

THE BAR REVIEW

PUBLICATION OF THE SHREVEPORT BAR ASSOCIATION

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1/23	SBA Membership Luncheon – 12:00 p.m. - Petroleum Club
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2/23	Centaur Parade
2/27	SBA Membership Luncheon – 12:00 p.m. - Petroleum Club



From The President

by Curtis R. Joseph Jr., President, curtis@wjlawfirm.net

GREETINGS AND SALUTATIONS!

It is my good fortune to take the helm as the Shreveport Bar Association president for the 2019 calendar year. I vividly recall receiving the telephone call from Ben Politz in July 2016, advising me of my selection. Suffice it to say that, much like a ship whose sails have been blown flat against the masts and spars that support them, I was taken aback. I am truly honored and excited when I consider the prospects that this year holds, and I look forward to working with each and every one of you to achieve the vast potential that lies before us. Trust that there is no pride of authorship, and I welcome all ideas that may benefit our Bar.

At this juncture, I'd like to thank those upon whose shoulders I've stood to arrive at this point. Chief among them is Wellborn Jack Jr. If you've had the occasion to know Wellborn, then you've become acquainted with the fact that he is a visionary. But for a chance encounter with him, I would likely have remained in Virginia. I'd attended Washington and Lee University for undergrad and law school, and I was absolutely enamored with southern Virginia. Like many, I had no designs to return to Shreveport. However, a Friday afternoon interview with Wellborn changed my life's trajectory, and I am forever grateful.

I'd also like to thank past presidents, especially Zelda Tucker, who encouraged me to become active in the Bar. As has often been the case in my life, good people steer me in the direction that I need to go. Sometimes, I even listen. To my Golf Tournament co-chair of many years, Jimmy Mijalis, I truly cannot thank you enough. Though the tournament has had its ups and downs through the years, I've always been proud of the hard work that the members of our committee put into making the tournament as much of a success as possible.

That said, in addition to Dana Southern, who deftly wears so many hats for our Bar, I want to give a special thanks to each committee chair for the upcoming year. It's difficult to put into words the way I felt when each chair agreed to serve without reservation. It goes without saying that the respective committee chairs will be the real MVPs of my term, and I'd like to thank them in advance. They are: Steven E. Soileau (Archives), Roy (Hal) Odom Jr. and Chris Slatten (Bar Review editors), Judge Michael A. Pitman and Judge Frances Pitman (Continuing Legal Education), Jarred Franklin, Alexander Mijalis and Jimmy Mijalis (Golf Tournament), Jabrina Edwards (Law Day), Melissa Allen (Legal Technology), Don Weir Jr. (Mediation/Arbitration), Valerie DeLatte and Sarah Giglio (Membership), Julie Payne Johnson (Memorial/Recognition), Penny Nowell (Military Affairs), William Gaskins (Professionalism), Jerry Edwards (Program) and Shante Wells (Publicity).

I'd certainly be remiss if I didn't thank my mother, who raised my brother and me, and provided a real-life, tangible example of what was possible when you dream

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big and work hard. As she tells the story, I was seven years old, and we were stationed in Germany at the time. I came home from school and told her that I wanted to be a lawyer. I didn't know any lawyers, but I knew I wanted to be one. In fact, the first lawyer that I recall meeting was my good friend, Don Weir, whom I met the summer before I matriculated to our shared alma mater. Nevertheless, I've always wanted to be a lawyer, and I'm proud to introduce myself as a lawyer.

To that point, many have either read or heard Shakespeare's line, which was stated by Dick the Butcher in *Henry VI*: "The first thing we do, let's kill all the lawyers." However, I submit that the line has all too frequently been taken out of context, and used in a manner that is intended to malign lawyers and the practice of law. By that, a close read reveals that Dick the Butcher was a follower of the rebel Jack Cade. Cade's intention was to disturb law and order so he could become king. Consequently, Shakespeare's goal was to compliment attorneys and judges, who instill justice in our ordered society. It has been, and it will always be, lawyers who are at the forefront. For example, of the 56 signers of the Declaration of Independence, 25 were lawyers. Of the 55 framers of the Constitution, 32 were lawyers.

I cherish being a member of this noble profession, and I ask that you join me in sharing the treasure that is our Shreveport Bar Association. Together, we can serve as an educational, networking and mentoring resource for our attorneys. Moreover, we can assist each other in becoming better both personally and professionally. Again, I look forward to this year, and I thank you.

My kindest regards,

Curtis

Bar Review December 2018 We're In the Parish Now by Hal Odom Jr.



Women's Section

by Sarah Giglio,
sarah@gilmergiglio.com



Happy New Year to the members of the Shreveport Bar Association! I am so honored to serve as the 2019 president of the SBA Women's Section. Our officers who will serve with me are: Elizabeth Wong – Vice-President, Katherine Gilmer – Secretary, Courtney Harris – Treasurer, and Anna Brown Priestley – Immediate Past President.

Thank you to last year's president, Anna Priestley. Under Anna's leadership, the Women's Section hosted a very well-attended CLE in October, several "Wine Down Wednesday" happy hours, where female attorneys were able to network and make new friends, and "Coffee with the Court" for Caddo Parish Juvenile Court, District Courts in Caddo and Bossier Parish, Shreveport City Court and the Second Circuit Court of Appeal. Throughout last year, we saw increased attendance at our Women's Section events, ending with a very successful Christmas Party. We look forward to growing the size of our group over the next year.

We remain committed to our mission: promoting the empowerment and strengthening of the bond between women lawyers in the Shreveport-Bossier area through social engagement, community involvement and continued legal education. We are excited to continue to host social and networking events, CLE and other activities in the upcoming year. If you would like to see a particular type of event, please reach out to us via Facebook message or email at SBAWomensSection@gmail.com and let us know. We are here to serve you!

The new officers will be getting together soon to plan events for 2019, and we will continue sending out information in our newsletter and posting it to our Facebook page. If you are not already receiving our newsletter please visit <https://shreveportbar.com/womens-section/> and enter your email address to stay up to date on all the Women's Section events.

We look forward to another great year in 2019, and again, thank you for trusting me with the great privilege of serving as your president.



Elizabeth Wong
Vice-President/
President Elect



Katherine Gilmer
Secretary



Courtney Harris
Treasurer



Anna Brown
Priestley
Immediate Past
President



Second Circuit Highlights

by Hal Odom Jr., rhodom@la2nd.org

Let's mediate this. One of the reasons, perhaps, that appellate filings in the Second Circuit are down is the explosion of ADR. Many of the standard-form contracts you sign, plus many you merely “click to agree,” contain clauses waiving the use of courts in the event of a dispute. In some cases, the parties opt for mediation even without a contract. However, this does not always keep the matter out of court.

In *Shehee v. Shehee*, 52,319 (La. App. 2 Cir. 11/14/18), two branches of the family that owns Kilpatrick's Rose-Neath Funeral Homes fell into serious dispute over allegations of misuse of corporate money. Things had held together as long as the matriarch, Virginia K. Shehee, was alive and well, but her faculties eventually diminished, and she granted powers-of-attorney to one daughter, Margaret. Another daughter, Nell, then sued to nullify the powers-of-attorney and to interdict their mother. She also alleged that Margaret and a brother, Andy, were misusing the company credit card for personal expenses. These parties, plus another sister, Shane, agreed to take all matters to mediation. There, they reached an agreement whereby management of the company “shall be undertaken by” the four children, and “majority rule shall govern.” An asterisk led to a side note which stated that the power-of-attorney “shall be modified” to show all four children as co-agents via majority rule. Finally, “This arrangement shall be confirmed via court order.” Later, Nell sued her brother and sister, contending, among other things, that the mediation agreement was not a valid compromise because it was never “confirmed via court order.” The defendants filed peremptory exceptions of prescription, preemption, “supersession” (no cause of action) and “preclusion” (*res judicata*). After a trial on the exceptions, and the admission of two binders of evidence, the district court found an enforceable agreement, and Nell appealed.

The Second Circuit affirmed, in an opinion by Judge Moore. The opinion closely followed the La. Mediation Act, La. R.S. 9:4101-4112, especially the provision (§ 4111 A) that a written agreement is “enforceable as any other transaction or compromise” and is governed by the Civil Code. The court found that the agreement complied with La. C.C. arts. 3072 and 3076. As for the requirement of confirmation by court order, the Second Circuit held that the district court's ruling on the exceptions (and finding of an enforceable agreement) sufficed.

The bulk of the opinion addressed fairly technical questions of the time limit for raising a challenge to a corporate vote, under the Business Corporation Act, La. R.S. 12:1-724 E. This Act only took effect January 1, 2015, and is derived from the Model Business Corporation Act, which has been adopted, in whole or part, by 30 other states. Practitioners with shareholders as clients

are (or should be) aware of this fairly new scheme.

It's a recurring issue. Ms. McGee was a passenger in a 1981 Corvette owned and being driven by her nephew, Walter. Unfortunately, one of the wheels came off the vintage Vette, Walter lost control and the car slammed into a tree; no other vehicles were involved. Walter had liability and UM coverage with Allstate. Ms. McGee settled with Allstate and Walter for the policy limit of liability coverage, but her damages exceeded the limit. She then sued Allstate on Walter's UM coverage. Allstate moved for summary judgment, which the district court granted, and Ms. McGee appealed.

The Second Circuit affirmed, *McGee v. Allstate Ins. Co.*, 52,299 (La. App. 2 Cir. 11/14/18), in an opinion by Judge Garrett. The court first noted that it had addressed precisely the same issue in the very recent case of *Mills v. Mills*, 51,509 (La. App. 2 Cir. 1/10/18), 243 So. 2d 1245 (see, also, “Second Circuit Highlights,” March 2018). The court then recounted, at some length, the long and uniform jurisprudence, starting with *Breaux v. Gov't Emp. Ins. Co.*, 369 So. 2d 1335 (La. 1979) (“the at-fault host driver in a single car accident” cannot be “both the person insured under the policy and the owner or operator of an uninsured or underinsured vehicle”), and *Nall v. State Farm*, 406 So. 2d 216 (La. 1981) (“the UM statute does not mandate protection under the host driver's UM coverage when the cause of the accident is the negligence of the host driver”). Then there were five Second Circuit cases, starting in 1986 and culminating in *Mills v. Mills* (“when the insurance policy contains an exclusion of the vehicle named in the policy from being an uninsured vehicle, the insured claimants cannot recover under both the UM and liability provisions of the same policy”), cases from three other circuits, and the magisterial McKenzie & Johnson *Insurance Law & Practice* (“where a policy excludes an insured vehicle from the definition of an uninsured or underinsured vehicle, a guest passenger cannot recover under both the liability and the UM provisions of the policy where the host driver is at fault”). Here, Allstate's policy specified that “an uninsured auto is not a motor vehicle defined as an insured auto under Part I [liability] of this policy,” and the result was no UM coverage for Ms. McGee.

Counsel raised the ingenious argument that a different part of the policy, Part IV (1), plainly extended economic-only UM coverage for bodily injury, and this provision should override the limitation quoted above, or at least create an ambiguity that would require interpretation against the insurer. Not so, said the court, citing jurisprudence that just because a policy provides general coverage, and then subjects it to certain exclusions, does not make the policy ambiguous. *Bilyeu v. National Fire Ins. Co. of Pittsburgh, PA*, 50,049 (La. App. 2 Cir. 9/30/15), 184 So. 3d 69.

In a minor victory for the plaintiff, the Second Circuit denied Allstate's claim for costs and attorney fees for a frivolous appeal. However, the methodical analysis in **McGee** should put this recurring issue to rest, at least as long as R.S. 22:1295 (1)(a)(i) is not amended.

A chilling effect. On a sleety, icy day in February 2015, Mr. Sepulvado drove his GMC truck from his home in DeSoto Parish to Yokem Motors, in Shreveport, to get a repair estimate for some body work. He parked, and a Yokem employee waved for him to get out of the truck. Sepulvado took three steps, but his feet suddenly slid out from under him and he landed on a thin sheet of ice; he injured his back and head. He was taken by ambulance to Highland Hospital; while waiting to get in the ER, he said two Yokem employees had told him they slipped on the same patch of ice that morning. He sued Yokem and its insurer for personal injuries, pain and suffering, medical expenses and other losses. Yokem moved for summary judgment, which the district court granted, finding "the plaintiff was certainly on notice, it was open and obvious that the conditions were bad." Sepulvado appealed.

The Second Circuit affirmed, **Sepulvado v. Travelers Ins.**, 52,415 (La. App. 2 Cir. 11/8/18), in an opinion by Judge Cox. The statute, La. R.S. 9:2800.6, requires merchants to protect their patrons from unreasonable risks of harm, and not from open and obvious hazards. The Second Circuit cited Sepulvado's own deposition admitting the weather was "bad," "there were spots of ice and stuff like that" on his commute, and his son was off school that day because of the ice (while still insisting there "wasn't that much ice in the road"). Mrs. Sepulvado maintained she did not see any ice as she came around to help pick up her husband, but a Yokem employee said there was ice on the parking lot. There was also the deposition of Yokem's HR director, who said conditions were such that the previous day she brought in 48 boxes of salt to counter the icy conditions. From these facts, the Second Circuit found the ice was open and obvious.

My guess is that ice and snow are so unusual in Louisiana that courts will, almost intuitively, treat such conditions as extraordinary and hard not to notice. However, the outcome will depend on the kind of evidence developed in a given case.

Writ ruling is not a step. Martin, a builder and general contractor, took out a construction loan with National City Mortgage Co. in 2004, but he felt his lender did not live up to its disbursement commitment so he sued for breach of contract and violations of the La. Unfair Trade Practices Act ("LUTPA"). National City moved for summary judgment, which the district court granted as to the LUTPA claim but denied as to breach of contract. National City filed notice of intent to take a writ on March 24, 2014; the Second Circuit denied it on March 29, 2014. National City then applied to the Supremes on June 27, 2014; this writ was denied on October 3, 2014. Time passed. Martin requested a status conference and filed a notice of deposition on September 29, 2017. Arguing that over three years had elapsed, National City moved to dismiss the case as abandoned. The district court agreed, and dismissed Martin's suit. Martin appealed.

The Second Circuit affirmed, **Martin v. National City**

Mortg. Co., 52,371 (La. App. 2 Cir. 11/14/18), in an opinion by Judge Stephens. The court held that National City's notice of intent (March 24, 2014) was definitely a step in the prosecution or defense of the case. By contrast, the writ denial (March 29, 2014) was not, as it was "an action taken by the court," not a step taken by a litigant to hasten the matter to trial. Similarly, the Supreme Court's writ denial (October 3, 2014) was also not a step in the prosecution. Because over three years had passed since National City filed its notice of intent, the suit was abandoned.

The court had to distinguish *Causey v. Caterpillar Mach. Corp.*, 2002-0746 (La. App. 4 Cir. 6/26/02), 822 So. 2d 188, which held that a notice of intent was a step in the prosecution but that the three-year period was *interrupted* until the writ was denied. The crucial point was that in *Causey*, there was no action the plaintiff could have taken while the writ was pending; in **Martin**, there was – he could have proceeded with the deposition, just sooner. On the right record, *Causey* might work.

Martin did not argue, and the Second Circuit did not consider, whether National City's writ application to the Supreme Court (June 27, 2014) counted as a step. Seemingly, it was an action to determine Martin's breach of contract claim, but it wouldn't have averted this abandonment claim, as the next step was not until September 29, 2017. Overall, **Martin** embraces a bright-line view that time spent waiting on a writ ruling does not count against abandonment.

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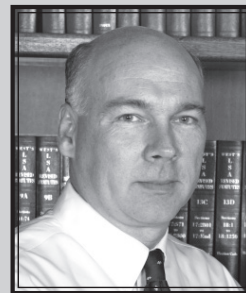
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JANUARY 23

SBA Member Luncheon

12:00 Noon at the Petroleum Club (15th Floor)

Speaker: Errol Laborde

FEBRUARY 1

Krewe of Justinian Bal

Horseshoe Casino Riverdome

FEBRUARY 23

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Krewe of Justinian Participates

FEBRUARY 27

SBA Member Luncheon

12:00 Noon at the Petroleum Club (15th Floor)

Speaker: Judge Paul Young

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Monroe Inn of Court

by Hal Odom Jr., rhodom@la2nd.org

Legal Ethics of the Internet and Social Media

The Fred Fudickar Jr. AIC (Monroe, La.) held its third meeting of the 2018-'19 season on December 10, 2018. Judge Alvin R. Sharp, of the Fourth JDC, presented "Ethical Scenarios to Consider Due To the Internet and Social Media." It was a timely and relevant topic.

Judge Sharp began with the obligatory definition of ethics, "a set of principles which govern the overall behavior of a person or group. It's the basic correctness of a specified or targeted conduct." The concept is simple.

The interface of ethics and the Internet and social media, however, can be challenging. Judge Sharp said the pitfalls really struck home while he was watching "Ralph Breaks the Internet" with his kids recently. "I may have learned more about the Internet from Wreck-It Ralph than I ever knew before," he chuckled. With this in mind, he fashioned a series of scenarios about Internet and social media use that may require a "higher degree of awareness."

One of these involved Twitter: "What if someone tweets that they just got a DWI. Should the lawyer (who specializes in DWIs) respond to the tweet?" Another concerned Live Group Chat: "What if an attorney is participating in a Live Group Chat and the person 'hosting' it said that all persons on the panel were 'experts'?" Of course, ethical rules apply to these situations, but the relaxed or informal ambiance of social media may put some practitioners off their guard. Lively discussion followed each scenario, and some members shared nearly similar experiences. At one point, U.S. Magistrate Karen Hayes added, "This is probably why federal judges are discouraged from having social media accounts!"

"I really don't have any answers for you," Judge Sharp concluded, in his usual animated and engaging style. "But I do have some questions!" He reminded members that full disclosure is always a good practice, and that the Ethics Advisory Service is a beautiful resource. "Make the call. They've got some nice folks down there."

The meeting was held at Fat Pelican, on Tower Drive, at noon. The 20 members in attendance received one hour of ethics CLE credit, and chose between the "Pelican Burger," shrimp polenta and grilled chicken pasta for luncheon.

The Inn held its second meeting of the season on November 13, 2018, at the Lotus Club. Unfortunately, this writer was unable to attend, but the program had the intriguing title, "Responding

to Reptile Theory Tactics."

The Inn will hold its next meetings on February 12 and March 11, 2019.



Judge Alvin Sharp brought his dynamic style to a discussion of the ethical pitfalls of social media, December 11, 2018, at Fat Pelican. (Photo by Hal Odom Jr.)



John Saye (Hayes Harkey, Monroe), Shereba Diaz (sole practitioner, West Monroe) and Hal Odom were among the attendees at the December meeting.

BILLY J. GUIN, JR.

Medical Review Panel

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BAR BRIEFS

SBA Member Julie Lafargue Receives Recognition



Julie Lafargue, of Abrams & Lafargue LLC, was featured in the Winter 2018/2019 issue of *Renewal News*, the magazine of Community Renewal International, for her voluntarism. This is a major part of Julie's life, and CRI recognized her for her long involvement at the Allendale Friendship House, hosting "report card dinners" and creating a caring environment to help kids stay in school and off drugs. She has also organized school uniform drives and coordinated neighborhood cookouts, among other activities. "The Friendship House is such a safe and nurturing place for them to learn that their life doesn't have to be spent as a drug dealer on the corner," Julie told *Renewal News*. Congratulations to Julie for this recognition from CRI, and gratitude for her part in mending the social fabric.



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Attorney Robin Jones

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Felicia T. Williams Inducted as New 2C Chief

by Hal Odom Jr., rhodom@la2nd.org

"This is our pledge to you: access to the courts, and fair treatment." So said Judge Felicia Toney Williams after taking the oath of office as new chief judge of the La. Second Circuit Court of Appeal. "Of course, not everybody can win, but rest assured, I pledge and promise fair treatment in the Second Circuit."

Judge Williams took the oath of office at an induction ceremony on December 13, 2018, at the Shreveport Convention Center. She assumed the office of chief by point of seniority on October 4. She is a 1977 graduate of Southern University and 1980 graduate of Southern University Law Center. She was elected judge of the Sixth JDC in 1990, first elected to the Second Circuit in 1992, and won unopposed reelection in 2002 and 2012. She was the first African American woman ever elected to the court, and becomes the first to serve as chief.

The ceremony featured a wide panoply of speakers. Perhaps the most touching was the introduction, by her husband, Moses Junior Williams, who recalled the first time he ever saw her, "riding a Honda motorcycle on the streets of Tallulah as a teenager. That was unusual for a girl back then!" He recapped her professional career, but emphasized her love of softball and her initiative to coach young people in East Carroll, Madison and Tensas Parishes. He also related an incident from early in her tenure on the Second Circuit when the late Chief Judge Bill Norris gently tried to prank them by telling him not to call her "judge." When the outcome was revealed, everyone got a good chuckle – including Judge Williams.

Other speakers included Chief Judge Ulysses Gene Thibodeaux, of the La. Third Circuit, who peppered his greeting with quotes from Liz Taylor, Justice Thurgood Marshall and Booker T. Washington, and an allusion to the Sankofa bird of west Africa; First JDC District Attorney James E. Stewart, who served with Judge Williams on the Second Circuit for 22 years, and joked that the court's new leadership should "keep on affirming our cases"; and Alainna Mire, City Attorney of Alexandria, La., and LSBA president-elect for 2019-'20, who extolled Judge Williams as a role model for young female attorneys.

Judge D. Milton Moore III, of the Second Circuit, Judge Piper D. Griffin, of the New Orleans Civil District Court and president of the National Bar Association-La. Judicial Conference, and Hon. Suzanne Stinson, chair of the La. Judiciary Commission, offered additional greetings. Trey Morris spoke briefly on behalf of SULC Chancellors emeriti Bhishma K. Agnihotri and Freddie Pitcher Jr., who were unable to attend. John K. Pierre, current chancellor of SULC, served as master of ceremonies. Justices Scott J. Crichton, John L. Weimer, Marcus R. Clark and Chief Justice Bernette Joshua Johnson, of the La. Supreme Court, were also in attendance. Chief Justice Johnson spoke briefly and administered the oath of office.

Immediately after the oath, Judge Williams's children and grandchildren presented her with a bible, a framed portrait, a clock

and a bouquet of flowers. Musical interludes were provided by Laryssa Killory, solo flute; Pastor Don L. Pope, in a soulful rendition of the National Anthem; Patricia Buchanan, of the Madison Parish Police Jury, spiritual vocal, with Rodney Richard on the piano; and Camryn Jackson, Judge Williams's granddaughter, vocal, accompanied by Pastor Pope. Benedictions were offered by Rev. Oliver Billups Jr., of Mt. Olivet Baptist Church, Monroe, La., and Dr. Theron Jackson, pastor of Morning Star Missionary Baptist Church, Shreveport.

In her closing remarks, Judge Williams expressed her deep gratitude for the enormous turnout – nearly 600 people attended the gala event – and her humility at being entrusted with the chief's robe. "If you could look out [at this crowd] and see what I see, you would understand the honor and the responsibility."

After the ceremony, attendees enjoyed a reception dinner, with stylish sounds provided by the Southern University Shreveport Jazz Ensemble.



Chief Justice Bernette J. Johnson, left, administered the oath to Chief Judge Felicia T. Williams, center, as her husband, Moses J. Williams, held the bible and their daughters, Rhonda Jackson and Myra Williams, looked on. (Photos by Hal Odom Jr.)



LSBA President-Elect Alainna Mire, left, with Chief Judge Williams immediately after the induction ceremony.



Young Lawyers' Section

by: Valerie DeLatte, President
vdelatte@getgordon.com

I am honored to serve as the 2019 president of the Young Lawyers' Section. We have an absolutely amazing bar association here in Shreveport, and I am excited to invite new members to get to know our legal community. Young Lawyers' Section strives to promote professionalism, cooperation, and camaraderie among young lawyers through social networking events and community service opportunities.

It is my pleasure to introduce our 2019 Executive board of officers and committee members: Gordon Mosley – Vice-President and President-Elect; Luke Whetstone – Secretary; Ashby Davis – Treasurer; Elizabeth Wong – Development Chair; Hannah Marler – Social Media Chair; William Murray – Mock Trial Chair; Jack “Jake” Bailey, III - Member-at-Large

As a former Trial-Advocacy competitor, it should come as no surprise that our first volunteer opportunity in 2019 is by far my favorite. The annual Region 1 High School Mock Trial is held in north Louisiana and gives students the opportunity to try a hypothetical criminal or civil case to a jury of community members and attorney judges who score students on their knowledge of the rules of evidence and case facts, as well as overall presentation of their case theory. Please mark your calendar to save the date of Saturday, March 2, 2019. If you are interested in volunteering to serve as a performance judge or general volunteer, please contact Billy Murray at: William@nhsmedmal.com.

If you are a young lawyer (under 40 years old or in the first 5 years of practice) and would like to receive our email newsletter and updates on events, please email shreveportbarassocyls@gmail.com and follow us on [instagram@sba_yls](https://www.instagram.com/sba_yls).

Happy New Year.



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How Write You Are

by Hal Odom Jr., rhodom@la2nd.org

I am undaunted. A national magazine with the reputation of impeccable editing recently quoted a New York-based sports reporter as saying, with reference to mischief in the Yankees' locker room, "All of this is why nothing about the Babe *phases* me." Which phase of Babe Ruth's career did she have in mind? Did the editors at *The New Yorker* nod off?

The word for *disconcert* or *fluster* is *faze*, *f* at the beginning and *ze* at the end. According to John Ayto's *Dictionary of Word Origins* (London: Columbia Mktg. ©1990) this word dates to the early 19th century and is "mainly restricted to American English" but derives from an Anglo-Saxon word, *feeze*, meaning *alarm* or *drive away*.

The word is unusual but not unknown to legal writers. "Seals insisted this first shot did not *faze* Feeney, then * * * Feeney renewed their tussle for the gun." *State v. Seals*, 95-0305 (La. 11/25/96), 684 So. 2d 368. "Vergo was in a frenzy and Cates' efforts did not *faze* decedent." *Harris v. Vergo*, 441 So. 2d 483 (La. App. 2 Cir. 1983).

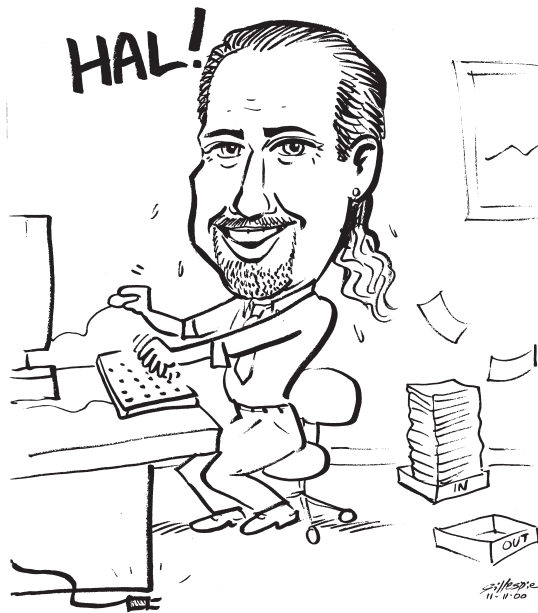
The much more common word is *phase*, a noun for a *stage in the development of something*; as a verb, it means to *synchronize*. It is incorrectly used when stating that someone's penal history "clearly establishes that this defendant is not *phased* by the threat of incarceration." *State v. Williams*, 95-1556 (La. App. 3 Cir. 2/19/97), 688 So. 2d 1343. The defendant is not *fazed* by the threat of prison, and the reporter is not *fazed* by stories of the Bambino's carousing.

Don't let these similar words confound you. Be unfazed.

Who says grammar doesn't matter? The U.S. Supreme Court recently conducted a tutorial on the proper use of past participles! In *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1317, 85 USLW 4346 (2017), the court analyzed the Fair Debt Collection Practices Act, which limits the conduct of debt collectors: do these limits also apply to persons who purchase outstanding debt and try to collect it on their own account? The plaintiffs had taken out car loans with CitiFinancial Auto, but after they defaulted, CitiFinancial sold the loans to Santander, who started badgering the plaintiffs for payment. According to the plaintiffs, Santander's conduct violated FDCPA.

The case hinged on the statutory definition of *debt collector*, anyone who "regularly collects or attempts to collect * * * debts owed or due * * * another." 15 U.S.C. § 1692a(6). The district court and the Fourth Circuit held that a debt purchaser is not a *debt collector*, based on this definition; however, two other circuits had decided otherwise. The plaintiffs took a writ, which the Supremes accepted.

One of the plaintiffs' arguments was that the word *owed* is the past participle of the verb to *owe*; hence, the statute's definition of a debt collector captures anyone who regularly seeks to collect debts *previously owed* to another. If Congress had wanted to exempt all *present* debt owners from the definition, it would have used the present participle, *owing*. In that event, the statute would have said "debts owing or due * * * another." The Supremes unanimously slapped this down, with a flair almost worthy of the late Justice Scalia:



"But this doesn't follow even as a matter of good grammar, let alone ordinary meaning. Past participles like 'owed' are routinely used as adjectives to describe the present state of a thing – so, for example, *burnt* toast is inedible, a *fallen* branch blocks the path, and (equally) a debt *owed* to a current owner may be collected by him or her. * * * Just imagine if you told a friend that you were seeking to 'collect a debt *owed* to Steve.' Doesn't it seem likely your friend would understand you as speaking about a debt *currently* owed to Steve, not a debt Steve *used* to own and that's now actually yours? In the end, even petitioners find themselves forced to admit that past participles can and regularly do work just this way, as adjectives to describe the present state of nouns they modify."

It's fair to say that this analysis of past participle as something that "can occur in what is technically a present tense" had real results: debt purchasers are not *debt collectors*, and they are not bound by the restrictions of FDCPA. They have the same status as simple creditors.

In fairness, it's disturbing that anybody – creditor, debt collector, debt purchaser – would misrepresent the amount owed and his authority to collect the debt (as the plaintiffs alleged). Even the author of *Henson*, Justice Neil Gorsuch (Scalia's successor), bemoaned the "disruptive dinnertime calls" and "downright deceit" involved. Yet the court would not accept the plaintiffs' strained and erroneous grammatical argument.

Grammar matters. Get it right.

Accessing the damage. A sharp-eyed court recently corrected a document extending a promissory note: "This October 10th agreement also stated that 'THE CONTRACT WILL BE ACCESSED [sic] A FEE OF \$100.00 PER DAY OR UNTIL PAID.'" The court discreetly did not mention which party, lender or borrower, actually wrote the extension, but it was probably the lender. *Taylor v. Dash Equip. & Supp.*, 2018-335 (La. App. 3 Cir. 11/7/18). Oddly enough, the same court committed that very error a year earlier: "Costs of these proceedings are *accessed* to S.E. PROPERTY HOLDINGS, LLC." I hope the losing party has access to sufficient funds to pay appellate costs. *S.E. Property Holdings LLC v. Chunn*, 2017-246 (La. App. 3 Cir. 11/8/17), 231 So. 3d 89. In both instances, the writers meant *assessed*.

Um, no. I've written frequently about the tiniest error, *de minimus*, meaning *inconsequential*, which should always be *de minimis*. Sorry, it's just a rule of Latin.

First cousin to this is the Latin phrase for to *the point of nausea*. It's *ad nauseam*. Please don't replicate the *-um* error: "The facts of the related cases have been detailed *ad nauseum*. Familiarity is assumed." *David v. Signal Int'l LLC*, 37 F. Supp. 3d 836 (E.D. La. 2014), fn. 3. "Mr. Green testified that Gawain Ministries was asked '*ad nauseum*' to provide a competing contractor's estimate for damages to the property, but declined to do so." *River Bend Capital LLC v. Lloyd's of London*, 2010-1317 (La. App. 4 Cir. 4/13/11), 63 So. 3d 2011. Fortunately this is an error not seen often, nothing near *ad nauseam*. Still, I wouldn't call it *de minimis*.

Thanks For Your Valuable Contribution!

The planners and speakers of the SBA December CLE by the Hour seminar are volunteers. Their gift of time and talent make this event successful. We acknowledge and greatly appreciate their work.

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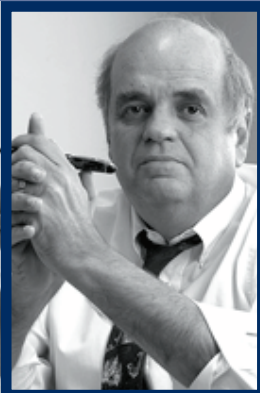
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VETERANS APPRECIATION LUNCHEON - JANUARY 23

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\$25.00 for SBA members includes lunch with advance reservation and \$30.00 for late reservation
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JANUARY LUNCHEON

When: Wednesday, January 23 from 12:00 Noon to 1:15 p.m.

Where: Petroleum Club (15th floor)

Featuring: Errol Laborde, Mardi Gras Historian and New Orleans Magazine Publisher

Join us on Wednesday, January 23 to welcome Mardi Gras historian Errol Laborde, Executive Vice President and Editor-in-Chief of Renaissance Publishing Company. He serves as Editor/Associate Publisher of *New Orleans Magazine* and Editor/Publisher of *Louisiana Life Magazine*. He also oversees several other company publications, including *Acadiana Profile*, *St. Charles Avenue* and *New Orleans*

Homes & Lifestyles. Laborde is producer and a regular panelist on *Informed Sources*, a weekly news discussion program broadcast on public television station WYES-TV, Channel 12. The winner of over 20 New Orleans Press Club awards, Laborde is a three-time winner of the Alex Waller Award, the highest award given in print journalism by the Press Club. In 2004, 2013 and 2017 he won the Press Club's Ashton Phelps Award for editorial writing.

Laborde is a recognized authority on Carnivals. His most recent book is *Mardi Gras: Chronicles of the New Orleans Carnival*. Other books are *Krewe: The Early Carnival from Comus to Zulu* and *Marched the Day God*, a history of the Rex organization. He also wrote the text for a pictorial book, *Mardi Gras – A Celebration*.

Laborde is a Fellow of Loyola University's Institute of Politics and the New Orleans Regional Leadership Institute. He was recognized as a Role Model by New Orleans' Young Leadership Council and received the Advertising Club of New Orleans' Hornblower Award for his civic work. He holds a Ph.D. in political science from the University of New Orleans and in 2011 was selected as UNO's co-Alumnus of the year. He has also received the Lifetime Achievers Award from the New Orleans Press Club.

Each Mardi Gras night he is a co-host of the broadcast of the ball of the Rex organization and the historic meeting of the courts.

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