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THE HILLSBOROUGH COUNTY BAR ASSOCIATION
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This March, the PGA Tour will again visit the famed Copperhead Course in Palm Harbor for the Valspar Championship. Featured on the cover is 2015 Valspar tournament champion Jordan Spieth hitting an approach shot.

Photo credit: Al Messerschmidt.

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(ISSN 1553-4456) THE HILLSBOROUGH COUNTY BAR ASSOCIATION *Lawyer* is published six times per year by the Hillsborough County Bar Association. Editorial, advertising, subscription, and circulation offices: 1610 N. Tampa St., Tampa, FL 33602. Changes of address must reach the *Lawyer* office six weeks in advance of the next issue date. Give both old and new address. POSTMASTER: Send change of address notices to Hillsborough County Bar Association, 1610 N. Tampa St., Tampa, FL 33602. One copy of each *Lawyer* is sent free to members of the Hillsborough County Bar Association. Additional subscriptions to members or firm libraries are \$50. Annual subscriptions to others, \$100. Single copy price, \$15.00. (All plus tax.) The *Lawyer* is published as part of the HCBA's commitment to provide membership with information relating to issues and concerns of the legal community. Opinions and positions expressed in the articles are those of the authors and may not necessarily reflect those of the HCBA. Submissions of feature articles, reviews, and opinion pieces on topics of general interest to the readership of the *Lawyer* are encouraged and will be considered for publication.



Working Toward Justice for All

Less than full justice is imperfect justice.

“And justice for all.” Unfortunately for many Floridians, that guarantee — enshrined in our Pledge of Allegiance and the Florida Constitution — is an empty promise. Although the Florida Constitution guarantees that the “courts shall be open to every person for redress of any injury,” an October 1, 2015, interim report by the Florida Commission on Access to Civil Justice found that a “large category of moderate income Floridians are effectively excluded economically from access to justice because they cannot afford to hire a lawyer and they do not qualify for legal aid.” Presently, Florida legal services attorneys are only equipped to serve, at most, 20 percent of the needs of indigent civil litigants. As the commission rightly acknowledges, the consequences of depriving low- and moderate-income Floridians access to justice can be dire:

[T]he inability to obtain legal assistance often threatens their health and safety, undermines their family structure, and puts at risk their housing and employment.

Recently, Bankruptcy Judge Cathy McEwen became the first recipient of the Chief Justice’s Distinguished Federal Judicial Service Award for her efforts to solve this disturbing problem. The award, presented to Judge McEwen by Florida Supreme Court Chief Justice Jorge Labarga, “recognizes an active or retired federal judge for outstanding and sustained service to the public, especially as it relates to the support of pro bono legal services.” Anyone who knows Judge McEwen knows her commitment to pro bono services.



Judge McEwen’s pro bono efforts, as Chief Justice Labarga explained during the award ceremony, date back to early in her career, when she was an active participant in the Bay Area Volunteer Lawyers Program. As a sitting judge, she is permitted to engage in activities intended to

encourage attorneys to perform pro bono services. So since being appointed to the bench in 2007, Judge McEwen has served on the Thirteenth Judicial Circuit Pro Bono Committee; helped organize a judicial pro bono summit to educate state and federal judges on how they can encourage pro bono service and contribute themselves; and helped produce a video on bankruptcy basics for pro se debtors, which is a model for other courts across the nation.

At the award ceremony, Judge McEwen explained the motivation behind her pro bono efforts:

Everyone knows we really only have justice for some. And we only have some justice for the rest of us. Less than full justice is imperfect justice.

Judge McEwen implored attorneys and judges to “resurrect, reinvigorate, and reaffirm” the Florida Supreme Court’s One Campaign. For anyone looking for suggestions on how to fulfill the One Campaign’s mission, Judge McEwen said to simply “Call Cathy at (813) 301-5082.”

I admire Judge McEwen for many reasons: She’s an outstanding judge; she’s a fantastic mentor to current and former law clerks and interns; and her efforts on behalf of the indigent are truly inspirational. And she is well-deserving of the award. But rather than call her to congratulate her on her accomplishing, “call Cathy at (813) 301-5082” to find out how you can help the poor access justice.



Extraordinary Leadership: Living by “A Higher Standard”

“Never walk by a mistake.” — General Ann Dunwoody

On June 23, 2008, President George W. Bush nominated Ann Dunwoody as a four-star general in the United States Army — the first woman to achieve the four-star rank. Today, General Dunwoody is president of First 2 Four, LLC, a leadership mentoring and strategic company, and also serves on the boards of several companies. In April 2015, General Dunwoody released her book, “A Higher Standard.”

At the HCBA's General Membership Luncheon on January 19, General Dunwoody gave our keynote address, and everyone in attendance learned how living by a higher standard

is critical to a life and career of extraordinary leadership. General Dunwoody's gracious and generous commitment to the Tampa community led her to agree to give our

keynote address without any speaking fee or other requirements — the general gave to us and asked nothing in return. General Dunwoody also took the time to personalize 100 copies of her book, “A Higher Standard,” and connect individually with every one of our members who wanted to meet her. General Dunwoody's actions — treating every person she touched at our membership lunch with dignity and respect — were a lesson to us all.



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THE BEST
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General Dunwoody's words were so powerful. She shared that she never intended to write a book, and certainly never thought "a higher standard" was applicable to herself or any other small group. General Dunwoody realized in writing her memoir that the United States Armed Forces held each and every member of every service to "a higher standard" every day. She credited the military and everyone who serves for holding themselves to a higher standard — a standard that made her the leader she became. General Dunwoody confessed she had no stories of purposely smashing barriers and leaving wrongdoers in her wake, but rather she shared lessons on leadership — such as "never walk by a mistake," General Dunwoody's rule that when something is wrong, big or small, not to let it go but to fix it, and to hold people accountable.

General Dunwoody also shared her most proud accomplishment in the military: "In the military, it is said that you can often fool your boss, you can sometimes fool your peers, but you can never fool your soldiers." General Dunwoody was widely complimented as a "soldier's soldier" — her greatest accomplishment was earning the respect of her soldiers — a lesson that we lawyers can take back to our offices or firms or companies.

General Dunwoody shared stories of the generations of military officers in her family, and how her competitiveness and other skills learned as a three-sport athlete served her so well in the United States Army. General Dunwoody recounted inspirational and moving contrasts between a 1995 high-level military meeting she attended as an Army colonel, where she was the only woman in the room, and her 2014 speech to Facebook's North American Women's Leadership Day. As Facebook COO Sheryl Sandberg said of General Dunwoody: "I watched her inspire 1,500 women, offering both practical advice and encouragement. She told us to put our passion before our fear." Sandberg admitted that she did not know General Dunwoody when she wrote her book "Lean In," but General Dunwoody is exactly who Sandberg had in

mind when she wrote: "[I]n the future, there will be no female leaders. There will just be leaders." This rings true with everyone who attended the HCBA Membership Luncheon and listened to General Dunwoody — there was one leader in the room that day. The rest of us were fortunate to learn from General Dunwoody.

General Dunwoody's stories and advice made me think about two of my law partners, Amanda Buffinton and Meredith Freeman. Amanda, a board-certified construction lawyer, and Meredith both focus their practice on construction litigation and professional liability defense. But what I see every day behind the scenes are two lawyers living "a higher standard" in everything they do. In addition to their incredible

litigation practices, Amanda and Meredith take the time to give back and to lead through their efforts with the American Bar Association Commission on Women in the Profession; with both the Hillsborough County Bar Association's Diversity Committee and Bush Ross's Diversity Committee; and co-authoring articles such as "Retention and Promotion of Female Attorneys – What Can We Do Better?" that was published in the *Lawyer* magazine. Amanda and Meredith are both leaders in the General Dunwoody

mold — soldier's soldiers — earning the respect of their peers and their soldiers.

General Dunwoody shared with us the exciting news that we will be hearing a lot about "A Higher Standard" in Florida in 2016. Her book was selected as the 2016-2017 Common Reading Program Selection at the University of Florida. That means all 8,000 students entering UF in 2016-2017 as graduate candidates or undergraduates will receive a copy of "A Higher Standard" to create a shared experience by all UF students, and General Dunwoody will deliver the keynote address to the Class of 2020 at New Student Convocation in August. I hope that many of our members will get to share the experience of hearing from General Dunwoody and reading "A Higher Standard" with our college-aged children! We were fortunate to hear from General Ann Dunwoody, a most thoughtful and inspirational leader and speaker.

**"In the military, it is said
that you can often fool
your boss, you can
sometimes fool your
peers, but you can never
fool your soldiers."**

— General Ann Dunwoody



HCBA PAST PRESIDENTS LUNCHEON

The HCBA was pleased to host a large gathering of our past presidents on December 14 for the annual Past Presidents Luncheon. These leaders of the local legal community took the time to catch up and reminisce about their experiences with the HCBA. Thank you to the luncheon's sponsor:



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The Chester H. Ferguson Law Center: A Wonderful Place for HCBA Members to Call Home

“Nothing happens unless first a dream.” — Carl Sandburg

The Chester H. Ferguson Law Center, which officially opened for business in 2008, is something that all HCBA members can rightfully be proud of.

For years leading up to the official ribbon cutting, however, there were some who questioned the wisdom of building a permanent home for the HCBA and Bar Foundation. Even after the decision was made to go forward with formulating plans, others wondered whether the facility would ever get built, especially given all the financing and construction challenges that lay ahead. Still others questioned just how much the facility would be used after completion.

Now, going into its eighth year of operation, I believe it's safe to say the Ferguson Law Center, or the Chet, has fulfilled most, if not all, of the expectations of those who originally supported the concept.

Gwynne Young, with Carlton Fields, was directly involved in many important aspects of the law center's planning and development. Young served as president of the HCBA and Bar Foundation, and later as Florida Bar president.

Although there were some serious challenges early on, the project helped bring members of the legal community and other civic leaders together for a common purpose, Young told me recently.

“The law center has helped create a great sense of pride,” Young said. “Overall, I think everyone would agree that it has been a tremendous success.”

On any particular day, the law center is a hub of activity. In fact, you might be surprised to learn there were 712 individual meetings and events held at the law center last year alone.

This includes numerous HCBA section and committee meetings, luncheons, and CLEs; Bar Foundation program meetings and legal mediations; and other events hosted by outside groups, such as Inns of Court and the Tampa Downtown Rotary.

As an aside, I would be remiss if I didn't point out that there is a discount for HCBA members on building rentals.

* * *

The concept of the law center goes back to the 1970s when HCBA leaders began looking at other Bar buildings across the country. In the mid-1990s, HCBA leaders formed a blue-ribbon committee to explore the possibility of a permanent facility. Later, when the decision was made to move forward, a building committee was formed.

In the meantime, in 1996, the Bar Foundation was created, and it would assist with the building financing and fundraising. William Kalish served as the Foundation's first president.

Interestingly, the parcel where the Ferguson Law Center is now located is land that was formerly home to the headquarters of Tampa's police department.

William A. Gillen Jr. chaired the Bar Foundation's capital campaign to help fund the 17,000-square-foot, state-of-the-art facility, which ultimately cost \$6 million to construct. The Bar Foundation, which technically owns the building, worked to secure financial commitments and provided naming rights for the major conference rooms and meeting spaces in the building.

In June 2006, there was a groundbreaking ceremony. Less than two years later, close to 1,000 people attended the lavish ribbon-cutting ceremony in February 2008.

* * *

Since its creation, the Bar Foundation's role in the community has continued to grow and evolve.

Working to fulfill its charitable mission, the Foundation has, over the years, contributed more than half a million dollars in grants to local legal-related nonprofits from the proceeds generated at its annual Law & Liberty Dinner.

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Darlene Kelly, the Foundation's executive director, also continues to effectively manage the Thirteenth Circuit's Residential Mortgage Foreclosure Mediation Program, which generates funds for the Foundation and provides an important service to the judiciary and Hillsborough County residents.

In addition, I can report that the Foundation's fundraising efforts are now focused on its charitable goals and maintaining the law center as the hub of the local legal community.

Looking to the future, the Foundation's board recently approved a long-term strategic plan. The plan focuses on a wide range of topics, including building greater awareness of the Foundation's work

in the community, establishing a building endowment and a reserve fund, and developing necessary staff resources to support and manage the Foundation's future growth.

"Our focus is on growing the Foundation and making it an important part of the legal community and the community as a whole," said Roberta Colton of Trenam Law, who is the current Bar Foundation president. "I'm very excited about the direction the Foundation is headed."

Finally, please plan to attend the Foundation's 11th Annual Law & Liberty Dinner on May 19 at the Hilton Tampa Downtown. National political analysts Mark Halperin and John Heilemann with Bloomberg Politics will be the featured speakers.

See you around the Chet.

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Accident Report Privilege in Criminal Cases

Certain evidence obtained from the driver at the crash scene is not covered by the accident report privilege.

Our streets can be dangerous. In 2014, Florida experienced over 340,000 reported traffic crashes.¹ While the majority of crashes are civil in nature, there are times when those crashes become criminal. When the facts of a particular crash lead to a criminal investigation, law enforcement must obtain admissible evidence for use in criminal prosecution. The accident report privilege may apply to statements made to the officer during the investigation and could limit the use of those statements in trial.

The accident report privilege provides that a “crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report ... shall be without prejudice to the person so reporting.”² Statements that fall within the privilege cannot be used as evidence in a criminal trial.³ “The purpose of the accident report privilege ... is to encourage people to make a true report of the accident in order to facilitate the ascertainment of the cause of accidents, thus furthering the state’s ultimate goal of making the highways safer for all of society.”⁴ The privilege protects a motorist’s Fifth Amendment right to be free from testimonial compulsion when reporting an accident.⁵

Certain evidence obtained from the driver at the crash scene, however, is not covered by the accident report privilege. The accident report privilege applies only to statements; observations made by law enforcement officers are not protected.⁶ The results of lawfully obtained breath, urine, and blood tests are not included in the privilege,⁷ nor is the refusal to submit to such tests.⁸ The privilege also does not cover non-testimonial field sobriety exercises.⁹



In addition, some statements relating to a crash investigation may be admissible. Statements that are volunteered spontaneously to the world at large may not be protected by the privilege.¹⁰ Where the defendant is advised that a criminal investigation has begun and has been properly advised of Miranda warnings, subsequent statements by that motorist may be admissible.¹¹ Where a defendant has left the scene of an accident and failed to report the accident, the privilege would not apply to a subsequent non-custodial interview.¹²

My office seeks to keep our community safe. When a traffic crash involves criminal activity, we build our case on admissible evidence to secure a conviction.

¹ Florida Department of Highway Safety and Motor Vehicles, Traffic Crash Facts Annual Report 2014, https://firesportal.com/Pages/Public/DHSMVPublishedDocuments/Current_Year/Crash_Facts_

2014_as_of_07-30-2015.pdf, (last visited January 11, 2016).

² § 316.066(4), Fla. Stat. (2014).

³ *Id.*

⁴ *Dep’t of High. Saf. & Motor Veh. v. Corbin*, 527 So. 2d 868, 871 (Fla. 1st DCA 1988).

⁵ *State v. Whelan*, 728 So. 2d 807, 810 (Fla. 3rd DCA 1999).

⁶ *State v. Edwards*, 463 So. 2d 551, 554 (Fla. 5th DCA 1985).

⁷ § 316.066(4), Fla. Stat.

⁸ *Evans v. Hamilton*, 885 So. 2d 950, 950-51, (Fla. 4th DCA 2004).

⁹ *Whelan*, 728 So. 2d at 810.

¹⁰ *Conner v. State*, 398 So. 2d 983, 983 (Fla. 1st DCA 1981).

¹¹ See *State v. Marshall*, 695 So. 2d 686, 686 (Fla. 1997); *State v. Norstrom*, 613 So. 2d 437, 440-441 (Fla. 1993).

¹² See *Cummings v. State*, 780 So. 2d 149, 149 (Fla. 2d DCA 2001); *State v. Hepburn*, 460 So. 2d 422, 425 (Fla. 5th DCA 1984).

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Tampa's civil litigation Inns are The J. Clifford Cheatwood Inn, The Ferguson-White Inn, The Tampa Bay Inn, and The Wm. Reece Smith Litigation Inn. Each Inn limits membership to approximately 80 members who are assigned to pupillage groups of eight or nine members. Pupillage groups include at least one judge as well as attorneys of varying experience and areas of practice. The Inns usually meet monthly from September through May for dinner programs, except for The Wm. Reece Smith Litigation Inn which meets monthly for a weekday luncheon. Inn members usually earn one hour of CLE credit for each program attended.

Each year, the Inns invite new members to join for varying membership terms. Members are selected based upon their length and area of practice. Discounted memberships are available for full-time law students who wish to apply. If you are interested, please apply promptly! (Please note: Current Inn members who wish to renew membership in their present Inn need not apply.)

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Firm: _____

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Years in practice and specialty? _____

Prior experience with any Inn of Court? _____

Have you previously applied? _____ When? _____

Have you been referred to an Inn? If so, by whom? _____

List any weekday evening you cannot attend meetings: _____

Do you have a preference for a particular Inn? _____

Please attach a current resume limited to one page in length.

Forward Application Package to:

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Tips for Interacting with Jurors

The more attorneys understand what is important to jurors, the more successfully they can cultivate their relationship with them.

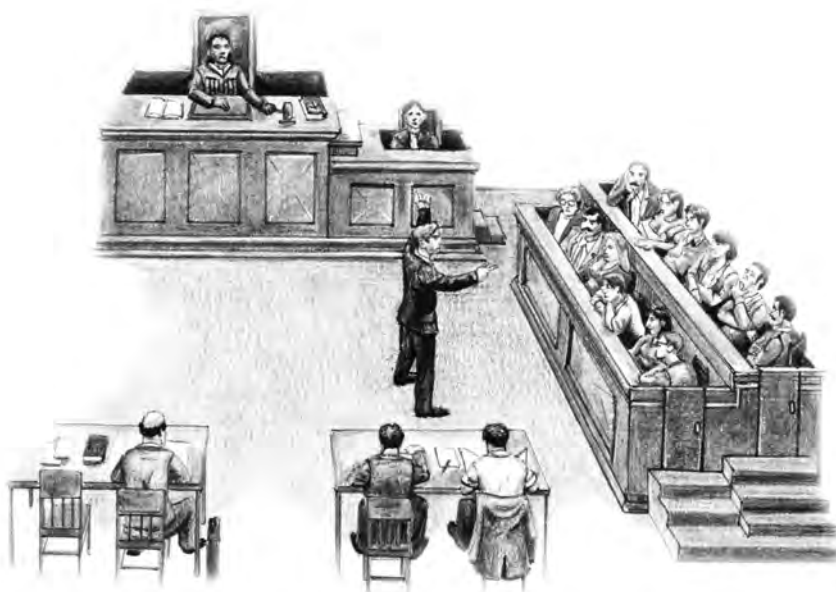
At the Hillsborough County Bar Association's recent 19th Annual Bench Bar Conference "View from the Box: The Jury Speaks," jurors were asked to provide feedback regarding their likes and dislikes concerning the lawyers who litigated before them. The more attorneys understand what is important to jurors, the more successfully they can cultivate their relationship with them. Judges also gleaned information from jurors' responses. That insight has assisted their communication in the courtroom (and may perhaps even get the jurors larger, sound-proof bathrooms, which was specifically requested.) This article summarizes the key takeaways.

Lawyers Should Use Helpful Visual Aids

Many jurors expressed an appreciation for visual aids. They have a particular interest in attorneys using more storyboards with pictures. They found attorneys who were able to convey their cases in a story-like manner were more effective in communicating with the jury.

In today's world of constant multimedia stimulation, jurors expect to see the case and not merely hear a recitation of evidence. The presentation need not be high-tech, but it must be presented in a way that appeals to more than one sense. Your visual aids should be simple enough for the jurors to understand but interesting enough to captivate their attention. Consider from the outset the best use of visual aids to display key documents, emails, maps, and photographs.

Additional suggestions from the jurors included using demonstrative evidence for every witness and not merely some of them. Jurors appreciated these supplements to the spoken information they are presented in such a brief amount of time. Remember: Never present your case in an entirely spoken format. Also remember: Jurors notice when the visual presentation complements the spoken format. Your visual aids should not merely serve as a distraction.



Lawyers Should Be Succinct

One aspect of lawyering that jurors seemed to uniformly dislike was the attorneys' propensity to pontificate. Jurors hate when lawyers spend excessive amounts of time going over things that could be covered quickly. For instance, jurors' comments included, "I would try to reduce the amount of repetition of some information" and "information brought forth would have only needed to be presented once and not 10 times." Get to your point immediately. Especially with younger jurors, your audience will not have the patience for the longer storytelling of old. Limit your opening statement to the relevant points and avoid buildup. Jurors appreciate efficiency and will be less likely to lose interest or zone out. While brevity is a good rule of thumb, bear in mind, however, that it sometimes is not your best friend. In many trials, jurors take notes. Given that, you want to make sure that you fully develop all of your points so that the jurors' notes reflect your "best" story. Make sure to fully present your evidence. But set expectations with the jurors: Explain why you may become heated or get carried away — you are zealously representing your client. Also, the "group dynamic" is often at play in jury deliberations. Judges often remind jurors that partial testimony from their notes is not the most reliable, and they try to avoid reading only part of a witness' testimony back to the jury. The judicial consensus was to read the entire testimony to the jury to avoid bias.

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Lawyers Should Never Present Themselves as Smarter Than the Jury

Unsurprisingly, jurors do not want attorneys to make it appear they are smarter than the jurors. Jurors appreciate the “average Joe.” Avoid legalese. Jurors expressed an especially high regard for attorneys who were willing to acknowledge their own mistakes rather than behaving as if they were infallible. Many jurors expressed a great deal of confidence in their abilities to understand the proceedings and to adequately process the data to reach a fair result. Jurors do not appreciate an attorney “talking down” to them. Some noted that it was off-putting when the attorney acted as though the jurors “did not understand anything.” Conversely, an attorney who conveys “mutual respect” with the jury was highlighted as being key and appreciated. Jurors felt as though they were making the “right” decision. Attorneys should not appear to criticize a juror for making a “wrong” decision.

Lawyers Should Limit Objections to the Minimum Necessary

Some objections are necessary to preserve appellate rights and to create a robust record. Jurors, however, expressed distaste for frivolous and overused objections. They noted that “objections can get annoying,” particularly when they “came too frequently” and were “redundant and without merit.” Object when necessary but consider controlling your use of them.

Lawyers Should Be Wary of Advertisements

Many attorneys saturate the media with advertisements to generate business. Bad advertisements may be used against an attorney by tainting a juror’s

opinion. And when the juror stops trusting the attorney, the juror stops trusting that attorney’s case. Take proactive steps to prevent opponents from taking advantage of these advertising efforts in front of a jury. A recent concern is some advertising now contains statements that attorney “X” was able to recover a sum certain for a litigant. Jurors may see this as a floor or a ceiling in a case. Consider how to question jurors regarding the juror’s beliefs on damage caps and what may be too much without stating a specific figure.

Judges’ Findings of Fact

Judges have reflected on the jurors’ responses that revealed certain aspects of juror interaction. It is clear how a judge treats jurors makes a vivid impression on the jury. According to the jurors interviewed, jurors should be treated like “guests in your home.” This includes having bailiffs walk jurors to their cars, if late at night; explaining the mechanics of the trial process and the reasoning behind it; explaining why the lawyers raise objections and why breaks occur during objections; and explaining the difference between legal and factual arguments made to the court.

The participants in the Bench Bar Conference hope these tips will aid everyone in making the trial experience better for all involved.

Authors: Judge Samantha Ward, Judge Lisa Campbell, and Judge Steven Stephens (with contributions from Michael Boucher - TCS; and Kirk S. Davis and Stacey Callaghan - Akerman, LLP)



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Off the Record with the Hon. Richard A. Lazzara

“I always like to tell lawyers that we judges know that you talk about us. Well, we talk about you, too!”

The following is an edited excerpt of an interview with the Hon. Richard A. Lazzara, United States District Court, Middle District of Florida, Tampa Division.

Q. Can you tell us a little about what it was like growing up in Tampa?

A. I had a wonderful childhood growing up in Tampa. I had two wonderful parents, who provided for all my needs, and three wonderful brothers. Although we were competitive, we loved and supported each other very much. I had an extended loving family of uncles, aunts, and cousins on both my mother's and father's sides of the family. As we sit here now, I can look out my window to the north and see my old neighborhood. I grew up three blocks north of the North Boulevard Bridge — on the southwest corner of Francis and North Boulevard. So I can gaze out here every once in a while and see where I used to play and get into mischief as a kid. It was a wonderful life.

Q. I understand your father was in the oil business.

A. Yes, he was a petroleum marketing jobber. He started out selling fuel oil, and during the cold months, we

were instructed not to stay on the phone too long because people would call up the house and say, “I need Tony to come out and deliver some fuel oil to us.” He was a very ambitious man, a very hard-working man.

Q. Did you ever consider following in his footsteps?

A. Although I admired him a lot, business was not my forte, but my younger brother, Mike, did go into business with him.

Q. You attended Jesuit High School, then went to college at Loyola New Orleans, then came back to Florida to attend law school at the University of Florida. Was it always your intent to come back to Florida?

A. It was always my intent to come back to Tampa. I was born and raised here. I had no ambition to practice law anywhere else.

Q. You had a variety of practice experiences before becoming a judge. You were an assistant county solicitor and an assistant state attorney. You were also in private practice for several years. Which did you enjoy the most?

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A. I enjoyed all of them, although a lot of people may not know what an assistant county solicitor is. I remember I gave a speech one time and mentioned that I was an assistant county solicitor, and everybody looked at me with these strange looks. Before Article V passed in the Florida Constitution in 1972, some counties in addition to having a state attorney, had a county solicitor, and the county solicitor was responsible for prosecuting everything from second-degree murder on down.

Q. Is there any unique or memorable case that stands out from your private practice days?

A. As a matter of fact, there is a case. I was retained to represent a gentleman who was charged with first-degree murder. He was charged along with a co-defendant. The co-defendant was apprehended first and went to trial and was convicted of second-degree murder and given a substantial sentence. And then my client was apprehended, and I was retained to represent him. I investigated the case, and it didn't make sense in terms of my client's



guilt. I remember interviewing the young man who had been convicted, and he told me, "I don't know what I'm doing here. I didn't do this," and he convinced me. In the course of investigating my client's case, I was able to convince the state attorney that not only was my client innocent, and I mean truly innocent, but also this gentleman, his name was Brett Bachelor, was truly innocent. As a consequence, his conviction was vacated, and the State Attorney's Office *nolle prossed* the case, and he was free. I think he spent one year in jail. In fact, as fate would have it, the person who actually committed

the murder was indicted many years later.

Q. When did you decide you wanted to be a judge?

A. When I was at the University of Florida Law School, I became involved with the Honor Court. I later became Chancellor of the Honor Court, and it was a very interesting experience. I presided over several trials in which students were accused of violating the Honor Code by cheating, and I enjoyed that experience. I felt maybe that was what I would like to do someday.

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- Q.** Your background as a judge is obviously varied insofar as you've served as a county court judge, a state circuit court judge, an appellate court judge on the Second District Court of Appeal, and now a federal district court judge. How do you think your diverse background has shaped you as a jurist?
- A.** Each position was different and brought different challenges. As a county court judge, I was just inundated with cases. In fact, that experience really helped me understand and become efficient at case management. When I became a circuit court judge, I was immediately thrust into the Criminal Division. I had about 700 pending cases at that time. And again I had to learn good case management techniques. I really enjoyed my time on the appellate bench; it was just a world of difference. It was more relaxed, and I had two law clerks because as a county court judge and circuit court judge back then, it was just me and my judicial assistant, Ms. Hartman. So when I was on the Second District Court of Appeal and I had two — we didn't call them law clerks, we called them staff attorneys — I thought I was in heaven having these two accomplished people assisting me. And then I came here, and I don't know if you remember back then, but we had the "rocket docket." I think I had 700 pending cases, civil cases, plus a rather extensive criminal docket. Again I had to utilize my case management skills. But we got

through it all, and I enjoyed every position that I've had. I think my time on the Second District Court of Appeal really helped me in my new position here as a district judge because I can anticipate possible errors and make sure I don't make them.

- Q.** What advice would you give to a lawyer who might be thinking about pursuing a judicial career?
- A.** Develop an unquestioned reputation from the outset, for honesty, integrity, and for being prepared. I always like to tell lawyers that we judges know that you talk about us. Well, we talk about you, too! And I always try to impress whenever I am speaking to a group of lawyers that your reputation precedes you into the courtroom. So make sure that when you walk into that courtroom to meet a judge for the first time that whatever that judge has heard about you from a colleague is nothing but good things in terms of your work ethic, your professionalism, your ethics, and your honesty and integrity.
- Q.** Speaking of reputation, you have a reputation of being extremely well prepared on the bench. What do you typically do to prepare for hearings?
- A.** I read and research as if I was preparing to argue a case before a judge, before a jury, or before an appellate panel. If the lawyers are going to take the time to brief issues, file motions, file memoranda, I have an obligation as the judge to read those thoroughly and to do my own independent research.

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- Q.** If you could offer one piece of advice to lawyers about how they can better assist you in resolving disputes they bring to court, what would that advice be?
- A.** Try to resolve them before you come to me. We have Local Rule 3.01(g), which requires that lawyers confer before they file certain motions, but I find that most lawyers just don't communicate anymore personally. Everything is by text; everything is by email. So when I receive a discovery motion — because I do all my own discovery practice — and it has a 3.01(g) certification to the effect that I sent an email or a letter and I haven't heard back, that motion is denied without prejudice with the directive that counsel are to confer *personally* — and I italicize personally in the order — “within so many days, and if you cannot resolve your discovery dispute, and the motion is refiled, I'm going to have you here on short notice.” Many times I don't hear anymore about the matter.
- Q.** You moved to senior status a few years ago. Has your caseload and the type of cases you preside over changed as a result?
- A.** One of the great things about taking senior status is that you can pick the kind of cases that you want, and you can also advise the clerk not to assign you certain types of cases. There are certain cases that I don't take anymore. But I do maintain enough of a caseload to continue to be able to have two law clerks and my judicial assistant. Plus I offer my services to the active district judges when their schedules are hectic, if you will. I've tried several cases for them over the last two to three years.
- Q.** You've been a judge now for almost 30 years. What would you say is the most significant thing that's changed about the way lawyers practice law?
- A.** The technology. Back in the old days, when I would try a case, and I wanted to demonstrate something to the jury, through a witness, you would have the witness step down, put a blackboard in front of the jury, and you would have the witness diagram the crime scene or the accident scene, or if you were

really sophisticated, you had an easel, and you had exhibits blown up and you put them on the easel. Now we have all this technology to aid lawyers in presenting their case to a judge or jury.

- Q.** I understand you've been seen riding a bicycle downtown sometimes on your lunch hour. Have you always been physically active?
- A.** I've always tried to stay physically active ever since I was a child. In fact, one of my routines when I'm here at the office is I work out. The U.S. Marshals have a full-service gym on the third floor. I have access to it, and I try to go down there every day I'm here.
- Q.** You reportedly like spending time with family and friends. Can you tell us a little about your family?
- A.** My wife just retired from the University of South Florida a few years ago. She was an academic advisor in the Honors College. Before that, she worked in the Admissions Office. Now she's enjoying a well-deserved retirement. My son has returned home from Toronto after six years. He's obtained a bachelor's, master's, and a Ph.D., all in the area of humanities. He's been very helpful to us as we grow older.
- Q.** You obviously have been a dedicated lawyer and jurist for a long time now. What sort of things do you like to do away from the office to relax and get away from the stress?
- A.** I like reading. I used to work in the yard a lot, but now we've downsized. We moved, getting ready to sell our other home in Lutz. I also enjoy watching the History Channel and programs of that nature.
- Q.** Last question. If you had a chance to go back and do it all over again, would you choose the same career path?
- A.** Absolutely. Without hesitation. I always wanted to be a lawyer. I only hope I did a credible job as a lawyer. After that I wanted to be a judge. I realized that dream, and I also hope I did a credible job as a judge in all the judicial positions that I have held.



Author: Michael S. Hooker - Phelps Dunbar, LLP

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ELEVENTH CIRCUIT AMENDS RULES; PROPOSES FURTHER CHANGES

Appellate Practice Section

Chairs: Jared Krukar - Butler Weihmuller Katz Craig, LLP; and Mariko Outman - Florida Second DCA



On December 1, 2015, the Eleventh Circuit adopted several changes to its Local Rules and Internal Operating Procedures, granting the clerk wider latitude in granting extensions to the briefing schedule and clarifying its corporate disclosure and attorney admissions requirements. Three days later, the

court proposed several more amendments, most of which are designed to ensure a clear and accurate electronic record on appeal.

The Eleventh Circuit now allows a first request for extension of time of up to 14 days (instead of seven) — without having to certify pursuant to 11th Circuit Rule 26-1 that the requestor conferred with opposing counsel about the extension — which can be granted by the clerk on a telephonic request showing good cause, so long as the court

**The Eleventh Circuit
now allows a
first request for
extension of time
of up to 14 days
(instead of seven).**

hasn't established a written briefing schedule. 11th Cir. R. 31.2. Any request for an extension greater than 14 days still requires consultation with opposing counsel and a written motion, and

the first request must still be made at least seven days in advance.

The court also amended the rules for filing a Certificate of Interested Persons and Corporate Disclosure Statement (CIP) to not only require the appellant or

Continued on page 19

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petitioner to file a CIP within 14 days of docketing of the appeal and complete the Web-based CIP form the same day, but to require all other parties to file a response to the CIP within 14 days that either indicates the CIP is correct or adds additional interested persons or entities. 11th Cir. R. 26-1(a). The rule now clearly states that failure to complete the separate Web form will delay the case and may result in sanctions. 11th Cir. R. 26-1(b), 26.1-5. The rule change also clarifies the parties that need to be identified in various kinds of cases, speaking specifically to including the identity of the victims in criminal appeals, and the debtor,

creditor's committee members, and any entity that may be affected by the decision in bankruptcy appeals. 11th Cir. R. 26.1-2. Any amendments to the CIP must be brought to the court's attention, both in briefs and through the Web-based CIP. 11th Cir. R. 26.1-4.

Finally, the attorney admission rules now impose a continuing obligation to notify the court if an attorney's status with any other Bar lapses, and they make clear that attorneys applying for admission to the Bar or to appear *pro hac vice* must be in good standing elsewhere. 11th Cir. R. 46-1, 46-4; 46-7. Renewal fees may now be paid online.

The December 4 proposed changes would direct the district

court clerks to ensure that documentary exhibits are included in the electronic record on appeal, and they would forbid clerks from returning exhibits until an electronic copy is made. The proposed changes would also ensure that photos and other non-documentary exhibits are part of the record. Proposed 11th Cir. R. 11-3. The court also proposes filing Internet material on the docket rather than in a separate file maintained by the clerk.

Expect the proposed changes to go into effect in July.



Author: Dineen Pashoukos Wasylik - 3 Legal



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STATUTORY RE-CONSTRUCTION: LITIGATION UNDER THE NEW CHAPTER 558

Construction Law Section

Chairs: Erik Raines - Hill Ward Henderson; and Edward J. Kuchinski - Sivyer, Barlow & Watson, P.A.



Effective October 1, 2015, Florida House Bill 87 (H.B. 87) implemented significant changes to chapter 558, Florida Statutes. Both the previous and current versions of chapter 558 require a claimant to provide written notice to construction or design professionals allegedly responsible for defects or deficiencies. Upon notice, the professionals must timely review the claims, inspect the property, and respond. The respondent may avoid litigation by offering repairs and absorbing the associated costs or issuing a monetary settlement. The respondent may also dispute a claim in part, or in its entirety. In the event the claim is not resolved, litigation may ensue.

Although a key reason for the enactment of chapter 558 in 2003 was to reduce litigation, a myriad of claims still plagued the courts. Therefore, Governor Rick Scott signed the latest version of chapter 558 into law in an effort to better facilitate pre-suit resolution. That effort was highlighted in the revisions made to section 558.001, Florida Statutes, which now states that parties to a construction defect dispute must attempt to resolve a

claim without further legal process “through confidential settlement negotiations.” While this change rings true to the legislative intent of chapter 558, other changes imposed by H.B. 87 may prove to further impede pre-suit resolution of construction defect claims.

Of the several other modifications imposed by H.B. 87, those made to section 558.004(1)(b) appear most noteworthy. Specifically, section 558.004(1)(b) now includes the phrase “if known,” modifying the requirement that a claimant identify the damage or loss resulting from the defect. Further, the need for visual inspection and identification of defects was emphasized since H.B. 87 does not impose any requirement on claimants to “perform destructive or other testing for purposes of [a 558] notice.” Although this alleviates the need for claimants to incur the often exorbitant costs associated with destructive or other investigative testing prior to placing a construction or design professional on notice of a defect claim, section 558.004(1)(b) was further modified to require a claimant to identify “the location of each alleged construction defect sufficiently to enable the responding parties to locate the alleged defect without undue burden.”

Of the several other modifications imposed by H.B. 87, those made to section 558.004(1)(b) appear most noteworthy.

While H.B. 87 made various other modifications to chapter 558, the changes to section 558.004(1)(b) could prove most significant to litigators, as the inherently vague term “undue burden” may become a key point of contention among parties to

the pre-suit phase. Claimants will undoubtedly argue that defects need not be revealed pre-suit through destructive or other testing, while respondents will assert that the defect is unascertainable via a visual inspection. Respondents may further argue that incurring costs for destructive testing or identification of unknown damage or loss resulting from the defect would be unduly burdensome.

It is foreseeable that disputes of this nature will become more prevalent and complex in cases involving condominiums, multi-unit developments, and other large-scale projects. Once parties to a construction defect claim reach this point pre-suit, the negotiations encouraged by H.B. 87 will ultimately diminish, leaving

litigation as the inevitable method of recourse.



Author:

*Frank T. Moya -
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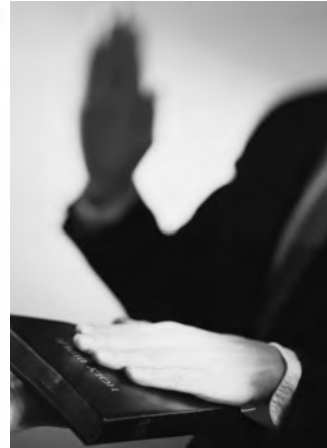
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The constitutional protection against self-incrimination is one of the most important rights afforded by our state and federal constitutions. It can be asserted in any proceeding — civil or criminal, administrative or judicial, or investigatory or adjudicatory — in which the witness reasonably believes that the information sought (or discoverable as a result of his testimony) could be used in a subsequent state or federal criminal proceeding. *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972). But this right can also impede the investigation of crimes. The law of immunity is the means by which “the prosecutor can loosen lips the Constitution would otherwise permit to remain sealed.” *Tsavaris v. Scruggs*, 360 So. 2d 745, 749 (Fla. 1978). Because,

except in the case of judicial immunity, immunity is typically a creation of statute, its application varies from state to state and by the federal government. In Florida, section 914.04, Florida Statutes, allows a court or state prosecutor to grant immunity for investigative purposes. Section 914.04 “previously provided for transactional immunity, but in 1982 the legislature amended the statute to provide for only use and derivative use immunity.” *Zile v. State*, 710 So. 2d 729, 733 (Fla. 4th DCA 1998).

Although a state prosecutor has the power to confer state immunity,



Although a state prosecutor has the power to confer state immunity, many individuals face the dilemma of providing testimony in a state proceeding that could subject them to federal prosecution.

many individuals face the dilemma of providing testimony in a state proceeding that could subject them to federal prosecution. In *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 79 (1964), the Supreme Court barred the federal government from using state testimony (or the fruits of that testimony) compelled by a grant of state immunity in order to obtain a federal conviction. “After *Murphy*, the immunity option open to the Executive

Branch could be exercised only on

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the understanding that the state and federal jurisdictions were as one, with a federally mandated exclusionary rule filling the space between the limits of state immunity statutes and the scope of the privilege.” *United States v. Balsys*, 524 U.S. 666, 683 (1998). Since fear of prosecution in the one jurisdiction implicated the very privilege binding upon the other, the *Murphy* opinion recognized that if a witness could not assert the privilege in such circumstances, the witness could be “whipsawed into incriminating himself under both state and federal law even though the constitutional privilege against self-incrimination is applicable to each.” *Id.* at 682 (quoting *Murphy*, 378 U.S. at 55).

While *Murphy* provides some comfort to those compelled to testify by state authorities, it can only work if the underlying state grant of immunity is sound. The mere issuance of a subpoena is immaterial because “compulsory attendance is one thing and compulsory testimony is another.” *Tsavaris*, 360 So. 2d at 750. Florida’s statutory immunity only arises if the defendant asserts his or her Fifth Amendment privilege and testimony or record production is compelled. *Id.* at 751.

Also, immunity is only conferred to the judicial and investigative proceedings listed in the statute. *Id.* at 752. A pretrial discovery deposition where the assistant state attorney may be present and may even ask questions does not confer immunity. See *State ex rel. D’Amato v. Morphonios*, 358 So. 2d 1119, 1121 (Fla. 3d DCA 1978) approved *sub nom. D’Amato v. Morphonios*, 381 So. 2d 1355 (Fla. 1980). “Such depositions cannot be converted into ex parte state attorney investigative proceedings.” *Id.* If you have a concern about whether immunity would apply in your particular situation, the best practice may be to have the state move to compel the testimony because a court order will confer immunity.

Author: Matt Luka - Trombley & Hanes, P.A.



CRIMINAL LAW AND TAX LAW SECTIONS JOIN FORCES

The Criminal Law and Tax Law Sections joined forces on December 8 to host a special CLE luncheon. Guest speakers Kimberly Lappin and Rachelle DesVaux Bedke covered current topics in criminal tax enforcement, and Matthew Mueller moderated. The sections appreciate those who came out, and they give a special thanks to FindLaw for sponsoring the event.



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John, the bartender.
Paul, the real estate broker.
The unidentified waitress.

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**Our personal diversity
sets us apart from
everyone else and
motivates us to achieve
our personal goals.**

other hand, is a hard-working real estate broker with dreams of writing the great American novel. Between his job and his novel-writing, Paul never had time for love. Finally, the waitress, whose name we do not know, has her sights set on politics. Although we don't know

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Continued from page 24

much about her, it's safe to say she put her political aspirations on hold for a steady paycheck, settling for the present without fighting for her future.

Like John, Paul, and the rest of the "Piano Man" cast, we each have a unique story to tell. Our personal diversity is not only what sets us apart from everyone else, but also what motivates us to achieve our personal goals.

But because diversity is usually invoked in the context of race, gender, or sexual orientation, we are quick to forget that diversity exists in each of us through our differing ideas, personal experiences, and objectives. As General Ann Dunwoody said at

the HCBA Diversity Membership Luncheon on January 19, "The power of diversity is diversity of thought." In ignoring this, our personal goals are often blurred by those around us. We start comparing ourselves to our friends and colleagues and seeking to achieve their versions of success, forgetting where we started and, in turn, where we want to go.

For example, how many of us know a colleague who resents her career path because she followed someone else's plans instead of her own? Or how about the colleagues we all know who struggle to maintain a healthy work-life balance? Finally, what about the colleague who spun his wheels as a young associate waiting for his big break, or

perhaps relishing the paycheck of his Big Law job, before realizing that several years had passed and he's still dissatisfied?

While there is no easy answer to achieving personal success and happiness, we can all learn a lesson from "Piano Man" and redefine success in terms of our personal goals. This requires us as an industry to have a meaningful discussion about diversity, not merely resorting to the default and slapping on a label, but

instead embracing the diversity within us all.

*Author:
Jessica Ronay -
United States
District Court*



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In 2014, a unique Inn of Court was established. The Thomas E. Penick, Jr., Elder Law Inn of Court is the only elder law Inn of Court in the United States — and possibly the world. The Penick Inn welcomes attorneys and students practicing in areas that touch upon elder law issues, including Medicaid planning; probate; guardianship; estate planning; veterans' benefits; and real property, probate, guardianship, and trust litigation.

The Penick Inn is unique not only in its members' practice areas, but also in the fact that it is a multi-circuit Inn, composed of the Sixth, Twelfth, and Thirteenth Circuits. Throughout the year, three multi-circuit meetings are held, one in each circuit, and the remainder of the meetings are held within each circuit's own respective counties. Currently, there are nearly 100 members between the three circuits.

Judge Herbert Baumann of the Thirteenth Circuit is president of the Penick Inn this year, and Judge Erika Quartermaine of the Twelfth Circuit will be next year's president.

Like other Inns of Court, the Penick Inn provides the opportunity to socialize with judges, magistrates, and other attorneys, and it also offers the opportunity to obtain CLE credit through fun and educational programs developed by each pupilage group. Pupilage groups are composed of judges or magistrates, attorneys with various years of practice (Masters, Barristers, and Associates), and pupils (students).

Examples of recent topics and programs in the various circuit meetings include a panel of judges and magistrates sharing "horror stories" from the bench; a game show competition between the various circuits; and a male appellate court judge dressed up as a female client (including wig and high heels) for purposes of

The Penick Inn provides the opportunity to socialize with judges, magistrates, and other attorneys, and it also offers the opportunity to obtain CLE.

illustrating the pros and cons of using Lady Bird deeds.

In addition to providing the opportunity to socialize and earn CLE credits, the Penick Inn provides opportunities to mentor or be mentored

by more senior attorneys. The Penick Inn also engages in community outreach projects and periodically meets with other Inns of Court, providing the opportunity for further networking with attorneys and judges in other areas of practice.

In Tampa, the Penick Inn of Court meets at the Chester Ferguson Law Center. If you would like further information about the Thomas E. Penick, Jr., Elder Law Inn of Court, feel free to contact Cady Huss, membership director for the Thirteenth Circuit, at clh@estatedisputes.com.

Authors: Susan G. Haubenstein - Law Office of Susan G. Haubenstein; and Debra L. Dandar - Tampa Bay Elder Law Center



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TRIAL & LITIGATION SECTION LUNCHEON

The Trial & Litigation Section hosted a special luncheon on December 7 featuring guest speaker Lanny Davis, who was President Bill Clinton's chief spokesman and is currently a regular commentator and political and legal analyst for multiple TV news programs. Davis shared his stories about working on some of the biggest issues and crises of our time. He also discussed what individuals and companies should do to survive the inevitable crossfire after a crisis. The Trial & Litigation Section appreciates the support of the luncheon's sponsor:



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Membership Luncheon Celebrates Diversity

Gen. Ann Dunwoody, the first female four-star general in the U.S. Army, spoke to a group of about 400 attorneys, judges, and members of the military during the HCBA's Diversity Membership Luncheon on January 19. Gen. Dunwoody, who is now retired from the Army, inspired the crowd with her message of setting high standards and developing leadership skills.

Also at the luncheon, the Hillsborough County Bar Association recognized Michael Hooker with the Outstanding Lawyer Award for his devotion to the legal profession and the community. The Young Lawyers Division recognized Melissa Mora with the Outstanding Young Lawyer Award, and the YLD showed appreciation for Judge Samantha Ward by giving her the Robert Patton Outstanding Jurist Award.

The HCBA would like to thank all the representatives of the various local bar associations who came out to support this event, and we'd like to extend a special thanks to those servicemen and women who honored us with their presence.

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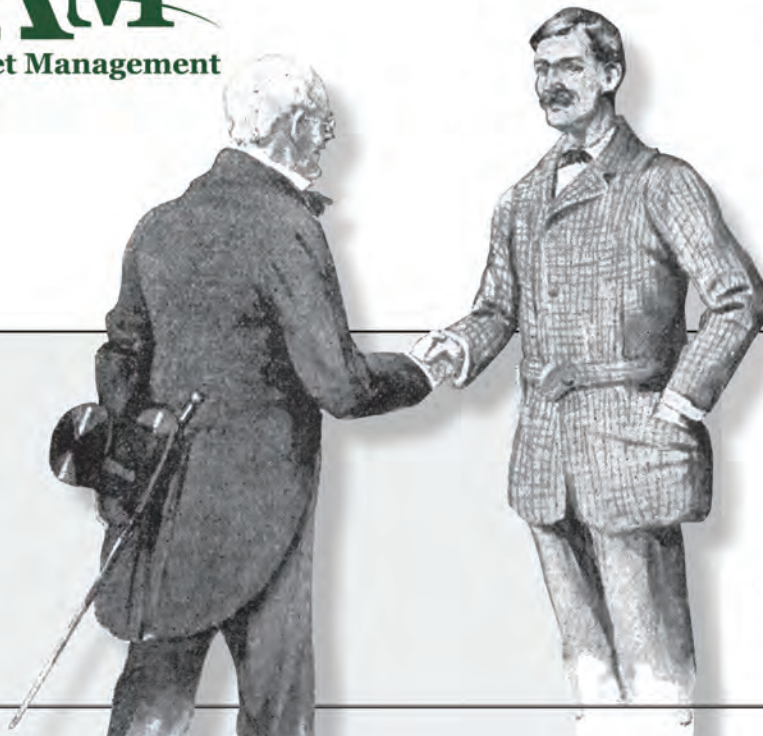
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THE END OF MEANINGFUL USE?

Health Care Law Section

Chairs: T.J. Ferrante - Foley & Lardner LLP; and Sara Younger Seifried - BayCare Health Systems



In 2009, the Health Information Technology for Economic and Clinical Health (HITECH) Act, housed within the broader American Recovery and Reinvestment Act (ARRA), introduced the concept of Meaningful Use (MU), or “the use of certified Electronic Health Record (EHR) technology in a meaningful manner,”¹ an effort led by the Department of Health and Human Services (HHS) Centers for Medicare and Medicaid Services (CMS) and Office of the National Coordinator for Health IT (ONC). (Note: That is an introductory sentence with, count them, seven acronyms.) Putting aside the federal government’s love of acronyms, the number “seven” carries significance here: Seven

years since the introduction of MU, and approximately \$30 billion in EHR incentive payments to providers later,² CMS has announced that the program will end in 2016.³ Although the seemingly abrupt termination of the Meaningful Use program has raised numerous questions, many of the core elements of the program will be captured in other CMS programs, with even longer acronyms, such as MIPS (Merit-Based Incentive Program) under MACRA (Medicare Access and CHIP Reauthorization Act). (That’s a four-acronym sentence, not that you are counting.)

Critiques of the complex and cumbersome metrics that providers were required to attest to under the EHR Incentive Program became more widespread as Meaningful Use moved beyond Stage 1 into Stage 2 and Stage 3. Each stage

Seven years since the introduction of Meaningful Use, and approximately \$30 billion in EHR incentive payments to providers later, CMS has announced that the program will end in 2016.

required providers to attest to meeting additional elements that, on a shortened timeline, proved to be challenging. This attestation process carried with it a cognizable risk: Those failing to meet the requirements for Meaningful Use in 2015

would see their Medicare Physician Fee Schedule payments reduced by 1 percent in 2017. As complaints grew, Congress, in a rare moment of bipartisan consensus, passed a law as part of the 2016 budget agreement that permitted CMS to grant a hardship exemption from the EHR requirement for certain entities that applied for such an exemption before March 15, 2016.⁴

CMS took further action though, albeit in a manner that few expected. Instead of again delaying

Continued on page 43

HAVE AN EMPLOYMENT/EMPLOYEE BENEFITS CASE? NEED A MEDIATOR?



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Mr. Taldone is a certified circuit and county mediator and was an in-house employment lawyer for a Fortune Global 500 company. Admitted to practice law in Florida (1997), New York (1980), New Jersey (1983), and California (1985).

Mr. Taldone is not a Florida Board Certified Labor and Employment lawyer.

Continued from page 42

certain requirements or modifying specific elements of the program, CMS elected to terminate the program in its current format. While critics of the program may tout this as a victory, it certainly does not represent a wholesale abandonment of the goal of incentivizing the adoption of EHR systems because MIPS is intended to integrate many of the same aims as MU.

The Meaningful Use program certainly suffered through its fair share of issues, but the program's adoption signaled that CMS is seeking to invest substantial resources in integrating technology into the (now more than 50-year-

old) Medicare and Medicaid programs. At the very least, CMS, through the Meaningful Use program, created the framework for the increased adoption of EHR systems by providers on a nationwide scale. Now, the agency says it will transition to allowing physicians, rather than the federal government, to take the lead in adopting and implementing new EHR technologies as "MU" becomes "MIPS" and the focus is turned to a new program (and acronym!).

¹ American Recovery and Reinvestment Act of 2009 (ARRA) § 4101(a), 42 U.S.C. § 1395w-4(o)(2)(A)(i) (2015).

² See Center for Medicare and Medicaid Services, "Combined

Medicare and Medicaid Payments by State: January 2011 to November 2015," available at https://www.cms.gov/Regulations-and-Guidance/Legislation/EHRIncentivePrograms/Downloads/November2015_PaymentsbyStatebyProgram.pdf.

³ See Andy Slavitt, Acting Administrator, Center for Medicare and Medicaid Services, Keynote Address at the J.P. Morgan Healthcare Conference (Jan. 13, 2016).

⁴ See Patient Access and Medicare Protection Act of 2015 § 4, 42 U.S.C. § 1395w-4(a)(7)(B) (2015).



Author: Kevin Rudolph - Shriners Hospitals for Children



JUDICIAL LUNCHEON WITH JUDGES FROM THE SECOND DCA

Judges from the Second DCA came over to the Chester H. Ferguson Law Center for a Judicial Luncheon on January 13. Guest speakers included Chief Judge Craig C. Villanti, Judge John L. Badalamenti, Judge Edward C. LaRose, and Judge Chris Altenbernd. Each shared his own pointers on how to win an appeal (or at least not lose it). Thanks to everyone who attended!



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THANKS TO ALL OUR FOX 13 ASK-A-LAWYER VOLUNTEERS!

Attorneys from the Lawyer Referral & Information Service once again got up before dawn to start answering phones as part of Fox 13's Ask-A-Lawyer program. We appreciate all those who volunteered to take calls in December and January!

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IMMIGRATION REFORM: WHERE ARE WE TODAY?

Immigration & Nationality Section

Chair: Maria del Carmen Ramos - Shumaker, Loop & Kendrick, LLP



The Supreme Court is on the verge of deciding an immigration case that could not only have a profound effect on our immigration policy but on the limits of a president's powers, as well. As background, last November, President Obama issued a series of executive actions on immigration, which, among other things, expanded eligibility for "deferred action." "Deferred action" is a regular practice in which the Secretary of Homeland Security exercises his or her discretion to refrain from removing particular aliens from the United States for humanitarian reasons or convenience. Aliens who have been accorded deferred action status are eligible to receive work authorization and federal benefits. As part of his executive actions, President Obama directed that the Department of Homeland Security (DHS) grant deferred action status to — i.e., not deport — the parents of U.S. citizens and lawful permanent residents. That executive action program is known as Deferred Action for Parents (DAPA).

Two weeks after President Obama announced his executive actions, 26 states sued the federal government in federal court in Texas to enjoin DHS from implementing the DAPA program. Those states alleged that DAPA was

unconstitutional because it violated the Take Care Clause of Article II, section 3 of the U.S. Constitution.

They also argued DAPA was arbitrary and capricious under the Administrative Procedures Act (APA) and not properly promulgated under the APA's notice-and-

comment procedures. The district court entered a nationwide preliminary injunction enjoining DHS from implementing the DAPA program on the notice-and-comment procedures grounds.

On November 9, 2015, the Fifth Circuit Court of Appeals affirmed the district court.¹ The government had sought a stay of the injunction pending appeal, which, had it been granted, would have meant DHS could have implemented DAPA while the appeal was pending. But the Fifth Circuit declined to stay the injunction.² Given that, the government sought expedited review by the Supreme Court, and on January 19, the Supreme Court agreed to hear the case.³

The Supreme Court's decision to hear the case is significant because it will have a major impact on our immigration policy. With the injunction in place, an estimated 4 million parents of U.S. citizens or permanent legal residents are subject to deportation and ineligible to work in the United States. But



The Supreme Court's decision to hear the case is significant because it will have a major impact on our immigration policy.

the decision to accept review will have an impact on more than our immigration policy.

When the government petitioned the Supreme Court, it presented three questions for review: (1) whether the states had standing to challenge the executive action; (2) whether DAPA was arbitrary and capricious under the APA; and

(3) whether DAPA was subject to the APA's notice-and-comments procedures. The court granted review on all three questions but, in an unusual move, added a fourth question: Whether DAPA violates the Take Care Clause of Article II, section 3 of the Constitution. The Take Care Clause obligates the president to "take Care that the Laws be faithfully executed."

It is likely, according to court observers, that the Supreme Court will hear oral argument in the case sometime in April and rule before the current term concludes in June. Keep an eye out for what could be a bombshell decision.

¹ *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. Nov. 9, 2015).

² *Texas v. United States*, 787 F.3d 733, 768-69 (5th Cir. 2015).

³ *United States of America v. Texas*, Case No. 15-674.

Author: Maria del Carmen Ramos – Shumaker, Loop & Kendrick LLP

SUPREME COURT TAKES TWO IP CASES

Intellectual Property Section

Chairs: Jeff Fabian - Shumaker, Loop & Kendrick, LLP; and Kathy Wade - Fee Jeffries



The United States Supreme Court in January granted certiorari review of two important intellectual property cases: One to determine the appealability of the decision to create the Inter Partes Review (IPR) procedure and the proper standard for patent claim construction in IPR proceedings, and another to re-examine the proper standard for awarding attorney's fees in copyright cases.

Patent IPR Procedures: *Cuozzo Speed Technologies, LLC v. Lee*, Case No. 15-446 (cert. granted Jan. 15, 2016).

In *Cuozzo*, a divided panel of the Federal Circuit affirmed the Patent Trial and Appeal Board's procedure of applying a "broadest reasonable interpretation" standard to claim construction in IPR proceedings, rather than the "plain and ordinary meaning" standard applied in district courts. The petition describes the IPR process as "both unexpectedly popular and surprisingly lethal," with 85 percent of the patents challenged in an IPR being cancelled. Stakeholders from every side participated in the petition process, with the pharmaceutical industry, the biotech industry, 3M, and several IP industry groups appearing as *amici*. The court is also asked to determine whether it can

even review the creation of the IPR procedure.

Copyright Fees: *Kirtsaeng v. John Wiley & Sons, Inc.*, No. 15-374 (cert. granted Jan. 15, 2016).

If the name of this case sounds familiar, that's because it is Kirtsaeng's second trip to the Supreme Court. Kirtsaeng, an enterprising foreign student, purchased textbooks abroad and re-sold them to classmates in the United States, and a textbook publisher sued him for copyright infringement. In 2013, the Supreme Court held that the first sale doctrine applied to copies of works lawfully made outside of the United States and later brought here for re-sale. The court therefore reversed the jury's finding that Kirtsaeng was liable for willful infringement. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).

On remand, Kirtsaeng, as the now-prevailing party, sought attorney's fees pursuant to 17 U.S.C. § 505. ("The court may also award a reasonable attorney's fee to the prevailing party as part of the costs.") The district court refused to award attorney's fees, stating that the plaintiff's litigation position, while ultimately rejected by the Supreme Court, was not "objectively unreasonable." *John Wiley & Sons,*



PHOTO COURTESY OF MICHAEL ALEX WASYLIK

The petition describes the IPR process as "both unexpectedly popular and surprisingly lethal," with 85 percent of the patents challenged in an IPR being cancelled.

the Ninth and Eleventh Circuits granting fees when a defense advanced the purposes of the Copyright Act; the Fifth and Seventh Circuits employing a presumption of fees; and the remaining circuits placing substantial weight on whether the other party is "objectively unreasonable." The Supreme Court granted certiorari on the question: "What is the appropriate standard for awarding attorney's fees to a prevailing party under § 505 of the Copyright Act?"

Both cases are scheduled to have briefing concluded in late April,

so we'll have the court's decisions by summer.



Author:
Dineen Pashoukos Wasylik – DPW Legal

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LAW WEEK 2016 CELEBRATES HISTORIC MIRANDA DECISION

Law Week Committee

Chairs: Amy Nath - Shriners Hospitals for Children; Alexandra Haddad Palermo – Burr & Forman; and Maja Lacevic – Trenam Law



As a procedural safeguard, the words of the Miranda Warning help secure the privilege against self-incrimination.

It was 50 years ago this June that the United States Supreme Court decided a case that has arguably permeated popular culture more than any that came before it or that have come since. *Miranda v. Arizona* engendered the famous Miranda Warning, which has been recited countless times in films and television. The power and importance of the Miranda Warning goes far beyond plot development, though.

Miranda addressed four separate cases involving custodial interrogations. In each of the cases, the defendant was questioned by authorities in a room in which he was cut off from the outside world. None of the defendants were given a full and effective warning of their rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions and, in three of them, signed statements that were admitted at trial.

The words of the Miranda Warning themselves advise a defendant prior to questioning that he has the right to remain silent; that anything he says can be used against him in a court of law; that he has the right to the presence of an attorney; and that if he cannot afford an attorney, one will be appointed for him prior to any questioning, if he so desires. As a

procedural safeguard, these words help secure the privilege against self-incrimination.

The 2016 Law Week Theme, “*Miranda*: More Than Words,” celebrates the historic *Miranda* decision by exploring the procedural protections afforded by the United States Constitution, how these rights are safeguarded by the courts, and why the preservation of these principles is essential to our liberty.

Here in Hillsborough County, Law Week will take place May 23-27. Once again, this event will provide attorneys and judges across the Tampa Bay area the opportunity to reach out to Hillsborough County students through three different activities: courthouse tours, classroom discussions, and mock trials. The courthouse tour activity involves leading groups of students through the George E. Edgecomb Courthouse to give them a glimpse of our judicial system in action. Classroom discussions involve traveling to a local school to lead a class or group of students in a discussion on the law and answer student

questions. Finally, volunteers who participate in mock trials team up and travel to a local school to work with students in presenting an elementary student-friendly case. Participating schools are located throughout the county, and volunteer attorneys and judges are welcome to participate in any (or all!) of the three activities.

Please mark your calendars to participate in Law Week 2016. Join your colleagues, and address basic legal principles with Hillsborough County students in a fun and accessible way! If you are interested in learning more about Law Week 2016 or volunteering as a courthouse tour guide, classroom speaker, or mock trial participant, please contact HCBA Young Lawyers Division Law Week Committee Co-Chairs Dane Heptner (heptd@usalaw.com) or Clinton Morrell (cmorrell@slk-law.com).

Author: Amy Nath - Shriners Hospitals for Children

PRENUPTIAL AGREEMENTS

Marital & Family Law Section

Chair: Seth Nelson - Seth Nelson, P.A.



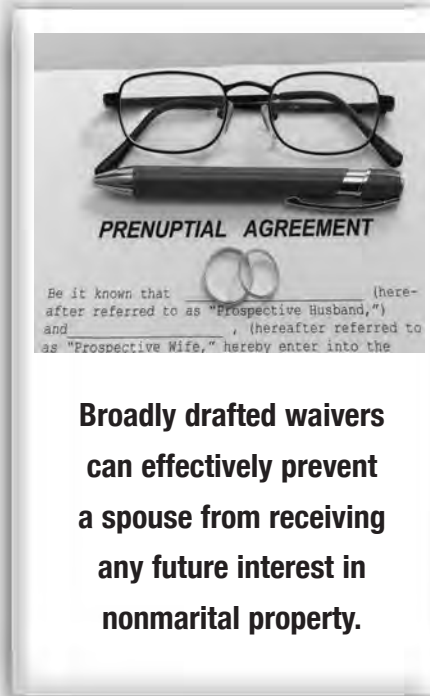
A prenuptial agreement is the last thing a couple want to discuss before their impending marriage. Nothing saps the excitement from an engagement more than discussing how assets and liabilities will be treated if the upcoming marriage ends in divorce. However, this conversation should take place if a client expresses an interest in protecting nonmarital assets or earnings in a future dissolution action.

One of the most important and sensitive issues in any prenuptial discussion is the treatment of assets upon dissolution. Typically, the future spouse with the greater financial position will request a provision that limits or eliminates the creation of marital property. This type of provision may allow the spouse who purchased the property to retain it, as a nonmarital asset, after a divorce. Historically, this “what’s mine is mine and what’s ours is mine” strategy was effective but not foolproof because some courts interpreted broadly drafted prenuptial waivers to exclude the enhanced value of nonmarital property caused by the expenditure of marital funds or labor (active appreciation). Specifically, the

Second and Third District Courts of Appeal previously held that a spouse did not waive the right to receive the enhanced value of nonmarital property that resulted from active appreciation when the prenuptial agreement was silent on the issue of enhancement or appreciation. See *Valdes v. Valdes*, 894 So. 2d 264, 267 (Fla. 3d DCA 2004); *Irwin v. Irwin*, 857 So. 2d 247, 248 (Fla. 2d DCA 2003).

However, in *Hahamovitch v. Hahamovitch*, 174 So. 3d 983 (Fla. 2015), the Florida Supreme Court rejected *Valdez* and *Irwin* when it decided the following certified question in the affirmative:

Where a prenuptial agreement provides that neither spouse will ever claim any interest in the other’s property, states that each spouse shall be the sole owner of property purchased or acquired in his or her name, and contains language purporting to waive and release all rights and claims that a spouse may be entitled to as a result of the marriage, do such provisions serve to waive a spouse’s right to any share of assets titled in the other’s spouse’s name, even if those assets were acquired during the



marriage due to the parties’ marital efforts or appreciated in value during the marriage due to the parties’ marital efforts?

Shortly thereafter, in *Felice v. Felice*, 2015 WL 9487576, at *3 (Fla. 2d DCA Dec. 30, 2015), the Second DCA recognized that *Irwin* was no longer good

law and interpreted a broadly drafted prenuptial waiver to restrict a spouse’s claim to the enhanced value of a marital home purchased before the marriage. In both *Hahamovitch* and *Felice*, the nonmarital properties increased in value due to the expenditure of marital funds.

Accordingly, when drafting or interpreting prenuptial agreements, it is important to be aware of this shift in the law in order to properly advise clients that broadly drafted waivers can effectively prevent a spouse from receiving *any* future interest in nonmarital property even when marital funds or labor

were used to increase the value of that property.



Author: Martin Deptula - Harris & Hunt, P.A.

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MEDIATION RESOURCES FOR LAWYERS

Mediation & Arbitration Section

Chairs - Benjamin S. Jilek - Bush Ross, P.A.; and Amy Mahan Tamargo - Tamargo Mediation, PLLC



Mediation is a process every Florida lawyer encounters and one some lawyers participate in on a regular basis. It is an event that requires each participating litigator to know their client(s), the law, the courts, the facts, and their mediator. These elements are absolutely necessary to get the best results. It is also very helpful to know the defining sources of the process. This article is designed to identify the most important parameters of mediation. The authors would encourage you to save this article and to pass it on physically or electronically to your team members for future reference. Another resource worth saving is *Myths and Urban Legends*, The Florida Bar Journal, May 2008, at 52.

Chapter 44, Florida Statutes, is the ‘constitution’ for Florida Mediation. It is the source for mediation standards and procedures, confidentiality, and privileges. It is one of the standards interpreted by the Florida Supreme Court’s Mediator Ethics Advisory Committee (MEAC) Opinions. <http://www.flcourts.org/core/fileparse.php/550/urlt/RuleBookletJanuary2015.pdf>.

Florida’s Rules for Certified and Court-Appointed Mediators are the Florida

Supreme Court’s foundational rules regulating mediators. They are the source of mediator certification and renewal requirements. The rules also set forth the Standards of Professional Conduct for mediators. They provide the mechanism for discipline and define the mission of the Mediator Ethics Advisory Committee (MEAC) to interpret these rules.

MEAC Opinions are the most directly applicable standards. The MEAC was formed by Florida’s Supreme Court in 1994. Its formal ethics opinions primarily answer questions from mediators and involve interpretations of Florida’s mediator rules. However, the opinions address the roles and violations of all participants. They can be found at: <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/meac-opinions.shtml>.

U.S. Bankruptcy Courts - Middle District:

Bankruptcy courts have two separate forms of mediation: Mortgage Modification Mediation and Alternative Dispute Resolution (ADR) Mediation. Generally, administrative orders and local rules govern mediation. Not all bankruptcy courts have the same rules, and it is imperative that one review the information specifically related to the court the mediation is to take place in.

See www.flmb.uscourts.gov. The Local Rule is 9019-2 (M.D. Fla. L.B.R. 9019-2).

This article is designed to identify the most important parameters of mediation.

The local rule generally incorporates the Florida rules, the MEAC Opinions, and Chapter 44, Florida Statutes. But there are some differences. For example, a party may waive a mediator’s

actual or potential conflict of interest. Also, the Bankruptcy Court imposes a “good faith” requirement, which is not part of the Florida Rules or Chapter 44, Florida.

The Mortgage Modification Mediation procedures are set forth on the court’s website including administrative orders, sample motions, orders, and forms. Mediators must be a Florida Supreme Court Circuit Mediator and have completed eight hours of training focused on modifying residential mortgages in bankruptcy.

U.S. District Courts - Middle District:

The mediation process is governed by Chapter Nine, Court Annexed Mediation of the Rules of the District Court. See www.flmd.uscourts.gov.

The federal district courts differ in their approach to mediation. Review the particular court’s requirements before embarking on the mediation process.



Authors: Clark Jordan-Holmes and Constance d’Angelis - Mediation for Florida



The Uniform Code of Military Justice (UCMJ), don't ya know, has become a punching bag for the far left and the far right in this country for all of the wrong reasons. To most of the members of this association, it is a strange and difficult procedural quagmire that thankfully needs little attention. To a few, it is law that we touched and were touched by during and after military service. To very, very few, it is an active and demanding practice area.

The roots of the UCMJ, originally called the Articles of War, rest in the need expressed by General George Washington in 1776. The Continental Congress responded, and the first Articles of War guided the management of the Army and Navy through the American Revolution. Under the Constitution, the Congress asserted its influence over the armed forces with revisions thought necessary as war and the threat of war arose over the last 240 years.

The development of today's UCMJ is, again to the very few, instructive and fascinating. Major legislative changes were enacted in 1806, 1863, 1920, 1951, 1969, and 2006. Throughout the UCMJ's history, both the executive and the judicial branches asserted their

proper constitutional role. Pick up a modern Manual of Courts Martial and you will find the UCMJ itself, the Rules of Court Martial (the armed services' "Federal Rules of Criminal Procedure"), and the Military Rules of Evidence.

Political and philosophical differences abound over UCMJ statutory and personal jurisdiction, non-judicial punishment, pre- and post-trial procedure, the punitive articles, and the ever-challenged Article 134 (the "general article"). In many ways, however, the UCMJ has been ahead of civilian criminal justice system developments in other federal courts. The rights warnings in military cases preceded *Miranda v. Arizona* by nearly a decade and a half. Additionally, the right to counsel was afforded to all military defendants years before *Gideon v. Wainwright* provided representation only to indigent litigants.

Further, watching older "war movies" featuring court martial scenes is not a very informative instruction tool. The older "law member" is now the military judge; the board of officers are the jury. Proceedings under the current Manual for Courts-Martial are a formidable amalgam of executive, legislative, and judicial handiwork.

Even the clamor over Article 134 seems stale and dated. Article 134, authorizing the prosecution of offenses not specifically detailed by any other article, seems to raise the



Watching old "war movies" is not a very good instructional tool. "Be careful out there!"

ire of many. Specifically, what are "disorders and neglects to the prejudice of good order and discipline in the armed forces"? What is "conduct of a nature to bring discredit upon the armed forces"? To steal a phrase we all know, "I may not know what it is, but I know it when I see it."

That may be the most rational answer to the clamor, at least for today and tomorrow.

On a personal note, having been subject to the 1951 articles and having been the presiding officer at numerous Summary Courts-Martial under that legislation, I am reminded continuously of the advice given by a law professor who was a law officer under the 1920 legislation: "Be careful out there!"

As this issue of the *Lawyer* goes to press, our profession and the nation as a whole will see the UCMJ discussed on the evening newscasts and on radio talk shows, as well as printed on or near front pages of the nation's newspapers. Sergeant Bowe Bergdahl will face a court martial under this statute. We will be initially fascinated, then bored, and finally, depending on our philosophical inclinations, either

delighted or outraged. "Be careful out there!"



Author:
Harold (Hal) W. Youmans - Colonel, USA, Retired

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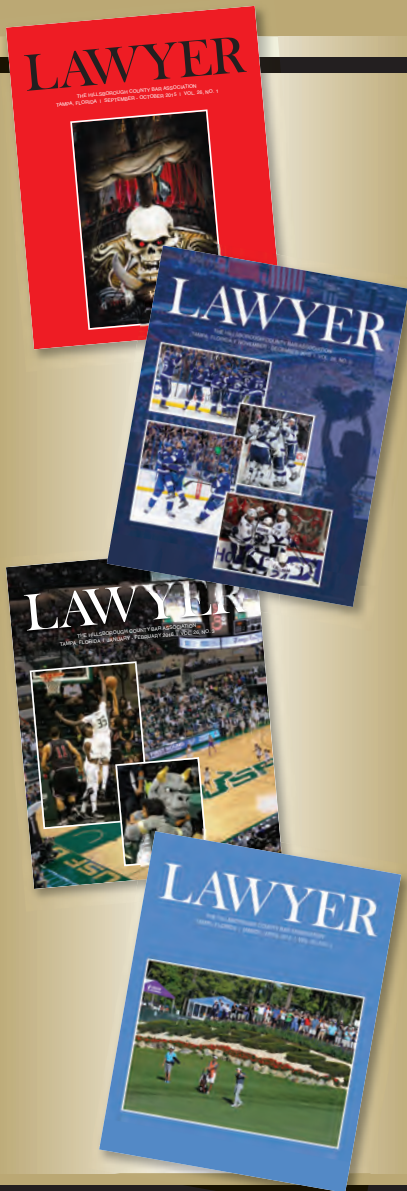
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THIRD-PARTY PURCHASER RIGHTS IN COMMUNITY ASSOCIATION LAW

Real Property, Probate & Trust Law Section

Chairs: Mike Kangas - Philip A. Baumann, P.A.; Kristin Morris - Shutts & Bowen



In May 2015, the Fourth District Court of Appeals issued an opinion in *Pudlit 2 Joint Venture, LLP v.*

Westwood Gardens Homeowners Association, Inc., 169 So. 3d 145 (Fla. 4th DCA 2015), that has become a prevalent topic of discussion among community association lawyers and has significantly impacted the collection practices for homeowners and condominium associations. *Pudlit* expanded the holding in *Coral Lakes Community Association v. Busey Bank, N.A.*, 30 So. 3d 579 (2d DCA 2010) to third-party purchasers based upon constitutional prohibitions against the impairment of contracts. In *Coral Lakes*, the court held that statutes cannot impair or supersede a preexisting declaration provision. “To hold otherwise would implicate constitutional concerns about impairment of vested contractual rights.” *Id.* at 584. The declaration for a community association is a contractual right, as a matter of law. As a result, if the language in an association’s declaration provides

more rights (and less assessment liability) to subsequent purchasers or mortgagees than current statutes, those restrictions, based on the governing documents, will control over current statutory obligations. While *Pudlit* may affect

an association’s ability to hold third-party purchasers jointly and severally liable with former owners for all past-due assessments, as provided in sections 720.3085 and 718.116, Florida Statutes, careful review of the association’s governing documents is required to determine the applicability of *Pudlit* in a given case.

Based upon *Pudlit*, associations may be limited to collecting past-due assessments depending on the existing language found in their governing documents, as opposed to the statutory liability found in section 720.3085 or section 718.116. Associations may, however, avoid contractual limitations in their governing documents by including certain provisions that incorporate changes in law. Specifically, text may be added to governing documents to provide for the incorporation of statutory changes in pre-existing governing documents. See *Kaufman v. Shere*, 347 So. 2d

Application of *Pudlit* is contingent on particular facts and dependent on the specific language of an association’s governing documents.

627, 628 (3d DCA 1977).

Since the holding in *Pudlit*, lawyers for community associations, lenders, and property owners have argued over the nuances and expansion of its application, especially in considering when

and if governing documents provide for incorporation of changes in law or identify the controlling authority when a conflict arises between Florida law and the governing documents. During these discussions, it has become evident that the application of *Pudlit* is contingent on particular facts and dependent on the specific language of an association’s governing documents. While *Pudlit* expanded the holding in *Coral Lakes*, the decision has caused varying positions to be advanced by community associations, lenders, and property owners who all continue to battle over the rights of third-party purchasers who take title

to real property that is part of a community association.



Author: Tiffany Love McElheran – Bush Ross, P.A.

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RPPTL SECTION LUNCHEON

The Real Property, Probate & Trust Law Section hosted a luncheon on January 14 to learn about all the new applications for 3D printing. The section would like to thank Todd Jones for presenting and The Bank of Tampa for sponsoring.



FLORIDA BAR HOSTS VIRTUAL CAREER FAIR

The Florida Bar Practice Resource Institute, in partnership with YourMembership, will host a virtual career fair on March 31 from noon to 3 p.m. The event will allow legal professionals to network with multiple employers from the comfort of their homes or offices, all within one afternoon. Professionals looking for career opportunities will be able to chat online with top employers looking to hire lawyers in different specialties.

"The Florida Bar Virtual Career Fair is a very dynamic and proactive way to introduce candidates with strong skill sets directly to potential employers who are looking to fill open positions," said Jonathon Israel, director of The Florida Bar Practice Resource Institute. "By using an online platform, The Florida Bar Virtual Career Fair makes it very easy for hiring companies and job seekers to connect from anywhere."

The virtual platform makes it easy to register, upload a resume, and learn about participating employers before the event. On the day of the event, participants can log in from anywhere and interact one-on-one with employers through online interviews. After the event, participants can log in to facilitate follow-ups.

To register, go to: <http://fl.bar.associationcareernetwork.com>.

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Get rich or die trying. That's the motto (and album title) of hip-hop star 50 Cent, aka Curtis Jackson. Jackson's words may seem out of place in discussing securities law, but welcome to the 21st century. The intersection of celebrity and securities is no longer limited to Martha Stewart or infamous financiers like Michael Milken, Bernie Madoff, or Allen Stanford. Over the past several years, retired NBA star Shaquille O'Neal, actress/model Carmen Electra, and Jackson have all spent time promoting stocks. And while admired celebrities have been hawking products since there have been celebrities to admire and products to hawk, public figures promoting stocks through social media is a relatively recent phenomenon. Coupled with the Jim Kramer, StockTwits, everybody-can-be-a-savvy-investor culture in which we live — voila! — we find ourselves entering the everybody-can-be-a-financial-victim era.

Last November, the SEC issued a bulletin warning investors about fraudsters who may attempt to manipulate stock prices through social media. This story begins, however, earlier. Way back in the dial-up AOL days of 1999, 15-year-old Jonathan Lebed made headlines (and tens of thousands of dollars) by using Internet chat rooms to

promote penny stocks he owned and then selling them. The digital pump-and-dump had arrived. Fast forward to 2011, when Jackson tweeted about a penny stock that he owned, causing the price to skyrocket from one cent to — you cannot make this up — nearly fifty cents — in two days. Rumors of an SEC and even criminal investigation surfaced, but apparently Jackson never sold the stock, which likely kept him out of trouble. (Whether one can tout a security while complying with the disclosure requirements of § 17(b) of the 1934 SEC Act in fewer than 140 characters is a question for another day.)

Authorities have charged individuals for market manipulation cases through digital media. This past November, the SEC and DOJ, respectively, brought a complaint and indictment against James Craig, a Scotland-based promoter, for tweeting about equities using Twitter accounts that he deceptively created to look like established market research company accounts. In one day following Craig's tweets, the stocks dropped 28 and 16 percent.

Craig's case appears straightforward: He allegedly exploited the price drops by trading



The intersection of celebrity and securities is no longer limited to Martha Stewart or infamous financiers like Michael Milken, Bernie Madoff, or Allen Stanford.

the stocks through his girlfriend's account, and created Twitter handles and logos that falsely suggested an affiliation with market research companies. The critical fact of any securities fraud is deception: the misrepresentation or omission of a material fact. The allegations, if true, support that Craig knowingly manipulated the stock value, which would be sufficient to establish civil liability under § 10b-5 as well

as a criminal violation. In other circumstances, however, the facts may not be so supportive. For example, even a C-list celebrity like Carmen Electra has enough of a social media following that she does not need to disguise herself as a market analyst like Craig allegedly did in order to affect a stock price. Furthermore, celebrities' endorsement deals with and ownership of a company are often in the public domain. Thus, a celebrity accused of manipulating a stock may have a built-in defense that there was no deception because all relevant information was publicly available. Consequently, there is a vast gray area of market

Continued on page 59

Continued from page 58

manipulation through social media in which it is difficult to determine — much less prove — fraudulent conduct. That is why the SEC's November bulletin warns investors to exercise extreme caution in using information gleaned from social media about a security where the investor does not

personally know the information source. Although the SEC and DOJ will continue to prosecute the more egregious violations of social media market manipulation, investors need to be more discerning in following investment advice from professional athletes, models, or hip-hop artists.



Author: Andrew Warren



HCBA WELCOMES NEW MEMBERS

DECEMBER AND JANUARY

Bryce Holloway Alley	Melissa Giasi	Zachary W. Lombardo
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Sam Badawi	Kelly Green	Nancy Neaves
Debbie Baker	Elizabeth Chantal Greene	Laurie Ohall
Leland Toman Baldwin	Mary Greenwood-McDermott	Lauren Osa
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Alan D. Borden	Jonathan Hart	Jennifer A. Roberts
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Valerie Cisco	Amber Leigh Inman	Sean Saval
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Francisca Diaz	Chante' Jones	Andre Sesler
Sunai Joy Edwards	Adrienne C. Kendall	James G. Souza
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Nicole Engebretsen	David Knox	Andy Steingold
Christine N. Failey	Jennifer M. Komarek	Angela Tormey
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Solo & Small Firm Section

Chair: Amanda M. Uliano - Law Office of Amanda M. Uliano, P.A.



Having now passed the season of annual limited generosity, we have a year of what many consider to be hard work ahead of us. The most recent period that passed excited everyone with the concept of philanthropy and donating money or time to individuals, institutions, and other societal positive purposes. The emphasis of that season focuses on how we can help others and, for a very brief period of time, change the general attitude of most of the world.

What is overlooked is the significant non-economic benefit to the giver as well.

According to a Stanford University study, frequent volunteering is associated with delayed mortality. A different study measured the mental health of older individuals in assisted-living facilities who were engaged in helping activities. These individuals enjoyed better mental health, including positive attitudes toward aging, improvements and feelings of control and life satisfaction, decreased depression, and a sense of connectedness. They also enjoyed a lower rate of mortality.

Brain scans show that people are made happier by simply thinking about making a donation or helping others. This happens because thoughts of helping activate the

area of the brain that is associated with happiness — the mesolimbic pathway. This in turn releases dopamine, a neurotransmitter that regulates the brain's centers for reward and pleasure.

Actual face-to-face helping also triggers areas in the brain associated with happiness. A study of adults in the United States who volunteered their time to help others reports increased happiness in 96 percent of these volunteers compared with their non-helping counterparts. The study also found:

- An improved sense of well-being (89 percent)
- Lower stress levels (73 percent)
- Better physical health (68 percent)
- Enhanced emotional health (77 percent)
- Enriched sense of purpose (92 percent)

In addition, the act of giving helps people fight depression, according to a study conducted in Great Britain. "Giving to neighbors and communities" was cited as one of the top five factors associated with lower rates of depression. Even mere thoughts of philanthropy help people



**"It is one of the beautiful compensations of life that no man can sincerely help another without helping himself."
— Ralph Waldo Emerson**

fight off disease. A study at Harvard University showed an increase in the production of protective antibodies, compared with a control group of individuals who merely watched a film about the work of Mother Teresa in India.

Ralph Waldo Emerson wrote: "It is one of the beautiful compensations of life that no man can sincerely help another without helping himself." A growing body of scientific evidence

indicates that the giving of one's time makes the world a better place for both giver and recipient.

We can all enjoy the hard work ahead in the New Year and contribute to our enjoying good health and happiness to the fullest in the New Year through our pro bono efforts.

**Note: Statistical information from Bruce Debosky, Tribune News Service*



*Author:
Raymond A.
Haas Jr. - HD
Law Partners*

TAX ATTORNEY PRIVILEGES: CONFIDENTIALITY AND COMPLETENESS

Tax Law Section

Chairs: Justin Klatsky - Owens Law Group, P.A.; and Brian Harris - Akerman



Section 10.3 of Treasury Department Circular No. 230 outlines who may practice before for the Internal Revenue Service. Those who may practice include attorneys, certified public accountants (CPA), and enrolled agents (EA). Naturally, this creates competition among these professionals for clients.

For those unfamiliar with the EA credential, the IRS website states: “An enrolled agent is a person who has earned the privilege of representing taxpayers before the Internal Revenue Service. ... Enrolled agents, like attorneys and certified public accountants, have unlimited practice rights. This means they are unrestricted as to which taxpayers they can represent, what types of tax matters they can handle, and which IRS offices they can represent clients before.”

There are, however, significant differences in the privileges that apply to communications with an attorney as compared to an enrolled agent or a CPA.

Client Confidentiality

I.R.C. § 7525 addresses “confidentiality privileges relating to taxpayer communications.” It states: “With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer

and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.”

In layman terms, the common law attorney-client privilege has been extended to those “authorized under Federal law to practice before the Internal Revenue Service.” I.R.C. § 7525(a)(3)(A). Note, however, the privilege only applies to “noncriminal tax matters” before the IRS and in federal court. I.R.C. §§ 7525(a)(2)(A), (a)(2)(B). Suppose your client tells you that he regularly structures deposits to avoid currency transaction reports. Or suppose you are informed of questionable intercompany transfer pricing practices. In any criminal matter, the client’s communications with an enrolled agent or CPA about these issues would not be protected from disclosure. The same communications with an attorney would be protected.

Florida law also provides an accountant-client privilege. § 90.5055, Fla. Stat. The application of this privilege to federal tax matters is likewise limited. Federal Rule of Evidence



**Only a tax attorney
can communicate all
of the options legally
available to a client.**

501 grants common law privileges unless the Constitution, federal statute, or Supreme Court Rule provides otherwise. State law privileges only apply when state law supplies the rule of decision, but federal tax cases are generally governed by federal law

and not state law, thereby limiting the application of the state accountant-client privilege.

Complete Counsel

In addition to having stronger protection for privileged communications, the tax attorney is able to provide “complete counsel” to a client. Only a tax attorney can communicate all of the options legally available to a client. For example, in the area of tax controversy, this may include advising a client on whether the facts support bankruptcy. Neither a CPA nor EA may give true legal advice. A tax attorney is able to represent a client in an audit and appeals, as well as litigation in the Tax Court, if necessary.



Author:
Nehemiah Jefferson
— *The Jefferson*
Firm, LLC

NATIONAL PRO BONO WEEK: CELEBRATING PRO BONO FROM TOP TO BOTTOM

Thirteenth Judicial Circuit's Pro Bono Committee

Chair Rosemary Armstrong, Crossroads for Florida Kids, Inc.



Practitioners in the Thirteenth Judicial Circuit and Hillsborough County joined the national celebration with activities spearheaded by virtually all segments of the local legal community. Activities ranged from judges participating in a pro bono summit to a law school and young lawyers hosting pro bono fairs to bring together service providers with those interested in donating their time and talents. Local



With the multitude of events comes much opportunity — opportunity to get involved, opportunity to help those who desperately need help.

Bar associations and sections of the Bar hosted events to help members of the community. Service providers, such as Bay Area Legal Services, Crossroads for Florida Kids Inc., and Are You Safe Inc., hosted activities to help the community, train pro bono attorneys, and raise money to support pro bono efforts. In fact, so many

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activities occurred that they were spread out over a much greater time period than the official national celebratory week.

Even those not directly involved in providing pro bono service joined in the celebration. For example, the James J. Lunsford Law Library co-hosted a “Coffee at the Courthouse” event with Bay Area Legal Services. The event recognized volunteer attorneys for their pro bono service and provided them with free coffee and breakfast pastries as a “thank you” for their efforts. The Hillsborough County Board of County Commissioners also joined in the celebration by issuing a proclamation at its October 21 public meeting, in which Commissioner Kevin Beckner presented representatives of the Thirteenth Judicial Circuit’s Pro Bono Committee with a proclamation declaring the week of October 25, 2015, to be Pro Bono Week in Hillsborough County. The Honorable Ronald Ficarrotta, chief judge of the Thirteenth Judicial Circuit, also spoke about the importance of pro bono service at the public meeting.

With so many important pro bono events taking place, it is difficult to discuss each one in detail or to select one to showcase. However, with the multitude of events comes much opportunity — opportunity to get involved, opportunity to help those who desperately need help, opportunity to make a difference in the community, opportunity to improve access to justice, opportunity to gain experience in a new area of law, opportunity to develop or enhance legal skills, and the opportunity to change someone’s life.

If you are interested in participating in the Thirteenth Judicial Circuit’s Pro Bono Committee, or learning about pro bono opportunities available through the committee’s member organizations, please contact

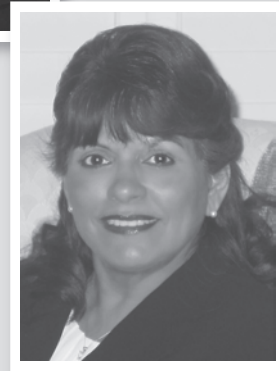
Committee Chair Rosemary Armstrong at rosemary@crossroadsfloridakids.org.



Author: Amy Bandow - Western Michigan University/Thomas M. Cooley Law School



The Honorable
Catherine
Peek McEwen



Isabel “Cissy”
Boza Sevelin

FLORIDA BAR PRO BONO AWARDS

In a special ceremony on January 28 at the Florida Supreme Court, two local legal professionals were recognized for their commitment to pro bono service.

The Honorable Catherine Peek McEwen of the U.S. Bankruptcy Court, Middle District of Florida, Tampa, was the first recipient of the Chief Justice’s Distinguished Federal Judicial Service Award. The new award, which recognizes an active or retired federal judge for outstanding and sustained service to the public, especially as it relates to the support of pro bono legal services, was presented by Chief Justice Jorge Labarga.

Also at the ceremony, Isabel “Cissy” Boza Sevelin was recognized with a Florida Bar President’s Pro Bono Service Award for her continued work on behalf of poor and indigent clients. In 2014, Sevelin donated 863 hours to various organizations, and in 2015 that total was even higher.

The HCBA is honored to have such upstanding role models to serve as leaders in our legal community.

SUING A FOREIGN (INTERNATIONAL) DEFENDANT: INITIAL STEPS

Trial & Litigation Section

Chair: John Schifino - Burr & Forman



As with any case, a plaintiff suing a foreign defendant must decide whether to sue in state court or federal court. Federal courts generally have original jurisdiction over cases arising under federal law (federal question jurisdiction) or between diverse parties (diversity jurisdiction). 28 U.S.C. §§ 1331, 1332. Federal question jurisdiction requires that the action be based on federal law, not merely based on state law that is likely to provoke a federal law defense. *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152-53 (1908). Diversity jurisdiction, on the other hand, requires complete diversity. *Ferry v. Bekum Am. Corp.*, 185 F. Supp. 2d 1285, 1287-88 (M.D. Fla. 2002). Complete diversity does not exist where any one defendant is from the same U.S. state as any one plaintiff. *Id.* However, when a plaintiff wishing to sue a foreign (international) defendant in state court fraudulently joins an in-state defendant simply to defeat complete diversity, the court will disregard the improperly joined defendant for the purposes of determining diversity jurisdiction. *See Tran v. Waste Mgmt., Inc.*, 290 F. Supp. 2d

1286, 1292-94 (M.D. Fla. 2003). In sum, an action against a foreign defendant belongs in state court only if it arises under state law and there is a properly joined co-defendant from the same state as at least one plaintiff.

After commencing the action, the plaintiff must arrange for service of process on the foreign defendant. Serving a defendant in the U.S. requires compliance with the applicable state or federal rules of service. But these rules do not typically apply to service abroad. In most cases, service abroad must comply with the rules promulgated by the Hague Service Convention (HSC). The HSC enumerates several potential methods of valid service, including transmission to the foreign defendant's "designated central authority" or through the postal channels. More than 70 countries have ratified the HSC, including most Western European countries, China, and Russia. If a foreign defendant is a citizen of one of the HSC's member states, service on that defendant must comply with the HSC, and any inconsistent state or federal service law is preempted. *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694, 699 (1988); *Grupo Radio Centro v. Am. Merch. Banking Grp., Inc.*, 71 So. 3d 151, 151 (Fla. 3d DCA 2011).

However, if the foreign defendant has appointed a U.S. agent for

**In most cases,
service abroad must
comply with the
rules promulgated
by the Hague
Service Convention.**

service of process, or if the defendant has a U.S. subsidiary that will be deemed the defendant's agent for service of process purposes, service of process on the agent within the U.S. is valid

service notwithstanding the HSC. *See Volkswagenwerk AG*, 486 U.S. at 706-708. Moreover, if the foreign defendant has a U.S. lawyer who has entered an appearance on its behalf in the litigation, courts may approve motions for leave to serve process on the lawyer in lieu of HSC service. *See, e.g., Calista Enters. Ltd. v. Tenza Trading Ltd.*, 40 F. Supp. 3d 1371 (D. Or. 2014). Additionally, the foreign defendant may agree to waive formal service of process. Fed. R. Civ. P. 4(d).

While the HSC applies to most foreign defendants, a number of Central and South American nations have not ratified the HSC. Of these non-ratifying countries, most have signed the Inter-American Service Convention (IASC). The IASC and its service protocol is accessible through the U.S. State Department's International Judicial Assistance – Service of Process webpage.



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Information, please email Teresa@hillsbar.com**

LIABILITY EXPOSURE FOR WORK INJURIES

Workers' Compensation Section

Chairs: Anthony V. Cortese - Anthony V. Cortese, Attorney at Law; and Irene M. Rodriguez - Irene M. Rodriguez, PA



In any serious injury case, should an employer/carrier ever file an initial denial of benefits? There is authority now for the proposition that an employer/carrier should not until it has thoroughly evaluated exposure: *Vazquez v. Romero & Associated Industries*, OJCC Case No. 14-006910. The *Vazquez* decision has major implications for workers' compensation attorneys and liability attorneys on both sides of the equation, as well as corporate and insurance attorneys.

The Florida Workers' Compensation Act provides strong immunity provisions for employers when an employee is injured by the employer's negligence. However, if the employer/carrier denies an employment relationship, workers' compensation coverage, or that the occurred injury in the course of employment, the employer/carrier may be estopped from raising the workers' compensation immunity as a defense. *Byerley v. Citrus Publ'g, Inc.*, 725 So. 2d 1230 (Fla. 5th DCA 1999).

In *Vazquez*, the claimant alleged he suffered a severe head injury when he fell about 30 feet at a construction site. The claimant filed workers' compensation claims against three possible employers.

Each employer/carrier filed a denial. So the claimant then voluntarily dismissed each of the claims and filed civil actions in circuit court against each employer.

The case was filed in Miami, but perhaps cognizant of the kind of liability established in *Matthews v. Mosaic* (a \$64.5 million jury verdict for a construction worker reported here previously), one of the employers (Romero) later attempted to begin voluntarily providing benefits to the claimant. The claimant refused Romero's offer of indemnity and medical benefits and continued to pursue the civil action. Romero then tried to pursue discovery from the claimant in the workers' compensation action and also filed a request for contribution from the other two employers. An order regarding discovery was appealed, and the First District Court of Appeals held that the Judge of Compensation Claims did not have jurisdiction to enter an order regarding discovery in the case because all of the Petitions for Benefits had been voluntarily dismissed.

In response to a request for rehearing or clarification, the First



**The Employer/Carrier
cannot unilaterally change
its mind after
an initial denial ... and
avoid an estoppel.**

distinguished decisions permitting discovery in the absence of a pending petition for benefits where workers' compensation benefits were being provided.

The effect of the *Vazquez* decision is that the employer/carrier cannot unilaterally change its mind after an initial denial of workers' compensation benefits and avoid an estoppel response to an effort to raise workers' compensation immunity in a subsequent civil action. The efforts of Romero to reinstate the workers' compensation claim show that someone realized that the workers' compensation exposure was much more limited than the liability exposure, something that should have been considered before the initial denials were filed.

Author: Anthony V. Cortese - Anthony V. Cortese, Attorney at Law

DCA confirmed its ruling that where there was a denial of benefits, followed by a voluntary dismissal and a civil action, the Judge of Compensation Claims was divested of jurisdiction. *Vazquez v. Romero*, 2015 WL 6876664, at *1 (Fla. 1st DCA Nov. 9, 2015). In doing so, the First DCA

JOIN A SECTION OR COMMITTEE AT HILLSBAR.COM.

Jessica Kirkwood Alley, a partner in **Phelps Dunbar's** Tampa office, has been selected as a fellow of the Litigation Counsel of America based on her excellence in litigation among all segments of the Bar.

Lee Bell, CPA, has been promoted to president of **Saltmarsh, Cleaveland & Gund**.

Steve Bernstein, managing partner in **Fisher & Phillips'** Tampa office, has been appointed treasurer of the Greater Tampa Chamber of Commerce.

Robert Blank, of the Tampa office of **Rumberger, Kirk & Caldwell**, was recently re-certified as a Board-Certified Specialist in Civil Trial Law by The Florida Bar.

Robert "Bob" W. Boos, a partner at **Adams and Reese**, has been elected to the firm's Executive Committee. The six-partner Adams and Reese Executive Committee oversees strategic operations of the multidisciplinary firm and its attorneys and staff.

Stephanie A. Caldwell has joined **Smolker, Bartlett, Loeb, Hinds & Sheppard, P.A.** Caldwell focuses her practice on the acquisition, disposition, development, financing, and leasing of commercial real property.

Victoria Cruz-Garcia was the recipient of the 2015 Luis Cabassa Award from the Tampa Hispanic Bar Association at the annual gala dinner and ceremony on November 12 at The Palma Ceia Golf and Country Club. A principal attorney at **Givens**

Givens Sparks, Cruz-Garcia was chosen to receive the THBA's highest award because of her commitment to law, professionalism, and the community through the organization.

Kevin J. Healey has been named a partner at **Smolker, Bartlett, Loeb, Hinds & Sheppard, P.A.** Healey joined the firm in August 2014 and has devoted his practice to complex commercial litigation.

Dominique E. Heller has been named a shareholder with **Wiand Guerra King**. She concentrates her practice in the areas of general commercial litigation and appeals with a focus on the securities and financial services industries.

Vivian Cortes Hodz, of **Cortes Hodz Family Law & Mediation, P.A.**, was sworn in as president of the Tampa Hispanic Bar Association and will lead the organization into its 10th year.

Michael Hooker, Phelps Dunbar Tampa litigation partner, was elected to a fourth consecutive two-year term on The Florida Bar Board of Governors beginning in 2016. The 52-member Board of Governors develops and adopts the policy of the Bar for the state's admitted attorneys.

William E. Kirilloff has joined **Roig Lawyers'** Tampa office. Kirilloff concentrates his practice on personal injury protection/no-fault and commercial litigation.

Dennis J. LeVine, a partner in the Tampa office of **Kelley Kronenberg**, has been appointed to serve a two-year term on

the Hillsborough County Metropolitan Planning Organization's Citizens Advisory Committee for Transportation. LeVine also spoke at the annual meeting of the National Association of Retail Collection Attorneys in Washington, D.C., and presented "Practical Insights on the Most Common Bankruptcy Hurdles Faced by the Collection Practitioner."

Jonathan Lewerenz has joined **Phelps Dunbar** as a new associate in its Tampa office. He will practice in the area of insurance and reinsurance.

Anne-Leigh Gaylord Moe, a shareholder at **Bush Ross**, was recently sworn in as president of the Tampa Bay Chapter of the Federal Bar Association. Moe is an experienced trial lawyer who has received an AV Preeminent Peer Review Rating by Martindale-Hubbell for her commercial litigation practice involving contract and employment disputes, professional liability, and construction law.

James Marshall Moorhead has been promoted to partner at **Adams and Reese**. He is a member of the firm's Transactions and Corporate Advisory Services Practice Group.

Michael Ruel has been promoted to director at **Galloway, Johnson, Tompkins, Burr & Smith's** Tampa office.

Marshall Schaap has been named a partner at **Weekley | Schulte | Valdes**, a civil trial law

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firm with offices in Tampa and Ocala. Schaap practices in the areas of personal injury and construction-related matters. He manages the firm's downtown Ocala office.

Jacqueline Simms-Petredis has been elected into partnership at the Tampa office of **Burr & Forman LLP**.

Jason P. Stearns, an associate in **Phelps Dunbar's** Tampa office, has been elected a fellow of the American Bar Foundation. The American Bar Foundation Fellows is an honorary organization of attorneys, judges, law faculty, and legal scholars who have been elected by their peers to become a member.

John V. Tucker of **Tucker & Ludin, P.A.**, presented a lecture on VA disability compensation at the National Organization of Veterans Advocates conference in Chicago.

Luis Viera of **Ogden & Sullivan** was elected chairman of the City of Tampa Civil Service Board.

David B. Weinstein, managing shareholder of the Tampa office of international law firm **Greenberg Traurig, P.A.**, has been named to the State Litigation Advisory Committee of the U.S. Chamber Litigation Center, the litigation arm of the U.S. Chamber. The Litigation Center is a nonprofit affiliate of the U.S. Chamber of Commerce that advocates for the fair treatment of business before courts and regulatory agencies. The State

Litigation Advisory Committee focuses on state law issues.

Akerman LLP, maintained its leadership in workplace diversity and inclusion by once again earning a perfect 100 percent score in the 2016 Corporate Equality Index, a benchmarking survey administered by the Human Rights Campaign Foundation that measures the equality of corporate policies and practices for LGBT employees.

Carlton Fields, for the seventh consecutive year, received a perfect score of 100 percent on the 2016 Corporate Equality Index, earning the distinction of one of the best places to work for LGBT equality.

The Florida Medical Clinic Foundation of Caring recently announced that **Bay Area Legal Services**, a nonprofit legal aid organization, has been selected as a recipient of a \$1,450 grant. The grant is part of the foundation's bi-annual initiative to fund programs and services for deserving children, families, and individuals in Hillsborough and Pasco counties.

The James Hoyer Law Firm was named Whistleblower Lawyers of the Year by Taxpayers Against Fraud at TAF's 15th annual awards dinner in Washington, D.C. James Hoyer client Peggy Ryan, whistleblower in the off-label marketing case against Endo Pharmaceuticals, was also named Whistleblower of the Year. The Endo case resulted in a \$192.7 million settlement for both criminal and civil charges that the company illegally marketed a pain treatment patch called Lidoderm.

For the month of November 2016

Judge: Hon. Richard A. Nielsen

Parties: Dominga Garcia v.

Hillsborough Area Regional Transit Authority

Attorneys: For plaintiff: Gil Sanchez Valencia; for defendant: Michael H. Rosen

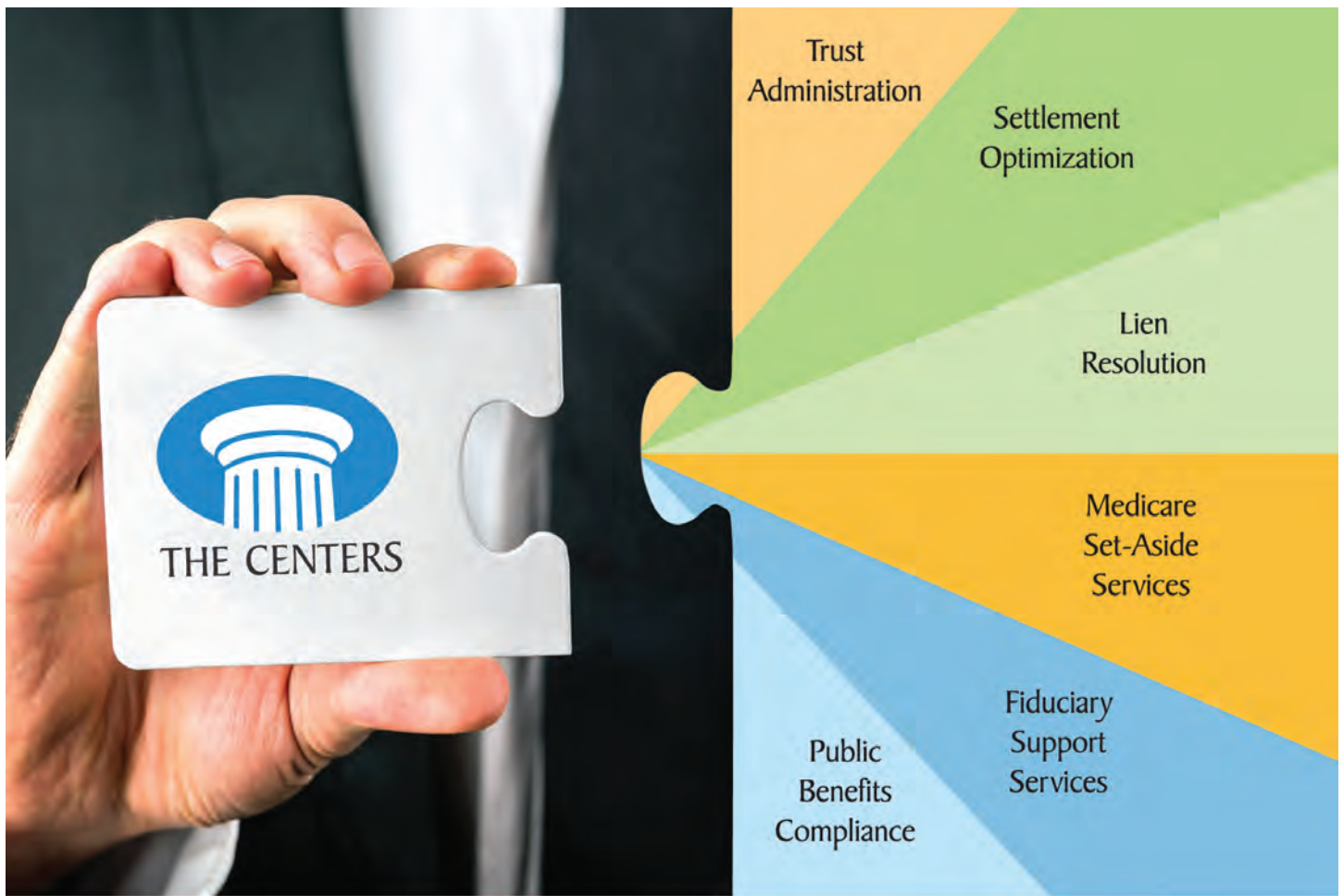
Nature of case: Personal injury; plaintiff sought \$491,148 for injuries to back and neck

Verdict: Net verdict \$6,900 based upon finding that plaintiff was 90 percent negligent

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Bonezzi Switzer Polito & Hupp Co. L.P.A., an established Ohio defense firm with over 20 attorneys, is seeking an attorney with self-supporting and established client base for affiliation or integration for the Florida office. Preferred practice areas: Product Liability Defense, General Liability Defense, Workers Compensation Defense, Employment Defense, Healthcare Law Defense, Asbestos/Environmental Defense, Medical Negligence and Nursing Home Defense. Interested attorneys may forward CV's to William D. Bonezzi, Bonezzi Switzer Polito & Hupp Co. L.P.A., City Center, 100 2nd Avenue South, Suite 502-S, St. Petersburg, FL 33701-4313, email to wbonezzi@bsphlaw.com or fax to 727-826-0914. The firm is an equal opportunity employer.



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