

*Erin Lorio and Allyson Byrd with*

**LITCHFIELD**  

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**CAVO** LLP  
ATTORNEYS AT LAW

*Present*

**“Did She Really Just Say That?”  
Professionalism in the Era of Oversharing**

*and*

**Help Us Help You: Risk and Claims  
Management Tips from the Litigator’s  
Vantage Point**

*Two CLE hours including one hour of Professionalism*

October 11, 2019  
11:00 am – 2:00 pm  
Brennan’s  
New Orleans, Louisiana



**Association of Corporate Counsel Meeting**  
October 11, 2019  
Brennan's, New Orleans, Louisiana

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Help Us Help You: Risk and Claims Management Tips  
from the Litigator's Vantage Point

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**Roadmap** **LITCHFIELD  
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**In the context of claim or loss:**

- Identify critical data to collect/isolate;
- Examine roles of in-house counsel vs. risk manager vs. TPA vs. outside counsel in collecting/isolating data;
- Review discovery rules and privileges that apply to claim data;
- Discuss best practices for preserving privileges and limiting production of claim data.

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**The Loss or Claim** **LITCHFIELD  
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- Claimant-Plaintiff suffers injury or loss due to Company's *alleged* negligence; i.e.:
  - Claimant slipped and fell on wet floor that was just mopped by Retailer's employee;
  - While making deliveries, Distributor's employee rear-ends Claimant;
  - Terminated employee accuses Former Employer of racial discrimination.
- Claimant's counsel sends a Letter of Representation
- LOR sent to outside counsel for handling

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## Defending the Claim: Wish List

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### ❖ TANGIBLES:

- Full name, address, telephone number of all involved EEs;
- Incident Reports (formal or informal);
- Statements (written or recorded);
- Investigation materials (notes, photographs, names of employees/witnesses with info, emails, texts);
- Policies and procedures (job-specific and re: incident reporting);
- Personnel File (incl timesheets, schedules, training, reviews);
- Claim Notes.

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## Defending the Claim: Wish List (cont'd)

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### ❖ INTANGIBLES (Company Priorities & Objectives):

- ❖ "Risk philosophy" (i.e., zero tolerance, cost-efficiency, measured expediency, case-by-case);
- ❖ Trade considerations (publicity, reputation, business-specific concerns, protecting proprietary interests)
- ❖ Personnel issues (employee/management turnover);
- ❖ Business realities;
- ❖ Litigation priorities: agreed upon strategy, communication expectations, responsiveness, billing/budget requirements.

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## Defending the Claim: Wish List (cont'd)

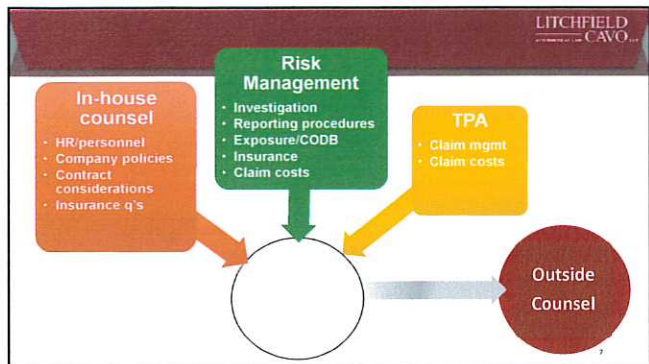
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### ❖ 2019 CLM Litigation Management Study:

- Spending more on litigation does not reduce indemnity costs (79%)
- Only 3.4% of BI lawsuits resolved with a verdict rather than settlement
- Majority of litigated claims settle later in the process than necessary (80%)
- Cost effective resolution and reduction of claims requires long view and more than just the tangible claim information

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Discoverability: Overview

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- "A party may obtain **discovery** about any matter, **not privileged**, which is **relevant** to the subject matter of a pending action."
- Discoverable if "**reasonably calculated** to lead to the discovery of admissible evidence"

La. C.C.P. art. 1422

- **Not Discoverable:**
  - ✓ Matters that are **privileged**
  - ✓ Matters **not relevant** to underlying action
  - ✓ Unlikely to yield **admissible evidence**

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## Privileges

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- **Privileges** - evidentiary concepts that are generally disfavored and thus subject to scrutiny.
- Most common and effective re: investigative, claim-related materials:
  - **Attorney-Client Privilege**
  - **Work-Product Doctrine**

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## Attorney-Client Privilege

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**A/C Privilege:** A client has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication, whether oral, written, or otherwise, made for the purpose of facilitating the rendition of professional legal services to the client. La. C.E. 506(B)

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## Attorney-Client Privilege

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- Applies to communications between client and lawyer or their representatives
- "Client" includes any person, including a corporation, to whom legal services are rendered by a lawyer
- If client is a corporation, privilege extends to any communication to or by a corporate employee who:
  1. has authority from corporation to obtain legal services or act on advice so obtained, and
  2. who makes the communication for the purpose of effectuating legal representation for the corporation while acting in the scope of his employment

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### Attorney-Client Privilege - Hypothetical

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**Q:** In-house counsel drafted a memorandum for Company in which she gave advice as to the disclosure of certain data during contract negotiations, i.e., what should and should not be disclosed. The memo was inadvertently produced in litigation unrelated to the contract negotiations. Company asserted A/C privilege albeit after the fact.

#### A/C Privilege?

**A:** Yes. *Exxon Mobil Corp. v. Hill*, 751 F.3d 379, 382 (5th Cir. 2014).

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### Attorney-Client Privilege: In-House Counsel

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- For **In-House Counsel**, what is protected by **A/C Privilege**?
  - **Business communications?** No. Generally no intracorporate privilege between 2 corporate employees.
  - **Legal communications?** Yes. Communications to/from in-house counsel relating to legal matters will likely be privileged.
  - **Business vs. Legal communications?** Fact-specific inquiry; ultimately depends on the nature of the communication and the work performed by the lawyer.

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### Attorney-Client Privilege - Hypothetical

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**Q:** In-house counsel took minutes during a company meeting. Plaintiff requested minutes in discovery to corp.

#### A/C Privilege?

**A:** No. A/C privilege does not protect non-legal business advice given by a lawyer; rather, the primary purpose of the communication must be to secure legal advice. *Burroughs Wellcome Co. v. Barr Labs., Inc.*, 143 F.R.D. 611 (E.D.N.C. 1992).

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## Work-Product Privilege

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**Two-part test (La. C.C.P. Art. 1424):** a writing is W-P if prepared:

1. By the **adverse party, his attorney, surety, indemnitor, or agent**
  2. In **anticipation of litigation** or in **preparation for trial**
- **Burden** is on party claiming privilege;
  - If W-P proven, **burden shifts to party seeking production** to show unfair prejudice, hardship or injustice if not produced

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## Hypothetical: Be kind, rewind.

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**Q:** Risk manager takes a recorded statement from Plaintiff. In discovery, Plaintiff seeks the audiotape. Company objects, citing the work-product doctrine.

Is the audiotape covered by the work-product doctrine?

**A:** No. Article 1424 only protects "writings"; audiotapes are "tangible things". *Landis v. Moreau*, 2000-1157 (La. 2/21/01), 779 So. 2d 691, 697.

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## Hypothetical: Transcriptions

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**Q:** Before suit is filed, Insurer takes recorded statements from Insured's employees and later transcribes them. In post-suit discovery, Plaintiff seeks production of the transcriptions. Insurer objects, citing the work-product doctrine.

Are the transcriptions covered by the work-product doctrine?

**A:** No. First, Statements taken by insurers not covered by express language of La CCP art. 1424 ("... *taken or prepared by adverse party, his attorney, surety, indemnitor, expert, or agent* ..."). Second, not prepared in litigation ("taken as part of an initial investigation"). *Whittenburg v. Zurich Am. Ins. Co.*, 2000-2697 (La. App. 4 Cir. 4/18/01), 786 So. 2d 163, 166.

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## Discoverability: Incident Report

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CAVO**Q:** Are **Incident Reports** discoverable?**A:** Depends. When was the Report drafted? Why?

- If immediately after the incident and routine procedure, **yes**.
- If later, after knowledge of potential litigation, no. **W/P applies**.
  - *Johnson v. Mike Anderson's Seafood, Inc.*, 2013-0379 (La. App. 4 Cir. 6/11/14), 144 So. 125.
  - *Ogea v. Jacobs*, 344 So. 2d 953, 957 (La. 1977).

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## Discoverability: Witness Statements

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CAVO**Q:** Are **Witness Statements** discoverable?**A:** Maybe. Who took it? When? Why?

- ❖ Non-party witness statements arguably protected under **W/P**. La. C.C.P. arts. 1422, 1424.
- ❖ Names of witnesses *are* discoverable

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## Discoverability: Plaintiff's Statement

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CAVO**Q:** Is **Claimant-Plaintiff's Statement** discoverable?**A:** Yes.

- "A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party." La. C.C.P. art. 1424(B).

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## Discoverability: Claims Files

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**Q:** Are insurer **Claims Files** discoverable?

**A:** Yes and no.

- ❖ **Request for Specific, Non-Privileged Items?** **Yes**, i.e., existence and contents of insurance policy, policy limits (La. C.C.P. art 1423); privileged info that is unobtainable and nonproduction would unfairly prejudice requesting party. *Lehmann v. American Southern Home Ins. Co.*, 615 So. 2d 923 (La. App. 1<sup>st</sup> Cir. 1993).
- ❖ **Broad request for entire file?** **No**. Court will conduct an in-camera inspection to determine which parts of file are privileged.

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## Discoverability: Surveillance

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CAVO

**Q:** Is **Surveillance** discoverable?

**A:** Yes. Not a "writing" so **not W-P**. But, the **timing** of production depends on subject matter.

- ❖ Surveillance of PL engaged in physical activity - discoverable **after** defendant deposes PL. *Wofford v. JoEllen Smith Psychiatric Hosp.*, 96-2460 (La. 5/20/97), 693 So. 2d 1164, 1168.
- ❖ Security/surveillance of incident - immediately discoverable. *Bell v. Treasure Chest Casino, L.L.C.*, 2006-1538 (La. 2/22/07), 950 So. 2d 654, 656.

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Written Policies and Procedures:  
DiscoverabilityLITCHFIELD  
CAVO***Ambrose-Frazier v. Herzing Inc.***

No. 15-CV-1324, 2016 WL 890406 (E.D. La. Mar. 9, 2016)

- ❖ Plaintiff filed employment discrimination Complaint with Company pursuant to Company Policy
- ❖ Per Company Policy, Company investigated Complaint, HR Resources Director (who also was a lawyer) interviewed Ambrose-Frazier and 8 other employees, made notes which included her mental impressions and evaluations
- ❖ Plaintiff ultimately fired following investigation
- ❖ Plaintiff requested Company's investigation of her Complaint and the investigator's notes; Company objected, claimed **W/P** and **A/C privileges**

*What said the Eastern District?*

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## Written Policies and Procedures: Discoverability

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### ***Ambrose-Frazier v. Herzing Inc.***

- ❖ **W/P Doctrine?** No. Company's policy *required* investigation upon receipt of Complaint. Investigation was done in the ordinary course of business, not in "anticipation of litigation".
- ❖ **A/C Privilege?** No. Although a lawyer, HR Director was acting in that capacity in accordance with Company's policy when she took statements and conducted investigation.

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## Best Practices for Claim Data – Preserving Your Privileges and Limiting Production

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- ✓ Incident reports/statements: stick to the facts; avoid editorializing;
- ✓ Have (outside) counsel prepare key documents/reports;
- ✓ Reframe reports or key findings as memo to counsel;
- ✓ Prominently label documents: "*Prepared in Anticipation of Litigation*", "*Attorney-Client Communication*", "*Attorney Work Product*", "*Legal Opinion*";
- ✓ Identify basis for anticipated litigation in writings, i.e., threat of litigation, LOR, severity of injury, inability of EE to return to work;
- ✓ Avoid broad distribution of investigative/claim materials;

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## Best Practices for Claim Data – Preserving Your Privileges and Limiting Production

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- ✓ Claims files - have **detailed, fact-based reporting in each claim note**, ideally geared towards litigation
- ✓ Surveillance –
  - Take surveillance at initial stage of case for impeachment value
  - Object to production prior to Plaintiff's deposition
  - Produce surveillance after Plaintiff's deposition
- ✓ Witness statements - Get outside counsel involved early to conduct **witness interviews**. Otherwise, focus should be on facts

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**Best Practices –  
General Tips for Documenting the Claim/Loss**

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- ❖ Develop a claim reporting **protocol** that reflects risk intangibles and corporate realities to insure compliance
- ❖ Designate a **risk point person** for employees
- ❖ **Educate & train** employees on claim protocols and risk intangibles on an ongoing basis
- ❖ **Document training**
- ❖ **Apply protocols consistently** for every claim/loss

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**Best Practices –  
General Tips for Documenting the Claim/Loss**

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- ❖ Claim investigation priority? **FACTS**
- ❖ Late notice or no notice of a claim until suit?
  - ❖ Involve counsel ASAP
  - ❖ Investigate and isolate key info & documents as soon as possible
  - ❖ Minimize number of people involved (need to know)

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**Questions?**

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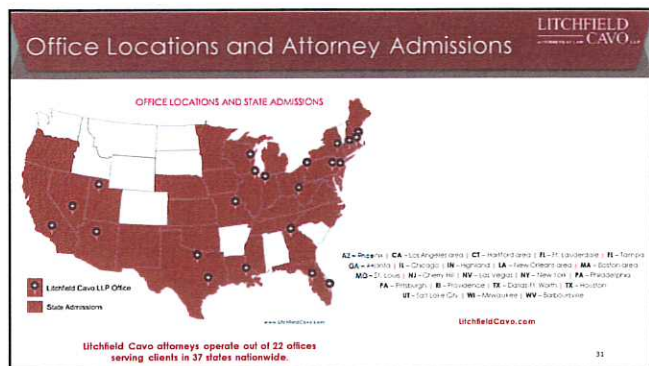
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TAB  
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2016 WL 890406

Only the Westlaw citation is currently available.  
United States District Court, E.D. Louisiana.

Myeshia S. AMBROSE-FRAZIER, Plaintiff

v.

HERZING INC., et al., Defendants

CIVIL ACTION NO. 15-1324

|  
Signed March 08, 2016

|  
Filed 03/09/2016

#### Attorneys and Law Firms

Jean-Paul Robert, Sr., Jean-Paul Robert, Sr., Attorney at Law, Gonzales, LA, for Plaintiff.

George Davidson Fagan, Margaret Frohn Swetman, Tiffany Thomas Smith, Leake & Andersson, LLP, New Orleans, LA, for Defendants.

#### SECTION: "E" (3)

#### ORDER AND REASONS

SUSIE MORGAN, UNITED STATES DISTRICT JUDGE

\*1 Before the Court is Plaintiff's Motion for Appeal/Review of Magistrate Judge's Ruling on her motion to compel production of the notes of Lisa Baiocchi.<sup>1</sup>

#### BACKGROUND

This is a Title VII employment discrimination case. Plaintiff Myeshia S. Ambrose-Frazier ("Ambrose-Frazier") filed this action against Herzing, Inc. and Herzing University, Ltd. (collectively, "Herzing") on April 23, 2015.<sup>2</sup> Ambrose-Frazier, a black female, alleges she began working for Herzing on December 6, 2006, "and worked without incident" until Jason Morgan ("Morgan"), a white male, became Ambrose-Frazier's supervisor.<sup>3</sup> The complaint alleges that Morgan "exhibited strange and alienating behavior toward black female employees at Herzing."<sup>4</sup> Soon after becoming Ambrose-Frazier's supervisor, Morgan announced there would be lay-offs, listing both white and black employees for termination, but ultimately laid off "mostly black employees."<sup>5</sup>

Ambrose-Frazier alleges she was subject to intentional race discrimination and "suffered a severe and pervasive hostile work environment"<sup>6</sup> and was treated differently than other similarly situated non-black employees.<sup>7</sup> She alleges that when Ambrose-Frazier complained about the "blatant race discrimination and harassment[...], she was retaliated against by being written up and terminated."<sup>8</sup> She avers she complained of the harassment and retaliation but Herzing did not take preventive or corrective action.<sup>9</sup>

Ambrose-Frazier filed this suit alleging claims of discrimination, retaliation, and harassment alleging harassment on the basis of her sex and race, in violation of Title VII of the Civil Rights Act<sup>10</sup> and 42 U.S.C. § 1981. She seeks damages for loss of wages and earning potential, severe emotional distress, pain and suffering, and great bodily injury, as well as attorney's fees and costs, interest, and penalties.<sup>11</sup>

On February 3, 2016, Ambrose-Frazier filed a Motion to Compel and/or In Camera Inspection regarding her request for production of “any statements in any form obtained from any person that is not privileged under law regarding any fact pertaining to the injury of plaintiff.”<sup>12</sup> In her motion to compel, Ambrose-Frazier noted, “The documents requested are the notes of the investigation into Plaintiff's claims of discrimination.”<sup>13</sup> Herzing objected to the request to that extent it sought “attorney-client communications and/or work product created in anticipation of litigation”<sup>14</sup> and filed an opposition to Ambrose-Frazier's motion to compel on February 11, 2016.<sup>15</sup>

Herzing provided Ambrose-Frazier with certain documents, including notes written by Lisa Baiocchi. Baiocchi and Brian Olson, another Herzing employee, conducted interviews of Ambrose-Frazier and eight other employees to investigate Ambrose-Frazier's allegations of employment discrimination.<sup>16</sup> Herzing redacted several lines of Baiocchi's notes,<sup>17</sup> contending the redacted portions contained her “mental impressions and evaluations of the information learned during these interviews [that] were plainly created in anticipation of litigation.”<sup>18</sup>

\*2 Magistrate Judge Knowles held an oral hearing on the motion to compel on February 17, 2016, and subsequently ordered Herzing to produce certain documents to the Court for an *in camera* inspection.<sup>19</sup> Judge Knowles ultimately denied Ambrose-Frazier's motion to compel, finding that the redacted portions of Baiocchi's interview notes were mental impressions protected by the work-product privilege.<sup>20</sup>

On February 26, 2016, Ambrose-Frazier filed a motion for review of Judge Knowles' order, seeking an order compelling production of Baiocchi's notes.<sup>21</sup> Herzing filed an opposition on March 2, 2016.<sup>22</sup> On March 3, 2016, Herzing filed an *ex parte* motion to expedite consideration of Ambrose-Frazier's motion for review.<sup>23</sup>

## STANDARD OF LAW

A magistrate judge's non-dispositive order may be set aside only if it is clearly erroneous or contrary to law.<sup>24</sup> As other courts in this District have summarized: “Under this standard, factual findings are reviewed for clear error, which is present when the reviewing court upon examination of the entire evidence is left with the definite and firm conviction that a mistake has been committed. Conclusions of law should be overturned when the magistrate fails to apply or misapplies relevant statutes, case law, or rules of procedure. For issues that are committed by law to a judge's discretion, such as the resolution of discovery disputes, the magistrate's rulings are reviewed for abuse of discretion.”<sup>25</sup>

## DISCUSSION

Judge Knowles found, and Herzing maintains,<sup>26</sup> that the redacted portions of Baiocchi's notes are protected by the work-product doctrine.<sup>27</sup>



The work-product doctrine protects from disclosure materials prepared by or for an attorney in anticipation of litigation,<sup>28</sup> including the attorney's research, analysis of legal theories, and mental impressions.<sup>29</sup> In the Fifth Circuit, "the privilege can apply where litigation is not imminent, 'as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.'" <sup>30</sup> "Factors that courts rely on to determine the primary motivation for the creation of a document include the retention of counsel and counsel's involvement in the generation of the document and whether it was a routine practice to prepare that type of document versus whether the document was instead prepared in response to a particular circumstance."<sup>31</sup>

\*3 The work-product doctrine "is not an umbrella that shades all materials prepared by a lawyer, however."<sup>32</sup> Materials created in the ordinary course of business are excluded from the work-product privilege.<sup>33</sup> "If the document would have been created regardless of whether litigation was also expected to ensue, the document is deemed to be created in the ordinary course of business and not in anticipation of litigation."<sup>34</sup> The mere possibility that litigation may result is not determinative.<sup>35</sup> "If in connection with an accident or an event, a business entity in the ordinary course of business conducts an investigation for its own purposes, the resulting investigative report is produceable in civil pre-trial discovery."<sup>36</sup>

Herzing has raised the *Faragher-Ellerth* affirmative defense in this litigation.<sup>37</sup> Under the *Faragher-Ellerth* defense, "an employer will not be vicariously liable for harassment by a supervisor if it can show: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>38</sup> Generally, an employer may satisfy the first prong of the *Faragher-Ellerth* defense by demonstrating that (1) it has a harassment policy that was promulgated to employees and properly implemented, and (2) if an employee makes a complaint under that policy, the employer conducts a prompt investigation.<sup>39</sup>

Ambrose-Frazier argues that because Herzing raises the *Faragher-Ellerth* defense, Herzing "necessarily put at issue any notes from any investigation of the allegations of harassment, even if those notes were made by an attorney who could otherwise utilize the work product doctrine to shield the notes from discovery."<sup>40</sup>

The third defense in Herzing's answer states as follows:

Herzing maintained, implemented and enforced adequate and reasonable policies, practices and procedures, and provided training, posted notices and circulated communications to Herzing employees regarding unlawful or wrongful discrimination, harassment and retaliation in the workplace, including but not limited to policies, practices and procedures to prevent, investigate, and promptly address and correct any actions, conduct and/or omissions involving unlawful or wrongful discrimination, harassment or retaliation.<sup>41</sup>

Herzing also states in its answer, "Herzing conducted a prompt and effective investigation of the complaints and violations of state and federal law, harassment, discrimination, and retaliation described in Plaintiff's Complaints, and took prompt, appropriate, and effective remedial action in response to that complaint."<sup>42</sup>

\*4 Herzing's employee handbook contains a complaint procedure for harassment incidents:



Upon notification of a harassment complaint, Herzing will conduct a confidential and impartial investigation, which will include interviews with involved parties and, where appropriate, with employees who may be witnesses or have knowledge of matters relating to the complaint. The complaining employee will be notified of the results of the investigation.<sup>43</sup>

Baiocchi's notes were created during the investigation conducted by Baiocchi and Olson of Ambrose-Frazier's allegations of workplace discrimination. The investigation, which involved interviews of Ambrose-Frazier and eight other Herzing employees "in an effort to evaluate Plaintiff's allegations," was conducted pursuant to Herzing's policy, which required an investigation of each harassment complaint.<sup>44</sup> Herzing argues that the interviews were not conducted in the ordinary course of business but rather "were conducted for the specific purpose of investigating Plaintiff's April 30, 2013 complaint," and "were created in response specifically to Plaintiff's discrimination complaint."<sup>45</sup> Judge Knowles agreed, finding that "[Baiocchi] prepared the documents in response to a particular circumstance, the accusation by plaintiff against defendants."<sup>46</sup> Of course, this would be true for every investigation of a harassment complaint conducted pursuant to Herzing's policy; that is, under Herzing's policy, an employee's lodging a complaint of harassment or discrimination would trigger an investigation specific to the allegations the employee made. It is clear that, pursuant to Herzing's policy, the investigation would have been conducted regardless of whether litigation ensued. As a result, the investigation was conducted in the ordinary course of business.<sup>47</sup> Accordingly, the work-product privilege does not apply to Baiocchi's notes.

The Court also finds the attorney-client privilege does not apply. The attorney-client privilege protects from disclosure communications made in confidence by a client to his attorney for the purpose of obtaining legal advice and communications from the lawyer to the client "only to the extent that these are based on, or may disclose, confidential information provided by the client or contain advice or opinions of the attorney."<sup>48</sup> The privilege, however, "is not a broad rule of law which interposes a blanket ban on the testimony of an attorney."<sup>49</sup> It does not protect a communication "simply because it is made by or to a person who happens to be a lawyer."<sup>50</sup> The attorney "must have been engaged or consulted by the client for the purpose of obtaining legal services or advice services or advice that a lawyer may perform or give in his capacity as a lawyer, not in some other capacity."<sup>51</sup>

\*5 At the time she made her notes, Baiocchi was the director of human resources at Herzing,<sup>52</sup> and, although she also happened to be a lawyer, she was acting in her capacity as the human resources director when conducting the investigation in accordance with Herzing's employee policy. Considering this, and in light of the Court's analysis above, the Court finds that the attorney-client privilege does not apply to Baiocchi's redacted notes from her May 10, 2013, interviews.

Even if the attorney-client or work-product privileges were to apply, Herzing waived the privileges by asserting the *Faragher-Ellerth* defense. When a Title VII defendant affirmatively invokes a *Faragher-Ellerth* defense that is premised at least in part on an internal investigation, the defendant waives the attorney-client privilege and work-product doctrine for all documents created as part of that investigation.<sup>53</sup>

\*6 Accordingly, the Court finds that denying the motion to compel Baiocchi's unredacted notes constituted clear error and was contrary to law.

## CONCLUSION

For the foregoing reasons;

**IT IS ORDERED** that Ambrose-Frazier's Motion for Appeal/Review of Magistrate Judge's Ruling is **GRANTED**.<sup>54</sup>

**IT IS FURTHER ORDERED** that the February 24, 2016, order denying Ambrose-Frazier's motion to compel is **REVERSED**,<sup>55</sup> and Ambrose-Frazier's motion to compel the production of Lisa Baiocchi's unredacted notes is **GRANTED**.<sup>56</sup> Herzing is to produce the unredacted documents to Ambrose-Frazier by **Friday, March 10, 2016**.

**IT IS FURTHER ORDERED** that Herzing's motion to expedite consideration of the motion for appeal/review is **DENIED AS MOOT**.<sup>57</sup>

#### All Citations

Not Reported in Fed. Supp., 2016 WL 890406

#### Footnotes

- 1 R. Doc. 55.
- 2 R. Doc. 1.
- 3 R. Doc. 40 at ¶¶ 6, 7.
- 4 *Id.* at ¶ 8.
- 5 *Id.* at ¶ 9.
- 6 *Id.* at ¶ 11.
- 7 *Id.* at ¶ 15.
- 8 *Id.* at ¶ 11.
- 9 *Id.* at ¶ 14.
- 10 42 U.S.C. § 2000e et seq.
- 11 R. Doc. 40 at ¶ 16.
- 12 R. Doc. 34 at 1.
- 13 R. Doc. 34-1 at 2.
- 14 R. Doc. 34 at 1.
- 15 R. Doc. 43.
- 16 R. Doc. 43 at 5; R. Doc. 43-1.
- 17 See R. Doc. 43-2 at 9–13 for the redacted version of Baiocchi's notes that Herzing provided to Ambrose-Frazier.
- 18 *Id.*
- 19 R. Doc. 53 at 1.
- 20 *Id.* at 6–8.
- 21 R. Doc. 55.
- 22 R. Doc. 56.
- 23 R. Doc. 57.
- 24 FED. R. CIV. P. 72(a); *Moore v. Ford Motor Co.*, 755 F.3d 802, 806 (5th Cir. 2014).
- 25 *Energy Intelligence Grp., Inc. v. Canal Barge Co.*, No. 12-2107, 2014 WL 201698, at \*1 (E.D. La. Jan. 17, 2014) (citations omitted). See also *Territa v. Oliver*, No. 11-1830, 2013 WL 6490338, at \*1 (E.D. La. Dec. 10, 2013); *Kiln Underwriting Ltd. v. Jesuit High Sch. of New Orleans*, No. 06-4350, 2008 WL 4724390, at \*1 (E.D. La. Oct. 24, 2008); *Bolding v. C.I.R.*, 117 F.3d 270, 273 (5th Cir. 1997).
- 26 R. Doc. 56 at 6–8. See also R. Doc 43 at 2–8.
- 27 R. Doc. 53 at 7.
- 28 See FED. R. CIV. P. 26(b)(3). See also *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991); *S. Scrap Material Co. v. Fleming*, No. 01-2554, 2003 WL 21474516, at \*5 (E.D. La. June 18, 2003); *Hickman v. Taylor*, 329 U.S. 495 (1947).
- 29 *Dunn*, 927 F.2d at 875.



30 *In re Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 593 (5th Cir. 2000) (quoting *United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982)).

31 *Motion Indus., Inc. v. Superior Derrick Servs., LLC*, No. 15-1958, 2016 WL 760776, at \*5 (E.D. La. Feb. 26, 2016) (citing *Piatkowski v. Abdon Callais Offshore, L.L.C.*, No. 99-3759, 2000 WL 1145825, at \*2 (E.D. La. Aug. 11, 2000)).

32 *El Paso Co.*, 682 F.2d at 542.

33 *Id.*

34 *Motion Indus.*, 2016 WL 760776, at \*5 (citing *Piatkowski*, 2000 WL 1145825, at \*2).

35 *Id.*

36 *Id.* (quoting *Carroll v. Praxair, Inc.*, No. 05-307, 2006 WL 1793656, at \*2 (W.D. La. June 28, 2006)).

37 See R. Doc. 54 at 1–2.

38 *E.E.O.C. v. Boh Bros. Const. Co.*, 731 F.3d 444, 462 (5th Cir. 2013) (quoting *Watts v. Kroger Co.*, 170 F.3d 505, 509–10 (5th Cir. 1999)) (internal quotations omitted).

39 *Angeletti v. Lane*, No. 12-503, 2014 WL 4386063, at \*4 (M.D. La. Sept. 4, 2014) (citing *Williams v. Admin. Review Bd.*, 376 F.3d 471, 478–79 (5th Cir. 2004)). See also *Moayedi v. Compaq Computer Corp.*, 98 Fed.Appx. 335, 338 (5th Cir. 2004) (per curiam) (finding that employer was entitled to rely on *Faragher-Ellerth* affirmative defense based on its quick investigation of the plaintiff's harassment claim and the subsequent termination of the plaintiff's supervisor).

40 R. Doc. 55-1 at 3.

41 R. Doc. 54 at 1–2.

42 R. Doc. 54 at 2.

43 R. Doc. 34-5 at 5. This excerpt from Herzing's employee handbook is attached to Ambrose-Frazier's motion to compel. Herzing does not dispute the accuracy or authenticity of the excerpt.

44 R. Doc. 43 at 5.

45 R. Doc. 56 at 8.

46 R. Doc. 53 at 7.

47 See *Motion Indus.*, 2016 WL 760776, at \*5 (“If the document would have been created regardless of whether litigation was also expected to ensue, the document is deemed to be created in the ordinary course of business and not in anticipation of litigation.”).

48 *United States v. Neal*, 27 F.3d 1035, 1048 (5th Cir. 1994) (quoting *Wells v. Rushing*, 755 F.2d 376, 379 n. 2 (5th Cir.1985)). See also *United States v. Pipkins*, 528 F.2d 559, 562 (5th Cir. 1976).

49 *Pipkins*, 528 F.2d at 562–63.

50 *Levingston v. Allis-Chalmers Corp.*, 109 F.R.D. 546, 551 (S.D. Miss. 1985). See also *United States v. Evans*, 113 F.3d 1457, 1463 (7th Cir. 1997) (“The privilege extends only to communications between a client and a professional legal advisor ‘in his capacity as such.’” (emphasis in original) (citation omitted)); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977) (“A communication is not privileged simply because it is made by or to a person who happens to be a lawyer.”); *Gen. Foods Corp. v. Jay V. Zimmerman Co.*, No. 86-2697, 1988 WL 5371, at \*2 (S.D.N.Y. Jan. 14, 1988).

51 *Diversified*, 572 F.2d at 602. See also *Evans*, 113 F.3d at 1463.

52 R. Doc. 43-2 at 20. The parties do not dispute this.

53 See *Williams v. United States Envtl. Servs., LLC*, No. 15-168, 2016 WL 617447, at \*5 (M.D. La. Feb. 16, 2016) (“Defendant has raised the *Faragher/Ellerth* affirmative defense....Defendant has cited to the investigation ...to show that it exercised reasonable care to promptly correct any harassing behavior....By relying on its investigation to defend against Plaintiff's allegations, Defendant has waived any applicable privilege with respect to not only the investigative report, but any underlying documents.”); *Angelone v. Xerox Corp.*, No. 09-6019, 2011 WL 4473534, at \*2 (W.D.N.Y. Sept. 26, 2011) (“[T]he clear majority view is that when a Title VII defendant affirmatively invokes a *Faragher-Ellerth* defense that is premised, in whole in or part, on the results of an internal investigation, the defendant waives the attorney-client privilege and work product protections for not only the report itself, but for all documents, witness interviews, notes and memoranda created as part of and in furtherance of the investigation.”); *Reitz v. City of Mt. Juliet*, 680 F. Supp. 2d 888, 892–93 (M.D. Tenn. 2010) (“But the defendant cannot use the...report as a sword by premising its *Faragher-Ellerth* defense on the report, then later shield discovery of documents underlying the report by asserting privilege or work-product protection.”); *Musa-Muaremi v. Florists' Transworld Delivery, Inc.*, 270 F.R.D. 312, 317–18 (N.D. Ill. 2010) (“Even assuming, *arguendo*, that the documents are attorney-client privileged or protected work product, any such protection for these particular documents was waived by [the defendant's] assertion of its *Faragher/Ellerth* defense.”); *E.E.O.C. v. Outback Steakhouse of Fla., Inc.*, 251 F.R.D. 603, 611 (D. Colo. 2008) (“Courts have interpreted an assertion of the *Faragher/ Ellerth* affirmative defense as waiving the protection of the work product doctrine and attorney-client privilege in relation to investigations and remedial efforts in response to employee complaints of discrimination because doing so brings the employer's investigations into issue.”); *Walker v. Cty. of Contra Costa*, 227 F.R.D. 529, 535

(N.D. Cal. 2005) (“If Defendants assert as an affirmative defense the adequacy of their pre-litigation investigation into [the plaintiffs] claims of discrimination, then they waive the attorney-client privilege and the work product doctrine with respect to documents reflecting that investigation. Where a party puts the adequacy of its pre-litigation investigation at issue by asserting the investigation as a defense, the party must turn over documents related to that investigation, even if they would ordinarily be privileged.”).

54 R. Doc. 55.

55 R. Doc. 53.

56 R. Doc. 34.

57 R. Doc. 57.

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End of Document

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TAB

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**LITCHFIELD  
CAVO**  
ATTORNEYS AT LAW LLP

"Did she really just say that?"  
Professionalism in the Era of Oversharing

**ERIN F. LORIO**  
**ALLYSON C. BYRD**  
Mandeville, LA  
985.869.8700

10/11/2019 [www.LitchfieldCavo.com](http://www.LitchfieldCavo.com) 1

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One Hour – Three Questions: **LITCHFIELD  
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1. Why are we here? (The road to mandatory **Professionalism** CLE)
2. What exactly *is* **Professionalism**?
3. What role does **Professionalism** play in this era of oversharing and "say anything"?

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Why Are We Here? **LITCHFIELD  
CAVO**

**What Prompted Mandatory **Professionalism** CLE?**

- Actual or perceived decline in professionalism;
- Erosion of the once-prevailing view of the practice of law as a "calling";
- Excesses/abuses of the adversarial process, increased costs to litigants & public; and
- Shifts in economic realities which converted law practice to a business.

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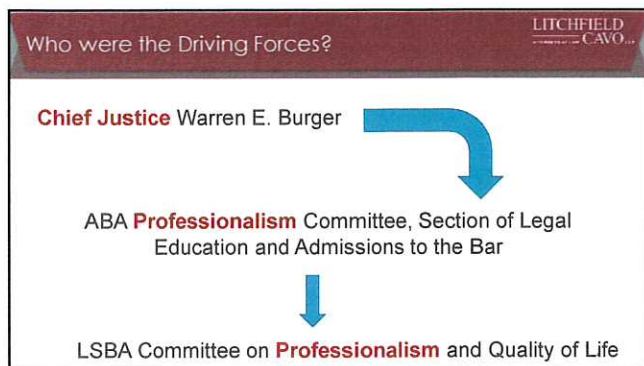
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Conclusions of the Reports LITCHFIELD  
CAVO

- ❖ Adopted formal definition of "**Professional Lawyer**": an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good.
- ❖ Increasing professionalism would require:
  1. Significant changes should be made in the way professionalism ideals are taught; and
  2. Structural changes in the way law firms operate and legal services are delivered.
- ❖ Designated professionalism CLE hours.

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Louisiana's Response to **Federal** Professionalism LITCHFIELD  
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- **1910**: ABA adopts Canon of Ethics
- **1969**: ABA adopts the Model Code of Professional Responsibility
- **1970**: Louisiana adopts the Model Code of Professional Responsibility
- **1983**: ABA adopts the Model Rules
- **1988**: Louisiana adopts the Model Rules
- **1992 - 1996**: ABA publishes Reports on importance of continued education
- **1997**: Louisiana requires every Louisiana lawyer to attend 1 hour of Professionalism CLE annually

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What Exactly Is "Professionalism"?
LITCHFIELD  
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**Professionalism** concerns the knowledge and skill of the law faithfully employed in the service of client and public good, and entails what is more broadly expected of attorneys.

*R. 3(C) of the Louisiana Supreme Court Rules for Mandatory CLE*

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What Exactly Is "Professionalism"?
LITCHFIELD  
CAVO

**Professionalism** refers to those goals, values, and attitudes which exemplify the nobler aspects of the practice of law and that enhance the public image of lawyers and the legal profession.

*✧ Daicoff, Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism, Vol. 46, No. 5 The American University Law Review 1337 (June 1997)*

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What Exactly Is "Professionalism"?
LITCHFIELD  
CAVO

**Professionalism:** an approach to the practice of law that minimizes conflict which is unnecessary for the effective representation of clients and maximizes the quality of service that the judicial system is able to provide.

*✧ W. Ray Persons, August 2007 issue of The Atlanta Lawyer.*

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What Exactly Is "Professionalism"?

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— CAVO —

**Professionalism** → What is **Expected**

**Ethics** → What is **Required**

*R. 3(C) of the Louisiana Supreme Court Rules for Mandatory CLE*

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What Exactly Is "Professionalism"?

LITCHFIELD  
— CAVO —

➤ **Professionalism** in the affirmative is:

- How we behave;
- How we treat each other, our clients, prospective clients, the court, and the public;
- In the context of the performing the extraordinary work that we are uniquely qualified and educated to do.

➤ At its core, Professionalism is **CIVILITY**.

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What Exactly Is "Professionalism"?

LITCHFIELD  
— CAVO —

**Civility**

- ❖ Originally used to describe being a good citizen for the benefit of one's community
- ❖ Civility is *not*:
  - ❖ Agreement
  - ❖ Liking someone
  - ❖ The absence of criticism
  - ❖ Politeness or manners alone
- ❖ Civility is a behavioral code of decency that characterizes a civilized society.

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## What Exactly Is "Professionalism"?

LITCHFIELD  
— JOURNAL OF THE — CAVO —

**The "Civility Imperative":** implied professional standard that guides the lawyer in fulfilling her roles as client representative, officer of the legal system and citizen

- Appears first in law school and bar admissions:
  - Moral Character and Fitness Statements
  - MPRE
- Codified in our practices:
  - Lawyer's Oath
  - Code of Professionalism
  - Louisiana Rules of Professional Conduct
  - Model Rules of Professional Conduct

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## What Exactly Is "Professionalism"?

LITCHFIELD  
— JOURNAL OF THE — CAVO —

- What happens to the civility imperative as our practices evolve?
- Can civility and effective advocacy co-exist?
- What social factors impact the lack of civility in the legal profession?
- How does the lack of civility in society at large impact our civility imperative?

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## What Exactly Is "Professionalism"?

LITCHFIELD  
— JOURNAL OF THE — CAVO —**Why is incivility becoming the norm?**

- Over-the-top portrayals of lawyers on TV and in films
- Inexperienced lawyers and a lack of mentoring
- Fuzzy line between aggressive advocacy and rudeness
- Broad platform provided by today's technology, coupled with the ability to act anonymously online
- Current, fractious public discourse

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### Consequences of Incivility

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- More difficult and time-consuming to resolve client matters
- Increases litigation costs
- Unprofessional behavior by opposing counsel linked to job dissatisfaction
- Can result in attorney discipline
- Undermines public confidence in the judicial system

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### Benefits of Civility

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- Higher personal and professional outcomes
- Reduces needless stress
- Earns favor from bench and jury box
- Tied to positive professional reputations

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### Professionalism in an era of oversharing?

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❖ 2018 - LSBA Committee amended the **Louisiana Rules of Professional Conduct** and the **Code of Professionalism**

❖ Amendments *appear* to address broader loss of civility:

- I will conduct myself with honesty, dignity, civility, courtesy and fairness and will not engage in any demeaning or derogatory actions or commentary toward others.
- I will use technology, including social media, responsibly. My words and actions, no matter how conveyed, should reflect the professionalism expected of me as a lawyer.
- I will stay informed about changes in the law, communication, and technology which affect the practice of law.

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## Professionalism in the "say anything" era

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## Hypothetical Number 1

**Q:** Counsel receives an email from Opposing Counsel that includes a settlement demand which expires in 3 days and then threatens motions to compel and for sanctions - should the settlement offer be declined - for discovery deficiencies not previously identified by Opposing Counsel.

**A:** LRPC 3.4

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## Professionalism in the 'say anything' era

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## Hypothetical Number 2

**Q:** Nancy is a young mergers and acquisition associate with a New Orleans-based M&A firm. Nancy used check-in and location-sharing features on her social media accounts to document her "quick work trip" to Chicago to finalize due diligence on an imminent acquisition. She even added a video of herself in front of her client's Chicago skyscraper to her Snapchat.

**A:** LRPC 1.6

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## Professionalism in the 'say anything' era

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## Hypothetical Number 3

**Q:** Outside Counsel is retained to represent Corporate Client in a lawsuit filed by a former employee. Outside Counsel begins the case with Opposing Counsel on a cordial basis. Early in the proceedings, however, Corporate Client tells Outside Counsel not to extend any courtesies or do anything for Opposing Counsel on any issues - large or small, material or immaterial - other than what is absolutely necessary.

**A:** LRPC 1.2, 1.3, 1.4, 1.6, 1.16, 3.4

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Professionalism in the 'say anything' era

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Hypothetical Number 4

**Q:** Lawyer receives an overbroad demand from Opposing Counsel for discovery to which Lawyer believes Opposing Counsel is probably not entitled. Lawyer takes an extremely aggressive position in response. Specifically, Lawyer is inclined to force Opposing Counsel to file a motion to compel, in part to "educate the judge" about what lousy human beings Opposing Counsel and his client truly are.

**A:** LRPC 1.2, 3.2, 3.4, 8.4

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*"Every lawyer at least once in every case feels himself crossing a line that he doesn't really mean to cross. It happens; and if you cross it enough times, it disappears forever. And then you're nothing but another lawyer joke. Just another shark in the dirty water."*

Rudy Baylor (Matt Damon), *The Rainmaker* (1997)

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Questions?

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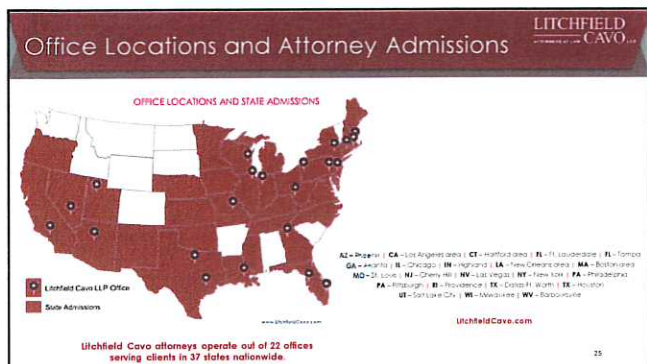
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# **Louisiana Rules of Professional Conduct**

**With amendments through November 27, 2018**

Published by the  
Louisiana Attorney Disciplinary Board  
2800 Veterans Memorial Boulevard  
Suite 310  
Metairie, Louisiana 70002  
(504) 834-1488 or (800) 489-8411

## **Client-Lawyer Relationship**

### **Rule 1.1. Competence**

- (a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- (b) A lawyer is required to comply with the minimum requirements of continuing legal education as prescribed by Louisiana Supreme Court rule.
- (c) A lawyer is required to comply with all of the requirements of the Supreme Court's rules regarding annual registration, including payment of Bar dues, payment of the disciplinary assessment, timely notification of changes of address, and proper disclosure of trust account information or any changes therein.

### **Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer**

- (a) Subject to the provisions of Rule 1.16 and to paragraphs (c) and (d) of this Rule, a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, religious, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

### **Rule 1.3. Diligence**

A lawyer shall act with reasonable diligence and promptness in representing a client.

### **Rule 1.4. Communication**

- (a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
  - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  - (3) keep the client reasonably informed about the status of the matter;
  - (4) promptly comply with reasonable requests for information; and
  - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.
- (c) A lawyer who provides any form of financial assistance to a client during the course of a representation shall, prior to providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made, including but not limited to, repayment obligations, the imposition and rate of interest or other charges, and the scope and limitations imposed upon lawyers providing financial assistance as set forth in Rule 1.8(e).

**Rule 1.5. Fees**

- (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
  - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
  - (3) the fee customarily charged in the locality for similar legal services;
  - (4) the amount involved and the results obtained;
  - (5) the time limitations imposed by the client or by the circumstances;
  - (6) the nature and length of the professional relationship with the client;



- (1) When the client pays the lawyer a fee to retain the lawyer's general availability to the client and the fee is not related to a particular representation, the funds become the property of the lawyer when paid and may be placed in the lawyer's operating account.
- (2) When the client pays the lawyer all or part of a fixed fee or of a minimum fee for particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid, subject to the provisions of Rule 1.5(f)(5). Such funds need not be placed in the lawyer's trust account, but may be placed in the lawyer's operating account.
- (3) When the client pays the lawyer an advance deposit against fees which are to accrue in the future on an hourly or other agreed basis, the funds remain the property of the client and must be placed in the lawyer's trust account. The lawyer may transfer these funds as fees are earned from the trust account to the operating account, without further authorization from the client for each transfer, but must render a periodic accounting for these funds as is reasonable under the circumstances.
- (4) When the client pays the lawyer an advance deposit to be used for costs and expenses, the funds remain the property of the client and must be placed in the lawyer's trust account. The lawyer may expend these funds as costs and expenses accrue, without further authorization from the client for each expenditure, but must render a periodic accounting for these funds as is reasonable under the circumstances.
- (5) When the client pays the lawyer a fixed fee, a minimum fee or a fee drawn from an advanced deposit, and a fee dispute arises between the lawyer and the client, either during the course of the representation or at the termination of the representation, the lawyer shall immediately refund to the client the unearned portion of such fee, if any. If the lawyer and the client disagree on the unearned portion of such fee, the lawyer shall immediately refund to the client the amount, if any, that they agree has not been earned, and the lawyer shall deposit into a trust account an amount representing the portion reasonably in dispute. The lawyer shall hold such disputed funds in trust until the dispute is resolved, but the lawyer shall not do so to coerce the client into accepting the lawyer's contentions. As to any fee dispute, the lawyer should suggest a means for prompt resolution such as mediation or arbitration, including arbitration with the Louisiana State Bar Association Fee Dispute Program.

**Rule 1.6. Confidentiality of Information**

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
- (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
  - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.
  - (4) to secure legal advice about the lawyer's compliance with these Rules;
  - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - (6) to comply with other law or a court order; or
  - (7) to detect and resolve conflicts of interests between lawyers in different firms, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

**Rule 1.7. Conflict of Interest: Current Clients**

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

**Rule 1.8. Conflict of Interest: Current Clients: Specific Rules**

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
  - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
  - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
  - (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
- (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift, is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, or grandparent.
- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except as follows.

- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

**Rule 3.4. Fairness to Opposing Party and Counsel**

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
  - (1) the person is a relative or an employee or other agent of a client, and
  - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

**Rule 3.5. Impartiality and Decorum of the Tribunal**

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;



**Rule 6.4. Law Reform Activities Affecting Client Interests**

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

**Rule 6.5. Nonprofit and Court-Annexed Limited Legal Services Programs**

- (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
  - (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
  - (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.
- (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

**INFORMATION ABOUT LEGAL SERVICES**

**Rule 7.1. General**

- (a) **Permissible Forms of Advertising.** Subject to all the requirements set forth in these Rules, including the filing requirements of Rule 7.7, a lawyer may advertise services through public media, including but not limited to: print media, such as a telephone directory, legal directory, newspaper or other periodical; outdoor advertising, such as billboards and other signs; radio, television, and computer-accessed communications; recorded messages the public may access by dialing a telephone number; and written communication in accordance with Rule 7.4.
- (b) **Advertisements Not Disseminated in Louisiana.** These rules shall not apply to any advertisement broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted if such advertisement complies with the rules governing lawyer advertising in that jurisdiction and is not intended for broadcast or dissemination within the state of Louisiana.
- (c) **Communications for Non-Profit Organizations.** Publications, educational materials, websites and other communications by lawyers on behalf of non-profit organizations that are not motivated by pecuniary gain are not advertisements or unsolicited written communications within the meaning of these Rules.

**Rule 7.10. Firm Names and Letterhead**

- (a) **False, Misleading, or Deceptive.** A lawyer or law firm shall not use a firm name, logo, letterhead, professional designation, trade name or service mark that violates the provisions of these Rules.
- (b) **Trade Names.** A lawyer or law firm shall not practice under a trade name that implies a connection with a government agency, public or charitable services organization or other professional association, that implies that the firm is something other than a private law firm, or that is otherwise in violation of subdivision (c)(1) of Rule 7.2.
- (c) **Advertising Under Trade Name.** A lawyer shall not advertise under a trade or fictitious name, except that a lawyer who actually practices under a trade name as authorized by subdivision (b) may use that name in advertisements. A lawyer who advertises under a trade or fictitious name shall be in violation of this Rule unless the same name is the law firm name that appears on the lawyer's letterhead, business cards, office sign, and fee contracts, and appears with the lawyer's signature on pleadings and other legal documents.
- (d) **Law Firm with Offices in More Than One Jurisdiction.** A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in any jurisdiction where an office is located.
- (e) **Name of Public Officer or Former Member in Firm Name.** The name of a lawyer holding a public office or formerly associated with a firm shall not be used in the name of a law firm, on its letterhead, or in any communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
- (f) **Partnerships and Organizational Business Entities.** Lawyers may state or imply that they practice in a partnership or other organizational business entity only when that is the fact.
- (g) **Deceased or Retired Members of Law Firm.** If otherwise lawful and permitted under these Rules, a law firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the law firm, or of a predecessor firm in a continuing line of succession.

**MAINTAINING THE INTEGRITY OF THE PROFESSION**

**Rule 8.1. Bar Admission and Disciplinary Matters**

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (a) Knowingly make a false statement of material fact;

- (b) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6; or
- (c) Fail to cooperate with the Office of Disciplinary Counsel in its investigation of any matter before it except for an openly expressed claim of a constitutional privilege.

**Rule 8.2. Judicial and Legal Officials**

- (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
- (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

**Rule 8.3. Reporting Professional Misconduct**

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Office of Disciplinary Counsel.
- (b) A lawyer who knows that a judge has committed a violation of the applicable rules of judicial conduct that raises a question as to the judge's honesty, trustworthiness or fitness for office shall inform the Judiciary Commission. Complaints concerning the conduct of federal judges shall be filed with the appropriate federal authorities in accordance with federal laws and rules governing federal judicial conduct and disability.
- (c) This rule does not require the disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program or while serving as a member of the Ethics Advisory Service Committee.

**Rule 8.4. Misconduct**

It is professional misconduct for a lawyer to:

- (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) Commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) Engage in conduct that is prejudicial to the administration of justice;

- (e) State or imply an ability to influence improperly a judge, judicial officer, governmental agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law; or
- (g) Threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

**Rule 8.5. Disciplinary Authority; Choice of Law**

- (a) **Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
- (b) **Choice of Law.** In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
  - (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
  - (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.



TAB

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**Erin F. Lorio, Counsel**

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Erin specializes in commercial, transaction and civil defense litigation. She has defended national and international corporations, small business owners and insurance carriers throughout Louisiana in state and federal courts. Erin also has extensive experience advising business startups, drafting operating and partnership agreements, and employment and commercial contracts. She also counsels individuals on wills and estate planning matters.

**EDUCATION**

Loyola New Orleans College of Law, JD, 1999

Seton Hall University, BA, Criminal Justice, 1994

**ADMISSIONS**

Louisiana

**US COURT ADMISSIONS**

Eastern District of Louisiana

Middle District of Louisiana

Western District of Louisiana

**US COURT OF APPEALS**

Fifth Circuit

**PRACTICES**

Business Litigation

General Liability

Real Estate and Title Claims

**Allyson C. Byrd, Attorney**

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Ally practices in the areas of premises liability, employment law, workers' compensation, products liability, commercial litigation and insurance defense in Louisiana and Mississippi state and federal courts.

Ally has successfully argued multiple motions for summary judgment in premises liability and for breaches of contract. Furthermore, she obtained favorable rulings from various Louisiana workers' compensation courts in defense of employers and third-party administrators.

**EDUCATION**

Paul M. Hebert Law Center, JD, 2014, *cum laude*

Louisiana State University, BS, Psychology, 2011

**ADMISSIONS**

Louisiana

Mississippi

**US COURT ADMISSIONS**

Eastern District of Louisiana

Western District of Louisiana

**PRACTICES**

Business Litigation

Insurance Coverage

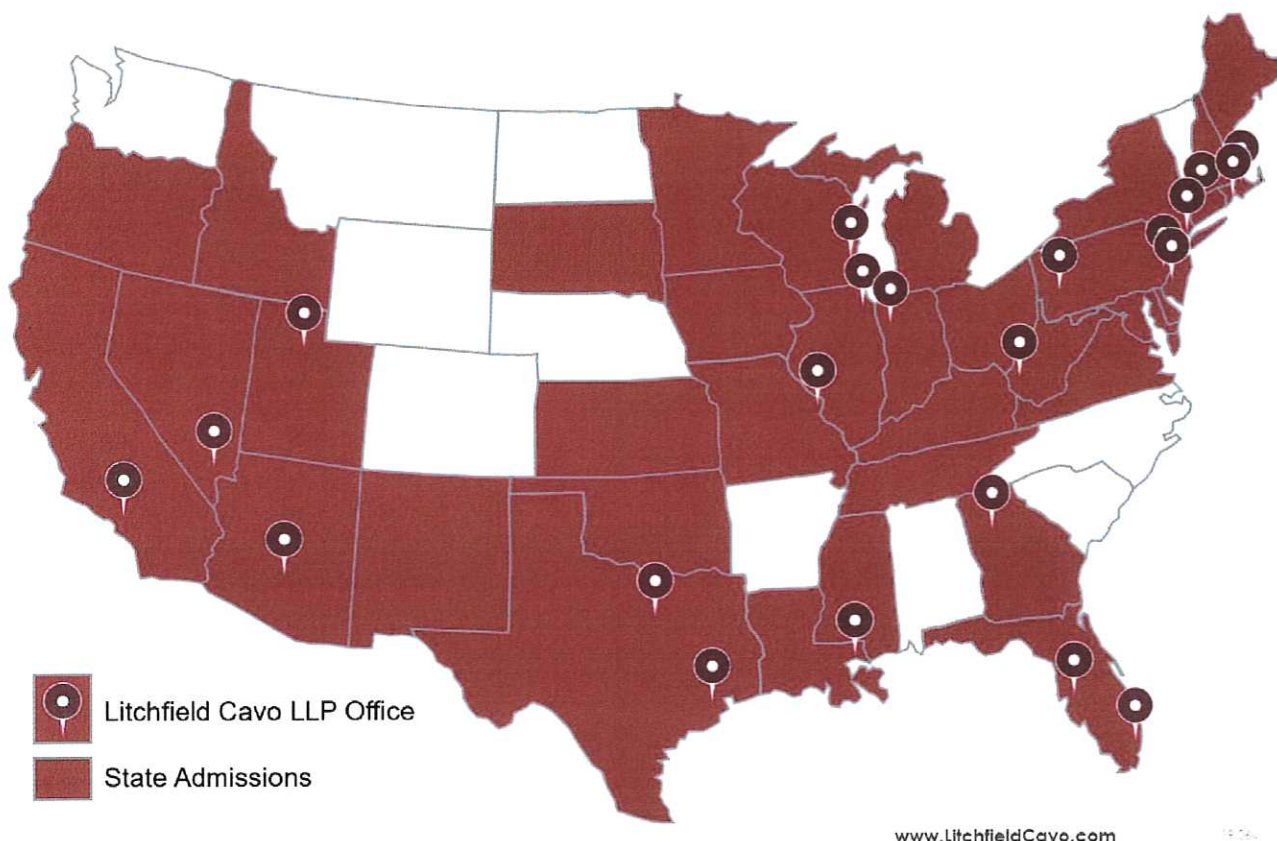
Products Liability

Workers' Compensation

TAB

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## Office Locations and State Admissions



**Litchfield Cavo attorneys operate out of 22 offices  
serving clients in more than 35 states nationwide.**

**AZ** – Phoenix | **CA** – Los Angeles area | **CT** – Hartford area | **FL** – Ft. Lauderdale  
**FL** – Tampa | **GA** – Atlanta | **IL** – Chicago | **IN** – Highland | **LA** – New Orleans area  
**MA** – Boston area | **MO** – St. Louis | **NJ** – Cherry Hill | **NV** – Las Vegas | **NY** – New York  
**PA** – Philadelphia | **PA** – Pittsburgh | **RI** – Providence | **TX** – Dallas–Ft. Worth | **TX** – Houston  
**UT** – Salt Lake City | **WI** – Milwaukee | **WV** – Barboursville