LOUISIANA BAR JOURNAL

October / November 2017 Volume 65, Number 3

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- Member Benefits

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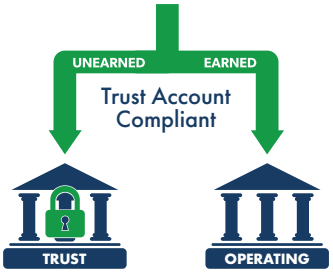

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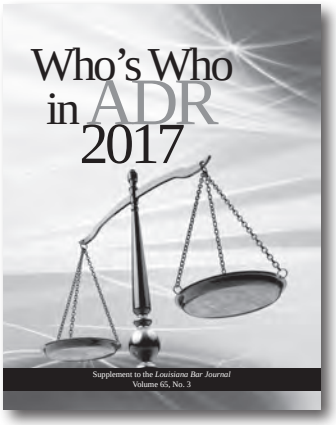

LSBA Annual Report 2016
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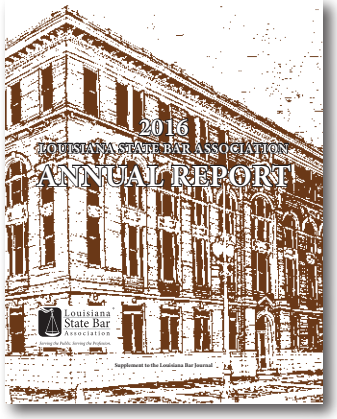

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By John E. McAuliffe, Jr.

Lawyers and Librarians

All of us (of a certain age) are familiar with libraries and librarians. Before the Internet, we joined summer reading programs, researched term papers and perused periodicals at our local libraries.

Our librarians are a source of important information for the community. Where do I vote? How do I use the Internet? Do you have a self-help book on this or that? Librarians do much more than tell us to "BE QUIET."

So, in 2014, under the leadership of 2014-15 Louisiana State Bar Association (LSBA) President Joseph L. (Larry) Shea, Jr., the LSBA joined with the Louisiana Library Association and our local libraries to begin the Lawyers in Libraries Program. It was a natural fit. Our librarians provide valuable information to the public. The LSBA provides valuable legal information to citizens who cannot afford a lawyer or otherwise have no access to the legal system. And, the contacts take place in a familiar and comfortable setting — the local library.

For the first three years, the LSBA held its "day of service" in late October on the Thursday of National Pro Bono Week. This year, Lawyers in Libraries programs will take place on any day, or days, during the entire Pro Bono Week (Oct. 23-28, 2017). This will allow more flexibility for the public, our librarians and our attorney volunteers.

Every year, the LSBA has placed attorney volunteers in libraries in each of our 64 parishes. These attorney volunteers have provided assistance in a variety of areas including landlord-tenant matters, divorce, Social Security, public assistance, custody issues and the like. Last year, our attorney volunteers made contact with more than 700 individuals.

Librarians with the Carnegie Library pose with attorney volunteer Mark Judson, right, in Lake Charles during the 2016 Lawyers in Libraries event.

John Frazier, left, attorney volunteer, and Chris Kirkley, Main/Downtown Branch manager in Caddo Parish (Shreveport) during the 2016 Lawyers in Libraries event.

In past years, I have traveled to several parish libraries on Lawyers in Libraries Day. Those waiting to see our attorney volunteers told me how important it was that we were providing a lawyer to them for their questions or problems. The librarians are very happy with this program and view it as another valuable tool in providing assistance and knowledge to the residents of their parishes.

As the old saw states, "information is power." This is one reason why our public libraries and librarians are so important. That is also why the Lawyers in Libraries Program is such an important method of providing legal information to our citizens.

Want to provide an "Ask-a-Lawyer" session or educational presentation free of charge to library patrons during "Lawyers in Libraries" events from Oct. 23-28? To sign up, contact the LSBA Access to Justice Department at (504)619-0106 or (800)421-5722, ext. 106, or email nicole.louque@lsba.org. Learn more: *www.LouisianaLawyersinLibraries.org*.

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By Dona Kay Renegar

United We Stand

When I originally drafted my message for our members in August, I reflected on the goals, issues, and values that unite us as a mandatory Bar Association. I chose the title, "United We Stand." Little did I know that just two weeks later Hurricane Harvey would change the substance of the article but neither the message nor the title.

United we stand — as members of our Bar Association and alongside our brethren in the great state of Texas. As we watched Hurricane Harvey bear down on Texas and Louisiana, we could not help but harken back to August 2005 when Louisiana experienced the devastation of Hurricane Katrina and August 2016 when Louisiana suffered flooding of historic proportions, often referred to as the 100-year flood. Those of you from the areas worst hit by the 2016 flood — Acadiana, Baton Rouge, and the Florida parishes — reached out to me expressing your inability to watch the coverage of Hurricane Harvey as it brought back painful memories of the damage and loss we suffered last year. Despite this fact, our citizens, attorneys, and judges rallied to the aid of our neighbors to the west as Hurricane Harvey took aim at and battered the city of Houston and the Gulf Coast eastward through Beaumont, Orange, and southwest Louisiana. The Cajun Navy marshaled its forces and struck out for southeast Texas to help rescue citizens trapped by the flooding. Using the information and knowledge we accumulated and organized during and after Katrina, the members of the Louisiana federal and state judiciary reached out to their Texas counterparts to offer support and guidance on how to handle inaccessibility to courts, pending litigation, and deadlines that may run before the courts are up and running again. Gov. John Bel Edwards and his staff, while keeping an eye on potential damage to our own state, supported the efforts of the Cajun Navy to begin rescue operations in Texas, opened shelters to support those displaced by Hurricane Harvey, and shared lessons learned by our state in dealing with the 2016 flooding and the devastation of Hurricane Katrina.

Disaster Response

The Louisiana State Bar Association (LSBA) has mobilized as well. We have activated our Disaster Response website, *www.lsba.org/DR/*, dedicated to providing valuable information on displacement resources, court closures, emergency declarations, and assistance for flood victims. Help is still needed. If you want to volunteer, consider registering with *LA.FreeLegalAnswers.org*, an online pro bono program that connects low-income clients with volunteer attorneys. The State Bar of Texas is currently recruiting volunteers to help with anticipated legal needs. A recently amended order of the Supreme Court of Texas, *www.lsba.org/goto/TexasCourtOrder,* permits out-of-state lawyers to practice Texas law temporarily. Interested volunteers must fill out the Disaster Relief Volunteer Form, *www.lsba.org/goto/TexasVolunteerForm*, in order to be matched with current legal needs.

You can make a donation to the Louisiana Hurricane Harvey Disaster Fund, *www.lsba.org/DR/donations.aspx*, administered by the Louisiana Bar Foundation, the proceeds of which will go to civil legal aid services for indigent Louisiana citizens who are victims of Hurricane Harvey. These services include housing claims, evictions, domestic/family issues, and others that always arise after a natural disaster. You may also make a donation to the Hurricane Harvey Legal Aid Fund, *www.lsba.org/DR/donations.aspx,* administered by the Texas Access to Justice Foundation.

The LSBA Disaster Response Message Board, *www.lsba.org/DR/drmessageboard.aspx*, was created to help facilitate the giving and receiving of non-monetary donations like housing help, office equipment, commuting assistance, and employment opportunities. Visit the message board if you are willing to donate or are in need of donations. SOLACE is also accepting assistance requests for non-monetary needs from those affected by the severe weather. If you or someone you know needs assistance, forward your request to SOLACE at solaceinfo@lasolace.org. Include an

email address that protects the sender's identity.

The Louisiana Civil Justice Center (LCJC) has activated its disaster legal hotline at 1-800-310-7029. The hotline will provide legal advice and services for individuals who reside in Louisiana parishes affected by the disaster, including Beauregard, Calcasieu, Cameron, Jefferson Davis, and Vermilion. Callers can receive answers to legal questions regarding insurance claims, replacement of legal documents, home repair contracts, FEMA issues, etc. The American Bar Association Committee on Disaster Response and Preparedness has also developed a Hurricane Harvey Relief website, *www.lsba.org/goto/ABAHurricaneRelief*, with valuable information for both storm survivors and attorneys who would like to help.

Get Involved and Be Heard

The way our citizens have come together to help Texas and the parts of Louisiana affected by Harvey's devastation underlines and emphasizes the message I intended to bring to our members this month before the storm hit: I encourage you to recall those issues, values, and needs that unite us as a Bar Association. While our membership is made up of more than 22,000 attorneys with diverse areas of practice, political affiliations, and geographic locations, we each contribute unique skills, experience, and styles to the practice of law in Louisiana. As a profession, we are unified in upholding the rule of law, supporting the American judicial system, defending the integrity of our judiciary, and supporting our members and their representation of their clients, be they corporate or individual, in the civil or criminal arena, or in transactions or litigation.

Sometimes our members find themselves at odds over our rules of professionalism, ethics, advertising, or the LSBA Legislation Committee's actions. Lively debate is an essential element of our mandatory bar and we count on our members to let us know how proposed rule changes, lobbying efforts, and the advancement of technology affect your practice. The old adage, "You must be present to win," comes to mind. You cannot participate in the debate if you do not know where and when the discussion is happening. I encourage you to engage in our Bar Association by running for representative of your respective Judicial Districts, the Board of Governors, or requesting an appointment to an LSBA committee that interests you. We often have vacancies in leadership positions in the LSBA, and the president is tasked with filling those vacant positions by appointment. Let me know if you are interested in any available positions. The LSBA's website has a link to a description of all of our committees and a form you may complete and return to the LSBA indicating which committees are of interest to you. Go to: *www.lsba.org/BarGovernance/Committees.aspx*. I hope all of you will consider getting involved, making yourselves heard, and contributing to our Association. The contributions of our members who volunteer to lead the Association in these ways make us vibrant and strong. That strength helps us rise to the occasion when situations such as this recent storm develop.

Disaster Resources

- ABA Hurricane Harvey Relief
  www.lsba.org/goto/ABAHurricaneRelief
- Hurricane Harvey Legal Aid Fund
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- LSBA Disaster Reponse website
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- LSBA Disaster Response Message Board
  www.lsba.org/DR/drmessageboard.aspx
- LSBA Online pro bono program
  LA.FreeLegalAnswers.org
- SOLACE requests
  solaceinfor@lasolace.org
- Texas Disaster Relief Volunteer Form
  www.lsba.org/goto/TexasVolunteerForm

Leadership LSBA Class

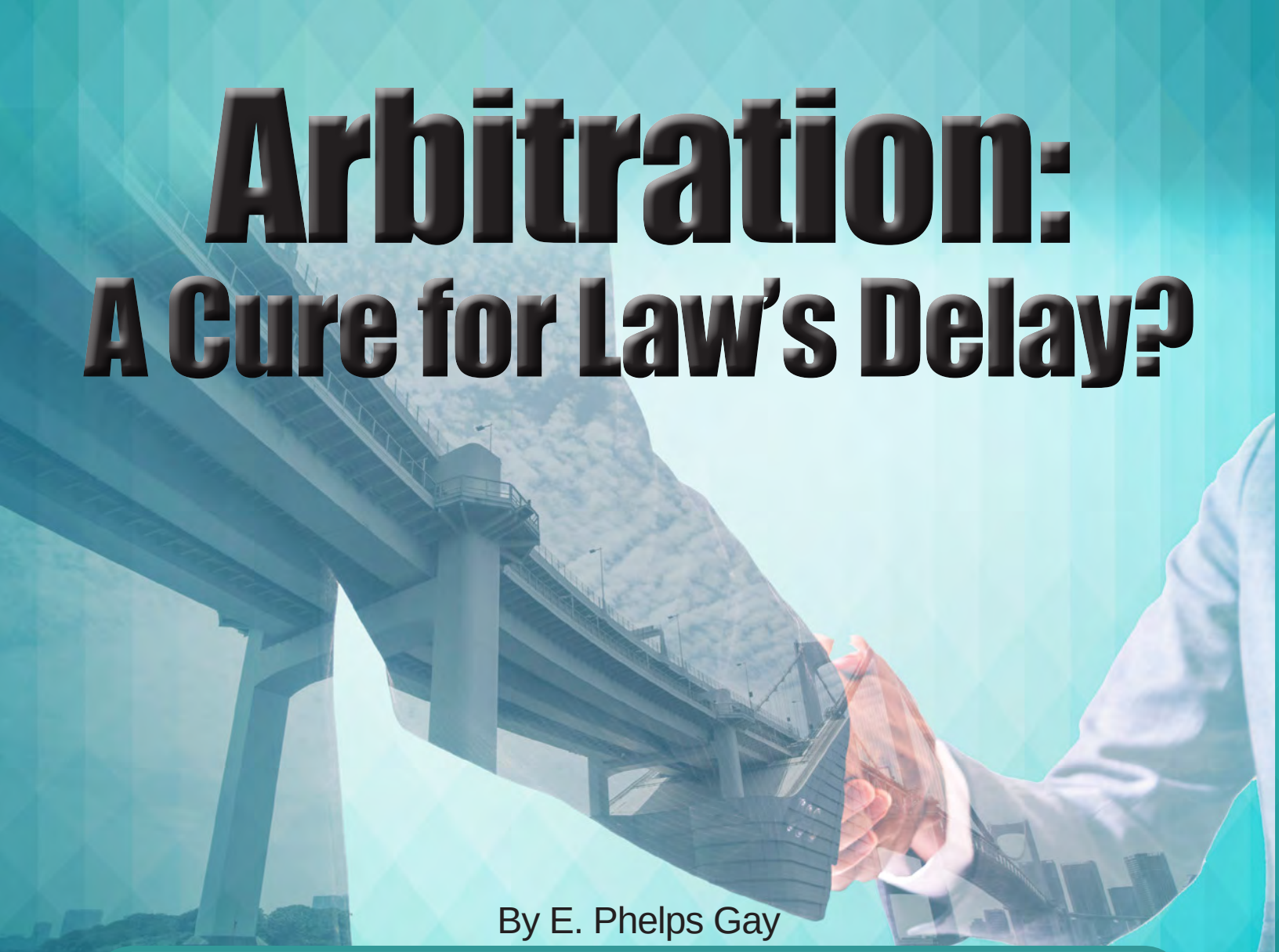
The Leadership LSBA Class for 2017 — compromised of 14 young lawyers who want to learn about the Association, its leadership, and service to our members — recently began its year-long commitment. The application process begins in July each year, so let us know about young lawyers who may be interested in getting involved next year. I am thankful for the large number of lawyers who applied for the program reflecting their interest in and commitment to learning about the Bar Association. The class introduces lawyers to the various leadership positions and opportunities to serve our Association. If this year's class is an indication of the kind of lawyers in which we are entrusting the future of our profession, we are in great hands. Their dedication of time to this program while working and raising families is admirable. We have a diverse group of lawyers in this year's class. I look forward to getting to know them better and learning about the class project they propose.

Join me in welcoming the following lawyers to our 2017 Leadership LSBA Class — Bethany A. Blackson, Lake Charles; Anna Brown Priestley, Shreveport; Kristian B. Dobard, New Orleans; Shanerika M. Flemings, Shreveport; Gerald J. Hampton, Jr., New Orleans; R. Gary Higgins, Jr., Covington; Kathleen M. Legendre, New Orleans; Betty Ann Maury, Gretna; J. Reed Poole, Jr., Metairie; Alexander L. Reed, Lake Charles; Christopher J. Sellers, Jr., New Orleans; Elizabeth Fontenot Shea, Lake Charles; Todd C. Taranto, Mandeville; Arielle L. Young, Baton Rouge; and co-chairs Brittany O. Rosenbloom of Metairie and Micah C. Zeno of Gretna.

Conclusion

As of presstime, Hurricane Irma, a Category 5 storm for most of its existence, has barreled through the Caribbean, the Florida Keys and peninsula, and much of the southeastern United States. Again, united we stand as a Bar Association to help those who need our services in her wake. May God be with us all during this hurricane season.

Arbitration: A Cure for Law's Delay?



By E. Phelps Gay

In his "to be or not to be" soliloquy, Hamlet enumerates the "whips and scorns" of time from which he might be released. These include the "oppressor's wrong, the proud man's contumely, the pangs of despised love," and, of course, "the law's delay." Indeed, the law's delay occupies a prominent place in world literature, not least in Charles Dickens's Bleak House, where the interminable chancery suit of Jarndyce and Jarndyce has become "so complicated that no man alive knows what it means." The parties "understand it least," and "no two Chancery lawyers can talk about it for five minutes, without coming to total disagreement as to all the premises."

After an eternity, the case ends when the lawyers' fees are discovered to have consumed the entire estate forming the subject of the dispute.

To the rescue comes . . . arbitration. Its advantages feature the "speedy disposition of differences through informal procedures without resort to court action."[1] Instead of becoming enmired in lengthy, costly and risky litigation before unknown and unpredictable fact-finders, the parties can choose their own arbitrator, limit discovery and obtain a quick hearing. They can also keep their dispute private and confidential. The arbitrator's decision (all agree) will be final, eliminating the expense and uncertainty of appeals. Finally, the arbitrator's decision can be transformed into an enforceable judgment. All in all (some say), this seems vastly preferable to the law's delay.

As an arbitrator, I believe many disputes can be resolved quickly and efficiently through this process, which under both Louisiana and federal law is "favored."[2] We know that many commercial, construction, consumer and maritime contracts include agreements to arbitrate in the event a dispute arises. Arbitration provisions also appear in energy, insurance, employment and real estate agreements. Some lawyers even include arbitration clauses

in their retainer agreements, although the Louisiana Supreme Court has imposed strict rules surrounding that course of action in light of the fiduciary duties attorneys owe to clients and the significant rights a client would be giving up.[3]

Herewith a few basic questions and answers about arbitration, which you may find useful and informative.

Are arbitration agreements valid and enforceable?

Yes. Under the Louisiana Binding Arbitration Law, a provision in any contract to settle a controversy by arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[4] The Louisiana statute tracks the Federal Arbitration Act, which applies to arbitration agreements affecting interstate commerce.

A determination whether the parties have agreed to arbitrate involves two considerations — (1) whether there is a valid agreement between the parties; and (2) whether the dispute falls within the scope of that agreement. A court may apply ordinary principles of state contract law to determine whether the parties have formed a valid agreement to arbitrate.[5]

Do you have to sign a contract for an arbitration agreement to be enforceable?

Generally, yes, but there are exceptions. To be subject to arbitral jurisdiction, a party must ordinarily be a signatory to a contract containing an arbitration clause.[6] Arbitration is a matter of contract, and a court cannot compel a party to submit to arbitration if he or she did not agree to it.[7] However, under certain legal theories, a court may compel arbitration by a non-party. These theories include agency, piercing the corporate veil, alter ego, incorporation by reference, third party beneficiary, waiver, and equitable estoppel.[8] It should be noted that Louisiana courts have respected the distinction between corporate entities and their members, deciding not to compel an individual to arbitrate simply because that person is the sole member of a limited liability corporation.[9]

Also, Louisiana law does not absolutely require written acceptance of an arbitration agreement. When an agreement lacks a signature, the actions and conduct of the party or parties who did not sign may show the effect or validity of the agreement.[10]

In accordance with settled Louisiana law, a signing party cannot avoid arbitration by claiming he or she did not read or understand the contract.[11]

What about arbitration clauses hidden or buried in fine print?

Depending on the circumstances, these may be invalidated. In *Duhon v. Activelaf, L.L.C.*, 16-0818 (La. 10/19/16), 192 So.3d 762, the Louisiana Supreme Court struck down as adhesionary and unenforceable an arbitration provision requiring patrons of a Lafayette indoor trampoline park to arbitrate any dispute. The court found the provision was "camouflaged" within an 11-sentence paragraph, nine of which did not relate to arbitration, and thus did not comply with the standards earlier set forth in *Aguillard v. Auction Management Corp.*, 04-2804 (La. 6/29/05), 908 So.2d 1. The court also criticized the lack of mutuality in the agreement since it referred only to the patron's obligation to arbitrate, not to any obligation on the part of the business owner.[12]

Can the right to arbitration be waived?

Yes, but waiver is not favored, and there is a presumption against it.[13] Waiver has been defined as a "voluntary and intentional relinquishment of a known claim."[14] Neither answering a judicial complaint nor a period of delay in filing an arbitration demand necessarily constitutes a waiver, especially in the absence of prejudice to the opposing party.[15] However, waiver may be possible where a party has resorted to judicial remedies and has allowed a significant period of time to elapse before demanding arbitration, so as to indicate an intent to litigate instead of arbitrate.[16]

What if someone simply refuses to arbitrate?

You can petition the court for an order directing the parties to proceed to arbitration.[17]

What if the arbitration agreement contains no method for appointing an arbitrator?

If no method of appointing an arbitrator is provided in the contract, the court in the parish where the arbitration is to be held "shall designate and appoint an arbitrator or arbitrators or an umpire as the case may require . . . ."[18]

What if, despite an arbitration agreement, someone files suit?

File an exception of prematurity and a motion to stay.[19] Under the statute, if suit is brought on any issue referable to arbitration, the court "shall" stay the action until an arbitration has been had in accordance with the terms of the agreement, provided the stay applicant is not in default in proceeding with the arbitration.[20]

How many arbitrators are usually chosen?

The parties may select a sole arbitrator to resolve their dispute, which is commonly done in smaller, less complicated cases. In larger cases, the parties often select a panel of three persons.

Is arbitration really less expensive than litigation?

Generally, but not always. The parties have to pay for the arbitrator or arbitrators, and they have to pay filing fees to any entity administering the arbitration, such as the American Arbitration Association.[21]

Do you have to use the American Arbitration Association to administer the arbitration?

No, although typically an arbitration is administered by a professional arbitration institution such as the AAA or JAMS (an acronym for Judicial Arbitration and Mediation Services, Inc.). The AAA has promulgated detailed rules and procedures for arbitration of commercial, construction, consumer, employment and international disputes. These can be found at *www.adr.org*.

What is discovery like in arbitration?

Excessive discovery (particularly depositions) is generally discouraged, but the arbitrator enjoys a degree of latitude in handling discovery depending on the nature of the case and the agreement of the parties. For example, Rule 22 of the AAA Commercial Arbitration Rules provides that the arbitrator "shall manage any necessary exchange of in-

formation among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses."

Can you file dispositive motions in an arbitration proceeding?

Yes, but they are viewed with caution, since the purpose of arbitration is to give the parties a fast and fair hearing. Rule 33 of the AAA Commercial Arbitration Rules provides that the arbitrator "may allow" the filing of, and make rulings upon, a dispositive motion "only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case."

Is an arbitration hearing different from a trial?

Yes and no. Arbitrators may compel the attendance of witnesses and the production of records. Parties to the arbitration "may offer evidence as is relevant and material to the dispute and shall produce evidence as the arbitrator may deem necessary to an understanding and determination of the dispute." But conformity to the code of evidence shall not be required, except for laws pertaining to testimonial privileges. The arbitrator shall determine the admissibility, relevance and materiality of the evidence offered and may exclude evidence deemed to be cumulative or irrelevant.[22]

Like a trial, an arbitration hearing involves presentation of evidence in the form of testimony and exhibits. Claimant presents evidence to support its claim, and Respondent presents evidence to support its defense. The arbitrator may require witnesses to testify under oath, and the witnesses may be examined by counsel for the adverse party and by the arbitrator. Since there is no appeal, many arbitrations are conducted without a stenographer, but under the rules any party desiring a stenographic record may make appropriate arrangements and bear the expense.[23]

Arbitrators generally enjoy broad discretion in conducting the proceedings.[24]

What is an arbitration award?

An award is simply the decision of the arbitrator or the arbitration panel. It is generally produced within 30 days of the close of the hearing. Arbitration awards may include an order for the payment of money, a declaration as to a matter in dispute, an order for a party to do or refrain from doing something, an order for specific performance of a contract, or an order setting aside or canceling a deed or other document.

Are arbitration awards enforceable?

Yes. Because of the strong public policy favoring arbitration, awards are presumed to be valid.[25] At any time within one year after the award is made, any party may apply to the court in the parish where the award was made for an order confirming it. Upon the granting of an order confirming an award, a judgment may be entered which has the same force and effect as a judgment in any action.[26]

Can an arbitration award be vacated?

It's possible, but rare. The burden of proof is on the party attacking the award.[27]

Awards can be vacated on only a few narrow grounds, namely: (1) where the award was procured by corruption, fraud or undue means; (2) where there was evident partiality or corruption on the part of the arbitrators or any of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.[28]

For example, in one case the Louisiana 5th Circuit Court of Appeal found that the arbitration panel exceeded its powers in granting a defendant surgeon's motion to strike live testimony four days before the hearing. The panel decided to review the experts' opinions through deposition transcripts and ultimately ruled in favor of the surgeon on the merits. Finding there was no authority which would prevent plaintiff from calling live witnesses, the court held the panel should not have denied plaintiff's request for a continuance because one of her experts could not attend the hearing on the date scheduled.[29]

A motion to vacate must be filed within three months of the award.[30]

But what if the arbitrator or arbitration panel makes a mistake on the facts or the law?

Two years ago, the Louisiana Supreme Court reiterated its prior ruling that an error of law or fact is not sufficient to invalidate an arbitration award.[31] The purpose of arbitration is thwarted when parties seek judicial review on grounds that the panel "just got it wrong on the law."[32] Because the record in that case contained no evidence that the panel had willfully misbehaved or imperfectly executed their authority, nor that they had denied the parties due process or consciously disregarded Louisiana law, the award could not be vacated.

Can an award be modified or corrected?

Yes. This can be done if (1) there was an evident material miscalculation of figures or a material mistake in the description of any person, thing or property referred to in the award; (2) the arbitrators awarded on a matter not submitted to them, unless it was a matter not affecting the merits of the decision; or (3) the award is imperfect in matter of form not affecting the merits of the controversy."[33]

Does the Louisiana Arbitration Law apply to labor contracts?

No.[34]

What about federal preemption of state law?

The U.S. Supreme Court has held that the substantive provisions of the Federal Arbitration Act preempt state law as to arbitration agreements in contracts affecting interstate commerce. To the extent federal and state law differ, the Federal Arbitration Act will apply.[35] Any inconsistency between the federal act and Louisiana law must be resolved in favor of the federal act.[36]

So what's so great about arbitration?

Like most choices, it depends on what you want. If you want robust, broad discovery, wide-ranging motion practice, trial by jury, and an opportunity to appeal, and you do not mind bearing the expense at-

tending all these options, you should look to our courts. We have a lot of good judges and conscientious jurors. You may be subjecting yourself to the slings and arrows of "the law's delay," but, at the end of the day, you may find fairness and justice (or not). On the other hand, if you want efficiency, speed, privacy, confidentiality, closure and a "decider" who is well-versed in a particular area of law, you might well prefer to arbitrate. I can attest that the process works.

Of course, you might prefer to mediate, which is another story for another day — or perhaps for another writer in this issue of the *Louisiana Bar Journal*.

FOOTNOTES

1. Firmin v. Garber, 353 So.2d 975, 977 (La. 1977). *See also,* National Tea Co. v. Richmond, 548 So.2d 930, 933 (La. 1989).

2. La. R.S. 9:4201, *et seq.* Louisiana's favored treatment of arbitration agreements echoes the Federal Arbitration Act. 9 U.S.C. §1 *et seq.*, on which it is based. *See, e.g.*, Aguillard v. Auction Management Corp., 04-2804 (La. 6/29/05), 908 So.2d 1; University of Louisiana at Monroe Facilities, Inc. v. JPI Apartment Development, 151 So.3d 126 (La App. 2 Cir. 2014), *writ denied,* 158 So.3d 818 (La. 2/6/15); and Hill v. Hornbeck Offshore Services, Inc., 799 F. Supp. 8 (E.D. La. 2011). The Federal Arbitration Act reflects "a congressional declaration of a liberal federal policy favoring arbitration agreements." Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

3. Hodges v. Reasonover, 12-0043 (La. 7/2/12), 103 So.3d 1069. While there is no *per se* rule against arbitration clauses in attorney-client retainer agreements, such agreements are subject to higher scrutiny than ordinary commercial contracts due to the fiduciary duties involved. Attorneys must fully disclose the terms and scope of the arbitration clause and explicitly set forth the rights the parties will be giving up, such as the right to broad discovery, trial by jury, and appeal, as well as the upfront costs of arbitration. Attorneys must also advise clients of their right to seek independent counsel before signing the contract.

4. La. R.S. 9:4202; 28 U.S.C. §2 (2017).

5. Prasad v. Bullard, 10-291 (La. App. 5 Cir. 10/12/10), 51 So.3d 35; Am. Heritage Life Ins. Co. v. Lang, 321 F.3d 533 (5 Cir. 2003).

6. Bridas S.A.P.I.C. v. Government of Turkmenistan, 345 F.3d 347 (5 Cir. 2003), *cert denied*, 541 U.S. 937, 124 S.Ct. 1660, 158 L.Ed.2d 37 (2004).

7. Lakeland Anesthesia, Inc. v. United Healthcare of Louisiana, Inc., 03-1662 (La. App. 4 Cir. 3/17/04), 871 So.2d 380, *writs denied*, 04-969 and 04-972 (La. 6/25/04), 876 So.2d 834; Horseshoe Entertainment v. Lepinski, 40,753, (La. App. 2 Cir. 3/8/06), 923 So.2d 929, *writ denied*, 06-0792 (La. 6/2/06), 929 So.2d 1259; O'Neal v. Total Car Franchising Corp., 44,793 (La. App. 2 Cir. 12/16/09), 27 So.3d 317.

8. Arthur Andersen, L.L.P. v. Carlisle, 556 U.S. 624, 631, 129 S.Ct. 189, 173 L.Ed.2d 832 (2009). *See also,* Sturdy Built Homes, L.L.C. v. Carl E. Woodward, L.L.C., (La. App. 4 Cir. 12/14/11), 82 So.3d 473, 478, *writ denied*, 12-0142 (La. 3/23/12), 8 So.3d 94; Rodney Henry v. New Orleans Saints, L.L.C., 15-5971 (E.D. La. 5/18/16). For more on this subject, *see* Anthony M. DiLeo, "The Enforceability of Arbitration Agreements by and against Non-Signatories," *J. Am. Arbitration*, Tulane Arbitration Inst., (Vol. 2, Issue 1, 2003).

9. Prasad v. Bullard, 10-291 (La. App. 5 Cir. 10/12/10), 51 So.3d 35.

10. Hurley v. Fox, 520 So.2d 467, 469 (La. App. 4 Cir. 2/10/88); Alford v. Johnson Rice & Co., L.L.C., 773 So.2d 255, 258 (La. App. 4 Cir. 11/15/00); In re Succession of Taravella, 734 So.2d 149, 151 (La. App. 5 Cir. 4/27/99); Marino v. Dillard's Inc., 413 F.3d 530 (5 Cir. 2005).

11. Aguillard v. Auction Management Corp., 04-2804 (La. 6/29/05), 908 So.2d 1, 7. A party who signs a written instrument is presumed to know its contents and cannot avoid its obligations by contending he did not read it, understand it, or that the other party failed to explain it to him. Tweedel v. Brasseaux, 433 So.2d 133, 137 (La. 1983).

12. The U.S. Supreme Court has recognized that under the "savings clause" in 9 U.S.C. §2, state contract law applies to assess whether agreements to arbitrate are valid and enforceable. AT&T Mobility, L.L.C. v. Conception, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 686-87, 116 S.Ct. 1652, 1656, 134 L.Ed.2d 902 (1996).

13. Lorusso v. Landrieu Enterprises, Inc., 02-2346 (La. App. 4 Cir. 5/21/03), 848 So.2d 656.

14. Standard Company of New Orleans, Inc. v. Elliott Construction Company, Inc., 363 So.2d 671 (La. 1978).

15. Lorusso v. Landrieu Enterprises, Inc., *supra*; Rauscher Pierce Refsnes, Inc. v. Flatt, 632 So.2d 807, 810 (La. App. 4 Cir. 1994); Matthews-McCracken Rutland Corp. v. City of Plaquemine, 414 So.2d 756, 757 (La. 1982); Electrical Instrumentation Unlimited v. McDermott, 627 So.2d 702 (La. App. 4 Cir. 1993); Lincoln Builders, Inc. v. Raintree Inv. Corp. Thirteen, 37,965 (La. App. 2 Cir. 1/28/04), 866 So.2d 326, 331.

16. Hospital Service District No. 3. of the Parish of Lafourche v. Fidelity and Deposit Company of Maryland, 99-2773 (La. App. 1 Cir. 1/16/01), 809 So.2d 145, *writ denied*, 01-0679 (La 4/27/01); Simpson v. Pep Boys-Manny, Moe & Jack, Inc., 03-0358 (La. App. 4 Cir. 4/10/03), 847 So.2d 617.

17. La. R.S. 9:4203.

18. La. R.S. 9:4204.

19. La. C.C.P. art. 926(A)(1). *See, e.g.,* Town of Homer, Inc. v. General Design, Inc., 42,027 (La. App. 2 Cir. 5/30/07), 960 So.2d 310, *writ denied*, 07-1820 (La. 11/09/07), 967 So.2d 510. Another option is to file an exception of no cause of action. Barkley Estate Community Ass'n v. Huskey, 09-268 (La. App. 5 Cir. 1/12/10), 30 So.3d 992.

20. La. R.S. 9:4202. This tracks the language of the Federal Arbitration Act, 9 U.S.C. §3. *See, e.g.,* Coleman v. Jim Walter Homes, Inc., 6 So.3d 179 (La. 3/17/09); Long v. Jeb Beithaupt Design Build, Inc., 44,002 (La. App. 2 Cir. 2/25/09), 4 So.3d 930.

21. The American Arbitration Association allows parties whose income is below 200 percent of federal poverty guidelines to seek a waiver of the initial filing fee.

22. La. R.S. 9:4206. This language is tracked in Rule 34 of the AAA Commercial Arbitration Rules.

23. AAA Commercial Arbitration Rules 32 and 34.

24. Hennecke v. Canepa, 96-0772 (La. App. 4 Cir. 5/21/97), 700 So.2d 521, 522.

25. National Tea Co. v. Richmond, 548 So.2d 930, 932-33 (La. 1989); Dicorte v. Landrieu, 08-0249 (La. App. 4 Cir. 9/10/08), 993 So.2d 799.

26. La. R.S. 9:4212 and 9:4214.

27. Robert S. Robertson, Ltd. v. State Farm Ins. Companies, 05-435 (La. App. 5 Cir. 1/17/06), 921 So.2d 1088.

28. La. R.S. 9:4210. A district court may not vacate an arbitrators' award unless specifically authorized by statute. Johnson v. 1425 Dauphine, L.L.C., 10-0793 (La. App. 4 Cir. 12/1/10), 52 So.3d 962.

29. Webb v. Massiha, 08-0226 (La. App. 5 Cir. 9/30/08), 993 So.2d 345. *See also,* Mayeaux v. Skyco Homes, 13-1053 (La. App. 3 Cir. 7/2/14), 11 So.3d 7.

30. La. R.S. 9: 4213.

31. Crescent Property Partners, L.L.C. v. American Mfrs. Mutual Ins. Co., 14-0969 (La. 1/28/15), 158 So.3d 798. In this case, the Louisiana 4th Circuit Court of Appeal vacated an arbitration award on grounds that the arbitrators had erroneously found that a construction peremption statute could be applied retroactively. Taking no position on the peremption issue, the Louisiana Supreme Court reversed, reaffirming the principle that judges are not allowed to substitute their judgment for that of arbitrators chosen by the parties.

32. 158 So.3d at 808.

33. La. R.S. 9:4211.

34. Under La. R.S. 9:4216, "Nothing contained in this Chapter shall apply to contracts of labor or to contracts for arbitration which are controlled by valid legislation of the United States." The same is true under the Federal Arbitration Act.

35. Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 2, 115 S.Ct. 834, 130 L.Ed.2d 73 (199); Hodges v. Reasonover, 12-0043 (La. 7/2/12), 103 So.3d 1069, 1072; FIA Card Services, N.A. v. Weaver, 10-1372 (La. 3/15/11), 62 So.3d 709, 712; Collins v. Prudential Ins. Co. of America, 99-1423 (La. 1/19/00), 752 So.2d 825, 827.

36. Blount v. Smith Barney Shearson, Inc., 96-0207 (La. App. 4 Cir. 2/12/97), 695 So.2d 1001.

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Avoiding Impasse and Reaching Agreements in Mediations

By Bobby M. Harges

Mediators are hired to help parties settle cases. When cases are in litigation, most lawyers who attend a mediation go there expecting the litigation to end and to move on to the next case. Although there are different approaches to mediation — such as transformative mediation1 where the goals of empowerment, recognition and the desire to change how people interact with each other during conflict are of utmost importance, and facilitative mediation2 where the mediator does not offer an opinion on the strengths and weaknesses of the parties' cases — in mediations where lawyers are involved, lawyers expect the process to end with a binding and enforceable settlement agreement.3

Two of the key ingredients to obtaining a settlement at a mediation are lawyers who are prepared for the mediation and an effective mediator. An additional ingredient for a successful mediation is for the parties to know how a good mediator works with the parties to avoid an impasse and to reach an agreement. This article addresses a myriad of things that lawyers can expect at a mediation and how lawyers can work with the mediator to avoid an impasse.

Knowing When an Impasse Occurs

A good mediator will not stop mediating until the agreement is signed. During the mediation, it is important to know what an impasse is and who is saying that the parties are at an impasse. An impasse in a mediation occurs when all parties *and* the mediator believe that they cannot reach an agreement. An impasse does not occur when only one party thinks that an agreement is not possible.

How Do the Parties Know When to End the Mediation?

Many mediators are paid by the hour. At some point, it may become obvious to the mediator that the case will not settle that day. How will the parties know when it is over? The parties must trust the mediator. A good mediator will not unnecessarily prolong the mediation and will let the parties know when progress is no longer possible. Many cases settle during a mediation long after the parties believe that they were "wasting their time" or "spinning their wheels." An effective mediator will consider whether further movement is possible at the mediation or whether a short break is necessary to recess until further discovery is conducted or whether follow-up is needed in a day, a week or a month. In most cases, the mediator will determine what to do when parties are approaching an impasse, depending on what caused the impasse.

Lack of Settlement Authority as a Cause of an Impasse

Sometimes the lack of settlement authority at the mediation often leads to an impasse. The mediator can prevent an impasse in this situation when he works with the parties before the actual mediation commences to ensure that the appropriate parties will attend the mediation. It should be abundantly clear to the parties that the mediator expects the parties to have the representatives with settlement authority present at the mediation, either physically or virtually. With the various types of technology available today, an excuse that the decision-maker could not attend the mediation should not be accepted. If, even after the diligent efforts of the mediator to obtain the presence of the necessary parties at the mediation, the representatives are still not available, attorneys can look forward to the mediator probing those present at the mediation intently with questions about what can be done at the mediation to ensure that a settlement occurs either that day or a later time, such as contacting the party with settlement authority by phone, fax, email, text or other similar method. If the authority figure is not able to be contacted at all during the mediation, one would anticipate that the mediator would get a commitment from the representatives at the mediation to make a recommendation in accord with the tentative agreements made during the mediation. Another possibility is for the mediator to discuss exactly what will happen when the authority figure is contacted. In other words, anticipate that the mediator will not stop the mediation simply because one party communicates that the authority figure is not available for the mediation.

Parties Simply Going Through the Motions

If the mediation is headed towards an impasse because one of the parties does not want to settle at the mediation, the mediator must work with that party to show him the benefits of settlement. The benefit might be a quicker resolution of the case, the saving of money, or less stress on the parties resulting from a final settlement. In mediations with lawyers, one can expect these matters to be discussed during the caucuses instead of in the joint session. During the caucus, expect the mediator to also conduct a risk-benefit analysis that will give the parties a better understanding of the benefits of settlement and how significant risk is involved when a case is tried by a judge, jury or arbitrator.

If the impasse occurred simply because the parties attended the mediation merely because the judge suggested or ordered the mediation, this is another opportunity for the mediator to show the parties the path to settlement. Just as a salesperson has an opportunity to sell a piece of furniture to a couple who are just browsing while visiting the showroom on a Saturday evening, the mediator has the opportunity to demonstrate to the parties that settlement is the right choice to make. An experienced mediator simply will not allow this opportunity to pass. The mediator will realize that, even if parties with settlement authority are present at the mediation simply because they were ordered to be there, seizing the moment and focusing the parties on the benefits of settlement will often lead the parties to a settlement. Typically, most people who attend

a mediation want to settle the case. The mediator must be the catalyst who aids the parties in understanding their needs, interests and concerns. This process will often lead to the parties realizing that settlement is a better option than a trial.

Different Perceptions of the Case

When different perceptions of the case, the law and/or the facts lead to an impasse, one can anticipate that the mediator will have a candid discussion with the parties in the caucuses in order to assist the parties in evaluating the risks, costs and benefits if the dispute is not resolved at the mediation. This discussion with the parties will give the parties a different perspective about their cases. This is particularly true when parties become too attached to their case, having lived with the case for weeks, months or years, only to focus on the facts and laws that benefit their case. The mediation process works better when the parties are open to this type of discussion with the mediator as such will benefit both the lawyers and clients because both will become more knowledgeable about their cases, thus resulting in a change in perspectives of the case, the law and/or the facts. When parties are too emotionally attached to their case, the mediator might focus on facts or circumstances that one of the parties might have overlooked or thought to be unimportant. A different perspective on a case promotes understanding and a better knowledge of how a case might look to an "outsider" such as judge, jury or arbitrator. During litigation, lawyers will generally consider all the possibilities that could occur at a later adjudication. However, lawyers are often singly focused on the facts that best support their position and they suppress or toss aside facts that appear to support the other side.

During these candid discussions, rather than with the parties, the mediator simply engages the parties in an analysis of the strengths and weaknesses of their respective positions, interests, the law and the facts. This discussion and re-analysis of the critical issues in the case will empower the parties with more

information and will help to promote settlement. Lawyers and litigants might view these "crucial conversations" with the mediator as adversarial. However, the mediator is simply examining the interests and needs of the parties to ascertain what is really important to the parties and to ensure that the views held by the parties are in accord with reality. This task performed by the mediator allows him to become an agent of reality, a person who effectively deflates extreme positions and unreasonable demands, while remaining neutral, objective and balanced with the realization that all disputes will someday end and that the dispute in issue should very well end that day. All of this will result in settlement, after the parties have looked beneath their positions, explained their thinking, and considered the views and interests of the other side.

A Case Being Mediated Too Early

If the fact that the case may have been mediated too early is the cause of the impasse, the mediator might suggest a recess of a few weeks or a few months until more information is gathered through the discovery process. Perhaps a deposition of a critical fact witness will provide the missing information, or the opinion of an expert witness is necessary to offer a perspective on the case that was lacking at the mediation. Alternatively, if critical facts are not known that will allow the parties to properly evaluate the case, the mediator might get the parties to consider the possibilities if certain facts turn out to be one way or the other. For example, a serious disagreement between lawyers might exist on the value of a personal injury case based on the difference of opinion of whether the plaintiff, who was injured in a motor vehicle accident, needs surgery. One option at the mediation would be to recess the mediation until the deposition of the treating physician is taken. Another option is for the mediator to discuss with the parties the value of the case if surgery is needed as compared to the value of the case if surgery is unnecessary. A discussion of these values will educate the lawyers of the possible outcomes at trial which could give them the necessary information to properly evaluate the case for settlement.

The Pendency of a Dispositive Motion

If the pendency of a dispositive motion is causing or leading to an impasse, the mediator again has an opportunity to discuss with the parties the various possibilities that might result after the judge rules on the motion. The possibilities include a partial or complete victory for the plaintiff or a similar ruling for the defendant. The mediator has an opportunity to have the parties consider all the various possibilities. These discussions will enlighten the parties, giving them information or insights that they may not have considered before the mediation.

The willingness of the parties to be open-minded and to work with the mediator can open new avenues and allow the parties to investigate new possibilities for settlement.

Running Out of Time

Occasionally, the parties will reach an impasse because someone has an afternoon or evening commitment such as an airplane to catch, a child to pick up, or an afternoon meeting. If this information is learned shortly before the time of departure for the commitment, the parties and the mediator can be caught off guard and surprised, thereby interrupting the progress of the mediation. In this instance, an impasse can be avoided if the mediator learns early on, at the beginning of the day, of the commitments that might interfere with the mediation. The knowledge of these obligations will allow the mediator and the parties to plan around these obstacles, thus preventing them from becoming stumbling blocks to an agreement. For example, if everyone present at the mediation knew that a decision-maker had to leave the mediation at 3 p.m. to catch an airplane, knowledge of that fact will allow the participants to take this fact into account during the day instead of being surprised by the departure of the principal at the last hour. Similarly, if a party must leave the mediation early because of a commitment with a child, perhaps a recess for a few hours could allow the parties to continue with the mediation later that evening.

"If you were me, what would you do?"

Occasionally, despite all of the diligent efforts of the mediator before and during the mediation, the mediator might believe that the mediation is at an impasse. Before announcing to the parties that the mediation is over, the mediator might ask the parties for their thoughts on how to keep the prospects of settlement alive. Questions like "what do you think?," "what would you do if you were me?" or "do you have any ideas?" might be just what the parties need to inject new ideas into the mediation. In a recent case, after seven hours of mediating a commercial matter, an impasse was on the horizon after the parties had made significant progress throughout the day. It was late in the evening because the mediation did not begin until noon. Before announcing to the parties that there was an impasse, one lawyer informed one of the lawyers in a caucus that he did not believe that the case would settle that day and asked him if he had any ideas. What resulted was a solution that previously had not been considered. When it was presented to the other side, the case settled after another two hours of mediation.

Use of Conditional Offers — Brackets

In many mediations such as in personal injury cases, the key question is how much money one party will pay to the other. When the parties appear to be progressing too slowly after a significant number of offers, and if the parties are still far apart, the mediator might get the parties to consider making conditional offers or using bracketed offers (also referred to as brackets). A bracketed offer is a way to break an impasse or to expedite settlement negotiations that are proceeding slowly. A bracketed offer is a conditional offer made by one party who offers to make a greater concession than previously made in exchange for a greater concession by the receiving party. For example, if the last offers of the defendant and plaintiff in a personal injury case are $50,000 and $450,000, respectively, the defendant, who has increased his previous offers by $2,500, $5,000 and $15,000, may propose to increase his offer from $50,000 to $100,000 if the plaintiff decreases his demand from $450,000 to $250,000. In the example, the plaintiff had made previous concessions of $5,000, $10,000 and $15,000. Here, the defendant's proposal to increase his offer by $50,000 is contingent on the plaintiff reducing his offer by $200,000. In response to the defendant's bracketed offer, the plaintiff can accept the bracketed offer and the mediation will continue within the range of the bracketed offer. Alternatively, the plaintiff can make a counter-bracketed offer which the defendant can accept or reject. The introduction of brackets into a case can jumpstart an otherwise slow-paced mediation and increase the chances of settlement.

Conclusion

Mediation is a process. It has a beginning, a middle and an end. It takes time for parties to consider and to reconsider their previous positions and the offers and counters of the other side. Thus, it is incumbent on the parties and the mediator to be patient in order to give the mediation process a chance to succeed. Trusting and working with the mediator and allowing him to guide the parties towards settlement will go a long way in avoiding impasse and reaching agreement.

FOOTNOTES

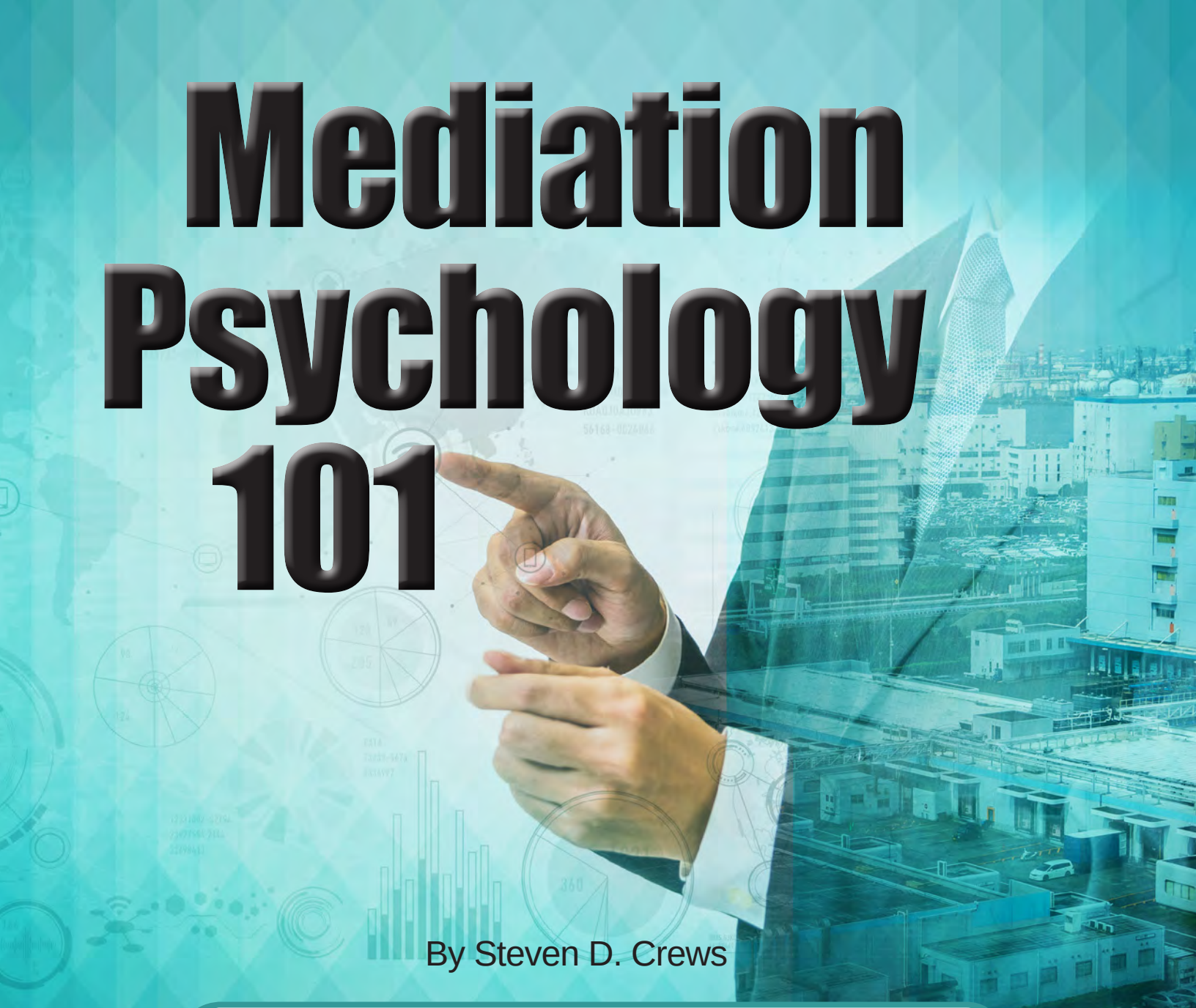
1. See *www.transformative-mediation.com/*.

2. See *https://www.peoples-law.org/mediation-approaches*.

3. In Louisiana, a Memorandum of Settlement Agreement that is executed by the parties during a mediation is binding even if the terms of the agreement indicate a subsequent more detailed settlement will be completed later. See, Bobby Marzine Harges, *The Handbook on Louisiana Alternative Dispute Resolution Law*, 38 (Esquire Books 2011) (citing Walk Haydel & Associates, Inc. v. Coastal Power Prod. Co., 720 So.2d 372; and LeBlanc v. State Farm. Ins. Co., 878 So.2d 715 (La. App. 3 Cir. 2004)).

Bobby M. Harges mediates and arbitrates with Mediation Arbitration Professional Systems, Inc. (MAPS) in Louisiana and Mississippi. He has been a neutral since 1990 in the capacities of special master, mediator, arbitrator, attorney chair of medical review panels, and a complaint hearing officer for energy regulatory matters. He is member of the Executive Committee of the Louisiana State Bar Association's Alternative Dispute Resolution Section, the immediate past chair of the Mississippi Bar ADR Section, and teaches mediation and arbitration, evidence, torts, sports law, and criminal law and procedure at Loyola University College of Law. (harges@loyno.edu; 7214 St. Charles Ave., Campus Box 901, New Orleans, LA 70118)

Mediation Psychology 101



By Steven D. Crews

I read an article in college stating the top three majors for people wanting to go to law school were accounting, history and psychology. I could understand accounting since it required you to analyze a set of facts. I also could understand history since it required a great deal of reading. I could never understand psychology until I actually earned my law degree. I have always been fascinated by watching the psychology prevalent throughout the litigation process and, in particular, during the settlement phase of litigation.

In most cases, there is a desire to resolve the case before trial. It obviously avoids the risk of an unfavorable decision, saves wear and tear on our mind and body, and saves our clients from the unpleasantries of cross-examination.

We should all remember, first and foremost, that mediation is not about a case but about a person. Most of the time there is someone who has been genuinely injured or wronged. We tend to lose some of the compassion necessary for successful mediation. Most parties in mediation just want to know there is someone who cares and is willing to listen and understand what they are going through. Some lawyers may get "numb" to the litigation process, but we have to stay forever mindful that most of these people are unfamiliar with litigation.

I encourage all plaintiffs' attorneys to have a pre-mediation conference with their clients. You need to fully discuss realistic expectations and the good points and bad points of the case. I had a recent mediation and I was very impressed in that the plaintiff's attorney had reviewed everything with the client in a pre-mediation conference. Every solid point I brought back from the defendant during the private caucus had already been fully discussed and, consequently, the clients were mentally prepared to deal with the bad facts. The comprehensive pre-mediation conference had a big role in bringing about a successful resolution.

Mediators do understand that, in some cases, they are being requested to be the bearer of the bad news. We understand that this is part of the job and comes with the territory. However, in most cases, the attorney should be the one who prepares the client prior to mediation. If you were the client, would you want to hear the bad news from a mediator you just met or from your own attorney? Also, I do not encourage establishing hard-line numbers at a pre-mediation conference. Sometimes that only creates unrealistic expectations for the client. Facts might be developed during the mediation which could significantly impact the settlement value of the case. I would advise the client to keep an open mind and consider any reasonable settlement offer, and you, along with the mediator, will analyze the reasonableness of the offers throughout the mediation process.

When the day of mediation arrives, hopefully, all sides have had an adequate pre-mediation conference. This is where I have the benefit and enjoyment of watching the actual psychology of the mediation process. It starts by looking at the various personalities. Some people are timid and some are strong. Some are quiet and some are loud. There are all types and that is why I absolutely love mediation. Attorneys, their clients and the claims people are all different. It is fascinating to watch everyone approach the different cases. They all have different life experiences and, consequently, all mediations are different.

It is always good psychology for all attorneys and parties to be respectful. We need to get back to statesmanship. We can have disagreements but still do it in a respectful manner. It is never good psychology to be offensive during your opening remarks or to say things that will cause people to retract or dig in. One hundred percent of the time it is best to be respectful, open and honest during the opening session. That sets the right tone and gets everything on the table. Admittedly there are some mediations where bad information needs to come out bit by bit but it can still be handled in a respectful manner at the opening.

After the opening comments, the mediation then shifts into what I call the "monopoly money" phase. Most of the offers are unrealistic and I do everything I can to prepare both sides for this reality. I have had to chuckle over the years when I pounded as hard as I could during the opening statement that we need to be "reasonable early" and then, when the process begins, we still go through the same monopoly money phase. It is just part of the process and most of the time it only impacts the speed of the mediation and not the final result.

After several rounds of the monopoly phase, the mediation actually begins. It is always interesting to watch people as they respond to pressure. As the numbers approach the more realistic values, you can see the reactions change. When under stress, the body reacts by going to stress-relieving behavior. Suddenly people start tapping the pencils more on the desk, wringing their fingers more or tapping their feet faster. This is also the part of the mediation where I have to take a deep breath and relax. My compulsion is to push fast and bring it to the resolution everyone is beginning to see. However, everyone, myself included, needs to slow down and let the process work. Sometimes the facts and the numbers have to "percolate." I enjoy being part of the psychology of the true mediation phase. My demeanor, tone and comments play a direct role as well. For that reason, I need to always represent total confidence in the process and in the chance of resolution.

Assuming the mediation was successful and the case resolved, all parties need to stay calm and collected, unless everyone has the same state of euphoria. Most of the time, everyone is a little disappointed so it is not hard for everyone to have a solemn face. However, there is the occasion when everyone has a reason to celebrate and that is a great moment. The mediation needs to conclude, just as it began, being respectful of everyone as you never know when the adjuster or attorney will be on the other side of the table.

For the occasional mediation that does not end in a settlement, it does not mean that the mediation was not successful. Certain parameters are created and information is exchanged. I have seen numerous cases resolve after the mediation when the facts continue to develop and the risk increases for one side or the other.

All lawyers want to know, as early as possible, if this is a case that is going to have to be tried or if there was a potential for settlement. Litigation attorneys recognize there is a distinct difference between "settlement mode" and "trial mode." Mediation allows all the parties to place a case in one of these two categories. We all know that the mindset changes when we recognize that a case is going to have to be tried.

In summary, never lose sight of the psychology involved in helping bring about a just result. 1) Be prepared. 2) Be sympathetic. 3) Be courteous. 4) Be reasonable.

Steven D. Crews is a senior partner with Corkern, Crews, Guillet & Johnson, L.L.C., in Natchitoches and a founding member of Upstate Mediation Group. He earned his JD degree in 1983 from Louisiana State University Paul M. Hebert Law Center. He has an AV Preeminent Rating. (sdcrews@ccglawfirm.com; 616 Front St., Natchitoches, LA 71457)

Book Review

Ada and the Doc:
An Account of the Ada LeBoeuf and Thomas Dreher Murder Case by Charles M. Hargroder

Reviewed by Margaret E. Judice

Charles M. Hargroder has written an extremely interesting and informative book on a murder committed on July 1, 1927, which murder resulted in the conviction and hanging of a woman in Louisiana for the first time in the history of the state. Hargroder primarily relied on the trial transcript and news stories in the writing of this book, first published in 2000 by the University of Louisiana-Lafayette Center for Louisiana Studies and now offered in reprint. The following is a brief overview of the book.

Hargroder begins the book by describing the discovery of the body of James LeBoeuf and continues with the investigation of the murder. The carved-up body was found in Lake Palourde. Railroad angle irons were found around his neck and feet and his body had been disemboweled to prevent buildup of bodily gases, both in an attempt to prevent the body from surfacing. If the 1927 flood waters had not started to recede, the body may not have been found.

James LeBoeuf's wife, Ada Bonner LeBoeuf (Ada), was the first individual questioned. When first questioned, Ada said that she and her husband took a boat ride and that shots were fired. She then said that her husband thought she and Dr. Thomas E. Dreher were having an affair, that she and her husband were going to meet with Dr. Dreher to patch things up, that at the meeting her husband fired his gun first, and that James Beadle (Dr. Dreher's handyman) then fired two shots. She was brought to jail and gave a confession. The second person questioned was Dr. Dreher. He also said that James LeBoeuf fired first and then James Beadle fired two shots. Dr. Dreher was then taken to jail. James Beadle was the third individual questioned and he denied any knowledge of the murder. He was then taken to jail.

Hargroder then describes how Dr. Dreher mortgaged his house and hired attorneys to represent all three of the defendants. The defense attorneys began their own investigation. One interesting detail is that the defense attorneys represented all three defendants and that the three defendants did not have separate attorneys. Shortly thereafter, the District Attorney announced that he would seek first-degree murder indictments for all three defendants.

District Judge James D. Simon, who was 28 years old at the time, was the presiding judge. The Grand Jury met on July 12, only 11 days from the murder. Indictments on all three defendants were turned over to the District Attorney.

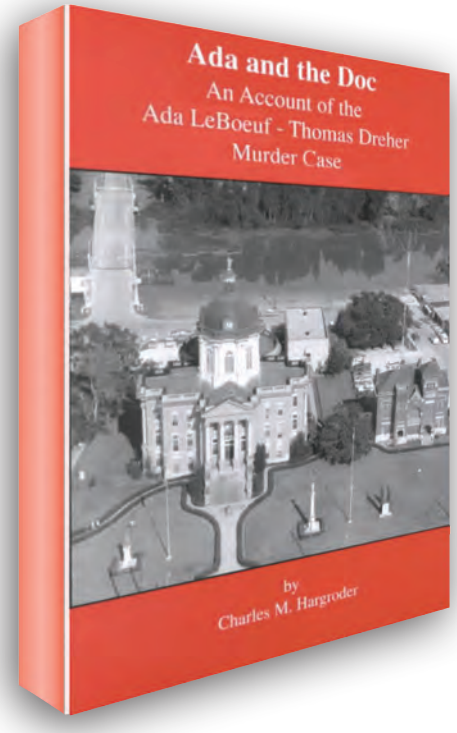
The book continues with the arraignment on July 13. At this proceeding, all three defendants pleaded not guilty. The trial was set for July 25. Although the

defense objected to the trial date due to insufficient time to prepare a defense, the motion was overruled by Judge Simon. The defense attorneys then sent a letter to the jury commission arguing that the Louisiana statute on women serving on juries conflicted with the 14th and 19th amendments of the United States Constitution. Louisiana law at the time stated that women had to ask that their names be included among those from whom juries would be selected. No women had made such a request. Judge Simon ordered the jury commission to proceed.

On July 25, the trial began. The last jury member was selected on July 28 and the trial was due to start on July 29. On July 29, one juror was replaced and the trial commenced. Testimony was given. Several days into the trial, James Beadle requested that he be provided with his own attorney and Judge Simon appointed a new attorney for him. James Beadle's statement or "confession" was submitted to the jury without any objection from James Beadle's new attorney. Despite objections from their defense attorneys, the confessions of Ada and Dr. Dreher were also admitted to the jury.

On Aug. 3, the State rested its case. Ada testified and she stated that James LeBoeuf fired the first shot and that James Beadle fired the next two shots. The State pointed out to the jury that Ada's confession and testimony were different.

On Aug. 4, Dr. Dreher testified and he also stated that James LeBoeuf fired the first shot and that James Beadle fired the next two shots. James Beadle did not testify. The jury was given the case and did not have a lengthy deliberation. The jury returned verdicts against Ada and Dr. Dreher of guilty as charged, and a verdict against James Beadle of guilty without capital punishment.



Judge Simon denied a motion for new trial and the attorneys for Ada and Dr. Dreher lodged a suspensive appeal with the Supreme Court. It was heard in February 1928 and the judges ruled in a 4-3 decision that the defendants had received a fair trial. The United States Supreme Court refused to hear the case.

In November 1928, the defendants appealed to the State pardon board, which was composed of Attorney General Percy Saint, trial Judge Simon and Lieutenant Governor Paul N. Cyr. Even when presented with a petition signed by 75 percent of the voters of St. Mary Parish and a petition of the jurors that they had been unduly influenced by pressure from the community, in a vote of 2-1, the board refused to grant a commutation of the sentence.

Numerous clubs of women and members of the public tried to save Ada and Dr. Dreher from hanging. Nevertheless, Governor Huey P. Long set the date of Jan. 5 for the executions.

On Jan. 3, Judge Simon agreed to a stay pending a hearing on application for appointment of a sanity commission. After the hearing, Judge Simon declined the plea.

On Jan. 4, Governor Long refused to grant clemency.

On the night of Jan. 4, Justice O'Niell issued a stay of execution based on the state Constitution giving any judge of the Supreme Court said right. A few days later, the Supreme Court held Justice O'Niell's order null and void.

Despite an enormous amount of pressure to spare them from capital punishment, on Feb. 1, 1929, Ada LeBoeuf was first executed and then Dr. Dreher.

The book is very informative and clearly highlights the differences in criminal cases from the time of this murder case to present day. The case moved along rapidly, even with the objection of the defendants. I highly recommend this book to any individual interested in a historical murder trial.

Copies of the book can be purchased for $22 (plus $5 shipping costs) by mailing a check (payable to "Ada and the Doc Continues") to Pam Heffner, 1406 Thomas St., Franklin, LA 70538. For more information, email Heffner at *stmarysecwfranklin@gmail.com*.

Margaret E. Judice is a partner in the Franklin law firm of Aycock, Horne & Coleman. She has been a member of the Louisiana Bar Journal's Editorial Board for several years. (margaretjudice@cox-internet.com; P.O. Box 592, Franklin, LA 70538-4101)

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Member Benefits: Save 10% on MyCase Practice Management Software

By Micah J. Fincher

The *Louisiana Bar Journal's* Editorial Board, in collaboration with the Louisiana State Bar Association's (LSBA) Outreach Committee, continues its series of articles highlighting benefits available to LSBA members. This article features Amber L. Cain in a Q&A about MyCase, a web-based practice management software platform.

Q. Amber, tell us about yourself and where you live and practice.

A. I was born in Metairie, grew up in the Shreveport-Bossier area, and now I live and work in the Lakeview area of New Orleans. I have a family law practice that spans from divorce, custody, adoption and domestic violence cases to estate planning, successions, interdictions and mediation.

Q. What is MyCase? How do you use it?

A. MyCase is web-based practice management software. As long as I have access to the Internet, I can manage case deadlines and tasks, track time and billing, access my calendar and address book, and communicate with my clients. I've used it since the beginning of my practice, and now I couldn't function without it!

Q. Are there any other features you like?

A. My clients and I can use MyCase to send and receive documents to one other, and they can pay their invoices using their credit card or checking account. That makes it easy to get paid quickly. I also use it to organize my schedule, and it has a convenient activity feed where I can view when and if clients are logging on to view documents and communications I've put up for them. Communications through MyCase also seem more secure than email, especially in cases where spouses may have access to (or hack) each other's email accounts, as I can deactivate or reset an account at any time with the click of a button. Oh, and it offers a mobile application for lawyers and their clients to download to their smart phones to access all these features on the go.

Q. Any other features?

A. I just love the organization of it all. From the address book to the task manager to case reporting to the ability to manage my client's trust account funds, MyCase and my email are the two browser tabs I have open at all times.

Q. What discount does MyCase offer LSBA members? How do you claim it?

A. LSBA members receive a 10 percent lifetime discount. You can follow the link to MyCase on the LSBA member services website or use this link: *http://bit.ly/mycaselsba*. If you already have MyCase, call customer support at (800)571-8062 and ask for the discount to be added to your account.

Q. Anything else you'd like to share?

A. Funny story. I had been using MyCase for years when you contacted me for this interview. I had used a discounted introductory rate when I first signed up, but I forgot to ask them to apply the 10 percent discount after that. I'm sure many attorneys are using MyCase, but they don't know that their LSBA membership saves them 10 percent. Thank you for the reminder!

Micah J. Fincher is the chair of the LSBA's Outreach Committee. He is a graduate of Louisiana State University Paul M. Hebert Law Center and currently practices in intellectual property and technology law at Jones Walker LLP in New Orleans.

Amber L. Cain is a graduate of Louisiana State University Paul M. Hebert Law Center and Millsaps College. As a principal of Amber L. Cain, L.L.C., her practice includes all aspects of family law in the Greater New Orleans area.

Have you used a member benefit through the LSBA? Tell us about it! Contact the Outreach Committee at outreach@lsba.org with questions, comments and ideas for future "Member Benefits" articles. Remember... you can always learn more about discounts on the LSBA's website at www.lsba.org/Members/DiscountBusinessServices.aspx.

House Resolution Deadline is Dec. 13 for 2018 Midyear Meeting

The Louisiana State Bar Association's (LSBA) Midyear Meeting is scheduled for Thursday through Saturday, Jan. 18-20, 2018, at the Renaissance Hotel in Baton Rouge. The deadline for submitting resolutions for the House of Delegates meeting is Wednesday, Dec. 13. (The House will meet on Jan. 20, 2018.)

Resolutions by House members and committee and section chairs should be mailed to LSBA Secretary John E. McAuliffe, Jr., 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. 13. 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.

LSBA Disaster Response Website Activated

The Louisiana State Bar Association (LSBA) is committed to serving the needs of members and the public in the wake of Hurricane Harvey. The LSBA's Disaster Response website provides information on displacement resources, court closures, emergency declarations and assistance for flood victims. The site also includes links to offer donations and to volunteer services. Go online: *www.lsba.org/DR/*.

Elections: Self-Qualifying Deadline is Oct. 16; Voting Begins Nov. 13

Several leadership positions are open in the 2017-18 Louisiana State Bar Association (LSBA) election cycle, including positions on the Board of Governors, LSBA House of Delegates, Nominating Committee, Young Lawyers Division and American Bar Association House of Delegates.

Deadline for return of nominations by petition and self-qualification forms is Monday, Oct. 16. First election ballots will be available to members on Monday, Nov. 13.

Robert A. Kutcher of Metairie and Shayna L. Sonnier of Lake Charles have been nominated for 2018-19 LSBA president-elect and 2018-20 LSBA treasurer, respectively. The LSBA's Nominating Committee formulated these recommendations on Aug. 25 and presented its report to the Board of Governors on Aug. 26. The president-elect will automatically assume the presidency in 2019-20.

According to the president-elect rotation, the nominee must have his/her preferred mailing address in Nominating Committee District 2 (parishes of Ascension, Assumption, East Baton Rouge, East Feliciana, Iberville, Jefferson, Lafourche, Livingston, Pointe Coupee, St. Charles, St. Helena, St. James, St. John the Baptist, Tangipahoa, Terrebonne, Washington, West Baton Rouge and West Feliciana).

According to the treasurer rotation, the nominee must have his/her preferred mailing address in Nominating Committee District 3 (parishes of Acadia, Allen, Avoyelles, Beauregard, Bienville, Bossier, Caddo, Calcasieu, Cameron, Caldwell, Catahoula, Claiborne, Concordia, DeSoto, East Carroll, Evangeline, Franklin, Grant, Iberia, Jackson, Jefferson Davis, Lafayette, LaSalle, Lincoln, Madison, Morehouse, Natchitoches, Ouachita, Rapides, Red River, Richland, Sabine, St. Landry, St. Martin, St. Mary, Tensas, Union, Vermilion, Vernon, Webster, West Carroll and Winn).

Also, the Young Lawyers Division (YLD) Council nominated Scott L. Sternberg of New Orleans and Carrie L. Jones of Baton Rouge for 2018-19 YLD chair-elect and secretary, respectively.

Other positions to be filled:

Board of Governors — one member each from the Sixth, Seventh and Eighth districts.

LSBA House of Delegates — one delegate from each of the First through Nineteenth Judicial Districts, plus one additional delegate for every additional district judge in each district.

Nominating Committee (15 members, one-year terms).

Young Lawyers Division. **Chair-elect** (2018-19 term), nominee **shall** be a resident of or actively practicing law in any parish in Louisiana, based on preferred mailing address. **Secretary** (2018-19 term), nominee **shall not** be a resident of or actively practicing law in the parishes of Orleans, Jefferson, St. Bernard or Plaquemines, based on preferred mailing address. Also, one representative each from the First, Second, Third, Fifth and Seventh districts (two-year terms).

American Bar Association House of Delegates *(must be members of the American Bar Association)* — two delegates from the membership at large and one delegate from that portion of the membership not having reached their 35th birthday by Aug. 7, 2018 (young lawyer delegate). All LSBA members may vote for both sets of candidates.

LBF Accepting Hurricane Harvey Donations

After a disaster, civil legal aid needs are dramatically increased. Displaced families and individuals experience a variety of legal needs. Domestic violence centers are impacted with increased residents. Vulnerable children need protection due to family instability and separation. The economic security of the elderly is in jeopardy. Many need help with successions and title clearing to access federal recovery dollars.

Funding for immediate legal services is a significant need facing Texas and Louisiana hurricane victims. The Louisiana Bar Foundation (LBF) is working with stakeholders on the local, state and national level to most efficiently and effectively address the many needs.

The Louisiana Hurricane Harvey Disaster Fund has been established to provide support. Also, donations may be provided directly to the Texas Equal Access to Justice Foundation Hurricane Legal Aid Fund.

Donations can be made online at *www.raisingthebar.org*, or checks may be sent, payable to "Louisiana Bar Foundation/ Harvey Disaster Fund," to: Ste. 1000, 1615 Poydras St., New Orleans, LA 70112.

For more information on these funds, contact LBF Development Director Laura Sewell at (504)561-1046.

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, 2017, through Feb. 28, 2018.

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

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

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

► Appellate Practice — 18 hours of appellate law.

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

► Family Law — 18 hours of family law.

► Tax Law — 18 hours of tax law.

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

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

Anyone interested in applying for certification should contact LBLS Specialization Director Mary Ann Wegmann, email maryann.wegmann@lsba.org or call (504)619-0128. For more information, go to the LBLS website: *https://www.lascmcle.org/specialization/*.

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, 2017. 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 — 18 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, 2018. 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, 2017.

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

For more information, contact LBLS Specialization Director Mary Ann Wegmann at (504)619-0128 or email maryann.wegmann@lsba.org.

QUALITY of Life

By Judge Michael A. Pitman | THE OUTDOORS & ENDURANCE SPORTS

It is a tremendous honor that the *Louisiana Bar Journal* Editorial Board chose my photograph of Caddo Lake in northwest Louisiana to be on the cover of this issue. It was taken at Jones Potter Ponderosa, a family farm owned by my wife, 2nd Circuit Court of Appeal Judge Frances Jones Pitman, and her brother, Shreveport attorney Marshall Jones. This beautiful property was originally purchased by their grandfather, Marshall Carl Jones, and has been enjoyed by family and friends for five generations.

When asked to write a short artist's statement, I had to laugh because I certainly don't think of myself as an artist or even a photographer. For me, photography is a byproduct of two of my greater passions — the love of the great outdoors and endurance sports.

The hiking path in Crested Butte, CO. *Photo by Judge Michael A. Pitman*

Flowers from the yard in Shreveport, LA. *Photo by Judge Michael A. Pitman*

I have always loved the outdoors and spend as much of my time there as possible. My involvement in endurance sports is the result of a tragic event which shaped my life as a young child. When I was 9 years old, my Dad suffered a heart attack. He was just 49. Although he did not die then, the event caused massive damage and he was severely disabled until he passed away on Easter Sunday in 1990 when I was in law school. I have spent my life trying to avoid health complications by not smoking, eating a healthy diet, exercising, and keeping regular checkups with my doctor.

The practice of law can be a sedentary and stressful profession which can lead to adverse health issues. Recognizing these perils inspired me to start a wellness program through the Louisiana Judicial College. I have given many lectures on the importance of wellness at various continuing legal education seminars and want to encourage everyone reading this article to make wellness a priority.

I have friends who are judges, lawyers and other professionals who say they are too busy to exercise, watch their diets and keep regular appointments with their health care providers. The bottom line is we make time for what we believe is important. If you don't think your health is important, I can tell you firsthand it is very important to the people who love and depend

Flowers along the trail, taken while hiking in Crested Butte, CO. *Photo by Judge Michael A. Pitman*

Caddo Lake, LA. *Photo by Judge Michael A. Pitman*

on you. Additionally, there is a significant body of research which supports the fact that healthier people are more productive and miss fewer days of work than their unhealthy counterparts. Make time each day to get some form of exercise. Regardless of the type of activity you choose, find some exercise that is fun and enjoyable and do it at least five times a week for 30 or more minutes.

Trail flowers in Crested Butte, CO. *Photo by Judge Michael A. Pitman*

As a marathoner and triathlete, I spend a lot of time outdoors and see the most beautiful things imaginable. God is the greatest artist of all time and I often stop to photograph His creations. Louisiana is "The Sportsman's Paradise" and we have been blessed with magnificent nature, wildlife and people. I would encourage you to take a break from your busy and stressful practice to enjoy the great outdoors. While you are at it, take a photo or two. You will be glad you did!

Judge Michael A. (Mike) Pitman was elected to the First Judicial District Court in 2003 and has been re-elected twice without opposition. He is the 2017 president of the Louisiana Judicial College and is a black belt in Tae Kwon Do, has completed two Ironman triathlons, 25 marathons (including two Boston Marathons) and countless other races. (jpitman@firstjdcla.org; Ste. 300-D, 501 Texas St., Shreveport, LA 71101-5403)

Judge Michael A. Pitman

PRACTICE Management

By Elizabeth LeBlanc Voss

EXPAND THE TOOLS BUT AVOID COMPLACENCY

Even with the complications that come with a modern-day law practice, having information at one's fingertips has made certain aspects of practice infinitely easier. There are countless tools available to assist firms in calendaring, organization, conducting conflicts checks, and performing legal research. It is precisely because technology has made some work easier that complacency, and, thus, risk exposure, can arise.

A quick online search often produces salient information to answer virtually any question, including many legal questions. Checklists, legal blogs and guidelines abound on virtually every facet of legal practice. These tools are a great starting point. But, when it comes to legal research, they must remain a starting point only.

Although most online and published material comes with a disclaimer, be reminded that Louisiana Rules of Professional Conduct Rule 1.1 requires attorneys to be thorough as a component of competency. Attorneys cannot rely solely on the legal research of unvetted third parties. Secondary sources are merely commentaries on the law, and, while they can be educational and may be your key source for developing an understanding of the law, they are not the law.

To mitigate risk and to remain in compliance with the Rules of Professional Conduct, attorneys are obligated to confirm the accuracy of the information they access. Relying on a white paper of another law firm, a prescriptive period checklist, or any other shortcut — even from a reputable source — does not relieve attorneys of their obligation to verify legal authority. Attorneys must consult the appropriate authoritative publications that report the actions of governmental bodies, such as constitutions, statutes and codes (from the Legislature), case opinions (from the judiciary) and regulations (from administrative agencies).

Do not be discouraged from using easily accessible resources as they can be tremendous tools. But attorneys must not allow these tools to lull them into thinking that they possess all the information necessary to properly conduct business, or that they have met their burden of thoroughness. Make it a practice to go one step further after reviewing secondary source material; consult primary legal authority and verify that the law is accurate, has not changed, and that citations are correct.

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

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By J.E. (Buddy) Stockwell | THE PATH TO LAWYER WELL-BEING

Across the nation, lawyers' assistance programs are encouraged by a new report that has every potential to be the catalyst for long-overdue change in the legal profession.

The report calls for all major stakeholders to get involved firsthand in a mission to support the wellness and mental health of judges, lawyers and law students. Titled "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change," the report is by far the most comprehensive document ever generated as to precisely how courts, regulators, law firms, law schools, bar associations, liability carriers and lawyers' assistance programs can best work in concert to improve our collective well-being.

All stakeholders are encouraged to apply their respective experience and influence within a unified mission to effectively address the plague of substance abuse, mental health and general well-being threats that damage so many lives and careers in our profession (and often clients as well).

The report was generated by a national task force initiated by the American Bar Association's Commission on Lawyers Assistance Programs (ABA CoLAP), the National Organization of Bar Counsel (NOBC) and the Association of Professional Responsibility Lawyers (APRL). Their recommendations represent literally thousands of hours of work. Scores of dedicated individuals participated, all with the experience required to provide a realistic road map to improved wellness. The full report can be accessed at JLAP's website: *www.louisianajlap.com.*

In 2015, a prior report was released, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys" (also available at *www.louisianajlap.com*). It confirmed what we already knew — a shocking percentage of our colleagues in the legal profession are suffering from various degrees of diagnosable substance abuse and mental health disorders. In addition, many more still are simply unhappy and unfulfilled to various degrees in the practice of the law.

To sum it up neatly, this has been a two-stage process. The 2015 study provided a stunning snapshot of the true pervasiveness of mental health and well-being issues within our profession. Now, in 2017, and in direct response to the very serious challenges identified in the 2015 study, we have in-hand a comprehensive report that realistically sets a new course for all of us to steer toward if we are, in fact, going to do what must be done to improve the health and well-being of legal professionals.

There are five central themes of focus in

the 2017 report: 1) identifying stakeholders and the role each of us can play in reducing the level of toxicity in our profession; 2) eliminating the stigma associated with help-seeking behaviors; 3) emphasizing that well-being is an indispensable part of a lawyer's duty of competence; 4) educating lawyers, judges and law students on lawyer well-being issues; and 5) taking small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.

As to the overarching, general recommendation for all stakeholders, the authors suggest that the first step is for everyone to acknowledge the problems and take responsibility. Every single person can make a difference within his/her own spheres to shift from "passive denial of problems to proactive support for change."

The report recommends that all stakeholders partner directly with, and ensure stable and sufficient funding for, their state-based lawyer assistance program to deliver specialized clinical assistance and programming specifically tailored for the needs of lawyers, judges and law students.

Judges and Lawyers Assistance Program, Inc. (JLAP)

Your call is absolutely confidential as a matter of law.

Toll-free (866)354-9334
Email: jlap@louisianajlap.com

The Louisiana JLAP (Judges and Lawyers Assistance Program) has been aggressively and proactively improving its programming and services in the last five years. JLAP is now a comprehensive, full-service professionals' program that provides a complete array of confidential mental health support services to the profession. For information on all of JLAP's various services, go to: *www.louisianajlap.com.*

JLAP remains dedicated to delivering the finest professional support possible to the Louisiana legal profession and its stakeholders as we all begin to traverse this new path together toward significantly improving lawyer mental health, wellness and well-being.

We need *your* help, too! Per the authors of the 2017 report: "We invite you to read this report, which sets forth the basis for why the legal profession is at a tipping point, and we present these recommendations and action plans for building a more positive future. We call on you to take action and hear our clarion call." So, if you can, lend a hand. Reach out to JLAP for ideas on how you can get involved. Encourage those within your sphere of influence to get involved, too.

If you or someone you know is suffering right now, reach out confidentially to JLAP for help. Call the helpline at (866)354-9334, email jlap@louisianajlap.com, or visit the website: *www.louisianajlap.com.*

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.

Newest Diversity Signatories Spotlighted

The Louisiana State Bar Association's Committee on Diversity in the Legal Profession acknowledges the newest signatories of the LSBA's Statement of Diversity Principles. By executing the Statement, the leaders of a legal organization or court agree to promote a culture that adopts best practices to improve retention of diverse talent and encourages the hiring and promotion of diverse talent.

2016-17 New Signatories

Baton Rouge Bar Association
Craig P. Cassagne, Jr.
Liska, Exnicios & Nungesser
The Bagneris Firm, L.L.C.
The Woods Law Group, L.L.C.

The Louisiana State Bar Association's (LSBA) Member Outreach and Diversity Department co-hosted a CLE with the LSBA's Civil Law & Litigation Section titled "12 Angry Men: Should Peremptory Challenges Be Abolished?" at the LSBA's Annual Meeting on June 7, 2017. Panel members included, from left, Hon. Ulysses Gene Thibodeaux, 3rd Circuit Court of Appeal; Sharonda R. Williams, Fishman Haygood Phelps Walmsley Willis & Swanson, LLP; Professor Raymond T. Diamond, Louisiana State University Paul M. Hebert Law Center; Hon. Scott J. Crichton, Associate Justice, Louisiana Supreme Court; Tony M. Clayton, Attorney at Law; Moderator Lynn Luker, Stanley, Reuter, Ross, Thornton & Alford, LLC; and James M. Williams, Chehardy, Sherman, Williams, Murray, Recile, Stakelum & Hayes, LLP.

The Louisiana State Bar Association Diversity Committee's Integration Subcommittee held a Professionalism Facilitator Training Workshop on April 8, 2017. At this workshop, attorneys increased their awareness of unconscious bias, discovered ways to reduce bias, gained tools to promote diversity and inclusion, and boosted their confidence in delivering elective CLE presentations. From left, Senior Facilitators Kandace R. Hamilton, Tulane University; Troy N. Bell, Courington, Kiefer & Sommers, L.L.C.; and I.J. Clark-Sam, Attorney at Law.

The third installment of the disability series titled "Fit to Practice" was held in May, 2017. The session addressed the liability and ethical issues related to attorneys with mental health challenges, disabilities and/or substance abuse issues. Speakers included, from left, J.E (Buddy) Stockwell III, executive director, Judges and Lawyers Assistance Program (JLAP); Kathy L. Cook, deputy general counsel, Mental Health Advocacy Services; and Damon S. Manning, Schiff, Scheckman & White, L.L.P.

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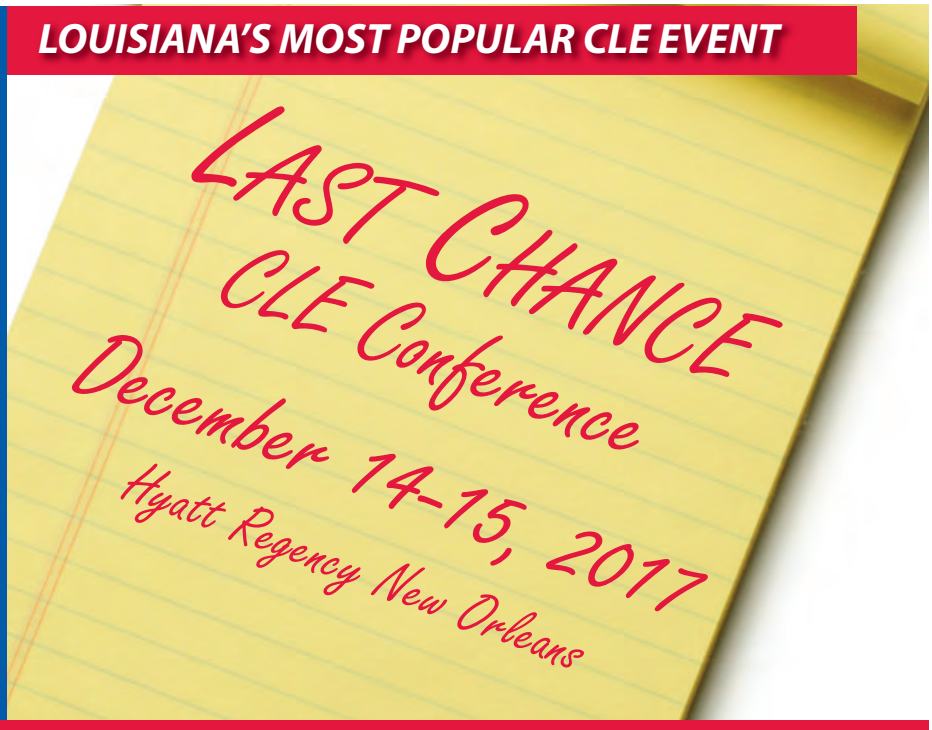

Review of Louisiana Law to include:

J. E. Cullens, Jr.
Walters, Papillion, Thomas, Cullens, LLC; Baton Rouge

J. Neale deGravelles
deGravelles & Palmintier; Baton Rouge

Maria B. Glorioso
The Glorioso Law Firm; Metairie

Matthew E. Lundy
Lundy, Lundy, Soileau & South, L.L.P.; Lake Charles

P. Craig Morrow
Morrow, Morrow, Ryan, Bassett & Haik; Opelousas

Michael C. Palmintier
deGravelles & Palmintier; Baton Rouge

Mark L. Riley
The Glenn Armentor Law Corporation; Lafayette

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

Winning with the Masters Faculty to include:

Ben Baker
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.; Montgomery, AL

Lance Cooper
The Cooper Firm; Marietta, GA

Jeffrey J. Kroll
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Elizabeth Larrick
Larrick Law Firm; Austin, TX

Joseph H. Low, IV
The Law Firm of Joseph H. Low IV; Long Beach, CA

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e-mail: kbellanger@lsba.org

If you prefer to charge your listing (Visa, Mastercard or Discover only), please contact Krystal at (504)619-0131 or (800)421-5722, ext. 131.

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FOR MORE INFORMATION, VISIT *www.lsba.org/expertwitness*

Note to Lawyer/Law Firm Advertisers: Per Rule 7.7 of the Louisiana Rules of Professional Conduct, all lawyer advertisements — unless specifically exempt under Rule 7.8 — are required to be filed for a compliance review by the Louisiana State Bar Association's Ethics Counsel prior to first publication. This process could take up to 30 days, so advertisers should consider that time window in relation to the publication's ad placement deadline. For more information on compliance with the Rules, contact LSBA Ethics Counsel and/or go online: *www.lsba.org/LawyerAdvertising*. Communications Department staff cannot discuss Rules compliance issues.

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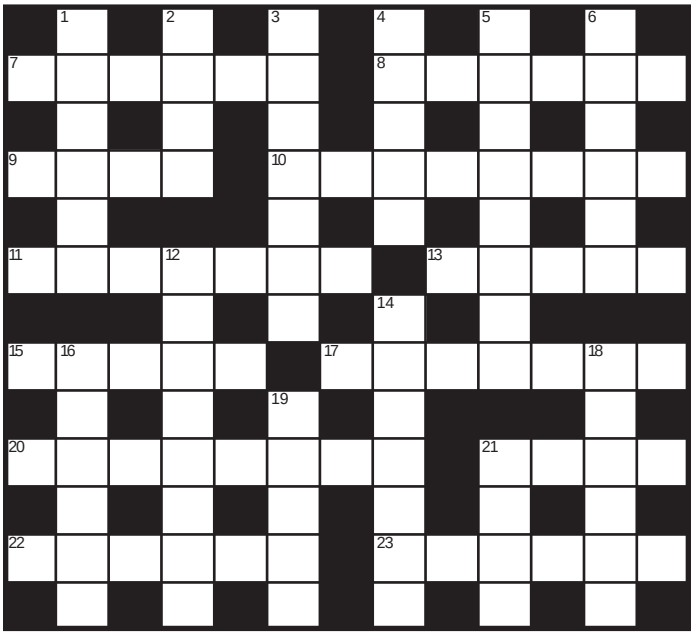
Crossword PUZZLE

By Hal Odom, Jr. | THE PRIVILEGED ONES



ACROSS

7 ___ Panza, Don Quixote's sidekick (6)
8 ___ Income Tax Credit (6)
9 Type of bailment;smallest chess piece (4)
10 One with privilege for doing work on your car (8)
11 Testifying (7)
13 Good place for a creditor to be when privileges are ranked (5)
14 Ones with privilege for unpaid legal fees (7)
15 Called balls and strikes (5)
17 Under which one may find acorns (3, 4)
20 One with privilege for unpaid legal fees (8)
21 One form of privilege (4)
22 ___ disease, also called BSE (3, 3)
23 Like a jury that has been tampered with (6)

DOWN

1 Unoccupied (6)
2 Subj. for Milton Friedman or Paul Krugman (4.)
3 Just a few (3, 4)
4 Low card that's often wild (5)
5 Church keyboard player (8)
6 Negligent (6)
12 "May __ be with you," Star Wars salutation (3, 5)
14 Ones with privilege for unpaid legal fees (7)
16 Kind of fund that is usually open-ended (6)
18 Leveling tool, out of veneer? (6)
19 Chews on (5)
21 Popular interlocking toy bricks (4)

Answers on page 215.

Alcohol and Drug Abuse Hotline

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	Dian Tooley	(504)861-5682 (504)831-1838
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	William Kendig, Jr.	(318)222-2772 (318)572-8260 (cell)
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The Judges and Lawyers Assistance Program, Inc. provides confidential assistance with problems such as alcoholism, substance abuse, mental health issues, gambling and all other addictions.

REPORT BY DISCIPLINARY COUNSEL

Public matters are reported to protect the public, inform the profession and deter misconduct. Reporting date Aug. 4, 2017.

Decisions

Toby James Aucoin, Baton Rouge, (2017-B-0451) **Suspended for one year and one day from the practice of law** by order of the Louisiana Supreme Court on May 26, 2017. JUDGMENT FINAL and EFFECTIVE on June 9, 2017. *Gist:* Respondent failed to properly communicate with his client, failed to provide diligent and prompt representation, abandoned the client during the course of the representation, failed to take action, failed to return the (unearned/advance) fee, and failed to return the client file.

Kenneth Robin Bowen, New Orleans, (2017-OB-0712) **Permanently resigned from the practice of law in lieu of discipline** by order of the Louisiana Supreme Court on June 5, 2017. JUDGMENT FINAL and EFFECTIVE on June 5, 2017. *Gist:* Commission of a criminal act.

Michael Langdon Cave, Baton Rouge, (2017-B-1307) **Interimly suspended from the practice of law** by order of the Louisiana Supreme Court on July 27, 2017. JUDGMENT FINAL and EFFECTIVE on July 27, 2017. He may not practice law in Louisiana until further orders of the Court.

Charles L. Dirks III, Baton Rouge, (2017-B-0067) **Suspended for a period of 60 days** by order of the Louisiana Supreme Court on June 29, 2017. JUDGMENT FINAL and EFFECTIVE on July 13, 2017. *Gist:* Failure to properly communicate with a client.

Richard R. Fisher, Shreveport, (15-DB-055) **Public reprimand** by order of the Louisiana Attorney Disciplinary Board on March 8, 2017, and must attend the LSBA's Trust Accounting School. JUDGMENT FINAL and EFFECTIVE on March 8, 2017. *Gist:* Engaged in commingling his personal funds with those of his clients.

George William Jarman, Baton Rouge, (2017-OB-0693) **Permanently resigned from the practice of law in lieu of discipline** by order of the Louisiana Supreme Court on May 26, 2017. JUDGMENT FINAL and EFFECTIVE on May 26, 2017. *Gist:* Commission of a criminal act.

Michael Thomas Joseph, Jr., New Orleans, (16-DB-004) **Public reprimand** by order of the Louisiana Attorney Disciplinary Board on April 21, 2017. JUDGMENT FINAL and EFFECTIVE on May 12, 2017. *Gist:* Respondent negligently managed his trust account and violated the Rules of Professional Conduct.

Freddie King III, Gretna, (2017-B-1010) **Suspended, on consent, for one year and one day, fully deferred, subject to a two-year period of supervised probation**, by order of the Louisiana Supreme Court on June 29, 2017. JUDGMENT FINAL and EFFECTIVE on June 29, 2017. *Gist:* Mishandling his trust account.

Marcus Paul LaCombe, Iowa, (2017-B-1014) **Interimly suspended from the practice of law** by order of the Louisiana Supreme Court on July 7, 2017. JUDGMENT FINAL and EFFECTIVE on July 7, 2017. He may not practice law in Louisiana until further orders of the Court.

David M. Mark, Covington, (2013-B-1097) **Previously imposed interim suspension from the practice of law dissolved** pursuant to Supreme Court Rule XIX Section 19 by order of the Louisiana Supreme Court on June 16, 2017. JUDGMENT FINAL and EFFECTIVE on June 16, 2017.

Heather Munoz Murphy, Metairie, (2017-B-0068) **Permanently disbarred** by order of the Louisiana Supreme Court on July 13, 2017. JUDGMENT FINAL and EFFECTIVE on July 27, 2017. *Gist:* Neglect of legal matters; failure to communicate with clients; failure to refund unearned fees; attempting to solicit clients from other attorneys; engaging in dishonest conduct; making misrepresentations to the court; practicing while ineligible to do so; engaging in the unauthorized practice of law after being placed on interim suspension; engaging in criminal conduct; and failing to cooperate with ODC in its investigations.

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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. 1, 2017.

Respondent	Disposition	Date Filed	Docket No.
Richard Collins Dalton	(Reciprocal) Suspension.	7/10/17	17-6161
Hugh B. Exnicios, Jr.	(Reciprocal) Suspension.	6/30/17	17-4868
Dwight D. Poirrier	(Reciprocal) Suspension.	6/30/17	17-4988
Channing J. Warner	(Reciprocal) Suspension.	6/12/17	17-3773

Discipline continued from page 188

Sherman Stanford, Opelousas, (2017-OB-1069) **Permanently resigned from the practice of law in lieu of discipline** by order of the Louisiana Supreme Court on June 28, 2017. JUDGMENT FINAL and EFFECTIVE on June 28, 2017. *Gist:* Commission of a criminal act; engaging in conduct involving dishonesty, fraud, deceit and misrepresentation; improper advances to clients and charging interest on sums advanced; and solicitation.

Bradley J. Trevino, Lake Charles, (2017-B-1053) **Conditional admission revoked** by order of the Louisiana Supreme Court on June 29, 2017. JUDGMENT FINAL and EFFECTIVE on June 29, 2017.

Lenise R. Williams, Smyrna, GA, (2017-B-0906) **Suspended by consent for a period of one year and one day, all but 60 days of the suspension shall be deferred, following the active portion of suspension, shall successfully complete a two-year period of unsupervised probation**, by order of the Louisiana Supreme Court on June 29, 2017. JUDGMENT FINAL and EFFECTIVE on June 29, 2017. *Gist*: Neglect of a legal matter; failure to communicate with a client; and failure to withdraw properly from representation.

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

No. of Violations

Violation of Rule 1.4(a)(3) — A lawyer shall keep the client reasonably informed about the status of a matter.....1

Violation of Rule 8.4(d) — It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice 1

TOTAL INDIVIDUALS ADMONISHED.....2

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No Justification to Void the Order

Novoa v. Minjarez, No. 16-50955, 2017 WL 2438264 (5 Cir. June 5, 2017).

Julio Novoa, the Chapter 7 debtor (debtor), faced six pre-petition malpractice suits from former patients and subsequently initiated his bankruptcy proceeding. Debtor then filed for bankruptcy relief. The patients moved for relief from the automatic stay to recover from Novoa's insurance carrier. After Novoa failed to respond to the motion for relief, the court entered an order permitting the patients to settle their claims with the insurance carrier without Novoa's consent. Novoa argued that this provision of the court's order ignored a provision in his insurance contract requiring the insurance company to get Novoa's consent before settling any claims.

Novoa moved to vacate the order, arguing that the settlements could have an impact on his medical license. The court denied the motion due to lack of evidence supporting this argument. The district court dismissed Novoa's appeal, and the bankruptcy case was later closed.

Nearly one year after the court entered the lift-stay order, Novoa moved to reopen the case so that he could then file a motion to vacate the order as void. The bankruptcy court denied the motion, and Novoa moved for reconsideration, arguing that the bankruptcy court had exceeded its powers by "destroying" a covenant in his insurance policy. The court denied the motion to reconsider, and the district court affirmed.

On appeal to the 5th Circuit, the court noted that generally courts will declare that a judgment is void only if there is a jurisdictional error or violation of due process. Novoa argued neither of these but claimed the order was void due to the bankruptcy court's "usurpation of power" in "extinguishing" the consent provision of his insurance contract. The 5th Circuit

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held that even if the bankruptcy court exercised its authority in a way that exceeded its non-jurisdictional limits under the Bankruptcy Code, it would still not justify the extreme remedy of declaring the order void. Finding no other reason to reopen the bankruptcy case, the 5th Circuit affirmed the lower court's decisions.

Community Property

Rosbottom v. Schiff, No. 16-31108, 2017 WL 3034261 (5 Cir. July 17, 2017).

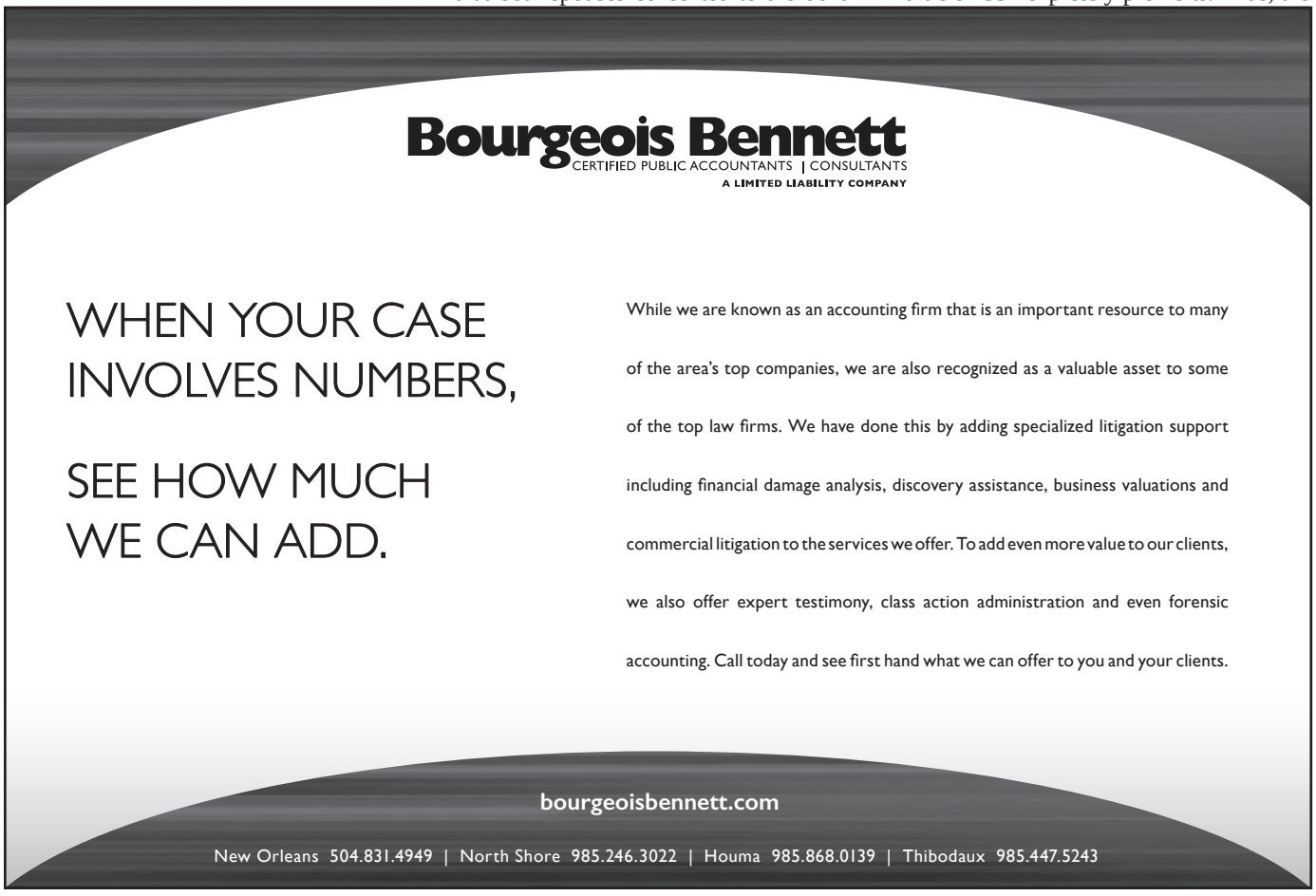
Harold Rosbottom and his wife Leslie Fox lived together in their community-property home in Shreveport. In 1999, each spouse each created an individual trust bearing his or her own name and donated the undivided interest in the home to the respective trust.

In 2005, the pair decided to sell the home but were cautioned by counsel that the prior donations to the individual trusts were null, as a violation of community-property principles against donating an individual spouse's one-half share to a third party. Their counsel conditioned the sale on Fox and Rosbottom signing the sale deed in their individual capacities. The couple split the proceeds of the sale evenly, depositing the proceeds into each respective trust.

Fox and Rosbottom then moved to Texas and filed for divorce soon thereafter. Each used his or her share of the sale proceeds to purchase a new home in Texas. In 2009, Rosbottom filed for bankruptcy and was later convicted of conspiracy to commit bankruptcy fraud, illegally transferring and concealing assets and falsifying an oath. Because Rosbottom used the funds in his trust to purchase his Texas home, the home was not included in his Chapter 11 estate, as the trust technically held title. Fox and the Chapter 11 trustee, however, sought a declaratory judgment that the home belonged to the estate since the transactions creating the trust were null, as they violated Louisiana community-property law. The bankruptcy court agreed, finding the home was part of the bankruptcy estate. The district court reversed, finding that both spouses consented to the donations and that their conduct after the donations evidenced their intent to transfer their entire interests in the Shreveport home.

On appeal to the 5th Circuit, Fox and the trustee argued that the trusts never existed; therefore, Rosbottom's home was purchased with community property and should be included in the estate. La. Civ.C. art. 2337 prohibits a spouse from alienating his undivided interest in community property to a third party. The court explained that spouses wishing to divide community property have options for doing so, such as pursuing a voluntary partition. The intent of the parties is relevant where there is a clear indication that they truly intend to establish the separateness of their interests in the community property.

Here, the 5th Circuit found that Fox and Rosbottom's intent was not so clear. There was no agreement designed to establish that the Shreveport home was to be separate property, and they did not seek a partition. They instead sought to donate each of their individual, undivided interests in the property to the trusts, third parties, which article 2337 expressly prohibits. Thus, the



court held that the transactions purporting to donate each spouse's interest into separate trusts were absolutely null because "[p]arties are not free to contract in violation of law." Therefore, the court held that the title to the Shreveport home never transferred to a trust, and the Texas home, which was purchased with community property, was included in the bankruptcy estate.

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Effect of "At Any Time" Provision for Withdrawal from an LLC

It's Golden, L.L.C. v. Watercolors Unit 6, L.L.C., 16-1362 (La. App. 1 Cir. 6/2/17), ____ So.3d ____, 2017 WL 2403015.

One of the members of Watercolors Unit 6, L.L.C., sent an email to the manager of the company on March 28, 2016, stating that the member was withdrawing effective April 29, 2016. The parties did not dispute that the email was sent to the manager at his business email address and that the manager received the email. The member's assignee, It's Golden, requested that the trial court fix and award it the fair market value of the member's interest.

Two issues were raised in the context of an exception of prematurity sustained by the trial court. The Louisiana 1st Circuit Court of Appeal considered whether, under La. R.S. 12:1325(B):

> (1) the provision in a limited liability company's operating agreement providing for withdrawal "at any time" eliminated the necessity for the "thirty days prior written notice" required under the statute; and
>
> (2) the email to the manager of the limited liability company eliminated the statutory requirement of "written notice to the limited liability company at its registered office as filed of record with the secretary of state."

In reversing the trial court, the 1st Circuit concluded that as the operating agreement provided the "time" and "event" for withdrawal, *i.e.,* "at any time," the language of the statute did not apply.

Further, as the email to the manager met the time and event requirement, "written notice to the limited liability company at its registered office as filed of record with the secretary of state" as set forth in La. R.S. 12:1325(B) was inapplicable.

The matter was remanded for further proceedings.

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Environmental Whistleblower Statute

The Louisiana Environmental Whistleblower Statute, La. R.S. 30:2027, provides protection from retribution (via treble damages) for *employees* acting in *good faith* who disclose or threaten to disclose a violation of any environmental law, rule or regulation. Two recent decisions have helped clarify the proper interpretation of this statute.

Collins v. State, 16-1195 (La. App. 1 Cir. 4/28/17), 220 So.3d 92.

Collins arises out of a dispute between landman Dan Collins and the Louisiana Department of Natural Resources (DNR). Collins provided consulting services for land, title and environmental research for DNR's Atchafalaya Basin Program from 1997 to 2010. Beginning in 2007, Collins noticed and reported what he perceived to be violations of environmental laws, particularly his belief that the underlying purpose for two water-quality projects was actually to benefit the oil-and-gas-exploration opportunities for adjacent landowners. Collins' contract with DNR expired in 2009 and was not renewed in 2010, which precipitated the filing of this

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suit under, *inter alia*, La. R.S. 30:2027. The case eventually proceeded to a jury trial in the 19th Judicial District Court, where a jury found against DNR and awarded Collins $750,000 in damages.

On appeal, DNR argued that the jury erred in finding an employee relationship. Although he alleged that he was in fact an employee under § 2027, allowing the case to reach trial, Collins stated that he and his company were "employed as the *consulting* landman contractor" for DNR and they "provided *consulting* services for land-related research" (emphasis added). Although the whistleblower statute does not define the term *employee* and no cases directly define the term in this context, the 1st Circuit concluded that Collins had "conceded that their claims arise out of a contractual relationship. Thus, they cannot pursue an action under La. R.S. 30:2027, as it is a statute that is intended to protect employees . . . ." *Collins*, 220 So.3d at 96.

Although Collins' claim to an employee relationship under La. R.S. 30:2027 was probably a longshot, this case is relevant from a jurisprudential standpoint because the 1st Circuit conducted a meticulous analysis of how courts should distinguish between employees and independent contractors for the purposes of the environmental whistleblower statue. To that point, the court explicitly tied the interpretation of § 2027 to its previous decision in *O'Bannon v. Moriah Technologies, Inc.*, 15-1460 (La. App. 1 Cir. 6/3/16), 196 So.3d 127, which outlines a totality of the circumstances test to determine whether a person is an employee or a contractor. The relevant factors include: (1) whether a valid contract existed; (2) whether the work was independent in nature such that the contractor could employ non-exclusive means; (3) whether the contract calls for contractor to use its own methods without being subject to control and direction; (4) whether there was a specific price for the overall project; and (5) whether there was a specific timeline not subject to termination at will. More generally and in conjunction with these factors, the court reiterated that the principal factor is the degree of control over the work reserved by the employer.

Therefore, at least for cases in the 1st Circuit, the law is now clear on how courts should interpret the term "employee" in the Louisiana Environmental Whistleblower Statute.

Borcik v. Crosby Tugs, L.L.C., 16-1372 (La. 5/3/17), ____ So.3d ____, 2017 WL 1716226.

Siding with a terminated employee and the Louisiana Department of Environmental Quality (LDEQ), the Louisiana Supreme Court recently clarified the meaning of the phrase "good faith" in the context of the Louisiana Environmental Whistleblower Statute. The court found that in order for an employee to be entitled to protection under the statute, he or she must only have reported the employer under an honest belief that an environmental violation occurred, and it is irrelevant whether the employee also possessed malice against

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the employer.

At trial in the Eastern District of Louisiana, the core dispute was whether the plaintiff, a terminated tugboat crew member, acted in "good faith" when reporting what he believed to be environmental harm. The disagreement over the meaning of good faith played out in the submission of two different versions of proposed jury instructions. The employer proposed that good faith "means that plaintiff had no intent to seek an unfair advantage or harm another party in making his report of an environmental violation." The employee instead proposed that good faith be defined as "the plaintiff had an honest belief that an environmental violation occurred." The district court created its own hybrid of the two proposals and instructed the jury that good faith "means that the plaintiff had an honest belief that an environmental violation occurred and that he did not report it either to seek an unfair advantage or to try to harm his employer or another employee." Because the question turned entirely on Louisiana state law, the U.S. 5th Circuit certified the question to the Louisiana Supreme Court.

The Court noted that the Environmental Quality Act (which contains § 2027) is rooted in the Public Trust Doctrine, La. Const. Art. IX, § 1; thus, the whistleblower protection must be interpreted consistently with that context. As such, the Court adopted a broad definition of good faith — that "an employee is acting with an honest belief that a violation of an environmental law, rule, or regulation occurred." On June 1, 2017, the U.S. 5th Circuit accepted the Louisiana Supreme Court's definition and remanded the case for further proceedings. *Borcik v. Crosby Tugs, L.L.C.*, 858 F.3d 936 (5 Cir. 2017).

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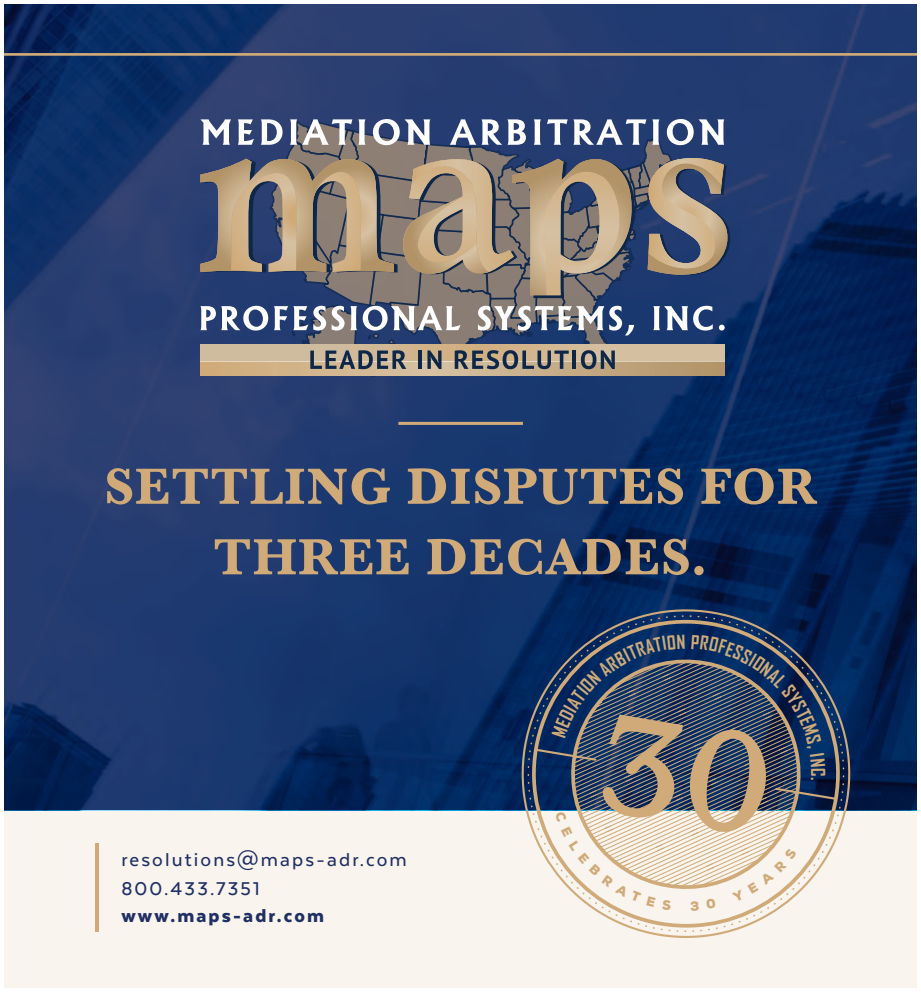
Child Support

Guste v. Guste, 16-0872 (La. App. 4 Cir. 4/19/17), 217 So.3d 542.

The trial court did not err in allowing Ms. Guste "straight line depreciation" regarding rental property, as La. R.S. 9:315C(3)(c) excludes only accelerated depreciation. The trial court was correct in not making the child support retroactive to the date of filing because there was an interim award in place; because of an agreement between the parties that Ms. Guste would receive the state and federal tax refunds for the years 2013 and 2014; and because the trial court did not abuse its discretion under the circumstances. The trial court also did not err in not making private-school tuition part of the child-support obligation because the trial court did not abuse its discretion under the circumstances of the case, which included its belief that the parties could work together to make educational decisions concerning the children. Regarding Ms. Guste's argument that the trial court erred in not admitting certain medical records in the possession of the custody evaluator, the court of appeal found that it could not review the matter because Ms. Guste failed to proffer the records.

Hammond v. Hammond, 51,316 (La. App. 2 Cir. 4/5/17), 217 So.3d 1198.

Although the trial court failed when rendering this custody decision to also address the child support, interim spousal support and income-tax dependency issues, although they were before the court, the court of appeal found that the trial court's failure to address these issues was not a rejection



of them, but was an abuse of discretion in failing to address them. Consequently, the appellate court amended the judgment to reinstate the awards in accordance with the hearing officer's report, which had been adopted as an interim judgment.

Custody

State ex rel. Bushman v. Knapp, 16-0979 (La. App. 4 Cir. 4/12/17), 216 So.3d 130.

The trial court granted Knapp's rules for contempt against Bushman, denied Bushman's rules for contempt against Knapp, and changed domiciliary custody from Bushman to Knapp. The court of appeal stated that, although it might have ruled differently, the record supported the trial court's rulings. The court's primary focus was that Bushman had shown a pattern of unwillingness to facilitate the child's relationship with his father, had repeatedly thwarted efforts by the father to spend time with the child and had disregarded recommendations, whereas Knapp showed a greater willingness and ability to facilitate the child's relationship with the mother and to support the child both financially and through a family support system. The court of appeal found that there was much conflicting testimony but was unwilling to disturb the trial court's credibility determinations or evaluation of the testimony. Further, the trial court's rejection of the custody evaluator's opinion was supported by the record, particularly as the evaluation was over a year old, Bushman had not revealed relevant information to the evaluator and her situation had changed in several respects between the date of the evaluation and the date of trial.

Final Spousal Support

Freeman v. Freeman, 16-0580 (La. App. 1 Cir. 4/12/17), 218 So.3d 653.

The court rejected Mr. Freeman's argument that the final spousal support being paid to Ms. Freeman was actually "disguised child support" as it was set up to terminate on the child's graduation from high school. The court found that there was no evidence of an agreement to that effect, that she remained in need of final spousal support and that he had the ability to pay. Ms. Freeman was not required to deplete her assets in order to obtain final spousal support. The court rejected Mr. Freeman's argument that she was underemployed because as a pre-school teacher's aide she did not work year round as the court imputed income to her for the summer. The court also rejected his argument that the court erred in not considering her qualification for an earned-income tax credit as the court found the trial court had considered that credit.

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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 Wednesday through Friday, Nov. 1-10, during business hours (8:30 a.m.-4:30 p.m.).

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Community Property

Radcliffe 10, L.L.C. v. Burger, 16-0768 (La. 1/25/17), 219 So.3d 296.

The trial court ruled that the failure to file a joint petition under La. Civ.C. art. 2329 to commence an action to terminate a matrimonial agreement was an absolute nullity. The appellate court affirmed by an evenly split vote. The Louisiana Supreme Court reversed, finding that because the spouses' petition was styled as an adversary, rather than a joint, petition, the judgment terminating their community regime and allowing them to partition their property was a relative, not an absolute, nullity. The Court found that article 2329's requirement was a rule "intended for the protection of private parties," rather than a "rule of public order," and, consequently, resulted in a relative, rather than an absolute, nullity because it was designed to protect the "less worldly, economically vulnerable spouse from an overreaching spouse." *Id.* at 301.

As the judgment was relatively null, Radcliffe 10, L.L.C., a judgment creditor, lacked standing to attempt to nullify the judgment, allowing the termination of the parties' regime and their entering into a matrimonial agreement. Further, because Radcliffe limited its attack to article 2329 and did not pursue its initial revocatory action under La. Civ.C. art. 2036, and since it had failed to introduce any evidence regarding its revocatory action, that claim was denied for lack of proof. Two well-written dissents both argued that the requirement of article 2329 was one of public order, since matrimonial regimes and contracts affect more than only the parties and cannot be "viewed in a vacuum," as the parties' regime "affects the rights of far more people, classes, and institutions than just the parties themselves," including "creditors, heirs, and legatees," and affects "systems of property ownership, successions, inheritance, and obligations." *Id.* at 304-06. One of the dissenters also would have remanded for the court to consider plaintiff's revocatory action and claims for fraud.

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Writ of Mandamus

St. Bernard Port, Harbor & Terminal Dist. v. Guy Hopkins Constr. Co., 220 So.3d 6 (La. App. 4 Cir. 4/15/17).

St. Bernard Port, Harbor & Terminal District (District) sought review of a judgment granting a writ of mandamus to the contractor compelling the District to pay a $101,306 judgment previously rendered in favor of the contractor. Subsequent to the initial judgment becoming final, the contractor filed a Petition for Writ of Mandamus pursuant to La. R.S. 38:2191(D) to collect on the judgment. The District argued that the mandamus statute was not applicable since the suit was not one to collect final payment under the contract as outlined in the statute. The court found that the fact the contractor obtained the judgment pursuant to an ordinary proceeding did not bar its right to utilize a mandamus proceeding to thereafter collect the judgment. The district court granted the mandamus and directed the director of the District to pay the judgment.

La. Att'y Gen. Op. No. 17-0044 (2017)

A question was presented to the Attorney General regarding whether a person who makes a valid Public Records Act request to inspect documents is required to pay "copy costs" for such documents if actual copies of the documents are not made by the public entity. In response to a Public Records Act request, the custodian of the records produced the documents for inspection. Rather than request copies, a personal hand-held scanner was used and the individual made a scan copy of the documents instead of requesting Xerox copies. Pursuant to La. R.S. 44:32(C)(3), no fee may be charged for a

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person to "examine or review any public records." Since no actual copies were made by the public employee, the public body was unable to collect fees for the scanned documents.

Public Works Act

84 Lumber Co. v. FH Paschen, S.N. Nielsen & Assocs., L.L.C., No. 12-1748 (E.D. La. 8/8/17), 2017 WL 3425958.

La. R.S. 38:2247 provides that "any claimant having a directional contractual relation with a subcontractor, but not in direct contractual relation with the contractor," must provide notice by registered or certified mail to the contractor of its office in Louisiana. The claimant allegedly emailed a copy of its sworn statements of claims to the general contractor's attorney. While there was an issue as to whether in fact the email was received, the district court held that, regardless, sending a copy of the filed claims to the general contractor's attorney rather than directly to the general contractor does not comply with the Public Works Act. Therefore, the notice requirements under the Public Works Act were not met.

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Insurance, Tort, Workers' Compensation & Admiralty Law

Louisiana's Dram Shop Act

Tregre v. Champagne, 16-0681 (La. App. 5 Cir. 7/26/17), ____ So.3d ____, 2017 WL 3174697.

Arthur Tregre was southbound on La. Highway 52 in St. Charles Parish, following a vehicle driven by Dallas Veillon. Veillon, attempting a left turn, was struck by a northbound police cruiser driven by St. Charles Parish sheriff's deputy Jeff Watson, which then entered the southbound lane and struck Tregre's vehicle head-on. Watson was killed and Tregre suffered serious injury. Immediately preceding the accident, Veillon had been drinking at Boogie's Lounge, from which he was ejected in an intoxicated state. Suits were brought against Veillon, the sheriff's office, Boogie's and its owner, and their insurers. Tregre alleged that Boogie's employees ejected Veillon from the bar, which sits beside a busy highway, knowing he was intoxicated and was going to drive on that highway.

La. R.S. 9:2800.1 provides, in pertinent part:

A. The legislature finds and declares that the consumption of intoxicating beverages, rather than the sale or serving or furnishing of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or upon another person.

B. Notwithstanding any other law to the contrary, no person holding a permit under either Chapter 1 or Chapter 2 of Title 26 of the Louisiana Revised Statutes of 1950, nor any agent, servant, or employee of such a person, who sells or serves intoxicating beverages of either high or low alcoholic content to a person over the age for the lawful purchase thereof, shall be liable to such person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises, including wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served. . . . .

D. The insurer of the intoxicated


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person shall be primarily liable with respect to injuries suffered by third persons.

E. The limitation of liability provided by this Section shall not apply to any person who causes or contributes to the consumption of alcoholic beverages by force or by falsely representing that a beverage contains no alcohol.

The trial court granted motions for summary judgment, dismissing with prejudice all claims against Boogie's Lounge, L.L.C., its owner and its insurer. Plaintiffs appealed, alleging, *inter alia,* that the bartender did not have a valid license.

In its ruling, the 5th Circuit quoted *Zapata v. Cormier*, 02-1801 (La. App. 1 Cir. 6/27/08), 858 So.2d 601, 606-07:

> For the immunity provisions of La. R.S. 9:2800.1 to apply, the following requirements must be met: 1) the bar owner must hold a permit under Title 26 of the Louisiana Revised Statutes; 2) the bar owner, its agents and servants or employees sell or serve intoxicating beverages to a person over the age for lawful purchase thereof; 3) the purchaser thereof suffers an injury off the premises; and 4) this injury or accident was caused by the intoxication of the person to whom the intoxicating beverages were sold or served.

Finding all these requirements were indisputably met, the court affirmed the trial court's dismissal of the defendants, with prejudice.

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Updates in Labor and Employment Law

It was a busy summer for labor and employment law, both judicially and administratively. This article provides information on what labor and employment practitioners need to know about the ever-changing state of law and changes ahead.

New Overtime Regulations Ahead?

On Nov. 22, 2016, the Eastern District of Texas issued a last-minute injunction on the new Fair Labor Standards Act Regulations, which would have doubled the salary requirement for the "white collar" exemptions. *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016). However, changes to the overtime exemptions are still possible. In July 2017, the DOL filed a Request for Information in the Federal Register seeking public comment on setting an appropriate salary level for the exemptions and several other interesting issues, including the possibility of instituting multiple salary levels depending on geographic regions and employer size, as well as reverting to a duties-only test. Wage and Hour Division, U.S. Department of Labor; Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 82 FR 34616, (July 26, 2017). The comment period closed on Sept. 25.

Tip-Pooling Regulations Rescinded

On June 20, 2017, the federal government's Unified Agenda of Regulatory and Deregulatory Actions announced plans to rescind the DOL's 2011 tip-pooling restriction. Before the restriction, employers could collect employees' tips and redistribute them among the other staff members, typically those working in the "back of the house." In 2011, the DOL restricted employers from tip pooling and redistributing tips among a larger group of employees, even if the employer provided a "tip credit" ensuring that employees were paid at least minimum wage. 29 U.S.C. § 203(m); 76 Fed.Reg. 18,832, 18,841-42 (April 5, 2011). Numerous lawsuits across the country followed, and, at one point, the regulation's validity was poised for Supreme Court review. *See, Oregon Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080 (9 Cir. 2016), *petition for cert. filed,* 2017 WL 360483 (U.S. No. 16-920) (Jan. 19, 2017). The DOL's Notice of Proposed Rulemaking suggests rescinding the 2011 restrictions on tip pooling for employers who pay tipped employees the full minimum wage directly. Department of Labor, Wage and Hour Division; Tip Regulations Under the Fair Labor Standards Act (FLSA), RIN 1235-AA21.

DOL Administrator Interpretations Redacted

The Wage and Hour Division's "Administrator's Interpretations" were issued by the DOL but did not carry the force of law. In a June 7, 2017, news release, the DOL announced the redaction of two of its controversial Interpretations on "Joint Employment" and "Independent Contractors" and promptly removed the Interpretations from the Department's website. The Department cautioned that these withdrawals do not alter an employer's obligations under the FLSA's regulations and case law.

Wage and Hour Opinion Letters Reinstated

On June 27, 2017, the DOL announced it would resume issuing Opinion Letters on wage-and-hour matters, which was suspended in 2010. Opinion Letters are penned by the Wage and Hour Division in response to questions it receives about the laws it enforces, such as the FLSA. Employers and employees alike can now submit requests for opinion letters through the Department's website or by mail to receive an official written opinion on how the DOL interprets the law.

Sexual Orientation Discrimination under Title VII

As the Labor and Employment Law Section reported in the August/September 2017 *Louisiana Bar Journal*, the 7th Circuit issued an en banc opinion on April 4, 2017, holding that Title VII of the Civil Rights Act of 1964's prohibition on discrimination "because of . . . sex" covers sexual-orientation discrimination. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7 Cir. 2017), 42 U.S.C. § 2000e-2(a)(1). Meanwhile, the 11th Circuit Court of Appeal issued a panel decision in the case of *Evans v. Georgia Regional Hospital* denying Title VII coverage of sexual-orientation discrimination. 850 F.3d 1248 (11 Cir. 2017). Developments in federal courts this summer signal that the Supreme Court may rule on this legal question soon.

First, the 11th Circuit denied en banc review in *Evans* on July 6, 2017. As a result, there is officially a circuit split between the 11th and 7th Circuits on this matter and Lambda Legal, who represents Evans, quickly announced it would appeal the decision to the Supreme Court.

Second, the circuit split may widen or narrow depending on the outcome of *Zarda v. Altitude Express*, a similar case pending in the 2nd Circuit. 855 F.3d 76 (2 Cir. 2017). The district court and appellate court ruled that sexual-orientation discrimination is not covered by Title VII. *Id.* at 79. The 2nd Circuit granted en banc review on May 25, 2017, and the plot is beginning to thicken as *amicus curiae* briefs are filed. On July 26, 2017, the Department of Justice filed an *amicus curiae* brief stating its position that sex discrimination does not include sexual-orientation discrimination. This opinion, which directly contradicts the EEOC's 2017-2021 Strategic Enforcement Plan, adds to the state of confusion over this legal issue. Given the circuit split and uncertainty among federal agencies, this legal question will likely be before the Supreme Court soon.

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Mineral Law

Well Cost Reporting Statutes

La. R.S. 30:103.1 provides that, if a compulsory unit includes "lands . . . upon which the operator . . . has no valid . . . lease," the operator must provide certain financial reports to any unleased owner who requests them. Next, La. R.S. 30:103.2 provides that, if the operator fails to send those reports within a specified time, and the operator also fails to timely correct the omission after written notice, the operator will forfeit its right to demand contribution from the unleased owner for drilling costs.

In *Miller v. J-W Operating Co.*, No. 16-0764 (W.D. La. July 28, 2017), 2017 WL 3261113, Miller wrote to J-W Operating Co. to request financial reports. The plaintiff described herself as the owner of an unleased oil-and-gas interest in Bossier Parish, but she did not identify the interest that she owned or the unit in which the interest was located. J-W, which operates a number of wells in Bossier Parish, responded by requesting more information. Miller wrote a second letter to J-W, but the second letter similarly failed to identify the plaintiff's interest. Again, J-W responded by requesting more information.

The plaintiff then sent a third letter to J-W, finally identifying a five-acre tract that she owned. J-W responded by sending the plaintiff financial reports and a check for plaintiff's share of production, minus her share of drilling costs. J-W's response was timely if its obligation to provide financial reports was triggered by the plaintiff's third letter, but not if its obligation was triggered by the earlier letters. The plaintiff brought suit, asserting that J-W had forfeited its right to deduct well costs because the company failed to timely send the financial reports she requested.

The court disagreed. The court noted that the well-cost reporting statute does not specify what information must be contained in an unleased owner's request for financial reports. The court reasoned, however, that it would be unreasonable to interpret the statute as imposing a potentially harsh penalty on an operator for failing to send reports in response to a request that does not even identify the unleased interest that is at issue. Accordingly, J-W's reporting duty was not triggered until it had received the request in which the plaintiff identified her interest.

Liability of Lessee's Lender for Lease Obligations

In 2004, Gloria's Ranch granted an oil-and-gas lease to Tauren Exploration. Later, Tauren assigned portions of its lease rights to Cubic Energy and EXCO USA. *Gloria's Ranch, L.L.C. v. Tauren Exploration, Inc.*, 51,077 (La. App. 2 Cir. 6/2/17), ____ So.3d ____, 2017 WL 2391927.

In 2007, Cubic borrowed money from Wells Fargo Energy Capital and executed a credit agreement. The agreement required that the borrowed money be used for certain purposes, such as drilling. It also provided that Wells Fargo retained the right to approve the location and depth of wells, as well as certain actions that Cubic might take, such as its entry into new operating agreements or its alienation of its oil-and-gas lease rights. Wells Fargo also received certain other rights, but not a working interest.

The lease covered portions of five sections in Caddo Parish. Tauren drilled wells on the leased premises in three of the sections. In the other two sections, an unrelated company drilled wells that served as unit wells for units that included the portion of the leased premises in those sections. Gloria's Ranch eventually concluded that the lease had terminated for lack of production in paying quantities. In early 2010, it wrote a letter to the lessees (Tauren, Cubic and EXCO) and to Wells Fargo, demanding that they execute a recordable act recognizing that the lease had terminated. They declined

to do so, and Gloria's Ranch sued them. EXCO settled, but the case went to trial against the other defendants.

The trial court determined that, in four of the five sections, the lease had terminated for lack of production in paying quantities (the lease contained a vertical Pugh Clause). The court also concluded that Gloria's Ranch had lost valuable leasing opportunities because of the defendants' failure to execute an act recognizing partial lease termination. As for the fifth section, the court concluded that Tauren and Cubic had failed to pay royalties to Gloria's Ranch for the portion of unit production that was attributable to the leased premises.

The trial court entered judgment holding that the lease had terminated in its entirety and granting a money judgment for the sum of: the unpaid royalties; statutory penalties equaling twice the unpaid royalties; millions of dollars for lost leasing opportunities; interest and attorney's fees. Notably, the trial court held that Wells Fargo was solidarily liable with Tauren and Cubic for the entire money judgment, even though Wells Fargo never owned a working interest.

The Louisiana 2nd Circuit affirmed. Wells Fargo applied for rehearing, but a five-judge panel denied the application by a 3-2 vote. In a strongly worded opinion, the two judges who dissented from the denial of rehearing asserted that the judgment is erroneous and that it will bring trouble for the banking industry.

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Not Charted, Not Done?

Royal ex rel. Mott v. Blanch, 16-1215 (La. App. 4 Cir. 6/14/17), ____ So.3d ____, 2017 WL 2570926.

Royal was triaged by an emergency-room physician (Blanch) who did not document in any record that a pulse oximetry test (SpO2) was performed prior to Royal's discharge that same day. Royal died the next day from a pulmonary embolism, the presence of which might have been detected a day earlier by an SpO2 test. A medical-review panel found that the hospital breached the appropriate standard of care because an SpO2 test was required, and there was no record that it had been done.

During a bench trial against Blanch, the plaintiffs relied on the panel opinion and claimed that "not charted, not done" was a medical maxim that required a finding that the absence in the record of the SpO2 result meant that it was not run. The Royals called no expert witness to testify. Blanch called two expert emergency-medicine physicians and testified on his own behalf.

Blanch claimed that he had an independent recollection of treating Royal and that he did measure her SpO2, adding "there was no doubt in his mind that he tested her oxygen saturation level" and got a result greater than 95 percent "because had it been less, [his] course of treatment would have been different," *e.g.*, he would have then ordered a specialized test (ABG), whereas he ordered only routine testing.

Blanch agreed that not running an SpO2 would have been negligent, but he disputed the applicability of "not charted, not done," which he said does not reference the care rendered but rather "is a saying associated with billing, admonishing health care providers to document the treatment and testing they perform, but it is not the standard of care."

Why, Blanch was asked on cross-examination, if he had run the test, did he not include that information in his brief to the panel? Blanch replied that he told his attorney that he had performed the test, but thereafter "no one asked" him about it, and he did not know what rules applied to medical-review panels. Blanch's brief to the panel was not offered as evidence.

Blanch also testified that his normal practice was to record the SpO2 results, but he did not do so in this case because there was no easy way to record the result at the spot he ran the test, and he forgot to record it later.

A panel member testified that the basis for the panel's finding of breach was the lack of a record of the test, but if he had known that Blanch performed the test, he would have found no breach. He added that "not charted, not done" is a term used in the legal community that doctors use as a teaching tool for the premise that if it is not recorded, "people are going to assume that you didn't do it." Another of Blanch's expert witnesses testified that the phrase is an axiom or admonition used to train physicians about the importance of documen-

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—Kernion T. Schafer, CPA

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tation and that it is not related to whether testing was actually done.

The Royals called in rebuttal an expert witness in forensic pathology who testified that if, at the time of the emergency room visit, the pulmonary emboli that caused Mrs. Royal's death were in the same condition as they appeared at the time of autopsy, the pulse oximetry results would probably have been abnormal. He also testified that he was trained as a physician to document all significant medical information. He stated that while he was unwilling to say that the testing was not done simply because it was not recorded, before he could accept that it was done but not charted, "he would have to be shown 'some other good evidence to state that it in fact was'" done.

The hospital objected to additional questioning of the pathologist to whether "not charted, not done" was the standard of care. The objection was sustained, and the Royals proffered the testimony that it was, in fact, the standard to which healthcare providers adhere.

On appeal from the trial court's judgment for the defendant, the Royals argued that the hospital should not have been allowed to raise the "done but not charted" defense at trial as it was not considered by the medical-review panel. The appellate court noted that it was prevented from reviewing the unintroduced panel submission, and Blanch testified that he had run the test. Thus, the court concluded that because the Royals failed to raise as error on appeal the exclusion of the pathologist's proffered testimony that "not charted, not done" is "a standard by which healthcare providers conduct themselves," it was unable to say that the lower court's finding that the test had been run was clearly wrong. The court added, "Moreover, we decline to interpret [the failure to chart] as absolutely conclusive that the testing was not done."

Recent Legislation

The amendments to La. R.S. 40:1231.8(A)(2)(b) and 1237.2(A)(2)(b) retain existing law and provide further clarification that a request for panel review, when sent to the Division of Administration, is:

> (aa) Sent, if the request is electronically sent by facsimile transmission or other authorized means, as provided by R.S. 9:2615(A), to the division of administration.
>
> (bb) Mailed, if the request is delivered by certified or registered mail to the division of administration.
>
> (cc) Received, if the request is delivered by any means other than as provided by Subitem (aa) or (bb) of this Item.

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"I worked with the Pro Bono Project before going to law school. That job allowed me to work with some amazing volunteers who gave their time to help people who could not afford legal representation. I was inspired by those professionals to pursue a law degree, and I try to give back now as a way to honor those who volunteered their time and experience in service to others."

Elizabeth S. Meneray, Attorney at Law
Meneray Family Law, LLC • New Orleans, LA

Prescription: Each Claim for Refund Stands on Its Own

Cajun Indus., L.L.C. v. Sec'y Dep't of Revenue, No. 9898D (La. Bd. Tax App. 4/12/17).

Cajun Industries, L.L.C., and Cajun Construction, Inc. (collectively, Cajun) appealed to the Board of Tax Appeals the Louisiana Department of Revenue's denial of a sales-tax refund request in the amount of $1,695,801.92 for the period of 1/1/10 to 1/31/11 (Cajun II). The Department denied the requested refund because it was not timely filed as required by La. R.S. 47:1623. Cajun's refund claim was mailed to the Department on April 28, 2016. The claim was not timely and was clearly prescribed in its face. The only question was whether Cajun had fulfilled the burden of establishing the prescriptive period was interrupted or suspended as provided by La. R.S. 47:1623.

Cajun had previously filed with the Department a claim involving a similar sales-tax issue for the same period but involving other transactions. That other claim was denied and appealed to the Board (Cajun I).

Taxpayers claimed that the refund requested in Cajun II is for similar but distinct transactions from those in Cajun I, but that it had been left out of the calculation and supporting schedules of Cajun's request for the Cajun I refund. Cajun I's refund request was presented to the Department on Department of Revenue Form R-20-127 (2/11). That form asked for the total amount of tax paid for the period; Cajun's answer was $2,442,843.53. The form asked for the amount of tax requested to be refunded; Cajun's answer was $2,442,843.53.

The Board reasoned:

> Refund claims are not made for time periods but for transactions that make up the claim. In the present case, those transactions were identified to the Department and a specific dollar amount was listed. This is not the case of a potential clerical error on a form; the transactions in dispute in the prior claim are distinct from the transactions involving the later claim.

The Board held Cajun II must stand on its own, and there was no statutory basis for the argument that prescription had been suspended and interrupted. The Cajun II claim was held to be untimely and, in fact, prescribed.

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Different Valuation Approaches for Affordable Rental Housing Projects

Williams v. Opportunity Homes Ltd. P'ship, 16-1185 (La. App. 4 Cir. 5/10/17), 220 So.3d 188.

Opportunity Homes Limited Partnership operates a scattered-site, low-income affordable rental housing development composed of 32 separate single and double houses located throughout Orleans Parish. These properties are all interconnected through a Tax Credit Regulatory Agreement and are qualified for Low Income Housing Tax Credits (LIHTCs) under IRS Code § 42 because the rent is capped at 60 percent of the area median income. Opportunity Homes challenged its *ad valorem* tax assessments on the grounds that Erroll Williams, the parish assessor, failed to follow the duly promulgated rules of the Louisiana Tax Commission that recommended use of the income approach in assessing affordable rental-housing properties and instead used a purported "market" approach that relied on sales and averages of market rate properties rather than actual comparison properties with similar rent restrictions and transfer limitations. The Commission ruled in favor of Opportunity Homes, and the assessor appealed to the Orleans Parish Civil District Court, which affirmed. The assessor then appealed to the 4th Circuit Court of Appeal.

The assessor first argued that the Commission exceeded its statutory authority in limiting the assessment methodology to only the income approach. An earlier panel of the 4th Circuit approved the use of only the income approach (*see, Williams v. The Muses Ltd. I*, 16-0250 (La. App. 4 Cir. 10/19/16), 203 So.3d 558); nevertheless, this panel found that the Commission's rule was only a recommendation and that the assessor was authorized to use any of the three statutorily approved assessment methodologies to determine fair-market value.

Next, the assessor contended that use of the market approach was required to satisfy the constitutional requirement of uniformity of assessment. The assessor stated that, while he ordinarily assessed multi-unit properties with more than 10 units under the income approach, he assessed single and double units under the market approach. Opportunity Homes responded that, although the units were not under a single roof, they were all part of a single affordable-housing development subject to a single rent-capping TCRA, and thus should be assessed like other multi-unit properties in Orleans Parish.

The court agreed with the assessor, finding that focusing on the characterization of the housing as affordable or not would result in different fair-market values for single or double unit homes based on their designation, resulting in similarly situated properties being taxed differently. Accordingly, the court reinstated the assessor's values.

The Commission has proposed revisions to its rules regarding assessment of affordable-rental housing in response to this case.

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CHAIR'S MESSAGE

Tips for Establishing Your Own Practice

By Bradley J. Tate

It is no secret that many young lawyers have difficult times finding jobs or establishing their own solo practices. I have watched many friends and colleagues struggle with both of those issues since completing law school almost 10 years ago. Some have found jobs outside of the practice of law because of difficulties in the job market, while others struggled with going out on their own and eventually went on a different path. Conversely, I have seen others establish new practices and flourish with sustainable, growing practices.

While the job market can be a tough place, I can offer some tips for those of you who are establishing your own practices.

Bradley J. Tate

I work with small businesses on a daily basis and here are the tips I believe can be beneficial to each of you who are out on your own.

Find a mentor. An easy way to do that for some young lawyers is the Transition into Practice (TIP) Program offered by the Louisiana State Bar Association (LSBA), *www.lsba.org/mentoring*. For those who do not qualify for the TIP Program, seek out a mentor in your community. Those of us on the Young Lawyers Division Council would be more than happy to help you find someone to offer guidance in establishing your practice.

Understand the business side of your practice. A law firm is a business and oftentimes new attorneys are not experienced in the operation of a business. There are issues from office equipment to staff to bills and collections that can be overwhelming on top of the law practice. Many colleges and universities offer continuing education classes that can help guide you through some of these issues.

Consult a tax professional. Establishing a new business has many pitfalls and understanding the tax implications are very important. Failure to understand proper tax elections, accounts and deductions can add hefty tax bills onto a newly established practice. The tax compliance obligations, including income tax, occupational taxes, withholding taxes and property taxes, should all be considered.

In addition to these tips, the LSBA and your local bar associations offer many ways to gain experience and clients. Many of the local bar associations have client referral services that can help you find new clients. Through the LSBA, there are many ways to gain experience including programs like Lawyers in Libraries. Taking on a pro bono case can also be a great way to gain experience. The LSBA's Access to Justice Program offers many ways to become involved in pro bono and reduced fee cases.

The Young Lawyers Division will have many opportunities for you to be involved in our activities this spring. Our annual Louisiana64 will take place in January. Several Wills for Heroes events will be conducted. Our annual High School Mock Trial competition will begin. Stay tuned to our social media for ways to participate.

YOUNG LAWYERS SPOTLIGHT

Treneisha Jackson Hill
Shreveport

Treneisha Jackson Hill

The Louisiana State Bar Association's Young Lawyers Division Council is spotlighting Shreveport attorney Treneisha Jackson Hill.

Hill has prosecuted more than 1,000 cases in five years at the Caddo Parish District Attorney's Office and has tried more than 30 jury trials. She is a native of Shreveport and graduated from Huntington High School. She began her college career at Louisiana State University in Baton Rouge, where she received her BA degree in sociology with a concentration in criminology. For her first year in college, she studied forensic science and thought she wanted to do crime investigations. But now, she says, she is sure she would have always wondered "what if" if she had not become a lawyer. She received her JD degree from Southern University Law Center (SULC). While in law school, she was a member of the SULC Moot Court Board, an intern with the Louisiana 2nd Circuit Court of Appeal and an extern with the East Baton Rouge Parish District Attorney's Office.

Following law school graduation, she returned to Shreveport and began working as a research attorney for Judge John Mosely, Jr. and Judge Ramon Lafitte. In 2012, she accepted a position with the Caddo Parish District Attorney's Office, where she currently works as felony assistant prosecuting violent offenses and sex crimes.

Hill is a self-described music junkie — she occasionally turns on mellow crooners like Sam Smith or Ed Sheeran at the office — who is currently trying to decide whether she wants to learn to play the piano or guitar. In her community, she works as a teen mentor for Volunteers for Youth Justice and is a member of Delta Sigma Theta Sorority, Inc.

She enjoys traveling, spending time with her family and friends, and serving the people of Caddo Parish. She is married to attorney Kerry Hill and they have one child.

UPCOMING EVENTS

Check the Young Lawyers Division website at *www.lsba.org/YLD* for the most up-to-date listing of upcoming events. Do you have an event to add to the list? Email YLD Secretary, Scott Sternberg, at scott@snw.law.

▶ Friday, October 13, 2017
Federal Bar Association • "Lawyers Who Lunch"

An opportunity to meet members of the bench and bar in a casual setting.

▶ Monday, October 16, 2017
LSBA • Hanging Out Your Own Shingle CLE
New Orleans Marriott Hotel, 555 Canal St., New Orleans

This add-on option to the Bridging the Gap program is specially designed for Young Lawyers and will provide practical "need to know" information about starting a solo practice. Find out more at *www.lsba.org/yld* or *www.lsba.org/cle.*

▶ Tuesday, October 17-18, 2017
LSBA • 57th Bi-Annual Bridging the Gap
New Orleans Marriott Hotel, 500 Canal St., New Orleans

Bridging the Gap was created to acquaint recent law school graduates with many of the practical aspects of a law practice and to afford newly admitted active members of the Louisiana Bar the opportunity to obtain their mandatory continuing legal education. Find out more at *www.lsba.org/yld* or *www.lsba.org/cle.*

▶ Friday, October 27, 2017
Baton Rouge Bar Association • "Belly Up with the Bar"
Live Oak Arabian Stables, 6300 Jefferson Hwy., Baton Rouge

This fundraiser is an annual brew fest and cook-off competition featuring live music and fun activities for the kids. The event is sponsored by the YLS of the BRBA.

▶ Saturday, October 28, 2017
Southwest Louisiana Bar Association Young Lawyer Section • OctoBARfest

This fundraiser pits teams from local law offices around the region for the title of best gumbo or chili.

▶ Wednesday, November 8, 2017
Federal Bar Association • Federal Judges Reception
Windsor Court Hotel, 300 Gravier St., New Orleans

The YLD of the FBA invites you to this reception, which is an opportunity to meet members of the bench and bar.

▶ Thursday, November 9, 2017
Baton Rouge Bar Association • YLS Cocktails with the Court
Manship Theatre, 100 Lafayette St, Baton Rouge

This reception recognizes judges and law clerks from Baton Rouge and the surrounding area courts.

Louisiana Center for LAW & CIVIC Education

LEGACY PROJECT

The Louisiana Center for Law and Civic Education (LCLCE) partnered with Arkansas educators to organize the James Madison Legacy Project, a teachers' workshop for civics education funded by the U.S. Department of Education through the Supporting Effective Educator Development Program. Louisiana teachers traveled to the University of Central Arkansas for a six-day teachers' workshop on the We the People civics curriculum. LCLCE Director Peggy V. Cotogno and two Louisiana We the People teaching mentors, Chris Totaro and Jamie Staub, also attended the program. Teachers and mentors are gathered at the Clinton Presidential Library in Little Rock, Ark.

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

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

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

JUDICIAL Notes

By David Rigamer, Louisiana Supreme Court | NEW JUDGES... RETIREMENTS

New Judges

Stephen G. Dean

Stephen G. Dean was elected judge, 5th Judicial District Court, Division C. He earned his BS degree in 1977 from Northeast Louisiana University and his JD degree in 1981 from Louisiana State University Paul M. Hebert Law Center. Prior to his election, he practiced law for 35 years and served as assistant district attorney for 15 years. Judge Dean is married to Jane Brown Dean and they are the parents of three children.

Rachael Denise Johnson

Rachael Denise Johnson was elected judge, Orleans Parish Civil District Court, Division B. She earned her bachelor's degree in 1998 from Spelman College, her master's degree in social work in 2000 from Smith College and her JD degree in 2005 from Tulane University Law School. She began her legal career as law clerk for Orleans Parish Civil District Court Judge Nadine M. Ramsey in 2005. She served as city attorney for the City of Riviera Beach, Fla., and, most recently, as senior staff attorney with the Law Offices of Julie E. Vaicius, which serves as the staff counsel in Louisiana for Hartford Insurance and its subsidiaries. She is a former president of the Greater New Orleans Chapter of the Louis A. Martinet Legal Society, Inc., and served as a member of the Louisiana State Bar Association's Board of Governors. Judge Johnson was sworn into office by her mother, Louisiana Supreme Court Chief Justice Bernette Joshua Johnson.

Appointment

► Milton Donegan, Jr. was reappointed, by order of the Louisiana Supreme Court, to the Louisiana Board of Examiners of Certified Shorthand Reporters for a term of office ending July 1, 2020.

Retirements

► 4th Circuit Court of Appeal Judge Madeleine M. Landrieu retired effective June 30. After attending Georgetown University, she earned her BA degree in 1984 from Louisiana State University and her JD degree in 1987 from Loyola University College of Law. While at Loyola, she was a member of the Moot Court Board and the *Loyola Law Review*. She was in private practice from 1987 until her election to the Orleans Parish Civil District Court bench in 2001 and was elected to the 4th Circuit in 2011. She is a former board member and chair of the New Orleans Pro Bono Project. She also served on the Board of Governors of the Louisiana Trial Lawyers Association. She now serves as dean of Loyola University College of Law.

► 18th Judicial District Court Judge John Robin Free retired effective July 12. He earned his BS degree in 1983 from Louisiana State University and his JD degree in 1989 from Southern University Law Center. He was elected to the bench in 1996. Prior to his judicial service, he served as an assistant district attorney for the 18th JDC, as city prosecutor for Port Allen City Court and as the attorney for the West Baton Rouge Parish Council.

► Baton Rouge City Court Judge Suzan S. Ponder retired effective June 30. She earned her BA degree from Louisiana State University and her JD degree from Southern University Law Center. She was elected to the bench in 1993. Prior to her election, she practiced law for 10 years, five as an assistant district attorney and five in private practice. As a judge, she served as president of the Louisiana City Judges Association, on the Judiciary Commission's Rules Revision Committee, and as a delegate to the National Conference on Assisting *Pro Se* Litigants.

Deaths

► Retired 1st Circuit Court of Appeal Judge Ernest (Ernie) Gourrier Drake, Jr., 69, died June 7. He earned his BS degree in 1971 from Southeastern Louisiana University and his JD degree in 1974 from Tulane University Law School. He was elected to the 21st Judicial District Court in 1998. In 2013, he was elected to the 1st Circuit Court of Appeal where he served until his retirement in 2016.

► Retired 2nd Circuit Court of Appeal Judge Fred C. Sexton, Jr., 78, died July 9. He earned his BA and JD degrees in 1961 and 1962, respectively, from Tulane University. Following law school, he entered the U.S. Army where he served as first lieutenant. After his active duty concluded, he joined the Army Reserves, obtaining the rank of captain. He entered private practice in Shreveport in 1964. He served as a Caddo Parish assistant district attorney from 1968 until his election to the 1st Judicial District Court in 1974. He was elected to the 2nd Circuit Court of Appeal in 1982 and served there until his retirement in 1996. In retirement, Judge Sexton served by appointment on many courts throughout the state, including the Louisiana Supreme Court.

► Retired Morgan City Court Judge Robert (Bob) S. Robertson, Sr., 83, died July 24. He earned his bachelor's degree in 1956 from Elon College in North Carolina and his law degree in 1961 from Tulane University Law School. He was elected to Morgan City Court in 1976 and served there until his retirement in 1996.

PEOPLE

LAWYERS ON THE MOVE

Baldwin Haspel Burke & Mayer, L.L.C., in New Orleans announces that S. Beaux Jones has joined the firm as an attorney and George A. (Jack) Casanova, Jr. has joined the firm as an associate.

Breazeale, Sachse & Wilson, L.L.P., announces that Tracy Averett Morganti has joined the firm as a partner in the Baton Rouge office.

Chaffe McCall, L.L.P., announces that Donald B. Ensenat has joined the firm's New Orleans and Houston, Texas, offices as senior counsel. Also, partners Brent A. Talbot and Ivan M. Rodriguez have been re-elected to the management committee.

Christus Health announces that Traci S. Thompson has joined its Advocacy and Public Policy team, headquartered in Baton Rouge.

Courington, Kiefer & Sommers, L.L.C., announces that Robert L. Keller has joined the firm's New Orleans office as an associate.

Gordon, Arata, Montgomery, Barnett, McCollam, Duplantis & Eagan, L.L.C., announces that Edward (Ted) L. Fenasci has been elected as a member in the firm's New Orleans office.

Gregorio, Chafin, Johnson, Poolson & Tabor, L.L.C., announces that Charles E. Tabor has joined the firm as a member in the Shreveport office. Daniel J. Poolson, Jr. has joined the firm as a member in the new office at Ste. 200, 3000 W. Esplanade Ave., Metairie, LA 70002; phone (504)475-7100; fax (504)475-7101.

King, Krebs & Jurgens, P.L.L.C., in New Orleans announces that Matthew D. Fraser has joined the firm as an associate.

The Kullman Firm announces that **Stephen H. Clement** and **Allison A. Fish** have joined the firm as associates, **Patricia A. Bollman** has joined the firm as a shareholder and **MaryJo L. Roberts** has joined the firm as of counsel, all in the New Orleans office. Also, **Heather D. Hearne** has joined the firm as of counsel in the Baton Rouge office.

Phelps Dunbar, L.L.P., announces that Nathan G. Huntwork has been elected to partner in the New Orleans office, and W. Bradley Kline has been elected to partner in the Baton Rouge office. J. Walter Green has joined the firm as a partner in the Baton Rouge office. Elevated to counsel were Jessica C. Huffman in the Baton Rouge office and Douglas M. Kleeman and Tessa P. Vorhaben in the New Orleans office. Also, Taylor J. Boudreaux, Taylor J. Crousillac, Leah Neupert Bullock and Gregory J. Reda have joined the firm as associates in the Baton Rouge office. Michael N. Bardwell, Catherine L. Cranfield, Lillian M. Grappe and Justin C. Warner have joined the firm as associates in the New Orleans office.

Continued next page


Richard J. Arsenault


Patricia A. Bollman


Sean P. Brady


Stephen H. Clement


J. Gregg Collins


Blake T. Couvillion


Lillian E. Eyrich


Allison A. Fish


Harold J. Flanagan


Thomas M. Flanagan


Heather D. Hearne


Robert A. Kutcher

Rabalais & Hebert, L.L.C., of Lafayette announces that **Blake T. Couvillion** has joined the firm as an associate.

Stone Pigman Walther Wittmann, L.L.C., announces that David C. Rieveschl has joined the firm as special counsel in the New Orleans office.

Taylor, Porter, Brooks & Phillips, L.L.P., in Baton Rouge announces that Barrye Panepinto Miyagi has joined the firm as a partner.

Wagar Richard Kutcher Tygier & Luminais, L.L.P., in Metairie announces that Andrew M. Maestri, Jade C. McKeough and Jenna S. Ard have been named of counsel to the firm. Also, **Deani B. Milano** has joined the firm as an associate.

Ware Immigration announces that Erin T. Hebert and Laura N. Buck have joined the firm's Metairie office as associates.

NEWSMAKERS

Aaron Z. Ahlquist, an attorney in the New Orleans firm of Herman, Herman & Katz, L.L.C., was appointed as a member of the American Association for Justice Public Education Committee.

Richard J. Arsenault, a partner in the Alexandria firm of Neblett, Beard & Arsenault, will chair the 17th annual Louisiana State Bar Association's Class Action/Complex Litigation Symposium in November. He also was recognized as one of *America's Top 100 Attorneys*.

Danielle L. Borel, an associate in the Baton Rouge office of Breazeale, Sachse & Wilson, L.L.P., was appointed vice chair of the American Bar Association Health Law Section's Distance Learning Committee. Also, she was appointed to three positions within the ABA's Young Lawyers Division — Health Law Committee chair, Membership Board, and liaison to the Health Law Section (membership).

Jaimmé A. Collins, a partner in the New Orleans office of Adams and Reese, L.L.P., was invited to join the International Association of Defense Counsel.

Clay J. Countryman, an associate partner in the Baton Rouge office of Breazeale, Sachse & Wilson, L.L.P., was appointed vice chair of the American Bar Association Health Law Section's Health Reform Committee. He also was appointed chair of the ABA Health Law Section's Medical Legal Partnerships Committee and is a member of the ABA Health Law Section's Governing Council.

Elia Diaz-Yaeger, a shareholder in the New Orleans office of Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, is the recipient of the *Chambers USA* 2017 Women in Law Future Leader Gender Diversity Award.

Emily Black Grey, a partner in the Baton Rouge office of Breazeale, Sachse & Wilson, L.L.P., was reappointed to a third term as vice chair of the American Health Lawyers Association's Hospitals and Health Systems Practice Group.

Steven J. Levine, a partner in the Baton Rouge office of Phelps Dunbar, L.L.P., was elected as a Fellow of the American College of Environmental Lawyers.

Ryan M. McCabe, a partner at Steeg Law Firm, L.L.C., in New Orleans, was appointed the 2017-18 vice chair of the American Bar Association Tort Trial & Practice Section's Title Insurance Litigation Committee.

East Baton Rouge Parish District Attorney Hillar C. Moore III was honored at the STAR (Sexual Trauma Awareness and Response) third annual Champions of Change breakfast in April.

E. Fredrick Preis, Jr., a partner in the New Orleans office of Breazeale, Sachse & Wilson, L.L.P., was named to the LeadingAge Nursing Home Advisory Group and the LeadingAge Compliance and Business Ethics Advisory Group.

Elizabeth Haecker Ryan, a director in the New Orleans office of Coats Rose, P.C., was elected as vice chair of the American Bar Association's Commercial Transportation Litigation General Committee for the 2017-18 term.

James E.A. Slaton, a member in the Baton Rouge office of Stone Pigman Walther Wittmann, L.L.C., was elected to the American College of Real Estate Lawyers as a Class of 2017 Fellow.


Bradley J. Luminais


David A. Martinez


Ryan M. McCabe


Deani B. Milano

Continued next page


Randy Opotowsky


Thomas M. Richard


MaryJo L. Roberts


Robert M. Steeg


Charles L. Stern, Jr.


Nelson W. (Chip) Wagar III

Assistant U.S. Attorneys John Luke Walker and Robert C. Abendroth of the U.S. Attorneys' Office in the Western District of Louisiana were two of 179 members of the Department of Justice recognized at the 33rd Director's Awards Ceremony in Washington, D.C., in June. They were recognized for their prosecution of *U.S. v. Robert Williams, et al.*

PUBLICATIONS

***Best Lawyers in America* 2017**

Gregg Collins Mediation Arbitration (New Orleans): **J. Gregg Collins**.

Deutsch Kerrigan, L.L.P. (New Orleans): Nancy J. Marshall and Kelly E. Theard.

***Best Lawyers in America* 2018**

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

Flanagan Partners, L.L.P. (New Orleans): **Sean P. Brady**, **Harold J. Flanagan** and **Thomas M. Flanagan**.

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

Wagar Richard Kutcher Tygier & Luminais, L.L.P. (Metairie): **Robert A. Kutcher**, Lawyer of the Year.

***Chambers USA* 2017**

Baldwin Haspel Burke & Mayer, L.L.C. (New Orleans): Leon H. Rittenberg III.

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

Lugenbuhl, Wheaton, Peck, Rankin & Hubbard (New Orleans): Ashley L. Belleau, Benjamin W. Kadden and Stewart F. Peck.

Taylor, Porter, Brooks & Phillips, L.L.P. (Baton Rouge): Michael A. Crawford, Anne J. Crochet, Vicki M. Crochet, Paul O. Dicharry, Brett P. Furr, Harry J. (Skip) Philips, Jr., Patrick D. Seiter and Fredrick R. Tulley.

***Louisiana Super Lawyers* 2018**

Wagar Richard Kutcher Tygier & Luminais, L.L.P. (Metairie): **Robert A. Kutcher**, **Bradley J. Luminais**, **Thomas M. Richard** and **Nelson W. (Chip) Wagar III**.

Benchmark Litigation

Barrasso Usdin Kupperman Freeman & Sarver, L.L.C. (New Orleans): Judy Y. Barrasso, Michael A. Balascio, Kristin L. Beckman, Jamie L. Berger, David N. Luder and Stephen L. Miles.

People Deadlines & Notes

Deadlines for submitting People announcements (and photos):

Publication	Deadline
Feb./March 2018	Dec. 4, 2017
April/May 2018	Feb. 2, 2018
June/July 2018	April 2, 2018

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

UPDATE

Judiciary Commission Names New Member, New Counsel

Baton Rouge attorney Edward J. Walters, Jr. has been appointed by the Conference of Court of Appeal Judges as an attorney member of the Judiciary Commission of Louisiana for a four-year term. Also, New Orleans attorney Michelle A. Beaty was appointed as deputy judicial administrator/special counsel for the Judiciary Commission.

Walters, a partner in the Baton Rouge firm of Walters, Papillion, Thomas, Cullens, L.L.C., has practiced law for more than 40 years and is board certified in civil trial advocacy by the National Board of Trial Advocacy. He is a Fellow of the American College of Trial Lawyers and the International Academy of Trial Lawyers. He also has served as adjunct professor of law at Louisiana State University Paul M. Hebert Law Center for more than 25 years. He serves on the Louisiana State Bar Association's Board of Governors, the Rules of Professional Conduct Committee, the *Louisiana Bar Journal* Editorial Board and the Mandatory Continuing Legal Education Committee. He is a graduate of Louisiana State University (BS, 1969) and the LSU Law Center (JD, 1975) where he is a member of its Hall of Fame and was chosen as the 2015 Distinguished Alumnus.

Michelle A. Beaty

Edward J. Walters, Jr.

Beaty earned her BA degree in political science in 1991 from Duke University and her JD degree in 1994 from Tulane University Law School. She served as Orleans Parish assistant district attorney from 1996-98 and 2003-08. In 2008, she joined the law firm of Blue Williams, L.L.P., as an associate. In 2014, she was appointed as an assistant special counsel for the Judiciary Commission. She rejoined Blue Williams in 2015 as of counsel and was named partner in 2016. She is a member of DRI and serves as a board member of the Louisiana Association of Defense Counsel. She is a member of the Louisiana State Bar Association's Committee on the Profession.

Lafayette attorney Warren A. Perrin, left, executive officer of the Louisiana State Bar Association's Francophone Section, presented the 2017 John A. "T-Jean" Hernandez III Memorial Award for Francophone Leadership to Louisiana State University Paul M. Hebert Law Center Professor Alain A. Levasseur for his lifetime of work promoting the civil law in Louisiana and the world.

Chief Justice Recognized at Child Law Conference

Louisiana Supreme Court Chief Justice Bernette Joshua Johnson was recognized at the 40th annual conference of the National Association of Counsel for Children, conducted in New Orleans in August. She was honored for her participation on the Louisiana Child Protection Representation Commission.

The Commission was established in 2014, upon the recommendation of the legislatively created Task Force on Legal Representation in Child Protection Cases, to oversee the uniform statewide system of representation created as a result of 11 years of Task Force efforts. In addition to Chief Justice Johnson, Commission members include Department of Children and Family Services Secretary Marketa Walters; Louisiana State Bar Association President Dona Kay Renegar; Judge K. Anastasia Wiley, president of the Louisiana Council of Juvenile and Family Court Judges; Sen. Rick Ward, chair of Senate Committee Judiciary A; Rep. Raymond E. Garofalo, Jr., chair of the House Committee on Civil Law and Procedure; Rep. Barbara Carpenter, Legislative Women's Caucus; Becky J. Hollen, Louisiana District Attorney Association; and Richard M. Pittman, Louisiana Public Defender Board.

LOCAL/SPECIALTY BARS

The Baton Rouge Bar Association (BRBA) hosted its annual Bench Bar Conference in July in Destin, Fla. Attending, from left, Edmund J. Giering IV, Baton Rouge Area Foundation; attorney D. Carson Marcantel; and Shelton Dennis Blunt, BRBA treasurer.

Members of the New Orleans Bar Association's Public Service Committee help serve lunch twice a month to the needy and homeless at Ozanam Inn, a homeless shelter in downtown New Orleans. Volunteering at a recent meal service were, from left, Christopher D. Wilson, Lara E. White, Kerry A. Murphy, Rachel M. Scarafia, Lauren E. Godshall, Christopher K. Ralston and Kimberly R. Silas.

The Lafayette Bar Association and its Young Lawyers Section partnered to host the July 20 Summer Social. Traditionally, Summer Socials are an opportunity to meet the new summer law clerks. During the social, Louisiana State Bar Association's 2017-18 President Dona Kay Renegar from Lafayette was recognized. With her is Travis J. Broussard, president of the Lafayette Bar Association's Young Lawyers Section.

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LOUISIANA BAR FOUNDATION

LBF Unveils New Grant Application System

New this year, all Louisiana Bar Foundation (LBF) grant applications will be submitted online through a new grants management system. The new system is user-friendly and will make it easier to submit applications, populate and summarize data, and provide for the submission of electronic reports.

The LBF grant application for 2018-19 funding is currently available online. Deadline for submitting grant applications is Dec. 1, 2017.

The Loan Repayment Assistance Program (LRAP) application for 2018-19 funding also is currently available online. Deadline for submitting LRAP applications is Feb. 9, 2018.

For more information, contact Renee LeBoeuf at (504)561-1046 or email renee@raisingthebar.org.

Grant applications are available online at: *www.raisingthebar.org*.

Save the Date! Louisiana Bar Foundation 32nd Annual Fellows Gala

Friday, April 20, 2018
Hyatt Regency New Orleans

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

SEND YOUR NEWS!

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

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

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

President's Message

October is Domestic Violence Awareness Month

By President Valerie Briggs Bargas

Domestic violence is the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior as part of a systematic pattern of power and control perpetrated by one intimate partner against another. It includes physical violence, sexual violence, threats and emotional abuse.

October is Domestic Violence Awareness Month. The National Coalition Against Domestic Violence recently reported that one in three women in the United States has experienced some form of physical violence by an intimate partner. This could be your mother, your sister, your daughter, your friend. Domestic violence cuts across all socioeconomic lines, affecting rich, poor, black, white, young and old.

Did you know?

► Every nine seconds, a woman is battered in the United States.[1]

► Fifty-seven percent of homeless families identified domestic violence as a primary cause of homelessness.[2]

► About four in 10 female victims of intimate partner violence lived in households with children under age 12.[3]

► Forty to 60 percent of men who abuse women also abuse children.[4]

► Each year, an estimated 3.3 million children are exposed to violence by family members against their mothers or female caretakers.[5]

► Boys who witness domestic violence in their own home are three times more likely to become batterers.[6]

Valerie Briggs Bargas

► Forty percent of teenage girls age 14 to 17 know someone their age who has been hit or beaten by a boyfriend.[7]

► Louisiana is ranked second highest in the nation for homicides related to domestic abuse. Also, 81 percent of female homicides in Louisiana are committed by a partner or ex-partner.[8]

► There has been at least one domestic homicide in every parish in Louisiana.[9]

► More than 5,000 adult women per year living in Louisiana will experience domestic violence.[10]

The Louisiana Bar Foundation (LBF) is dedicated to helping protect families and empower victims so they can feel safe. According to 2015 statistics provided by our grantees, LBF funding was able to help more than 10,118 women and 5,454 children in Louisiana with the safety they needed from an abuser.

I am proud to report that this year the LBF awarded more than $499,602 in grants to domestic violence agencies across the state. These agencies provide legal services for women and children to help them feel safe again. The essential services provided by these agencies include a 24-hour crisis line; shelter for abused spouses and their children; legal services; education concerning domestic and dating violence; and establishing collaborative relationships with law enforcement, judges, clerks of court and prosecutors.

As lawyers, we have an opportunity to help victims gain access to the legal system regardless of financial situation and to help break the cycle of violence in their family. We can do this by supporting the LBF.

The LBF proudly supports the following domestic violence programs — Beauregard Community Concerns, Inc.; Catholic Charities Archdiocese of New Orleans/Project S.A.V.E.; Chez Hope, Inc.; D.A.R.T. of Lincoln; Faith House, Inc.; Faith House, Inc./Family Justice Center of Central Louisiana; Jeff Davis Communities Against Domestic Abuse; Metro Centers for Community Advocacy; Oasis; Project Celebration, Inc.; Safe Harbor, Inc.; Southeast Spouse Abuse Program; St. Bernard Battered Women's Program; The Haven, Inc.; and The Wellspring Alliance for Families, Inc.

FOOTNOTES

1. AMA, 1998, Georgia Department of Human Resources, 1999.
2. The United States Conference of Mayors, A Status Report on Hunger and Homelessness in America's Cities: 1999, December 1999, p. 94.
3. Reprinted and adapted from "News Flash" (*http://www.fvpf.org/newsflash*), an online newsletter of the Family Violence Prevention Fund.
4. American Psychl. Ass'n, Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family (1996), p. 80.
5. American Psychl. Ass'n, Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family (1996), p. 11.
6. M.A. Straus, R.J. Gelles and S. Steinmetz, *Behind Closed Doors*. Doubleday, Anchor, 1980.
7. Children Now/Kaiser Permanente Poll, December 1995.
8. Violence Policy Center. When Men Murder Women: An Analysis of 2014 Homicide Data (September 2016).
9. Louisiana Coalition Against Domestic Violence. 2015 Legislative Guide. *http://lcadv.org/wp-content/uploads/2015-LCADV-Legislative-Guide2.pdf.*
10. Tjaden and Thoenne, National Institute of Justice and the Centers of Disease Control and Prevention Survey, 2000. 4. M.C. Black, K.C. Basile, M.J. Breiding, S.G. Smith, M.L. Walters, M.T. Merrick, J. Chen and M. Stevens (2011). The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report. National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. Retrieved from*: http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.*

Louisiana Bar Foundation Announces New Fellows

The Louisiana Bar Foundation announces new Fellows:

Hon. Clare F. Jupiter	New Orleans
Kathryn A. Dufrene	Baton Rouge
Hon. Charles G. Fitzgerald	Lafayette
Katherine L. Hurst	Lafayette
Marla E. Mitchell	Thibodaux
Laura Tuggle	New Orleans

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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$1 per each additional word
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$60 per insertion for 50 words or less
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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 December issue of the Journal, all classified notices must be received with payment by Oct. 18, 2017. Check and ad copy should be sent to:
LOUISIANA BAR JOURNAL
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RESPONSES
To respond to a box number, please address your envelope to:
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c/o Louisiana State Bar Association
601 St. Charles Avenue
New Orleans, LA 70130

POSITIONS OFFERED

Lafayette healthcare defense firm interviewing for two positions: 1) Associate with three-seven years' litigation experience to handle medical malpractice defense files; trial work and travel required. 2) Associate with two-plus years' defense experience to handle medical malpractice defense files, or a background in nursing in lieu of legal experience. Competitive salary and benefits package. All inquiries will remain confidential. Send résumés to Hope.Marks@gachassin.com or mail Hope Marks, P.O. Box 80369, Lafayette, LA 70598.

Civil law attorney needed for Family Justice Center of Central Louisiana to represent victims of domestic violence in all related civil matters, *e.g.*, protective orders, divorce, custody and support. Salary $45,000; benefits (health and dental); 401(3)(b) with 3 percent match; malpractice insurance; new office/equipment/furniture/supplies. For more information, go to: *www.facebook.com/FJCCENLA*. Email résumé: pmansour@fjccenla.org.

Attorney wanted. Aggressive, successful, experienced plaintiff personal injury attorney with excellent winning jury trial record in Orleans Parish Civil District Court. All replies and résumés will remain strictly confidential. Send to C-Box 278.

Law office needs full-time paralegal. Draft pleadings, legal research, scheduling, court preparations. Submit résumé to: P.O. Box 3138, Houma, LA 70364.

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.

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*.

Texas counsel: Louisiana attorney licensed in Texas since 1992 available to handle Texas ancillary probate proceedings and serve as local litigation counsel. Assistance in transfer of oil and gas properties and valuations. Statewide coverage. Jack Wilhelm and Edward Wilhelm, 1703 West Ave., Austin, TX 78701, (512)236-8400, *www.wilhelmlaw.net.*

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South Florida counsel accepting referrals of personal injury claims in south Florida, including automobile, premises liability and industrial accidents. Licensed in both Louisiana (1979) and Florida (1991) with more than 35 years of experience. Contact Gary M. Hellman, Esq., Goldman & Hellman, Ste. 404, 8751 West Broward Blvd., Ft. Lauderdale, FL 33324, (954)356-0460, gary@goldmanandhellman.com.

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NOTICE

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

Notice is hereby given that Ali Zito Shields has filed a petition and has applied 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.

ANSWERS for puzzle on page 187.

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The Last WORD

PART 2: IF YOU ARE A PROFESSIONAL...

Here are 11 more things you should NOT say if you are a professional . . . and why. (The first 10 were published in the August/September 2017 *Louisiana Bar Journal*.)

1. At a hearing on a motion for summary judgment, the attorney for the defendant says, "My client has no liability and summary judgment should be granted," knowing that he has settled with the plaintiff for $10,000.

a. My word is my bond. I will never intentionally mislead the court or other counsel. I will not knowingly make statements of fact or law that are untrue.

b. See Code of Civil Procedure article 966(F) which states that, if the court finds a party not negligent or not at fault, that party may not be considered in any subsequent allocation of fault.

2. At a motion to quash a deposition subpoena: "I don't know why counsel is complaining. I sent him a notice of the deposition."

a. I will consult with the other counsel whenever the scheduling procedures are required and will be cooperative in scheduling discovery.

3. In court on confirming a default judgment: "I haven't contacted the opposing attorney to say that I was confirming this default."

a. I will never intentionally mislead other counsel.

b. I will conduct myself with a sense of fair play.

c. I will allow counsel a fair opportunity to respond.

4. At a motion to compel: "I emailed the opposing attorney asking to schedule a 10.1 conference, but he did not respond."

a. My word is my bond. I will never intentionally mislead the court.

b. I will consult with the other attorney whenever scheduling procedures are required.

c. I will not utilize any course of conduct for the purpose of harassment of any other counsel.

d. I will allow counsel a fair opportunity to respond.

5. After the court has signed the judgment and the opposing attorney is calling to object: "I forgot to tell you that the opposing attorney did not agree to the judgment."

a. I will never intentionally mislead the court.

b. I will allow counsel fair opportunity to respond.

c. I will conduct myself with a sense of fair play.

d. I will cooperate with the court to reduce the costs of litigation.

6. At a pre-trial conference: "I didn't bring my calendar. Can I call my office on your phone?"

a. I will be punctual and prepared for all court appearances.

7. At a hearing on a motion for summary judgment: "I want the plaintiff's opposition to the summary judgment stricken because it was filed only seven days prior to the hearing date."

a. I will allow counsel fair opportunity to respond and will grant reasonable requests for extensions of time.

b. I will cooperate with counsel and the court to reduce the costs of litigation.

8. Knowing that your client has been in the hospital since Friday, on the Tuesday morning of trial: "I need a continuance because my client is in the hospital and cannot be present in court."

a. I will consult with other counsel and will be cooperative in the handling of the entire course of any legal matter.

b. I will cooperate with counsel and the court to reduce the cost of litigation.

c. My word is my bond.

d. I will promptly notify the court of any likely problems.

9. At a motion to compel: "I want attorney's fees and costs," even though opposing attorney answered the interrogatories two weeks ago.

a. I will cooperate with counsel and the court to reduce the costs of litigation and will readily stipulate to all matters not in dispute.

b. I will not file or utilize any course of conduct for the purpose of harassment of any other counsel or party.

10. At a hearing on an exception or motion for summary judgment: "I didn't read the case but only read two head notes and my clerk's memo."

a. I will be prepared for all court appearances.

b. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities in any oral or written communication to the court.

c. I will never intentionally mislead the court or other counsel.

11. At a pre-trial conference: "Even though my client was at fault, I don't have authority to settle this case for policy limits of $25,000 even though the plaintiff has medical bills of $21,000. Please set this matter for trial."

a. I will not abuse or misuse the law and its procedures in the judicial process.

b. I will cooperate with counsel and the court to reduce the costs of litigation and will readily stipulate to all matters not in dispute.

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