LOUISIANA BAR
JOURNAL
October / November 2019 Volume 67, Number 3

Judy Perry Martinez
ABA President 2019-2020

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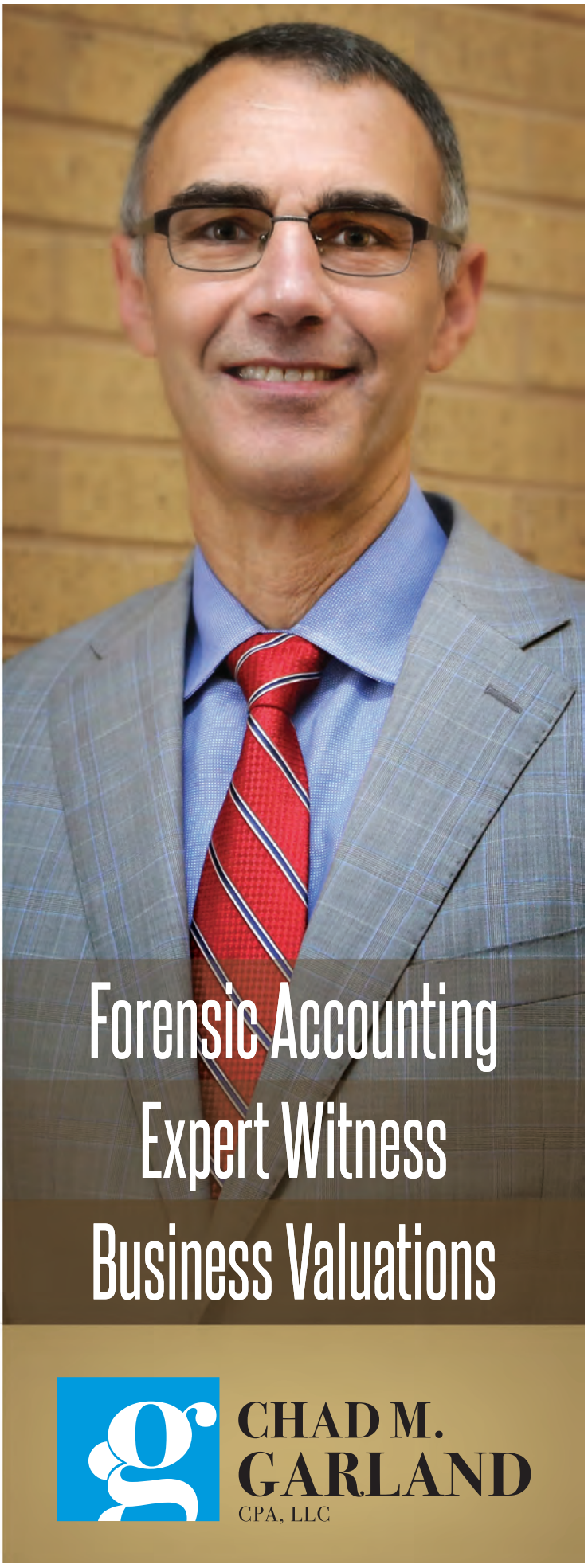

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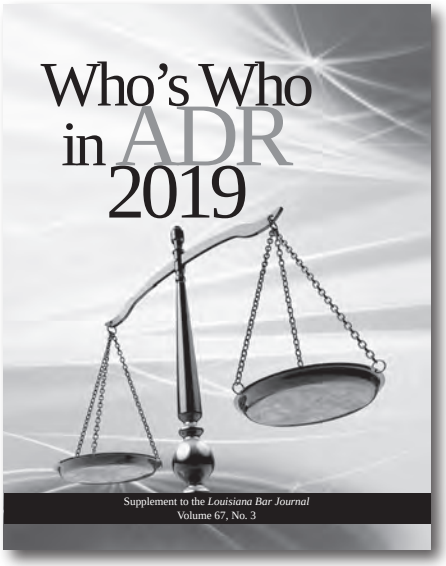
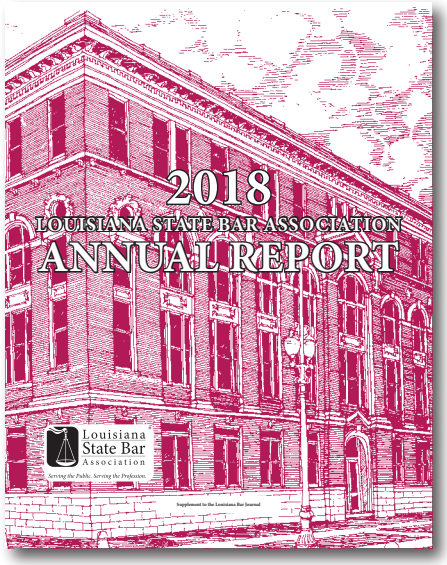


Who's Who in ADR 2019 Supplement mailed with this issue.



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The Red Mass and St. Thomas More Catholic Lawyers Association

By Patrick A. Talley, Jr.

Well, it is now fall. Although our state is not known for having colorful fall leaves, we do have the annual (and colorful) Red Mass in several cities, which celebrates the opening of Louisiana courts and the beginning of the new judicial year.

In New Orleans, the Red Mass is celebrated in St. Louis Cathedral on the first Monday of October. The Oct. 7 Mass was the 67th annual celebration. For those of you who have never attended the Red Mass in New Orleans, it is a beautiful and moving service. There is nothing quite like the beauty and pageantry of seeing the entire Supreme Court led by the Chief Justice march down the aisle in St. Louis Cathedral followed by dozens of robed judges from the courts of appeals, the district courts and the local courts, as well as many lawyers and other dignitaries, to celebrate the opening of courts and the new judicial year.

How and why do we have the Red Mass? First, a little history:

> The origin of the Red Mass is obscured by its antiquity. It is the Solemn Votive Mass of the Holy Spirit. (The word "votive" indicated that the Mass is offered for a special intention.) Celebrated generally at the beginning of the judicial year, the Red Mass is attended by judges, lawyers and officials of all faiths for the purpose of invoking God's blessing and guidance in the administration of justice. Its traditional name, the Red Mass, is derived from the color of the vestments the celebrants, con-celebrants, clergy and ministers wear, symbolizing the tongues of fire representing the Holy Spirit. Moreover, the robes of the attending judges were bright scarlet, thus providing an additional reason for the name "Red Mass."

During the 2017 Red Mass, Archbishop Gregory M. Aymond, left, with the Archdiocese of New Orleans, poses with Judge Raymond S. Steib, Jr., 24th Judicial District Court, next to the St. Thomas More Catholic Lawyers Association banner. *Photo by Darryl Schmitt Photography.*

The tradition of the Red Mass goes back many centuries in Rome, Paris and London. From long tradition, this ceremony has officially opened the judicial year of the Sacred Roman Rota, the Tribunal of the Holy See. During the reign of Louis IX, Saint Louis of France, La Sainte-Chapelle was designated as the chapel for the Red Mass. This magnificent edifice, erected in 1246, was used only once a year and only for celebration of the Red Mass. In England, the custom began in the Middle Ages and continued even during World War II, when judges and lawyers attended the Red Mass annually in Westminster Cathedral.

In the United States, the tradition was inaugurated in 1928 in New York City by the Guild of Catholic Lawyers. They celebrated the Votive Mass in old Saint Andrew's Church in the shadows of the towering State and Federal

Court buildings. The annual celebration of the Red Mass in the District of Columbia is attended by justices and judges of the highest courts in the land, by persons of all faiths and from all branches of government, and by foreign diplomats and other distinguished guests who pray for God's help in their roles as administrators of justice.[1]

The first Red Mass celebrated in Louisiana was offered in St. Louis Cathedral on Oct. 5, 1953, and this tradition has continued annually for 67 years. The Red Mass also is a longstanding celebration in other Louisiana cities.

Many Louisiana State Bar Association members may not know that the Red Mass in New Orleans is largely sponsored and serviced by fellow lawyers who comprise one of our unique specialty bars, the St. Thomas More Catholic Lawyers Association (CLA), a non-profit association of Catholic attorneys in the legal profession. The CLA works in conjunction with the Archbishop of New Orleans and the Bishops of Louisiana for the Red Mass and also sponsors the annual St. Thomas More Feast Day Mass and continuing legal education of interest to Catholic attorneys.

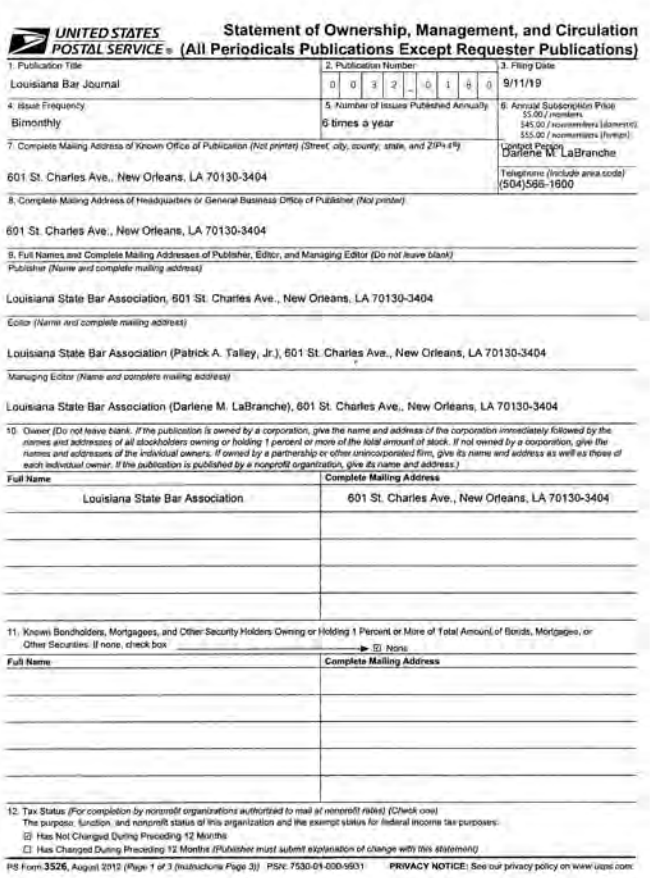
The CLA is named in honor of St. Thomas More (1477-1535), an English attorney and government official who died for his convictions. More rose to become the chancellor of England under King Henry VIII. When Henry declared that he was the head of the Church in England, More resigned his position rather than violate his convictions. While More did not publicly disavow Henry's position, Henry required that More sign an oath acknowledging that the children of Henry and Anne Boleyn were the legitimate heirs to the throne, which More refused to do, and he consequently was imprisoned in the Tower of London. More was eventually tried and convicted of treason for his refusal to execute an oath which violated his convictions. He was sentenced to death and then beheaded. More was declared a saint in the Roman Catholic Church by Pope Pius XI in 1935.[2]

Many of the members of the CLA are prominent and influential attorneys and leaders in the Louisiana bar and judges who hold important leadership roles in the state's judiciary. All in all, the CLA contributes substantially to the bar and the judiciary, quietly and behind the scenes. We owe them a great deal of gratitude for their contributions to the profession, and particularly for their annual sponsorship of the Red Mass, a wonderful tradition that we are fortunate to have as lawyers in Louisiana (particularly since we don't have many fall leaves to enjoy).

FOOTNOTES

1. History of the Red Mass is largely taken from the program for the 67th Annual Red Mass in New Orleans.

2. History of St. Thomas More is largely taken from the website of the St. Thomas More Catholic Lawyers Association.



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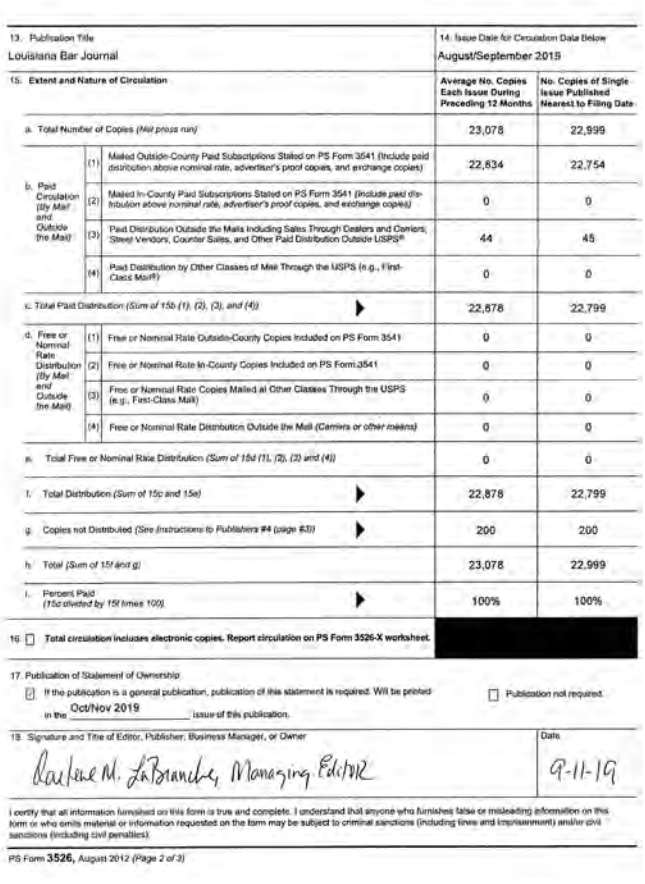

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Serving the Public; Serving the Profession

By Robert A. Kutcher

On Aug. 1, 2019, one of our members sued the Louisiana State Bar Association (LSBA), the Louisiana Supreme Court and the individual Justices alleging that the mandatory bar structure of the LSBA, which has been in place since 1941, is a constitutional violation of the 1st and 14th Amendments. There are more than 30 mandatory bars in the United States. This is not an isolated claim, and we are not the only state which has been sued. Substantially similar claims have been filed against the states of Wisconsin, North Dakota, Oregon, Oklahoma, Texas and Michigan. The Phoenix, Ariz.-based Goldwater Institute is working with the plaintiffs in a number of these suits, including the one here in Louisiana.

The LSBA is in full compliance with the law. Mandatory membership in a state bar and payment of compulsory fees were held constitutional in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Lathrop v. Donohue*, 367 U.S. 820 (1961), and the LSBA operates in accordance with these decisions. The LSBA's legislative advocacy, which is a target of the litigation, is subject to a number of provisions set forth in the Association's Bylaws. These activities are limited to matters involving issues affecting the profession, the regulation of attorneys and the practice of law, the administration of justice, the availability and delivery of legal services to society, the improvement of the courts and the legal profession, and such other matters consistent with the mission and purposes of the Association.

In accordance with *Keller*, we have a remedy available if any member takes issue with the Bar's legislative activities. Our reimbursement policy is available on our website. The total cost of our legislative activities amounts to less than $3 per member per fiscal year.

The goal of all of these lawsuits is to obtain a ruling from the U.S. Supreme Court holding that all mandatory bars are unconstitutional, employing the same analysis as that which the Supreme Court applied in the case of *Janus v. American Federation of State, County and Municipal Employees, Council 31*. The distinctions between labor unions and bar associations, which regulate the practice of law, are obvious and do not need discussion here, but that is the goal of all of these actions.

Most recently, as directed by the U.S. Supreme Court, the 8th Circuit reconsidered its earlier dismissal of a challenge to the North Dakota State Bar in light of *Janus*. After reconsideration, the 8th Circuit concluded that *Janus* did not alter its prior grant of summary judgment in favor of the Bar.

In Louisiana, our Association and the Louisiana Attorney Disciplinary Board and its Office of Disciplinary Counsel are charged with assisting the Supreme Court in the regulation of the practice of law. The Supreme Court has the sole authority to regulate the practice of law in this state. Through these and other efforts, we have helped to ensure that our profession continues to be self-regulated and that Louisiana lawyers continue to have a voice in the administration of the practice of law. It is both an honor and obligation which we willingly accept.

We also recognize that we live and practice in a changing world. Toward that end, at our Annual Meeting in June, the House of Delegates voted to suspend the Legislation Committee and all related legislative activities until the Midyear Meeting in January 2020 and also voted to require that all future House policies be approved only upon a vote of 75% of the House. The latter requires an amendment to the Articles of Incorporation, which must be voted on by the members. That proposal will be on our fall election ballot.

Additionally, on June 11, 2019, long before this litigation was instituted, a committee was formed to review all of the House of Delegates' policies and assess their appropriateness for a mandatory bar. I fully expect that this committee's work will be presented at the House of Delegates meeting in January.

Our Bar works diligently to ensure competency, professionalism and engagement of Louisiana lawyers. Our CLE programming includes seminars on numerous topics, many of which are offered at little to no cost to our members. Through administration of both MCLE and legal specialization, we assist the Supreme Court in ensuring the competency of practicing attorneys. We are committed to protecting the public by promoting the highest standards of ethical conduct and by addressing the unauthorized practice of law. We offer a number of free practice resources through our Practice Management Program, while Fastcase provides LSBA members with free legal research. All of these programs come with our membership.

We also have an extensive Access to Justice Program which helps facilitate the provision of civil legal services to

indigent and working-poor Louisiana citizens. Our fellow citizens rely on us to help them navigate a complex and vitally important body of laws and justice. Through collaboration with the Louisiana Bar Foundation, Louisiana law schools, private practitioners, local bar associations, pro bono programs and legal aid providers, the LSBA supports a broad-based and effective justice community. As lawyers, we all have an obligation to help. This profession should be much more than a paycheck.

During the past 12 months, our Board of Governors went through an exhaustive planning process and developed the following goals to move our Bar forward in the coming years:

► The LSBA preserves self-regulation and self-governance through our mandatory bar in service to the public and the profession.

► The LSBA cultivates professionalism, collegiality and quality of life among its members to improve the quality of practice and respect for the profession.

► The LSBA helps foster inclusion and participation by the diversity of its members and works to satisfy the unique needs of all members.

► The LSBA expands access to justice.

► The LSBA improves public trust and confidence in the legal system and its participating judges and lawyers.

► The LSBA has the financial, governance and organizational capacity to serve its vision.

We are firmly committed to accomplishing these goals, and, collectively, we can use our combined influence to advance and improve the legal profession and to safeguard shared principles including protection of the public and promotion of access to justice for all.

"Serving the Public; Serving the Profession" is more than a tagline. Since 1941, it is who we are and what we do. The mandatory structure has served us well for nearly 80 years. We will strongly defend it so that we may continue to fulfill our mission for the lawyers and all citizens of Louisiana.

I encourage everyone to visit our website at *www.lsba.org* to learn more about this pending litigation and the litigation in other states. More importantly, visit our website and see what the LSBA can do for you. We offer a lot.

New Orleans Attorney Judy Perry Martinez Installed as 2019-20 American Bar Association President

Judy Perry Martinez, of counsel with the law firm of Simon, Peragine, Smith & Redfearn, L.L.P., in New Orleans, was installed as the 2019-20 president of the American Bar Association (ABA) at the conclusion of the ABA Annual Meeting in San Francisco in August. Her one-year term will end in August 2020.

"The American Bar Association will continue to stand up for an independent judiciary and bolster the integrity of our democratic institutions, especially those that depend on due process, equality, civility, respect and fairness," Martinez said. "As lawyers, advancing the rule of law, which protects everyone's liberties, is of paramount importance. The ABA also will work to increase public awareness, so more people understand the vital role they can play in protecting democracy. Working together, we can ensure that laws are fair and justly enforced, and our rights are never taken for granted."

Martinez returned to Simon Peragine in 2015, previously serving the firm from 1982-2003 as a partner, member of its Governing Committee and commercial litigator. In 2003, she joined Northrop Grumman as assistant general counsel for litigation, managing litigation for the western half of the country before becoming vice president and chief compliance officer there in 2011. She retired from Northrop in 2015 to become a fellow in residence for one year at the Advanced Leadership Initiative at Harvard and then returned to New Orleans.

For more than 30 years, Martinez held various leadership positions at the ABA. From 2014-16, she chaired the ABA Presidential Commission on the Future of Legal Services. She also was a member of the ABA Task Force on Building Public Trust in the American Justice System. In 2011, she was appointed chair of the ABA Standing Committee on the Federal Judiciary, which evaluates all prospective nominees to the federal bench. She has served as the ABA lead representative to the United Nations and as a member of the ABA Board of Governors and its Executive Committee. She previously served as chair of the ABA Young Lawyers Division, a member of the ABA Commission on Women in the Profession and chair of the ABA Commission on Domestic Violence. She has been a member of the ABA House of Delegates since 1991. She has served as a member of the ABA Task Force on Attorney-Client Privilege, the Council of the ABA Center for Racial and Ethnic Diversity and the ABA's World Justice Project Committee.

Outside of her work with the ABA, Martinez, along with other members of the Louisiana State Bar Association (LSBA), established the New Orleans Pro Bono Project and served as its first chair in the early1980s. Additionally, she served as chair of the New Orleans Bar Association's Young Lawyers Section. She chaired the LSBA's Committee on Minority Involvement in its inaugural year (1989) and chaired the LSBA's Professionalism and Quality of Life Committee and the Post-Conviction Death Penalty Representation Committee.

She is a member of the board of directors of the American Bar Foundation, a Fellow of the American Bar Foundation and the Louisiana Bar Foundation, and a member of the American Law Institute.

Martinez is the recipient of numerous awards. In 2017, she received the LSBA's David A. Hamilton Lifetime Achievement Award and the New Orleans Bar Association's Presidents' Award. In 2012, she received the Camille Gravel Pro Bono Public Service Award from the New Orleans Chapter of the Federal Bar Association. She is a past recipient of the Sam Dalton Capital Defense Advocacy Award from the Louisiana Association of Criminal Defense Counsel (1997), the Michelle Pitard Wynne Professionalism Award from the Association of Women Attorneys (1998) and the Alliance for Justice Award from the National Gay and Lesbian Law Association (1999).

She earned her BS degree from the University of New Orleans and graduated from Tulane University Law School, with honors, in 1982.

Judy Perry Martinez. ***Photo courtesy of Media Relations, American Bar Association.***

Remarks by ABA President Judy Perry Martinez ABA Annual Meeting

August 12, 2019

Thank you, Chief Justice Johnson. Your presence here means so much to me and is truly an honor for the American Bar Association.

President Carlson, you amplified the Association's voice on the independence of the judiciary, the essential role of lawyers and judges across the globe, and the fair and just treatment of those seeking safety and the hope of a new life within our borders. You made us stronger through your heartfelt insistence that we sound the trumpets for lawyer and law student well-being. You made the ABA better by working closely with our executive director, staff and volunteer leadership on a vast range of Association operations, including our strategy to increase and sustain membership. We are forever grateful. Thank you, Bob.

Our many Association past presidents who have served with distinction continue to be a source of great knowledge and influence for our profession. In fact, 19 past presidents recently gathered by phone at my invitation so that we could update them on the ABA and call on them to work with us in the coming year as we build on their prior work. Please join me as we show our appreciation to our former presidents for their prior and continued service to the Association and our profession.

As we look back to strengthen the present, we also look forward. We are fortunate to have President-Elect Trish Refo on our team. She will be outstanding. Along with our other officers and the Board of Governors working closely with our professional staff led by Jack Rives and with all ABA entities, we will not only promote our four goals — to serve our members, improve our profession, eliminate bias and enhance diversity, and advance the rule of law — we pledge to do so strategically, with a seamless transition of leadership, year after year.

Two weeks ago, Rene and I celebrated our 40th anniversary. He has supported my bar work, my pro bono and my professional career, always with a nudge that I need to give back more. He has provided our four children and their loved ones, our many nieces and nephews, my treasured three brothers and sisters in-law, the finest example of what enduring love and support means. I am grateful for them and also to have had such a powerfully enabling law firm, Simon Peragine, Smith & Redfearn, and employer, Northrop Grumman Corporation. It means so much to me that my family, dear friends from New Orleans and beyond, and so many of my current and former colleagues have gathered here.

Many years ago, I had the privilege of speaking on behalf of the New Orleans Bar Association at a Naturalization Ceremony at the federal courthouse.

That November day was meaningful to me, in part, because Rene is a naturalized citizen. As a 2-year-old in 1958, he came with his parents to America from Algeria. The reverence with which Rene and my in-laws have spoken about the blessing and privilege of U.S. citizenship awakened me to my own obligation not to take for granted rights and responsibilities I had done nothing to achieve but must do everything to fulfill.

The courtroom where the ceremony took place was filled with soon-to-be new Americans beaming with pride. Many were holding tiny American flags. One, who later introduced himself to me as Obin, was from Laos. More than 17 years earlier, his parents had fled violence and poverty and secured safe passage out of the country for their family. Now, he was a practicing CPA at a major accounting firm.

I asked Obin what he planned to do for his first Thanksgiving as an American. He said he didn't know because he had not celebrated Thanksgiving before. Without hesitation, he accepted my invitation to join our extended family, including Rene's family, at my parents' home. That tradition of inviting those who don't have a place to go has continued for many years in our family — our daughter, Carson, hosted her first Thanksgiving last year in D.C. and invited 10 foreign students to her table.

Just as the exchange of stories, ideas, hopes and dreams at the same table with those of different backgrounds, perspectives and cultures makes our lives richer, the gathering of people from different lands makes our nation stronger. We make room not because we must, but because we can. When they have no place to go because of war, repression or fear

Judy Perry Martinez leads in the Louisiana Delegation to the ABA House of Delegates. ***Photo courtesy of Media Relations, American Bar Association.***

The Louisiana delegation. Back row: Graham H. Ryan, John H. Musser IV, Barry H. Grodsky, Michael W. McKay, Richard K. Leefe, Darrel J. Papillion and Hon. Raymond S. Steib, Jr. Middle row: Ashley L. Belleau, Jeanne C. Comeaux, Jan M. Hayden and David F. Bienvenu. Front row seated: Frank X. Neuner, Jr., Hon. Bernette Joshua Johnson, Judy Perry Martinez and Robert A. Kutcher. ***Photo courtesy of Media Relations, American Bar Association.***

of safety, we bring them home. And our family, our America, welcomes them.

Our Constitution demands, and our laws confirm, that we afford due process rights to immigrants and asylum-seekers who are in or are seeking entry into the United States.

That is the key reason why the ABA is so fiercely committed to due process for asylum-seekers and other immigrants at our border. Moreover, as this House has confirmed, our sense of decency owed to fellow human beings and our American values compel us to insist on "safe and sanitary conditions" and more, for children and all detainees, and against separation of families.

Our commitment is a lasting one, as borne out by the 30th anniversary this fall of the ABA Commission on Immigration's Pro Bono Asylum Representation Project in South Texas, known as ProBAR. I was honored to join President Carlson there for a week a year ago to do pro bono service, and I look forward to a similar show of support in the coming weeks when President-Elect Refo joins me. We are proud not only of ProBAR but also our Immigration Justice Project in San Diego and our Children's Immigration Law Academy in Houston. And we value our coordination of lawyer volunteers by the Commission on Immigration and the Standing Committee on Pro Bono and Public Service, with support from the American Bar Endowment.

Our commitment is deepened by so many of you and other lawyers who are stepping up with these projects and in your local communities. Just recently, a member of this House put me in contact with a law student who had an older sibling facing possible deportation. Through the work of a pro bono immigration practitioner who is a colleague of yet another member of this House, the family obtained legal assistance, and steps are being taken toward a likely positive outcome.

Lawyers know no strangers. We are taught to reach deep within ourselves to do the best we can to help those in need, whether the client can pay our posted fees and sometimes even when they can only say "thank you."

Lawyers are instilled with the understanding that somehow, some way, we must make room at the table of justice. And we can best do so by collaborating with one another and seeing our mission and purpose as a unified pursuit. The ABA's four goals are listed as separate and distinct, yet they are, in fact, intertwined. We serve our members as we improve and advocate for our profession. We improve our profession as we work to eliminate bias and enhance diversity. Our focus on diversity is essential to promoting the rule of law by making our profession more responsive to our clients and opening our eyes to, and driving strategies to overcome, systemic injustice. And by promoting the rule of law, we provide a vital benefit to our members who see the legal profession as a calling and share our passion for justice and liberty.

Lawyers want to be the best at their profession they can be, and they expect support from the world's premier association of lawyers. The ABA is energized by the work of our volunteer leadership and staff to introduce membership to more lawyers, make it easier to join and renew, bring them more educational programs tailored to their needs, and offer opportunities for connection, involvement and leadership. Our newly appointed ABA state membership chairs will further these efforts by deploying to actively recruit and retain members. I will continue to visit law schools, at every opportunity, to foster a deep sense of belonging among law students and faculty in the ABA community. We all know that being an ABA member has enriched our professional lives and is an essential

Louisiana Supreme Court Chief Justice Bernette Joshua Johnson administered the oath of office for the ABA presidency to Judy Perry Martinez. ***Photo courtesy of Media Relations, American Bar Association.***

of good lawyering. Each of us needs to share that experience far and wide.

A foundation of good lawyering is a deep belief in the rule of law. Our members want the most powerful and influential association that represents their profession to be champions of justice, protectors of democracy, and advocates for the rule of law, at home and abroad.

We will continue to speak out to protect the judiciary from unwarranted and personal attacks. We will raise our voices in unison on the necessity of an independent judiciary to the health of our democracy.

We stand for the rule of law as we leverage our voice with other national organizations to celebrate the 100th anniversary of the 19th Amendment, which guaranteed women the right to vote and launched the largest expansion of democracy in our country's history. My thanks go to the Hon. Margaret McKeown, who is serving as chair of the ABA's centennial effort. This historic milestone offers unparalleled opportunities throughout the year for our members to engage in civics education, explore the issues of voting rights and equal rights today, and encourage voting in elections at all levels.

Again and again, we hear from our colleagues that, at the heart of our national challenges, is the imperative for civics education and greater public knowledge about the rule of law. This fall, we will launch an engaging social media campaign on the rule of law in our democracy. Our campaign will leverage the communication power of groups throughout the ABA and beyond, including bar associations represented in this House, to reach people we have not typically reached in the past.

Civics rests on civility, an essential tool of our trade as lawyers that is so desperately needed in the public square. I call on each of you, individually, as citizen-lawyers sworn to ethics and professionalism, to stand up for civility and respect, and speak out against bigotry and hatred. Each of us must do our part to insist that our public discourse be better.

The preamble of our Constitution contains three words that may lay forth the greatest imperative our nation owes the individuals and families of today: "Insure Domestic Tranquility." If those words are to have purpose and meaning

The ABA presidency gavel is passed to new ABA president Judy Perry Martinez. ***Photo courtesy of Media Relations, American Bar Association.***

today — if we are to be safe in our homes, our schools, our workplaces, our houses of worship and our public spaces — our policymakers must take specific actions that will make mass shootings a historical, not ongoing, tragedy. We must put an end to gun violence — whether handgun violence in our cities and towns or civilian use of military-grade weapons for mass murder.

This body has given our policymakers a roadmap to make that happen through more than 20 specific policies on gun safety adopted by this House over the last 50 years. This House has spoken, and I pledge to you we will act on that authority. It is time to end the repeated destruction of innocent lives.

We have another imperative that is rooted in our Association's goals and the quest for justice — and that is to understand the breadth and depth of the racial divides that continue to plague our profession and our country. We need to build bridges and seek insights from other professions that similarly struggle with a lack of diversity, but somehow outpace the legal profession's lagging opportunities for minorities. Working together across professions, we must explore our failures and share our successes so that once and for all the needs of the public in our respective fields are met because all available talent is there to meet their needs.

We will continue to champion gender parity and women's rights, and welcome our LGTBQ+ colleagues. We will pay needed attention to the challenges faced by our colleagues and law students with disabilities, focusing on delivering information and tools for law school career advisers and law firm recruiters guiding how they can be more fully inclusive.

This past spring, when the presidents-elect of the national bars of color met at the ABA as they do annually, for the first time ever, leaders of the Disability Rights Bar Association and the National LGBT Bar Association were both at the table, and we all felt the incredible difference their presence made. I urge you to similarly invite them to your table.

We will commit to "No Ladders Up" until each and every person who sees themselves as having the potential to contribute to our profession and to the greater good through the practice of law has no doubt that the profession can be theirs through hard work, competency, discipline and integrity.

We must not be an insular profession, removed from the people we serve. We are a people's profession that is at its best defending liberty and pursuing justice when we listen to what consumers of justice need. We must continue to actively listen as the profession and beyond explores, examines and tests innovations in both technology and our regulatory framework, through our state supreme courts, state bar associations and affiliated organizations. Our purpose in these explorations and examinations is not to protect lawyers or our livelihoods. Our purpose is to provide access to justice.

Our support for legal aid and pro bono is a signature collaboration between the ABA and state and local bar associations. Through your leadership back home, once again this October for the National Celebration of Pro Bono, the ABA will boost individual, law firm, law department and bar association efforts to bring pro bono front and center. Our theme this year is service for survivors of sexual and domestic violence. Please encourage your colleagues to participate in this effort of lawyers across our country to advocate for people who need us, and literally, protect and save lives.

In the coming year, we will celebrate another important centennial, the 100th anniversary of our Standing Committee on Legal Aid and Indigent Defendants.

As we do so, we will leave no room for doubt that the ABA means business when it comes to closing the justice gap. We will stand with the Legal Services Corporation before Congress. We will help state and local bars secure more funding for legal aid and court systems. And we will not say no to innovations simply because that is not the way we, the lawyers and the courts, have always done it; at each and every turn, we will have the public we serve at the forefront of our minds.

Our colleagues and our country, and, indeed, the world, look to us to lead with knowledge of the law and respect for the principles on which our nation was founded. Our finest moments and most enduring contributions have been when we have used our voice and resources for causes about which we can act with authority, and which we can influence with impact. As lawyers, we know equality. We know liberty. And we know justice.

Together, we will honor the words of abolitionist and women's suffrage leader Lucy Stone who said, "Now all we need is to continue to speak the truth fearlessly, and we shall add to our number, those who will turn the scale to the side of equal and full justice in all things."

I am honored and humbled to be your president. Thank you for your support as we work together.

U.S. Supreme Court Declines to Mandate Class Arbitration in Its Decision, *Lamps Plus, Inc. v. Varela*

By Anthony M. DiLeo

The United States Supreme Court on April 24, 2019, once again issued an opinion with regard to class arbitration and declined to compel a party to submit to class arbitration in the absence of an affirmative contractual basis to conclude that the parties intended to do so. This ruling in *Lamps Plus, Inc. v. Varela*[1] follows and is an extension of the Court's prior decisions in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), where the arbitration agreement was "silent" on the issue of class arbitration; *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333 (2011),[2] where the Court upheld a mandatory arbitration agreement in a consumer contract barring customers from bringing class actions; and *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018),[3] from the last term in which the Court confirmed the enforceability of class action waivers in arbitration agreements. Stated otherwise, the Court's holding is that an arbitration agreement that is ambiguous as to class arbitration is insufficient to provide the necessary contractual intent for class arbitration.[4]

In *Lamps Plus, Inc. v. Varela*, the Court issued six separate opinions in reaching a 5-4 ruling declining to order class arbitration.[5] In this case, Frank Varela filed a putative class action against his employer, Lamps Plus, Inc. The suit arose following a 2016 data breach where a hacker impersonated a company official and tricked a Lamps Plus employee into releasing the tax information of roughly 1,300 employees, including Varela's. After learning of the breach and the subsequent filing of a fraudulent federal income tax return in his name, Varela filed a class action against Lamps Plus in a California federal district court. However, at the start of his employment, Varela had signed an employment contract containing an arbitration clause which stated that Varela consented that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment."[6]

In the federal district court, Lamps Plus moved both to compel arbitration and to dismiss Varela's claims. Lamps Plus additionally contended that arbitration should be compelled on an individu-

al, rather than a class-wide, basis because there was no contractual basis for finding that the parties intended to submit to class-wide arbitration.[7] Varela, however, argued that the motion to compel arbitration should be denied either because the data breach was outside the scope of the employment relationship and, therefore, outside the scope of the arbitration agreement, or because the arbitration agreement itself was unconscionable.[8]

Moreover, Varela asserted that, should the arbitration agreement be found both valid and applicable, the court should compel class-wide, rather than individual, arbitration because the agreement did not waive class-wide arbitration. Varela argued that the language providing that "all claims" be submitted to arbitration was broad enough to include class claims, or alternatively, was ambiguous enough to trigger the principle of *contra proferentem*.[9] The district court accepted Varela's argument, finding that because the language of the arbitration agreement was at least ambiguous with regard to class claims, and because the principle of *contra proferentem* dictates that ambiguities within a contract should be construed against its drafter, the ambiguity should be construed against Lamps Plus.[10] Therefore, the district court compelled arbitration on a class-wide basis and the U.S. 9th Circuit Court of Appeals affirmed.[11]

The U.S. Supreme Court granted certiorari to determine whether the Federal Arbitration Act (FAA) bars an order compelling class arbitration when an agreement is "ambiguous" as to its availability.[12] In a 5-4 opinion authored by Chief Justice Roberts, the Court held that an ambiguous agreement fails to "provide the necessary 'contractual basis' for compelling class arbitration."[13] Extending its prior holding in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Court reasoned that because class arbitration fundamentally differs from bilateral arbitration and sacrifices its principal advantages, more than ambiguity is required to ensure the parties consented to class-wide arbitration.[14] Emphasizing the fundamental principle that "[a]rbitration is strictly a matter of consent,"[15] the Court rejected the 9th Circuit's application of *contra proferentem* to construe the arbitration agreement against Lamps Plus.[16] The Court reasoned that because "*contra proferentem* seeks a result other than the intent of the parties," it cannot be used to compel class arbitration in the absence of consent.[17] The Court reversed the judgment of the lower courts and remanded the case to the 9th Circuit to compel bilateral individual arbitration in lieu of class arbitration.[18]

In formulating its holding, the Court recited its precedent in *Stolt-Nielsen*, wherein the Court held that a court cannot compel class arbitration of an arbitration agreement that is silent on that matter.[19] The Court reiterated the reasons for its holding in *Stolt-Nielsen*, emphasizing that class arbitration forgoes many of the benefits, such as greater efficiency and lower costs, associated with bilateral arbitration and, as stated in *Stolt-Nielsen*, implicates "serious due process concerns by adjudicating the rights of absent members of the plaintiff class" with only limited judicial review.[20] In that case, the Court reasoned that due to the "crucial differences" between class and bilateral arbitration, there is "reason to doubt" that parties have consented to class-wide arbitration, and courts, therefore, cannot infer such consent "absent an affirmative 'contractual basis for concluding that the party *agreed* to do so.'"[21] Ruling that *Stolt-Nielsen* is controlling, the Court concluded that "[l]ike silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice [ ] the principal advantage of arbitration.'"[22] Remarking upon the relationship of this conclusion to past decisions regarding arbitration, the Court noted that its conclusion here "aligns with [the Court's] refusal to infer consent when it comes to other fundamental arbitration questions," such as whether parties have authorized arbitrators to resolve gateway questions.[23]

The Court noted too that the FAA preempts state law where principles of state law stand as an obstacle to accomplishing the full purposes of the FAA.[24] Repeating its axiom that arbitration is a matter of consent, the Court reasoned that because *contra proferentem* is a rule of construction, it must give way to the FAA's fundamental emphasis upon the consent of the parties, citing its prior conclusion in *AT&T Mobility, L.L.C. v. Concepcion*.[25]

The majority opinion prompted separate dissents from Justices Ginsburg, Breyer, Sotomayor and Kagan. In her dissent, Justice Ginsburg emphasized that the FAA was intended to allow parties with roughly equal bargaining power to arbitrate commercial disputes, not to govern contracts of adhesion.[26] Justice Ginsburg criticized the majority's consent-focused reasoning as ironic because it "impos[ed] individual arbitration on employees who surely would not choose to proceed solo."[27]

Joining Justice Ginsburg's dissent in full, Justice Sotomayor wrote separately to challenge the proposition established over the past decade of the Court's precedents that the "'shift from bilateral arbitration to class-action arbitration' imposes such 'fundamental changes,' that class-action arbitration 'is not arbitration as envisioned by the' Federal Arbitration Act (FAA)."[28] Justice Sotomayor further categorized class actions as merely a "procedural device" to which an employee "should not be expected to realize that she is giving up access" by signing an arbitration agreement.[29]

Joined in full by Justices Ginsburg and Breyer and in part by Justice Sotomayor, Justice Kagan emphasized in her dissent her belief that the language of the contract was comprehensive in scope and unambiguously included class arbitration.[30] Justice Kagan concluded that even if the contract was ambiguous, the even-handed principle of *contra proferentem* would dictate the same result — authorizing class arbitration.[31] However, the majority opinion advises that this is "far from the watershed Justice Kagan claims it to be. Rather, it is consistent with a long line of cases holding that the FAA provides the default rule for resolving certain ambiguities in arbitration agreements. For example, we have repeatedly held that ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration."[32]

The Supreme Court's holding in this case can be seen as a marked extension of its decision in *Stolt-Nielsen* nearly a decade ago, holding that a contract that

is silent on the issue of class arbitration cannot provide the necessary basis for compelling class arbitration. There, the Court reasoned that due to the fundamental importance of consent in arbitration, the FAA required more than silence to support an order compelling class arbitration. Here, the Court has clarified further that an ambiguous agreement does not qualify for class arbitration.

Despite the Court's several rulings restricting the availability of class arbitration, the Court has, however, in recent years consistently issued decisions in support of arbitration, such as *Buckeye Check Cashing, Inc. v. Cardegna;*[33] *Oxford Health Plans, L.L.C. v. Sutter;*[34] *Rent-A-Center, West v. Jackson;*[35] and *Hall Street Associates, L.L.C. v. Mattel, Inc.*.[36] Other appellate courts have approved of arbitration of matters in newer arenas, such as of an ERISA retirement plan.[37]

FOOTNOTES

1. 139 S.Ct. 1407 (2019).

2. Customers of AT&T brought a class action lawsuit against the telecommunications company alleging a relatively small fraud — the company was charging sales tax on the retail value of allegedly "free" phones. AT&T moved to compel arbitration, which would effectively bar the action based on the contract's no-class action clause. California had a conflicting law that provided that arbitration clauses were only enforceable if they allowed for class actions. In a 5-4 ruling, the Court upheld the mandatory arbitration clause in the AT&T consumer contracts barring customers from bringing class actions, even though this effectively negated relief for consumers bringing claims for small amounts. The Court's holding also signified that the Federal Arbitration Act (FAA) preempted any state law that ran contrary to the objectives of the FAA.

3. Epic, a software company, had an arbitration agreement in its employee contracts that required individualized arbitration for any employment-based dispute. The clause also waived the employees' right to participate in or benefit from class or collective proceedings. An employee sued Epic in federal court under the Fair Labor Standards Act as a representative of a class, and Epic moved to dismiss the complaint. The district court held that the arbitration clause was unenforceable because it violated the employees' right to engage in "concerted activities" under the National Labor Relations Act (NLRA). The 7th Circuit affirmed, and the Court granted certiorari to determine whether such a clause violated the NLRA. The Court held 5-4 that arbitration agreements in employment contracts requiring individualized proceedings were enforceable and were not a violation of the NLRA.

4. The Louisiana Supreme Court has ruled that Louisiana courts are governed by these decisions. Aguillard v. Auction Management Corp., 908 So.2d 1, 40 (La. 2005), superseded by La. C.C.P. art. 2083, as amended by 2005 La. Acts, No. 205 § 1, effective Jan. 1, 2006, with respect to the right to interlocutory appeal (adopting the Supreme Court's interpretation of federal arbitration law and holding that a "strong presumption of arbitrability" exists in Louisiana). The Louisiana Binding Arbitration Law, La. R.S. 9:4201, largely tracks the language of the FAA.

5. The six separate opinions are the majority by Chief Justice Roberts, a concurring opinion by Justice Thomas, and four separate dissents by Justices Ginsburg, Breyer, Sotomayor and Kagan.

6. Lamps Plus, 139 S.Ct. at 1413.

7. Varela v. Lamps Plus, Inc., No. CV 16-577-DMG (KSX), 2016 WL 9110161, at *1, *6 (C.D. Cal. July 7, 2016), *aff'd*, 701 F. App'x 670 (9 Cir. 2017), *rev'd and remanded*, 139 S.Ct. 1407, 203 L.Ed. 2d 636 (2019), and *vacated*, 771 F. App'x 418 (9 Cir. 2019), *and rev'd and remanded*, 71 F. Ap'x 418 (9 Cir. 2019).

8. *Id.* at *3.

9. *Id. Contra proferentem* is defined as "[t]he doctrine that, in the interpretation of documents, ambiguities are to be construed unfavorably to the drafter." *Black's Law Dictionary* (11th ed. 2019).

10. *Id.* at *7.

11. *See*, Varela v. Lamps Plus, Inc., 701 F. App'x 670, 672 (9 Cir. 2017), *cert. granted*, 138 S.Ct. 1697, 200 L.Ed. 2d 948 (2018), and *rev'd and remanded*, 139 S.Ct. 1407, 203 L.Ed. 2d 636 (2019), and *vacated*, 771 F. App'x 418 (9 Cir. 2019).

12. Lamps Plus, 139 S.Ct. at 1412.

13. *Id.* at 1415 (*quoting* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684, (2010)).

14. *Id.* (The majority stated that its ruling here is "a conclusion that follows directly from our decision in *Stolt-Nielsen*.")

15. *Id.* (*quoting* Granite Rock Co. v. Teamsters, 561 U.S. 287, 299 (2010)) (alteration in original).

16. *Id.* at 1417.

17. *Id.* at 1417-18.

18. *Id.* at 1419.

19. *Id.*at 1415.

20. *Id.* at 1416.

21. *Id.* (*quoting* Stolt-Nielsen, 559 U.S. at 687 (emphasis in original)).

22. *Id.* (*quoting* AT&T Mobility, L.L.C. v. Concepcion, 563 U.S. 333, 348, 131 S.Ct. 1740 (2011)).

23. *Id.* at 1416-17 (*citing* Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed. 2d 414 (2003)).

24. *Id.* at 1415.

25. *Id.* at 1417-18 (*citing* Concepcion, 563 U.S. at 348).

26. Lamps Plus, 139 S.Ct. at 1420 (Ginsburg, J., dissenting).

27. *Id.* at 1421.

28. *Id.* at 1427 (Sotomayor, J., dissenting).

29. *Id.*

30. *Id.* at 1428-30 (Kagan, J., dissenting).

31. *Id.* at 1430.

32. *Id.* at 1418-19 (internal citations omitted).

33. 546 U.S. 440 (2006). There, the plaintiff claimed that a loan contract was illegal and that, as a result, the arbitration clause was unenforceable. The Court granted certiorari to determine whether, under the FAA, a party to a contract can avoid arbitration by claiming that the overall contract is illegal. The Court held that unless an arbitration clause is itself directly and independently challenged as unenforceable, the validity of the contract as a whole is a matter for the arbitrator, rather than the courts, to decide.

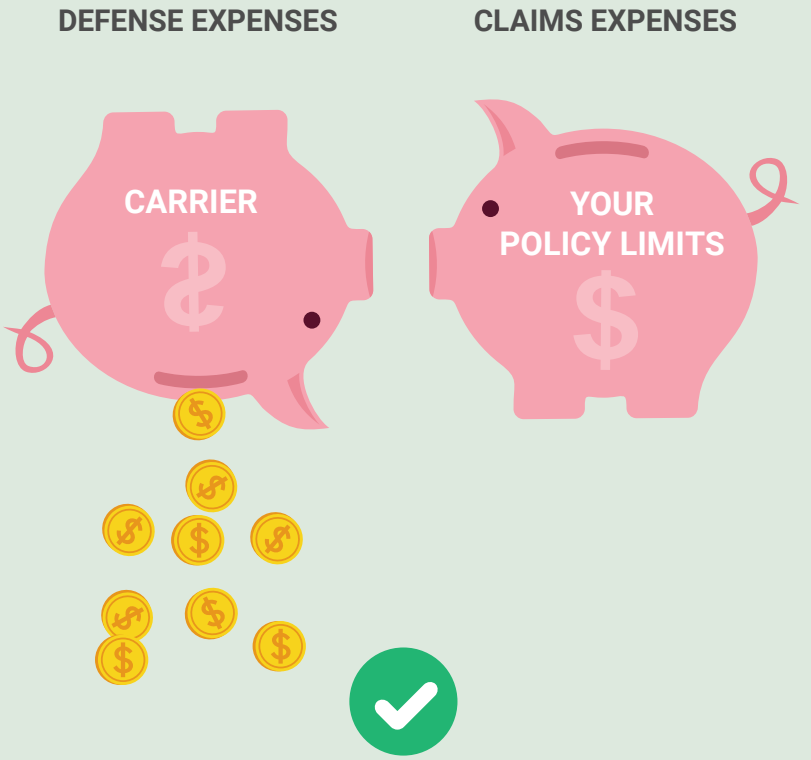
34. 569 U.S. 564 (2013). In that case, a primary care doctor contracted with a care network; the doctor initiated a class action, on behalf of himself and other medical providers. The contract contained an arbitration clause which stated that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court." The parties agreed that the arbitrator had the authority to interpret the arbitration provision. The arbitrator concluded that the clause encompassed any action, including class actions. The defendant moved to vacate that decision, arguing that the arbitrator had exceeded his authority. The Court held unanimously that an arbitrator does not exceed his authority by deciding that the parties agreed to class arbitration based on general contractual language requiring arbitration of any dispute. More broadly, the Court signaled that, under the FAA, a court cannot overrule an arbitrator even if the arbitrator's interpretation was likely erroneous.

35. 561 U.S. 63 (2010).

36. 552 U.S. 576 (2008). There, toy manufacturer Mattel was sued by its landlord, Hall Street Associates. The arbitration agreement contained a provision stating that "if the arbitrator's conclusions of law are erroneous," a district court had the authority to overturn the arbitrator's decision. This provision would grant a court considerable authority over an arbitrator's ruling that was not granted by the FAA. The FAA only provides for narrow circumstances in which a court can override an arbitration decision. The Supreme Court invalidated the contractual provision at issue, holding that the FAA's restrictions on review are exclusive and not susceptible to contractual expansion or modification by the parties to an agreement.

37. Dorman v Charles Schwab Corp., No. 18-15281 (9 Cir. Aug. 20, 2019), where the court reversed its 1984 ruling that ERISA disputes are not arbitrable.

Anthony M. DiLeo is a life member of the American Law Institute, served as a law clerk for Judge John Minor Wisdom and Judge Alvin B. Rubin, and received an LLM from Harvard Law School after graduating from Tulane University Law School. He is the co-reporter for the ADR Committee of the Louisiana State Law Institute for arbitration law. He has taught arbitration at Tulane Law School as an adjunct professor. For this article, the author greatly appreciates the assistance of Dara Mouhot (JD, 2021) of the Tulane Law Review. *(tdileo1@gmail.com; Ste. 2405, 201 St. Charles Ave., New Orleans, LA 70170)*



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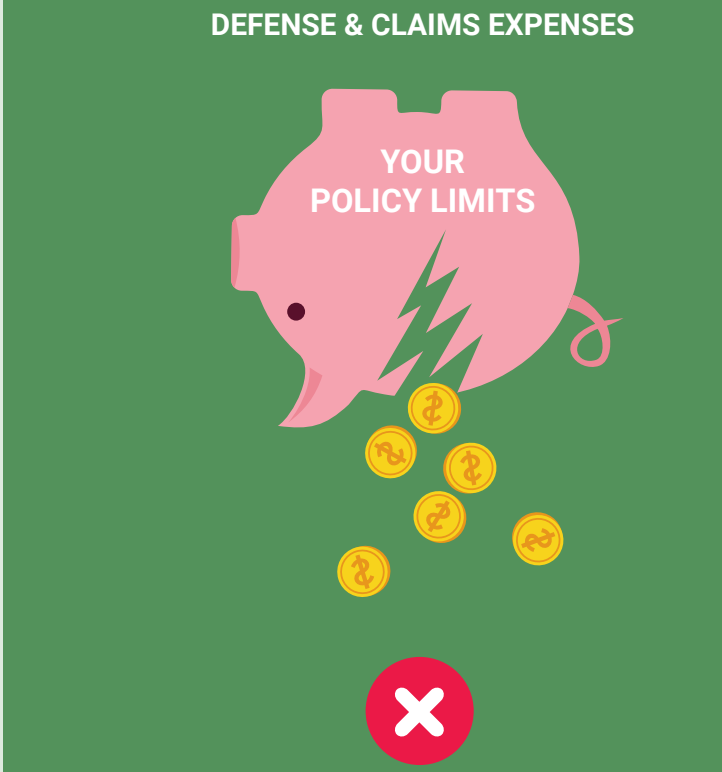

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When Disability Law Meets Private Land Use Regulations:

Understanding Emerging Constraints on Private Land Use Controls

By Marc L. Roark

Erica Hernandez and Paulo Regaldo filed a claim against their neighborhood homeowners' association (HOA), the Golf Course Estates Homeowners Association.[1] The Regaldos' daughter suffers from severe autism that makes her prone to "wander" when left alone. As a part of her Individual Education Plan, the school provided "door-to-door" pick up service by a public-school bus. The complaint alleges that the HOA board voted to prevent access to the bus because of potential wear and tear to the neighborhood roads and because of safety concerns for residential children. Nevertheless, the complaint also alleges that the association regularly allows other large vehicles such as UPS trucks, FedEx trucks and garbage trucks onto the neighborhood streets. The Regaldos claim that the HOA violates the Fair Housing Act because of its refusal to make a "reasonable modification" to its rules.

Cities, neighborhoods and developers generally understand that various sources of property control impact the spaces they regulate. Zoning regulations, neighborhood covenants and

other servitudes are cost-based regulatory schemes that owners and developers take into account when developing land. When these properties interact in the public sphere, such as where public accommodations are required, building schemes typically include greater access points to ensure that use is available for all persons. In Louisiana, most of the cases dealing with a property owner's interaction with disability law have dealt with public accommodations requirements,[2] landlord-tenant disputes[3] and zoning challenges.[4] However, private developments, such as neighborhood covenants (known colloquially as HOAs), have often flown under the radar of these requirements since the general view is that accessibility requirements found in building schemes do not apply to privately owned property.

In Louisiana, HOAs fall under the category of building restrictions. The Civil Code defines building restrictions as "charges imposed by the owner of an immovable in pursuance of a general plan governing building standards, specified uses and improvements."[5] These restrictions are "*sui generis real rights*" and may be enforced by the association or other landowners in the association.[6] They may impose requirements that impact area controls on property (such as lot size, height or square footage of buildings attached to the land); or uses of the property (such as pet allowances, vehicle allowances or whether someone can operate a business from the property).[7]

Yet, as cases around the country have demonstrated, there is another path towards land use restraints in the form of the Fair Housing Act's requirements that "reasonable modifications" be permitted to ensure that disabled persons are not unfairly deprived of housing. Several recent cases have demonstrated how the Fair Housing Act raises conflict with private land use schemes. Nearly 20-25% of the U.S. population has a family member with a disability that limits mobility; these issues will become even more frequent, bringing private communities into conflict with HOAs.[8] This article unpacks some of the points of tension that exist between HOAs and different strands of disability law and highlights some of the ongoing cases in the United States.

Sources of Disability Law that Impact Building Restrictions

There are three primary sources of disability law in the United States — the Americans with Disabilities Acts of 1990 and 2008 (ADA),[9] the Fair Housing Act and its amendments (FHA)[10] and section 504 of the Rehabilitation Act of 1973 (RHA).[11] Each of these acts work to protect persons with disabilities from discrimination if the disability falls into the definition under those acts. The ADA's definition of a disability is:

> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.[12]

The FHA uses the term "handicap" as the basis for determining whether its provisions reach a particular disadvantage and is defined as a "a physical or mental impairment which substantially limits one or more of such person's major life activities, a record of such handicap or being regarded as having such a handicap."[13] The definition of disability in the RHA references the definition of disability in the ADA.[14]

Title III of the ADA addresses the provision of "goods, services, facilities, privileges, advantages, or accommodations" of any place of public accommodation.[15] This applies to private communities and country clubs that provide space for public events, to residential homes that include a home office, businesses where members of the public are invited and common areas of housing facilities.[16] The RHA specifically prohibits discrimination by programs or activities that receive federal financial assistance from a federal agency.[17] The FHA prohibits discrimination in housing choice on the basis of a number of vulnerable categories, including persons with handicaps. Under the FHA, a discriminatory practice includes any "refusal to permit reasonable modifications, at the expense of the handicapped person, or reasonable accommodations in rules, policies, practices or services, and failures in the design and construct of dwellings scheduled for first occupancy."[18]

Three Potential Conflict Areas for HOAs and Disability Law

One aspect of HOAs is the vast amount of control that HOA rules impose on owners of property. These rules are premised on the idea that homeowners voluntarily consent to the rules when they purchase property in the neighborhood or when they form the association with other homeowners.[19] However, disabilities are not planned events and can arise after individuals have invested in a home. It can impact the homeowners, their children or their parents who are living in the family home.

Still, HOAs can be particularly protective over common environments and aesthetic features of homes. These concerns generally can be grouped into three major areas dealing with persons with disabilities — vehicle access to the home; architectural features added to the home; and control over common areas of the community.

Accommodation of Homeowner Association Rules for Persons with Disabilities — Vehicles

In *Kuhn v. McNarry Estates Homeowners Association*, the plaintiffs (the Kuhns) were parents of a severely disabled adult daughter (Khrizma) with Down Syndrome, autism, chronic digestive problems, scoliosis, who had the intellectual capacity and functionality of a 2-year-old child. In 2005, the Kuhns purchased a home in McNarry Estates, an exclusive neighborhood that imposed two distinctive sets of home ownership rules on owners.[20] For the first five years, Khrizma lived with the

Kuhns part-time, but, starting in 2010, she moved in with her parents full time. In 2014, complications in her conditions required the Kuhns to provide around-the-clock care, including quick access to a toilet and access to a shower for cleanup after use of the toilet. Because of the curvature of her spine, Khrizma required transportation in a prone position. Her doctors recommended that the Kuhns purchase a specially equipped RV with toilet and shower facilities and a place for Khrizma to rest. For easy access, her doctor recommended that the RV be parked in the driveway. The HOA's rules prohibited RVs from being parked in driveways within the subdivision.

Khrizma's doctor provided detailed written reasons why the family required an accommodation of the existing rules. Nevertheless, both the neighborhood board and the separate homeowners' association denied the Kuhns' request for a reasonable accommodation. The Kuhns filed a fair housing claim against both associations in 2016, after they were forced to sell their home, purchase a higher-priced home and vacate their home more than a month before closing on the new home. The extra expense caused them to sell their car and had detrimental effects on Mr. Kuhn's health. In January 2016, a federal judge sided with the Kuhns, finding that the HOAs had indeed engaged in housing discrimination. The Kuhns later settled with the HOA for $300,000 plus other costs.

A similar dispute in Las Vegas[21] found an HOA liable for failure to make reasonable accommodation and permit a family to park an ambulance used to transport their disabled son to and from his doctor appointments, despite their rules prohibiting extra vehicles.

Accommodation of Homeowner Association Rules for Persons with Disabilities — Design Rules

In 2012, Charles and Melanie Hollis filed a federal lawsuit against the Chestnut Bend Homeowners Association for its denial of a right to build a therapeutic sunroom onto their home.[22] The HOA denied the Hollises' request for a modification based on the aesthetics of the new addition. The family first requested permission to build the sunroom in 2011 and spent a year providing information to the HOA architectural board before they were summarily denied. Eventually, the family sold their home at a loss, frustrated that the process dragged on so long. The Hollises' children required the sunroom for therapeutic play and for in-home physical therapy. Despite this fact, the HOA denied the claims, alleging that the association had an obligation to uphold "architectural standards for everyone in the neighborhood." The HOA ultimately agreed to settle the suit for $156,000.

In a similar suit, in 2009, Cindy and Ian Block bought a townhouse in the Carriages at Allyn's Landing neighborhood and later installed a wheelchair ramp.[23] Cindy Block's mother was wheelchair-bound. The neighborhood association required that the Blocks paint the wheelchair ramp the same color as the siding of the home and remove the ramp if and when it was no longer needed. In September 2010, Ms. Block's mother died and the HOA sent the Blocks a letter ordering them to remove the ramp. In the meantime, Ms. Block, who is legally blind, acquired a letter from her optometrist requesting that they be allowed to keep it. The HOA then set forth additional conditions on the Blocks keeping the ramp, including that they remove the ramp prior to attempting to sell their townhouse. The Blocks brought a lawsuit claiming housing discrimination and eventually settled with the HOA for $20,000 plus attorney's fees associated with the action.

Control over Common Areas of the Community

The HOA's common areas can become a source of conflict that navigate between the territories of the association as a private actor and the extent to which the association is bound to provide access as a public accommodation. Sometimes, the common areas may interfere with the ability to access public accommodations, like transportation, bathroom access or parking. When and what the association is bound to provide depends on who has access to the community areas. For example, if the association regularly opens its facilities to the public, its restroom must comply with public accommodation requirements. If the access is limited to members of the community, the association must not create obstacles that make it difficult for those individuals to enjoy the amenities of the community.

In 2018, the Village of Valleybrook Homeowners Association in Pennsylvania settled claims with four residents who filed a HUD complaint for failure to provide handicapped parking spaces. The residents requested the spaces in 2017, and the association told the residents that they would be required to pay for reserved spaces, per the written policy regarding handicapped parking access. The residents refused, and the association in turn refused to designate spaces.[24] HUD found that the refusal was a direct violation of the FHA amendments in 2009. In fact, HUD in publications produced by the department specifically identified requiring handicapped residents to pay the costs for signage relating to a handicapped parking spot to be a violation of the FHA.

Conclusion

Advising an HOA can be fraught with peril. The residents and governing actors often believe the rules help maintain an orderly (and economically viable) community that they chose to live in. In many regards, they are given broad authority to enforce covenants laid out when the subdivision was created and modify those rules as needed.

However, HOAs are not immune from restraint themselves. Despite some views that HOAs are governments without limits, the various provisions designed to protect disabled persons from housing discrimination is proving to be a formidable check on an HOA's seemingly limitless power to deny homeowner use of property. Because the regulatory scheme that protects disabled persons is federal, the Supremacy Clause of the Constitution requires that HOA schemes

make reasonable adjustments. An HOA would be wise to take seriously claims by disabled persons for reasonable modifications and accommodations. If well documented and the request is a reasonable accommodation, failure to make a modification of rules for a disabled resident could cost the association and its homeowners thousands of dollars in fines, damages and attorney's fees.

FOOTNOTES

1. Hernandez v. Golf Course Estates Homeowners Ass'n, 6:18-cv-00932 (D. Ore. 5/29/18).

2. Covington v. McNeese State Univ., 996 So.2d 667 (La. App. 3 Cir. 2008), *writ denied*, 3 So.3d 491 (La. 2009); London v. E. Baton Rouge Par. Sch. Bd., 134 So.3d 623 (La. App. 1 Cir. 2013).

3. *See e.g.*, Mazzini v. Strathman, 140 So.3d 253 (La. App. 4 Cir. 2014); Renewal Homes v. Laneheart, 2017 WL 4700825 (La. App. 4 Cir. 2017); Foster v. Tinnea, 705 So.2d 782 (La. App. 1 Cir. 1997); Riser v. H.Y. Bell Mem'l Apartments, 669 So.2d 689 (La. App. 2 Cir. 1996).

4. *See, e.g.*, Esplanade Ridge Civic Ass'n v. City of New Orleans, 136 So.3d 166 (La. App. 4 Cir. 2014).

5. La. Civ.C. art. 775.

6. La. Civ.C.. art. 779; *id.* cmt. (c) ("every landowner in a subdivision is adversely affected by violations and has a substantive right as well as procedural standing to bring an action."); Lakeshore Property Owner's Assoc. v. Delatte, 579 So.2d 1039, 1044 (La. App. 4 Cir. 1991), *writ denied*, 586 So.2d 560.

7. *See*, Gail Stephenson, "Good Fences Make Good Neighbors (But Only if the HOA Approves)," 2 *The Baton Rouge Lawyer* 8, 8 (Jan./Feb. 2019).

8. Robin Malloy, Land Use Law and Disability: Planning and Zoning for Accessible Communities 7 (2017).

9. 42 U.S.C. § 12101 et seq.

10. 42 U.S.C. § 3601 et seq.

11. 29 U.S.C. § 701 et seq.

12. 42 U.S.C. §12102(1).

13. 42 U.S.C. §3602(h).

14. 29 U.S.C. § 705 (9).

15. 42 U.S.C. § 12181 et seq.

16. Kalani v. Castle Village, L.L.C., 14 F. Supp. 3d 1359 (E.D. CA 2014).

17. 29 U.S.C. § 705 (9).

18. Hollis v. Chestnut Bend Homeowners Assoc., 760 F.3d 531 (6 Cir. 2014).

19. 4 Louisiana Civil Law Treatise § 10.3.

20. Kuhn v. McNarry Estates Homeowners Ass'n, 228 F.Supp. 3d 1142 (D. Ore. 2017).

21. "Feds Announce Settlement with Las Vegas HOA," *Las Vegas Review Journal* (Oct. 30, 2018) available at: *www.reviewjournal.com/news/feds-announce-settlement-with-las-vegas-hoa-over-ambulance/* (noting that the suit brought and settled by HUD resulted in a $65,000 settlement in favor of the family).

22. Hollis v. Chestnut Bend Homeowners Ass'n, 760 F.3d 531 (6 Cir. 2014).

23. The N.C. Human Relations Comm'n v. Carriages at Allyn's Landing Owners Ass'n, Inc., 13-823 (N.C. Ct. App. 2014).

24. "Valleybrook group to pay $31k in disabled complaint," *Daily Times* (10/27/18) available at: *https://independentamericancommunities.com/2018/11/03/hoa-pays-31k-installs-handicapped-parking.*

Marc L. Roark is an associate professor and Senior Fellow at Southern University Law Center. He focuses in property law, land use and housing issues, including the law relating to homelessness public housing. He is a member of the Louisiana, North Carolina and District of Columbia Bars. (mroark@sulc.edu; 2 Roosevelt Steptoe Dr., Baton Rouge, LA 70813)

Elections: Self-Qualifying Deadline is Oct. 22; Voting Begins Nov. 18

Several leadership positions are open in the 2019-20 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 qualification forms is Monday, Oct. 22. First election ballots will be available to members on Monday, Nov. 18.

H. Minor Pipes III of New Orleans and John E. McAuliffe, Jr. of Metairie have been nominated for 2020-21 LSBA president-elect and 2020-22 LSBA treasurer, respectively. The president-elect will automatically assume the presidency in 2021-22.

According to the president-elect rotation, the nominee must have his/her preferred mailing address in Nominating Committee District 1 (parishes of Orleans, Plaquemines, St. Bernard and St. Tammany).

According to the treasurer 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).

Also, the Young Lawyers Division (YLD) Council nominated Danielle L. Borel of Baton Rouge for 2020-21 YLD secretary. The secretary will automatically succeed to chair-elect in 2021-22. Current YLD Secretary Graham H. Ryan will succeed to 2020-21 YLD chair-elect.

Other positions to be filled include:

Board of Governors (three-year terms beginning at the adjournment of the 2020 LSBA Annual Meeting and ending at the adjournment of the 2023 LSBA Annual Meeting) — one member each from the First, Second, Third and Fifth Board Districts.

LSBA House of Delegates (two-year terms beginning at the commencement of the 2020 LSBA Annual Meeting and ending at the commencement of the 2022 LSBA Annual Meeting) — 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 beginning at the adjournment of the 2020 LSBA Annual Meeting and ending at the adjournment of the 2021 LSBA Annual Meeting) — District 1A, Orleans Parish, four members; District 1B, parishes of Plaquemines, St. Bernard and St. Tammany, one member; District 2A, East Baton Rouge Parish, two members; District 2B, Jefferson Parish, two members; District 2C, parishes of Ascension, Assumption, East Feliciana, Iberville, Lafourche, Livingston, Pointe Coupee, St. Charles, St. Helena, St. James, St. John the Baptist, Tangipahoa, Terrebonne, Washington, West Baton Rouge and West Feliciana, one member; District 3A, Lafayette Parish, one member; District 3B, parishes of Acadia, Beauregard, Calcasieu, Cameron, Iberia, Jefferson Davis, St. Martin, St. Mary and Vermilion, one member; District 3C, parishes of Allen, Avoyelles, Evangeline, Grant, LaSalle, Natchitoches, Rapides, Sabine, St. Landry and Vernon, one member; District 3D, parishes of Bossier and Caddo, one member; and District 3E, parishes of Bienville, Caldwell, Catahoula, Claiborne, Concordia, DeSoto, East Carroll, Franklin, Jackson, Lincoln, Madison, Morehouse, Ouachita, Red River, Richland, Tensas, Union, Webster, West Carroll and Winn, one member.

Young Lawyers Division. Secretary (2020-21 term), nominee shall be a resident of or actively practicing law in any parish in Louisiana, based on preferred mailing address. Petitions for nomination must be signed by 15 members of the Young Lawyers Division. Also to be elected, 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 his/her 35th birthday by Aug. 4, 2020 (that delegate being the "young lawyer delegate"). All LSBA members may vote for both sets of candidates. The delegates will serve two-year terms, beginning with the adjournment of the 2020 ABA Annual Meeting and expiring at the adjournment of the 2022 ABA Annual Meeting, as provided in Paragraph 6.4(e) of the ABA Constitution.

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LBLS Accepting Requests for Certification Applications

The Louisiana Board of Legal Specialization (LBLS) is accepting applications for certification in five areas — appellate practice, estate planning and administration, family law, health law and tax law — from Nov. 1, 2019, through Feb. 28, 2020.

Also, the LBLS will accept applications for business bankruptcy law and consumer bankruptcy law certification from Jan. 1 through Sept. 30, 2020.

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

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

► Appellate Practice — 15 hours of approved appellate practice.

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

► Family Law — 18 hours of approved family law.

► Health Law — 15 hours of approved health law.

► Tax Law — 18 hours of approved 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 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 *www.lsba.org/specialization.*

House Resolution Deadline is Dec. 18

The Louisiana State Bar Association's (LSBA) Midyear Meeting is scheduled for Thursday through Saturday, Jan. 16-18, 2020, at the Renaissance Hotel in Baton Rouge. The deadline for submitting resolutions for the House of Delegates meeting is Wednesday, Dec. 18. (The House will meet on Jan. 18, 2020.)

Resolutions by House members and committee and section chairs should be mailed to LSBA Secretary Patrick A. Talley, 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. 18. Resolutions must be signed by the author. Also, copies of all resolutions should be emailed (in MS Word format) to LSBA Executive Assistant Jen France at jen.france@lsba.org.

LBLS Recertification Applications Due by Nov. 1

The Louisiana Board of Legal Specialization (LBLS) mailed recertification applications on Oct. 1 to specialists whose certification is due to expire on Dec. 31, 2019. The completed application and the $100 check (payable to "Louisiana Board of Legal Specialization") should be mailed or delivered to the LBLS office c/o Specialization Director Mary Ann Wegmann, 601 St. Charles Ave., New Orleans, LA 70130, no later than Friday, Nov. 1, 2019, to avoid penalties. For questions, contact Wegmann at (504)619-0128 or email maryann.wegmann@lsba.org.

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By Elizabeth LeBlanc Voss

SPLITTING FEES: ENGAGEMENT AGREEMENT

A recent Formal Opinion on fee-splitting issued by the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility warrants a look at Louisiana Rule of Professional Conduct 1.5 regarding fees.

The Opinion presents a hypothetical where the client has a written contingency-fee agreement with a lawyer, who the client terminates without cause. The client then retains a successor firm on the same contingency terms. The question at hand is whether the successor firm has an obligation to disclose to the client the original lawyer's potential claim and entitlement to a portion of the recovery.

Louisiana Rule 1.5(e) addresses the division of fees between lawyers at unrelated firms when they are working in concert on the representation. In that situation, fee-splitting is allowed if the client agrees in writing to the dual representation as well as the fee schedule of the respective lawyers, provided the total fee is reasonable and each lawyer renders meaningful legal services to the client in the matter. However, the Louisiana rule does not expressly address how fees must be split when one firm replaces another in a contingency representation. The ABA Opinion offers guidance on how to appropriately navigate the division of fees when that occurs.

ABA Formal Opinion 487 states that the successor firm in a contingency-fee matter must notify the client in writing of the continuing obligation to pay the original lawyer. Because the notice must be in writing, the engagement agreement can easily be used to satisfy this obligation. While the details of recovery and future division of fees is not known at the onset of the representation, the successor firm can address the client's obligation to his original lawyer and a potential fee-split in the fee section of the engagement agreement.

In Louisiana, the dismissed attorney would likely be entitled to recover in *quantum meruit* for legal services provided prior to termination. *See*, *Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102 (La.1979); *see generally*, Restatement of Law (Third) Governing Lawyers § 40 (2000). If termination was for cause, the fee would likely be proportionately reduced and possibly eliminated.

The engagement agreement also is the ideal place to address a waiver that likely will be required to effect the division of fees. If negotiation with the original lawyer becomes necessary, as it typically does, the successor lawyer must advise and obtain a waiver from the client to avoid Rule 1.7 personal conflict of interest regarding the distribution of the funds.

For successor firms in a contingency representation, we recommend that attorneys discuss the client's obligations to pay former counsel during your engagement agreement review with the client. When explaining that the Rules of Professional Conduct mandate that attorney's fees be reasonable, address the likelihood of a negotiation process between current and former counsel to arrive at a fair division of fees. Also, ask for the client's permission and get a waiver when finalizing the engagement contract.

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

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18 Students Complete 2019 "Suit Up for the Future" Program

Chief Justice Bernette Joshua Johnson and Hon. Tiffany G. Chase welcome Suit Up student interns. From left, Lora L. Ghawaly; Lannette Richardson; Lauren Bennett; Quentin C. Stalker; Madison G. Campbell; Jamia S. Brown; Miles M. Francis; Belema A. Derefaka; Hon. Tiffany G. Chase, Louisiana Court of Appeal, Fourth Circuit; Ally D. Flakes; Issis M. Haydel; Ning (Nina) Xi; Javier A. Calderon-Yanar; Casey L. Shaefer; Chief Justice Bernette Joshua Johnson, Louisiana Supreme Court; Taylor P. Wardsworth; Lizzie N. Flores-Miranda; Miles I. Lee; Ann M. Rome; Rachael J. Hahn; Christian J. Olivier; Kai Z. L. Haley; Benjamin J. Burstain; Jessica A. Burrell; Christian A. Falcone; Trinity A. Holmes; and Ashley Berry.

The Louisiana State Bar Association's (LSBA) Suit Up for the Future High School Summer Legal Institute and Internship Program had another successful year with 18 student interns completing the program. The three-week program (June 10-28) included abridged law school sessions; shadowing opportunities at law firms, courts and agencies; and field trips to courts and law schools.

During the program, students prepared written memorandums to support their oral arguments, which were presented on the last day to a panel of judges.

The LSBA Suit Up for the Future Program, a partnership with Just the Beginning, the Louisiana Bar Foundation and Louisiana law schools, is an award-winning Diversity Pipeline program and a 2013 American Bar Association Partnership recipient.

The success of the program is credited to the dedicated volunteers.

► LSBA Pipeline to Diversity and Outreach Subcommittee Co-Chair Scherri N. Guidry, 15th JDC Public Defenders Office; LSBA Pipeline to Diversity and Outreach Subcommittee member Angela White-Bazile, executive counsel to Louisiana Supreme Court Chief Justice Bernette Joshua Johnson; and 2019-20 LSBA President Robert A. Kutcher.

► **Instructors:** Professor Emily A. Bishop, Loyola University New Orleans College of Law; Professors Jeffrey C. Brooks and Raymond T. Diamond, Louisiana State University Paul M. Hebert Law Center; Advocacy Fellow Annie F. Scardulla, LSU Paul M. Hebert Law Center; and Professor Roederick C. White, Southern University Law Center.

► **Shadowing Employers:** Hon. Nakisha Ervin-Knott and Hon. Piper D. Griffin, Orleans Parish Civil District Court; Hon. Lee V. Faulkner, Jr., 24th JDC; Hon. Ivan L.R. Lemelle, U.S. District Court, Eastern District of Louisiana; Hon. Terri F. Love, Louisiana 4th Circuit Court of Appeal; Courington Kiefer & Sommers, L.L.C; Liskow & Lewis; SHIELDS| MOTT L.L.P.; Simon, Peragine, Smith & Redfearn, LLP; Stone Pigman Walther Wittmann LLC; Orleans Public Defenders Office; Orleans Parish District Attorney's Office; Michelle D. Craig, Transcendent Law Group; Scott, Vicknair, Hair & Checki, LLC; and Entergy Services, Inc.

► **Judge Panel:** Hon. Dana M. Douglas and Hon. Karen Wells Roby, U.S. District Court, Eastern District of Louisiana; Hon. D. Nicole Sheppard (Section J), Orleans Parish Civil District Court; Hon. Dale N. Atkins and Hon. Roland L. Belsome, Jr., Louisiana 4th Circuit Court of Appeal.

► **Field Trip Presenters:** Chief Justice Bernette Joshua Johnson and Associate Justice Marcus R. Clark, Louisiana Supreme Court; Hon. Roland L. Belsome, Jr., Hon. Tiffany G. Chase, Hon. Sandra C. Jenkins and Hon. Terri F. Love, Louisiana 4th Circuit Court of Appeal; Hon. Camille G. Buras (Section H) and Hon. Tracey Flemings-Davillier (Section B), Orleans Parish Criminal District Court; Loyola University New Orleans Law School; Tulane University; Tulane University Law School; and Trina S. Vincent and Miriam D. Childs, Louisiana Supreme Court.

► **Interns:** Ashley Berry; Adrija Bhattacharjee; Lauren Bennett; Belema Derefaka; Ally Flakes; Asia Hentkowski; Kai Johnson, extern to Hon. Karen Wells Roby; and Lannette Richardson.

LSBA Pipeline to Diversity and Outreach Subcommittee Co-Chair Scherri N. Guidry, left, 15th JDC Public Defenders Office; 2019-20 LSBA President Robert A. Kutcher, center; and Hon. Karen Wells Roby, Chief Magistrate Judge, U.S. District Court, Eastern District of Louisiana welcomed students on Day One.

Sherri N. Guidry, left and LSBA Pipeline to Diversity and Outreach Subcommittee member Angela White-Bazile.

► **Lunch Presenters:** Denia S. Aiyegbusi, J. McCaleb Bilbro, Kieone H. Cochran, Kristen A. Lee, Janell McFarland-Forges and Micah C. Zeno.

Matthew R. Slaughter, Phelps Dunbar, LLP, fifth from left, assisted student interns with memorandum prep.

Suit Up student interns on the final day of the program. Seated from left, afternoon session oral argument winner (prosecution) Issis M. Haydel; Casey L. Schaefer; Lizzie N. Flores-Miranda; best memo winner (prosecution) Taylor P. Wardsworth; Ning (Nina) Xi; morning session oral argument winner (defense) Ann M. Rome; afternoon session oral argument winner (defense) Rachael J. Hahn; and best memo winner (defense) Javier A. Calderon-Yanar. Standing from left, Christian J. Olivier; Madison G. Campbell; Benjamin J. Burstain; morning session oral argument winner (prosecution) Jessica A. Burrell; Miles I. Lee; Kai Z.L. Haley; Jamia S. Brown; Quentin C. Stalker; Christian A. Falcone; and Trinity A. Holmes.

Lunch presenter LSBA Diversity Committee Co-Chair Denia Aiyegbusi, Deutsch Kerrigan LLP, fourth from left, with student interns.

Afternoon session judge panel with Hon. D. Nicole Sheppard, Orleans Parish Civil District Court (top row left) and Hon. Dale N. Atkins (top row right) and Hon. Roland L. Belsome, Jr., Louisiana Court of Appeal, Fourth Circuit (bottom row far right).

Morning session judge panel, Hon. Dana M. Douglas and Hon. Karen Wells Roby, Chief Magistrate Judge, U.S. District Court, Eastern District of Louisiana.

Kimberly Jones, MS, JD, Director Law Admissions, fourth from left, welcomes students to Loyola University New Orleans College of Law.

Emily Wojna-Hodnett, Assistant Director of Admission, far right, welcomes students to Tulane University Law School.

"Legal Research and Writing" presenter Professor Emily A. Bishop, center, Westerfield Fellow, director of the Lawyering Program, Loyola University New Orleans College of Law, with student interns.

"Oral Argument Workshop" presenters Annie Scardulla, third from left, Advocacy Fellow, LSU Paul M. Hebert Law Center, and Jeffrey C. Brooks, fourth from left, assistant professor of Professional Practice, with student interns.

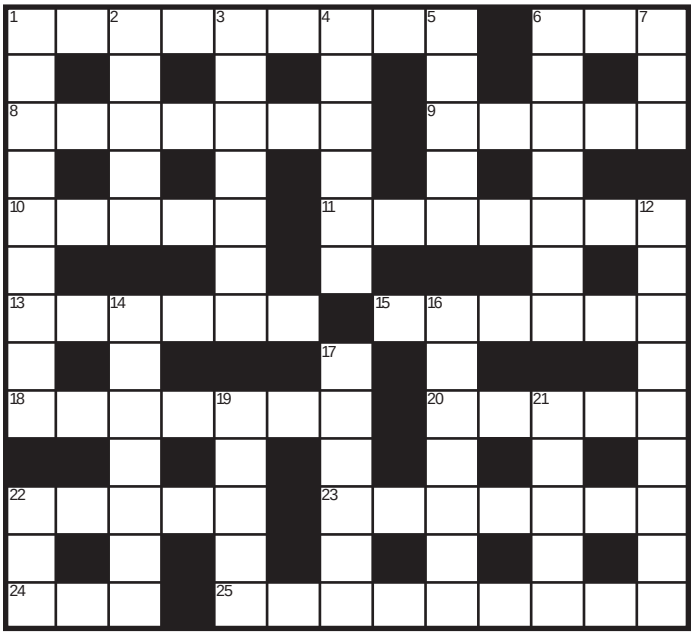
"Constitutional Law" presenter Raymond T. Diamond, center, director of the Pugh Institute for Justice, James Carville Alumni Professor of Law and Jules F. and Frances L. Landry Distinguished Professor of Law, LSU Paul M. Hebert Law Center, with student interns.

"Contracts" presenter Professor Roederick C. White, fifth from left, Vice Chancellor for Academic and Student Affairs, Southern University Law Center, with student interns.

Crossword PUZZLE

By Hal Odom, Jr.

OFFICIAL STATE



ACROSS

1 Site of Official State "Christmas in the Country" festival (9)
6 ___-au-Lait, Official State freshwater fish (3)
8 Official State boat (7)
9 ___ pelican, Official State bird (5)
10 Uteri (5)
11 Kind of seedless mandarin orange, *not* the Official State citrus fruit (7)
13 Word of preference (6)
15 In addition (2, 4)
18 Rapidly shrinking salt lake (4, 3)
20 Healthy notation on a menu (2, 3)
22 ___ de lis, Official State symbol (5)
23 Fried and sugared pastry, *not* the Official State donut (7)
24 Kind of fishing (3)
25 Official State mammal (5, 4)

DOWN

1 Having personal autonomy or self-determination (9)
2 Kind of jurisdiction (2, 3)
3 Renoir or Rodin (7)
4 Nevertheless (4, 2)
5 Something to kick or break (5)
6 In her own right, not by virtue of marriage (Latin) (3, 4)
7 Atlanta-based news channel (3)
12 Official State reptile (9)
14 One genre of Shakespearean drama (7)
16 Aten, in ancient Egyptian art (3, 4)
17 "___, Black Sheep" (3, 3)
19 Cancel, as a space trip (5)
21 Café du___, noted place to order 23 across (5)
22 Very loud, musically (3)

Answers on page 229.

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REPORT BY DISCIPLINARY COUNSEL

Public matters are reported to protect the public, inform the profession and deter misconduct. Reporting date Aug. 5, 2019.

Decisions

Evelyn Adams, Grove Hill, AL, (2019-OB-0624) **Transferred from disability inactive status to active status** by order of the Court on May 1, 2019. JUDGMENT FINAL and EFFECTIVE on May 1, 2019.

Evelyn Adams, Grove Hill, AL, (2019-B-0625) **Interimly suspended** by order of the Court on May 1, 2019. JUDGMENT FINAL and EFFECTIVE on May 1, 2019.

John Christopher Alexander, Baton Rouge, (2019-B-0664) **By consent, issued a public reprimand** by order of the Court on June 3, 2019. JUDGMENT FINAL and EFFECTIVE on June 3, 2019. *Gist:* Respondent negligently endorsed a third-party's name to a settlement check.

Lynden James Burton, New Iberia, (2019-B-0893) **Suspended from the practice of law for a period of two years, retroactive to Sept. 22, 2017**, by order of the Court on June 17, 2019. JUDGMENT FINAL and EFFECTIVE on June 17, 2019. *Gist:* Guilty plea to failure to file tax returns and acknowledged tax evasion and filing false returns.

Gregory Cook, Baton Rouge, (2018-B-1076) **Previously suspended for six months, with all but 30 days deferred, subject to a one-year period of unsupervised probation.** After receiving evidence the attorney engaged in the practice of law during the period of suspension, the Court made the deferred portion of the suspension immediately executory. The attorney will be **suspended for six months** by order of the Court on June 3, 2019. JUDGMENT FINAL and EFFECTIVE on June 17, 2019. *Gist:* Respondent en-

Continued next page

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- Has been asked to serve as an expert on professional ethics and responsibilities
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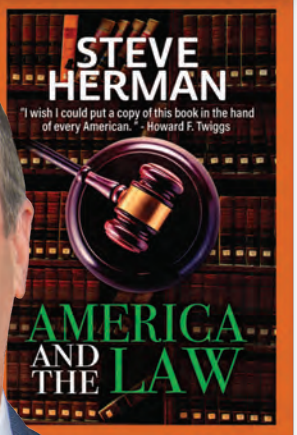

Discipline continued from page 194

gaged in a conflict of interest.

Donald C. Douglas, Jr., Mandeville, (2019-B-0984) **By consent, issued a public reprimand** by order of the Court on June 26, 2019. JUDGMENT FINAL and EFFECTIVE on June 26, 2019. *Gist:* Respondent engaged in conduct prejudicial to the administration of justice.

Maurice R. Franks, Baker, (2018-B-1483) **Reciprocal discipline disbarment** by order of the Court on May 28, 2019; rehearing denied by the Court on June 26, 2019. JUDGMENT FINAL and EFFECTIVE on June 26, 2019. *Gist:* Respondent abandoned his law practice; converted his clients' funds to his own use; and failed to cooperate in the disciplinary proceedings.

Patrick A. Giraud, Chalmette, (2019-B-1646) **Suspended for one year and one day, with all but six months deferred**, by order of the Court on June 26, 2019. JUDGMENT FINAL and EFFECTIVE on July 10, 2019. *Gist:* Conversion of client funds from his trust account.

Forrest E. Guedry, Baton Rouge, (2019-B-0558) **Suspended on consent from the practice of law for one year and one day, fully deferred, subject to probation**, by order of the Court on May 28, 2019. JUDGMENT FINAL and EFFECTIVE on May 28, 2019. *Gist:* Criminal conduct (DWI).

Todd A. Harris, Mansura, (2019-B-0827) **Previously deferred suspension of one year and one day made executory** by order of the Court on June 17, 2019. JUDGMENT FINAL and EFFECTIVE on June 17, 2019. *Gist*: Failure to comply with the terms of his probation agreement.

Kevin Lovell James, Baton Rouge, (2019-B-0653) **Suspended on consent to a one-year-and-one-day period of suspension, with all but 30 days deferred, followed by a two-year period of supervised probation**, by order of the Court on June 3, 2019. JUDGMENT FINAL and EFFECTIVE on June 3, 2019. *Gist:* Respondent mismanaged her client trust account and failed to cooperate with the Office of Disciplinary Counsel in its investigation.

Ernest L. Johnson, Baton Rouge, (2019-B-0682) **Suspended on consent from the practice of law for six months, fully deferred**, by order of the Court on June 26, 2019. JUDGMENT FINAL and EFFECTIVE on June 26, 2019. *Gist:* Knowingly made a false statement of fact or law to a tribunal or failed to correct a false statement of material fact or law previously made to the tribunal by the lawyer; failed to disclose legal authority known to the lawyer to be directly adverse to the position of the client; engaged in conduct prejudicial to the administration of justice; and violated the Rules of Professional Conduct.

Yolanda J. King, New Orleans, (2019-B-0356) **Suspended from the practice of law for one year, retroactive to her March 14, 2016, interim suspension**, by order of the Court on May 20, 2019. JUDGMENT FINAL and EFFECTIVE on May 20, 2019. *Gist:* Misdemeanor criminal conviction involving statements as to her domicile in connection with qualifying as a candidate for public office.

Continued next page

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

The following is a verbatim report of the matters acted upon by the United States District Court for the Eastern District of Louisiana, pursuant to its Disciplinary Rules. This information is published at the request of that court, which is solely responsible for the accuracy of its content. This report is as of Aug. 5, 2019.

Respondent	Disposition	Date Filed	Docket No.
Daniel E. Becnel III	[Reciprocal] Suspension.	6/21/19	19-9435
Philip Martin Kleinsmith	[Reciprocal] Disbarment.	6/4/19	19-2433
Victor Roy Loraso III	Interim suspension.	6/21/19	19-9436
Christine Yvonne Voelkel	Interim suspension.	6/4/19	19-3442
Doris McWhite Weston	[Reciprocal] Suspension.	6/21/19	19-9794
Robert Wiegand II	[Reciprocal] Suspension fully deferred.	7/11/19	19-10231

Discipline continued from page 196

Victor Roy Loraso, Baton Rouge, (2019-B-0688) **Permanently disbarred, on consent**, by order of the Court on June 17, 2019. JUDGMENT FINAL and EFFECTIVE on June 17, 2019. *Gist:* Respondent was convicted of possession and distribution of child pornography.

Jack F. Owens, Jr., Harrisonburg, (2019-OB-0985) **Permanently resigned in lieu of discipline** by order of the Court on June 26, 2019. JUDGMENT FINAL and EFFECTIVE on June 26, 2019.

Ashton DeVan Pardue, Springfield, (2019-B-0901) **Suspended on consent from the practice of law for one year** by order of the Court on June 17, 2019. JUDGMENT FINAL and EFFECTIVE on June 17, 2019. *Gist:* Neglected legal matter; failed to communicate with client; engaged in personal relationship with current client; and violated the Rules of Professional Conduct.

Lucretia Patrice Pecantte, New Iberia, (2019-B-0892) **Suspended from the practice of law for a period of two years, retroactive to Sept. 22, 2017**, by order of the Court on June 17, 2019. JUDGMENT FINAL and EFFECTIVE on June 17, 2019. *Gist:* Guilty plea to failure to file tax returns and acknowledged tax evasion and filing false returns.

Matthew V. Shelton, Alexandria, (2019-B-0791) **Suspended on consent from the practice of law for three years, with all but six months deferred, subject to probation**, by order of the Court on June 17, 2019. JUDGMENT FINAL and EFFECTIVE on June 17, 2019. *Gist:* Plead no contest felony possession of a Schedule II CDS and to first-offense DWI.

Mark G. Simmons, Baton Rouge, (2019-B-0908) **Probation revoked and the previously deferred portion of the one-year-and-one-day suspension has been made executor** by order of the Court on June 26, 2019. JUDGMENT FINAL and EFFECTIVE on June 26, 2019.

Gregory Joseph St. Angelo, New Orleans, (2019-B-1102) **Interimly suspended** by order of the Court on July 22, 2019. JUDGMENT FINAL and EFFECTIVE on July 22, 2019.

Channing J. Warner, Gretna, (2019-B-0663) **Suspended on consent for a period of three years** by order of the Court on June 3, 2019. JUDGMENT FINAL and EFFECTIVE on June 3, 2019. *Gist:* Respondent's suspension is a result of serious attorney misconduct, including neglect of his clients' legal matters, failure to refund unearned fees, failure to place advanced deposits for costs and expenses into his client trust account, and failure to return his clients' files upon termination of the representation; also practiced law while ineligible to do so, failed to cooperate with the Office of Disciplinary Counsel in its investigation; and was charged with issuing worthless checks.

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

Rule 1.1(a) — Competence.
Rule 1.2 — Failure to timely litigate.
Rule 1.3 — Failure to act with diligence.
Rule 8.4(c) — Dishonest conduct.

MEDIATION AND ARBITRATION *of* COMPLEX DISPUTES

Guy deLaup

Ross Foote

Phelps Gay

Thomas Hayes, III

Patrick Ottinger

Mike Patterson

Larry Roedel

Marta-Ann Schnabel

THE Patterson RESOLUTION GROUP

Mike McKay, a partner at the Stone Pigman Walther Wittmann L.L.C. law firm in Baton Rouge, has represented plaintiffs and defendants in a wide variety of matters ranging from intellectual property to community property; wills and trusts to antitrust; RICO to ERISA; class actions to derivative actions; product liability to professional liability; and more. He has been mediating casualty and commercial disputes for over 20 years and is a member of the American Arbitration Association's Roster of Arbitrators. He received a graduate certificate from the Straus Institute of Dispute Resolution at Pepperdine Law School and is currently completing Pepperdine's LLM program. He served as president of the Louisiana State Bar Association 2004-2005.

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There Actually is (Still) a Limit to GAO Bid Protest Jurisdiction

MD Helicopters, Inc., B-417379, Apr. 4, 2019, 2019 CPD ¶ 120.

In spring 2019, the U.S. Army issued an Other Transaction Agreement (OTA) for prototyping solicitation No. W911W6-19-R-0001 for the development of future attack reconnaissance aircraft prototypes under its prototype OTA authority contained within 10 U.S.C. § 2371b. In response to the solicitation, multiple interested vendors, including MD Helicopters, Inc., submitted "white papers" or offers. After a first round of evaluations, MD Helicopters was not selected by the Army to continue into phase one of the OTA competition. After receiving notice of its non-selection, MD Helicopters filed a pre-award bid protest with the Government Accountability Office (GAO) alleging that the Army: (1) unreasonably evaluated its offer, and (2) failed to promote small business participation pursuant to 10 U.S.C. § 2371b(d)(1). The Army requested the GAO dismiss the bid protest for lack of jurisdiction.

For a discussion on what is a bid protest, *see* Bruce L. Mayeaux, "Recent Developments: Corrective Action, Presumption of Good Faith and Speculation at the GAO," 65 La. B.J. 418 (2018).

GAO Does Not Have Bid Protest Jurisdiction Over OTAs — Generally

In its request for dismissal, the Army argued that the GAO does not have jurisdiction to review bid protests of OTAs because such instruments are not considered "procurement contracts" under the Competition in Contract Act of 1984 (CICA). Generally, under CICA, procurement contracts are contracts entered into by the federal government for the procurement of goods and services. *See*, 31 U.S.C. §§ 3551(1), 3552. In the instant matter, while the Army may use

a prototype OTA to procure goods or services, an OTA does not fall under the auspices of CICA because OTAs draw authority from a separate statute, 10 U.S.C. § 2371b. *See,* 10 U.S.C § 2371b(d)(1). Contrary to its recent decisions in *ACI Techs., Inc.*, B-417011, Jan. 17, 2019, 2019 CPD ¶ 24, and *Oracle America, Inc.*, B-416061, May 31, 2018, 2018 CPD ¶ 180, where the GAO appeared to be taking a more expansive view of its jurisdictional grant under CICA, the GAO agreed with the Army and strictly interpreted its jurisdiction.

In its decision, the GAO referenced its basis for the dismissal as jurisdictional limitations provided by Congress in CICA and under its own Bid Protest Regulations; specifically, that it has jurisdiction to preside over bid protests concerning allegations of violations of procurement statutes or regulations by federal agencies in the award or proposed award of procurement contracts. *See,* 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. § 21.1(a). The GAO noted that under this general jurisdictional limitation, however, it would review a bid protest allegation that an agency is misusing its OTA authority merely to procure goods and services. *See,* 4 C.F.R. § 21.5(m); *Blade Strategies, L.L.C.*, B-416752, Sept. 24, 2018, 2018 CPD ¶ 327 at 2. In the instant bid protest, the GAO noted that MD Helicopters' allegations involved the Army's evaluation of offers and award decisions and not its use of its OTA authority under 10 U.S.C. § 2371b.

In its opposition to the dismissal, MD Helicopters argued that the GAO's Bid Protest Regulations actually allow an expansive jurisdictional grant in 4 C.F.R. § 21.5(m) when it provides that the "GAO *generally* does not review protests . . . of agreements other than procurement contracts" and that the GAO should use this "considerable discretion" to hear its protest. *See, MD Helicopters, Inc.*, B-417379, Apr. 4, 2019, 2019 CPD ¶ 120 at 3 (emphasis in original). However, the GAO did not find MD Helicopters' argument persuasive. Specifically, the GAO reiterated in its decision that the jurisdictional grant was from Congress by way of CICA and not its Bid Protest Regulations. Hence, because CICA limits the GAO's bid protest jurisdiction to procurement contracts and OTAs are not procurement contracts, the GAO could not hear the bid protest.

Additionally, as a point of clarification, the GAO commented that the use of the term "generally" in its Bid Protest Regulations does not:

> connote some reserved discretion for [the] GAO to consider hearing cases involving the award or proposed award of an OTA, or other non-procurement agreement. Rather, it connotes that [the] GAO may, in limited circumstances, hear a protest that tangentially impacts an agency's award or proposed award of other than a procurement contract.

MD Helicopters, Inc., B-417379, at 4. This statement harked back to the GAO's earlier position that it reviews OTAs only to see if an agency is properly using its statutory OTA authority because of a challenge to that effect. As MD Helicopters was not challenging the Army's decision to use an OTA and opposed only the outcome of the OTA competition, the GAO dismissed the bid protest for lack of jurisdiction.

This decision placed the GAO back in line with its earlier jurisdictional precedent regarding OTAs as contained within *MorphoTrust USA, L.L.C.*, B-412711, May 16, 2016, 2016 CPD ¶ 133, or at least attempts to clarify its jurisdictional limitations in light of *ACI Techs.* and *Oracle America*. Potential government contractors should be mindful of this restatement of GAO's bid-protest jurisdictional limitations and consider other fora, such as COFC or the federal district courts, for protests of OTAs as the GAO has now made clear that it will not entertain those protests.

Disclaimer: The views presented are those of the writer and do not necessarily represent the views of DoD or its components.

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

Bankruptcy Law

5th Circuit Allows Administrative Expense Claims for Costs "Induced" by a Debtor-in-Possession

Nabors Offshore Corp. v. Whistler Energy II, L.L.C. (In re Whistler Energy II, L.L.C.), ____ F.3d ____ (2019), 2019 U.S. App. LEXIS 22337.

The U.S. 5th Circuit Court of Appeals recently clarified the scope and definition of "administrative expenses" under 11 U.S.C. § 503 of the Bankruptcy Code. For non-bankruptcy practitioners, an "administrative expense" is ordinarily a debt that arises post-bankruptcy that is related to, and usually beneficial to, the bankruptcy estate. For example, the debtor's bankruptcy counsel fees are typically considered administrative expenses. Classification as an administrative expense is important in bankruptcy because these expenses are given repayment priority ahead of most other creditors.

In *Whistler*, the 5th Circuit considered whether the bankruptcy court conducted the correct analysis when determining whether certain post-bankruptcy expenses were "administrative expenses." The facts of the case are this: prior to filing bankruptcy, Whistler Energy II, L.L.C., contracted with Nabors Offshore Corp. Nabors was to provide a drilling rig to Whistler, as well as related equipment and services. When Whistler entered bankruptcy, it rejected its contract with Nabors. Contract rejection is treated as a pre-bankruptcy breach of the agreement. 11 U.S.C. § 365(g)(1); *see also*, § 502(g).

The parties then entered a "pre-demobilization" period — the timeframe before equipment and infrastructure is removed from a drilling platform. During this time, Nabors' rig, equipment and some personnel remained on Whistler's platform. Approximately one month after rejecting its contract with Nabors, Whistler sent Nabors a letter requesting a "demobilization" plan. This plan was required by Whistler's federal regulator. Four months after Whistler rejected the Nabors contract, demobilization began.

Nabors then asked the bankruptcy court to classify its approximately $7 million in pre-demobilization and demobilization expenses as administrative expenses. However, the bankruptcy court found that many of Nabors' expenses during the pre-demobilization period were akin to Nabors merely being *available* to provide services, if needed, rather than *actually providing* those services. With the exception of services specifically requested by Whistler, the bankruptcy court found that a majority of Nabors' pre-demobilization expenses were not administrative expenses. Further, the bankruptcy court found that none of Nabors' demobilization expenses were administrative expenses because these costs did not benefit the bankruptcy estate. In total, the bankruptcy court awarded Nabors an administrative expense claim of only $897,024.

The district court affirmed the bankruptcy court's decision.

The 5th Circuit then reversed the lower courts' decision on pre-demobilization expenses. Regarding demobilization costs, the court agreed that these expenses were a consequence of Whistler's rejection of the Nabors' contract and did not benefit the estate. However, the court of appeals found that the bankruptcy court should have analyzed whether pre-demobilization expenses (1) benefitted the estate, and (2) whether Whistler induced the services giving rise to these expenses, regardless of whether Nabors actually provided any services.

The second prong of this test, inducement, is key in the 5th Circuit's ruling. With this statement, the 5th Circuit clarified that a creditor may prove entitlement to administrative priority when its post-bankruptcy expenses are triggered by "inducement [from the debtor-in-possession] via the knowing and voluntary post-petition acceptance of desired goods or services." *Id.* at *13.

In *Whistler*, the court of appeals noted that Nabors' availability to provide services during the pre-demobilization period may have benefitted the bankruptcy estate, even if services were not actually provided. The court analogized this availability to that of an insurance policy, which benefits the debtor by minimizing risk even if the policy is not actually triggered. The 5th Circuit remanded the matter to the bankruptcy court for a factual determination of inducement on pre-demobilization expenses, applying the new inducement test.

Practitioners in the 5th Circuit should familiarize themselves with the *Whistler* inducement standard. This standard may allow for more administrative expense claims, and the court's analysis offers guidance on how to support such claims.

—**Sarah E. Edwards**
Member, LSBA Bankruptcy Law Section
McGlinchey Stafford, P.L.L.C.
Ste. 1200, 601 Poydras St.
New Orleans, LA 70130

Shhhh . . . No Talking

Gotch v. Scooby's ASAP Towing, L.L.C., 19-0030 (La. 6/26/19), 2019 La. LEXIS 1624.

This case arose from a jury trial relative to injuries sustained from an automobile accident, where the jury discussed the matter prior to deliberations. In a split decision, the Louisiana Supreme Court held that, even though the jury members discussed the matter before it was submitted to them, the trial court did not abuse its discretion in denying a mistrial for lack of prejudice, and the verdict should stand.

At the start of trial, the trial judge instructed the jury, "You may only discuss the case with the other members of the jury when you begin deliberations on your verdict and all other members of the jury are present."

After deliberations began, counsel for plaintiff asked the alternate juror, who had remained in the courtroom, about her impression of the case. Her answer suggested that the jurors had already discussed the case among themselves over the course of the trial. The alternate stated, "Pretty much from the opening statement, we had decided that the defendant wasn't at fault."

The jury deliberated for approximately 15 to 20 minutes before returning a unanimous verdict for the defendant, just as the alternate had said the jurors had previously decided. The court, with the parties' consent, and on the record, asked the jurors if they had discussed the case before deliberations. The procedure by which the court went about questioning the jurors is not evident from the opinion. The foreperson confirmed that the jurors did not know they were not allowed to discuss the case while in the jury room; on the contrary, they felt a "duty" to discuss the case over the course of the trial in order to reach a verdict.

Another juror explained that some jurors formed opinions from the beginning, but none of them had made their minds up "one hundred percent," evinced by the fact that they all took copious notes over the course of the trial. She assured the court that the jury "looked at all the information" before reaching its verdict.

Plaintiff filed a motion for mistrial, arguing that the jurors disregarded the instruction against making a determination before the conclusion of the trial. The district court found that there was no manifest error in allowing the verdict to stand and denied the motion for mistrial because the discussion did not affect the jury's verdict, and reasonable minds could have reached the same verdict. Plaintiff's appeal ensued.

The Louisiana 3rd Circuit Court of Appeal reversed the district court, and the Louisiana Supreme Court granted certiorari. The ultimate question was whether the district court had abused its discretion in denying a mistrial. In a 4-3 opinion, the court reversed the appellate court's decision and reinstated the district court's denial of mistrial.

The majority began by stating that a mistrial is a drastic remedy, not a matter of right, that a trial court has vast discretion to grant or deny, and which should be granted only when an error results in substantial prejudice sufficient to deprive a party of any reasonable expectation of a fair trial. To qualify for a mistrial, the court continued, juror misconduct must make it impos-

sible to proceed to a proper judgment.

Here, the majority found the district court did not abuse its discretion in finding that the jurors did not make a premature decision, and, therefore, the plaintiff was not prejudiced, because one juror's testimony refuted any suggestion of prejudgment or prejudice to plaintiff's case. Moreover, the majority believed any prejudice would have favored the plaintiff since his case was presented first.

Three justices dissented, including Chief Justice Johnson. The chief justice noted jury misconduct rises to the level of a mistrial when it causes prejudice that cannot be cured by admonition or further instruction. The chief justice stated unequivocally that, here, the jury had received instructions not to engage in premature deliberations and had violated them, causing prejudice that necessitated a mistrial. Further, the chief justice cited the alternate juror's comment as well as the court's comments on the record, stating that deliberations were barely long enough for the jurors to have a bathroom break, as evidence that the verdict was "predetermined."

Justice Hughes also dissented, chiding the courts for "cavalier treatment" of the Plain Civil Jury Instructions promulgated by the Louisiana Supreme Court. He, too, noted the apparent brevity of the jury's deliberations to suggest a predetermined verdict. Ultimately, he felt that the majority simply ignored the rules violations herein.

Justice Genovese dissented as well, stating outright that plaintiff was prejudiced by jury misconduct and that the only remedy available was a mistrial. Justice Genovese reasoned the alternate juror's statement that "[p]retty much from the opening statement, we had decided the defendant wasn't at fault" prohibited the plaintiff from a fair trial, as the jury had made a preliminary decision before any evidence could be presented.

This opinion begs the question of where the scale tips in establishing juror misconduct sufficient to necessitate a mistrial. At least for now, it is not where jurors openly disregard the court's instructions against discussing the case prior to submission, as happened here. Notably, this decision represents one of the last votes cast by former Louisiana Supreme Court Justice, now U.S. District Court Judge, Greg G. Guidry. His vacancy may raise the opportunity for a sudden reversal of this recent decision.

— **Shayna Beevers Morvant**
Secretary, LSBA Civil Law & Litigation Section
Beevers & Beevers, L.L.P.
210 Huey P. Long Ave.
Gretna, LA 70053
and
Ashton M. Robinson
3L Tulane Law School and Law Clerk
Beevers & Beevers, L.L.P.
210 Huey P. Long Ave.
Gretna, LA 70053

Community Property

Volpe v. Volpe, 18-0809 (La. App. 4 Cir. 2/20/19), 265 So.3d 871, *writ denied*, 19-0479 (La. 5/20/19), 271 So.3d 1269.

Ms. Volpe purchased a home prior to the parties' marriage and refinanced it shortly before the marriage. After their marriage, they lived in the home, and she later donated one-half of her interest in the property to Mr. Volpe. The preexisting mortgage remained in her name. Mr. Volpe was not entitled to reimbursement for community funds used prior to the donation to pay for flood insurance, homeowner's insurance and property taxes since such expenses are not reimbursable.

Further, the trial court's awards to Mr. Volpe of one-half of the community funds paid on the loan principal from the date of marriage to the termination of community, and for one-half of the community funds upon the sale of the property that were used to satisfy the existing mortgage, were reversed. Although the mortgage remained in her name, he was aware of the mortgage and acknowledged it in the Act

of Donation. His share of the equity in the property was calculated after payment of the mortgage due, not before.

The court found that "it is unjust, inequitable and improper for Mr. Volpe to also be reimbursed for half of the payments to the princip[al] on the mortgage during the marriage, and for one half of the funds used to settle the mortgage at the act of sale." Further, Ms. Volpe was not entitled to reimbursement for one-half of the mortgage payments she made post-termination because she had exclusive use and occupancy of the home and, under the co-ownership articles, La. Civ.C. art. 806, a mortgage expense is not a necessary expense or one for ordinary maintenance and repairs, or necessary management expenses paid to a third person.

Sonnier v. Gordon, 52,650 (La. App. 2 Cir. 5/22/19), 273 So.3d 629.

Because both Mr. and Ms. Gordon, during their marriage, signed a promissory note in favor of Mr. Sonnier, and funds from Mr. Sonnier were deposited into an account controlled by Mr. Gordon for a business venture between him and Mr. Sonnier, Ms. Gordon was liable on the note, even though she claimed that she did not receive any consideration for signing and had no control of the funds. The court found that she personally incurred the obligation by signing the note.

Pembo v. Pembo, 17-1153 (La. App. 1 Cir. 6/28/19), ____ So.3d ____, 2019 WL 2723554.

In this community property partition, Ms. Pembo was awarded a portion of Mr. Pembo's 401(k) plan as of Aug. 26, 2011, and all earnings or losses thereon until the date of segregation into her separate account. Almost a year later, Mr. Pembo filed a rule requesting that the court correct an error in calculation and calculate the amount as of Nov. 7, 2013, arguing that the sum awarded to Ms. Pembo was determined as of the date of settlement, and thus already included interest and earnings on her community portion since the date of termination, Aug. 26, 2011. Ms. Pembo filed an exception of res judicata, arguing that the court could not make a substantive amendment to the prior judgment, and that Mr. Pembo's request was for more than a mere correction of a calculation error.

The trial court ordered that the QDRO be amended to reflect that her share was calculated as of Nov. 7, 2013, and that she was entitled to interest and earnings only since that date, not since the community termination date, Aug. 26, 2011. The court of appeal reversed, finding that the exception of res judicata was not the proper procedural mechanism to challenge an attempt to amend a judgment, but instead considered her arguments under La. C.C.P. art. 1951 that Mr. Pembo sought a substantive amendment to the judgment, not a mere correction of an error in calculation.

The court also found that the QDRO, which had already been accepted by the plan administrator, was not interlocutory under La. R.S. 9:2801 (B) but was a final judgment. Further, although La. C.C.P. art. 1951 allows final judgments to be amended, because the amendment he sought would change the substance of the agreement, it could have been changed only by consent of the parties, an application for a

new trial, an action for nullity or a timely appeal. The court of appeal thus reversed the trial court, finding that the change was not an error in calculation, but was substantive.

Succession of Schelfhaudt, 19-0129 (La. App. 4 Cir. 5/8/19), 271 So.3d 304.

During their long-term relationship, Ms. Schelfhaudt donated a one-half interest in her home to Mr. Stephens, subject to a mortgage. Subsequently, she refinanced the home and executed a promissory note in favor of the bank. Mr. Stephens did not sign the note, but he did sign the mortgage, allowing the home to secure the debt represented by the note. After her death, her heirs argued that Mr. Stephens was responsible for the note. The court found that his signing the mortgage only allowed the home to be used as security, and since he did not sign the note itself, he was not obligated on it.

Appeals

Meadows v. Adams, 18-1544 (La. App. 1 Cir. 8/7/19), ____ So.3d ____, 2019 WL 3717547**.**

Mr. Meadows filed a motion for new trial and then a motion for devolutive appeal by facsimile filing with an electronic signature; he then submitted the same pleadings but with a handwritten signature. The appellate court dismissed his appeal as untimely, as the second filed pleadings were not exactly the same as the facsimile-filed pleadings because of the different signatures. Consequently, the facsimile-filed pleadings were ineffective, leading to the second filings each being untimely. The dissent argued that appeals are favored and should not be dismissed on "hypertechnical" interpretations of statutes, including here, where the only difference in the pleadings filed was the electronic and handwritten signatures.

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

Insurance, Tort, Workers' Compensation & Admiralty Law

Tort: Liability for Damages in Civil Protests

Doe v. Mckesson, ____ F.3d ____ (5 Cir. 2019), 2019 WL 3729587.

In July 2016, during the summer of our national discontent, a protest associated with Black Lives Matter took place by blocking a highway in front of the Baton Rouge Police Department headquarters. The Baton Rouge Police Department prepared by organizing a front line of officers in riot gear, standing in front of other officers, including Officer Doe, prepared to make arrests. DeRay Mckesson, associated with Black Lives Matter, was "the prime leader and an organizer of the protest."

Some protestors began throwing full water bottles, stolen from a nearby convenience store. The complaint alleges that Mckesson did nothing to prevent the escalating violence but rather incited it. The police began making arrests when an unidentified person picked up a rock or piece of concrete and hurled it at the officers, striking Doe in the face. His injuries included loss of teeth, injuries to his jaw, head and brain, lost wages "and other compensable losses." Doe filed suit in district court, naming Mckesson and Black Lives Matter as defendants, on theories of negligence, respondeat superior and civil conspiracy. Mckesson filed two motions: (1) a Rule 12(b)(6) motion asserting failure to state a plausible claim for relief against Mckesson, and (2) a Rule 9(a)(2) motion asserting that Black Lives Matter is not an entity with capacity to be sued. Officer Doe moved to amend his complaint to add factual allegations as to Black Lives Matter Network, Inc., and #Black Lives Matter as defendants. The district court granted both of Mckesson's motions and denied Doe's motion for leave to amend, taking judicial notice that #Black Lives Matter is a "hashtag" and, therefore, an "expression," lacking capacity to be sued, and dismissed

his case with prejudice. The court did not reach the merits of Doe's state tort claims against Mckesson, but found that Doe failed to plead facts that took Mckesson's conduct outside of the bounds of First Amendment-protected speech and association.

On appeal, the 5th Circuit found that Mckesson's conduct was not necessarily protected by the First Amendment. It began by addressing Doe's state tort claims.

La. Civ.C. art. 2320 provides that "[m]asters and employers are answerable for the damage occasioned by their servants . . . in the exercise of the functions which they are employed." A "servant" under the Code "includes anyone who performs continuous service for another and whose physical movements are subject to the control or right to control of the other as to the manner of performing the service." Doe's vicarious liability theory fails because he did not allege facts that support an inference that the unknown assailant "performed a continuous service" for or that his "physical movements [we]re subject to the control or right to control" of Mckesson.

In order to impose liability for civil conspiracy in Louisiana, a plaintiff must prove that (1) an agreement existed with one or more persons to commit an illegal or tortious act; (2) the act was actually committed; (3) the act resulted in plaintiff's injury; and (4) there was an agreement as to the intended outcome or result. The court found that the plaintiff had alleged no facts supporting civil conspiracy, stating:

> Although Officer Doe has alleged facts that support an inference that Mckesson agreed with unnamed others to demonstrate illegally on a public highway, he has not pled facts that would allow a jury to conclude that Mckesson colluded with the unknown assailant to attack Officer Doe or knew of the attack and specifically ratified it.

Finally, Doe alleged that Mckesson was negligent for organizing and leading the Baton Rouge demonstration because he "knew or should have known" that the demonstration would turn violent. Louisiana's "duty-risk" analysis for assigning tort liability under a negligence theory requires a plaintiff to establish that (1) the plaintiff suffered an injury; (2) the defendant owed a duty of care to the plaintiff; (3) the duty was breached by the defendant; (4) the conduct in question was the cause-in-fact of the resulting harm; and (5) the risk of harm was within the scope of protection afforded by the duty breached.

The court found that Doe had alleged sufficient facts to support a negligence claim. Doe "plausibly alleged" that Mckesson breached his duty of reasonable care by intentionally leading the demonstrators to block the highway, a criminal act under La. R.S. 14:97, making it patently foreseeable that the Baton Rouge police response would almost certainly provoke a confrontation between police and demonstrators. Doe also plausibly alleged that Mckesson's breach of duty was the cause-in-fact of his injuries. By leading the demonstrators onto the public highway and provoking a violent confrontation with the police, Mckesson's negligent actions were the "but for" causes of Doe's injuries. The court found that Doe's claim was "sufficiently plausible to allow him to proceed to discovery," noting that its "ruling at this point is not to say that a finding of liability will ultimately be appropriate."

The court further held that Doe did not plead sufficient facts to show that Black Lives Matter is a "suable entity." The trial court took judicial notice that Black Lives Matter is a "social movement" and, thus, could not be a juridical person. The 5th Circuit found that was legal error as whether Black Lives Matter was a "national unincorporated organization" as alleged by Doe was a mixed question of law and fact. However, the court found that Doe failed to plead sufficient facts to support a plausible inference that Black Lives Matter was an entity capable of being sued.

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

U.S. Court of International Trade

JSW Steel (USA) Inc. v. United States, Case 1:19-cv-00133 (Ct. Intl. Trade)**.**

JSW Steel (USA) is the American subsidiary of a large Indian steel company. After breaking ground on a new electric arc furnace in Texas and crediting the Trump administration's steel tariffs as the primary justification for up to $1 billion in U.S. expansion investment, the company turned around and sued the Trump administration for failing to grant it an exemption to the same steel tariffs that it applauded. JSW Steel (USA) sued the U.S. Department of Commerce at the Court of International Trade seeking to reverse Commerce's decision denying its request to exclude various categories of steel that it imports from Mexico and China from the Section 232 steel tariffs. The complaint alleged that the Commerce Department's decision is arbitrary and capricious and violates the Administrative Procedures Act (APA).

In March 2018, the United States imposed a 25% tariff on steel imports. The President's Executive Order imposing the tariff, issued pursuant to authority granted under the Trade Expansion Act of 1962 (19 U.S.C. § 1862), also directs the Secretary of Commerce to grant tariff exclusions to U.S. businesses for certain steel imports that are not immediately available from U.S. producers in sufficient quantity and quality. The purpose of the exclusions is to "protect downstream manufacturers that rely on products not produced by U.S. domestic industry at this time." *See, Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum*, 83 Fed. Reg. 46,026, 46,038-39 (Sept. 11, 2018).

JSW operates a facility in Texas where it manufactures steel plate and pipe for infrastructure projects, including

natural gas and oil pipelines. The company and its Indian parent are investing up to $1 billion to expand and upgrade the plant. Company leadership credited the Trump administration's steel tariffs with providing the flexibility to compete on a more level playing field and to commit necessary resources to the expansion. However, the company utilizes primarily imported steel slab feedstock for its operations. Alleging that the feedstock is unavailable in the U.S. market at its quantity and quality specifications, the company filed an exclusion request seeking exemption from the 25% tariffs on its imports from Mexico and India. The Mexican tariffs have since been lifted after conclusion of the U.S.-Mexico Canada Free Trade Agreement, but tariffs remain on the Indian imports.

The lawsuit contends that the Commerce Department refused to consider the record evidence on U.S. steel quality and quantity and that it issued the same boilerplate denial for each exclusion request. JSW acknowledges the objections from the U.S. steel industry to its request wherein the U.S. producers claimed to have sufficient capacity to satisfy the product demand and quality specifications. The company takes issue with Commerce's alleged failure to verify the domestic industry's assertions and with the fact that the denials are "part of a broader pattern in which the Department has rejected thousands of exclusion requests by providing the same pro forma, conclusory explanation, with no reasoning or analysis." *See,* Complaint, Case No. 19-00133, at ¶34. The complaint seeks redress under the APA for the Department's alleged failure to provide any evidentiary basis for its denial, which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at ¶39.

World Trade Organization

United States-Certain Measures Relating to the Renewable Energy Sector, WT/DS510/R (June 27, 2019).

A panel constituted under the auspices of the World Trade Organization (WTO) dispute-settlement system recently issued a ruling against the United States for various domestic-content requirements and subsidies granted by numerous U.S. state governments to the renewable energy sector. India brought the complaint back in 2016, but the panel was not constituted until 2018.

India's complaint asserts that the U.S. state governments of Washington, California, Montana, Massachusetts, Connecticut, Michigan, Delaware and Minnesota enacted various laws, regulations and programs that provide an unfair advantage to U.S. domestic products in the development of the U.S. renewable-energy sector, in violation of, *inter alia*, U.S. commitments under Article III:4 of the General Agreement on Tariffs and Trade 1994. Article III:4 is a bedrock non-discriminatory principle requiring WTO members to afford imported products treatment that is "no less favourable than that accorded to like products of national origin" with respect to internal laws and regulations. In short, WTO members are not allowed to enact laws or regulations that discriminate in favor of domestic products against imported products. India contends that the eight U.S. states enacted a plethora of renewable-energy tax rules and incentive programs that favor the inclusion of U.S.-made products to the detriment of imported products.

The legal relationship between U.S. states and the federal government in international economic matters is sometimes controversial. On the one hand, the federal government is constitutionally tasked with regulating international commerce. On the other, all powers not allocated to the federal government are reserved to the states by the 13th Amendment. U.S. state economic-development-incentive programs heighten this constitutional tension when states enact laws or programs that implicate international commerce but otherwise likely fall within the states' constitutional prerogative. The U.S. Supreme Court's most recent statement in this area is *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), where it struck down a Massachusetts law forbidding state procurement contracts to companies doing business with the country of Burma. The Court's holding was limited inasmuch as it found that the state law was preempted because of federal sanctions against Burma.

U.S. WTO commitments include specific obligations to take all reasonable measures necessary to bring U.S. states into conformity with the federal government's international trade commitments. *See,* GATT Art. XXIV:12 ("Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories."). In this case, the WTO panel concluded that the United States is violating its WTO obligations and commitments because the U.S. state programs do not comply with WTO rules. The WTO dispute-settlement panel ordered the WTO to request that the United States bring the non-conforming measures into compliance with WTO rules. It remains to be seen how the various U.S. states

will react to the ruling and what, if any, reasonable measures the federal government will seek to employ against the states. Economic-development-incentive programs appear to fall squarely within the constitutional prerogative of the states, so the road to resolving this dispute remains unclear. If the United States refuses to comply, or asserts that it lacks the ability to force the states the change their laws, India will be entitled to impose retaliatory tariffs against U.S. exports in amounts commensurate with the level of trade impacted by the U.S. state programs.

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

Abortion Protected, But Not Drinking on the Job

A district court in the Eastern District of Louisiana recently found that abortion is encompassed within the statutory text of Title VII, 42 U.S.C. § 2000e(k), prohibiting adverse employment actions "because of or on the basis of pregnancy, childbirth, or related medical conditions." *Ducharme v. Crescent City Déjà Vu, L.L.C.*, ____ F.Supp.3d ____ (E.D. La. 2019), 2019 WL 2088625. The court noted that "[w]hile abortion is not a medical condition related to pregnancy in the same way as gestational diabetes and lactation, it is a medical procedure that may be used to treat a pregnancy related medical condition." The court also found that because the Louisiana Pregnancy Discrimination Act (LPDA), La. R.S. 23:342, includes the exact same language as Title VII, it is subject to the same interpretation. Although the 5th Circuit has yet to weigh in on the issue, the 3rd and 6th Circuits, the only two appellate courts to have addressed the issue, have found that it is.

However, Ducharme, who alleged she was fired because she had an abortion, could not avoid dismissal of her discrimination claims under Title VII and the LPDA where she admittedly drank on the job and could not demonstrate the decision maker had any anti-abortion animus. Additionally, several coworkers, including the bartender's boyfriend, were also fired for drinking on the job, belying any allegation that she was treated differently than those who did not have abortions.

Pertinent Facts

In September 2017, Ducharme, a bartender at a bar and grill, told her manager that she had become pregnant and planned

to have an abortion. She requested two days off to have the procedure, and the manager accommodated the request. The manager declared that she was not upset about the employee having an abortion and had no real opinion about abortion generally. However, the employee testified that the manager began treating her "crappily" and "indifferently" after learning of the employee's planned abortion.

While the employee was off work for her abortion, another employee alerted the manager that he had seen the employee drinking many times while on the clock. The manager confirmed through her review of security tapes that the employee had not only been drinking on the job, but had given another person a drink without charging for it. The company terminated the employee for drinking on the job and also terminated the employee's boyfriend, who was also captured on video surveillance drinking while on the job.

The employee sued the bar and the manager, alleging they violated Title VII and the LPDA when they terminated her.

Abortion Recognized as Protected Characteristic Under Title VII and LPDA

The employer argued that the employee's claims should be dismissed because neither Title VII nor the LPDA recognize pregnancy as a protected characteristic. The court rejected the employer's argument that abortion did not fall within the text of the two statutes at issue and found that a woman who was terminated from employment because she had an abortion was terminated because she was affected by pregnancy, and thus Title VII and the LPDA extend to abortions.

Employee's On-the-Job Drinking not Protected

However, the court granted the employer's summary judgment motion, concluding that the employee was fired for drinking on the job, not because she had an abortion. The employee could not produce competent evidence that other employees who did not have abortions but drank or used drugs on the job were not fired. Moreover, the court rejected the employee's attempt to demonstrate disparate treatment by distinguishing between drinking on the job and being intoxicated on the job. The employee claimed she and her boyfriend were fired for simply drinking or "taking just one sip," while others who were terminated were drinking so much they were seriously impaired. The court found this to be a distinction without a difference as both drinking on the job and being intoxicated on the job were terminable offenses.

It was undisputed that the employee was drinking alcohol on the job. The employee admitted she drank on the job at least monthly, and the employer produced security camera footage showing her doing so. It was also undisputed that this conduct violated the rules as stated in the employer's handbook and that the employee was aware of these rules.

Although the employee was fired the same day she underwent an abortion, the 5th Circuit has held that "[a]lthough the temporal proximity between the employer learning of the plaintiff's pregnancy and her termination may support a plaintiff's claim of pretext, such evidence — without more — is insufficient." *Fairchild v. All Am. Check Cashing, Inc.*, 815 F.3d 959, 968 (5 Cir. 2016).

Most damning to the employee's pregnancy discrimination claim was the complete absence of any support for any alleged anti-abortion animus by the manager. It was uncontroverted that the manager had never said anything about abortion or religion to the employee any time during their 18-month, "very good" relationship.

In sum, an employee who has an abortion in Louisiana may now be able to assert that she is protected from being terminated or otherwise discriminated against on that basis, but undergoing the procedure does not immunize the employee from the application and enforcement of legitimate workplace rules.

—**Christine M. White**
Member, LSBA Labor and Employment Law Section
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
Ste. 3600, 201 St. Charles Ave.
New Orleans, LA 70170

Secret Santa

SIGN UP EARLY!
Sign up early and receive your informational packets in November!

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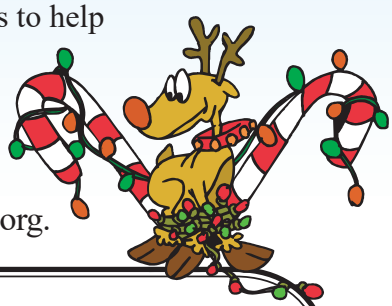
The Louisiana State Bar Association/Louisiana Bar Foundation's Community Action Committee is inviting Bar members and other professionals to brighten the holidays for needy children by participating in the 23rd annual Secret Santa Project.

- Sponsors will shop with inspiration from the child's "Wish List."
- Informational packets will be distributed in November.
- No required minimum or maximum amount on gifts.
- Gift collection will run from 9 a.m. to 4 p.m. on Wednesday, Dec. 4 through Friday, Dec. 6, 2019.
- More details about gift-wrapping, drop-off, etc., will be included in the informational packet.

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



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

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I would like to sponsor _____ child(ren). Preferred age range (not guaranteed) _____
(12 and under)

To participate, fax this form to Krystal Bellanger Rodriguez at (504)566-0930.

Co-ownership and Authority to Operate

Acts 2019, No. 350, amended Mineral Code article 164 (La. R.S. 31:164) to provide that if a co-owner of land creates a mineral servitude that burdened his interest, the servitude owner can conduct mineral operations, provided that the owner acquires the consent of co-owners owning at least an undivided 75% interest in the land (the fractional interest of the co-owner who created the servitude should count toward the total amount of consenting interests). The same legislation amended Mineral Code article 166 (La. R.S. 31:166) to provide that if a co-owner of land creates a mineral lease covering his interest, the lessee may operate with the consent of co-owners owning at least an undivided 75% interest in the land. Finally, the 2019 legislation amended Mineral Code article 175 (La. R.S. 31:175) to provide that, if land is subject to a mineral servitude and the mineral servitude itself is co-owned, a co-owner can conduct operations if co-owners owning at least an undivided 75% interest consent. Under the original version of these articles that were enacted with the Mineral Code, unanimous consent was required. This was changed to 90% in 1986 and to 80% percent in 1988.

Use of Oilfield Site Restoration Fund

Acts 2019, No. 193, amends La. R.S. 30:86 to authorize use of money from the Oilfield Site Restoration Fund to respond to emergencies declared by the Commissioner of Conservation pursuant to R.S. 30:6.1. Act No. 193 also amends R.S. 30:93.1 to provide that, if money from the Fund is used to respond to an emergency, the Commissioner must seek recovery of those funds from any party that has operated or held a working interest in the site where the emergency occurs.

State Leases, Including a Provision for a Security Interest

Acts 2019, No. 403, provides that the State Mineral and Energy Board may include in state mineral leases issued after July 31, 2019, a clause that grants a security interest in minerals produced pursuant to the lease (or lands pooled therewith and attributable to the leased premises) to secure the lessee's obligation to pay lease royalties or other sums due under the lease.

Additional Reclamation Fee for Coal and Lignite Mines

Acts 2019, No. 150, amends La. R.S. 30:906.1 to impose on all persons holding a permit under the Surface Mining and Reclamation Act an annual reclamation fee of $6 for each acre of land included within the approved mine permit area. The revenue is to be used for enforcing the Louisiana Surface Mining and Reclamation Act. This annual fee is in addition to the existing fee under 30:906.1 of 8 cents per ton of coal and lignite produced.

No Claim Against Mineral Lessee for Crop Damages

Precht v. Columbia Gulf Transmission, L.L.C., ____ F.Supp.3d ____ (W.D. La. 2019), 2019 WL 3368600.

Columbia Gulf Transmission constructed a natural gas pipeline across land owned by a limited liability company, pursuant to a right-of-way agreement that required Columbia to pay for any damage to crops. In addition, though, in return for a specified payment, the landowner had released Columbia for any future claims the landowner might have for crop damages. Flavia and Kelly Precht later sued Columbia, alleging that they were farming the land pursuant to a verbal farming lease. In resolving cross motions for summary judgment, the court resolved several issues.

First, citing La. Civ.C. art. 2004, the court noted that a party can contract in advance to release another party from future liability for simple negligence (as opposed to gross negligence). Thus, the release was not invalid altogether, as the Prechts argued. But the release did not apply to claims brought by someone other than the landowner. Thus, the release did not bar the Prechts' claim.

Second, because the contractual clause that obligated Columbia to pay for damages to crops did not limit this obligation to paying for damages to crops that *belonged to the mineral lessor*, the clause appeared to be a *stipulation pour autrui* (third party beneficiary contract) under La. Civ.C. art. 1978. Thus, the clause could benefit a farming lessee. Accordingly, Columbia was not entitled to a summary judgment dismissing the Prechts' contractual claims. However, the Prechts were not entitled to a summary judgment that Columbia had contractual liability to them under the *stipulation pour autrui* because there was a genuine issue of material fact as to whether the Prechts actually had a valid verbal farming lease.

Third, Columbia sought dismissal of the Prechts' tort claims on grounds that the Prechts could not show that they owned the crops that were damaged. The court agreed. La. Civ.C. art. 491 provides that, as to third persons, crops are presumed to belong to the owner of the land unless separate ownership is shown by an instrument filed for registry in the conveyance records of the parish where the land is located. This presumption is conclusive. That is, the presumption applies even if the third person knows that the crops belong to some person other than the landowner. Accordingly, Columbia was entitled to a dismissal of the Prechts' tort claims for damage to their crops.

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

Three-Year Prescription

In re Med. Review Panel of Lindquist, 18-0444 (La. App. 5 Cir. 5/23/19), 274 So.3d 750.

Lindquist underwent surgery in 2013. X-rays of his spine two days post-operatively showed a metal artifact in the surgery site, and the surgeon noted it in a progress note. Lindquist was not informed of the artifact.

Four years later, following an MRI of his spine, Lindquist was advised of the presence of the foreign object, after which he filed suit. The defendants filed an exception of prescription based on the three-year period of La. R.S. 9:5628. Lindquist argued that the failure to inform him of the artifact constituted fraudulent concealment, invoking the doctrine of *contra non valentem*. Thus, prescription did not begin to run until he learned of its presence four months before filing his panel complaint. The defendants countered that Lindquist was not prevented from bringing his suit within three years because the presence of the foreign object was documented in his medical records, which were continuously available to him. The trial court granted the exception.

The appellate court noted this *res nova* issue of whether a health-care provider, who is aware of such a situation but fails to disclose such to the patient, has engaged in conduct that rises to the level of concealment, misrepresentation, fraud or ill practices sufficient to trigger the application of the third category of *contra non valentem* to interrupt the prescriptive period set forth in La. R.S. 9:5628.

The appellate court distinguished earlier cases that imposed the three-year limitation on malpractice actions when neither the patient nor the defendant was aware of its presence. In the instant case, the defendant allegedly was aware of the presence of the artifact, as evidenced by Lindquist's medical record.

The court decided that, at this preliminary stage of the proceedings, it would make no findings as to whether there was any malpractice. But assuming Lindquist's allegations were true, the court found that the failure to disclose the results of the x-rays was a fraudulent act that prevented him from filing a malpractice claim and that prescription was suspended until he learned of the presence of the foreign object. The mere availability of the information in Lindquist's records did not serve as sufficient constructive knowledge to start the running of prescription. Instead, the court wrote, it was what he "*knew or should have known,*" not what he "*could* have known." *Id.* at 761, quoting *Lennie v. Exxon Mobil Corp.*, 17-0204 (La. App. 5 Cir. 6/27/18), 251 So.3d 637, 646, *writ denied*, 18-1435 (La. 11/20/18), 256 So.3d 994. The trial court's ruling on the exception of prescription was reversed.

Medical Review Panel Evidence

In re Med. Review Panel for Brock, 19-0480 (La. App. 4 Cir. 6/19/19), 274 So.3d 1275.

Does the trial court have the authority to impose restrictions on evidence submitted to a medical-review panel? La. R.S. 40:1231.8(D)(2) references things that "may" be submitted, *e.g.*, medical records, and concludes that "any other form of evidence allowable by the medical review panel" may be submitted.

The plaintiffs issued subpoenas to the Orleans Parish coroner and to the executive director of the Louisiana State Board of Medical Examiners, intending to submit the records to the medical-review panel. The defendants moved to quash the subpoenas, arguing that the "catchall provision" at the end of the statute warranted strict construction "in the context of the MMA," in that the information sought was irrelevant to the medical treatment at issue. Unpersuaded by plaintiffs' contention that it lacked the authority to make that determination, the trial court granted the motion to quash.

The appellate court noted that the issue of whether a trial court, in the pretrial context, has the authority to impose restrictions on the type of evidence a panel member may consider was *res nova* in Louisiana.

The court found instructive Indiana's malpractice statute, on which Louisiana's malpractice act was modeled. Indiana courts consistently have held that a trial court may not function as a gatekeeper of evidence that may be submitted to a medical-review panel or that a panel member may consider, quoting *Griffith v. Jones*, 602 N.E.2d 107, 110 (Ind. 1992). In *Griffith*, the Supreme Court of Indiana observed:

> In view of the fact that the legislature clearly intended for the medical review panel to function in an informal manner in rendering its expert medical opinion, we believe that the legislature did not simultaneously intend to empower trial courts to dictate to the medical review panel concerning either the content of the panel's opinion or the manner in which the panel arrives at its opinion, or the matters that the panel may consider in arriving at its opinion. In other words, the grant of power to the trial court to preliminarily determine matters is to be narrowly construed.

Without any Louisiana statutory or jurisprudential law that allows a court to act as gatekeeper of admissible panel evidence, the appellate court decided the pertinent statute "places no restrictions on the type of evidence that may be produced to [a] medical review panel. Moreover, this provision grants [a] medical review panel the authority to determine the evidence it will consider." *Id.* at 1279.

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

Boat Broker Does Not Disqualify Isolated or Occasional Sale Exclusion

Tortuga Charters, L.L.C. v. Tax Collector, Parish of St. Tammany, BTA Docket No. L00637 (4/15/19).

Randy Smith, sheriff and ex-officio tax collector for St. Tammany Parish (collector), assessed Tortuga Charters, L.L.C., for sales/use tax and related amounts relating to Tortuga's purchase of a particular vessel. Tortuga paid the tax at issue under protest and filed suit for recovery at the Louisiana Board of Tax Appeals (BTA).

Tortuga filed a motion for summary judgment asserting that the vessel was purchased in a non-taxable occasional or isolated sale under the occasional sale exclusion, La. R.S. 47:301(10)(c)(ii)(bb). Tortuga bought the vessel from a third-party seller with the aid of a broker in the business of facilitating such vessel sales. The collector asserted the position that both the broker and the seller were persons engaged in the business of selling such vessels, and thus the occasional sale exclusion does not apply.

The question presented was whether the definition of an occasional sale in the occasional sale exclusion, as a matter of law, excludes sales involving a broker. In reviewing the statutory language of La. R.S. 47:301(10)(c)(ii)(bb), the BTA found that its plain language does not state that a broker can never be involved in an occasional sale. The BTA noted that it could not find any case law in support of such position. The BTA referenced a conclusion by the Louisiana Department of Revenue in Revenue Ruling 15-001 that the language of La. R.S. 47:301(10)(c)(ii)(bb) does not state that a broker can never be involved in an occasional sale. Moreover, as tax exclusions must be interpreted in the taxpayer's favor, the BTA refused to stretch the language to include the restriction on a broker being involved in such transactions as urged by the collector.

However, the BTA ultimately denied Tortuga's motion for summary judgment, finding that the record did not make

clear that the seller of the vessel was not in the business of selling boats. The only evidence submitted by Tortuga as to the seller's business was an addendum to the vessel-purchase agreement in which the alleged owner of the seller stated that it is not a dealer in used vessels, and that the sale of the vessel constituted an occasional sale of used equipment as defined in the Louisiana tax code. Tortuga did not produce an affidavit by the seller's owner nor any other corroborating evidence. As such, the BTA found that the record was insufficient to grant summary judgment.

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

Presence of In-State Beneficiary Alone Does Not Empower State to Tax Undistributed Trust Income

N.C. Dep't of Rev. v. Kimberley Rice Kaestner 1992 Family Trust, 139 S.Ct. 2213 (2019).

The North Carolina Department of Revenue assessed a tax deficiency on the undistributed income of a New York trust whose only connection to North Carolina was a trust beneficiary who was a North Carolina resident. North Carolina is one of few states that tax undistributed trust income based solely on the residence of beneficiaries. The trust kept all physical records in New York and had no direct investments in North Carolina. The trust agreement gave the Connecticut trustee exclusive control over the distribution of trust income and provided the trustee with the right to roll the trust over into a new trust ahead of its scheduled termination date. The trustee paid the tax under protest and sued for a refund, winning against the Department of Revenue throughout the North Carolina legal system.

The trial court held that North Carolina's tax violated both the dormant Commerce Clause and the Due Process Clause. The North Carolina appellate courts affirmed the trial court's decision solely on due process considerations. The U.S. Supreme Court granted a petition for writ of certiorari to the North Carolina Department of Revenue on appeal from the North Carolina Supreme Court.

The only legal issue before the Supreme Court was whether the Due Process Clause prohibited North Carolina from taxing the undistributed trust income. The Court found that North Carolina did not have sufficient "minimum connection" to tax the trust because the North Carolina beneficiary did not receive any distributions in the tax years in question, had no right to control the trust assets and was not legally certain to ever receive any trust income if the trustee continually rolled the trust over.

—**Sanders Whitworth Colbert**
Member, LSBA Taxation Section
Kean Miller, LLP
Ste. 3600, 909 Poydras St.
New Orleans, LA 70112

May Parol Evidence Resolve Ambiguity to Create a Predial Servitude?

In *Brunson v. Crown Brake, L.L.C.*, 18-994 (La. App. 3 Cir. 6/19/19), ____ So.3d ____, 2019 WL 2607202, the Louisiana 3rd Circuit reviewed whether the language of recorded documents was sufficient to create predial servitudes.

Ballina sold 190.02 acres to Galloway by a 2008 Act of Exchange, with a metes and bounds legal description attached, a description of the servitude and reference to an unrecorded November 2008 plat. The plat attached to the Act of Exchange was dated December 2008 and did not reference a servitude. In 2011, Ballina transferred 2.89 acres to the Tarvers, who later sold to Close in 2014. Close also purchased 5.87 acres of adjacent land from Galloway. In 2017, the Brunsons purchased from Ballina a 6.1-acre tract adjacent to Galloway's land and began building their home. Crown Brake purchased the 190-acre tract from Galloway in September 2017 and claimed a 50-foot-wide servitude through the middle of the Brunsons' partially constructed home. Crown Brake claimed the servitude base on language attached to the 2008 Act of Exchange. The Brunsons filed a petition for declaratory judgment and injunctive relief, claiming the servitude did not exist. The trial court allowed evidence outside of the 2008 Act of Exchange and found that two predial servitudes existed in favor of Crown Brake based on the parties' intent.

The use and extent of a servitude is governed by the title that creates it, and any doubt as to the existence of a servitude is resolved in favor of the servient estate. Servitudes must be express and cannot be implied from vague or ambiguous language. As a predial servitude must be recorded to be effective against third persons, the third parties in this lawsuit are bound by only the 2008 Act of Exchange, Exhibit A and the December 2008 plat survey, not the unrecorded November 2008 plat. As there was no identification of the servient estate in these documents, doubt arises as to the "existence, extent, or manner of exercise" of the alleged predial servitude. This ambiguity must be resolved in favor of the servient estate.

However, the court is not to interpret the intent of the contracting parties when dealing with third parties. The 3rd Circuit found that the recorded documents failed to express the nature, location and extent of a predial servitude. Thus, the trial court's judgment was reversed, and the 3rd Circuit granted judgment declaring that the recorded 2008 Act of Exchange did not create a predial servitude.

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

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CHAIR'S MESSAGE

It's Election Time: Be Informed

By Scott L. Sternberg

It's election time — some would say "silly season" — around Louisiana. I love elections. They are fun to watch, and they make my personal law practice way more exciting. They can also get expensive.

A fellow young lawyer sat down in my office recently and asked me why I go to fundraisers and participate in the process. He was contemplating his political involvement and uncertain of what he had to gain from being active in that sphere.

People expect us to be up on the issues of the day, I told him. And, it's a great way to meet people.

In the August/September 2019 issue of the *Louisiana Bar Journal*, I suggested that Bar events are a great way to work on your marketing skills. It's true, and we have quite a few events and programs coming up over the next few months. Stay tuned for more information.

Political events, like Bar events and professional activities, can serve not only as marketing opportunities but also as opportunities for personal and professional growth.

The fellow young lawyer went to a fundraiser for a major candidate that very same night and told me afterwards how his appreciation for political involvement had grown just from attending that one event. He had learned about issues he was unaware of before the event and developed a greater understanding of topics that he already cared about.

Scott L. Sternberg

Not only was he able to network with friends and fellow professionals he already knew, but he met more seasoned attorneys in his practice area who held opinions that aligned with the candidate's views. He realized how the rooms change with the issues involved and saw the value in being a part of the process.

I could see how, for this young attorney, the picture became a little clearer for him. To complement his enjoyable evening, he had made several new marketing contacts that he hopes to develop into new business. He's still not sure how he feels about the candidates he met, but I'm 100% sure he's more informed and further along in his professional development than he was *before* he walked into that room.

His newfound appreciation for political involvement matters, and not just because we should all care about what happens in our state or our community (we should). As a young lawyer, your clients, family and friends will expect you to be "up" on the issues — if not to have an opinion that they will seek out.

People will ask you which judicial candidate to vote for. Why? You're a lawyer, shouldn't you know? If you don't know which judge you would support to hear your legal dispute, then how should the general public? The same can be said for every public office. So, take a moment to get informed about the issues and the candidates.

I'm not saying you should stake out an extreme or even any position on every single issue. I am saying that people will expect you to be a resource because of your training and role as an officer of the Court. Our Code of Professionalism states that we will "be mindful of our responsibility to the judicial system, the public, our colleagues, and the rule of law."

Informing yourself on the issues of the day that affect your community will not only make you a better citizen, it will make you a more authoritative source. That will have benefits for you and your practice for years to come. It might also help you land a new client!

Wills for Heroes Program Offers Legal Help and "Peace of Mind" to First Responders

"After choosing a career involving service to others, it was very humbling to be on the receiving end," Probation and Parole Officer Mark Davis said during a Wills for Heroes event in Amite, La. "I am grateful for the peace of mind I now have, thanks to the volunteers who prepared my estate planning documents."

The Wills for Heroes program is designed to provide free legal services to first responders in the preparation of basic estate planning documents. Groups of attorney volunteers go to emergency service sites across Louisiana to set up one-day clinics where they draft basic wills, powers of attorney and health care directives for eligible first responders and their spouses.

The program was created shortly after the terrorist attacks of Sept. 11, 2001, when South Carolina attorney Anthony Hayes contacted his local fire department asking what lawyers could do to help. It became clear that there was a glaring need for estate planning services and, since then, the charitable program has provided more than 50,000 estate planning documents nationwide.

"As the wife of a firefighter, the Wills for Heroes program is very dear to my heart," said Louisiana State Bar Association Young Lawyers Division (LSBA YLD) Wills for Heroes Co-Chair Betty A. Maury. "First responders selflessly place themselves at risk for the benefit of their community. The program brings a little peace to our Louisiana heroes and their family members."

With events held across the country, there are now Wills for Heroes programs in 28 states. The LSBA YLD hosted Louisiana's first Wills for Heroes event in October 2008 for the Calcasieu Parish Fire Department in Lake Charles. Since that time, the YLD has continued to host events for Louisiana first responders, providing first responders with the equanimity of knowing their affairs are in order should the unthinkable occur.

At a typical Wills for Heroes event, attorney volunteers arrive early to receive one hour of CLE-approved training on preparing wills and other estate planning documents using hardware provided by the LSBA. Participating first responders download a questionnaire in advance of the meeting to be completed prior to their clinic appointment. The attorney volunteers work with each first responder to review the completed questionnaire in a confidential manner, while another volunteer enters the information into a laptop. Once the documents have been explained, the will, power of attorney and health care directive are generated, executed and notarized. The goal is to complete the entire process in one meeting. Each event averages 30 first responder participants.

"I can't protect a firefighter who runs into a burning building or a police officer who is knocking on a door not knowing what's on the other side," said Wills for Heroes Foundation President Daniel McKenna in an interview with Comcast. "But, as a lawyer, I can help protect their families."

To find more information and how to volunteer for upcoming events, go to: *www.lsba.org/YLD/willsforheroes.aspx*.

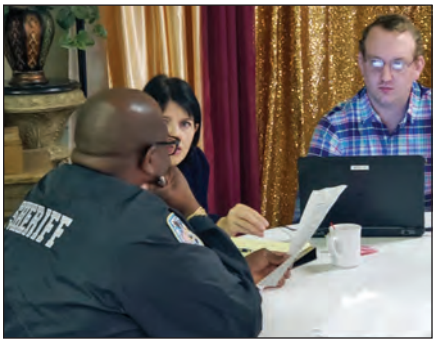
Wills for Heroes event in Lafayette, LA.

Wills for Heroes event in Baton Rouge, LA.

Wills for Heroes event in Amite, LA.

Wills for Heroes event in Covington, LA.

Wills for Heroes event in St. Tammany Parish.



Wills for Heroes event in Terrytown, LA.

YOUNG LAWYERS SPOTLIGHT

Stuart R. Breaux
Lafayette

The Louisiana State Bar Association's Young Lawyers Division Council is spotlighting Lafayette attorney Stuart R. Breaux.

Breaux is general counsel at Southern Lifestyle Development Co., L.L.C. (SLD), a Lafayette-based real estate development company with projects throughout the Gulf South.

A Lafayette native, Breaux is a graduate of the Episcopal School of Acadiana, the University of Louisiana at Lafayette and Tulane University Law School. While at Tulane, he was an active member of Tulane's Moot Court program and is most proud of having coached the Green Wave to victory over its in-state "rivals" at the 2011 Louisiana State Bar Association (LSBA) Law School Mock Trial Competition. He was also a Moot Court Board member and an Order of Barristers inductee.

Stuart R. Breaux

Prior to joining SLD in 2018, he worked for the law firm Becker & Hebert, L.L.C. He focused his practice on local government law and real estate and commercial transactions.

Breaux is the president of the Young Lawyers Section of the Lafayette Bar Association, co-chair of the Leadership Institute of Acadiana's IntroLafayette program and president of Fix the Charter PAC, which helped to pass and defend, and is now working to smoothly implement, amendments to the Lafayette City-Parish Home Rule Charter. He is a member of the American Inn of Court of Acadiana, the St. Thomas More Society of Acadiana, the Krewe of Gabriel and Our Lady of Fatima Roman Catholic Church.

In 2018, he received the Hon. Michelle Pitard Wynne Professionalism Award from the LSBA Young Lawyers Division.

As a lifelong fan of the New Orleans Saints, he eagerly anticipates the start of football season and the sweet, sweet revenge that awaits.

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Shown seated: Holly Sharp, CPA, CFE, CFF Shown standing from left: Gilbert Herrera; Michele Avery, CPA/ABV, MBA, CVA, MAFF; Ginger Liu, CPA/ABV, MBA, MS

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Lawyers/Judges in the Classroom Programs Presented Statewide

In recognition of Law Day, the Louisiana Center for Law and Civic Education (LCLCE) organized 65 presentations throughout the state, reaching 4,451 students. Attorneys and judges volunteered their time to present in-class programs in all six Louisiana congressional districts and at all grade levels.

The LCLCE, working through the Lawyers in the Classroom/Judges in the Classroom programs, endeavors to provide year-round classroom visits with a special emphasis on the celebration of Law Day in schools that may not otherwise have a Law Day event.

Several judges participated in the Judges in the Classroom program, including LCLCE President Judge Randall L. Bethancourt, Judge Marilyn C. Castle, Judge Aisha S. Clark, Judge Charles G. Fitzgerald, Judge J. Hadley Fontenot, Judge Theodore M. Haik III, Judge Sandra C. Jenkins, Judge Donald T. Johnson, Judge Curtis Sigur and Judge Karelia R. Stewart.

Several attorneys participated in the Lawyers in the Classroom program, including LCLCE Board member W. Thomas Angers, Justin S. Brashear, Jessica G. Braun, Paeton L. Burkett, Albert D. Clark, Joshua P. Clayton, Samuel C. D'Aquilla, Jeanette E. DeWitt-Kyle, Claire B. Edwards, Daniel J. Gauthier, Lauren E. Godshall, Courtney H. Guillory, A. Spencer Gulden, Felicia M. Hamilton, Jack P. Harrison, William K. Hawkins, Kenneth P. Hebert, Christine Lipsey, Angel V. Manzanares, Jason R. May, Jackie M. McCreary, Mark A. Myers, Ebonee R. Norris, Alicia Reitzell, Celeste H. Shields, Susan S. Simon, Philip M. Smith, David A. Szwak, Jason A. Weaver and Adrienne S. Wood.

Louisiana Center for Law and Civic Education Board member W. Thomas Angers presented a Law Day program at Comeaux High School in Lafayette.

Schools participating in the Lawyers/Judges in the Classroom programs included Baton Rouge International School, Boyet Junior High School, C.E. Byrd High School, Cedarcrest-Southmoor Elementary School, Comeaux High School, East Feliciana Middle School, FK White Middle School, Glasgow Middle School, Immaculate Conception Cathedral School, LJ Alleman Arts Academy, Loyola College Prep, Martha Vinyard Elementary School, Meisler Middle School, New Iberia Senior High School, Northdale Superintendent's Academy, Northshore High School, QuesTech Learning, Richwood Middle School, South Louisiana Community College, St. James Parish 4-H Achievement Day, St. Joseph Catholic School, The Net Charter School, University of Louisiana at Lafayette, Vandebilt Catholic High School, Werner Park Career Day and Westgate High School.

The Lawyers in the Classroom/Judges in the Classroom programs are a partnership of the Louisiana District Judges Association, the Louisiana State Bar Association and the LCLCE.

Louisiana elementary, middle and high school educators participated in the 2019 Justice Catherine D. Kimball Summer Institute in New Orleans. *Photo courtesy of Louisiana Supreme Court.*

Teachers Participate in 2019 Justice Catherine D. Kimball Summer Institute

Louisiana elementary, middle and high school teachers met in New Orleans for the 2019 Justice Catherine D. Kimball Summer Institute to learn about mock trials, iCivics, student sexting, student texting, child trafficking and child abuse.

Following training on mock trials, the Haynes Academy mock trial team performed a mock trial demonstration. This team was the second-place finisher at the 2019 Richard N. Ware IV State High School Mock Trial Competition. Serving as judge was Louisiana Center for Law and Civic Education (LCLCE) Board member and Haynes Academy mock trial coach Val P. Exnicios.

Louisiana Supreme Court Associate Justice Scott J. Crichton and Louisiana Supreme Court Community Relations and Website Coordinator David Rigamer presented a program on "Sexting, Texting and Beyond." Louisiana 4th Circuit Court of Appeal Judge Joy Cossich Lobrano addressed teachers on early intervention collaboration among schools, juvenile court and NGO's on sex trafficking of minors. Stacie Schrieffer Leblanc, CEO of the UP Institute and president-elect of the American Professional Society on the Abuse of Children, spoke on "Beyond Mandatory Reporting Laws: Recognizing, Responding and Reporting."

Participants were welcomed to the Institute by LCLCE President Judge Randall L. Bethancourt and Louisiana District Judges Association President Judge Lisa M. Woodruff-White. Robert Gunn, Louisiana Supreme Court deputy judicial administrator/community relations, and Miriam D. Childs, director of the Law Library of Louisiana, provided a tour of the Louisiana Supreme Court and the Law Library.

Following mock trial training, Summer Institute teachers were given a mock trial demonstration by the Haynes Academy for the Advanced Studies mock trial team. Val P. Exnicios, the Haynes Academy mock trial team coach, served as the mock trial judge for the demonstration. *Photo courtesy of Louisiana Supreme Court.*

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

Among those attending were elementary school educators Yvette Stevens of Jefferson Terrace School, Lindsay Peterson of St. Mary Margaret, Krystal Critton of Turner Elementary, Christa Watson of Lake Forest Charter School and Kristy Lewis of Woodmere Elementary. Middle school educators were D'Andre Blouin and Karen Watson of Dutchtown Middle; Chris Kourvelas of Elm Grove Middle; and Missy Varnado of Northshore Charter School. High school educators were Mandy Perret and Dirk Schexnaydre of Dutchtown High; Vincent Hoang from Episcopal High; Charles Vidrine, Jade Johnston and Karen Olivier from the Magnet Academy for Cultural Arts; Yulinda Marshall from Istrouma High; Abbie Tucker from St. Amant High; Greg Warren and Larry Williams from Saline High; and Sammi Dunn from Glenbrook School.

Civics in Action Award

Abigail Roberts, a senior at Captain Shreve High School in Shreveport, was the recipient of the 2019 Civics in Action Award, presented by the Louisiana Center for Law and Civic Education (LCLCE). The award recognizes an outstanding middle or high school student who has demonstrated outstanding civic virtue and involvement in his/her community. The plaque was presented by Louisiana Supreme Court Associate Justice Scott J. Crichton at the Justice Catherine D. Kimball Summer Institute. *Photo courtesy of Louisiana Supreme Court.*

JUDICIAL Notes

By Trina S. Vincent, Louisiana Supreme Court | RETIREMENTS... IN MEMORIAM

Retirements

► Louisiana Supreme Court Associate Justice Greg G. Guidry retired, effective June 22, to fulfill his appointment by the United States President as judge of the U.S. District Court, Eastern District of Louisiana. He earned his BA degree in 1982 from Louisiana State University and his JD degree in 1985 from LSU Paul M. Hebert Law Center. He practiced law in the New Orleans office of Liskow & Lewis, P.L.C., from 1985-89. From 1989-90, he worked as an assistant attorney general at the Louisiana Department of Justice in Baton Rouge. He worked as assistant U.S. attorney, U.S. Attorney's Office, Eastern District of Louisiana, from 1990-2000. Judge Guidry served on the 24th Judicial District Court, Division E, from 2000-06 and the 5th Circuit Court of Appeal from 2006-08. In 2009, he was elected to the Louisiana Supreme Court.

► 21st Judicial District Court (Division D) Judge M. Douglas Hughes retired, effective July 1. He earned his BA degree in 1982 from Louisiana State University and his JD degree in 1986 from Mississippi College School of Law. Prior to his election to the bench, he worked in the general practice of law and as city attorney for Denham Springs. He served in Family and Juvenile Court when first elected to the bench in 1995. In 1997, he transitioned to the Criminal/Civil Court.

Deaths

► Retired 4th Circuit Court of Appeal Chief Judge Patrick M. Schott, 88, died June 3. He earned a BA degree in 1951 and his JD degree in 1953 from Loyola University New Orleans. He served in the Judge Advocate General Corps of the U.S. Army from 1953-56. Prior to his election to the 4th Circuit in 1972, he practiced law in New Orleans. He became chief judge in 1988, serving until his retirement in 1998. He served as ad hoc judge on the 4th and 5th Circuit Courts of Appeal. He worked as a mediator through Mediation Arbitration Professional Systems, Inc. and as an arbitrator through the American Arbitration Association. Additionally, he served as a hearing officer for the Judiciary Commission of Louisiana.

► Retired 5th Circuit Court of Appeal Chief Judge H. Charles Gaudin, 88, died June 29. He earned a BA degree in 1952 from the University of Louisiana at Lafayette (formerly University of Southwestern Louisiana) and his JD degree in 1958 from Loyola University College of Law. He served in the U.S. Air Force from 1953-54. From 1956-66, he was a sports columnist for the *New Orleans States-Item* and served as vice president and legal counsel of the Louisiana Sportswriters' Association. In 1966, he was elected to the 24th Judicial District Court, Division G, and served as chief judge. He was reelected in 1972 and 1978. In 1982, he was elected to the 5th Circuit Court of Appeal, First District, and served as chief judge. He is a former president of the Louisiana Conference of Court of Appeal Judges and the 4th and 5th Circuit Judges Association. He also served on the Executive Committee of the Louisiana District Judges Association. He served as president of the Louisiana Chapter of the National Cystic Fibrosis Research Foundation and was an honorary member of the Louisiana State University Paul M. Hebert Law Center Alumni Association. After retiring from the bench, he worked with the Department of Justice writing opinions for the Louisiana Attorney General. In 2002, he served as president of the Louisiana Retired Judges Association. In 2004, he was appointed by the Governor as chair of the Louisiana Gaming Control Board, a position he held for six years.

PEOPLE

LAWYERS ON THE MOVE . . . NEWSMAKERS

LAWYERS ON THE MOVE

Adams and Reese, L.L.P., announces that Philip B. Sherman has joined the firm's New Orleans office as special counsel.

Breazeale, Sachse & Wilson, L.L.P., announces that **Timothy W. Hardy** and **V. Joyce Matthews** have joined the firm's Baton Rouge office as partners. **David C. Fleshman** has joined the Baton Rouge office as an associate.

Chaffe McCall, L.L.P., announces that Frank A. Piccolo has joined the firm's Houston, Texas, office as a partner.

Chehardy, Sherman, Williams, Murray, Recile, Stakelum & Hayes, L.L.P., announces that **R. Christopher (Chris) Martin** has joined the firm's Metairie office as a special partner.

Richard J. Arsenault

Daniel N. Bays, Jr.

Colvin, Smith & McKay announces that **Daniel N. Bays, Jr.** has been named a partner in the firm's Homer office. **J. Clayton Caraway** has joined the firm's Shreveport office as an associate.

Degan, Blanchard & Nash, A.P.L.C., announces that **Danielle L. Trostorff** has joined the firm's New Orleans office as of counsel.

Erlingson Banks, P.L.L.C., announces that **Ashley M. Caruso** has joined the firm's Baton Rouge office as an associate.

Kelly McNeil Legier has been appointed as a federal administrative law judge for the Office of Medicare Hearings and Appeals within the U.S. Department of Health and Hospitals in the New Orleans Field Office.

Perrier & Lacoste, L.L.C., announces that **Margie R. Scott** has joined the firm's New Orleans office as an associate.

Brian D. Perry, Sr. has retired from the Department of Defense as the deputy chief of staff for the Defense Language Institute in Monterey, CA. He has returned to the greater New Orleans area.

Taylor, Porter, Brooks & Phillips, L.L.P., in Baton Rouge announces that **Jess C. Frey** has joined the firm as special counsel.

NEWSMAKERS

Robert S. Angelico, managing partner in the New Orleans office of Liskow & Lewis, A.P.L.C., received the Distinguished Service Award from the Society of Louisiana Certified Public Accountants.

Richard J. Arsenault, a partner in the Alexandria firm of Neblett, Beard & Arsenault, was recognized as one of the Top 25 Mass Tort Trial Lawyers in Louisiana by the Mass Tort Trial Lawyers Association. He was selected by the American Academy of Attorneys as one of the Top 100 attorneys in personal injury law in Louisiana. He was selected to the Lawdragon 500 leading plaintiff consumer lawyer guide.

Stephen J. Holliday, an attorney with Gulino Law, A.P.L.C., in Baton Rouge, was appointed as a member of the National Academies of Sciences, Engineering and Medicine's Transportation Research Board Standing Committee on Intermodal Freight Transport for the 2019-22 term.

J. Clayton Caraway

Ashley M. Caruso

David C. Fleshman

Jess C. Frey

Timothy W. Hardy

R. Christopher Martin

Erin Sayes Kenny, a partner with Taylor, Porter, Brooks & Phillips, L.L.P., in Baton Rouge, was named to the "On the Rise, Top 40 Young Lawyers" list by the American Bar Association's Young Lawyers Division.

Frank X. Neuner, Jr., managing partner of Neuner Pate in Lafayette, was appointed to the board of directors of the Legal Services Corp. He is a member of the LSC's Governance and Performance Review Committee and Operations and Regulations Committee. He was Louisiana State Bar Association president in 2005-06. He chaired the Louisiana Public Defender Board from 2008-13.

Alejandro R. Perkins, a partner in the Baton Rouge office of Hammonds, Sills, Adkins & Guice, L.L.P., received an honorary degree of Doctor of Humane Letters from Grambling State University in May.

Jack K. Whitehead, Jr., senior partner of Whitehead Law Firm in Baton Rouge, was inducted into the 100 Black Men of Baton Rouge, Ltd.

James M. Williams, senior partner and head of litigation in the Metairie office of Chehardy, Sherman, Williams, Murray, Recile, Stakelum & Hayes, L.L.P., was appointed to the Louisiana State Law Institute as a member of the Torts and Insurance Committee.

PUBLICATIONS

***Best Lawyers in America* 2010**

Barrasso Usdin Kupperman Freeman & Sarver, L.L.C. (New Orleans): Judy Y. Barrasso, New Orleans Lawyer of the Year, insurance law; Celeste R. Coco-Ewing, George C. Freeman III, Craig R. Isenberg, John W. Joyce; Stephen H. Kupperman, New Orleans Lawyer of the Year, securities litigation; H. Minor Pipes III, Andrea M. Price, Richard E. Sarver, Steven W. Usdin and Charles-Theodore Zerner.


V. Joyce Matthews


Frank X. Neuner, Jr.


Margie R. Scott


Danielle L. Trostorff


Jack K. Whitehead, Jr.


James M. Williams

People Deadlines & Notes

Deadlines for submitting People announcements (and photos):

Publication	Deadline
Feb./March 2020	Dec. 4, 2019
April/May 2020	Feb. 4, 2020
June/July 2020	April 4, 2020
August/September 2020	June 4, 2020
October/November 2020	Aug. 4, 2020

Announcements are published free of charge for members of the Louisiana State Bar Association. Members may publish photos with their announcements at a cost of **$50 per photo**. Send announcements, photos and photo payments (checks payable to Louisiana State Bar Association) to:

Publications Coordinator Darlene M. LaBranche
Louisiana Bar Journal
601 St. Charles Ave.
New Orleans, LA 70130-3404
or email dlabranche@lsba.org.

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

UPDATE

LSBA Members Receive Awards at National Bar Association Events

Louisiana Supreme Court Chief Justice Bernette Joshua Johnson and Orleans Parish Civil District Court Judge Piper D. Griffin were two of the Louisiana State Bar Association (LSBA) members recognized during the National Bar Association's (NBA) 94th Annual Conference July 20-26 in New York City.

Judge Karelia R. Stewart, First Judicial District Court, received the National Bar Association Women Lawyers Division's Excellence in Judiciary Award.

Chief Justice Johnson received the William H. Hastie Award, the NBA Judicial Council's highest award, to recognize excellence in legal and judicial scholarship and for demonstrated commitment to justice under law. Judge Griffin, current chair of the Louisiana Judicial Council (the Louisiana affiliate of the NBA Judicial Council), was honored with the NBA Judicial Council's Sarah J. Harper Humanitarian Award, recognizing her consistent and unselfish commitment to the purpose and goals of the NBA. Both awards were presented during the NBA's 2019 Thurgood Marshall Awards Luncheon on July 24.

Orleans Parish Civil District Court Judge Piper D. Griffin received the National Bar Association Judicial Council's Sarah J. Harper Humanitarian Award.

Also during the conference, the NBA Women Lawyers Division held an Achievement Awards Breakfast on July 23. Among the award recipients honored were Louisiana lawyers Camille R. Bryant, McGlinchey Stafford, P.L.L.C., Outstanding Young Lawyer; Sharonda R. Williams, Fishman Haygood Phelps Walmsley Willis & Swanson, L.L.P., Outstanding Woman Lawyer Hidden Figure/Impact; and Judge Karelia R. Stewart, 1st Judicial District Court, Excellence in the Judiciary.

Other Louisiana attorneys honored were attorney William C. Snowden, London J. Alexander Award for Advocacy and Leadership; and Kenneth R. Barnes, Louisiana Supreme Court, Top 40 Young Lawyers in America.

Louisiana Supreme Court Chief Justice Bernette Joshua Johnson, right, received the National Bar Association Judicial Council's William H. Hastie Award in July. With her is her daughter Orleans Parish Civil District Court Judge Rachael D. Johnson.

Camille R. Bryant, left, with McGlinchey Stafford, P.L.L.C., received the National Bar Association Women Lawyers Division's Outstanding Young Lawyer Award; and Sharonda R. Williams, Fishman Haygood Phelps Walmsley Willis & Swanson, L.L.P., received the Outstanding Woman Lawyer Hidden Figure/Impact Award.

Attorney William C. Snowden, center, received the National Bar Association's London J. Alexander Award for Advocacy and Leadership. With him are, left, Cory J. Vidal, Hancock Whitney Bank; and Camille R. Bryant, McGlinchey Stafford, P.L.L.C., recipient of the National Bar Association Women Lawyers Division's Outstanding Young Lawyer Award.

SULC Recognizes Distinguished Alumni, Judicial Wall of Fame Honorees

Southern University Law Center (SULC) honored its distinguished alumni at the Alumni and Friends Round-up on April 4. Festivities included the Alumni Hall of Fame Gala, CLE workshops, student development events and an evening reception.

Inducted into the SULC Judicial Wall of Fame were Hon. Tonya Jones, Harris County Criminal Court; Hon. Michael Bellamy, Alabama 26th Circuit Court; and D. Nicole Sheppard, Orleans Parish Civil District Court.

Several alumni were recognized for professional achievements and support of the law center including Brian Jackson, Laner Muchin; Robin Raasch, Akin Gump Strauss Hauer & Feld; Paula Hartley Clayton, Law Offices of Paula L. Hartley; Harry L. Daniels III, Daniels and Washington Law Firm; Kavitha Akula, Akula & Associates; Carl A. Moore, Law Office of Carl A. Moore; Deidre D. Robert, Southern University System; Daryl Washington, Washington Law Firm; and Chancellor John K. Pierre, Southern University Law Center.

Several Southern University Law Center (SULC) alumni were recognized for professional achievements and support of the Law Center. From left, Brian Jackson, Laner Muchin; Robin Raasch, Akin Gump Strauss Hauer & Feld; Paula Hartley Clayton, Law Offices of Paula L. Hartley; Harry L. Daniels III, Daniels and Washington Law Firm; Kavitha Akula, Akula & Associates; Carl A. Moore, Law Office of Carl A. Moore; Deidre D. Robert, Southern University System; Daryl Washington, Washington Law Firm; and SULC Chancellor John K. Pierre.

(Right) **Judges inducted into the Southern University Law Center's Judicial Wall of Fame were, from left, Hon. Tonya Jones, Harris County Criminal Court; Hon. Michael Bellamy, Alabama 26th Circuit Court; and D. Nicole Sheppard, Orleans Parish Civil District Court.**

Chief Justice Delivers Keynote at Advocacy at the Capitol

Members of Alpha Kappa Alpha (AKA) and Alpha Phi Alpha attended AKA Day in Baton Rouge on May 8. The theme for the 2019 Day at the Capitol was "Mobilizing the Ivy Power." In the morning, Gov. John Bel Edwards addressed AKA and Alpha Phi Alpha members at the Legislative Briefing Governor's Press Room, joined by members of the Louisiana Legislative Black Caucus.

At noon, keynote speaker Louisiana Supreme Court Chief Justice Bernette Joshua Johnson led a Joint Advocacy Luncheon.

AKA Day ended with closing remarks from AKA South Central Regional Director Katina M. Semien and Alpha Phi Alpha Louisiana District Director Keith Dillon.

Louisiana Supreme Court Chief Justice Bernette Joshua Johnson gave the keynote speech at the Joint Advocacy Luncheon in conjunction with Alpha Kappa Alpha Day in Baton Rouge.

Martinet Greater Lafayette Chapter Hosts Scholarship Breakfast

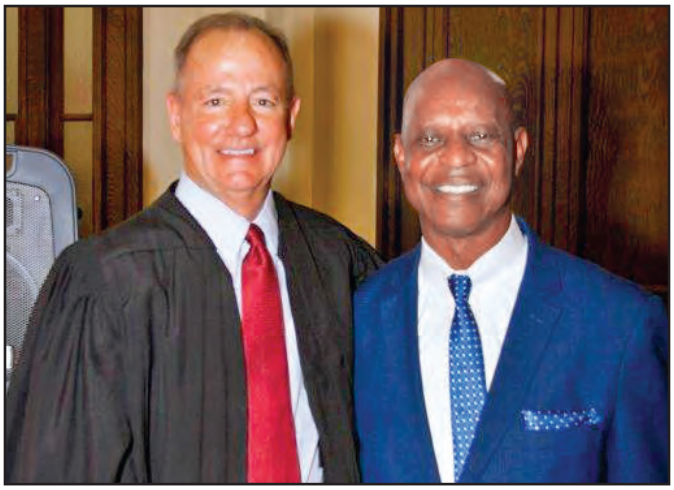
Attending the Louis A. Martinet Legal Society, Inc. Greater Lafayette Chapter second annual scholarship breakfast were, seated from left, Terri Butler (mother of scholarship recipient Tierra Butler); Franchesca L. Hamilton-Acker, Martinet Lafayette Chapter president; and scholarship recipient Caleb Coleman. Standing from left, Orida B. Edwards, Valerie Gotch Garrett, Dwazendra J. Smith, Jocelin M. Sias, Taylor L. Johnson and Glenn M. Lazard.

The Louis A. Martinet Legal Society, Inc. Greater Lafayette Chapter hosted its second annual scholarship breakfast on July 19 to honor Tierra Nicole Butler and Caleb Joseph Coleman, each awarded a $500 scholarship. The Scholarship Committee was chaired by JoAnn Nixon.

Butler graduated from Acadiana High School and is attending Prairie View A&M in Texas. Coleman is a graduate of Lafayette High School and is attending Louisiana State University. Both recipients were high academic achievers and exhibited a commitment to public service while in high school with a stated commitment to continue while in college.

The Louis A. Martinet Legal Society, Inc. Greater Lafayette Chapter hosted a Summer Social on June 28. Members gathered for a reception and then participated in creating a unique painting of the organization logo. From left, Tia C. Benton, Dwazendra J. Smith, Orida B. Edwards, Martinet Lafayette Chapter President Franchesca L. Hamilton-Acker, Taylor L. Johnson and Mckinley B. James, Jr.

The Avoyelles Parish Bar Association held its annual Law Day ceremony on May 3 and awarded scholarships to high school students. From left, District Attorney Charles A. Riddle III, Riddle & Donaghey, L.L.C.; and Gracie Tingle, second place winner of the scholarship.



Ted Justice Williams, Law Offices of Ted Justice Williams, right, was the keynote speaker for the Southwest Louisiana Bar Association's annual Law Day ceremony on May 3 at the Old Calcasieu Parish Courthouse. Following the ceremony, members attended the midyear buffet luncheon meeting. With him is Judge Clayton A.L. Davis, 14th Judicial District Court.

President's Message

Investing in Civil Legal Aid Technology

By 2019-20 President Amanda W. Barnett

Technology is fundamentally changing the way the world operates, and the legal system has not escaped this fate. Across the United States and the world, legal service innovators are experimenting with new service delivery models and technologies that aim to narrow the ever-growing justice gap; Louisiana is no exception.

At its 2017 strategic planning meeting, the Louisiana Bar Foundation (LBF) identified as a priority to identify and implement technology that would serve our grantees and our communities. Taking steps toward that goal, in 2018, the LBF hired a technology consultant to support the development of an online legal information access portal, the Louisiana Civil Legal Navigator, to direct civil legal aid clients to the best, most relevant legal information, forms and referral sources.

Building on that momentum and recognizing the need to support this program and others like it, the LBF is excited to share that it is investing in the future of civil legal aid technology through a special grant to Lagniappe Law Lab.

Amanda W. Barnett

Lagniappe Law Lab was founded in May 2019 by Amanda Brown and is a new technology-focused non-profit poised to deliver services to Louisiana's civil justice system. The Lab will provide in-house service delivery consulting to civil legal aid organizations, and will facilitate the design, development and implementation of new legal aid technology projects. It will also provide a home for and maintain existing technology programs, such as the Louisiana Civil Legal Navigator. Through the use of technology, design thinking and operations principles, Lagniappe Law Lab aims to put people back into the center of the legal process and bring a more streamlined legal service experience to Louisiana's underprivileged populations. Through this work, Lagniappe Law Lab will help our service providers scale their impact on our community, increasing access to justice for all.

"Lagniappe Law Lab's existence is purely motivated by the goal of improving the justice system and the legal profession in Louisiana. All services provided are in direct support of expanding access to justice to all. Day-to-day, Lagniappe Law Lab will work to improve service providers' case velocity and/or outcomes and provide and maintain legal information resources for the public. These efforts will ideally advance the reality of equal justice under the law through increased public understanding of the legal system and a more streamlined delivery of legal services," Brown said.

For more information on Lagniappe Law Lab, contact Amanda Brown at (504)561-1046 or email amanda@lagniappelawlab.org. Visit the website at: *www.lagniappelawlab.org*.

LBF Announces New Fellows

The Louisiana Bar Foundation welcomed the following new Fellows:

Taylor Alexander	Lake Charles
Bethany B. Breaux	Lafayette
Hon. Laurie R. Brister	Lake Providence
Lenzi C. Hebert	Lake Charles
Monique Y. Metoyer	Shreveport
Alexandra Camille Patti	New Orleans
Hon. Robin D. Pittman	New Orleans
Mary Katherine Price	Winnfield
Kelly M. Rabalais	Mandeville
Tina L. Suggs	Metairie

LBF Grant Application Available Online

The Louisiana Bar Foundation's (LBF) grant application for 2020-21 funding is now available online. Deadline for submitting grant applications is Dec. 2, 2019.

The Loan Repayment Assistance Program (LRAP) application for 2020-21 funding is now available online. Deadline for submitting the LRAP application is Feb. 7, 2020.

For more information and questions, contact Renee LeBoeuf at (504)561-1046 or email renee@raisingthebar.org. Grant applications will be available at: *www.raisingthebar.org*.

Save the Date!

Louisiana Bar Foundation
34th Annual Fellows Gala
Friday, April 3, 2020
• Hyatt Regency New Orleans

Discounted rooms are available Thursday, April 2 and Friday, April 3, 2020 at $259 a night. To make a reservation, call the Hyatt at 1(800)233-1234 and reference Louisiana Bar Foundation or go to: https://www.hyatt.com/en-US/group-booking/MSYRN/G-LGAL. Reservations must be made before Friday, March 13. For more Gala information, contact Danielle J. Marshall at (504) 561-1046 or danielle@raisingthebar.org.

LBF Kids' Chance Awareness Week is Nov. 11-15

Every year the entire Kids' Chance community (now in 47 states) dedicates one special week to raising awareness of Kids' Chance nationwide. This year, Kids' Chance Awareness Week will be held November 11-15, 2019. In Louisiana, Governor John Bel Edwards has proclaimed It LBF Kids' Chance Awareness Week. During this week the committee will be sending care packages to our current Kids' Chance scholarship recipients. Attend our "Kids' Chance Awareness Meet and Greet" at Urban South Brewery in New Orleans on Wednesday, November 13, from 5-7.

The Louisiana Bar Foundation (LBF) Kids' Chance Scholarship Program is for dependents of Louisiana Workers' killed or permanently and totally disabled in a work accident. Applications for the 2020-21 academic year will be available online December 1, 2019.

For more info about LBF Kids' Chance *https://raisingthebar.org/programs-and-projects/kids-chance-scholarship-program.*

For program guidelines *https://raisingthebar.org/kids-chance-scholarship-program/kids-chance-scholarship-guidelines.*

Too young for college? Sign up for Planning for the Future and when the time is right, Kids' Chance will make contact, *https://www.kidschance.org/planning-for-the-future/.*

You can help with Awareness Week this year.

► We are looking for donations of your company swag and gift cards to include in the Kids' Chance Care packages.

► You can host a "Dress Down for Kids' Chance Day," with donors getting to wear jeans to work for the day.

► Host a "Pizza Party for Kids' Chance," letting donors have a fun pizza party at work.

► Attend our "Kids' Chance Awareness Meet and Greet" at Urban South Brewery in New Orleans on Wednesday, November 13, from 5-7.

Contact Dee Jones if you have questions or want to get involved with helping families of Louisiana workers' killed or permanently and totally disabled in a work accident, call 504-561-1046 or dee@raisingthebar.org.

ANSWERS for puzzle on page 192.

INDEX TO ADVERTISERS

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

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

Non-members of LSBA
$85 per insertion of 50 words or less
$1 per each additional word
$20 for Classy-Box number

Members of the LSBA
$60 per insertion for 50 words or less
$1 per each additional word
No additional charge for Classy-Box number

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

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

DEADLINE
For the February issue of the Journal, all classified notices must be received with payment by Dec. 18, 2019. Check and ad copy should be sent to:
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601 St. Charles Avenue
New Orleans, LA 70130

RESPONSES
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c/o Louisiana State Bar Association
601 St. Charles Avenue
New Orleans, LA 70130

POSITIONS OFFERED

Insurance coverage associate. Phelps Dunbar, LLP, is seeking an attorney for the insurance practice group in the New Orleans office. The preferred candidate will have one-plus years of experience. Must have strong writing (coverage writing) and research skills and excellent academic credentials (top 25% required). Interested applicants should send a cover letter, résumé and transcript to Annie Sinclair at annie.sinclair@phelps.com or apply using the following link: *http://ow.ly/1HU930lLq4g*.

New Orleans CBD office of a multi-state law firm is looking to add lateral attorneys with portable business. The firm's practice areas include admiralty, commercial litigation, construction, defense litigation, energy, estate planning/administration, general business, insurance, products and real estate law. Mail confidential résumé to C-Box 286.

New Orleans-based law firm led by well-known attorney Stuart H. Smith seeks résumés to fill attorney positions as the firm continues to grow. Litigation, environmental and scientific experience desired. Three-seven years of plaintiff litigation preferred. Pay commensurate with experience. Email résumé, cover letter and writing sample to info@sch-llc.com.

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NOTICE

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

Fred A. Blanche III intends to file a petition seeking reinstatement of his license to practice law in Louisiana. Any person(s) concurring with or opposing this petition must file such within 30 days with the Louisiana Attorney Disciplinary Board, Ste. 310, 2800 Veterans Memorial Blvd., Metairie LA 70002.

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

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

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

Notice is hereby given that Kimuel Lee intends on petitioning for reinstatement to the practice of law in Louisiana. Any person(s) concurring with or opposing this petition must file such within 30 days with the Louisiana Attorney Disciplinary Board, Ste. 310, 2800 Veterans Memorial Blvd., Metairie LA 70002.

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

Notice is hereby given that Duke Ellington Tilley, Jr. is filing a petition for reinstatement to the practice of law in Louisiana. Any person(s) concurring with or opposing the petition and application for reinstatement must file notice of same within 30 days with the Louisiana Attorney Disciplinary Board, Ste. 310, 2800 Veterans Memorial Blvd., Metairie LA 70002.

How'd I Do?

By E. Phelps Gay

These days you can't order a pizza, rent a car, book a room or get your battery replaced without the service providers asking you to fill out a survey to tell them how they did. How was the service? Were our people courteous and professional? Was the service carried out in a timely fashion? Did we successfully complete your order? How would you rank our performance on a scale of 1-to-10? Would you use our company again? Would you recommend it to your friends?

Almost as annoyingly, nowadays service providers are not content merely to have your business. No, they must invite you to join their special Rewards Club so you can get a lot of little discounts the next time you book a room or buy a cookie. Gone are the days when you simply called someone on the phone or walked into a shop, asked for service, got it, paid the bill and went on your way. Now, no matter how brief or insignificant the transaction, they want you to tell them how they did. Recently, as I wound down my already-too-long call to a rental car agency, eager to turn back to other pressing matters, the company representative asked: "Would you mind holding on to take a brief survey?" Politely, I declined, knowing "brief" in this context meant an excruciating extra 20 minutes.

Why is all this happening? I suppose there is nothing wrong with companies wanting feedback in order to gauge "customer satisfaction," although, in truth, I suspect they are trying to "manufacture" customer satisfaction so they can brag about it in their next advertisement. Car companies want good ratings from J.D. Power. Colleges and universities want high rankings from *U.S. News & World Report*. Hotels want nice comments on Yelp and Trip Advisor. As a reader of these ratings and rankings, one must take them — good or bad — with a healthy dose of salt. Or, perhaps, a healthy pinch of the nose.

All this got me wondering how our clients would react if we, their service-providing lawyers, were constantly asking them to tell us how we are doing or how we did. For example:

Lawyer: "Hello, client. As you know, I just filed an Answer to that new lawsuit. How did I do? Didn't you like those affirmative defenses? And what about all those denials for lack of sufficient information to justify a belief? Weren't those great? And that prayer for dismissal with prejudice — wasn't that impressive?"

(Client's Private Thoughts: "God help me.")

Lawyer: "Hello, client. I just took a deposition of the plaintiff. What did you think? Weren't my questions incisive and well-constructed? Would you agree that I skillfully elicited important testimony helpful to our defense? Wasn't my demeanor a perfect combination of tough but professional? How did I do on a scale of 1-to-10?"

(Client's Private Thoughts: "How quickly can we cross this yo-yo off our approved list?")

Lawyer: "Hello, client. I just made an oral argument in court on our motion for summary judgment. How'd I do? Did you think my argument was persuasive? Weren't my responses to the judge's questions clever and articulate? Would you agree I kept opposing counsel on the defensive? Based on what you saw, would you hire me again to argue an important motion?" *(Client's Private Thoughts: "I'd prefer root canal.")*

Back in the day — an expression old dudes tend to use, which may be as annoying as people asking you to take a survey — I remember telling our managing partner, the late A.R. (Dick) Christovich, Jr., that despite doing what I thought was a pretty good job on a case, I got no positive comment or pat on the back from the client.

Dick, who at age 19 had flown bombers over Germany and lived to tell the tale, looked at me as if I were possibly the most pitiful specimen he had ever had the misfortune to examine. Gruffly, he replied: "The pat on the back is when they pay your bill." Translated: Just work hard, do your job, and don't go looking for any pat on the back.

So, with this alleged humor column, how'd I do? (Don't answer that!) ♦

E. Phelps Gay is a partner and former managing partner of Christovich & Kearney, L.L.P. He also is an arbitrator and mediator with The Patterson Resolution Group. A graduate of Princeton University and Tulane Law School, he served as 2000-01 president of the Louisiana State Bar Association and as 2016-17 president of the Louisiana Association of Defense Counsel. (epgay@christovich.com; Ste. 2300, 601 Poydras St., New Orleans, LA 70130)

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Blake R. David: Board certified by National Board of Trial Advocacy (Civil Trial Law), "AV" Bar Register of Preeminent Lawyers, Super Lawyers 2012-2019, National Trial Lawyers Top 100 Trial Lawyers, National Association of Distinguished Counsel (Top One Percent), Million Dollar Advocates Forum, Multi-Million Dollar Advocates Forum, Top Trial Lawyers in America.
Jerome H. Moroux: Super Lawyers Rising Stars 2014-2019, Million Dollar Advocates Forum, Top Trial Lawyers in America.
J. Derek Aswell: Super Lawyers Rising Stars 2019.