THE BAR REVIEW

PUBLICATION OF THE SHREVEPORT BAR ASSOCIATION Volume XXVI, Number 9 • November 2019

INSIDE | NOVEMBER

EVENTS AT A GLANCE

11/2	5th Annual Midway to Mardi Gras "5K, 10K, and Fun Run
11/6	SBA Membership Luncheon – 12:00 p.m. - Petroleum Club
12/10-11	December CLE by the Hour Seminar at Petroleum Club of Shreveport
12/15	SBA and Area Law Student Christmas Party

From The President

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

THE 4-WAY TEST

During my sophomore year in college, my mentor, Professor Robert DeMaria, sent myself and a fellow Mass Communications major to Winchester, Virginia, to cover a town hall meeting. Unbeknownst to us was the fact the agenda featured a highly contentious issue, one that remains the source of division throughout our country even to this very day: the removal of Confederate monuments from public spaces. So, there we were, two young black kids, pulling into a foreign town, which was overrun by people wearing Confederate regalia, waving Confederate flags and shouting unpleasantries. Being that I was from Louisiana, I'd encountered my fair share of Confederate flags. However, my classmate was from Brooklyn, New York, and she was terrified. I assured her that I wouldn't let anything happen to her, and I advised her that I would take the issue up with our professor the following day.

Fortunately, we covered the meeting without incident. When I entered the professor's office the next morning, he saw the anger in my eyes, and he headed me off at the pass. He stated that he would not apologize for sending us to the meeting. However, he went on to admit that he owed us an apology for not letting us know about the hot-button issue on the agenda. More importantly, he used the opportunity as a teaching moment to stress the point that, as journalists, it was our job to find out what happened in the world on a certain day, and to report it objectively to our readership or viewership. As members of the Fourth Estate, we were charged with reporting the facts and only the facts. In other words, ours was a quest for truth. Similarly, as officers of the court, we are charged with an ethical obligation that encompasses candor before the court. Which brings me to the 4-Way Test.

Approximately three years ago, my father-in-law, David Ginsburg, invited me to a lunch meeting of the Rotary Club of Shreveport, of which I am now a proud member. At the conclusion of the meeting, the members and guests stood and recited the test, which provides as follows:

> "Of the things we think, say, or do,
>
> 1. Is it the truth?
>
> 2. Is it fair to all concerned?
>
> 3. Will it build goodwill and better friendships?
>
> 4. Will it be beneficial to all concerned?"

Suffice it to say, I was fascinated by such a litmus test. And, I was curious as to its origins. As it turns out, the test was penned by Herbert J. Taylor in the early 1930s. Taylor sought to save the Club Aluminum Products distribution company from imminent bankruptcy. He firmly believed that a change in mentality was the first step in righting the ship. After all, as I think, I am. Basically, by establishing a set of guidelines that pointed toward elevated ethics and morals, Taylor changed the overall climate of the company which, in turn, changed the company's fortunes.

I make specific mention of the fact that the test leads off with the threshold inquiry – Is the thing true? Prior to assessing its equitableness, its benevolence or its usefulness, Taylor weighed the veracity of the thing. Is it the truth? As I write this article, our President is in the midst of an impending impeachment and the cauldron that is the Middle East is poised to erupt. Yet, one can channel surf the various news outlets and find altogether different versions of the truth depending upon one's appetite. There is actually a new term for this

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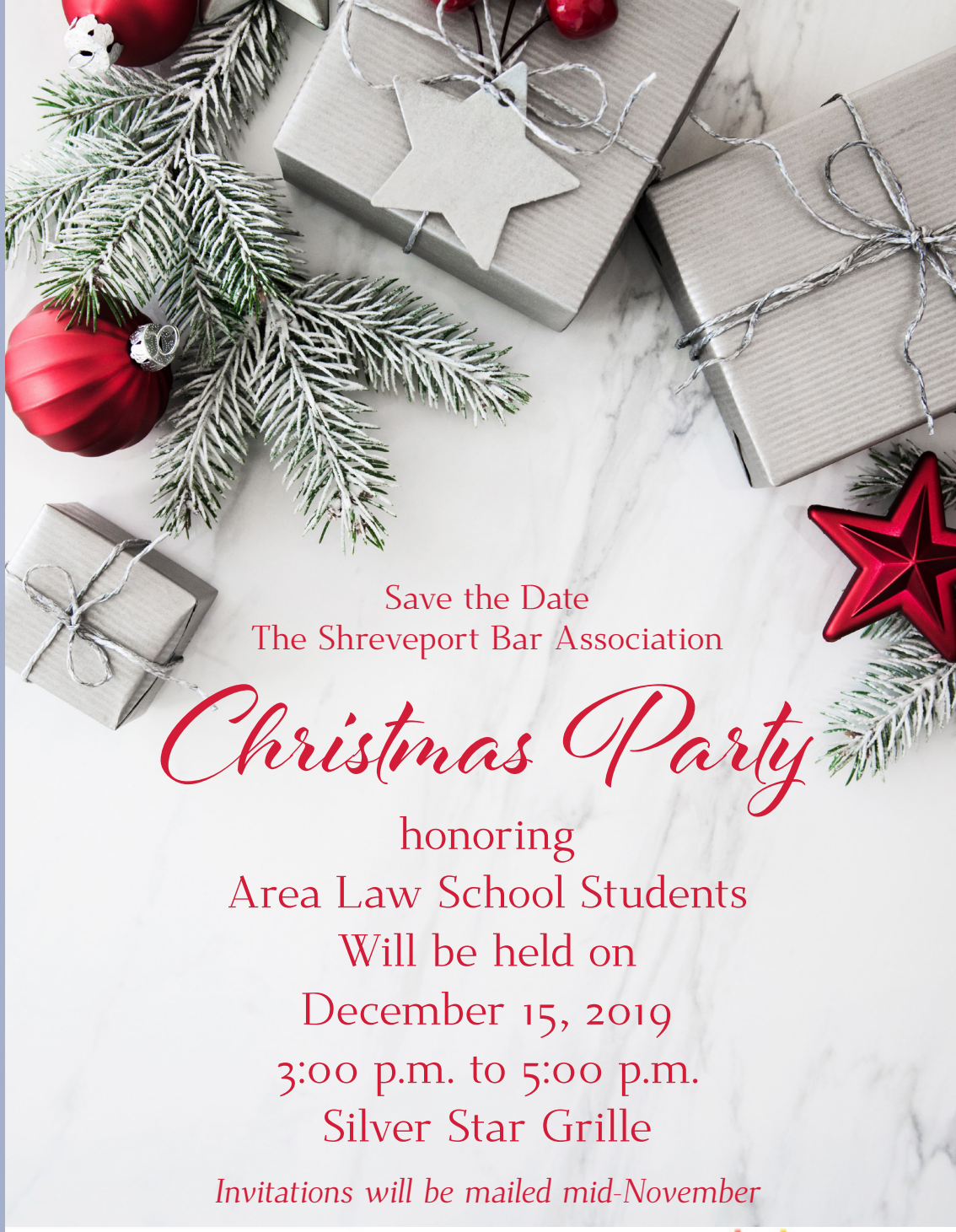


Save the Date
The Shreveport Bar Association

Christmas Party

honoring
Area Law School Students
Will be held on
December 15, 2019
3:00 p.m. to 5:00 p.m.
Silver Star Grille

Invitations will be mailed mid-November

December CLE By The Hour
December 10 & 11, 2019

Petroleum Club, 15th Floor
416 Travis Street, Shreveport

13 Louisiana CLE Credits (including Ethics & Professionalism) Texas CLE Credit Approved (including Ethics)
Presented by SBA CLE Co-Chairs Judge Frances J. Pitman and Judge Michael A. Pitman
(Please Circle All Classes Attending)

Tuesday, December 10, 2019

8:00 A.M. Registration & Continental Breakfast

8:30 A.M. First Judicial District Court Amended and Unified
60 Minutes Scheduling Orders and Other Interesting Topics
Judge Michael Pitman – First Judicial District Court

9:30 A.M. Appellate Practice
60 Minutes *Kenneth P. Haines – Weems, Schimpf, Haines, Shemwell & Moore*

10:30 A.M. Sponsor Break

10:45 A.M. Federal Procedure
60 Minutes *Magistrate Judge Mark Hornsby - United States District Court, Western District*

11:45 A.M. Lunch (included with all-day registration, or $25)

1:00 P.M. Helpful Hints from A to Z from Fannin Street
75 Minutes *Judge Jeanette Garrett - Second Circuit Court of Appeal*

2:15 P.M. Sponsor Break

2:30 P.M. Successions
60 Minutes *Ben Politz - Booth, Lockard, Politz & LeSage*

3:30 P.M. The Boys Are Back in Town: Meet the New Second
60 Minutes Circuit Court of Appeal Judges
Judge Jay McCallum, Judge James "Jimbo" Stephens , and Judge Jeff Thompson (Moderated by Judge Frances Pitman)

Wednesday, December 11, 2019

8:00 A.M. Registration & Continental Breakfast

8:30 A.M. Employment Law (Current Issues)
60 *Minutes* *Pamela Jones – Downer, Jones, Marino & Wilhite*

9:30 A.M. Technology in the Courts: 2019 Update
60 Minutes *Melissa Allen - United States Fifth Circuit Court of Appeals*

10:30 A.M. Sponsor Break

10:45 A.M. United States Supreme Court Update 2018-2019 Term
90 Minutes *Judge Carl E. Stewart - United States Fifth Circuit Court of Appeals*

12:15 P.M. Lunch (included with all-day registration, or $25)

1:00 P.M. Ethics (Office of Louisiana Attorney Disciplinary Board)
60 Minutes *TBD*

2:00 P.M. Professionalism: Adapting to the Changes in the Practice
75 Minutes of Law *Donald Hathaway Jr.– Sockrider, Bolin, Anglin, Batte & Hathaway, Zelda Tucker-Attorney at Law, Patricia Miramon-Attorney at Law, Frank Spruiell-Wiener, Weiss & Madison, Herschel Richard-Cook, Yancey, King & Galloway, and Curtis Joseph Jr.– Winchell & Joseph*
(Moderated by Judge Frances Pitman and Judge Mike Pitman)

3:15 P.M. Sponsor Break

3:30 P.M. Gambling Addiction
60 Minutes *TBD– Office of the Louisiana Attorney General*

BACK BY POPULAR DEMAND!! Our Recent Developments seminar presenters were such a **HUGE** success, that by popular demand we are bringing some of them back for our **December CLE by the Hour seminar!** Some of the comments we received, "Great speakers, very knowledgeable and entertaining!" "The information presented was universal and interesting." "The presenters were excellent!"

Name _____

Billing Address _____

City, State, Zip _____

Phone No. _____ **Fax No.** _____

Email _____
(Please include email for materials to be sent)

Registration Fees: ***Complete this form or register online at shreveportbar.com***

Hourly Rate	**Non-Members - $65 per hour ($75 after Dec. 1)**
	SBA Members - $55 per hour ($65 after Dec. 1)
Tuesday (6.25 hrs)	**Non-Members - $375 ($400 after Dec. 1)**
	SBA Members - $275 ($300 after Dec. 1)
Wednesday (6.75 hrs)	**Non-Members - $400 ($425 after Dec. 1)**
	SBA Members - $300 ($325 after Dec. 1)
Both Days (13 hrs)	**Non-Members - $550 ($600 after Dec. 1)**
	SBA Members - $450 ($500 after Dec. 1)

Materials: Please circle your materials preference below:

Electronic - FREE Flash Drive - $25

Full registration refund until November 15, 2019, less a $25 administrative fee After November 15, full credit less a $25 administrative fee may be applied to future SBA sponsored CLE for up to one year.

Materials: The registration fee includes course materials provided electronically. Materials on flash drive are available at an additional cost upon request.

Important Note: A link to the seminar materials will be sent to you via email prior to the seminar. Because neither internet access nor electrical outlets are guaranteed, we suggest that you either print or save the PDF materials to your laptop, and fully charge your batteries if you wish to review the materials at the seminar.

Walk-In Registration: Must receive materials electronically by default.

Please charge to my _____V _____ MC _____ AMX

Card No. _____

Expiration Date _____ **SIC#:** _____

Signature _____

(318)222-3643 **(318) 222-9272**

Please remit with payment to:

Shreveport Bar Association, 625 Texas Street, Shreveport, LA 71101

phenomenon – "alternative facts." I'm fairly certain my grandmother wouldn't accept such a term. For his part, Dan Rather has lamented that we have entered a post-factual America.

As one trained to be both a journalist and a lawyer, it truly pains me to witness the lengths to which unscrupulous individuals will go in order to obfuscate basic truth. Notwithstanding the fact that many of us carry mobile devices that possess far more computing power than the mainframe computers that sent the first rockets to the moon, we struggle to unearth the objective truth. That said, it is worth noting that objective truth is to be distinguished from subjective truth. And, facts are to be distinguished from opinions. For example, when witnesses are sworn before giving testimony, the officer authorized to administer oaths makes a very simple and direct inquiry of the witness, "Do you swear or affirm to tell the truth, the whole truth, and nothing but the truth so help you God?" Consequently, our judicial system, much like Taylor's 4-Way Test, is primarily interested in truth.

Due to our standing in the community, people often seek us out to provide clarity as it regards some of the more complex goings-on. It is, therefore, incumbent upon us to honor the public trust as members of this noble profession. If we can get to the truth of the matter, we will be better positioned to address the remaining areas of inquiry. And, in the end, just as Taylor reversed his company's fortunes by improving upon the ethics and morality of the company's employees, we have the ability to effect the same impact upon our profession, our communities and our country.

My kindest regards,

Curtis

Welcome TO THE SBA

Charles Holoubek
Holoubek Patent Law

Audrius Reed
Attorney at Law

Julia Todd
Miramon Law Firm, Inc.

McLaurine Zentner
United States District Court, Western District of Louisiana

Monroe Inn of Court

by Hal Odom Jr., rhodom@la2nd.org

Louisiana Employment Law leads off Inn's 2019-'20 season

Louisiana employment law was the topic of the Fred J. Fudickar (Monroe, La.) AIC's inaugural meeting of the 2019-'20 season.

"Most people are astonished to see there is so much employment law in Louisiana's statutes," began Mickey DuBos, of Breithaupt, Dunn, DuBos, Shafto & Wolleson LLC. "Some of it is consistent with Title VII of the Civil Rights Act of 1964, and I would call R.S. 23:332 'the Louisiana Title VII.'" Mickey outlined the reach of § 332 – race, color, religion, sex or national origin – and said that it approaches an equal-pay-for-women provision. "This is as close as it gets, but it has some effects in prohibiting the employer from reducing other employees' wages in order to equalize payment."

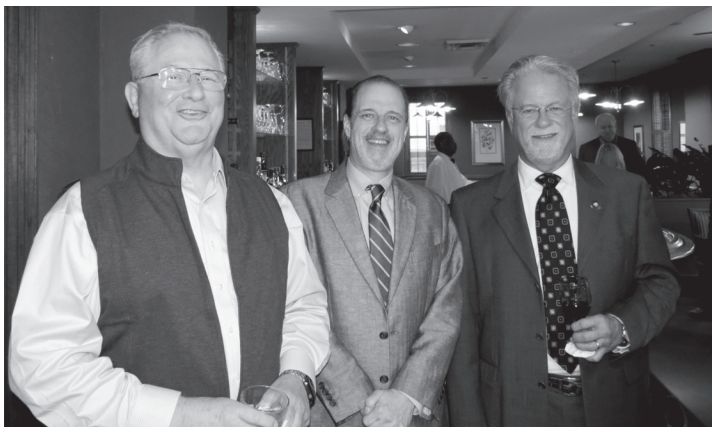
Mickey then made a thoughtful survey of other antidiscrimination laws in La. Title 9. He stressed a special limitation, in R.S. 9:303 C, requiring a complaining employee to give a 30-day written notice to the alleged discriminator, before any civil action can be filed. "This is the crucial overlay to all Louisiana's antidiscrimination statutes. And, it is part of the one-year prescriptive period. Get that letter in by the 335th day."

Team member Lamar Walters, also of the Breithaupt firm, then outlined the Payment of Employees statute, R.S. 23:631, and recent cases that treated various forms of compensation as wages. In *U.L. Coleman Co. v. Gosslee*, 51,396 (La. App. 2 Cir. 11/3/17), 244 So. 3d 783, the court held that a real estate agent's lease commissions were wages, provided that "only collection of the fee is outstanding and collection is beyond the control of the employee." In *Kaplon v. Rimkus Consulting Group Inc. of La.*, 2009-1275 (La. App. 4 Cir. 4/28/10), 39 So. 3d 725, the court held that profit-sharing bonuses were wages and subject to § 631, even if the employer could not calculate them until year's end. "A lot of things are really wages, for purposes of this statute."

James Close, also of the Breithaupt firm, wrapped up with a quick overview of La.'s Trade Secrets Act, R.S. 51:1431-1439. "Most of these cases involve customer lists and computer programs as trade secrets." He cited *Turbine Powered Tech. LLC v. Crowe*, 2018-0881 (La. App. 1 Cir. 9/5/19), as a very recent illustration of a company's failure to prove the existence of a trade secret. Nondisclosure agreements are closely related. *Heard, McElroy & Vestal LLC v. Schmidt*, 52,783 (La. App. 2 Cir. 9/25/19), shows the courts' comfort level with reforming NDAs. "At one time, courts were more inclined to throw out a nondisclosure agreement that violated the statute," he said. "*Schmidt* shows judicial willingness to excise offending portions and salvage the agreement as a whole."

The meeting was held Monday, October 14, at 6:00 pm, at the Lotus Club, on the eighth floor of the historic Vantage-ONB Tower in downtown Monroe. Perhaps owing to the clammy fog and cool drizzle, attendance was a slender 12 members. Those members, however, got to see the newly redecorated lounge, enjoy the open bar and heavy hors-d'oeuvres, and earn one hour of CLE. Upcoming meetings will be announced to members via email. Any practitioner in the northeast part of the state who might be interested in joining the Inn is encouraged to contact the secretary, Mike Street, street@wmhllp.com.

Lamar Walters and James Close, both of the Breithaupt firm, covered payment of wages and the Louisiana Trade Secrets Act as part of the program on Louisiana Employment Law. (photo by Hal Odom Jr.)



David Verlander, Hal Odom Jr. and Judge D. Milton Moore III shared a few amusing stories at the bar before the meeting.

Thank You

Roland Achee (deceased) - Navy Reserve - LTJG
Michael Adams - Army Reserve - Captain
Matthew Bailey - Army National Guard - Specialist
John R. Ballard (deceased) - Army - Captain
Roy Beard - Army - Captain
Ed Blewer Jr. (deceased) - Army - 1st Lieutenant
John N. Bokenfohr - Army - E4
James E. Bolin Jr. - Army - 1st Lieutenant
Hon. Henry Brown - Army - 1st Lieutenant
Hon. Stephen V. Callaway - Marine Corps -. Reserve Sergeant
Nelson Cameron - Navy - Petty Officer 3rd Class
James H. Campbe ll - Army - 1st Lieutenant
Arthur R. Carmody Jr. - Army Reserve - 1st Lieutenant
Reginald Cassibry - Navy - Captain
Samuel W. Caverlee - Army Reserve - 1st Lieutenant
Merritt Chastain Jr. - Army Reserve - Captain
Hon. James E. Clark (deceased) - Marine Corps - Corporal
Air Force Reserve - Captain
Joseph M. Clark Sr. (deceased) - Navy - PO3
William Carey Clark (deceased) - Army - Captain
Ben E. Coleman (deceased) - Army - Corporal
Air Force Reserve - Staff Sergeant
Steven Cowel (deceased) - Army - Captain
H. T. (Ted) Cox - Army Reserve - Colonel
Jackson B. Davis (deceased) - Navy - Lt. Commander
Robert M. Davis III - Army Reserve - Captain
S.P. Davis - Army Reserve - Colonel
Hon. Harmon Drew - Army Reserve - Captain
Robert Eatman Sr. (deceased) - Navy - Chief Petty Office
Gary L. Fox - Army - 2nd Lieutenant
Hon. Andrew Gallagher - Army - Corporal
Sidney Galloway (deceased) - Air Force - Major
James C. Gardner (deceased) - Army - 1st Lieutenant
Twain K. Giddens Jr. (deceased) - Navy - Lieutenant
Gaylon Kent Gill - Army - Specialist 4
Robert Gillespie - Army - Sergeant
Harold C. Gilley Jr. - Air Force - Lt. Colonel
Joseph R. Gilsoul - Army - E5
Rellis Godfrey - Army - Sergeant
James Godfrey (deceased) - Air Force Reserve - Colonel
Richard Goorley - Navy - Petty Officer 2nd Class
Norman R. Gordon - Air Force - Captain
James Graves - Air Force Reserve - Major General
Warren Graves (deceased) - Air Force - Colonel
A.J. Gregory Jr. (deceased) - Army - Sergeant
David G. Griffith - Army - Acting Sergeant
Charles Grubb - Army Reserve - Command Sgt. Major
Hon. Gayle K. Hamilton - Marine Corps - Corporal
Elizabeth A. Hancock - Air Force - E3
F. Stanton Hardee III - Army - 2nd Lieutenant
Quintin T. Hardtner III - Marine Corps - Captain
Kenneth L. Hickman - Navy - Captain
W. James Hill III - Army Reserve - Colonel
Elmon Holmes (deceased) - Army - Captain
John Hussey - Army - Captain
Val Irion (deceased) - Army National Guard - Lt. Colonel
Wellborn Jack Jr. - Army Reserve - Major
Whitfield Jack (deceased) - Army - Major General
Patrick R. Jackson - Army National Guard - Lt. Colonel
T. Haller Jackson Jr. (deceased) - Army - Captain
T. Haller Jackson III - Navy - Ensign
Robert A. Jahnke - Army Reserve - Lt. Colonel
Joseph G. Jarzabek - Navy - Petty Officer 2nd Class
James R. Jeter (deceased) - Army - Captain
Harry A. Johnson Jr. (deceased) - Army - Lt. Colonel
Tommy J. Johnson - Army National Guard - E4
Walter F. Johnson III - Air Force - 1st Lieutenant
David C. Joseph - Army - Captain
Hon. Charles W. Kelly IV - Army - Colonel
Benjamin King Sr. (deceased) - Air Force - Lt. Colonel
David Klotz (deceased) - Army - Tech Sergeant
Norman Lafargue - Marine Corps - Corporal
William H. Ledbetter Jr. - Army - Captain
Joe C. LeSage Jr. (deceased) - Army - Captain
Hon. Charles Lindsay - Army - Brigadier General
Stuart D. Lunn (deceased) - Army - Captain
Wilburn V. Lunn (deceased) - Army - Colonel
Paul Lynch (deceased) - Army - Major
Hal V. Lyons (deceased) - Navy - AM 3C
John M. Madison - Army - 1st Lieutenant

TO OUR *Veterans*

Winfred L. Martin (deceased) - Army - Lt. Colonel
Kenneth Mascagni - Air Force - Captain
Robert K. Mayo (deceased) - Army - 1st Lieutenant
Lawrence McCollum (deceased) - Army Reserve - Lt. Colonel
Kyle McCotter - Army National Guard - Captain
Marshall McKenzie (deceased) - Army - Sergeant
Donald R. Miller (deceased) - Air Force - Captain
Garner R. Miller (deceased) - Army - Tech 5th Grade
C. Gary Mitchell - Army National Guard - Sergeant
J. Peyton Moore - Army - Captain
John B. Morneau (deceased) Coast Guard Reserve E5
Seth Moyers - Marine Corps - E-4
Harry R. Nelson (deceased) - Air Force - Lt. Colonel
Sydney B. Nelson - Navy - Lieutenant
Jeffrey S. Norris - Army - Major
John S. Odom Jr. - Air Force Reserve - Colonel
Ross Owen - Army National Guard - Specialist
Curtis N. Petrey (deceased) - Navy - Petty Officer 1st Class
John R. Pleasant (deceased) - Navy - Lieutenant
Hon. Henry A. Politz (deceased) - Air Force - Staff Sergeant
Robert G. Pugh (deceased) - Air Force - 1st Lieutenant
David Rabb Jr. - Army - Captain
Cecil Ramey (deceased) - Army - Air Corps Sergeant
Elton Richey - Army National Guard - Lt. Colonel
C. Vernon Richie - Army National Guard - Specialist 4
Hon. John Robinson - Army National Guard - Staff Sergeant
Hon. Patrick Robinson - Army - Captain
Gordon Rountree - Army - 1st Lieutenant
Jennifer Sandusky - Air Force - Captain
Daniel C. Scarborough (deceased) - Army Reserve - Major
John E. Settle Jr. - Air Force - Captain
Hon. Fred C. Sexton (deceased) - Army - Captain
John M. Shuey Sr. (deceased) - Army - CIC 1st Lieutenant
I. Henry Smith (deceased) - Navy - Lieutenant
James W. Spradling II - Air Force - Major
Hon. Tom Stagg (deceased) - Army - Captain
Hugh Milling Stephens (deceased) - Navy - Lt. Commander
Hon. Carl E. Stewart - Army - Captain
Hon. Ford Stinson Jr - Army Reserve - Captain
A. M. (Marty) Stroud III - Army National Guard - Major
Fred Sutherland - Air Force - Sergeant
Hon. Gorman Taylor (deceased) - Army - Corporal
Edmund M. Thomas - Army - 1st Lieutenant
Graham H. Todd - Air Force - Lt. Colonel
Casper Ardis Tooke Jr. (deceased) - Army - 2nd Lieutenant
John H. Tucker Jr. (deceased) - Army - Colonel
Yves M. Verret III - Marine Corps - Reserve E5
Hon. Jeffrey P. Victory - Army National Guard - Spec. 4
Glenn E. Walker - Air Force - Captain
Walter Doug White - Army - Lt. Colonel
Charles R. Whitehead Jr. - Army - Captain
William Scott Wilkinson (deceased) - Army - Colonel
David S. Williams - Marine Corps - Corporal
Navy - Lieutenant
Thomas N. Williams - Air Force - Lt. Colonel
Kenneth P. Wright - Army National Guard - Spec. 6
Clarence L. Yancey (deceased) - Army - Lt. Colonel
Steve R. Yancey II - Army - 1st Lieutenant

If you served in the Armed Forces and are not listed, or if you know of a past or present SBA member who is not listed, please provide the information below, or call Dana Southern at the SBA office at 222-3643 Ext. 3.

Name	*Branch of Service*	*Rank*

Thanks For Your Valuable Contribution!

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

Reginald "Reggie" Abrams
Melissa Allen
Jimmy Barnhill
Theodore "Ted" Casten
Honorable Scott Crichton
Honorable Jeanette Garrett
Kenneth Haines
Honorable John Hodge
Honorable Mark Hornsby
Allison Jones
Lyn Lawrence
Honorable Jay McCallum
James McMichael Jr.
Ronald Miciotto
James "Jimmy" Mijalis
Trey Morris
Patrick Ottinger
Honorable Frances Pitman
Honorable Michael Pitman
Bennett Politz
Robert Pugh
Honorable James "Jimbo" Stephens
Honorable Jeff Thompson

Recent Developments By The Judiciary CLE Sponsors

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Recent Developments by the Judiciary

CLE Highlights

Second Circuit Highlights

by Hal Odom Jr., rhodom@la2nd.org

This month we continue our focus on appeals that were successful – from the appellant's standpoint.

The Recreational Use Immunity statute, La. R.S. 9:2795, saved the day for the City of Bastrop in ***Lewis v. City of Bastrop***, 52,884 (La. App. 2 Cir. 9/25/19), in an opinion by Judge Thompson. Ms. Lewis was attending her grandson's t-ball game at Carter Park around 5:30 pm one day in late April 2013. She and her daughter-in-law were walking toward the field, chatting, and going by a "significant distance of fencing." Suddenly, she tripped and fell to the ground, seriously injuring her foot. She turned back and noticed, for the first time, an above-ground "pipe stander and securing rebar only partially driven into the ground."

She sued the City for this unreasonably dangerous condition. The City asserted both the Recreational Use Immunity statute and the Limitation of Liability for Public Bodies statute, La. R.S. 9:2800. After a bench trial, the court found that the protruding pipe was unreasonably dangerous and that the City had actual or constructive knowledge of it; the City's failure to warn the public of this condition was "willful and grossly negligent," thus negating the application of R.S. 9:2795; and the City never should have allowed anyone to walk through that area, thus negating the application of R.S. 9:2800. The court awarded Ms. Lewis $300,000 in general damages and $58,180 in specials, but assessed her with 30% fault for "apparently" being inattentive. The City appealed.

The Second Circuit carefully parsed the Recreational Use Immunity statute, noting that it immunizes the owner of urban or rural land open to the public for recreational purposes except for a "willful or malicious failure to warn against a dangerous condition." R.S. 9:2795 B(1). The court next cited jurisprudence that "mere knowledge and appreciation of a risk does not constitute intent, and reckless or wanton conduct does not constitute intentional wrongdoing," *Stanley v. Airgas-Southwest Inc*., 2015-0274 (La. 4/24/15), 171 So. 3d 915, and the Second Circuit's recent opinion in *Crump v. Lake Bruin Recreation & Water Conservation Dist*., 52,599 (La. App. 2 Cir. 4/10/19), 267 So. 3d 1229. The court then referred to Ms. Lewis's own expert, Dennis Howard, who testified that even though the protruding pipe was indeed a defect, he could find no evidence of intentional or malicious acts by City employees. Finally, the court applied another part of the statute, § 2795 E(2)(d), which precludes immunity for "intentional or grossly negligent acts by an employee of the public entity." The court concluded that on this record, the immunity applied, and the district court was plainly wrong to find otherwise. The judgment was reversed and the claim dismissed.

As an aside, the district court's evasiveness in handling (even inaccurately quoting) the statute facilitated this outcome. However, after the opinions in *Stanley* and *Crump*, and now in *Lewis*, we can see a growing judicial acceptance of recreational use immunity, and might expect that plaintiffs will have an increasingly hard time winning premises liability claims against public parks.

The plaintiff's affidavit was enough to reverse a summary judgment in ***Green v. Brookshire Grocery Co***., 53,066 (La. App. 2 Cir. 9/25/19), an opinion by Judge Cox. Ms. Green was shopping at a Super One, pushing her rolling cart down an aisle, when she slipped and fell in a puddle of red-colored beverage that another shopper had spilled moments earlier and tracked some distance on the floor. She sued under the Claims against Merchants statute, La. R.S. 9:2800.6. Brookshire's answered asserting that the red spill was perfectly obvious to Ms. Green, and moved for summary judgment on grounds that it used all reasonable care, § 2800.6 B(3). The district court granted summary judgment, and Ms. Green appealed.

The Second Circuit closely reviewed the store's surveillance video, which showed that the other shopper spilled her pop at 1:34 pm, and notified a store clerk within one minute; store employees placed a yellow cone "on the far side of the spill, several aisles away" and another "in the middle of the spill, next to a display pallet," at 1:36; and Ms. Green pushed her cart straight into the spill, slipping and falling, at 1:37. This showed that Brookshire's had actual knowledge of the spill and that it created an unreasonable risk of harm. Ms. Green's affidavit insisted that she never saw the spill or the warning cones, and that no store employee verbally warned her to watch her step. Even though the video clearly showed employees placing two cones in the aisles, the court felt that the nearby pallets may have obstructed Ms. Green's ability to see them. The court found a genuine issue as to whether two cones were sufficient for a spill of this size, and considered it "arguable" whether a store employee should have verbally warned Ms. Green. So the court reversed the summary judgment and remanded. Ms. Green will get her day in court, although the district court has fairly well signaled its view of the claim.

Failure of proof led to the reversal in ***Taylor v. Bedingfield***, 52,946 (La. App. 2 Cir. 9/25/19), an opinion by Judge Pitman. Ms. Bedingfield and her late husband, Jimmy, owned The Home Store, in Bossier City. In early 2010, Jimmy told Taylor, his good friend, that the store was in a financial pinch and could really use a loan. Taylor wrote a check for $30,000 to Jimmy, who deposited it in the store's account. Unfortunately, Jimmy died in February 2011. After this, Ms. Bedingfield allegedly told Taylor that she would use the life insurance to pay the loan, and that she fully intended to pay it, until January 2016, when she suddenly denied knowing anything about the debt and said she had no intention of paying him anything. Taylor sued.

Ms. Bedingfield answered denying that Taylor ever gave them a loan, and asserting, in the alternative, offset. Ms. Bedingfield's testimony was diametrically opposed to the Taylors', but all agreed that sometime after Jimmy's death, The Home Store had allowed

Taylor to shop there – he was building a house – without being charged for the carpet, tile and labor he bought. An "independent agent" figured the offset was worth $11,990, and the district court ordered an offset of this amount against the $30,000 loan. Taylor appealed.

After finding that Ms. Bedingfield had the burden of proving her offset, the Second Circuit agreed with Taylor's position that she simply failed to offer evidence to document the value of the materials and labor provided to him. The court affirmed the principal judgment of $30,000 but vacated the offset. In short, you still need a receipt to get any money back.

A more technical issue faced the court in ***Southern Trace Property Owner's Ass'n v. Williams***, 52,653 (La. App. 2 Cir. 9/25/19), an opinion by Judge Bleich, ad hoc. The homeowners' association ("HOA") sued Dr. Williams for unpaid dues. Dr. Williams filed an exception of prescription asserting that under La. C.C. art. 781, the action was untimely because it was "for damages on account of the violation of a building restriction" and was brought over two years after "the commencement of a noticeable violation." The district court interpreted Art. 781 to limit the HOA's action to two years' worth of dues; both sides appealed.

The Second Circuit analyzed Art. 781, C.C. art 3499 (personal actions are subject to 10-year prescription) and the La. Homeowners Association Act ("LHAA"), R.S. 9:1141.1 et seq. Critically, when the legislature enacted LHAA, in 1999, it also amended La. C.C. art. 783 to provide that LHAA's provisions supersede the Civil Code in the event of conflict. The court recognized that the Supreme Court applied a two-year prescriptive period in *Brier Lake Inc. v. Jones*, 2009-2413 (La. 4/14/98), 710 So. 2d 1054, but found that the 1999 amendment was intended to overrule *Brier Lake*, and that cases from other circuits have subsequently applied the 10-year prescription of Art. 3499. The court then found that the HOA's covenants, § 5.1(C), created a personal obligation against the owner, as well as a real obligation against the property, to pay dues. The court reversed, finding the HOA's claim was not limited to two years' worth of dues.

Judge Stone dissented, expressing her view that not only did Art. 781 apply, but the HOA's failure to sue within two years meant that the immovable was freed of the restriction that had been violated – and neither Dr. Williams nor any future owner of his lot would owe HOA dues.

There is surely some advantage to stating, in an HOA covenant, that monthly dues are a real obligation and binding on the property, no matter who owns it. However, in light of Dr. Williams's claims, any practitioner hired to write or review such a covenant might consider specifying that the monthly dues are also a personal obligation for purposes of collection and prescription.

Strict construction of a penalty statute knocked down the plaintiffs' recovery in ***Handy v. State Farm***, 52,905 (La. App. 2 Cir. 9/25/19), an opinion by Judge Cox. Ms. Handy was driving her brother's Ford F-150 when she made a left turn into oncoming traffic, causing a four-car accident. Two people in the other vehicles were injured, with claims totaling $18,916. The F-150 was insured by State Farm, with standard 15/30 coverage. Ms. Handy's passengers – her minor son, and her brother and sister – also made claims against the policy, but there was only $11,084 left, and their claims exceeded this. State Farm's audit claim rep reviewed their medical bills and complaints and made them offers within the policy limits. The claimants, however, considered these unacceptable, so Ms. Handy sued. She demanded damages for her minor son; her brother and sister joined, seeking their own damages; and all claimed penalties for failure to pay that was arbitrary, capricious, or without probable cause. The City Court agreed, awarding Ms. Handy's passengers damages totaling $27,893, penalties of $5,000 each, and an attorney fee of $7,500. State Farm appealed.

The Second Circuit quoted the penalty provisions of La. R.S. 23:1973 B(6) and 23:1892, plus the jurisprudence that penalties are strictly construed and that the phrase "arbitrary, capricious, or without probable cause" means "vexatious," *Reed v. State Farm*, 2003-0107 (La. 10/21/03), 857 So. 2d 1012. The court concluded that State Farm's handling of the claims could not be vexatious because the three claimants were limited to $11,084 left on the policy, some allocation was required, and State Farm made offers that covered each claimant's medical expenses and a small amount of general damages. The court therefore reversed the $15,000 in penalties and $7,500 in attorney fees.

The only bright spot for the plaintiffs was that the special and general damages, which exceeded policy limits by over $16,000, were left intact.

Finally, a couple of representative affirmances are worth noting. ***Heard, McElroy & Vestal LLC v. Schmidt***, 52,783 (La. App. 2 Cir. 9/25/16), an opinion by Chief Judge Williams, involved the noncompetition agreement in a well-known accounting partnership. The opinion closely analyzed La.'s Restraint of Trade statute, La. R.S. 23:921, subsection by subsection, and applied it to a very detailed operating agreement. The First JDC found, and the Second Circuit affirmed, that Heard, McElroy & Vestal's noncompetition agreement was overbroad, but that it could be reformed rather than nullified, and that the firm did not waive its right to seek enforcement. The opinion is a useful review of this specialized area of labor law.

Child custody is perhaps the field of greatest discretion afforded to district court findings. Such was the case in ***Abrams v. Turner***, 52,922 (La. App. 2 Cir. 9/25/19), an opinion by Judge Moore. Brittany, a New Orleans native displaced by Hurricane Katrina, moved back and forth between Houston and Monroe, apparently in the latter long enough to conceive two children, in 2007 and 2012, with Michael, a barber and instructor at Delta Community College. She left Michael several times, occasionally taking one of the boys with her, and in 2017, she dumped both boys with her father, after which she dropped off the radar so effectively that her father couldn't find her. Michael then filed a petition for sole custody; Brittany also demanded sole custody. The hearing officer recommended joint custody, with Michael as primary domiciliary parent; the district court adopted this; Brittany appealed, and the Second Circuit affirmed. On a record full of inconsistencies and recriminations, the court would not touch the finding that joint custody was in the boys' best interest, La. C.C. art. 134.

However, it did remand for the district court to clarify the visitation schedule. Such quarrelsome parties could not be expected to work out the exchanges themselves.

Federal Bar Donates $10,000 to Barksdale Charity

The Federal Bar Association of North Louisiana recently held its 7th Annual Clay Shoot Fundraiser at the Los Paloma Gun Club in Benton. The beneficiary of the event was Operation Bright Holiday, a project exclusive to Barksdale Air Force Base that helps send first-year airmen home for the holidays. Several of our Barksdale neighbors volunteered to operate target throwers and help things run smoothly.

The FBA presented a $10,000 check to 2nd Bomb Wing Commander Col. Michael Miller during Barksdale's annual Oktoberfest, another event that benefits Operation Bright Holiday. Among the many beneficiaries of the fund have been a young service member who was able to return home for a last visit with an ill grandparent, and a young couple who were able to visit family members they had not seen since their wedding. Thanks to Operation Bright Holiday, scores of other airmen, chosen by officers based on exemplary work and need, have been able to enjoy a well deserved holiday with family.

There were more than 70 shooters at the Clay Shoot, and the staff at Gregorio, Chafin, Johnson, Tabor, & Fenasci did a great job with the details and making sure the event was a success. The current officers of the Local FBA chapter are President-Whitney Howell; Vice President-Will Huguet; Treasurer-Jason Nichols; & Fundraising Chair-Scott Chafin.

Sponsors for the 2019 Clay Shoot were Shreve City Car Care; BRF; Blanchard, Walker, O'Quin & Roberts; Williams Creative Group; Rice & Kendig; Pilant Court Reporting; Cook Yancey King & Galloway; Boeing; Kean Miller; Dr. Mody with The Orthopedic Clinic; Gregorio, Chafin, Johnson, Tabor & Fenasci; Wiener, Weiss, & Madison; Cole, Evans, & Peterson CPAs; Fischer & Manno; Bradley Murchison Kelly & Shea LLC; Louisiana Association for Justice; Wilkinson, Carmody, & Gilliam; and Scott J. Chafin Attorney at Law.

Team members Fritz Gourdet, William Bradford, Keith Carter, Judge Mark Hornsby and Chris Slatten

Scott Chafin with Cyd Maliwat & Kekona Murao, who were able to visit family thanks to Operation Bright Holiday.

Team members Mark Gilliam, Tom Brice, Bobby Gilliam, Shan Jackson and Kevin Gamble.

Winning Team: The winning team was Deupree James Wealth Management. Members were Ben James, Dan Keasler, Ed Durham, Buddy Collins and Reagan Collins.

How Write You Are

by Hal Odom Jr., rhodom@la2nd.org

No hidden meaning, please. A young lawyer-turned-writer contributed a piece to Narratively.com about his first job in the legal profession, found on Craigslist, in tax debt resolution. One passage particularly caught my attention. "Technically, we don't have to be lawyers. Accountants and enrolled agents * * * can also do this job. But 'clients pay for the *cache* of a lawyer,' Nick explains." Surely neither the author nor Nick, his slightly disreputable supervisor, was referring to the *hidden stock* of techniques known to lawyers alone.

The word used, *cache* (pronounced like *cash*) means a *hiding place*, *something hidden away* or a *secret supply* of something. In legal writing, it most often refers to a stash of illegal drugs or weapons. "[T]here was evidence that the defendant * * * failed to report to his probation officer, tested positive on several occasions for illegal drugs, and had in his possession a *cache* of dangerous weapons." *State v. Williams*, 2015-803 (La. App. 3 Cir. 3/2/16), 186 So. 3d 333. "Finally, the cocaine was cleverly concealed on a pier and beam under the house, a relatively inaccessible *cache* which was uncovered only by Congo, a sniffer dog." *State v. Russell*, 46,426 (La. App. 2 Cir. 8/17/11), 73 So. 3d 991.

The word intended was *cachet* (pronounced *cash-shay*), which means *superior status*, *prestige* or *seal of approval*. It is correctly used in an opinion about former Dallas Cowboys linebacker Eugene Lockhart: "The straw buyers were individuals with good credit, who relied in part on the *cachet* of Lockhart's celebrity." *United States v. Beacham*, 774 F. 3d 267 (5 Cir. 2014). It was also used correctly, if somewhat ironically, when the U.S. Supreme Court dismissed concerns that "the common law might lose some metaphysical *cachet* on the road to modern realism." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739 (2004). (Cachet also means something in stamp collecting, but this is not the forum to *cover* that technical point!)

The confusion can also work the other way: "Obviously, Webb had been told of the alleged theft and would have checked his *cachet* of chips." *Adams v. Harrah's Bossier City Inv. Co.*, 41,468 (La. App. 2 Cir. 1/10/07), 948 So. 2d 317 (dissenting opinion). That should have been his *cache* of chips, but in the anything-goes world of casino gaming, they might call it a player's *cash-shay* of chips, to distinguish it from actual *cash*, Benjamins.

Try to maintain that professional *cachet*. Use the right word.

Like adding zeros. Some superfluous words add nothing to our writing, or usually add nothing:

- Basically
- Literally (often misused instead of *figuratively*)
- Technically
- Really (would you ever say anything *unreally*?)
- Interesting
- Awesome (could mean *unspeakably cute*, like a puppy or a kitten)

Many of these are perfectly fine in spoken English: they fill the air with familiar sounds and allow the mouth to keep running while the brain is trying to decide what to say next. But when we translate our spontaneous thoughts to the page, we don't need these crutches.

Sample editing. There is no great writing, only great rewriting, goes an epigram ascribed to Justice Louis Brandeis.[1] The burden of the first draft is merely to set out everything, often in a redundant, awkward or clunky way. Rewriting, or editing, is the key. Some time back, Kristen L. Mayer, a writing maven in Ohio, gave an example of the summary of argument in a (fictional, I hope) memo in support of MSJ:

> Now comes Defendant Ronco and respectfully moves this Honorable Court for summary judgment in its favor for the reason that plaintiff's claims are barred under the applicable statute of limitations. This is a product liability action. Plaintiff Veronica Wickersham Basshead (hereinafter "Basshead") has filed numerous, over-lapping tort claims arising out of what she claims were alleged defects in a Ronco All-Purpose Shredder/Blender, all of which should be dismissed under Ohio Revised Code § 2305.10. Section 2305.10 provides a two-year statute of limitations for product liability claims. The two years under § 2305.10 begins to run from the date of injury. Basshead claims that she suffered second-degree burns when her Shredder/Blender shorted and burst into flames on January 1, 2017. It has been determined that Basshead did not file her complaint until January 5, 2019, four days after the two-year statute of limitations expired. Defendant therefore submits that it is entitled to summary judgment and that the Court should enter judgment accordingly, forthwith. (162 words.)[2]

Ms. Mayer asks, why not something like this:

> Plaintiff Veronica Wickersham Basshead's product claims are time-barred under Ohio's two-year statute of limitations because Basshead filed her complaint two years and four days after she sustained injuries. Defendant Ronco is therefore entitled to summary judgment. (36 words.)

To be sure, the first version, like an X-ray, gives a skeletal view of the accident, injury, procedural history, code citation – everything the court needs to know. But then, the second version gives the court the gist of the MSJ and prepares the judicial mind for the issue before hiking into the weeds. Which version is likely to be effective?

Oh, those little letters. "The facts as presented in this case, clearly show that the cap adopted by the legislature is arbitrary and unreasonable in that it has no relationship to the lowering of *medial malpractice* insurance premiums." *Arrington v. ER Physicians Group*, 2004-1235 (La. App. 3 Cir. 9/27/06), 940 So. 2d 777 (concurring opinion). The judge did not mean *in the middle* or *pertaining to mediation,* but almost suggests distrust of *mass media*. Check those little letters!

[1] If anyone can locate the actual source of this quote, other than unattributed forums like Pinterest, AZ Quotes.com, goodreads.com, or the like, I would hugely appreciate hearing from them with the proper citation.

[2] Kristen L. Mayer, Writers' Corner: Of "Plain Speak," *For the Defense* (June 2009), 69-70 (with slight adjustments to the dates).

Jim McMichael Receives 2019 Professionalism Award

by William Gaskins, wgaskins@caddoda.com

Each autumn, the Shreveport Bar Association bestows its yearly Professionalism Award on a local attorney whose law practice exemplifies the integrity and honor befitting our profession. This year, the recipient is James C. McMichael Jr.

Jim has been a member of the Shreveport Bar Association for 43 years – since 1976. Jim graduated from Northeast Louisiana University and LSU Law Center, and was an assistant district attorney in Caddo Parish early in his career; he now practices in the law firm of McMichael, Medlin, D'Anna, Wedgeworth & Lafargue. His practice consists of business and commercial litigation, white collar criminal defense, general civil trial work and appellate litigation.

Jim was the president of the Shreveport Bar Association last year, and was vice-president in 2016. He also twice has been the captain of the Krewe of Justinian (in 2001 and 2014), and is a member of the Inns of Court. He speaks frequently in CLEs, and this was Jim's fourth year to coordinate and lecture in the SBA's Summer Trial Advocacy Series – an annual series of programs he developed to provide a means for young lawyers to develop basic trial and evidence skills. Older lawyers have found the programs helpful, as well.

Norman Lafargue (one of Jim's law partners) nominated Jim for the award. Norman praises Jim for "conducting himself in a gentlemanly and congenial manner both in and out of court while diligently serving his clients."

Last year, in an article that Jim wrote when he was president of the Shreveport Bar, Jim called the Professionalism Award our way "to honor a colleague who lives the ideals of professionalism that we value" and "the highest honor the SBA can bestow on a member." Having given so much to the local bar, Jim himself is worthy of that same honor. It is a pleasure to announce him as this year's recipient, and to call him a colleague.

September Luncheon Highlights

SBA
SHREVEPORT BAR ASSOCIATION
625 Texas Street
Shreveport, LA 71101
www.shreveportbar.com

DEADLINE FOR DECEMBER ISSUE: NOVEMBER 15, 2019

VETERANS APPRECIATION LUNCHEON - NOVEMBER 6

Petroleum Club (15th Floor) – Buffet opens at 11:30 a.m. Program and Speaker from 12:00 Noon to 1:15 p.m.
$25.00 for SBA members includes lunch with advance reservation
$30.00 for Late Reservations (after 5:00 pm the Monday prior to the luncheon) and Non-SBA Members

When: Wednesday, November 6 from 12:00 Noon to 1:00 p.m.

Where: Petroleum Club (15th floor)

Featuring: **Mayor Adrian Perkins**

Our keynote speaker for the 2019 SBA Veterans Day Program will be Mayor Adrian Perkins. Mayor Perkins was born in the Cedar Grove neighborhood of Shreveport. He is the grandson of a sharecropper and the youngest of three boys raised by a single mother. He attended Arthur Circle, Youree Drive Middle School and Captain Shreve High School.

In the wake of 9/11, Perkins felt compelled to serve his country. He accepted a nomination to West Point, where he was the first African American cadet elected Class President in the Academy's history. Subsequently, he deployed to Iraq and Afghanistan, achieving the rank of Captain and Company Commander in the United States Army.

After three tours of duty, Perkins enrolled in Harvard Law School, where he was once again elected Student Body President. He chose Harvard to gain the requisite skills and knowledge to serve his hometown, focusing his studies on crime and the use of technology by city governments. While in law school, he assisted Governor John Bel Edwards on criminal justice reform.

Adrian Perkins announced his candidacy on April 26, 2018. During the campaign, he stressed policing reform, economic development, and smart-city initiatives. Perkins was elected December 8, 2018, and was installed as the 56th Mayor of Shreveport on December 29, 2018.

Please join us on Wednesday, November 6 as we honor our SBA Veterans and all those who have served our great nation.

YES, I'M ATTENDING

You may confirm your reservation(s) by email, telephone, or fax.
Email: cwithers@shreveportbar.com Phone: 222-3643 Ext 2 Fax: 222-9272

I plan to attend the November luncheon. Attorney:_____

Please remember to call and cancel if you're unable to attend. The SBA pays for each reservation made. Thank You!