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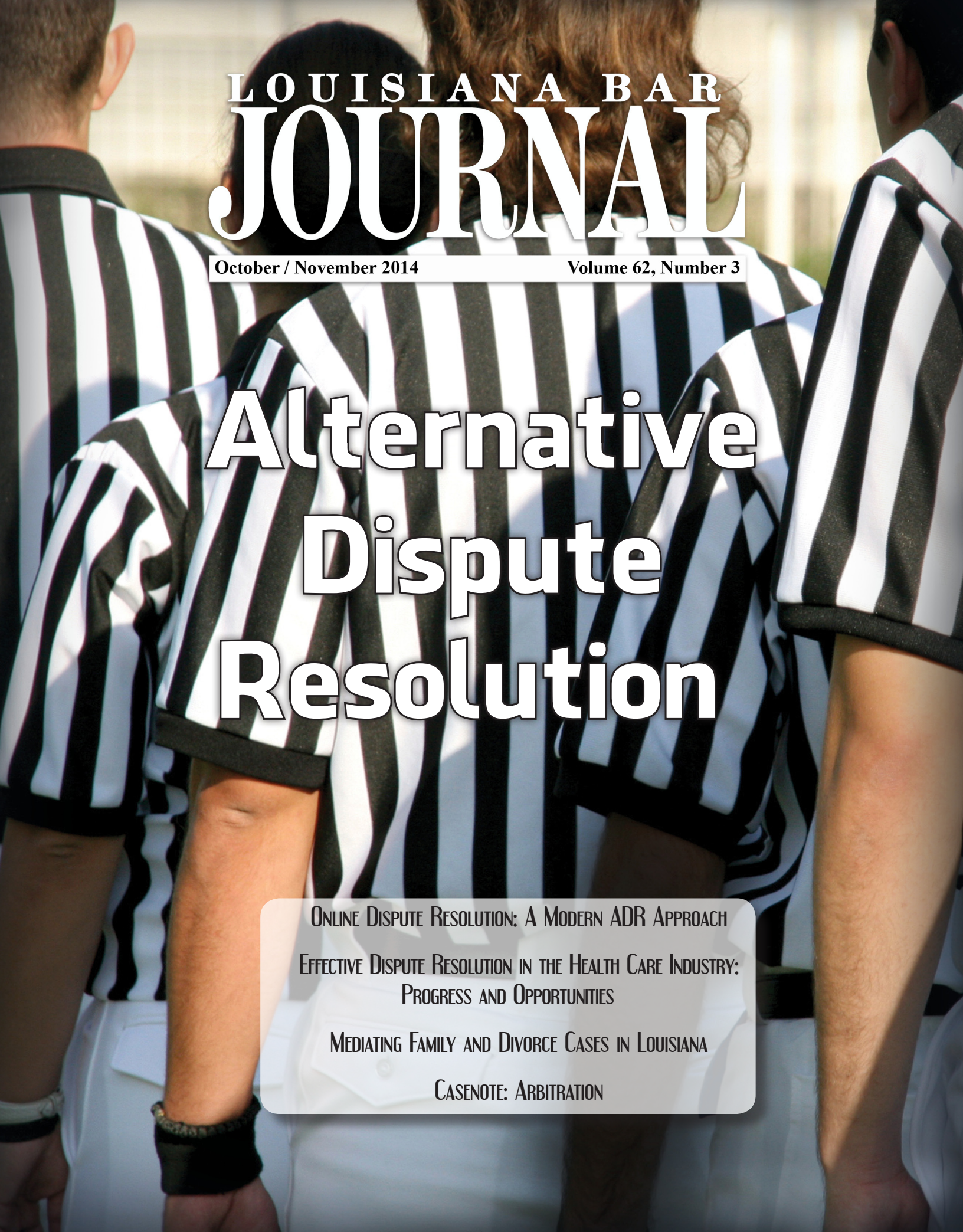
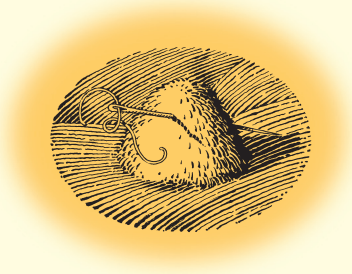


Alternative Dispute Resolution

The Needle In A Haystack



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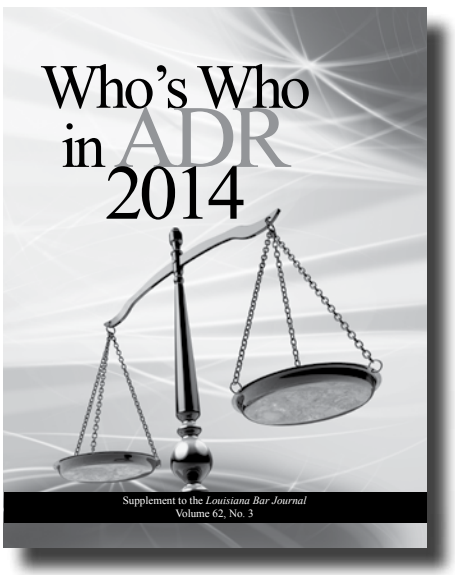

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Random Thoughts

By Barry H. Grodsky

Having different roles for the Louisiana State Bar Association (LSBA), including serving as secretary, editor of the *Louisiana Bar Journal* and chair of the Committee on the Profession, I frequently have random thoughts (mostly all too often) about the Bar and the practice of law. Probably not a lot of wit and wisdom but I thought I would share a few.

► I am overwhelmed by how many judges are active in the Bar, from giving CLE presentations to serving on committees and participating in the law school professionalism programs. Clearly service to the Bar does not end when the robes go on.

► A significant number of past LSBA presidents have remained very active in the Bar and have played key roles in current Bar programs. Some have become very active in the American Bar Association.

► If you have not read John Broadwell's "Thank You Letter to the Bar" (it is "The Last Word" in the August/September 2014 issue), you really need to read it. This gives a poignant perspective on being a lawyer in the most difficult of circumstances.

► Bob Kutcher, the LSBA treasurer, is clearly the most dapper dresser ever to serve in the House of Delegates or on the Board of Governors.

► As a committee chair and LSBA secretary, I have received very few complaints but one thing is consistent: those who complain the most about the Bar do the least for the Bar.

► If you get a chance to look at the bar journals from other states, you will see just how good our *Bar Journal* is.

► The decision to have additional themed issues each year has generated favorable feedback. More such issues are on the way.

► If you get a chance to meet Mark Cunningham (president-elect) and Darrel Papillion (president-elect designee), you should. These are energetic and dynamic leaders who will do a great job leading the Bar.

► I'm not sure how many professionalism speeches I give each year but one speech I give to young lawyers starts with "There are two things I know about professionalism — it is hard to be a lawyer and I am proud to be a lawyer."

► No matter how bad my day is I feel better when I get home and see my 5-and-a-half-year-old daughter Caroline.

► Usually professionalism can be reduced to two concepts: 1) The Golden Rule; and 2) Be humble in victory and gracious in defeat.

► It is great to see how many lawyers, and not just those from Louisiana, want to contribute to the *Bar Journal*.

► Volunteerism is the heart of successful Bar programs.

► I am amazed at how many good friends I have made and relationships I have established which would never have taken place but for Bar activities.

► Professionalism programs in the law schools and the upcoming mentoring program for new admittees will pay dividends to those just starting to practice. Those who volunteer to help with these programs benefit as well.

► Recently at a second-year law student program at Loyola, a student told LSBA President Larry Shea and me that she remembers from her 1L orientation program that we said, "Professionalism starts today." That was a good thing.

► We still don't promote the good work of lawyers both in and away from the practice of law nearly enough. Any suggestions or stories on this? Let me know.

► Never underestimate the hard work and dedication of the Bar staff. They are truly the unsung heroes of this organization.

► The Bar's video-conferencing system is in place and ready to be used. Other local bars such as Baton Rouge, Lafayette and Shreveport have the system in place as well. If you need it, let the Bar know.

► It's never too late to sign up for a committee. Call or email LSBA President Larry Shea.

► If you get a minute, read (or re-read) the Code of Professionalism. It's only a page long.

► It takes less effort to be professional and courteous than it does to be disagreeable and mean-spirited.

► Last year's LSBA Annual Meeting was great; next year's might be just a little bit better.

More thoughts on the way!

Barry Grodsky

By Joseph L. (Larry) Shea, Jr.

LSBA – Reaching Out Across the State

As an attorney who has practiced law in Shreveport for more than 35 years, I am proud to be the first president from north Louisiana in 12 years and only one of nine presidents from Shreveport over the last 85 years. It is this background that drives one of my primary initiatives of outreach to and inclusion of members throughout the state. I want to bring the Louisiana State Bar Association (LSBA) to all of its members wherever located and to bring as many of those members into active membership in the LSBA through participation in sections, committees or positions of governance.

Louisiana State Bar Association President Joseph L. (Larry) Shea, Jr., far right, attended the Sept. 17 "Celebration of the 40th Anniversary of the Legal Services Corporation" at the Shreveport Bar Center. The event celebrated and recognized Legal Services of North Louisiana. Attending, from left, were Judge Leon L. Emanuel III, director of Legal Services of North Louisiana; Judge C. Wendell Manning, president of the Louisiana Bar Foundation; Ben L. Politz, chair of the board of Legal Services of North Louisiana; Judge Roy S. Payne, president of the Shreveport Bar Foundation; Larry W. Pettiette, Jr., president of the Shreveport Bar Association; and Shea.

I often joke about being from the "outlier" province of Shreveport. One of the most frequently repeated tales told among Shreveport attorneys is the story of the outlier who requested of a New Orleans colleague that a committee meeting be scheduled in Shreveport. As the story goes, the New Orleanian responded, "That is a long way to travel for a meeting," to which the outlier replied, "It is the same distance both ways." I hear that similar tales are told in Monroe, Ruston, Natchitoches, and even a province to the west, Lake Charles. In truth and in fact, both the outlier and New Orleanian were correct. It is the same distance and it is a long way.

But, travel is no longer necessary to participate. Advances made by the LSBA in the area of technology have substantially enhanced the capabilities of the Bar to meaningfully involve members from across the state. The LSBA has installed a video-conferencing system whereby attorneys may participate in Bar meetings from their hometowns, at the computers in their offices or even on a mobile device. The LSBA has partnered with local bars to place compatible video-conferencing

Follow the LSBA President Joseph L. (Larry) Shea, Jr. on twitter @LSBA_President.

equipment in the bar centers in Lafayette, Baton Rouge and Shreveport. There is now an Outreach Committee of the Bar that meets exclusively via video-conference and whose mission is to identify and develop the means to engage more members in the programs and activities of the LSBA by using rapidly advancing but widely available technology. I am hopeful that we will, together, put this technology to good use.

On a similar note, and in furtherance of outreach, the state Bar has worked diligently toward establishing closer relationships with the many local and specialty bars that serve Louisiana. We have partnered with local bars on many endeavors, including the delivery of quality CLE programs and providing assistance to and support of many of the admirable access to justice projects that have been undertaken. I hope to follow the lead of past presidents by enhancing these collaborations. As part of that effort, the LSBA is planning a local bar leadership conference in January 2015 to provide a forum for representatives from local bars and legal communities to discuss the common problems facing the bars and ways to address those problems, as well as to share information relating to successful ventures and to assist in coordinating activities. The attorneys who are in a legal community that is just starting a local bar or that needs to jump-start an existing local bar will be welcome to attend the forum. The LSBA is available to assist in any way that it can.

Over the last two years, I have had the opportunity to visit with many LSBA members about their perceptions of the Bar and views of what the state Bar has to offer. I have been provided with suggestions concerning projects that the Bar should pursue. I have listened. One observation I have taken from all of these conversations is that the LSBA needs to do a better job of communicating with our members about all of the worthwhile and valuable programs the Bar is currently supporting and undertaking.

The LSBA needs to make sure that its members know about the services it provides, including Fastcase, the free legal research tool offered to members; the Client Assistance Fund, providing compensation to clients who have been defrauded by their lawyers; the variety of continuing legal education programs, including free seminars, being offered by the LSBA; the assistance offered by the Ethics Advisory Service to members confronted with difficult legal ethics issues; the Law Practice Management Assistance Program and the Lending Library, both of which are designed to help lawyers improve their practices and increase the quality of the legal services provided; and the LSBA Lawyer Fee Dispute Resolution Program to resolve fee disputes between attorneys and clients.

LSBA members need to know that the state Bar is at the forefront of efforts to address a myriad of issues facing the legal profession in Louisiana, from mental health concerns within the profession to an uncertain future in legal education, from a shrinking legal job market to a crisis in access to both criminal and civil justice, just to name a few.

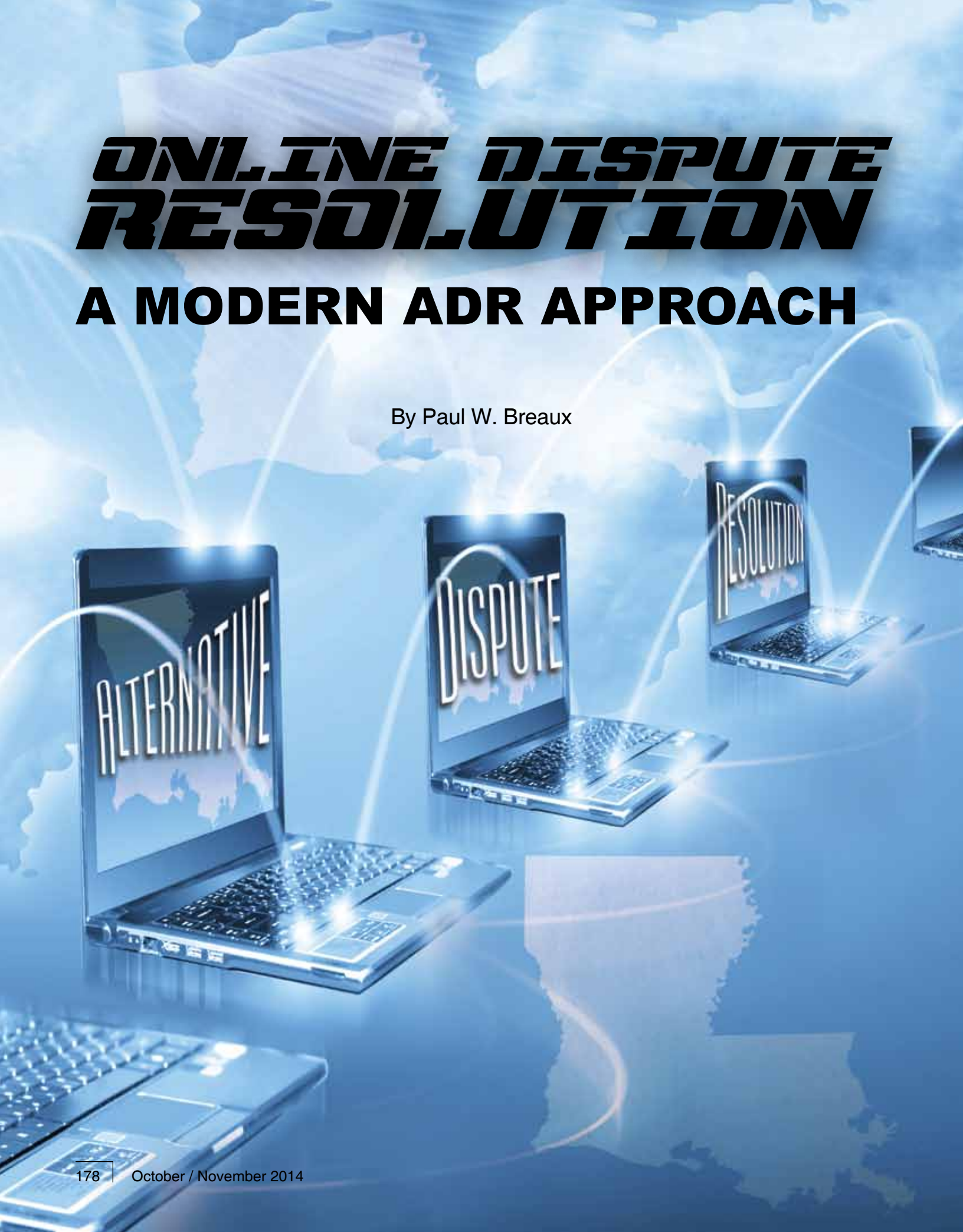
I am focused on communicating with our members, having gone so far as to "tweet" on occasion (something that someone my age should seriously consider avoiding). I am committed to the LSBA using every opportunity to reach out to its members wherever they are located and to connect those members with those services and programs that will be most helpful. I will continue to bring this message to our members all over the state so keep a look out for me.

Joseph L. Shea, Jr.

ONLINE DISPUTE RESOLUTION

A MODERN ADR APPROACH

By Paul W. Breaux



As technological advances continue to shrink the world, the personal and business interactions in which we engage can lead to disputes with others that are geographically distant. Thus was born the field of Online Dispute Resolution (ODR). Far from its beginnings with eBay, ODR has adapted and grown into its own separate field of alternative dispute resolution (ADR). This article will give a brief description of the various forms of ODR currently being offered and is intended to be a resource for further exploration of this brave new world.

Automated Negotiation Platform

One cannot begin a discussion on ODR without starting with eBay and SquareTrade. eBay knew that, with the millions of transactions occurring through its website, disputes such as billing, warranties and non-delivery of goods were inevitable. For these one-time transactions involving geographically distant parties with no real connection, SquareTrade developed an assisted negotiation process as its first-line of dispute resolution. The process is initiated when a party files an online complaint form and is directed to a pull-down menu with options for the nature of the complaint. If the available options do not match the situation, the complainant can fill out an open-faced box with his own description. Afterwards, the complainant is directed to choose from possible solutions, with the same option of including his own solution in an open-faced box. The complaint and requested solution are then sent by the system to the other party, with the request to choose several solution options available or suggest his own.[1] This back-and-forth continues until the matter is resolved or an impasse is reached. In this way, the product "is a technological hybrid of negotiation and mediation . . . moving the parties from a problem mode to a solution stance."[2]

e-Mediation

In the event that a dispute cannot be resolved through the assisted negotiation process, the SquareTrade model utilized by eBay offered assistance for a nominal fee through online mediation. Because of the relatively small amount of money involved and parties' geographical distance from each other, traditional face-to-face mediations were not an option. Instead, the mediation takes place through individual email communications between the mediator and the parties in a "shuttle diplomacy" format. There are many advantages to this approach,

including convenience (differences in time zones, geographic locations and conflicting work schedules can be accommodated);[3] access to mediators with experience who may not be available locally; the slower pace may allow for more deliberate application of mediator techniques; and text communication may result in the balancing of power if one of the parties is more articulate or persuasive in face-to-face discussions.[4] The disadvantages include the potential loss of confidentiality due to all of the communications occurring in a written format; the "lack of warmth, immediacy, rapport and other attitudes and affects that make face-to-face mediation what it is;" and that "messages conveyed online . . . are prone to misinterpretation . . . and to causing deterioration of trust."[5]

Despite these potentially negative factors, services such as Modria and Juripax (based in the United Kingdom and purchased by Modria in April 2014) offer this model for cases beyond e-commerce. Modria focuses on providing resolutions services to large businesses for handling customer complaints, as well as government entities for citizen complaints (*i.e.*, property valuation disputes).[6] Juripax expands the types of cases handled to include employment/labor, divorce/parenting, small claims disputes, and personal injury and construction cases that are in the preparation stage.[7] Both utilize dispute intake forms that can be used for dispute categorization and diagnosis before getting to the mediation stage. Modria is an "institutional service provider," meaning that it provides its dispute resolution service by "performing intake of cases, collection of fees, assignment to mediators from [their in-house] roster, provision of training and support to neutrals, etc."[8] Juripax, on the other hand, offers its dispute resolution module to outside mediators for an annual fee.

Other providers, such as Virtual Courthouse and the American Arbitration Association (AAA), have added a video-conferencing option to their services.[9] With the Virtual Courthouse model, the parties and mediator join the conference from their respective locales. Through a series of clicks, the mediator is able to provide a more traditional mediation experience with the ability to invite all of the participants in for a joint conference, as well as conduct private caucus sessions with each. Those invited by the mediator can see and communicate with each other and the mediator through their individual monitors. The AAA model works much the same way, with the difference being that the parties and mediator participate at one of AAA's 23 regional sites. While AAA maintains its own roster of mediators in a service provider business model, Virtual Courthouse is open to any mediator who chooses to sign up for its services. Although mediating through video-conference still lacks the "warmth" of face-to-face meetings, video-conferencing does reintroduce tone, spontaneity and visual clues into the e-mediation process. All of the services discussed above, with the exception of AAA, propose their websites as secure platforms for dispute case management purposes as well.

Noam Ebner, an assistant professor at the Werner Institute at Creighton University's School of Law and a negotiation/ADR scholar, provides a quick suitability test to see if a case is suitable for mediation:[10]

► Are disputants geographically distant from each other (common in e-commerce) or from their preferred neutral?

► Did the dispute itself arise from an online transaction or interaction?

► Is travel to face-to-face mediation impossible, cost-prohibitive or a factor likely to rule out mediation for any other reason?

► Does the dispute include trans-jurisdictional issues, making choice of law or court decision enforcement difficult?

► Are the parties unwilling, or unable, to meet with each other face-to-face?

► Do scheduling issues or party preferences make it difficult or impractical for parties to convene for face-to-face mediation?

► Is a party/mediator handicapped or disabled in a way challenging travel or convening?

► Are there concerns regarding inter-party violence or intimidation that make convening in the same room a risky prospect?

► Have parties participated in the past in e-mediation?

If the answer to any one of these questions is "yes," then e-mediation can be seen as a suitable forum for dispute resolution. In light of these factors, Ebner believes that e-mediation may be particularly adaptable for elder and health care disputes.

e-Arbitration

(The following discussion is derived from Mohamed S. Abdel Wahab's "ODR and E-Arbitration.")[11]

As noted in the discussion of e-mediation, the advancement and increasing use of information and communication technologies (ICTs) in business and everyday life has led to these technologies being used to bring arbitration online. In defining "e-arbitration," Wahab argues that "the sheer exchange of electronic communications or submissions, or the simple use of teleconferencing or video-conferencing for an arbitration hearing, would not suffice to characterize the process as e-arbitration."[12] His admittedly idealistic notion of "e-arbitration" would mean that the proceedings would be "conducted wholly or substantially online . . . includ[ing] filings, submissions, hearings, and awards being made or rendered online."[13] In today's world, however, e-arbitration providers fall within the former category, with an eye toward the future ideal version.

The numerous advantages to e-arbitration versus traditional arbitration include the speed within which the entire process can be conducted, its cost-effectiveness, its accessibility and availability, and its case management efficiency.[14] As far as disadvantages, it became evident early in its development that properly addressing the technical challenges of confidentiality, privacy and security concerns would be paramount to the acceptance of e-arbitration by its eventual users. "Virtual Magistrate," which launched in 1996 and conducted the process largely through email, was not very popular and resolved only one case.

"CyberTribunal," another project which launched the same year, utilized software applications and encryption technologies for security, implemented arbitration rules and procedures in accords with those used for international commercial arbitration, and provided transparency and due process, all of which led to its resolving 100 cases before the project concluded in 1999.[15] In the modern world of technology, any attorney contemplating the use of e-arbitration would want to ensure that the provider has in place the use of "encryption technologies, digital signatures, firewalls and passwords . . . to guarantee both privacy [of the proceedings] and authentication [of documents]."[16]

As far as the legal challenges of e-arbitration, they include the agreement to arbitrate itself, procedural issues and awards-related challenges.[17] Arbitration provisions are prevalent in business and consumer contracts. The question arises as to whether *e-arbitration* provisions will be held enforceable, particularly in regards to consumer contracts (such as with credit cards or software licenses) where the language often occurs buried among long, tedious provisions seldom, if ever, read by the consumer. To alleviate this concern, several measures can be implemented, including notifying consumers in enhanced size and colored font that they are entering into an e-agreement, requiring them to perform a specific consensual act, and not allowing them to enter into the contract unless they specifically agree to the e-arbitration clause.[18] Regarding the issue of due process, an attorney should ensure that the use of technology in the arbitral proceedings (*i.e.*, emails, document uploads, audio/video conferencing, etc.) is such that all participants have equal access to the appropriate and necessary information in order to present their evidence, counterclaims, etc. on equal grounds.[19] Finally, regarding arbitral awards, the question arises as to whether one that is "e-written and e-signed . . . considered an original?"[20] The writing requirement is satisfied where the e-document provides "a functional equivalent of a paper document" and the relevant state law proscribes to the "functional equivalent" doctrine.[21] Concerning the validity of an arbitrator's e-signature, adequate technologies are available and need to be implemented by the provider to "identify the signing arbitrator, indicate the arbitrator's intention in respect to the content of the award, and [ensure] the reliability of the arbitrator's signature."[22]

There are several U.S.-based, e-arbitration service providers. Modria and net-Arb offer an asynchronous arbitration product whereby communication takes place through one-way messaging. Modria does this through its all-inclusive dispute resolution module (dispute diagnosis, assisted negotiation, mediation, then, if necessary, arbitration), while net-Arb relies on email. ZipCourt follows in much the same way, but offers the parties two options: "Arbitrator's Discretion" (where the arbitrator independently reviews the case and makes a decision based on local law), and "Baseball Arbitration" (where the parties each submit a proposed resolution and the arbitrator chooses the one he believes is best).[23] Virtual Courthouse offers to arrange arbitrations face-to-face, via audio, video or a combination.[24]

Conclusion

As we become increasingly comfortable with technology encroaching into more aspects of our lives, our readiness to handle our disputes via technology will continue to rise. From fully automated negotiation platforms, to hybrids of e-mediation and e-arbitration, the practice of dispute resolution is following the trend of an increasingly paperless society. There are even hypothetical discussions in the ODR community of a time when e-arbitration is fully automated to a point where a final decision will be made without human intervention by a computer equipped with artificial intelligence (AI)![25] While much work still needs to be done to bring ODR into mainstream use, its convenience and cost-effectiveness makes ODR a permanent fixture in the future of alternative dispute resolution.

NOTE: *The dispute resolution providers listed in this article were a sample of those in operation. Their mention is not a recommendation or an endorsement by the author of their services.*

FOOTNOTES

1. The description of SquareTrade's automated negotiation process is an adaption of the description found in Orna Rabinovich-Einy's "Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation," 11 Harv. Negot. L. Rev. 258 (Spring 2006).
2. *Id.*
3. *Id.* at 259.
4. Noam Ebner, "E-Mediation," *Online Dispute Resolution Theory and Practice*, Chapter 17 (May 2013), *www.mediate.com/pdf/ebner1.pdf*.
5. Ebner, p. 378.
6. *www.modria.com/resolution-center*.
7. *www.juripax.com/EN/home.php*.
8. Ebner, p.372.
9. *www.virtualcourthouse.com*; *www.adr.org/aaa/ShowPDF?doc=ADRSTG_002566*.
10. Ebner, p. 379.
11. Mohamed S. Abdel Wahab, "ODR and E-Arbitration," *Online Dispute Resolution Theory and Practice,* Chapter 18 (May 2013), *www.mediate.com/pdf/ebner1.pdf*.
12. Wahab, p. 402.
13. *Id.*
14. Wahab, p. 403.
15. Wahab, p. 400.
16. Wahab, p. 413.
17. Wahab, p. 403.
18. Wahab, p. 410.
19. Wahab, p. 414-415.
20. Wahab, p. 424.
21. *Id.*
22. Wahab, p. 425.
23. Wahab, p. 436.
24. *See www.virtualcourthouse.com/index.cfm/category/41/arbitration-demand.cfm*.
25. Wahab, p. 420.

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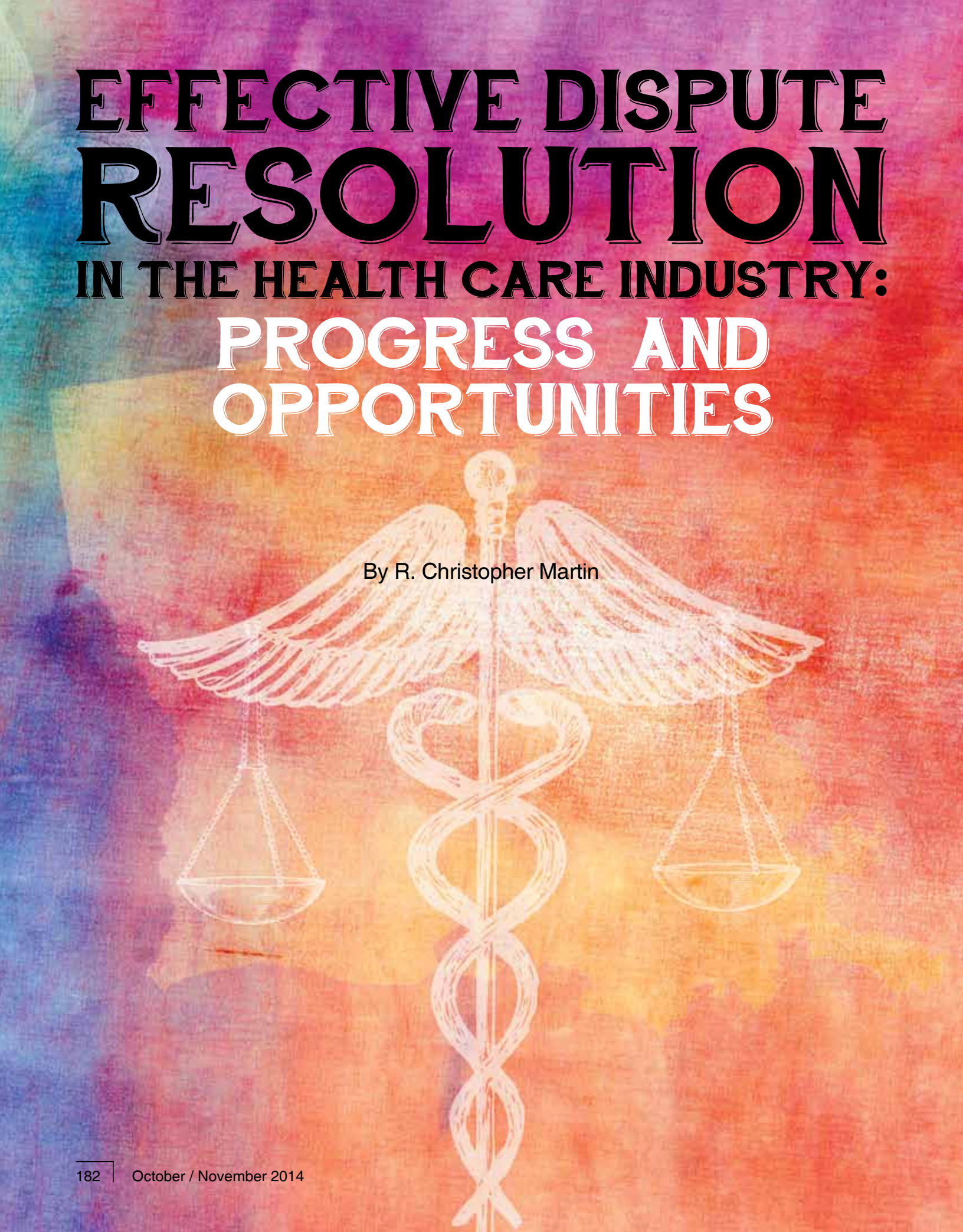
EFFECTIVE DISPUTE RESOLUTION IN THE HEALTH CARE INDUSTRY: PROGRESS AND OPPORTUNITIES

By R. Christopher Martin



All great changes are preceded by chaos.
—Deepak Chopra

Hardly a week passes without a news story about changes in our health care system. Nationally, the Patient Protection and Affordable Care Act, also known as PPACA, the "Affordable Care Act" or "Obamacare," is being implemented, yet still faces legal challenges.[1] Changes in payment systems that reward quality rather than the volume of services delivered are spurring new business models that are blurring the lines between providers and insurers. To illustrate, consider the clear trend toward more direct hospital employment of physicians and other forms of hospital-physician integration such as clinical integration, bundled payments and accountable care organizations. Similarly, Louisiana has just completed a massive transition of its charity care system to various public-private partnerships. Couple these tectonic changes in the landscape with increased funding for fraud enforcement activity at the federal level and you have a perfect storm of change that will produce new and different types of disputes.[2] This article will briefly explore the current state of dispute resolution nationally, discuss a few programs that are working in hospitals elsewhere, and describe some effective dispute resolution approaches currently used in the health care arena.

In 2011, researchers returned to the Fortune 1000 (including several large for-profit health systems and insurers) to conduct a follow-up survey (from 1997) to gain more recent information regarding the use of alternative dispute resolution (ADR) and explore how ADR practices had changed over the last 15 years.[3] The research revealed a dramatic decline in arbitration usage, except in the consumer area. Mediation and other interest-based options have replaced arbitration, with mediation usage rising in almost every type of dispute covered. Concerns about arbitration include the difficulty of appealing rulings; concern that arbitrators may not follow the law; the perception that arbitrators tend to compromise; the lack of confidence in neutrals; and the high costs. Arbitration has "become too much like litigation," whereas mediation has the advantages of privacy, informality, flexibility and, above all, control. Other dispute resolution options increased such as fact finding, early neutral evaluation, early case assessment and in-house grievance programs for non-union employees. One clear trend was away from hardball litigation towards more creative alternatives.

Health care is a diverse and complex industry with an imbalance of power, knowledge and interests among the various stakeholders, including hospitals (and other in-patient facilities such as skilled nursing facilities and long-term acute care facilities), physicians, nurses (and other mid-level providers), insurers and patients. Those working in hospitals, for example, participate in the ultimate team sport and encounter a number of interprofessional relationships and dynamics and complex communication skills and challenges. Health care providers (and leaders) are concerned about patient safety and privacy; preservation of ongoing relationships and reputations; the adverse impact of personal distractions; an aversion to public controversy; and the overall stress of daily life and death consequences. Such concerns can, and will, lead to more systematic, strategic approaches to conflict resolution and more creative, collaborative dispute resolution processes.[4]

Institutions and individuals have five different styles for managing/responding to conflict. They are avoidance, accommodating, competing, compromising and collaborating.[5] The Fortune 1000 study suggests a gradual movement away from conflict avoidance to a culture of more compromising and, hopefully, ultimately to collaboration. Collaborating with and among health care providers takes open, honest and respectful communication. It takes more time and energy and enhanced listening skills. However, for caregivers, fear of retaliation and lack of support by organizational leaders create mistrust and can actually create more conflict.

Recognizing the need for stronger leadership that stresses a collaborative approach and more effective communication and conflict management, the Joint Commission, which accredits and certifies more than 20,500 U.S. health care organizations and programs, took action. In 2009, it required that health care organizations establish policies and procedures for regular communication among leaders on issues of quality and safety (Standard L.D.02.03.01); conflict management among leadership groups (Standard LD.02.04.01); a system for resolving conflicts among individuals working in the hospital (Standard LD.01.03.01, EP7); and in regard to disruptive behavior, "a process for managing disruptive and inappropriate behavior" (Standard LD.03.01.01.).[6]

Despite these requirements, it seems that hospitals still generally rely on *ad hoc* approaches to resolving conflict and their use of ADR is still tactical and reactive rather than proactive, systematic and strategic. However, this creates opportunity for lawyers who represent health care clients to learn more about conflict resolution processes such as coaching, collaborative law, third-party facilitation and even formal mediation training.[7] With such enhanced skills, lawyers can help this industry make the full transition to a culture of collaboration.

There are some effective dispute resolution programs used in other parts of the country that could be adopted for use in Louisiana. In the medical malpractice and medical error arena, one success story is the University of Michigan Health System (UMHS) which implemented an early disclosure and offer of compensation program more than 10 years ago. It represents a radical departure from the traditional "deny and defend" paradigm.[8] UMHS promotes patient safety through honesty, transparency and accountability with a stated goal of becoming the safest hospital system in the nation. At UMHS, if a patient is injured due to inappropriate care, its policy is to offer patients a prompt apology and fair compensation. However, if the adverse outcome is not the result of inadequate care, the hospital generally refuses to settle regardless of the cost or expediency. New claims have decreased from 2.1 claims per 100,000 patients per month to roughly .75 claims. The average time from claim to resolution has dropped from 1.3 years to nine months. Costs and legal fees have decreased as well.

Similarly, the "Seven Pillars" process adopted by the University of Illinois Medical Center in Chicago in 2006 spread to 10 Chicago area hospitals as a demonstration project in 2010.[9] The seven elements are reporting; investigation; communication; apology with resolution; process and performance improvement; data tracking and analysis; and education. Settlement time for malpractice cases has reduced from five years to one year. Litigation costs have decreased by at least 70 percent. Interestingly, the hospitals have waived almost $6 million in hospital and professional fees where care was found to be substandard or unreasonable.

Another area gaining traction is the growing trend of apologizing for medical errors. The data suggests that, as apologies increase, civil actions and financial recoveries by patients decrease.[10] At least seven states (Nevada, Florida, New Jersey, Pennsylvania, Oregon, Vermont and California) mandate written disclosure of unanticipated outcomes to patients. In order to encourage these disclosures, these states prohibit communications about the errors from being admitted as evidence of liability for the disclosed event. Some states, such as Pennsylvania, require written disclosure of serious events to patients within seven days of occurrence or discovery and such notification made pursuant to the statute does not constitute "acknowledgement or admission of liability."[11]

Louisiana does not go that far. La R.S. 13:3715.5 makes a distinction between a statement of sympathy and an admission of fault. Apologies are protected, but not the accompanying acknowledgments of fault. So "I am sorry that *you are hurt*" is protected, but not "I am sorry *that I hurt you*." One commentator has argued that if these apology statutes are truly designed to foster more open communication between patients and providers and encourage providers to apologize to patients for medical errors, then legislation should provide broader protection of physician's statements. "Legislating a physician's syntax seems counterintuitive to the overall goal of open communications."[12]

In Louisiana, traditional litigation focused-evaluative mediation is being used to mediate medical malpractice claims, business disputes and personal injury claims, but mediation is not available statutorily in medical peer review. In health care, peer review is a self-policing system where physicians monitor the appropriateness of patient care delivered by their fellow physicians. Reported disruptive conduct, impaired conduct or quality of care concerns are some instances that can trigger peer review. These disputes are very personal, stressful and can carry dire consequences for the physician such as practice restrictions, summary suspension and/or termination of hospital privileges. The physician is entitled to a peer-review hearing, but such hearings can be very expensive, disruptive and stressful. In contrast, Texas, for example, allows a physician to request mediation, a less expensive venue to explore resolution.[13] If Louisiana had such a detour, it could save time, money and a lot of workplace stress and trauma.

In health care, hybrids of mediation, especially more facilitative, interest-based approaches, are being used, especially in clinical settings where conflict is more about values, relationships, patient safety and staff workloads than about money. These approaches offer a collaborative, interest-based, rather than a rights-based, approach, where the mediator keeps the parties together, is comfortable with emotional conversations, and encourages active participation of all parties.

Elder mediation focuses on conflicts that arise in the context of issues related to the aging process such as housing and living arrangements, finances and insurance, guardianship, health care and end-of-life planning and decision making. In elder mediation, the mediator meets with the family members and advocates for mutual respect and understanding to promote problem solving. Elder mediators are specially trained to understand the effects of aging on individuals and families.[14]

Bioethics mediation is used to ameliorate conflict with difficult end-of-life choices, such as continuing care versus withholding life-sustaining treatment. The mediator, a hospital employee or an outside neutral, consults with the medical team to better understand the medical situation. The mediator then meets with the patient's family and the medical team and coaches each how to talk and listen to one another in more productive ways; clarifies misconceptions; provides

medical data; defuses deeply held values and emotions; and identifies common interests towards finding a common solution.[15]

Another hybrid is physician co-mediation. When a dispute involves exclusion of a physician from a network or involves a quality of care issue, it might be advantageous to use an experienced health care attorney/mediator and a physician with a particular background and experience in the specific issues. Such co-mediation may add credibility to the process especially if the disputants are physicians. Sometimes physicians prefer to listen and/or talk to physicians rather than attorneys. Obviously the co-mediators must work well together with the appropriate skill set to be effective co-mediators.[16]

Finally, other traditional techniques such as early neutral evaluation and early case management can be used in the initial stages of litigation before parties have incurred the cost of extensive discovery. In early neutral evaluation, a neutral evaluator conducts a confidential session to hear both sides of the case and offers a non-binding assessment of the case. The neutral evaluator also may help with case planning by clarifying arguments and issues. Early case assessment uses different approaches aimed at effectively managing the conflict by actively and systematically analyzing various aspects of a case and developing appropriate strategies consistent with business goals.[17]

Conclusion

In conclusion, as the quote from Deepak Chopra suggests, health care is in a chaotic time. However, out of such chaos comes opportunity, as lawyers, to do our part to contribute to a culture of collaboration. There are some innovative programs around the country that Louisiana could adapt to the local needs of our communities. As health care disputes increase, hybrids of mediation and other processes will evolve to address them with the overall goal of ensuring that we all receive the right care, at the right time, in the right setting.[18]

FOOTNOTES

1. Halbig v. Burwell, No. 14-5018, Slip Opinion (D.C. Cir. July 22, 2014); King v. Burwell, No. 14-1158, Slip Opinion (4 Cir. July 22, 2014).

2. Press release by Dept. of Health & Human Services, Feb. 26, 2014; for every $1 spent on health care fraud and abuse investigations in last three years, the recovery/return on investment is $8.10.

3. *See* Thomas J. Stipanowich and J. Ryan Lamare, "Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations," 19 Harv. Negot. L. Rev. 1 (2014) and Pepperdine University and Legal Studies Research Paper No. 2013-16; J. Ryan Lamare, "The Evolution of ADR Systems at Large U.S. Corporations," Dispute Resolution Magazine, ABA Section on Dispute Resolution, Vol. 20, No. 1.

4. Marti G. O'Hare, "A Case-Study for Effective Conflict Management in the Healthcare Workplace: Lessons from *Babb v. Centre Community Hospital,*" AHLA Labor and Employment Practice Group Publication, Vol.12, issue 3, Dec. 2013; Haavi Morreim, "Malpractice, Mediation and Moral Hazard: The Virtue of Dodging the Data Bank," 27 Ohio St. J. on Disp. Res. 109 (2012); Pam Marshall, RN, LLB, LLM (ADR) and Rob Robson, MDCM, FRCP(C), "Conflict Resolution in Healthcare: An Overview," Interaction, Vol. 16, No. 1/2 (2003); Gary A. Balcerzak, MS, and Kathryn K. Leonardt, MD, MPH, "Alternative Dispute Resolution and Healthcare: A Prescription for Increasing Disclosure and Improving the Patient Safety," Patient Safety and Quality Healthcare, July/August 2008; Dale C. Hetzler, Deanne R. Messina and Kimberly J. Smith, "Conflict Management in Hospital Systems: Not Just for Leadership," 5 Am. J. Mediation 65 (2011).

5. Antoine Hymer, MS, RN, "Conflict Resolution," Journal of Nursing online at *http://rnjournal.com/journal-of-nursing/conflict-resolution*, last accessed on Aug. 10, 2014.

6. The Joint Commission: 2011 Comprehensive Accreditation Manual for Hospitals: The Official Handbook.

7. Charity Scott and Debra Gerardi, "A Strategic Approach to Managing Conflicts in Hospitals: Responding to the Joint Commission Leadership Standards, Parts 1 and 2," 37 Joint Commission J. Qual and Patient Safety, 59-79 (2011); Jean Reister Conrad and Jeanne F. Franklin, "Addressing the Art of Conflict Management in Healthcare Systems," 16(3) Dispute Resolution Magazine 15 (2010); Haavi Morreim, "Conflict Resolution in Healthcare," AHLA Connections Magazine, January 2014, pages 28-32. E.H. Morreim, "In-House Conflict Resolution Process: Health Lawyers As Problem Solvers," (Feb. 1, 2014), The Health Lawyer 2014: 25(3):10-14.

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16. Michael D. Roth and Dr. Leonard M. Fromer, "Identifying and Resolving Disputes in New Accountable Care Settings," AHLA Connections Magazine, Dec. 2013, Vol. 17, Issue 12.

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18. For services, there are at least three organizations (JAMS, American Arbitration Association and the American Health Lawyers Association) that offer health care specialized panels of mediators, arbitrators and peer review hearing officers.

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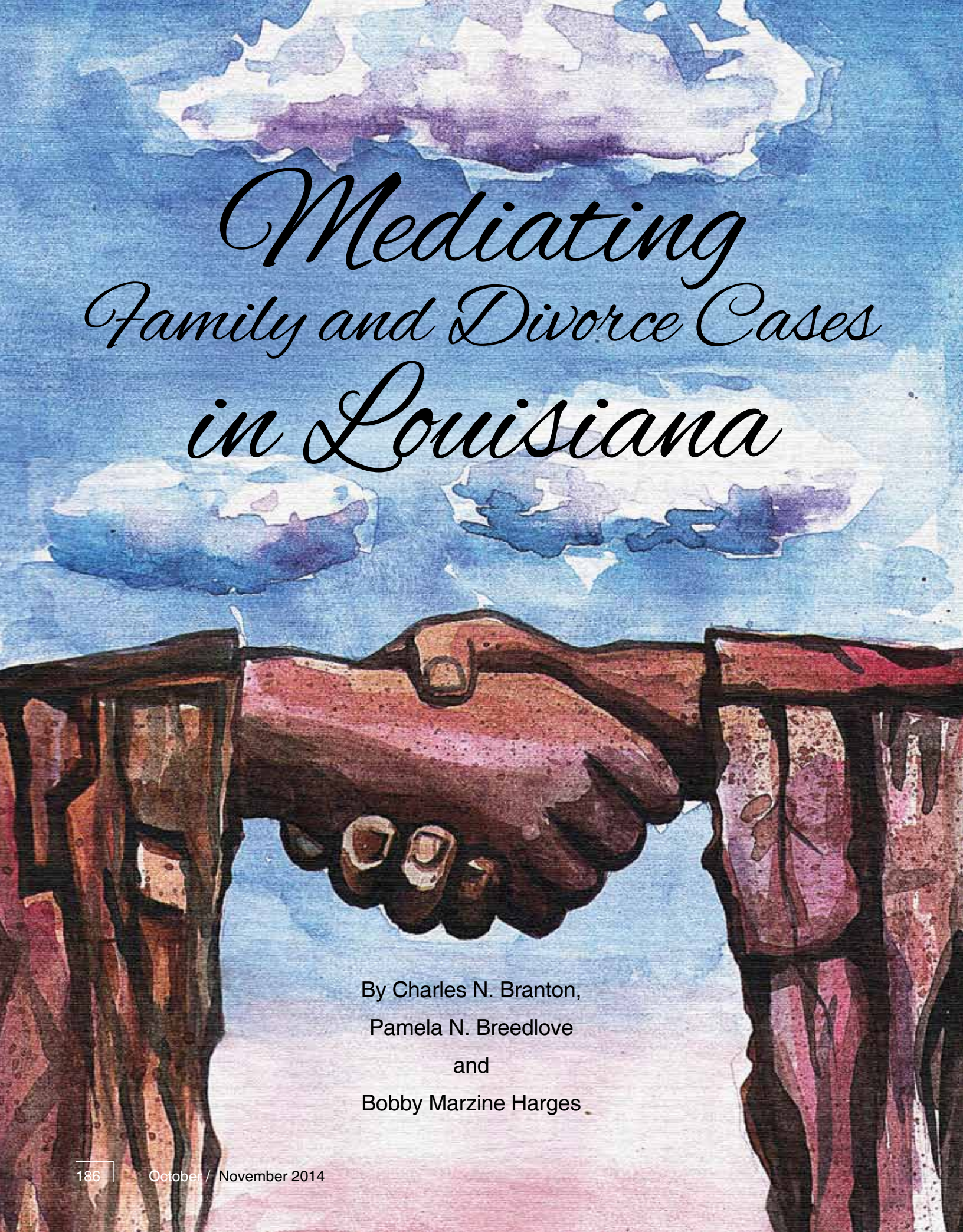
Mediating Family and Divorce Cases in Louisiana



By Charles N. Branton,
Pamela N. Breedlove
and
Bobby Marzine Harges

Mediation has become a popular tool for resolving child custody and visitation disputes in Louisiana. The mediation of these types of disputes reduces conflict between parents and helps them to communicate more effectively when they are resolving disputes and when their disputes end.[1] Mediation allows divorcing or separating parents to resolve personal and complex issues in private, outside the courtroom environment, without the presence of outsiders who have no interest in the dispute.[2] When compared to litigation, which can be a costly endeavor for the parents, the mediation of child custody and visitation disputes saves the parties considerable time and money.[3]

Because a large number of litigants in family courts in Louisiana are not represented by attorneys, family court judges, who are allowed to order the parties to mediation under La. R.S. 9:332, should always consider whether it is appropriate to order mediation — even if neither party has requested it. Even when parties have excellent attorneys, mediation is often proper in domestic cases considering the overcrowding of dockets, the length of time between court dates, and the emotional issues involved in family law matters.

Additionally, family mediators, who are qualified to mediate these cases under La. R.S. 9:334, have an ethical duty to be impartial and to advise each of the parties participating in the mediation to obtain review by an attorney of any agreement reached as a result of the mediation prior to signing such an agreement.[4] While having a duty to be impartial, the family mediator cannot serve as a lawyer for the unrepresented litigants or ensure that the unrepresented litigants have enough information to make an informed decision. Moreover, because mediation is often effective in high-conflict cases, family court judges should consider the use of mediation in these cases.

Court-Ordered Mediation

Courts have been authorized to order mediation in custody and visitation proceedings since 1984.[5] Three decades later, mediation in these proceedings is slowly becoming accepted by the courts, lawyers and litigants.[6] Empirical studies are showing that mediation is effective and results in settlement of some or all of the issues in family law matters between 40-80 percent of the time.[7]

Judges can order mediation of custody and visitation matters upon the motion of either party or on the court's own motion.[8] Unlike in civil cases, mediation can be ordered even if a party objects. If the parties do not agree upon a mediator, then the court has the authority to appoint any mediator on the Louisiana State Bar Association ADR Section's Child Custody and Visitation Mediator Registry.[9]

If an agreement is reached during the mediation, the mediator drafts a written, signed and dated agreement, commonly referred to as a Memorandum of Understanding. A consent judgment incorporating the agreement is later submitted to the court for approval.[10] When at least one of the parties is represented, the party's attorney drafts this judgment. When the parties are unrepresented, the parties are responsible for drafting the judgment. Some legal aid offices and clerks of court have forms that parties can use to prepare orders adopting the agreement reached as a judgment of the court. Some mediators provide these forms to unrepresented parties to prepare and file. Some judges in north Louisiana allow mediators to present agreements reached before them to the court when the parties are not represented.

Court-ordered mediation is also appropriate and should be ordered in cases even when both parties are represented by counsel. In the past, lawyers have been hesitant to request mediation in family law cases for multiple reasons, including the fear of removing them from the equation. However, many mediators, particularly attorney mediators, welcome attorney participation during and/or after mediation conferences. If the attorneys are present and participate in the mediation, any agreement reached will be an enforceable agreement. If the attorneys do not participate, they still need to review any agreement reached, advise their client whether to finalize the agreement, draft the judgment, and present same to the court.

Surveys show that lawyers have found participating in mediation "increases efficiency, decreases communication problems, enhances client involvement and understanding of the process, increases information for attorneys, and dignifies the divorce process for many clients. Unlike many of the theoretical models of negotiation, actual negotiations over divorce cases are discontinuous and fragmented. By gathering everyone together at the same place and time to give sustained attention to settlement, the 'months [or more] of diddling back and forth between lawyers' can be diminished."[11] In family law cases, clients often just want an objective person to listen to what they have to say before they can rationally consider resolutions recommended by their own attorneys. Lawyer participation in mediation can help clients actually understand the relevant law and procedures and help them accept that things which are important to them mean little to the judge who will make a decision if the parties do not reach an agreement. No matter how many times a lawyer may tell a client something, it sometimes sinks in when the client hears it from another person.

Mediation in family law cases is becoming the standard nationwide as more states mandate mediation — either in all cases or upon motion of the parties. Court-ordered mediation provides an opportunity for the parties to resolve their differences in private and to address the everyday issues that the court system does not have time

to consider, provides parties with an ownership in the agreement instead of having it dictated to them, and gives lawyers a better chance at helping their clients be satisfied with the outcome.

The Ethics of Mediating with Pro Se Litigants

There is no code of ethics for mediators in child support and visitation cases in Louisiana. However, ethical issues arise when a mediator mediates with one or more pro se litigants. How does the mediator address the many legal issues that arise in mediations? How does the mediator ensure that pro se litigants have enough information to make an informed decision? These questions are easily answered when one realizes that the primary responsibility of a mediator is to be a neutral third-party facilitator who does not give legal advice.

While many child custody mediators are attorneys,[12] mediators are not serving as attorneys when they are mediating. Thus, the duty of the mediator is not to give legal advice. While it is appropriate for the mediator to provide legal information, it is not appropriate for the mediator to give legal advice. For example, a mediator can provide information such as the fact that Louisiana is a community property state, but the mediator cannot advise the parties about specific property in issue being community property or separate property. The former would be providing legal information and the latter would be providing legal advice. Rule 2.4 of the Louisiana Rules of Professional Conduct states that a lawyer serving as a mediator shall inform unrepresented parties that the lawyer is not representing them and that, when a party does not understand that role, the lawyer-mediator should explain the difference between the lawyer's role as a mediator and a lawyer's role as one who represents a client.[13] Because a lawyer who is serving as a mediator is acting as a third-party neutral and is not representing a client,[14] the lawyer should not give legal advice. When non-lawyers serve as mediators in Louisiana, they also should not give legal advice because they may violate La. R.S. 37:212 and 37:213, the laws regulating the unauthorized practice of law in Louisiana.[15]

What about when both parties to a child custody or visitation mediation are unrepresented and cannot or will not obtain legal counsel? Should the mediator then provide legal advice to the parties so that the parties do not miss important legal issues and arrive at an unfair and unbalanced agreement? The answer is still no. The mediator has no duty to ensure that an agreement is fair. If the parties arrive at a child custody or visitation mediation without lawyers, it is not the responsibility of the mediator to fill in the void left by the absence of attorneys. Even if the mediator can sympathize with the parties' need for legal counsel and feels the need to offer legal advice, the mediator must not assume the additional responsibility of being a legal advisor.

What if the mediator mediates in a district where most of the litigants in family mediations are unrepresented and have critical needs for legal services? How should the mediator respond to these litigants? The fact that litigants in family mediations need the advice of lawyers does not place the burden on the mediator. The burden of providing legal services in Louisiana is the responsibility of others, not that of the mediator.

Statutorily, in Louisiana, the duties of a child custody and visitation mediator are to develop and execute an agreement to mediate which identifies the issues to be resolved, which affirms the parties' intent to mediate, and the circumstances under which the mediation may terminate.[16] The mediator also has a duty to advise each of the parties participating in the mediation to obtain review by an attorney of any agreement reached as a result of the mediation prior to signing such an agreement.[17] While the mediator can explain procedurally what will happen before, during and after the mediation process, the mediation process, legal terms or procedures, ethically, the mediator cannot offer legal advice to the parties.

The Mediation of High-Conflict Cases

The most emotional and highly contested disputes in courts today often involve parents who cannot agree on custody and visitation issues. Mediating custody and visitation cases that are highly conflicted in nature is rarely considered by Louisiana courts. Too often, the attorneys and the courts default to the process that they know — litigation. While mediating high-conflict cases may sound oxymoronic, it can be effective. The future of family court issues involving custody and visitation involves mediation, not litigation.

Courts are burdened with more divorce cases involving conflicted issues of custody and visitation. The caseload of conflicted cases grows larger every year. In 1980, a study revealed that almost 30 percent of divorcing parents with children continued to have serious conflicts three to five years after the divorce was rendered.[18]

A highly conflicted case consumes a great deal of the court's time. Professionals who may be appointed by the court to assist with the processing of custody and visitation cases include parenting coordinators[19] and mental health experts, such as custody evaluators.[20] Appointment of these experts is often considered by the court because the parents cannot stop fighting with each other. Utilizing these experts is not only expensive for the parties, but their involvement also can lengthen the litigation process and, in doing so, create more and increasing conflict between the parents. Often, when a court appoints a mental health expert, that expert is sometimes perceived as a threat by one or both of the parties.

Attorneys often reject the idea of mediating a high-conflict case. The reasons mediation is not more utilized in contested custody and visitation cases vary. Sometimes, the attorneys and the courts are unfamiliar with mediation. There also exists a mindset among some lawyers and judges that mediation is not suitable in these types of cases. Mediation of highly conflicted cases may take several sessions; however, it can be far more effective and less expensive to the parties than litigation. Moreover, the mediation of these cases can assist the courts who are laboring under an ever-increasing caseload of conflicted cases.

The court has its own ideas of what is best for children. This opinion is often based upon the judge's life experiences

as a parent, child, son or daughter. In determining what is in the best interest of the children, the court may defer to a mental health expert who has met with the parents and the children for several hours over several sessions. However, the court can never know all that has happened between the parents and the children. Yet, the court must make its most important decision, *i.e.*, which parent becomes the domiciliary parent and how much time the non-domiciliary parent has with the children, based upon a tiny smidgeon of available information. What the court has learned from other cases may not be applicable to the case in litigation before it now; however, the court will sometimes use prior cases as a guidepost in making these decisions.

Mediating a high-conflict case may involve working with parents who have personality disorders. These individuals often cannot see themselves as others see them and they can be inflexible in their demands. A trained mediator is not there to provide a diagnosis; however, he can recognize potential patterns and adapt the approach to mediation accordingly.

The mediation of high-conflict cases requires the mediator to be extremely patient. High-conflict people are invested in their positions and they are not easily moved. A mediation involving high-conflict people must be structured and focused. The focus of the mediation should always be the best interest of the children. High-conflict people are often angry and fearful of the court. By maintaining a calm demeanor, the mediator can try to keep the parties focused on achieving an agreement. A mediator who is experienced in mediation with high-conflict people can be an asset to the court and to the parties. When the parties are able to craft their own agreement, it is better for all concerned.

High-conflict people are not going away. They will continue to file petitions for custody and visitation. The court's existing framework needs to be expanded to include mediation in the early stages of the dispute. Mandatory mediation should be considered. Courts should also allow litigants to choose mediation at the time of filing. Mediation is the future of child custody and visitation and the courts should embrace it now.

Conclusion

Mediation is a proven means of alternative dispute resolution. As the courts see an increasing number of self-represented or pro se litigants and more cases involving highly conflicted parties and/or attorneys, mediation is a tool that the courts should implement on a more frequent basis. When parties are placed with an appropriately trained mediator in the early stages of the proceeding, there is an opportunity to avoid protracted and harmful litigation. The goal is always to do what is in the best interest of the child. When parents are removed from their adversarial positions and craft their own custody agreement, there is higher chance of keeping them out of court. We need to embrace alternatives to the traditional litigation structure of the courts. Mediation can be cost-effective and it can alleviate some of the ever-increasing caseload of the courts while still keeping lawyers involved. It is now time to add mediation to the existing toolkits used by the courts to resolve custody matters.

FOOTNOTES

1. Bobby Marzine Harges, "Mediator Qualifications: The Trend Toward Professionalization," 1997 B.Y.U. L. Rev. 687, 688 (1997).
2. *Id.*
3. *Id.*
4. La. R.S. 9:333.
5. Kenneth J. Rigby, "Symposium: Family Law: Alternate Dispute Resolution," 44 La. L. Rev. 1725, 1752, n 107 (1984).
6. Rebecca Hinton, "Comment: Giving Children a Right to Be Heard: Suggested Reforms to Provide Louisiana Children a Voice in Child Custody Disputes," 65 La. L. Rev. 1539, 1565 (2005). Mediation is mandatory in Orleans Parish. Some judges in Caddo and Bossier Parishes are ordering mediation on a frequent basis.
7. Stephen G. Bullock and Linda Rose Gallagher, "Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana," 57 La. L. Rev. 885, 919-920 (1997); and Hon. Howard H. Dana, Jr., "Court-Connected Alternative Dispute Resolution in Maine," 57 Me. L. Rev. 349, 367 (2005).
8. La. R.S. 9:332(A).
9. The Louisiana Child Custody and Visitation Mediator Registry can be found online at: *http://files.lsba.org/documents/Committees/louisianamediatorregistry.pdf.*
10. La. R.S. 9:332(B).
11. Craig A. McEwen, Nancy H. Rogers and Richard J. Maiman, "Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation," 79 Minn. L. Rev. 1317 (1995).
12. Under La. R.S. 9:334, lawyers, psychiatrists, psychologists, social workers, marriage and family counselors, professional counselors, clergymen and other professions who receive the requisite training can serve as child custody mediators in Louisiana.
13. Rule 2.4 of the Louisiana Rules of Professional Conduct.
14. *Id.*
15. La. R.S. 37:213 prohibits anyone from rendering or furnishing legal services or advice to another unless that person is licensed or approved to do so by the Louisiana Supreme Court.
16. La. R.S. 9:333.
17. La. R.S. 9:332.
18. J. Wallerstein and J. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (New York: Basic Books, 1980).
19. See La. R.S. 9:358.1.
20. See La. R.S. 9:331.

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CASENOTE: ARBITRATION

By the Publications Subcommittee of the
Louisiana State Bar Association's Ethics Advisory Committee

Jacqueline T. Hodges and HRC Solutions, Inc. (formerly known as Med-Data Management, Inc.) v. Kirk Reasonover, Esq., Alfred A. Olinde, Jr., Esq. and Reasonover & Olinde, L.L.C.

Supreme Court of Louisiana Opinion
No. 2012-CC-0043
On Supervisory Writs to the Civil
District Court for the Parish of Orleans

On July 2, 2012, the Louisiana Supreme Court issued its decision in *Jacqueline T. Hodges and HRC Solutions, Inc. (formerly known as Med-Data Management, Inc.) v. Kirk Reasonover, Esq., Alfred A. Olinde, Jr., Esq. and Reasonover & Olinde, L.L.C.* The Court was "called on to decide whether a binding arbitration clause in a lawyer-client retainer agreement is enforceable where the client has filed suit for legal malpractice."

5-2 Ruling with Three Separate Opinions

The majority opinion was issued by Justice Knoll, with a concurring opinion by Justice Weimer. Justice Johnson concurred in the result. Separate dissenting opinions were issued by Chief Justice Kimball and Justice Victory. This is a decision of significance for a number of reasons because: (1) it addresses an issue of first impression within Louisiana; (2) the scope of the language of the Court as well as the number of opinions issued; and (3) it affects basic relationships between lawyers and clients within the state of Louisiana.

The most obvious directly relevant and important conclusion of the opinion is how lawyers should handle arbitration agreements within their fee agreements with their clients. However, the implications of the Court's opinion may go beyond that issue and into the general question of what level of notice or explanation to clients is appropriate or necessary, both legally and ethically, in order for clients to be bound to their agreements with lawyers, as those agreements are typically written by those same lawyers.

Given the wide range of sophistication among clients with regard to finance, business, law and accounting, there can be a wide range of explanation both appropriate and necessary to properly inform clients and to validate provisions of lawyer fee agreements with clients. In order to obtain a lawyer's services, some clients will merely sign the fee agreement without receiving an adequate explanation or having a clear understanding of the terms and conditions of the agreement. For that reason, a lawyer should take the time and give the attention needed to explain the retainer agreement in detail to a client. One conclusion from the Court's opinion is that an uninformed client may seek to overturn an arbitration provision and potentially other provisions of a retainer agreement because of a lack of thorough explanation or comprehension of the details of the agreement.

In some cases, the lawyer-client relationship is of such financial and legal significance to the client, and the matter may be of such size, that it may be appropriate for the client to have a separate independent lawyer to provide advice on the fee agreement itself. Certainly, where clients have separate general counsel or similar long-standing trusted lawyers with whom they work regularly, that lawyer may play the role of negotiating a fee agreement with the new lawyer for the same client, or participate in the drafting of the retainer agreement with the new lawyer.

Factual Background

The arbitration clause at issue in *Hodges* stemmed from a lawyer-client retainer agreement reached in August 2009. In this case, the parties were not strangers as they were engaged in a lawyer-client relationship dating back to 1998. The arbitration clause in their agreement was likely similar to numerous agreements used by lawyers throughout Louisiana, and found in the American Arbitration Association standard arbitration provision stating, in pertinent part, "[a]ny dispute, disagreement or controversy of any kind concerning this agreement . . . shall be submitted to arbitration." The retainer agreement urged the client to "review this agreement with independent counsel." On the face of the agreement, counsel appeared to meet the requirements of professional conduct by stating in clear language that *any* dispute shall be handled through arbitration and also urging the client to seek independent

legal counsel before signing the agreement.

Before the Louisiana Supreme Court, the parties advanced their arguments as to whether the arbitration agreement was enforceable. The lawyers' counsel argued that the arbitration clause did not result in a limitation of ultimate liability to the clients in a malpractice suit. They argued that the agreement merely limited the venue for the airing of such disputes, by removing the case from the state courts of Louisiana and placing the matter before the American Arbitration Association and an arbitrator or arbitrators appointed through the procedures of that organization. In contrast, the clients' counsel provided a two-part argument. First, it was argued that arbitration, while not limiting the substantive remedies available to the clients, did impose substantial procedural barriers.[1] Second, and critical to the Court, the clients' counsel argued the lawyers had failed to adequately disclose the full scope of the arbitration clause and the potential consequences to the clients of agreeing to limit their remedies to arbitration. The clients contended that the lawyers never mentioned malpractice throughout their negotiations and that it was the clients' understanding that the arbitration agreement only applied to fee disputes.

Facets of the Opinion

All members of the Court, with the exception of Justice Weimer, agreed that arbitration agreements between lawyers and clients are enforceable. However, the Justices disagreed over what requirements are necessary to make such agreements both legally binding and appropriate to fulfill a lawyer's professional responsibility pursuant to the Louisiana Rules of Professional Conduct.

Justice Knoll, speaking for the majority, laid out the requirements, which, as a result of this opinion, are now the law in Louisiana as it pertains to arbitration agreements in legal fee agreements. First, the Court held that there is not a *per se* bar on arbitration agreements, provided the agreement does not limit the lawyer's substantive liability, does not impose an undue procedural burden on the client, and the agreement is fair and reasonable. However, the Court went further in discussing the disclosures a lawyer must make to the client before seeking an arbitration provision. In short, the lawyer must make the consequences of arbitration abundantly clear to the client. At a minimum, the lawyer must inform the client of the following elements of binding arbitration:

1. The waiver of a right to a jury trial on the possible claims that arise under the arbitration agreement;
2. The waiver of the right to appeal the decision of the arbitrator;
3. The waiver of the right to the broad discovery permitted under the Louisiana Code of Civil Procedure or the Federal Rules of Civil Procedure;
4. An explanation that arbitration may include significant upfront costs and a comparison between the costs of arbitration and the costs of litigation;
5. An explicit disclosure of the nature of the claims covered by the arbitration agreement, *i.e.*, malpractice claims, fee disputes, etc.;
6. The fact that the arbitration agreement does not limit the client's ability to file a disciplinary complaint against the lawyer; and
7. The lawyer must provide an opportunity for the client to consult with independent legal counsel prior to signing the agreement.

In promulgating these new disclosure requirements, the Court relied upon the language of Rule 1.4(b) of the Louisiana Rules of Professional Conduct as it pertains to the lawyer's duty of candor and communication, and its requirement that a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The Court reasoned that, embodied in this Rule, is the principle that a lawyer cannot take action which may be adverse to the client unless the lawyer reveals all risks and consequences of the action. The Court also discussed Rule 1.0(e), which defines "informed consent."[2] In expounding upon what was required by Rules 1.4 and 1.0(e), the Court delineated what must be made clear to a client. Applying the disclosure requirements to the lawyers in *Hodges*, the majority found the lawyers did not reasonably explain to the clients the terms and consequences of the arbitration agreement. The arbitration clause failed to alert the clients as to what specific claims would be subject to arbitration. The arbitration clause failed to alert the clients that by participation in arbitration they waived a jury trial and appeal, as well as the right to the broad discovery offered through traditional litigation.

The dissenting opinions of both Chief Justice Kimball and Justice Victory would have permitted these parties to proceed in arbitration, as opposed to litigation. Chief Justice Kimball found that the current Louisiana Rules of Professional Conduct failed to mandate the disclosure requirements required by the majority of the Court; and that, as such, retroactive application resulted in an unfair application upon the lawyers who lacked notice of the requirements set out by the Court in this opinion.

Justice Victory agreed with Chief Justice Kimball that retroactively imposing new disclosure requirements upon the lawyers in this case was unfair and unnecessary, as the lawyers performed all that was required under the law at the time of entering into the fee agreement. However, Justice Victory also believed the lawyers met their duty of full disclosure in regard to the arbitration clause. First, the clear language of the clause reveals that it pertains to "any dispute" that may arise under the contract, thus alerting the client that the arbitration agreement includes malpractice claims. Second, the client was informed through the clause to obtain independent legal counsel and review the agreement with counsel; it was the client's decision not to seek independent counsel on the matter and, therefore, the lawyer performed his duty.

Only Justice Weimer was willing to find that an arbitration clause that included legal malpractice was not fair and reasonable to the client, regardless of lawyer disclosure. Justice Weimer based this argument on La. R.S. 9:5605, which governs the timeliness of legal malpractice claims and mandates that a claim must be filed within one year of the alleged malpractice. Based upon the statute, the peremptive period could limit a client's remedies. For instance, even if a client filed a claim in arbitration within the one year mandated by the statute, if an award is not rendered within one year of filing the arbitration action, the client could not then enter a Louisiana court seeking a

remedy as the period would have expired. Justice Weimer concluded that this "trap," in his words, is unfair to clients and cannot be overcome, regardless of the disclosures made by a lawyer. However, Justice Weimer believed the "trap" could be fixed by the Legislature's amending the malpractice statute to consider arbitration the functional equivalent of litigation and satisfying the peremptive period.

In contrast to Justice Weimer's view, despite the Court's additional disclosure requirements, arbitration clauses were acceptable to six of the seven Justices, suggesting that the new disclosure requirements are likely here to stay. In addition to the majority, Chief Justice Kimball believed the requirements could be added to the Louisiana Rules of Professional Conduct and based her dissent on retroactive application of the requirements. Even Justice Victory was not hostile to the new disclosure requirements, rather based his dissent on retroactive application and his conclusion that the lawyers satisfied the disclosure requirements. Considering the foregoing, there may be little potential for rescinding the disclosure requirements in the future.

Legal and Ethical Requirements of Arbitration Agreements

In light of *Hodges*, many lawyers will be required to alter their protocol in negotiating with clients and entering into fee agreements. No longer will a lawyer merely be able to hand a client a document and say "Please sign here."

Obviously, lawyers must engage in detailed conversations with clients in regard to arbitration, explaining what procedural rights can be lost in the process. With less sophisticated clients, this process may need to be extensive, as a client may be naïve about differences between arbitration and litigation. A conversation about how jury trials and appeals could be lost should be straightforward. However, some discussions may be more complex, requiring a lawyer to carefully discuss the differences between the litigation process and the arbitration process. One example is how discovery or costs differ between arbitration and traditional litigation. Some conversations will also need to touch on uncomfortable subjects for the lawyer, such as disciplinary complaints and the claims, including legal malpractice, that will be covered in arbitration. These topics should be included in client discussions, although many lawyers may prefer that these subjects not be raised with a client. Finally, a lawyer must alert the client of the opportunity to speak with independent counsel in regard to the matter because, throughout these conversations, a client may be inclined to seek additional consultation from an independent lawyer due to the procedural rights the client is relinquishing under arbitration and the potential costs/risks associated with same.

Many lawyers may conclude that *Hodges* has little impact on their cases and clients because they represent a sophisticated entity or entities with counsel. However, that may be an incorrect assumption. The majority in *Hodges* explicitly disagreed and stated that a client's sophistication or familiarity with the arbitration process is irrelevant in providing warnings and disclosures to clients. The majority did not wish to create two classes of clients and did not believe a business-savvy client was any less deserving of a lawyer's reasonable communication than an average client.[3] Thus, the disclosures mandated by the Court must be made to every client, regardless of whether the client is inexperienced and with little formal education or is a long-time, sophisticated business person.

How Attorneys Can Protect the Legality of an Arbitration Agreement

Once a lawyer makes all the necessary disclosures required by *Hodges*, then the issue becomes what the lawyer must do to show that proper disclosures have been made.

A lawyer would be advised to discuss the arbitration disclosure requirements while reviewing the fee agreement with the client. The aspects of the disclosures can perhaps be emphasized through enlarging, highlighting or applying bold print to the disclosures in the agreement, or even interlineation and initialing of specific provisions of the fee agreement. This is an obvious approach, but it could be relevant if a client later claims that he or she was unaware of the limitations of arbitration. In fact, this same argument was persuasive to Justice Victory, who found the contractual language of the fee agreement in *Hodges* put the clients on notice that "any dispute" would be resolved by arbitration. To further emphasize the disclosures in the fee agreement, a lawyer should ask the client to initial each of them specifically, allowing the client to read the document and then directly sign off next to each one in the arbitration clause. The agreement could also contain a client certification that the lawyer did discuss all relevant disclosures. The combination of both emphasized language and a client signature immediately next to the arbitration clause, as well as a client certification of discussion of all relevant disclosures, should provide additional protection to a lawyer. While not required, a combination of some or all of these suggestions may provide evidence for a lawyer looking to safeguard an arbitration agreement in the event a dispute or challenge is later raised.

Wise counsel must be familiar with the new disclosure rules promulgated by *Hodges* and act accordingly when entering into new agreements with clients. Furthermore, counsel should also take care to follow the new disclosure requirements with any clients who have previously entered into such agreements.

FOOTNOTES

1. The clients stated their filing fee with the American Arbitration Association was $18,800, compared to the $500 that would be required in Louisiana state courts. The American Arbitration Association bases filing fees in relation to the size of plaintiff's demand. Here, the clients demanded $70 million in damages.

2. ". . .*(e) "Informed consent" denotes the agreement by a person to the proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably reasonable alternatives to the proposed course of conduct. . . .*"

3. In making this point, the Court cited to *Mayhew v. Benninghoff*, where the court was "baffled" by a lawyer's argument that ethical considerations were loosened in dealings with wealthy and business-educated clients. 53 Cal. App. 4th 1365, 1368 (1997).

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Elections: Voting Begins Nov. 17

Online voting will begin Monday, Nov. 17, for contested races in the 2014-15 Louisiana State Bar Association (LSBA) elections. Deadline for electronically casting votes is Monday, Dec. 15. Balloting will be conducted electronically only. No paper ballots will be provided.

Leadership positions are open on the Board of Governors, LSBA House of Delegates, Nominating Committee, Young Lawyers Division and American Bar Association House of Delegates.

When voting opens, members will receive an email with their E-ballot. The email will include the member's PIN number and a link to the voting website. On the voting website, the member must type in the PIN number to access the ballot. Ballots will only include races for which the member may cast a vote. Members who do not have an email address, or members preferring to vote from the LSBA website, will be able to log-in from the LSBA website to a special log-in page that will ask for additional information (Bar roll number, birth date, zip code).

For more information on the election procedures and the schedule, go to: *www.lsba.org/goto/elections.*

House Resolution Deadline is Dec. 17

The Louisiana State Bar Association's (LSBA) Midyear Meeting is scheduled for Thursday through Saturday, Jan. 15-17, 2015, at the Hotel Intercontinental, 444 St. Charles Ave., New Orleans. The deadline for submitting resolutions for the House of Delegates meeting is Wednesday, Dec. 17. (The House will meet on Jan. 17, 2015.)

Resolutions by House members and committee and section chairs should be mailed to LSBA Secretary Barry H. Grodsky, 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. 17. Resolutions must be signed by the author.

Also, copies of all resolutions should be emailed (in MS Word format) to LSBA Executive Assistant Mindi Hunter at mindi.hunter@lsba.org.

Judges: Granting of *Cy Pres* Funds Authorized by LASC Rule XLIII

The granting of Cy Pres funds by the courts is authorized by Louisiana Supreme Court Rule XLIII, specifically Section 2. Judges are reminded that this provision covers all entities eligible to receive these funds, as well as the Louisiana Bar Foundation.

Section 2 states: "In matters where the claims process has been exhausted and Cy Pres Funds remain, such funds may be disbursed by the trial court to one or more non-profit or governmental entities which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, including the Louisiana Bar Foundation for use in its mission to support activities and programs that promote direct access to the justice system."

To review the rule, go to: *www.lasc.org/rules/orders/2012/Rule_XLIII.pdf.*

Pilot Mentoring Program Begins Jan. 1, 2015: More Mentors Needed

The Louisiana State Bar Association (LSBA) and its Committee on the Profession are encouraging more mentors to participate in the Transition Into Practice (TIP) pilot mentoring program, set to begin Jan. 1, 2015, in the Baton Rouge, Shreveport and greater New Orleans areas.

Through the program, approved by the Louisiana Supreme Court and sponsored by CNA/Gilsbar, new lawyers admitted into practice in 2014 will be paired with mentors. Mentors must be in good standing, have no disciplinary history and must have at least 10 years of experience. Mentors can receive up to 6 hours of free CLE credit by volunteering.

For more information, to register as a mentor and to view video messages from Louisiana Supreme Court Chief Justice Bernette Joshua Johnson and LSBA Committee on the Profession Chair Barry H. Grodsky, go to: *www.lsba.org/mentoring/.*

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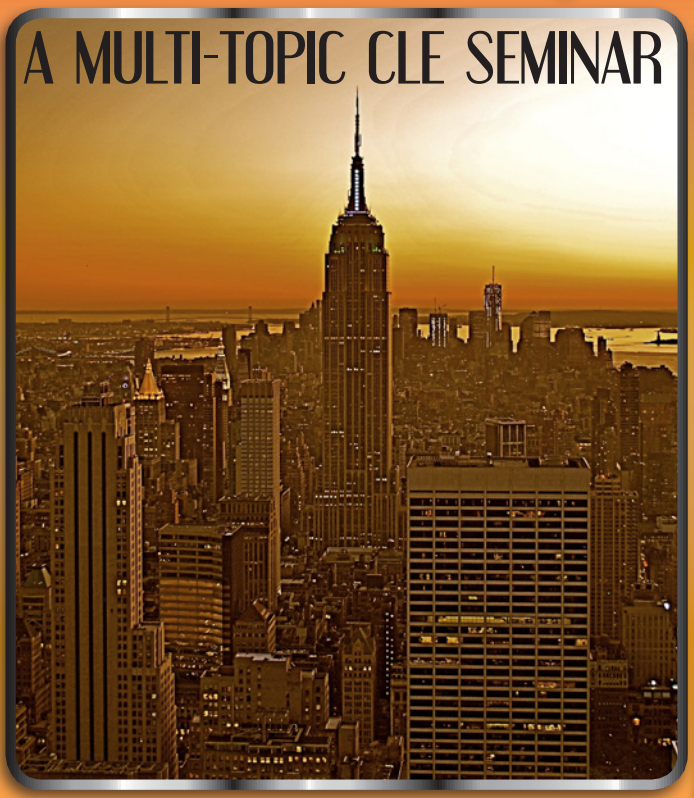

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SATURDAY, NOV. 22 – 4.75 CLE HOURS

7:30-8:00 a.m.	Registration
8:00-9:00 a.m. (1 credit)	Compelled Production of Documents and Business Records in Civil Discovery — The Fifth Amendment's Reach into Civil Litigation C. Frank Holthaus • *deGravelles, Palmintier, Holthaus & Fruge • Baton Rouge*
9:00-10:30 a.m. (1.5 credits)	Recent Developments in Civil Procedure and Evidence Hon. Guy P. Holdridge • *23rd Judicial District Court • Gonzales* Hon. Scott J. Crichton • *1st Judicial District Court • Shreveport*
10:30-10:45 a.m.	Break
10:45 a.m.- Noon (1.25 credits)	What is "Spoliation"? Once Found, What are the Consequences? Moderator: Hon. James E. Kuhn • *1st Circuit Court of Appeal • Ponchatoula* Panelists: Hon. John M. Guidry • *1st Circuit Court of Appeal • Baton Rouge* Hon. Ulysses Gene Thibodeaux • *3rd Circuit Court of Appeal • Lake Charles* Roy C. Cheatwood • *Baker, Donelson, Bearman, Caldwell & Berkowitz • New Orleans* Harry J. "Skip" Philips, Jr. • *Taylor, Porter, Brooks & Phillips • Baton Rouge* Thomas J. Madigan • *Sher Garner Cahill Richter Klein & Hilbert • New Orleans*
Noon-1:00 p.m. (1 credit)	Revisiting the View from the Fishbowl Hon. W. Ross Foote (Ret.) • *Attorney at Law • Shreveport* Lynn Luker • *Lynn Luker & Associates • New Orleans*

SUNDAY, NOV. 23 – 4.25 CLE HOURS

7:30-8:30 a.m. (1 credit)	Social Media in the Workplace Karleen J. Green • *Phelps Dunbar • Baton Rouge*
8:30-9:30 a.m. (1 credit)	A Statutorily Mandated Rocket Docket and Other Surprises — What You Never Learned But Need to Know About Louisiana Antitrust and Unfair Trade Practice Laws Mark A. Cunningham • *Jones Walker • New Orleans*
9:30-10:45 a.m. (1.25 credits)	Does Spoliation Constitute an Independent Cause of Action? Moderator: Hon. James E. Kuhn • *1st Circuit Court of Appeal • Ponchatoula* Panelists: Hon. Sylvia R. Cooks • *3rd Circuit Court of Appeal • Lafayette* Hon. Phyllis M. Keaty • *3rd Circuit Court of Appeal • Lafayette* James M. Garner • *Sher Garner Cahill Richter Klein & Hilbert • New Orleans* Dean A. Sutherland • *Jeansonne & Remondet • New Orleans*
10:45-11:00 a.m.	Break
11:00 a.m.-Noon (1 credit)	Professionalism Hon. Tiffany G. Chase • *Orleans Parish Civil District Court • New Orleans*

MONDAY, NOV. 24 – 4 CLE HOURS

8:00-9:00 a.m. (1 credit)	Ethics and All That Jazz! Joseph L. "Larry" Shea, Jr. • *Bradley Murchison Kelly & Shea • Shreveport*
9:00-10:00 a.m. (1 credit)	The Private Right of Action for Statutory Violations: Louisiana and Beyond J. Lee Hoffoss, Jr. • *Hoffoss Devall • Lake Charles*
10:00-10:15 a.m.	Break
10:15-11:15 a.m. (1 credit)	U.S. Supreme Court Update & Tidbits From The Feds Hon. Ivan L.R. Lemelle • *U.S. District Court, Eastern District of La. • New Orleans*
11:15 a.m.-12:15 a.m. (1 credit)	A Primer and Update on Louisiana Insurance Coverage and "Bad Faith Law" H. Minor Pipes III • *Barrasso, Usdin, Kupperman, Freeman & Sarver • New Orleans*

The Louisiana State Bar Association presents

2014 VooDoo Festival Seminar

LITIGATION SPOOKTACULAR

For attorneys, a trial can be both frightening and exhilarating! Preparation is the key ingredient to a successful brew. Effective voir dire can uncover anything that might "go bump in the night" or in the courtroom. Rattle your opponent's chain with a killer opening statement. Undermining their case is the trick to a successful verdict. **HON. JAMES E. KUHN** and **ROY CHEATWOOD**, seminar co-chairs, have called upon highly experienced members of the bench and bar to walk you through the daunting and potentially danger-filled lairs of direct and cross examinations. Attendees will walk away spellbound with spine-tingling skills to prevail in the courtroom. The program concludes with the required ethics credit, sure to vanquish all your litigation demons. Don't miss this opportunity to gain effective jury trial techniques explained by veteran jury trial lawyers and judges.

Friday, October 31, 2014

Sheraton New Orleans Hotel

500 Canal St., New Orleans

This program has been approved for a maximum of 6.25 hours of CLE credit, including 1 hour of ethics.

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

Attorneys Apply for Recertification as Legal Specialists

Pursuant to Section 8.7 of the Rules and Regulations of the Louisiana Board of Legal Specialization, notice is hereby given that the following attorneys have pending applications for recertification as legal specialists. Any person wishing to comment upon the qualifications of any applicant should submit his/her comments to the Louisiana Board of Legal Specialization, 601 St. Charles Ave., New Orleans, LA 70130, no later than Nov. 30, 2014.

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

Tax Law

Hirschel T. Abbott, Jr. ...New Orleans
A. Albert Ajubita.....New Orleans
Robert S. Angelico.....New Orleans
Walter Antin, Jr. .....Hammond
Jane E. Armstrong .....New Orleans
William M. Backstrom, Jr.....New Orleans
Dale R. Baringer.....Baton Rouge
Alton E. Bayard III .....Baton Rouge
Hilton S. Bell.....New Orleans
John C. Blackman IV ....Baton Rouge
Thomas G. Blazier.....Lake Charles
Sidney M. Blitzer, Jr. .....Baton Rouge
Robert T. Bowsher.....Baton Rouge
Jean C. Breaux, Jr. .....Lafayette
Timothy Paul Brechtel...New Orleans
Susan J. Burkenstock.....New Orleans
Douglas C. Caldwell..... West Monroe
Richard M. Campbell ..... Monroe
Donald A. Capretz .....Lafayette
Robert R. Casey .....Baton Rouge
David R. Cassidy .....Baton Rouge
John P. Cerise .....New Orleans
David M. Charlton.....Baton Rouge
John W. Colbert .....New Orleans
J. Grant Coleman .....New Orleans
George R. Collier, Jr. ..... Monroe
Katherine Conklin .....New Orleans
Gary L. Conlay .....Natchitoches
Paul D. Cordes, Jr. .....New Orleans
David N. Corkern .....Metairie
Jeanne T. Cresson .....Metairie
Christopher J. Dicharry .Baton Rouge
Mary Lintot Dougherty ..... Houston
Richard S. Dunn .....Baton Rouge
Michael L. Eckstein.....New Orleans
William W. Edelman .....New Orleans
Gary J. Elkins.....New Orleans
Mark S. Embree.....New Orleans
James C. Exnicios.....New Orleans
William J. Friedman, Jr. .....Lafayette
Mandy Mendoza Gagliardi.....New Orleans
Edward N. George III....New Orleans
Joseph R. Gilsoul..... Shreveport
Carl S. Goode.....Baton Rouge
William F. Grace, Jr. .....New Orleans
Michael E. Guarisco.....New Orleans
David S. Gunn .....Baton Rouge
Kernan August Hand, Jr.....New Orleans
Steven E. Hayes.....Metairie
Robert L. Henderson, Jr.....Slidell
Ted W. Hoyt .....Lafayette
Edwin Kidd Hunter .....Lake Charles
Charles B. Johnson .....New Orleans
Allen P. Jones ..... Shreveport
Steven I. Klein .....New Orleans
William H. Langenstein III.....New Orleans
John Paul LeBlanc.....Mandeville
Brian T. Leftwich.....New Orleans
Lawrence M. Lehmann .New Orleans
Susan Whittington Leidner.....New Orleans
Lawrence L. Lewis III.....Lafayette
Dwayne O. Littauer .....New Orleans
Peter J. Losavio, Jr. .....Baton Rouge
John L. Luffey, Jr. ..... Monroe
David J. Lukinovich .....Metairie
Richard E. Matheny.....Baton Rouge
Berlon M. Mauldin .....Baton Rouge
Michael A. Mayhall.....Covington
Van R. Mayhall, Jr. .....Baton Rouge
Ray C. Mayo, Jr. ..... Shreveport
Donald H. McDaniel .....Metairie
John F. McDermott.....Baton Rouge
W. Deryl Medlin ..... Shreveport
Donald M. Meltzer .....Baton Rouge
Joel A. Mendler.....New Orleans
Carey J. Messina.....Baton Rouge
Bruce A. Miller .....Metairie
Albert Mintz.....New Orleans
J. Tracy Mitchell .....Baton Rouge
Max Nathan, Jr.....New Orleans
William A. Neilson .....New Orleans
Daniel A. Palmer..... Waco
Paul C. Pepitone.....Baton Rouge
Laura Walker Plunkett...New Orleans
Eugene F. Pollingue, Jr....Palm Beach Gardens
Edward M. Porche II .....Covington
Betty Ann Raglin .....Lake Charles
Rudolph R. Ramelli.....New Orleans
Glenn J. Reames .....New Orleans
Jerome John Reso, Jr. ....New Orleans
Patrick K. Reso .....Hammond
Earl C. Reynolds.....Baton Rouge
F. Kelleher Riess.....New Orleans
Leon H. Rittenberg, Jr. ..New Orleans
Armand L. Roos ..... Shreveport
John A. Rouchell.....New Orleans
Robert E. Rowe.....Lafayette
H. Brenner Sadler ..... Alexandria
Douglas L. Salzer .....New Orleans
Robert C. Schmidt .....Baton Rouge
David R. Sherman .....Metairie
John F. Shreves .....New Orleans
David L. Sigler.....Lake Charles
Scott Joseph Sonnier .....New Orleans
Paul D. Spillers ..... Monroe
David Bruce Spizer.....New Orleans
Mark S. Stein .....New Orleans
William P. Stubbs, Jr. ..... Lafayette
Robert E. Tarcza .....New Orleans
Alexander P. Trostorff ...New Orleans
Chris A. Verret..... Lafayette
Barry E. Waguespack ....Baton Rouge
Jess J. Waguespack ..... Napoleonville
Paul H. Waldman .....Metairie
J. Benjamin Warren, Jr..... Shreveport
William Brooks Watson ..... Monroe
Charles S. Weems III..... Alexandria
John J. Weiler .....New Orleans
Kenneth A. Weiss.....New Orleans
Jack G. Wheeler.....Lake Charles
Lester J. Zaunbrecher ..... Lafayette
Karl J. Zimmermann .....New Orleans

Family Law

Dawn Amacker .....Covington
Ernest S. Anderson .....Slidell
D. Rex Anglin ..... Shreveport
James H. Askew..... Shreveport
Michael Baham.....Metairie
Alfred R. Beresko ..... Shreveport
David A. Blanchet .....Lafayette
Lisa Leslie Boudreaux .....Baton Rouge
David L. Carriere ..... Opelousas
Amy Elizabeth Counce.....Baton Rouge
Robert P. Cuccia..... Houma
Jennifer Carter deBlanc.....Marrero
Mary Clemence Devereux .....Covington
Karen D. Downs .....Baton Rouge
Lillian T. Dunlap..... West Monroe
Jack L. Dveirin.....New Orleans
James L. Fortson, Jr. ..... Shreveport
Patricia M. Franz .....Metairie
Frank A. Granger .....Lake Charles
Nancy S. Gregorie .....Baton Rouge
Grace Phyllis Gremillion .....Covington
Steven W. Hale.....Lake Charles
Helen Popich Harris .....Lafayette
Mitchell J. Hoffman.....New Orleans
Lila Tritico Hogan .....Hammond
Melanie Newkome Jones .....Baton Rouge
Patricia M. Joyce ..... Gretna
Debra M. Kesler .....Metairie
Philip C. Kobetz.....Lafayette
Robert D. Levenstein..... Laplace
Robert G. Levy ..... Alexandria
Robert C. Lowe.....New Orleans
Christine O'Brien Lozes ... Covington
Lorraine Jane Andresen McCormick .....Baton Rouge
Edith H. Morris.....New Orleans
Kim M. O'Dowd .....New Orleans
Patrice Wightman Oppenheim.....Mandeville
Carolyn F. Ott..... Amite
David R. Paddison.....Covington
David M. Prados.....New Orleans
Philip Riegel, Jr. .....Metairie
Sandra S. Salley .....Metairie
Walter M. Sanchez.....Lake Charles
H.F. Sockrider, Jr..... Shreveport
Diane A. Sorola.....Lafayette
D. Reardon Stanford.....Lafayette
Charles W. Strickland..... Shreveport
Susan L. Theall .....Lafayette
Linda A. Veazey..... Abbeville
Lynne W. Wasserman .....Metairie
Barbara J. Ziv.....New Orleans

Estate Planning and Administration Law

David M. Charlton.....Baton Rouge
Ronda Mary Gabb .....Covington
Carl S. Goode.....Baton Rouge
Lawrence Dietrich Huter.....Lafayette
Conrad Meyer IV.....Metairie
Ronald Wayne Morrison, Jr. .Metairie
Joseph Michael Placer, Jr. ...Lafayette
Joseph A. Prokop, Jr. .....Baton Rouge
Beau P. Sagona.....Metairie
Eric M. Schorr.....New Orleans
Scott Joseph Sonnier .....New Orleans

Business Bankruptcy Law

Patrick Shawn Garrity ...Baton Rouge
Michael David Rubenstein..... Houston

2014 LSBA Energy and Environmental Law SUMMIT

Nov. 6 - 7, 2014 Sheraton New Orleans Hotel

There is no more dynamic topic in Louisiana at the present time than energy and environmental law. Because of the heightened interest in this topic from in-house and outside counsel within and without the state, the LSBA is presenting its first ever two-day Energy and Environmental Law Summit covering matters of interest to executives and lawyers on both sides of the aisle, including how the Louisiana Legislature works, the latest 2014 significant energy and environmental legislation and jurisprudence, coastal land loss and contamination claims, litigation involving claims of imprudent operations that caused reservoir loss, regulatory issues, how units are created and established in Louisiana, alternate dispute resolution of energy and environmental claims and topics straight from the morning newspapers and the evening news. This summit brings it all together.

Matt Randazzo, J. Michael Veron and Roy Cheatwood, summit co-chairs, have recruited jurists along with some of the state's leading and experienced lawyers and specialists to give summit attendees the latest and best information about what is going on in the world of oil and gas and the Louisiana environment. This summit includes an hour on ethics and an hour on professionalism.

This program has been approved for a maximum of 12 hours of CLE credit, including 1 hour of ethics and 1 hour of professionalism.

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

LIFT Incubator Program Creates Jobs that Serve Community Needs

The Louisiana Civil Justice Center (LCJC), in partnership with the Louisiana State Bar Association, has launched the LIFT (Legal Innovators for Tomorrow) Legal Incubator Program, the first legal incubator program of its kind in Louisiana. The program is designed to address two startling issues in Louisiana — the lack of job opportunities for recent law graduates, and an underprivileged population in need of legal representation. To address these issues, LIFT matches newly admitted attorneys passionate about social justice and serving the basic legal needs of vulnerable populations with those most in need of affordable legal services.

Since launching the program in April 2014, the participating attorneys have provided legal assistance to more than 50 low- and moderate-income people in Louisiana.

The LIFT Legal Incubator is a two-year pilot program that provides new attorneys with the resources necessary to develop innovative, public interest-oriented solo practices.

After a competitive application process, four attorneys were chosen to participate in the program — James A. Graham, Robyn R. Griffin, Nicholas J. Hite and Betty A. Maury. Each attorney has his/her own innovative practice covering a broad range of legal issues affecting children with disabilities, the LGBTQ community, the elderly, and those unable to afford high-priced legal services.

James A. Graham formed his solo practice, the Law Office of James A. Graham, in 2013. Since joining LIFT, his practice primarily focuses on building medical-legal partnerships with health service providers to address health-harming legal needs that disproportionately affect people living in poverty.

Robyn R. Griffin started Griffin Law Group, L.L.C., in 2012. Her firm works with medical providers and educators to ensure every child with mental and/or physical disabilities has the resources needed to lead a happy and healthy life.

Nicholas J. Hite formed Hite Law Group in 2014. His practice provides affordable legal services to all individuals, with a focus on serving the unique needs of the LGBTQ community and all forms of non-traditional families. He offers free legal community education seminars.

Betty A. Maury formed Maury Law Firm, L.L.C., in 2013. Her general-practice firm has a family law focus. She works with clients to provide affordable legal services, with reasonable repayment plans.

In addition to the LIFT program, the LCJC implemented the LIFT Practice Network (LPN), which connects aspiring public interest attorneys with the resources, collaboration and training they need to build their solo practices. Currently, the program has eight participating attorneys.

LCJC Executive Director Jonathan M. Rhodes said, "The LIFT program and practice network are not only about helping young attorneys gain the resources and experience they need to build a sustainable solo practice, it is also about innovating and collaborating to better serve the needs of our community." Although the legal incubator program is currently based in New Orleans, Rhodes said the plan is to expand the program statewide.

For more information, visit *www.laciviljustice.org* or contact Amy Duncan at amy.duncan@laciviljustice.org or (504)355-0980.

Louisiana Supreme Court Associate Justice Marcus R. Clark, second from left, was not correctly identified in a photo caption in the August/September 2014 Louisiana Bar Journal. We regret the error. From left, 2014-15 Louisiana State Bar Association President Joseph L. (Larry) Shea, Jr., Justice Clark, Civics in Action Award recipient C. Jefferson Manning III and his father, Hon. C. Wendell Manning, at the LSBA Annual Meeting. *Photo by Matthew Hinton Photography.*

Access to Justice in the Character or Manner of a Pauper

By Ashley P. Gonzalez

The ability of individuals to access the court systems, regardless of income level, is a privilege that has long been entrenched in both state and federal law. This privilege is central to the Louisiana Constitution, which states that "[a]ll courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."[1]

Providing individuals with access to the courts is a basic concept; however, there are considerable expenses associated with litigation. Louisiana's judicial system is not designed to finance the filing fees and court costs incurred by its litigants. With nearly 20 percent of all residents living below the poverty line, Louisiana has the second highest poverty rate in the United States, and the highest in the South.[2] These statistics indicate that, for the approximately 1 million people in Louisiana who cannot afford even the basic costs of living, they are also likely unable to pay the court fees due in connection with any claim or action they wish to file. This inability to advance court costs creates a significant obstacle to achieving access to justice.

Recognizing this situation, the Louisiana Legislature enacted *in forma pauperis* laws in an effort to guarantee all Louisiana citizens equal access to the courts. *In forma pauperis* (IFP) means "in the character or manner of a pauper."[3] These laws provide the impoverished with special exceptions relative to cost so they may litigate in Louisiana courts.

The *in forma pauperis* laws, as set forth in the Louisiana Code of Civil Procedure, permit a litigant to initiate legal proceedings without pre-paying the costs related to such claim or furnishing a bond for such costs, if the litigant is "unable to pay the costs of court, because of his poverty and lack of means[,]"[4] as ordered by the court after submission of the litigant's IFP affidavit. The privilege is reserved for those who are clearly entitled to it by considering the type of proceeding, the fees and costs associated with the proceeding and the ability of the litigant to pay those fees and costs as they become due.

Notably, however, Louisiana's IFP laws do not waive the litigation fees and costs owed by IFP litigants in connection with the proceeding; rather, they defer the cost of litigation until a judgment is rendered. If judgment is rendered in favor of the IFP litigant, the party against whom the judgment is rendered shall pay all costs incurred by the IFP party. Except as otherwise provided by the Code of Civil Procedure, if judgment is rendered against an IFP litigant, he or she shall be responsible for the payment of costs incurred as well as those recoverable by the adverse party.

Despite the IFP scheme outlined in the Code of Civil Procedure, Louisiana's legal aid providers have long expressed concern about the inappropriate application of Louisiana's IFP laws. The Code of Civil Procedure provides that an IFP litigant is entitled to the services required by law of a sheriff, clerk of court, court reporter, notary or other public officer in connection with the judicial proceeding, including, without limitation, the filing of pleadings and exhibits, the issuance of certificates, the certification of copies of notarial acts and public records, the issuance and service of subpoenas and process, the taking and transcribing of testimony, the issuance of judgments and the preparation of a record of appeal.

Nevertheless, in practice, attorneys have reported that many IFP litigants' pleadings are initially refused for filing pending payment of filing fees. Additionally, IFP litigants are often told that they cannot obtain a copy of the judgment in their proceeding until the court costs are paid, and are improperly charged with some or all of the court costs when they have already prevailed in their cases.

In its efforts to address systemic issues facing legal aid providers, the Louisiana State Bar Association's Access to Justice Policy Committee surveyed public interest attorneys throughout Louisiana to determine the reality and frequency of concerns surrounding the application of IFP laws. Through their research, the Access to Justice Policy Committee members identified more than a dozen common practices that inhibit meaningful access to justice for indigent litigants.

In response to these findings, the Access to Justice Policy Committee partnered with Louisiana Appleseed to further study the issue and to develop a strategy for improving access to justice for indigent litigants. Using Louisiana Appleseed's findings, documented in an extensive white paper, the Access to Justice Policy Committee developed an educational brochure that was distributed to legal service programs who could in turn share it with local judges and clerks of court in an effort to help ensure that IFP laws are properly understood and administered.

The time and effort Louisiana Appleseed's volunteers dedicated to researching IFP procedures and practices and the educational outreach from the Access to Justice Policy Committee have been worthwhile. Legal service program representatives from across the state report that they are seeing improved administration of the IFP laws and, consequently, improved access to justice as a result of this research, education and outreach.

The recent improvements in the accessibility of Louisiana's judicial system are an important accomplishment; however, as legal service programs continue to face budgetary limitations, a greater number of indigent litigants will be forced to advocate for IFP status on their own behalf, without the benefit of an attorney. It is the responsibility of Bar members to ensure that Louisiana's judicial system recognizes and adheres to its IFP rules and procedures so that those litigants eligible to proceed IFP are granted such status.

FOOTNOTES

1. La. Const. art. I, § 22.
2. *http://quickfacts.census.gov/qfd/states/22000.html*.
3. Henry Campbell Black. (1979). *Black's Law Dictionary* (5th ed.), West Publishing, p. 701.
4. La. Code Civ. Proc. art. 5181.

Ashley P. Gonzalez is an attorney volunteer for Louisiana Appleseed, a nonprofit that recruits professionals to donate pro bono time to solve problems at the systemic, or policy, level. *A special thanks to Carolyn Buckley for her assistance with this article and to King Krebs & Jurgens, P.L.L.C., for its support of this project.*

State's Legal Services Programs Schedule Activities for National Pro Bono Week

Several Louisiana legal services programs are planning events to celebrate National Pro Bono Celebration Week, Oct. 19-25. Sponsored by the American Bar Association, National Pro Bono Celebration Week is part of a coordinated effort to showcase the legal community's commitment to public service and the positive impacts that pro bono lawyers make to the nation and the justice system.

The week offers opportunities both to make a difference for clients by providing special pro bono programming and to acknowledge the selfless acts of attorney volunteers from every part of Louisiana who, on a regular basis, make the lives of many much better. Whether it is the volunteer who helps represent the spouse and family in a drawn-out domestic violence case or whether it is the volunteer who takes five minutes to notarize a document to help keep a child in school, pro bono volunteers are making a difference in Louisiana. While helping others, many volunteers speak of the personal benefit they receive from volunteering.

Local bar foundations and pro bono programs in Louisiana are scheduling several recognition events and activities in conjunction with the event. For updates on all Pro Bono Week activities, go to: *www.lsba.org/celebrateprobono*.

PRACTICE Management

By Johanna G. Averill

NON-ENGAGEMENT/DECLINATION LETTERS

The best way to decline an attorney-client representation is with a non-engagement/declination letter. It is important to create written evidence of the declination. Reasons to decline representation include:

- ► lack of subject matter experience;
- ► conflict of interest;
- ► no time to take the case to conclusion; and
- ► client's expectations are unreasonable.

Often, lawyers think they are too busy to confirm in writing what they've already communicated orally to the non-client — that they will not handle the matter. However, the time it takes to draft and send the non-engagement letter is much less time-consuming and expensive than to later face a suit because a party remembered it differently.

In Louisiana, the existence of an attorney-client relationship turns largely on the "client's subjective belief" that such a relationship exists. *See, e.g., In re LeBlanc*, 884 So.2d 552, 557 (La. 2004); *Francois v. Reed*, 714 So.2d 228 (La. App. 3 Cir. 1998).

The way to avoid a swearing contest is a non-engagement/ declination letter, such as below:

Dear ____:

This is to confirm that this firm will not represent you in the XXX matter. We have not investigated your case and are expressing no opinion as to its merits or the likelihood of whether you would prevail. Rather, we have merely decided you would be better served retaining another lawyer and we must decline to represent you. Enclosed are the documents that you provided to us.

We strongly recommend that you consult with another attorney about this matter without delay to ensure that your rights will not be lost or jeopardized. If you wish to proceed with your claim, act immediately. Failure to do so may bar your claim based upon time limits established by law, court rules or case law. If your claim is lost based upon time limits, you will not be able to pursue any action to recover damages or other relief. Because we are not representing you and will not be taking action on your behalf, we have not researched or advised you regarding the application of time limits to any claims you may have.

Thank you for your consideration of our firm.

Sincerely,

There are many reasons to decline representation. In Louisiana, establishing in writing that you are not handling a matter is the best investment in security you can make. Faithful use of non-engagement/ declination letters likely will even eliminate a claim being made against you.

Johanna G. Averill is professional liability loss prevention counsel for the Louisiana State Bar Association and is employed by Gilsbar, L.L.C., in Covington. She received her BS degree in marketing in 1982 from Louisiana State University and her JD degree in 1985 from Loyola University Law School. In her capacity as loss prevention counsel, she lectures on ethics as part of Mandatory Continuing Legal Education requirements for attorneys licensed to practice law in Louisiana. She can be emailed at javerill@gilsbar.com.

LAWYERS Assistance

By J.E. (Buddy) Stockwell

RISKS FOR MINORS USING ALCOHOL

New studies have established that the use of alcohol before the age of 15 can result in four times the risk of becoming an alcoholic at some point later in life. According to the U.S. National Institutes of Health (NIH), the earlier a person begins using alcohol, the greater the risk of not only developing alcoholism but also developing other serious problems.[1] The NIH said:

> People who reported starting to drink before the age of 15 were four times more likely to also report meeting the criteria for alcohol dependence at some point in their lives. In fact, new research shows that the serious drinking problems (including what is called alcoholism) typically associated with middle age actually begin to appear much earlier, during young adulthood and even adolescence.

Other research shows that the younger children and adolescents are when they start to drink, the more likely they will be to engage in behaviors that harm themselves and others. For example, frequent binge drinkers (nearly 1 million high school students nationwide) are more likely to engage in risky behaviors, including using other drugs such as marijuana and cocaine, having sex with six or more partners, and earning grades that are mostly Ds and Fs in school.

According to the NIH article referenced above, the brain does not fully develop until a person reaches his/her 20s. Child and adolescent brains are at high risk for damage by alcohol (and other mood-altering drugs). Nonetheless, alcohol use by minors is currently widespread. A 2005 study cited by the NIH has established that three-fourths of 12th graders, at least two-thirds of 10th graders and about two in every five eighth graders have consumed alcohol.

More troubling still, when adolescents drink, a significant number of them "binge" drink, often consuming four to five drinks at one time. The NIH indicates that 11 percent of eighth graders, 22 percent of 10th graders and 29 percent of 12th graders had participated in binge drinking within the past two weeks of the survey.

Lawyers Assistance Program, Inc. (LAP)

Your call is absolutely confidential as a matter of law.

Toll-free (866)354-9334
Email: lap@louisianalap.com

The Substance Abuse & Mental Health Services Administration (SAMHSA) published information in 2011 stating that 74 percent of people ages 18 to 30 who were admitted for substance abuse treatment reported that they began using mood-altering substances at 17 or earlier. At least 10 percent of those admitted for treatment started using alcohol or drugs at age 11 or younger.[2]

Moreover, there appears to be an additional link between early alcohol use and the potential for addiction to multiple substances, not just alcohol. Of people who started drinking at age 11 or younger, a staggering 78 percent of those people reported eventually abusing two or more mood-altering substances prior to treatment.

In contrast, for those who reported first starting to use alcohol later in life at age 25 to 30, less than half as many — 30.4 percent — reported abusing two or more substances. Per SAMHSA:

> "Early to late adolescence is considered a critical risk period for the beginning of alcohol and drug use," said SAMHSA Administrator Pamela S. Hyde. "Knowing the age a person starts the use of a substance can inform treatment facilities so that they can better provide timely and appropriate prevention and treatment programs."

As science uncovers more contributing factors that increase the risk of developing alcoholism and addiction, we can all take advantage of that information to undertake appropriate steps to reduce the odds that someone in our family will become an alcoholic or addict in the fullness of time.

Based on the recent findings discussed above, it is now more important than ever to ensure that young people, including older teenagers and young adults, are extremely careful about alcohol use and the potential impact that alcohol consumption can have on their developing brains. By drinking too much alcohol too soon, young people may be setting themselves up for dramatically increased likelihoods of developing alcohol dependency and other serious substance use disorders — all of which requiring clinical intervention and treatment later in life.

The Lawyers Assistance Program, Inc. (LAP) not only provides confidential assistance to lawyers and judges, but also to the family members of the Bar, including children and adolescents. If you are concerned about alcohol or drug use by any member of your family, call LAP for confidential assistance at (866)354-9334 or email LAP@louisianalap.com.

FOOTNOTES

1. National Institute on Alcohol Abuse and Alcoholism, Alcohol Alert Number 67: "Underage Drinking: Why Do Adolescents Drink, What Are the Risks, and How Can Underage Drinking Be Prevented?" *http://pubs.niaaa.nih.gov/publications/AA67/AA67.htm.*

2. Substance Abuse & Mental Health Services Administration: "Substance use during childhood or adolescence is linked to long-term health risks." *http://www.samhsa.gov/newsroom/advisories/1407174039.aspx.*

J.E. (Buddy) Stockwell is the executive director of the Lawyers Assistance Program, Inc. (LAP) and can be reached at (866)354-9334 or via email at LAP@louisianalap.com.

By Alan J. Yacoubian

A QUESTION OF BALANCE

Given the inordinately high percentage of lawyers suffering from stress and depression in connection with the practice of law, it is tempting to simply disparage our entire profession. Perhaps it would make better sense to first look at ways to enhance our own work situation. In examining ways to improve our professional life, it is encouraging to note that a survey of published material on this issue reveals common themes suggested by experts. These themes include acknowledging the need for change in your personal life and then developing a strategy for implementing this change. Any such strategy must include efforts to develop more of a balance in life that reflect less of an emphasis on success in the legal profession and more of a focus on happiness and satisfaction with the practice of law. Invariably, this strategy will focus on other aspects of your life that are equally, or more, important, including family, faith and personal interests. This article offers suggested strategies to improve your level of job satisfaction.

The 12-Step Process

A thorough and direct approach toward enhancing satisfaction in the legal profession is offered by Hon. Carl Horn III, chief magistrate judge for the Western District of North Carolina. Judge Horn developed his "12 steps toward personal fulfillment" in the practice of law.[1] The following is a brief review of those 12 steps, with additional comments.

Step 1: Acknowledge Your Needs

Given the increasing number of attorneys who report being unhappy with the practice of law, the first question one needs to ask is whether you are pleased with the balance in your professional and personal life. This inquiry inevitably involves the question of whether you are having difficulty managing stress. [2]

Step 2: Regain Control of Your Time

In view of the inescapable truth that "time is money," lawyers may be overwhelmed with the feeling of never having enough time to "stay ahead." Those who operate by the billable hour know all too well that the more we work, the more we bill, and the more we bill, the more we make. This practice, although seemingly having a positive financial result, will undeniably put a strain on our physical and emotional health, sense of work-life balance and ultimate happiness. To avoid the "slippery slope" of chasing the next billable hour, we must draw the line at how much of our time we will devote to work.[3] It has been said that regaining control of our time will begin once we decide to allocate a certain portion of our time to our families, friends, hobbies and other personal pursuits.

Step 3: Develop Good Time Management Skills

Once we regain control of our time, it is essential that we develop good time management skills to maximize our productivity in our personal and professional lives. Making the most of your time while at work allows for efficiency and allocation of time toward personal endeavors which may operate to increase your overall satisfaction in life.

Step 4: Live Below Your Means

Although it is tempting to constantly seek to increase our annual compensation and seek a big bonus at the end of the year, such financial pursuits often inhibit our ability to choose a happier, more balanced life. During tough economic times, it is even more important to exercise discipline over your spending. Taking responsibility with regard to our financial choices can reduce the stressful financial pressures we face on a daily basis and free us to make more balanced decisions in other aspects of our lives.

Step 5: Protect and Nurture Good Relationships

As we age, we come to realize and cherish the personal fulfillment of good and nurturing relationships. Maintaining relationships that provide personal fulfillment will allow us to feel satisfaction in other areas, including work. Relationships take time to develop and nurture, and it is important that we incorporate relationships with our family and friends into our busy schedule. Making regular dates with your family, scheduling mini-vacations, sharing a hobby or sport with a spouse or friend and not bringing work home all contribute to achieving the proper life-work balance and nurturing those most important relationships.[4] Make this the year that you take your family on a vacation, coach your son's soccer team or invite a college friend to dinner.

Step 6: Implement Healthy Lifestyle Practices

According to a North Carolina task force survey, a positive correlation exists between healthy lifestyle practices and subjective well-being.[5] The survey noted that healthier practices include exercise, attending faith-based activities, prayer, hobbies, outdoor recreation, pleasure reading and weeks of vacation. To identify what you can do for yourself, put some things in writing.[6]

► Write a list of activities that nurture you, such as watching the sunrise, dancing, a massage, reading, etc.

► Next, make a list of things you would do if you didn't have to do them perfectly.

► Make another list of things you would do if you didn't mind seeming silly.

► Identify one activity you will pursue this month and one for this year.

After you have listed these items, do what you say you are going to do and do not let anything else interfere. To prevent the demands of the office from permeating into our individual lives, it is essential that we are disciplined enough to engage in activities unrelated to work.

Step 7: Encouragement of Individuals Striving for Balance

Many of us are actively involved in our law practice, including those of us who have administrative roles in our law firm. Being a partner or law firm administrator exposes us to the realities of "the bottom line," which may complicate our ability to be mindful of others who are striving for balance. Law firms have a responsibility to encourage their associates and partners to maintain a healthy and well-balanced lifestyle. The benefit of encouraging other lawyers to strike a balance between work and their personal lives will ultimately benefit the bottom line by creating healthy and happy lawyers.

Step 8: Rigorously Apply the Golden Rule and Rule 11

The Golden Rule of lawyering translates into the notion that lawyers should provide each other with courtesy and professionalism, including simple tasks such as returning phone calls and providing prompt responses to discovery. Rule 11 imposes consequences for a lawyer's poor judgment or misconduct. Although not utilized often, Rule 11 prevents lawyers from creating a hostile environment for the legal profession. Civility and professionalism in the practice of law allow for positive interaction among attorneys, which helps to promote contentment and conceal negativity. Judge Horn said, "I am struck by the way the Golden Rule and Rule 11 balance each other. The former is the general rule, the foundation for good lawyering and living; the latter is the exception, a necessary last resort if we are to achieve what Rule 11 describes as the overriding purpose of the Federal Rules of Civil Procedure: 'the just, speedy, and inexpensive determination of every action.'"[7]

Step 9: Live a Life Marked by Charity and Kindness

Most appropriately noted by Judge Horn, "[T]o the extent our profession has made us excessively combative, argumentative and hard-nosed, these qualities eventually will consume us if not properly balanced with kindness, gentleness and charity."[8] To balance these tendencies, we should seek opportunities to give our time, resources, talents and enthusiasm to our community with the hope of making others feel appreciated. In the words of the immortal John Wooden, "Happiness begins where selfishness ends."[9] Nothing can give you greater joy than doing something for another.

Step 10: Courts Must Respect the Responsible Efforts by Lawyers to Manage Time and Balance Lives

We all recognize the need for courts to ensure judicial efficiency. As the saying goes, "Justice delayed is justice denied." However, there must be a balance between the need for judicial expediency and the right to manage one's own calendar. In recognition of the need for this balance, North Carolina's 18th Judicial District Court has adopted a vacation policy, which allows lawyers to file with the court three weeks of reserved vacation. During those reserved weeks, none of those lawyers' cases will be scheduled for hearing. This policy in North Carolina serves as an example in tolerance for those lawyers who are striving to achieve a work-life balance. Without compromising efficiency, the courts have a responsibility to respect reasonable efforts by lawyers to better themselves and combat the negative stigma imposed on the legal profession.

Step 11: Law Schools Need to Prepare Young Lawyers for the Real World

Those on the academic side of the legal profession have a responsibility to provide a realistic view of the life of the average lawyer. Most practitioners can relate to the notion that, as a law student, you have no idea what will be required from you as a lawyer. Law schools should request that practitioners speak to students about their daily work and life experiences after law school. Those in private practice or other fields of law should consider volunteering their time to mentor law students about the realities of practice. Law schools must do their part by encouraging new lawyers to be faithful and ethical leaders in their field rather than being concerned about getting rich.

Step 12: Take Your Vacation

A renewed sense of energy and enthusiasm can often come from taking time off work and enjoying that vacation you keep putting off. In Europe and other parts of the world, employees are **required** to take up to six weeks of "holiday" a year. Here's a list of tips for planning a great vacation.[10]

► Commit to vacation dates and write them on your calendar**.**

► Select a vacation destination that is not accessible by cell phone or email.

► Make monetary deposits for the trip. You will be less likely to back out if you put money down.

► Contact your top clients and let them know you will be unavailable for those dates.

► Send out bills two weeks before you leave because you will need the cash flow upon your return.

► Pay your bills one month ahead for one less thing to worry about.

► Block off the week before and week after your vacation to allow for full relaxation.

► Take care of all vacation details in advance.

► Arrange for another attorney to handle any emergencies.

► Make provisions for mail and phone calls.

► Avoid calling your office and checking emails.

► Finally, enjoy your trip and do not stress about work.

FOOTNOTES

1. Judge Carl Horn III, "Twelve Steps Toward Personal Fulfillment in Law Practice," Law Practice Management (1999).

2. Dr. Maynard Brusman, "How to Master Stress," Working Resources (2008).

3. Horn, *supra* note 1.

4. "Eight Tips Toward Balancing Home and Office Life," Capital Connection (November 1996).

5. Horn, *supra* note 1.

6. Deborah K. Andelt, "Get a Life," Legal Management 73-74 (July/August 1998).

7. Horn, *supra* note 1.

8. Horn, *supra* note 1.

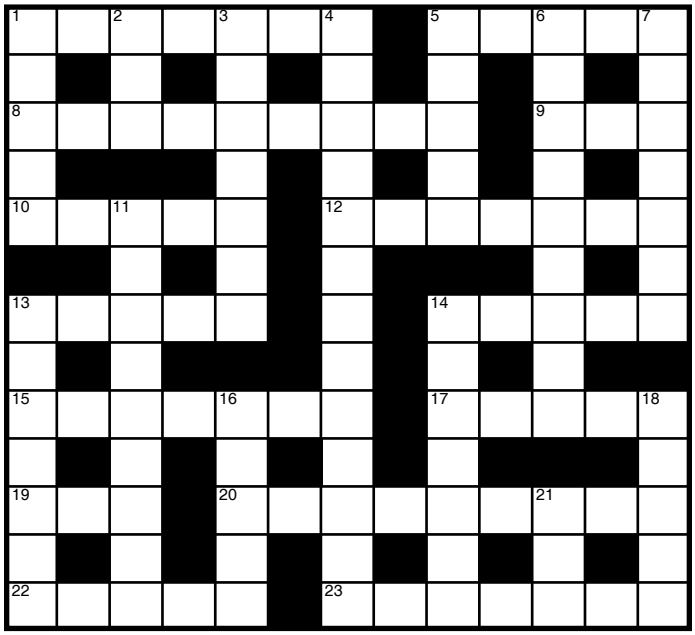
9. John Wooden, *Wooden: A Lifetime of Observations and Reflections On and Off the Court,* 197.

10. Shannan L. Hicks, "Top 10 Tips to Planning a Great Vacation," Louisiana Bar Journal (June/July 2008).

Alan J. Yacoubian is a partner in the New Orleans firm of Johnson, Yacoubian & Paysse, A.P.L.C. He received a BA degree, cum laude*, in 1982 from Tulane University and his JD degree,* cum laude*, in 1985 from Tulane Law School. He is a member of the Louisiana State Bar Association's Committee on the Profession. (ajy@jjbylaw.com; Ste. 4700, 701 Poydras St., New Orleans, LA 70139-7708)*

Crossword PUZZLE

By Hal Odom, Jr. | SPECIAL PROCEEDINGS



ACROSS

1 One appointed to manage the affairs of an interdict (7)
5 Applications for supervisory review (5)
8 Special proceeding analogous to interpleader (9)
9 Test for many college seniors not taking the LSAT (1, 1, 1)
10 The most socially desirable people (1, 4)
12 Taking the same side in a lawsuit (7)
13 Floodwall (5)
14 Roundball, familiarly (5)
15 Refer to, without quoting (7)
17 Watering hole; sanctuary (5)
19 "Much ___ About Nothing" (3)
20 Not principal, as many special proceedings (9)
22 Where to find Memphis and Cairo (5)
23 Transfers from state to federal court (7)

DOWN

1 Popular hot beverage (5)
2 Seek political office (3)
3 One holding legal title to trust property (7)
4 Place to dine on an elegant train (10, 3)
5 "___ may, ___ might" alternate title for "Star Light, Star Bright" (4, 1)
6 Extremely clever (9)
7 Big name in small swimwear (7)
11 Alternative to a detailed descriptive list (9)
13 Green, summertime drink (7)
14 Gangster (7)
16 Not appropriate (5)
18 "The ___ falling," mantra of Chicken Little (3, 2)
21 Offroad motor bike (3)

Answers on page 247.

Alcohol and Drug Abuse Hotline

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

Alexandria	Steven Cook	(318)448-0082
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	David E. Cooley	(225)753-3407
	John A. Gutierrez	(225)715-5438 (225)744-3555
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	Thomas E. Guilbeau	(337)232-7240
	James Lambert	(337)233-8695 (337)235-1825
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New Orleans	Deborah Faust	(504)304-1500
	Donald Massey	(504)585-0290
	Dian Tooley	(504)861-5682 (504)831-1838
Shreveport	Michelle AndrePont	(318)347-8532
	Nancy Carol Snow	(318)272-7547
	William Kendig, Jr.	(318)222-2772 (318)572-8260 (cell)
	Steve Thomas	(318)872-6250

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

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REPORT BY DISCIPLINARY COUNSEL

Public matters are reported to protect the public, inform the profession and deter misconduct. Reporting date Aug. 4, 2014.

Decisions

Geraldine Broussard Baloney, LaPlace, (2014-B-1012) **Suspended for six months, fully deferred, subject to one-year supervised probation**, ordered by the court as consent discipline on June 13, 2014. JUDGMENT FINAL and EFFECTIVE on June 13, 2014. *Gist:* Engaging in a conflict of interest between two current clients that led to one client being overcharged for costs; and accepted an aggregate settlement on behalf of the clients without their informed consent.

Donita Yvette Brooks, Harvey, (2014-B-1102) **Suspended for one year and one day, with all but six months deferred, subject to a one-year supervised probation**, ordered by the court as consent discipline on July 9, 2014. JUDGMENT FINAL and EFFECTIVE on July 9, 2014. *Gist:* Lack of diligence; failure to communicate; failure to return the unearned portion of a fee; failure to return a client file upon request; conduct involving misrepresentation; and violating or attempting to violate the Rules of Professional Conduct.

Craig Thomas Broussard, Lafayette, (2014-OB-0545) **Reinstated to the practice of law** ordered by the court on May 23, 2014. JUDGMENT FINAL and EFFECTIVE on May 23, 2014.

David P. Buehler, New Orleans, (2014-B-0619) **Suspended for six months** ordered by the court as reciprocal discipline on May 23, 2014. JUDGMENT FINAL and EFFECTIVE on June 6, 2014. *Gist:* Reciprocal discipline imposed for misconduct occurring in Virginia.

David Augustus Capasso, New Orleans, (2014-B-1186) **Suspended for 18 months, fully deferred, subject to two years' supervised probation**, ordered by the court as consent discipline on June 20, 2014. JUDGMENT FINAL and EFFECTIVE on June 20, 2014. *Gist:* Neglected a legal matter; failed to promptly refund an unearned fee; and mishandled his client trust account.

John F. Dillon, Folsom, (2014-B-1090) **Six-month suspension, fully deferred upon completion of a two-year period of probation**, ordered by the court as consent discipline on June 20, 2014. JUDGMENT FINAL and EFFECTIVE on June 20, 2014. *Gist:* Commingling operating funds with client and third-party funds in client trust account.

Margrett Ford, Shreveport, (2014-B-0831) **Adjudged guilty of additional violations warranting discipline, which shall be considered in the event she seeks readmission after becoming eligible to do so with conduct occurring outside the time frame of In Re: Ford, 12-1016, the minimum period for seeking**

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, 2014.

Respondent	Disposition	Date Filed	Docket No.
Johnny S. Anzalone	(Reciprocal) Interim suspension.	7/29/14	14-1233
Seth Cortigene	(Reciprocal) Permanent disbarment.	7/29/14	14-1070
Craig A. Davis	(Reciprocal) Deferred suspension.	7/29/14	14-1223
Darrell K. Hickman	(Reciprocal) Deferred suspension.	7/29/14	14-1222
Devin W. Morris	(Reciprocal) Deferred suspension.	7/29/14	14-1225
Newton B. Schwartz, Sr.	Enjoined for 3 years from seeking admission to EDLA.	7/29/14	14-1070

Discipline continued from page 208

readmission shall be extended for one year, subject to conditions, ordered by the court on June 20, 2014. JUDGMENT FINAL and EFFECTIVE on July 7, 2014. *Gist:* Neglect of legal matters; failure to communicate with clients; failure to return unearned fees; failure to cooperate with the ODC in its investigations; and violating the Rules of Professional Conduct.

Darrell K. Hickman, Alexandria, (2014-B-0817) **Suspended for one year, fully deferred**, ordered by the court on May 16, 2014, as consent discipline. JUDGMENT FINAL and EFFECTIVE on May 16, 2014. *Gist:* Failing to properly communicate with a client; and misleading the client about the status of her legal matter.

Troy A. Humphrey, Baton Rouge, (12-DB-073) Public reprimand ordered by the Louisiana Attorney Disciplinary Board on May 23, 2014. JUDGMENT FINAL and EFFECTIVE on June 12, 2014. *Gist:* Failing to return unearned fees and violating the Rules of Professional Conduct.

William F. Kendig, Jr., Shreveport, (2014-B-1059) **Suspended for one year and one day, with all but six months deferred, followed by a two-year period of unsupervised probation**, ordered by the court as consent discipline on June 20, 2014. JUDGMENT FINAL and EFFECTIVE on June 20, 2014. *Gist:* Failure to exercise independent professional judgment and render candid advice; conflict of interests; and violating or attempting to violate the Rules of Professional Conduct.

Clyde Lain, Jr., Monroe, (2014-OB-1021) **Permanent resignation from the practice of law** ordered by the court on June 13, 2014. JUDGMENT FINAL and EFFECTIVE on June 13, 2014.

Robin Kent Ljungberg, Covington, (2014-B-1393) **Conditional admission revoked** ordered by the court on July 8, 2014. JUDGMENT FINAL and EFFECTIVE on July 8, 2014. *Gist:* Conditional admission to the Louisiana Bar revoked.

William Steven Mannear, Baton Rouge, (2014-OB-1390) **Permanently resigned from the practice of law in lieu of discipline** ordered by the court on July 8, 2014. JUDGMENT FINAL and EFFECTIVE on July 8, 2014. *Gist:* Commission of a criminal act; engaging

Continued next page

Discipline continued from page 209

in conduct involving dishonesty, fraud, deceit or misrepresentation; and violating or attempting to violate the Rules of Professional Conduct.

Jennifer Matte, Lake Charles, (2014-OB-1200) **Transferred to active status** ordered by the court on June 20, 2014. JUDGMENT FINAL and EFFECTIVE on June 20, 2014.

Kenner O. Miller, Jr., Baton Rouge, (2014-B-0538) **Permanent disbarment** ordered by the court on May 23, 2014. JUDGMENT FINAL and EFFECTIVE on June 6, 2014. *Gist:* Commingled, converted and/or misappropriated $208,260.83 in client and third-party funds over a period of approximately three years.

David J. Mitchell, New Orleans, (2013-B-2688) **Permanent disbarment** ordered by the court on May 7, 2014. Rehearing denied on July 1, 2014. JUDGMENT FINAL and EFFECTIVE on July 1, 2014. *Gist:* Conduct involving dishonesty, fraud, deceit and misrepresentation; violating or attempting to violate the Rules of Professional Conduct; and making an agreement for, charging or collecting an unreasonable amount for expenses.

Devin W. Morris, Denver, Colorado, formerly of Baton Rouge, (2014-B-0730) **Suspended for one year and one day, fully deferred, subject to successful completion of a one-year period of unsupervised probation**, ordered by the court as consent discipline on May 16, 2014. JUDGMENT FINAL and EFFECTIVE on May 16, 2014. *Gist:* Neglecting two matters; failing to properly communicate with a client; failing to account for work performed; failing to timely return a client's file upon termination of the representation; and failing to fully cooperate with ODC in its investigation.

Cory Scott Morton, New Orleans, (2014-B-1349) **Interim suspension** ordered by the court on June 27, 2014.

Clarence T. Nalls, Jr., Baton Rouge, (2013-B-2873) **Disbarment** ordered by the court on May 7, 2014. Rehearing denied on July 1, 2014. JUDGMENT FINAL and EFFECTIVE on July 1, 2014. *Gist:* Engaged in the unauthorized practice of law following his suspension; failed to inform clients of his suspension; collected a fee following his suspension; failed to provide a client with a copy of his file; and failed to promptly manage and account for clients' funds.

Otha Curtis Nelson, Sr., Baton Rouge, (2013-B-2699) **Suspended for three years, with all but one year deferred, subject to two years' supervised probation following the active portion of his suspension**, ordered by the court on May 7, 2014. Rehearing denied on July 1, 2014. JUDGMENT FINAL and EFFECTIVE on July 1, 2014. *Gist:* Mishandled his client trust account, resulting in commingling and conversion; collected an excessive fee; failed to timely turn over property and funds belonging to third parties; failed to seek approval of his attorney's fees in a workers' compensation matter; charged clients his hourly fee for services such as typing and updating his time sheet; caused a mistrial; failed to refund unearned fees; and failed to cooperate with the ODC in its investigations.

Charles Phillips II, Bossier City, (2014-B-0714) **Disbarment** ordered by the court on June 13, 2014. JUDGMENT FINAL and EFFECTIVE on June 27, 2014. *Gist:* Neglected legal matters; failed to communicate; failed to account for or refund unearned fees; and failed to cooperate with the ODC in its investigations.

Barry S. Ranshi, New Orleans, (2014-B-0767) **Conditional admission to the practice of law in Louisiana revoked** ordered by the court on May 13, 2014. JUDGMENT FINAL and EFFECTIVE on May 13, 2014. Mr. Ranshi may not reapply for admission until he can demonstrate at least a one-year period of sobriety and compliance with the terms and conditions of a contract with the Lawyers Assistance Program.

Ronald A. Rossitto, Lake Charles, (2014-B-1273) **Interim suspension** ordered by the court on June 30, 2014.

Chanci Shermaine Shaw, Melville, (2014-B-0714) **Permanently disbarred**

Continued next page

ordered by the court on June 20, 2014. JUDGMENT FINAL and EFFECTIVE on July 7, 2014. *Gist:* Felony conviction of theft by fraud.

C. Hearn Taylor, New Orleans, (2014-B-0646) **Suspended for one year and one day** ordered by the court on May 23, 2014. JUDGMENT FINAL and EFFECTIVE on June 6, 2014. *Gist:* Neglected client's legal matters; failed to communicate; failed to refund unearned fees; and failed to cooperate with the Office of Disciplinary Counsel.

Bridget Brennan Tyrrell, New Orleans, (2014-B-1187) **Suspended for 18 months** ordered by the court as consent discipline on June 20, 2014. JUDGMENT FINAL and EFFECTIVE on June 20, 2014. *Gist:* Practiced law while ineligible to do so; and failed to cooperate with the ODC in its investigation.

Channing J. Warner, Gretna, (2014-B-1060) **Suspended for one year and one day, fully deferred, followed by two years' supervised probation**, ordered by the court as consent discipline on June 20, 2014. JUDGMENT FINAL and EFFECTIVE on June 20, 2014. *Gist:* Neglect of a legal matter; failure to communicate with a client; commingling client funds; and failure to promptly deliver settlement funds to a client.

Frank V. Zaccaria, Jr., Bossier City, (2014-OB-1237) **Transfer to disability inactive status** ordered by the court on June 30, 2014. JUDGMENT FINAL and EFFECTIVE on June 30, 2014.

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

	No. of Violations
A person the lawyer knows to be represented by another lawyer in the matter	1
Simultaneously representing clients with adverse interests	1
Threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter	1
TOTAL INDIVIDUALS ADMONISHED	**2**

New Orleans' Community Members and Police Mediate Conflict

Those who practice in the field of alternative dispute resolution know that mediation changes lives, transforms relationships and creates a space for healing and forgiveness.

Seldom does a week go by where we do not hear alarming reports about alleged police misconduct. Many make national headlines; however, below the media's radar are less dramatic, though still troubling, encounters between police and community members in need of the same transformation and healing of relationships. At the root of many community-police conflicts are poor communication and a misunderstanding (or an incomplete understanding) of police work. With the new Community-Police Mediation Program, complaints such as lack of professionalism, discourtesy and neglect of duty may now be mediated in New Orleans.

The mediation program comes at a time when morale within the New Orleans Police Department (NOPD) is at an all-time low, crime rates rank among the nation's highest, high-profile officer convictions have led to public distrust, and a deep history of oppression strains relationships with communities of color. The City of New Orleans needs an alternate means of creating mutual understanding and transforming community-police relationships.

In New Orleans, complaints of officers' alleged misconduct may be filed with the Office of the Independent Police Monitor (OIPM) or the Public Integrity Bureau (PIB), the investigative arm of the NOPD. Investigations of police misconduct complaints have limited efficacy in some types of cases — particularly those that are "she said/he said" and discourtesy/attitude-based cases. Complaints can take

up to 180 days to be investigated by the PIB, and residents often receive a letter in the mail stating that their complaint could not be sustained because it lacked physical evidence or witnesses. The complaint, however, remains on the officer's record, affecting promotions and other opportunities. Often, neither party is satisfied with the process. By contrast, a three-year study of police mediation programs in other U.S. cities revealed a 90-100 percent satisfaction rate from both civilian complainants and police officers after a mediation session.

The Community-Police Mediation Program is the first of its kind for New Orleans and one of the first in the U.S. South. The program was established with community and NOPD support to build mutual understanding and improve relationships between residents and officers. Mediation is a voluntary and confidential process that helps residents and officers share how their interaction affected each other and listen to the other person. It is a non-confrontational, participant-driven process facilitated by two professionally trained neutral mediators to help the resident and the officer reach a mutually agreeable solution.

Mediation allows the complainant to be fully heard and understood and to speak directly with the officer. The process also gives officers feedback and helps to prevent similar incidents from occurring in the future. The community member is able to regain confidence in police services and to play an active role in creating a solution. Officers have the opportunity to gain new understandings, improve community relationships and trust, explain why they may have acted the way they did on a certain day and share about their role. Mediation is powerful because both the complainant and the officer can gain an understanding of why the other person acted as he or she did. When the parties gain this knowledge, the other's behavior is put into a new context that is more understandable. The person may not approve of what happened, but he can understand why it happened. When mediation is successful, this understanding can, and often does, lead to forgiveness and healing. In the long term, mediation helps with resource efficiency in the handling of complaints, resolves complaints in a satisfactory manner for all involved and improves community-police relations.

Local commissions and federal bodies required the creation of a Community-Police Mediation Program in New Orleans: the Police-Civilian Review Task Force in 2001, the Department of Justice's Civil Rights Division in 2011, the New Orleans City Ordinance creating the OIPM, and the Memorandum of Understanding between the NOPD and the OIPM.

The OIPM administers and coordinates the program in accordance with the laws requiring such a program with a small temporary grant from the U.S. Department of Justice's Community-Oriented Policing Services. The OIPM has applied for public financing for the mediation program from Mayor Landrieu and the City of New Orleans to ensure the sustainability and success of the low-cost program with many benefits to public safety. The number one reason around the country for the failure of these programs is the lack of public financing.

The goal in police misconduct investigations is determining and correcting behavior that hurts the ability of each side to relate to the other. While traditional discipline is an important and necessary tool to achieve this goal, mediation is a more powerful tool to bring about a deeper and lasting change. Relationships deepen. Trust is gained. There is no losing side. Both participants come away with the gift of genuine understanding and a new ability to talk out conflict. The Community-Police Mediation Program offers the tools of incremental healing to a city urgently trying to rebuild its trust and confidence in the police department and bridge relationships between the community and the police to create a safer city.

—Sister Alison R. McCrary, CSJ
Community-Police Mediation Program Coordinator
Office of the Independent Police Monitor
Office of the Inspector General
City of New Orleans
525 St. Charles Ave.
New Orleans, LA 70130

Bankruptcy Law

Federal Law, not State Law, Governs Distribution of Fees Pursuant to 11 U.S.C. § 506(b)

Wells Fargo Bank, N.A. v. 804 Congress, L.L.C., 756 F.3d 368 (5 Cir. 2014).

808 Congress, L.L.C. (debtor) owned an office building in Austin, Texas (property). Wells Fargo Bank financed the purchase of the property through a real-estate-lien note, which was secured by a deed of trust. Greta Goldsby became the substitute trustee under the Wells Fargo deed of trust. 804 Congress later obtained another loan from VIA Lending, secured by a second-priority lien on the property.

Sometime thereafter, 804 Congress defaulted on the note, abandoned the property, and Wells Fargo initiated foreclosure-sale proceedings on the property. In response, 804 Congress filed for bankruptcy. Wells Fargo sought relief from the stay, and Goldsby conducted a non-judicial foreclosure on the property. In order to distribute the proceeds among the creditors, the bankruptcy court ordered the creditors to file proofs of claim. The bankruptcy court subsequently ordered Goldsby to pay VIA Lending in full, to pay herself $7,500, and to pay Wells Fargo in full, except for its claim for attorneys' fees, which the court completely disallowed as being unreasonable. Wells Fargo appealed to the district court, which found that once the foreclosure sale occurred, the bankruptcy court ceased to have jurisdiction over the sale proceeds. Deciding that the sale proceeds were governed by Texas law, the district court remanded for further proceedings and ordered Goldsby to distribute the proceeds under Texas law.

On appeal, the 5th Circuit was faced with the primary issue of "whether, after an automatic stay in bankruptcy has been lifted and a creditor is permitted to foreclose on real property, federal or state law governs an oversecured creditor's recovery of attorneys' and other fees from the sale proceeds." 756 F.3d at 371.

The 5th Circuit began by noting that while the majority of Wells Fargo's attorneys' fees were incurred post-petition, it did seek pre-petition fees as well. In reviewing the claim for pre-petition attorneys' fees, the 5th Circuit cited to its opinion in *Blackburn-Bliss Trust v. Hudson Shipbuilders, Inc.*, 794 F.2d 1051 (5 Cir. 1986), where the court held that 11 U.S.C. § 506(b) governs, rather than state law. In *Hudson Shipbuilders*, the 5th Circuit reasoned that bankruptcy courts have jurisdiction in regard to pre-petition attorneys' fees pursuant to section 506(b) because Congress "intended that federal law should govern the enforcement of attorneys' fee provisions, notwithstanding contrary state law." The 5th Circuit went on to find no discernible basis to treat post-petition attorneys' fee claims any differently.

Moving on to the issue of reasonable-

ness as to the Wells Fargo attorneys' fees, the 5th Circuit again turned to *Hudson Shipbuilders*, in which it determined that a bankruptcy court has the power to decide whether attorneys' fees are reasonable even if the contractual attorneys' fee provisions are presumed valid under state law. The 5th Circuit agreed with the 11th Circuit decision in *Welzel v. Advocate Realty Invs., L.L.C.*, 275 F.3d 1308, 1314 (11 Cir. 2001), which found that the language of section 506(b) does not indicate that "just because a given fee arrangement is enforceable under state law, it should be exempt from the reasonableness standard." The 5th Circuit reasoned that the bankruptcy court was within its discretion to find Wells Fargo's fees unreasonable as the claims were entirely unsubstantiated.

As to the issue of "whether § 506(b) categorically forecloses recovery of fees or charges found to be unreasonable" or whether parties can seek fees under 11 U.S.C. § 502 as an unsecured claim, the 5th Circuit declined to make a determination due to the sparse factual record. Therefore, the 5th Circuit remanded the case to the bankruptcy court to consider whether Wells Fargo may seek to recover pre- or post-petition attorneys' fees under section 502, even though the bankruptcy court found the claims unreasonable under section 506(b).

Federal Rules of Civil Procedure Rule 60 not a Substitute for Timely Appeal in Bankruptcy Proceedings

Bell v. Bell Family Trust, No. 13-31219, 2014 WL 3058319 (5 Cir. July 8, 2014).

In 2002, the Bell Family Trust initiated Chapter 7 bankruptcy proceedings through its trustee, Mary S. Bell. In 2005, a ruling was entered that classified the Trust as a business trust, rendering it eligible to file for bankruptcy (the ruling). A final decree was entered in 2012, terminating the bankruptcy proceedings. In 2013, Bell moved to reopen the bankruptcy case under 11 U.S.C. § 350(b), "for other cause," to file a Federal Rules of Civil Procedure Rule 60 motion to vacate all orders and judgments entered. In the Rule 60 motion, Bell intended to petition the court to vacate the ruling by arguing that the Trust was ineligible to file for Chapter 7 relief as it should have been classified as a spendthrift trust.

The bankruptcy court denied the motion to reopen, finding that Bell would not have been able to obtain Rule 60 relief as the ruling was never appealed. The district court affirmed the bankruptcy court, reasoning that a Rule 60 motion is not a substitute for a timely appeal and, while Bell had ample opportunity to appeal the ruling, she failed to do so.

On appeal, the 5th Circuit reviewed the text of section 350(b), which states that a "case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." The 5th Circuit determined that the phrase "for other cause" grants discretion to the bankruptcy court to decide when to reopen a bankruptcy case. Such "discretion depends upon the circumstances of the individual case and accords with the equitable nature of all bankruptcy court proceedings." *In re Case*, 937 F.2d 1014, 1018 (5 Cir. 1991). While Bell argued that the bankruptcy court lacked subject-matter jurisdiction over the Trust, the 5th Circuit disagreed, stating that "[a] district court's exercise of subject-matter jurisdiction, even if erroneous, is *res judicata* and is not subject to collateral attack through Rule 60(b)(4) if the party seeking to void the judgment had the opportunity previously to challenge jurisdiction and failed to do so." Finding that Bell had sufficient opportunities to appeal the classification of the Trust and the bankruptcy court's exercise of jurisdiction but failed to do so, the 5th Circuit affirmed.

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Exculpation of Directors and Officers for Personal Liability for Breach of Fiduciary Duty

A significant revision of the Louisiana Business Corporation Law, La. R.S. 12:1 *et seq.*, has been passed by the Louisiana Legislature and signed by Gov. Jindal (also discussed in this section in the August/ September 2014 *Louisiana Bar Journal*). The amendments and revisions contained in Act No. 328 will go into effect on Jan. 1, 2015, after which time Louisiana's corporate statute will be renamed the Louisiana Business Corporation Act (the LBCA). While many aspects of Louisiana's corporate statutes currently in effect have been incorporated into the Model Act provisions that served as a drafting guide for the LBCA and will continue in effect after Jan. 1, 2015, several significant changes will impact both seasoned business lawyers and persons unfamiliar with the nuances of corporate practice. One significant change affects the minimum provisions required to be included in the articles of incorporation when forming a Louisiana corporation.

After Jan. 1, 2015, a statement indicating whether, and to what extent, the protection against personal liability of directors and officers against monetary damages to the corporation and its shareholders for breaches of fiduciary duty will be a mandatory provision of the articles of incorporation. Articles of incorporation submitted for filing to the Secretary of State that lack such a statement regarding the exculpation of directors and officers will be rejected.

Under the currently existing Louisiana Business Corporation Law, provisions limiting or eliminating the personal liability of a director or officer to the corporation or its shareholders for monetary damages for breaches of fiduciary duties are not required to be stated in the articles of incorporation, leaving it to the discretion of the incorporator and/or legal counsel drafting the articles of incorporation. La. R.S. 12:24 C(4). While seasoned corporate attorneys routinely advise the inclusion of exculpation provisions, persons forming a Louisiana corporation via the forms on the Secretary of State's website who may not seek legal counsel beforehand usually do not provide such provisions, unaware of the possible pitfalls and benefits associated with them. In view of the routine practice of corporate lawyers to include such provisions, and in order to provide the benefits of exculpation of directors and officers to persons who may not seek legal counsel, in drafting the LBCA, the Corporate Laws Committee of the Louisiana State Law Institute opted to require an express election to be made and to be described in the articles of incorporation.

Like Section 91 currently in effect, the LBCA provides a "default" rule of exculpating directors and officers from personal liability for monetary damages for breaches of the fiduciary duties those persons owe to the corporation and its shareholders.

In order to keep this default rule consistent and avoid disrupting settled practice relating to it, the Corporate Laws Committee broadened the exculpation provision of the Model Business Corporation Act by including features of Section 91 currently in effect. Therefore, the Corporate Laws Committee included among the limitations on the exculpation from personal liability afforded to directors and officers of a Louisiana corporation an exclusion for monetary damages for breaches of the director's or officer's duty of loyalty to the corporation or its shareholders. On this point, Louisiana law as it currently exists afforded greater protection to corporations and shareholders than the Model Act, under which directors and officers retain personal liability only for the amount of a financial benefit improperly received by the director or officer.

Accordingly, persons forming a Louisiana corporation will need to describe the extent to which the default rule of exculpation in the LBCA applies by indicating whether the exculpation protection is accepted, rejected or accepted with limitations. A statement that the exculpation provision is accepted will mean that the protections against personal liability for monetary damages under the LBCA will be afforded to corporation's directors and officers to the fullest extent. Likewise, a statement that the exculpatory provision of LBCA is rejected means that the corporation's directors and officers will not be protected against personal liability for monetary damages in any way. A statement that purports to limit the application of the LBCA's protection against personal liability must be accompanied by an express description of the manner of limitation in order to be effective. A statement limiting the protection against liability that is not accompanied with a description of the manner of the limitation will be ineffective, and the protection against liability will be applicable to the corporation's directors and officer without any limitation whatsoever.

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Spousal Support

King v. King, 48,881 (La. App. 2 Cir. 2/26/14), 136 So.3d 941.

Ms. King had justifiable legal cause to leave the matrimonial domicile and thus was not at fault for abandonment, and, in any case, Mr. King did not ask her to return. His lack of support of her during her serious medical issues, accusations of her having an affair, the decision to terminate the marriage, cutting off the television service, removing her from a checking account and terminating her Internet service all made their living together insupportable. The final spousal support award of $500 per month was reduced to $421.58 per month because that was the gap between her income and her expenses. Internet and television services were considered as necessary expenses since she had medical issues and was not able to leave her house often. Costs for Medicare coverage, although not to be incurred until one month after the hearing, were also appropriately included in her expenses as the court accepted her testimony that these expenses would definitely occur. Net income for spousal support purposes is distinguishable from "disposable income."

Stephens v. Stephens, 48,957 (La. App. 2 Cir. 4/9/14), 137 So.3d 1242.

Ms. Stephens filed a claim for post-divorce spousal support in January 1996. The parties were divorced on Oct. 26, 2004. In April 2009, she filed an amended and supplemental rule for final spousal support. He then filed an exception of peremption under La. Civ.C. art. 117. The trial court granted the exception, and the court of appeal affirmed, finding that her 1996 claim was abandoned for failure to take any step in its prosecution and, further, that all of the time delays provided in article 117 had run.

Child Support

State, Dept. of Social Servs. v. F.P., 13-0894 (La. App. 5 Cir. 4/23/14), 140 So.3d 328.

Because Mr. Payne's driver's license was administratively suspended for non-payment of child support, the juvenile court judge could not order the license restored to him. He was required to proceed by the proper statutory administrative procedures.

Custody

Wootton v. Wootton, 49,001 (La. App. 2 Cir. 5/14/14), 138 So.3d 1253.

When Mr. Wootton filed for divorce in Caddo Parish in 1998, the mother and children were living in Mississippi. Their 2009 consent judgment provided for joint custody, with the mother as domiciliary parent, and the mother's residence as the children's legal domicile. The judgment also provided that Louisiana would retain jurisdiction over all future custody litigation.

The father subsequently moved to

Ouachita Parish and filed a motion to transfer and change the venue, which was granted. He then filed to modify the prior custody judgment, and the mother filed exceptions of prematurity, lack of jurisdiction, no cause of action and *forum non conveniens*, primarily on the grounds that Mississippi was the children's home state and that Louisiana was an inconvenient forum. The trial granted her exceptions of prematurity and lack of jurisdiction, and Mr. Wootton appealed. The court of appeal affirmed the judgment, finding that Mississippi was the children's home state, that Ouachita Parish did not have jurisdiction and that the continuing jurisdiction provision of the prior consent judgment was unenforceable as subject matter jurisdiction cannot be conferred by agreement of the parties. Moreover, while Caddo Parish might have had jurisdiction, it had divested itself of that jurisdiction by transferring the matter to Ouachita Parish on the grounds that none of the parties continued to live there. Louisiana was also an inconvenient forum as the evidence regarding the children was in Mississippi.

Link v. Link, 13-1441 (La. App. 3 Cir. 5/7/14), 139 So.3d 659.

An award of sole custody pursuant to a default judgment obtained when the mother did not appear at the custody trial is not subject to the *Bergeron* burden of proof, even though the court heard some testimony from the father regarding parental fitness. The burden of proof to modify a default judgment is the low evidentiary standard of prima facie evidence, and "a considered decree in the best interest of the children mandates a higher evidentiary consideration of the circumstances of the litigants that is simply not met by a default judgment proceeding."

Community Property

Barker v. Barker, 13-0116 (La. App. 1 Cir. 12/18/13), 137 So.3d 16.

Ms. Barker had her retirement contributions to the Baton Rouge City Police Department Retirement System refunded to her during the marriage, and the parties spent the funds. She later went back to work for the Department and repurchased the credits by withdrawals from her paychecks during and after the termination date of the parties' matrimonial regime, with the final lump-sum payment coming after the termination of the community. The credits earned during the community and those repurchased were community property because they were earned during the community regime, even though some were repurchased with her separate property. She was entitled to a reimbursement for her separate property used to repurchase community credits.

Olson v. Olson, 48,968 (La. App. 2 Cir. 4/23/14), 139 So.3d 539.

Because the parties obtained a court-approved, post-nuptial separation-of-property agreement, they were co-owners of certain entities formed thereafter and owned other property as separate property. Following Ms. Olson's petition for divorce and for partition of co-owned property, Mr. Olson petitioned to declare the post-nuptial contract null and sought a jury trial. In contrast to *Brumfield*, 477 So.2d 1161 (La. App. 1 Cir. 1985), a jury

trial was not available because the petition to declare the agreement null was filed after a petition for divorce had been filed, whereas in *Brumfield* no separation or divorce proceedings had been filed. The contract was valid, even though a single attorney represented both parties in confecting and entering the post-nuptial agreement, because they appeared before the court, who rendered a judgment finding that the parties understood the agreement and that it served their best interests. Both parties had consented to the attorney's dual representation.

Although the court stated that the two co-owned condominium units were to be partitioned in kind, both were partitioned to her, which was inappropriate under the articles controlling partition of co-owned property. As the units could not be divided in kind, they had to be partitioned by licitation and sold. Moreover, the court could not partition movable property between the parties, as such property was their separate, not co-owned, property. The court could not partition a corporation and LLCs owned by the corporation or the property owned by the entities as the parties owned their shares in the corporation as separate property, not co-owned property. As such, there was nothing to partition as each already had a separate ownership. The vehicle to obtain ownership of the property was by dissolving the entities and having the assets liquidated. Ms. Olson's claims regarding the entities' debts to her were not subject to partition proceedings.

Goines v. Goines, 13-0981 (La. App. 5 Cir. 4/23/14), 140 So.3d 314.

Because the parties' community property was not fully partitioned, their respective appeals from rulings on rules to show cause regarding particular property issues were dismissed because the judgments were interlocutory and not appealable because no irreparable harm was shown. The court's ruling on a QDRO was interlocutory because the order had not been qualified by the plan administrator per La. R.S. 9:2801(B).

Adoption

In re Puckett, 49,046 (La. App. 2 Cir. 4/17/14), 137 So.3d 1264.

The trial court granted an intrafamily adoption, and Mr. Puckett, who had been serving in the military, appealed. The court of appeal reversed, finding that the mother and her new husband failed to show by clear and convincing evidence that the biological father refused or failed to visit, communicate or attempt to communicate with the child without just cause for a period of at least six months. The court of appeal noted that the burden of showing that the failure to communicate was "without just cause" rested on the petitioners and that their obstruction of Mr. Puckett's communication with the child contributed to their failure to prove that he did not communicate with the child. He had made numerous attempts, through numerous avenues, to communicate and to establish a relationship with the child, but was thwarted by the mother and step-father at almost every turn. The restrictions upon him due to his military service were also a consideration in finding that his lack of communication was not without just cause. Although he raised the Service Member's Civil Relief Act, the court of appeal found that it did not have to address whether that Act suspended the tolling of all deadlines, based on its other findings.

Procedure

Okechukwu v. Okechukwu, 13-1421 (La. App. 3 Cir. 5/21/14), 139 So.3d 1135.

The court of appeal reversed the trial court's granting of Mr. Okechukwu's exception of no cause of action to Ms. Okechukwu's petition for protection from abuse, finding that her allegations had to be accepted as true, and, even though the alleged abuse was remote in time, "although La. R.S. 46:2135 requires that the danger of abuse be immediate and present, there is no statutory requirement that the abuse itself be recent, immediate, or present." The court declined to adopt a bright line rule of how recent any abuse must have occurred in order to qualify a petitioner for relief under La. R.S. 46:2135(A). In this case, it gave credence to the allegations made in the petition and found that Ms. Okechukwu's fear of the danger of being abused was real and sufficient to entitle her to a protective order despite that no actual abuse had occurred in the 11 months before she filed the petition. The court of appeal remanded for the trial court to issue a protective order and to proceed under La. R.S. 46:2136.

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Duty to Defend: The Eight-Corners Rule

Wisznia Co. v. Gen. Star Indem. Co., No. 13-31125, ____ F.3d ____, 2014 WL 4199555 (5 Cir. 7/16/14).

Wisznia, an architecture firm, contracted with Jefferson Parish to design a building, the Performing Arts Center, an ongoing construction project. Jefferson Parish brought suit against Wisznia, claiming improper design and inadequate coordination with the builders during its construction. General Star, Wisznia's general liability insurer, refused to defend, asserting that the relevant insurance policies excluded coverage for damages resulting from the rendering of professional services. The district court granted summary judgment for General Star, and Wisznia appealed.

The 5th Circuit, lacking a Louisiana Supreme Court decision on point, recognized it should "predict how, in our best judgment, that court would decide the question," deferring to Louisiana's civil law tradition of first examining "'primary sources of law' — the constitution, codes, and statutes — because '[j]urisprudence . . . is a secondary law source in Louisiana.'" Under Louisiana law, the insurer's duty to defend suits brought against its insured "is broader than its liability for damage claims." Thus, the insurer's duty to defend is determined by comparing the insurance policy to "the allegations [in] the injured plaintiff's petition, with the insurer being obligated to furnish a defense unless the petition unambiguously excludes coverage." Louisiana courts apply the "eight-corners rule," in which they "compare the four corners of the petition with the four corners of the insurance policy without resort to extrinsic evidence."

Jefferson Parish's petition alleged that Wisznia was liable for both professional liability and ordinary negligence. General Star countered that no possible claim existed that Wisznia breached any general duty of care to report unsafe conditions or protect persons. The petition alleged, *inter alia*, that Wisznia was negligent and breached its contractual and warranty obligations to Jefferson Parish by:

- ► designing and preparing a defective set of plans and specifications;
- ► failing to coordinate the design with its consultants effectively and professionally;
- ► failing to design the Performing Arts Center with any accurate and sufficient structural detailing, requiring the modification of the building;
- ► failing to provide specifications that were definite in concept; and
- ► under-designing the project.

The petition further alleged the parish's damages were caused by Wisznia's "negligence, failure of professional skill, breach of contract and breach of warranty in the faulty design."

General Star's policy excluded coverage for "'bodily injury,' 'property damage' or 'personal and advertising injury' arising

out of the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is employed by you or performing work on your behalf in such capacity." The policy defined "professional services" to include "preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications," and "[s]upervisory, inspection architectural or engineering activities."

Applying the standard mandated by the Louisiana Civil Code in interpreting insurance contracts "to ascertain the common intent of the parties to the contract by construing words and phrases using their plain, ordinary and generally prevailing meaning," La. Civ.C. arts. 2045 and 2047, and using the eight-corners rule, the court concluded that Jefferson Parish allegedly hired Wisznia "for its expertise." Thus, "it is not far-reaching to find that all of the services it rendered in connection with [the performing arts center] project were professional in nature." The court affirmed the district court's decision because it correctly concluded that General Star owed no duty to defend Wisznia as the insurance policies unambiguously excluded coverage for professional liability.

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Primer on Committee on Foreign Investment in the United States

Louisiana is an increasingly popular destination for foreign direct investment. The combination of generous state tax and income incentives, easy access to raw materials and an expansive transportation network are enticing foreign investors into the state. Recent notifications of significant inbound foreign direct investment include Yuhuang Chemical's (China) $1.85 billion methanol project in St. James Parish; Sasol's (South Africa) estimated $16-21 billion ethane cracker and gas-to-liquids project in Lake Charles; and EuroChem's (Russia) $1.5 billion ammonia and urea production plant in either St. John the Baptist Parish or Iberville Parish. While the net economic benefit of inbound foreign direct investment tied to economic incentives is oft-debated, the legal nuances of these projects are equally complex. One little known committee in Washington has the authority to stop any of these projects in their tracks, either before or after the foreign companies have closed on local investments. Counsel representing parties in what are known as "covered transactions" should carefully consider the potential of the Committee on Foreign Investment in the United States (CFIUS) to scrap or unwind an investment transaction.

What is CFIUS?

CFIUS was created by the Defense Production Act of 1950 to conduct national security reviews of foreign direct investment transactions. *See* 50 U.S.C. app. § 2170. The committee consists of the secretaries of Treasury, Homeland Security, Commerce, Defense, State and Energy, along with various other *ex officio* members. 50 U.S.C. app. § 2170(k)(2). CFIUS scrutinizes covered transactions, statutorily defined as transactions that "could result in foreign control of any person engaged in interstate commerce in the United States." *Id.* at § 2170(a)(3). Covered transactions include mergers, acquisitions and take-overs by a foreign individual or entity in the United States. CFIUS must determine whether "the transaction threatens to impair the national security of the United States" and recommend appropriate mitigation or prohibition of the transaction. *Id.* at § 2170(b)(2)(A), (B).

Any party to a covered transaction may initiate CFIUS review before or after conclusion of the underlying transaction. *Id.* at § 2170(b)(1)(C)(i); 31 C.F.R. § 800.401(a). CFIUS has authority to scrutinize covered transactions *sua sponte*. *Id.* at § 2170(b)(1)(D). If CFIUS determines that the transaction poses a potential threat to national security, it initiates a 45-day formal investigation of the transaction's effects on national security, using 11 statutory factors as guidance. *Id.* at § 2170(b)(2)(A), (B) & § 2170(f). CFIUS may impose Interim Mitigating Measures on the subject transaction during the course of the investigation in order to alleviate any potential national security concerns. *Id.* at § 2170(I)(1)(A). If the committee determines that the national

security impact of the transaction has been mitigated and is otherwise not prohibited, the entire proceeding is closed and CFIUS submits a final investigative report to the U.S. Congress. *Id.* at § 2170(b)(3)(B); 31 C.F.R. § 800.506(d)

If CFIUS concludes the transaction poses a national security threat and should be prohibited, it issues a report to the President of the United States requesting presidential action on the covered transaction. 31 C.F.R. § 800.506(b), (c). The President has ultimate authority and may prohibit or unwind the transaction where there is "credible evidence that leads [him] to believe that the foreign interest exercising control might take action that threatens to impair the national security." 50 U.S.C. app. § 2170(d)(4). Presidential action under the Defense Production Act is statutorily immune from judicial review. *Id.* at § 2170(e). The scope of this immunity and its due process implications are at issue for the first time in the *Ralls* case, discussed *infra*.

CFIUS Annual Report to Congress

CFIUS publishes an annual report summarizing its activity in the prior calendar year. The 2013 report on activities for the 2012 calendar year discloses 114 total reviews in 2012. Chinese nationals and entities led the way with 23 total covered transactions under review in 2012. Only 10 of the 114 transactions reviewed in 2012 failed to garner approval and were rejected by the United States due to security concerns. This failure rate is somewhat misleading as the vast majority of CFIUS reviews in 2012 were resolved after extensive negotiations and implementation of mitigating measures. Most of the prohibited transactions involved cases where the parties closed the investment deal before notifying CFIUS.

The annual report indicates that CFIUS continues to actively scrutinize foreign direct investment projects. Parties to international mergers, acquisitions and takeovers should carefully weigh the CFIUS national security statutory factors and determine whether prior CFIUS notification is strategically beneficial. Pre-closing modifications can be done to mitigate potential CFIUS scrutiny where prior notification is not sought.

The following case is one of the 10 covered transactions that failed to secure CFIUS approval in 2012. That outcome may very well change in light of the Court of Appeals for the District of Columbia Circuit's opinion imposing for the first time a measure of participatory due process in CFIUS investigations.

Ralls Corp. v. Comm. on Foreign Inv., 2014 U.S. App. LEXIS 13389 (D.C. Cir. July 15, 2014).

The national security issues and classified information permeating "covered transactions" necessitate confidential deliberations between officials with the appropriate level of security clearance. Legal practitioners have long sought access to the opaque CFIUS process. The recent U.S. Court of Appeals for the District of Columbia Circuit decision in *Ralls Corp. v. Comm. on Foreign Inv*.

provides a narrow measure of access to the CFIUS process. The decision requires CFIUS to provide foreign companies with access to, and the opportunity to rebut, unclassified information regarding its determination. If the decision withstands potential appeals after remand, it imposes a narrow measure of due process to the system for the first time.

The *Ralls* case involves a series of transactions surrounding the development of windfarms in Oregon. 2014 U.S. App. LEXIS 13389, at *1. Ralls Corp. is an American company owned by two Chinese nationals. *Id.* at *9. The company purchased four American limited liability companies that were previously established to effectuate the development of the windfarms. *Id.* at *11. The windfarms at the root of the covered transaction are located in and around restricted airspace and a bombing zone maintained by the U.S. Navy. *Id.* at *11-12.

CFIUS self-initiated review after the transactions were complete. *Id.* at *9, *12 at note 7. CFIUS concluded the acquisition poses a national security threat and issued its report and recommendation to the President. *Id.* at *14-15. President Obama subsequently issued a Presidential Order prohibiting and retroactively unwinding the transaction in light of "credible evidence that leads [the President] to believe that Ralls . . . might take action that threatens to impair the national security of the United States." *Id.*

Ralls filed suit against CFIUS and President Obama in the U.S. District Court for the District of Columbia challenging the exclusion order, *inter alia*, as contrary to the Due Process and Equal Protection Clauses. *Id.* at *16-17. The district court rejected Rall's Equal Protection claim, but not the due process claim, for lack of subject matter jurisdiction based on the Defense Production Act's grant of Presidential immunity. *Id.* at *17; 50 U.S.C. app. § 2170(e). The district court granted a Rule 12(b)(6) motion dismissing the Due Process challenge. *Id.* at *17-18. The court found that the President's Order did not deprive Ralls of any constitutionally protected property interest and that Ralls waived its opportunity to obtain prior consent from CFIUS by failing to notify the transaction in advance. *Id.* at *18. Even if Ralls had a protected interest, the court surmised that CFIUS provided due process of law through notification of its review and investigation. *Id.* at *18-19.

The D.C. Circuit appellate court devoted the vast majority of its opinion to the due process claim. The court first reviewed the statutory bar to judicial review. The relevant portion of the Defense Production Act states that the "actions of the President . . . shall not be subject to judicial review." *Id.* at *20, quoting 50 U.S.C. app. § 2170(e). CFIUS and President Obama argued that the statutory immunity permeates all activities in the process, including the President's decision "not to confide in Ralls his national security concerns, and his judgment about the appropriate level of detail with which to publicly articulate his reasoning." *Id.* at *28, quoting Br. for the Appellees, 27. Statutory bars to judicial review must be clear and convincing and expressed with unequivocal congressional intent. *Id.* at * 21-22. The court concluded "neither the text of the statutory bar nor the legislative history of the statute provides clear and convincing evidence that the Congress intended to preclude judicial review of Ralls' procedural due process challenge to the Presidential Order." *Id.* at 31.

CFIUS and President Obama also asserted that Ralls' due process claim presents a non-justiciable political question within the scope of the President's Executive Branch authority. *Id.* at *36-37. After discussing the political question doctrine and framework of judicial review set forth in *Baker v. Carr*, 82 S.Ct. 691 (1962), the court found that Ralls did not ask it to "exercise judgment in the realm of foreign policy and national security" but rather "whether the Due Process Clause entitles it to have notice of, and access to, the evidence on which the President relied and an opportunity to rebut that evidence before he reaches his non-justiciable (and statutorily unreviewable) determinations. *Id.* at *41. Ralls' claim does not present a potential judicial encroachment on the political branch of government, and therefore the matter is justiciable before the courts. *Id.*

On the merits, the court found that Ralls had a constitutionally protected state property interest in the windfarm projects. *Id.* at *43-50. Moreover, a minimum measure of adequate due process is required with respect to that protected interest. The measure of process due requires that Ralls receive notice of the Presidential action, access to the unclassified evidence upon which the action is based, and an opportunity to rebut that evidence. *Id.* at *56-57.

The appellate court reversed the district court and remanded the case with direction to provide appropriate due process as set forth in the opinion. To the extent this due process holding prevails after any further post-remand appeals, it represents the first crack in the otherwise impenetrable shield of CFIUS investigations. While the opening is narrow insofar as it allows access only to unclassified information, it creates a quasi-judicial process of review for covered transactions.

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Employment 2014 Legislative Update

Two of the 800-plus acts passed during the 2014 Louisiana Legislature Regular Session are particularly relevant to employers based out of, or doing business in, Louisiana.

Act 165, the "Personal Online Account Privacy Protection Act," regulates employer's access, or lack thereof, to an employee's or job applicant's "personal online account." Act 750 amends Louisiana's wage-payment statute to address differential pay between genders. Both statutes, effective as of Aug. 1, 2014, afford additional rights and protections to employees.

Act 165

The Personal Online Account Privacy Protection Act, codified at La. R.S. 28:1951-1955, provides that no employer may "request or require" any employee or job applicant to disclose the user name, password or other authentication information related to a "personal online account." Personal online account includes any kind of online account — social media, personal blogs, personal email accounts — that an employee uses "exclusively for personal communications unrelated to any business purpose." In the event that an employer inadvertently learns an employee's or applicant's user name or password, it cannot use that information to access the personal online account. (The act also applies to schools and similar institutions *vis-a-vis* their students).

The law also sets forth a number of narrow exceptions for employers, including:

► An employer may request the employee's personal email address, but not the password, in order to facilitate communication in the event that the employer's system fails (for instance, in the event of a hurricane or mandatory evacuation).

► An employer may request the user name and password for any electronic communication device paid for or supplied by the employer (such as a company-issued phone or computer).

► The employer may request the user name and password of any online account provided by the employer, used for business purposes, or obtained through the employment relationship.

► The employer may discipline or discharge the employee for wrongfully transferring confidential or proprietary information to his or her personal online account (although an employer may *not* access the account just to "fish" for confidential information).

► The employer may review any information that is in the "public domain" and that can be accessed without using the employee's user name or password.

An employer also may conduct an investigation if it is aware of specific information on the employee's personal online account that may run afoul of the law or evidences work-related misconduct, or if the employer has specific information that the employee transferred confidential, proprietary or financial data to a personal online account. The statutory language regarding these exceptions is somewhat vague, and their precise contours will likely have to be developed

through the courts. Employers also should be aware that the National Labor Relations Board has taken an active interest in social-media policies of late, and the board is not limited by Louisiana state law in determining whether a particular policy constitutes an "unfair labor practice."

Act 750

Act 750 contains two significant, distinct amendments that directly affect employers. First, it amends Louisiana's employment discrimination statute, La. R.S. 23:332, to state: An employer may not "intentionally pay wages to an employee at a rate less than that of another employee of the opposite sex for equal work on jobs in which their performance requires equal skill, effort, and responsibility, and which are performed under similar working conditions." The insertion of the adverb "solely" is important because it means the statute applies only if the pay gap is based *solely* on sex or gender, as any pay differential based on "any other differential based on any factor other than sex" is not unlawful discrimination. Of additional importance is the fact that an employer may not reduce the wages of a higher-earning employee solely to comply with this new law.

In addition, this amendment is substantively similar — though not identical — to last year's Equal Pay for Women Act, La. R.S. 23:661 *et seq.*, which applies only to governmental employees. The amendments to § 23:332 expand the reach of the law to all Louisiana employers, including private employers, who intentionally pay women less than similarly situated men based solely on gender (or vice versa). Employees may enforce § 23:332, as amended, through a private right of action, and may seek both back pay and injunctive relief. As the case law develops, courts will presumably clarify what showing a plaintiff must make to prove that any pay gap is based on gender rather than some other factor, what it means for two positions to "require equal skill, effort, and responsibility," and whether any equitable or other defenses apply. Both the amendments to the Louisiana wage statute and Louisiana's "Equal Pay for Women Act" reflect the national attention on gender-pay issues raised by President Obama in his much-cited but controversial claim that women are paid 77 cents on the dollar relative to men. (Sarah Wheaton, "Obama Promotes Women's Economic Prospects," *N.Y. Times*, March 21, 2014, p. A15).

Second, Act 750 codifies the "good faith" defense to Louisiana's wage-payment statute, La. R.S. 23:632, to state that an employer is not subject to statutory penalties for nonpayment of wages if there is a good faith dispute regarding the amount of wages owed. This provision does not effect a true change in the law, as Louisiana courts have long applied an equitable good faith defense to claims for penalties under § 23:632. *See, e.g., Carriere v. Pee-Wee's Equip. Co.*, 364 So.2d 555, 556-57 (La. 1978). Rather, the amendment codifies judicial doctrine and solidifies a significant affirmative defense for employers, crucial in light of the newly increased employer obligations under Louisiana's discrimination and wage statutes.

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Mineral Law

Act No. 766 (Senate Bill 585)

Act No. 766 adds a new section (Sec. N) to La. R.S. 30:4. The Act prohibits the issuance of any permits to: (1) drill or operate a new solution-mined cavern in Iberia Parish, or (2) expand or convert an existing cavern in Iberia Parish until a public hearing is held. The hearing cannot occur before Aug. 15, 2015. Also, an operator must provide notice to the public in advance of the hearing on at least three different occasions within a 30-day period. Notice must be published in the *Louisiana Register* and the official journal of Iberia Parish. Thirty days prior to the hearing, an operator must also provide:

► a report to the Commissioner of Conservation, Save Lake Peigneur, Inc. and

the parish providing a baseline analysis of groundwater levels and salt content of nearby groundwater wells;

► a plan for monitoring groundwater while the cavern is being created, converted or expanded;

► a third-party geologic analysis as to the structural analysis of the salt dome; and

► results of any testing that attempts to determine the source and composition of any foaming or bubbling in Lake Peigneur.

The Act also prohibits the issuance of any permits prior to Jan. 31, 2016.

Proposed rules implementing the Act were issued on Aug. 20, 2014.

Act No. 691 (Senate Bill 209)

Act No. 691 provides for reimbursement of costs to state or political subdivisions of the state for reasonable and extraordinary costs in responding to or mitigating a disaster due to a cavern collapse or other violation of any rule, regulation or order promulgated pursuant to La. R.S. 30:4(M)(6). Costs are to be approved by the Governor's Office of Homeland Security. However, payment of those costs does not amount to an admission of liability or responsibility.

The Act also provides for payment of the "replacement value" of noncommercial, residential immovable property in an area under forced evacuation for more than 180 days. The replacement value must be based on an appraisal (*i.e.*, the value of the property before the disaster). Pursuant to the Act, a property owner would be reimbursed within 30 days after accepting an operator's offer to pay the replacement value, provided the owner can show proof of continuous ownership before and during the evacuation. All transfers of title would be free and clear of any liens, mortgages or other encumbrances to the operator.

Proposed rules implementing the Act were issued on Aug. 20, 2014.

Breach of Fiduciary Duty; Exception of Prescription

Norwood v. Mobley Valve Servs., Inc., 49,064 (La. App. 2 Cir. 6/25/14), ____ So.3d ____, 2014 WL 2875008.

The Norwoods purchased a 10 percent working interest in the Hunter-Mannies No. 1 lease operated by Mobley Valve Services (owned by Mark and Kimberly Mobley, collectively Mobley) in DeSoto Parish in 2005. Pursuant to their agreement, the Norwoods paid 10 percent of actual drilling costs and would receive 10 percent of any revenue generated by production. Mobley acted as mandatary for all purposes relating to the lease. In 2006, the Norwoods and Mobley transferred their interests in the lease to J.A. Lanza, L.L.C. In return, the Norwoods and Mobley received a cash payment and a 25 percent option to participate in future drills from 0 to 4,100 feet and an option up to 9.375 percent in new drills below 4,150 feet.

Thereafter, litigation ensued between Mobley and two other working interest owners, claiming that Mobley mismanaged the lease. The litigation was settled by a revised agreement in which Mobley conveyed to Lanza a 75 percent working interest in the lease from 0 to 4,100 feet and a 37.5 percent interest below 4,150 feet. In return, Mobley received modified well participation option rights, which provided that it shall have the right as to future wells to purchase a 12.5 percent working interest. Mobley presented this modified option to the Norwoods in a document and stated that the Norwoods would be paid in monthly installments and that Mobley and the Norwoods would split the 12.5 percent option. Later, Mobley sold the option rights to Lanza for $150,000 without telling the Norwoods.

In 2008, the deep rights (below 9,000 feet) were sold to Chesapeake. Chesapeake paid Mobley and Lanza $17,500 per net mineral acre; Mobley received $5,725,091.98 in proceeds. Mobley did not tell the Norwoods about the sale. Subsequently, the Norwoods sued Mobley for breach of contract, fraud and breach of fiduciary duty, among other claims. The trial court dismissed plaintiffs' claims for lack of evidence. The Norwoods appealed. Mobley filed a peremptory exception of prescription, arguing that a one-year prescriptive period applied because the Norwoods' claims were delictual in nature. The Louisiana 2nd Circuit disagreed and denied the exception, finding that Mobley's obligation to the Norwoods arose from Mobley's agreement to manage their lease interest. Thus the obligation was *ex contractu* (10-year prescriptive period), not *ex delicto* (one-year prescriptive period). In addition, the Louisiana 2nd Circuit found that Mobley breached its fiduciary duty to the Norwoods by not disclosing to them the sale to Chesapeake and awarded the Norwoods 10 percent of the $5,725,091.98 received from the sale to Chesapeake. The court found further that Mobley charged the Norwoods $169,409 in undocumented lease charges. As for the other claims — fraud, piercing the corporate veil, declaratory relief and intentional interference — the court found these assignments of error lacked merit.

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PCF's Indemnity Rights

Willis v. Ochsner Clinic Found., 13-0627 (La. App. 5 Cir. 4/23/14), 140 So.3d 338.

In response to the plaintiffs' petition for court approval of a $100,000 settlement with a qualified health-care provider (Ochsner), the PCF filed a cross-claim for indemnity and/or contribution from the manufacturer of a pump that malfunctioned during heart surgery, also alleging that the manufacturer was jointly, severally and solidarily liable with it. The plaintiffs then amended their petition to include the manufacturer (Abbott) as a defendant.

Before trial, the plaintiffs reached a confidential settlement with Abbott, following which they moved to strike the PCF's cross-claim against Abbott, contending the PCF was prohibited from maintaining an indemnity claim against Abbott because the PCF and Abbott were not joint tortfeasors, pursuant to La. Civ.C. art. 2323, and each could be liable only for its respective percentage of fault. The PCF responded that it was entitled to indemnity pursuant to La. R.S. 40:1299.44(D)(2)(b)(xi) because Abbot was not a qualified health-care provider, and its fault contributed to the damages.

At the hearing on the plaintiffs' motion to strike, the PCF argued its indemnity claim and asserted that Abbott violated its lease agreement concerning the pump by breaching the warranty Abbott gave Ochsner. The trial court denied plaintiffs' motion to strike.

A jury decided that Ochsner caused damages in excess of $100,000 and that the pump was unreasonably dangerous under the Louisiana Products Liability Act. It assessed 35 percent fault to the PCF and 65 percent to Abbott and awarded the PCF $400 for Abbott's breach of the warranty provisions of its contract with Ochsner. The trial court's judgment reduced the general damages to the PCF's $400,000 cap, reduced the judgment against the PCF for past medical expenses to 35 percent of the total, reduced the future medical expenses award against the PCF to 35 percent of the total, and awarded the PCF $400 on its indemnity/cross-claim.

The PCF, plaintiffs and Abbott filed separate appeals. Among the issues presented to the appellate court was the denial of the plaintiffs' pretrial motion to remove the indemnity cross-claim from the jury's province and have it decided post-trial. The PCF had opposed the motion to sever its cross-claim; this led the appellate court to rule that the PCF could not on appeal argue in favor of what it had before trial opposed. Yet, because the plaintiffs preserved on appeal the indemnity issue, the court said it had to determine whether the PCF had indemnity rights.

The plaintiffs argued that the MMA's indemnity statute applied only when the PCF was held liable for damages attributable to a nonqualified health-care provider, whereas in the case at bar, it sought a reduction of its liability under comparative fault principles; thus the trial court's refusal to strike the PCF's indemnity claim improperly allowed it to obtain a further reduction of its liability. The PCF countered that the MMA's indemnity statute gave it broad powers to recover against a nonqualified provider for "any and all damages" assessed against it.

The court of appeal noted that the PCF's right to indemnity is limited with respect to whom it can pursue (only nonqualified providers), as well as the amount of indemnity for which a nonqualified provider "may be held liable," which "shall be limited to that amount that the fund may be cast in judgment." But the jury's verdict apportioned fault between the PCF and Abbott under the comparative fault statute (La. Civ.C. art. 2323), and the judgment did not cast the PCF in judgment for any amount attributable to Abbot; instead it cast the PCF only for its proportionate share of fault, rendering the indemnity statute inapplicable.

The appellate court relied, in part, on *Hall v. Brookshire Bros.*, 02-2404 (La. 6/27/03), 848 So.2d 559, 568, in which the Supreme Court noted that the Legislature's intention was to hold the PCF liable "only for acts constituting medical malpractice." When the trial court rendered judgment, reducing the PCF's liability to 35 percent of damages, the PCF had "only been cast in judgment for an amount proportionate to the PCF's percentage of fault, and, therefore, the indemnity provision of the (statute) is not applicable." To hold otherwise would not make sense, concluded the court, as it would allow the PCF first to ask the jury to apply comparative fault to its responsibility and then to receive an indemnity from Abbott for the PCF's fault for malpractice. Once the verdict was reduced by comparative fault, the PCF was not at risk to pay damages caused by a nonqualified provider, and the appellate court ruled that the trial court erred by refusing

to strike the PCF's indemnity claim after it sought and received the reduction for its liability under comparative fault principles.

The trial court's judgment was affirmed in all respects, except for the PCF's $400 cross-claim award, which was reversed, because the PCF was "more in the nature of statutory intervenor than a defendant, and it does not stand in the shoes of Ochsner," which was a health care provider-defendant that was party to the contract with Abbott.

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Economic Development Deal Not Subject to Ad Valorem Tax

Pine Prairie Energy Ctr., L.L.C. v. Soileau, 14-0005 (La. App. 3 Cir. 6/11/14), 141 So.3d 367.

The 3rd Circuit Court of Appeal affirmed a trial court's decision to grant summary judgment in favor of Pine Prairie Energy Center, L.L.C. (PPEC) to hold that industrial development board property is exempt from ad valorem property tax.

PPEC operates a natural gas storage facility and associated facilities and pipelines in Evangeline Parish (the project property). In May 2005, an application was filed with the Evangeline Parish Police Jury for the establishment of Evangeline Parish Industrial Development Board Number 1 (the IDB) with the purpose to acquire, own and lease property to PPEC as a means of encouraging PPEC to locate in the parish. IDB entered into a memorandum of understanding, which was affirmed, with PPEC agreeing to issue bonds to finance the acquisition and construction of the project property. Pursuant to that agreement, the project property would be owned by the IDB and leased to PPEC, and it was agreed that the property would not be subject to ad valorem property taxes. The police jury approved the issuance of the bonds.

In 2006, PPEC conveyed the project property to the IDB, and IDB leased it back to PPEC. In 2011, the assessor for Evangeline Parish placed the PPEC project property on the tax rolls. PPEC objected and paid the taxes under protest. PPEC asserted that, because the property is owned by the IDB, a public entity, and the property is used for economic development, the property is exempt from ad valorem tax in Louisiana pursuant to Article VII § 21(A) of the Louisiana Constitution.

The assessor challenged the economic development deal by asserting that PPEC actually owned the property, not the IDB. The 3rd Circuit affirmed the district court's finding that the IDB owned the project property. In addition, the assessor argued that because the facility was operated by a private for-profit entity, it could never be for a "public purpose" as required by the Louisiana Constitution for the exemption. In rejecting this argument, the 3rd Circuit looked to prior jurisprudence, which held that any allocation to a use resulting in advantages to the public at large will suffice to constitute a public purpose. In addition, the 3rd Circuit accepted the uncontested affidavit of the president of the IDB of the substantial economic impact the project has had on the parish.

The 3rd Circuit held that the project property is properly characterized as public property used for a public purpose and is, therefore, exempt from Louisiana ad valorem tax under the Louisiana Constitution. The 3rd Circuit enjoined the assessor from further assessing or taxing the project property during the term of the lease back between PPEC and IDB.

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IRS Makes Important Changes to Offshore Voluntary Disclosure Program

On June 18, the Internal Revenue Service announced major changes to its offshore voluntary compliance programs, providing new options to taxpayers living overseas and taxpayers residing in the United States. The changes include an expansion of the streamlined filing-compliance procedures and modifications to the offshore-voluntary-disclosure program, often referred to as the "OVDP." The expanded program is intended to help those U.S. taxpayers whose failure to disclose their offshore assets was non-willful.

The changes to the streamlined filing-compliance procedures are now available to certain U.S. taxpayers residing in the United States. The changes eliminate both the requirement that the tax liability be $1,500 or less and the requirement of a risk questionnaire from the taxpayer. The changes now require the taxpayer to certify that his or her previous failures to comply with the law were non-willful.

When a taxpayer intends to take advantage of the new streamlined disclosure, he must amend the most recent three years of personal income tax returns, complete a certification form and submit full payment of the tax liability, including interest and the miscellaneous offshore penalty. This miscellaneous offshore penalty is now equal to 5 percent of the highest aggregate balance/value of the taxpayer's total foreign financial assets. The taxpayer is also required to electronically file the most recent six years of overdue FBAR reports.

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Attorney Benjamin J. Bleich and teachers Susan Prado and Teresa Davis innovatively created an interactive "Day in Court" for the Law Day presentation at Ringgold Elementary School.

Law Day Celebrated in Louisiana Schools

The Louisiana Center for Law and Civic Education (LCLCE) each year partners with the Louisiana District Judges Association and the Louisiana State Bar Association to present Law Day activities to schools across the state. This year, 56 Law Day presentations were organized, reaching more than 2,600 students. Thanks to dedicated teachers, attorneys and judges, these programs covered all six Louisiana congressional districts and all grade levels.

Several judges participated in the programs, including Judge Randall L. Bethancourt, Judge Vincent J. Borne, Judge June Berry Darensburg, Judge W. Ross Foote, Judge Andrea P. Janzen, Judge Patricia E. Koch, Judge Lawrence L. Lagarde, Judge C. Wendell Manning, Judge Michele R. Morel, Judge Richard J. Putnam III, Judge J. Wilson Rambo, Judge Cameron B. Simmons, Judge Parris A. Taylor, Judge M'elise Trahan, Judge Zorraine M. Waguespack, Judge Trudy M. White and Judge H. Stephens Winters.

Participating attorneys were E. Adrian Adams, Denise A. Allemand, Claire E. Bergeron, Benjamin J. Bleich, Danielle N. Brown, Michael J. Busada, Thomas R. Caruso, Mekisha S. Creal, Trina T. Chu, Albert D. Clary, John F. Dillon, J. Keith Gates, Gerald J. Hampton, Jr., Fred D. Jones, Joseph P. Landreneau, J. Clay LeJeune, Gernine M. Mailhes, Sarah S.J. Midboe, Paula E. Miles, Joseph H.L. Perez-Montes, Mark A. Myers, Monique F. Rauls, Erica J. Rose, Thomas B. Thompson, Angel G. Varnado, Jason M. Verdigets, Amanda L. Westergard and Christie C. Wood.

Cyberbullying Mock Trial Presented at Summer Institute

Louisiana elementary, middle and high school teachers from six Louisiana congressional districts met in New Orleans for the 2014 Justice Catherine D. Kimball Summer Institute to learn about Sandra Day O'Connor's iCivics Program and the nationally acclaimed "We the People: The Citizen and the Constitution" civics curriculum. Led by Northside High Academy for Legal Studies' Liz Tullier, the participants also conducted a mock trial on *Billings v. Pearson*, dealing with cyberbullying among high school students.

Coordinated by the Louisiana Center for Law and Civic Education, the Summer Institute was made available to Louisiana educators at no cost, with lodging, meals and educational materials provided.

Participants were welcomed by Judge Raymond S. Childress, president of the Louisiana District Judges Association.

Among the teachers attending were Dwayne Alexander, Jeanerette High School; Katie Bateman, Woodlawn Middle School; Robert Chauvin, Academy of Our Lady High School; Sonia Clements, Morgan City High School; Valerie Courville, L.J. Alleman Middle School; Lauren Edelen, Ascension Catholic High School; Cynthia Edmonston, LSU Laboratory School; Matthew Edwards, Glenbrook School; Christy Flynn, South Grant Elementary School; Camile Gautreaux, St. Jude the Apostle School;

Continued next page

Louisiana Supreme Court Associate Justice Greg G. Guidry, left, addressed Summer Institute attendees prior to the commencement of the *Billings v. Pearson* mock trial on cyberbullying. *Photo courtesy of the Louisiana Supreme Court.*

Several educators participated in the 2014 Justice Catherine D. Kimball Summer Institute.

LCLCE continued from page 230

Vickie Hebert, Early College Academy; Leisa Hurst, Summerfield Elementary Base School; Charlene Johnson, Bolton High School; Randy Kinsey, EBR Readiness Superintendent's Academy; Nancy Monroe, Bolton High School; Lacie Oliver, Terrebonne High School; Charles Rivet, St. Martin's Episcopal School; Rebekah Romero, Northside High School; Alisa Ross-White, Park Forest Middle School; Patsy Scates, LSU Laboratory School; Janice Schaff, Lutheran High School; Walee Shakur, Bastrop High School; Denise Thomas, Woodlawn Middle School; Missy Varnado, Franklinton High School; Tyquenica Vessel, Buchanan Elementary School; and Christina Wilbert, Central High School.

Anger Receives President's Award for Outstanding Civics Teacher

Tim Anger, a social studies teacher at Archbishop Hannan High School in Covington, is the recipient of the 2014 President's Award for Outstanding Civics Teacher. The annual award, presented jointly by the Louisiana Center for Law and Civic Education and the Louisiana State Bar Association, recognizes an outstanding Louisiana elementary, middle or high school teacher who imparts knowledge and understanding of law and civic education and demonstrates the use of interactive learning techniques.

Louisiana Supreme Court Associate Justice Greg G. Guidry presented the award at the 2014 Justice Catherine D. Kimball Summer Institute.

Anger, a teacher for 17 years, was recommended by Charles J. Baird, chair of the school's Social Studies Department. "On a daily basis, he shares his love of law and civics with our students through his enthusiasm and his high-spirited classroom lessons. His passion is truly passed on to the students as several students each year realize they would like to pursue law, politics or become a social studies teacher. Never have I met a teacher who gives 150 percent one hundred percent of the time," Baird said.

Tim Anger, right, a social studies teacher at Archbishop Hannan High School in Covington, is the recipient of the 2014 President's Award for Outstanding Civics Teacher. Louisiana Supreme Court Justice Greg G. Guidry, left, presented the award at the 2014 Justice Catherine D. Kimball Summer Institute. *Photo courtesy of the Louisiana Supreme Court.*

Anger considers one of the most important aspects of teaching to be the promotion of active civic participation among his students using a variety of teaching strategies and activities. "Through the promotion of active civic engagement in my classes and the law-related content that I teach, I hope to instill in my students the abilities to not only follow the law, but to have the knowledge and desire to effectively shape it as well," Anger said.

CHAIR'S MESSAGE

Alternative Dispute Resolution: The New Norm for Young Lawyers

By J. Lee Hoffoss, Jr.

J. Lee Hoffoss, Jr.

When I first began practicing law, we had few mediators in the Lake Charles area, and the now-large mediation and arbitration groups in the state were in their infancy. The concept of alternative dispute resolution (ADR) through mediation and arbitration was just gaining ground. Now, mediation and arbitration have become commonplace and a part of every litigator's practice. Some mediation groups in our state have become larger than most law firms, and the need for experienced mediators is only growing.

As a young lawyer, mediation is not a foreign concept. We have been grounded in it since beginning the practice of law. You do your discovery and then enter into mediation to see if you can settle the case without going to court. For the sake of judicial efficiency, it is fortunate that mediation oftentimes results in settlement. However, does the option of mediation lessen the younger lawyer's ability to just go to court and try his or her case? Does mediation's success prevent a younger lawyer from gaining trial experience? The answer to these questions is often a mixed bag.

In my first year as a litigator, my then-boss told me that mediation was so foreign to him that he really thought it to be a waste of time. His motto was to play the role in the event, but rarely settle because all he knew was to give the defense his number and go to trial if the defense did not accept it. This is the way most seasoned litigators felt. Why? Because ADR was not ingrained in their practices.

Now, ADR has long roots in every young lawyer, and its seed is planted in law school with classes specific to ADR. Young lawyers often build their case to try in mediation rather than court. The benefit is quick resolution to cases. The downside is not gaining valuable courtroom experience. Indeed, I know some young litigation lawyers who have been practicing for 10 years and have never tried a jury trial. The availability of a quick settlement is often too tempting to resist and is detrimental to gaining courtroom experience.

As lawyers, we have to realize that the goal in every case is to get the best result for our client. Many times, ADR proves to be a better option than a risky trial. Additionally, ADR allows clients to have more involvement and control in the ultimate outcome of a mediation proceeding, rather than leaving their fate to a judge or 12 strangers. However, as young lawyers, we must keep in mind that our skills in the courtroom should be built early on in our practice. ADR is certainly a worthwhile and valuable tool for our profession, and its success prevents a backlog of cases waiting to go to trial. But never forget that sometimes you have to get in the trenches of the courtroom to do battle. The more you do it, the more times you will leave the battlefield victorious.

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Review of Louisiana Law

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YOUNG LAWYERS SPOTLIGHT

Nicholas R. Rockforte Plaquemine

Nicholas R. Rockforte

The Louisiana State Bar Association (LSBA) Young Lawyers Division is spotlighting Plaquemine attorney Nicholas R. (Nick) Rockforte.

Rockforte is a partner with Pendley, Baudin & Coffin, L.L.P., with offices in Plaquemine and New Orleans. In 2004, he received a BS degree in construction management from Louisiana State University's College of Engineering. While at LSU, he worked for state Sen. Robert Marionneaux and the Unglesby & Marionneaux law firm. He pursued his law degree at Southern University Law Center, graduating first in his class while receiving other recognition and honors. During law school, he clerked for several Baton Rouge litigation firms and the Louisiana attorney general. Following graduation, he clerked for Hon. James J. Best of the 18th Judicial District Court.

After his clerkship, Rockforte began working as an attorney in the Plaquemine office of Pendley, Baudin & Coffin in 2008. He maintains a plaintiffs' litigation practice, primarily focused on mass tort and class action litigation related to defective pharmaceutical drugs and devices, products liability cases involving defective building and construction materials, consumer fraud and whistleblower actions. He also has represented farmers and producers who suffered losses resulting from contamination of the U.S. rice and wheat supply with unapproved, genetically modified seeds.

His most rewarding work to date involved Chinese drywall litigation in which he was instrumental in obtaining settlements for hundreds of homeowners in the Gulf Coast states who were forced to move out of their homes and completely remodel them. He also maintains a national mass tort pharmaceutical drug and medical device practice which has allowed him the opportunity to actively litigate cases in state and federal courts throughout the country, including the United States Supreme Court.

Rockforte and his wife, Hannah Pellegrin Rockforte, who works alongside him at his law office, are the parents of one child. In his spare time, he loves exploring everything that the sportsman's paradise has to offer and is an avid hunter and fisherman. An LSU football fan, he is a true country boy, having been raised on a farm in Iberville and Pointe Coupee parishes. He works hard to find a comfortable balance of family, farm and law in his life.

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

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

Law firms, attorneys and legal professionals wishing to donate should drop off costumes at the Louisiana Bar Center, 601 St. Charles Ave., New Orleans, on Monday and Tuesday, Nov. 3-4, during business hours (8:30 a.m.-4:30 p.m.).

Costumes may simply be placed in bags. There is no labeling or sorting process required. 'WEEN DREAM volunteers will handle the sorting process and match the costumes to children for Halloween 2015. (Costumes that were donated after Halloween 2013 are being distributed to children for 2014.)

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Alexandria City Attorneys Office
625 Murray Street, 3rd Floor
Alexandria, LA

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

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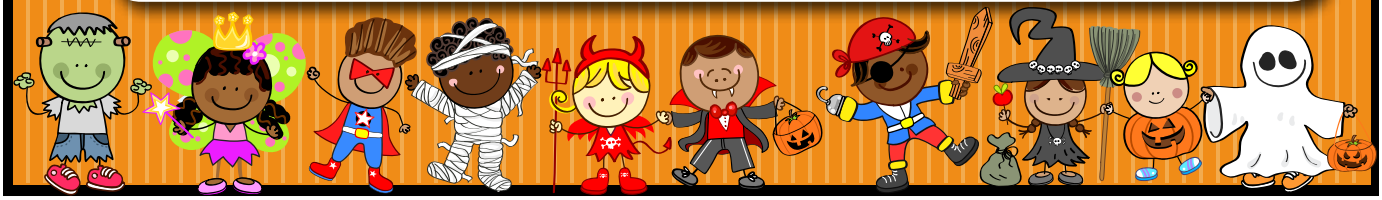

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JUDICIAL Notes

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

New Judge

Jeanne Nunez Juneau

Jeanne Nunez Juneau was elected as judge of Division B, 34th Judicial District Court, becoming the court's first woman judge. She earned her BA degree, *magna cum laude*, in 1994 from Loyola University and her JD degree, with honors, in 1997 from Loyola University College of Law. That year, she began her career as an associate attorney with Lobman, Carnahan, Batt, Angelle & Nader, L.L.C., in New Orleans. From 1999-2001, she was an associate attorney with Aubert & Pajares, L.L.C., in Covington. In 2001, she entered private practice opening the Law Office of Jeanne Nunez Juneau, L.L.C., in Chalmette. She served as executive attorney for St. Bernard Parish Government from January 2012 until her election to the bench. She is a member of the 34th JDC Bar Association and serves on the boards of the St. Bernard Parish Council on Aging and the Kiwanis Club. She is married to Timmy Juneau and they are the parents of two children.

Appointments

► Celeste R. Coco-Ewing was appointed, by order of the Louisiana Supreme Court, to the Committee on Bar Admissions for a term of office which began July 1 and will end on June 30, 2019.

► John H. Andressen, 4th Circuit Court of Appeal Judge Paul A. Bonin, Milton Donegan, Jr. and May Dunn were reappointed, by order of the Louisiana Supreme Court, to the Board of Examiners of Certified Shorthand Reporters for terms of office ending on July 1, 2017.

► Lisa Leslie Boudreaux was appointed, by order of the Louisiana Supreme Court, to the Louisiana Board of Legal Specialization for a term of office which began July 1 and will end on June 30, 2017.

► Professor Ronald J. Scalise, Jr. and Thomas Rockwell Willson were reappointed, by order of the Louisiana Supreme Court, to the Louisiana Board of Legal Specialization for terms of office ending on June 30, 2017.

Retirement

5th Judicial District Judge E. Rudolph McIntyre, Jr. retired effective June 30. He earned his BS degree in 1973 and his JD degree in 1977 from Louisiana State University and LSU Paul M. Hebert Law Center. From 1977-96, he was in private practice with his wife and father at McIntyre, McIntyre, McIntyre in Winnsboro. Prior to his election to the 5th JDC in 1997, Judge McIntyre served as an assistant district attorney from 1979-92 and as the Winnsboro City Court judge from 1993-97. He served as president of the 5th District Bar Association, district judge representative on the Louisiana Commission on Law Enforcement and Administration of Criminal Justice, and as president of the Louisiana District Attorneys Association/ADA Section. His community involvement includes the Chamber of Commerce (past president), the Lions Club, the Tourism Commission, the Rotary Club and the Winnsboro Camp of Gideons International.

Death

27th Judicial District Court Judge Donald W. Hebert, 65, died July 9. After four years of service in the United States Navy, Judge Hebert earned his BA degree in 1966 from the University of Southwestern Louisiana and his JD degree in 1977 from Louisiana State University Paul M. Hebert Law Center. He practiced law in St. Landry Parish until his election to the 27th JDC bench in 1999. He was a member of the St. Landry Parish Bar Association and the Louisiana Trial Lawyers Association. He was a founding member of Parents Against Drug Dealers (P.A.D.D) and was involved in several civic organizations including the St. Landry Parish Community Action Agency, the United Giver's Fund, the St. Landry Parish Heart Association and the St. Landry Parish Scholarship Committee.

SOLACE

Support of Lawyers/Legal Personnel — All Concern Encouraged

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

Area	Coordinator & Contact Info	Area	Coordinator & Contact Info
Alexandria Area	Richard J. Arsenault (318)487-9874 Cell (318)452-5700 rarsenault@nbalawfirm.com	Lake Charles Area	Melissa A. St. Mary (337)497-0022 melissa@simienlaw.com
Baton Rouge Area	Ann K. Gregorie (225)214-5563 ann@brba.org	Monroe Area	John C. Roa (318)387-2422 roa@hhsclaw.com
Covington/ Mandeville Area	Suzanne E. Bayle (504)524-3781 sebayle@bellsouth.net	Natchitoches Area	Peyton Cunningham, Jr. (318)352-6314, Cell (318)332-7294 peytonc1@suddenlink.net
Denham Springs Area	Mary E. Heck Barrios (225)664-9508 mary@barrioslaw.com	New Orleans Area	Helena N. Henderson (504)525-7453 hhenderson@neworleansbar.org
Houma/ Thibodaux Area	Danna Schwab (985)868-1342 dschwab@theschwablawfirm.com	Opelousas/Ville Platte/ Sunset area	John L. Olivier (337)662-5242, (337)942-9836 (337)232-0874 johnolivier@centurytel.net
Jefferson Parish Area	Pat M. Franz (504)455-1986 patfranz@bellsouth.net	River Parishes Area	Judge Jude G. Gravois (225)265-3923, (225)265-9828 Cell (225)270-7705 judegravois@bellsouth.net
Lafayette Area	Josette Abshire (337)237-4700 director@lafayettebar.org	Shreveport Area	M'Lissa Peters (318)222-3643 mpeters@shreveportbar.com

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

PEOPLE

LAWYERS ON THE MOVE . . . NEWSMAKERS

LAWYERS ON THE MOVE

Becker & Hebert, L.L.C., in Lafayette announces that **Daniel A. Rees**, **Christopher D. Granger** and **James P. Doherty III** have joined the firm.

Beirne, Maynard & Parsons, L.L.P., announces that Marne A. Jones has joined the firm's New Orleans office as an associate.

Bland & Partners, P.L.L.C., a New Orleans-based firm with an office in Houston, Texas, merged with the Houston office of Crain Wilson, P.L.L.C..

Breazeale, Sachse & Wilson, L.L.P., announces that Jacob S. Simpson has joined the firm's Baton Rouge office.

Christovich & Kearney, L.L.P., in New Orleans announces that **F. Sherman Boughton, Jr.** and **Mindy Brickman** have joined the firm as partners and **Cara E. Hall** has joined the firm as an associate.

Cook, Yancey, King & Galloway, A.P.L.C., in Shreveport announces that **D. Logan Schroeder** and **Andrew P. Lambert** have joined the firm as associates.

Deutsch, Kerrigan & Stiles, L.L.P., in New Orleans announces that **Suzan N. Richardson** has joined the firm as a partner.

Dunlap Fiore, L.L.C., in Baton Rouge announces that **Erin Gourney Fonacier** has joined the firm as an associate.

Duplass, Zwain, Bourgeois, Pfister & Weinstock, A.P.L.C., in Metairie announces that Meredith L. Simoneaux has joined the firm as an associate.

Fowler Rodriguez announces that four attorneys have been named to the partnership in the New Orleans office: **Jacques P. DeGruy**, **W. Jacob Gardner, Jr.**, **Michael A. Harowski** and **E. Stuart Ponder**.

Robert K. Guillory & Associates has relocated to 605 W. Congress St., Lafayette, LA 70501 (P.O. Box 53478, Lafayette, LA 70505-3478); phone (337)234-0500.

Herman, Herman & Katz, L.L.C., in New Orleans announces that **Jennifer J. Greene** and **John S. Creevy** have been named partners. Also, **Patrick R. Busby** has joined the firm as an associate.

Johnson, Johnson, Barrios & Yacoubian, A.P.L.C., in New Orleans announces that **Maurice C. Ruffin** has joined the firm.

Kelly Hart & Hallman, L.L.P., announces the opening of its New Orleans office, which will operate as Kelly Hart & Pitre, located at Ste. 1812, 400 Poydras Tower, New Orleans, LA 70130. Loulan J. Pitre, Jr. has joined the firm as partner-in-charge. Also joining the firm are Aimee Williams Hebert, Demarcus J. Gordon, Kelly E. Ransom, Jane A. Jackson and Victor E. Jones.

Continued next page


Richard J. Arsenault


F. Sherman Boughton, Jr.


Mindy Brickman


Patrick R. Busby


John S. Creevy


J.E. Cullens, Jr.


Jacques P. DeGruy


James P. Doherty III


Erin Gourney Fonacier


George J. Fowler


W. Jacob Gardner, Jr.


Christopher D. Granger

Koeppel Traylor announces that Erik A. Mayo, Katherine C. Minor and Steven N. Newton have joined the firm's New Orleans office as associates. Newton will handle Louisiana and Mississippi statewide matters.

Liskow & Lewis, A.P.L.C., announces that Brittan J. Bush has joined the firm's Lafayette office as an associate.

Moore, Thompson & Lee, A.P.L.C., in Baton Rouge announces that Holly Graphia Hansen has joined the firm.

L. Lane Roy announces the formation of his new firm, L. Lane Roy, L.L.C., located at Ste. 101, 110 E. Kaliste Saloom Rd., Lafayette, LA 70508; phone (337)234-0438.

Sessions, Fishman, Nathan & Israel, L.L.C., announces that **Lindsay E. Reeves** has joined the New Orleans office as an associate.


Jennifer J. Greene


Cara E. Hall

Stone Pigman Walther Wittmann, L.L.C., announces that Peter M. Thomson has joined the firm's New Orleans office as special counsel.

NEWSMAKERS

Richard J. Arsenault, a partner in the Alexandria firm of Neblett, Beard & Arsenault, will chair the 14th annual Louisiana State Bar Association Complex Litigation/Mass Tort Symposium on Nov. 21 in New Orleans. In September, he was a speaker at the Kentucky Justice Association Annual Convention.

Judy Y. Barrasso, a founding member of the New Orleans firm of Barrasso Usdin Kupperman Freeman & Sarver, L.L.C., was awarded "Best in Litigation" at the 2014 Euromoney LMG Women in Business Law Awards. She also was named to *Benchmark Litigation*'s top 250 Women in Litigation.

Preston J. Castille, Jr., a partner in the Baton Rouge firm of Taylor, Porter, Brooks & Phillips, L.L.P., was elected national president of the Southern University Alumni Federation.

Kaye N. Courington, managing member of Courington, Kiefer & Sommers, L.L.C., with offices in New Orleans and Ocean Springs, Miss., was appointed to a three-year term on the Director's Advisory Council of the Newcomb College Institute, an academic center at Tulane University. She also was named to the Editorial Board of the new *Journal of American Law* in the environmental/energy specialty board area and was selected to co-chair the CLE Subcommittee of the National Association of Minority and Women Owned Law Firms' Insurance Alliance Committee.

J.E. Cullens, Jr., a founding partner in the Baton Rouge firm of Walters, Papillion, Thomas, Cullens, L.L.C., earned national board certification by the American Board of Professional Liability Attorneys in the field of medical malpractice.

Tiffany Delery Davis, a shareholder in the New Orleans office of Liskow & Lewis, A.P.L.C., was named to the *Lawyers of Color*'s second annual Hot List, which recognizes early- to mid-career minority attorneys.

Nancy Scott Degan, a shareholder in the New Orleans office of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., is serving a one-year term as chair of the American Bar Association's Section of Litigation.


Michael A. Harowski


Robert E. Kleinpeter


Andrew P. Lambert


Ryan M. McCabe


E. Stuart Ponder


Daniel A. Rees


Lindsay E. Reeves


Suzan N. Richardson


Antonio J. Rodriguez


Maurice C. Ruffin


D. Logan Schroeder


Norman C. Sullivan, Jr.

Attorney Barbara L. Edin of Metairie was honored as a past president (1993-94) by the Women's Bar Association of Maryland, Montgomery County.

Monica A. Frois, a shareholder in the New Orleans office of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., was reappointed as co-vice chair of Diverse Member Development for the Diversity Committee of the International Association of Defense Counsel.

Emily B. Grey, a partner in the Baton Rouge office of Breazeale, Sachse & Wilson, L.L.P., was appointed vice chair of Strategic Activities in the American Health Lawyers Association's Hospitals and Health Systems Practice Group.

Daisy Gurdián Kane, an associate in the New Orleans office of Jackson Lewis, P.C., was named to the *Lawyers of Color*'s second annual Hot List, which recognizes early- to mid-career minority attorneys. She also is serving as president-elect of the Hispanic Lawyers Association of Louisiana.

Robert E. (Bob) Kleinpeter, managing partner in the Baton Rouge firm of Kleinpeter & Schwartzberg, L.L.C., achieved the status of diplomate in the National College of Advocacy and was recognized at the American Association for Justice's 2014 convention.

Linda A. Liljedahl, founder of Dispute Resolution Institute of Louisiana, Ltd., based in Baton Rouge, was named the top female executive for 2014 by the *Cambridge Who's Who of America*.

Eve B. Masinter, a partner in the New Orleans office of Breazeale, Sachse & Wilson, L.L.P., was appointed to a three-year term on the board of directors of the International Association of Defense Counsel.

Ryan M. McCabe, an associate in the New Orleans firm of Steeg Law Firm, L.L.C., was named chair of the Louisiana State Bar Association's Law-Related Education Committee and has joined the board of the Louisiana Center for Law and Civic Education.

Orleans Parish Criminal District Court Judge Robin D. Pittman is serving on the Loyola University New Orleans College of Law's Alumni Board of Directors. She also was appointed by the Louisiana Supreme Court to the Louisiana Judicial College Board of Governors, serving through September 2015.

Meera U. Sossamon, an associate in the New Orleans firm of Irwin Fritchie Urquhart & Moore, L.L.C., was named to the *Lawyers of Color*'s second annual Hot List, which recognizes early- to mid-career minority attorneys.

PUBLICATIONS

***Chambers USA* 2014**

Breazeale, Sachse & Wilson, L.L.P. (Baton Rouge, New Orleans): John T. Andrishok, Robert L. Atkinson, Thomas M. Benjamin, David R. Cassidy, Murphy J. Foster III, Alan H. Goodman, Richard D. Leibowitz, Steven B. Loeb, Eve B. Masinter, E. Fredrick Preis, Jr., Claude F. Reynaud, Jr. and Jerry L. Stovall, Jr.

Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, L.L.C. (New Orleans): M. Hampton Carver, M. Taylor Darden, William T. Finn, I. Harold Koretzky, Frank A. Tessier and David F. Waguespack.

Fowler Rodriguez (New Orleans): **George J. Fowler**, **Antonio J. Rodriguez** and **Norman C. Sullivan, Jr.**

Jackson Lewis, P.C. (New Orleans): René E. Thorne, Susan F. Desmond and Charles F. Seemann III.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C. (New Orleans): Mark N. Mallery and Christopher E. Moore.

New Orleans Magazine

Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, L.L.C. (New Orleans): Jacqueline M. Brettner, 2014 top female achiever.

IN MEMORIAM

Edgar F. Barnett

Edgar F. Barnett, 82, of Houston, Texas, died July 27. He received his law degree from Louisiana State University Law School in 1958 and was admitted to practice in Louisiana the same year. He was admitted to the Texas Bar in 1990. He practiced law in Lake Charles from 1958-89, focusing in insurance defense law and maritime law. He served as president of Southwest Louisiana Bar Association and was a member of the Maritime Law Association of the United States since 1963. In 1989, he moved to Houston where he practiced maritime law as a sole practitioner, representing both plaintiffs and defendants. He also served as a consultant to Louisiana lawyers in maritime cases, practicing in both Louisiana and Texas. He served in the United States Army as an artillery lieutenant in the Korean War. Mr. Barnett is survived by his wife, Gerry; his daughter, Jana Phelps; his son, Lake Barnett; his stepdaughter, Jennifer Hubbs; a grandson and two great grandchildren.

UPDATE

Chair, Vice Chair Elected to Judiciary Commission

Shreveport attorney Jerry Edwards and 15th Judicial District Court Judge Jules D. Edwards III were elected as chair and vice chair, respectively, of the Judiciary Commission of Louisiana, the Louisiana Supreme Court announced.

Attorney Edwards earned his law degree in 2005 from Vermont Law School. He served as a law clerk for 1st Judicial District Court Judges Scott J. Crichton and Jeanette G. Garrett. In 2006, he joined the Shreveport law firm of Blanchard, Walker, O'Quin & Roberts, A.P.L.C., as an associate and became a director in 2014. He is serving on the Louisiana State Bar Association's Young Lawyers Division Council and is a member of the Shreveport Bar Association and the Booth-Politz American Inn of Court.

Judge Edwards, chief judge of 15th Judicial District Court and a drug court pioneer, received his undergraduate and law degrees in 1981 and 1984, respectively, from Loyola University. He earned a master in public administration degree in 1994 from Louisiana State University and a master of strategic studies degree in 2005 from the U.S. Army War College.

During his career, he served as an indigent defender attorney, assistant district attorney, counsel to the Louisiana Senate's Select Committee on Crime and Drugs, and a partner of the Edwards and Edwards Law Offices.

Jerry Edwards

Judge Jules D. Edwards III

Warren A. Perrin of Lafayette, fourth from left, represented the Louisiana State Bar Association (LSBA) at the Caen Bar Association's conference on human rights in litigation in June in Cabourg, France. Perrin is chair of the LSBA's Francophone Section. Also attending the conference were, from left, Antoanella Motoc, judge for the European Court of Human Rights; Gilles Straehli, counselor for the French Supreme Court; Emmanuel Pire, attorney with the Paris Bar; Perrin; Robert Apery, bâtonnier of the Caen Bar Association; Jean-Pierre Versini Campinchi, attorney with the Paris Bar; Vincent Le Beguec, director of Central Police of the Judiciary; and Robert Gelli, president of the National District Attorneys' Association.

The Shreveport law firm of Cook, Yancey, King & Galloway, A.P.L.C., is one of the recipients of the 2014 Beacon of Justice Award, presented annually by the National Legal Aid and Defender Association. All law firms recognized devote resources to delivering on the mandate of *Gideon v. Wainwright*, which 50 years ago established the right to counsel for people accused of a crime and facing a loss of liberty. Cook Yancey was recognized for its work to advance policies and practices that provide pathways to justice and opportunity. Cook Yancey shareholder Herschel E. Richard, Jr., left, and special counsel Lisa C. Cronin accepted the award on the firm's behalf at the June ceremony in Washington, D.C.

SEND YOUR NEWS!

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70130-3404

Southern University Law Center Chancellor Freddie Pitcher, Jr., far left, with the seven 2014 Law Center Hall of Fame inductees, from left, Mayor Jacques M. Roy, Alexandria; attorney Edward Larvadain, Jr., Alexandria; Judge Ramona L. Emanuel, Shreveport; attorney Rickey W. Miniex, Lafayette; Judge Jeffrey S. Cox, Bossier City; Judge Wilson E. Fields, Baton Rouge; and attorney Clyde R. Simien, Lafayette. *Photo provided by Southern University Law Center.*

Southern University Law Center Chancellor Freddie Pitcher, Jr., far right, with the six 2014 Law Center Distinguished Alumni, from left, Yolanda Martin Singleton, Baton Rouge; State Rep. Katrina R. Jackson, Monroe; Vanessa Caston LaFleur, Baton Rouge; Jason M. Stein, New Orleans; Tricia R. Pierre, Lafayette; and Samuel L. Jenkins, Jr., Shreveport. *Photo provided by Southern University Law Center.*

SULC Recognizes Hall of Fame, Wall of Fame and Distinguished Alumni

Seven Southern University Law Center (SULC) alumni were inducted into the Hall of Fame in April. Eight judges' portraits were unveiled for installation on the SULC Judicial Wall of Fame. Six other graduates were recognized as 2014 Distinguished Alumni.

Hall of Fame inductees included Mayor Jacques M. Roy and attorney Edward Larvadain, Jr., both of Alexandria; Judge Ramona L. Emanuel, Shreveport; attorney Rickey W. Miniex and attorney Clyde R. Simien, both of Lafayette; Judge Jeffrey S. Cox, Bossier City; and Judge Wilson E. Fields, Baton Rouge.

Judicial portraits unveiled for the Wall of Fame included Judge Ernestine (Teena) Anderson-Trahan, Orleans Parish Second City Court; Judge Paula A. Brown, Orleans Parish Civil District Court; Magistrate Judge Harry E. Cantrell, Jr., Orleans Parish Criminal District Court; Judge Wilson E. Fields, 19th Judicial District Court, East Baton Rouge Parish; Judge Frank E. Lemoine, Kaplan City Court, Vermilion Parish; Judge Brenda Bedsole Ricks, 21st Judicial District Court, Livingston, St. Helena and Tangipahoa parishes; Judge Shonda D. Stone, Caddo Parish Juvenile Court and Family Preservation Court; and Judge Felicia Toney Williams, 2nd Circuit Court of Appeal.

Recognized as Distinguished Alumni were Yolanda Martin Singleton and Vanessa Caston LaFleur, both of Baton Rouge; State Rep. Katrina R. Jackson, Monroe; Jason M. Stein, New Orleans; Tricia R. Pierre, Lafayette; and Samuel L. Jenkins, Jr., Shreveport.

SULC Hall of Fame inductees are recognized for their career accomplishments, commitment to bettering the community and support to the Law Center. Their names are placed on a special recognition wall display at the Law Center's A.A. Lenoir Hall. Since 2003, 59 alumni have received Hall of Fame recognition.

SULC graduates who serve or have served as members of the judiciary have portraits on the Wall of Fame in the North Wing of A.A. Lenoir Hall. The eight new portraits join 23 others currently on display.

Distinguished Alumni Award recipients have maintained active engagement in the continued progression of the Law Center; have been practicing law, or another legal discipline, for five-plus years; are financially contributing supporters of the Law Center; and have been recognized by their peers for contributions to their fields of law at the state, national and/or international levels.

Russian law students, accompanied by Professors Gaya Davidyan and Natalia Sherback from Moscow State University in Moscow, Russia, visited the courtroom of Orleans Parish Criminal District Court Judge Arthur L. Hunter in July. For eight years, the students, hosted by Professor James M. Klebba of Loyola University College of Law, have visited the court to observe criminal proceedings and learn about the American criminal justice system. Also participating in the program were attorneys Carrie E. Ellis and Sarah Chervinsky of the Orleans Public Defenders Office, attorney Ike Spears and Assistant District Attorneys Robert J. Ferrier, Jr. and Irena Zajickova.

LOCAL / SPECIALTY BARS

Federal Bar Association/New Orleans Chapter Names 2014-15 Board

Christopher J. Alfieri was installed as 2014-15 president of the Federal Bar Association/New Orleans Chapter during the association's annual meeting and awards luncheon in August.

Joining him on the executive board of directors are Hon. Sarah S. Vance, president-elect; Kelly T. Scalise, treasurer; Celeste R. Coco-Ewing, recording secretary; W. Raley Alford III, membership chair; Wendy Hickok Robinson, immediate past president; and Stephen G.A. Myers, younger lawyers representative.

Serving on the chapter board of directors are Erin K. Arnold, John T. Balhoff II, Hon. Carl J. Barbier, Hon. Nannette Jolivette Brown, Brian J. Capitelli, Hon. Lyle W. Cayce, Lawrence J. Centola III, Jose R. Cot, Donna Phillips Currault, Michael J. Ecuyer, Joelle F. Evans, Harold J. Flanagan, Kathleen C. Gasparian, Soren E. Gisleson, Steven F. Griffith, Jr., Brian L. Guillot, Alida C. Hainkel, Hon. Stephen A. Higginson, Kathryn M. Knight, Tracey N. Knight, Hon. Mary Ann Vial Lemmon, Andrew T. Lilly, Omar K. Mason, Diana A. Mercer, Hon. Jane Triche Milazzo, Douglas J. Moore, Hon. Susie Morgan, Thomas Kent Morrison, Hon. Michael B. North, Kyle L. Potts, Sally Brown Richardson, Bradley J. Schlotterer, Paul M. Sterbcow, Peter J. Wanek and Richard W. Westling.

Ex-officio board members are Hon. William Blevins and Tara G. Richard.

Shreveport Bar Association Names 2014 Officers, Board

Lawrence W. Pettiette, Jr.

Lawrence W. Pettiette, Jr., a partner at Pettiette, Armand, Dunkelman, Woodley, Byrd & Cromwell, L.L.P., in Shreveport, was installed as 2014 president of the Shreveport Bar Association (SBA). Also sworn in as officers were Bennett L. Politz, president-elect; Laura P. Butler, vice president; and Robin N. Jones, secretary-treasurer.

The 2014 SBA directors-at-large are Melissa L. Allen, Curtis R. Joseph, Jr., John C. Nickelson and J. Marshall Rice.

Sarah Smith-Brown is head of the SBA Young Lawyers Section. Judge Michael A. Pitman is judicial liaison, and Linda Millhollon Ryland is head of the Women's Section.

Other 2014 committee and section chairs include James C. McMichael, Jr., Krewe of Justinian; S. Christopher Slatten, Roy H. (Hal) Odom, Jr. and Arthur R. Carmody, Jr., *Bar Review* editors; Gregory J. Barro, membership; Marcus E. Edwards and Erik S. Vigen, Law Week; Graham H. Todd, military affairs; Sam N. Gregorio, mentoring; Judge Jeanette G. Garrett and Judge Mark L. Hornsby, continuing legal education; Curtis R. Joseph, Jr., James A. Mijalis and Donald E. Hathaway, Jr., golf and tennis tournament; Amy C. Gardner and Melissa L. Allen, legal technology; Jaqueline A. Scott and Judge James J. Caraway, long-range planning; John T. Kalmbach, memorial and recognition; Judge Gay C. Gaskins, professionalism; Mark W. Odom, archives; W. Ross Foote, mediation/arbitration; Trudy Daniel, Gerald M. Johnson and Kristen B. Bernard, publicity; and Jerry Edwards and Ronald J. Miciotto, program.

Important Reminder: Lawyer Advertising Filing Requirement

Per Rule 7.7 of the Louisiana Rules of Professional Conduct, all lawyer advertisements and all unsolicited written communications sent in compliance with Rule 7.4 or 7.6(c) — unless specifically exempt under Rule 7.8 — *are required to be filed* with the LSBA Rules of Professional Conduct Committee, through LSBA Ethics Counsel, prior to or concurrent with first use/dissemination. Written evaluation for compliance with the Rules will be provided within 30 days of receipt of a complete filing. Failure to file/late filing will expose the advertising lawyer(s) to risk of challenge, complaint and/or disciplinary consequences.

The necessary Filing Application Form, information about the filing and evaluation process, the required filing fee(s) and the pertinent Rules are available online at: *http://www.lsba.org/members/LawyerAdvertising.aspx.*

Inquiries, questions and requests for assistance may be directed to LSBA Ethics Counsel Richard P. Lemmler, Jr., RLemmler@LSBA.org, (800)421-5722, ext. 144, or direct dial (504)619-0144.

LBF Sets Grant Application Deadlines

The Louisiana Bar Foundation's grant application for 2015-16 funding is now available online and must submitted by Dec. 1, 2014.

The Loan Repayment Assistance Program (LRAP) application for 2015-16 funding will be available online beginning Dec. 1, 2014. Deadline for submitting the LRAP application is Feb. 13, 2015.

Renee Bienvenu is the new grants coordinator and will oversee the overall administration of the grant programs and application process. For more information, go to: *www.raisingthebar.org*.

President's Message

Protecting and Empowering Against Abuse

By President Hon. C. Wendell Manning

October is observed nationally as Domestic Violence Awareness Month. One out of every four women in a relationship will experience some sort of physical abuse in her lifetime — your mother, your sister, your daughter, your friend.[1] It can happen to anyone. Domestic violence cuts across all socioeconomic lines; it affects rich, poor, black, white, young and old.

In 2012, Louisiana was ranked as having the fourth highest homicide rate among female victims killed by male offenders in single-victim/single-offender incidents. Of the victims who knew their offenders, 51 percent were wives, common-law wives, ex-wives or girlfriends of the offenders.[2]

Did you know?

► Nationally, an estimated 1.3 million women are victims of physical assault by an intimate partner each year.

► Domestic violence is more than three times as likely to occur when couples are experiencing high levels of financial strain.

► Boys who witness domestic violence are twice as likely to abuse their own partners and children when they become adults.

► The average number of times a battered woman may leave from, and return to, her batterer is between five and seven.[3]

The Louisiana Bar Foundation (LBF) is dedicated to helping protect families, empower victims and break the cycle of violence in Louisiana. I am proud to report that the LBF awarded more than $300,000 in grants to domestic violence agencies across the state this year. These agencies empower people to leave abusive relationships and seek safety. The essential services provided by these agencies range from providing communities with a 24-hour crisis line; shelter for abused spouses and their children; legal services; education on domestic and dating violence; and establishing collaborative relationships with law enforcement, judges, clerks of court and prosecutors. According to 2012-13 statistics provided by our grantees, they were able to help more than 8,500 women and 3,500 children in Louisiana obtain safety from their abusers.

Hon. C. Wendell Manning

Included in the 2014 Domestic Violence Programs grantees are: Beauregard Community Concerns, Inc., Catholic Charities/ Project S.A.V.E., Chez Hope, D.A.R.T. of Lincoln, Faith House, Inc., Metropolitan Center for Women and Children, Oasis, Project Celebration, Safe Harbor, Inc., Safety Net for Abused Persons, Southeast Spouse Abuse Program, St. Bernard Battered Women's Program, The Haven, Inc., The Wellspring Alliance for Families, Inc. and United Way of Central Louisiana.

As members of the legal community, we can help. Please consider joining the LBF. The LBF is working to help break the cycle of violence by helping women and children. We also assist the elderly, working poor, people with disabilities, disaster victims and many others. Through our projects and activities, we work to better the legal profession and our communities. To join, contact Membership Coordinator Danielle Marshall at (504)561-1046 or email danielle@raisingthebar.org. For more information, go to: *www.raisingthebar.org*.

FOOTNOTES

1. Patricia Tjaden and Nancy Thoennes, National Institute of Justice and the Centers for Disease Control and Prevention, "Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey," (2000).

2. Violence Policy Center, "When Men Murder Women: An Analysis of 2012 Homicide Data" (September 2014).

3. Statistics and facts: National Coalition Against Domestic Violence; The National Network to End Domestic Violence; Violence Policy Center based on FBI data; and the Governor's Office on Women's Policy.

LBF Receives *Cy Pres* Award

The Louisiana Bar Foundation (LBF) is the recipient of a $10,000 *cy pres* award. Unused administrative funds from the *Elmira Preston et al v. Tenet HealthSystems Memorial Medical Center et al* class action case were directed to the LBF by Orleans Parish Civil District Court Judge Tiffany Gautier Chase.

"The LBF is deserving of this award because of its commitment to ensuring access to equal and fair representation in civil legal aid matters for the indigent," Judge Chase said.

In 2012, the Louisiana Supreme Court adopted Rule XLIII, which names the LBF as a permissible recipient of *cy pres* funds. The LBF is the only organization specifically identified in the rule. Because of the tremendous need for civil legal services for low-income people in Louisiana, *cy pres* awards can go a long way toward meeting the need for legal services.

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

Louisiana Bar Foundation Announces New Fellows

The Louisiana Bar Foundation announces new Fellows:

Kristin L. Beckman	New Orleans
Jennifer C. Deasy	New Orleans
C. Kevin Hayes	Baton Rouge
Hon. Patricia E. Koch	Alexandria
Diana A. Mercer	New Orleans
Jonathan M. Rhodes	New Orleans
Weldon J. Rougeau	Chicago, IL
Paul L. Wood	Shreveport
Hon. Lisa Woodruff-White	Baton Rouge

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Nov. 12, 2014
Smoothie King Center, New Orleans

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Suburban New Orleans AV-rated law firm seeks attorney to practice in the area of insurance coverage and defense. Minimum five years' experience preferred but will consider other applicants with excellent academic background. Competitive salary and benefits package. All replies held strictly confidential. Send résumé to cbrechtel@grhg.net or fax (504)362-5938.

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Notice is hereby given that E. Eric Guirard is filing a petition and application for readmission to the practice of law. Individuals may file notices of concurrence or objection with the Louisiana Attorney Disciplinary Board, Ste. 310, 2800 Veterans Memorial Blvd., Metairie, LA 70002, within 30 days.

Notice is hereby given that Michael K. LeBlanc intends to make application for reinstatement/readmission to the practice of law. 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.

ANSWERS for puzzle on page 206.

C	U	R	A	T	O	R	■	W	R	I	T	S
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INDEX TO ADVERTISERS

The Last WORD

By Joseph I. Giarrusso III

NOT JUST HUMBLEBRAGGING

The quote "It ain't braggin' if you can do it" is attributed to former baseball star Dizzy Dean. While this may come as a surprise to some, it is advice that certain lawyers seem to live by. Before recent technological advances, such boasting was generally confined to personal exchanges among attorneys. However, the advent of the Internet (and social media in particular) has drastically changed the scope and immediacy of "counsel crowing." As a Generation X-er — firmly entrenched between the importance of a personal conversation and the lightning speed of a short text message — I am perfectly situated to observe these emerging social media trends.

First, have you ever noticed that real estate, succession and transactional lawyers rarely seem to brag on Facebook or Twitter? I am waiting for posts like "I generated 20 sets of closing documents today. More closings = more MONEY" or "Texas lawyer wanted to call a usufruct a life estate. What a joke. #commonlawproblems."

Second, it seems as though no one ever loses anything on social media. All plaintiff cases are resolved favorably and all defense cases end in summary judgment or after a "decisive" trial. If so inclined to this type of horn-tooting, I would like to propose a 3:1 ratio. For every three times a lawyer brags, he/she must post one humiliating or defeated moment such as, "Well, my witness imploded during his depo today. If plaintiff's counsel had asked just a few more questions, with all due respect to Daniel Kaffee from *A Few Good Men*, he would have copped to the Kennedy assassination" or "My client who told me she had no prior injuries to her back had not one, not two, but three earlier back operations. #Pre-existing-injury-fail."

Finally, social media has launched a new word into the lexicon — the concept of which is one of my biggest pet peeves. The authoritative cultural online journal, *www.urbandictionary.com*, defines "humblebragging" as:

> The lowest, most despicable and loathsome form of self-promotion, often delivered in a terse one or two fragmented sentences on social networking sites. A typical and popular approach is to use a disingenuous complaint about something, a self-deprecating statement or a comment on something completely innocuous as a vehicle to deliver the real message, which invariably shows the person in a favourable light.[1]

What are some classic "humble-bragging" examples? Look no further:

► I am so not looking forward to Cambridge, MA winters while in law school! Trying to soak up as much sun as I can before leaving town.

► Wish I could watch TV today. But those cite checks are not going to do themselves. #lawreviewproblems.

► I am so out of shape. All out of breath from walking a few blocks to take my picture for this year's Super Lawyers. If only I had more time to exercise.

► Can't believe they videotaped my LSBA speech. I suppose if people want to be uninspired for 15 minutes, they can click here.

► Awkward. Saw some guy next to me LOL-ing while reading "The Last Word" in the Journal.[2]

FOOTNOTE

1. Apparently, Urban Dictionary is populated by those speaking the Queen's English.
2. Shout out to @humblebrag for the help!

Joseph I. Giarrusso III is a shareholder in the New Orleans office of Liskow & Lewis, P.L.C. He received his JD degree in 2001 from Louisiana State University Paul M. Hebert Law Center (Louisiana Law Review and Order of the Coif). He is admitted to practice in Louisiana and Texas. (jigiarrusso@liskow.com; Ste. 5000, 701 Poydras St., New Orleans, LA 70139)

The Louisiana Bar Journal is looking for authors and ideas for future "The Last Word" articles. Humorous articles will always be welcomed. But Editor Barry H. Grodsky is broadening the scope of the section, including "feel-good" pieces, personal reflections, human interest articles or other stories of interest. If you have an idea you'd like to pitch, email Grodsky at bgrodsky@taggartmorton.com or LSBA Publications Coordinator Darlene M. LaBranche at dlabranche@lsba.org.

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