

THE BAR REVIEW

PUBLICATION OF THE SHREVEPORT BAR ASSOCIATION

Volume XXIII, Number 8 • October 2016

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EVENTS AT A GLANCE

10/13 & 14	Recent Developments by the Judiciary CLE at Hilton Garden Inn Event Center Bossier City
10/15	November Bar Review Ad & Article Submission Deadline
10/26	SBA Membership Luncheon – 12:00 p.m. - Petroleum Club
10/28	Shreveport Bar Foundation Costume Party Fundraiser at Silver Lake Ballroom
11/3	Memorial & Recognition Ceremony – 2:00 p.m. –Caddo Parish Courthouse, Courtroom G
11/9	SBA Veteran's Program Luncheon – 12:00 p.m. - Petroleum Club



From The President

by Donald E. Hathaway Jr., President, dhathaway@socklaw.com

It's hard to believe how fast this year is flying by. We have so much on our calendar over the next couple of months. So far this year we have been blessed with strong attendance at all of our functions. Our budget goals are being met, but we must press on to the end of the year to make sure we have a strong association to pass on to next year's Executive Council. Our incoming president, Rebecca Edwards, has already started working on committee assignments and stressing about what she is going to say in the President's Message. She will be well prepared for the job!

This year's Professionalism Award winner will be announced at the Bar Luncheon on October 26, 2016. J. Marshall Rice has served as Chairman of the Professionalism Committee this year and has provided the *Bar Review* with articles on several lawyers who deserve the award, but unfortunately only one can receive it. The award grows in prestige each passing year due to the integrity and quality of its recipients. I am confident this year's winner will be deserving of this honor and will further add to its desirability. To find out who it is you have to be in attendance so mark your calendars now.

The Memorial and Recognition Ceremony will return to its traditional site in Courtroom G of the Caddo Parish Courthouse. Marcus Edwards, chairman of the Memorial and Recognition Committee, has been working hard to continue this great tradition. When we have conducted surveys in the past about what our members enjoy most out of the many services we offer, the Memorial and Recognition Ceremony always ranks near the top. Please come and remember our members who are no longer with us and welcome newly admitted members to the Bar.

The Shreveport Bar Foundation will be hosting its 2016 Costume Party October 28 at the Silver Lake Ballroom. Ghouls and goblins are to arrive at 8:00 PM to enjoy entertainment provided by The Caravan Band. Luke Thaxton is organizing the event. If you are interested in sponsoring the event contact him or Dana Southern at (318) 222-3643 Ext. 3 or email dsouthern@shreveportbar.com. Sponsorship packages include recognition on event signage, admission tickets, drink tickets and VIP parking spots.

Also, I want to remind everyone about this year's Recent Developments by the Judiciary Seminar. This year's seminar will begin Thursday, October 13 with registration and continental breakfast at 7:30 AM. and finish up Friday afternoon. Online registration ends October 12 at 4:00 PM, but you will be able to register at the door. The seminar will be held at the Hilton Garden Inn/Homewood Suites on the Old Minden Road in Bossier City. Be sure to thank CLE co-chairs Honorable Frances Pitman and Honorable Michael Pitman for their hard work.

GET INVOLVED!

2016 SHREVEPORT BAR FOUNDATION

Costume Party

October 28, 2016 • 8:00pm - 12:00am • Silver Lake Ballroom

Fundraiser benefiting Shreveport Bar Foundation Pro Bono Project



2016 SPECIALTY SPONSORSHIP OPPORTUNITIES

DRACULA SPONSOR - \$1,500

Business Logo on all Event Signage

10 Admission Tickets

4 Liquor Tickets Per Admission

5 VIP Parking Spots

FRANKENSTEIN SPONSOR - \$750

Business Logo on all Event Signage

5 Admission Tickets

2 Liquor Tickets Per Admission

Become a sponsor by
contacting Dana Southern
at 318-222-3643 Ext. 3 or email
dsouthern@shreveportbar.com

ENTERTAINMENT BY

The Caravan Band

INDIVIDUAL TICKETS

\$35.00

UNLIMITED BEER, WINE AND LIQUOR

\$20.00



Young Lawyers' Section

by: Luke Thaxton
luke@thethaxtonlawfirm.com

I would like to thank Blanchard, Walker, O'Quin & Roberts for sponsoring our last social event, at Red River Brewing. We had a great turnout.

Our next event will be our 2nd Annual Kickball Tournament on October, 8, 2016, held at Arthur Circle Elementary School starting at 11:00 a.m. Please check your email for further details.

Also, the Shreveport Bar Foundation is having its annual fundraiser Friday, October 28, 2016, at Silver Lake Ballroom. The event is a costume party, but feel free to show up in cocktail attire. Tickets are on sale now for \$35.00. There will be a full bar and live entertainment from the Caravan Band. This is the Foundation's third year to have the Halloween party. It is a great event and a great way to raise money for the Pro Bono Project. If you would like to purchase tickets, you can contact Dana Southern at the Shreveport Bar Center at 318-222-3643.

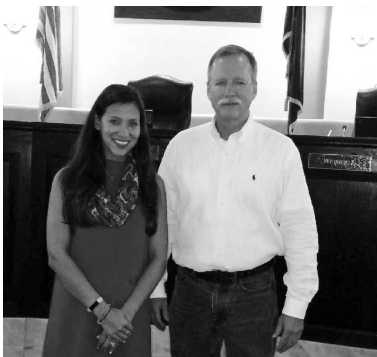
The Young Lawyers' Section will also be hosting a CLE for the newly admitted lawyers on November 3, 2016, at the Petroleum Club. Registration starts at 8:00 a.m. and lunch will be provided to all registrants. Our speakers this year include Justice Scott Crichton, Judge Michael Pitman, Judge Parker Self, Melissa Fox and Jim McMichael.

I hope to see everyone at the upcoming events.

Respectfully,
Luke Thaxton
YLS President

BAR BRIEFS

Shreveport Bar Foundation staff, Heidi Kemple Martin, Nellie Walton and Dana Southern attended the National Training Institute on Protection Order Practice for Attorneys and Advocates in New Orleans last month. While there, they received a private tour of the Louisiana Supreme Court from Associate Justice Scott Crichton.



Heidi Kemple Martin and
Justice Scott Crichton



Heidi Kemple Martin, Dana
Southern and Nellie Walton

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The Shreveport Bar Review reserves the right, in its discretion, to decline to accept advertisements from any individual, corporation, partnership, entity, group or association, without the necessity of giving a reason for its declination.



Recent Developments By the Judiciary
Sponsored by the Shreveport Bar Association
October 13 & 14, 2016

HILTON GARDEN INN / HOMEWOOD SUITES - BOSSIER CITY

13.25 Louisiana CLE Credit including Ethics & Professionalism
13.25 Texas Board of Legal Specialization CLE Credit Approved

Thursday, October 13, 2016

- 7:30 A.M. Registration & Continental Breakfast**
- 8:30 A.M. Torts Update**
60 minutes *Attorney Jerry Edwards - Blanchard, Walker, O'Quin & Roberts and Attorney Marshall Rice - Rice & Kendig*
- 9:30 A.M. Helpful Hints from A to Z from Fannin Street**
60 minutes *Judge Jeanette Garrett - Second Circuit Court of Appeal*
- 10:30 A.M. Sponsor Break (Refreshments)**
- 10:45 A.M. Criminal Law: A View From The Inside**
60 minutes *District Attorney James E. Stewart Sr. - Caddo Parish District Attorney's Office and Attorney Pam Smart - District Defender, First Judicial District*
- 11:45 A.M. Lunch (included with full registration)**
- 1:00 P.M. Professionalism**
60 minutes *Raymond T. Fisher - Kilpatrick Townsend*
- 2:00 P.M. The Regulatory Role of the Office of Conservation and Its Impact on Louisiana Economy**
75 minutes *Richard Ieyoub - Louisiana Department of Natural Resources Commission of Conservation*
- 3:15 P.M. Sponsor Break (Refreshments)**
- Break-Out Session 1**
(Break-Out Session 1A)
- 3:30 P.M. Federal Procedure**
75 minutes *Magistrate Judge Mark Hornsby - U.S. District Court, Western District of Louisiana*
- (Break-Out Session 1B)**
How the IRS is Relevant to Your Legal Practice
Attorney Cary Bryson - Bryson Law Firm, LLC

Friday, October 14, 2016

- 7:30 A.M. Continental Breakfast**
- 8:30 A.M. Successions**
60 minutes *Attorney Bennett L. Politz - Booth, Lockard, Politz & LeSage*
- 9:30 A.M. Ethics by the Louisiana Supreme Court**
60 minutes *Justice Scott J. Crichton - Louisiana Supreme Court*
- 10:30 A.M. Sponsor Break (Refreshments)**
- 10:45 A.M. Technology in the Courts: 2016 Update**
75 minutes *Attorney Melissa Allen - United States Fifth Circuit Court of Appeals*
- 12:00 Noon Lunch (included with full registration)**
- 1:00 P.M. United States Supreme Court Update 2015-2016 Term**
60 minutes *Chief Judge Carl E. Stewart - United States Fifth Circuit Court of Appeals*
- Break-Out Session 2**
(Break-Out Session 2A)
- 2:00 P.M. Evidence and Procedure**
75 minutes *Judge D. Milton Moore, III - Second Circuit Court of Appeal*
- (Break-Out Session 2B)**
Recent Developments in Mediation and Tips for the Pros
Attorney Elizabeth W. Middleton - Elizabeth Middleton Mediation and Dr. Durell Tuberville - Personal Solutions, Inc.
- 3:15 P.M. Sponsor Break (Refreshments)**
- Break-Out Session 3**
(Break-Out Session 3A)
- 3:30 P.M. Staying on Mission-The Intersection Between Nonprofits and the Law**
75 minutes *Attorney Destiny Deas - Attorney at Law*
- (Break-Out Session 3B)**
False Claims Act, Fundamentals and Recent Developments: What Every Lawyers Needs to Know About Bringing and Defending Whistleblower Suits
Attorney A.G. (Alec) Alexander III - Breazeale, Sachse & Wilson, LLP

REGISTRATION FORM

Name _____
Firm _____
Billing Address (Credit Card) _____
City, State, Zip _____
Phone No. _____
Email _____

BREAK OUT SESSION OPTIONS

Please register me for the following Break Out Sessions

Thursday, October 13

Choose One

3:30 P.M. (Break-Out Session 1A)

- _____ Federal Procedure
(Break-Out Session 1B)
- _____ How the IRS is Relevant to Your Legal Practice

Friday, October 14

Choose One

2:00 P.M. (Break-Out Session 2A)

- _____ Evidence and Procedure
(Break-Out Session 2B)
- _____ Recent Developments in Mediation and Tips for the Pros

Choose One

3:30 P.M. (Break-Out Session 3A)

- _____ Staying on Mission-The Intersection Between Non-Profits and the Law
(Break-Out Session 3B)
- _____ False Claims Act, Fundamentals and Recent Developments: What Every Lawyers Needs to Know About Bringing and Defending Whistleblower Suits

Credit Card Information Visa American Express Discover MasterCard
Card No. _____
Expiration Date _____ SIC: _____
Signature _____

Registration Fees:

\$400.00 for Non-SBA Members (\$425 after September 25) Full program
\$375.00 for SBA Members (\$400 after September 25) Full program
\$60.00 Ethics Only \$60.00 Professionalism Only

Full refund until September 1, 2016, less a \$25 Administrative Fee
After September 1, Full Credit Less a \$25 Administrative Fee May Be Applied To Future SBA sponsored CLE Seminar For Up To One Year

For Questions and to find out the Special Rate for Government Employees Please Contact the SBA Office at (318) 222-3643

Please remit with payment to:

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

Important Note: A link to the seminar materials will be sent via email to you 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 them at the seminar. If you select hard-copy materials, they will be distributed upon check-in at the seminar.

Walk-In Registration: Must pay the registration price and receive hard-copy materials by default.

Materials: The registration fee includes course materials provided electronically. Other options are available for an additional cost when pre-registering. A printed manual can be purchased for an additional \$45 and seminar materials on a flash drive can be purchased for \$25.00. Be sure to make your selection by checking the appropriate box on the registration form.

Materials: Please select your materials preference below:
Electronic FREE Printed Manual \$45 Flash Drive \$25



The Neutral Ground

by Kay Medlin, kmedlin@bradleyfirm.com

ASSESSING MEDIATOR'S PERFORMANCE

We are all interested in increasing the number of mediations conducted in our area. Understanding what our clients think we are doing well and what they think we are doing not so well may help us to better serve them and increase their willingness to spend the time and money to use our services.

Assessing mediator performance and client satisfaction is not an easy task. Odds are that the skills we believe to be valuable in doing our job may vary from those valued by the lawyers we serve, and the skills the lawyers value may be different from those that their clients think are most helpful. We have put some thoughts together on a possible evaluation process as well as the traits we believe might be considered in an evaluation.

First, we considered the process. Observing mediators at work is not practical for a number of reasons, including confidentiality. Looking at success rate is helpful, but so many variables contribute to whether a matter results in settlement that rate of settlement can be very misleading. We decided that the best tool for assessing our skills might be a questionnaire.

Several mediation organizations provide questionnaires to be filled in by both lawyers and clients at the conclusion of mediations. Some of these questionnaires are available online and provide guidance on the types of questions that may be asked. Our ADR section might consider doing a questionnaire as a group, if members have sufficient interest. Or the section may simply offer a questionnaire that we prepare to be used by individual mediators in their own practices if they want feedback on their performance.

Some of the areas that have been evaluated include:

- Personal Skills
 - Communication
 - Listening Skills
 - Patience
 - Perseverance
 - Personal Appearance
 - Empathy
 - Demeanor
 - Emotional Maturity
- Neutrality
 - Equal Opportunity for parties to Speak
 - Perception of Fairness
 - Lack of Bias or Preconceived Opinions
- Problem Solving
 - Suggesting Solutions
 - Analyzing Legal Issues
 - Creative Settlement Ideas

The questionnaire may ask participants to indicate which of these traits were most important to the success or failure of the process.

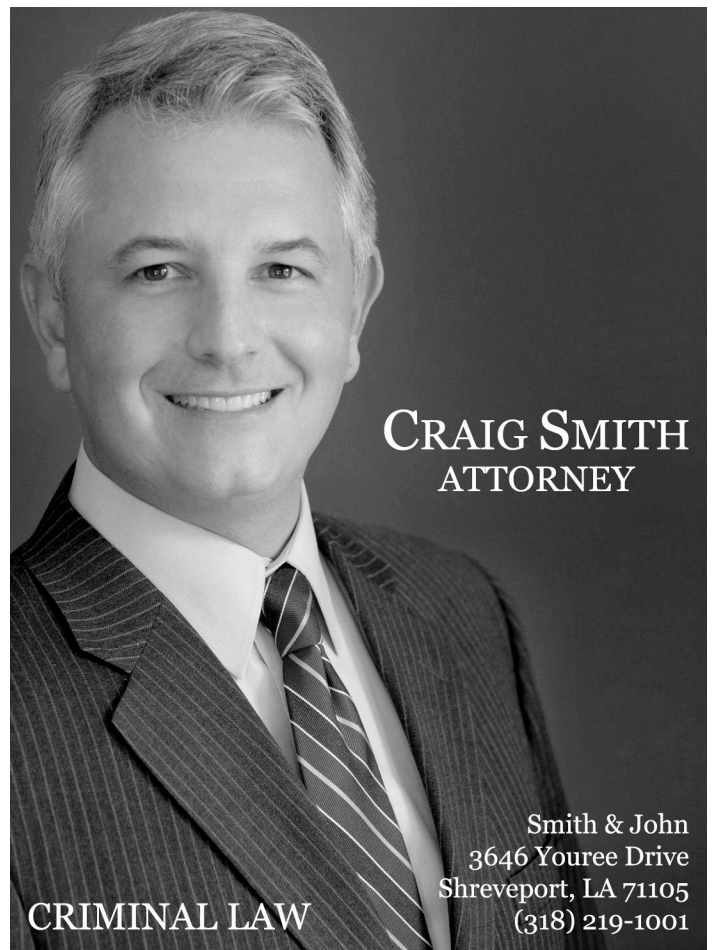
Some questionnaires focus more on the techniques mediators use to achieve settlement and ask the participants to rate the mediator and to rate the importance of the technique to the process.

Some of these techniques include:

- Reducing animosity among participants
- Helping participants evaluate their positions factually
- Helping participants evaluate their positions legally
- Suggesting likely outcomes
- Identifying underlying interests
- Identifying flexibility and willingness to compromise
- Overcoming impasse
- Guiding negotiations

Most businesses understand the importance of customer feedback and responding. Mediators should be no exception. Our work has some unusual challenges in allowing us to learn how we are doing but, with a little thought and creativity, we should be able to overcome them.

If you think the section should work on a questionnaire to be used for the section as a whole or to provide to the members for use in individual practices, please email Dana Southern at dsouthern@shreveportbar.com at the Shreveport Bar Association,. If anyone has questions about this please send them to Kay Medlin at kmedlin@bradleyfirm.com or Don Weir at don@dweirjr.com.



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ATTORNEY

CRIMINAL LAW

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(318) 219-1001

Secret Santa

Please make it a Merry Christmas for a needy child in our community by serving as an SBA Secret Santa. **Email secretsanta.sba@gmail.com to sign up.**

Last year, the SBA Secret Santa project delivered truckloads of gifts (footballs, clothes, dolls, bicycles, etc.) to dozens of needy children in our community. We want to help even more families in 2016.

If a firm, chambers or government office volunteers, please include an estimate of the number of children you would like to help. Around Thanksgiving, volunteers will receive an email with the names of their children plus wish lists and information (age, gender, clothing size, hobbies, etc.). What you buy and how much you spend is up to you. Volunteers will deliver their gifts to the Bar Center, and we will take it from there.

Early volunteers make planning easier and ensure success, so please sign up now. Questions? Call Kristi Gustavson at 429-1206 or Chris Slatten at 934-4696.

Welcome TO THE SBA

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Davidson Summers

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Memorial & Recognition Ceremony

Members of the Shreveport Bar Association are encouraged to participate in the annual Memorial & Recognition Ceremony to be held Thursday, November 3 at 2:00 p.m. at the Caddo Parish Courthouse in Courtroom G. It is an opportunity for SBA members to honor the deceased and celebrate their contributions to the profession and to the sanctity of law. Their families are also invited and truly appreciate this show of honor and respect. The memorial service is followed by the introduction of new lawyers, which is an important and meaningful kickoff tradition for those just starting to serve the legal profession.

In addition to honoring deceased members and recognizing new members, this gathering presents an occasion to reflect on your own legal career and to encourage those who are just entering the profession.

A reception following the Memorial & Recognition Ceremony will be held at the Shreveport Bar Center, 625 Texas Street.

Attention All Attorneys!

**New Attorneys will be honored on November 3.
Please pass this information along to anyone who
passed the Louisiana Bar Exam in 2016.**

In connection with the SBA's Memorial & Recognition Ceremony being held on Thursday, November 3, 2016, the following events have been planned for area new attorneys:

8:30 AM – 1:30 PM New Attorney Seminar – New Attorney Seminar – Petroleum Club (15th Floor) – Energy “A” Room (includes lunch). All new attorneys who have passed the Louisiana Bar Exam in 2016 are invited to attend the seminar.

2:00 PM – Memorial & Recognition Ceremony – Courtroom G – Caddo Parish Courthouse

Reception immediately following at the Shreveport Bar Center, 625 Texas Street

All attorneys who have passed the Louisiana Bar Exam in 2016 will be recognized during the ceremony. Attorneys and judicial offices are asked to turn in any names of attorneys who have passed the bar to Dana at the SBA Office either by email: dsouthern@shreveportbar.com, telephone (222-3643) or fax (222-9272).

In Memory of:

Judge John Richard Ballard

John Alan Broadwell

Jackson Beauregard Davis

Huey L. Golden

A.J. Gregory Jr.

Elizabeth Baucum Joyce

Joe C. LeSage Jr.

Charles Don McNeil

Judge William “Bill” Norris III

Amber Huffman Watt

The Shreveport Bar Association
and Judges of the First Judicial
District Court
cordially invite you
to attend the annual

Memorial & Recognition Ceremony

honoring deceased and
new members of the Bar
Thursday, the third of November at
Two o'clock in the afternoon
Courtroom G
Caddo Parish Courthouse
501 Texas Street
Shreveport, Louisiana
Reception to follow
at the Shreveport Bar Center
625 Texas Street Shreveport, Louisiana

Mark Your Calendar



OCTOBER 13-14

Recent Developments by the Judiciary CLE

Hilton Garden Inn, Bossier City

OCTOBER 26

SBA Member Luncheon

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

Speaker: Alston Johnson

Professionalism Award Presentation

OCTOBER 28

SBF Costume Party Fundraiser

Silver Lake Ballroom

900 Market Street

NOVEMBER 3

SBA Memorial & Recognition Ceremony

2:00 p.m. at the Caddo Parish Courthouse

Courtroom G

NOVEMBER 9

SBA Member Luncheon

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

Speaker: TBD (Veterans' Program)

DECEMBER 13-14

December CLE By the Hour Seminar

Petroleum Club (15th Floor)

DECEMBER 18

Area Law Student Holiday Reception

3:00 p.m. to 5:00 p.m. at Wine Country

MEDIATION AND ARBITRATION OF COMPLEX DISPUTES



Ross Foote



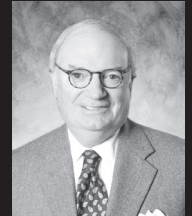
Phelps Gay



Thomas Hayes, III



Mike McKay



Pat Ottinger



Mike Patterson



Marta-Ann Schnabel

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Commercial Real Estate

Oil and Gas

Maritime

Construction

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Banking

Employment

Insurance

Healthcare

Professional Liability

Governmental

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for more information and the article, "Getting Your Client and Yourself Ready for Mediation."

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<p>ROYAL RECOGNITION</p> <ul style="list-style-type: none"> *Top listing of business name/logo on of the race t-shirt (one color) *Individual banner with logo displayed at race and Justinian Midway Party 	✪					
<p>PURPLE LEVEL</p> <ul style="list-style-type: none"> *Business name/logo on banner at race entry *Give aways - Donor's choice or item from list provided (3 available) 		✪				
<p>GREEN LEVEL</p> <ul style="list-style-type: none"> *Business name/logo on banner at one of the following: <ul style="list-style-type: none"> - Water Station(s) - Food & Beverage Station - Finish Line 			✪			
<p>GOLD LEVEL</p> <ul style="list-style-type: none"> *Recognition through Krewe of Justinian social media, website & publication 	✪	✪	✪			
<ul style="list-style-type: none"> *Business name/logo on signage along race route 	✪	✪	✪			
<ul style="list-style-type: none"> *Business name/logo on race-site banner (sponsors \$1500 and below - no logo) 	✪	✪	✪	✪	✪	✪
<ul style="list-style-type: none"> *Sponsor provided business literature placed in race bags 	✪	✪	✪	✪	✪	✪
<ul style="list-style-type: none"> *Business name/logo on back of t-shirt (sponsors \$1500 and below - no logo) 	✪	✪	✪	✪	✪	✪

For more information, contact
 Amy Bokenfohr at 318-518-7117 or Meagan Pilcher-Roberson at 318-747-5329

SPONSORSHIP SIGN UP



The Krewe of Justinian and the Midway to Mardi Gras 5k raise money for the Shreveport Bar Foundation and the community outreach projects that it supports. Last year, the Krewe donated \$25,000 to the Bar Foundation because of generous sponsors from our community. Previous beneficiaries of the money raised include:

Noel Ministries | Providence House | Habitat for Humanity
 Renovation of Columbia Park | LSUHSC Children's Center
 The Lighthouse Program | Volunteers for Youth Justice
 Shreveport Green's Adopt-A-Spot | The Gingerbread House
 Caddo and Bossier Early Head Start Programs
 Book Fair for the Shriners Hospital for Children

Your sponsorship of the Krewe of Justinian and the Shreveport Bar Foundation will enable us to continue to provide funds for projects that benefit the Shreveport/Bossier City area. Please look over the various Midway to Mardi Gras 5k sponsorship opportunities, and if you are interested, please fill out the Sponsorship form below.

\$5,000 Captain Obli-gator T-Shirt Royal Recognition Sponsor (1)	\$1,500 Queen Insti-gator
\$2,500 Royal Liti-gator Race Bag Give Away Sponsor (3) <i>(Donor's choice or choose an item from the list provided)</i>	\$1,000 Duke Investi-gator
\$2,000 King Miti-gator Race Location Sponsor (3) <i>(Choose from: Finish Line, Food & Beverage, or Water Station)</i>	\$500 Duchess Abdi-gator

FORM OF PAYMENT

<input type="checkbox"/> Check Enclosed <i>(Make payable to: the Krewe of Justinian)</i>	<input type="checkbox"/> Invoice Business
<input type="checkbox"/> Mastercard <input type="checkbox"/> Visa <input type="checkbox"/> American Express <input type="checkbox"/> Discover <i>(circle one)</i>	
Name on Card	
Card Number	
Exp Date	Billing Zip

SPONSOR INFORMATION

Sponsor Name & Recognition	
Sponsor Name for Publication	
Contact Person	Phone
Email	

For more information, contact
 Amy Bokenfohr at 318-518-7117 or Meagan Pilcher-Roberson at 318-747-5329



Second Circuit Highlights

by Hal Odom Jr., rhodom@la2nd.org

Awards of general damages in personal injury cases are reviewed by the abuse of discretion standard, as required by La. C. C. art. 2324.1. The Second Circuit seldom finds an abuse of discretion, but the amount of discussion may well suggest how close the court considered the issue to be. In *Baw v. Paulson*, 50,707 (La. App. 2 Cir. 6/29/16), 2016 WL 3541388, Baw, an off-duty Monroe police officer, got into a fight with his date's ex-boyfriend in the parking lot of Trio's, a Monroe nightspot. Baw's injuries were pretty severe, requiring major back surgery, but it transpired that many of his complaints predated the altercation. The jury awarded him only \$25,000 in general damages, \$7,500 in medical expenses and \$2,500 in lost wages (and found him 10% at fault); Baw appealed. The Second Circuit's detailed opinion implied that for a perfectly healthy plaintiff, the awards might well be inadequate, but the court could not find any abuse of discretion. Judgment was affirmed.

In *Harper v. State Farm*, 50,728 (La. App. 2 Cir. 6/22/16), 2016 WL 3417307, quantum was something of an afterthought. The driver of a blue Ford minivan erratically swerved out of the right-hand lane of Benton Road, forcing Harper to veer into the turn lane and strike a Chevy Suburban head-on. Fortunately the collision was not at high speed. The trial judge awarded Harper \$10,000 in general damages, and his passenger \$6,000. The minivan's insurer appealed, arguing (among other issues) the awards were excessive, but the Second Circuit, without much ado, found no abuse of discretion. Judgment was affirmed.

Other cases raise technical issues that require special attention. *Cantu v. Schlumberger*, 50,605 (La. App. 2 Cir. 5/25/16), 2016 WL 3002172, explored the treacherous field of compromise and reservation of rights. Cantu, a delivery driver, was climbing the stairs to a trailer at a gas field operated by Schlumberger in Red River Parish. He discovered, a moment too late, a hole in the stairs, and took a nasty fall. He sued Schlumberger and, in October 2013, executed a settlement of "all matters and claims filed by any party against any party herein" for \$375,000. Before this was presented to the court, however, Cantu amended his petition to add the owner of the well, Encana, as defendant. The very next day, Cantu and Schlumberger filed a motion of dismissal based on their settlement; the court granted this on October 28, 2013. Four months later, Encana filed exceptions of res judicata and no cause of action urging that Cantu failed to expressly reserve his rights against Encana.

An ad hoc judge in the district court reluctantly agreed that without a specific reservation of rights, the plaintiff compromised and settled his claim. The court sustained the exceptions, and Cantu appealed.

Most older practitioners would state, as an article of faith, that a compromise settles all claims except those specifically reserved. However, at least since *Brown v. Drillers Inc.*, 93-1019 (La. 1/14/94), 630 So. 2d 741, the courts have narrowly construed compromises and shown greater willingness to let associated claims proceed. Moreover, res judicata applies only between the *same parties*, *Chevron USA v. State*, 2007-2469 (La. 9/8/08), 993 So. 2d 187. Simply put, Schlumberger and Encana were not the same party. Despite the broad "all matters" and "any party" language of the settlement, Encana was not a party thereto and could not get its benefits. The judgment was reversed and the case remanded, with the court noting that Encana has no claim for contribution against Schlumberger. The plaintiff gets to proceed, but some reservation language in the compromise might have averted this side trip to Fannin Street.

Thomas v. Economy Premier Assur. Corp., 50,638 (La. App. 2 Cir. 5/18/16), 196 So. 3d 7, raised the elusive issue of judicial estoppel. Thomas, a delivery driver, was bringing fish to East Ridge Country Club when a car failed to stop and pinned him between the two vehicles. The driver's insurer, Economy Premier, stipulated liability. During a deposition, Thomas admitted that before the accident, he had filed Chapter 13 and, in February 2010, the bankruptcy court had confirmed a plan; however, he had not informed the bankruptcy court of his new asset, his auto accident claim, even though his bankruptcy plan referred to "all post-petition claims." Economy Premier moved for summary judgment, urging that Thomas's failure to report the asset constituted judicial estoppel. Thomas also moved for summary judgment, seeking to strike the defense of estoppel. The district court ruled in favor of Thomas, and Economy Premier appealed.

The Second Circuit gave a long exposition of the common-law concept of judicial estoppel, ultimately finding it did not apply. The court was not convinced that Thomas took an "inconsistent position" because, at the time of his bankruptcy filing and injury, it was "unclear" that he had a duty to disclose his claim. In fact, Thomas's bankruptcy attorney gave a strong affidavit and deposition voicing his belief that Thomas was not required to disclose a "post-filing unliquidated cause of action." The judgments were affirmed.

and Thomas was allowed to continue his claim against Economy Premier.

Notably, the Second Circuit cited the bankruptcy lawyer's testimony that the "model plan used now is different from that used in Thomas's case." Under the current model plan, the "better practice, if not the rule," is that the debtor must disclose any cause of action acquired after the initial filing or after the plan confirmation. Still, judicial estoppel is a problematic field.

A "bad taste in his mouth" was the outcome in *Simmons v. Brookshire Grocery Co.*, 50,521 (La. App. 2 Cir. 4/13/16), 194 So. 3d 653. Simmons bought some Del Monte fruit cups at the Brookshire's on North Market St. He ate two of them that night and felt slightly queasy; the next morning, in the light of day, he opened the remaining cups and discovered some mold growing around the rims. He returned the cups and got a refund, but later filed suit against Brookshire's alleging that they had given him food poisoning. He relied on the fundamental principle that to establish liability for the consumption of deleterious food, the plaintiff must prove the product was in a deleterious condition when purchased and caused his illness. *Le Blanc v. La. Coca Cola Bottling Co.*, 221 La. 919, 60 So. 2d 873 (1952).

Brookshire's conceded this as a general rule, but countered that it applied only to manufacturers of foodstuffs, not to nonmanufacturing sellers. Against a mere seller, the plaintiff must prove that the seller took part in the preparation, processing or manufacture of the product, or subjected the product to improper care. *Ard v. Kraft Inc.*, 540 So. 2d 1172 (La. App. 1 Cir.), writ denied, 542 So. 2d 515 (1989). Brookshire's sought summary judgment on this basis.

Simmons opposed it, strenuously arguing that all he needed to prove was a deleterious condition at the time of purchase, and causation.

The district court granted summary judgment, adopting Brookshire's position and dismissing Simmons's claim; the Second Circuit affirmed. The general rule of *Le Blanc* applies only against a manufacturer; Simmons offered no summary judgment evidence that Brookshire's manufactured Del Monte fruit cups or tampered with them. The court also dismissed the suggestion that the grocery store should have inspected its packaged food minutely before selling it; the level of inspection needed would have destroyed the fruit cups.

An action against Del Monte might have utilized *Le Blanc*, but that suit was probably prescribed. The general rule is fine, except when an exception applies, with not-so-peachy results.

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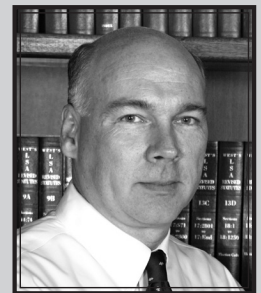
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How Write You Are

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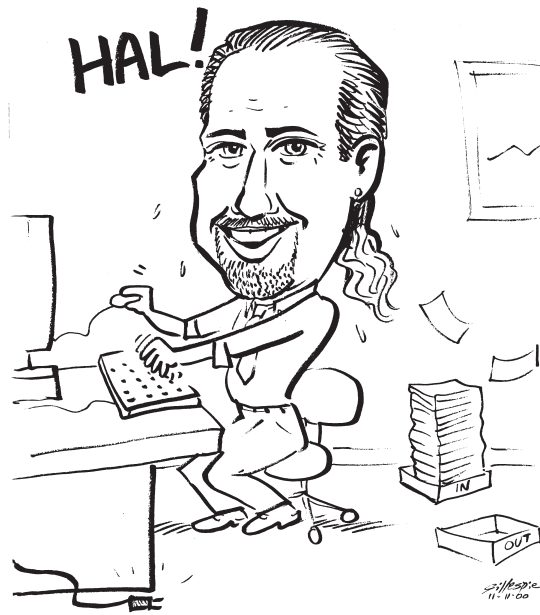
Skip to m' lieu. The Supreme Court recently wrote, “However, in lieu of this Court’s and the First Circuit’s recent jurisprudence focusing on the degree to which a dangerous condition should be observed by a potential victim, Judge Whipple felt compelled to concur in the result.” Following suit, the Third Circuit wrote, in a footnote, “Thus, claimant’s request that he be awarded SEBs in lieu of our finding that he was not entitled to TTDs beyond the date of trial is denied.” Something is definitely out of *place* here.

The word used, *lieu*, is a loanword from French and a perfect synonym for *place* or *stead*. The phrase *in lieu of* means *instead of* or *as a replacement for*. The word is emphatically not a fancy Gallic portmanteau of *light* and *view*. It does not mean *in light/view of the fact that*. In the passages quoted, the Supreme Court and Third Circuit obviously intended the latter meaning. In *light* of the court’s emphasis on apparentness as a factor in determining defect, and not simply the bumpiness of the floor, one judge concurred. *Broussard v. State*, 2012-1238 (La. 4/5/13), 113 So. 3d 175. A claimant may be entitled to SEB in *light* of (or in spite of) his failure to prove TTD. *Lamartiniere v. Boise Cascade*, 2016-120 (La. App. 3 Cir. 6/1/16), 193 So. 3d 587.

Some very common statutes and rules use *lieu* properly. The court may allow a litigant to post a deposit in lieu of a jury bond, La. C. P. art. 1734.1. An attorney under investigation may resign in lieu of discipline, La. S. Ct. R. XIX, § 20.1. Courts routinely impose additional jail time in lieu of payment of a fine and costs, except against indigent defendants, *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064 (1983). If you are quoting one of these authorities, use *lieu* with confidence.

In other situations, consider using the simpler *instead of*. No one will ever misquote you for that.

Literally interpreted. We know that *literally* means by the *letter*, and is the manner of construing statutes *as written*, La. C. C. art. 9. Literal construction is almost synonymous with strict construction. *Rachal v. Peters*, 28,655 (La. App. 2 Cir. 9/25/95), 680 So. 2d 1280; *Francois v. Tufts*, 491 So. 2d 673 (La. App. 4 Cir. 1986). In other contexts, it means *actually* or *without exaggeration*. “Furthermore, he committed these crimes in what can only be described as a grotesque fashion, *literally* blowing off



the faces of his parents with a shotgun.” *State v. Fletcher*, 49,303 (La. App. 2 Cir. 10/1/14), 149 So. 3d 934. No further details of the gruesome outcome are needed.

Outside the realm of statutory (and contract) construction, careless writers often use *literally* as an intensifier, to mean *virtually*, *nearly* or *as far as I’m concerned*. This usage contradicts, or at least dilutes, the true meaning. Recently, some courts have enclosed this dubious usage in quote marks: “Citing this history, the trial court described such conduct as ‘literally incorrigible[.]’” *State v. Cormier*, 2014-1177 (La. App. 3 Cir. 5/6/15), 164 So. 3d 419. “She stated that Mr. Washington ‘was literally the greatest dad that any girl could

wish for.” *Washington v. Gusman*, 2015-0177 (La. App. 4 Cir. 10/14/15), 183 So. 3d 510. In these quotes, *virtually* would have been more accurate.

Careful writers will avoid using *literally* unless they mean by the *letter* or *without exaggeration*.

You’ll be seeing great sites! The featured photograph was circulated after people reported seeing a large reptile crawling on the north shore of Lake Pontchartrain.



Dr. Seuss was entirely correct: you’ll be seeing great *sights*. Something you see is a *sight*. Once it’s been seen, it’s been *sighted*. A plot of ground, in a specific location, is a *site*. Once a building location has been selected, it’s *sited*. Wildlife & Fisheries got it wrong in the banner print, but right in the small text.

Let us not forget a third word, meaning *adduce as a reference*. “And also [I have] looked at the case law that has been *sited* [sic] to me by counsel.” *Maylen v. Great West Cas. Co.*, 2015-484 (La. App. 3 Cir. 11/4/15), 178 So. 3d 302 (quoting a trial transcript, *sic* supplied by the appellate court).

Always be on the lookout for homophone sightings.

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Highlights





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2016 LEGISLATIVE UPDATES

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Where: Petroleum Club (15th floor)

Featuring: H. Alston Johnson III

H. Alston Johnson is a favorite presenter at the SBA luncheon series. His annual Louisiana legislative update CLE is highly anticipated and well-attended. Johnson was for many years senior counsel in the Baton Rouge office of Phelps Dunbar LLP, with a particular emphasis on complex litigation and appellate matters. He received his J.D. from the Paul M. Hebert Law Center and is now an adjunct member of the LSU Law faculty.

He is the author or co-author of three books on Louisiana law, published by West Publishing Company in the Louisiana Civil Law Treatise series: *Louisiana Worker’s Compensation Law and Practice* (Fourth Edition); *Louisiana Insurance Law and Practice* (Second Edition, with Shelby McKenzie); and *Louisiana Civil Jury Instructions* (Second Edition). He was associate editor of the Louisiana Law Review and member of the Order of the Coif. In 2005, he was chosen for the Curtis R. Boisfontaine Trial Advocacy Award by the Louisiana State Bar Association. In May, 2006, he was honored by the Louisiana Bar Foundation with its Distinguished Attorney Award for 2005.

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