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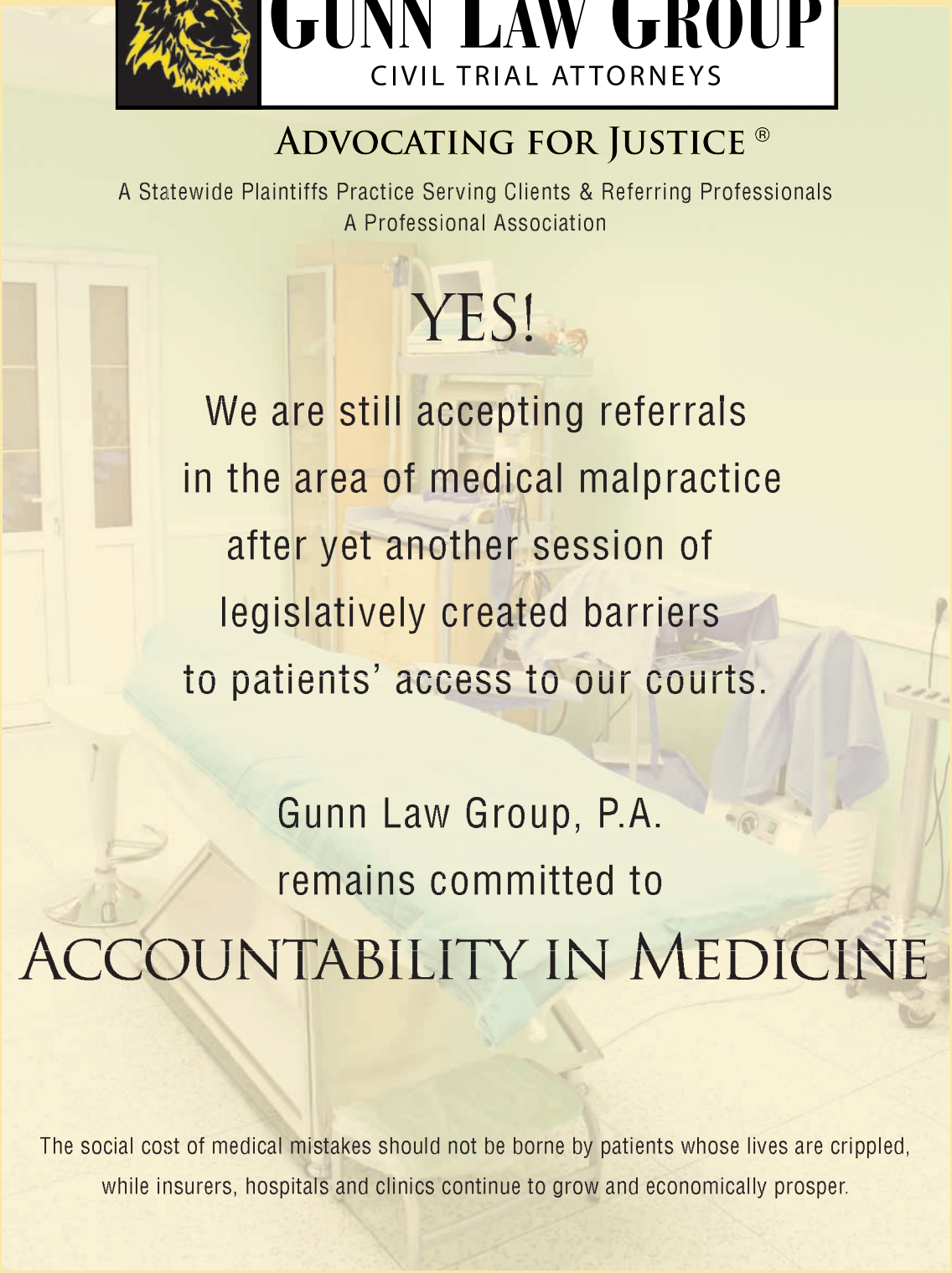

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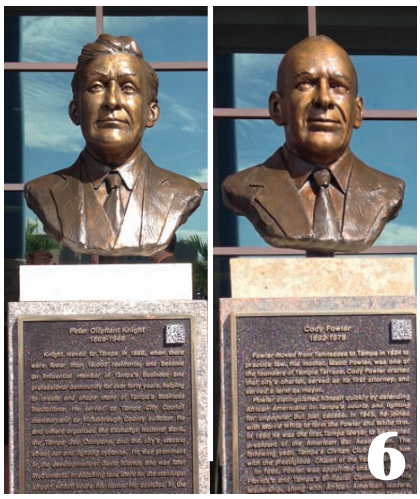
DIVISIONS



3 **THE JOYS AND PAINS OF TECHNOLOGY AND SOCIAL MEDIA**
Editor's Message
by Rena Upshaw-Frazier

4 **JUSTICE FOR ALL**
HCBA President's Message
by Susan E. Johnson-Velez

6 **LAWYERS PETER O. KNIGHT AND CODY FOWLER ADDED TO RIVERWALK MONUMENT TRAIL**
Executive Director's Message
by John F. Kynes

8 **SEARCH AND SEIZURE OF MOTOR VEHICLE PASSENGERS**
State Attorney's Message
by Mark A. Ober

10 **A POSITIVE STEP**
From the Clerk of the Circuit Court
by Pat Frank

FEATURES AND EVENTS

5 **SHAPING YOUNG MINDS**

9 **PAST PRESIDENTS LUNCHEON**

11 **YLD LUNCHEON HIGHLIGHTS VOLUNTEER OPPORTUNITIES**

30 **GET READY FOR THE 6TH ANNUAL HCBA 5K PRO BONO RIVER RUN**
by Sarah E. Kay and Laura Westerman

32 **JANUARY MEMBERSHIP LUNCHEON**

34 **HOLIDAY OPEN HOUSE**

43 **ELDER LAW CLE**

43 **HEALTH CARE LAW CLE**

47 **JUDICIAL LUNCHEON**

52 **SENSORY FRIENDLY SANTA**

59 **TRIAL & LITIGATION SECTION QUARTERLY LUNCHEON**

ABOUT THE COVER

You may have passed this massive mural project (the largest outdoor original artwork in Florida) while driving by Ybor City on Adamo Drive. The mural was designed by Michael Parker and produced with the help of volunteers, Hillsborough Community College students, and sponsors. The project captures the evolution of Ybor City and reflects the diversity of its population over the years. The mural touches on the struggles that the people of Ybor have faced — the challenges of leaving a homeland in turmoil, fighting for equality, and finding a place to build a new legacy. "There is no better example of successful assimilation of vastly different cultures within the United States. This is a legacy to treasure," organizers state on the website for the project. To learn more about the mural, go to yborartproject.com.

SECTIONS

16 PRO BONO OPPORTUNITIES WITH "APPEAL"
Appellate Practice Section
by Sarah Lahlou-Amine

18 TOP 3 REASONS TO PRACTICE COLLABORATIVE LAW
Collaborative Law Section
by Adam B. Cordover

22 P3S IN FLORIDA: INNOVATION IN PUBLIC PROJECTS
Construction Law Section
by Erin E. Banks

24 HOW FAR CAN A LONG ARM REACH?
Corporate Counsel Section
by Caroline Johnson Levine

26 VENTURING OUT FOR CLE
Criminal Law Section
by George Bedell

38 ELDER LAW UPDATE
Elder Law Section
by Elizabeth P. Allen

39 U.S. SUPREME COURT DECIDES FLORIDA CASE
Eminent Domain Section
by Kenneth C. Pope

41 FLORIDA'S PATIENT SELF-REFERRAL ACT: THE STARK LAW ON STEROIDS
Health Care Law Section
by Jon Gatto

42 FIRST-TO-FILE RULE: WHAT'S IN A NAME?
Intellectual Property Section
by Kathleen M. Wade

44 TAX IMPLICATIONS OF SUPREME COURT DECISION ON DOMA
Marital & Family Law Section
by Constance Rossi and Briggs Stahl

46 REVISED FLORIDA ARBITRATION CODE: ARBITRATION FACE-LIFT
Mediation and Arbitration Section
by Christopher M. Shulman

50 ESTATE AND TAX PLANNING FOR SAME-SEX MARRIED COUPLES IN FLORIDA
Real Property, Probate & Trust Law Section by Taylor C. Russo and Jamil G. Daoud

54 THE PECULIAR AND BRIEF SHELF LIFE OF THE "ESSENTIAL SERVICES" TEST
Real Property, Probate & Trust Law Section by William J. Podolsky, III, and Derek Larsen

57 THE PROPOSAL FOR SETTLEMENT — AN ALL-OR-NOTHING PROPOSITION?
Trial & Litigation Section
by Jaret J. Fuente

58 LIMITATIONS ON THE DISCOVERY OF ESI
Trial & Litigation Section
by Morgan W. Streetman

60 REDEFINING COVERAGE: LONGSHORE/DBA/ JURISDICTION ISSUES
Workers' Compensation Section
by Anthony V. Cortese

COMMITTEES

12 TAMPA BAY AREA PRO BONO LAWYERS MEAN BUSINESS
Pro Bono Committee's Message
by Sarah Lahlou-Amine and Traci L. Koster

20 VOLUNTEER FOR A DAY AND CHANGE THE WORLD OF SOMEONE IN NEED
Community Services Committee
by Lara M. LaVoie

28 TAMPA BAY BEST BUDDIES SERVES VULNERABLE
Diversity Committee by Jason Whittemore and Luis Viera

49 SUSPEND PROFESSIONALISM AND SUSPEND YOUR LICENSE!
Professionalism & Ethics Committee
by Caroline Johnson Levine

IN EVERY ISSUE

23 100 CLUB
27 HCBA BENEFIT PROVIDERS
43 SAVE THE DATES
62 AROUND THE ASSOCIATION
63 CLASSIFIED ADVERTISING
64 ADVERTISING INDEX
64 JURY TRIAL INFORMATION

THE HILLSBOROUGH COUNTY BAR ASSOCIATION

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The Joys and Pains of Technology and Social Media

It can be difficult to not only stay abreast of the new technology but also the rules and regulations governing it.

Twitter. Facebook. LinkedIn. Instagram. The "cloud." DropBox. Summation. Westlaw. Lexis. BlackBerry. iPhone. iPad. The pace at which companies and clever entrepreneurs are developing new ways to create, manipulate, share, and store information is astounding. Typewriters, once the mainstay for drafting documents, have been relegated to those few documents and envelopes that cannot be altered by computer. Advertising in the Yellow Pages has been replaced by online forums. Electronic mail is replacing "regular" mail. Electronic filing is replacing paper filing. Indeed, depending on your law practice, it is now possible to have completely electronic — that is, paperless — files. Technology and social media are constantly changing and evolving. Consequently, our law practices, and the rules governing them, are also constantly changing and evolving.

Technological advances undoubtedly enhance our business and networking. They allow us to reach more people in a faster amount of time, and we can share information with clients or colleagues in the blink of an eye. For example, with the Hillsborough County Bar Association's *Lawyer* magazine, pictures from events are immediately posted to our Facebook page (www.facebook.com/HCBAtampabay). Members can view them instantly without having to wait for the written publication.

Additionally, electronic databases allow us to access stored information from anywhere in the world. We can now file a document with the court without ever leaving our seat. We can advertise our services to millions of people with a well-placed online advertisement or get access to thousands of potential employers by uploading a resume to one of the Internet job forums or using a LinkedIn profile.

Technology and social media are powerful tools.

However, as has been cautioned throughout history — with great power comes great responsibility. This rings especially true with technological advances and social media. Navigating the potential pitfalls of evolving technology can be daunting. The Florida Bar is just starting to scratch the surface in dealing with the landmine of advertising legal services on social media. The procedural and evidentiary rules governing e-discovery are developing every day. Countless articles are being written about protecting a client's privacy when storing data and information on the "cloud."

It can be difficult to not only stay abreast of the new technology but also the rules and regulations governing it as they apply to the practice of law. While utilizing social media and technological advances becomes increasingly important, so does the responsibility of using it prudently and with care.

I will be the first to admit that it is not easy to take full advantage of all that these advances have to offer. For example, I dictated the outline of this Editor's Message on my iPhone's voice memo while waiting at my daughter's volleyball practice, but then I spent an inefficient five minutes trying to find where it was saved so that I could replay it. I am not alone (hello to those of you who still use the physical case reporters and digests). But at the *Lawyer* magazine, we strive not only to use technological advances and social media to bring information to you, but also to keep you apprised of some of the ever-changing rules and regulations. Enjoy the February publication!

Justice for All

Diversity has been a hot topic for many years but will likely continue to be so in light of the rapidly changing demographics in our country.

There are many words you could use to describe me. Some people think of me as a female attorney. Others label me half African-American or, on the flip side, half Filipino. Then there are descriptors such as heterosexual, college graduate, and mother of two. It's difficult to pigeonhole a person into just one category, especially when such a diversity of interests, experiences, and backgrounds collide to make each one of us unique.

Diversity has been a hot topic for many years but will likely continue to be so in light of the

Continued on page 5

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Continued from page 4

rapidly changing demographics in our country. "Embracing Diversity" was the theme of the Hillsborough County Bar Association's January Membership Luncheon. The HCBA has a Diversity Committee, of which I am a part. Law firms and other companies have internal panels and groups that work toward the goal of inclusion in the workplace. The conversation has been building, and I'm pleased to see it stretching beyond good intentions and into positive actions.

In the Tampa Bay area, the HCBA's Diversity Committee is spearheading two great events this year to raise awareness about the importance of diversity in the legal community. The first is the annual Diversity Networking Social, which is in its seventh year and is modeled after a similar event in Miami.

The Diversity Committee has invited students from all of the Florida law schools to come to the HCBA on Saturday, February 22, for a day of networking with representatives from local law firms and other voluntary bar associations. The social aims to highlight the diversity of the local legal community and to help students connect with professionals who may serve as mentors. If your firm would like to participate in this event, we would love to have you. Please contact committee co-chairs Amanda Buffinton (abuffinton@bushross.com) or Ronnell Robinzine (rrobinzine@bushross.com) for more information.

Less than a week after the social, on February 25, the committee is hosting a CLE featuring Gilbert King, Pulitzer Prize-winning author of "Devil in the Grove: Thurgood Marshall, the Groveland Boys and the Dawn of a New America." King's book recounts in chilling detail the racial injustices that plagued a 1949 rape case in Lake County, Florida. The author will discuss the case and share insights from the book, which fans can get signed copies of at the luncheon. King's talk will be followed by a panel discussion about the evolution of justice and civil rights. To register, call (813) 221-7777.

Through these two events, the Diversity Committee hopes to provide you with an opportunity to learn from the past and look toward a more inclusive future.

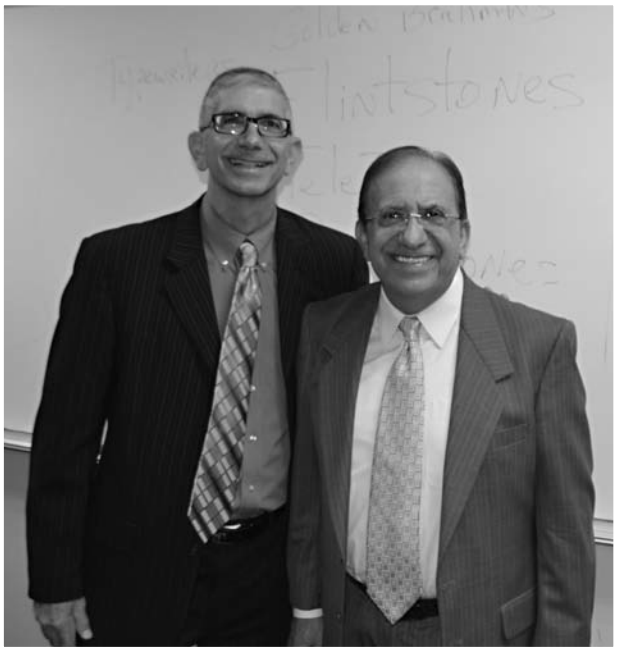
Although headlines of racial injustice may be fading, new tales of immigration challenges and LGBT issues are coming into the spotlight. As we strive to get a better grip on these topics and confront potential injustices, I'd like to leave you with a parting thought: In 1896, the year the Hillsborough County Bar Association was formed, I would not have been able to join because women had not yet been admitted to practice law in Florida. Not to mention the barriers that would have stemmed from the color of my skin. Isn't it amazing how far we've come? Now just imagine how far we can go.

Shaping Young Minds

Hillsborough County Bar Association Past President Bob Nader and his brother, George Nader, shared tales from past lives with a group of University of South Florida students in Wendy Whitt's journalism class on November 20. Before becoming attorneys, both brothers worked in media — Bob as a radio DJ and George as a sports reporter. They reminisced about the days of calling the newsroom from payphones to dictate stories and cuing up vinyl records on turntables. My, how times have changed!

Both Bob and George stressed to the students the importance of having excellent communication skills in any career field. They also gave tips on transitioning into law school. The students were so interested in the presentation that the Naders were invited to return to speak to another class.

The HCBA invites members to share photos of themselves giving back to the community! Email high-resolution photos to Corrie Benfield at corrie@hillsbar.com or post them on Facebook.com/HCBAtampabay.



Lawyers Peter O. Knight and Cody Fowler Added to Riverwalk Monument Trail

Bronze busts of the former HCBA presidents and community leaders were unveiled at the ceremony.

Two titans from Tampa's legal community — Peter O. Knight and Cody Fowler — will be among other prominent city leaders memorialized along Tampa's developing Riverwalk. Tampa Mayor Bob Buckhorn and attorney Steve Anderson, president of Friends of the Riverwalk, unveiled bronze busts of the two distinguished lawyers in front of family, friends, and local officials at a ceremony at the Tampa Convention Center in December.

The Class of 2013 honorees also includes newspaper publisher C. Blythe Andrews, civic leader Kate Jackson, Cuban civil rights leader Paulina Pedroso, and businessman G.D. Rogers. The statues are mounted on granite pedestals and will be placed in a permanent location along the Riverwalk's Historical Monument Trail, which stretches along the downtown waterfront from the Channel District to Tampa Heights, just west of the Chester H. Ferguson Law Center.

"The trail allows us to remember and honor those who were so committed and dedicated to moving our community forward," Buckhorn said.

Among their many accomplishments, both Knight and Fowler served as president of the Hillsborough County Bar Association, in 1904 and 1936, respectively.

"Our goal is to preserve and honor the local people who created a lasting impact on Tampa," said Anderson, who heads the local nonprofit Friends of the Riverwalk and is working in collaboration with the city of Tampa and the Tampa Bay History Center on the project.

The first group of honorees was selected in 2012, and the plan is to designate six new honorees each year until 30 or more historical monuments line the waterfront trail. To be considered, the honorees must have been dead for at least 15 years.

Knight moved to Tampa in 1889 and served as a Tampa City Council member and as Hillsborough County Solicitor. "At the turn of the 20th century, Peter O. Knight was probably the most influential lawyer and community leader in Hillsborough County," said retired Appellate Judge E.J. Salcines, who is a member of the honoree selection committee.

Knight helped organize the Exchange National Bank, the Tampa Gas Company, and the city's electric streetcar system. "[Knight] had his hands in everything, and he was integral in making Tampa a bigger and better place," Salcines told me.

Continued on page 7

Continued from page 6

Additionally, Knight was a founding partner of what is now the international law firm of Holland & Knight.

Tampa attorney William A. Knight, the great-grandson of Peter O. Knight, said about his relative: "He was a remarkable guy. I am in awe of what he was able to accomplish."

In 1924, Fowler moved from Tennessee to Tampa to practice law. His mother, Maud, helped found Temple Terrace, and Cody Fowler served as its first attorney and later as mayor for a term.

Fowler quickly made a name for himself early in his career by defending African-Americans in Tampa's courts — something few other white attorneys were willing to do at the time. In 1943, he joined with Morris White to form the Fowler and White law firm. In 1950, Fowler was elected president of the American Bar Association — the first Tampa lawyer to attain that position.

"[Fowler] was the go-to guy for the bar association on major issues," Salcines told me. "You always wanted Cody Fowler on your side."

Appointed chairman of both Florida's and Tampa's Bi-Racial Commissions in 1959, Fowler, along with African-American leaders, helped guide the peaceful integration of Tampa's lunch counters in 1960. His leadership on improving race relations continued through the turbulent 1960s as Tampa and the nation struggled with racial integration and other equality issues, such as the hiring practices of local businesses.

Fowler's grandsons, Cody F. Davis and former U.S. Rep. Jim Davis, are both lawyers in Tampa. Jim Davis says people referred to Fowler as "Big Cody" and that he was inspired by Fowler's example to "treat everyone with respect."

"In his [Fowler's] day, that meant standing up for equality among races," Jim Davis said.

He added: "Big Cody took great joy in serving our community and helping his clients … and thought every lawyer should do his or her part to make their community a better place."

See you around the Chet.

THE HCBA WELCOMES ITS NEW MEMBERS

NOVEMBER 2013

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Bradley H. Merritt
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DECEMBER 2013

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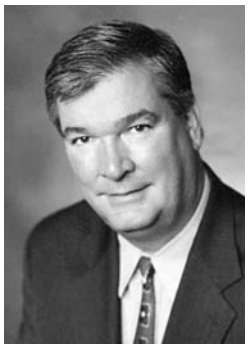
Jason Wentworth Fraser
Brett P. Gliosca
Sarah Gottlieb
Gregg W. Hooth
Andrew R. Mallory
Jason Quintus
Andrew Scott Rapacke
Bo Sellitti
Andrew H. Warren



Search and Seizure of Motor Vehicle Passengers

When a vehicle stop results in a passenger being charged with a crime, the legality of the detention or search of the passenger may become an issue in the case.

Under the United States Constitution, the Fourth Amendment guarantees "(t)he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Florida Constitution provides that this right must be "construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."[1] When a vehicle stop results in a passenger being charged with a crime, the legality of the detention or search of the passenger may become an issue in the case.

Previously, Florida law indicated that a law enforcement officer could not lawfully command a passenger of a vehicle to remain in a vehicle during a traffic stop.[2] Subsequent rulings by the U.S. Supreme Court have held that when a law enforcement officer stops a motor vehicle based on a traffic stop, the driver and all passengers are seized for Fourth Amendment purposes.[3] The Supreme Court has held that all occupants of a vehicle are seized when law enforcement stops the vehicle, law enforcement may require passengers to remain at the scene of the traffic stop, and the temporary seizure of the driver and passengers continues and remains reasonable for the duration of the stop.[4]

In *Brendlin v. California,* the court held that the passenger of a vehicle that was seized during a traffic stop was entitled to challenge the legality of the stop because "no reasonable person in his position … would have believed himself free to terminate the encounter"[5] and the "stop necessarily curtail[ed] the travel a passenger ha[d] chosen as much as it halt[ed] the driver."[6] In *Arizona v. Johnson,* the court held that an officer's pat-down search of the defendant, who was a passenger during a traffic stop, was lawful.[7] Although the police did not have a reason to suspect the car's passenger of criminal activity at the time of the traffic stop, facts arose during the stop that provided the police with reasonable suspicion for a pat-down search of the passenger.[8] The court relied upon the precedent set by *Brendlin,* as well as *Pennsylvania v. Mimms,* 434 U.S. 106 (1977), and *Maryland v. Wilson,* 519 U.S. 408 (1997). These rulings by the U.S. Supreme Court have extended the same constitutional protections to the passenger of a detained vehicle as are given to the driver, while also allowing law enforcement to develop reasonable suspicion to conduct further searches.

As your state attorney, I will always seek to keep the people of our community safe while respecting the safeguards put in place by the Constitution.

[1] Fla. Const. Art. I, §12.

[2] *Faulkner v. State,* 834 So. 2d 400 (Fla. 2d DCA 2003).

[3] *Brendlin v. California,* 551 U.S. 249 (2007).

[4] *See Brendlin v. California,* 551 U.S. 249 (2007); *Arizona v. Johnson,* 555 U.S. 323 (2009).

[5] *Brendlin,* 551 at 257.

[6] *Id.*

[7] *Arizona*, 555 U.S. 323.

[8] *Id.*

Past Presidents Luncheon

About 25 former presidents of the Hillsborough County Bar Association gathered for a luncheon with the current president, Susan Johnson-Velez, and HCBA board members on December 9 at the Chester H. Ferguson Law Center. The group of former HCBA leaders who were present for the camaraderie and festivities covered a 45-year period, starting with Lewis Hill, III, who was the president in 1968, Larry Stagg (1970), David Shear (1971), Don Stichter (1972), Leonard Gilbert (1974), Ron Cacciatore (1975), Steve Sessums (1977), Ben Hill, III (1981), Judge Jim Moody, Jr. (1987), up to the present. What a memorable occasion!

Thank you to the luncheon sponsor:

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A Positive Step

This past session, the Florida Legislature passed an amendment ... prohibiting people from purchasing firearms if they have been voluntarily admitted to a Baker Act receiving facility and the examining physician deems that they are an imminent danger to themselves and someone else.

As I write this article for the upcoming issue of the *Lawyer* magazine, I see by the calendar date that we are approaching the one-year anniversary of the killing rampage in Sandy Hook, Connecticut, when 20 young children and six adults were murdered at Sandy Hook Elementary School.

Unfortunately, that is not an isolated incident. There have been similar frightening instances this past year of individuals with histories of mental illness who went on shooting rampages.

One way to help prevent these random acts of violence is to tighten up the laws regulating the purchase of firearms. This past session, the Florida Legislature passed an amendment, which took effect on July 1, 2013, that addressed the circumstances and conditions for prohibiting people from purchasing firearms if they have been voluntarily admitted to a Baker Act receiving facility and the examining physician deems that they are an imminent danger to themselves or someone else.

The challenge is how to best collect, qualify, and report information for the purpose of firearm purchase determinations nationwide — and how to develop a communication and training plan on behalf of reporting agencies to assist with implementation.

I am proud to say that in the state of Florida, Robin McCarty, manager of the clerk's Mental Health Department, has been recognized for her work with the MECOM database, which is the Mental Competency database, established in February 2007. Due to Robin's efforts, Hillsborough County is leading the state in reports of voluntary commitments, with 375 thus far.

For her leadership, she was asked by the Florida Department of Law Enforcement to serve on a work group for Hillsborough County, representing the clerk's office, along with General Magistrate Sean Cadigan of the Thirteenth Judicial Circuit, representing the judiciary; Gracepoint, representing Baker Act receiving facilities; and other state agencies. The group is assigned the task

of how to implement this amendment — collecting, qualifying, and reporting information on firearm purchases by individuals prohibited from doing so.

"Our group is trying to not only identify the practices but also trying to educate the key groups, including the mental health community, doctors, hospitals, and the judiciary, as well as the clerk offices throughout the state," Robin said.

"We are also going to conduct training throughout the state to spread the word. It is so important to prevent people who are not supposed to be getting a gun from being able to get one," she emphasized.

Robin has conducted training for members of the Hillsborough County Sheriff's Office Crisis Intervention Team to update them on the new legislation. Along with other members of the training team, Robin is conducting similar statewide training that began in mid-January. She has also created a form for the officers to hand out, which outlines the steps for petitioners to follow for both the Baker and Marchman Acts.

This legislation will not prevent all senseless killings, but it is certainly a step in the right direction, and our office is proud to be on the cutting edge.

YLD Luncheon Highlights Volunteer Opportunities

The Hillsborough County Bar Association's Young Lawyers Division hosted a luncheon in December with the goal of connecting local legal aid and community service organizations with attorneys who want to volunteer. All HCBA members were invited to participate by visiting the organizations' booths and signing up to take on pro bono cases or volunteer. Keeping with the theme of giving, the YLD ordered boxed lunches from Metropolitan Ministries' Inside the Box Cafe & Catering, where every meal purchased provides a meal for someone in need.

Thanks to the organizations that participated in the luncheon: Bay Area Legal Services, Big Brothers Big Sisters Tampa Bay, Crossroads for Florida Kids, Family Forms Clinic, the Hillsborough County Bar Foundation, the Hillsborough Education Foundation, The Spring, Wills for Heroes, and the Thirteenth Judicial Circuit Pro Bono Committee.

Tampa Bay Area Pro Bono Lawyers Mean Business

Harnessing the power of business to help those in need is something our community does exceedingly well.

As practicing attorneys and hard-working members of a thriving business community, we are a very fortunate group. We have the rewarding privilege of advocating for justice to help our clients achieve their goals. This privilege allows us not only the opportunity to make a living in a meaningful way, but it also allows us the opportunity to help those who cannot afford the legal assistance they need to fight for their families, their homes, and, in some cases, even their lives.

Local businesses and law firms recognize the immeasurable value of pro bono service and are leading an ongoing movement to integrate pro bono work into their business models. As part of that movement, the local business and legal communities have joined together to form the Tampa Bay Pro Bono Partnership, a project that pairs local businesses and law firms to provide pro bono service to the members of our community who need it the most.

Harnessing the power of business to help those in need is something our community does exceedingly well. The

Continued on page 13

Continued from page 12

synergies are countless, and it is to the credit of the decision-makers at our local businesses and law firms who have made it a priority to identify and implement these synergies to help those who are less fortunate.

The Tampa Bay Pro Bono Partnership is scheduled to launch in 2014. It will host two events per year. Each event will begin with a networking reception for participating law-firm attorneys, in-house counsel, and local members of the state and federal judiciary. The reception will be followed by a brief program and breakout session, during which up to three attorneys from each participating law firm will be teamed with up to three in-house counsel from each participating business. Teams will have the opportunity to select from a list of pro bono projects, ranging widely in time commitment and complexity. Each event offers a new opportunity to mix things up, as pairings and pro bono opportunities will vary every time. Team members are encouraged to network and get to know each other while providing service to their community.

In addition to creating a unique platform for networking, the partnership offers participants resources and support, including mentoring, malpractice coverage for a variety of projects, and sponsorship opportunities. The program is supported by members of our local judiciary, who witness the critical need for pro bono service in their courtrooms every day and are excited to participate and see this project take hold.

Participants in the program are encouraged to make it their own by sharing ideas to develop the program to help those in need while achieving their business goals. For additional information about the Tampa Bay Pro Bono Partnership and to find out how you and your organization can get involved, please contact Sarah Lahlou-Amine at sarah.amine@fowlerwhite.com or Traci L. Koster at tkoster@bushross.com.

Authors: Sarah Lahlou-Amine, Fowler White Boggs, P.A., and Traci L. Koster, Bush Ross

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The son of an economist and writer, Stein was born in Washington, D.C. and attended school in Maryland. He graduated from Columbia University in 1966 with honors in economics and from Yale Law School in 1970 as valedictorian of his class by election of his classmates. He has worked as an economist at The Department of Commerce, a poverty lawyer in New Haven and Washington, D.C., a trial lawyer in the field of trade regulation at the Federal Trade Commission in Washington, D.C., a university adjunct at American University in Washington, D.C., at the University of California at Santa Cruz and at Pepperdine University in Malibu, CA. He has taught about the political and social content of mass culture, political and civil rights under the Constitution, libel law, securities law, and ethical issues since 1986.

In 1973 and 1974, he was a speech writer and lawyer for Richard Nixon at The White House and then for Gerald Ford. (He did NOT write the line, "I am not a crook.") He has been a columnist and editorial writer for The Wall Street Journal, a frequent contributor to Barrons, a regular columnist for Los Angeles Magazine, New York Magazine, E! Online, and has written a lengthy diary for twenty years for The American Spectator. He currently writes a column for The New York Times Sunday Business Section, has a column about personal finance for Yahoo!, and is a commentator for CBS Sunday Morning and Fox News. He has written, co-written and published thirty books, including seven novels. His most recent books are the best-selling humor self-help series, How To Ruin Your Life.

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PRO BONO OPPORTUNITIES WITH "APPEAL"

Appellate Practice Section

Chairs: Ezequiel Lugo - Butler Pappas Weihmuller Katz Craig, LLP; and Dineen Pashoukos Wasylik - Dineen Pashoukos Wasylik, P.A.

A pro bono client's needs do not always end with a disposition in the trial court. An appeal may be the client's last hope for justice. Or, a client who has prevailed in the trial court may become an appellee when the other side appeals the favorable result.

For a *pro se* litigant, proceeding unrepresented in an appellate court can be an overwhelming hurdle to the relief he or she needs. The ability to use one's legal skills to help someone in need to overcome that hurdle is an incredibly satisfying and meaningful experience.

In addition to being an important component of a pro bono client's legal needs, appellate pro bono service gives lawyers a unique opportunity to develop their skills and obtain an even more comprehensive understanding of appellate rules and procedures than their everyday practice may afford. Particularly where the client was *pro se* in the trial court, the uncommon issues that may arise in pro bono cases help lawyers learn the ins and outs of appellate practice, including ensuring a thorough record on appeal, organizing a layperson's argument into concrete appellate issues, and helping a client minimize appellate costs. In these ways, appellate pro bono service provides great opportunities for a lawyer's professional development.

An appeal may be the client's last hope for justice.

The Hillsborough County Bar Association Appellate Practice Section's Pro Bono Committee has teamed up with the Pro Bono Committee of The Florida Bar Appellate Practice Section to help interested attorneys learn about current appellate pro bono opportunities. The Florida Bar Appellate Practice Section's Pro Bono Committee maintains a listserv for such attorneys to apprise them of these opportunities as they arise. Both sections welcome members to participate in this program.

The program provides information about pro bono opportunities in a wide array of practice areas in all of Florida's appellate courts. Members may volunteer for opportunities across the state, regardless of where they routinely practice, because aside from a possible oral argument, the vast majority of a lawyer's appellate work can be done from the lawyer's office. Pro bono lawyers participating in the program are invited to work with board-certified appellate specialists who can provide mentoring to assist with the pro bono representation.

The pro bono opportunities available through the program are not limited to direct representation. Opportunities also exist for more limited appellate assistance, including providing appellate advice to legal aid offices across the state on discrete appellate issues as they arise in cases. Opportunities for those interested in program development to expand the provision of appellate pro bono service are also available.

If you have been looking for an "appealing" pro bono opportunity and would like more information about the program offered by The Florida Bar and HCBA Appellate Practice Sections' Pro Bono Committees, please contact Sarah Lahlou-Amine at sarah.amine @fowlerwhite.com.

Author: Sarah Lahlou-Amine, Fowler White Boggs, P.A.

Are you looking for pro bono opportunities?
Go to hillsbar.com and click on "Pro Bono/Volunteer Opportunities" under the Quick Links menu.

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TOP 3 REASONS TO PRACTICE COLLABORATIVE LAW

Collaborative Law Section

Chair: Caroline Sikorske - Mason Black & Caballero, P.A.

You may have heard of the reasons clients choose the collaborative method to resolve their legal and family disputes: Respect is fostered. Communication is enhanced. Privacy is maintained. Solutions are comprehensive. Budgets are respected. Agreements are long-lasting.

But why do attorneys choose to practice collaborative law?

Work in a Team Environment

Rather than adversaries, the other party and attorney on a collaborative case are fellow team members whose goals include finding a solution best for the family. The team is led by a neutral facilitator — generally a mental health professional — who guides productive and respectful behavior for the clients and their attorneys. A financial professional usually takes over many of the disclosure responsibilities and develops options that maximize the parties' resources. Collaborative practitioners refer to this team-centric view as a "paradigm-shift," as attorneys must: (i) discard the "us versus them" mentality; and (ii) cede control over aspects of the case to professionals who will more efficiently and effectively address them.

Engage in a Creative and Intellectual Endeavor

Creativity as a problem-solving skill is essential in collaborative practice, as attorneys must withdraw if the clients are unable to reach an agreement. Unlike in mediation, where the option of impasse takes the pressure off of parties and their attorneys from making difficult decisions, attorneys who do not want to be fired must dig deep into their toolboxes to address interests behind stated positions.

Client growth brings higher rates of satisfaction, and happy clients lead to happy attorneys.

Of course, this is made easier with the help of the interdisciplinary team. The facilitator will identify underlying issues, lead brainstorming sessions, and help the clients respectfully and productively choose the best solution for them. Further, the financial professional will propose property division, child support, and alimony scenarios that are well beyond the expertise of family law attorneys. In turn, attorneys' exposure to financial and mental health professionals' perspectives on issues tend to widen their knowledge base and aide their general law practice.

Help Clients Grow

Rather than being destructive, collaborative practice tends to be a constructive process for clients. The facilitator teaches respectful communication skills and techniques for resolving future disputes. Where children are involved, the focus remains on them, and co-parenting skills are enhanced. The financial professional can often find tax benefits, teach the financially less sophisticated spouse how to create a budget, and/or propose better strategies for the clients' portfolios.

Client growth brings higher rates of satisfaction, and happy clients lead to happy attorneys. (By the way, according to a multi-year study by the International Academy of Collaborative Professionals, almost 90 percent of collaborative cases end successfully, with an additional 2 percent of cases ending in reconciliation of the clients.)

So how can you become a collaborative lawyer?

The first step is to attend a collaborative training. Fortunately, we are having a training session March 20-22 right here in Tampa. You can find the registration form and learn more about collaborative practice at the websites of Next Generation Divorce, Tampa Bay Collaborative Divorce Group, and the HCBA Collaborative Law Section.

Author: Adam B. Cordover, The Law Firm of Adam B. Cordover, P.A.

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VOLUNTEER FOR A DAY AND CHANGE THE WORLD OF SOMEONE IN NEED

Community Services Committee

Chairs: Lisa Esposito - Law Offices of Lisa Esposito, P.A.; and Lara M. LaVoie - LaVoie & Kaizer, P.A.

The committed group of volunteers that I have met over the past few months through my involvement as co-chair of the Community Services Committee (CSC) has left me with a great sense of hope and pride, especially for the legal profession. After the success of the Adopt-a-Veteran event in October, where volunteers gave their time so generously to fulfill the wish lists and hearts of veterans in need, I am amazed at how many individuals stepped up once again to support the Elves for Elders event in December. The CSC (due in no small part to the unwavering dedication of my co-chair, Lisa Esposito) was able to get all 230 Elders "adopted" this year! Without elves like us, these wonderful seniors would have had no presents under their trees/menorahs. As I write this article, I am anticipating the joy of delivering gifts and smiles to this forgotten group of people during the holidays.

"Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it's the only thing that ever has."
— Margaret Mead

Continued on page 21

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To schedule mediation or arbitration, or to arrange an interview with one or more WGK-ADR principals, contact Diane Burnette at dburnette@wiandlaw.com or 813.347.5125.

For more information about WGK-ADR, visit wiandlaw.com.

Continued from page 20

Hopefully, you will be able to spare a few hours to volunteer at one of our upcoming heartwarming volunteer events. In February, we will spend a day with the children at A Kid's Place in Brandon, which is a 60-bed facility for abused, neglected, or abandoned children. It has a unique setting with five 3,200-square-foot homes, located on 5 acres. A Kid's Place uses a live-in house parent model, which provides the children (from newborn to 17 years of age) with a family living atmosphere and a variety of services to meet their social, educational, medical, and psychological needs. We hope to have a carnival-type event there on a Saturday afternoon, with a cookout and fun events for the kids and teens. Organizing and implementing this event is going to require a lot of time and resources; we really appreciate and need any and all help that you can provide! To find out more about A Kid's Place, please visit: http://www.akidsplacetb.org.

In March, the CSC will participate in Dining with Dignity Week, in association with Trinity Café. The CSC's friends and family will spend a few hours at Trinity Café serving sit-down, three-course meals to Hillsborough County's homeless, hungry, and working poor. The café's mission is to restore a sense of dignity to the homeless and hungry, while serving a nutritious meal. This unique café sets its tables with tablecloths and silverware. Lunch is served on china; drinks are poured in glasses; and the conversation is cheerful and compassionate. We will need volunteers for any day that week to serve lunch, pour drinks, or just sit and share some one-on-one meal-time conversation! To learn more about Trinity Café, please visit: http://www.trinitycafe.org.

If you are interested in joining the CSC or volunteering for an upcoming event, please contact Lara LaVoie (landklawgroup @gmail.com) or Lisa Esposito (lisa@lesposito.com).

Author: Lara M. LaVoie, LaVoie & Kaizer, P.A.

THANK YOU TO OUR VOLUNTEERS FOR DECEMBER'S ASK-A-LAWYER ON FOX 13!

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To volunteer for the Ask-A-Lawyer programs, please contact HCBA Lawyer Referral & Information Service at (813) 221-7780.

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P3S IN FLORIDA: INNOVATION IN PUBLIC PROJECTS

Construction Law Section

Chairs: Jeff Paskert - Mills Paskert Divers, P.A.; and Mark Smith - Carlton Fields Jorden Burt, P.A.

The recent economic downturn, coupled with a decline in the availability of public funding for capital projects, has resulted in a focus on public-private partnerships (also referred to as "PPPs" or "P3s"). P3s are contractual agreements formed between public and private entities that allow for greater private-sector participation in the financing and delivery of public building and infrastructure projects. See USDOT, Innovative Program Delivery website, http://www.fhwa.dot.gov/ipd/p3/defined/index.htm.

Florida recently adopted a bill, chapter 2013-223, Laws of Florida, to broaden the ability to use P3s in the state because "there is a public need for timely cost effective acquisition, design, construction, improvements, renovation, expansion, equipping, maintenance, operation, implementation, or installation of project serving a public purpose" and "a public-private partnership has demonstrated it can meet the needs by improving the schedule for delivery, lowering the cost, and providing other benefits to the public." The Florida Department of Transportation (FDOT) already operates a P3 program pursuant to Section 334.30, Florida Statutes. For example, the FDOT is currently in the process of taking proposals for the $2.1 billion I-4 Ultimate Project, which is being procured as a 40-year design, build, finance, operate, and maintain concession agreement.

The bill broadens the ability to use P3s in Florida in an effort to further encourage growth. Among other things, the bill amends Section 255.60, Florida Statutes, to authorize P3s to contract for public-service work with not-for-profit organizations or charitable youth organizations, and it created Section 287.05712 to govern the procurement process for P3s in Florida. Section 287.05712 expansively defines a "private entity" as "any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public-benefit corporation, non-profit entity or other private business entity." Subsections 287.05712(4), (5), and (6) provide procurement procedures for both solicited and unsolicited proposals for qualifying projects, project approval requirements, and project qualification processes. Perhaps most importantly, Subsection 287.05712(11) sets forth financing options for P3s that include private-source financing secured by the private entity, the loan of funds from the responsible public entity to the private entity, and the use of "innovative finance techniques" by the responsible public entity, including federal loans, commercial bank loans, and hedges against inflation from commercial banks or other private sources.

P3s are contractual agreements formed between public and private entities that allow for greater private-sector participation in the financing and delivery of public building and infrastructure projects.

The bill also creates a task force responsible for recommending guidelines to the Florida Legislature for establishing a uniform P3 selection and review process. The task force must submit a final report of its recommendations to the governor and others by July 1.

What does this all mean for Florida? Some believe growth is on the horizon as a large increase in private funding to construct, operate, and maintain public projects becomes available. For example, the Seminole State College is planning to leverage the new legislation to build up its new Altamonte Springs campus, with the first floor of the building probably consisting entirely of retail and commercial with classrooms above — arguably the kind of innovation promoted by P3s.

Author:
Erin E. Banks,
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HOW FAR CAN A LONG ARM REACH?

Corporate Counsel Section

Chairs: Eric Almon – Holland & Knight, LLP; and Patricia Huie – Intelident Solutions, Inc./Coast Dental Services, Inc.

Employees of foreign corporations who are physically present and working in Florida may believe that they enjoy immunity from liability for any tortious acts committed within Florida. However, the Florida Supreme Court has made it clear in *Kitroser v. Hurt,* 85 So. 3d 1084 (Fla. 2012), that the "corporate shield doctrine" does not operate as a bar to personal jurisdiction over nonresidents who commit negligent acts in Florida on behalf of their corporate employer.

Dale Dickey was driving a commercial truck as an employee of Airgas Carbonic Inc. when he struck and killed Rhina Castro Lara. The estate of Lara *(Kitroser)* filed a lawsuit against Airgas, Dickey, and five Airgas employees who failed to properly supervise and train Dickey. Airgas was a foreign corporation. However, Airgas employees used an Airgas facility in Bartow. Airgas filed motions to quash service and a motion dismiss the complaint because it "asserted that because their actions were taken on behalf of Airgas, rather than for their own personal benefit, the corporate shield doctrine precluded personal jurisdiction over them in Florida even though the negligent conduct occurred in Florida." *Id.* at 1086. Uncontroverted evidence demonstrated that the Airgas employees were not Florida residents; did not rent or own Florida vehicles or real estate; did not have Florida financial accounts or tax liability; did not obtain Florida vocational, professional, or driver's licenses; and were not registered to vote.

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The "corporate shield doctrine" does not operate as a bar to personal jurisdiction over nonresidents who commit negligent acts in Florida.

Generally, "the 'corporate shield' doctrine, also referred to as the 'fiduciary shield' doctrine, provides that acts performed by a person exclusively in his corporate capacity not in Florida *but in a foreign state* may not form the predicate for the exercise of personal jurisdiction over the employee in the forum state." *Id.* at 1088; citing *Doe v. Thompson,* 620 So. 2d 1004, 1005 (Fla. 1993). Based upon this doctrine, the Airgas employees asserted that the "relevant inquiry is whether the actions occurred within the scope of employment and thus on behalf of the corporation." *Id.* at 1088.

Importantly, the Florida Supreme Court has created a procedural process to determine whether the long-arm statute provides for personal jurisdiction over a nonresident. "First, a court must determine whether sufficient jurisdictional facts are alleged to bring the action within the ambit of Florida's long-arm statute. If the first step of the inquiry is satisfied, a court must then determine whether the defendant has sufficient 'minimum contacts' with the state to satisfy the Fourteenth Amendment's due-process requirements." *Id.* at 1087; citing *Venetian Salami Co. v. Parthenais,* 554 So. 2d 499, 502 (Fla. 1989). Further, Florida's long-arm statute, Section 48.193(1), provides that a nonresident submits himself or herself to the jurisdiction of Florida courts if that individual (b) commits a "tortious act within this state" or (f) causes "injury to persons or property within this state" as the defendant engages in business or service activities within Florida.

In *Kitroser,* the court established that corporation employees can be held liable for negligent or intentional acts, regardless of the employees' resident status.

Author: Caroline Johnson Levine, Office of the Attorney General

Save the date: Corporate Counsel CLE at noon on March 27. Call (813) 221-7777 to register.

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My recent trip to England made me wonder whether I have missed some great opportunities in fulfilling my CLE requirements. I had already planned a vacation in Scotland for late September when, shortly after booking my flight, an email from the American Bar Association arrived announcing (probably for at least the third time) that there was a white-collar crime seminar in London two days after I was scheduled to return to Tampa. After briefly considering how much I enjoy my white-collar cases, I signed up for the seminar and rescheduled my flight.

The first indication that the trip was going to be professionally worthwhile and personally fulfilling came on the flight from Atlanta to London. The passenger to my right, who now lives in Naples, Florida, turned out to be a barrister and member of Grays Inn in London. She offered to take me to an inn dinner. Unfortunately, the schedule would not work out, but I hope to be able take her up on that nice offer in the future. Next, at baggage claim, I ran into a friend who used to practice law in Tampa who is now in Tallahassee. He, too, was heading for Scotland, and it turned out that our hotels in London were directly across the street from one another.

The white-collar seminar was hosted by a solicitors firm that has its offices on the north bank of the Thames River. Although a large portion of the attendees were from London, there were others from the Netherlands, France, Germany, Russia, Portugal, and, of course, the United States. The group was small enough that it was easy to meet, recognize, and talk with other lawyers, which is always valuable.

The substantive aspect of the seminar began with David Green, director of United Kingdom Serious Fraud Office, explaining the U.K. approach to large-scale fraud. The sessions covered both U.S. and U.K. enforcement of tax laws, foreign corrupt practices, money laundering, whistleblowing, and other contemporary issues that companies and individuals may encounter during business transactions. I learned a number of worthwhile strategies that will help with my next white-collar client.

The first indication that the trip was going to be professionally worthwhile and personally fulfilling came on the flight from Atlanta to London.

Fishmongers' Company Banqueting Hall, the setting for lunch on Monday and the reception that evening, provided one of the more interesting parts of the program. The Fishmongers' Company is a 700-year-old guild that has its building on the north bank of the Thames River at the foot of London Bridge. The building has a Greco Roman design and was completed in 1835. Towering portraits of King George II, Queen Caroline, and Queen Elizabeth II hang on the walls; coats of arms hang beneath the gilded molding in the banquet room; and every bit of brass in the building gleams.

Over the years, I have been perfunctory in fulfilling my CLE requirements. From here on, I plan to be a bit more adventurous in acquiring the credits I need because of my experience in London. I learned a lot, met some interesting people, and enjoyed a historic change of scenery.

Author:
George Bedell,
George Bedell, P.A.

Save the date: The Criminal Law Section will present the Bubba Huerta Award at its luncheon on March 6. Call (813) 221-7777 to register.

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TAMPA BAY BEST BUDDIES SERVES VULNERABLE

Diversity Committee

Chairs: Amanda Buffinton - Bush Ross, P.A.; and Ronnell Robinzine - Bush Ross, P.A.

To us, one of the great attributes of our country has been the march toward equality for all. Since its founding, our country has made great strides — generation by generation — to bring the American promise of liberty and equality to more and more groups of Americans.

Few Americans have had a more troubled journey to this promise than those with developmental disabilities. One organization that has done so much to fulfill both the promise of liberty and equality, as well as the moral promise of dignity, for Americans with developmental disabilities is Best Buddies.

Since its founding, Best Buddies has served as one of the greatest advocates for those with developmental disabilities in the United States. Founded by two great Americans, Sargent Shriver and Eunice Kennedy Shriver, Best Buddies has come to reflect the hopes and dreams of families raising children with developmental disabilities and special needs.

BEST BUDDIES

TAMPA BAY

We both are proud to serve on the Board of the Tampa Bay Best Buddies organization.

The purpose of Best Buddies is simple: to create a culture of tolerance, affirmation, and fair play in our school system as it applies to those with developmental disabilities. Participating schools have students without special needs who are partnered with "Buddies," or individuals with special needs or developmental disabilities. Those students then serve as not only friends for their "Buddies" but as advocates. This role fosters tolerance in our schools for a population that is all too often maligned and attacked, and it allows the student participant to become aware of a world that few of us know about.

We both are proud to serve on the board of the Tampa Bay Best Buddies organization. We come to this organization based on similar experiences. We both have siblings who are developmentally disabled. We both know what is like to hear words such as "retarded" and feel the sting of bias as suffered by our siblings. We both know what it is

Continued on page 29

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Continued from page 28

like to feel the scar of rejection or discrimination, as felt by our beloved siblings. And we both know what it is like to see our parents hope and pray that their special-needs child will be cared for after they are no longer on this earth to protect them.

We both firmly believe that there is no greater duty in life than to speak out on behalf of those who have no voice. As attorneys, we promise to defend the substantive values enshrined in our Constitution. As Americans, we are given the duty to care for our neighbor.

There are few populations more ripe for this level of care and advocacy than those with developmental disabilities. This is a group of Americans who, quite often, lack a voice to speak on their behalf.

That is why it is incumbent on us — both as Americans and attorneys — to speak out for this group of vulnerable people who have no voice. People like our siblings deserve dignity, and until the day this goal is achieved, Best Buddies of Tampa Bay will be here to advocate on their behalf.

We hope you will join us in our journey. For more information, go to www.bestbuddiesflorida.org or contact us.

Authors:
Jason Whittemore, Wagner Vaughan McLaughlin and Luis Viera, Ogden Sullivan

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Get Ready for the 6th Annual HCBA 5k Pro Bono River Run

The countdown has begun for the Sixth Annual Hillsborough County Bar Association 5k Pro Bono River Run on Saturday, March 22! Get ready for a fantastic family friendly event! The 2013 River Run was record-breaking, with 249 registered runners and 899 pro bono service hours pledged. The 2014 River Run is on track to be even better.

The River Run is well-suited for everyone from casual walkers to elite runners, featuring professional chip timing, a USTAF-certified course, a water station, and the glorious Hillsborough River! Check-in begins at 4 p.m. at Bush Ross, and the race

Continued on page 31

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After the River Run, please stay for the Judicial Pig Roast/Food Festival on the grounds of Stetson University's Tampa Law Center.

Continued from page 30

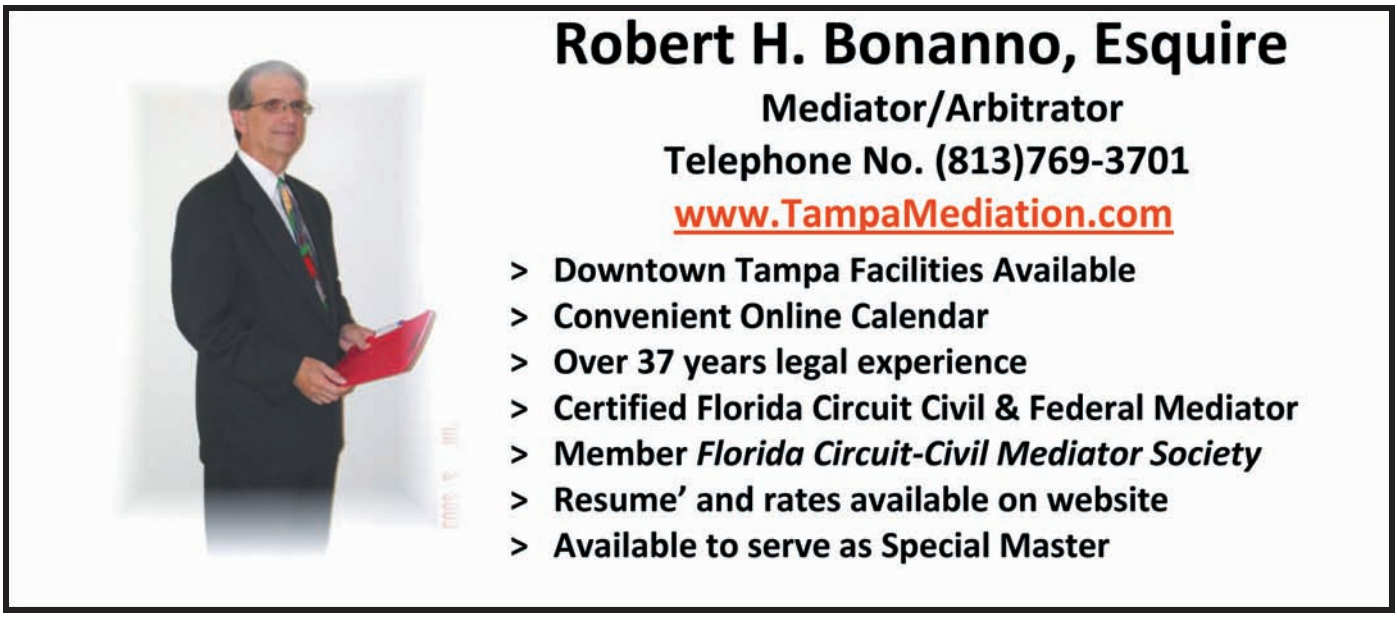
begins promptly at 5:30 p.m. You can register for the 2014 River Run ($35 for adults or $15 for those 12 and younger before March 1) on the HCBA website, www.hillsbar.com.

After the River Run, please stay for the Judicial Pig Roast/Food Festival on the grounds of Stetson University's Tampa Law Center. You can expect to enjoy delicious food, an abundance of fun, and even a little dancing. The pig roast is free for HCBA members and their families.

Not a runner or walker? You can still get involved by volunteering or sponsoring the 2014 River Run. Last year, we had more than 60 volunteers. Please contact Laura Westerman Tanner at ltanner@burr.com if you are interested in volunteering. You can sponsor the River Run through a financial contribution or an in-kind donation for the goody bags. If you wish to be a sponsor, please visit the HCBA website for a form or contact Corrie Benfield at corrie@hillsbar.com or (813) 221-7779.

So, grab your sneakers and come on downtown for an exciting race, a fun afternoon, and a chance to support pro bono legal services! We hope to see you there!

Authors: Sarah E. Kay, Mason, Black and Caballero P.A., and Laura Westerman Tanner, Burr & Forman LLP



January Membership Luncheon Celebrates Diversity

The Hillsborough County Bar Association explored the future of diversity and inclusion at the first membership luncheon of the year on January 16. Kathleen Koch, associate general counsel and senior vice president at Bank of America, was the guest speaker. Koch discussed taking a broader view of diversity, thinking beyond the traditional categories of race and gender and identifying "unconscious biases" people may have. She shared some of Bank of America's practices and identified ways law firms could foster a more inclusive work environment.

Recognizing local efforts to promote inclusion, HCBA President Susan Johnson-Velez thanked HCBA Diversity Committee Co-Chairs Amanda Buffinton and Ronnell Robinzine for their hard work in coordinating the upcoming Diversity Networking Social and a special CLE featuring Pulitzer Prize-winning author Gilbert King. She also recognized several representatives of local minority bar associations — the George Edgecomb Bar Association, Hillsborough Association for Women Lawyers, Tampa Bay Hispanic Bar Association, South Asian Bar Association of Florida, Asian Pacific American Bar Association of Tampa Bay, and the Florida Muslim Bar Association.

Speaking on another important topic, Judge Catherine Peek McEwen discussed the pro bono needs of groups such as Bay Area Legal Services and encouraged attendees to sign up to take a case. Hillsborough County Bar Foundation President Rob Williams also encouraged members to support the upcoming Law & Liberty event, which raises money for local legal-related charities.

January's luncheon was sponsored by Florida Lawyers Mutual Insurance Company, which is celebrating its 25th anniversary in 2014. The HCBA appreciates the continued support Florida Lawyers Mutual has provided.

FOR MORE EVENT PHOTOS, GO TO WWW.FACEBOOK.COM/HCBATAMPABAY

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Holiday Open House

The trees were lit and the mood was festive at the Hillsborough County Bar Association's Holiday Open House on December 5. About 300 lawyers, judges, family members, and friends gathered to celebrate, mingle, and catch up on the events of 2013. The open house was a great success, thanks largely in part to the generosity of our sponsor, The Bank of Tampa.

For more event photos, go to www.facebook.com/HCBAtampabay.

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ELDER LAW UPDATE

Elder Law Section

Chairs: Jack M. Rosenkranz - Rosenkranz Law Firm; and Elizabeth Allen - Gibbons, Neuman, Bello, Segall, Allen & Halloran, P.A.

By the time you read this article, the revived Elder Law Section of the Hillsborough County Bar Association will have had six months of luncheon meetings under its belt. The section got to this point through a lot of hard work by some very dedicated people.

The goal of the Elder Law Section is to educate and update attorneys of the Tampa Bay area on the critical issues and status of the law that affect the lives of the seniors and people with disabilities who are their clients. From real estate to guardianship, personal injury to family law, elder law issues are everywhere. With the aging of our population, the intersection of other areas of law and elder law will only widen. Increased knowledge of the often unique issues facing our elderly and disabled populations can only make the HCBA a stronger and better advocate for the people who use the services of its members.

In the first six months, the Elder Law Section has hosted luncheons, with accompanying CLE credit, on such varied topics as Florida's Medicaid Long-Term Care Managed Care Program, durable powers of attorneys, and VA benefits, trends and pitfalls. Other meetings dealt with the subject of Medicaid transfer rules and the impact of holiday gift giving, transfer on death accounts and implications for probate, and the role of pre- and post-nuptial agreements in long-term care planning. At all of these luncheons, expert attorneys and industry personnel provided important information and practical tips to those in attendance. Upcoming luncheon meetings should prove to be just as timely and informative. The meetings to come will cover:

March 12: The Affordable Care Act and Special Needs Trust, presented by attorney David Lillesand

April 10: Qualified Income Trusts, presented by attorney Ira Wiesner

Increased knowledge of the often unique issues facing our elderly and disabled populations can only make the HCBA a stronger and better advocate for the people who use the services of its members.

May 14: Situational Capacity – CYA for the Attorney, presented by Professor Rebecca Morgan and Professor Roberta Flowers, Stetson University College of Law

All luncheon meetings are from noon to 1 p.m. at the Chester H. Ferguson Law Center, 1610 N. Tampa St., Tampa FL 33602. Members and nonmembers of the HCBA are welcome. The cost for the CLE luncheon is $35 for members and $65 for nonmembers. Registration is available at www.hillsbar.com. We look forward to your attendance at the remaining meetings and the further growth of the Elder Law Section.

Author: Elizabeth P. Allen, Gibbons, Newman, Bello, Segall, Allen & Halloran, P.A.

Are you interested in writing an article for the Lawyer magazine? Contact Corrie Benfield at (813) 221-7779 or corrie@hillsbar.com

U.S. SUPREME COURT DECIDES FLORIDA CASE

Eminent Domain Section

Chairs: Meredith Delcamp - Fowler White Boggs P.A.; and Kenneth Pope - Hillsborough County Attorney's Office

The recent United States Supreme Court case *Koontz v. St. Johns River Water Management District,* 133 S. Ct. 2586 (2013), dealt with the requirements of two previous U.S. Supreme Court cases: *Nollan v. California Coastal Comm'n,* 483 U.S. 825, and *Dolan v. City of Tigard,* 512 U.S. 374. Those cases held that the government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his or her property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use.

In *Koontz,* the Supreme Court answered two questions concerning the application of the *Nollan/Dolan* test in holding that: 1. The government's demand for property from a land-use permit application must satisfy the *Nollan/Dolan* requirements even when it denies the permit; and 2. The government's demand for property from a land-use permit applicant must satisfy the *Nollan/Dolan* requirements even when its demand is for money.

In the 1990s, Mr. Koontz sought to develop about 4 acres of his nearly 15-acre tract of land near Orlando. State regulation required him to obtain certain wetlands permits from the Water Management District. State law authorized the district to apply reasonable conditions to the permits to ensure that construction is not harmful to the water resources of the district. Such conditions could include mitigation for wetland impacts. In seeking the permit to develop, Mr. Koontz proposed to grant a conservation easement on 11 acres of his property to prevent any future development. The district found the conservation easement to be inadequate to offset the impacts of the proposed development, and the district suggested other mitigation conditions that would be acceptable offsets, including reducing the footprint of the development and using retaining walls or paying for off-site wetlands improvements on district-owned property several miles away. The district did not require these alternatives and left the door open for Mr. Koontz to suggest other possible mitigation.

The Supreme Court majority identified the injury to the applicant to be an unconstitutional condition, not a taking of property.

Mr. Koontz felt the requests for additional mitigation were excessive, accepted his permit rejection, and filed suit in state court. When challenging a denied permit, the claim is not for an uncompensated taking but for damages caused by an unconstitutional condition. It is important to note that no property was taken from Mr. Koontz. The parties appealed the case through the Florida court system and eventually to the U.S. Supreme Court.

In ruling in favor of Mr. Koontz, the Supreme Court majority identified the injury to the applicant to be an unconstitutional condition, not a taking of property. The *Koontz* decision further clarified that the *Nollan/Dolan* doctrine stands for the proposition that the government may not require an individual to give up a constitutional right in order to obtain a government benefit. However, no compensation is due if the government agency can show the "nexus" and "proportionality" between the impact of the development and the exaction.

Author: Kenneth C. Pope, Hillsborough County Attorney's Office

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EQUAL HOUSING LENDER

FLORIDA'S PATIENT SELF-REFERRAL ACT: THE STARK LAW ON STEROIDS

Health Care Law Section

Chairs: T.J. Ferrante - Carlton Fields Jorden Burt, P.A.; and Sara Younger - BayCare Health Systems, Inc.

The federal Stark Law, 42 U.S.C. § 1395nn, regulates referrals of specific "designated health services" payable by federal insurance programs such as Medicare and Medicaid by physicians who have financial relationships with entities to which they refer such services. The law has resulted in a maze of complex and rapidly evolving regulations, leaving providers in a quandary as to which types of referrals are permissible.

Complicating matters even further is the Florida Patient Self-Referral Act of 1992, Section 456.053, Florida Statutes (the Florida Act), which the American Medical Association has described as "the most complicated and perhaps the most restrictive self-referral law of any of the states."[1] The Florida Act serves a similar purpose as the Stark Law and contains some overlapping language, but it does not expressly tie itself to the Stark Law. Rather, the Florida Act stands on its own as a separate prohibition. In January 2013, the Eleventh Circuit held that the Stark Law does not pre-empt the Florida Act.[2]

In one respect, the Florida Act is narrower than the Stark Law because it prohibits referrals only when a provider has a direct or indirect investment interest in the entity receiving the referrals. In contrast, the Stark Law applies to a host of financial relationships, including investment interests and other relationships such as independent contractor relationships. In two other respects, however, the Florida Act is broader. First, it applies to referrals of any health services, not just "designated health services." Second, the Florida Act applies regardless of who pays for the referred services, whereas the Stark Law is limited to services payable by federal insurance programs.

The law has resulted in a maze of complex and rapidly evolving regulations, leaving providers in a quandary as to which types of referrals are permissible.

The Florida Act and the Stark Law contain two largely distinct sets of exceptions to their referral prohibitions. The most important exception that is common to both laws is the "in-office ancillary services exception," which allows providers to refer ancillary services such as imaging and laboratory services to their own group medical practices. Although both laws embrace this general principle, the Florida Act, true to form, is more restrictive. First, the Florida Act requires one of the physician members of the practice to be in the office while the ancillary services are performed, whereas in many cases the Stark Law does not. Second, the Florida Act requires that the ancillary services be provided solely for the benefit of patients of the practice, prohibiting the acceptance of outside referrals for such services (except that the practice may accept up to 15 percent outside referrals for diagnostic imaging services if it meets a host of onerous requirements). No such requirement is included in the Stark Law exception.

A violation of the Florida Act requires the entity to which the services were referred to forego any claim for payment for the services. If the entity knowingly submits a claim in violation of the Florida Act, the entity is subject to a civil penalty of $15,000 per claim.

[1] http://www.ama-assn.org/resources/doc/clrpd/self-referral-laws.pdf

[2] *Fresenius Medical Care Holdings, Inc. v. Tucker*, 704 F.3d 935 (11th Cir. 2013).

Author: Jon Gatto, Carlton Fields Jorden Burt, P.A

Save the date: Health Care Law CLE at noon on March 12. Call (813) 221-7777 to register.

FIRST-TO-FILE RULE: WHAT'S IN A NAME?

Intellectual Property Section

Chairs: Woodrow H. Pollack - GrayRobinson, P.A.; and Mindi Richter - Shumaker, Loop & Kendrick, LLP

Well Juliet, it depends upon whether you are asking a patent prosecutor or litigator. Under the Leahy-Smith America Invents Act (AIA), the rule means as the name suggests: A patent is issued to the first to file an application.[1] Although the AIA awards patents to the inventor who first files, federal courts do not automatically award the race to the courthouse to the swiftest in patent cases.

The litigation rule was not misnamed when originally established by the United States Supreme Court in 1824. "In all cases of concurrent jurisdiction, the Court which first has possession of the subject must decide it." *Smith v. McIver,* 22 U.S. 532, 535 (1824).

Since *Smith*, the general rule in federal litigation favors the forum of the first-filed action.

The Federal Circuit, whose law controls issues impacting patent law[2], advocates following this general rule "*unless* considerations of judicial and litigant economy, and the just and effective disposition of disputes, requires otherwise." *Electronics for Imaging, Inc. v. Coyle,* 394 F.3d 1341, 1347 (Fed. Cir. 2005) (emphasis added). The court has rejected applying a bright-line rule that would automatically defer to the first-filed court, the fate of the second-filed action. *Micron Tech., Inc. v. Mosaid Techs., Inc.,* 518 F.3d 897, 904 (Fed. Cir. 2008). Instead, Federal Circuit precedent instructs that factors such as tenuousness of jurisdiction, broadness of the parallel actions, the degree of judicial investment, the possibility of consolidating related litigation, and the convenience factors under 28 U.S.C. § 1404 (a) may be considered in determining whether parallel actions should proceed separately or together, and, if the latter, in which forum.

The Federal Circuit desires that the justice and expediency considerations behind the first-to-file rule, and not the name, have meaning in patent cases.

Exceptions to the general rule may also be made if bad faith, anticipatory suit, and forum shopping are present.

The Federal Circuit has further carved out a "customer suit exception": If an infringement action is first brought against the customer, and the manufacturer (from whom the customer purchased the allegedly infringing good) subsequently brings a declaratory judgment action in response, the first-filed action may be stayed in favor of the manufacturer's declaratory judgment action. *See Kahn v. General Motors Corp.,* 889 F.2d 1078, 1081 (Fed. Cir. 1989).

In light of the "ample degree of discretion" the Federal Circuit accords the lower courts, it may be the second-filed court that determines both actions when applying the first-to-file rule. *Merial Ltd. v. Cipla Ltd.,* 681 F.3d 1283, 1299 (Fed. Cir. 2012).

So as Juliet doth love the man behind the name, the Federal Circuit too desires that the justice and expediency considerations behind the first-to-file rule, and not the name, have meaning in patent cases.

[1] 35 U.S.C. § 102.

[2] *Midwest Indus., Inc. v. Karavan Trailers, Inc.,* 175 F.3d 1356, 1359 (Fed. Cir. 1999).

Author:
Kathleen M. Wade,
Fee & Jeffries, P.A.

Save the date:
Intellectual Property Section Luncheon at noon on March 19.
Call (813) 221-7777 to register.

Elder Law CLE

The HCBA Elder Law Section welcomed guest speaker Babette B. Bach in November for a CLE luncheon detailing "VA Benefits, Trends, Pitfalls and Medicaid." Thanks to all who attended!

Health Care Law CLE

HCBA Heath Care Law Section Chairs Sara Younger and T.J. Ferrante welcomed guest speaker Radha V. Bachman in November for a CLE luncheon detailing "Disability Compliance for Health Care Providers: Navigating the Landmines." Thanks to all who attended!

Save the Dates

FEBRUARY 22
Diversity Networking Social at the Chester H. Ferguson Law Center

FEBRUARY 25
Diversity Committee Presents: A Special Luncheon, CLE and Book Signing with "Devil in the Grove" Author Gilbert King at the Chester H. Ferguson Law Center

MARCH 17
HCBA Hockey Night, Tampa Bay Lightning vs. Vancouver Canucks

MARCH 22
Judicial Pig Roast/Food Festival & 5K Pro Bono River Run on the grounds of Stetson's Tampa Law Center

MAY 13
Law Day Membership Luncheon at the Hilton Tampa Downtown

Learn more about HCBA events at www.hillsbar.com.

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TAX IMPLICATIONS OF SUPREME COURT DECISION ON DOMA

Marital & Family Law Section

Chair: Courtney Bowes - The Bowes Law Group

The United States Supreme Court's recent decision — "Section 3 of the Federal Defense of Marriage Act (DOMA) violates the equal protection of the Fifth Amendment of the U.S. Constitution as applied to persons of the same sex who are legally married under the law of their state" — opens the door for same-sex couples to enjoy many federal tax-related benefits previously available only to opposite-sex married couples. These benefits include income tax benefits, estate and gift tax benefits, and taxpayer-friendly employee benefits.

Under the ruling, individuals of the same sex will be considered to be lawfully married under the code as long as they were married in a state, which means any domestic or foreign jurisdiction having the legal authority to sanction marriage, even if they are domiciled in a state that does not recognize the validity of same-sex marriage. Due to our increasingly mobile society, it is important to have a uniform rule of recognition that can be applied with consistency by the IRS and taxpayers alike for all federal tax purposes.

A taxpayer's filing status determines the right to many tax benefits relative to access and amounts. The filing status determines income tax bracket levels, the standard deduction, personal exemptions, and the adjusted gross income at which many of the tax benefits "phase-out." In most cases, the taxpayer's marital status is the deciding factor for the filing status.

Same-sex couples who are currently married under state law must file either a jointly or married filing separately return for 2013. They are barred for federal tax purposes from filing separate returns as single or head of household unless, like opposite-sex couples, they are divorced or have a final separation agreement in place by the end of 2013.

For 2012 and prior years, assuming the statute of limitations for amending a return has not expired, same-sex spouses who filed their return before September 16, 2013, may choose to amend their returns to file using a joint filing or married filing separately status. However, the returns are not required to be amended; this is optional.

Keep in mind that the benefits of filing a joint return may not always produce a better result than filing separately as unmarried individuals. One factor, known as the marriage penalty, is a problem for many opposite-sex married couples and same-sex married couples. Same-sex married couples also cannot turn a blind eye to any item that is listed on a joint return, triggering the consideration of joint and several liability. Innocent spouse status now comes into play with the decision to file joint returns.

DOMA opens the door for same-sex couples to enjoy many federal tax-related benefits previously available only to opposite-sex married couples.

Many same-sex married couples may find it beneficial to revisit their estate plans to make certain that interests passing to the other spouse qualify for all the tax benefits. The marital deduction can defer or eliminate transfer tax until the surviving spouse dies. The ability to transfer assets between same-sex married couples with no concern for lifetime gift tax consequences creates flexibility for estate planning.

Effective date issues of the ruling will consider the same-sex marriage effective retroactively to the date of the couple's marriage under state law rather than the date of the Supreme Court's decision, June 27, 2013.

Authors:
Constance Rossi and Briggs Stahl, Stahl Consulting Group, P.A.

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REVISED FLORIDA ARBITRATION CODE: ARBITRATION FACE-LIFT

Mediation and Arbitration Section

Chair: Hilary High, Hilary High, P.A.

Effective July 1, 2013, most new arbitration agreements between Florida parties[1] are subject to the Revised Florida Arbitration Code (RFAC), Chap. 682, Fla. Stat. (2013).[2] Here are some of the highlights:

Arbitration Agreement. The RFAC provides that many of its provisions may be waived or varied by the parties, but some may not.[3] The RFAC specifies that the court decides whether the agreement is enforceable and whether it applies to a specific controversy, but the arbitrator decides whether the arbitration clause is enforceable and whether conditions precedent to arbitrability have been fulfilled.[4] Moreover, the sections relating to motions to compel/stay arbitration have been updated.[5]

Initiation of Arbitration. Parties commence arbitration using the method they have provided in their agreement; if none, then by certified mail or service of process. Separate arbitrations may be consolidated by the court, unless prohibited by the arbitration agreement(s), and waivers of class arbitration retain their validity.[6] The arbitrator appointment process has been streamlined and prevents appointment of a non-party arbitrator with a clear conflict of interest.[7] Arbitrators must disclose potential conflicts of interest and may only serve if all parties consent after such disclosure.[8]

Provisional Remedies. The RFAC allows the arbitrator (or the court, before an arbitrator has been appointed) to order interim relief. Parties may challenge/enforce such interim orders of provisional relief, in much the same manner as an arbitration award.[9]

Effective July 1, 2013, most new arbitration agreements between Florida parties are subject to the Revised Florida Arbitration Code.

Arbitrators. Arbitrators have judicial immunity under the RFAC, even if they don't disclose properly, and cannot be called to testify (or produce documents) other than in a proceeding brought by the arbitrator against a party (limited to what is needed to establish the arbitrator's claim) or when a party has established *prima facie* basis for vacating an award based on arbitrator misconduct.[10]

Prehearing Procedures. Arbitrators may permit discovery as they deem appropriate, considering "the needs of the parties … and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective." They may issue subpoenae for appearance or *duces tecum* at hearing or "at a discovery proceeding" and may issue protective orders.[11]

Arbitration Hearings. Scheduling and conduct of the hearings is more streamlined.[12] Arbitrators may rule on motions for summary disposition, with due notice; final evidentiary hearings are no longer required. A hearing – summary or final – may move forward in the absence of a party, if that party has received due notice. Parties still have the right to be heard, present evidence, and cross-examine witnesses appearing at a final hearing.[13]

Awards. Arbitrators may award punitive damages or attorney's fees and costs, if such would be available in a civil action involving the same claim(s). Awards may be modified or corrected by the arbitrator, on motion submitted within 20 days after receipt of the award; opposing party has 10 days to object. Alternatively, on motion to confirm, vacate, or modify the award, the court may rule, after taking what evidence the court deems necessary, or may submit some types of modifications or corrections to the arbitrator to resolve.[14]

[1] The Federal Arbitration Act still pre-empts arbitration clauses involving disputes related to "maritime transactions" or "interstate commerce" as defined in 9 U.S.C. §1. An exception to the pre-emption exists where the parties have specifically stated that the law of Florida would govern the agreement. *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468 (1989).

[2] The code will apply to all non-pre-empted arbitration agreements as of July 1, 2016, and applies to any pre-existing agreement where the parties agree it will apply. Fla. Stat. § 682.013 (2013).

[3] For example, the following may not be waived: whether RFAC applies;

Continued on page 47

Continued from page 46

the availability of judicial proceedings pre- and post-hearing; the standards for judicial vacation or modification of an arbitration award; arbitrator immunity; the arbitrator's authority to change an award; provisional remedies; arbitrator authority to issue subpoenae and to permit depositions; the enforceability of a judgment on award or the bases for appeal therefrom. Fla. Stat. § 682.014 (2013).

[4] Fla. Stat. § 682.02(2) - (4) (2013).

[5] Fla. Stat. § 682.03 (2013).

[6] Fla. Stat. §§ 682.032, 682.033 (2013). Waivers of class arbitration are enforceable under the Federal Arbitration Act, whether the substance of the claim being arbitrated is a creature of state or federal law. *American Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 178 - 1752 (2011). The Florida Supreme Court has followed *Concepcion*, acknowledging that the Federal Arbitration Act preempts state law. *McKenzie Check Advance of Florida, LLC v. Betts*, 112 So. 3d 1176, 1183 - 1188 (Fla. 2013).

[7] *I.e.*, an arbitrator "who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party." Fla. Stat. § 682.04 (2013).

[8] Fla. Stat. § 682.041 (2013).

[9] Fla. Stat. §§ 682.031, 682.081 (2013).

[10] Fla. Stat. § 682.051 (2013). Arbitrators are also entitled to their reasonable attorney's fees and costs if the court determines the arbitrator is immune or is not required to testify. *Id.*

[11] Fla. Stat. § 682.08 (2013).

[12] Fla. Stat. § 682.06 (2013).

[13] Fla. Stat. §§ 682.05, 682.06 (2013).

[14] Fla. Stat. §§ 682.09 - 682.10, 682.12 - 682.14 (2013).

Author: Christopher M. Shulman, Christopher M. Shulman, P.A.

Judicial Luncheon

A panel of judges gave some very helpful tips to HCBA attorneys on November 19 during a presentation titled "Motions: How to Present, Persuade and Defend in Motion Practice by the Circuit Criminal Felony Bench." Attendees earned 2 CLE credits during the luncheon. The HCBA greatly appreciates the judges who participated: Judge Tom Barber, Judge Lisa D. Campbell, Judge Kimberly K. Fernandez, Judge Ronald Ficarrotta, Judge Gregory P. Holder, Judge Christopher C. Sabella, Judge Michelle Sisco, Judge Caroline J. Tesche, and Judge Samantha L. Ward.

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Professionalism & Ethics Committee

Chairs: Julie Sneed - Akerman Senterfitt LLP; and Joan Boles - Bay Area Legal Services, Inc.

Incivility in the legal community can be a constant source of frustration for attorneys who seek to honor and hold the legal profession in high regard. Some practitioners may unwittingly assume that nothing can be done to cure this issue. However, the Florida Supreme Court is working to remedy what some practitioners believe is an increasing problem of unprofessionalism in The Florida Bar.

In *The Florida Bar v. Norkin,*[1] the Supreme Court recently overruled a referee recommendation that Jeffrey Alan Norkin should only be suspended from the practice of law for 90 days and serve 18 months of probation for unprofessionalism. In its place, the court imposed a two-year suspension of his Bar license.

Norkin was litigating a civil case in Miami when he "improperly threatened the filing of a legal action against [his opponent] personally and, without supporting facts, asserted that [his opponent] was involved in a conspiracy."[2] Subsequently, Norkin filed a motion to recuse the presiding judge and wrote disparaging and unprofessional remarks about his opponent and the judge, to include assertions that the court's rulings allowed the opposing party "in [a] fraudulent and criminal manner, [to] use this Court as an instrument of destruction."[3] Further, Norkin asserted that the court "acted at the 'beck and call' of the plaintiff, and that there was an improper and illegal relationship between the judge" and Norkin's opponent.[4]

Norkin routinely raised his voice and was confrontational in the courtroom until the judge finally granted Norkin's motion for recusal. A second judge also found that Norkin was antagonistic, and eventually that judge "was forced to terminate [the] proceedings and refer" them to a general magistrate.[5] The Supreme Court found that Norkin's "lack of professionalism and inappropriate courtroom demeanor made it impossible for the judges to conduct hearings."[6]

Additional evidence of Norkin's unprofessionalism became apparent in his emails, where he wrote statements such as "when is your unprofessional, ludicrous, downright unintelligent conduct going to stop? Before or after you are directed to pay my bills?"[7] Norkin's subsequent outbursts included publicly screaming about his opponent, stating that "[he] is a liar. He's lying" and that he "is underhanded and a scumbag."[8]

The Florida Supreme Court is working to remedy what some practitioners believe is an increasing problem of unprofessionalism.

The Supreme Court found that "the record amply demonstrates that Norkin knowingly, or through callous indifference, was incessantly disparaging and humiliating" toward his opposing counsel.[9] Further, the court found Norkin guilty of violating Rules 4-3.5(c), 4-8.2(a), and 4-8.4(a) and (d).

Members of the public and the legal profession may assume that antagonistic lawyers are simply fulfilling a bona fide responsibility to be a zealous advocate. However, the Florida Supreme Court imposed a severe sanction upon Norkin, making it clear that incivility and unprofessionalism will not and cannot be tolerated in the practice of law.

[1] *Florida Bar v. Norkin,* —So. 3d—, 2013 WL 5878901 (Fla. 2013).

[2] *Id.* at 3.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 6.

[6] *Id.*

[7] *Id.* at 7.

[8] *Id.* at 8.

[9] *Id.*

Author: Caroline Johnson Levine, Office of the Attorney General

To join an HCBA section or committee, call (813) 221-7777.

ESTATE AND TAX PLANNING FOR SAME-SEX MARRIED COUPLES IN FLORIDA

Real Property, Probate & Trust Law Section

Chairs: Katie Everlove-Stone, Everlove Legal, PLLC; and Stephanie Adams - Shutts & Bowen, LLP

The recent U.S. Supreme Court ruling in *U.S. v. Windsor* and subsequent guidance published by the Internal Revenue Service (IRS) has created numerous estate and tax planning opportunities for same-sex married couples nationwide. Because many of these couples may relocate to Florida to take advantage of Florida's lack of income, gift, and estate taxes, practitioners should apprise themselves of the various planning opportunities that now exist.

In *Windsor*, the U.S. Supreme Court held Section 3 of the Defense of Marriage Act to be unconstitutional as a deprivation of the equal liberty protection found in the Fifth Amendment. After *Windsor*, same-sex married couples were considered married for purposes of federal estate and gift tax laws if they had been married in a state that recognizes same-sex marriages and if they resided in a state that recognizes same-sex marriages. Therefore, immediately after *Windsor*, same-sex married couples who had been married in a state that recognizes same-sex marriages but who resided in Florida, a non-recognition state, could not avail themselves of the benefits of married couples under federal gift and estate tax laws. This all changed when the IRS issued Revenue Ruling 2013-17, which clarified that any same-sex marriages legally entered into will be recognized for federal income, gift, and estate tax purposes even if the same-sex married couples reside in a state that does not recognize same-sex marriages.

Florida appears to be an attractive home for same-sex married couples due to its lack of income, gift, and estate taxes.

The IRS's Notice IR-2013-72 makes it clear that same-sex married couples must now file their 2013 federal income tax returns (and all future income tax returns) as married filing jointly or as married filing separately. Additionally, this notice also states that individuals who were in same-sex marriages may file amended federal returns (income, gift, or estate) for one or more prior tax years still open under the statute of limitations. This option may create income, gift, and estate tax planning opportunities for same-sex married couples that should be evaluated.

Same-sex married couples (regardless of where they reside) are now able to take advantage of several federal tax benefits that were previously unavailable to them. These benefits include, but are not limited to, the following: (i) unlimited marital deduction for federal estate and gift tax purposes; (ii) "portability" of the deceased spouse's unused estate tax exclusion amount for federal estate tax purposes; and (iii) gift splitting for federal gift tax purposes.

A possible problem now arises when same-sex married couples reside in a state that does not recognize same-sex marriages but has a state income, gift, or estate tax. For example, under current law and IRS guidance, these couples will now be required to file their federal income tax returns as married filing jointly or as married filing separately, but they may very well be forced to file separate state income tax returns. For this reason, Florida appears to be an attractive home for same-sex married couples due to its lack of income, gift, and estate taxes, and Florida practitioners should be prepared to advise such couples on the various planning opportunities that are now available.

Authors:
Taylor C. Russo and Jamil G. Daoud, MacFarlane Ferguson and McMullen, P.A.

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MATERIAL DEADLINE	PUBLICATION
JULY 15	SEPTEMBER/OCTOBER
SEPTEMBER 15	NOVEMBER
OCTOBER 15	DECEMBER/JANUARY
DECEMBER 15	FEBRUARY
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MARCH 15	MAY
APRIL 15	JUNE/JULY/AUGUST

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Sensory Friendly Santa

Santa made a very important stop at the Chester H. Ferguson Law Center on December 7 to bring joy to children living with autism and developmental delays. The Lawyers Autism Awareness Foundation organized the Sensory Friendly Santa event, which featured arts and crafts, a toy giveaway, and photos with the bearded man himself. Elements that make up traditional visits with Santa, including bright lights, loud Christmas music, and long lines, can cause stress and anxiety for children with autism. The Sensory Friendly Santa event provided a more calming environment, including natural light, low noise, and appointed blocks of time to minimize waiting for Santa. The organizers would like to thank Judge Rex Barbas and Judge Nick Nazaretian for suiting up to play Santa. Also added to the "nice" list are the event sponsors: City of Tampa Firefighters Local 754, Cooley Law School, Hillsborough County Bar Association, Joe Photo Tampa, Kubicki Draper, Law Offices of Christine Derr, Phelps Dunbar, Sanchez Valencia, and Tampa Hispanic Bar Association.

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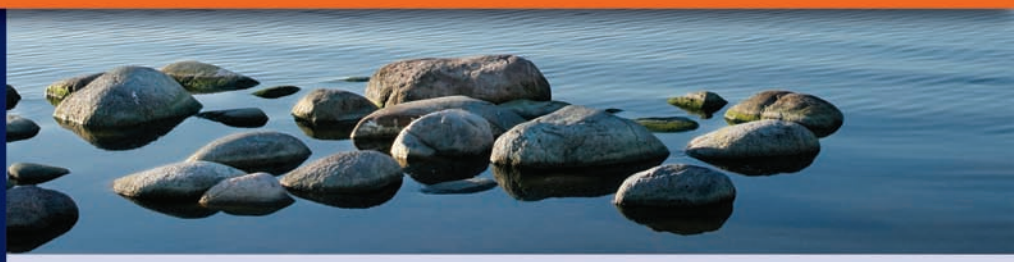

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THE PECULIAR AND BRIEF SHELF LIFE OF THE "ESSENTIAL SERVICES" TEST

Real Property, Probate & Trust Law Section

Chairs: Katie Everlove-Stone, Everlove Legal, PLLC; and Stephanie Adams - Shutts & Bowen, LLP

An unusual confluence of Florida statutory and common law has created — and immediately doomed — an expanded view of the implied warranty of habitability as applied to the development of residential subdivisions. The story began when Lakeview Reserve Homeowners Association, on behalf of its members, sued builder Maronda Homes, Inc., which subsequently joined the subdivision's developer, T.D. Thompson Construction Co., for damages resulting from defective infrastructure improvements within the common areas of a subdivision in Orange County. Residents alleged that the builder and developer breached the implied warranty by erecting a faulty drainage system that caused recurrent flooding, which, in turn, caused erosion and damage to the subdivision roads. The trial court, however, rejected the association's claim that the implied warranty extended beyond the residence to the common areas.[1]

In 2010, the Fifth District disagreed, concluding that roads and sewage and drainage systems are "essential to the habitability of the residence." The district court explained that a defect in a nonessential improvement, such as landscaping, recreational facilities, or a security system, would not render a residence unfit for its intended purpose. Aiding in this distinction, the Fifth District created the "essential services" test — is the allegedly defective "improvement providing a service essential to the habitability of the home? If [so], then the implied warranties apply." The Fifth District reasoned that a developer is better positioned than a homeowner to discover a defective improvement that may affect habitability and, as such, should be the party responsible for the defect. The builder and developer appealed the Fifth District's ruling.[2]

An unusual confluence of Florida statutory and common law has created — and immediately doomed — an expanded view of the implied warranty of habitability as applied to the development of residential subdivisions.

In direct response to the Fifth District's holding, the Florida Legislature enacted Florida Statute Section 553.835. The statute states that implied warranties do not

Continued on page 55

Continued from page 54

apply to "offsite improvements," which include roads, drainage, or any other improvement "not located on or under the lot on which a new home is constructed ..." In an attempt to nullify the Fifth District's warranty liability expansion, the Legislature provided that the statute "shall take effect on July 1, 2012, and apply to all cases accruing before, pending on, or filed after that date."[3]

Meanwhile, the Florida Supreme Court agreed to hear the appeal and, in a ruling released on July 11, 2013, adopted the "essential services" test. In doing so, the court expanded the definition of services "immediately supporting" a residence beyond those improvements on or under the lot on which a new home is constructed. The court further held that Section 553.835 is a substantive law rather than a procedural law and, as such, cannot be applied retroactively to prohibit accrued causes of action.[4]

The result of this decision creates a peculiar and short-lived shelf life for common law "essential services" test claims. It offers associations a limited window to pursue an implied warranty claim against their builders and developers, provided the claim accrued before July 1, 2012, and is filed prior to the statute of limitations deadline.[5] It will likewise leave developers exposed to common law implied warranty claims — claims that had been aimed at builders. However, this period of exposure will expire along with the "essential services" test once the statute of limitations bars all claims accruing before July 1, 2012. At that time, the implied warranty will essentially be limited in the same manner as it was prior to this skirmish between the courts and Legislature. Once order is restored, parties will be able to look to Section 553.835 for guidance.

[1] *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n,* 2013 WL 3466814, *1-2 (Fla. July 11, 2013).

[2] *Lakeview Reserve Homeowners Ass'n v. Maronda Homes, Inc. of Fla.*, 48 So. 3d 902, 908-910 (Fla. 5th DCA 2010).

[3] Fla. Stat. § 553.835 (2013); *see also Maronda Homes, Inc. of Fla.*, 2013 WL 3466814 at *11-12.

[4] *Maronda Homes, Inc. of Fla.*, 2013 WL 3466814 at *16-17. In dissent, Justice Canady noted that although the majority, in dicta, found the statute violated the right of access to courts by abolishing a common law cause of action without providing a reasonable alternative, the court's conclusion stopped short of holding that the prospective application of the statute is unconstitutional. *Id.* at *18.

[5] Fla. Stat. § 95.11 (2013).

Authors: William J. Podolsky, III, and Derek Larsen, Chaney, Phelps Dunbar, LLP

Blast from the Past

Last year's *Lawyer* magazine covers featured vintage Florida postcards. If you're feeling nostalgic and want to read past issues of the *Lawyer*, check them out online at www.hillsbar.com.

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THE PROPOSAL FOR SETTLEMENT — AN ALL-OR-NOTHING PROPOSITION?

Trial & Litigation Section

Chair: Brad Kimbro - Holland & Knight, LLP

Effective January 1, 2014, Rule 1.442(c)(2)(B), Florida Rules of Civil Procedure, has been amended. The rule, which previously required that a proposal for settlement "identify the claim or claims the proposal is attempting to resolve," now will require instead that a proposal for settlement "state that the proposal resolves all *damages* that would otherwise be awarded in a final judgment in the action in which the proposal is served, subject to subdivision (F)." *In re Amendments to the Fla. Rules of Civil Procedure,* No. SC13-74, — So. 3d —, 2013 WL 6164572, at *1 (Fla. Nov. 14, 2013) (emphasis added). The amendment makes the rule consistent with section 768.79(2), Florida Statutes, which states that "[t]he offer [to settle] shall be construed as including all *damages* which could be awarded in a final judgment." Fla. Stat. § 768.79(2) (emphasis added).

The amendment is significant because it eliminates partial proposals for settlement, which, although popular because they allow litigants to cherry-pick claims, are tricky and oftentimes complicate cases pre- and post-judgment. However, it also raises an interesting issue: Will proposals for settlement be valid in actions in which plaintiffs seek both damages and equitable relief, and if so, will such proposals be deemed to implicitly carve out the equitable claims if they are drafted in accordance with amended Rule 1.442 to resolve "all damages" that would otherwise be awarded in a final judgment?

The amendment is significant because it eliminates partial proposals for settlement, which, although popular because they allow litigants to cherry-pick claims, are tricky and oftentimes complicate cases pre- and post-judgment.

The offer of judgment statute states that it applies to "civil actions for damages." Fla. Stat. § 768.79(1). It does not state that it applies to actions for equitable relief, or even to actions for both equitable relief and damages. Before the amendment, the Florida Supreme Court held that Section 768.79 "does not apply to an action in which the plaintiff seeks both damages and equitable relief, and in which the defendant has served a general offer of judgment that seeks release of all claims." *Diamond Aircraft Indus., Inc. v. Horowich,* 107 So. 3d 362, 374 (Fla. 2013). But what about proposals in such cases that attempt to resolve "all *damages*" instead of all claims? The result is unclear.

Proposals for settlement in damages-only cases will be all-or-nothing propositions under the amended Rule 1.442. Their interpretation remains to be seen, however, in cases with both damages and equitable claims.

Author:
Jaret J. Fuente,
Carlton Fields
Jorden Burt, P.A.

Save the date:
The next Trial & Litigation Section Quarterly Luncheon is at noon on February 26. Call (813) 221-7777 to register.

A little more than a year ago, the Florida Supreme Court made changes to the Rules of Civil Procedure in order to bring the rules into the digital era and to address some of the rapid developments in electronic discovery. A review of all of the changes is beyond the scope of this column, but the Supreme Court gave a short and clear statement of the changes on July 5, 2012.[1] The changes apply to all pending and new civil actions.

Rule 1.280 was changed to allow litigants to request discovery of actual electronically stored information (ESI), which is "data" instead of traditional written documents.[2] Given the volume and breadth of ESI created and stored in our "digital society," adding that data to discovery is daunting.

To balance the burden of allowing discovery of ESI, the Supreme Court limited such discovery. The trial court must determine whether "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from another source or in another manner that is more convenient, less burdensome, or less expensive."[3] The court must also conduct a proportionality test similar to federal litigation to determine whether "the burden and expense of discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[4]

In a recent case in my practice, a party requested a "write block" of all of my clients' drives as "discovery" under the new rules.[5] A "write block" is a forensic copy of a drive that can be used in litigation. It captures all of the data stored on the drive, whether relevant or not. It is very invasive when sought in a business dispute between former partners.

Florida law does not require a party to permit a "write block" of its computer hard drives in discovery. The new rules highlight the need for restraint by requiring courts to balance the right to discover ESI with a consideration of the need, burden, expense, and issues at stake. Similarly, a recent case from the Fifth District holds that without proof of spoliation or "thwarting discovery," a party does not have an absolute right to obtain ESI.[6] The court noted that there was a less intrusive means of discovery and that allowing the copying of a party's computer drives "would expose confidential communications and matters extraneous to the litigation." The court found a departure from the essential requirements of law and irreparable harm in the trial court's allowing the "write block" without first balancing the factors or establishing appropriate protections.

Florida law does not require a party to permit a "write block" of its computers in discovery. ... [W]ithout proof of spoliation or "thwarting discovery," a party does not have an absolute right to obtain ESI.

[1] The Supreme Court's written opinion is styled *In re: Amendments to the Florida Rules of Civil Procedure - Electronic Discovery*, No. SC11-1542, and is available at: http://www.floridasupremecourt.org/decisions/2012/sc11-1542.pdf.

[2] Fla. R. Civ. P. 1.280(b)(3).

[3] Fla. R. Civ. P. 1.280(d)(2).

[4] *Id.*

[5] Fla. R. Civ. P. 1.280(b)(3).

[6] *Holland v. Barfield,* 35 So. 3d 953, 955-56 (Fla. 5th DCA 2010) ("The unlimited breadth of the trial court's order allows Respondent to review, without limit or time frame, all of the information on Petitioner's computer[s] … without regard to her constitutional right of privacy and the right against self incrimination or privileges… .").

Author: Morgan W. Streetman, Streetman Law

Trial & Litigation Section Quarterly Luncheon

Florida Attorney General Pam Bondi visited the Hillsborough County Bar Association on December 19 to speak at the Trial & Litigation Section Quarterly Luncheon. Section Chair Brad Kimbro introduced Bondi, who took note of the many familiar faces in her hometown crowd.

Bondi discussed the accomplishments her office has made, including in the statewide fight against human trafficking. She particularly highlighted successful partnerships with federal authorities, law enforcement, the trucking industry, convenience store owners, and motel owners to raise awareness of the issue.

The attorney general also took pride in the increased protections the state has been able to offer the families of active-duty military personnel, who have been the target of scammers. To deter such activity, the state has increased penalties for those who dare to defraud members of the military or their families.

On the topic of scams, Bondi warned the crowd of a trend in business-to-business scams that target law firms, car dealerships, and other frequent advertisers. The scammers replicate print ads the businesses are running and then submit them to the businesses' accounting department along with invoices for payment. Bondi urged the audience to pay close attention to their invoices and report anything suspicious.

Throughout her talk, the attorney general stressed the importance of keeping open lines of communication with her office. "We can't fix it unless we know about it," she pointed out.

The HCBA Trial & Litigation Section would like to thank The Bank of Tampa for sponsoring the luncheon!

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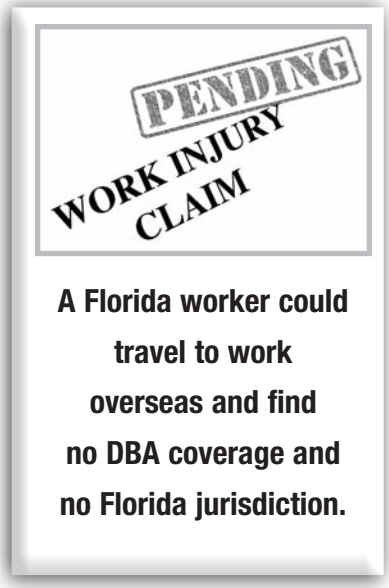
The Florida Workers' Compensation Act excludes coverage for any injury covered by the Longshore Act or its extensions, such as the Defense Base Act (DBA). Fla. Stat. § 440.09 (2). These questions of jurisdiction are not waivable. As the federal statute and case law changes, the proper forum for litigation is changing, and in some cases there may be no United States coverage available.

In 2009, the president and Congress reduced Longshore coverage by excluding shipbuilders who build recreational vessels less than 65 feet in length, 33 U.S.C. Section 902 (3)(F) (amended 2009) (supp. 2011). In *Czikowsky v. Ocean Performance*, BRB No. 13-0108 (2013), the ALJ found that a hearing loss claim in April 2009 by a man working for a company that manufactured recreational vessels was excluded from coverage. The extension was held to apply even though the manufacturer also sold the vessels to fire departments and charter boat businesses. On appeal, the Benefits Review Board reversed, holding that a hearing loss claim is a repetitive trauma and exposure claim, and because some of the



A Florida worker could travel to work overseas and find no DBA coverage and no Florida jurisdiction.

Continued on page 61

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Primary Trainer: Gregory Firestone, Ph.D.

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November 1, 2, 3, 9 & 10, 2013
March 21, 22, 23, 29 & 30, 2014
Primary Trainer: James Williams, Esq.

Parenting Coordination Training [1,3]
January 23, 24 & 25, 2014
Trainers: Debra Carter, Ph.D. & Hon. Hugh Starnes

Dependency Mediation Certification Training [1,2,3]
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[1] Approved by the Florida Bar for CLER. [2] Approved by the Florida Supreme Court. [3] Visit www.crc.usf.edu for CEU information for other professionals.

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Continued from page 60

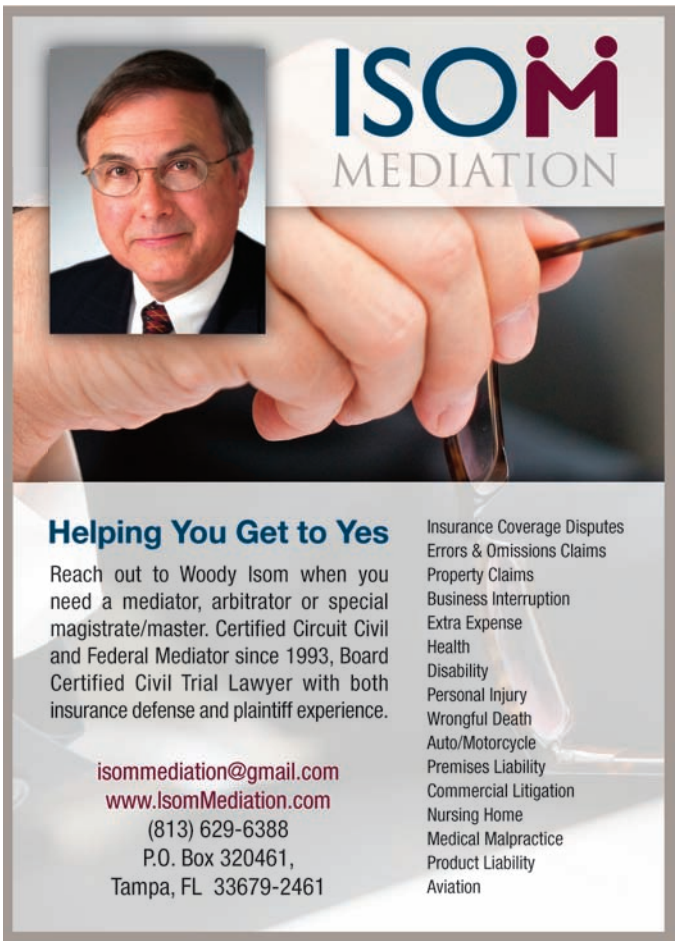
man's work and exposure occurred before the act was changed, the injury was covered. An employer must maintain both coverages in the near future to cover repetitive trauma claims.

In *Delgado v. Air Serv,* BRB No. 12-0283 (2013), the Benefits Review Board reversed an ALJ who dismissed a Defense Base Act claim from a man injured working on humanitarian transportation in Chad, Africa, as not covered by the act. The general rule had been that a DBA claim required that the employer be under a contract to provide service to the United States government, but in *Delgado*, the Benefits Review Board held that if the United States government provides even partial funding for services and approves employment contracts, there is DBA coverage.

The employment contract is becoming more important to the issue of appropriate jurisdiction and coverage in Florida and elsewhere. In *Owens II v. CCJ Transport,* OJCC 07-0342000 (2/11/10), the claimant was from Tampa, was retained by a company from Utah to drive trucks from state to state, sometimes drove through Florida, and was injured in Georgia, but there was no employment contract addressing workers' compensation coverage. It was held that Florida did not have jurisdiction. The claimant in *Owens II* was not prevented from filing a claim in Georgia, but what if this injury had occurred while the claimant was driving a truck in Mexico or Chad, Africa?

The Longshore recreational vessel exclusion only applies if there is state workers' compensation insurance available to cover the injury, so the injured worker is not left with nothing. What is more troubling is the possibility that a Florida worker could travel to a job overseas only to find no DBA coverage and no Florida jurisdiction. An employee traveling to a job overseas should be counseled to get language on workers' compensation coverage in an employment contract, and an employer who puts such language in such an agreement will have better control over claims.

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



Jolyon D. Acosta, **Charles Evans Glausier,** and **Bryan D. Hull** have been named shareholders of **Bush Ross, P.A.** Acosta is a certified public accountant. His practice focuses on estate planning and administration, wills, trusts, corporate law, partnership law, and federal and state taxation. Glausier's practice focuses on the representation of corporate clients in real estate matters involving complex real estate litigation and real estate transactions. Hull's practice focuses on the representation of clients in business disputes involving contracts, fraud, employment matters, trademark and copyright issues, and professional liability defense.

Lee Atkinson, formerly of Forizs & Dogali, P.A., has joined **STYMCO Technologies, LLC**, a national durable medical equipment company in Tampa, as its general counsel.

Marci Britt has joined the Tampa office of **Fisher & Phillips LLP**, a national labor and employment law firm. As an associate, she will represent employers in all areas of labor and employment law, including discrimination, harassment and retaliation claims, wage and hour disputes, whistleblower claims, and family and medical leave issues.

Jacob T. Cremer of **Smolker, Bartlett, Schlosser, Loeb & Hinds** in Tampa led a panel discussion, "Where Do Property Rights Fit into Sustainability: Developments Affecting Planners," at the American Planning Association's Florida annual conference. He was also selected by the Tampa Bay Business Journal as a 2013 "Up and Comer."

Mark J. Criser, shareholder in the litigation group at **Hill Ward Henderson**, has been selected to participate in Leadership Florida's 32nd class. A statewide community of leaders actively engaged in understanding and serving our state, the Leadership Florida program is highly competitive, accepting 40 to 70 leaders throughout the state each year.

Alberto "Al" F. Gomez, Jr., has been named a partner in the Tampa office of **Johnson, Pope, Bokor, Ruppel & Burns, LLP.** The majority of his practice is in the area of bankruptcy law, insolvency, assignments for the benefit of creditors, and all other aspects of debtor/creditor law.

Gail Golman Holtzman, head of Tampa law firm **Kass Shuler**'s Labor and Employment Practice Group, was recently elected at the American Bar Association's annual meeting in San Francisco as vice chair (employer) of the ABA's Section of Labor and Employment Law. Holtzman is in line to become chair of the section in 2016. The section, which has more than 25,000 members, represents all perspectives of labor and employment law and is committed to a balanced discussion of employment issues throughout the world.

Gregg Hutt, a shareholder in **Trenam Kemker**'s Tampa office, was one of six attorneys selected by the American Bar Association Forum on the Construction Industry to present at its regional program, entitled "Fundamentals of Construction Law," on November 8 in Tampa. The ABA Forum on the Construction Industry is the largest organization of construction lawyers in the world.

Kari K. Jacobson of **La Cava & Jacobson, P.A.**, has been invited to join the prestigious Claims and Litigation Management Alliance, a nonpartisan group composed of thousands of insurance companies, corporations, corporate counsel, litigation and risk managers, claims professionals, and attorneys. Through education and collaboration, the organization's goals are to create a common interest in the representation by firms of companies and to promote and further the highest standards of litigation management in pursuit of client defense. Attorneys and law firms are extended membership by invitation only based on nominations from CLM fellows.

Ajay Malshe has joined **Hill Ward Henderson** as an associate in the firm's Corporate and Tax Group. His practice encompasses a broad range of corporate transactional matters, including venture capital and private equity, joint ventures, partnerships, and securities.

Victoria McCloskey, a shareholder at **Bush Ross**, was named runner-up to receive the Community Leadership Award presented by the University of South Florida's Women in Leadership & Philanthropy for her service to the Hillsborough County Bar Association, Hillsborough Association for Women Lawyers, and dedication to various local civic and community organizations. Twenty women were nominated for the award — the most nominees ever received in one year.

Eric D. Nowak, an associate with **de la Parte & Gilbert, P.A.**,

Continued on page 63

Continued from page 62

has been appointed to the Board of Directors of the Florida Justice Association (FJA) Young Lawyers Section. The FJA is dedicated to upholding and strengthening Florida's civil justice system and protecting the rights of its citizens and consumers. Membership in the Young Lawyers Section provides networking opportunities for new lawyers and provides a support system as they enter the practice of law.

T. Cole Peterson has joined **Moffitt Cancer Center** as associate general counsel. Peterson will report to **David de la Parte**, executive vice president and general counsel. Peterson most recently served as general counsel, chief regulatory officer, privacy officer, and management representative at United Orthopedic Group, an international 600-employee bracing manufacturer and multi-state service company.

Laura Prather has joined **Akerman LLP** as a partner in the Tampa office, where she brings nearly two decades of trial experience representing management in all facets of labor and employment law, enhancing Akerman's capabilities in complex litigation and class actions.

Brett J. Preston, a shareholder at **Hill Ward Henderson**, has been elected to the Board of Directors for The Federation of Defense and Corporate Counsel (FDCC), an international, invitation-only defense organization. The FDCC is composed of recognized leaders in the legal community who have achieved professional distinction. It is dedicated to promoting knowledge, fellowship, and professionalism of its members as they pursue the course of a balanced justice system and represent those in need of defense in civil lawsuits.

Jeffrey Shear, a shareholder in **Gunster**'s Tampa office, has been elected to the Tampa Theatre Foundation board. Shear's practice primarily involves commercial and residential real estate development and land use, commercial leasing, mortgage lending, and purchase and sale transactions.

Stacy Estes Yates has joined full-service law firm **Pennington, P.A.**, as a partner. Yates focuses her practice on general civil litigation, insurance defense litigation, physician and pharmacist professional liability defense, health care compliance, and criminal defense.

Fisher & Phillips LLP won first place in the social/interactive media category of the Legal Marketing Association Southeastern Chapter's Your Honor Awards for its FMLA Leave Calculator App. One of the nation's leading labor and employment firms representing employers, Fisher & Phillips created the app, which allows employers to calculate basic leave requests and determine how much Family and Medical Leave Act time an employee has available.

The **Law Offices of Cynthia N. Sass, P.A.**, in 2013 celebrated the firm's 20th anniversary of representing employees in labor and employment law matters.

Tampa-based **Stichter, Riedel, Blain & Prosser, P.A.**, has opened a second satellite office, this one in Destin. The firm also has an office in Fort Myers.

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For the month of:
September 2013

Judge: Honorable Peter A. Dubensky

Parties: Allen Young vs. The L.E. Myers Company

Attorneys: For plaintiff: Marc Matthews and Lisha Bowen; for defendant: Michael Reed, William Hyland, and Michael Siegel

Nature of Case: Wrongful death; defendant was found negligent for failing to implement traffic control

Verdict: The jury awarded $1,200,000 for pain and suffering, loss of parental companionship, instruction, and guidance of Allen Young, Jr. The jury awarded $9,800,000 as punitive judgment damages owed by The L.E. Myers Company. Final verdict is pending.

For the month of:
October 2013

Judge: Honorable Charles E. Bergmann

Parties: Emigdio Rojas vs. State Farm Insurance

Attorneys: For plaintiff: Julian A. Sanchez; for defendant: Evelio Garcia and Lizandra Miranda

Nature of Case: Motor vehicle accident; defendant disputed causation and plaintiff's proposal for settlement of $37,000 in damages; defendant's proposal for settlement was $7,500

Verdict: $167,110; plaintiff motion for fees and cost pending

For the month of:
October 2013

Judge: Honorable Wayne Durden

Parties: Benjamin D. Markuson vs. Erik J. Saterbo and Stephen C. Saterbo

Attorneys: For plaintiff: Daniel J. McBreen, Eric D. Nowak, and Patrick J. McNamara; for defendants: Sidney M. Crawford, Benjamin Crawford, and James C. Valenti

Nature of case: Rear-end automobile collision; plaintiff sustained permanent injuries including a right brachial plexus (nerve) injury, temporomandibular joint injuries, right shoulder impingement syndrome, and disk injuries at multiple levels of the cervical spine

Verdict: For the plaintiff in the amount of $3,414,000

For the month of:
November 2013

Judge: Honorable Thomas B. McCoun, II

Parties: Donna Pisorchik v. Big Lots Stores, Inc.

Attorneys: For plaintiff: Richard Bokor and Sam Hillman; for defendant: Robert Maxim Stoler and Catherine M. Verona

Nature of the case: Premises liability

Verdict: Defense verdict

To submit news for Jury Trial Information, email Corrie Benfield at corrie@hillsbar.com.

ADVERTISING INDEX

Bank of Tampa....Back Cover
Bay Area Legal Services....51
Buell & Elligett....30
C1 Bank....48
Charles W. Ross....13
Chris Craft Tampa Bay....45
ExecuCar....37
Financial Divorce Consultants....45
Fowler White Boggs P.A....12
Free Press....61
Gil Singer....63
Glass Ratner Advisory & Capital Group LLC....53
Gunn Law Group....Inside Front Cover
Isom Mediation....61
Jim Freeman....48
John Reaves Real Estate, Inc....54
Johnson, Pope, Bokor, Ruppel & Burns LLP....28
LawPay....17
Mediation FLA, LLC....53
Observer Group/Business Observer....37
Older & Lundy....36
Paul Sidney Elliott....29
Robert Bonanno....31
Sabadell United Bank....40
Saxon, Gilmore, Carraway & Gibbons, P.A....63
The Centers....Inside Back Cover
The Fraley Law Firm, P.A....45
Thompson Studios....19
Trenam Kemker....37
Trial Consulting Services LLC....25
University of South Florida HPCC....60
V. Hendricks, P.A....29
Waller & Wax Advisors....4
WGK-ADR....20

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