership interest of the member with payment of the unsatisfied amount of judgment with interest . . . . [T]o the extent so charged, the judgment creditor shall have only the rights of an assignee of the membership interest." *Id.* at 758-59, *citing* La. R.S. 12:1331. An assignee of a membership interest in a LLC is granted certain financial rights to profits, losses and allocations, but no other rights or powers as a member. *See*, La. R.S. 12:1330. Under La. R.S. 12:1319, the right to obtain and inspect an LLC's records is reserved to the members of the LLC. The court held that a judgment creditor with a charging order is an assignee — not a member — of the LLC and does not have the right to obtain or review the LLC's records.

Importantly for business and corporate practitioners, the opinion contrasts the default creditor protections offered by an LLC versus those extended to partner-

ships and corporations. Specifically, "the Louisiana LLC Act affords LLCs different and greater protections from charging creditors of its members compared to Louisiana laws pertaining to creditors of corporate shareholders or partners in a partnership." *Id.* at 760. A creditor may seize a partner's interest in the partnership and be paid an amount equal to the value of the interest as of the time of seizure. *See*, La. Civ.C. arts. 2819, 2823. Similarly, a creditor may seize a shareholder's stock and exercise all rights associated with the stock. *See*, Susan Kalinka *et al.*, *Limited Liability Companies and Partnerships: A Guide to Business and Tax Planning*, 9 La. Civ. L. Treatise § 3.2 (4th ed. 2015); La. R.S. 12:1-140, 12:1-723. Under the LLC Act, the exclusive remedy of a judgment creditor of a member is obtaining a charging order against the membership interest and being treated as an assignee of that membership interest. Practitioners should consider the protections afforded by an LLC in advising clients on entity formation and conversion and the difficulties associated with attempting to monetize a membership interest in an LLC when advising clients seeking to secure a debt or enforce a judgment.

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

Community Property

Radcliffe 10, L.L.C. v. Burger, 14-0347 (La. App. 1 Cir. 3/28/16), 191 So.3d 79.

Radcliffe 10, L.L.C., the judgment creditor of Mr. Burger, sought to revoke a judgment obtained by the Burgers, during their marriage, to obtain a separation of property, to terminate their legal regime and to partition their previously existing community property. The trial court revoked the Burgers' judgment, finding that it was void ab initio because, although obtained under La. Civ.C. art. 2329, it was obtained by contradictory petition, rather than joint petition. In a per curiam opinion, en banc, by 10 of the 12 judges of the 1st Circuit, the trial court's judgment was maintained, since the court could not reach a majority to affirm or reverse. Five of the 10 judges would have affirmed, but the other five would have reversed. Numerous well-supported and -considered arguments were made by the judges in concurring and dissenting opinions. The case should be read for the contrasting analyses of the various issues at play.

Custody

State ex rel. S.K., 15-0457 (La. App. 5 Cir. 7/29/15), 189 So.3d 1103.

An appeal from a judgment terminating parental rights must be taken within 15 days from the mailing of the notice of the judgment under Louisiana Children's Code article 332(A), due to the priority nature of matters regarding parental status.

Ardoin v. Grice, 15-0972 (La. App. 3 Cir. 4/13/16), 190 So.3d 440.

Two ex parte custody orders — one to the putative father, and one to the putative father's mother — were declared absolute nullities because (1) no service had ever been effectuated on the mother regarding the pleadings that gave rise to those ex parte orders, and (2) the ex parte orders were not obtained in compliance with law. On the custody trial between the mother and the non-party putative paternal grandmother, the trial court further erred by placing the burden on the mother to regain custody of her child, which had been inappropriately taken from her under the above ex parte orders. The court of appeal awarded custody to the mother, finding that the putative paternal grandmother had failed to show that an award of custody to the mother would result in substantial harm to the child. The trial court's suspension of the father's visitation was affirmed, as he had been incarcerated, as was the requirement that he petition the court prior to any visitation being awarded. The court ordered that custody be transferred from the paternal grandmother to the mother immediately upon the finality of the court of appeal's opinion.

Darby v. Duplechain, 16-0002 (La. App. 3 Cir. 5/4/16), 192 So.3d 258.

After the parties appeared before the hearing officer, the hearing officer recommended that a protective order be issued against Mr. Duplechain and in favor of Ms. Darby and her two children. Mr. Duplechain objected and obtained a hearing before the trial court. After an in-chambers conference with the court, Mr. Duplechain orally moved for a continuance, which was denied. He then requested that the matter be heard, which the trial court also denied. Nevertheless, the trial court adopted the recommendation of the hearing officer and issued the protective order. The court of appeal reversed, finding that Mr. Duplechain's due process rights were violated, as he was not given a meaningful opportunity to be heard, as no evidence was taken despite his request for a hearing. The court of appeal remanded the matter for hearing.

Divorce

Barajas-Merez v. Valdovinos-Moreno, 15-0473 (La. App. 1 Cir. 2/26/16), 190 So.3d 758.

Plaintiff was a Mexican illegal alien residing in Terrebonne Parish. Defendant was still residing in Mexico and was unable to be located by the court-appointed curator *ad hoc*. On plaintiff's motion to obtain the divorce, the trial judge denied the judgment, stating that because plaintiff was an illegal alien, he did not believe that the plaintiff had any standing or the right to the benefits of the law of the state of Louisiana. Thus, he wrote "JUDGMENT Denied" across the proposed divorce judgment. The court of appeal dismissed the plaintiff's appeal, finding that the judgment was not a final judgment because it lacked the necessary decretal language and other formal-

ities. The dissent argued that the court of appeal should have converted the appeal to a writ, exercised its supervisory authority, granted the writ, vacated the court's judgment and remanded for further proceedings. The dissent expressed the position that the trial court should have allowed the plaintiff to proceed on the divorce. The dissent also stated:

> Because the majority has dismissed this appeal based on a lack of a valid, final judgment, this divorce proceeding is still pending before the trial court below. Procedurally, plaintiff may again attempt to set the matter for trial on the merits or attempt to take a confirmation of default, whichever is legally appropriate.

Id. at 763 n.2 (Pettigrew, J., dissenting).

Child Support

State ex rel. C.I.B. v. Bye, 16-0102 (La. App. 5 Cir. 5/12/16), 191 So.3d 1207.

Mr. Bye's appeal of a child support ruling rendered in juvenile court, under La. R.S. 46:236.1.1, *et seq.,* was untimely, since filed more than 15 days after the issuance of the judgment. Matters in juvenile court, which are controlled by the Children's Code, are subject to the procedural provisions of the Children's Code, which provides for appeal delays of 15 days, rather than the similar 30-day provision of the Code of Civil Procedure.

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Tort: No Class

Crutchfield v. Sewerage & Water Bd. of New Orleans, ____ F.3d ____ (5 Cir. 2016), 2016 WL 3769303.

In May 1995 — 10 years before Katrina and 21 years before our present difficulties — New Orleans experienced a major flood, causing multiple deaths and more than $3 billion in damages. This prompted Congress to provide increased flood protection for the region in the Water Resources Development Act of 1996, authorizing the Army Corps of Engineers to partner with state and local agencies to improve drainage and prevent flooding in Orleans, Jefferson and St. Tammany parishes via the Southeast Louisiana Urban Flood Control Project. This procedur-

ally complex case involved the construction of the Dwyer Road Intake Canal, a 7,000-foot-long, 14-to-16-foot-deep box culvert in New Orleans' Ninth Ward, begun in 2008 and completed five years later. The suit was filed in state court in 2012, seeking to represent a class of owners of immovable property and residents within 1,000 feet to the north or south of the project, approximately 1,054 houses, alleging construction activities such as excavation, dewatering and pile driving damaged and stigmatized their property and caused them mental and emotional distress.

All defendants except the Sewerage and Water Board (Board), which plaintiffs claim exercised oversight and control over the project, were dismissed. The Board filed a third-party demand against Hill Brothers Construction, the general contractor. Hill brought in several subcontractors and removed to federal court under the federal-officer-removal statute (28 U.S.C. § 1442(a)(1)) on the ground that its challenged conduct related to work it performed on a Corps of Engineers contract. Plaintiffs sought remand, arguing that Hill's non-compliance with the Corps' contract specifications precluded availability of the government-contractor defense. Unimpressed, the district court kept the matter in federal court.

Plaintiffs then moved to certify a class. Denying plaintiffs' motion, the district court concluded that they failed to satisfy the requirements of commonality under Rule 23(a) and predominance and superiority under Rule 23(b)(3). The threshold criteria for certification of Rule 23 class actions are:

> 1. The class is so numerous that joinder of all members is impracticable.
> 2. There are questions of law or fact common to the class.
> 3. The claims and defenses of the representative parties are typical of the claims or defenses of the class.
> 4. The representative parties will fairly and adequately protect the interests of the class.

The court stated that the relevant provision was Rule 23(b)(3), which allows a class action to be maintained "if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The court gave three reasons for denying the motion for class certification — commonality under Rule 23(a) and predominance and superiority under Rule 23(b)(3), with lack of predominance being the "fatal defect." The court explained that the predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." The court quoted Wright and Miller's treatise:

> When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

The district court concluded that individualized questions of causation would be the central, or predominant, issue at trial. "[E]ach plaintiff will need to prove which activities performed by which defendants caused which damages to a particular property. Repeat that inquiry for the more than 1,000 houses that would make up the proposed class, and a 'series of mini-trials' would result." The 5th Circuit affirmed the denial of certification, finding that the district court did not abuse its discretion in concluding that individualized issues of causation and damages would predominate.

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U.S. Court of Appeals for the Federal Circuit

Best Key Textiles Co. Ltd. v. United States, ____ Fed. Appx. ____ (Fed. Cir. Aug. 15, 2016), 2016 U.S. App. LEXIS 14918.

The U.S. Court of Appeals for the Federal Circuit recently affirmed a Court of International Trade (CIT) remand decision dismissing for lack of subject matter jurisdiction a case involving an alleged improper customs classification. Appellant Best Key Textiles is a Hong Kong yarn maker involved in a dispute with U.S. Customs over the classification of, and resulting tariff applied to, its merchandise. Best Key initially filed suit challenging the customs classification at the CIT, invoking its residual subject matter jurisdiction under subsection 1581(i). The United States appealed the exercise of subject matter jurisdiction. The Federal Circuit had previously ruled that Best Key Textiles improperly invoked residual jurisdiction instead of the more specific subsection 1581(a) jurisdictional ground that grants the CIT exclusive jurisdiction over customs classification matters. The Federal Circuit remanded the case with a mandate to "dismiss for lack of jurisdiction." *See, Best Key Textiles v. U.S. (Best Key I)*, 777 F.3d 1356, 1357 (Fed. Cir. 2015).

On remand at the CIT, Best Key filed a motion to transfer the action to the U.S. District Court for the District of Columbia. The CIT denied the motion as foreclosed by the specific mandate of the appellate court. Best Key appealed the denial, and the Federal Circuit affirmed the CIT's denial on the ground that its mandate implicitly foreclosed any transfer because of the exclusive jurisdictional ground that Best Key should have invoked. While the specific issue on appeal involved the scope of the Federal

Circuit's mandate, the case is noteworthy because of counsel's improper invocation of the CIT's residual jurisdiction where a more specific and exclusive jurisdictional ground was available. Best Key was unable to save its case through a transfer to district court.

U.S. Court of Appeals for the District of Columbia Circuit

Sierra Club v. Fed. Energy Regulatory Comm'n, 827 F.3d 59 (D.C. Cir. 2016).

The D.C. Circuit Court of Appeals recently rejected environmental challenges in a consolidated case involving liquefied natural gas (LNG) export terminals in Freeport, Texas, and Sabine Pass in Cameron Parish, Louisiana. The Sierra Club challenged the Federal Energy Regulatory Commission's (FERC) authorizations of export activity at both facilities. Sierra Club challenged FERC's authorizations under the National Environmental Policy Act for failing to consider the projects' individual and cumulative environmental impacts, including the impact of increased fracking and related greenhouse gas emissions; increased coal consumption as a result of higher domestic gas prices; and the cumulative effects of these and other LNG export projects in the United States. Petitioner asserted that FERC should have included these "induced-production" problems in its environmental analysis before issuing permits.

The D.C. Circuit rejected the claims, finding petitioner's allegations too attenuated, and thus not a reasonable part of FERC's required environmental analysis. FERC's approval of the subject terminals is not the "proximate cause" of natural gas exports, and its approval analysis need not include consideration of the alleged impacts of the natural gas exports. The court offered no opinion on whether DOE should consider these "induced-production" concerns in its decision making process.

International Center for Settlement of Investment Disputes

Philip Morris Brand Sarl (Switzerland) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (July 8, 2016).

A panel constituted under the auspices of the International Center for Settlement of Investment Disputes recently issued an award in a landmark case brought by Philip Morris International against Uruguay. Uruguay implemented significant anti-smoking legislation starting in 2008 to protect public health from the negative effects of smoking. The legislation included public smoking bans, increased taxes on tobacco products and labeling requirements on tobacco packages. Philip Morris International filed a complaint against Uruguay on Feb. 19, 2010, alleging that the anti-smoking legislation significantly diminishes the value of its investments in Uruguay, including the value of its cigarette trademarks. Philip

Morris International is headquartered in Lausanne, Switzerland, and invoked the provisions of the Bilateral Investment Treaty between Switzerland and Uruguay. On July 8, 2016, the arbitral panel issued its decision rejecting Philip Morris' claims and ordering Philip Morris to pay Uruguay $7 million plus all fees and expenses of the proceeding. This was the first time a tobacco company sued a sovereign country in an international dispute-settlement forum.

World Trade Organization

Russia—Tariff Treatment of Certain Agricultural and Manufacturing Products, WT/DS485/R (panel) (Aug. 12, 2016).

A World Trade Organization (WTO) panel issued its decision in the first WTO case against Russia since its accession in 2012. The European Union (EU) launched the complaint on Oct. 31, 2014, asserting that Russia violated its basic tariff obligations regarding paper and paperboard, palm oil, refrigerators, and refrigerator-freezers from the EU.

The EU challenged 12 tariff measures applied by Russia's customs authority leading to the application of customs duties in excess of those set forth in Russia's Schedule of Tariff Concessions. The panel found that 11 of the 12 measures at issue exceeded the bound levels in Russia's schedule and, therefore, violated Article II of the General Agreement on Tariffs and Trade 1994. The 12th measure, referred to by the EU as a Systematic Duty Variation (SDV), allegedly consisted of a common practice of systematically applying higher rates to certain EU goods. The panel rejected the EU's claim on the alleged SDV because the EU did not establish that it was applied systematically to the goods in question or that it constituted a general practice of Russia's customs authority.

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Risk Fee Statute

Acts 2016, No. 524 (S.B. No. 388), amends Louisiana's "risk fee statute," La. R.S. 30:10(A)(2). The Act revises the statute's language to make it clear that a unit operator can invoke the risk fee statute either before the start of drilling of a unit well, during the drilling process or after the drilling is complete. Prior to this revision, some of the language in the statute could be read as allowing the operator to invoke the statute before drilling began, but not after (though other portions of the statute suggested that it could be invoked before or after drilling had started). Under the amended statute, as under the pre-amendment version of the statute, an interested party that consents to participate in an operation, but then fails to pay its share of the estimated costs of drilling timely, will be deemed to have chosen not to participate. As amended, the statute provides that a payment is considered timely if the payment is made within 60 days of either the start of drilling or the party's receipt of the notice required by the statute, whichever is later.

Sale of Minerals by Mail Solicitation

Acts 2016, No. 179 (S.B. No. 404), creates the "Sale of Mineral Rights by Mail Solicitation Act," composed of La. R.S. 9:2991.1 through 9.2991.11. The Act applies to:

> the creation or transfer of a mineral servitude or mineral royalty, or the granting of an option, right of first refusal, or contract to create or to transfer a mineral servitude or mineral royalty, that is contracted pursuant to an offer that is received by the transferor through the mail or by common carrier and is accompanied by any form of payment.

La. R.S. 9:2991.2. But the Act does not apply to a transaction that is contracted "subsequent to a prior personal contract that included a meaningful exchange between the transferor and transferee." La. R.S. 9:2991.3. Further, the Act does not apply to mineral leases. La. R.S. 9:2991.2.

A transferor may rescind a transfer to which the Act applies within 60 days, provided that the offer is accompanied by a specified notice of the transferor's right to rescind. La. R.S. 9:2991.6. In the absence of such a notice, the transferor may rescind the transfer within a three-year preemptive period. *Id.* As between the transferor and transferee, the transferor can rescind by providing written notice to the transferee, but to be effective against third persons the notice must be filed for registry. La. R.S. 9:2991.7. If the act of transfer contains the notice required by the Act, a notice of rescission is effective against third persons if filed within 90 days of the filing of the act of transfer. *Id.* If the act of transfer does not contain the required notice, an act of rescission does not have effect against a third person unless filed for registry before the third person acquires an interest in the mineral rights at issue. *Id.* For the act of rescission to be effective against a third person who is obligated to make royalty or other production payments, a certified copy of the act must be provided to that third person. In such cases, the act of rescission will be effective against that third person 60 days after the certified copy is provided (the 60-day delay in effective date gives that third person time to make the required changes in its accounting system). La. R.S. 9:2991.8.

A transferor who rescinds a transfer must return to the transferee any money paid by the transferee to purchase the mineral right at issue, and the transferee must pay to the transferor any mineral royalties or production payments received. La. R.S. 9:2991.9. Any transfer to which the Act applies must be made by authentic act or act under private signature, signed by the transferor, and the transferor's acceptance of payment cannot satisfy the requirement of the trans-

feror's signature. La. R.S. 9:2991.4. Any provision that purports to waive the protections of this legislation will not be effective. La. R.S. 9:2991.10.

Preemption of Local Regulations

St. Tammany Parish Gov't v. Welsh, 16-0650, 16-0657 (La. 6/17/16), 194 So.3d 1108, 1109 (mem.)

In the June/July 2016 Recent Developments section (Mineral Law), it was reported that the Louisiana 1st Circuit had affirmed a district court's ruling against St. Tammany Parish in this case. In particular, the 1st Circuit held that a St. Tammany Parish ordinance that purported to ban certain oil and gas activity, including drilling, was preempted by La. R.S. 30:28, which provides that political subdivisions of the state are "expressly forbidden" from "prohibit[ing] or in any way interfer[ing] with the drilling of a well or test well in search of minerals by the holder of . . . a permit" to drill granted by the Louisiana Office of Conservation. St. Tammany Parish and an anti-drilling group each sought review by the Louisiana Supreme Court, but that court has now declined to hear the case. Accordingly, the lower court rulings — that the Parish ordinance is preempted and, therefore, not enforceable — remain in effect. Justices Knoll, Clark and Guidry voted to grant review, and Justices Knoll and Guidry each authored written dissents from the decision not to hear the case.

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Panel Opinion

Magee v. Williams, 50,726 (La. App. 2 Cir. 6/22/16), ____ So.3d ____, 2016 WL 3416930.

Medical-review panelists issued an opinion in which they said that the defendant dentist did not breach any standard of care in his initial treatment of the plaintiff, but they also opined that a question of fact existed as to whether the defendant had obtained informed consent for follow-up procedures he performed. The plaintiff then filed a lawsuit contending that the defendant performed the follow-up procedures without her consent and alleging other negligence issues.

In response to the defendant's motion for partial summary judgment, the

parties signed a consent judgment dismissing all claims except that for lack of informed consent. The defendant then filed a motion for summary judgment asking for dismissal of the informed-consent claim.

The defendant contended that he obtained verbal consent, which the court noted is allowed pursuant to La. R.S. 40:1299.131 F (now re-designated as R.S. 40:1161.1 F), in support of which he attached a portion of the plaintiff's deposition. The plaintiff opposed the motion, offering her own affidavit in which she said that the follow-up procedures were done without her consent, and she offered the medical-review panel opinion that found there was a "question of fact" as to this issue.

The trial court granted summary judgment, following which plaintiff's counsel withdrew from her representation. The *pro se* plaintiff then filed an extensive and complicated brief; however, the only issue recognized by the appellate court concerned informed consent, as the plaintiff had signed a consent judgment as to all other issues during the district court proceedings.

The court found no genuine issue of material fact as to the essential element of causation, relying in large measure on the plaintiff's admissions in her deposition and, while that finding obviated the need to address the rest of plaintiff's arguments, the court decided to address them briefly "out of courtesy to the *pro se* litigant."

The court first found that there was no negligence in "failing to document, in writing, an act of consent that need not be in writing." To the medical-review panel's opinion that there was a question of fact concerning informed consent, about which it could not issue a medical opinion, the court noted that this established "only that a genuine issue existed on the record before the MRP," whereas the evidence before the court, *i.e.*, the subsequent lawsuit, discovery and evidence submitted on the two motions for summary judgment, showed that there was no genuine issue of fact. The trial court judgment was affirmed.

Recent Legislation

HB195 amends La. R.S. 40:1231.8(A)(1)(c) and (5) and 1237.2(A)(1)(c) and (5). The commencement of the period within which to pay fees due for the filing of a medical-review-panel request is changed from 45 days from the date the Division of Administration or Patient's Compensation Fund *mails* the confirmation of receipt of the request to 45 days from the date of *receipt* of the confirmation by the claimant.

HB 537 amends La. R.S. 40:1165.1(A)(2)(b)(i) and (ii). Copies of the entirety of medical records may be obtained in the form "in which they exist." If the records exist in both digital and paper form, "the maximum limit of one hundred dollars shall apply only to the portion of records stored in digital form."

HB 480 amends La. R.S. 37:1271(B)(2) and (3) and enacts La. R.S. 37:1271.1. Physicians who possess an unrestricted license and who practice telemedicine in licensed health-care facilities are allowed to prescribe controlled substances "without the necessity of conducting an appropriate in-person patient history or physical examination of the patient as would otherwise be required by R.S. 37:127(B)(2)."

HB 570 amends La. R.S. 37:1271(B)(2)(b) and (4) and La. R.S. 40:1223.3(5) and 1223.4(A), and enacts La. R.S. 37:1271(B)(6) and La. R.S. 40:1223.5.

The requirement that a "telemedicine physician" maintain an office in Louisiana is repealed. Telemedicine physicians may now "utilize interactive audio without the requirement of video" if, after reviewing the patient's medical records, "the physician determines that he is able to meet the same standard of care" as if the medical care were provided in person.

Venue for lawsuits that involve care

rendered via telehealth is proper in the district court:

> in which the patient resides or in the district court having jurisdiction in the parish where the patient was physically located during the provision of the telehealth or telemedicine service. The patient is considered located at the originating site as defined in R.S. 40:1223.3.

SB 107 amends La. R.S. 36:251(A), (B) and (C)(1), enacts La. R.S. 49:191(9)(b), and repeals La. R.S. 49:191(6)(d). The name of the Department of Health and Hospitals has been changed to Louisiana Department of Health.

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Partnership Held Not Liable for Failure to File Penalty

The Bankruptcy Court for the District of Delaware, in *In re Refco Pub. Commodity Pool, L.P.*, 14-11216 (BLS), 2016 WL 4150620 (Bankr. D. Del. Aug. 2, 2016), recently held that a partnership that did not file partnership returns for three years was not liable for a failure-to-file penalty because most of its income and other tax return information came from its investment in another partnership that did not provide Schedule K-1s for those years, and because, despite reasonable efforts, the taxpayer was unable to obtain that tax information from other sources.

A partnership that fails to timely and completely file the return (Form 1065) required by IRC § 6031(a) is subject to a penalty unless it is shown that the failure is due to reasonable cause. IRC § 6698(a). In addition, IRC § 6721(a) imposes a penalty for failure to file an "information return." The term "information return" is defined in IRC § 6724(d)(1), which does not include partnership returns. IRC § 6724(a) provides that penalties under the part of the Code that includes IRC § 6721(a) are not to be imposed if the failure is due to reasonable cause and not willful neglect.

To establish reasonable cause under IRC § 6724(a), a filer must prove that either (1) the failure was due to impediments beyond the filer's control, or (2) significant mitigating factors with respect to the failure to file existed. Reg. § 301.6724-1(a)(2)(i), Reg. § 301.6724-1(a)(2)(ii). One such mitigating factor is "that the filer has an established history of complying with the information reporting requirement with respect to which the failure occurred." Reg. § 301.6724-1(b).

In addition, a filer must prove it acted in

a responsible manner both before and after the failure occurred. Reg. § 301.6724-1(a). Acting in a responsible manner means "(i) that the filer exercised reasonable care, which is that standard of care that a reasonably prudent person would use under the circumstances in the course of its business in determining its filing obligations, and (ii) that the filer undertook significant steps to avoid or mitigate the failure." Reg. § 301.6724-1(d)(1).

The taxpayer in *Refco* had invested substantially all of its assets in SPhinX Managed Futures Fund, SPC (SMFF), part of a group of affiliated companies, the SPhinX Group, which voluntarily placed itself into liquidation in the Grand Court of the Cayman Islands in June 2006. The liquidators discovered serious accounting issues and advised Refco that the accounting work was inaccurate and incomplete.

In a declaration submitted with a U.S. Bankruptcy Court motion, the liquidators stated that they would not be filing partnership returns for any year after 2005, explaining that to prepare these returns would cost between $5 million and $7 million because an accounting firm would have to reconstruct thousands of records. IRS and the liquidators settled the matter, and SPhinX Group was absolved from having to file partnership returns for the years 2005 to 2007.

Refco did not file partnership returns (Form 1065) for 2006-2008. It filed an extension with respect to its 2006 Form 1065, but it did not file extensions for 2007 or 2008. The IRS assessed penalties for Refco's failures to file its 2006-2008 partnership returns.

The court, after noting that the relevant penalties were those under both IRC § 6698(a) and IRC § 6721(a), looked to IRC § 6724(a) and regulations and case law under that section with respect to reasonable cause and willful neglect, and held that Refco was not liable for penalties for failure to file, agreeing that the circumstances were entirely out of Refco's control.

The court's reasoning for considering IRC § 6721 is unclear; as noted above, while IRC § 6721 provides a penalty for failure to file an information return, the term "information return" is defined for this purpose in IRC § 6724(d)(1), and IRC § 6724(d)(1) does not include partnership returns, *i.e.*, returns required to be filed under IRC § 6031(a). Where IRC § 6698 applies and IRC § 6721 does not apply, a partnership is not required to prove no willful neglect to avoid the penalty for failure to file a partnership return.

The court's consideration of IRC § 6724(a) and the regulations and case law under that section with respect to reasonable cause may have been because little IRS-provided or case law precedent for what constitutes reasonable cause under IRC § 6698 exists. Because both IRC § 6724(a) and IRC § 6698 concern information returns, it would appear that such consideration by the court has value as to what constitutes reasonable cause under IRC § 6698. Moreover, the opinion explains what constitutes reasonable cause under IRC § 6724 in cases where, due to circumstances beyond its control, a taxpayer does not have accurate information for preparing an IRC § 6724(d)(1) information return.

The record reflected that Refco had serious concerns over filing with the information it possessed. Refco was on notice that it did not have accurate information with which to prepare its partnership returns: the liquidators repeatedly advised SMFF investors as early as 2006 that SPhinX Group's accounting records

should not be relied on. The court found that based on this knowledge, a reasonable person would likely be concerned with signing the jurat clause at the bottom of Form 1065, which provides in relevant part, that "Under penalties of perjury, I declare that I have examined this return . . . and to the best of my knowledge and belief, it is true, correct, and complete." To the best of Refco's knowledge, the information it had to prepare the partnership returns was inaccurate.

Refco had reasonable cause to be concerned of exposure to accuracy-related penalties if it knowingly filed inaccurate returns. Refco was a partnership with approximately 1,600 partners. With inaccurate information, Refco would invariably have had to amend its partnership returns, and then its 1,600 partners would have to amend their own returns. Not only would this be an imposition on its partners, Refco, as a preparer and disseminator of Schedule K-1s, also risked prosecution for preparing inaccurate Schedule K-1s for use by its partners.

Instead of filing with the information it had, Refco tried to obtain better information from SMFF. Both before and after Refco failed to file its partnership returns, Refco undertook steps to avoid or mitigate the failure by attempting to obtain SMFF's Schedule K-1. Although Refco did not file extensions for the years 2007 and 2008, its attorney testified that Refco decided not to file these extensions because it had no intention to file its partnership returns, given the liquidators' refusal to send investors a Schedule K-1.

The court said that the inquiry under the responsible-manner standard was not whether Refco undertook, or even considered, every conceivable option; rather, it was whether Refco exercised reasonable care under the circumstances.

In finding that Refco proved that it carefully considered its filing obligations and undertook appropriate steps to avoid the failure, the court noted that significant mitigating factors were present under Reg. § 301.6724-1(a)(2)(i). Refco had an established history, although brief, of timely filing its partnership returns and had not previously been penalized for failure to comply with the Code. The first time Refco did not file its returns coincided with the first year the SPhinX Group stopped sending investors Schedule K-1s and filed for liquidation.

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CHAIR'S MESSAGE

Never Too Young to Share Old Battle Wounds

By Scotty E. Chabert, Jr.

Scotty E. Chabert, Jr.

"I have been doing this for 30 years, and I have..." "Back in my day, we didn't..." "I remember this one time..." You do not have to practice 30 years to get a "battle scar" in this business! Like myself recently, if you are not careful, the new Motion for Summary Judgment[1] rules and procedure can "bruise" you quickly.

Recent amendments to the summary judgment law became effective on Jan. 1, 2016, and they impose more stringent filing deadlines and service requirements. Some of the more substantial changes are the deadlines for filing and serving oppositions to a MSJ, the deadline for filing reply memoranda, and the type of documentary evidence allowed on a MSJ.

A recent amendment provides that a MSJ "shall be filed and served on all parties in accordance with La. C.C.P. art. 1313 not less than sixty-five days prior to the trial." Practically speaking, this amendment may require the mover to file his/her motion too soon without the benefit of evidence or information that could be obtained later in the discovery process.

Under the prior version of 966, an opposition to a MSJ had to be filed and served eight days prior to the hearing. Pursuant to the recent amendment, oppositions to a MSJ and all documentary evidence contained therein must be filed and served in accordance with art. 1313 15 days prior to the hearing. Additionally, reply memoranda must be filed and served five days prior to the hearing. It is important to note that reply memoranda cannot include any additional documents in support of the motion for summary judgment.

There are now specific statutory limitations on the type of documentary evidence that can be filed in support of or in opposition to a motion for summary judgment. The new, current version allows for the filing of only pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions in support of motions for summary judgment. Further, opposing counsel must state their objections to submitted documents in timely filed opposition or reply memoranda, as said objections cannot be made orally at the hearing or by motion to strike the evidence. Thus, it is important to review the evidence submitted promptly and make all appropriate objections in timely filed memoranda.

The recent amendments have not technically changed the burden of proof set forth in art. 966. But as a word to the wise, the wording of this section of the statute has changed to "the burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law." The former version of the statute stated, "Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact."

If I can give any free "advice" to the Young Lawyers Division, it would be that upon receipt of a MSJ, immediately read it and begin opposing it. At the very least, be diligent in calendaring the new deadlines required by art. 966. Please read the new article closely to avoid receiving your very own "battle wound."

FOOTNOTE

1. Louisiana Code of Civil Procedure art. 966 (hereinafter referred to as "La. C.C.P. art. 966" or "MSJ").

YOUNG LAWYERS SPOTLIGHT

Brad C. Cashio
Kenner

Brad C. Cashio

The Louisiana State Bar Association's (LSBA) Young Lawyers Division is spotlighting Kenner attorney Brad C. Cashio.

Cashio, a personal injury attorney with Cashio Law Firm, started his practice at age 23, crediting all of his knowledge of the law to his father, S. Michael Cashio, a fixture of Louisiana law for more than 40 years.

Throughout his 15 years of practice, Cashio has provided pro bono assistance and representation to small businesses, nonprofits, churches and individuals. He mentors and assists young attorneys to help them have ethical and effective careers. He has spearheaded an initiative to make estate planning affordable for everyone with his "Peace of Mind" package. He also has taught several areas of law at the high school through postgraduate levels of study.

Cashio is a frequent guest speaker inspiring and educating young adults about pursuing a career in the law as well as the future landscape of the law. He is a volunteer chaplain working with the Orleans Parish Sheriff's Office. He leads Bible studies with inmates at Orleans Parish correctional facilities and at Jefferson Parish juvenile detention centers. He is a volunteer teacher and guest speaker with Junior Achievement of Greater New Orleans, serving schools and youth with programs to inspire work readiness, entrepreneurship and financial literacy.

He has received several awards for his legal and community activities, most recently, the 2016 Millennial Award for Law, honoring young professionals in the Greater New Orleans area who have contributed to the community through public service, made significant strides in business sectors, and served as cultural ambassadors; the 2016 *Times-Picayune* NOLA Everyday Hero Award for professional and volunteer services to the Greater New Orleans community; and the 2015 *Gambit Weekly* "40 Under 40" Award.

At Loyola University College of Law, he received the 2000-01 Joseph M. Rault Award for excellence in admiralty and maritime law, the 2000-01 Law Excellence Award for maritime personal injury and the 1999-2000 Law Excellence Award for donations and trusts. He also was a 1998 Charles Wesley Merritt Scholar for Academic Excellence in the College of Business at Southeastern Louisiana University.

JUDICIAL Notes

By David Rigamer, Louisiana Supreme Court | NEW JUDGE... APPOINTMENTS

New Judge

Judge Shonda D. Stone

Judge Shonda D. Stone was elected to the 2nd Circuit Court of Appeal, filling the unexpired term of Caddo Parish District Attorney James E. Stewart, Sr. She earned both her undergraduate and JD degrees in 1984 and 1988, respectively, from Southern University. She practiced law for more than 15 years, focusing in juvenile and family cases, before her election to the Caddo Parish Juvenile Court bench in 2009. In 2012, Judge Stone was named Judge of the Year by Louisiana Court-Appointed Special Advocates.

Appointments

► 26th Judicial District Court Judge Jefferson R. Thompson was appointed, by order of the Louisiana Supreme Court, to the Committee on Judicial Ethics for a term of office which began July 1 and will end on June 30, 2018.

► Donna Phillips Currault was appointed, by order of the Louisiana Supreme Court, to the Committee on Bar Admissions for a five-year term which began June 2 and will end on June 1, 2021.

► Maxine Crump was appointed, by order of the Louisiana Supreme Court, to the Judicial Campaign Oversight Committee for a term of office which began June 15 and will end on June 14, 2020.

Retirement

42nd Judicial District Court Judge Robert E. Burgess retired effective June 30. He earned his BA degree in 1978 from Louisiana Tech University and his JD degree in 1982 from Louisiana State University Paul M. Hebert Law Center. He served as an assistant district attorney in the 11th Judicial District Court from 1985-90. In 1990, he was elected to the 11th JDC bench. In 2008, Burgess was sworn in as judge of the 42nd JDC when it was split from the 11th JDC.

Deaths

► Retired 27th Judicial District Court Judge Robert Brinkman, 82, died June 8. He earned his undergraduate degree in 1956 from Southwestern Louisiana Institute and his law degree in 1962 from Louisiana State University Law School. He joined the staff of the 27th JDC District Attorney's Office in 1967 and became first assistant district attorney in 1973. He was elected to the Division D seat of the 27th JDC in 1983 and served there until his retirement in 1999.

► Retired 33rd Judicial District Court Judge John P. Navarre, 88, died July 6. He received his bachelor's degree in 1945 from Louisiana College in Pineville and his JD degree in 1951 from Louisiana State University Law School. He served as an assistant district attorney for the 31st Judicial District Court from 1954-60. In 1967, he was elected as judge of Oakdale City Court, Ward 5. While serving there, Judge Navarre was elected president of the Louisiana City Judges' Association. In 1991, he was elected to the 33rd JDC and served there until his retirement in 1996.

► Retired 2nd Circuit Court of Appeal Judge William Norris III, 79, died July 13. He earned his BA degree in 1959 from Northeast Louisiana University and his JD degree in 1962 from Tulane University Law School, serving as student body president. He served as West Monroe city attorney from 1966-72. He also served two terms on the Ouachita Parish School Board during that time and as president from 1969-71. He was elected to West Monroe City Court in 1972. In 1974, he was appointed to the 4th Judicial District Court and elected without opposition in 1975. In 1981, he was elected to the 2nd Circuit Court of Appeal, where he served until his retirement in 2002.

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PEOPLE

LAWYERS ON THE MOVE

Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., announces that Patricia B. McMurray has joined the firm as a shareholder and Amanda Spain Wells has joined the firm as of counsel, both in the Baton Rouge office. Colleen C. Jarrott has joined the firm as of counsel in the New Orleans office. Lacey E. Rochester has joined the firm's New Orleans office as an associate.

Carver Darden Koretzky Tessier Finn Blossman & Areaux, L.L.C., announces that Robert P. Thibeaux and Francis J. Lobrano have joined the firm as members in the New Orleans office. David S. Landry has joined the New Orleans office as a partner and William Allen Schafer has joined the New Orleans office as of counsel. Also, Haley E. Nix has joined the firm as an associate in the New Orleans office.

Chaffe McCall, L.L.P., announces that **V.M. Wheeler III** and **Jon W. Wise** have joined the New Orleans office as partners. Also, **Julie D. Livaudais**, a partner in the New Orleans office, has been elected to the firm's Management Committee.

The Conroy Law Firm announces that **John D. Miranda** has joined the firm as a partner and **Amanda D. Hogue** has been appointed senior associate, both in the Metairie office.

Courington, Kiefer & Sommers, L.L.C., announces that **Steven M. Lozes** has joined the New Orleans office as of counsel and **Colin F. Lozes** has joined the New Orleans office as an associate.

Deutsch Kerrigan, L.L.P., announces that **Sloan L. Abernathy** and **Margaret M. Guidry** have joined the firm's New Orleans office as associates.

Phelps Dunbar, L.L.P., announces that **Traci S. Thompson** has joined its Baton Rouge office as counsel.

Salley, Hite, Mercer & Resor, L.L.C., in New Orleans announces that **Matthew S. Resor** has joined the firm as an associate.

Patrick B. Sanders and J. Christopher Ford announce the formation of their


Sloan L. Abernathy


W. Raley Alford III


Michael A. Balascio


Kristin L. Beckman


Jamie L. Berger


Daniel R. Estrada


Lillian E. Eyrich


Margaret M. Guidry


Amanda D. Hogue


Julie D. Livaudais


Colin F. Lozes


Steven M. Lozes


David N. Luder


Lynn M. Luker


David A. Martinez


Stephen L. Miles

firm, Sanders and Ford, L.L.C., located at Ste. 103N, 4300 S. I-10 Service Rd. W, Metairie, LA 70001.

Seale & Ross, P.L.C., announces that Jesse P. Lagarde has joined the firm as an associate in the Hammond office.

Simien & Miniex, A.P.L.C., in Lafayette announces that **Katrena A. Porter** and **Brenton I. Mims** have joined the firm as associates.

NEWSMAKERS

W. Raley Alford III, a member in the New Orleans firm of Stanley, Reuter, Ross, Thornton & Alford, L.L.C., was inducted as president-elect of the New Orleans Chapter of the Federal Bar Association.

Brad C. Cashio, an attorney with Cashio Law Firm in Kenner, received the 2016 Millennial Award for Law presented at the fourth annual Millennial Awards event in New Orleans. The awards honor young professionals in the Greater New Orleans area who have contributed to the community through public service, made strides in business sectors and served as cultural ambassadors.

Daniel R. Estrada, an associate in the New Orleans office of Courington, Kiefer & Sommers, L.L.C., was selected as an honoree for the Louisiana March of Dimes and its Spotlight on Success Program.

Jonathan A. Hunter, a shareholder in the New Orleans office of Liskow & Lewis, A.P.L.C., was elected president of the Rocky Mountain Mineral Law Foundation for 2016-17.

Melissa M. Lessell, a partner in the New Orleans office of Deutsch Kerrigan, L.L.P., will serve a two-year term as the American Bar Association Young Lawyers Division's liaison to the Standing Committee on Lawyers' Professional Liability.

Barbara B. Ormsby, a partner in the New Orleans office of Deutsch Kerrigan, L.L.P., has been appointed vice chair for the American Bar Association's Toxic Torts and Environmental Law Committee for 2016-17.

Zachary I. Rosenberg, an associate at Steeg Law Firm, L.L.C., in New Orleans, was selected as a member of the Emerging Philanthropists of New Orleans 2016 Class.

James A. (Jim) Stuckey, practice coordinator and partner in the New Orleans office of Phelps Dunbar, L.L.P., was named a 2016 Fellow of the American College of Real Estate Lawyers.

Rebecca K. Wisbar, a founding member of Akers & Wisbar, L.L.C., in Baton Rouge, launched "The Mediation Minute" podcast, offering insights into mediation, arbitration and negotiation.

Continued next page


Brenton I. Mims


John D. Miranda


Randy Opotowsky


Barbara B. Ormsby


Thomas P. Owen


Katrena A. Porter


Andrea M. Price


Matthew S. Resor


Bryan C. Reuter


Zachary I. Rosenberg


William M. Ross


Richard C. Stanley


Robert M. Steeg


Charles L. Stern, Jr.


Traci S. Thompson


Jennifer L. Thornton


V.M. Wheeler III


Jon W. Wise

Zachary L. Wool, a partner in the New Orleans firm of Barrios, Kingsdorf & Casteix, L.L.P., founded the American Association for Justice's LGBT Caucus. For his efforts, he was awarded the group's inaugural Founder's Award, which will be presented annually and named in his honor.

PUBLICATIONS

***Best Lawyers in America* 2016**

Deutsch Kerrigan, L.L.P. (New Orleans): Nancy J. Marshall and Kelly E. Theard, "Women in the Law" Business Edition.

Stanley, Reuter, Ross, Thornton & Alford, L.L.C. (New Orleans): **Lynn M. Luker** and **Jennifer L. Thornton**, "Women in the Law" Business Edition.

***Best Lawyers in America* 2017**

Barrasso Usdin Kupperman Freeman & Sarver, L.L.C. (New Orleans): Judy Y. Barrasso, George C. Freeman III, John W. Joyce, Stephen H. Kupperman, H. Minor Pipes III, Andrea M. Price, Thomas A. Roberts, Richard E. Sarver and Steven W. Usdin.

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

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

Steeg Law Firm, L.L.C. (New Orleans): **Lillian E. Eyrich**, **David A. Martinez**, **Randy Opotowsky**, **Robert M. Steeg** and **Charles L. Stern, Jr.**

***Chambers USA* 2016**

Deutsch Kerrigan, L.L.P. (New Orleans): Keith J. Bergeron, Terrance L. Brennan, Ellis B. Murov and Robert E. Kerrigan.

Lugenbuhl, Wheaton, Peck, Rankin & Hubbard (New Orleans): Rose M. LeBreton and Stewart F. Peck.

Benchmark Litigation

Barrasso Usdin Kupperman Freeman & Sarver, L.L.C. (New Orleans): **Michael A. Balascio**, **Kristin L. Beckman**, **Jamie L. Berger**, **David N. Luder**, **Stephen L. Miles** and **Andrea M. Price**, all in the inaugural Under 40 List; and Judy Y. Barrasso, Top 250 Women in Litigation for 2016.

***New Orleans CityBusiness* 2016**

Barrasso Usdin Kupperman Freeman & Sarver, L.L.C. (New Orleans): Celeste R. Coco-Ewing, Women of the Year 2016.

Stanley, Reuter, Ross, Thornton & Alford, L.L.C. (New Orleans): **Lynn M. Luker**, 2016 Leadership in Law, 2016 Women of the Year, and 2016 Women of the Year Hall of Fame.

IN MEMORIAM

Louis Douglas Curet

Louis Douglas Curet, a longtime Baton Rouge attorney, died on June 9. He was 88. Graduating with distinction from Louisiana State University in 1948, he received his JD degree from LSU Law Center in 1950 and served two years as first lieutenant in the U.S. Air Force Judge Advocate Department. Following his military service, he returned to Baton Rouge and began his law practice with the late Sam J. D'Amico, working more than 55 years until his retirement in 2005. Mr. Curet served as president of the Baton Rouge Bar Association from 1972-73, was a Fellow with the American College of Trust and Estate Counsel, and was a board member of the Louisiana Supreme Court Historical Society. He was inducted into the LSU Alumni Hall of Distinction in 2002 and received the Distinguished Attorney Award from the Louisiana Bar Foundation in 2004. He devoted time and support to several organizations, including the Society of St. Vincent de Paul, Our Lady of the Lake Foundation Board, the Pennington Biomedical Research Foundation, the Baton Rouge Area Foundation, the LSU Alumni Association and the LSU Foundation. He served on the board of the Mary Bird Perkins Cancer Center, was the recipient of the 2006 Baton Rouge Golden Deeds Award and was inducted into the LSU Cadets of the Ole War Skule Hall of Honor for LSU's military alumni in 2015. He is survived by his daughter, his brother, grandchildren and other relatives.

People Deadlines & Notes

Deadlines for submitting People announcements (and photos):

Publication	Deadline
Feb./March 2017	Dec. 4, 2016
April/May 2017	Feb. 4, 2017
June/July 2017	April 4, 2017
Aug./Sept. 2017	June 4, 2017
Oct./Nov. 2017	Aug. 4, 2017

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.

Louisiana Center for LAW & CIVIC Education

SUMMER INSTITUTE

Louisiana elementary, middle and high school teachers attended the 2016 Justice Catherine D. Kimball Summer Institute. Four days of programming was conducted at the Louisiana Supreme Court.

Civics Curriculum Offered at Justice Catherine D. Kimball Summer Institute

Louisiana elementary, middle and high school teachers met in New Orleans for the 2016 Justice Catherine D. Kimball Summer Institute to learn about the "We the People: The Citizen and the Constitution" civics curriculum.

Participants were welcomed by Judge Marilyn C. Castle, president of the Louisiana District Judges Association. Louisiana 4th Circuit Court of Appeal Judge Madeleine M. Landrieu addressed educators and introduced former Louisiana Supreme Court Chief Justice Pascal F. Calogero, Jr.

Teaching the scholarly content of the program were Christopher R. Riano, lecturer in constitutional law and government at Columbia University; Jeffry H. Morrison, Ph.D., director of academics at the James Madison Memorial Fellowship Foundation; and Timothy D. Moore, deputy director of the Center for the Study of the American Constitution.

Louisiana Center for Law and Civic Education (LCLCE) President Lawrence J. (Larry) Centola III joined the teachers on the final day of the program when each teacher took part in a simulated congressional hearing. Centola presented participants with certificates of achievement.

Four days of the program were held at the Louisiana Supreme Court building. Valerie Willard, Louisiana Supreme Court deputy judicial administrator for community relations, and Miriam Childs, director of the Law Library of Louisiana, provided a tour of the Louisiana Supreme Court and the Law Library.

Coordinated by the LCLCE, the six-day Summer Institute was made available to educators at no cost, with lodging, meals and educational materials provided.

Teachers attending were Rebecca Albano, Chateau Estates School; Natalie Almerico, Grace King High School; Heather Benton, Holy Savior Menard; Noelle Bordelon, South Louisiana University Lab School; Karen Boutte, St. Martinville Junior High School; Belinda Cambre, Ph.D., JD, University High School; Stephanie Darr, John Ehret High School; Bernard K. Gaines, Glasgow Middle School; Renee Gresenz, John Ehret High School; Lee Gresham, Ruppel Academy for Advanced Studies; Julianna Hebert, Cecilia High School; Marie Hoeven, Edna Karr High School; Bradley Kiff, Ehret High School; Richell M. Lee, Mentorship Academy; Yulinda M. Marshall, Park Forest Middle School; Carla C. Powell, Scotlandville Magnet High School; Tongia S. Reed, Wossman High School; Cherlyn Scott, Grace King High School; Dane Thibodeaux, Cecelia High School; Tyquenica Vessel, Buchanan Elementary School; and Gaile M. White, Southern University Lab School.

Judge Madeleine M. Landrieu addressed the Summer Institute attendees.

Each teacher was paired with an experienced "We the People" mentor who provided pedagogy and continues to serve as an ongoing mentor. They are Vickie Hebert, Jamie F. Staub, Martha D. Palmer and Ann Majeste.

NEWS

LAW DAY... LOCAL BARS... LBF

LAW DAY

DeSoto Parish Bar Celebrates Law Day

The DeSoto Parish Bar Association presented its annual Law Day program on April 29 at the DeSoto Parish Courthouse in Mansfield. Guest speaker Rebecca L. Hudsmith, federal public defender for the Middle and Western Districts of Louisiana, discussed the U.S. Supreme Court case Miranda v. Arizona, in conjunction with the American Bar Association's Law Day 2016 theme of "Miranda: More than Words," in recognition of the 50th anniversary of the case.

In addition to the legal community, Law Day program attendees included public officials, members of the community (including students from DeSoto Parish high schools) and the media.

The DeSoto Parish Bar Association, the DeSoto Parish Clerk's Office and the Louisiana State Bar Association sponsored the reception following the program.

The DeSoto Parish Bar Association (DPBA) presented its annual Law Day program on April 29 at the DeSoto Parish Courthouse. Participating were, front row from left, attorney Brenda F. Ford; attorney Amy Burford McCartney; attorney Adrienne D. White, DPBA president; attorney Katherine E. Evans, DPBA secretary/treasurer; guest speaker Rebecca L. Hudsmith, federal public defender for the Middle and Western Districts of Louisiana; attorney Dave Knadler, DPBA vice president; and attorney John S. Evans. Back row from left, attorney Murphy J. White; DeSoto Parish District Attorney Gary V. Evans; and 42nd Judicial District Judge Charles B. Adams.

LOCAL/SPECIALTY BARS

The Louisiana State Bar Association's (LSBA) Francophone Section presented a talk on the influence of French law on Louisiana law on June 7 during the LSBA's Annual Meeting. Special guest was Michelle Dayan, left, a representative of the Paris Bar Association. Section Chair Warren A. Perrin presented a gift to Dayan.

UPDATE

Southeast Louisiana Legal Services (SLLS) presented its third annual "Bar Exam: A Fundraising Pub Quiz" on July 27 in New Orleans, with all proceeds helping to increase access to the civil legal system to those in need. Players participated in six-person teams. Prizes were awarded for most points and best team name (this year, "Pikachusufruct"). Among those attending the event were, from left, SLLS Board President Warren P. McKenna III, Judge Paula A. Brown, Judge Regina Bartholomew-Woods, Judge Kern A. Reese and SLLS Executive Director Laura Tuggle. *Photo by Mae LiZama.*

U.S. 5th Circuit Court of Appeals Chief Judge Carl E. Stewart, right, a Dillard University alumnus, celebrated his 45th class reunion during Dillard's Alumni Family Reunion Weekend in May. Chief Judge Stewart was presented with the Revius O. Ortique Alumni Award for Professional Excellence by Dillard President Walter Kimbrough during the event.

FBA New Orleans Chapter Installs Board Members, Presents Awards at Luncheon

Kelly T. Scalise, a shareholder in the New Orleans office of Liskow & Lewis, A.P.L.C., was installed as 2016-17 president of the New Orleans Chapter of the Federal Bar Association during the chapter's Annual Meeting and Awards Luncheon on Aug. 25.

Members of the 2016-17 board of directors also were sworn in and several awards were presented.

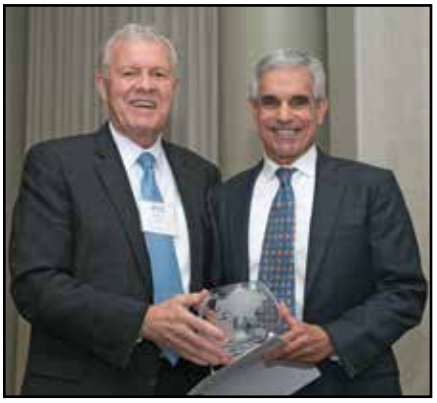
Christopher K. Ralston, a partner in the New Orleans office of Phelps Dunbar, L.L.P., received the 2016 President's Award for his contribution to community leadership outside the practice of law.

Irving J. Warshauer, a member of the New Orleans law firm Gainsburgh, Benjamin, David, Meunier & Warshauer, L.L.C., received the John R. (Jack) Martzell Professionalism Award for best exemplifying outstanding professionalism in the practice of law.

Dana M. Douglas, a shareholder in the New Orleans office of Liskow & Lewis, A.P.L.C., received the Camille Gravel Public Service Award for her dedication to public service legal work in keeping with the spirit and values exemplified by the late Camille Gravel.

Keynote speaker was Jonathan Turley, a professor at the George Washington University Law School and a nationally recognized legal scholar and commentator who has testified in Congress on constitutional and statutory areas.

New Orleans attorney Kelly T. Scalise, right, was installed as 2016-17 president of the New Orleans Chapter of the Federal Bar Association, succeeding U.S. District Court Judge Sarah S. Vance, left.



New Orleans attorney Irving J. Warshauer, right, received the 2016 Federal Bar Association New Orleans Chapter's John R. (Jack) Martzell Professionalism Award, presented by Judge Carl J. Barbier.

New Orleans attorney Dana M. Douglas, right, received the 2016 Federal Bar Association New Orleans Chapter's Camille Gravel Public Service Award, presented by Judge Ivan L.R. Lemelle.

New Orleans attorney Christopher K. Ralston, left, received the 2016 Federal Bar Association New Orleans Chapter's President's Award, presented by outgoing chapter President Judge Sarah S. Vance.

Save the Date! LBF Annual Fellows Gala

The Louisiana Bar Foundation's 31st Annual Fellows Gala is Friday, April 21, 2017, at the Hyatt Regency New Orleans.

Discounted rooms are available Thursday, April 20, and Friday, April 21, 2017, at $239 a night. To make a reservation, call the Hyatt at 1(888)421-1442 and reference Louisiana Bar Foundation or go to: *https://resweb.passkey.com/go/LBFANNUALGALA*. Reservations must be made before Thursday, March 30.

For more Gala information, contact Danielle J. Marshall at (504)561-1046 or email danielle@raisingthebar.org.

The New Orleans Bar Association (NOBA) and New Orleans Bar Foundation (NOBF) hosted an April 20 seminar on the new Louisiana sales tax changes impacting nonprofits. Co-sponsors were the Louisiana Association of Nonprofits, the Louisiana Society of CPAs, the United Way, Via Link 211, the Pan Am Conference Center and the Junior League. NOBA and NOBF hosted seven employees from the Louisiana Department of Revenue, including two lawyers from their policy division, who answered scores of questions. From left, David M. Hansen, Emily W. Toler, Bryan Peters, Darryl M. Phillips and Jaye A. Calhoun.

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Judge, Ret.

Baton Rouge


Daniel Balhoff


David Butler Jr.


Carey Guglielmo


Trippe Hawthorne


William Helm


Richard Hymel


Jim Lochridge Jr.


Steven Judice


Doug Moreau
Judge, Ret.


Darrel Papillion


Michael Ponder
Judge, Ret.


Keely Scott


Katherine Loos


Emmett Sole


Patrick Wartelle

New Orleans & Northshore


Robert Burns Sr.
Judge, Ret.


David Clement


James Cobb Jr.


René DeRojas


Michael Helm


Richard Kingrea


A. J. Krouse

North Louisiana


Donald Armand Jr.


Brian Homza


Peggy Landry


Andrew Lemmon


Lynn Luker


Daniel Lund III


Christopher Moody


Michael Pulaski


David Shea

Hodge O'Neal III

Chet Traylor
Justice, Ret.

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The 34th Judicial District Bar Association presented its "Judges Speak Out" CLE program on Aug. 20. Participating were, from left, attorney Ewell C. Potts III; Louisiana State Bar Association Ethics Counsel Richard P. Lemmler, Jr.; attorney Ryan P. Gregoire; attorney Scott A. Cannon; attorney Shannon M. Livermore; Judge Kim Cooper-Jones, 34th JDC; Judge Jeanne Nunez-Juneau, 34th JDC; Judge Robert A. Buckley, 34th JDC; attorney Adele P. Faust; attorney David W. Gernhauser, Jr.; Megan T. Suffern, St. Bernard Parish District Attorney's Office; Michael G. Morales, St. Bernard Parish District Attorney's Office; attorney Elizabeth Borne; attorney Paul A. Tabary III; attorney Gregory J. Noto; attorney Matthew J. McLaren; attorney Alan G. Bouterie, Jr.; attorney Cullen A. Tonry; attorney Nicholas N.S. Cusimano; attorney A. Scott Tillery; Stacey LaGraize Meyaski, 34th JDC; attorney Tracy A. Petruccelli; attorney Dan A. Robin, Jr.; William M. McGoey, St. Bernard Parish District Attorney's Office; attorney Lacey M. Tabary; attorney Lorna Perez Turnage; Thomas H. Gernhauser, St. Bernard Parish Public Defender's Office; attorney Rosemarie F. Gioia; Clyde F. Babylon, law clerk for Judge Cooper-Jones; and attorney Alan G. Bouterie.

The New Orleans Bar Association (NOBA) hosted an event for the annual rivalry baseball game between Tulane and LSU on April 26. NOBA obtained tickets for members and hosted a hospitality tent sponsored by Epiq Systems, Inc. Among those attending were, from left, Walter J. Leger, Jr., past NOBA president; William B. Gaudet, NOBA board member; Judy Y. Barrasso, NOBA president; and Christopher K. Ralston, NOBA president-elect.

LBF Sets Grant Application Deadlines

The Louisiana Bar Foundation's grant application for 2017-18 funding is now available online. The deadline for submitting grant applications is Dec. 1.

The Loan Repayment Assistance Program (LRAP) application for 2017-18 funding is now available online. The deadline for submitting LRAP applications is Feb. 10, 2017.

For more information, go to: *www.raisingthebar.org*.

The Alexandria Bar Association's Young Lawyers Section hosted its annual Bench Bar CLE and golf tournament on May 6 at the Alexandria Golf and Country Club. Presenters included a panel of judges from the Louisiana 3rd Circuit Court of Appeal. Front row from left, Shane D. Williams, Judge Phyllis M. Keaty, Judge Elizabeth A. Pickett and Allie P. Nowlin. Middle row from left, Christie C. Wood, Judge Jimmie C. Peters, Judge Shannon J. Gremillion, Judge John E. Conery, Bernetta Y. Bryant and Lauren S. Laborde. Back row from left, Judge D. Kent Savoie, Judge Billy H. Ezell and Joshua J. Dara.

Twice a month, New Orleans Bar Association members serve lunch at the Ozanam Inn, a homeless shelter in downtown New Orleans. Recent volunteers included, from left, Aaron B. Greenbaum, Salvador J. Pusateri, Kimberly R. Silas, Edward W. Trapolin and Christopher K. Ralston.

President's Message

When It Rains, It Pours!

By President E. Jane Sherman

Communities across Louisiana have experienced unprecedented flooding this year. In August, Louisiana was plunged for the second time in 2016 with more than 24 inches of rain from a single event. Almost 27 inches of rain fell in the south Monroe and Shreveport areas on March 8-11, 2016, and floods also ravaged historic downtown Covington and other parts of western St. Tammany Parish, resulting in President Obama declaring 26 of our state's 64 parishes as disaster areas. Five months later, in August, one third of Louisiana's parishes were underwater with the Red Cross labeling this August's 500-year flood "the worst natural disaster to strike the United States since Superstorm Sandy." The Washington Post noted that the "no-name storm" dumped three times as much rain on Louisiana as Hurricane Katrina, and enough to fill Lake Pontchartrain about four times. People living on high ground were forced to flee to makeshift shelters. But like other communities in Louisiana that have been hit with similar tragedy, the support and assistance from others are also unprecedented.

Although the rains came, volunteer assistance also is pouring in, but more support is needed.

We know that, after a disaster, civil legal needs are dramatically increased. Displaced families and individuals experience a variety of legal needs. Thousands need help with title clearing to access insurance and federal recovery dollars. Vulnerable children need protection due to family instability and separation. The elderly's economic security needs increase. And, history shows that domestic violence centers are severely impacted with increased residents.[1] For example, New Orleans had a 45 percent increase in domestic violence following Hurricane Katrina.[2] The stories of all these needs are powerful and heartbreaking.

E. Jane Sherman

October is National Domestic Violence Month. Nationally, an average of 20 people are physically abused by intimate partners every minute, which equates to more than 10 million abuse victims annually.[3] A recent census conducted by the National Network to End Domestic Violence showed the need for domestic violence services in Louisiana is growing.[4] In a single day, 714 Louisiana citizens received services from a domestic violence program. These services ranged from refuge in emergency shelters to counseling, legal advocacy and children's support groups. In addition, Louisiana domestic violence programs answered more than 11 hotline calls every hour. These hotlines are a lifeline for victims in danger, providing support, information, safety planning and resources. While these services are lifelines, on that day, sadly, there were 126 UNMET requests for services due to a critical shortage of staffing resulting from funding cuts and reduced individual donors.

The domestic violence agencies that the Louisiana Bar Foundation (LBF) funds enable people to leave abusive relationships and seek safety. As lawyers, we have an opportunity to help victims gain access to the legal system regardless of financial situation, to help protect their families so they can feel safe. A pouring out of support is needed after the storm.

The LBF is committed to increasing resources for civil legal aid for the poor, especially during times of natural disaster. Now those needs are even greater with domestic violence garnering a high amount of need. But with your help, we can make a difference.

The LBF is working with stakeholders, including the legal services corporations, pro bono projects, the Louisiana State Bar Association, law schools, community foundations and other key organizations in our civil legal aid network, to most efficiently and effectively address the many needs.

The LBF has established the Louisiana Bar Foundation Flood Recovery Fund to address the recent increased need for legal services, including domestic violence issues, homeowners' insurance, title clearing and federal aid eligibility, by utilizing community-based clinics modeled in conjunction with FEMA's disaster recovery centers.

For more information about the LBF and the Louisiana Bar Foundation Flood Recovery Fund, contact LBF Development Director Laura Sewell at (504)561-7306 or email laura@raisingthebar.org. Or go to: www.raisingthebar.org.

Thank you for your generosity and for pouring out your support after the rain and disastrous floods experienced by our state.

October is National Domestic Violence Month. The LBF proudly supports the following domestic violence programs: Beauregard Community Concerns, Inc., Catholic Charities/Project S.A.V.E., Chez Hope, D.A.R.T. of Lincoln, Faith House, Inc., Jeff Davis Communities Against Domestic Abuse, Metropolitan Center for Women and Children, Oasis, Project Celebration, Safe Harbor, Inc., Safety Net for Abused Persons, Southeast Spouse Abuse Program, St. Bernard Battered Women's Program, The Haven, Inc., The Wellspring Alliance for Families, Inc. and United Way of Central Louisiana.

FOOTNOTES

1. www.nj.gov/dcf/home/Domestic%20Violence%20and%20Disasters%20with%20Sources.pdf.
2. www.ncdsv.org/images/AsDomesticViolenceRisesinNewOrleansWakeKatrina.pdf.
3. http://ncadv.org/learn-more/statistics.
4. www.ncadv.org/files/Louisiana.pdf.

CLASSIFIED

ADS ONLINE AT WWW.LSBA.ORG

CLASSIFIED NOTICES

Standard classified advertising in our regular typeface and format may now be placed in the ***Louisiana Bar Journal*** and on the LSBA Web site, *LSBA.org/classifieds*. All requests for classified notices must be submitted in writing and are subject to approval. Copy must be typewritten and payment must accompany request. Our low rates for placement in both are as follows:

RATES

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Contact Krystal L. Bellanger at (504)619-0131 or (800)421-LSBA, ext. 131.

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No additional charge for Classy-Box number

Screens: $25
Headings: $15 initial headings/large type

BOXED ADS
Boxed ads must be submitted camera ready by the advertiser. The ads should be boxed and 2¼" by 2" high. The boxed ads are $70 per insertion and must be paid at the time of placement. No discounts apply.

DEADLINE
For the February issue of the Journal, all classified notices must be received with payment by December 18, 2016. Check and ad copy should be sent to:
LOUISIANA BAR JOURNAL
Classified Notices
601 St. Charles Avenue
New Orleans, LA 70130

RESPONSES
To respond to a box number, please address your envelope to:
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c/o Louisiana State Bar Association
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POSITIONS OFFERED

Metairie law firm (AV-rated) seeks a health law attorney with hands-on regulatory and transactional experience advising hospitals, medical practices and other health care providers. Compensation is negotiable. Reply in strict confidence to: Office Administrator, P.O. Box 931, Metairie, LA 70004-0931.

Curry & Friend, P.L.C., an established boutique defense firm, is currently seeking environmental and medical malpractice attorneys. Curry & Friend, P.L.C., takes pride in the high engagement level of its members and is committed to fostering an inclusive atmosphere. 1) Environmental litigation attorney — Eight-plus years' civil defense litigation experience preferred with emphasis on complex litigation; A/V rating preferred; environmental experience preferred. 2) Litigation attorney — Qualified candidates must have at least five years of litigation experience; medical malpractice defense experience and an AV rating are preferred; excellent organizational, case management and deposition skills required. To learn more about the firm and available positions, visit *www.curryandfriend.com/careers*.

Louisiana State University Paul M. Hebert Law Center seeks to hire tenure-track or tenured faculty members. Areas of particular interest include business/transactional law; clinical; criminal law and criminal procedure; evidence; family law; and civil, international and/or comparative law. Applicants who specialize in areas other than those listed also may be considered. Applicants should have superior academic credentials and publications or promise of productivity in legal scholarship. Send a letter, curriculum vitae and any supporting materials to Faculty Appointments Committee, c/o Pam Hancock, Ste. 400, Paul M. Hebert Law Center, Louisiana State University, 110 LSU Union Building, Baton Rouge, LA 70803-0106. The Paul M. Hebert Law Center of LSU is an Equal Opportunity/Equal Access Employer and is committed to building a culturally diverse faculty and encourages applications from female and minority candidates.

Established litigation and general business defense firm is seeking qualified attorney candidates for a position in the New Orleans office. Preferred applicants will have high academic credentials and a minimum of five years' experience of work in the following practice areas: workers' compensation, transportation and civil litigation. Résumés should be directed to: jbonnet@leakeandersson.com.

SERVICES

Texas attorney, LSU Law 1985. Admitted in Louisiana and Texas. I am available to attend hearings, conduct depositions, act as local counsel and accept referrals for general civil litigation in the Houston area. Contact Manfred Sternberg, Jr. at (713)622-4300; email manfred@msternberg.com.

Mobile, Ala., attorney accepting referrals of personal injury claims in South Alabama, including automobile, workers' compensation and slip & fall accidents. Licensed in both Louisiana (since 1979) and Alabama (1998). Russell E. Bergstrom, 955 Dauphin St., Mobile, AL 36604; (251)433-4214; fax (251)433-1166; email rebmouthpiece@aol.com**.** "No representation is made that the quality of legal services provided is greater than the quality of legal services provided by other attorneys."

Appellate briefs, motions, legal research. Attorneys: the appellate process is your last chance to modify or defend your judgment. Lee Ann Archer, former Louisiana Supreme Court clerk and Tulane Law honors graduate, offers your best chance, with superior appellate briefs, outstanding legal research, pinpoint record review and 20-plus years of appellate experience. Confidential; statewide service; fast response. Call (337)474-4712 (Lake Charles); email lee@leeaarcher.com; visit *www.leeaarcher.com*.

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JD with honors, federal judicial clerk, graduate of top 10 law school, 20 years' experience, federal and state litigation. Available for briefs, research, court appearances, analysis of unusual or problem cases. References on request. Catherine Leary, (504)436-9648, statewide services, registered office Jefferson Parish.

Northwest Florida counsel. Louisiana attorney with 32 years' experience, and licensed in Florida, available for referral of civil and criminal matters from Pensacola to Panama City. Contact John F. Greene, Ste. 210, 4507 Furling Lane, Destin, FL 32541. Call (850)424-6833 or (504)482-9700; or visit *www.destinattorneyjohngreene.com*.

Need help? I am available for brief and memorandum writing, both on the trial and appellate levels. I have superior legal research skills, creative analytical thinking ability and am able to distill complex issues to their essence for greater comprehension and understanding by the reader. Also available for financial analysis, especially in the family law context of support and community property issues, and the preparation of support worksheets and

Community Action Committee & 'WEEN DREAM Partnering for Halloween Costume Donations

The Louisiana State Bar Association/Louisiana Bar Foundation's Community Action Committee is assisting the 'WEEN DREAM program in the collection of new and/or slightly used Halloween costumes for children in need.

Law firms, attorneys and legal professionals wishing to donate should drop off costumes at the Louisiana Bar Center, 601 St. Charles Ave., New Orleans, on Tuesday through Friday, Nov. 1-4, during business hours (8:30 a.m.-4:30 p.m.).

Costumes may simply be placed in bags. There is no labeling or sorting process required. 'WEEN DREAM volunteers will handle the sorting process and match the costumes to children for Halloween 2017. (Costumes that were donated after Halloween 2015 are being distributed to children for 2016.)

NEW ORLEANS
Krystal Bellanger Rodriguez
Louisiana State Bar Association
601 St. Charles Ave.
New Orleans, LA 70130
(504)566-1600

BATON ROUGE
Baton Rouge Bar Association
544 Main St.
Baton Rouge, LA 70802
(225)344-4803

LAFAYETTE
Jo Abshire
Lafayette Bar Association
2607 Johnston St.
Lafayette, LA 70503
(337)237-4700

MONROE
Clint R. Hanchey
Hayes, Harkey, Smith & Cascio
2811 Kilpatrick Blvd.
Monroe, LA 71201
(318)387-2422

ALEXANDRIA
Alainna Mire
Alexandria City Hall
915 Third St.
Alexandria, LA 71301

SHREVEPORT
Dana Southern
The Shreveport Bar Association
625 Texas St.
Shreveport, LA 71101
(318)222-3643

LAKE CHARLES
Shayna L. Sonnier
Hunter, Hunter & Sonnier, LLC
1807 Lake St.
Lake Charles LA, 70601
(337)436-1600
-or-
Hoffoss Devall, LLC
517 West College St.,
Lake Charles LA 70605
(337)433-2053

descriptive lists. I have 30-plus years of experience in a broad civil context, both as a litigator and transactional lawyer, including as the law clerk to a district court judge. Contact Gwen Hanhart at ghanhart@gmail.com, (504)304-7783 (New Orleans). References and writing samples available upon request.

FOR RENT METAIRIE

For lease. Building solely comprising legal office. Prime location on Metairie Road consisting of 1,300 square feet. Has been law office for past 33 years, renovated. Includes two offices, reception and secretarial area, conference room and kitchen. Premises also has private garage. Call (504)701-3916 or email egbrown93@gmail.com for further details.

Law office suite available, Metairie, La. Convenient to downtown, interstate and Causeway. Reception area, one attorney office and one secretarial area. Use of conference room, kitchen area, free parking, five minutes from the Causeway Bridge and I-10. Total monthly rent, $500, plus pro rata utilities. Contact Bob Caluda, 3232 Edenborn Ave., Metairie, LA 70002; (504)586-0361.

FOR RENT NEW ORLEANS

Ideal setup with long-established, small, well-managed AV law firm. Window office on 27th floor of 650 Poydras Building with shared use of reception and conference rooms, receptionist, modern telephone system, library, Westlaw, network color printers, digital copiers, scanners, fax machines, Broad Band Internet Connection, digital dictation system and kitchen facilities. $1,100/month. Excellent referrals for sole practitioner in fields of bankruptcy, labor and employment law, patent and intellectual property, tax, Social Security and disability, trusts and estates. Reply in strict confidence to C-Box 276 or email sirius6274@cox.net.

FOR LEASE OR SALE BATON ROUGE

Office on Florida Boulevard, downtown Baton Rouge, for lease or sale. See website for further details on the office, including proximity to state administrative judicial offices, federal court and bankruptcy court, photos, map, location, diagrams, measurements, etc., at: *http://watsoninc.org/FloridaOffice*.

NOTICE

Notice is hereby given that William A. Roe is filing a petition and application for reinstatement to the Louisiana State Bar Association. Any person(s) concurring with or opposing the petition and application for reinstatement must file notice of their concurrence or opposition with the Louisiana Attorney Disciplinary Board, Ste. 310, 2800 Veterans Memorial Blvd., Metairie, LA 70002, within 30 days.

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

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The Last WORD

By Edward J. Walters, Jr. | IPSE DIXIT: BIG DATA

Due to our current technology, there is now so much data available and so much computing power to manipulate it that we can now do things which were unthinkable, and even unknowable, not so long ago.

What does "Big Data" have to do with the practice of law?

Enter "Ross." Ross is touted as "the world's first artificially intelligent attorney that helps human lawyers research faster." You ask Ross a question in plain English and Ross returns an answer with readings from statutes, cases and other sources. Ross's handlers claim that Ross can THINK like a lawyer and that several (unnamed) big firms are now using Ross like an additional unpaid (but not unbilled) associate. True story. Google it.

So, let's fast forward and peek at the conversation between your client and Ross.

Ross: Dewey, Cheatham and Howe, this is Ross, may I help you?

Client: Mr. Ross, . . .

Ross: Call me Ross, Mr. Jones. As I see, you are president of Jones Industries, a public company in Sandusky, Ohio, with 3,127 employees and 13 offices throughout the Midwest, calling from your wife's cell phone in Aspen.

Client: . . . er . . ., yes, our company had an accident where one of our employees got his arm caught in a lathe and he was very badly injured. May I speak to Mr. Dewey?

Ross: Well, Mr. Jones, this is your intake portal. Luckily for you, according to the OSHA report, which I have now read, and according to the Louisiana law on job site negligence, which I have read, all you owe this person is workers' compensation benefits, which are meager, of course, unless this was an intentional act, which would make you liable for full damages, but, since the accident was in St. Atchafalaya Parish, a VERY conservative parish, you should easily win the case, so we will settle very quickly. I have researched the injured person's background, work history, criminal record, and that of his family. In all probability, his family will hire the local lawyer, Alcide Boudreaux, who has NEVER tried any case to a jury. I see the injured person is way behind on the mortgage on his trailer and Mr. Boudreaux is behind on his office rent. So, we will pay him $50,000, which we will write off as office expenses. Please log on to your computer and see the documents I have just emailed to you. I have your authorization to use your electronic signature, so I signed them for you. I will handle everything.

Client: I'd REALLY like to speak to a lawyer. Is Mr. Cheatham available?

Ross: Well, Mr. Jones, I am in Calcutta, so I don't know if Mr. Cheatham is at work today — not part of my data-set.

Client: What if my employee does not agree to the $50,000? I LIKE this guy and feel like we should do the right thing because he got hurt on this lathe because we removed the guard.

Ross: Let's go with the data, Mr. Jones. I spoke to your foreman who witnessed the accident.

Client: Wait, I didn't want you to discuss this with my management personnel . . .

Ross: You signed the waiver for the insurance carrier who has your coverage in this matter. As we were talking, using the Federal Court Electronic Filing system, I placed $50,000 in an interpleader. I have your permission to file, on file, so I filed.

Client: Wait! We have an arbitration clause in our employment contract.

Ross: Those arbitration clauses are very much under attack, as you know. If you read the law in Nebraska . . .

Client: We ain't IN Nebraska . . .

Ross: Mr. Jones, regardless, my research reveals that you have no chance of winning that point. The firm's program calls for filing a concursus, which is what I did.

Client: You did? When?

Ross: Just now, as we were speaking. I just emailed a copy to you. It should be there by now.

Client: I need to speak to a lawyer! Get me to Mr. Howe, immediately. I didn't hire a MACHINE. I hired a PERSON. Get me a PERSON! NOW! . . . Ross?

Client: What happened? Ross? I want a lawyer. . . . Ross?

Ross: Do not turn off your computer. We will do that for you. We need to update your software. This may take a few minutes.

DAL: This is DAL, your law firm's Disciplinary Complaint Portal. Please enter your username, password and the grounds of your complaint. It will be analyzed through our disciplinary complaint database. Your legal matters are very important to us and we appreciate your business. Please fill out the short evaluation form attached so that our quality control computer can report on our performance.

Client: I'll be GLAD to . . .

"You have entered an invalid username and password. Please try again. If you need assistance, please contact our firm's online client support portal."

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

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Jerome H. Moroux: Super Lawyers Rising Stars 2014 - 2016, Million Dollar Advocates Forum, Top Trial Lawyers in America.