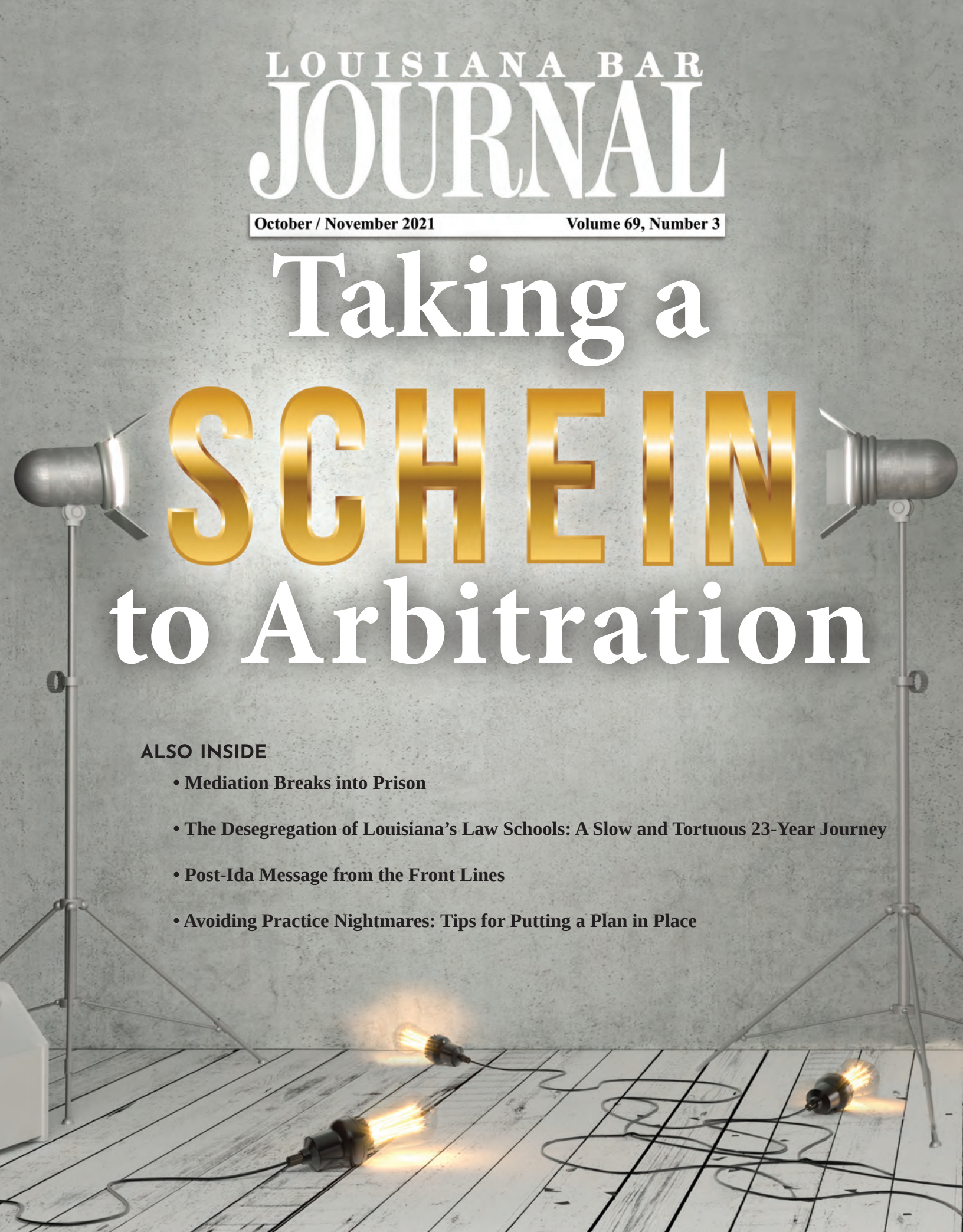
LOUISIANA BAR
JOURNAL
October / November 2021 Volume 69, Number 3

# Taking a SCHEIN to Arbitration



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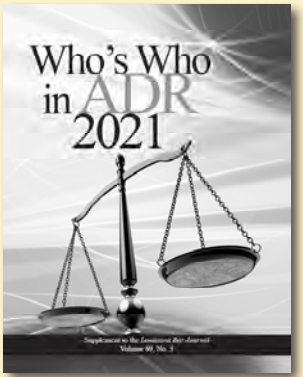


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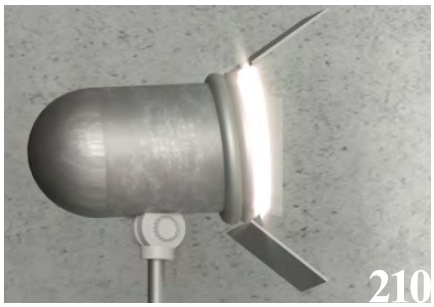




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# This Too Shall Pass

*By C.A. (Hap) Martin III*

Our printing schedule requires us to have articles submitted substantially before the issuance of the *Louisiana Bar Journal*. As I am writing this Editor's Message, we are at the height of a resurgence of the COVID-19 pandemic, this time with the Delta variant. I am reminded now of what my father would tell me from time to time, particularly when I was younger and things weren't going so well. Dad would tell me, "Remember, son, this too shall pass."

Dad was a man of few words, and he was a member of what many call the "Greatest Generation." He grew up in the small town of Waurika, Okla., and left the University of Oklahoma in 1940 to join the Army Air Corps because he "saw the handwriting on the wall" with World War II and became a 30-year veteran Air Force pilot. During World War II, he flew in North Africa and was shot down twice, being wounded the second time. So, between those experiences and generally growing up in the Great Depression and war time rationing, he had seen a lot by the time he was 30. When Dad said "this too shall pass," it carried some weight; he had seen a lot of "this" pass.

The expression didn't start with Dad, by any means. It is attributed to either an early Persian monarch or King Solomon, depending upon the source, but it became commonly used after Abraham Lincoln referred to it in a speech prior to becoming President. Since Dad's family was originally from Illinois, maybe that is where he heard it first.

Needless to say, the past year and the new resurgence of the Delta variant after a little taste of "normal" this past summer have made it difficult for many to accept going back to masks and other restrictions. The beauty of what Dad told me was that in "this too shall pass" is the belief that there is always hope. This came together with a book I was reading recently in which one of the characters, at a down point, said, "Where there is hope, there is life, and where there is life, there is hope."


Now, I have had to return to this Editor's Message because, two days before it was due, Hurricane Ida came roaring ashore in Louisiana with wind, rain and fury. What else can we take must come to mind, but what also comes to mind is that there is always hope, and that this too shall pass. The people of Louisiana are a resilient bunch, amazingly so. Who else could face five hurricanes that hit on virtually the same day in the last 16 years (Katrina, Isaac, Gustav, Harvey and Ida) and still, with hope in their eyes, say, "Let's rebuild because this is our home"?

As lawyers, many of us hoped when we came out of law school to not only make a living for our families but also to make a difference in our communities. It is during times like this (with COVID, hurricanes, whatever the crisis of the day may be) that we as a legal community can make a difference. Remember that this too shall pass, but the important thing is to hold on to that hope that makes Louisiana such a wonderful place to live and makes our legal community a giving and caring part of that hope.

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# Recovery – Working Our Way Back

*By H. Minor Pipes III*

What a 15 months it has been! After Hurricanes Laura and Delta devastated Lake Charles and the surrounding area, then headed north through Alexandria and up to Monroe last year, nature's onslaught continued with freezes and flooding to start this year. All of this during a worldwide pandemic. And now, more hurricanes. I know many are still experiencing the devastation from one or more of these disasters. At this point, it is my hope that many who suffered damage from Hurricanes Ida and Nicholas have been able to return to their homes and are continuing the recovery from these devastating storms.

I know that many of you have used our website at *www.lsba.org* for the latest updates from the Louisiana State Bar Association (LSBA). In addition, the Louisiana Supreme Court's website at *www.lasc.org* includes several Court Orders in reference to Hurricanes Ida and Nicholas, among them an Emergency Extension of Prescription, Peremption and Abandonment, and an Emergency Extension of Time Limitations in Criminal Matters, as well as Court Closing information.

During these emergencies, I have been in constant contact with Chief Justice John L. Weimer, and we both encourage all lawyers and courts to take into account all litigants involving cases or lawyers affected by the storms when it comes to scheduling and rescheduling hearings and trials. The damage is massive and the loss of power and Internet issues have and continue to affect many of our lawyers and their offices. Please use this time to work with those affected to make sure that all parties are able to participate, and justice is served.

## Disaster Resources

### Statewide Resources

- Louisiana Supreme Court website *www.lasc.org*
- LSBA Disaster Reponse website *www.lsba.org/DR*
- Disaster Reponse Message Board *www.lsba.org/DR/drmessageboard.aspx*
- YLD Disaster Tip Worksheet *www.lsba.org/goto/YLDdisastertipsworksheet*
- SOLACE *www.lsba.org/goto/solace*
- JLAP *www.louisianajlap.com*
- LSBA Disaster Planning Handbook *www.lsba.org/goto/disasterhandbook*

### Volunteer Opportunities

- Louisiana Free Legal Answers *LA.FreeLegalAnswers.org*
- Pro Bono Organizations *www.lsba.org/public/FindLegalHelp*
- LBF Hurricane Disaster Fund *www.raisingthebar.org/*

The LSBA continues working with other stakeholders, including the Louisiana Bar Foundation and the Access to Justice Commission, to assess how we might best assist our members and the public impacted by the storms. If you have any specific needs with which we can assist, please let us know.

We are pleased that many are using our Disaster Response Message Board, *www.lsba.org/DR/drmessageboard.aspx*, where members of the legal community may post things they need as well as offers of help to others. We also hope you will continue to use our Disaster Response Page, *www.lsba.org/DR/*, for its wealth of resources. Finally, please remember that SOLACE is available for individual needs as well.

Additionally, the LSBA's Young Lawyers Division, in conjunction with the American Bar Association, created a Disaster Tips Worksheet with resources for dealing with a disaster. The worksheet includes post-disaster tips for recovery, tips for filing insurance or FEMA claims, and information on legal aid, fraud and important contact information. The worksheet is accessible online at *www.lsba.org/DR/*.

We continue to receive offers of assistance from members not impacted by the storm, as well as our friends in other states. We have been directing them to our Disaster Response Message Board and asking neighboring bar associations to share it with their members. We will continue to work diligently to facilitate those connections.

The LSBA is here for you. We continue to keep you and your families in our thoughts and prayers. Please be safe. Importantly, the trials and tribulations will pass. I am proud of the work our bench and bar have done to support each other, and society at large, and I commend each of you for those efforts. Please keep it up.

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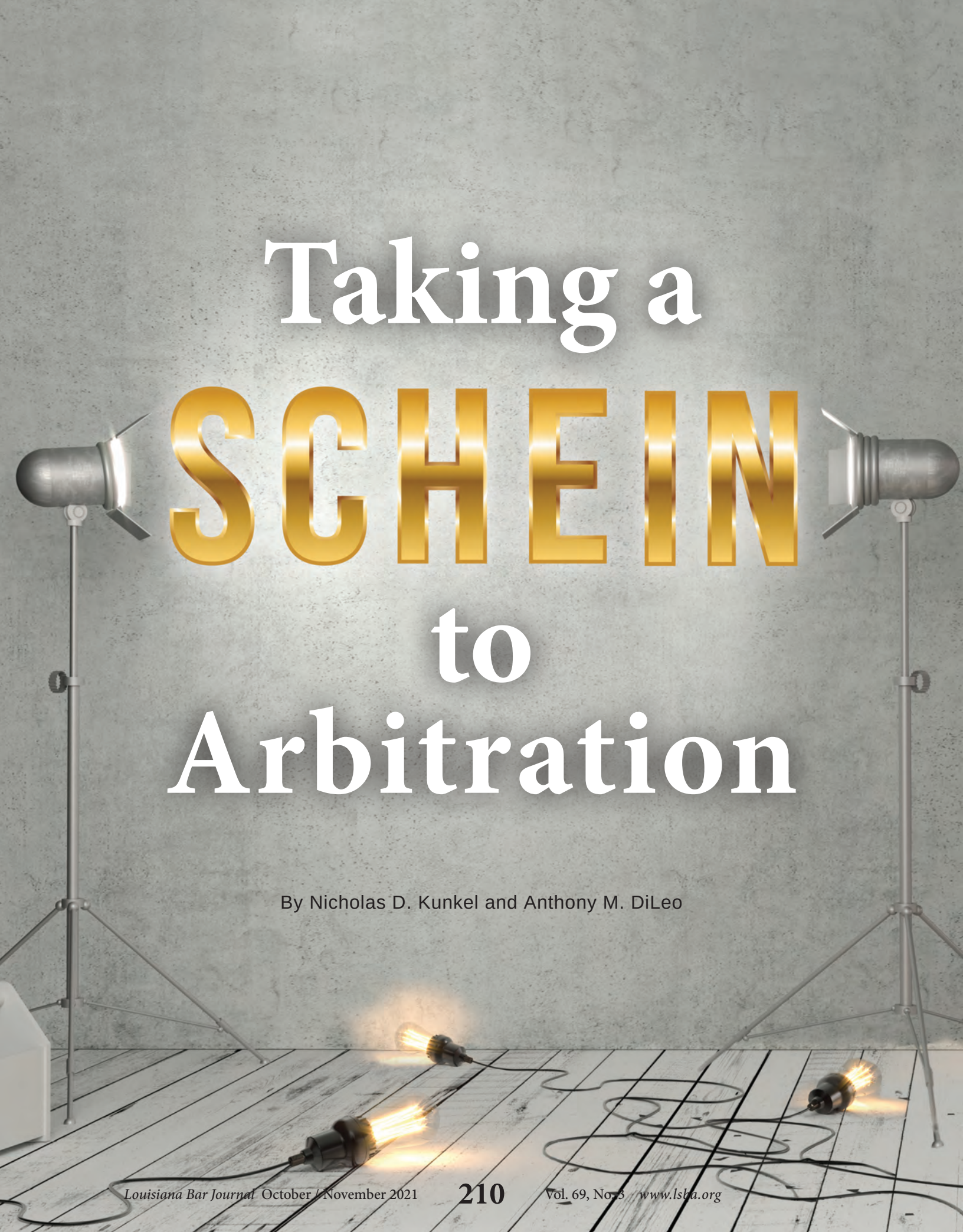
# Taking a SCHEIN to Arbitration

By Nicholas D. Kunkel and Anthony M. DiLeo



When the Supreme Court in early 2021 dismissed certiorari in *Henry Schein, Inc. v. Archer and White Sales, Inc.* as improvidently granted, the dismissal represented a rare victory for a party opposing arbitration before the Supreme Court.[1] Indeed, the Court's most recent arbitration precedents — including a prior decision in the very same matter[2] — stands as a laundry list of decisions supporting arbitration and confirming the force of the Federal Arbitration Act (FAA).[3] Although this dismissal does not signal a shift in the Court's strong deference to the text of the FAA, the 5th Circuit's decision here and in other cases spotlights a competing interest: the parties' freedom of contract. Examination of the *Henry Schein* decisions and other recent jurisprudence can give lawyers insight on how to balance these interests and achieve client objectives when drafting arbitration agreements.

The *Henry Schein, Inc.* line of cases began when Archer and White Sales, a small distributor of dental equipment, brought suit against Henry Schein, a dental equipment manufacturer, claiming that Schein had violated federal and state antitrust law. The suit sought both money damages and injunctive relief. Central to the dispute, the parties' contract contained an arbitration clause providing that any dispute "arising under or relating to [the] Agreement (*except for actions seeking injunctive relief . . .*), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]."[4]

In the district court, Schein requested that the matter be referred to arbitration based on the FAA.[5] Archer and White, however, argued that the complaint's demand for injunctive relief meant that the claim could not be subject to arbitration, as it fell into the carve-out in the arbitration clause.[6] Schein maintained that arbitrators nevertheless have the authority to resolve questions of arbitrability and, thus, the arbitrator — rather than the court — should be the one to decide whether the case would proceed in arbitration.[7]

On the issue of whether the gateway question of arbitrability should be decided by the court or by an arbitrator, Archer and White pointed to the "wholly groundless" exception.[8] This exception, adopted by several lower courts, essentially held that if a claim of arbitrability is wholly groundless, the court has authority to decide the threshold question of arbitrability regardless of whether it had been delegated to arbitration because sending such question to an arbitrator would be a waste of time.[9] Pointing to the arbitration clause provision, "except for actions seeking injunctive relief[,]" Archer and White argued that petitioner's claim for arbitrability was "wholly groundless" in light of the fact that the complaint sought injunctive relief. The district court agreed, finding that because Schein sought (in part) injunctive relief, and because the contract excepted suits seeking injunctive relief from its arbitration mandate, any claim of arbitrability was "wholly groundless."[10] On appeal, the 5th Circuit affirmed the district court's refusal to compel arbitration.[11]

The U.S. Supreme Court granted certiorari to determine "whether the 'wholly groundless' exception is consistent with the [FAA]."[12] In a unanimous opinion authored by Justice Kavanaugh, the Court held that the exception was inconsistent with both the FAA and with Supreme Court precedent.[13] Simply put, the Court recognized that "[t]he [FAA] does not contain a 'wholly groundless' exception, and [the Court is] not at liberty to rewrite the statute passed by Congress[.]"[14] Under both the FAA and Supreme Court precedent, "the question of who decides arbitrability is itself a question of contract."[15] Accordingly, if a contract calls for an arbitrator to decide "gateway questions of arbitrability," a court may not override the contract, even if the underlying claim of arbitrability may be "wholly groundless."[16] To do so, the Court reasoned, would be to "short-circuit the process" of arbitration called for by the contract.[17] Ultimately, the Court vacated the judgment of the lower courts and remanded the case to the 5th Circuit to address the issue of whether the contract delegated the question of arbitrability to an arbitrator.[18]

In formulating its holding, the Supreme Court first looked to the express language of the FAA, which provides, in relevant part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon any grounds as exist at law or in equity for the revocation of any contract.[19]

The Court then looked at its own application of the Act, noting that it had "held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of arbitrability[.]"[20] According to the Court, the text of the FAA requires that such an agreement — that is, an agreement to have an arbitrator decide gateway questions of arbitrability — must be treated just like any other contract to arbitrate.[21] In other words, because the Court was bound to "interpret the [FAA] as written," and because "the [FAA] in turn requires that [the Court] interpret the contract as written[,]" then it follows that "a court may not override the contract" where that contract delegates the arbitrability question to an arbitrator — "even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless."[22] This conclusion, the Court noted, follows not only from the text of the FAA but from precedent.[23] In particular, in *AT&T Technologies, Inc. v. Communications Workers*, the Supreme Court held that "a court may not 'rule on the potential merits of the underlying claim that is assigned by contract to an arbitrator, even if it appears to the court to be frivolous.'"[24] This conclusion, the Court emphasized, "applies with equal force to the threshold issue of arbitrability."[25]

The Court then addressed and rejected each of Archer and White's four principal arguments. Archer and White first urged a reading of §§ 3 and 4 of the FAA that would effectively dictate "that a court must always resolve questions of arbitrability and that an arbitrator may never do so."[26] Next, Archer and White argued that, because § 10 of the FAA allows for "back-

# Overview: Arbitration Law Cases in Louisiana State and Federal Courts

Compiled by Nicholas D. Kunkel and Anthony M. DiLeo

*Illustrative of the frequency with which arbitration law is adjudicated is the following sample of cases rendered in approximately the past year by Louisiana state and federal courts addressing a wide range of subjects. This list is not exhaustive or comprehensive, but presented by example.*

*Woodward Design + Build, LLC v. Certain Underwriters at Lloyd's London*, U.S.D.C., E.D. La., CA 19-14017, Sept. 29, 2020, 2020 WL 5793715 (motion to compel arbitration and stay litigation granted).

*1010 Common, LLC v. Certain Underwriters at Lloyd's London,* U.S.D.C., E.D. La., CA 20-2036, Dec. 14, 2020, 2020 WL 7342752 (motion to remand denied and motion to compel arbitration granted).

*Executive Strategies Corp. v. Sabre Industries Inc.*, U.S.D.C., W.D. La., 20-1067, Dec. 7, 2020, 2020 WL 7213002 (motion to compel arbitration granted).

*McHenry v. J P Chase Morgan Bank, N.A.,* U.S.D.C., W.D. La., 3:20-CV 00699, Jan. 11, 2021, 2021 WL 264885 (motion to compel arbitration granted).

*Pelsia v. Supreme Offshore Services, Inc.* U.S.D.C., E.D. La., 19-12 12295, Feb. 5, 2021, 2021 WL 411450 (motion to compel arbitration granted.). U.S.D.C., E.D. La., 20-1550, Feb. 18, 2021 and July 14, 2021, 2021 WL 638117 and 2021 WL 2948923 (motion to compel arbitration as to non-signatory granted).

*Georgetown Homeowners Association, Inc. v. Certain Underwriters at Lloyd's London,* U.S.D.C., M.D. La., 20-102-JWD-SDJ, Feb. 2, 2021, 2021 WL 359735 (motion to compel arbitration granted in part and stay granted).

*Troegel v. Performance Energy Services, LLC,* U.S.D.C., M.D. La., 18-105-JWD-EWD, July 30, 2020, 2020 WL 4370881 (motion to confirm arbitration award granted).

*Morel v. U.S. Xpress, Inc.,* U.S.D.C., E.D. La., 20-1348-WBV-JVM, Dec. 11, 2020, 2020 WL 7318081 (motion to compel arbitration granted).

*Montgomery v. Comenity Bank*, U.S.D.C., M.D. La., March 2, 2021, 2021 WL 817885 (motion to compel arbitration denied).

end judicial review" of an arbitrator's ruling, judicial review should similarly be available on the front end.[27] Archer and White finally advanced a pair of policy arguments: first, that "it would be a waste of the parties' time and money to send the arbitrability question to an arbitrator if the argument for arbitration is wholly groundless[;]" and second, "that the 'wholly groundless' exception was necessary to deter frivolous motions to compel arbitration."[28] After rebuffing the first of these arguments summarily, pointing out simply that the Court had consistently held that "parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties agreement does so by 'clear and unmistakable' evidence[,]" the Court rejected the three remaining arguments primarily on the familiar basis that they would require it to inappropriately rewrite the FAA. On the second argument: "Congress designed the Act in a specific way, and it is not [the Court]'s proper role to redesign the statute."[29] On the third: "[T]he Act contains no 'wholly groundless' exception and [the Court] may not engraft [its] own exceptions onto the statutory text."[30] Finally, on the fourth: the Court "may not rewrite the statute simply to accommodate that policy concern."[31] Accordingly, the Court vacated the 5th Circuit's judgment and remanded the matter for further proceedings.

Upon remand, the 5th Circuit was tasked with considering the question of whether the parties had "delegated the threshold arbitrability determination to an arbitrator."[32] Concluding that the parties "ha[d] not clearly and unmistakably delegated the question of arbitrability to an arbitrator[,]" the 5th Circuit answered in the negative, and ultimately affirmed the district court's order denying the defendants' motion to compel arbitration.[33]

In its investigation into whether the parties had validly delegated the gateway question of arbitrability to an arbitrator, the 5th Circuit stressed the importance of contractual intent. The court explained that this question turns on whether the arbitration clause at issue "evinces an intent to have the arbitrator decide [arbitrability]."[34] The 5th Circuit emphasized the Supreme Court's directive that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so."[35] Thus, the parties arguments hinged on the contractual language at issue — "Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief . . .), shall be resolved by binding arbitration in accordance with the [AAA rules]" — and whether this language satisfied the "clear and unmistakable" standard.

Schein, advocating for arbitration, contended that the agreement's incorporation of the AAA rules, which delegate questions of arbitrability to an arbitrator, was dispositive. Archer and White, however, argued that the agreement's carve-out of "actions seeking injunctive relief" meant that the incorporation of the AAA rules — and the resulting delegation — was inapplicable to the present action, as it sought both damages and injunctive relief. Schein asserted, however, that Archer and White's preferred reading would

"require the courts to make a merits determination about the scope of the carve-out" that fell into "precisely the category of inquiries a court is precluded from making in answering the delegation question."[36]

The 5th Circuit then expanded upon the "clear and unmistakable" standard. Noting that "a contract need not contain an express delegation clause to meet this standard[,]" the court examined jurisprudence on the issue.[37] It first highlighted *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, which held that "an arbitration agreement that incorporates the AAA Rules 'presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.'"[38] Recognizing, however, that "[t]he agreement in *Petrofac* . . . contain[ed] no carve-out provision[,]" the 5th Circuit looked next to *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*[39] The 5th Circuit explained that, in *Crawford*, it had applied the *Petrofac* holding to an arbitration agreement that *did* contain a carve-out provision.[40] The court, however, highlighted the fact that it had done so "[w]ithout specifically discussing the carve-out[,]" which was arguably distinguishable from the carve-out at issue in the present case.[41] The 5th Circuit additionally recounted *NASDAQ OMX Grp., Inc. v. UBS Securities, LLC*, a case in which the 2nd Circuit considered an arbitration clause that incorporated the AAA rules while exempting certain claims from arbitration.[42] There, the 2nd Circuit held that the "clear and unmistakable" standard had not been met "where a broad arbitration clause is subject to a qualifying provision that at least arguably covers the present dispute."[43]

From here, the court rejected defendants' argument that *Crawford* should control the present case and arbitrability should be decided in arbitration. Noting the defendants' argument that "the only difference between th[e] arbitration agreement [at issue in *Crawford*] and the one here is syntax — the ordering of words" — the court explained that the order of the words made all the difference. On this logic, it declined to "re-write the words of the contract."[44] It again emphasized the importance of the parties' language, noting that "[t]he plain language . . . delegates arbitrability for all disputes *except* those under the carve-out."[45] Thus, the 5th Circuit found the requisite clear and unmistakable intent to delegate arbitrability lacking.

Having decided the issue of primary jurisprudential interest, the 5th Circuit moved on to the question of whether the underlying dispute was arbitrable at all.[46] Ultimately finding that "this action [wa]s not subject to mandatory arbitration," the 5th Circuit affirmed the district court's order denying defendants' motion to compel arbitration. Once again, contractual language formed the basis of the court's determination.[47]

As alluded to previously, the decisions in *Henry Schein, Inc.* paint quite a picture in terms of courts' attitudes towards arbitration. The Supreme Court's opinion, for one, repeatedly emphasizes the statutory text of the FAA as the precept guiding its decision. The decision itself sends an

## Overview: Arbitration Law Cases in Louisiana State and Federal Courts, con't

*Erdogan v. Nouvelle Shipmanagement Co.*, CV-19-11391, U.S.D.C., E.D. La. June 23, 2021, 2021 WL 2579796 (motion to compel arbitration granted and motion to stay litigation granted).

*Coleman v. Affordable Care, LLC*, U.S.D.C., E.D. La., 19-10707, May 21, 2021, 2021 WL 2042249 (motion to compel arbitration granted and motion to stay litigation granted).

*Hardee v. CMH Homes, Inc.*, U.S.D.C., E.D. La., 21-641, May 28, 2021, 2021 WL 2187932 (motion to stay litigation pending arbitration granted).

*Illinois Central Railroad Company v. Brotherhood of Locomotive Engineers and Trainmen*, U.S.D.C., E.D. La., Dec. 4, 2020, 2:2020-CV-01717, 505 F. Supp. 3d 626 (arbitration award confirmed).

*Caillet v. Newman*, U.S.D.C., M.D. La., 19-515, April 21, 2021, 2021 WL 1388389 (motion to vacate arbitration award denied).

*Axiall Canada Inc. v. MECS Inc.*, U.S.D.C., 2:20-CV-01535,W.D. La., Feb. 5, 2021, __ F.Supp.3d __, 2021 WL 416804 (motion to compel arbitration denied).

*Badgerow v. Walters*, U.S. 5th Cir. Sept. 15, 2020, 975 F.3d 469, *writ granted*, Sup. Ct. of the U.S., May 17, 2021, __ S.Ct. __, 2021 WL 1951795 (Mem), 209 L.Ed.2d 748, 2021 Daily Journal D.A.R. 4715 (court to decide if a federal court has jurisdiction under the FAA to confirm or vacate an arbitration award, if the only basis for jurisdiction is a federal question in the underlying dispute).

*Covenant General Contractors, Inc. v. S.J. Louis Construction of Texas, Ltd.*, Not Reported in So. Rptr., 2020 WL 7226074, 2020-0939 (La. App. 1 Cir. 12/8/20) (arbitration ordered and stay of litigation granted).

*Calahan v. Liberty Mutual Insurance Company*, Not Reported in So. Rptr., 2021 WL 1171176, 2021-0135 (La. App. 1 Cir. 3/29/21) (writ denied, court holds claim not within arbitration agreement).

*Jeanerette Lumber & Shingle Company, LLC v Florida Gas Transmission Company, LLC*, __ So.3d __, 2021 WL 2946282, 2020-249 (La. App. 3 Cir. 7/14/21) (motion to compel arbitration denied upon holding by the court that a canal is not a "structure" within the parties' arbitration agreement).

*Jones v. Michaels Stores, Incorporated*, U.S. 5th Cir., 20-30428, March 15, 2021, 991 F.3d 614 (arbitration award upheld).

**Overview: Arbitration Law Cases in Louisiana State and Federal Courts, con't**

*Scorpio Drilling International Pte Ltd. v. HLV Mighty Servant 3*, U.S.D.C., E.D. La., 20-30428, March 25, 2021, 2021 WL 1143689 (arbitration agreement upheld).

*Barattini v. Northlake Construction & Development, LLC*, Not Reported in So. Rptr, 2020 CW 10158, 2021 WL 1172165 (La. 1st Cir. 2021), March 29, 2021 (writ granted, arbitration ordered).

*Kikuchi v. Silver Bourbon, Inc.*, U.S.D.C., E.D. La., 20-CV-2764, June 1, 2021, 2021 WL 2210915 (motion to dismiss granted based on arbitration agreement).

*Neptune Shipmanagement Services (PTE.), Ltd. v. Dahiya*, U.S.D.C., E.D. La., 20-1525, Oct. 14, 2020, 2020 WL 6059647 (granting motion for summary judgment for confirmation of Indian arbitrator's award and permanent injunction barring attempts to relitigate the award).

*Hanna v. J.P. Morgan Chase & Co.*, U.S.D.C., M.D. La., 19-887-SDD-EWD, Aug. 24, 2020, 2020 WL 4983065 (motion to compel arbitration granted).

*Colonial Oaks Assisted Living Lafayette, L.L.C. v. Hannie Development, Inc.*, U.S. 5th Cir., 19-30995, Aug. 25, 2020, 972 F.3d 684 (trial court dismissal of claims referrable to arbitration under the APA, affirmed on appeal).

*Mero v. National Railroad Adjustment Board*, U.S.D.C., W.D. La., 18-260, Nov. 6, 2020, 2020 WL 6551234 (granting motion for summary judgment and declining to set aside arbitration panel's award).

*Pontchartrain Natural Gas System v. Texas Brine Company, LLC*, 2020 CW 1179, (La. Ct. App. 1 Cir. March 25, 2021) (writ granted, motion to stay litigation granted pending "a determination of arbitrability of the claims between these parties by the arbitration panel and the arbitration of the claims subject thereto").

*Centurum Information Technology Inc. v. Geocent, LLC*, U.S.D.C., E.D. La., 21-0082, Feb. 12, 2021, 2:2021 CV 00082, 2021 WL 533707 (granting in part a motion to dismiss for lack of subject matter jurisdiction based on mandatory arbitration provisions).

*Florida Gas Transmission Company, LLC v. Texas Brine Company, LLC*, 2020 CW 1178 (La. Ct. App. 1 Cir. 2021), 2020 CW 1178, Jan. 29, 2021, 2021 WL 306368 (writ granted, confirming the arbitration agreement between parties to include tort claims).

*McHenry v. JPMorgan Chase Bank, N.A.*, U.S.D.C., W.D. La., 3:20-CV-00699, Jan. 26, 2021, 2021 WL 262044 (motion to compel arbitration granted).

unequivocal message to parties and courts that the "wholly groundless" exception is inconsistent with the FAA and, thus, no longer applicable. Further, many commentators awaited the Supreme Court's *Henry Schein, Inc.* decision in the hopes that it would indicate whether Justice Kavanaugh's appointment to the Court would serve to continue the Court's strong stance on arbitration. As of yet, there is no evidence to the contrary, as none of the nine Justices appeared open to collateral litigation over threshold questions of arbitrability.

But, enter the 5th Circuit's analysis of the *Henry Schein, Inc.* carve-out provision. There, the analysis is similar to and language reminiscent of the Supreme Court's — but with bearings centered on the parties' contractual language, rather than the FAA's statutory language. To some extent, the 5th Circuit appears to leave the door cracked slightly for collateral litigation over threshold questions of arbitrability by suggesting that it *is narrowly* possible for a contract to subject certain threshold arbitrability questions to arbitration, while leaving others for courts. Given the inherent tension between the emphasis on the FAA on the one hand and contractual language on the other, the 5th Circuit's decision in *Jones v. Michaels Stores, Inc.*[48] sheds light on whether, and the extent to which, the 5th Circuit favors the latter. In the end, the policy of arbitration is supported.

In *Jones v. Michaels Stores, Inc.*, the 5th Circuit opined regarding the so-called "manifest disregard" standard. After arbitrators twice decided against plaintiff-appellant Tiffany Jones — the second time ruling that her claim was barred by *res judicata*, because it arose from the same transaction at issue in the first arbitration — Jones urged the district court to vacate the second arbitrator's decision, arguing that the arbitrator manifestly disregarded Louisiana law in finding her claims precluded.[49] Although the district court ultimately sided with Michaels, it "noted uncertainty about whether the manifest-disregard standard retains any role in determining whether an arbitration award should be vacated."[50] Thus, the 5th Circuit took the appeal as "an opportunity to emphasize [that] 'manifest disregard of the law as an independent, non-statutory ground for setting aside an award must be abandoned and rejected.'"[51] Ultimately affirming the district court's judgment, it repeatedly emphasized that "arbitration awards under the FAA may be vacated only for reasons provided in § 10 [of the FAA]."[52] Indeed, the 5th Circuit made clear that this principle even withstands contractual attempts to the contrary, reiterating that "an arbitration agreement could not establish a ground for vacatur or modification of an arbitration award apart from those listed in the [FAA]."

Although not breaking fresh jurisprudential ground, *Michaels Stores* nevertheless helps clarify that the 5th Circuit is unwilling to uphold a contractual provision that directly conflicts with the FAA. Read together with *Michaels Stores, Henry Schein, Inc.* suggests that lawyers drafting arbitration agreements including carve-out provisions should

be explicit as to precisely which questions of arbitrability are to be subject to arbitration.

## FOOTNOTES

1. *See* Henry Schein, Inc. v. Archer and White Sales, Inc., 141 S.Ct. 656 (2021).
2. *See* Henry Schein, Inc., 139 S.Ct. 524 (2019).
3. *See, e.g.,* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006); Oxford Health Plans LLC v. Sutter, 133 S.Ct. 2064 (2013); Rent-A-Center, West v. Jackson, 130 S.Ct. 2772 (2010); AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333 (2011); and Epic Systems Corp v. Lewis, 138 S.Ct. 1612 (2018). These decisions are of importance in Louisiana because the Louisiana Supreme Court has ruled that Louisiana courts are governed by them. *See, e.g.,* Aguillard v. Auction Management Corp., 908 So.2d 1, 40 (La. 2005), superseded by La. C.C.P. art. 2083, as amended by 2005 La. Acts, No. 205 § 1, effective Jan. 1, 2006, with respect to the right to interlocutory appeal (adopting the Supreme Court's interpretation of federal arbitration law and holding that a "strong presumption of arbitrability" exists in Louisiana).
4. Henry Schein Inc., 139 S.Ct. at 528 (emphasis added).
5. Archer & White Sales, Inc. v. Henry Schein, Inc., No. 2:12-CV-572-JRG, 2016 WL 7157421, at *1, *4 (E.D. Tex. Dec. 7, 2016), *aff'd*, 878 F.3d 488 (5 Cir. 2017), *vacated and remanded*, 139 S.Ct. 524 (2019), *aff'd*, 935 F.3d 274 (5 Cir. 2019), *cert. granted*, 141 S.Ct. 107 (2020), *cert. dismissed*, 141 S.Ct. 656 (2021).
6. *Id.*
7. *Id.* at *4
8. *Id.* at *6.
9. *Id.* at *9.
10. *Id.*
11. Archer & White Sales, Inc. v. Henry Schein, Inc., 878 F.3d 488 (5 Cir. 2017), *cert. granted*, 138 S.Ct. 2678, 201 L. Ed. 2d 1071 (2018), *vacated and remanded*, 139 S.Ct. 524 (2019), *cert. granted*, 141 S.Ct. 107 (2020), *cert. dismissed*, 141 S.Ct. 656 (2021).
12. Henry Schein, Inc., 139 S.Ct. at 528.
13. *Id.* at 531.
14. *Id.* at 528.
15. *Id.* at 527
16. *Id.* at 529.
17. *Id.* at 527.
18. *Id.* at 531.
19. 9 U.S.C § 2.
20. Henry Schein, Inc., 139 S.Ct. at 529.
21. *Id.* (citing Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 68-69 (2010)).
22. *Id.*
23. *Id.*
24. *Id.* (quoting AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649-650 (1986)).
25. *Id.* at 530.
26. *Id.*
27. *Id.*
28. *Id.* at 530-531.
29. *Id.* at 530.
30. *Id.*
31. *Id.* at 531.
32. Archer and White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274, 276 (5 Cir. 2019), *cert. granted*, 141 S.Ct. 107 (2020), *cert. dismissed*, 141 S.Ct. 656 (2021).
33. *Id.* at 277.
34. *Id.* at 279
35. *Id.* (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995)).
36. *Id.*
37. *Id.*
38. *Id.* (quoting Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5 Cir. 2012)).
39. *Id. See also* Crawford, 748 F.3d 249 (5 Cir. 2014).
40. Archer and White Sales, Inc., 935 F.3d at 280.
41. *Id.* The carve-out at issue in Crawford provided that "Arbitration shall be the exclusive and final remedy for any dispute between the parties . . . provided, however, that nothing in this provision shall prevent either party from seeking injunctive relief[.]"
42. *Id. See also* NASDAQ OMX Grp., Inc. v. UBS Securities, LLC, 770 F.3d 1010 (2 Cir. 2014).
43. Archer and White Sales, Inc., 935 F.3d at 281 (quoting NASDAQ OMX Grp., Inc., 770 F.3d at 1031)).
44. *Id.*
45. *Id.*
46. *Id.* at 282.
47. *Id.* at 283 (noting that defendants' arguments "find no footing within the four corners of the contract").
48. Jones v. Michaels Stores, Inc., 991 F.3d 614 (5 Cir. 2021).
49. *Id.* at 614.
50. *Id.*
51. *Id.* at 615.
52. *Id.* at 616 (quoting Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 349, 358 (5 Cir. 2009)).

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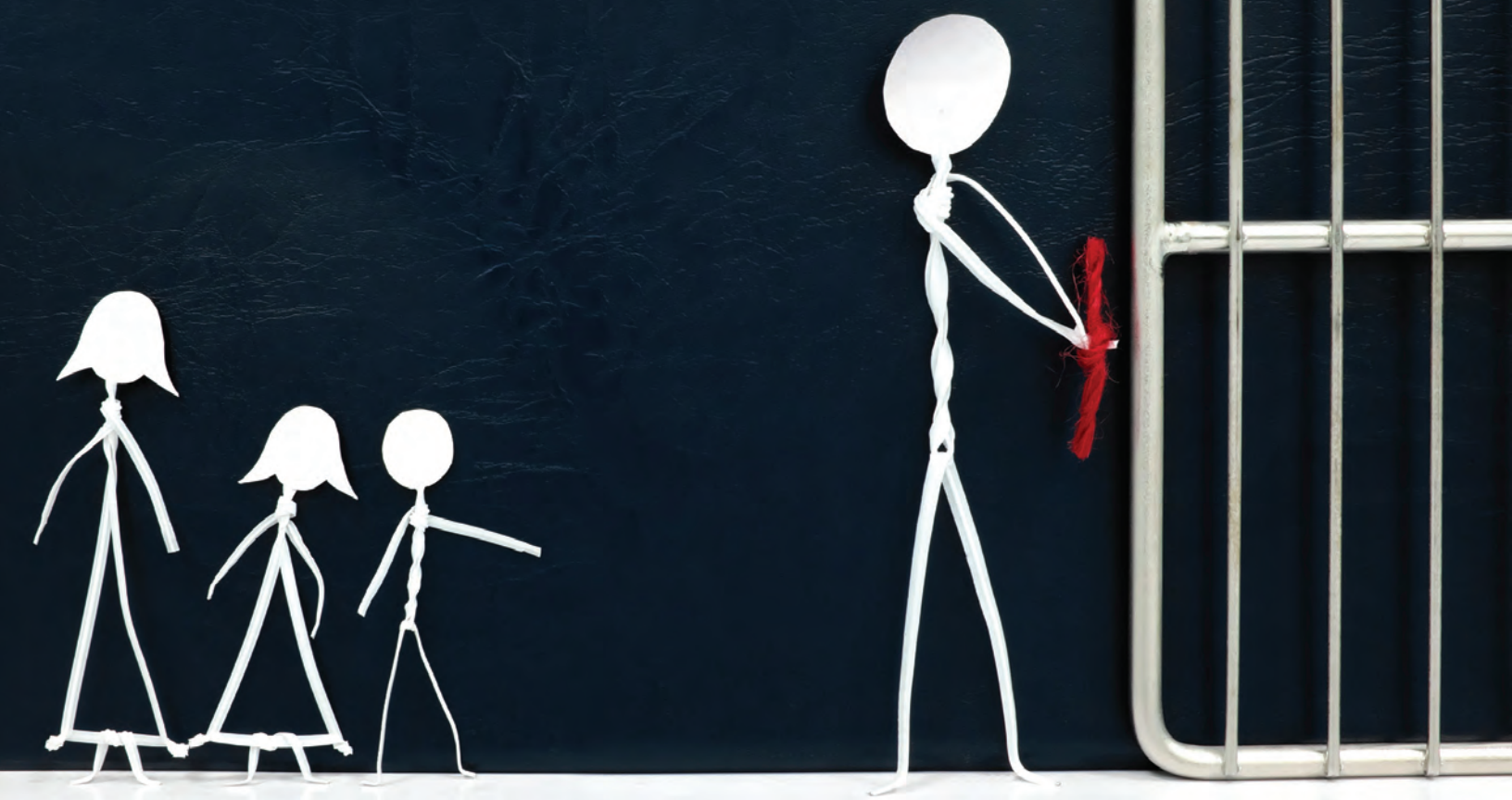
# Mediation BREAKS into Prison

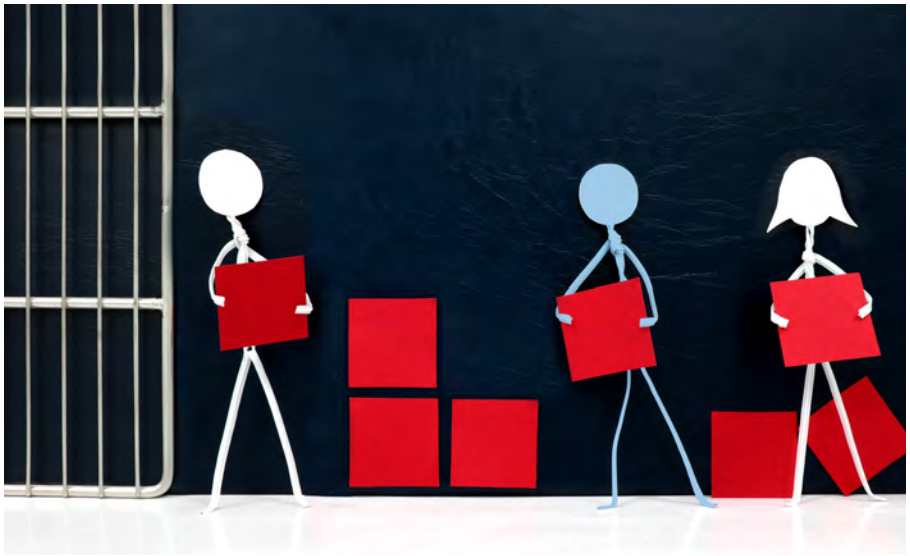
By Caroline A. Broussard and Justine M. Ware



Louisiana has some of the highest incarceration and recidivism rates in the United States. Alison McCrary, after obtaining her JD degree from Loyola University's College of Law in New Orleans, decided to use her background in social justice and mediation towards reducing this fact. McCrary created an organization with the goal of improving incarcerated persons' transition back into the home through mediation. She founded the Re-Entry Mediation Institute of Louisiana (REMILA) in 2018. REMILA seeks to decrease recidivism rates, improve a person's transition home from incarceration, and nurture sustainable support through positive relationships with loved ones.

Through REMILA, incarcerated persons have the opportunity to sit down prior to release from a correctional facility with family members and two mediators. During the mediation, the incarcerated person and his/her family will make a plan for a smooth re-entry. What makes this program unique to regular mediations is the nature of the mediator panel. Through REMILA, the role of the mediator is held by formerly incarcerated people and/or loved ones of presently or formerly incarcerated people. These mediators are given the necessary skills through a 50-hour training program, monthly training and an apprenticeship program.[1] Opening these positions to formerly incarcerated people provides an additional level of understanding to the mediations. Rebuilding relationships and resolving any remaining conflict are critical to a successful transition back into society and REMILA aids in facilitating this goal.[2]

Re-entry is the transition from life in incarceration to life in the community. Although re-entry may be inevitable, this does not mean that it will be successful.[3] Recidivism — the tendency to relapse into a previous mode of behavior, *especially* into criminal behavior — is an unfortunate and common result of re-entry. Individuals being released from prison are likely to face hardships after enduring the stress and isolation of a prison environment. Many have limited



job skills, addiction problems, strained relationships, and may have difficulty adjusting to cultural changes that have occurred during their time in correctional facilities.[4] Those reintegrating into society tend to lean on those around them for support. Unfortunately, if those familial and amical relationships are strained at the outset of re-entry, those crucial people in the reintegrating person's life may be unable to adequately aid them in re-entry.[5] These factors combined contribute to high recidivism rates in the United States.[6] In Louisiana, more than 18,000 people are released from the Department of Corrections (DOC) facilities each year. According to the DOC, 43% of those released return to prison within five years. This creates a cycle of incarceration and return to prison which REMILA seeks to decrease.[7]

Re-entry mediation is an attempt to break down these barriers in hopes of lowering the likelihood that the formerly incarcerated person recidivates. However, there is an additional hurdle that must be overcome to have a successful re-entry mediation. Often, incarcerated people may harbor negative feelings towards authority figures.[8] If the parties involved in mediation feel as though they cannot speak freely or are being judged, then the mediation is less likely to be effective. REMILA combats this by training formerly incarcerated people and others who will be mediators in re-entry mediations. The 50-hour training program teaches prospective mediators REMILA's model of mediation, how to mediate a case from start to finish, and how to handle existing and potential conflicts. The training program is an interactive program that utilizes role-playing to simulate the real-life situations the mediators will encounter. By encouraging people with conviction histories to apply to become a mediator through REMILA, the program is adding a level of understanding to re-entry mediations that has not previously been present.

The Community Mediation Maryland's Prison Re-Entry Mediation Program (CMM) is a comparative program to REMILA and has seen success thus far. This program facilitates re-entry mediations in a similar way to REMILA and also targets recruitment to those who have served time to ensure diversity among their mediators.[9] However, not all formerly incarcerated persons will be cleared to enter correctional facilities for the purposes of mediation depending on their conviction history. Regardless, these people will still be trained as mediators for mediations outside the facility.

In 2014, CMM hired Choice Research Associates, an independent evaluator, to evaluate the effectiveness of its re-entry program. Choice Research Associates found that the probability of re-arrest is reduced by 13%, and the probability of future conviction is reduced by 15% for those who participated in re-entry mediation compared to those who did not. Additionally, the research showed

that each additional individual mediation reduced the probability of re-arrest by 8%.[10] REMILA is also working in close partnership with Choice Research Associates as a third party to collect and analyze data and recidivism rates.

In 2013, CMM provided evaluation forms to participants in the re-entry program three months after its initial mediation with the program. Of the 96 participants, 80% agree they partake in creative problem solving when faced with a conflict. Significantly, these evaluations also showed that of the "inside" participants, meaning those who were incarcerated at the time of the mediation, 80% reported they felt they were more prepared to return home.[11] Given these results, it is clear that the CMM and REMILA Re-Entry Mediation Models are an effective tool for the individuals, their families and the community.

REMILA trained and hired its first group of system-impacted mediators in September 2021 through a 50-hour initial training and two-year performance-based evaluation apprenticeship program. It also launched its pilot project in Plaquemines Parish Detention Center, a maximum-security facility, in June 2021, to be followed by St. Tammany Parish jail. To get involved, support or learn more, go online to *www.reentrymediation.org*.

*The article was written under the supervision of Paul W. Breaux, Louisiana State University adjunct clinical professor and former chair of the Louisiana State Bar Association's Alternative Dispute Resolution Section.*

## FOOTNOTES

1. "About Re-Entry Mediation," *www.reentrymediation.org/about*.
2. Eric Mondesir, "Recidivism and Relationships," *www.reentrymediation.org/evaluation-and-data*.
3. Mondesir, *www.reentrymediation.org/evaluation-and-data*.
4. Lorig Charkoudian and Shawn Flower, "Prisoner Re-Entry Mediation," *Disp. Resol. Mag.*, at 14, 14 (2010).
5. Mondesir, *www.reentrymediation.org/evaluation-and-data*.
6. Nayely Esparza Flores, "Contributing Factors to Mass Incarceration and Recidivism," *Themis Rsch. J. Of Just. & Forensic Sci.*, Vol. 6, Article 4 at 56, 57 (2018).
7. Scott Peyton, "Employment and Second Chances in Louisiana," Right On Crime (April 17, 2019).
8. Shawn Anderson, "Ban the Box: Mediation's Place in Criminal Reentry and Employment Rights," 19 *Pepp. Disp. Resol. L.J.* 157, 166 (2019).
9. However, not all formerly incarcerated people will be cleared to enter correctional facilities for the purposes of mediation depending on their conviction history. Regardless, these people will still be trained as mediators for mediations outside the facility. *https://re-entrymediation.org/start-a-program/best-practices-sample-forms/.*
10. Shawn M. Flower, Community Mediation Maryland in-Depth Recidivism Report Analysis (Nov. 2014). *https://re-entrymediation.org/evaluation-results/.*
11. Flower, *https://re-entrymediation.org/evaluation-results/.*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# The Desegregation of Louisiana's Law Schools:

## A Slow and Tortuous 23-Year Journey

By Gail S. Stephenson

The desegregation of Louisiana's law schools took a slow and tortuous path that included the state establishing an all-Black law school at Southern University to keep Louisiana State University (LSU) all White, a litigant successfully taking a lawsuit to integrate LSU all the way to the U.S. Supreme Court but never attending a regular class, a World War II veteran and Xavier graduate pleading to receive a Catholic legal education in his home state but being rejected by Loyola, and two New Orleans federal judges deciding that Tulane could admit Blacks despite a provision in the act of donation of Paul Tulane, Tulane's original benefactor, that his gift was to be used to educate "white young persons." All four Louisiana law schools were finally desegregated in 1969 when Robert L. Comeaux, a White student, enrolled at Southern University Law Center (SULC).

## LSU

Most Louisianans know that Louisiana has two public law schools, LSU's Paul M. Hebert Law Center and SULC. Most don't realize, however, that SULC was created in 1947 to circumvent a court order that LSU admit a Black student, Charles Hatfield, to its law school. The creation of the new all-Black law school at Southern allowed LSU's regular law school classes to remain all-White until 1951.

Charles Hatfield, a graduate of Xavier University of Louisiana, applied for admission to LSU's law school on Jan. 10, 1946. Two weeks later, LSU's dean, Paul M. Hebert, wrote to Hatfield advising, "Louisiana State University does not admit colored students." Hebert directed Hatfield to apply to Southern University, Louisiana's Black land grant college. But there was just one problem with Hebert's advice. Although the 1880 legislative act that created Southern University permitted Southern to open both a law school and a medical school, Southern had neither when Hatfield applied to LSU.[1]

Hatfield, represented by Thurgood Marshall and the only three Black attorneys in Louisiana,[2] filed a state court mandamus action on Oct. 10, 1946, seeking admission to LSU law school. The court granted the writ of mandamus on Oct. 19, 1946, ordering LSU to admit Hatfield for the 1946-1947 term.[3] The victory was short-lived, however. Three days after the mandamus was granted, the Louisiana Board of Education, in emergency session, agreed to open a law school at Southern.

In January 1947, the Board of Education approved the plans for the law school, and, in April 1947, the trial court dismissed Hatfield's case on the ground that Hatfield should have sought a mandamus against Southern University rather than LSU.[4] The state appropriated $40,000 for Southern's law school, which opened in September 1947 on the second floor of the university library with four full-time faculty members and 13 students.[5]

Charles Hatfield was not among them. After he sued to be admitted to LSU, Hatfield received threatening telephone calls, was cursed and threatened on his job as a mail carrier, and was almost lured to his death down an elevator shaft. He moved to Atlanta to pursue a master's degree in sociology and eventually became a teacher and labor activist in New Orleans.[6]

Three years after the state created an allegedly "separate but equal" law school at Southern, Thurgood Marshall and Louisiana attorney A.P. Tureaud returned to court in Louisiana, this time bringing a class action in federal court.[7] Roy S. Wilson applied to LSU for admission for the 1950-1951 academic year.[8] LSU dealt with what it referred to as "the Negro problem"[9] by advising Wilson "by letter that the State of Louisiana maintains separate schools for its white and colored students and that Louisiana State University does not admit colored students."[10]

Trial testimony focused on comparing LSU's law school with that of Southern. The court compared the value of the physical plant at LSU (almost $35,000,000) to that of Southern (approximately $2,500,000); the years in operation (91 for LSU, three for Southern's law school); and the accreditations (LSU was "accredited by every recognized accrediting agency in the country" while Southern was accredited by no one).[11] Thus, the court found "the Law School of Southern University does not afford to plaintiff educational advantages equal or substantially equal to those that he would receive if admitted to" LSU.[12] Citing four Supreme Court cases on desegregation of higher education — *Sipuel, Gaines, Sweatt* and *McLaurin*[13] — the court granted the injunction against LSU and declared that Wilson "and all others similarly qualified and situated are entitled to" enroll at LSU.[14] LSU appealed to the Supreme Court, but the judgment was affirmed in a one-sentence per curium with citations to *Sweatt* and *McLaurin*.[15]

LSU's response to the loss in court was to have the dean and director of student life investigate Wilson's "character."[16] They discovered, among other things, that he had received psychiatric treatment while in the military during the Korean War and received a Section 8 discharge from the U.S. Army.[17] Wilson had enrolled in LSU conditionally on Nov. 1, 1950. He withdrew on Jan. 17, 1951, stating he knew the law school would reject him due to the investigation.

For the fall semester of 1951, three qualified Black students — Pierre S. Charles, Robert F. Collins and Ernest N. Morial — applied to LSU. "[M]ore thorough investigations of the character references for the black students w[ere] made than in the normal case," but nothing untoward was discovered. LSU President Troy Middleton sent the dean a note stating that if an applicant met the standards required of White students, "I see nothing that we can do but to accept him into the law school."[18] Charles resigned after the first semester, but Collins and Morial both graduated in 1954. Despite the court decision, LSU did not change its admissions policy of excluding Blacks.[19] No other Black students graduated from LSU's law school until 1969, when Bernette Joshua (now Johnson) and Gammiel B. Gray became the first Black females to graduate from LSU.[20] In 1978, Collins became Louisiana's first Black federal judge and Morial became the first Black mayor of New Orleans. In 2013, Johnson became the first Black chief justice of the Louisiana Supreme Court.

## Loyola

Although Louisiana law never required racial segregation at private educational institutions, Loyola's law school remained segregated until 1952.[21] The Board that controlled Loyola, which was composed of Jesuits, resisted integration in the 1940s out of fear that admitting Black students "would be the ruination" of the university.[22] But two Jesuits who joined Loyola's faculty in 1947, the Reverend Joseph S. Fichter, a sociology professor, and the Reverend Louis S. Twomey, the head of Loyola's Institute of Industrial Relations, had a different idea. Twomey became the law school's regent in 1948, and he and Fichter aggressively pushed for integration of the law school.[23] Loyola's president responded, however, that admitting a Black student would "destroy [ ] the only Catholic law school in the entire south" because "a vast majority of the students would depart from the school and go to Tulane or LSU."[24] Twomey succeeded, however, in quietly enrolling Black students in Tulane's Institute of Industrial Relations, a non-degree program, as well as three Black nuns in a Saturday teacher certification program and one Black student in the undergrad school's evening division.[25]

In 1951, Richard Gumbel applied to Loyola's law school. Six days later, his application was denied due to his race. In his appeal to Loyola's president, Gumbel explained that, after serving in the armed forces during World War II, he had secured employment in New Orleans, earned a degree at Xavier, bought a home for his family, and now wanted to further his Catholic education by earning a law degree at Loyola. Previously Loyola had recommended qualified Black applicants to Georgetown, but Gumbel pleaded that he not be forced to "leave the place of my birth, my parents, my wife's parents, my home, and my community in order to get what can be secured here at home." His plea fell on deaf ears, however. Twomey recommended Gumbel to Georgetown, where Gumbel pursued his legal education.[26]

In January1952, a committee was appointed to discuss the matter of desegregation and formulate policy. As the committee worked, Father Twomey urged the dean and president to admit Norman Francis, a Xavier honor graduate. He pointed out that 16 southern law schools, public and private, now admitted Blacks; that the potential existed for embarrassing litigation regarding discrimination because Loyola accepted tax exemptions; and that a report by the American Association of Law Schools stated that no problems had arisen when other schools had desegregated. In August 1952, the law school admitted Francis, along with Benjamin Johnson in the day program, and Elliott Keyes and Pierre Charles in the evening program. The Black students were well received by the student body, which included Moon Landrieu and Pascal Calogero.[27] Francis graduated in 1955, eventually became president of Xavier University; he served in that position for 47 years.

## Tulane

In 1884, Paul Tulane agreed to donate about a million dollars in property to the University of Louisiana, an existing state university in New Orleans, in exchange for a full tax exemption and full control by a private governing board that included three government officials — the governor, the state superintendent of education and the mayor of New Orleans.[28] The name of the school was changed to the Tulane University of Louisiana,[29] becoming what one commentator called a "strange hybrid creation."[30] The act of donation provided that the funds were to be used for the education of the "white young persons in the city of New Orleans . . . ."[31]

After the Supreme Court's 1954 decision in *Brown v. Board of Education*, some of the faculty joined groups working toward integration of the university, while others opposed it.[32] Eventually, in 1961, Tulane's Board voted to issue a statement that it "would admit qualified students regardless of race or color if it were legally permissible."[33] When Pearlie Hardin Elloie and Barbara Marie Guillory applied for admission to the school of social work and the graduate school, respectively, they were advised that they met the qualifications but could not be admitted due to the legal impediments.[34]

John Pettit (Jack) Nelson took on the case for Elloie and Guillory in the U.S. District Court for the Eastern District in New Orleans. Nelson argued that, because Tulane had received property from the University of Louisiana, had three public officials on its board, had received a tax exemption from the state, and had accepted government money in support of the institution, it was bound by the Fourteenth Amendment and could not discriminate.[35] The Tulane Board employed Wood Brown III and John Pat Little to defend it. They argued Tulane was a private institution that was "free to discriminate in admissions as it chooses."[36] Judge J. Skelly Wright, a Loyola graduate, granted summary judgment in favor of the plaintiffs, holding that "the present involvement of the state [wa]s sufficient to subject Tulane to the constitutional restraints on governmental action."[37] Thus, Tulane could not discriminate in admissions on the basis of race.[38]

Soon after he rendered summary judgment, Judge Wright was elevated to the D.C. Circuit Court of Appeals, and the case was reassigned to Judge Frank Ellis.[39] Tulane applied for a stay and a new hearing, which Judge Ellis granted and the Fifth Circuit upheld.[40] After a full hearing, Judge Ellis held that state involvement with Tulane was not so significant that the Fourteenth Amendment was applicable, and thus the plaintiffs were not entitled to relief. But the court further held that no court could enforce racial restrictions in private covenants. Thus, Tulane was free to admit Black students.[41]

The Tulane Board voted in December 1962 to admit Black students beginning with the February 1963 term.[42] Enrollment of Black students at Tulane's law school proceeded slowly, however. Michael Starks became Tulane's first Black law graduate in 1968, followed by Janice Martin Foster in 1970. Twelve more Black students graduated from Tulane by 1975, including Wayne Lee, the Louisiana State Bar Association's first Black president; Michael G.

Bagneris, who served on the bench of the Orleans Parish Civil District Court for 20 years until his retirement in 2013; and Ulysses Gene Thibodeaux, who served on the Louisiana Third Circuit Court of Appeal for 28 years, retiring as Chief Judge in 2020.[43]

## Southern

The final step in the desegregation of Louisiana's law schools was the enrollment of White students at SULC. Although its formal mission in 1947 was "the training of qualified men and women for the practice of law in Louisiana where the civil law system prevails," one of SULC's first faculty members and its second dean, Vanue B. Lacour, saw SULC's mission as similar to Howard University's: "to train [B] lack lawyers who would fight injustice and racism in the South."[44]

While Blacks were struggling to enter the three predominantly White law schools, Southern remained all-Black until 1969. Freddie Pitcher, Jr., retired judge and former chancellor of SULC, recalled that two White students were matriculating at SULC when he enrolled in 1970. One of these was Robert L. Comeaux, who graduated in 1972, becoming SULC's first White graduate.[45] Pitcher stated that the Black students welcomed the White students. Eugene Cicardo, Sr. enrolled at SULC the semester after Pitcher, graduating in 1973.[46] He became president of the Alexandria Bar Association, and at least six family members followed him to SULC, becoming "legacy graduates."[47] By 1984, SULC's mission statement had changed to providing "sound scholarship and opportunity for all persons interested in careers in the field of law . . . to students of varied backgrounds."[48] According to required disclosures filed with the American Bar Association in 2020, today SULC's enrollment is 40% non-Black.[49]

In a state where judges are elected, matriculation in a more diverse educational atmosphere may be beneficial to law students, both Black and White, whose ambition is to serve on the bench. As of Jan. 1, 2021, more Louisiana district court judges are SULC graduates than from any other law school. Seventy-one of Louisiana's district judges (33%) and 10 of its intermediate appellate judges (19%) are SULC graduates.[50]

## FOOTNOTES

1. *See* Evelyn L. Wilson, "Access to Justice: Charles Hatfield," 50 La. B.J. 114, 114 (2002); Rachel L. Emanuel & Carla Ball, Southern University Law Center 14 (2018).
2. Emanuel & Ball, *supra* note 1, at 14-15. The three attorneys licensed to practice law in Louisiana in 1946 were Joseph Antonio Thornton, Alexander Pierre Tureaud and Louis Berry, all of whom graduated from Howard University's law school. Wilson, *supra* note 1, at 115.
3. Evelyn L. Wilson, *Laws, Customs and Rights: Charles Hatfield and His Family* 100, 107, 129 (2004).
4. Wilson, *supra* note 3, at 116, 145-46; Emanuel & Ball, *supra* note 1, at 14.
5. Emanuel & Ball, *supra* note 1, at 17; Wilson, *supra* note 1, at 117. As none of the full-time faculty members were trained in civil law, professors from LSU came to Southern to teach the civil law classes to the students during the day and to the professors in the evening. Russell L. Jones, "African American Legal Pioneers: A Biography of Vanue B. LaCour 'A Social Engineer'," 23 S.U. L. Rev. 63, 72 (1995).
6. Wilson, *supra* note 1, at 117.
7. Wilson v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll., 92 F. Supp. 986 (E.D. La. 1950), *aff'd*, 340 U.S. 909 (1951).
8. Wilson, 92 F. Supp. at 987.
9. W. Lee Hargrave, *LSU Law: The Louisiana State University Law School from 1906 to 1977*, at 122 (2004).
10. Wilson, 92 F. Supp. at 987.
11. *Id.* at 988. Southern now has all the same accreditations as LSU.
12. *Id.*
13. Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631, 632 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 352 (1938); Sweatt v. Painter, 339 U.S. 629 (1946); McLaurin v. Okla. St. Regents for Higher Educ., 339 U.S. 637, 640 (1950).
14. Wilson, 92 F. Supp. at 988-89.
15. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll. v. Wilson, 340 U.S. 909 (1951).
16. Sharlene Sinegal-Decuir, "Opening the Doors: The Struggle to Desegregate LSU Law School," Around the Bar (Feb. 2017), at 10, 11; Hargrave, *supra* note 9, at 151-52.
17. "Roy Wilson Resigns from L.S.U.," Daily World (Opelousas, La.), Jan. 18, 1951, at 14.
18. Hargrave, *supra* note 9, at 151-53.
19. Darrell K. Hickman, "Realizing the Dream: United States v. State of Louisiana," 50 La. L. Rev. 583, 584-85 (1990).
20. Hargrave, *supra* note 9, at 153.
21. Maria Isabel Medina, *Loyola University New Orleans College of Law: A History* 66 (2016).
22. *Id.* at 69.
23. *Id.*
24. *Id.* at 70.
25. *Id.* at 72.
26. *Id.* at 76-77.
27. *Id.* at 81-83.
28. *See* Guillory v. Admins. of Tulane Univ. of La., 203 F. Supp. 855, 860-61 (1961). The agreement, of course, was much more complex than this.
29. *Id.* at 861.
30. Cheryl V. Cunningham, The Desegregation of Tulane University 43 (Dec. 1982) (M.A. thesis, University of New Orleans), *www.tulanelink.com/PDF/desegregation2.pdf*.
31. Paul P. Dyer, *Tulane: The Biography of a University* 12 (1966).
32. *Id.* at 287.
33. *Id.*
34. *Id.* at 287-88.
35. *Id.* at 288.
36. Guillory, 203 F. Supp. at 858.
37. *Id.* at 863.
38. *Id.* at 864.
39. Dyer, *supra* note 31 at 288.
40. Guillory v. Admins. of Tulane Univ. of La., 306 F.2d 489 (5 Cir. 1962).
41. Guillory v. Admins. of Tulane Univ. of La., 212 F. Supp. 674, 687 (1962).
42. Cunningham, *supra* note 30 at 98.
43. Karen Wells Roby, "Celebrating Diversity in Law: Tulane Law School," 67 La. B.J. 20, 20-21 (2019).
44. Clyde C. Tidwell, *A History of Southern University School of Law* 4 (1997).
45. Emanuel & Ball, *supra* note 1, at 81,
46. *Id.*
47. *Id.* at 87.
48. Tidwell, *supra* note 44 at 53.
49. See, *www.sulc.edu/assets/sulc/ABADisclosures/509-Report---2020.pdf*.
50. *See, www.sulc.edu/news/4466*, "Did You Know? SULC leads Louisiana in district judicial representation." Seventy-one of 214 Louisiana district judges and 10 of 53 Louisiana intermediate appellate judges graduated from Southern University Law Center. By comparison, 69 of the district judges are LSU alums, 46 are Loyola alums, 14 are Tulane alums, and the rest graduated from out-of-state schools.

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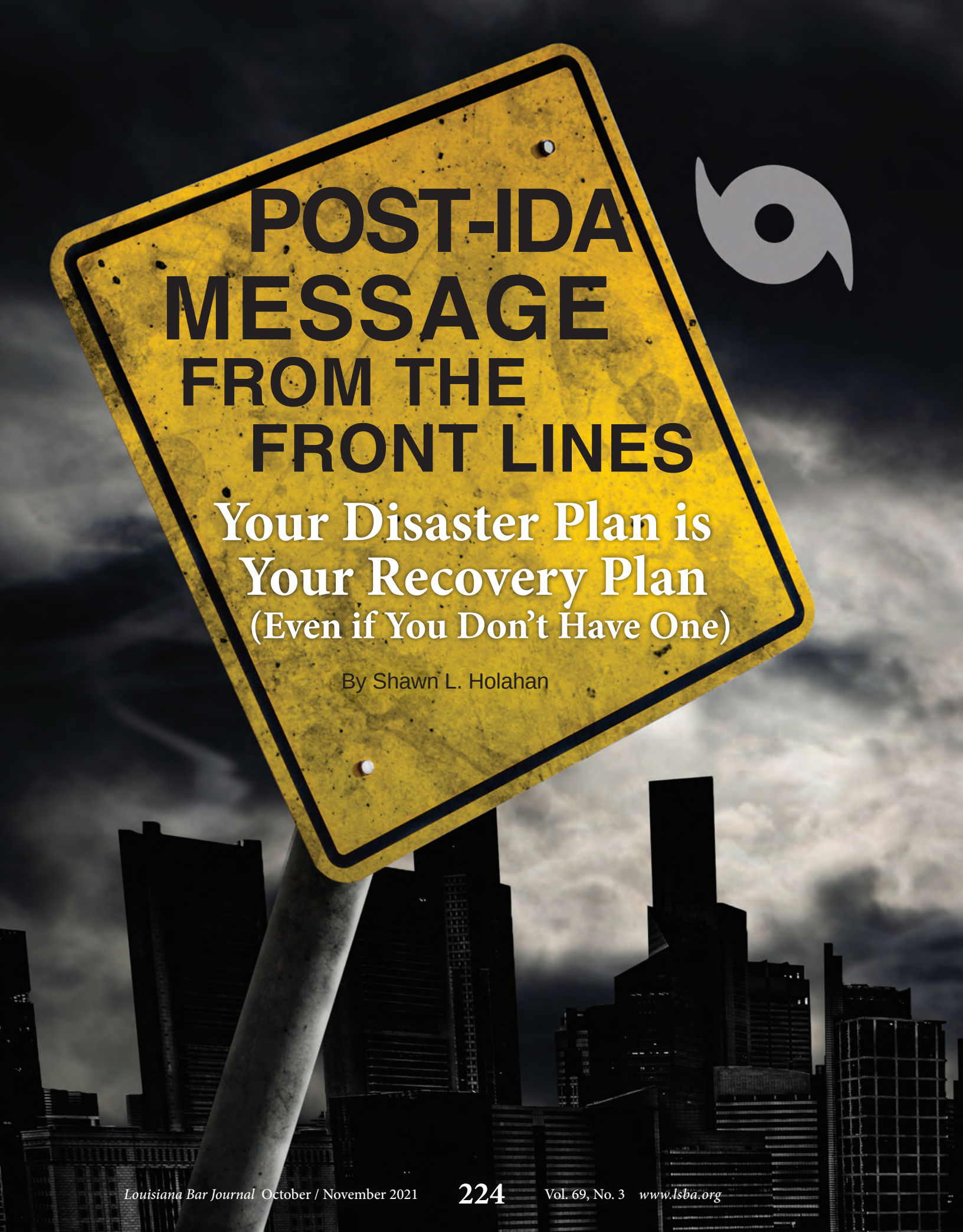

# POST-IDA MESSAGE FROM THE FRONT LINES

## Your Disaster Plan is Your Recovery Plan (Even if You Don't Have One)

By Shawn L. Holahan

Feeling "resilient" yet? Do terms like "spaghetti maps" and "feeder bands" cause uncomfortable visceral reactions? How about new vocabulary Ida words like "electrical nodes" or "nurdle spill?" (Google it.) If that's not bad enough, pre-existing, slower-moving disaster terms like COVID, boosters and masks still get bandied about. I get it. Whatever the response, consider that, by and large, you might be having *reasonable* reactions to *extraordinary* circumstances.

B R E A T H E .

Meanwhile, recovery is just beginning and you have to get back to work. Be advised that disasters do not suspend our obligations as lawyers under the Code of Professional Conduct.

But, do you know where to start? How do you pierce the disaster mental fog?

Start with a review of your disaster plan, and query as to what worked and what didn't. Even if you lacked a cogent disaster plan, it's not too late to create one because, in doing so, it will guide the way to recovery. Refer to the Louisiana State Bar Association's online publication and its extensive checklist, *Disaster Planning: It's Not Just for Hurricanes. Are You Ready?* Go to: *www.lsba.org/documents/DR/LSBADISASTERHANDBOOK.pdf.*

For additional disaster resources, check out the webpage, LSBA's Disaster Response for Attorneys, at *www.lsba.org/DR/*. Also review the LSBA YLD's Tips & Resources for Dealing With a Disaster, *www.lsba.org/documents/News/LSBANews/DisasterTipsWorksheet.pdf.*

Here are some immediate steps to implement:

**Step 1: Take care of yourself and your family.**

If your family and loved ones are not safe or are in need, you will not be useful to your firm, your staff or your clients. Encourage partners and staff to take care of their own families as well.

Keep a level head. Everything goes wrong all at once during a disaster, if it is big enough, and everyone will be at wit's end. Triage your issues and resolve the one having the biggest impact.

If feeling overwhelmed (*who isn't*?), know that it's ok to seek support, including counseling options. Accept help gracefully.

**Step 2: Establish communication with your staff, clients, opponents and the court.**

Communication is often the first to go in a disaster. Use all communication tools early and often. Do not assume the communication issues that your target audience is having. Be prepared to send the same message different ways to optimize the chances that your intended recipient will receive it.

Accomplish this by being able, or having someone on staff able, to post remotely critical firm information on your firm website, in an email, or on posts in Facebook, Twitter, LinkedIn, Instagram and/or other social media. Create a simple post-disaster default message for these sites that informs staff, client and opponents how to reach you. Think about a possible video message that you can upload onto a social media site.

As to your clients, check in with them. It is critically important that you reassure them that their matters are being handled competently, and that you are available to answer their questions. Be able to inform them of delays and any new deadlines. Call your clients, if you can, and let them hear your voice. Be patient. Seek help from colleagues, if necessary.

Reach out to opponents and let them know how to contact you.

If you have staff, find them and update any contact information. Establish a daily schedule to communicate with them during recovery.

Court systems will be affected in different ways. Consult the particular court's website for the latest information regarding how the court is conducting business, post-disaster. Continue to check the websites for updated information as recovery ensues. Be aware of deadlines and prescriptive dates that may have been affected by the disaster. Enter these changes into your calendars.

Use teleconferencing, where available, to keep communication lines open.

**Step 3: Assess home and office damages.**

Start the arduous claims process by contacting insurer(s), FEMA and/or Small Business Administration, and file for appropriate relief. The sooner you start this process, the sooner relief comes.

Gather proof. Take photos of your damage (including drone photos of your roof). You get a gold star if you have photos of your property pre-disaster. If you have business interruption coverage, assemble the documentation necessary to prove your claim.

Whatever the claim, muscle up the self-discipline to treat each claim like a client matter. Open a file and organize your relevant documents. Digitize your documents so they are easily retrievable. Memorialize relevant verbal conversations with adjustors, inspectors, contractors, etc. through emails to yourself and/or to the person to whom you spoke. Create a file for contact information for relevant individuals pertinent to each claim. Keep a chronology of relevant events.

**Step 4: Ensure that client files and information are secure.**

Assess each client's file to determine status and whether the file, digital or paper, is intact. Replace missing parts, if you can. If you haven't started scanning file materials, now would be a good time to start. A desktop scanner is not expensive and will be an enormous help to reduce the amount of paper and keep you organized.

Cloud-based solutions for the storage of client files are the best way to go. The use of servers can pose issues if that server is kept in an area that is susceptible to the disaster. Investigate cloud-based options to store data and documents. There are many options at a range of prices.

**Step 5: Refrain from the tendency to try and solve all issues at once.**

Consider disaster recovery as a marathon, not as a sprint. It is the safer, more effective, approach.

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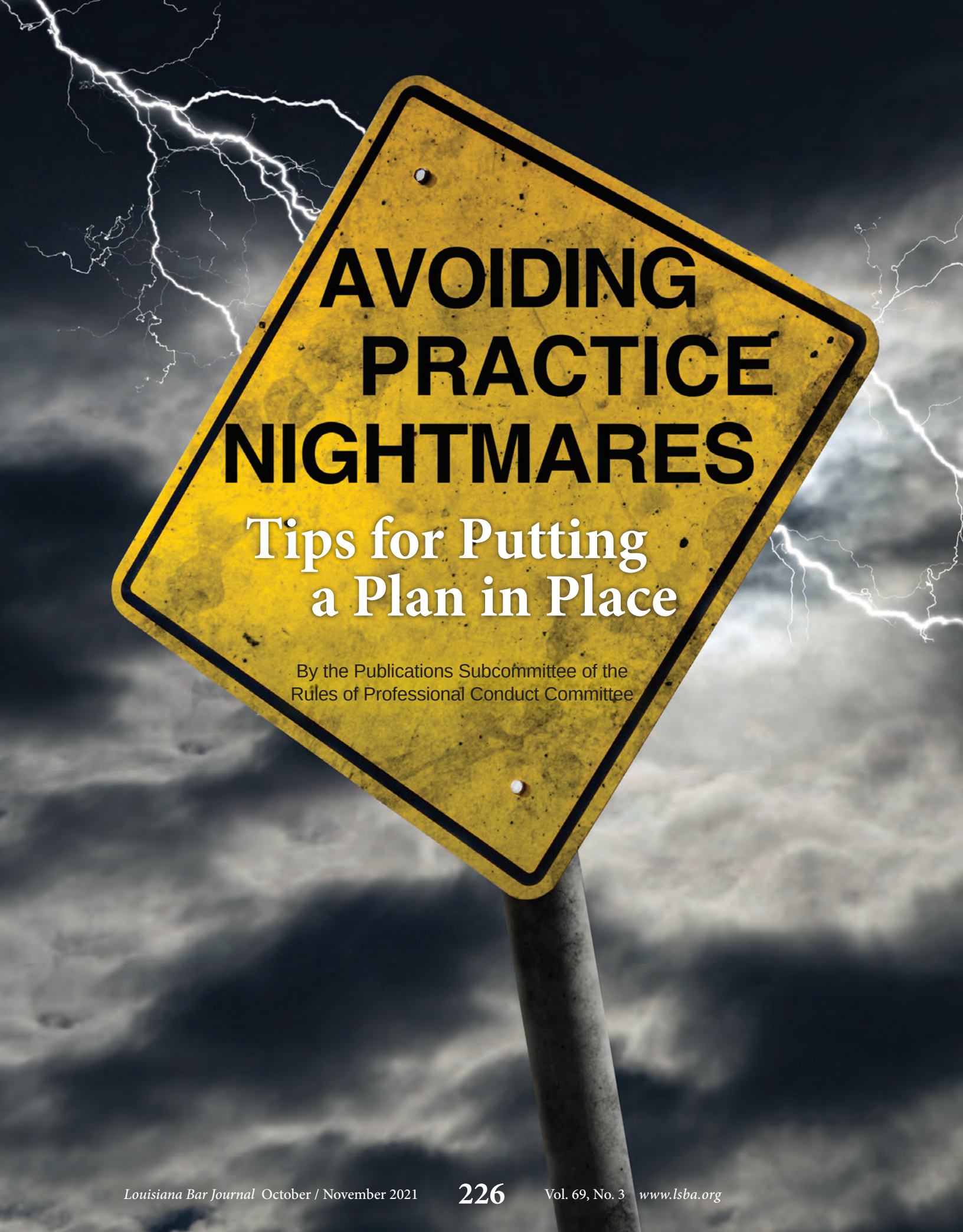


# Tips for Putting a Plan in Place

By the Publications Subcommittee of the
Rules of Professional Conduct Committee

What if there is a natural disaster or tragedy? What happens when a lawyer's ability to practice law is impacted? Maybe a lawyer gets into an accident or becomes sick. No one wants to contemplate awful scenarios, but what happens to a lawyer's clients when he or she is temporarily incapacitated or dies?

Do you have a plan in place? Can a partner or "back up counsel" access a client's file or funds in your trust account? What court or other deadlines are critical? Who assists your clients and family?

Pursuant to Louisiana Rules of Professional Conduct 1.1(a),[1] 1.3,[2] 1.4[3] and 1.16(a)(2),[4] lawyers have an ethical obligation to their clients to plan for these situations.

American Bar Association Formal Opinion 482[5] expounds on a lawyer's ethical duties related to disasters. In that opinion, it is suggested that:

*Lawyers have an ethical obligation to implement reasonable measures to safeguard property and funds they hold for clients or third parties, prepare for business interruption, and keep clients informed about how to contact the lawyers (or their successor counsel).*

A failure to plan could create potential malpractice exposure, disciplinary issues or a claim against a deceased lawyer's estate.

No one likes to think about what might happen if they get sick or die. A smooth law firm transition, whether temporary or permanent due to voluntary considerations like retirement or a new job or involuntary issues such as illness, death or discipline, is **a lawyer's responsibility**.

Where can a lawyer find information about drafting a plan to prepare for these nightmare situations or eventual retirement? Go to the Louisiana State Bar Association's website and review the e-book, *Practice Transition Handbook: Shutting Down a Law Practice in Louisiana*, at *www.lsba.org/PracticeManagement/ClosingPractice.aspx*.

## Select a "Back Up Lawyer" and Draft a Plan

Here are a few things to consider:

► You need a "back up lawyer" with emergency access to passwords, calendars and accounts. Access to client files and funds is critical.

Have you considered potential conflicts? Notice should be provided to clients and financial institutions. What is expected from the "back up lawyer?" The simplest plan is for the "back up lawyer" to inventory the files and advise clients to hire a new lawyer to complete the case. Sometimes the "back up lawyer" might have to take emergency action such as seeking a continuance.

► Is your practice organized in a way that someone else can step in on short notice? Do you have a law office procedures manual? Keep clear, understandable and accessible records. Financial clarity with the practice expenses as well as regular reconciliation of the trust account as required by Rule 1.15[6] will assist with any transition.

Is the scope of the representation and attorney fees clear from client contracts or engagement letters? Who do funds in the operating and trust accounts belong to? What bills and checks do you have that are outstanding? Good record keeping will assist with any transition situation whether temporary or permanent.

► Have a method of distinguishing active files and important deadlines.

Are the files in your office open or closed? Do you have a digital or paper calendar? Who has access to your schedule and files? If available, name a key staff contact person.

► Have a file retention/destruction policy.

What happens to client files? See LSBA Public Ethics Opinion 06-RPCC-08,[7] Client File Retention.

To act with competence and diligence, lawyers need a transition plan for their practice. Failure to have a plan in place may put clients, the firm and/or a lawyer's estate at risk.

Do not impose these burdens on your family. No matter how uncomfortable it is to contemplate these nightmare situations, strongly consider drafting your transition plan for your practice and (if you have not done so) prepare a last will and testament incorporating those provisions especially if you are a solo practitioner.

If you have questions about preparing a transition plan, consider reaching out to the Louisiana State Bar Association's Ethics Advisory Service[8] for assistance.

## FOOTNOTES

1. Louisiana Rule of Professional Conduct 1.1(a) regarding competence states: *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*

2. Louisiana Rule of Professional Conduct 1.3 states: *A lawyer shall act with reasonable diligence and promptness in representing a client.*

3. Louisiana Rule of Professional Conduct 1.4 states: *(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; . . . .*

4. Louisiana Rule of Professional Conduct 1.16(a)(2) states: *(a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; . . . .*

5. 2018 ABA Formal Opinion 482, Ethical Obligations Related to Disasters.

6. Louisiana Rule of Professional Conduct 1.15(f) in pertinent part states: *. . . A lawyer shall subject all client trust accounts to a reconciliation process at least quarterly, and shall maintain records of the reconciliation as mandated by this rule.*

7. Louisiana State Bar Association Public Ethics Opinion, *www.lsba.org/documents/Ethics/06LSBARPCC008.pdf.*

8. Ethics Counsel can be reached *www.lsba.org* or (504)566-1600.

# Elections: Self-Qualifying Deadline is Oct. 18; Voting Begins Nov. 15

Several leadership positions are open in the 2021-22 Louisiana State Bar Association (LSBA) election cycle. Balloting will be conducted electronically only, as approved by the LSBA Board of Governors and provided for in the Association's Articles of Incorporation. No paper ballots will be provided.

Deadline for return of nominations by petition and qualification forms is Monday, Oct. 18. First election ballots will be available to members on Monday, Nov. 15. Deadline for electronically casting votes is Monday, Dec. 13.

Shayna L. Sonnier of Lake Charles has been nominated for 2022-23 LSBA president-elect. (The president-elect will automatically assume the presidency in 2023-24.)

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

Lawrence J. Centola III of New Orleans has been nominated for 2022-24 LSBA treasurer.

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

The Young Lawyers Division (YLD) Council nominated Kristen D. Amond of New Orleans for 2022-23 YLD secretary. Current Secretary Senae D. Hall of Shreveport will automatically assume the post of 2022-23 YLD chair-elect.

## Other Positions Open

Other positions to be filled in the 2021-22 elections are:

**Board of Governors** (three-year terms beginning at the adjournment of the 2022 LSBA Annual Meeting and ending at the adjournment of the 2025 LSBA Annual Meeting) — one member each from the First, Fourth and Fifth Board Districts.

**LSBA House of Delegates** (two-year terms beginning at the commencement of the 2022 LSBA Annual Meeting and ending at the commencement of the 2024 LSBA Annual Meeting) — one delegate from each of the First through Nineteenth Judicial Districts, plus one additional delegate for every additional district judge in each district.

**Nominating Committee** (15 members, one-year terms beginning at the adjournment of the 2022 LSBA Annual Meeting and ending at the adjournment of the 2023 LSBA Annual Meeting) — District 1A, Orleans Parish, four members; District 1B, parishes of Plaquemines, St. Bernard and St. Tammany, one member; District 2A, East Baton Rouge Parish, two members; District 2B, Jefferson Parish, two members; District 2C, parishes of Ascension, Assumption, East Feliciana, Iberville, Lafourche, Livingston, Pointe Coupee, St. Charles, St. Helena, St. James, St. John the Baptist, Tangipahoa, Terrebonne, Washington, West Baton Rouge and West Feliciana, one member; District 3A, Lafayette Parish, one member; District 3B, parishes of Acadia, Beauregard, Calcasieu, Cameron, Iberia, Jefferson Davis, St. Martin, St. Mary and Vermilion, one member; District 3C, parishes of Allen, Avoyelles, Evangeline, Grant, LaSalle, Natchitoches, Rapides, Sabine, St. Landry and Vernon, one member; District 3D, parishes of Bossier and Caddo, one member; and District 3E, parishes of Bienville, Caldwell, Catahoula, Claiborne, Concordia, DeSoto, East Carroll, Franklin, Jackson, Lincoln, Madison, Morehouse, Ouachita, Red River, Richland, Tensas, Union, Webster, West Carroll and Winn, one member.

**Young Lawyers Division Secretary** (2022-23 term), nominee **shall** be a resident of or actively practicing law in the parishes of Orleans, Jefferson, St. Bernard or Plaquemines, based on preferred mailing address. Petitions for nomination must be signed by 15 members of the Young Lawyers Division. Also to be elected, one representative each from the First, Second, Third, Fifth and Seventh districts (two-year terms).

**American Bar Association House of Delegates** *(must be members of the American Bar Association)* – Two (2) delegates from the membership at large and one (1) delegate from that portion of the membership not having reached their 36th birthday by September 1, 2022, that delegate being the "Young Lawyer Delegate," all as required by the rules of the American Bar Association.

All LSBA members may vote for both sets of candidates. The delegates shall serve terms of two years, beginning with the adjournment of the 2022 Annual Meeting of the American Bar Association and expiring at the adjournment of the 2024 Annual Meeting of the American Bar Association, all as provided in Paragraph 6.4(e) of the ABA Constitution. For more information on the election procedures and the schedule, go to: *www.lsba.org/goto/elections*.

# House Resolution Deadline is Dec. 15 for 2022 Midyear Meeting

The Louisiana State Bar Association's (LSBA) Midyear Meeting is scheduled for Thursday through Saturday, Jan. 20-22, 2022, at the Renaissance Hotel in Baton Rouge. The deadline for submitting resolutions for the House of Delegates meeting is Wednesday, Dec. 15. (The House will meet on Jan. 22, 2022.)

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

**Kelly M. Rabalais, center, received the 2021 Stephen T. Victory Memorial Award at the August meeting of the *Louisiana Bar Journal* Editorial Board. The award recognizes the author of the most outstanding article published during the past *Journal* volume year. Rabalais' article discussed "Women in Leadership and the 100th Anniversary of the 19th Amendment." Presenting the award were 2020-21 Louisiana State Bar Association (LSBA) President Alainna R. Mire (who was profiled in the article) and 2019-21 LSBA Secretary Patrick A. Talley, Jr. (who selected Rabalais for the award).** *Photo by Barbara D. Baldwin.*

# LBLS Recertification Applications Mailed on Oct. 1

The Louisiana Board of Legal Specialization mailed recertification applications to specialists whose certification is due to expire on Dec. 31, 2021. The completed application, together with a check payable to the "Louisiana Board of Legal Specialization" for $100, should be mailed or delivered to the LBLS office c/o Specialization Director Mary Ann Wegmann, 601 St. Charles Ave., New Orleans, LA 70130, no later than Tuesday, Nov. 2, 2021, to avoid penalties. For more information, contact Wegmann at (504)619-0128 or email maryann.wegmann@lsba.org.

**The law firm of Simon, Peragine, Smith & Redfearn, LLP, hosted the first Free Legal Answers Summer Associate Pro Bono Challenge on July 16. Encouraged by American Bar Association (ABA) President Patricia Lee Refo, firms were challenged to engage their summer associates in answering questions on Free Legal Answers, the nationwide ABA online pro bono program. Summer associates were paired with existing attorney volunteers to assist with researching and answering questions on Louisiana's Free Legal Answers site, LA.FreeLegalAnswers.org. The site allows low-income Louisianans to ask civil legal questions online and attorneys answer those questions.**

# CLE Compliance Deadline is Dec. 31, 2021, for Board Certified Specialists

In accordance with the requirements of the Louisiana Board of Legal Specialization (LBLS), as set forth in the individual Specialty Standards for each field of legal specialization, board certified attorneys in a specific field of law must meet a minimum CLE requirement for the calendar year ending Dec. 31, 2021. The requirement for each area of specialty is as follows:

► Appellate Practice — 15 hours of approved appellate practice.

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

► Family Law — 15 hours of approved family law.

► Health Law — 15 hours of approved health law.

► Tax Law — 18 hours of approved tax law.

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

CLE credits will be computed on a calendar year basis and all attendance information must be delivered to the Committee on Mandatory Continuing Legal Education (MCLE) no later than Jan. 31, 2022. Failure to earn and/or timely report specialization CLE hours will result in a penalty assessment.

On Sept. 1, 2020, considering the continuing need to take measures to stop the spread of COVID-19, the Louisiana Supreme Court increased the limitation on "self-study" credits to a maximum of 18 hours for board certified specialists in 2020.

On Jan. 13, 2021, the Louisiana Supreme Court again increased the limitation on "self-study" credits to a maximum of 18 hours for board certified specialists in 2021.

In compliance with the Jan. 13, 2021, Court Order, board certified Estate Planning and Administration specialists and Tax Law specialists may earn up to 18 hours of approved specialization "self-study" credits on or before Dec. 31, 2021. Board certified Appellate Practice specialists, Family Law specialists and Health Law specialists may earn up to 15 hours of approved specialization "self-study" credits on or before Dec. 31, 2021. LBLS Business Bankruptcy Law specialists and Consumer Bankruptcy Law specialists must satisfy the continuing legal education requirements of the American Board of Certification.

On April 27, 2021, the Louisiana Supreme Court amended its Jan. 13, 2021, order, stating: "In addition to lifting the cap on 'self-study' credits . . . attorneys shall be permitted to carry forward a maximum of four (4) 'self-study' credits to compliance year 2022." Board certified specialists may carry forward up to eight (8) hours of approved specialization credits to 2022, but only four (4) of those hours may be approved specialization "self-study" credits.

Preliminary specialization transcripts will be sent in late November to all board certified specialists who are delinquent in their specialization CLE hours for 2021. Specialists should satisfy specialization CLE requirements by Dec. 31, 2021.

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

To obtain a copy of specialization transcripts, go to the LBLS's website at: *www.lsba.org/Specialization/*. Specialization transcripts may be accessed directly at: *www.lsba.org/Specialization/SpecializationTranscripts.aspx*. To find approved specialization CLE courses, consult the specialization CLE calendar at: *www.lsba.org/MCLE/MCLECalendar.aspx?L=S*. Check off your specialization and click on "Search Courses" to find approved specialization CLE.

# LBLS to Accept Board Certification Applications Beginning Nov. 1

The Louisiana Board of Legal Specialization (LBLS) will accept applications for board certification in appellate practice, employment law, estate planning and administration, family law, health law, labor law and tax law from Nov. 1, 2021, through Feb. 28, 2022.

The LBLS was established in 1993 by the Louisiana Supreme Court to assist consumers in finding a lawyer who has demonstrated ability and experience in specialized fields of law. To become a board certified specialist, an attorney must be an active member in good standing with the Louisiana State Bar Association, have a minimum of five years of full-time practice, demonstrate substantial experience in the specialty area and pass a written examination. Board certification also is offered in business bankruptcy law and consumer bankruptcy law.

To receive an application, contact LBLS Director Mary Ann Wegmann, (504)619-0128 or email maryann.wegmann@lsba.org.

For more information about specialization, go to the LBLS website at: *www.lsba.org/Specialization/*.

# Specialization Updates: Health Law, Employment Law, Labor Law

The Louisiana State Bar Association's House of Delegates and Board of Governors in June adopted an amendment to the Health Law Standards to incorporate Health Law Topics. The House and Board also adopted revised Employment Law Standards and Employment Law Exam Topics, as well as revised Labor Law Standards and Labor Law Exam Topics. Review all actions at: *www.lsba.org/Specialization/*.


# Secret Santa is coming to town!

# Secret Santa Volunteers needed!

Make a significant impact for appreciative children this holiday season! The LSBA/LBF Community Action Committee predicts a higher-than-average year of need based on the unprecedented circumstances of 2021. If you are in a position to help, the committee is inviting Bar members and other professionals to participate in the 25th annual Secret Santa Project to brighten the holidays for needy children.

Monetary donations are accepted (and tax deductible)! Visit *www.lsba.org/goto/SecretSanta* for more information and easy online donations. Contact Krystal Bellanger Rodriguez at (504)619-0131 or via email SecretSanta@lsba.org with any other questions.

Name:_____

Firm/Company: _____

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

**To participate, send this form to Krystal Bellanger Rodriguez via email at SecretSanta@lsba.org or fax to (504)566-0930.**

# PRACTICE Makes Perfect


*By LSBA Practice Assistance and Improvement Committee* | FEES, BILLING AND OTHER PEOPLE'S MONEY

The *Louisiana Bar Journal*'s section — Practice Makes Perfect — focuses on practice tips and general legal information published in the Louisiana State Bar Association Practice Assistance and Improvement Committee's *Practice Aid Guide: The Essentials of Law Office Management*, available 24/7 online at: *www.lsba.org/PracticeAidGuide.*

The information discussed in this article can be found in Section 3. To read the full Section 3, and to access the referenced forms, sample letters and checklists, go to: *www.lsba.org/PracticeAidGuide/PAG3.aspx.*

To access the Louisiana Rules of Professional Conduct, go to: *www.ladb.org/Material/Publication/ROPC/ROPC.pdf.*

The most important aspect of the attorney-client relationship is COMMUNICATION. And nowhere is communication more important than in dealing with legal fees and the attorney-client fee agreement. From the moment that the attorney-client relationship commences, the client must be made aware, preferably in writing, of:

► The scope of the representation.

► The type of fee arrangement (hourly? contingency? flat fee?).

► The amount of any advance deposit that is necessary and how it will be drawn against.

► The billing cycle and when payment is expected.

► The amount that it is likely to cost the client.

► In the case of an hourly rate, the exact amount of the hourly rate and, if possible, an estimate of the hours necessary to handle the matter.

► In the case of a flat fee, exactly what will and will not be covered by the flat fee.

► In the case of a contingency fee, the percentage that will be charged by the lawyer and any other deductions that will come out of the recovery in terms reasonably understood by the client.

► The charges for identifiable direct costs/expenses, such as photocopies, long distance calls and computer research.

► The additional expenses that will or are likely to be incurred on behalf of the client. This should be projected at the commencement of the relationship, if possible. As incurred, the exact amount of the expenses should be reported to and authorized by the client, even in contingency fee contract situations where costs are being advanced by the lawyer.

► Any changes in the basis or rate of the fee or expenses.

After the attorney-client relationship has commenced, the client should be informed preferably in writing of the status of the case on a periodic, preferably monthly, basis and the work being done to earn the fee.

Rule 1.5 of the Rules of Professional Conduct governs fees. It is long and complicated, but starts with an easy-to-understand and basic premise: *a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.* This means that the work and effort expended by you on the client's behalf should match the fee and expenses charged by an objective standard. The factors determining whether a fee is reasonable are set forth in Rule 1.5(a).

Thus, even in contingency fee or flat fee matters, you should be sure that the file reflects the work that you have done. Keeping time records is the surest way to do that, as is keeping notes and documentation of your work. If you have spent the afternoon at the library, be sure the research makes it into the file. If you talked to someone on the phone, make a memo to the file. Not only will your efficiency be increased by this recordkeeping, but you will be protecting yourself from client complaints and dissatisfaction.

## Other Points

► Be sure to obtain the client's signature on the contract and obtain any advance deposit before commencing the representation.

► Be sure any contract includes details about who will perform the services: you, your partner, an associate, a paralegal, or all of the above.

► Be sure any arrangements to advance costs are carefully spelled out, are understood by the client, and comply with the Rules of Professional Conduct.

► Be sure any potential conflicts of interest are spelled out in the contract and are consented to in writing, signed by the client. Remember that some conflicts cannot be addressed by client consent. (See Rule 1.7 and Rule 1.13.)

► Make sure to detail who is responsible for payment of the fee. If a family member or friend is responsible for paying the client's fee, then get their signature on the contract. But regardless of who pays the fee, remember that your client is the one who makes the decisions about her case. (See Rule 1.8(f).)

► Be sure to specify when payment is due.

► Specify when termination of the contract is acceptable, such as failure to pay the fee, non-cooperation of the client, or other good cause per Rule 1.16(b).

► Remember: A division of fees between lawyers who are not in the same firm may be made only if: 1) The client agrees in writing to the representation by all of the lawyers involved and is advised in writing as to the share of the fee that each lawyer will receive; 2) The total fee is reasonable; and 3) Each lawyer renders meaningful legal services for the client in the matter. (See Rule 1.5(e).)

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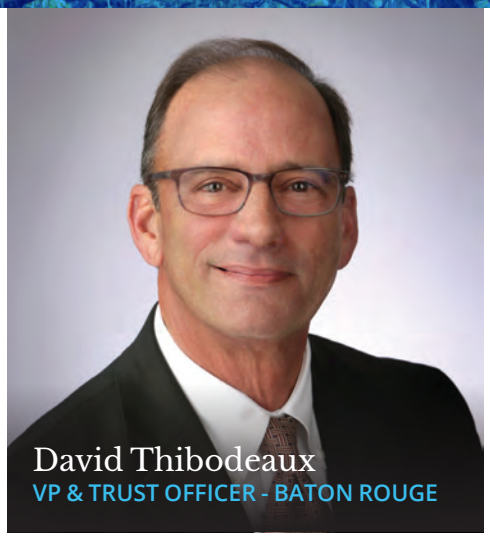



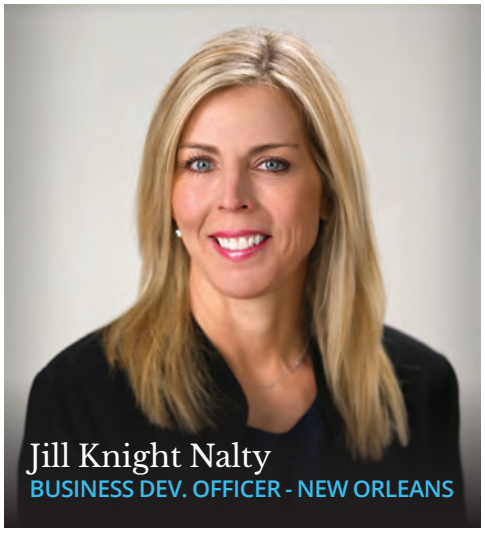



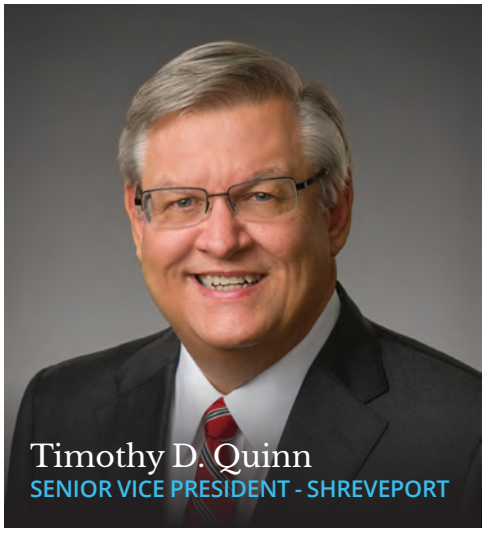


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# PRACTICE Management

*By Andrea Brewington Owen* | NEGATIVE ONLINE REVIEWS

Online research is a central part of consumer decision making. Consumers rely heavily on social proof, the psychological phenomenon wherein consumers assume that other consumers possess greater knowledge so they "follow the crowd." Consumers are driven to make decisions by researching what other consumers think of a particular product or service and perceive those customer reviews, public endorsements, customer ratings and social likes as trustworthy. A social media and marketing survey by Brightlocal found that "82% of consumers read online reviews before choosing a business and 52% of customers between the ages of 18 and 54 said they always read customer reviews about a company."

With competition in the legal market, lawyers should be concerned about their online reputation and the type of social proof that surrounds their firm's brand. Gone are the days when consumers chose an attorney by word of mouth, law firm ranking service, or advertisement. Statistically speaking, you should expect a potential client to do online research before hiring an attorney. If you find negative reviews about your firm that you believe are unwarranted, what are the options? Lawyers, unlike other companies, are limited in how they respond to reviews by the Rules of Professional Conduct. Around the country, attorneys are being disciplined, censured and even suspended for responding to online reviews and breaching their ethical duties — more specifically their Duty of Confidentiality to a Client or Former Client.

Rule 1.6(a) of the Louisiana Rules of Professional Conduct prohibits a lawyer from revealing information relating to a client's representation unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation. Even if the reviewer lies, unless the attorney has informed consent, the attorney cannot even use truthful information to refute the client's review unless the client gave consent to disclose that information. When attorneys are brought in front of disciplinary boards for their response, the most oft-cited response is that Rule 1.6(b)(5) permitted it. That Rule states that a lawyer may reveal information relating to representation of a client to the extent the lawyer believes is reasonably necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client or to respond to allegations in any proceeding concerning the lawyer's representation of the client. The American Bar Association (ABA) weighed in on this in Formal Opinion 496. The ABA states, "A negative online review, alone, does not meet the requirements of permissible disclosure in self-defense under Model Rule 1.6(b)(5) and, even if it did, an online response that discloses information relating to a client's representation or that would lead to discovery of confidential information would exceed any disclosure permitted under the Rule."

As lawyers, how should we approach this situation?

► First, don't take a negative review personally. Take time to determine the particulars and let the immediate panic and anger reaction subside. Was the post made by a current or former client? Even if the post was written by an opposing party, refuting the post by revealing any confidential information about your client's case is still prohibited without informed consent. Think about it rationally and read the Rules to determine if there is a way to respond without revealing any confidential information about the client or former client.

► Often the better option is not to respond at all. ABA Formal Opinion 496 advocates for this method. If the client is unreasonable, any response could provoke more negative online reviews on other websites. More responses and traffic to a post, and the added attention, could cause it to be optimized and more visible to others.

► Try to have the post removed. If the post was made by a non-client or potential client that you refused to represent, you may be able to ask the site to remove the post as long as you don't reveal confidential information about the client. Some website Terms of Service require that a reviewer must be the client of the lawyer being reviewed. This means you may be successful in having the post of a disgruntled family member of a client or a post by a potential client that you declined representation removed.

► Respond appropriately. Another alternative would be to say that you have read the review, appreciate their words, but are precluded from responding in detail.

► If you are determined to respond and you believe there has been a misunderstanding and your client is even keeled, one possibility is to respond to the poster with a plea for him/her to contact you offline. Only do this if you are willing to listen with empathy and try to work toward a solution. Be warned that if the client is difficult and he/she leaves an offline conversation even more upset, then more negative reviews will likely come your way.

However you ultimately choose to proceed, remember to do so with professionalism and within your ethical bounds.

*Andrea Brewington Owen is a loss prevention counsel for the Louisiana State Bar Association and is employed by Gilsbar, L.L.C., in Covington. She received a BA degree in 2002 from Auburn University and her JD degree in 2005 from Loyola University New Orleans College of Law. She worked as an assistant district attorney in Alabama's 28th Judicial Circuit in Baldwin County, Ala. She also worked as the director of legal programs for the South Alabama Volunteer Lawyers Program. She has been a member of the Alabama State Bar Association since 2005 and was admitted to the Louisiana Bar in 2019. Email her at anowen@gilsbar.com.*

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# Lawyers ASSISTANCE

*By Dr. Angela White-Bazile, Esq.*

## IS IT SAFE TO UNMASK?

Is it safe to unmask? I am not only referring to no longer wearing face coverings once required to slow the spread of COVID-19. Is it safe to take off the metaphorical mask you have been wearing since before the pandemic, maybe even since childhood? The mask you wear to please or impress others or the mask saying "everything is good or great" when, in actuality, the opposite is true. What about the mask that covers your fears, struggles, insecurities, or the truth of who you really are? Is the mask covering your reality revealed in the mirror of transparency to the naked eye?

In this instance, "unmasking" can be defined as unveiling, exposing, or releasing your hidden truth or true character. Unmasking is associated with a raw vulnerability that reveals your true nature without the privilege of having a quick cover-up. Surveillance can detect your great attributes during this process, but it also conveys scars, wounds, blemishes, defects and imperfections.

What do you do when it seems everything is falling apart on the inside? What are you concealing, resisting or avoiding? Why do you shy away from sharing when you feel overwhelmed, anxious, depressed or even suicidal? What are you allowing darkness to cover and you refuse to bring it to the light? Does happiness seem unattainable? Why is it so hard to have a conversation surrounding mental health? With whom can you unmask and become transparent without being ridiculed, judged or labeled as "unfit" to practice law?

The World Health Organization defines mental health as "a state of well-being in which an individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively and is able to make a contribution to his or her community."[1]

We are all aware of how challenging and demanding the legal profession can be with-working long hours, meeting deadlines, billing pressures, client demands, heavy dockets and adhering to the mandates of our judiciary. The law being a "jealous mistress" is an understatement because she requires your stability and competency even when you are feeling broken, shattered and maybe even empty. We can all acknowledge that our families, our communities and the public look to us for answers when there are times that we have questions ourselves. Thus, we do not always feel comfortable openly discussing when the lows in our life appear to outweigh the highs. Nor do we discuss when unhealthy habits or distractions become addictions.

### For mental health resources, visit these ABA websites:

- Law Students: *https://abaforlawstudents.com/events/initiatives-and-awards/mental-health-resources/*
- Lawyers/Legal Profession: *www.americanbar.org/groups/lawyer_assistance/resources/covid-19--mental-health-resources/*
- Judges: *www.americanbar.org/groups/lawyer_assistance/articles_and_info/resources_for_judges/*
- *"Fear Not: Speaking Out to End Stigma"* (short video): *www.americanbar.org/groups/lawyer_assistance/profession_wide_anti_stigma_campaign/*

Addictions are not just an issue for underserved communities, uneducated youth, or those labeled as "the wrong crowd." Anyone can suffer from an addiction. Addiction fails to discriminate based on age, gender, education level, social class or geographical location.[2] Addiction does not only apply to alcohol, drugs or mental health issues. Addictions can range from being a workaholic to being addicted to social media, food, caffeine, sugar, cigarettes, shopping or gambling. These are just a few examples of what you, your family members, classmates or colleagues may be masking.

Masking your emotions, addictions and mental health issues can be harmful to yourself and those around you. Mental health struggles are nothing to be ashamed of and should not be ignored. Mental health is just as important as physical health, and these issues, if not addressed, can lead to lifelong battles requiring more than positive thinking and inspirational quotes to overcome.

The American Bar Association's (ABA) 2020 Profile of the Profession concluded that lawyers have been, and still are, more susceptible to alcohol use, substance use and mental issues compared to the general population and other highly educated professionals.

- 21% qualify as problem drinkers, more than triple the rate for the general population (6%) and nearly double the rate for other highly educated professionals (12%).
- 28% struggle with depression.
- 19% have symptoms of anxiety.
- 25% to 30% of lawyers facing disciplinary charges suffer from some type of addiction or mental illness.[3]

The study found substance abuse, other unhealthy coping mechanisms and mental health issues started in law

school for some. Law students reported being reluctant to seek help because they thought it would be a threat to their job or academic status, a potential threat to bar admission, or because of the social stigma of seeking help.[4] Erasing the stigma and offering assistance for unmasking without deleting the protection afforded to the public is key to the balance of a successful lawyer.

According to the American Psychiatric Association, more than half of people with mental illness do not receive help for their disorders.[5] For people who do receive help, the National Alliance on Mental Illness (NAMI) found the average delay between onset of mental illness symptoms and treatment is 11 years.[6]

NAMI offers some suggestions about what we can individually do to reduce the biases and stigma of mental illness:

► Talk openly about mental health.

► Educate yourself and others by sharing facts.

► Be conscious of language — words matter.

► Encourage equality between physical and mental illness.

► Show compassion for those with mental illness.

► Normalize mental health treatment, just like other health care treatments.

► Choose empowerment over shame.

► Refuse to allow others to dictate how you view yourself or how you feel about yourself.[7]

Here are some suggestions for employers:

► Commit to leading a behaviorally healthy workplace.

► Train leaders to identify emotional distress, make referrals, and respond promptly and constructively to behavioral performance issues.

► Welcome the need for accommodations and change.[8]

As you unmask and encourage growth, you must be mindful of what you say and do. Words can sometimes hurt more than "sticks and stones." Try these simple tips in your personal and professional life.[9]

| DO SAY | DO NOT SAY |
|---|---|
| *Thanks for opening up to me.* | *It could be worse.* |
| *Is there anything I can do to help?* | *Just deal with it.* |
| *How can I help?* | *Snap out of it.* |
| *Thanks for sharing.* | *Everyone feels that way sometimes.* |
| *I'm sorry to hear that. It must be tough.* | *We've all been there.* |
| *I'm here for you when you need me.* | *You've got to pull yourself together.* |
| *How are you feeling today?* | *Maybe try thinking happier thoughts.* |
| *I love you.* | *You may have brought this on yourself.* |

It is exhausting pretending to be someone else while wearing multiple suffocating masks. If you think you will disappoint your family by admitting you need help, stop and reflect on what is best for you. Remember what you had to endure to become a member of this respected and prestigious profession. Think of the challenges and obstacles you have already overcome throughout your lifetime. You know the importance of perseverance and self-discipline to create the life you desire and, of course, deserve. But you are only one person, and you do not always have to pretend to be strong. Your family, friends and colleagues want you to be healthy and happy.

Mental health issues generally do not go away on their own. Let us create safe environments and normalize conversations surrounding mental health. It is okay to seek counseling or other assistance for areas you struggle with in your personal or professional life. You deserve to be heard. You deserve meaningful and supportive relationships.

Your life is more important than your career or keeping up an appearance. It is time to uproot all that you have buried over the years because you only have one life to live. Release the built-up pain, embarrassment and other suppressed feelings. Be kind to yourself. Take care of yourself. Please do not be discouraged from seeking a peer support group or mental health professional trained to listen and offer support, such as a psychiatrist, clinical psychologist, therapist or counselor. You are not alone and should no longer suffer in silence. No one has it all together or all figured out. We are all perfectly imperfect.

I want you to know it is safe to unmask and reveal the real you. Remember, the Louisiana Judges and Lawyers Assistance Program, Inc. (JLAP) is here to offer you a confidential, safe haven to heal and unmask without judgment.

To learn more or to seek confidential help with any type of mental health or addiction issue, contact the professional clinical staff at JLAP, (985)778-0571, email jlap@louisianajlap.com, or visit the website, *www.louisianajlap.com*. Remember, we are a Safe Haven of Healing.

## FOOTNOTES

1. "A Brief Mental Health Checkup," American Psychiatric Association, Oct. 9, 2015, *https://www.psychiatry.org/news-room/apa-blogs/apa-blog/2015/10/a-brief-mental-health-checkup*.
2. "The Myth of the Functioning Addict," Defining Wellness Centers, Inc., Oct. 9, 2020, *https://definingwellness.com/blog/the-myth-of-the-functioning-addict/*.
3. "ABA Profile of the Legal Profession 2020," American Bar Association, *https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf*.
4. *Id.*
5. "Stigma, Prejudice and Discrimination Against People with Mental Illness," American Psychiatric Association, *https://www.psychiatry.org/patients-families/stigma-and-discrimination*.
6. "Mental Health By the Numbers," National Association on Mental Illness, *https://www.nami.org/mhstats*.
7. *Id.*
8. *Id.*
9. *Id.*

*Dr. Angela White-Bazile, Esq., is the executive director of the Louisiana Judges and Lawyers Assistance Program, Inc. (JLAP) and can be reached at (985)778-0571, toll-free (866)354-9334 or by email at jlap@louisianajlap.com.*

Participants and organizers of the 2021 Suit Up Program. Front row from left, Janell M. McFarland-Forges, Louisiana 5th Circuit Court of Appeal; Malcolm X. Ferrouillet; Zoe K. Stamps; Jaden S. Armond; Chief Magistrate Judge Karen Wells Roby, U.S. District Court, Eastern District of Louisiana; Sage J. Allen; Lauren S. Benn; Veronica E. Camenzuli; Aleia B. Johnson; Sania B. Islam; and Sherri N. Guidry, 15th JDC Public Defender's Office. Back row from left, Tracey Gant; Lauren A. Langley; Emma R. Graff; Kori L. Dupree; Jackie B. Breckenridge III; Thomas A. Massey; and Isabella M. Lancaster.

Students with Louisiana Supreme Court Chief Justice John L. Weimer and Associate Justice Piper D. Griffin.

# 14 Students Complete 2021 Suit Up for the Future Program

The Louisiana State Bar Association's (LSBA) 2021 Suit Up for the Future High School Summer Legal Institute and Internship Program had another successful year with 14 students completing the program. The three-week program (June 14 - July 2) included abridged law school sessions; shadowing opportunities at law firms, courts and agencies; and field trips to courts and agencies.

During the program, students prepared written memorandums to support their oral arguments. Oral arguments were presented on the last day to a panel of judges at the U.S. District Court, Eastern District of Louisiana.

The LSBA Suit Up for the Future program is an award-winning Diversity Pipeline program and a 2013 American Bar Association Partnership recipient.

The Suit Up Program thanks its dedicated volunteers:

► LSBA Pipeline to Diversity and Outreach Subcommittee Co-Chairs Scherri N. Guidry, 15th JDC Public Defenders Office, and Janell M. McFarland-Forges, Louisiana 5th Circuit Court of Appeal; Chief Justice John L. Weimer and Associate Justice Piper D. Griffin, Louisiana Supreme Court; and 2021-22 LSBA President H. Minor Pipes III.

► Instructors — Professor Emily Bishop, Loyola University New Orleans College of Law; Professors Jeffrey C. Brooks and Danny Bosch, LSU Paul M. Hebert Law Center; and Professor Russell L. Jones, Southern University Law Center.

► Shadowing Employers — Hon. June Berry Darensburg and Hon. Shayna Beevers Morvant, 24th JDC; Hon. D. Nicole Sheppard, Orleans Parish Civil District Court; Courington, Kiefer, Sommers, Marullo & Matherne L.L.C.; Deutsch Kerrigan, LLP; Hair Shunnarah Trial Attorneys; Leake & Andersson LLP; Liskow & Lewis; Simon, Peragine, Smith & Redfearn, LLP; and Stone Pigman Walther Wittmann L.L.C.

► Judge Panel — Hon. Donna P. Currault, Hon. Dana M. Douglas and Hon. Karen Wells Roby, U.S. District Court, Eastern District of Louisiana.

► Field Trip Presenters — Hon. Dale N. Atkins, Hon. Tiffany G. Chase, Hon. Rosemary Ledet, Louisiana 4th Circuit Court of Appeal; Hon. Tracey Flemings-Davillier (Section B), Orleans Parish Criminal District Court; District Attorney Jason R. Williams, Orleans Parish District Attorney's Office; and Miriam D. Childs and Robert Gunn, Louisiana Supreme Court.

► Interns — 2018 Suit Up Alumni Adrija Bhattacharjee, Alexandrea Flakes and Christian Lacoste; Michael C. Ledet, LSU Paul M. Hebert Law Center; and Alexis B. Vegafria, Loyola University New Orleans College of Law.

Students viewed oral arguments at the Louisiana 4th Circuit Court of Appeal. Louisiana 4th Circuit Court of Appeal judges, top from left, Hon. Tiffany G. Chase, Hon. Rosemary Ledet and Hon. Dale N. Atkins.

Students were welcomed on day one by, from left, LSBA Pipeline to Diversity and Outreach Subcommittee Co-Chair Janell M. McFarland-Forges, Louisiana 5th Circuit Court of Appeal; 2021-22 LSBA President H. Minor Pipes III; LSBA Pipeline to Diversity and Outreach Subcommittee Co-Chair Scherri N. Guidry, 15th JDC Public Defenders Office; and Chief Magistrate Judge Karen Wells Roby, U.S. District Court, Eastern District of Louisiana.

Memorandum and Oral Argument winners Kori L. Dupree (Defense), left, and Jaden S. Armond (Prosecution).


Students with "Criminal Law" presenter Professor Russell L. Jones, center, Jesse N. Stone, Jr. Endowed Professor of Law, Southern University Law Center.

Students with Judge Tracey E. Flemings-Davillier, Section B, Orleans Parish Criminal District Court, center.

Students with Orleans Parish District Attorney Jason Williams, seventh from left.


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

Students with "Memorandum Preparation (One-On-One Assistance) presenter Matthew R. Slaughter, third from left, Phelps Dunbar LLP.


Students with "Law School Admission Preparation Workshop" presenter Morgan Jackson, center, Senior Administrative Program Coordinator for Student Life and Diversity Initiatives, Tulane Law School.

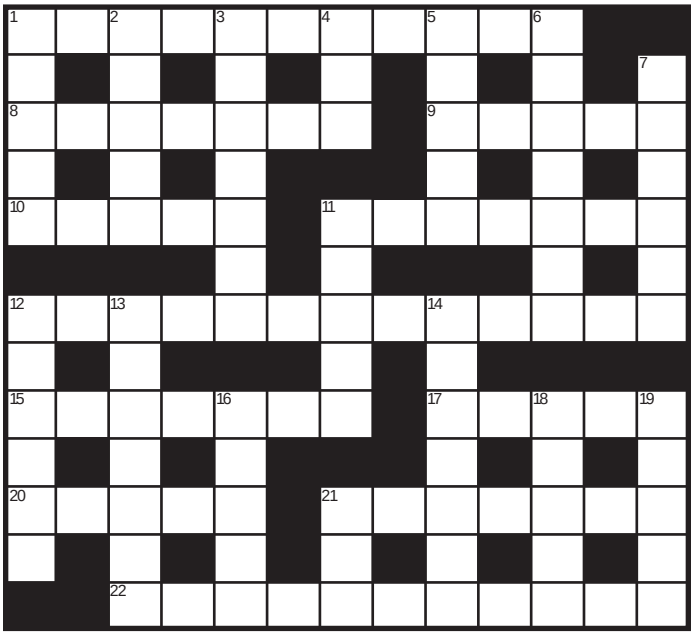

Students with "Oral Argument Workshop" presenters Danny Bosch, Advocacy Fellow, second from left, and Professor Jeffrey C. Brooks, third from left, Assistant Professor of Professional Practice, LSU Paul M. Hebert Law Center.

"Law School Admission Preparation Workshop" presenter Rick Bolte, Assistant Director of Law Admissions, Loyola University New Orleans College of Law.


Students with "Law School Admission Preparation Workshop" presenter Daphne A. James, third from left, Director of Admissions, LSU Paul M. Hebert Law School.

# Crossword PUZZLE

*By Hal Odom, Jr.* | IT'S FRAUD, I TELL YOU!



ACROSS

1 Intentional concealment of the truth (11)
8 Flourished; did very well (7)
9 High-grade porcelain (5)
10 "Just __," Nancy Reagan catchphrase (3, 2)
11 Real penny-pincher (7)
12 With which fraud must be alleged, in a petition (13)
15 "One Night in __," song from Chess (7)
17 Important bodily screening often subject to fraud (5)
20 Type of Greek column (5)
21 What opposites do, they say (7)
22 ___ of Justice: tampering with evidence, threatening a witness, etc. (11)

DOWN

1 Locations on the Web (5)
2 Political organization (5)
3 Pasta pillows (7)
4 Unfortunate; sorrowful (3)
5 Become liable to pay (5)
6 Capital city with a view of Kilimanjaro (7)
7 Fraudulence (6)
11 Weaselly person; stinky animal (5)
12 ___ Payroll Fraud, kind of "ghost employee" crime (6)
13 Encounter; collide with (3, 4)
14 Living in the water (7)
16 Jollies; propels by foot (5)
18 Persian; Shiite (5)
19 Vanished, as vittles (5)
21 Mediation, arbitration, etc. (3)

Answers on page 271.

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

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

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| New Orleans Area | Helena N. Henderson<br>hhenderson@neworleansbar.org | (504)525-7453 |
| River Parishes Area | Judge Jude G. Gravois<br>judegravois@bellsouth.net | (225)265-3923<br>(225)265-9828<br>Cell (225)270-7705 |
| Shreveport Area | Dana M. Southern<br>dsouthern@shreveportbar.com | (318)222-3643 |

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

# MINDFULNESS FOR LAWYERS

*By Alan J. Yacoubian*

Only after practicing law for a number of years (and having my share of regrets) did I come to realize that the basic foundation of our own happiness (professionally and personally) truly lies within us. Outside circumstances are nothing more than adverse or favorable and, ultimately, beyond our control. However, we can often control how we feel about our own lives, especially if we learn to practice mindfulness. As famed American novelist Ellen Glasgow stated, "No life is so hard that you can't make it easier by the way you take it." Consistent with this observation, research from the American Psychological Association shows "that mindfulness helps reduce stress, rumination and emotional reactivity while improving memory, focus, cognitive flexibility and relationship satisfaction."[1] Moreover, experts in the legal field have noted that lawyers can sharpen their skills with mindfulness.[2] With this background, I offer the following tips on practicing mindfulness for inside and outside of work.

**Learn to Breathe.** I know, everyone knows how to breathe. But do you *really* know how to breathe? It has been said that to know we are breathing is to know we are alive. Buddhists speak to "attending to the breath" by being aware of the breathing and allowing the breath to be natural, whether it is slow or fast, rough or smooth. When you inhale, focus on something positive for calm and ease; when you exhale, focus on releasing or letting go of stress. "Conscious breathing can change your psychological state."[3] Controlling and being more intentional or mindful about our breathing is a critical component to becoming more mindful of our thoughts and, ultimately, controlling how we feel. The breath is closely connected to the body and to the mind; it is a bridge between the two.

**Practice Gratitude.** When we live in a cloud of regret about the past or with anxiety about the future, we miss out on the simple gifts and pleasures that life offers us right now: the smile of a child, a great cup of coffee or the company of a friend. "Gratitude is an antidote to negative emotions, a neutralizer of envy, hostility, worry and irritation. It is savoring; it is not taking things for granted; it is present-oriented."[4] Express thanks as you go about your day and seek reasons for expressions of gratitude and thankfulness. Say "thank you" like you mean it, using eye contact and that all-important smile. Appreciating positive moments can help us feel more positive, which can ultimately have a positive effect on our overall health.

**Learn the STOP Method.** This technique teaches us to bring mindfulness into our daily lives by creating a pause (or shift) in whatever we are doing and **STOP** throughout the day —**S**top, **T**ake a few deep slow breaths, **O**bserve how you are feeling in your body as you are taking slower breaths, and **P**roceed with what you are doing mindfully.[5] Mindfulness anchors us in the present moment, freeing us from the pain of the past and fear of the future and stopping obsessive thoughts in their tracks. This practice can lead to better concentration and increased productivity.

**Practice Self-Kindness.** My friends are laughing now as they believe I'm good at "self-kindness!" But I am referring to a deeper version of self-kindness or self-compassion than mere self-indulgence. We are all familiar with the cliché, "I'm my worst critic," and it has its drawbacks. We can often be so hard on ourselves that there is little room for just being human as opposed to perfect. Research has shown that "self-compassionate people are actually *more* likely to take responsibility for their own actions because they realize that accepting the reality of a tough situation allows for a more intentional and effective response."[6] Be kind to yourself.

**Learn to Be Present in the Moment.** Mindfulness is about mono-tasking, being present in each moment and observing whatever the moment holds without judgment. Mindfulness means becoming more aware of what's going on here and now. In the words of Tennessee Williams, "Life is all memory, except for the one present moment that goes by you so quickly you hardly catch it going." To be present in the moment, practice mindfulness routines such as breathing exercises, various forms of meditation, gratitude journaling, and non-striving exercises.

In the final analysis, mindfulness is not a trendy, in vogue form of stress management; it originates from Buddhist traditions dating back more than 2,500 years. In some ways, it is no different than a structured exercise program at a fitness center, with routine being essential to the effective practice of mindfulness. But mindfulness has far greater benefits than mere physical fitness. Mindfulness has the potential to be a transformative social phenomenon that can change the entire way you live your life — and only for the better!

## Mindfulness Resources

► Hallie N. Love and Nathalie Martin, *Yoga for Lawyers: Mind-Body Techniques to Feel Better All The Time* (ABA Book Publishing, 2014).

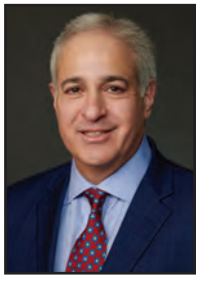
► Stewart Levine, *The Best Lawyer You Can Be: A Guide to Physical, Mental, Emotional and Spiritual Wellness* (ABA Law Practice Division, 2018).

► Jon Kabat-Zinn, *Mindfulness for Beginners* (Sounds True, Inc., 2012).

► David Michie, *Mindfulness is Better Than Chocolate: A Practical Guide to Enhanced Focus and Last Happiness in a World of Distractions* (Mosaic, 2014).

## FOOTNOTES

1. Jeena Cho, "Changing Minds: 4 Strategies for Effectively Implementing a Mindfulness Program," ABA Journal, May 2018.
2. Joseph Beckman, "The Genius of Gratitude," ABA Journal, Fall 2018.
3. Natalie Bell, Certified Meditation Instructor, UCLA Mindfulness Awareness Research Center.
4. Sonja Lyubomirsky, *The How of Happiness: A New Approach to Getting the Life You Want*, 2007.
5. Natalie Bell, Certified Meditation Instructor, UCLA Mindfulness Awareness Research Center.
6. Christy Cassisa and Kristin Neff, "The Promise of Self Compassion for Solos," GPSolo, May/June 2019.



*Alan J. Yacoubian is a partner in the New Orleans firm of Johnson, Yacoubian & Paysse, APLC. 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@jyplawfirm.com; Ste. 4700, 701 Poydras St., New Orleans, LA 70139-7708)*

# FORENSIC AND VALUATION SERVICES

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

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# DISCIPLINE Reports

REPORTING DATES 8/2/21 & 8/3/21

## REPORT BY DISCIPLINARY COUNSEL

Public matters are reported to protect the public, inform the profession and deter misconduct. Reporting date Aug. 3, 2021.

### Decisions

**Cecelia F. Abadie**, Hammond, (2020-B-1276) **Suspended from the practice of law for a period of one year and one day** by order of the Louisiana Supreme Court on May 13, 2021. Rehearing denied on June 29, 2021. JUDGMENT FINAL and EFFECTIVE on June 29, 2021. *Gist:* Failure to provide competent representation to a client and making false statements about the integrity of a judge.

**Frank E. Brown, Jr.**, Shreveport, (2021-OB-0647) **By petition for permanent resignation from the practice of law in lieu of discipline** by order of the Louisiana Supreme Court on June 22, 2021. JUDGMENT FINAL and EFFECTIVE on June 22, 2021. *Gist:* Respondent engaged in criminal misconduct, misused his client trust account, failed to maintain proper records, and commingled client funds.

**Michael Langdon Cave**, Baton Rouge, (2021-OB-0486) **Reinstated to the practice of law, with conditions**, by order of the Louisiana Supreme Court on June 8, 2021. JUDGMENT FINAL and EFFECTIVE on June 8, 2021.

**George A. Flournoy**, Alexandria, (2021-B-00614) **Probation revoked and the previously deferred portion of the one-year suspension imposed in the matter of *In re: Flournoy*, 19-1479 (La. 4/30/20), ____ So.3d ____, has been made executory** by order of the Louisiana Supreme Court on June 22, 2021. JUDGMENT FINAL and EFFECTIVE on July 6, 2021. *Gist:* Engaging in misconduct involving dishonesty, fraud, deceit and misrepresentation during a period of probation, including lack of candor to the tribunal, failing to properly supervise a non-lawyer assistant, and making false statements of material fact or law to third persons.

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

The following is a verbatim report of the matters acted upon by the United States District Court for the Eastern District of Louisiana, pursuant to its Disciplinary Rules. This information is published at the request of that court, which is solely responsible for the accuracy of its content. This report is as of Aug. 2, 2021.

| Respondent | Disposition | Date Filed | Docket No. |
|---|---|---|---|
| Robert Charles Jenkins, Jr. | [Reciprocal] Suspension, partially deferred. | 7/19/2021 | 21-823 |
| Phillip Jeremy Lafleur | [Reciprocal] Suspension. | 7/19/2021 | 21-824 |
| James Elwood Moore, Jr. | [Reciprocal] Interim suspension. | 7/29/2021 | 21-976 |
| Margot A. Tillman-Fleet | Disbarred. | 7/19/2021 | 21-695 |

**Michael W. Fontenot**, Baton Rouge, (2021-B-0743) **Interimly suspended from the practice of law** by order of the Louisiana Supreme Court on June 8, 2021. ORDER FINAL and EFFECTIVE on June 8, 2021.

**Peggy Inez Garris**, New Iberia, (2021-B-0599) **By consent, suspended from the practice of law for a period of one year and one day, deferred in its entirety, subject to respondent's successful completion of a two-year period of supervised probation**, by order of the Louisiana Supreme Court on June 8, 2021. JUDGMENT FINAL and EFFECTIVE on June 8, 2021. *Gist:* Respondent mismanaged her client trust account.

**James A. Hatch**, Metairie, (2021-B-00581) **Consented to a public reprimand** by order of the Louisiana Supreme Court on June 8, 2021. JUDGMENT FINAL and EFFECTIVE on June 8, 2021. *Gist:* Respondent filed a petition for damages while he was ineligible to practice law.

**Elizabeth H. Icamina**, New Orleans, (2021-B-00805) **Interimly suspended by joint petition from the practice of law** by order of the Louisiana Supreme Court on June 22, 2021. JUDGMENT FINAL and EFFECTIVE on June 22, 2021.

**James Elwood Moore, Jr.**, Baton Rouge, (2020-B-01376) **Interim suspension dissolved and returned to active status, subject to a period of probation**, by order of the Louisiana Supreme Court on July 16, 2021. JUDGMENT FINAL and EFFECTIVE on July 16, 2021.

**Martin E. Regan, Jr.**, New Orleans, (2021-OB-0370) **Transfer to interim disability inactive status, pending an expedited hearing**, by order of the Louisiana Supreme Court on July 28, 2021. JUDGMENT FINAL and EFFECTIVE on July 28, 2021.

**Patrick Bruce Sanders**, New Orleans, (2021-OB-0633) **Permanently resigned from the practice of law in lieu of discipline** by order of the Louisiana Supreme Court on June 22, 2021. JUDGMENT FINAL and EFFECTIVE on June 22, 2021. *Gist:* Respondent provided false information on his application for admission to the Louisiana Bar; allegations that he engaged in a conflict of interest and that his client trust account held insufficient funds to honor a check for payment.

**Kevin C. Schoenberger**, New Orleans, (2021-B-0191) **Suspended from the practice of law for one year and one day, all but 60 days deferred, subject to probation**, by order of the Louisiana Supreme Court on June 30, 2021. JUDGMENT FINAL and EFFECTIVE on July 14, 2021. *Gist:* Conduct involving dishonesty, fraud, deceit and misrepresentation; and violating or attempting to violate the Rules of Professional Conduct.

**George Allen Roth Walsh**, Baton Rouge, (2021-B-0200) **Disbarred** by order of the Louisiana Supreme Court on June 29, 2021. JUDGMENT FINAL and EFFECTIVE on July 13, 2021. *Gist:* Respondent knowingly and intentionally violated duties owed to his client, the public, the legal system and the legal profession.

**Lenise Rochelle Williams**, Atlanta, GA, (2017-B-0906) **Probation revoked, and the previously deferred suspension of one year and one day will now be imposed**, by order of the Louisiana Supreme Court on June 22, 2021. JUDGMENT FINAL and EFFECTIVE on June 22, 2021. *Gist:* Respondent has violated additional Rules of Professional Conduct while on court-ordered probation in *Williams I* and has not complied with Dec. 4, 2018, probation requirements; failed to cooperate with the ODC in its requirements to contact her; failed to comply with her bar membership requirements; and failed to pay the costs assessed against her in *Williams I*. Respondent also practiced law while ineligible to do so.

**No admonitions reported for this issue.**


## ASBCA Applies Bar to Affirmative Defense of Laches on Claims Brought Within Statute of Limitations Under CDA

***Lockheed Martin Aero. Co.***, ASBCA No. 62209, 2021 ASBCA LEXIS 147.

On April 30, 2007, the U.S. Air Force awarded a contract for a set of upgrades to certain aircraft to Lockheed Martin Aeronautics Co. (LMA). On Oct. 15, 2018, LMA submitted a certified claim in the amount of $143,529,290 to the Air Force contracting officer pursuant to the Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 7101, *et seq*. Ostensibly, LMA's claim centered around allegedly excessive "over and above" work that was ordered by the Air Force that resulted in greater costs and a cumulative lack of productivity to LMA. The claim was brought within the CDA's six-year statute of limitations.

On Dec. 7, 2018, the contracting officer notified LMA that he was declining to issue a final decision on the claim. About 10 months later, LMA appealed the contracting officer's "deemed denial" of its claim to the Armed Services Board of Contract Appeals (Board). In its answer to LMA's complaint, the Air Force asserted the affirmative defense of laches. In response, LMA filed a motion arguing that laches was an unallowable affirmative defense in the appeal. LMA's principal argument was that its claim was asserted under the CDA, and the CDA already provides an equitable defense through its six-year statute of limitations. Therefore, the "gap-filling" equitable doctrine of laches has no "gap" to fill and is unallowable under the U.S. Supreme Court's decisions in *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S.Ct. 954 (2017), and *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962 (2014).

### Laches and the CDA

The central question before the Board on LMA's motion was whether the Court's opinions in *SCA Hygiene* and *Petrella* — both cases not involving the CDA — precluded the affirmative defense of laches on a CDA claim that was brought before the CDA's statute of limitations had run. In its analysis of the two cases, the Board considered, among other things, the breadth of the language barring the use of laches; the Court's emphasis on the separation of powers as it relates to laches; and the fact that the Board and the U.S. Court of Appeals for the Federal Circuit — the Board's appellate body — are equally subject to the Court's decisions.

First, the language in *SCA Hygiene* and *Petrella* barring the use of laches when a statute of limitations is present is broad enough to encapsulate CDA claims. In arguing that laches remains a viable affirmative defense in CDA claims cases, the Air

# MEDIATION AND ARBITRATION *of* COMPLEX DISPUTES


Martin Coady


Guy deLaup


Larry Feldman


W. Ross Foote


E. Phelps Gay


Thomas Hayes, III


Mike McKay


Patrick Ottinger


Mike Patterson


Larry Roedel


Marta-Ann Schnabel

## THE Patterson RESOLUTION GROUP

**Robert W. Barton** is the managing partner of Taylor, Porter, Brooks & Phillips, LLP in Baton Rouge and serves on the firm's executive committee. He received mediation training through the Program on Negotiation at Harvard Law School.

In addition to serving as a mediator, Bob has 27 years of experience representing plaintiffs and defendants in lawsuits, transactions, arbitrations, and mediations in areas that include casualty and insurance litigation, commercial and business litigation, medical malpractice, employment disputes, product liability, premises liability, pharmaceutical and health care litigation, and disputes arising within high school and college campuses and athletic programs.

An LSU graduate, he earned his Juris Doctor, cum laude, from the University of Georgia Law School and his Master of Business Administration from the Terry College of Business at the University of Georgia. He is admitted to practice in all State and Federal Courts in Louisiana, the United States Court of Appeal, Fifth Circuit, and the United States Supreme Court.

Bob has taught as an adjunct faculty member at the LSU Law School and has lectured at seminars for the LSBA, LADC, LSU, Baton Rouge Bar Association, and Lafayette Bar Association.

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Force attempted to distinguish the subject matter involved in both *SCA Hygiene* (Patent Act) and *Petrella* (Copyright Act) from the LMA case (CDA). However, the Board found this argument unpersuasive, noting that the Court's language in *SCA Hygiene* was "deliberately broad" and that the Court had repeatedly endorsed the result in *Petrella. See SCA Hygiene,* 137 S.Ct. at 960.

Next, the Board found separation of powers precludes the use of laches in this case. In its analysis, the Board noted that, in both *SCA Hygiene* and *Petrella*, the Court emphasized the separate functions of the judicial and legislative branches as it relates to equitable doctrines such as laches. Specifically, in *SCA Hygiene,* the Court posited that "it is inappropriate for a judge to allow an equitable doctrine such as laches to limit a party's rights where a party complied with a Congressionally-enacted statute of limitations." *Lockheed Martin Aeronautics Co.,* 2021 ASBCA LEXIS 147 at 16. Therefore, the Board determined that, because LMA brought its claim within the CDA's statute of limitations, the use of laches would effectively "usurp Congressional power" and is prohibited under the Court's jurisprudence. *Id.* at 17, citing *Petrella,* 134 S.Ct. at 1967 ("courts are not at liberty to jettison Congress' judgment on the timeliness of suit.").

Finally, because both fora are subject to the Court's decisions, the Board does not need to wait for a Federal Circuit decision. The Board noted that while the Federal Circuit had not yet applied *SCA Hygiene* to the CDA or otherwise ruled laches was not available as an affirmative defense to the CDA, the Board was not required to wait for a Federal Circuit decision before it applied Supreme Court jurisprudence. *Lockheed Martin Aeronautics Co.,* 2021 ASBCA LEXIS 147 at 18.

In the end, the Board summed up the entire matter with a quote from the Court's holding in *Holmberg v. Armbrecht*: "Where 'Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive.'" 327 U.S. 392, 395 (1946). Consequently, because the Court's holdings in its previous decisions were sufficiently broad, separation of powers prevents judges from displacing Congress's judgment on timeliness of suits, and the Board is subject to the Court's jurisprudence independent of a Federal Circuit decision, the Board determined that laches is not available as an affirmative defense against a CDA claim otherwise timely brought by a contractor.

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

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## Circuit Split Resolved Regarding Abandonment of Claims

***Williams v. Montgomery***, 20-1120 (La. 5/13/21), 320 So.3d 1036.

With this decision, the Louisiana Supreme Court neatly resolved a circuit split regarding abandonment of claims. This case originated in a tort action against Montgomery and her alleged insurer, Foremost. Plaintiff served her petition on Foremost, but withheld service on Montgomery for an unknown reason. After three years with no action taken by or against Montgomery, the trial court granted Foremost's motion that plaintiff had abandoned her claims against Montgomery pursuant to La. C.C.P. art. 561. The district court also granted plaintiff leave to amend her petition on another, indirectly related issue, whereupon she re-added Montgomery as a party and finally served her.

Montgomery then filed her own exceptions in response to the amended petition, re-urging abandonment. The district court dismissed the claims against Montgomery once again, but the 1st Circuit Court of Appeal reversed, finding that Foremost's initial answer was a "step" taken in the defense of the case sufficient to interrupt abandonment as to *all parties*, including Montgomery, even though she was not served within the three-year abandonment period. Montgomery filed an exception of prescription, and the 1st Circuit ordered the case be remanded to permit the parties to develop evidence on the prescription issue. The Louisiana Supreme Court then granted *certiorari* to review the rulings made henceforth.

On review, the core issue to be decided was whether there had been a formal action taken in the prosecution or defense of the case such as to interrupt the tolling of abandonment against Montgomery. Chief Justice Weimer penned the majority opinion. The Court started its analysis by recognizing the general principle that when any party takes a step in the prosecution or defense of the action, the abandonment period is interrupted as to *all parties*. In cases involving multiple defendants, however, Louisiana's appellate courts disagreed on whether actions by or against one defendant are effective against another, *unserved* defendant. The 1st, 2nd and 5th Circuits acknowledged the difference between served and unserved defendants, while the 4th Circuit and past (indirect) Louisiana Supreme Court jurisprudence did not.

"[C]onsidering the issue directly for the first time," the Court observed that "the necessity of notice" is "an integral component underlying the concept of abandonment," as in Article 561's provision that certain discovery not filed into the record will interrupt abandonment, so long as it is served on all parties. In keeping with that rationale, the Court reasoned, steps taken in prosecution of a suit *would* interrupt abandonment against an unserved defendant, so long as they were taken *against* that unserved defendant, and not another party alone. Conversely, where no steps are taken by or against an unserved defendant within three years, the lack of service is to be taken as a lack of notice to the defendant as well as a lack of the plaintiff's intent to pursue the action. In that scenario, any action by another defendant — such as Foremost filing its answer — logically has no effect on the unserved defendant. Thus, the Court found that Foremost's answer never interrupted the tolling of abandonment as to the unserved Montgomery, reversing the 1st Circuit.

The Court declared plaintiff's claim abandoned, but further analysis was still required, as prescription and abandonment must be considered separately. Plaintiff argued that the pendency of the initial suit against Montgomery interrupted prescription as to her. To that point, however, La. Civ.C. art. 3463 plainly states that, in the case of dismissal without prejudice for abandonment, such an interruption is considered never to have occurred. Based on the plain reading of article 3463,

the abandoned action did not interrupt prescription on the underlying claim. Nevertheless, that did not necessarily mean the claim had prescribed: La. Civ.C. art. 1799 states that the interruption of prescription (*i.e.*, by filing suit) against one solidary obligor (Foremost) interrupts prescription as to all other solidary obligors. Finding insufficient evidence in the record to make a determination as to whether Foremost was in fact solidarily liable with Montgomery, the Court affirmed the 1st Circuit's order remanding the case to develop the issue at an evidentiary hearing.

Justice Crichton dissented in part, arguing that La. Civ.C. art. 3463 supersedes article 1799 because it does not carve out any exceptions for solidary obligors.

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## Status of Foreign Business Trust Under La. Law

***Nat'l Collegiate Student Loan Trust 2006-1 v. Thomas***, No. 21-0090 (La. App. 3 Cir. 6/2/21), ____ So.3d ____, 2021 WL 2217126.

In May 2018, the National Collegiate Student Loan Trust 2006-1, a Delaware statutory business trust, filed suit in Louisiana state court against an individual defendant to collect on student loan debt. The defendant argued that the Trust lacked procedural capacity to appear as plaintiff because Louisiana law "mandates that only the trustee has the capacity to file suit on behalf of the trust" and that a "trust itself has no right of action." The Trust argued that, as a Delaware statutory trust, it was an "unincorporated association" under Louisiana law, with the capacity to sue in its own name, citing, among other things, La. R.S. 12:507(A), which provides that "[a]n unincorporated association, in its name, may institute . . . a judicial . . . proceeding."

The trial court granted an exception of no right of action, reasoning that "[u]nder Louisiana law, a statutory trust created under the laws of another state is by definition an 'express trust' and . . . the trustee of an express trust is . . . the proper party plaintiff, in a lawsuit brought in Louisiana on behalf of an express trust . . . ." On appeal, the 3rd Circuit Court of Appeal was unable to find legal support in Louisiana's statutes for the first part of the trial court's reasoning. The court recognized that, under the Louisiana Trust Code, a trust is defined as "the relationship resulting from a transfer of title to property to a person [the trustee] to be administered by him as a fiduciary for the benefit of another," and that under the Code of Civil Procedure the trustee is the proper plaintiff in any action to enforce a right on behalf of a trust estate.

The court reasoned that, "[a]lthough Louisiana law does not have a 'statutory' or 'business' trust per se, its statutory laws do contain elements similar to those provided under the Delaware Statutory Trust Act . . ., which give a statutory trust the right and capacity to sue in its own name." The court noted that, under the Louisiana Business Corporation Act, "[u]nincorporated entity" is defined to include a "business trust . . . regardless of whether [it] is treated as a juridical person under the relevant organic law," La. R.S. 12:1-140(24B), and "[f]oreign unincorporated entity" is defined as "an unincorporated entity whose internal affairs are governed by an organic law of a jurisdiction other than this state," La. R.S. 12:1-140(10B). The court further noted that both the Louisiana Trust Code and the Louisiana Uniform Commercial Code define "person" to include a "business trust," La. R.S. 9:1725(3) and La. R.S. 10:1-201(27), and that a comment to the La. U.C.C. states a "Louisiana private trust" is not a person under Louisiana law, but "if . . . a trust arising in another state has a separate legal existence as a juridical person under the laws of that state, then [the La. U.C.C.] definition permits that entity to be a person for purposes of [the La. U.C.C.]."

The court concluded that the Trust "does not fit the definition of a Louisiana express trust because there has been no transfer of ownership of property to a trustee; rather, [the Trust] owns [the defendant's] loan and other loans in its portfolio." As evidence of this, the court reviewed a contract demonstrating that the student loans had been transferred to the Trust itself, not its trustees. After quoting a U.S. Supreme Court case that noted that many states have applied the "trust" label "to a variety of unincorporated entities" unlike the traditional trust, the court concluded:

> Because we find Louisiana statutory law recognizes an unincorporated foreign entity such as this business trust at issue, we find it was error for the trial court to assume [the Trust] was an express trust merely because it was "a statutory trust created under the laws of another state[,]" and thus, had no separate legal personality apart from its trustee. . . . [W]e find no Louisiana law that prevents [the Trust], a business trust that is recognized in Delaware as a juridical person, the same capacity to bring a civil suit in the courts of this state.

Accordingly, the court reversed the trial court judgment, overruled the exception of no right of action and remanded the matter for further proceedings on the merits.

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Environmental Law

## Supreme Court Reverses Course on Act 312 Damages Awards

***State v. La. Land & Expl. Co.***, 20-0685 (La. 6/30/2021), ____ So.3d ____, 2021 WL 2678913.

In 2004, the Vermillion Parish School Board (VPSB) and the State of Louisiana filed suit against defendants, including UNOCAL, alleging that oil and gas activities pursuant to a 1935 mineral lease and a 1994 surface lease contaminated lands controlled by the VPSB. Plaintiffs asserted claims including negligence, strict liability, unjust enrichment, trespass, breach of contract and violations of Louisiana environmental laws.

UNOCAL filed an exception of prescription, which was overruled. After a 2015 trial, the jury awarded the VPSB $3,500,000 for remediation of the land and $1,500,000 for strict liability claims. Both VPSB and UNOCAL appealed. The court of appeal affirmed the overruling of the exception of prescription and vacated the trial court's final judgment on grounds that the jury's verdict was inconsistent.

The plaintiffs filed a supplemental and amending petition after the effective date of the 2006 version of La. R.S. 30:29, commonly called Act 312, which caused the procedures of that statute to govern the case. Act 312 is intended to ensure that monetary damages awarded for environmental contamination of property are used to remediate the property to an acceptable condition. Pursuant to that statute, UNOCAL made an admission of liability for environmental damage. Such an admission would allow for the remediation process to begin and would ostensibly ensure that UNOCAL would be liable only for the actual cost of the remediation plan the state deemed feasible. This admission did not admit liability for any of VPSB's private causes of action.

On appeal to the Louisiana Supreme Court, the Court found that 1) the trial court did not commit manifest error when it overruled the exception of prescription, and 2) the trial jury was improperly allowed to decide issues reserved solely for the court under Act 312. Thus, the trial court's judgment was vacated and remanded for a new trial.

The decision to vacate the trial court's judgment expressly reverses the Supreme Court's prior decision in this same litigation. In *State v. La. Land & Exploration Co.*, 12-0884 (La. 1/30/13), 110 So.3d 1038, the Court ruled that, in Act 312 cases, the jury could grant damages greater than the cost needed to remediate the property to proper regulatory standards. Here, the Court reversed its previous decision and found that a strict reading of the language of Act 312 requires that the trial court — not the jury — determine the amount necessary to fund the remediation plan that it adopts. The only allowance for a jury to award excess damages beyond the costs of the court's plan is when an express contractual provision would allow such.

The Supreme Court ruled that the sole remedy for UNOCAL's limited admission of liability under Act 312 is the development and funding of a feasible remediation plan with the input of the parties and LDNR, to be adopted by the trial court. The Supreme Court remanded all remaining non-remediation causes of action to the trial court for a new trial.

## Louisiana's Interest in Remediation Action Doesn't Prevent Federal Court Jurisdiction

***Grace Ranch, L.L.C. v. BP Am. Prod. Co.***, 989 F.3d 301 (2021).

For landowners who possess property that was contaminated by exposure to toxic waste in the unlined earthen pits previously utilized by oil and gas operators, La. R.S. 30:16 provides a potential

remedy by allowing citizen suits to enforce state conservation laws if they can obtain an injunction entered in favor of the Commissioner of Louisiana's Office of Conservation. This case addressed whether this process makes Louisiana a de facto party to the proceedings.

After Grace Ranch acquired property allegedly contaminated by BP America Production Company and BHP Petroleum Americas, it filed suit in Louisiana state court to obtain an injunction ordering BP and BHP to remediate their property's contamination. Grace Ranch opposed the defendants' removal to federal court, alleging that diversity jurisdiction did not exist as Louisiana was a party in interest, and that under the *Burford* abstention doctrine, the federal court should abstain from exercising jurisdiction. The district court held that the federal court should abstain. Defendants appealed, and Grace Ranch moved to dismiss the appeal for lack of jurisdiction.

The 5th Circuit was asked to determine whether potential state involvement at the end of the litigation was sufficient to preclude diversity jurisdiction in federal court, and whether the general rule that state court remands are not appealable included any exceptions for remands on the grounds of abstention.

The 5th Circuit determined that diversity jurisdiction existed because Louisiana was not a proper party. Grace Ranch was not authorized to sue in Louisiana's name and Louisiana's interest was general and non-pecuniary. Further, the district court could fairly enter judgment in the state's absence.

Next, the court held that 28 U.S.C. §§ 1447(c) and 1447(d) demonstrated that remand orders based on abstention can be reviewed on appeal. Finally, the court determined that, although Grace Ranch's suit was a state law claim regarding unsettled questions of state law involving an important interest of the state, the *Burford* factors were meant to prevent federal courts from entanglement with state schemes addressing matters of state interest. This concern was not present in Grace Ranch's case. Therefore, Grace Ranch's motion to dismiss defendants' appeal for lack of jurisdiction was denied, and the case was remanded for further proceedings.

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## Contempt

***Young v. Young***, 54,038 (La. App. 2 Cir. 6/30/21), 2021 WL 2677439.

The trial court found Ms. Young in contempt for refusing to provide Mr. Young with court-ordered physical custody time, but refused to take evidence as to her reasons for refusing him access. The trial court found her allegations of domestic violence and abuse were relevant to the custody issues, but not to the contempt issues. However, the court of appeal noted that *"what the record does not contain is the requisite testimony and evidence to show that Allison's violation was (or was not) done intentionally, knowingly, and purposefully, without just cause."* The appellate court found that because evidence of domestic violence could have been relevant to whether she had "a justifiable excuse" to not comply with the order, the trial court abused its discretion in not allowing that evidence.

## Evidence

***Gonzales v. Gonzales***, 21-0172 (La. App. 5 Cir. 7/2/21), 2021 WL 2766900.

During the hearing on Mr. Gonzales' petition for protection from abuse against Ms. Gonzales, the issue arose regarding whether La. C.E. art. 1101.B(2) applied in the petition for protection-from-abuse hearing pursuant to La. R.S. 46:2131 to relax certain evidentiary rules. The issue arose when Mr. Gonzales' attorney asked the child's maternal grandmother about incidents where the minor child spoke to the grandmother. Ms. Gonzales' attorney objected to the questions as eliciting hearsay. The trial court ruled that the evidence was admissible and that La. C.E. art. 1101.B(2) applied because even if the child-custody issues were ancillary to the petition for protection from abuse, the court still had to decide regarding custody and supervised visitation, which required a best-interest analysis, thereby implicating the relaxed evidentiary rule.

The court of appeal found that this was a *res nova* issue and affirmed the trial court, finding that the best interest of the children was the ultimate issue, and that the relaxed evidentiary standard applied. The appellate court noted that other statutory provisions protecting children under the Children's Code, La. R.S. 9:361 and La. R.S. 46:2131 dealt with the best interest of the children within their respective contexts, and the relaxed evidentiary standard would, apparently, apply in those instances, too, given the court's paramount consideration to protect the best interests of the child. Finally, the court issued a caveat: "Nevertheless, the trial court should exercise its sound discretion in the appropriate weighing of evidence for the separate issues, *i.e.*, in considering the abuse petition, less weight should be given to evidence which might be otherwise inadmissible if tried separately."

## Paternity

***Bass v. Sepulvado***, 20-0608 (La. App. 3 Cir. 6/30/21), 2021 WL 2694865.

Mr. Bass filed a petition to establish paternity, alleging that he was the biological father of Ms. Sepulvado's child. Mr. Sepulvado, who was the presumed legal father as he was married to Ms. Sepulvado at the time of the child's birth, filed an exception of peremption, arguing that Mr. Bass filed his petition more than one year after the child's

birth. The trial court sustained the exception. However, the court of appeal reversed, finding that Mr. Sepulvado, in his petition for divorce, "judicially confessed" that he was not the father of the child but that he believed that Mr. Bass was. The court of appeal found this to be a judicial confession that precluded him from claiming that he was the father. Thus, because Mr. Sepulvado was not the legal father, Mr. Bass did not have to file his petition for paternity within one year of the child's birth. Further, Mr. Sepulvado also testified in these proceedings that he did not believe that he was the father of the child, corroborating his prior admission in his petition for divorce.

Mr. Sepulvado had argued that Mr. Bass could not prove that the mother had deceived him in bad faith regarding his paternity, despite that Mr. Bass filed his petition within one year of allegedly being told by the mother that he was the father. He argued that Mr. Bass introduced no evidence that he was deceived by the mother. The court of appeal also noted that Mr. Bass offered DNA evidence that he was the father of the child, which created a rebuttable presumption of his paternity; further, the mother testified that Mr. Bass was the father. This, combined with Mr. Sepulvado's admission, established that Mr. Bass was the father.

Two judges dissented. The judges opined that, first, a judicial confession must be made in the same proceeding in which it is attempted to be applied. That was not the case here, so there was no judicial confession; thus, Mr. Sepulvado did not disavow his paternity. Consequently, he maintained his status as the presumptive father, thus requiring Mr. Bass to have filed his petition within one year of the child's birth. Further, the dissent found that there was evidence that Mr. Bass may have known earlier that he was the father. In his petition to establish paternity, Mr. Bass alleged that he was in a sexual relationship with Ms. Sepulvado during her pregnancy until she was approximately seven months pregnant. The dissent thus suggested that he knew at the time of the child's birth that he was potentially the father of the child. Lastly, the dissent opined that Mr. Bass did not prove that he was deceived by Ms. Sepulvado.

## Appeals/Writs

***Williams-Beckwith v. Beckwith***, 21-0470 (La. App. 1 Cir. 7/22/21), 2021 WL 3140383.

The court of appeal denied Beckwith's request for a stay and did not consider his writ because his writ application did not include copies of the pleadings that formed the basis of the ruling to which he was objecting. The trial court had denied his rule to have his descriptive list deemed to constitute a judicial determination because Williams-Beckwith did not timely file her descriptive list. The appellate court noted that the petition for partition, the descriptive lists and the opposition to his petition were not in the record. It held that if he filed a new application, it had to contain all pertinent documentation and had to be filed within 30 days of this writ denial. One of the appellate judges dissented, stating that he would have reversed the judgment denying Beckwith's rule to show cause because Williams-Beckwith failed to show good cause for not timely filing her descriptive list.

***Adams v. Adams***, 20-1313 (La. App. 1 Cir. 7/26/21), ____ So.3d ____, 2021 WL 3179403.

After the trial court granted Mr. Adams' exception of prescription on this child support matter, Ms. Adams appealed. Her appeal was dismissed on the ground that the judgment lacked appropriate decretal language to constitute a final judgment. An amended judgment was signed by the trial court while the first appeal was pending, prior to the appellate court's dismissal of the appeal. Ms. Adams then appealed the amended judgment. The appellate court found that the amended judgment was null because the trial court's jurisdiction had been divested as a result of the first appeal.

## Custody

***Fuller v. Fuller***, 54,098 (La. App. 2 Cir. 7/21/21), ____ So.3d ____, 2021 WL 3073055.

The court of appeal affirmed the trial court's modification of custody to name Mr. Fuller as the domiciliary parent. The trial court had awarded her physical custody from 5:30 p.m. on Fridays to 5:30 p.m. on Sundays every other weekend, alternating weeks in the summer, and one-half of all major holidays. The court of appeal found that this did not establish frequent and continuing contact as required by law, as she had only four nights a month during approximately nine months of the year, and remanded the matter for the trial court to establish a physical custody schedule that gave her more time.

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## Louisiana Employment Law Update

The Louisiana Legislature passed new laws regarding pregnancy accommodation and regulating employers' use of an applicant's criminal history in hiring decisions. Both laws took effect on Aug. 1, 2021.

### Pregnancy Accommodation

Act 393 of the 2021 Regular Session added more protections to pregnant employees under La. R.S. 23:341-42. The Louisiana Employment Discrimination Law (LEDL) was amended to require employers to provide reasonable accommodations for pregnant employees and applies to employers with 25 employees or more. While the federal Pregnancy Discrimination Act and the Americans with Disabilities Act (ADA) provide some protections to pregnant employees, Louisiana joined other states in enacting provisions to provide additional protections.

The LEDL already required employers to provide specific accommodations to pregnant employees, including leaves of absence of up to four months and transfer to less strenuous positions. R.S. 23:342(B)(1) expands the LEDL by defining an employer's failure to provide reasonable accommodations as an unlawful employment practice, unless the employer can demonstrate that the proposed accommodation would result in an undue burden to the employer. This places the onus on the employer to prove that a proposed accommodation is unduly burdensome.

R.S. 23:341.1(B)(2)(b) also includes a non-exhaustive list of specific accommodations for employers to consider, including:

1. Providing scheduled, more frequent or longer compensated break periods;
2. Providing more frequent restroom breaks;
3. Providing a private place for an employee to express milk (not a restroom);
4. Modifying food or drink policies;
5. Providing seating or allowing employees to sit more frequently if the position requires the employee to stand;
6. Providing assistance with manual labor and placing limits on lifting;
7. Providing job restructuring or light duty if available;
8. Acquiring or modifying existing equipment or devices necessary to perform essential job functions;
9. Modifying work schedules.

Act 393 is not without limits. Like the ADA, employers are not required to create new positions as an accommodation or move pregnant employees into positions for which they are not qualified. La. R.S. 23:342(B)(1).

### Consideration of Criminal History

Louisiana previously placed no limits on an employer's consideration of criminal history, including arrests. Act 406 enacted La. R.S. 23:291.2, the first Louisiana law that that regulates an employer's consideration of an applicant's criminal history. The law is similar to the EEOC's guidance to employers in considering criminal history. This new law affects all employers, regardless of size.

R.S. 23:291.2 prohibits employers from considering an applicant's arrest if the arrest did not lead to a conviction. If an employee has been convicted of a crime, the statute requires employers to consider whether the applicant's criminal history has a direct and adverse impact on specific job duties that may justify rejecting the applicant for the position. Employers must consider the following factors:

1. Nature and gravity of the offense;
2. Time that has elapsed since the conviction;
3. Nature of the job sought.

The EEOC's guidance is similar and advises employers to undertake an individualized analysis of an applicant's criminal history. While employers can justify not hiring an applicant with an embezzlement conviction for a position that handles large sums of money, such as a bank teller position, the issue is not as clear for a 20-year-old robbery conviction for an applicant applying for a maintenance position. The new law also requires employers to provide applicants with background-check information used during the hiring process upon an applicant's written request.

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## 5th Circuit Holds Removal in Coastal Zone Litigation is Timely

Six Louisiana parishes, the Louisiana Attorney General and the Louisiana Department of Natural Resources brought 42 lawsuits in various parishes against numerous oil and gas companies based on alleged violations of the Louisiana State and Local Coastal Resources Management Act, which the plaintiffs claimed contributed to coastal land loss. The defendants removed the cases based on various jurisdictional theories, including federal-question jurisdiction under the substantial-federal-interest test set forth in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mnf.,* 545 U.S. 308 (2005), but the federal district courts remanded on the basis that the plaintiffs disclaimed any reliance on federal law and thus federal question jurisdiction did not exist. *See, e.g., Par. of Cameron v. Auster Oil & Gas, Inc.*, No. 16-0530 (W.D. La. May 9, 2018), 2018 WL 2144281, at *3; *Stutes v. Gulfport Ener. Corp.*, No. 6:16-cv-01253 (W.D. La. June 30, 2017), 2017 WL 4286846, at *15, *report and recommendation adopted*, (W.D. La. Sept. 26, 2017), 2017 WL 4274353; *Plaquemines Par. v. Rozel Operating Co.*, No. 13-6722 (E.D. La. Jan. 29, 2015), 2015 WL 403791, at *5.

Upon remand, however, the plaintiffs produced an expert report (the *Rozel*

Report) that the defendants argued demonstrated, for the first time, that the plaintiffs' claims relied in part on the defendants' activities during World War II while the companies were acting under the authority of the federal wartime agency known as the Petroleum Administration for War. The defendants also asserted that the *Rozel* Report made clear, for the first time, that plaintiffs were basing their claims in part on arguments that the defendants should have used steel tanks (instead of earthen pits for the storage of brine), disposed of brine in injection wells, used directional drilling (rather than vertical drilling), and produced petroleum at a slower rate, which the defendants stated would have violated the mandates of the Petroleum Administration for War. Thus, the defendants again removed the actions pursuant to federal question jurisdiction, but also relied on federal-officer removal (28 U.S.C. § 1442).

The U.S. District Court for the Western District of Louisiana issued a remand order in one of the cases, concluding that neither federal-question jurisdiction nor federal-officer jurisdiction existed. *See Par. of Cameron v. Auster Oil & Gas, Inc.*, 420 F. Supp. 3d 532 (W.D. La. 2019). Likewise, in another case, the U.S. District Court for the Eastern District of Louisiana concluded that removal was untimely and that, even if removal had been timely, neither federal-question nor federal-officer jurisdiction existed. Therefore, the Eastern District court issued an order of remand. *See Par. of Plaquemines v. Riverwood Prod. Co.*, No. 18-5217 (E.D. La. May 28, 2019), 2019 WL 2271118.

The defendants appealed (through a consolidated appeal). On original hearing, in *Par. of Plaquemines v. Chevron USA, Inc.*, 969 F.3d 502 (5 Cir. 2020), the U.S. 5th Circuit Court of Appeal affirmed the district courts' remand orders, concluding that the removals were untimely. On rehearing, however, the 5th Circuit reversed track.

At the outset, the 5th Circuit noted that remand orders generally are not appealable. But it proceeded to review both the propriety of federal-question jurisdiction and federal-officer removal based on the provisions of 28 U.S.C. § 1447(d) and the U.S. Supreme Court's recent decision in *BP P.L.C. v. Mayor & City Council of Baltimore*, 209 L.Ed.2d 631 (2021). That case held that, when such a remand order based on federal-officer removal is appealable, an appellate court also may review a district court's rejection of other bases of removal. *See Par. of Plaquemines v. Chevron USA, Inc.*, No. 19-30492 (5 Cir. Aug. 5, 2021), 2021 WL 3413161.

The 5th Circuit then turned to the timeliness of removal, concluding the removal was timely. If the face of the petition does not reveal a basis for federal jurisdiction, but a subsequent paper exchanged in the litigation does, a defendant has 30 days from the service of that paper to remove. While the Eastern District concluded that the plaintiffs' petition showed that the defendants' conduct going back as far as World War II might be an issue and thus the *Rozel* Report simply added more detail, the 5th Circuit disagreed. According to the court, the *Rozel* Report was the first paper that notified the defendants of the particular conduct that allegedly violated World War II-era regulations. Last, the 5th Circuit addressed subject-matter jurisdiction. While the 5th Circuit agreed with the lower courts that federal-question jurisdiction does not exist, it left the question of federal-officer jurisdiction to the lower courts, noting the 5th Circuit recently adopted a new standard for evaluating the propriety of federal-officer removal. *See Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 290 (5 Cir. 2020) (en banc). Because the district courts issued their remand orders before the new standard was announced, the 5th Circuit elected to remand the cases to district courts to evaluate, under the 5th Circuit's new standard, whether federal-officer jurisdiction exists.

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## Wrongful Life

***Robinson v. Mitchell***, 53,958 (La. App. 2 Cir. 6/30/21), ____ So.3d ____, 2021 WL 2673694.

A mother's blood test showed a positive result for Down syndrome of her unborn child. The result was sent to the defendant obstetrician's office, where an employee incorrectly recorded the results as "negative." The obstetrician/employer initialed the test results and told the parents that the results were "normal." Seven months later, the child was born and a blood test showed the results positive for Down syndrome. Subsequently, the obstetrician reviewed the child's file and advised the parents that he had incorrectly read the initial test results and that the Down syndrome test was positive.

A medical-review panel found that the obstetrician and his office personnel breached the standard of care but added that conflicting evidence prevented it from determining "whether this conduct was a factor of the resultant damages alleged by the Robinsons."

The parents contended in their lawsuit that they would have terminated the pregnancy had they known of the diagnosis, and they alleged 14 items of damage, including one for wrongful birth and one for wrongful life.

A settlement was reached in which $100,000 was paid by the physician's office. The PCF opposed the motion to approve the settlement. It admitted that the settlement established liability but contested causation for damages over $100,000 and contested whether there existed a cause or right of action for wrongful birth or wrongful life claims. The trial court acknowledged in its judgment all of the PCF's rights, including whether there existed a cause of action for wrongful birth or wrongful life.

The PCF filed a partial exception of no cause of action for the wrongful life claim filed on behalf of the child. The partial exception detailed the differences between wrongful birth (brought by the parents claiming avoidance of conception or termination of pregnancy with knowledge of the birth defects), wrongful life (brought on behalf of the child for damages due to enduring life in an affected condition) and wrongful pregnancy/conception (brought by the parents for damages ensuing from unintended conception and birth). The PCF argued that *Pitre v. Opelousas General Hospital*, 530 So.2d 1151 (La. 1988), and its progeny supported its position that "wrongful life is not an action in Louisiana." The Robinsons argued that *Pitre* was distinguishable because it dealt with a condition that "was not reasonably foreseeable," whereas Down syndrome was foreseeable as evident from the test results. The trial court sustained the exception of no cause of action on the wrongful life claim.

The appellate court noted that the Legislature has been silent on whether Louisiana recognizes a wrongful life claim and ultimately decided it did not. The court noted that, while the decision to abort the fetus could have been made within the time limits allowed by law, that right was granted to the mother, not the unborn child, adding that in the United States "the *mother* [has] the right to choose abortion within certain guidelines, *not the unborn child*. Given that an unborn child cannot choose an abortion of herself, it follows that a child cannot sue her doctor, or even parents, for not having been aborted." Included in the court's course of reasoning was a discussion of the societal and medical advances in medicine that allow children with the condition to become active participants in life, adding: "We refuse to regress back to the early 20th century way of thinking about children with Down syndrome. A life with Down syndrome, although difficult, does not equate to a life not worth living."

The dismissal of the wrongful life claim was affirmed.

## No Right of Action

***Rismiller v. Gemini Ins. Co.***, 20-0313 (La. 6/30/21), ____ So.3d ____, 2021 WL 2679552.

The Louisiana Supreme Court held that children given in adoption have the right to pursue survival and wrongful death actions pursuant to La. Civ.C. arts. 2315.1 and 2315.2 in *Rismiller v. Gemini Ins. Co.*, 20-0313 (La. 12/11/20), ____ So.3d ____. The court affirmed the district court's overruling of a peremptory exception of no right of action and remanded the case to the district court. The district court then ruled that Louisiana Civil Code articles 199, 2315.1(B) and 2315.2(D) unconstitutionally prevented children given in adoption from filing these claims. This led the Supreme Court to grant a rehearing in which it decided that the district court "legally erred" when it ruled that children given in adoption were allowed to bring claims for the deaths of their biological father and half siblings. The rights to bring these claims "are conferred only upon the persons the legislature has specifically included in the lists of eligible claimants" found in articles 2315.1 and 2315.2. The Court reasoned:

> Any relevant legal relationship between the children given in adoption and the biological relatives whose deaths are the subject of these tort cases has been terminated. In our civil law system, this court simply cannot reinsert codal language related to children given in adoption that has been specifically removed by the legislature.

The Court also noted that there was no constitutional impediment to eliminating adopted children as eligible claimants, but there was a "rational basis" for limiting eligible claimants to those most likely to be affected by the decedent's death.

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


# Tax Fraud Not Sustained on Appeal

***Succession of Ciervo v. Robinson,*** 19-0140 (La. App. 1 Cir. 12/12/19), 291 So.3d 1063 (reversing judgment in favor of LDR and remanding to the BTA); 20-1106 (La. App. 1 Cir. 4/16/2021), ____ So.3d ____, 2021 WL 1439805 (affirming judgment entered in favor of taxpayer on remand).

This state-income-tax prescription case involving a now-deceased taxpayer, Anthony Ciervo, Jr., who participated in the federal Offshore Voluntary Disclosure Program (OVDP), has now concluded, after two appeals to the 1st Circuit Court of Appeal. The first appeal arose from the Louisiana Board of Tax Appeal's (BTA) judgment finding that the decedent taxpayer had filed "false" returns as defined by La. R.S. 47:1580(A)(4), which suspended the three-year prescriptive period of La. Const. Art. VII, § 16. The BTA applied the federal "badges of fraud" framework to infer an "intent to evade taxes" based on Ciervo's understatement of income, concealment of assets offshore, and filing of incorrect returns. The BTA thus ruled that the several notices of assessment issued by the Louisiana Department of Revenue were timely; the Succession appealed.

The 1st Circuit reviewed the record of the hearing on prescription, which documented that Ciervo timely filed his federal and Louisiana income tax returns for the years 2006 through 2011. In 2015, Ciervo filed amended federal, but not state, income tax returns for those years while participating in the OVDP with the Internal Revenue Service. The IRS notified the LDR of the additional income reported on the federal amended returns and, with that information, the LDR issued notices of assessment. The LDR's notices of assessment asserted, among other things, a tax deficiency and the failure to pay penalty, but not that the Louisiana income tax returns for 2006 through 2011 were false or fraudulent.

The Succession filed a petition with the BTA asserting the three-year prescriptive period under La. Const. Art. VI Sec. 16 had run prior to the issuance of the notices of assessment for the years 2006 through 2011; therefore, the tax assessments should be abated for all years.

At trial in the BTA, LDR first contended the Louisiana income tax returns for the years 2006-2011 were false or fraudulent. The Succession introduced evidence that the Louisiana income tax returns were timely filed and that Ciervo had utilized the OVDP Program with the IRS. IRS transcripts for the years 2006 through 2011 and two expert witnesses showed that Ciervo was never under audit by the IRS at any time.

The BTA took the matter under advisement following the prescription hearing and subsequently issued reasons for judgment in favor of the LDR. The BTA found that Ciervo had substantially understated his income for six consecutive years, concealed assets offshore and filed incorrect returns. Using the federal courts' "badges of fraud" analysis, the BTA inferred from these facts that Ciervo filed false returns with the intent to evade taxes, and the filing of these returns suspended prescription under La. R.s. 47:1580(A)(4).

The 1st Circuit Court of Appeal reversed, finding that the BTA had manifestly erred in concluding that the LDR had carried its burden of proof to the standard of clear and convincing evidence.

Using federal jurisprudence, the court explained the LDR had the burden of proof to show by clear and convincing evidence that Ciervo filed his Louisiana tax returns with the intent to evade taxes. The court equated intent to evade taxes with fraudulent intent.

The inquiry to Ciervo's intent was again through federal jurisprudence by reviewing various "badges of fraud." The court listed the badges of fraud. It held that no single factor itself was sufficient to establish fraudulent intent, but a number of factors might show such intent. However, the court noted that, even if badges are present, a taxpayer may have a good faith misunderstanding of the law that works against fraudulent intent.

The 1st Circuit agreed that Ciervo substantially understated his Louisiana income for six consecutive years, but a mere understatement alone is not clear and convincing evidence of intent to evade taxes. The LDR had the burden of proving fraudulent intent by clear and convincing evidence, but the court found the record was devoid of any evidence of Ciervo's knowledge, level of culpability or intent in such underreporting of income. The court further noted that the record contained no evidence of Ciervo's educational background, occupation, work history, source of funds or even information about the foreign assets or foreign bank accounts themselves. Also, the court dismissed the BTA's last badge of fraud for filing false documents (which were the same tax returns as in the first badge of fraud) as it did not add to the evidentiary support of finding fraudulent intent. The 1st Circuit remanded the matter "for further proceedings" in accordance with its opinion.

On remand, the Succession moved for entry of judgment in its favor. The LDR opposed, contending that the remand was for the purpose of presenting additional evidence. The BTA refused any second bite at the apple and recognized that the purpose of the remand ordered in *Ciervo I* was to allow the BTA to vacate the assessments and other housekeeping details to grant the taxpayer full relief. Accordingly, on remand, the BTA entered judgment in favor of the Succession.

The second appeal was brought by the LDR, which disputed the scope of the remand ordered in the first appeal. The court of appeal examined its prior opinion and the procedural history of the case to conclude that the BTA correctly declined to re-open the matter for additional evidence. Thus, the court of appeal affirmed the BTA's entry of judgment in favor of the taxpayer's Succession, which ordered the abatement in full of the specified taxes, interest, penalties and charges for the specified years and amounts associated with the LDR's notices of assessments. The judgments of the 1st Circuit Court of Appeal are now final.

—**William A. Neilson**
Member, LSBA Taxation Section
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New Orleans, LA 70130

CHAIR'S MESSAGE

# The Young Lawyers Division:
## Supporting Young Lawyers

By Graham H. Ryan

The two previous issues of the *Louisiana Bar Journal* contained Chair's Messages centered on the importance for young lawyers to define professional fulfillment for themselves and to chart their own path in its pursuit. The Young Lawyers Division (YLD) plays a critical role in supporting young lawyers by creating an environment in which they can discover and pursue success and meaningfulness in their career. The YLD administers and supports a number of initiatives and programs through the leadership of a talented and diverse Council and Executive Committee led by Carrie Jones (Past Chair), Dani Borel (President-Elect) and Senae Hall (Secretary).

### Sharpen Your Practice Skills and Strengthen Your Network

► **Louisiana Young Lawyers Conference**. The YLD plans and executes the annual Louisiana Young Lawyers Conference, held in the spring in New Orleans (save the date: April 8, 2022). This engaging seminar offers CLE credit and networking opportunities with judges and legal leaders from around the state. The event also includes lunch and the YLD awards ceremony. The YLD Young Lawyers Conference committee is led by council members Megan Peterson and Camille Walther.


Graham H. Ryan

► **Professional Development Seminar**. The YLD plans and executes an annual Professional Development Seminar each winter geared specifically to young lawyers to sharpen their skillset. The YLD CLE committee is led by council members Joshua Dara and Jessica Fitts.

► **Bridging the Gap**. The YLD assists with the annual Bridging the Gap CLE, a three-day program designed to acquaint recent law school graduates with the practical aspects of law practice and to afford newly admitted active members with CLE hours.

### Help Heroes and Disaster Victims

► **Wills for Heroes**. The YLD administers the Wills for Heroes program, which provides free legal services to first responders (police officers, EMS and fire fighters) in the preparation of basic estate planning documents. Attorney volunteers visit emergency service sites across Louisiana and set up one-day clinics to draft basic wills, powers of attorney and health care directives for eligible first responders and their spouses. Volunteers receive one hour of CLE-approved training on preparing wills and other estate planning documents. The LSBA YLD hosted Louisiana's first Wills for Heroes event in October 2008 for the Calcasieu Parish Fire Department in Lake Charles. There are now Wills for Heroes programs held in 28 states across the nation. The YLD Wills for Heroes committee is led by council members Loren Shanklin Fleshman and Elizabeth Grozinger.

► **Disaster Legal Services**. The YLD, along with the LSBA Access to Justice Committee and other partners, administers Louisiana's Disaster Legal Services program (DLS). DLS is a program of the ABA's Young Lawyers Division and the Federal Emergency Management Agency designed to help survivors navigate the aftermath of presidentially-declared disasters. The DLS committee is led by council member Josef Ventulan and YLD President-Elect Dani Borel.

### Strengthen Your Community through Board Service

► **Barristers for Boards**. The YLD administers the Barristers for Boards program, which aims to help young lawyers stay involved in their local communities through placement on nonprofit boards and committees. The program

has received national recognition and we are partnering with the ABA to scale the program nationally. The Barristers for Boards committee is led by YLD Secretary-Elect Kristen Amond and council member Justin Brashear.

### Prepare Next Generation of Lawyers

► **High School Mock Trial**. The Council plans and implements the Richard N. Ware IV State High School Mock Trial Competition, which is the culmination of four Louisiana regional championships coordinated by the Council. The 2021 mock trial civil case was developed by the University of Louisiana-Monroe Mock Trial Team. The High School Mock Trial committee is led by council members Megan Réaux, Rachal Cox Cassagne and Collin Melancon.

► **Lawyers and Judges in the Classroom.** The Lawyers in the Classroom and Judges in the Classroom programs provide volunteer professionals from the legal community an opportunity to enhance civics and law-related education in Louisiana classrooms. Thousands of students statewide benefit from this program every year. These programs are led by the Louisiana Center for Law and Civic Education, partnered with the Bar and the Louisiana District Judges Association.

### Support Local Initiatives and Highlight the Best in Our Profession

► **Supporting Local Affiliates and Diversity.** The YLD supports initiatives and programs organized by the Young Lawyer Sections of the various bar associations and legal organizations throughout the state. The Membership and Affiliates committee, and Diversity committee, is led by council members Justin Jack and Josef Ventulan.

► **Young Lawyer Awards**. The YLD administers the annual LSBA YLD Awards, which recognizes outstanding young lawyers and affiliated organizations at the annual Louisiana Young Lawyers Conference. The YLD Council selects award winners based on recommendations made by a committee of young lawyers appointed from throughout the state. Awards include Outstanding Young Lawyer; Outstanding Local Affiliate; Affiliate Program of the Year; Hon. Michaelle Pitard Wynne Professionalism Award; and the YLD Pro Bono Award. The Awards committee is led by YLD Secretary Senae Hall and council members Josef Ventulan and Rory Bellina.

It would be my pleasure to personally assist anyone who may be interested in becoming more involved in the Bar. Please do not hesitate to reach out: gryan@joneswalker.com or (504)582-8370.

## YLD NEWS

# LSBA YLD Creates Disaster Tips Worksheet

The Louisiana State Bar Association's Young Lawyers Division, in conjunction with the American Bar Association, created a worksheet with tips and resources for dealing with a disaster. The worksheet includes post-disaster tips for recovery, tips for filing insurance or FEMA claims, and information on legal aid, fraud and important contact information. Go to: *www.lsba.org/documents/News/LSBANews/DisasterTipsWorksheet.pdf*.



## YOUNG LAWYERS SPOTLIGHT

### Breshatta M. Davis
### Monroe

The Louisiana State Bar Association's Young Lawyers Division Council is spotlighting Monroe attorney Breshatta M. Davis.

Davis was born and raised in Monroe, where she lived until she graduated from Richwood High School in May 2009. She proceeded to Baton Rouge to attend Southern University. She graduated with honors with a BA degree in political science. While attending Southern University, she joined the sorority of Alpha Kappa Alpha and has remained an active member of her sorority to this date. She received her JD degree from Southern University Law Center in 2019 and passed the Louisiana Bar exam in that same year.


Breshatta M. Davis

She is now licensed to practice law in all Louisiana courts. She focuses her practice in criminal cases, personal injuries and notary services. In July 2020, she returned to the Monroe area to start her own law firm, The B Law Firm, and to actively serve in the community where her foundation began.

Davis also has a private consulting business that focuses on marketing and public relations for marginalized business owners.

She serves on the board of directors for Ivy Elite, where they help shape young African-American women. She would eventually love to expand to the Houston, Atlanta and Ruston areas. She lives by the verse, Philippians 4:13, "I can do all things through Christ which strengthens me."

# JUDICIAL Notes

*By Trina S. Vincent, Louisiana Supreme Court*

APPOINTMENTS... RETIREMENTS... IN MEMORIAM

## Appointments

► C. Peck Hayne, Jr. was reappointed, by order of the Louisiana Supreme Court, to the Committee on Bar Admissions for a term of office which began June 24 and will end on Feb. 15, 2026.

► Thomas P. Owen, Jr. 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, 2026.

► Charles V. Cusimano III was designated, by order of the Louisiana Supreme Court, to serve as chair of the Louisiana Judicial Campaign Oversight Committee for a term of office which began May 24 and shall remain in full force and effect until amended through future Orders of the Court.

► Edwin G. Preis, Jr. was designated, by order of the Louisiana Supreme Court, to serve as vice chair of the Louisiana Judicial Campaign Oversight Committee for a term of office which began May 24.

► Arlanda J. Williams was appointed, by order of the Louisiana Supreme Court, to the Louisiana Judicial Campaign Oversight Committee for a term of office which began July 1 and will end on June 30, 2025.

## Retirements

► 21st Judicial District Court Division C Chief Judge Robert H. Morrison retired, effective Jan. 1, 2021. He earned his bachelor's degree from Rhodes College (formerly Southwestern at Memphis). He earned his JD degree in 1970 from Louisiana State University Paul M. Hebert Law Center. He worked in private practice from 1970-88 when he was elected to the 21st JDC bench. He was reelected without opposition in 1990 and served as chief judge for 21 years. He is a former chair of the Judiciary Commission of Louisiana. He is a former president of the Louisiana District Judges Association (LDJA) and served as a Legislative Liaison for the LDJA. He served as a co-chair of the Louisiana State Law Institute's Criminal Code and Code of Criminal Procedure Committee and as chair of the Trial Court Committee on Judgeships of the Judicial Council of the Supreme Court. He also served on the Judicial Budgetary Control Board.

## Deaths

► Retired 1st Circuit Court of Appeal Judge Randolph H. Parro, 78, died July 11, 2021. He earned his bachelor's degree in 1964 from the Georgia Institute of Technology and his JD degree in 1967 from Louisiana State University Paul M. Hebert Law Center. From 1967-70, he worked in private practice. He served as an administrative assistant to then-U.S. Rep. Patrick T. Caffery of Louisiana's 3rd Congressional District. In 1972, he was appointed as an associate director of the Louisiana Superport Authority. In 1975, he returned to private practice. Judge Parro was elected to the 17th Judicial District Court in 1982 and was reelected without opposition in 1985 and 1991. He was elected to the 1st Circuit Court of Appeal in 1993, where he served until his retirement in 2014.

► Hammond City Court Judge Grace B. Gasaway, 61, died June 17, 2021. She earned her bachelor's degree in 1982 from Louisiana State University and her JD degree in 1985 from LSU Paul M. Hebert Law Center. In 1986, she began working in private practice, serving as judge *pro tempore* from 1993-95. She was elected as a judge of the Hammond City Court in 1997. She is a former president of the Louisiana City Court Judges Association, the Council of Juvenile and Family Court Judges, the Committee on Family and Juvenile Court Rules of the Judicial Council and the Florida Parishes American Inn of Court. She served as president, vice president and secretary/treasurer of the 21st Judicial District Bar Association. She was a founding member and first president of the board of the Richard Murphy Hospice Foundation.

# PERRY DAMPF
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# PEOPLE

LAWYERS ON THE MOVE . . . NEWSMAKERS

## LAWYERS ON THE MOVE

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, announces that Monica J. Manzella has joined the New Orleans office as of counsel.

Baldwin Haspel Burke & Mayer, LLC, announces that **Kendra H. Merchant** has joined the firm as an associate in the New Orleans office.

The New Orleans-based litigation firm of Barrasso Usdin Kupperman Freeman & Sarver, LLC, announces that it has opened an office in Cleveland, Ohio.

Foster LLP announces that Oxana Bowman has been named a new partner in the firm's Houston, Texas, office.

Hinshaw & Culbertson LLP announces that **Julia H. Terry** has joined the firm as a partner in the New Orleans office.

Johnson Yacoubian & Paysse, APLC, in New Orleans announces that **Christopher M. G'sell**, **Denise M. Ledet** and **Christopher L. Williams** have become partners in the firm.

Kean Miller LLP announces that Amanda J. Francis has joined the firm as an associate in the New Orleans office.

Mouledoux, Bland, Legrand & Brackett LLC in New Orleans announces that **Tiffany L. Green** and **Tyler S. Loga** have joined the firm as associates.

Pipes, Miles, Beckman, LLC, in New Orleans announces that Etheldreda C. Smith and Rachel S. Kellog have joined the firm as of counsel, and Mia J. Lewis and Mary Elizabeth Ingram have joined the firm as associates.

Riess LeMieux, LLC, in New Orleans announces that **Brian D. Grubb** has joined the firm as a partner.

Steeg Law Firm, LLC, in New Orleans announces that **Margaret V. Glass** has become a partner in the firm and **Richard L. Traina** has joined the firm as an associate.

Strauss Massey Dinneen, LLC, in New Orleans announces that **Rachel M. Anderson**, **Paul A. Babineaux** and **Alexander A. Lauricella** have joined the firm as associates.

## NEWSMAKERS

**Richard J. Arsenault**, a partner in the Alexandria firm of Neblett, Beard & Arsenault, was appointed as a Planning Steering Committee member for the Multidistrict Litigation Conference at the George Washington Law School Complex Litigation Center. He will be a speaker this fall at the first invitation-only MDL conference.


Rachel M. Anderson


Richard J. Arsenault


Paul A. Babineaux


Blake R. David


James H. Gibson

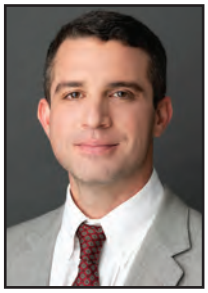

Margaret V. Glass


Tiffany L. Green


Brian D. Grubb


Christopher M. G'sell


Stephen J. Herman


Alexander A. Lauricella


Denise M. Ledet

Camille R. Bryant, a member (partner) in the New Orleans office of McGlinchey Stafford, PLLC, received the Brandes S.G. Ash/Toya Carmichael Leadership Award from the National Bar Association for her leadership as 2020-21 president of the Greater New Orleans Louis A. Martinet Legal Society, Inc.

**Blake R. David**, founding partner at Broussard & David, LLC, in Lafayette, was sworn in as president of the Louisiana Association for Justice in September.

Thomas E. Ganucheau, a partner in the Houston, Texas, office of Beck Redden LLP, was elected president of the National Foundation for Judicial Excellence.

**James H. Gibson**, co-founder/partner of Gibson Law Partners, LLC, in Lafayette, was selected as a Fellow in the International Academy of Trial Lawyers.

**Margaret V. Glass**, a partner in Steeg Law Firm, LLC, in New Orleans, has been elected to the board of directors for the Preservation Resource Center in New Orleans.

**Stephen J. (Steve) Herman**, a partner in Herman, Herman & Katz, LLC, in New Orleans, received the Distinguished Service Award from the American Association of Justice. Also, Herman, completing his term as president of the Pound Civil Justice Institute, moderated its annual national judges forum in July 2021, titled "Juries, Voir Dire, *Batson* and Beyond: Achieving Fairness in Civil Jury Trials."

Shreveport City Court **Judge Sheva M. Sims** received the A. Leon Higginbotham Award at the 50th Judicial Council National Bar Association convention.

## PUBLICATIONS

***Best Lawyers in America* 2022**

**Barrasso Usdin Kupperman Freeman & Sarver, LLC** (New Orleans): Michael A. Balascio, Judy Y. Barrasso, Jamie L. Berger, Christine M. Calogero, George C. Freeman III, Craig R. Isenberg, John W. Joyce, Stephen H. Kupperman, David N. Luder, Richard E. Sarver, Kyle W. Siegel and Steven W. Usdin; and Viviana H. Aldous, Chloé M. Chetta, Lorcan L. Connick, Robert J. Dressel, Laurence D. LeSueur, Jr., Shaun P. McFall, Janelle E. Sharer, Madison A. Sharko and Lance W. Waters, Ones to Watch.

**Pipes, Miles, Beckman, LLC (New Orleans):** Catherine F. Giarrusso, Alexis P. Joachim, Patrick J. Lorio, Kelsey L. Meeks, Stephen L. Miles, H. Minor Pipes III, Emily E. Ross, Lindsey M. Soboul and Christopher R. Teske.

***Chambers USA* 2021**

**Barrasso Usdin Kupperman Freeman & Sarver, LLC** (New Orleans): Judy Y. Barrasso, Jamie L. Berger, George C. Freeman III, Craig R. Isenberg, Stephen H. Kupperman, Richard E. Sarver and Steven W. Usdin.

**Chaffe McCall, LLP** (New Orleans): Walter F. Becker, Jr., G. Wogan Bernard, E. Howell Crosby, Julie D. Livaudais, Sarah Voorhies Myers and Harold K. Watson.

**Simon, Peragine, Smith & Redfearn, LLP** (New Orleans): Denise C. Puente, H. Bruce Shreves and Douglass F. Wynne, Jr.

***New Orleans CityBusiness* 2021**

**Chaffe McCall, LLP** (New Orleans): Leah N. Engelhardt and Peter J. Rotolo, Leadership in Law Class.

**Forman Watkins & Krutz, LLP** (New Orleans): Charles H. Abbott and Erin Latuso Wedge, Leadership in Law Class.

## IN MEMORIAM


**William Howard Slaughter III**

**William Howard (Bill) Slaughter III**, a New Orleans attorney, died from cancer on Oct. 22, 2020. He was 77. A memorial service was held on Sept. 11, 2021, at St. Augustine Catholic Church in Treme in New Orleans. A lifelong resident of Mid-City, New Orleans, he was a graduate of Jesuit High School (class of 1961) and Loyola University Law School (class of 1968, with honors). He worked as an attorney for more than 50 years, most recently practicing with partner Giles J. Duplechin. He was a member of the American Bar Association and was involved with the New Orleans and Jefferson bar associations. He was known and respected for his compassion and care for his clients, passion for the law and his friendly nature. He lived life to the fullest. He loved his family first and also traveling, food and wine, dancing, swimming, walks in nature, and classic poetry and literature. He was an avid churchgoer, patron and Eucharistic minister at St. Augustine Catholic Church. He is survived by his wife, Sheila Rose Bendix, three children, three sisters, two brothers, grandchildren and other relatives.

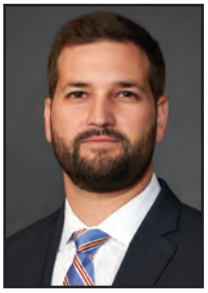

**Tyler S. Loga**


**Kendra H. Merchant**


**Judge Sheva M. Sims**


**Julia H. Terry**


**Richard L. Traina**


**Christopher L. Williams**

UPDATE

# Leadership LSBA 2021 Class Conducts Meeting and Reception

The Louisiana State Bar Association's Leadership LSBA 2021 Class had a reception and meeting on Aug. 26 at the Ritz Carlton New Orleans Library Lounge. Also participating were class members Stuart R. Breaux, Southern Lifestyle Development Company, LLC; Chaunda M. Brooks, Law Office of Roberto R. Arostequi; Quinn K. Brown, Dunlap Fiore, LLC; Jimmie C. Herring, Jr., attorney at law; and Briana C. Spivey, Acadiana Legal Service Corp.

**Leadership LSBA 2021 Class members, from left, Alexis P. Joachim, Pipes Miles Beckman, LLC; Margaret L. Manning, attorney at law; and Matthew S. Smith, attorney at law.**

**Leadership LSBA 2021 Class members, from left, ReAzalia Z. Allen, attorney at law, LSBA Leadership Class co-chair 2021-22; Iriane B. Lee, attorney at law, LSBA Leadership Class co-chair 2021-22; Andretta B. Atkins, attorney at law; and Rubiante L. Brown, Transcendent Legal.**

**Leadership LSBA 2021 Class members, from left, Farren L. Davis, McGlinchey Stafford, PLLC; Shermin S. Khan, attorney at law; Taylor M. LeDuff, Adams and Reese, LLP; Joseph T.D. Tran, LAMMICO; and Elizabeth L. Hyman, attorney at law.**

# Judge Currault Elected President of FBA New Orleans Chapter

Magistrate Judge Donna P. Currault, U.S. District Court, Eastern District of Louisiana, was elected 2021-22 president of the Federal Bar Association, New Orleans Chapter, at the Aug. 25 virtual Annual Meeting.

During the meeting, Immediate Past President Steven F. Griffith, Jr. presided over the election of officers — Judge Currault, president; Michael J. Ecuyer, president-elect; Brian J. Capitelli, treasurer; Jose R. Cot, recording secretary; Lawrence J. Centola III, membership chair; and M. Palmer Lambert, Young Lawyers Division chair.

Following the election of officers, Michael J. Ecuyer and Lawrence J. Centola III presented awards — S. Gene Fendler, Liskow & Lewis, APLC (posthumously) received the President's Award; Eva J. Dossier, Stanley, Reuter, Ross, Thornton & Alford, LLC, received the John R. (Jack) Martzell Professionalism Award; and Jee Young Park, Innocence Project New Orleans, received the Camille F. Gravel, Jr. Public Service Award.

**Magistrate Judge Donna P. Currault**

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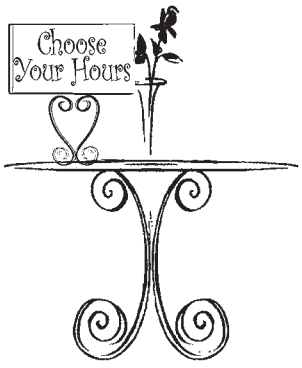
# CLE à la Carte

December 29-30, 2021

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Louisiana Association for JUSTICE

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# BRBA Hosts Opening of Court Ceremony

The Baton Rouge Bar Association (BRBA) hosted its annual Opening of Court, Memorial and New Member Ceremony on June 23 at the 19th Judicial District Courthouse. During the ceremony, BRBA President Christopher K. Jones recognized 50-, 55-, 60- and 65-year members of the Bar. Louisiana State Bar Association 2020-21 President Alainna R. Mire introduced new members. The Opening of Court Ceremony also paid homage to deceased bar members.

**Louisiana State Bar Association 2020-21 President Alainna R. Mire, left, and Baton Rouge Bar Association (BRBA) 2020-21 President Christopher K. Jones at the BRBA's Opening of Court Ceremony.**

**Attending the Baton Rouge Bar Association's (BRBA) Opening of Court Ceremony were, from left, BRBA Young Lawyers Section 2020-21 President Chelsea G. Caswell; BRBA 2020-21 President Christopher K. Jones; and BRBA YLS 2020-21 Secretary Ashley N. Butler.**

**The Lafayette Bar Association held its annual Young Lawyers Section (YLS) Installation of Officers Banquet at the Lafayette Bar Center on Aug. 19. The 2021-22 officers were sworn in by Judge Charles G. Fitzgerald, far right, U.S. 3rd Circuit Court of Appeal. From left, Kenneth P. Hebert, YLS secretary; Jason A. Matt, YLS Community Service chair (golf); J. Derek Aswell, YLS president; Jami L. Ishee, YLS treasurer; Carolyn C. Cole, YLS immediate past president; and Roya S. Boustany, YLS president-elect.**

# Save the Dates: LBF's POP UP Tour Scheduled

The Louisiana Bar Foundation (LBF) has set a series of stops in its next round of POP UP tours throughout the state. At the sessions, attendees can learn more about the LBF, how it operates, the growing need for civil legal aid, and how the LBF is trying to meet these needs. Attendees also can connect with local people and organizations with firsthand experience with civil legal aid issues.

The tour schedule is: Greater Orleans, Oct. 27; Northshore, Oct. 27; Bayou Region, Oct. 28; Central, Nov. 3; Northwest, Nov. 4; Northeast, Nov. 4; Southwest, Nov. 9; Acadiana, Nov. 10; and Capital Area, Nov. 10.

Check the LBF's website, *www.raisingthebar.org*, for updates on times and locations; or contact Danielle Marshall at (504)561-1046 or email danielle@raisingthebar.org.

# GNO Martinet Legal Society Presents Awards

The Greater New Orleans Louis A. Martinet Legal Society, Inc. cancelled the Annual Scholarship Jazz Brunch scheduled for Sept. 18 due to Hurricane Ida. The 2021 award recipients were announced — Judge Ernestine S. Gray, Orleans Parish Juvenile Court (Lifetime Achievement Award); Judge Robin D. Pittman, Orleans Parish Criminal District Court (Ernest N. Morial Award); Valerie E. Fontenot, Frilot, LLC (A.P. Tureaud Award); Ebony S. Morris, Garrison, Yount, Forte & Mulcahy, LLC (Louis A. Martinet Award); Professor Andrea Armstrong, Loyola University New Orleans College of Law (Dr. Norman C. Francis Award); and The Chase Family (Earl J. Amedee Award).

# LBF Welcomes New 2021 Fellows

The Louisiana Bar Foundation welcomed the following new Fellows:

Hon. Cynthia Clay Guillory ....Lake Charles

Jennifer Van Vrancken.....Jefferson

Donald R. Williams, Jr. .....Sacramento, CA

# LBF President Appoints Fellows for CPPs, Committees, Subcommittees

Louisiana Bar Foundation (LBF) President Christopher K. Ralston appointed Fellows to chair the nine Community Partnership Panels (CPP) and LBF standing committees and subcommittees. These volunteers work to strengthen communities in Louisiana, helping families facing non-criminal civil legal challenges.

CPP chairs are Shannon S. Dartez, Acadiana; Teresa D. King, Bayou Region; Linda L. Clark, Capital Area; Barbara B. Melton, Central; Margaret E. Woodward, Greater Orleans; G. Adam Cossey, Northeast; Hon. Page McClendon, Northshore; Paul L. Wood, Northwest; and Edwin F. Hunter III, Southwest.

Committee chairs are Hon. John C. Davidson, Communications; Chuck Bourque and Kerry A. Murphy, Development; Patrick A. Talley, Jr., Development Subcommittee-Annual Fellows Gala; Dave Ernest, Development Subcommittee-Collaborative Gifts; Chuck Bourque, Development Subcommittee-Major Gifts; Hon. Guy E. Bradberry, Development Subcommittee-Membership; Zebulon M. Winstead, Education; Christopher K. Ralston, Executive; Deidre D. Robert, Finance; Harry J. (Skip) Philips, Jr., Governance; Alan G. Brackett, Grants; Edmund J. Giering IV, Grantee Board and Staff Training; Deidre D. Robert, Investment; Patricia R. (Patsy) Bonneau and Matthew R. Richards, Kids' Chance Scholarship; and Christopher K. Ralston, Nominating.

# LBF Grant and LRAP Application Submission Deadlines Set

The Louisiana Bar Foundation's (LBF) grant application for 2022-23 funding is now available online. The deadline for submitting grant applications is Dec. 1, 2021.

The Loan Repayment Assistance Program (LRAP) application for 2022-23 funding will be available online beginning Dec. 1. The deadline for submitting the LRAP application is Feb. 11, 2022.

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

# Save the Date!

**Louisiana Bar Foundation 36th Annual Fellows Gala • Friday, April 22, 2022 • Hyatt Regency New Orleans**

Discounted rooms are available Thursday, April 21, and Friday, April 22, 2022, at $269 a night. To make a reservation, call the Hyatt at 1(800)233-1234 and reference "Louisiana Bar Foundation" or go to *https://www.hyatt.com/en-US/group-booking/MSYRN/G-GAAA*.

Reservations must be made before Thursday, March 24, 2022.

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

# 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 Nov. 1-5, 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 2022. (Costumes that were donated after Halloween 2020 are being distributed to children for 2021.)

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

**BATON ROUGE**
Baton Rouge Bar Association
544 Main St.
Baton Rouge, LA 70809
(225)344-4803

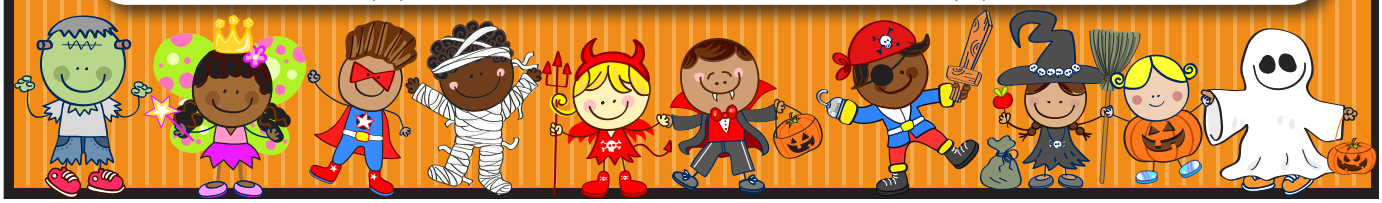
**MONROE**
Alicia Reitzell
The Reitzell Law Firm, LLC
1900 N 18th St., Ste 406
Monroe, LA 71201
(318) 570-4444

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

**LAFAYETTE**
Pam Landaiche
Lafayette Bar Association
2607 Johnston St.
Lafayette, LA 70503
(337)237-4700

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

**LAKE CHARLES**
Shayna Sonnier
Hunter, Hunter & Sonnier, LLC
1807 Lake St.,
Lake Charles LA 70601-5771
(337)436-1600



## President's Message

# LBF Hall of Fame Spotlight: Judge Eldon E. Fallon

*By 2021-22 President Christopher K. Ralston*

I am very pleased to announce a new project spearheaded by the Louisiana Bar Foundation's (LBF) Education Committee: *Hall of Fame Spotlight.* The purpose of this project is to honor the achievements of past presidents and others who have excelled in their service to the Foundation and its mission. The subject of our first *Hall of Fame Spotlight* is Judge Eldon E. Fallon. I had the privilege and honor of serving as a law clerk for Judge Fallon after graduating from law school. He instilled in me and other law clerks, interns, externs and others that we have a responsibility that comes with our position. That responsibility includes doing pro bono work and being philanthropic if and when we can. I feel very strongly that Judge Fallon's efforts and philosophy are key to the success of the Foundation.

Before Judge Fallon was nominated to the federal bench by President Clinton, he had a remarkable career as an attorney. A leader in his field, he rose to become the 1985-86 president of the Louisiana State Bar Association (LSBA). As the 45th LSBA president, Judge Fallon communicated his philanthropic message to the Bar membership via the President's Message in the *Louisiana Bar Journal* often. In his LSBA presidential interview, Judge Fallon said, "An association of lawyers has two broad purposes: first, to serve its members, and, second, to serve the public as a whole." It was during this time that he became aware of a shift or movement within the Bar. The Bar began to recognize that it had a responsibility not only to its members, but to society in general.

To spearhead the Bar's public service responsibilities, Judge Fallon dusted off the 1969 LBF charter, amended the articles, and set forth the reactivation of the Louisiana Bar Foundation. Judge Fallon said, "Organizing and funding projects that provide legal services for the poor, elderly, and mentally impaired will be a top priority of the Foundation. The Foundation will also award scholarships, fund law-related educational programs for the public, promote study and research and, in general, foster programs that encourage the effective administration of justice. The Louisiana Bar Foundation offers the members of our Bar an excellent opportunity to make a significant contribution to the quality of life of a large part of the citizenry of our state."


**Eldon E. Fallon, 1985-86 LSBA President**

At this time, voluntary Interest on Lawyers Trust Accounts (IOLTA) was successfully implemented in other states and administered by their Bar Foundations. This is a method of generating revenue on otherwise unproductive funds and using that money to fund law-related activities. In Louisiana, this concept was becoming a reality. In 1994, the LSBA House of Delegates and Board of Governors passed resolutions endorsing the IOLTA concept and recommended its adoption by the Louisiana Supreme Court. In 1985, the Louisiana Supreme Court amended Canon 9, DR 9-02, of the Code of Professional Responsibility to allow voluntary attorney participation in the IOLTA program to be implemented by the LBF.

This voluntary IOLTA program started a revenue stream to finance the administration of the pro bono projects throughout the state. One of the first public service programs of the LBF was the sponsorship of the New Orleans Pro Bono Project. To date, the IOLTA program has generated more than $100 million in funding for civil legal aid and law-related nonprofit efforts in Louisiana. The Judge's role in establishing the system to direct the interest on IOLTA to nonprofits in the state is a significant contribution that continues to this day.

Judge Fallon offers this advice for young lawyers, "It is important to realize we're in a special relationship with society, they look to us for a lot of their laws, they look to us for a lot of things, and recognize that you have a responsibility to give back."

In closing, I want to thank Judge Fallon for his contributions to our profession. As president of the LSBA, he was so instrumental in the LBF's beginning. He also served as the fifth LBF president before finding his way to the bench. Today the Louisiana Bar Foundation is the state's largest funder of civil legal aid. We partner with a trusted network of more than 70 organizations that lead community-driven efforts to help families facing non-criminal, civil legal challenges. Our goal is to make sure that all Louisianans, regardless of their background or income level, have access to civil legal services they need.

**Christopher K. Ralston**

**Louisiana Bar Foundation** is the State's largest funder of civil legal aid. We partner with a trusted network of more than 70 organizations that lead community driven efforts to help families facing non-criminal, civil legal challenges.

2021-22

# $ 8.3 Million

for Civil Justice Initiatives

Since 1989 the LBF has granted more than $102.3 million in grants.

## *Annual/Sustaining Funding* *$3,800,000*

| | |
|---|---|
| **Children's Legal Services** | **$110,000** |
| Catholic Charities - Diocese of Baton Rouge | $10,000 |
| Catholic Charities Archdiocese of New Orleans | $10,000 |
| First Grace Community Alliance | $15,000 |
| Louisiana Center for Children's Rights | $25,000 |
| Loyola University New Orleans College of Law | $8,000 |
| T.E.A.M.S. | $22,000 |
| The Advocacy Center | $20,000 |
| **Domestic Violence Programs** | **$500,000** |
| Beauregard Community Concerns | $36,000 |
| Chez Hope, Inc. | $60,000 |
| D.A.R.T (Domestic Abuse Resistant Team) | $36,000 |
| Faith House, Inc. | $36,000 |
| Family Justice Center of Central Louisiana | $37,500 |
| Family Violence Program of St. Bernard | $20,000 |
| Jeff Davis Communities Against Domestic Abuse | $20,000 |
| Metro Centers for Community Advocacy | $37,000 |
| Oasis A Safe Haven | $20,000 |
| Project Celebration, Inc. | $35,000 |
| Project SAVE | $40,000 |
| Safe Harbor | $16,000 |
| Southeast Spouse Abuse Program | $16,000 |
| The Haven, Inc. | $36,000 |
| The Wellspring Alliance For Families | $54,500 |
| **Law-Related Education** | **$90,000** |
| Baton Rouge Bar Foundation | $18,000 |
| Baton Rouge Children's Advocacy Center | $18,000 |
| Catholic Charities - Diocese of Baton Rouge | $5,000 |
| Louisiana Center for Law and Civic Education | $24,500 |
| Youth Service Bureau of St. Tammany | $24,500 |
| **Legal Services Corporations** | **$2,200,000** |
| Acadiana Legal Service Corporation | $1,118,341 |
| Southeast Louisiana Legal Services | $1,081,659 |
| **Loan Repayment Assistance Program** | **$200,000** |
| **Other Legal Service Providers** | **$350,000** |
| Catholic Charities Diocese of Baton Rouge | $26,917 |
| Catholic Charities Archdiocese of New Orleans | $26,917 |
| Catholic Charities of North Louisiana | $26,916 |
| Frontline Legal Services, Inc. | $50,000 |
| Innocence Project New Orleans | $50,000 |
| Justice and Accountability Center of Louisiana | $50,000 |
| Louisiana Center for Children's Rights | $15,750 |
| Loyola University New Orleans College of Law Wage Claim Clinic | $10,000 |
| NO/AIDS Task Force dba CrescentCare | $22,750 |
| Southwest Louisiana Law Center | $25,000 |
| The Advocacy Center | $33,750 |
| The Ella Project | $12,000 |
| **Pro Bono Projects** | **$350,000** |
| Baton Rouge Bar Foundation | $63,651 |
| Central Louisiana Pro Bono Project, Inc | $37,271 |
| Lafayette Bar Foundation | $64,596 |
| Shreveport Bar Foundation | $46,011 |
| Southwest Louisiana Bar Foundation | $34,500 |
| The Pro Bono Project | $103,971 |
| ***Jock Scott Community Partnership Panel Grants*** | ***$90,000*** |

***Child in Need of Care*** ***$3,350,000***
Provides legal assistance to needy children in areas of law which affect their safety, well-being, and future development.

***General Appropriation*** ***$500,000***
For the provision of adult civil legal services within the state's civil justice system.

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| ***Special Program and Project Funding*** | ***$483,500*** |
| Access to Justice Commission | $45,000 |
| Access to Justice Fund Grants | $40,000 |
| Grantee Board & Staff Training | $4,000 |
| Lagniappe Law Lab | $125,000 |
| Louisiana Appleseed | $150,000 |
| Oral Histories | $500 |
| Pro Hac Vice | $119,000 |
| ***Scholarships and other Funding Projects*** | ***$37,000*** |
| Kids' Chance Scholarships | $27,000 |
| Speak Out for Justice | $10,000 |

## Economic Impact and Social Return on Investment for Fiscal Year 2020

go to www.raisingthebar.org to see the full study

## $1 = $9.18

*For every $1 dollar invested in civil legal aid there is a $9.18 return on investment.*

## CIVIL LEGAL AID NET ECONOMIC IMPACT VALUE $64,823,000

## 23,143 civil legal cases

Louisiana's civil legal aid organizations helped in more than 100 types of civil legal issues including family law, housing, healthcare, consumer protection, public benefits, employment, and community support issues.

# CLASSIFIED

ADS ONLINE AT WWW.LSBA.ORG

## CLASSIFIED NOTICES

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

### RATES

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

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

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

**Screens: $25**
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Boxed ads must be submitted camera ready by the advertiser. The ads should be boxed and 2¼" by 2" high. The boxed ads are $70 per insertion and must be paid at the time of placement. No discounts apply.

**DEADLINE**
For the December issue of the Journal, all classified notices must be received with payment by Oct. 18, 2021. Check and ad copy should be sent to:
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Classified Notices
601 St. Charles Avenue
New Orleans, LA 70130

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To respond to a box number, please address your envelope to:
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**The Mandeville office of** Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, seeks an associate attorney with two-four years of construction litigation experience (transactional experience is a plus but not required) to join its Louisiana construction law practice. Academically distinguished applicants (top 10% and/or law review preferred) who have excellent writing and analytical skills, as well as deposition, discovery and motion practice experience, are sought to assume responsibility in an active and diverse federal and state court litigation and transactional practice. The firm seeks a bright, hard-working person with excellent judgement and attention to detail. Engineering, architecture or construction management experience is a plus. Must have a juris doctorate from an ABA-approved law school and be in good standing and an active member of the Louisiana Bar. For consideration, go to: *www.bakerdonelson.com/open-positions-lateral-attorneys*. Applicants should include a résumé, law school transcript and cover letter addressed to Rebecca Simon, Director of Recruiting.

**Florida lawyer** handling priest-abuse cases looking for co-counsel in Louisiana to work on priest-abuse cases in Louisiana. If interested, contact attorney Dyril Flanagan at (727)421-0718 or email flan119@msn.com.

## SERVICES

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

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**Brief writing/legal research.** Columbia Law School graduate; former U.S. 5th Circuit staff attorney; former U.S. District Court, Western District of Louisiana, law clerk; more than 20 years of legal experience; available for brief writing and legal research; references and résumé available on request. Douglas Lee Harville, lee.harville@theharvillelawfirm.com, (318)470-9582 (Shreveport).

**Personal property appraiser** specializing in fine art and antiques. Graduate of the Smithsonian program in Decorative Art in Washington, DC. Member of the International Society of Appraisers (ISA) since 2017. Writing to the *Uniform Standards of Professional Appraisal Practice* (USPAP). Contact Gregory Bingham at (470)261-1071, *https://www.gulfsouthappraisals.com/*.

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## NOTICE

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

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

**This is to inform** the members of the Louisiana State Bar Association and the public that Martha E. Minnieweather intends to file an application for reinstatement to practice law in the State of Louisiana and membership to the Louisiana State Bar Association. Any individuals may file a notice of opposition or concurrence with the Louisiana Attorney Disciplinary Board, Ste. 310, 2800 Veterans Memorial Blvd., Metairie, LA 70002, with 30 days of this publication.

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

**ANSWERS** for puzzle on page 240.

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## INDEX TO ADVERTISERS

# Here's to the Losers!

*By E. Phelps Gay*

A little over 20 years ago, when I was a muckety-muck with the Louisiana State Bar Association, I attended a meeting of a group called the Louisiana Association of Criminal Defense Lawyers. One of *their* muckety-mucks, an excellent lawyer from Baton Rouge with a wry sense of humor, was being given an award. In his acceptance remarks, he sighed and said: "I've represented a lot of clients over the years . . . a few of whom were actually innocent."

Everyone chuckled, including me, but the comment has stuck with me over the years. All lawyers, I suppose, would like to have a "winner" every time out — the rear-end collision with huge damages; the heartbreaking claim of mesothelioma against 15 asbestos manufacturers and their solvent insurers; the high-profile prosecution of an obviously guilty, cold-blooded murderer; or the class action against an oil company or chemical manufacturer that (let's say the evidence shows) placed profits over people.

Good lawyers advocate those claims, but what about those called upon to defend them? Not representing the "good guys," their job is primarily to hold claimants and prosecutors to their burden of proof and control the damages — in short, to make the best of a bad situation. That is not, despite some who may think otherwise, dishonorable work. It is hard, necessary work for our system of justice to function fairly and to protect our constitutional rights.

The same thing applies, of course, on the other side. The defending lawyer who brags about having obtained a summary judgment may have simply enjoyed the benefit of favorable case law, while the losing plaintiff's counsel fought valiantly for a change in the law so her clients could find justice. Put another way, it's easy to win when you're holding all the cards.

Sometimes, in a losing effort, by pushing the client's cause into the limelight, an attorney "moves the needle" toward a better outcome on a brighter day. No doubt the courageous lawyers who fought, for decades, against the odious doctrine of "separate but equal" fall into this category, as well as those who advocated for equal treatment on the basis of gender or sexual orientation. In the words of Robert Zimmerman (a/k/a Bob Dylan), "the loser now will be later to win."

And what about the public defenders, who soldier on day by day, without recognition or sufficient resources, seeking a fair shake for the criminally accused? In the course of fighting so many losing battles, they are, in a very real sense, "winning" the war for American justice. As Justice Black wrote in *Gideon v. Wainwright*, the right of the accused to defense counsel in our adversarial system is "fundamental and essential" to fair trials before impartial tribunals.

Besides, as we all know, determining who "wins" and who "loses" a case requires more than a glance at a headline. Upon diving into the details, you may discover that the defense lawyer who "lost" $10 million actually saved the client twice that sum; or that the plaintiff's counsel who "won" a $2-million verdict left a hefty sum on the table by advising his client to reject a more generous settlement offer; or that the criminal defense attorney whose client was convicted of manslaughter actually "won" a case where the district attorney argued mightily for first-degree murder and life in prison.

My not-too-original observation is that it takes a special kind of lawyer to spend a career defending difficult, unpopular cases, especially ones potentially involving loss of a person's freedom. While some lawyers (against whom I cast no aspersions) seek a pleasant, low-pressure office practice, and in so doing provide good legal service to their clients, others by nature thrive on facing near-impossible odds. They *like* living on the edge. To them, as the saying goes, "if you're not living on the edge, you're taking up too much space."[1]

In this respect, we might keep in mind something our British colleagues call the "cab rank" rule. Derived from the tradition requiring a taxi driver at the head of a "queue" to take the first passenger seeking a ride, English barristers (with some exceptions) have a professional obligation to take the next case crossing their desk — that is, to accept any work in a field in which they profess themselves competent, at a court where they normally appear, and at their usual rates. Upon receiving "instructions" from a client, they must accept them regardless of whether the case is being paid privately or publicly or "any belief or opinion which you may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client." Without this cab rank rule, an unpopular person might not receive representation, and the barristers who act for them might be criticized for doing so. The rule is intended, in part, to remove any social stigma associated with representing a "bad person." It recognizes and respects the critical importance of legal representation in a society which cares about the fair and impartial administration of justice.

But, you may ask, where's the humor in all this? Belatedly, I'll leave you with two jokes — one rather mild, the other a bit warped, qualifying, I suppose, as "gallows" humor.

**Joke #1 (Mild):**

Lawyer: "Now that you've been acquitted, will you tell me truly? Did you steal the car?"

Client: "After hearing your amazing argument in court this morning, I'm beginning to think I didn't."

**Joke #2 (Gallows):**

A criminal lawyer tells the defendant: "I have good news and bad news."

"What's the bad news?" asks the defendant.

"Your blood is all over the crime scene, and the DNA tests prove you did it."

"What's the good news?"

"Your cholesterol is 130."

## FOOTNOTE

1. This expression may have been coined, or at least popularized, by Jim Whittaker, the first American to reach the top of Mount Everest — not, as some may think, by Steven Tyler of Aerosmith.

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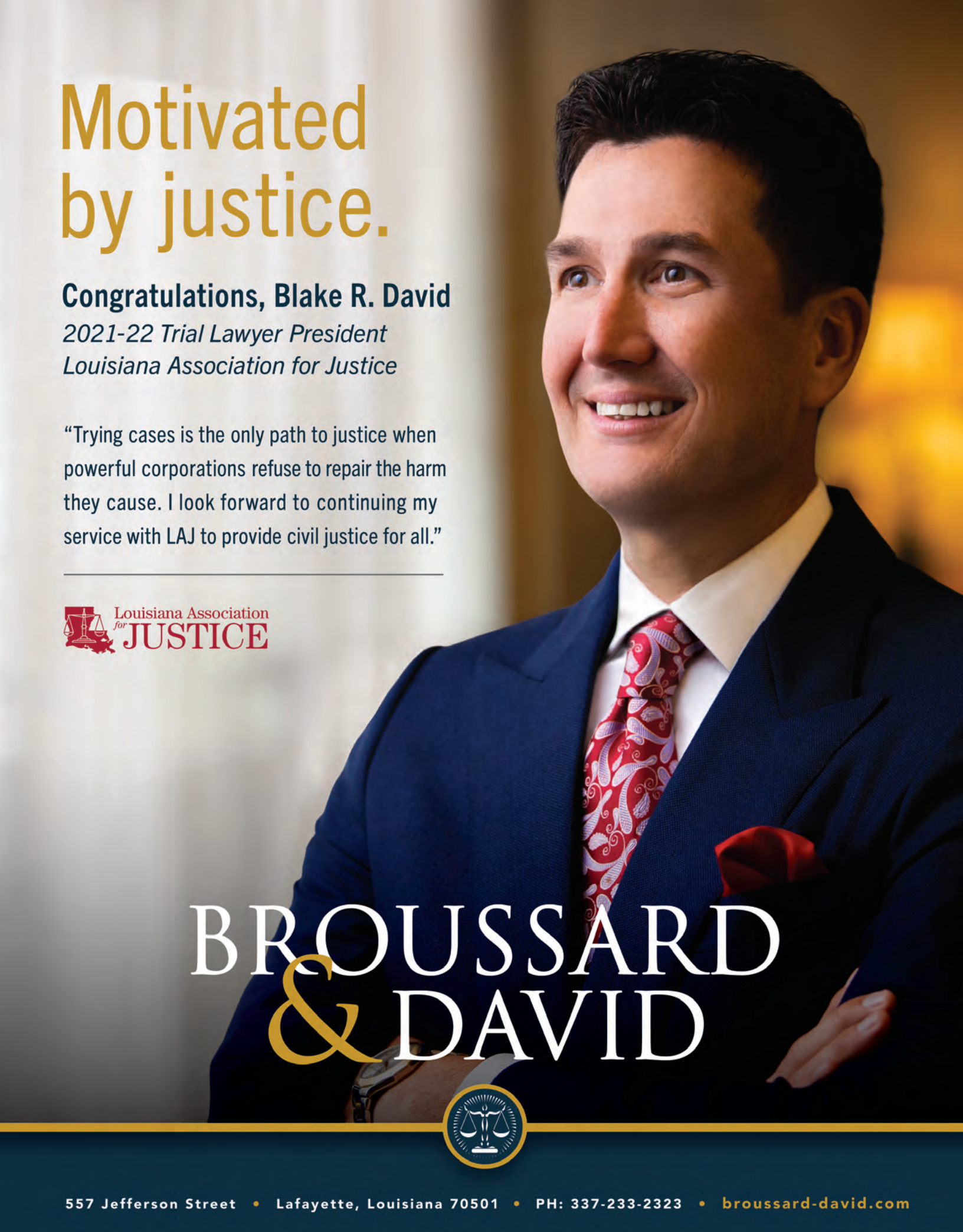
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