The Bar Review

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11/8	SBA Membership Luncheon – 12:00 Noon - Petroleum Club
11/9	SBA Memorial & Recognition Ceremony – 2:00 p.m. – Caddo Parish Courthouse
12/13-14	December CLE by the Hour Seminar
12/10	SBA Christmas Party

From The President

by Nancy Cooper, ngcoop23@gmail.com

The Certainty Trap

Sigmund Freud famously quoted English neurologist John Hughlings Jackson's philosophy that "the person who first flung a word of abuse at an enemy instead of an arrow was the founder of civilization." We, as lawyers, might take that a step further by suggesting that perhaps it was the formation of laws that marked the birth of civilization … but either way, humanity has ever since perfected the art of written and verbal discourse. We excel at the orderly exchange of ideas and civilized disagreement. We have mastered the craft of communication. Right?

Of course not! To the contrary, with all the recent gridlock and violence playing out in our country and around the world, it feels like humanity's ability to peacefully coexist and negotiate productive outcomes is at an all-time low. We've become so socially and politically polarized that we're on the brink of dysfunction, and one culprit may be the concept of certainty.

Perhaps it's time to reflect on how unwavering certainty can be paralyzing. How our dogmatic views about the world are a fortress that shuts people out and thwarts productive conversation, negotiation and compromise. How certainty often stifles problem-solving and reduces outcomes. It reverts us back to flinging arrows.

"Certainty drives both righteous indignation and moral outrage, and it carries a layer of virtuous superiority that makes communication practically impossible," says Ilana Redstone, professor of sociology at the University of Illinois at Urbana-Champaign and author of *The Certainty Trap* (to be published in summer 2024). "It leads to the kind of name-calling that's lobbed at the people who don't respond the way you want, when you want it. It's what gives us permission to feel noble in our convictions." Ilana Redstone, "Trapped by our Certainty," Daily Hampshire Gazette (9/7/2023) Op-ed.

Criticism of certainty is hardly modern. Socrates, one of the founding figures of Western philosophy, highlighted the value of skepticism long ago. In his quest for knowledge, he recognized that certainty can hinder one's pursuit of wisdom: "The only true wisdom is in knowing you know nothing." Two thousand years later, Voltaire must have agreed: "Doubt is not a pleasant condition, but certainty is absurd."

On a darker note, Dr. Randy Borum, Professor/Director of the School of Information and Director of Intelligence and National Security Studies at the University of South Florida, describes certainty as a "syndrome" exploited by extremists who will stop at nothing to push their ideology on others. In his 2004 publication Psychology of Terrorism, he suggests that the beliefs that guide and justify destructive behavioral mandates from extremist leaders to their followers "must be inviolable and must be neither questionable nor questioned." To the contrary, "the mind that questions, debates, opens itself to challenging ideas, will prove a source of division for a terrorist movement in the heat of battle."

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Continued from pg 1 "From the President"

On a lighter note, we may not be confronted with deadly terrorists every day, but sometimes – especially in the current political environment – we may feel terrorized by our neighbors, colleagues, friends or family members. When our children were clueless yet confident teenagers, my husband often referred to them as "often wrong, never in doubt." This probably describes a lot of us, especially in the courtroom where there's little room for doubt or skepticism.

Perhaps a more useful concept for our culture, however, is curiosity. With curiosity comes the spirit of inquiry – an unpretentious and genuine search for the truth, as opposed to sanctimonious arrogance. "The willingness to actually listen to others and to display your ignorance in a world full of know-it-alls is a bold move that now has a name – intellectual humility," writes Bruce Grierson in his *Psychology Today* article titled "Certainty is a Psychological Trap and It's Time to Escape" (7/5/23).

"The road to intellectual humility is paved with curiosity," writes Grierson. "It's not only a developable skill, but it could just end the culture wars…. The more diverse perspectives we entertain, the smaller our blind spots and the wiser our decision-making will generally be."

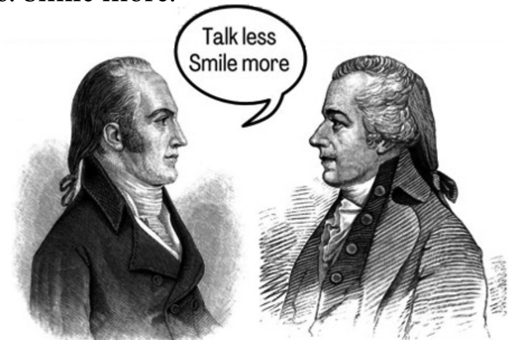
Grierson offers an entertaining anecdote about how major league pitcher Wade LeBlanc got some unsolicited advice from a cab driver on his way to the airport after he'd been "sent down to the farm club." The cabbie had evidently watched LeBlanc pitch the previous night. "You know, you've got some good stuff," the cabbie said, "but maybe try going over your head in the windup." For whatever reason, LeBlanc listened. And it turned his game and his career completely around.

As for the rest of us (who aren't necessarily looking to get back into major league baseball and aren't members of terrorist organizations), why should we strive to be less certain and more curious about the world?

Because, as it turns out, humility and social curiosity make us happier.

"Besides being more agreeable and less lonely," Grierson explains, "socially curious people are also more open-minded than others." Curiosity "softens our defenses against hostile pushback." Thus, people "high in intellectual humility" are, simply put, nicer and have more friends. They're also more thoughtful decision-makers because hauling the burden of unwavering certainty around is exhausting and makes us grouchy.

As lawyers, counselors and mediators, how can we help our clients (and ourselves) become more socially curious and less grouchy? Some worthwhile strategies include things like patience, active listening, asking open-ended questions, finding common ground, and reflecting on our own certainty. Listening to diverse perspectives from people with different stakes makes us smarter. And more charming. It shrinks our blind spots and earns respect. As Aaron Burr said to Alexander Hamilton in the wildly popular Broadway musical: "Talk less. Smile more."



Heading into the holidays, we have many reasons to smile. First and foremost, it's sunny and 64 degrees outside as I'm writing this. Second, we have two particularly meaningful events in November: Our SBA Veterans Appreciation Luncheon on Wednesday November 7, featuring Major General Jason R. Armagost, Commander, Eighth Air Force, and Commander, Joint-Global Strike Operations Center, Barksdale Air Force Base. The next day, November 8, is our annual SBA Memorial & Recognition Ceremony at Caddo Parish Courthouse.

We will cap off the year with our annual SBA Christmas Party at Silver Star Grille on December 10 and our CLE By-The-Hour at the Petroleum Club on December 13-14. These are all great opportunities to engage with other SBA members and sharpen our "social curiosity" skills.

In closing, Vincent Van Gogh spoke of certainty in an uplifting way that perhaps we can carry with us into the holiday season: "Is the whole of life visible to us, or do we in fact know only the one hemisphere before we die? For my part I know nothing with any certainty, but the sight of the stars makes me dream…." Happy stargazing, my friends. And stay curious.

December CLE By The Hour
December 13-14, 2023

Petroleum Club, 15th Floor ▪ 416 Travis Street, Shreveport

13 Louisiana CLE Credits (including 1 Hour Ethics & 1 Hour Professionalism)
13 Texas CLE Credits Approved (including 2 Hours Ethics)

(Please Circle Classes Attending)

Wednesday, December 13, 2023

7:30 A.M. **Registration**

8:30 A.M. **How to Win or Lose Summary Judgment**
60 Minutes *Judge Elizabeth Foote - U.S. District Court, Western District of Louisiana and Judge Michael Pitman First Judicial District Court*

9:30 A.M. **Break**

9:35 A.M. **Starting Your Own Law Office (Law Practice Management) -** *Ebonee Norris – The Norris Law Group and Katherine Gilmer - Gilmer & Giglio*
60 Minutes

10:35 A.M. **Break**

10:40 A.M. **What To Know About Former Employees and Intellectual Property -** *Meg Frazier and Reid Jones – Wiener, Weiss & Madison*
90 Minutes

12:10 P.M. **Lunch *(included with all-day registration, or $30)***

1:00 P.M. **Election Law Tips and Traps**
60 Minutes *William Bradford – Blanchard, Walker, O'Quin & Roberts*

2:00 P.M. **Break**

2:05 P.M. **Premises Liability Update**
60 Minutes *Alexander Mijalis - Lunn Irion Law Firm and Jason Nichols - Rice & Kendig Injury Lawyers*

3:05 P.M. **Break**

3:15 P.M. **DWI Defense**
60 Minutes *Ronald J. Miciotto - Law Office of Ronald J. Miciotto and Craig Smith - Smith & John*

Thursday, December 14, 2023

7:30 A.M. **Registration**

8:30 A.M. **Update on Federal Jurisdiction and Procedure**
60 Minutes *Judge Mark Hornsby and Robin McCoy- United States District Court, Western District of Louisiana*

9:30 A.M. **Break**

9:35 A.M. **Oil & Gas Update**
60 Minutes *Andrew Martin and Grant Summers – Davidson, Summers, Hearne, Martin & Powell*

10:35 A.M. **Break**

10:40 A.M. **Perfecting Your Writs and Appeals -** *Robin Jones and Jenny Segner – Second Circuit Court of Appeal*
90 Minutes

12:10 P.M. **Lunch *(included with all-day registration, or $30)***

1:00 P.M. **Ethics**
60 Minutes *Justice Jay McCallum - Louisiana Supreme Court*

2:00 P.M. **Break**

2:05 P.M. **Professionalism**
60 Minutes *Judge Frances Pitman - Second Circuit Court of Appeal*

3:05 P.M. **Break**

3:15 P.M. **Family Law: What Every Lawyer Should Know**
60 Minutes *Judge Edwin Byrd - First Judicial District Court*

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Federal Update

by Chris Slatten, Chris_Slatten@lawd.uscourts.gov

Sealing Filings: When a party seeks to file material under seal, the judge must undertake a case-by-case, document-by-document, line-by-line balancing of the public's common law right of access against the interests favoring nondisclosure and explain the sealing decision at a level of detail that allows for appellate review. A court errs if it makes no mention of the presumption in favor of the public's access to judicial records and fails to articulate any reasons that would support sealing. *Binh Hoa Le v. Exeter Fin. Corp*., 990 F.3d 410, 419 (5th Cir. 2021).

Many motions to seal are denied these days, and I suspect several of ones that are granted are reversible for lack of articulated reasons. If I were moving to seal, I would offer a proposed order that described the presumption and set forth compelling reasons for sealing, but I've yet to see a lawyer do that. If you want those trade secrets to stay secret, you might want to put some effort into it.

Sealing LLC Members: An LLC will sometimes move to seal its member information, which must be disclosed in a diversity case. The 5CA says that "the existence of jurisdiction is not undermined by the fact that certain supporting evidence is under seal" but an LLC's "unspecified and unsubstantiated privacy concerns do not amount to *compelling* countervailing interests sufficient to warrant" sealing LLC membership. That the information relates only to jurisdiction does not bear, in either direction, on the decision to seal. *IFG Port Holdings, LLC v. Lake Charles Harbor & Terminal Dist*., 82 F.4th 402 (5th Cir. 2023). It's now going to take a strong showing to justify sealing LLC membership.

Qualified Immunity; Change in Clearly Established Law: The 5CA held in *Castellano* (2003) that there was no Fourth Amendment claim for malicious prosecution. But the Supremes later recognized such a claim in *Thompson v. Clark* (2022). The plaintiff in *Guerra v. Castillo*, 82 F4th 278 (5th Cir. 2023) may have alleged a valid malicious prosecution claim under *Thompson*, but the defendant still obtained dismissal based on qualified immunity. The law supporting a claim must be clearly established at the time of the alleged misconduct to escape QI, and the 5CA's caselaw explicitly disclaimed the existence of a § 1983 malicious prosecution claim at the time of the defendant's alleged conduct in 2018 and 2019.

Qualified Immunity; Who makes the law clearly established?: In *Boyd v McNamara*, 74 F.4th 662 (5th Cir. 2023), the majority noted, "Defendants also assert in a footnote that 'it is not clear' whether our precedents, as opposed to the Supreme Court's, can clearly establish the law for purposes of qualified immunity. A proverbial mountain of binding authority is to the contrary." The mountain did not persuade Judge Oldham, who suggested in dissent that only the Supremes can clearly establish the law.

Keep an eye on this. If we have to wait on the Supremes—who decide fewer than 100 cases per year, with at best a handful on civil rights issues—to clearly establish law at the granular level required to defeat QI, then the already strong defense will be almost unsurmountable.

Class Action Fairness Act: A panel was unanimous that LA sheriffs and law enforcement districts—who filed a class action against software sellers—are separate entities when counting parties for purposes of the Class Action Fairness Act's exclusion of jurisdiction when there are "less than 100" plaintiff class members. But the vote was 2-1 on a holding that the case nonetheless did not belong in federal court because it fit the "local controversy" exception. *State of LA v. 13 Verticals, Inc.*, 81 F.4th 483 (5th Cir. 2023). Get out your highlighter and review this 24-pager if you are facing either of those issues.

Video and Summary Judgment: The Supremes said in *Scott v. Harris*, 127 S.Ct. 1769 (2007) that undisputed video that blatantly contradicts a party's testimony, so that no reasonable jury could believe him, can prevail in a summary judgment contest. But video does not always provide the complete story. Obstructed views, lack of detail about whose hands are where, and lack of intelligible audio are often obstacles to knowing all the relevant details based solely on the recording. When a video is inconclusive, ambiguous, or there is evidence challenging its accuracy or completeness, the modified rule from *Scott* is not applicable. *Aguirre v. City of San Antonio*, 995 F.3d 395, 410 (5th Cir. 2021). That was the case in *Boyd v. McNamara*, 74 F.4th 662 (5th Cir. 2023), where summary judgment for a deputy was reversed; a reasonable jury could interpret the video evidence to support the version of the facts offered by each side.

Video from businesses, cars, doorbells, jails, body cameras, and like is often used to support or oppose summary judgment. Some lawyers just attach the video and suggest that it supports their client. But the court often needs more information, such as who the heck is who in the video (such as when six deputies use force on two people). An affidavit that gives details about who is doing what and when (plaintiff enters from the left at 2:03, wearing a white shirt), and what was said by whom (if there is no audio) can make the difference between winning and losing. Attaching video to a summary judgment filing without a certifying and explanatory affidavit is not good advocacy.

The newest laptops issued to judges and law clerks in the Shreveport courthouse lack a DVD player, so I recommend that you file video on a flash-drive rather than a disk.

Second Circuit Highlights

by Hal Odom Jr., rhodom@la2nd.org

Those policies are pretty narrow. Two writ grants from the same case illustrate the need to read insurance policies closely.

In June 2020, Mallahan was standing on the driveway of his house, near Willow Chute in Bossier City, waiting for contractors to come do some work. One of them, EGE Painting, arrived and pulled into the circle driveway; however, the driver somehow drove the truck into and struck Mallahan, who was bent down plucking worms off the pavement. Mallahan sued a number of people and entities, including Hiscox Ins. Co., which provided a General Commercial Liability ("GCL") policy for EGE. Hiscox moved for summary judgment on grounds that its policy excluded coverage for bodily injury "arising out of the ownership, maintenance, use or entrustment * * * of any * * * auto * * * owned or operated by * * * any insured." Mallahan objected that this provision did not create a "blanket exception" for "any liability that has any relationship" arising from any auto, and, specifically, there was a genuine issue as to ownership of the truck. The district court agreed, without assigning reasons, denied summary judgment, and Hiscox took a writ.

The Second Circuit granted, reversed and rendered summary judgment, ***Mallahan v. Guevara,*** 55,167 (La. App. 2 Cir. 9/27/23), in an opinion by Judge Cox. The court used a plain reading of the exclusion, which referred to the definition section of the policy, and concluded, as a matter of law, that it excluded the type of bodily injury alleged – that caused by the use of an auto. The court also noted the established jurisprudence that GCL policies don't usually cover auto accidents, *Marzell v. Charlynn Enters. LLC*, 51,209 (La. App. 2 Cir. 2/15/17), 215 So. 3d 405. The plaintiff will have to go after somebody's auto policy.

And so he did. Mallahan also sued an auto carrier, Employers Mutual Casualty Co., which provided a commercial auto liability policy and a commercial umbrella policy for Mallahan's small business, Tadpole LLC. Mallahan alleged that these created "insurance coverage, excess coverage, umbrella coverage, or other coverage" for his damages. Employers Mutual, however, filed a MSJ. It conceded a genuine issue whether the UM rejection signed by Mallahan on behalf of Tadpole was valid, but argued it didn't matter: there was no coverage, as Mallahan was not an insured under either policy. Mallahan responded that the issue of the UM rejection was enough to defeat the summary judgment, and the district court agreed, again without assigning reasons. Employers Mutual took a writ.

The Second Circuit granted, reversed and rendered summary judgment, ***Mallahan v. Guevara,*** 55,136 (La. App. 2 Cir. 9/27/23), in an opinion by Judge Stephens. The court again applied a plain reading of the definition sections. In the commercial auto policy, an "insured" is "you for any covered auto" and anyone else "while using with your permission, a covered auto you own, hire, or borrow[.]" In the umbrella policy, an insured is "Only with respect to liability arising out of the ownership, maintenance, or use of covered autos: a. You are an insured. b. Anyone else while using with your permission a covered auto you own, hire, or borrow[.]" Unfortunately for Mallahan, he was not using any automobile at the time of the accident, so there was simply no coverage; the potential invalidity of the UM rejection was totally irrelevant. Even under the UM statute, R.S. 22:1295 (1)(a)(i), coverage is not mandated in this situation, even if the UM rejection was faulty. After this, Mallahan may well wonder what these policies actually do cover.

And sometimes they don't stack up. Ms. Slattery was riding as a passenger in her dad's Lexus, on Range Road in Barksdale AFB, when Ms. Holdsworth's Ford rear-ended them, injuring Ms. Slattery. Ms. Slattery sued Ms. Holdsworth and her insurer, Safeway; she later amended her petition to add her dad's UM carrier, Unitrin, and her own UM carrier, GEICO, on her own vehicle. She settled with Ms. Holdsworth and Safeway, and Unitrin paid under its UM policy. GEICO then filed a MSJ asserting that, because Ms. Slattery had already collected under her dad's UM policy, and because she and her dad were both members of the same household, she could not collect from both UM policies; this was prohibited "stacking" under the UM statute, R.S. 22:1295 (1)(c). The district court agreed, granting summary judgment, and Ms. Slattery appealed.

The Second Circuit affirmed, ***Slattery v. Holdsworth,*** 55,267 (La. App. 2 Cir. 9/27/23), in an opinion by Judge Hunter. The opinion defined stacking, tracing the distinction between "interpolicy" and "intrapolicy" stacking, *Boullt v. State Farm*, 99-0942 (La. 10/19/99), 752 So. 2d 739. It then parsed the statute, § 1295 (1)(c), noting its prohibition on stacking "when the insured has insurance available" under more than one UM policy, if the claim is for bodily injury "while occupying an automobile not owned by said injured party, resident spouse, or resident relative[.]" Further, the GEICO policy excluded coverage for bodily injury "while occupying an uninsured motor vehicle owned by an insured or relative" and defined a "relative." The court then found deposition testimony confirming that Ms. Slattery and her dad lived in the same house at the time of the accident. Finally, the court carefully reviewed over 20 years of jurisprudence involving passengers riding in a household member's car when injured by underinsured drivers; they could collect from their relative host driver's UM, but not also from their own.

The court noted that Ms. Slattery would have had coverage under both policies had she been injured while occupying an auto *not* owned by her, a resident spouse or a resident relative; but because she "sustained injuries while

occupying a vehicle owned by a resident relative, her father, and she received UM coverage under her father's" policy, that was all she got.

Even though she paid for UM coverage, the interplay between the statute and the policy barred her from getting the benefits. The social policy underlying UM coverage is to protect people from underinsured drivers, but, apparently, not to give limitless protection.

Some permissible self-dealing. Mr. Frierson had four accounts with Stephens Inc., an out-of-state private brokerage firm with offices in Shreveport. In January 2022, he and his wife went to Stephens's local office, in La. Tower; according to Ms. Frierson, her husband told the representative that he wished to turn over his accounts to her, and the rep gave him printed durable power of attorney forms to complete. These forms granted full authority to the agent (Ms. Frierson) to "deliver or distribute assets and securities from any of my account(s) and make payments of moneys, without restriction, to any one or more persons (specifically including my Agent himself or herself)." Mr. Frierson signed the forms, but he was in failing health. In April 2022, Ms. Frierson contacted the Stephens rep saying she needed to exercise the durable POA and transfer the assets of two of the accounts to her own name. Stephens balked, saying the matter needed further review by its legal department. Ms. Frierson sued for an injunction on May 9; Stephens opposed, arguing the durable POA didn't allow "an agent gifting the principal's assets to herself." Mr. Frierson passed away on May 17. After a hearing in June, the district court denied Ms. Frierson's injunction, and she appealed.

The Second Circuit reversed, ***Frierson v. Stephens Inc.,*** 55,115 (La. App. 2 Cir. 8/9/23), in an opinion by Judge Stephens (no relation to the corporate defendant). The court laid out the basic law of mandate and of contractual interpretation, concluding that the durable POA's key provision ("deliver or distribute assets * * * without restriction * * * to any one or more persons (specifically including [Ms. Frierson] herself)") easily superseded other provisions (requiring principal and agent to keep "assets and property separate") and justified the injunctive relief sought by Ms. Frierson. The court also found that Mr. Frierson's death, though it terminated the POA, did not negate the result; the request had been lodged three weeks before his death. The court reversed and remanded for entry of an appropriate order.

Judge Cox concurred, fully agreeing with the majority's rationale but wondering why Stephens even had standing to contest the transfer. It is an interesting question; though not quoted in the opinion, an internal email referred to "those 2 big accounts," and at the hearing, counsel for Ms. Frierson stated that one account "has considerably more money in it" than $1.48 million. Stephens might just have hated to see that large account (possibly) walk out the door. However, the opinion beautifully illustrates that content matters; a passage *specifically including the agent herself* is pretty strong, and contrasts with the thwarted attempts at self-dealing in recent cases like *Matter of Succession of Frazier*, 54,751 (La. App. 2 Cir. 9/21/22), 349 So. 3d 634, and *Richland State Bank v. dePingre*, 54,411 (La. App. 2 Cir. 4/5/22), 337 So. 3d 579.

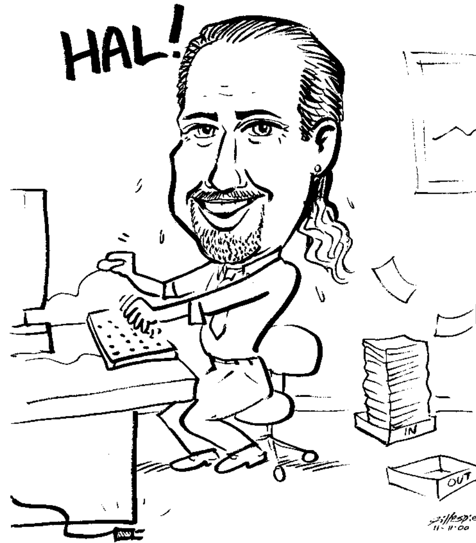
Employment matters. The court rendered two employment-related decisions from its August docket. In ***Sims v. Office of Emp. Sec.,*** 55,198 (La. App. 2 Cir. 9/27/23), Sims, a laborer in Monroe's public works department, failed to show up for three consecutive days; according to the city's policy, this is cause for termination unless, on the fourth day, the employee returns with a doctor's note. Sims called on the fourth day claiming to have caught COVID-19, but never turned in a doctor's note; he was fired. He applied for unemployment and received benefits for about four months. An internal review by La. Workforce Commission, however, found that Sims had actually been in jail for two of those three days, was released on the third day but still failed to call in until the fourth day – all of which justified the termination. LWC determined that not only was Sims disqualified from benefits, but he had to repay some $12,175 he had received. An ALJ, the Board of Review and the Fourth JDC all affirmed; Sims appealed. The Second Circuit affirmed, in an opinion by Chief Judge Pitman. The court laid out the law of disqualifying misconduct, R.S. 23:1601 (2)(a), of mandatory repayment of excess benefits, R.S. 23:1713, and rules pertaining to waiver of repayment, LAC 40:IV.369.A.1 and 15 U.S.C. § 9021(d)(4), finding no error in the agency determination, ALJ, Board of Review or District Court. Most unemployment claimants, Sims included, are unrepresented, but this opinion is a quick review of the major principles in this area of labor law.

In ***Fobbs v. CompuCom Sys. Inc.,*** 55,173 (La. App. 2 Cir. 9/27/23), Fobbs was a field tech who had been sent to Jackson, Mississippi, to install a server, and claimed that he injured himself while doing this, although the incident was unwitnessed and he drove back to Shreveport in spite of it. In three hospital visits over the next month, he complained of leg pain, never mentioning any work-related accident; it transpired that he had previously got his tibia smashed in an altercation, undergone surgery, it had not fully healed and he was unhappy with the follow-up treatment he received for this. However, when he filed for workers' comp, he alleged he hurt his *back* on the job in Mississippi. The WCJ found, in essence, that Fobbs could not prove any work-related accident and back injury; rather, he was trying to piggyback his prior injury into comp coverage; she dismissed his claim. He appealed, and the Second Circuit affirmed, in an opinion by Judge Ellender. The court noted that an employee with a preexisting injury may qualify for comp benefits, if a work-related injury aggravates, accelerates or combines with the prior condition to produce disability, *Peveto v. WHC Contractors*, 93-1402 (La. 1/14/94), 630 So. 2d 689. Fobbs simply could not prove a work-related accident or incident that had anything to do with his shattered shinbone. The opinion illustrates the burden of proof in comp and some evidentiary issues in the Office of Workers' Comp.

How Write You Are

by Hal Odom Jr., rhodom@la2nd.org

Quit drooling. "The opening statement is the attorney's best opportunity to capture the attention and interest of the jurors and also to *wet* their collective appetite for what the defense is going to prove." Roger B. Jacobs, Defense of Claims Brought Under the ADA, 49 Am. Jur. Trials 171 (May 2023 Update). "Your opening statement should now go beyond that taste and really *wet* their appetite." F. Lee Bailey & Kenneth J. Fishman, 2 Crim. Trial Techniques § 42:1 (Sept. 2022 Update). "Williams said that * * * he 'began to meet regularly w/OTS … to see if we could *wet* their appetite on at least some broader D&O claims.'" *FDIC v. Hurwitz*, 384 F. Supp. 2d 1039 (S.D. Tex. 2005) (quoting a memo). Does this word choice dampen your reading comprehension?



The intended word is *whet*, which means to *sharpen* (a knife) or *stimulate* (one's appetite). Of course, it sounds exactly like the much more common *wet*, a confusion fostered by the mental image of a *mouth watering*. Careful writers will not slip on this near-homophone. "The Government submits further that virtual child pornography *whets* the appetite of pedophiles[.]" *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389 (2002).

The challenge is that Spell Check will not catch this – both *wet* and *whet* are proper words – and speech recognition software will likely spit out the much more frequent *wet*. If this doesn't whet your appetite for proofreading, what will?

Surprising the court. A recent grammar tip from Scribes – The American Society of Legal Writers advised that of the three sentence-ending punctuation marks, "the exclamation point is the least used and, in legal writing, should be used even less than it is in other writing." Ann Taylor Schwing, Grammar Tip No. 235 (Oct. 29, 2021). She cited a Texas case (from 1983) that admonished a judge for using an exclamation point in a message to a jury, and a U.S. Sixth Circuit case (from 2010) that admonished an attorney for sending, in discovery, "exclamation-point-laden" emails.

Louisiana's Federal courts have occasionally addressed this surprising subject. Perhaps the most pointed was a footnote castigating the appellants' "briefs, which are noteworthy both for their excessive use of emotional overstatement, capital letters, underscoring, and exclamation points, and for their dearth of legal analysis and citation to apposite authority." *King v. Fidelity Nat'l Bank*, 712 F. 2d 188 (5 Cir. 1983). A district court admonished some defendants for the "rather tiresome habit of utilizing excessive bolding, underlining, capital letters, and exclamation points. Counsel is advised to refrain from gratuitous punctuation in future briefing before this Court." *In re Gulf States Long Term Acute Care of Covington LLC*, 2014 WL 1365950 (E.D. La. 2014). Recently, another intoned that "despite the plethora of exclamation points and question marks in plaintiff's complaint, nothing in either the complaint or the motion reveals that any of the judges acted outside the scope of their judicial capacity." *McCoy v. McCormick*, 2023 WL 3010215 (M.D. La. 2023).

State court judges seem not to have upbraided anyone over the use of exclamation points. One old case (from the era of the maternal preference rule) admitted that the mother had sent her ex-husband letters with "numerous emphasis signs such as underscorings, interlineations, marginal notations, and exclamation points," making her appear to be immature, like "an adolescent girl" rather than a "grown woman"; still, the Supreme Court deemed her fit to exercise custody of the parties' 11-year-old daughter. *Ane v. Ane*, 220 La. 345, 56 So. 2d 570 (1951).

One influential commentator has advised, "Emphasis by means of italics, underlining or exclamation points should be avoided * * *. The statement should tend toward understatement rather than overstatement." Roger A. Stetter, La. Civil Appellate Prac. (2022-2023 ed.) § 8:27. This might be the best advice to legal writers! Or, rather, the best advice to legal writers.

Just keep steady. From a brief filed in the Second Circuit: "Instead, a long line of cases following the same reasoning merely forms jurisprudence *contante*. * * * Indeed, even when a line of cases is lengthy enough to establish jurisprudence *contante*, it is merely a secondary source of law." Does this spelling make you somehow not content?

The intended word is perfectly cognate with the English word *constant*, meaning *continual and always the same*. The French phrase *jurisprudence constante* means "a constant stream of uniform and homogenous rulings having the same reasoning," thus creating "considerable persuasive authority." *Bergeron v. Richardson*, 20-01409 (La. 6/30/21), 320 So. 3d 1109. Such a stream of rulings graduates to the status of custom, under La. C.C. art. 1, a source of law inferior to legislation.

One legitimate example of *jurisprudence constante* is the notion of unreasonable risk of harm, in the context of premises liability. *Nugent v. Car Town of Monroe Inc.*, 50,910 (La. App. 2 Cir. 9/28/16), 206 So. 3d 369 (citing a constant stream of uniform and homogenous rulings). Most often, courts reject claims of *jurisprudence constante* or custom.

Just keep steady, and you'll get the right kind of jurisprudence.

This slithered in. An American Inn of Court in the DFW area held a meeting at the Ft. Worth Zoo. According to the report in *The Bencher* (Sept./Oct. 2023, p. 10), Inn members met some special guests – "an opossum, blue-tongued *skeet*, and magnificent parrot[.]" A what? A clay pigeon, hurled for trapshooting? No, it's a blue-tongued *skink*, an Australian lizard with a stunningly blue tongue and a docile manner. The reporter probably was not familiar with exotic animals, but at least she didn't call the little critter an amphibian.

2023 NORTH LOUISIANA CRIMINAL LAW SEMINAR

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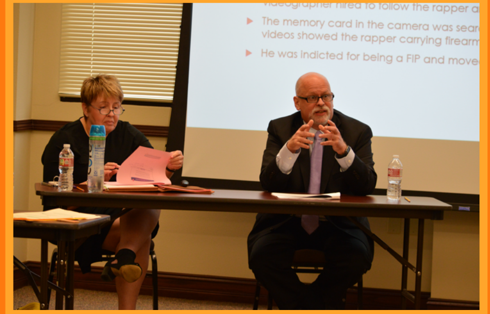

SBA Annual Golf Tournament

The Annual Shreveport Bar Association Golf Tournament was held at Querbes Park Golf Course. We had eleven teams participate in this year's tournament on Friday, September 29.

The SBA thanks everyone who participated in this year's tournament and past golf tournaments. We especially want to thank committee co-chairs, Curtis Joseph, Jimmy Mijalis and Alexander Mijalis and past chairmen and committee members for the work they put into coordinating this tournament over the past 30 plus years.

2023 Golf Tournament Winners:

1st Flight, 1st Place team score of 44.5 was Luke Thaxton's team which included Jeff Lee, Casey Robinson and Daniel Spear

2nd Flight, 1st Place team score of 45.25 was Holland Miciotto's team which included Jason Tores and James Scotto

1st Flight, 2nd Place team score of 53 was Nate Mixon's team which included Cy Scheffy, Lloyd Comegys and Steven Geter

Casey Robinson won Closest to the Hole on hole #13

Luke Thaxton's team

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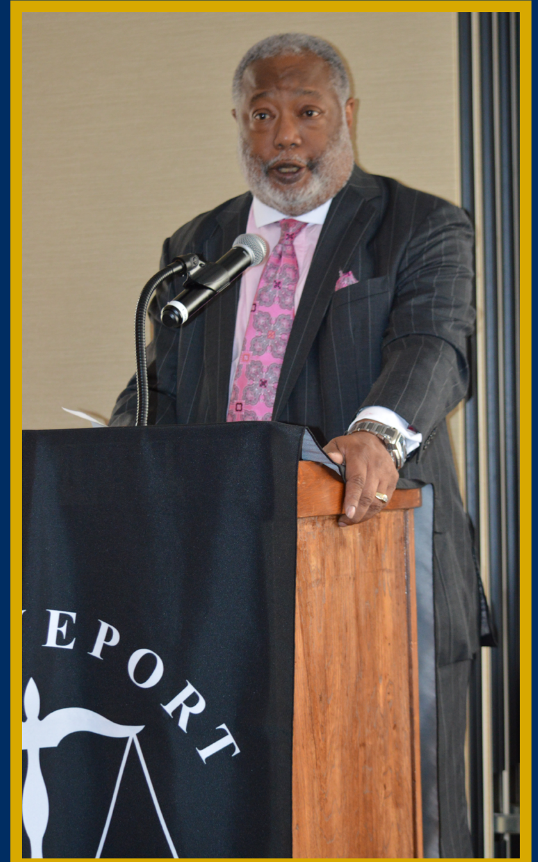
NOVEMBER LUNCHEON HIGHLIGHTS



The Captain Speaks

Amy Gardner Day, *amy@cbbd.law*

Hail Lyn Lawrence, Duke XXVIII, King XXI, Captain XXV! The Krewe of Justinian, along with the Shreveport-Bossier legal community, mourns the loss of Lyn Lawrence. Lyn truly lived life to the fullest, cherishing and making the most of every day. He loved his family, was dedicated to his clients, and gave his time to so many that he called friends. Lyn was a beloved member of the Krewe, as well as the whole NWLA Mardi Gras community, known for his fun-loving spirit and generosity. He will be greatly missed by all who knew him.

– Captain Justinian XXX, Amy Gardner Day

Taking from Lyn's famous toast he gave at his King/Queen dinner – "It's good to be King!" That's how he lived; facing a terminal illness, he lived by the motto, "It's good to be King!" He checked a lot of the boxes on his bucket list and enjoyed, as much as possible, his life. "It's good to be King!" In October, Lyn got a crown from the King of Kings. "It's good to be King!"

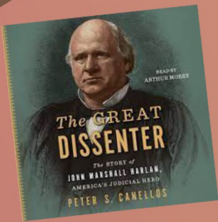
– Captain Justinian XIX, Kenny Haines

Harry V. Booth – Judge Henry A. Politz American Inn of Court

by Jerry Edwards, President, jerry.edwards.jr@gmail.com

On October 6, 2023, several lawyer members of the Booth-Politz Inn of Court attended a "Chambers Lunch" hosted by United States Magistrate Judge Mark Hornsby and United States Bankruptcy Judge John Hodge. This Chambers Lunch was the first in a series of lunches designed to advance the mentorship and professionalism goals of the Inn by providing opportunities for lawyers to meet and learn about judges and the courts in an informal setting. During the lunch, the lawyers and judges talked about their hobbies, interests and exchanged funny stories of events that occurred during trials or court hearings. By any measure, it was a fun and entertaining get-together. The lawyers who attended were Matt Smith, Emmanuel Billy, Marcus Sandifer, Courtney Ray and Lee Harville. You can learn more about Inns of Court at innsofcourt.org.

SBA Luncheon Save the Dates January–March 2024

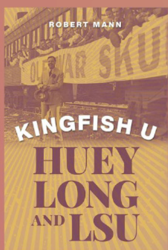


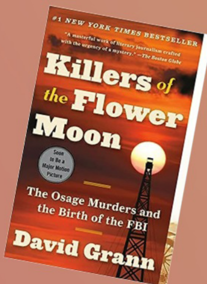
Januray 24 — **Peter S. Canellos, Author of *The Great Dissenter***

February 28 — **Robert T. Mann, Author of *Kingfish U: Huey Long and LSU***

March 27 — **Chief Geoffrey Standing Bear, Principal Chief of the Osage Nation and source for the book *Killers of the Flower Moon***

Peter S. Canellos





Chief Geoffrey Standing Bear

Robert T. Mann

CLASSIFIEDS

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

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Save the Date
The Shreveport Bar Association

Christmas Party

honoring
Area Law School Students
Will be held on
Sunday, December 10, 2023
3:00 p.m. to 5:00 p.m.
Silver Star Grille

Invitations will be mailed mid-November

The 2023 SBA Professionalism Award Goes to Allison Anne Jones

by Kenny Haines, kenny@weems-law.com

Every year, the Shreveport Bar Association presents its Professionalism Award to a lawyer who exemplifies the highest standards of legal practice. This year the recipient is Allison Jones. As Allison so eloquently observed in her acceptance speech, "professionalism" can be a funny thing, and it is sometimes hard to define. It does not mean always perfect, as that is a standard no one could ever meet. Allison embraces imperfections as a chance to learn, and, for her, professionalism means "*Siempre Mejor*," translated as "Always Better." I like that sentiment. It is a life goal we can all strive to achieve.

Law is a family affair with Allison. She is married to a lawyer, Philip Downer, whom she met her first day of law school at LSU. I went to law school with her sister, Pam, and her brother, Matt, both of whom were incredible students and graduated Order of the Coif. Allison likes to laugh that she was not Order of the Coif, but she is the "law and order" in her family and every family member acknowledges the same. Allison is the proud mother of two more LSU law graduates, her sons, Joshua Philip (2012) and Stephen Edward (2019), both of whom are thriving in the legal profession.

Allison began her law practice in Shreveport 38 years ago with Randy Davidson and Nicky Nix. Currently, she practices with her husband at Downer, Jones, Marino & Wilhite. She practices primarily in the area of employment and labor law, which brings me to the reason I believe Allison is so deserving of this award.

It is not easy to be considered one of the best lawyers in state for an area of practice. Few gain such a reputation. Having worked with Allison on programs with the United States Fifth Circuit, admired her work in numerous courtrooms and at the appellate level, read about her accomplishments in the paper and in legal publications, it is easy to see why Allison is considered one of the very best lawyers in her area of practice.

The best compliment I think a lawyer can receive is to be considered a "lawyer's lawyer." What that means to me is: Who would I call if I needed a lawyer for a certain thing? If the need surrounds employment law or a labor question – I'm calling Allison Jones. Period.

Litigation or adversarial advocacy often aligns with competition. It is very analogous to sports. Allison, being a huge fan of LSU athletics, would readily endorse that notion. You do not and cannot always win, but you can always give your best and strive to do better.

In baseball, we will sometimes hear the announcer or color analyst suggest that the hitter took a "professional at-bat." Or, maybe they will refer to the hitter as a "professional hitter." What they suggest is that the work displayed by the hitter is of high quality, requiring the adversary to deliver their best performance to win the contest.

That is how I think of Allison. "Professional Advocate." When she is on the other side, your best performance is required to compete. And win or lose, Allison is gracious. After all, tomorrow brings another trial, and a chance to be *Siempre Mejor*, Always Better. Congratulations to my friend, Allison Jones, on this well-deserved award.

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UPCOMING EVENTS

*2023 SBA MEMBERSHIP LUNCHEONS

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

*NOVEMBER 8

Speaker: Major General Jason R. Armagost
Commander of Joint-Global Strike
Operations Center
Barksdale Air Force Base
Veterans Program

DECEMBER 10

SBA CHRISTMAS PARTY
3:00 p.m. to 5:00 p.m.
Silver Star Grille

NOVEMBER 9

SBA Memorial & Recognition Ceremony
2:00 p.m
at Caddo Parish Courthouse

DECEMBER 13-14

DECEMBER CLE BY THE HOUR
Petroleum Club (15th Floor)

AMAZON WISH LIST

The Shreveport Bar Foundation is excited to announce the launch of its Wish List program for the Pro Bono Project, Legal Representation for Victims of Domestic Violence programs, and the Shreveport Bar Center through Amazon. This new wish list program allows our supporters to purchase supplies and other items needed to run our programs. This can range from pens (for the AAL clinics) to soap and paper products (for the building)! **Check out the full list of options!**
https://www.amazon.com/hz/wishlist/ls/3EW9JTZSJNVEZ?ref_=wl_share
Or scan the QR code.

Veterans Appreciation Luncheon – November 8

Petroleum Club (15th Floor) Buffet opens at 11:30 a.m.
Program and Speaker from 12:00 Noon to 1:00 pm.

Cost for lunch is $30.00 with advance reservation and $35.00 for late reservation (after 5:00 pm the Monday prior to the luncheon)

Major General Jason R. Armagost

When: 12:00 Noon on Wednesday, November 8

Where: Petroleum Club (15th floor)

With Featured Speaker: Major General Jason R. Armagost
Commander of Eighth Air Force, and of
Joint-Global Strike Operations Center

Our keynote speaker for the 2023 SBA Veterans Day Program will be Major General Jason R. Armagost, the Commander of Eighth Air Force, and Commander of the Joint-Global Strike Operations Center, Barksdale Air Force Base, Louisiana. "The Mighty Eighth" is responsible for the service's bomber force and airborne nuclear command and control assets, encompassing approximately 24,000 Airmen across six installations, and proudly operating more than 150 E-4, B-1, B-2, B-52 and T-38 aircraft. The J-GSOC serves as the central command and control node for all operations within Air Force Global Strike Command, orchestrating warfighting and readiness activities for the Commander, Air Forces Strategic.

Maj. Gen. Armagost graduated from the U.S. Air Force Academy and was commissioned in 1992. He has served in multiple operational and training assignments and logged more than 2,900 hours in the B-2A, F-16CJ, F- 16CG, B-1B, B-52H and T-38A. His notable educational and staff assignments include a fellowship at the Center for International Security and Cooperation at Stanford University, California, Chief of Nuclear Operations on the Joint Staff at the Pentagon, and Director of Strategic Plans, Programs, and Requirements at Air Force Global Strike Command.

Maj. Gen. Armagost commanded the 13th Bomb Squadron at Whiteman AFB, Missouri, the 5th Bomb Wing at Minot AFB, North Dakota, and the 379th Air Expeditionary Wing at Al Udeid Air Base, Qatar. His operational assignments supported contingency operations during operations Desert Strike, Southern Watch, Iraqi Freedom, Enduring Freedom, Inherent Resolve, Freedom's Sentinel and Deliberate Resolve. He also served as the Deputy Commanding General for Security Assistance Group-Ukraine, where he led coordination of the DoD's historic security assistance support effort to the Ukrainian government. Further, he has flown numerous combat missions in the F-16CJ, B-2A, B-1B and the B-52H. Please join us on Wednesday, November 8 as we honor our SBA Veterans and all those who have served our great nation.

#SHREVEPORTBARASSOCIATION

You may confirm your reservation(s) by email dsouthern@shreveportbar.com, or phone 703-8372.

I plan to attend the November Luncheon.

Attorney: ______________________________

Please remember to call and cancel if you are unable to attend.
The SBA pays for each reservation made.
No-shows will be invoiced.
Thank You!