THE BAR REVIEW

PUBLICATION OF THE SHREVEPORT BAR ASSOCIATION Volume XXVII, Number 1 • January 2020

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EVENTS AT A GLANCE

1/22	SBA Membership Luncheon – 12:00 p.m. - Petroleum Club
1/31	Krewe of Justinian Bal at Horseshoe Casino Rivedome
2/15	Centaur Parade
2/23	Highland Parade
2/26	SBA Membership Luncheon – 12:00 p.m. - Petroleum Club

From The President

by Tom Arceneaux, President, tarceneaux@bwor.com

BIG SHOES TO FILL

I'm a bit of a social media junkie.

A few weeks ago, Immediate Past President Curtis Joseph was giving thanks on Facebook for all those who helped him in his year as president of the Shreveport Bar Association. I told him I had big shoes to fill. He confirmed it – they are size 14! I have a bit of growing to do.

Don't we all have big shoes to fill as lawyers? Our predecessors left us with grand traditions and history, making what we do easier and sometimes even possible. Sometimes we forget that we are not accidents of history. We stand on the shoulders of those who came before us. As my friend, fellow lawyer, former Member of Congress and Deputy Secretary of Energy Henson Moore once reminded me, "Tom, if you ever see a turtle on a fence post, you know he didn't get there by himself."

I've been a member of the Shreveport Bar Association continuously since I returned to Shreveport in 1979. I had clerked here for Honorable Tom Stagg from 1976 to 1978, and I briefly left for "bright lights, big city" before I decided Shreveport was the best place for me to live and serve.

Just before I left for Houston in 1978, I went to the annual Pancake Festival of the Shreveport Kiwanis Club. While I was enjoying my pancakes, Roy Beard, who had been Judge Stagg's law partner, came up to visit with me.

"Tom," Roy said, "if you're ever interested in coming back to Shreveport, please give me a call."

Just before the Easter weekend in 1979, my family and I had decided to move back to Shreveport. My daughter Anna was about three months old. I called Roy and told him we would be in town for the weekend. I wondered if we could meet to talk about what he'd said to me at the Pancake Festival. He said yes.

Roy and I spent much of that Easter weekend talking about the future and practicing law together. By the time I went back to Houston, we had a handwritten partnership agreement for Beard & Arceneaux. I moved back in August, and we started practicing together on Monday, August 20, 1979. Fred Sutherland joined us just a few weeks later, and the firm became Beard, Arceneaux & Sutherland.

Practicing law in Shreveport has never disappointed me. Whether I have been in a small firm, in-house counsel for a small independent oil and gas company, in solo practice (twice), partners with Randy Davidson, Nicky Nix and Allison Jones, or at Blanchard Walker, I have had relationships with clients, opposing parties, and

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SBA Christmas Party

lawyers that have strengthened me and made me a better person as well as a better lawyer.

Lawyers have a unique ability to serve a community. The SBA does an excellent job of community service. SBA lawyers provide pro bono services and serve in leadership positions. The Shreveport Bar Foundation provides legal help to victims of domestic abuse.

Some communities have gone a little further to assist neighbors who have minor disputes with each other to resolve those disputes and become better neighbors. They do it through free, voluntary community mediations.

One major initiative for this year is to get such a program up and running in Shreveport. It would be completely voluntary and totally free, but it would permit neighbors to have trained mediators assist them in resolving their disputes without having to go to court. I will be calling on trained mediators and the judges of the district court and the city court for ideas about how best to administer the program.

The quote from Huey P. Long at the base of his statue by the State Capitol starts with, "I know the hearts of the people because I have not colored my own." What I think the governor and senator meant is that he never forgot where he came from or the people who helped him along the way, and he had a passion from his personal experiences to impact others who needed help. We can have that same remembrance and reverence for the people who helped us get where we are, and to "pay it forward" to make our community a better place.

Who has helped you get on top of the fence post? How will you pay it forward?

I am honored to serve you this year, and I hope we can stay in contact with each other. In addition to SBA events, you can find me on Facebook, Twitter and LinkedIn. Feel free to be my friend or follower. I love the interaction.

In addition, I publish a Business Development Thought for the Day by email each business day. If you'd like to receive those short thoughts, just send me an email and I'll add you to the list.

Together, let's make this a terrific year having fun making our association and our community better.

Courtney Harris
Vice-President/
President Elect

Audrius Reed
Secretary

Heidi Kemple
Martin
Treasurer

Sarah Giglio
Immediate Past
President

Women's Section

by Elizabeth Wong,
elizabeth@mmw-law.com

Happy New Year!

I am thrilled to be serving as the SBA Women's Section President this year. First off, thank you to our 2019 board for their service: Sarah Giglio, Anna Brown Priestley, Katherine Gilmer and Courtney Harris. Under the leadership of the 2019 board, the women's section saw an increase in attendance and a variety of events to attend. We ended our year with a successful holiday party at Judge Katherine Dorroh's home, whom we thank for hosting.

Our goal for 2020 is to continue to encourage attendance at our events and to foster meaningful relationships among our members. We look forward to our calendar of events and we hope you do too. With that said, it's my pleasure to announce the women who will be making these events happen: Immediate Past President, Sarah Giglio; Vice-President, Courtney Harris; Secretary, Audrius Reed; and Treasurer, Heidi Kemple Martin. I am confident that this group of women will lead us to another successful year.

Look for our first event in our monthly newsletter! If you are not receiving our newsletters, please subscribe through the SBA's website or email sbawomenssection@gmail.com. If you have any ideas or suggestions on what you'd like to see from the women's section, please email us! We'd love to hear from you.

Cheers to a great year ahead!

Elizabeth Wong

SBA Women's Section President

Welcome TO THE SBA

Christopher G. Forester
Pettiette, Armand, Dunkelman, Woodley, Byrd & Cromwell LLP

James E. Franklin III
Attorney at Law

Jean-Paul Guidry
Attorney at Law

Erin Rosson
Legal Aid of North Louisiana

Chad Sepulvado
Seabaugh, Joffrion, Sepulvado and Victory, LLC

Kristen Sepulvado
Seabaugh, Joffrion, Sepulvado and Victory, LLC

Lucie Thornton
Attorney at Law

BAR BRIEFS

SBA Member, Attorney Adrienne White Honored By The Southern University Alumni Federation

Attorney Adrienne White, a partner at the Law Offices of White & White, in Mansfield, Louisiana, was honored with the 40 Under Forty Award presented by the Southern University Alumni Federation. The 40 Under Forty Awards Gala, which was a sold-out event, was held on October 31, 2019, in Baton Rouge, Louisiana, during Southern University's Homecoming Week. Per the Southern University Alumni Federation award selection process, the 40 Under Forty Awards recognize Southern University alumni, "ages 40 and under, who have made significant contributions to their professional disciplines, local communities, and/or to the preservation of Southern University."

Captain Speaks

by Rebecca Edwards, redwards@caddoda.com

Happy New Year! One good thing about Louisiana is that we love to keep the good times rolling. In ordinary places, the holidays have given way to the bleak days of winter. But that is not the case here. Mardi Gras season is upon us with king cakes, parades, beads and bals to cast away the winter doldrums.

The Krewe of Justinian and our "Justinian League" royalty – King Jeff Cox, Queen Helen Herzog, Duke Sam Crichton, Duchess Elizabeth Hancock, Duke Kyle Robinson, Duchess Anne Wilkes, Prince Michael Schimpf and Princess Ellie Marcotte – invite you to celebrate the season with us at Grand Bal XXVI, the **"Gotham City Mardi Gras Gala"** on January 31 at the Horseshoe Riverdome. The doors to Gotham open at 6:30, entertainment begins at 7:00, and the presentation of Royalty XXVI is set for 8:00. It will be another spectacular Justinian production! RSVP or reserve your tickets now on our website, www.kreweofjustinian.com, or by contacting Chelsea at cwithers@ShreveportBar.com or (318) 222-3643 Ext. 2. Raffle tickets are available for a stunning ring from Stephen Miller Fine Jewelry. Tickets are $20 or three for $40, and the winning ticket will be drawn at the Royalty Brunch on Sunday, February 2 at East Ridge Country Club.

There is still time to join the Krewe and receive free admission for two to the Grand Bal and to the Royalty Brunch. Both these events are well worth the Krewe membership!

I look forward to welcoming you to Gotham City!

Rebecca Edwards

Captain XXVI

Monroe Inn of Court

by Hal Odom Jr., rhodom@la2nd.org

Ethics was the topic for the Fred J. Fudickar (Monroe, La.) AIC's December meeting. Wesley Johnson, of Escamilla & Poneck in Monroe, presented "What To Do When the Quarterback for the Other Team Doesn't Know the Plays? Ethical Issues in Dealing with Opposing Counsel." However, she started with an anecdote about recently meeting John F. Tinker, one of the plaintiffs in *Tinker v. Des Moines Indep. Comty. School Dist.*, 393 U.S. 503 (1969), at a Texas Bar Association retreat. "He was applauded like a hero! One of your worst fears, in school litigation, is coming up against an angry parent who's an attorney!"

Moving to the topic, Wesley began, "What we're talking about is when opposing counsel is not familiar with the unique rules surrounding the relevant legal issues. Do you let a seemingly unqualified lawyer stumble around in the dark until he or she perhaps finds that proverbial truffle, or do you take the lead and point out the appropriate legal standards and issues?" For a case study offering a lot of possibilities, she discussed *Sarfo v. Comm'n for Lawyer Discipline*, 2018 WL 1004473 (Tex. App. – Austin 2/22/18), a disciplinary action in which the attorney was suspended, with partial probation. Opposing counsel in an auto accident claim had filed suit close to the end of the prescriptive period, serving Sarfo's client with the petition, interrogatories and requests for admission. Sarfo filed an answer labeling the suit "frivolous" and "based on a contrived or concocted injury and narrative by plaintiff." He neglected to serve counsel with the answer, which was bad enough, but also ignored all the discovery, ignored a later MSJ, and best of all, did not notify his client's insurer that he had been sued. Opposing counsel warned Sarfo of the risks he was taking with his client's case and, eventually, herself notified the defendant's insurer of the claim. The insurer ultimately paid policy limits on the claim. Opposing counsel then filed the disciplinary action. At the trial of that action, Sarfo called the jury "stupid people" and the Commission's attorney a "stupid ugly bitch."

"Of course these precise facts wouldn't arise in Louisiana, because of direct action," Wesley said, "but the situation is a genuine dilemma." She compared La.'s RPC 1.1 (a) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation") with Texas's Rule 1.01 (b) ("A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter, or (2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonable necessary in the circumstances").

"The rules of Discipline do not impose an affirmative duty on an attorney to 'teach up' unskilled or incompetent opposing counsel," Wesley concluded. "However, it may be in your client's best interest to attempt to point out important information or authority when it could benefit your client." Lively discussion, complete with personal experiences of attendees, followed.

Wesley also discussed the nettlesome issues of "affirmative misrepresentation," in cases like *Crowe v. Smith*, 261 F. 3d 558 (5 Cir. 2001), and knowing disobedience of court orders, in cases like *In re Miniclier*, 2011-1859 (La. 11/4/11), 74 So. 3d 687. These situations easily lead to ethical complaints against the offending attorney, but pose ethical quandaries for opposing counsel, who's just trying to do the right thing.

The meeting was held at Fat Pelican, on Tower Dr., at noon on Monday, December 9. Lunch included the usual (and excellent) options of the Pelican Burger, shrimp polenta and grilled chicken pasta. The 12 members who attended received their ethics CLE credit. Inn secretary Mike Street announced that the next meeting would be Monday, February 10, at The Lotus Club.

Wesley Johnson, of Escamilla & Poneck in Monroe, presented a very useful program on dealing with other attorneys who are bent on being unethical. "You can lead a horse to water, but you can't make him drink." (Photo by Hal Odom Jr.)

Captain XXVI Rebecca Edwards and the Krewe of Justinian
request the honor of your presence at

Justinian's Grand Bal XXVI
January 31, 2020
6:30 pm until 12:00 am
Horseshoe Riverdome
Black Tie

6:30 pm Complimentary Cocktails & Silent Auction
7:00 pm Cash Bar & Entertainment by Limelight
8:00 pm Tableau | Food Opens Following Tableau

Tickets - $100 | Tables of 10 - $125
Available at www.kreweofjustinian.com
Complimentary Admission for Krewe of Justinian Members

RSVP by January 15, 2020, to Chelsea at SBA
318-222-3643 ext 2 or cwithers@shreveportbar.com

GOTHAM CITY
MARDI GRAS GALA

SBA Membership Renewal Forms have been mailed. Please renew by January 31, 2020

Try the Mediation Center at the Shreveport Bar Center.

For only $150 per day per room, you will receive a soundproof meeting space equipped with video conferencing system, Wi-Fi, and optional beverage service. Reserve Today! Contact the SBA office (318) 222-3643 Ext. 3 or go online to www.shreveportbarfoundation.org

Do Good Work: Pro Bono Project

by Lucy Espree, Pro Bono Coordinator, lespree@shreveportbar.com

"Do Good Work" - Hon. Henry A. Politz

Get involved. Being involved in Pro Bono is a rewarding experience as you give back to the community but also gain experience in the courtroom and earn CLE credit. Contact me at my email address lespree@shreveportbar.com or by calling me at 318-221-8107.

On Monday, January 20, we hold our annual MLK National Day of Service, at the MLK Community Center, located at 1341 Russell Road from 11 a.m. – 1 p.m. We are looking for volunteer attorneys who can assist with medical powers of attorney and living wills. All forms will be provided. Please contact me if you are available to assist with this event.

I would like to thank the following attorneys who have accepted one or more Pro Bono cases and volunteered at our December Ask A Lawyer clinic. Without our volunteer attorneys, we could not provide services to our clients who cannot afford legal assistance:

Donald Wiener
Wiener, Weiss & Madison

Angela Waltman
Waltman & Waltman

F. Michael Carmody
Attorney at Law

Gernine Mailhes
Volunteers of America

Audrius Reed
Attorney at Law

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.

Melissa Allen
Honorable Jeanette Garrett
Jeremy Gathe
Kenneth Haines
Donald Hathaway
Honorable Mark Hornsby
Pam Jones
Curtis Joseph
Jeff Little
Honorable Jay McCallum
Patricia Miramon
Charlie Picou
Honorable Frances Pitman
Honorable Michael Pitman
Bennett Politz
Herschel Richard
Frank Spruiell
Hon. James "Jimbo" Stephens
Honorable Carl Stewart
Honorable Jeff Thompson
Zelda Tucker

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December CLE by the Hour

Highlights

Second Circuit Highlights

by Hal Odom Jr., rhodom@la2nd.org

Whatever you do, don't floor it. Nathan Putman owned a real classic, a 1955 Chevy Bel Air, and (naturally) wanted to enjoy it to the max; he took it to Costello's Racing & Adapters for a "restomod" (restoration and modification). Costello initially installed a new 6.2-liter LS3 engine; however, Putman wanted even more oomph, and got Costello to add an Edelbrock supercharger and give it a "dyno tuning." After this work, and a test drive in Arkansas, Costello warned Putman not to drive it too fast: the Bel Air's suspension, tire size and tire compound would not meet the performance of the modern Corvette engine. Specifically, the car could "get sideways" at 70 mph and lose traction if you just "barely" touched the accelerator. After Costello adjusted the tire rims, Putman asked to take the car on a test drive. For some reason, Costello (the mechanic) was driving, and Putman (the owner) was in the passenger seat, neither wearing a seatbelt. Shortly after turning onto La. 585 in West Carroll Parish, Costello hit the gas. The Bel Air immediately spun out of control, skidded off the road and hit a culvert. Both men were ejected and badly injured. (How the Chevy fared was not noted.) Putman sued Costello and his own insurer, Shelter, for his personal injuries, a claim that is still pending.

Costello reconvened against Putman and Shelter urging that the '55 Bel Air posed an unreasonable risk of harm, which Costello warned him about, but Putman *insisted* on more power, resulting in the crash. Putman and Shelter moved for MSJs, which the Fifth JDC granted. Costello appealed, and the Second Circuit affirmed, ***Putman v. Costello***, 53,142 (La. App. 2 Cir. 11/20/19), in an opinion by Judge Stephens.

The court felt impelled to "note the obvious": Putman was only a passenger, was not operating or controlling the car, and "clearly" owed no duty to Costello, the driver. What's more, Costello had "firsthand, mechanical knowledge of this souped-up vehicle," and even admitted that nobody knew its performance and limitations better than himself. Finally, the court rejected the claim that the Bel Air posed an unreasonable risk of harm: the only cause of the accident was the driver's negligent conduct, not a defective car. Finding that the MSJ evidence excluded any genuine issues and showed lack of factual support for an essential element of the reconvention, the court affirmed.

The case is a brutal reminder of the risk of transforming a 62-year-old relic of Detroit's glory days into a 21st-century hot rod. It also shows that on the right facts, the conduct of a negligent actor may override the competing claim of an unreasonably dangerous thing, even in the context of a summary judgment.

Another speedy disposition. David Strozier was riding his motorcycle on Caplis Sligo Road, in Bossier City, one Saturday afternoon in April. For reasons unexplained, a trash can was sitting, at least partially, on the roadway. As he rounded the bend, Strozier ran into the trash can. (Two bikers accompanying him, riding in front, both managed to avoid it.) The can belonged to Ms. Loux, who lived some distance off the road. Strozier sued Ms. Loux and her homeowner's insurer, USAA, and Allied Waste Services, which had emptied the can the previous morning. Ms. Loux and her insurer, and Allied Waste, filed MSJs, which the district court granted. Strozier appealed.

The Second Circuit affirmed, ***Strozier v. Loux,*** 53,136 (La. App. 2 Cir. 11/20/19), in an opinion by Chief Judge Williams. Strozier faced a daunting challenge: he had to produce summary judgment evidence to show that one of the defendants, Ms. Loux or Allied Waste, placed the can in the road. Ms. Loux testified that Friday midmorning, before she left for a weekend trip, she saw the trash had been collected so she moved the can from the roadside to the ditch in front of her property, where she usually stored it. A neighbor who stopped by Friday afternoon and Saturday morning to check on Ms. Loux's animals said she did not notice the trash can, but had it been on or near the "white line," she would have noticed. Two BPSD deputies who performed wellness checks at the house Friday afternoon and Saturday morning, said the same thing. The Allied Waste driver who worked the route stated that their habit was, after each can was dumped, for the helper to pull it back across the "white line." (The helper on the route that day was not deposed.) In short, Ms. Loux stowed the can in the ditch by 11:00 am Friday, and it was still off the pavement by 8:30 am Saturday, but something happened between then and 2:00 pm when Strozier cycled round the bend. Unable to show that Ms. Loux or Allied Waste put the can in the road, Strozier lacked evidence to prove an essential element of his case.

Strozier also argued that Ms. Loux violated a Bossier Parish ordinance, § 94-4(a), which prohibits anyone from placing any obstruction "upon highways or in the ditches or in spaces within the right-of-way of any public road of the parish." However, the cause of the accident was a can on the road, not a can in the ditch, so the court rejected the statutory claim.

Strozier probably had a better chance than the average motorist who strikes debris on the road; he could figure out who owned the can, and who might have put it there. This was not enough, however, to meet the plaintiff's burden of showing who put it in harm's way.

Speaking of code violations… Ms. Gauthier was an elderly lady with mobility issues. After her house was damaged in a fire, her homeowner's carrier, State Farm, agreed to put a mobile home on her property for her use during repairs. Foster Homes supplied the mobile home and installed a handicap ramp. The ramp ran parallel to the front of the mobile home and, oddly, reached the landing on the same side as the hinge of the door. The door opened outward, leaving very little room for a person coming up the ramp. About two weeks after the ramp was installed, Ms. Gauthier was trying to "navigate the stairs and door" to enter the mobile home; when she opened the door, she fell backwards off the landing, plunged about four feet, and struck her head on the ground. She sued Foster Homes and State Farm alleging strict liability for creating an unreasonable risk of harm. State Farm was released on no cause. Foster Homes filed a MSJ urging that it did not have care, custody or control of the ramp, that it did not have actual or constructive knowledge of any unreasonably dangerous condition, and that the ramp did not pose an unreasonable risk of harm, all essential elements under La. C.C. arts. 2317 and 2317.1. The district court granted the motion, and Ms. Gauthier appealed.

The Second Circuit affirmed, ***Gauthier v. Foster Homes LLC***, 53,143 (La. App. 2 Cir. 11/20/19), in an opinion by Judge Pitman. The thrust of the argument was that Ms. Gauthier's expert, Philip Beard, a civil engineer from central Louisiana, examined the landing, steps, ramp and handrail, wrote a long report, signed an affidavit, and gave a deposition. He admitted that the setup complied with the International Residential Code (IRC § R311.1, dealing with egress) and the ADA, but he felt that it still did not allow enough space to make it safe. The court found, however, that the condition was "open and obvious," thus creating no duty on the part of the owner. *Bufkin v. Felipe's La. LLC*, 2014-0288 (La. 10/15/14), 171 So. 3d 851. No duty, no liability, and summary judgment affirmed.

Even if the expert could have positively identified a code violation, this would not necessarily create liability. *Laffitte v. D&J Comm'l Props. LLC*, 52,823 (La. App. 2 Cir. 8/14/19), 278 So. 3d 460, and citations therein. When Mr. Beard admitted there was no code violation, the plaintiff's chances fell pretty fast.

And now, some successful ones. A Bossier City Police officer felt misused when the Department laterally transferred him from internal affairs to patrol. He appealed this move to the civil service board, which summarily dismissed the appeal. The officer took his case to Fannin Street, where the court found that even though lateral transfer is always "at the pleasure of the appointing authority," the same statute guarantees a right to a hearing if the officer alleges the transfer was "made deliberately to discriminate against him." La. R.S. 33:2489. The bulk of the opinion validated the board's acts, but reversed to allow the officer to amend his appeal letter to state, if possible, a claim of deliberate discrimination. ***Estess v. Bossier City Municipal Fire & Police Civil Serv. Bd.,*** 53,068 (La. App. 2 Cir. 11/20/19), an opinion by Judge Stone.

The financial stability of the new Shreveport Aquarium has been the subject of much news coverage, with sympathetic stories of local subcontractors, suppliers and laborers who got "stiffed." The general contractor, Wieland, finally sued the owner urging it (Wieland) had completed the project and was due over $250,000. The Aquarium reconvened for breach of contract; Wieland filed an exception of prematurity and motion to stay urging that, under the contract, such a dispute had to go to arbitration. The district court denied these motions, finding that Wieland had waived arbitration by filing suit in the first place. Wieland sought supervisory review. The Second Circuit granted the writ and made it peremptory in a published per curiam order, ***Wieland v. Shreveport Aquarium LLC***, 53,302 (La. App. 2 Cir. 11/6/19). The court cited the "strong policy in Louisiana favoring arbitration when it has been agreed to by the parties," including issues of whether anybody waived arbitration and whether the particular dispute falls within the scope of the agreement. Notably, Wieland's original petition had expressly reserved the right to demand arbitration, and the Aquarium filed no response to Wieland's writ application. Although Wieland initially tried to air its claims in open court, the parties will now proceed in the relative seclusion of the American Arbitration Association.

Whoa, not so fast! This summer, the Second Circuit published two opinions holding that only substantial (and not categorical) compliance with La. C.C. art. 1577 is necessary for an attestation clause to sustain a notarial testament. *Succession of Hanna*, 52,664 (La. App. 2 Cir. 6/26/19), 277 So. 3d 438; *Succession of Pesnel*l, 52,740 (La. App. 2 Cir. 6/26/19), 277 So. 3d 842 (see "Second Circuit Highlights," Sept. 2018). Now the court has held that the same standard, substantial compliance, applies to notarial testaments in which the testator is unable to read, La. C.C. art. 1579. The district court nullified a will, but the Second Circuit found it valid, in ***Succession of Liner***, 53,138 (La. App. 2 Cir. 11/20/19), an opinion by Chief Judge Williams.

However, a few days after *Liner* was rendered, the Supreme Court summarily reversed the Second Circuit's ruling in *Succession of Hanna*, 2019-01449 (La. 11/25/19), __ So. 3d __, stating simply that the trial court correctly found that "the attestation clause in the subject testament materially deviated from" Art. 1577 (2). This result seems odd, after the Supremes had *denied a writ* in *Succession of Pesnell*, 2019-01194 (La. 10/9/19), 280 So. 3d 600, which had an attestation clause almost identical to that in *Hanna*. In both cases, the clause omitted "on each other separate page," while in *Hanna* it also omitted "at the end"; both wills were actually signed on each other separate page and at the end.

The Second Circuit's opinion in *Liner* cites and relies on its earlier opinion in *Hanna*, which has now been reversed. It is to be hoped that the appellants in *Liner,* the heirs who challenged their vision-impaired father's will, have not rushed out and spent the proceeds. The Supremes seem to be scrutinizing attestation clauses.

Mark Your Calendar

JANUARY 22

SBA Member Luncheon

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

Speaker: Sid Potts, Private Jeweler

JANUARY 31

Krewe of Justinian Bal

Horseshoe Casino Riverdome

FEBRUARY 15

Centaur Parade

Krewe of Justinian Participates

FEBRUARY 23

Highland Parade

Krewe of Justinian Participates

FEBRUARY 26

SBA Member Luncheon

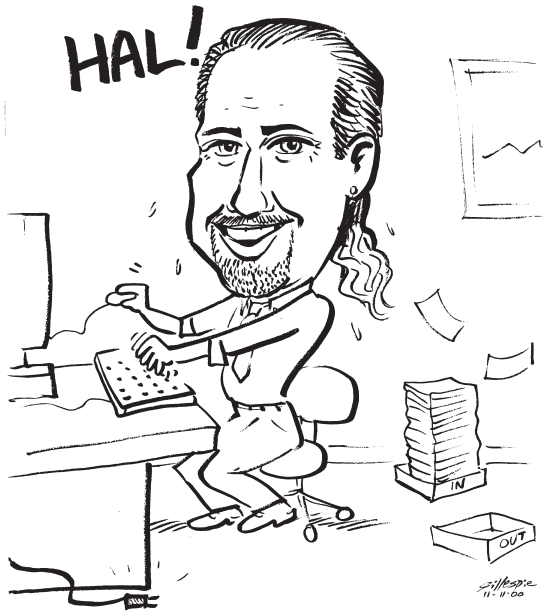
12:00 Noon at the Petroleum Club (15th Floor)

Speakers: TBD

How Write You Are

by Hal Odom Jr., rhodom@la2nd.org

I hate this error. A federal appellate court recently wrote, "When a state lawsuit is pending, federal courts are rightly *loathe* to exercise their discretion to grant declaratory relief that might short-circuit those proceedings." *Marriott Int'l Inc. v. Danna*, 772 Fed. Appx. 42, 2019 IER Cases 162,749 (5 Cir. 2019). The La. Supreme Court held, "While we are always *loathe* to reverse a jury's determination, we cannot ignore the overwhelming evidence that plaintiff was demoted for just cause." *LaBove v. Raftery,* 2000-1394, 18 IER Cases 434 (La. 11/28/01), 802 So. 2d 566. Even the Second Circuit joined in: "Additionally, courts are *loathe* to thwart the results of an election[.]" *Settle v. Bossier Parish School Bd*., 47,644 (La. App. 2 Cir. 7/3/12), 93 So. 3d 1284.



The adjective for *extremely reluctant* or *averse* is *loath*, no *e* at the end. It rhymes with *growth*. It is often used ironically, as if to say, "I hate to do this, but …" For example, "Nonetheless, until very recently, the Supreme Court has been *loath* to uphold sentences that are less than the mandatory minimum provided by law." *State v. Ladd*, 2015-0772 (La. App. 4 Cir. 4/13/16), 192 So. 3d 235. "Although many said he was miserly and *loath* to part with any of his assets, in the mid-1970s he was trying to sell a country lot[.]" *Skannal v. Bamburg*, 44,820 (La. App. 2 Cir. 1/27/10), 33 So. 3d 227, 175 Oil & Gas Rep. 597.

That other word, *loathe,* is a verb meaning *dislike intensely* or *be disgusted with*. It rhymes with *clothe*. It's a transitive verb: it must have a direct object. A dissenting justice recently used it correctly, and to perfect effect: "Gerrymandering, in short, helps create the polarized political system so many Americans *loathe*." *Rucho v. Common Cause,* 139 S. Ct. 2484 (2019) (Kagan, J, dissenting). And, sometime earlier: "Since I am a firm believer in the American jury system I *loathe* overturning that 'institution's' findings of fact." *Seals v. Pittman*, 499 So. 2d 114 (La. App. 1987) (Covington, J, dissenting).

The only other word pair I can think of that works like this is *teeth* (noun) and *teethe* (intransitive verb). In the case of *loath* and *loathe*, don't let confusion bite!

Fortunately, other forms of *loathe* present no problems. "He did not receive the maximum sentence of imprisonment for this heinous, *loathsome* crime and no fine was imposed." *State v. Elzie*, 37,920 (La. App. 2 Cir. 1/28/04), 865 So. 2d 248. "The PSI noted that one victim * * * continues to suffer severe anxiety and feelings of self-*loathing* as a result of the trauma[.]" *State v. Parfait,* 52,857 (La. App. 2 Cir. 8/14/19), 278 So. 3d 455.

Punctuated observations. An authority on legal writing has pointed out that in "most or all United States jurisdictions, court decisions reflect judicial disregard for punctuation as an isolated basis for statutory construction." In support is a venerable old case with a local connection: "Punctuation marks are no part of an act. To determine the intent of the law, the court, in construing a statute, will disregard the punctuation, or will repudiate, if that be necessary, in order to arrive at the natural meaning of the words employed." *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 53 S. Ct. 42 (1932).[1]

Other opinions have phrased it a little more gently. "Punctuation, as well as grammatical construction in general, although never relied upon to defeat the obvious intent, may operate as an aid in the construction and interpretation of the statute." *Pumphrey v. City of New Orleans,* 2005-0979 (La. 4/4/06), 925 So. 2d 1202. "Punctuation cannot control a statute's construction against the manifest intent of the legislature, and the court will punctuate or disregard punctuation to ascertain and give effect to real intent." *State v. Anderson*, 540 So. 2d 974 (La. App. 2 Cir. 1989).

Courts tend to say the same about contracts. "If the meaning of the words is clear, the court will interpret a contract according to their meaning and without regard to the punctuation marks or the want of them." *WBCMT 2007 C33 Office v. NNN Realty Advisors Inc*., 844 F. 3d 473 (5 Cir. 2016) (interpreting Texas law). "In a contract which contains punctuation marks, the words, and not the punctuation, are the controlling guide in its interpretation." *Housing Auth. of New Orleans v. Henry Ericsson Co.*, 197 La. 732, 2 So. 2d 195 (1941) (quoting Am. Jur.).

I mention this as food for thought, should anyone ever need to argue for (or against) a statute or contract on the basis of punctuation (or lack thereof). *This is, however no free rein to ignore the rules of punctuation in your own writing.* See how careless that looks?

They look alike, but … A reader asks, what do you call words that are spelled the same but can be pronounced different ways, with different meanings? Words like *wound* (tied up, or to injure) and *lead* (to guide, or a heavy metal)?

If the pronunciation is different, the words are *heteronyms* (also called *heterophones)*. Some such words have a bearing on legal writing: *advocate, alternate, contract, converse, deliberate, excuse, invalid, learned, perfect, permit, pervert, present, record, refund, subject, suspect, upset*.

These are not too much of a problem in legal writing. Legal diction is a different story. I don't object to making them an object lesson.

Is this real litigating? In *Reynolds v. Reynolds*, 33,216 (La. App. 2 Cir. 5/10/00), 759 So. 2d 295, Thomson Reuters supplied the following headnote:

A judgment that merely classifies the status of property that may be community property without addressing an accounting or value which is at the heart of the controversy is not an appealable judgment; however, such a judgment could be reviewed upon an appeal from the final judgment *homolitigating* the partition.

The opinion itself correctly refers to *homologating* (judicially approving) the partition. Whoever wrote the headnote must not have been too familiar with Louisiana's distinctive legal vocabulary.

[1] Ann Taylor Schwing, Grammar Tip No. 170: Punctuation Is No Part of the Statute (Scribes: The Amer. Soc. of Legal Writers, © 2019).

GREGORIO
CHAFIN
JOHNSON

TABOR & FENASCI, LLC

ATTORNEYS AT LAW

IS PROUD TO ANNOUNCE

JOSHUA K. WILLIAMS ATTORNEY AT LAW, LLC

WORKERS COMPENSATION & PERSONAL INJURY

9284 Linwood Avenue
Shreveport, LA 71106

w (318) 562-1140

m (318) 422-4145

e jkwilliamsattorney@mail.com

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

DEADLINE FOR FEBRUARY ISSUE: JANUARY 15, 2020

VETERANS APPRECIATION LUNCHEON - JANUARY 22

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

YOUR FRIEND FOR ST. VALENTINE'S DAY

When: Wednesday, January 22 from 12:00 Noon to 1:00 p.m.

Where: Petroleum Club (15th floor)

Featuring: Sid Potts, Private Jeweler

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I plan to attend the January luncheon. Attorney:_____

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