LOUISIANA ASSOCIATION
OF DEFENSE COUNSEL
NEWSLETTER

LOUISIANA ASSOCIATION
OF DEFENSE COUNSEL
P.O. Box 9430
Metairie, LA 70055

2019:10 **October 1, 2019**

UPCOMING MEETINGS

October 23, 2019	Northshore Regional Mini-Seminar, *Nuvolari's Restaurant*, Mandeville
November 6, 2019	Monroe Regional Mini-Seminar, *Lotus Club*, Monroe
November 7, 2019	Lafayette Reconnecting with Your LADC, *LaFonda*, Lafayette
November 12, 2019	New Orleans Reconnecting with Your LADC, *Lucy's*, New Orleans
November 20, 2019	North Louisiana Reconnecting with Your LADC, *Superior Steakhouse*, Shreveport
December 6, 2019	Defense Lawyers' Seminar, *Roosevelt Hotel*, New Orleans
February 5-9, 2020	Winter Seminar and Ski Trip, *Crested Butte*, Colorado
April 29-May 3, 2020	Annual Meeting, *Atlantis*, Pardise Island, Bahamas

BULLETIN BOARD

LADC SKILLS BEYOND THE COURTROOM SEMINAR: We had a very successful seminar, focusing on skills for young lawyers, at the Cambria Hotel in New Orleans on Sept. 19. The seminar was well attended, and participants gave it very positive reviews, so much so that the LADC will plan more seminars of this type. We are grateful to our lawyers, judges, and doctors who served as instructors.

LADC RESEARCH AND POLICY COMMITTEE: Watch for an email announcement soon regarding a significant new initiative of this LADC Committee.

NORTHSHORE SEMINAR: The second annual seminar will be held at *Nuvolari's* in Mandeville at 3-5 p.m. on Wednesday, Oct. 23. There will be two hours of CLE followed by a social hour. Judge Allison Penzato of the First Circuit will speak on Appellate Practice: What Not to Do. Judge William J. "Rusty" Knight of the Twenty-Second JDC will speak on Common Mistakes in Trial Practice and How to Avoid Them. Lambert J. "Joe" Hassinger of MAPS

will speak on Mediation: Putting Your Best Case Forward. Registration is open on the LADC website.

MONROE SEMINAR: Plan to attend the inaugural Monroe seminar, which will be at 3-5 p.m. on Wednesday, Nov. 6 at the Lotus Club, followed by a social hour. Judge Milton Moore of the Second Circuit Court of Appeal will speak on selected issues in civil procedure, and a panel of local LADC members will discuss recent developments in state law.

RECONECTING WITH YOUR LADC: In addition to conducting our regional mini-seminars, such as Northshore and Monroe, the LADC will be holding receptions in Lafayette, New Orleans and Shreveport in November. These receptions are not part of CLE seminars. Rather, they are an opportunity for LADC members in the area to socialize and remember why they are a part of one of the largest and most active state defense organizations in the country. Please join us in your city. The events are as follows: Nov. 7 at 5 p.m. at *La Fonda's* in Lafayette; Nov. 12 at 4:30 at *Lucy's* in New Orleans (preceded by one hour of complimentary CLE); and Nov. 20 at 5:30 at *Superior Steakhouse* in Shreveport. It's FREE! There is no registration charge, and the refreshments are on the LADC.

AN LADC HOLIDAY TRADITION: Join us at the always beautifully decorated *Roosevelt New Orleans Hotel* on Friday Dec. 6 for our joint seminar with the Louisiana Judicial College.

2020 WINTER SEMINAR AND SKI MEETING: We will be with the Texas Association of Defense Counsel and the Alabama Defense Lawyers Association in *Crested Butte* Feb. 5-9. More details to follow.

2020 ANNUAL MEETING: April 29-May 3 at *Atlantis, Paradise Island, Bahamas*. The Texas Association of Defense Counsel will be holding its meeting at Atlantis at the same time. Details to follow. Mark your calendar! Update: Atlantis Paradise Island was unaffected by Hurricane Dorian. It is fully operational and sustained no damages.

QUESTIONS REGARDING SEMINARS OR TRIPS. Call Kimberly Zibilich at Event Resources NOLA: Telephone (504) 208-5510, and email at:
Kimberly@eventresourcesnola.com.

NEW MEMBERS

Leigh Groves
Donohue, Patrick & Scott
Baton Rouge

Ronald Sholes, Jr.
Geico
Metairie

RECENT DEVELOPMENTS

CIVIL PROCEDURE

The Public Records Act recognizes that some reasonable delay may be necessary to compile, review, and, when necessary, redact or withhold certain records that are not subject to production. In such a case, within five business days of the request, the custodian must provide a written "estimate of the time reasonably necessary for collection, segregation, redaction, examination, or review of a records request." While plaintiffs alleged in their petition that "[n]o documents had yet been produced" and that the Parish had failed to comply adequately and timely or at all" with their public records request, a review of the petition and the attachments thereto demonstrated that the Parish did in fact respond to plaintiffs' public records request on November 8, 2017, stating that it would need an estimated six months to collect, examine, review, segregate (if necessary), and redact (if necessary) the records requested. Because plaintiffs filed their petition for mandamus before the end of the six month period, the trial court did not err in granting defendant's exception of no cause of action. However, the trial court erred in failing to allow plaintiffs an opportunity to amend their petition to state a cause of action. *Misita and Torres v. The St. Tammany Parish Government*, 2018 CA 1595 c/w *Misita v. Maumoulides, Lakelots, Inc., Intrepid, Inc., One Consort International, LLC, Lake Ramsey Development and St. Tammany Parish Government*, 2018 CA 1596 (La. App. 1 Cir. 9/11/19), found at: *https://www.la-fcca.org/opiniongrid/opinionpdf/2018%20CA%201595%20Decision%20Appeal.pdf*

The district court lacked authority under Article 2819, applicable to Louisiana partnerships, to order seizure of the non-resident Judgment Debtor's interest in a non-Louisiana partnership or to order payment of its value. Accordingly, it was legal error for the district court to order the out-of-state LP to pay a Louisiana judgment from the partnership interest of debtor/partner through garnishment proceedings under a writ of fieri facias. *Schiff and N.O.W. Properties, L.L.C. v. Pollard*, 2019-CA-0334 (La. App. 4 Cir. 9/12/19), found at: *https://www.la4th.org/opinion/2019/474127.pdf*.

CLASS ACTIONS

In class action challenging the enforcement of traffic camera violations, the trial court granted a motion for partial summary judgment in favor of a subclass of plaintiffs, ordering that the City return $25,612,690.32 to those who had paid traffic camera fines between January 1, 2008 and November 3, 2010. Because the Department of Public Works had no authority under the City's home rule charter to administer, adjudicate, and enforce the original ATES (Automated Traffic Enforcement System) regulation, the original ATES ordinance was unlawful, invalid, and null and void *ab initio*, and was "in reality no law and in legal contemplation is as if had never been passed." Trial court judgment affirmed. *McMahon, et al. v. City of New Orleans*, 2018-CA-0842 c/w *Washington-Wagegan, Blackman, Alverez, and Ducre*, 2018-CA-0843 c/w *Jarrell v. City of New Orleans*, 2018-CA-0844, 2018-CA-0845 c/w *Kleeman and McDonald v. City of New Orleans*, 2018-CA-0846 (La. App. 4 Cir. 9/4/19), found at: *https://www.la4th.org/opinion/2018/473498.pdf*.

EVIDENCE

Writ denied. While the factual findings resulting from an investigation of a particular complaint or incident would normally fall under the exclusions to the business records exception to the hearsay rule set forth in La.Code Evid. art. 803(8)(B)(iv), the enactment of La. Rev. Stat. 13:3715.3(G)(4)(e) in 2001 created a statutory exception to the hearsay rule for the admissibility of DHH's records, surveys, and statements of deficiencies, if those documents resulted from an investigation related to the type of injury sustained by a patient in a civil action and if the deficiencies contained in the documents have been admitted by the healthcare provider. *Sawyers, et al. v. Naomi Heights Nursing Home & Rehabilitation Center, L.L.C., et al.,* 19-331 (La. App. 3 Cir. 8/21/19), found at: *https://la3circuit.org/Opinions/2019/08/082119/19-0331opi.pdf*.

INSURANCE

The Make Whole doctrine is an insurance principle which mandates that, in the absence of a contrary agreement, an insurance company may not enforce its subrogation rights until the insured has been fully compensated for her injuries, or "made whole." The Make Whole doctrine is controlling in the absence of clear contractual provisions regarding the subrogation and reimbursement rights of the parties. Here, the plan stated that "[t]hese [subrogation and reimbursement] rights apply regardless of whether such recovery is designated as payment for, but not limited to, pain and suffering, medical benefits, or other specified damages, even if he is not made whole." Due to plaintiff' s contractual relationship with OGB as a person covered by the HMO plan, the plan' s Subrogation and Reimbursement provision was controlling in this case, and the Make Whole doctrine did not apply. It was legal error for the trial court to consider whether plaintiff was made whole. Plaintiff had a contractual obligation to reimburse OGB for benefits it paid to her, and OGB had a contractual entitlement to subrogation and/ or reimbursement of plaintiff's claim. *Bayham v. State of Louisiana, through the Office of Group Benefits*, 2018 CA 1708 (La. App. 1 Cir. 8/29/19), found at: *https://www.la-fcca.org/opiniongrid/opinionpdf/2018%20CA%201708%20Decision%20Appeal.pdf*.

MEDICAL MALPRACTICE

Plaintiffs argued that in *Billeaudeau,* the Louisiana Supreme Court recognized negligent credentialing as a cause of action arising in general negligence, and the information they sought as to how and why the physicians were credentialed was relevant and admissible. The Fifth Circuit had held that the peer review privilege was not a blanket protection for all documents included in an internal peer review. Because the trial court did not conduct an *in camera* review of the discovery documentation at issue before denying plaintiff's motion to compel, the trial court did not have sufficient information before it to determine the applicability, if any of 13:3715.3. Writ granted and case remanded for *in camera* review. *Danos v. Minnard, M.D., Jefferson Parish Hospital Service District No. 1 d/b/a West Jefferson Medical Center, Crescent Surgical Group,LLC, Cook and Kappelman,* 19-C-268 (La. App. 5 Cir. 8/28/19), found at: *http://www.fifthcircuit.org/dmzdocs/OI/PO/2019/9816C298-5622-4F92-8DE6-93CBF63C58FB.pdf*.

PRESCRIPTION/PEREMPTION

In *Anderson,* the Louisiana Supreme Court held that an insured has a private right of action for damages against a health care

provider under the Balance Billing Act. The First Circuit found that plaintiff's claims against the health care provider under the Balance Billing Act were delictual in nature and subject to a one-year prescriptive period. The First Circuit disagreed with the Third Circuit's holding in *Vallare* which found a ten-year prescriptive period against a health care provider based on the plaintiff's status as an insured. However, because the petition was silent as to the date the alleged violation of the Balance Billing Act occurred, the court of appeal reversed the trial court's judgment granting the exception of prescription. *DePhillips, individually and on behalf of all others similarly situated v. Hospital Service District No. 1 of Tangipahoa Parish, dba North Oaks Medical Center/North Oaks Health System*, 2017 CA 1423 R c/w *Williams, individually and on behalf of all others similarly situated v. Hospital Service District No. 1 of Tangipahoa Parish d/b/a North Oaks Health System and North Oaks Medical Center, and Louisiana Health Service & Indemnity Company d/b/a Blue Cross Blue Shield of Louisiana*, 2017 CA 1424 R (La. App. 1 Cir. 9/5/19), found at: *https://www.la-fcca.org/opiniongrid/opinionpdf/2017%20CA%201423%20R%20Decision%20Appeal.pdf*.

Writs denied. The jurisprudential doctrine of contra non valentem does not apply and peremption cannot be extended due to a late discovered and new cause of action. However, the "relation back" provision of La. Code Civ. P. art. 1153 allows the relation back of additional damages as long as the claims have a sufficient factual basis to the claims originally pled. On examination for such operative facts, jurisprudence provides for a strict construction in favor of maintaining enforcement of the newly asserted claim or action. The court of appeal found that the facts in this case presented a close question as to whether all of the "new claims" alleged by plaintiff were sufficiently related to the broad allegations of faulty design and construction alleged in the original petition such that they "relate back" to the timely pled original petition under La. Code Civ. P. art. 1153. The court of appeal was constrained to find that, except for the new claims allowed by the trial court as being fairly related to the timely filed initial claims, the broad expansion of the pleadings in this case alleging admittedly new claims went beyond that which the supreme court had previously allowed in cases of this nature. *The Rapides Parish School Board v. Zurich American Insurance Company, et al.*, 19-312 c/w 19-329 (La. App. 3 Cir. 8/21/19), found at: *https://la3circuit.org/Opinions/2019/08/082119/19-0312opi.pdf*.

TORTS

In sinkhole litigation, Texas Brine maintained that Adams Resources' "erroneous assumption" the reservoir was water driven "initiated a chain of events that lead to the depressurization of the AHI reservoir." The court of appeal found that the record offered no support for Texas Brine' s assertion that the depressurization of the AHI reservoir would not have occurred "but for" Adams Resources' initial characterization of the reservoir as water driven. That determination, even when later revealed to be incorrect, had no apparent effect on operational decisions regarding pressure maintenance in the reservoir. The trial court's involuntary dismissal of Texas Brine's claims against the insurers of Adams Resources was not manifestly erroneous. *Florida Gas Transmission Company, LLC v. Texas Brine Company, LLC, et al.*, 2018 CA 0907 (La. App. 1 Cir. 8/29/19), found at: *https://www.la-fcca.org/opiniongrid/opinionpdf/2018%20CA%200907%20Decision%20Appeal.pdf*.

DRI REPRESENTATIVE'S REPORT: LAGNIAPPE BY LOTTIE

by
Lottie Bash
Faircloth Melton Sobel & Bash, LLC

Annual meeting is upon us! October 16-18th at the Marriott Hotel in New Orleans come gather with your friends, colleagues, clients and potential new clients for a Mardi Gras fashioned good time! The Fulton Alley Street Party joins New Orleans fun and networking in a refreshing way. Because "[y]our network is your net worth," Annual Meeting offers many painless and fun-filled ways to build your net.

For those of us who just love top quality CLE (yes, I am one of you), there will be over 10 hours of CLE credit offered, including up to 3 hours of ethics credits. Specific CLEs are offered by the substantive law committees. These include toxic torts and environmental law, the ADR committee, medical liability and health care law, trucking law, commercial litigation, cybersecurity and data privacy, governmental enforcement, retail and hospitality, workers' compensation and the "juicy stuff" of employment and labor law. In the words of the immortal Satchmo: "Music is life itself. What would this world be without good music? No matter what kind it is." You tell them, Louis.

Some of these substantive law committees are doing their own get togethers. For example, the DRI Insurance Law Committee will be meeting at Antoine's for dinner. If you are interested, please contact *mlockett@lowestein.com* or *lchapman@lowestein.com*. Space is limited.

Friday is the Diversity and Inclusion and Women in the Law Networking Luncheon. The speaker is Judge Paula Brown from the Louisiana Fourth Circuit Court of Appeal. This is a ticketed event so reach out soon to be included. Also, the Friday night Mardi Gras Masquerade Ball closes the meeting, a king and queen are crowned and a purchase from the NFJE of a champagne glass and golden ticket gets you champagne throughout the evening! Bring your mask, but get your ticket early.

I would be remiss if I did not mention that Annual Meeting is not the only upcoming DRI event. The Complex Coverage Forum is set for November 6th in Hartford, Connecticut. This interactive seminar includes distinguished speakers from in and outside the industry. Free registration is offered to In-House Counsel and Claims Professionals although space is limited.

For our Construction Law group, there is a Construction Law Primer in New York on November 7th. And DRI may be taking a hint from LADC with DRI's Bootcamp for New Life, Health and Disability Lawyers on November 8th in Chicago. The Defense Lawyers Asbestos Symposium and the Asbestos Medicine Seminar are back to back on November 13th and 14th at the Westin Boston Waterfront.

See you at Annual Meeting!

Sincerely,
Lottie Bash
Faircloth Melton Sobel & Bash, LLC

ATTORNEY-CLIENT PRIVILEGE: ARE YOUR COMPANY'S CONSULTANTS COVERED?

by
Matt Smith
Kean Miller LLP

The reality of conducting business today is that companies are increasingly dependent on outside contractors, consultants, and subject matter experts to fill knowledge gaps and make business decisions. In some situations, when outsourcing makes more economic sense for example, these non-employees serve what were previously internal business functions. Though, in many instances, certain subject matter expertise has always been served by non-employees.

The reliance on specialized knowledge of non-employee personnel has resulted in a novel issue when such specialized knowledge is utilized or relied upon to make legal or quasi-legal business decisions: does the attorney-client privilege apply to third-party consultants, or is privilege broken by the introduction of such consultants into an otherwise privileged communication?

Under Louisiana Code of Evidence Article 506, both (i) a communication (which includes oral, written, or other communications), as well as (ii) the "perceptions, observations, and the like, of the mental, emotional, or physical condition of the client in connection with such a communication," may be privileged ***if***:

1. the communication was intended to be confidential (as that term is defined in Art. 506),

2. the communication was made for the purpose of facilitating the rendition of professional legal services to the client, and

3. the communication was made between any combination of the client, a representative of the client, the client's lawyer, or a representative of the client's lawyer.[1]

This last requirement, derived from Art. 506(B)(1)-(2) and (4)-(6), provides for a multitude of different situations in which the attorney-client privilege might apply, as long as the other requirements are met, including communications between:

- client and attorney (Art. 506(B)(1))
- representative of the client (*e.g.* an employee of the client) and attorney (Art. 506(B)(1))
- client and representative of the attorney (*e.g.* the attorney's paralegal) (Art. 506(B)(1))
- representative of the client and representative of the attorney (Art. 506(B)(1))
- attorney and representative of the attorney (Art. 506(B)(2))

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[1] While beyond the scope of this article, privilege also may extend to communications between the client, the client's lawyer, or a representative of either, on the one hand, and a lawyer or lawyer's representative of another party, on the other hand, where a matter of common interest exists between the client and the other party. This is sometimes referred to as the joint prosecutorial or common interest privilege. Art. 506(B)(3).

- client and representative of the client (Art. 506(B)(4))
- representative of the client and representative of the client (Art. 506(B)(4))
- representative of the attorney and representative of the attorney (Art. 506(B)(6))
- different attorneys, and representatives of those attorneys, who represent the same client (Art. 506(B)(5)).

Particularly relevant to the consideration of whether privilege extends to non-employee consultants of the client is the fact that Art. 506 explicitly acknowledges that privilege may apply to communications between a representative of the client, on the one hand, and either the attorney, representatives of the attorney, the client, or even another representative of the client, on the other hand.

Accordingly, a threshold matter for determining whether the attorney-client privilege can extend to a third-party consultant is the determination of *whether a non-employee consultant is or at least can be a "representative of the client."* Art. 506 provides a general definition of who may be a representative of the client: someone that (i) has authority to obtain legal services for the client, (ii) has authority to act on legal services obtained for the client, or (iii) while acting in the scope of their employment makes or receives a "confidential communication for the purpose of effectuating legal representation for the client."[2]

In a situation where a company is the client, an employee whose job responsibilities require consultation with in-house or outside counsel on certain issues, like responding to an inquiry from an agency or seeking review of a contract, would be a representative of the client with authority to obtain legal services for the client. Where a company has enlisted in-house or outside counsel to provide advice on, for example, a policy or how to handle certain labor and employment situations, and that advice is provided to an employee to implement, that employee would be a representative of the client with authority to act on legal services obtained for the client. If the company is involved in litigation, and an employee is contacted to provide documents or information maintained by that employee for use in developing a case theme or responding to discovery requests, that employee would be a representative of the client who makes or receives a confidential communication for the purpose of effectuating legal representation for the client, while acting in the scope of employment for the client.
Next, one must determine whether the communication falls within the definition of "confidential" under Art. 506(A)(5), which requires that the communication is not intended to be disclosed to anyone other than:

1. "Those to whom disclosure is made in furtherance of obtaining or rendering professional legal services for the client.
2. Those reasonably necessary for the transmission of the communication.

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[2] La. Code Evid. art. 506(A)(2)

3. When special circumstances warrant, those who are present at the behest of the client and are reasonably necessary to facilitate the communication."[3]

Essentially, the "confidential" component of the communication requires that those involved in the communication are necessary to the provision of legal services, necessary to conveying the communication, or are requested by the client to assist in the communication.

Both Louisiana law and federal common law recognize that "the attorney-client privilege protects confidential communications between the client or a representative of the client and the client's lawyer or a representative of the lawyer…"[4] Courts have further recognized that this privilege can extend to non-employee representatives of the client. "There is substantial authority for the proposition that the privilege will apply to protect communications with agents of the client who facilitate the transmission and technical interpretation of confidential information flowing between the attorney and client."[5] Specifically, courts have recognized that communications between lawyers and non-employee representatives of the client who are acting as the functional equivalent of employees (such as contractors and consultants) are privileged.[6]

As the United Stated District Court for the Middle District of Louisiana aptly stated:

> While the attorney-client privilege may be waived when the confidential communication is disclosed to third parties, "when agents or employees participate as members of a team to provide information and documents to litigation counsel and to obtain from counsel answers to the client's questions, with the primary purpose of effectuating counsel's rendition of legal advice to the client, communications between the client's legal personnel and the third-party agents are privileged, and the privilege is not waived by the communications."[7]

The reality is that "corporations increasingly conduct their business not merely through regular employees, but also through a variety of independent contractors retained for specific purposes."[8] In these complex times, the attorney-client privilege would be greatly eroded unless

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[3] La. Code Evid. art. 506(A)(5)

[4] *Firefighters' Retirement System v. Citco Group Limited*, No. 13-373 (Slip Copy, May 22, 2018), 2018 WL 2323424 (M.D. La. 2018), *citing Benson v. Rosenthal*, No. 15-782 (Order and Reasons on Motions, March 16, 2016), 2016 WL 1046126 (E.D. La. 2016).

[5] D. M Greenwald, *1 Testimonial Privileges*, §2.36 (3d ed.) (October 2017 Update), *citing Wigmore on Evidence* § 2317 (2011 Supp.) ("A communication, then, by any form of agency employed or set in motion by the client is within the privilege.").

[6] *See e.g. In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994) (finding that communications between a partnership's attorney and a consultant hired to assist in developing a piece of real estate were privileged, and reasoning that distinguishing between employees and independent contractors for the purpose of applying the attorney-client privilege was inconsistent with the Supreme Court's decision in *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981)).

[7] *Washington-St. Tammany Elec. Coop., Inc. v. Louisiana Generating, L.L.C.*, No. CV 17-405-JWD-RLB, 2019 WL 2092566, at *4 (M.D. La. May 13, 2019) (*citing Firefighters' Ret. Sys. v. Citco Grp. Ltd.*, No. 13-373, 2018 WL 2323424, at *4 (M.D. La. May 22, 2018)(citations omitted)).

[8] E.S. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, p. 269 (5th ed. 2007).

the client is allowed to communicate with its attorney through or with experts whose technical services are outsourced by the client.

Recognizing this dynamic, and applying these principles, various courts have recognized the extension of the attorney-client privilege to specific types of consultants. In *Smith v. Kavanaugh, Pierson & Talley*, 513 So. 2d 1138, 1143 (La. 1987), the Louisiana Supreme Court held that the fact that the client's accountant was present during her consultation with her attorney did not deprive the communication of its confidential and privileged character because the accountant's assistance was necessary to enable the client to consult with her attorney, and the client could reasonably assume that the attorney understood that their communications were intended to be confidential.

Additionally, in *F.T.C. v. GlaxoSmithKline*, 294 F.3d 141 (D.C. Cir. 2002), the court held that communications that the defendant shared with its government affairs consultants were protected by the attorney-client privilege, explaining:

> The Kinzig affidavit notes that GSK's corporate counsel "worked with these consultants in the same manner as they d[id] with full-time employees; indeed, *the consultants acted as part of a team* with full-time employees regarding their particular assignments" and, as a result the consultants "*became integral members of the team assigned to deal with issues [that] . . . were completely intertwined with [GSK's] litigation and legal strategies*." In these circumstances, "there is no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice."[9]

In *Washington-St. Tammany Elec. Coop., Inc. v. Louisiana Generating, L.L.C.*, No. CV 17-405-JWD-RLB, 2019 WL 2092566, at *4-5 (M.D. La. May 13, 2019), the Middle District of Louisiana recognized the extension of the attorney-client privilege to engineering consultants that provided technical and regulatory compliance advice which served to support a company's regulatory compliance initiatives. The court additionally recognized the extension of the attorney-client privilege to a governmental affairs consultant who served in the same capacity which an in-house government affairs professional would have traditionally served, working as part of the company's strategic team for regulatory and legal matters.[10]

Another aspect of this privilege consideration driven by modern communication is the potential significance of whether an email communication with the third-party consultant comes directly to or from an attorney. However, the mere fact that an attorney is copied on an email, and nothing more, does not in and of itself remove the email document from the auspices of the attorney-client privilege.[11] It should not matter whether the attorney's name appears in the "To,"

[9] 294 F.3d at 148, *citing In re Copper Market Antitrust Litig.*, 200 F.R.D. 213, 219 (S.D.N.Y. 2001) (emphasis added).
[10] *Id.* at *6.
[11] *United Investors Life Ins. Co. v. Nationwide Life Ins. Co.*, 233 F.3d. 483, 489 (5th Cir. 2006) (applying Miss. R. Evd. 502(b), substantively comparable to L.C.E. art. 506); *see also In re Avantel, S.A.*, 343 F.3d 311, 321 (5th Cir. 2003) (relying upon Tex. R. Evid. 503(b)(1)(D), substantively comparable to L.C.E. art.

"From," or "cc" box of the email if the content of the email is privileged. Indeed, the privilege protects communications between representatives of the client, and between the client and the client's representatives, so long as the communications are "made for the purpose of facilitating the rendition of professional legal services to the client."[12]

In summary, the attorney-client privilege should generally be recognized to extend to any third-party consultants as "representative of the client," to the extent that the non-employees serve as a part of the client's decision-making team, often, though not exclusively, in the same capacity that an employee of the client may have served traditionally. The current business environment increasingly requires companies to rely on non-employee consultants to serve roles traditionally served by employees, or to seek expertise not within the purview of a company's employees in order to make legal or quasi-legal business decisions. To not recognize the extension of the attorney-client privilege to this important group, acting as the functional equivalent of employees, would undermine the very protections which the attorney-client privilege serves to protect. Fortunately, in this situation, the courts have recognized and adapted to the realities of changing business operation.

506) ("Put differently, while it is not disputed that 26 of the documents were cc'ed to attorneys, this fact does not disqualify it for the privilege under the subject-matter test.").

[12] *United Investors*, 233 F.3d at 489.

HOW TO PREPARE FOR AN EXPERT'S DEPOSITION

by
Amber Barlow
Kuchler Polk Weiner

Whether you are a young lawyer preparing for your first expert deposition or a seasoned lawyer preparing for your twenty-fifth expert deposition, there are tips and tricks that an attorney should always remember when preparing to take an expert's deposition. Preparing to take an expert's deposition can be a difficult task given that an expert witness is usually an educated, prepared, sophisticated witness. In most cases, experts are accustomed to litigation such as researching, knowledge of the facts of the case, depositions, and trial testimony. With this said, it is important, no matter your experience level, that an attorney is organized, prepared, and knowledgeable. In order to do so, there are a few key points to implement.

KNOW YOUR CASE

This may seem like a silly first step, but it is a crucial first step that sometimes gets lost in the preparation process due to the simplicity. Make sure you know the jurisdiction of the case and are familiar with the law of the state in terms of expert's depositions and reporting requirements. State laws may be slightly different from federal laws when it comes to deposing an expert and what is required of an expert, and these differences may steer your preparation and examination of the expert in your case. You will also want to make sure you truly know your case, meaning know what legal elements a plaintiff must prove to prevail at trial and know what element of the cause of action opposing counsel is using the expert to prove. Another important component of knowing your jurisdiction is having knowledge of the evidentiary issues that apply to an expert's testimony. For example, determine whether your state applies the *Frye* or *Daubert* standards to the admissibility of expert opinions. It is important to know what you need to get from this expert to potentially exclude him or her as an expert.

KNOW THE EXPERT

The first step in preparing for an expert deposition is to know your expert. This means researching your expert. Chances are this expert has been involved in similar cases in the past. Find those cases, know those cases, know what the expert's opinions were, and know if the Court allowed the expert to testify. The best ways to make sure you know the expert is to run a Westlaw search of the expert to determine what cases and jurisdictions the expert has been deposed and/or testified in at trial. This may also lead to information on whether the expert has ever been precluded from testifying or offering opinions in a case. If there are deposition transcripts and trial transcripts of the expert's testimony, it would be beneficial to review the testimony. You may also consider correspondence with other attorneys who may have experience with this expert in prior cases for tips and tricks. The best way to prepare for an expert's deposition is to learn from others that have deposed the expert previously. Additionally, be familiar with the expert's curriculum vitae (CV); the expert's educational background; the expert's research history; and the expert's qualifications, licenses, professional memberships, etc.

KNOW THE REPORT

In most jurisdictions, expert reports are required but not in all. If the expert has issued a report, it is important to read all four corners of the report and know it backwards and forwards. From the report, it is important to focus on the key aspects of the report: (a) Identify all of the factual assumptions made; (b) identify what facts and science the expert uses to support the conclusions; and (c) identify what facts or science would weaken the conclusions.

KNOW THE RELIANCE MATERIALS.

When noticing an expert's deposition, it is important to request reliance materials and materials the expert has used to form his/her opinions in the case. Whether you issue a subpoena duces tecum to the expert and/or a Notice of Deposition, include a request for production of the expert's file in the case and reliance materials. This is an important aspect of taking an expert's deposition. You will want to focus on the reliance materials to ensure that the materials the expert is relying on to form the basis of their opinions in the case are what the expert purports them to be. In some cases, an expert will form an opinion and cite to reliance materials that do not at all support the basis of their opinions. In this case, this is a key issue that needs to be fleshed out during the deposition and in further preparation of motion practice. You will want to make sure you have read and are familiar with the expert's published articles, opinions, or articles. In some cases, you may discover conflicting opinions the expert has issued.

UTILIZE YOUR EXPERT

Occasionally it may be beneficial to have a call with your own expert in the case to give you issues and areas to further explore with the opposing expert during deposition, especially if the expert is of a highly scientific field. The benefit of having your expert review the expert's report and letting you know why certain reliance materials do not justify the opinions or conclusions will further assist in your preparation for the expert's deposition. Another benefit to utilizing your expert in preparing for the opposing expert's deposition is also for a pure teaching moment. Again, many times the experts are designated to give specific, scientific testimony in the case. The attorney will want to make sure they truly understand the subject matter and the role of the expert in the case. One of the keys to an effective expert deposition is when the attorney truly grasps and understands the concepts, the expert's opinion, the expert's role in the case, and the elements of the cause of action the expert is needed to assist in the case.

KNOW OPPOSING COUNSEL

You may be asking yourself why knowing opposing counsel is a step in preparing for an expert's deposition. The truth is that knowing opposing counsel is a crucial step in preparing for any deposition, especially an expert deposition. You want to be prepared when it comes to knowing your expert, knowing the expert's report, and knowing the expert's reliance materials, but this is a deposition after all. It is important that you make sure you are fresh and prepared for all possibilities. For example, you will want to review objections to know what objections opposing counsel may make during your examination of opponent's expert and how to handle those objections to make a clean record. Since the deposition will likely be used in motion practice, it is important to make a clean record and correct any questions that may be corrected during the deposition. In that, knowing the temperament and style of opposing counsel is always beneficial. Some attorneys routinely use speaking objections as a tactic to coach the witness throughout the

deposition. If this is opposing counsel's style, you will need to be aware of it and aware of how to handle it throughout the deposition to ensure you are not caught off guard and/or sidetracked from your main duty. Additionally, knowing your opposing counsel will assist in making agreements and stipulations ahead of time to make the deposition examination time more efficient. There is nothing worse than spending inordinate amount of time arguing with opposing counsel over nuisance issues. Not only is this just simply annoying, it also has the tendency to set the tone for the deposition. If you are able to, you want to avoid a tense tone during an expert's deposition. You will be more successful in getting what you need and beneficial information if you are cordial and professional throughout the examination.

CONCLUSION

There are many ways to prepare for an expert's deposition. As most attorneys know, taking a deposition is an art. Every attorney develops their own art of deposition taking and ways to prepare. Taking an expert's deposition is an important craft and usually an important aspect of your case. One component that all are able to agree on is the fact that preparation for an expert deposition is a must.

Employability Formula: Look beyond the formula.

Knowing the codes, definitions, and other scripted data is important. However, getting to know the claimant better than most others take the time to do, and applying common sense logic to employability issues is priceless.

Jeff Peterson, an expert in Vocational Evaluation, Rehabilitation, and Employability, assisting attorneys since 1985.

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