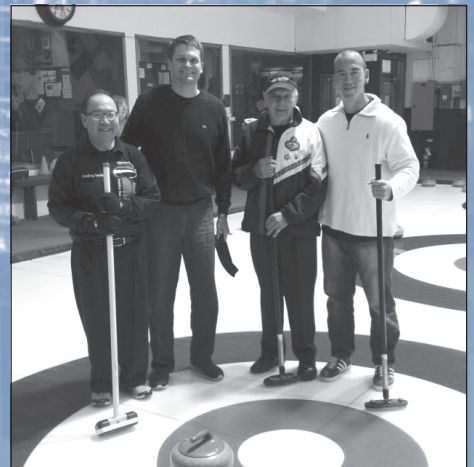


JOURNAL

Newsletter of the Fairfax Bar Association www.fairfaxbar.org December 2013/January 2014

MONTRÉAL MEMORIES 2013 FBA Convention, Montréal, Canada



President's Column

By Edward L. Weiner, Esq.

So Near, Yet So Far

In October, 51 members of the Fairfax Bar arrived in Montreal, Quebec, via air, land, and St. Lawrence Seaway—destination Le Westin Montréal. For some, it was a first trip to La Belle Province; for others more like a homecoming. Regardless, Montréalers greeted us all like old friends.

The foliage was gorgeous; the weather was unseasonably warm during the day with plenty of sunshine. The evenings were nippy.

The CLEs were well attended and received. We were fortunate to gain from the insights of five members of the Fairfax Bench: Hon. Leslie Alden (Ret.), Hon. Penny Azcarate, Hon. Glenn Clayton, Hon. Lisa Mayne, and Hon. John Tran.

The Comparative Law Symposium featured five leading Quebec attorneys, including a member of the Quebec National Assembly, as well as the Chief Justice of the Court of Quebec. The presentations and Q&A session were fast-paced and very informative. The session highlighted the remarkable similarities and substantive differences in:

- the laws and legislative process of the US and Canada, Virginia and Quebec;
- the way that lawyers are trained and licensed; and
- how judges come to the bench (elected).

We were fortunate to have the speakers continue their conversations over lunch afterward. We were impressed to learn that court is conducted simultaneously in both French and English, with judges and attorneys moving back and forth between languages, sometimes in the same paragraph. Our guest panelists made it clear that they sincerely appreciated our interest in their city and their legal system.

Montréal, which was founded by the French explorer de Maisonneuve in 1642, is a beautiful and cosmopolitan city, which prides itself in its French roots. Montréal's many ethnic neighborhoods blend their food, music, and art into a vibrant international tapestry. Hockey, however, is above all, as is evidenced by its prominent appearance on Canadian currency.

Some of our members were lucky enough to enter the hallowed halls of the Bell Centre to see the Canadiens trounce the Philadelphia Flyers (4-1). Simultaneously and nearby, the Fairfax Bar Association International Curling Team (FBAICT) made its inaugural debut in the also-hallowed halls of The Royal Montreal Curling Club, founded in 1807. After some preliminaries with curling professionals, the FBAICT took to "the sheets" with stones and brooms. Under the splendid leadership of co-captains Judges Tran and Clayton, your curling team performed brilliantly! We are certain to be invited back within the next 200 years!

Le Westin, our homebase, is located in the financial district on the edge of Old Montréal. Only a few steps from our door were the Cathedral of Notre Dame, Montréal's Chinatown, and the spectacular St. Lawrence River/Seaway. We enjoyed an evening boat tour of the harbor of Old Montréal, passing the site of Expo '67, glimpsing the Olympic Park and into the modern port of Montréal.

I could continue on about the oven-smoked bagels, the Haunted Walk of Old Montréal, and the fabulous cafés, food, and jazz clubs, but here's a closing thought:

In reaching out to our nation's neighbor to the North, we glimpsed into Canada's diverse culture, gaining valuable insights into Canadian life and the practice of law.

Many thanks to all those who attended and helped make the FBA's 2013 Annual Convention. As Quebecers say, "Je me souviens / I will remember." ■



FAIRFAX BAR JOURNAL

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are inappropriate for the Journal.*

REPORT ON THE 2013 AMERICAN BAR ASSOCIATION ANNUAL MEETING

By Robert B. Walker, Esq., Fairfax Bar Association's Representative in the ABA House of Delegates

The 135th Annual Meeting of the American Bar Association (ABA) was held August 12-13, 2013, at the Moscone Convention Center West in San Francisco.

The House of Delegates (House) met on Monday, August 12, and Tuesday, August 13, 2013. Robert M. Carlson of Montana presided as Chair of the House.

The Hon. Eric H. Holder, Jr., Attorney General of the United States, addressed the House, which he thanked for its faithful service as stewards of the legal system. He stated how he appreciated ABA leadership on a range of issues, including gun violence prevention and human trafficking. Attorney General Holder focused on the need to reduce incarceration rates in America and announced new Department of Justice policies related to mandatory minimum sentences, the prosecution of certain drug-related offenders, creating best practices for alternative programs such as drug treatment and community service programs, and the early release of elderly inmates. Attorney General Holder called on the ABA to support these efforts going forward.

ABA President Laurel G. Bellows of Illinois introduced Hillary Rodham Clinton, former Secretary of State, as the recipient of this year's ABA Medal. Secretary Clinton stated how grateful she is to receive the award. She values the award so much because she knows the important work that the ABA does. She reflected on the work of the first Commission on Women in the Profession, which she chaired 25 years ago. Secretary Clinton stated that the ABA helped start the movement for gender equality in the legal profession and continues to be at the forefront today to ensure equal work for equal pay. She said the ABA is also leading the way to combat human trafficking, and she appreciates the critical work the ABA ROLI and the World Justice Project are doing to advance the rule of law.

ABA Treasurer Lucian Pera addressed the House. He reported that the ABA's finances are sound. He stated that there are financial challenges related to the future sustainability of the ABA's general operations finances, but overall the financial results are good, projected to end the year better than budget, and are generally positive.

Paula H. Holderman of Illinois moved Resolution 10D, supporting the establishment of access to justice commissions in all states and territories and urging ABA members to support efforts to create access to justice commissions and to promote access to justice. The resolution was approved.

Edward Haskins Jacobs of the Virgin Islands presented Report 11-1 amending §1.2 of the Constitution to include the following language as one of the purposes of the Association: "to defend the right to life of all innocent human beings, including all those conceived but not yet born." Stephen J. Curley of Connecticut, Chair of the Standing Committee on Constitution and Bylaws, reported the action of the standing committee. Beverly J. Quail of Colorado moved to postpone indefinitely consideration of the proposal. Robert L. Weinberg of the District of Columbia and Steven K. Hazen of California spoke in opposition to the motion to postpone indefinitely. The proposal was postponed indefinitely. This was the only controversial item and the controversy was over whether to defeat the motion or table it. The vote was so close that a physical count had to be taken.

ABA CONSTITUTION, BYLAWS, AND HOUSE RULES OF PROCEDURE

Thomas C. Grella of North Carolina moved Report 11-2, amending §6.2(a)(5), §6.7(h), and §10.1(a) of the Association's Constitution, and §30.5 of the Bylaws to change the name and status of the Law Practice Management Section to the Law Practice Division. Stephen J. Curley of Connecticut, Chair of the Standing Committee on Constitution and Bylaws, reported the action of the standing committee. The proposal was approved.

ATTORNEY-CLIENT PRIVILEGE

On behalf of the Tort Trial and Insurance Practice Section, Robert S. Peck of the District of Columbia moved Revised Resolution 103, adopting principles that should be applied in determining the availability of attorney-client privilege for law firm consultations with in-house counsel. The resolution was approved as revised.

COURTS/JUDGES

On behalf of the Ohio State Bar Association, William K. Weisenberg of Ohio moved Resolution 10C, urging legislative bodies and governmental agencies to adopt laws and policies that ensure full and adequate court funding and adopting the Principles for Judicial Administration, dated August 2013, as appropriate guidance for those states desiring to establish principles for judicial administration in their efforts to restructure court services and secure adequate court funding. The resolution was approved.

On behalf of the Standing Committee on Federal Judicial Improvements, Hon. Norma L. Shapiro of Pennsylvania moved Resolution 115, supporting enactment of comprehensive legislation to authorize needed permanent and temporary judgeships, focusing particularly on the federal districts with identified judicial emergencies so that affected courts may adjudicate all cases in a fair, just, and timely manner. The resolution was approved.

CRIMINAL JUSTICE

On behalf of the Criminal Justice Section, Neal R. Sonnett of Florida moved Revised Resolution 113A, urging governments to take legislative action to curtail the availability and effectiveness of the "gay panic" and "trans panic" defenses, which seek to partially or completely excuse crimes on the grounds that the victim's sexual orientation or gender identity is to blame for the defendant's violent reaction. The resolution was approved as revised.

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CURRENT TRENDS IN ALTERNATIVE DISPUTE RESOLUTION (ADR)

By Nancy Wiegers Greenwald, Esq., and Grant Moher, Esq., Co-Chairs, Alternative Dispute Resolution Section

"If the only tool you have is a hammer, you tend to see every problem as a nail."—Abraham Maslow, American psychologist (1908-1970)

Modern trends in ADR have created more effective and flexible tools for lawyers to use in helping their clients resolve disputes. From the reinvigorated focus on process efficiency in commercial arbitration, to the growth of collaborative dispute resolution in family law, to the emergence of targeted mediation (e.g., discovery mediation) and the development of online dispute resolution, alternative dispute resolution processes are more numerous, more flexible, and more useful than ever.

ADR gives attorneys the opportunity to consider with their clients what type of dispute resolution process is best suited to their clients' needs. Factors including the time and cost involved are only one part of the equation. Control over the process, confidentiality, and the flexibility to craft solutions that take into account a broader range of issues than those that can be resolved through litigation, are important considerations. Rule 1.2 of the Virginia Rules of Professional Conduct (Scope of Representation) requires that a lawyer "consult with the client as to the means by which ... [the objectives of representation] are to be pursued." Comment 1 instructs Virginia lawyers to "advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives." Particularly in a time when court resources are strained by budgetary realities, the use of ADR to resolve disputes is in the interests of clients, their attorneys, and the courts.

The focus of our section this year is to engage attorneys who are "consumers" of ADR services as well as those among us who are ADR practitioners in an exploration of best practices in ADR, and a discussion of expanding and enhancing the uses of ADR to help our clients resolve disputes in a way that promotes greater investment in, and control over, the dispute resolution process.

Please join our discussion. The Alternative Dispute Resolution Section meets on the second Wednesday of each month in the FBA conference room at 8:30 AM. This year we are beginning each meeting with a 20-30 minute educational program. Our October meeting featured Al Bonin from ShounBach with a presentation on ADR marketing. Our November meeting featured a presentation by the Hon. Robert W. Wooldridge, Jr. on the uses of a mediator's opening statement. Our 2014 CLE will focus on techniques for "getting to yes," how to break impasses and bring conflicts to a negotiated solution.

Here is a brief discussion of some current trends in ADR, including the reinvigoration of traditional approaches and emerging practices.

- **Arbitration** – There is a renewed emphasis on streamlining arbitration procedures. Organizations like the American Arbitration Association are updating their rules and encouraging their arbitrators to take a more active role in the management of the arbitration process, particularly with respect to curtailing discovery and motions practice, in order to reverse the trend of stretching arbitration into a more time consuming procedure.

- **Mediation** – The goal of mediation remains to assist the parties in crafting their own solution to a dispute. The modern mediator is also an active process manager, who works with the parties in setting the ground rules, clarifying the issues, facilitating the exchange of information, and helping the parties think creatively about ways to resolve their differences.

- **Collaborative Law** – This involves parties signing an agreement in advance of negotiations that neither of them will go to court. Each party engages the services of an attorney with specialized collaborative training, and the attorneys are then free to "collaborate" and work together to assist the parties in resolving their disputes. If either or both parties wish to terminate the process, neither attorney may represent the parties in future litigation. Collaborative law is most commonly found in divorce and other family law cases, but may be used in other situations as well. Other professionals may also be brought into the process, such as mental health practitioners who may facilitate agreements regarding children, neutral financial professionals who assist with gathering financial data and evaluating the financial issues, and child specialists, who bring the voice of the parties' children to the table.

- **Early Neutral Evaluation or Early Case Evaluation** – This is a process in which a lawyer with subject matter expertise acts as a Neutral Evaluator of the case. It provides a "reality check" for parties and their attorneys by providing an assessment of the merits by a neutral expert. The process can also streamline formal discovery by assisting with the informal exchange of key information, vetting pre-trial motions, and helping parties identify and clarify the central factual and legal issues in the dispute. Early Neutral Evaluation can lead to settlement or, if not, to a more efficient arbitration or litigation process.

- **Online Dispute Resolution (ODR)** – ODR refers to both a set of tools and an emerging branch of dispute resolution that uses technology to facilitate the resolution of disputes between parties. As a tool for resolving any dispute, ODR can reduce both costs and time through secure online document sharing, video-conferencing, and similar processes. Online companies like Amazon.com and PayPal have been employing their own online dispute resolution processes for a number of years. More recently, both private services and some courts have begun to develop online dispute resolution procedures for the resolution of small business and small claims disputes. A current survey is available on the website of the Internet Bar Organization (<http://www.internetbar.org/resources/online-dispute-resolution/>).

- **Dispute Systems Evaluation and Design** – Dispute Systems Evaluation and Design takes a more customized look at conflict management in context, for example, from developing more effective methods of resolving consumer disputes to developing comprehensive dispute resolution systems for complex, multi-party commercial transactions. The idea is to invest more time in the upfront design of a dispute resolution process appropriate to the nature of the relationship or subject matter, which can significantly reduce the time and money lost in resolving subsequent disputes as they arise. In the commercial arena, risk assessment and planning are important additional components.

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LEGISLATIVE COMMITTEE *Update*

By Aaron Christoff, Esq., and Chris Costa, Esq., Co-Chairs, Legislative Committee

The Legislative Committee meets to discuss, monitor, and promote legislation that may be of interest to FBA members. Most of these issues arise out of the Virginia General Assembly. The FBA has no lobbyist in Richmond, so a key function of the Legislative Committee is to monitor and report to the Board of Directors on important legislation. The Board then determines whether the FBA should advocate for or against a particular bill. If the FBA wants to advocate for or against a particular piece of legislation, the Committee members may begin to contact other FBA members, Delegates, and Senators to express our organization's view. As attorneys, we are often able to present unique arguments to elected officials on the possible consequences of a bill.

With the General Assembly going back into session on January 8, 2014, this time of year can be busy. The FBA focuses on legislation that affects the administration of justice and avoids more partisan issues such as taxes, transportation, or health care. By way of example, in 2013, the Legislative Committee provided advice and support to the FBA Board as the FBA sought funding in the Budget for local judgeships. This effort was in response to the General Assembly's decision to leave judgeships vacant after a judge had retired or had chosen not to seek reappointment. The FBA's effort resulted in the critical funding of two judgeships, one in the Circuit Court and the other in the General District Court. Funding for the Judiciary is expected to remain an issue in 2014 after the Virginia Supreme Court releases the Weighted Caseload Study, which is being conducted by the National Center for State Courts and is due to the General Assembly on November 15, 2013. See *2012 Va. Acts c. 601*.

You can access all of the bills online as they are introduced in Richmond and follow their journey through the legislative process at www.leg1.state.va.us and click on "Bills & Resolutions." As of the date when this article was written, the General Assembly's website has not yet posted the Bills & Resolutions for the 2014 Session. If there are any bills that you believe merit attention, please contact the FBA or the Legislative Committee's Co-Chairs at achristoff@nugentchristofflaw.com and christopher.costa@fairfaxcounty.gov. ■

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Hon. J. Martin Bass (Ret.)

Retired Judge

Fifteenth Judicial Circuit of Virginia

After eighteen years of distinguished judicial service, J. Martin Bass has recently retired. Judge Bass served the Fifteenth Judicial Circuit with distinction for eight years, including two years as Chief Judge. Prior to that appointment, Judge Bass served in the Juvenile and Domestic District Court of Stafford County for ten years, including seven years as Chief Judge. While on the Juvenile Court bench, he was a Member of the National Council of Juvenile and Family Court Judges. Judge Bass also served on the Executive Committees of the Judicial Conference of Virginia and the Judicial Conference of Virginia for District Courts. Prior to his judicial service, he enjoyed a successful career in general practice in Fredericksburg. Judge Bass now brings this distinguished record of accomplishment to The McCammon Group to serve the mediation, arbitration, judge pro tempore, and special master needs of lawyers and litigants throughout the Commonwealth and beyond.



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10 Security Questions Managing Partners Need to Ask Their IT Directors

By Sharon D. Nelson, Esq. and John W. Simek

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Too often, law firm managing partners are content to let their IT departments operate on cruise control—until a crisis strikes. There are so many questions that they should be asking that it was hard to winnow our list down to 10.

1. How do we ensure that we are installing all critical updates and patches for our software and hardware? Believe it or not, this is the number one reason for data breaches—the failure to patch. There should be a reporting mechanism so that you receive weekly reports of all updates made—you don't have to read it, but at least there will be an audit trail—and making the report will constantly remind your IT director to be vigilant.
2. How often do we require passwords to be changed and what are our rules for password strength? Today, sadly, the answer should be every 30 days (no repeats), 12 characters, using upper and lower case, numbers, and special characters.
3. How are we preparing to move beyond passwords? Passwords will be obsolete in the near future. Google is already moving to two factor authentication and has announced that it will move away from “passwords only” in the future. Biometrics is one option, but we prefer two factor authentication using some kind of token (something you physically have) in addition to a password (which now doesn't have to be as complicated).
4. What is our process for securing data when we terminate employees? There should be a checklist of items to go through, including the return of all data, killing IDs and the ability to connect remotely, retrieving all firm cell phones, laptops, prox cards, keys, etc. If they have a personal code to get in the office, terminate the code. The list is long.
5. Do we change the defaults on all our equipment? This is the second most common reason for breaches – defaults are unchanged on routers, etc. and even the script kiddies (never mind the true cybercriminals) know all the defaults. There should be reports verifying this as well.
6. What is our incident response plan? If you suffer a breach, is there a team in place? Who needs to be notified? Do you have a digital forensics company that you can call to investigate and remediate a breach? Do you have an attorney who is a data breach specialist who can assist in helping you comply with any federal or state notification laws and regulations? Another long list here.
7. Do we have redundant hot and cold backups and a plan for business continuity in the event of an emergency?
8. Do we have a Bring Your Own Device (BYOD) policy? If so, have we recently evaluated the risks of having personal devices connected to our network?
9. Are we storing data in the cloud? If so, make sure that a lawyer has actually read the Terms of Service and your IT Director has adequately investigated the cloud for physical and data security – including whether the provider will advise you of any law enforcement requests for your data in time for you to file a Motion to Quash. No notice will be given if the requests are under the Patriot Act, but most of them are not.
10. How are we protecting mobile data? Do all laptops have full disk encryption? Do we have adequate remote access policies? When attorneys connect remotely, is the data encrypted in transit?

There could be 100 questions – easily – but start with these 10 to get a handle on how well you are securing your law firm data! ■

The authors are the President and Vice President of Sensei Enterprises, Inc., a legal technology, information security and digital forensics firm based in Fairfax, VA. 703-359-0700 (phone) www.senseient.com.

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November 2013

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Todd Stephen Rouse
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UPCOMING CLEs/EVENTS

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NOVEMBER 21, 2013 TECHNOLOGY IN FAIRFAX COURT- ROOMS: COME KICK OUR TIRES! CLE 5:00 - 7:00 PM

Fairfax County Courthouse
Courtroom 5J
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\$130 Attorney Non-Members

DECEMBER 5, 2013 THE NORTHERN VIRGINIA PRO BONO LAW CENTER PRESENTS "THE LAWYER'S GUIDE TO LANDLORD AND TENANT LAW CLE 4:00 - 7:00 PM

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intake sessions corresponding cases in conjunc-
tion with Legal Services of Northern Virginia

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Country Club of Fairfax
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\$40 FBA Members
\$45 Non-FBA Members

DECEMBER 12, 2013 PARALEGAL SECTION HOLIDAY PARTY 6:00 - 9:00 PM

Olive Garden (private dining room)
12980 Fair Lakes Parkway
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Includes dinner with salad and bread sticks,
soft drinks, gratuity, and dessert, courtesy of
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Questions about the party?
Contact Tina Fewell at
tfewell@curranmoher.com or 571-328-5020; or
Jana Schrer at jschrer@fairfaxbar.org or
703-246-2084 to register.

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CURRENT TRENDS IN ALTERNATIVE DISPUTE RESOLUTION (ADR)

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• **Court Connected ADR** – The Fairfax County courts have several examples of court affiliated ADR. One example is the very successful Conciliation Program run by the Fairfax Law Foundation, in which conciliators, who are experienced litigators with expertise in civil litigation and family law, volunteer their services to help resolve motions and other preliminary disputes without charge to the parties in the case. Another example is the voluntary mediation program in small claims court. ■

REPORT ON THE 2013 ABA ANNUAL MEETING

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On behalf of the Criminal Justice Section, Stephen A. Saltzburg of the District of Columbia moved Report 113B, urging governments to enact legislation relating to youth in the juvenile justice system with co-occurring mental health and substance abuse disorders. The resolution was approved.

On behalf of the Criminal Justice Section, Neal R. Sonnett of Florida moved Revised Resolution 113E, opposing plea or sentencing agreements that waive a criminal defendant's post-conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence unless based upon past conduct that is specifically identified in the plea or sentencing agreement or transcript of the proceedings. The resolution was approved as revised.

CYBERSECURITY

On behalf of the Cybersecurity Legal Task Force, Stephen A. Saltzburg of the District of Columbia moved Revised Resolution 118, condemning unauthorized and/or illegal governmental, organizational, and individual intrusions into the computer systems and networks of lawyers and law firms and urging governmental bodies to examine and, if necessary, amend or supplement existing laws to promote deterrence and provide appropriate sanctions. The resolution was approved as revised.

VOTING RIGHTS

On behalf of the Bar Association of San Francisco, Mark I. Schickman of California moved Resolution 10E, urging Congress to act expeditiously to preserve and protect voting rights by legislating a coverage formula setting forth the criteria by which jurisdictions shall or shall not be subject to Section 5 preclearance, and/or by enacting other remedial amendments to the Voting Rights Act of 1965, in response to *Shelby County v. Holder*. The resolution was approved.

On behalf of the Standing Committee on Election Law, Benjamin E. Griffith of Mississippi moved Resolution 110, urging states, localities, and territories to analyze their election systems and recent experiences of election delays, if any, in light of available data and scholarship, and encouraging the enactment of legislation or administrative rules to address the causes and potential remedies for election delays. The resolution was approved. ■

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4122 Leonard Drive at Judicial Drive

Great location across from FFX Courthouse! 3-story 3,300 SF TH-office condo. 8 pvt offices, lg conf rm, recep & 2 admin areas, 2 BA, kit/breakrm, copy/file rm, storage space. Ext signage & free parking.

JUST REDUCED! FOR SALE - \$795,000 (\$241 PSF)

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10621 Jones Street (at Judicial Dr) Ste 201 A&B:

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10615 Judicial Dr, Unit 303 - Judicial Ct - 1,003 SF upper level w/ cathedral ceilings, 2 pvt offices, lg conf rm, recep/open work area, breakrm or 3rd sm office & BA. New paint; owner will replace carpet in tenant's choice of color w/2-yr min lease.

\$1,650/mo + elec, cln & pass thru of inc, if any

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10605 Judicial Dr, A2 (Lawyers Row) - 2,318 SF 2-story TH-office condo w/recep, open work area, 7 pvt offices, conf rm, kit, storage closets & 2 BA. Furniture & copier convey. Ext signage & parking avail. **\$3,477/mo (\$18 PSF) + elec & cln**

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