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PHOTO BY DAWN MCCONNELL

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about the cover
The stars and stripes on the American flag and the seal on the state of Florida flag fly in the breeze along the Hillsborough River. The building featured on the cover was the third major legal construction project in the Tampa Heights community. Stetson University College of Law and the HCBA Chester H. Ferguson Law Center were the first two legal structures in this district. Can you identify the third? See page 55 for the answer.

PHOTO BY DAWN MCCONNELL

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MAY 2012 | HCBA LAWYER
editor's message
Grace H. Yang, GrayRobinson, P.A.

Challenges

I tell students that it can be immensely satisfying to be a lawyer, but I also tell them that the legal profession can be demanding and stress-inducing.

On average, I have the opportunity twice a year to speak with high school students, and they are sometimes very curious about what I do as a lawyer. I conduct college interviews annually, and sometimes the students ask me questions about how I followed a path from college to law school and then the practice of law. Sometimes the students are daughters or sons of friends who are curious about what lawyers do. At a recent leadership event, I even got to speak to a whole room full of high school students, all curious about various professions.

Some of the questions are amusing. A student once asked me if I enjoyed fancy lunches every day. (I don’t know about you, but I cannot claim that all workday lunches are fancy ones.) One student asked me if it was fun to play golf with clients because he heard lawyers golfed a lot. (The student did not know what terrible golf skills I have.) One student asked if it was fun to travel for work. (I said it depended on the travel destination and if there was actually time to venture away for a bit from the offices or buildings where lawyers are often found.)

Other questions are earnest ones, though. Students ask if I like being a lawyer (yes) and if the work is interesting (yes). There are concerns voiced about how costly law school can be and questions about how there are many different types of lawyers knowledgeable in many different areas of the law. There are thoughtful questions about whether it is hard to be a lawyer.

If asked, I am usually blunt with them. I tell students that it can be immensely satisfying to be a lawyer, but I also tell them that the legal profession can be demanding and stress-inducing. Sometimes, I do not have a predictable workload or schedule. I could have plans to work on XYZ File, and then an urgent call from a client might derail the plans for the workday. My task list changes daily, deadlines are important, and priorities often shift.

I am sure many of you can relate. The Florida Bar’s 2011 Membership Opinion Survey (all 101 pages are available through www.floridabar.org and then searching “2011 Membership Opinion Survey”), noted that 35% of respondents listed balancing family and work as a significant challenge or concern. 31% of respondents listed high stress as a significant challenge or concern. 22% cited time management as a significant challenge or concern.

We learn to juggle competing demands for our time as best as possible. We ask our loved ones for understanding and forgiveness if our work schedules are not always compatible with theirs. We hope to find ways to reduce stress, keep things in perspective, and maintain our sense of humor. We review and adjust the calendars. I tell the students that law will always be full of challenges. What counts is how we all deal with the challenges.
This November, Florida voters will be asked whether to retain three Florida Supreme Court justices and 15 appellate court judges through non-partisan merit retention elections. The genesis of merit selection and retention was a scandal on the Supreme Court during the mid-1970s. Governor Reuben Askew was at the forefront of a proposed constitutional amendment to de-politicize the selection of appellate judges. The amendment was designed to select the most qualified appellate court judges, yet provide a mechanism to remove unethical or incompetent judges. It was not designed to politicize those judicial positions; however, it appears a movement is afoot to use merit retention as a political tool in the coming election in order to remove certain judges based on some faction’s displeasure with legal rulings on politically sensitive issues, not based on their ethics or competency.

Continued on page 5

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Continued from page 4

The core mission of the HCBA is to help inspire and promote respect for the law and the justice system through service not only to the legal profession, but also to the community as a whole. In order to facilitate this mission, the HCBA is forming a committee to educate the public about the merit selection and retention process and exactly what they will be voting on in November. Most likely, voters will not recognize the judges’ names on the ballot or have any basis for their merit retention vote other than political propaganda. In fact, polls show an astounding 90% of voters questioned do not understand what the term judicial merit retention means.

You do not have to be a political scientist to realize this lack of understanding of the merit retention process could have a severe negative impact on the future of Florida’s judicial branch. In a functioning democracy, it is crucial that the public have confidence in its court system and its judiciary. The judicial branch and its function should transcend political parties and political agenda. Regardless of whether you agree with an appellate judge’s decision, every one of us should be concerned with politicizing the merit retention process. A strong example of how political this process has become is the significant amount of money pouring in from out of state interests to impact the Florida merit retention vote.

Imagine a judicial system where appellate court judges rule on points of law in accordance with the direction the public opinion wind may be blowing at that time, as opposed to upholding the Constitution and current Florida law. Among other things, we would be sitting here in 2012 with segregated schools. Politicizing the merit retention process results in transforming judges into politicians wearing black robes rather than politicians wearing seersucker suits. I believe we all share the same concerns about creating a system where judges make decisions as politicians rather than as members of an independent judiciary.

Our program will not be designed as an endorsement for or against any judge up for merit retention. Rather, it will be an effort to educate voters on the process and what it means, absent political rhetoric. We hope to promote a respect for the three independent branches of government and to promote respect for appellate court judges and their decisions.

This program will be about the process, not the result. Judges are restricted by judicial canons in raising money and what they can and cannot say in combating these political forces, which are not governed by such restrictions.

You will hear more about the HCBA’s merit retention education program as we approach November. We certainly hope that a significant number of our members choose to get involved with our educational process. I strongly encourage each of you to become better educated about the merit retention issue and its potential impact on Florida’s judicial branch. If you have an interest in supporting the HCBA’s merit retention education program and becoming an active participant in that program, please do not hesitate to contact me or John Kynes at the HCBA.

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Durant Wins Judge Simms Mock Trial Competition

The late Judge Simms believed that the most effective way of changing the world was by making a difference in the lives of local youth.

The late Judge Robert J. Simms believed that the most effective way of changing the world was by making a difference in the lives of local youth. To that end, each year, the Honorable Robert J. Simms High School Mock Trial Competition Committee of the HCBA Young Lawyers Division organizes a mock trial competition for Hillsborough County high schools to promote and develop talented youth with an interest in the law.

The 2012 competition was a shining success. With the help of eight judges from the Thirteenth Judicial Circuit, Middle District of Florida Bankruptcy Court, and the Second District Court of Appeal, and 43 volunteer attorney jurors, the competition saw its best year yet.

Eight area high schools competed for top honors and a chance to continue on to the statewide

Continued on page 7
competition. Students from Sickles, Durant, Tampa Preparatory, Riverview, Steinbrenner, Hillsborough, Berkeley Prep, and Wharton High Schools took on a complex fact pattern pulled from the headlines: bullying in schools and the use of social media. Guided by teachers and attorney coaches, the student teams prepared for the competition for six to ten weeks, and were expected to conduct their trials according to strict rules of procedure and conduct.

Each team participated in two full trials, presenting a different side of the case in each round. Attorney jurors scored each team as to content and presentation, and jurors and judges provided verbal feedback to the students. Scores were tallied from the first two rounds to determine which teams would advance to the finals.

In the end, the Durant High School team narrowly beat out Tampa Prep for top honors, would like to thank the sponsors for their support of this year’s competition: Akerman Senterfitt; de Beaubien, Knight, Simmons, Mantzaris & Neal; Carlton Fields; Hill Ward Henderson; and the HCBA Young Lawyers Division. The Committee would also like to thank the attorney jurors who gave their time in support of this event, and Judges Greco, Isom, Kelly, McEwen, Peacock, Sleet, Ward and Weis.

We hope you will consider joining us for next year’s competition!

Author:
Jacqueline R. Ambrose,
Carlton Fields, PA.
Executive Director’s Message
John F. Kynes, Hillsborough County Bar Association

Banner Year for HCBA Pro Bono Service

HCBA member Rosemary E. Armstrong recalls as a young girl her mother struggling as a single parent to make ends meet and to protect her and her brother against a violent, alcoholic husband. She says she also remembers her mother’s big heart and the strong emphasis she put on helping others in need, even when she had little to give.

It is her late mother’s giving spirit and inspiration that Armstrong credits with being awarded the 2012 Tobias Simon Pro Bono Service Award, the state’s highest statewide pro bono award.

This year marks the 30th anniversary of the prestigious statewide pro bono award commemorating the late Miami civil rights lawyer Tobias Simon.

“‘I only wish my mother were alive to know that she has and always will be my inspiration, and if not for her I would not be standing here today,’” Armstrong told a standing-room-only crowd at a pro bono awards ceremony at the Florida Supreme Court in Tallahassee in January.

“I grew up with a sense that fairness and justice were not always meted out equally, even in this great country of ours, and the certain knowledge that I could and should help people not as fortunate as I,” said Armstrong, with her husband, Tampa lawyer Sandy Weinberg, and their three children in attendance.

Continued on page 9

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Chief Justice Charles T. Canady noted in his introductory remarks that Armstrong had been providing pro bono legal services to low-income and other vulnerable residents in the Tampa Bay area for 25 years.

As a volunteer with Bay Area Legal Services’ Volunteer Lawyers Program since 1986, Armstrong has donated nearly 1,200 pro bono hours in legal services to those in need, he added.

Because of what she witnessed in her own family as a teenager, Armstrong said providing assistance to victims of domestic violence is especially important and meaningful to her.

According to Dick Woltmann, executive director of Bay Area Legal Services, “No other attorney has dedicated as much personal time and money to support our clients and mission. Her impact has been immeasurable. I can’t imagine Bay Area Legal Services without her.”

During the awards ceremony, Hillsborough County Circuit Court Judge James M. Barton, II also received the statewide 2012 Distinguished Judicial Service Award for his outstanding and sustained support of pro bono legal services since joining the bench in 1991.

In addition, Adrian J. “Stan” Musial, Jr. received the Florida Bar President’s Award for the Thirteenth Judicial Circuit for his commitment of pro bono service hours at the St. Paul Catholic Church Consultation and Referral Clinic which he created.

A video of the entire January pro bono awards ceremony, including Armstrong’s moving remarks, is available on the archives section of the Florida Supreme Court website.

Meanwhile, on April 26, the Thirteenth Judicial Circuit Pro Bono Committee recognized two law firms and three attorneys at its fifth annual Pro Bono Service Awards Ceremony, which was held at the Chester H. Ferguson Law Center.

The Pro Bono Committee, which is chaired by Circuit Judge Ashley B. Moody, presented the HCBA’s Jimmy Kynes Pro Bono Service Award to Jeanne T. Tate of the Law Office of Jeanne T. Tate, P.A. The law firms of Clark & Washington, P.C. and Stichter, Riedel, Blain & Prosser, P.A. received awards for Outstanding Pro Bono Service by a Law Firm.

Olin G. Shivers of Foley & Lardner LLP received the award for Outstanding Pro Bono Service by a Lawyer, and Jillian Estes with James, Hoyer, Newcomer & Smiljanich, P.A. received the award for Outstanding Pro Bono Service by a Young Lawyer. Please see pages 32-37 for more details.

Congratulations to all the award winners for this well-deserved recognition. It truly has been an exceptional year for HCBA pro bono service, which should make all HCBA members proud.

See you around the Chet.
Excusable Crimes

Procedurally, a defendant bears the burden of proving an affirmative defense.

When a person has been charged with a crime and the state of Florida meets its burden of proof, a defendant may nevertheless be acquitted if an affirmative defense is proved. Florida law recognizes numerous affirmative defenses. Insanity and self-defense are the affirmative defenses most frequently raised. Voluntary abandonment, independent act, duress or necessity, good faith, and advice of counsel are less common.

Voluntary abandonment occurs when a defendant renounces his criminal plan. In a criminal conspiracy, the defendant must further communicate his
renunciation of the plan to the co-conspirators sufficiently in advance of the crime that they may also consider abandoning the plan. If a defendant encounters unexpected difficulties in carrying out a criminal plan which cause the plan to be abandoned, it is an involuntary abandonment and is not a valid defense.

The independent act defense occurs when a defendant participates in a criminal plan, but does not participate in acts committed by a co-defendant which are outside the criminal plan and could not be reasonably anticipated. For example, a defendant who participates in a plan to steal money from an ATM could raise an independent act defense if a co-defendant uses a gun to rob a person at the ATM and the defendant did not expect or participate in the robbery.

A defendant who commits a crime under the reasonable belief that it was necessary to avoid an imminent greater evil may rely on duress or necessity as a defense. The defendant must not have caused the emergency or dangerous situation and must reasonably believe the criminal act is necessary to avoid a real, imminent and impending threat of significant harm, serious bodily injury or death. Also, he must have no other reasonable means to avoid the threat and must cease the criminal conduct the moment the necessity for it ends. Necessity or duress only applies when the harm avoided is more egregious than the criminal act performed. For example, courts have excused the crime of driving with a suspended license when it was done to prevent a drunk driver from taking the wheel or when a defendant drove to search for a missing child.

Perhaps the rarest defenses are the good faith and advice of counsel defenses. The good faith defense applies in theft cases when a defendant takes property under the honest but mistaken belief that he or she had a right to the property. A valid good faith defense establishes that the defendant did not have the specific intent to steal.

Similar to the good faith defense, reliance on advice of counsel is only a defense to specific intent crimes. When a person commits a criminal act under the erroneous but honest belief that he or she could lawfully commit the act in question, and that belief was based on legal advice provided by his or her lawyer, the specific intent to commit a crime is negated.

Procedurally, a defendant bears the burden of proving an affirmative defense. The prosecution is not required to disprove an affirmative defense to survive a judgment of acquittal. If the defendant presents sufficient evidence to raise an affirmative defense, the court will instruct the jury of the defense, and the fact finder must decide whether to excuse the criminal conduct.

As the State Attorney, it is my job to see that justice prevails. I am always willing to consider the validity of affirmative defenses in cases we prosecute. On occasion, the existence of a valid affirmative defense is made clear, and the case can be resolved prior to trial. At other times it is necessary and appropriate to leave the decision in the hands of the jury.

ROBERT J. NADER, HCBA PRESIDENT-ELECT
GRACIOUSLY REQUESTS THE HONOR OF YOUR PRESENCE
AT THE INSTALLATION OF OFFICERS AND DIRECTORS
MONDAY, THE TWENTY-FIFTH DAY OF JUNE, TWO THOUSAND AND TWELVE
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CHESTER H. FERGUSON LAW CENTER
COMPLIMENTARY FOR MEMBERS
RSVP TO 813-221-7777 OR HCBARSVP@ILLSBAR.COM
The Clerks of Court in Florida (“Clerks”) have been doing a strange dance with the Florida Legislature these past few years, with the legislators leading and the Clerks following. We have not always felt that they in step with the people we both serve, but this year, they stomped on our toes in an excruciatingly painful way.

We had been told before and during the session that we could expect the same allocation from the Legislature that we had received last year. Just before they were set to vote on the final version of the budget and then adjourn, we found out what our new numbers would be. To quote that old axiom, the other shoe finally dropped. The total budget for the 67 Clerks in Florida would be cut by $31 million.

For Hillsborough County alone, this means a cut of approximately $2 million, which, in the worst scenario, equates to at least 42 positions. This is on top of the repeated reductions we have taken in past years, resulting in cutting our staff by almost 20 percent.

The Florida Constitution requires that Clerks be adequately funded to perform their court-related duties by fines, fees and service charges set by the Legislature and, if that is not sufficient to fund these

Continued on page 13
Continued from page 12

services, to supplement Clerk budgets from “state revenues appropriated by general law.”

If this latest cut is not reduced, we will have to focus primarily on the criminal side to meet constitutional and statutory due process timelines, leaving civil cases to experience major backlogs in processing for the Courts. Matters that normally take two to three days to intake and process will now take weeks. Also, what about the mandate for Clerks to expedite foreclosure cases? Here, too, we will be backlogged even further.

Thus, you, too, will be impacted by this decision. Remember these cuts when you are forced to wait in long lines for service from our office. We may even have to reduce our hours of operation.

The timing couldn’t be worse on so many fronts. We are now in the process of implementing a new electronic case management system for our Courts, including eFiling, to make it easier for you to perform your duties. With our people already performing their daily duties as well as testing the new system, customer service will suffer inevitably.

The Clerks in Florida are in the process of deciding the best way to make our voices heard as one, to have the most impact. I hope that you will support us—as we seek funding to support YOU and our other customers in the services we provide to our judicial system. Together, we will be stronger—and hopefully, we will be heard.
Marketing legal services in current economic times can be a bit of a challenge to say the least. Sometimes it seems like a prospective client is only interested in which lawyer will handle the matter at the most reasonable price, as opposed to focusing on the lawyer’s experience and specialization. Is there anything you can do to market your firm beyond working to overcome a possible objection to fees?

One approach is to market your services to the people who know your legal abilities the best and who have a vested interest in you bringing in good-paying work. Drum roll please...it’s your law partners. Cross-marketing in your own firm can be a cost-effective way to bring in more business from existing clients or have your existing clients refer additional legal work to you.

Before you can expect to get work from your partners’ clients or vice-versa, you need to make sure that each lawyer in the firm has a good understanding of the work the other lawyers in the firm do best and their representative clients. While you may be able to do this by reading their bio, another approach is to have internal meetings so that each lawyer can take a few minutes to discuss what they do and who their clients are. Once you completely understand what type of legal matters your partners handle and the clients for whom they perform work, you then need to determine if their skill set is a match for any of your clients and if your skill set is in turn a match for theirs. It is a no-brainer to make the match if your client calls and asks if you can refer him to an employment lawyer and you have one in the office right next to you. The challenge arises if there is a potential match and the client has not made a specific request for legal services. One method to approach this challenge is to take the time to learn more about your clients’ businesses and, at the same time, provide them with more information about your firm. As your clients learn more about your firm, they may self-identify opportunities for work with your firm and later refer businesses in their network to your firm.

As your partners get to know your practice better and vice versa, everyone will have the opportunity to more thoroughly market the firm and explore opportunities that may not have been utilized in the past. As the firm engages in this type of internal marketing, it also may be a good time to ensure that your external marketing (social media outlets (Facebook, LinkedIn), website, etc.) includes up-to-date and consistent information.

Do not let the economy discourage you from creative and cost-efficient marketing at your law firm.
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CONSIDERING CROSS-APPEALS
Appellate Practice Section
Chairs: Marie A. Borland, Hill Ward Henderson, and Kristin A. Norse, Kynes, Markman & Felman, P.A.

If an appellee is victorious in the trial court and subsequently finds himself defending a favorable judgment in the appellate court, should the appellee file a notice of cross-appeal?

A cross-appeal is not necessary if the appellee only seeks to defend the final judgment. However, if the appellee wishes to enlarge his rights, a cross-appeal should be filed. Even if the judgment is favorable to the appellee, a cross-appeal should be considered if there is some chance an appellate court’s reversal or modification of the trial court’s judgment could result in an adverse outcome for the appellee in later litigation.

An appellee must serve a notice of cross-appeal within 10 days of the appellant’s notice of appeal. See Florida Rules of Appellate Procedure 9.110(g). However, the time limit of 9.110(g) is not jurisdictional. See Florida Fish & Wildlife Conservation Comm’n v. McGill, 823 So. 2d 236 (Fla. 1st DCA 2002). Therefore, an appellee may seek leave of the court to file an untimely notice of cross-appeal if the appellee can demonstrate good cause for the delay and it will not result in prejudice to the appellant. Id. at 238.

A “cross-appeal is appropriate if it seeks to review an order or judgment that is merged into or is an inherent part of the order or judgment properly under review by the main appeal.” See Florida Windstorm Underwriting v. Gajwani, 934 So. 2d 501 (Fla. 3d DCA 2005).

Further, a notice of cross-appeal “must identify with particularity the exact adverse trial court order or ruling which the appellee claims is error.” See Breakstone v. Baron’s of Surfside, Inc., 528 So.2d 437 (Fla. 3d DCA 1988).

The benefits of filing a cross-appeal are aptly demonstrated in Allen v. TIC Participations Trust, 722 So. 2d 260 (Fla. 4th DCA 1998), where the appellee was able to cross-appeal an order denying its motion to dismiss that was filed early in the litigation process. In Allen, the trial court initially denied the defendants’ motion to dismiss for lack of personal jurisdiction, but thereafter dismissed the case for lack of subject matter jurisdiction. The plaintiffs appealed the final order of dismissal based on subject matter jurisdiction. The defendants cross-appealed the trial court’s denial of their dismissal on personal jurisdiction grounds. While the final order of dismissal was favorable to the defendants, the cross-appeal insured that the defendants could still obtain dismissal based on lack of personal jurisdiction if the order of dismissal based on lack of subject matter jurisdiction was reversed.

In short, upon receiving an appellant’s notice of appeal, an appellee should consider filing a cross-appeal as an opportunity to correct adverse trial court rulings in anticipation of subsequent litigation.

Author: Caroline Johnson Levine, Office of the Attorney General
Imagine a homeowner repairs a small crack in the wall, only to find more minor cracks months later, gradually increasing in size, eventually revealing the truth: a significant foundation problem. In the ensuing construction defect litigation, the court must determine if the first crack put the homeowner on sufficient notice the statute of limitations was running.

For certain types of defects, such as a leaky roof, Florida courts generally hold that notice occurs at the first sign of a defect. This makes sense because, as the court noted in *Kelly v. School Board of Seminole County*, “when newly finished roofs leak it is not only apparent, but obvious, that someone is at fault.”¹

Other construction defects, however, are not always as clear as water dripping from the ceiling into a bucket on the floor. In these situations, where the problem’s manifestation could be attributable to causes other than an actionable defect, courts have held that defects initially attributed to other causes may preclude notice as a matter of law. The fountainhead of this stream of cases, *Board of Trustees of Santa Fe Community College v. Caudill Rowlett Scott, Inc.*, concluded that notice did not exist at the first instance of leaking pipes, where the problem was initially attributed to a variety of individual problems, rather than corrosive soil conditions.²

Similarly, in *Performing Arts Ctr. Auth. v. Clark Construction Group*, after minor cracks were identified in stucco, the building manager contacted the subcontractor, who claimed the cracks were the result of natural settlement.³ When later extensive cracking was discovered, the court concluded that notice “as a matter of law may not be inferred,” and the question was instead “an objective question of whether the facts and circumstances were sufficient to put [owner] on notice that a cause of action existed.”

*Snyder v. Wernecke* provides further guidance, where the court was again presented with a series of small cracks, slowly spreading into large cracks over a seven year period.⁴ The court found that plaintiffs were on notice once large cracks appeared, but declined to find notice from the time when only small cracks were present.

Flowing together, these cases suggest that a series of initially minor cracks, growing larger over time, may prohibit the court from inferring notice at the time of first discovery. Instead, the determination of notice is usually an objective question reserved for the finder of fact.

However, these cases raise the question: when is a defect big enough to provide definitive notice as a matter of law? When is a hidden pipe leak or hairline crack sufficient notice? Any clear answer has thus far slipped through the cracks.

¹ 435 So.2d 804 (Fla. 1983).
² 461 So.2d 239, 244 (Fla. 1st DCA 1984), review denied, 472 So.2d 1180 (Fla. 1985) (defects initially attributed to causes other than systemic defect precluded notice as a matter of law, finding a genuine issue regarding whether the plaintiff had discovered, or by diligence should have discovered the alleged defects).
³ *Performing Arts Ctr. Auth. v. Clark Constr. Group, Inc.*, 789 So. 2d 392, 394 (Fla. 4th DCA 2001) (reversing summary judgment entered on the basis of the statute of limitations because notice as a matter of law may not be inferred where manifestation may be from causes other than actionable defect).
⁴ *Snyder v. Wernecke*, 813 So.2d 213, 217 (Fla. 4th DCA 2002).

Author: Katherine L. Heckert, Esq., Carlton Fields, PA.
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ew practice areas are as time consuming and daunting to in-house attorneys as employment law. The overlap of federal and state law, coupled with the administrative law challenges that permeate employment law, require expert knowledge. A proactive approach to dealing with these issues can enhance a company’s culture and productivity and mitigate the risk of future issues. A close relationship with an industry leader can provide knowledge, relief, and confidence to in-house counsel and company managers.

First among the areas where employers appear to be currently incurring the most liability is violations of the Fair Labor Standards Act. Many employers have either misclassified employees as exempt or have poorly kept track of employee hours. Other employers have begun to hire large amounts of independent contractors as opposed to employees. However, many of these employers have treated these independent contractors as employees, thereby incurring liability.

The Family and Medical Leave Act is another employment statute which has caused great liability for employers. Being a regulatory intensive statute, many employers do not properly adhere to such regulations and either improperly deny employees their leave or otherwise interfere with such employees’ leave rights.

The Americans with Disabilities Act is another area of increasing liability for employers. With the relatively recent amendments to the Act, many more employees will qualify as “disabled” and therefore have the right to protection under the Act. Employers must be mindful of the responsibilities to accommodate these employees’ disabilities in order to avoid liability.

From the in-house counsel’s perspective, having a good working relationship with a law firm with national knowledge, national relationships, and national resources is empowering. In this administrative law heavy practice area, relationships with investigators are invaluable. Knowing that your employment counsel has these local relationships no matter where you may face an issue allows you to make the same proactive employment decisions across your organization without the fear of the unknown.

This national exposure also allows you to learn the nuances of law in states in which your business may operate but where your legal experience doesn’t extend. Finally, using the same employment counsel on a nationwide basis allows in-house attorneys to save countless hours teaching outside counsel about the company, its business practices, and its decision makers.

As an in-house attorney, there are enough things to worry about, and managing your employment issues needn’t be any more difficult than it has to be. It can be made far easier by building a strong working relationship with an expert in the field.

Authors:
Cal Everett, Ideal Image and Ignacio Garcia, Ogletree Deakins
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FATHER-SON TAMPA FIREFIGHTERS AFFIRM VALUES OF FATHERS DAY  
Diversity Committee  

There is no greater joy for a father than to see his children step into their own shoes. For Tampa firefighter Jace Kohan, this is a daily joy as he works alongside his fellow firefighter and only son, Matthew. Many of us are privileged to know Jace Kohan as a proud firefighter and union man, Treasurer of Tampa Fire Fighters Local 754, and one of Mayor Bob Buckhorn’s earliest high profile supporters in his 2011 Mayoral race. However, the lives of both Jace and his son Matthew are worth our attention on this Father’s Day 2012.

What makes Jace and Matthew’s tale unique is how hard the journey to today was for this father and son. Jace, like many fathers, was at one time a single father. When Matthew was four years old, Jace and Matthew’s mother divorced. With the determination of a survivor and his Catholic faith, Jace rebuilt his life on the rock and promise of Matthew. Though, as a

Continued on page 23
boy brought up with the values of faith and family, Jace never imagined he would be divorced, he persevered and applied those values to his newest chapter of his life.

Jace believed that God had a plan for him. Over time, that plan would include a wife, daughter and grandchildren, but for young Jace, that plan seemed distant. As the years progressed—from Matthew’s years as a young boy, to his teenage years, to his first day at the Firefighter Academy, to Matthew’s wedding, to the birth of Matthew’s child—Jace and Matthew developed an unrelenting bond.

Society often expects little of single fathers, save for a weekend or two a month, and financial support. However, basic morality dictates that children need someone who, despite difficulties that may have surrounded their time with their mom, will be there for them in a way that only a father can be. Values of empathy, tolerance and courage are passed on from father to child, generation after generation, through paternal examples of humility, hard work and unconditional support. Nothing can replace the active guidance, silent nobility and unique example of a good father. It was that guidance, silent nobility and unique example that Jace gave to Matthew each day.

On Father’s Day, we celebrate the great men of our lives who were present at our creation, guided us as insecure young adults, and bore witness to sons and daughters becoming men and women. Jace knew that all God ever asked of him as a father was to be the man Matthew deserved. Now, 20 years later, Jace and Matthew labor together as two of Tampa’s finest firefighters, making us all proud. The shoes Matthew has stepped into are the very shoes—complete with the same fighting and heroic spirit both on the job and in his family life—that his father Jace created for him. Nothing better explains the joy of being a father and a good man at the same time.

Author: Luis Viera, Ogden & Sullivan, PA.
As lawyers for hospitals, physician practices, and health plans, we are often unfamiliar with the intricate details of the standards for sending electronic health care transactions (patient claims). There are specific items which must be submitted in a particular order by providers through clearinghouses to the health plans/payors, items which have drastically changed in 2012. Many providers are struggling to make sense of the change, and a number of physicians have found themselves without revenue at the beginning of this tumultuous year for the healthcare industry.

Beginning on June 30, 2012, the Centers for Medicare & Medicaid Services (CMS) are scheduled to enforce compliance with Health Insurance Portability and Accountability Act (HIPAA) 5010. HIPAA 5010 is a version of electronic transaction standards set by CMS. CMS published the 5010 standards in January 2009, modifying the HIPAA Electronic Transaction Standards Final Rule and replacing version 4010A1. These standards regulate the transmission of patient claims for covered entities (i.e., hospitals, clearinghouses, physicians, and health plans). According to CMS, the change was necessary for purposes of uniformity and streamlining reimbursement transactions. Additionally, with the upcoming expansion of diagnosis codes under the medical coding system ICD-10, CMS stressed the importance of this uniformity to avoid confusion.

In November 2011, CMS recognized the industry was not prepared and delayed enforcement until March 31, 2012. Since November, the entire industry has struggled, resulting in delayed revenue for physician practices, operational difficulties, and even the possibility of closing practices due to the complications. Recognizing these issues, on March 15, 2012, the Medical Group Management Association was successful in its efforts to encourage another delay. Consequently, the new deadline is June 30, 2012; if covered entities are not compliant by that date, they will face penalties.

As counsel for clients in the healthcare industry, you can help your clients avoid delayed payments and possible penalties. Contact your clients to ensure they are aware of the 5010 deadlines and are working towards compliance, if they have not already done so. Encourage them to contact their vendors, particularly clearinghouses, billing services, and payors to discuss when they will be able to accept 5010 transactions and in what format. Ensure vendors have installed any necessary 5010 upgrades. Make sure internal systems are checked and tested to generate 5010 transactions, allowing for ample time to resolve issues which may arise (and, trust me, issues will arise). Make sure external systems are also checked and tested to ensure they receive transactions properly.

Proactive involvement with your healthcare clients will help avoid penalties as of the enforcement deadline.

Author: Jessica Cohen,
Physicians Independent Management Services, Inc.
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Our eyes glaze over and you begin to lose interest in the license agreement you had been intently reviewing—scribbling notes in the margins and emphatically striking sections of text. It’s clear—you have reached the boilerplate section of the license agreement! Boilerplate to many means inconsequential or formulaic, so many incorrectly assume that these provisions are not worth equal consideration and negotiation. However, as the examples below suggest, referring to these provisions as boilerplate undercuts the significance that they may have in setting forth the rights and obligations of parties to an intellectual property license agreement.

**Assignment:** Assignment provisions in intellectual property license agreements require special attention as the default rules differ from the treatment of other contracts. As a general rule, intellectual property licenses may not be assigned by the licensee unless expressly provided for in the license. It is important to consider the possible impact of corporate transactions on the license agreement. This may be particularly important when representing a start-up or other smaller company that may be more likely to enter into such a transaction. You may want to allow for a future corporate reorganization or sale of the business without granting the other party to the license a consent right to such reorganization or sale. Conversely, ensuring a total prohibition on assignment may be more appropriate. If so, note that a stock sale or, in some instances, a merger are not considered an “assignment” and will not be prohibited unless expressly referenced in the license.

**Third Party Beneficiaries:** The standard boilerplate provision typically states that there are no intended third-party beneficiaries. This is often appropriate; however, in the context of intellectual property licenses, it may be appropriate to include certain third party beneficiaries expressly. For example, if you represent the licensor and the licensee has the right to grant further sublicenses, it may be helpful to include your client as an intended third party beneficiary in each sublicense.

**Force Majeure:** We are all familiar with the force majeure provision of a contract. It typically references “acts of God” and other events that may excuse a party’s performance under a contract. However, it is important to pay particular attention to the laundry list of events excusing performance in a license agreement and ensure that they are not overbroad. For example, if a licensor is obligated to perform maintenance and/or hosting services, the licensee will want to exclude from the force majeure provision disruptions resulting from failures of the licensor’s systems, with the exception of general or widespread telecommunications or Internet failures. The force majeure provision should not act to relieve a licensor from its service level or other requirements.

**Disclaimers of Warranties:** Both licensors and licensees should carefully consider the language in the license disclaiming warranties. In certain transactions where Article 2 of the Uniform Commercial Code applies, unless expressly disclaimed, the warranty of non-infringement is implied. This can have disastrous and unintended results for a licensor, including liability for consequential damages and attorneys’ fees.

**Author:**
Rachel Marks
Feinman, Hill Ward Henderson
International Women’s Day is a global event designated by the United Nations in order to celebrate the economic, political, and social achievements of women. In honor of this annual event, The Florida Bar provided a “Diversity Leadership” grant to the Hillsborough Association for Women Lawyers (HAWL) for the purpose of presenting a CLE lecture on the “History of Women Pioneers in the Local Legal Community.” This educational effort was spearheaded by HAWL Diversity Committee co-chairs Cynthia Oster of the Office of the County Attorney and Jennifer Gabbard of the Office of the State Attorney.

117 lawyers attended this event, including women who have shaped the direction of the local legal community: Carolyn House Stewart, the first female African-American Assistant State Attorney; Julianne Holt, the first female Public Defender; and Kay McGucken, the first President of HAWL.

The Honorable Emiliano “E.J.” Salcines was the keynote speaker. He provided a historical perspective of Tampa and its embrace of all minority legal practitioners. As the elected State Attorney, Judge Salcines hired 29 women and inspired 11 of them to join the judiciary.

Marsha Rydberg, the first female president of the Hillsborough County Bar Association, and Clara Rokusek, President of the Tampa Bay Hispanic Bar Association, presented the Trailblazer Award to Marie Garcia Garrett for her contributions to the legal community. Mrs. Garrett’s parents emigrated from Spain and Cuba and settled in the cultural jewel of Tampa, Ybor City. She entered law school at the University of Florida in 1946 with two other

Continued on page 29
female students, in a class of 300, and returned to pursue her legal career as the second Hispanic female attorney to practice in Tampa.

Judge Claudia Rickert Isom moderated a discussion panel, which included Florida Bar President-Elect Gwynne Young of Carlton Fields; United States District Court Judge Susan Bucklew (first female judge in Hillsborough County); Judge Vivian Corvo (first female Hispanic Judge in Hillsborough County); and Judge Christine Vogel.

Importantly, the panelists felt that their gender did not result in any disparate treatment by other practitioners in the legal community. In fact, Gwynne Young pointed out that she had been recruited by Carlton Fields to be its first female trial attorney based upon her reputation in the courtroom as an Assistant State Attorney. Judge Vogel provided an additional narrative of how she had received her first offer of employment as an Assistant State Attorney while she was six months pregnant. Many inspiring stories were shared by the panelists, including how Judge Bucklew began her career as a teacher at Plant High School and taught young women who would eventually follow her into legal careers. Some of Judge Bucklew’s former students include Judge Catherine Peek McEwen, Judge Emily Peacock, and Judge Katherine Essrig.

At the close of the presentation, Gwynne Young encouraged the audience members to pursue their many aspirations by stating, “You have more control over your career than you think you do. Put yourself out there and put yourself forward and with hard work, you will move forward.”

Author: Caroline Johnson Levine, Office of the Attorney General
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On April 26, 2012, two law firms and three attorneys were honored at the fifth annual Pro Bono Service Awards Ceremony. Award nominations were submitted to the Thirteenth Judicial Circuit Pro Bono Committee, chaired by Circuit Judge Ashley B. Moody. The Awards Ceremony and Reception were hosted by the Thirteenth Judicial Circuit Pro Bono Committee, the Bay Area Legal Services Volunteer Lawyers Program (BAVLP), and the Hillsborough County Bar Association (HCBA).

**HILLSBOROUGH COUNTY BAR ASSOCIATION’S JIMMY KYNES PRO BONO SERVICE AWARD**

Jeanne T. Tate is the managing partner of the Law Office of Jeanne T. Tate, P.A. and is an Adjunct Professor at the University of Florida College of Law. She is a board certified adoption attorney and AV rated by Martindale Hubbell. She graduated with high honors from the University of Florida, and with honors from the University of Florida College of Law.

For 30 years, Ms. Tate has donated a substantial portion of her time to providing free legal services to low income people. She is actively involved with Bay Area Legal Services (BALS), contributing several hundred hours serving as a volunteer attorney, as a mentor to other pro bono attorneys, and as a resource to countless BALS attorneys and staff. Ms. Tate has offered to handle every adoption-related case presented to BALS and encourages the other lawyers in her firm to handle pro bono matters as well.

Ms. Tate cites helping abused, neglected, and abandoned children (many with special needs) in the custody of the state of Florida as one of her most gratifying...
The impact of Jeanne Tate’s pro bono service to poor children and families in Florida is immeasurable, but what is certain is that hundreds of children would not be in permanent placements today without her assistance.

Continued from page 32

accomplishments. She and other members of her firm donated legal services to the state and its local provider, Hillsborough Kids, Inc., to obtain adoptions for these children. Ms. Tate has also volunteered her time to facilitate permanent placements for foster care children. She founded the non-profit Heart of Adoptions, Inc. to help reduce or eliminate adoption-related costs for prospective parents with limited financial resources. She serves on the board of Gift of Adoption, a non-profit that helps low income families obtain the legal and social services necessary to complete their adoptions.

The impact of Jeanne Tate’s pro bono service to poor children and families in Florida is immeasurable, but what is certain is that hundreds of children would not be in permanent placements today without her assistance.

OUTSTANDING PRO BONO SERVICE BY A LAW FIRM

Clark & Washington, P.C., a consumer bankruptcy firm based in Atlanta, has six local offices. Clark & Washington is proud of its firm-wide commitment to providing pro bono representation.

In 2011, the firm’s Tampa attorneys handled 60 pro bono cases referred by the BAVLP and others, donating a total of 300 hours.

In 2009, the firm offered to accept all pro bono cases referred to it from BAVLP and the Tampa Bay Hispanic Bar Association, a kind act which significantly reduced the backlog of bankruptcy cases awaiting placement. Over 40 cases have been referred to the firm, with at least 22 of them placed in 2011.

Continued on page 34

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A case of note that the firm handled recently involved a judgment for $25,000 obtained by an insurance company against a BALS client. An unemployed mother, she received a letter stating that her driver’s license would be suspended due to the judgment related to an auto accident. She had not been served, and therefore had neither notice of the lawsuit nor the ability to assert a defense. The firm represented the client in a Chapter 7 bankruptcy and obtained a discharge of the debt.

Stichter, Riedel, Blain & Prosser, P.A., the successor to Stichter, Hoyt, Riedel & Fogarty, was founded in 1974 as a full service law firm. It began specializing in bankruptcy and insolvency matters in 1979 and now has 16 lawyers. They include Don Stichter and Harley Riedel, two of the original lawyers, and two second generation lawyers, Scott Stichter and Dan Fogarty. Pro bono service hours for firm members were recorded by the BAVLP as early as 1988. Scott Stichter was the recipient of the HCBA’s 2005 Jimmy Kynes Pro Bono Award and the Florida Bar’s 2009 Pro Bono Service Award.

In 2011, 100% of the firm’s attorneys participated in pro bono projects, including the BAVLP Case Referral Panel, Intake Clinic, and Mentor Panel; resulting in the donation of over 547 pro bono hours. Firm attorneys also responded to a request from BALS for bankruptcy training. Don and Scott Stichter, Susan Sharpe and Amy Harris provided in-house training on “Bankruptcy and Family Law.” The firm will make additional presentations in 2012.

In 2011, when BALS was faced with funding cuts necessitating moving its Children’s Legal Services (CLS) team from downtown Tampa to its main office, Stichter Riedel made a generous offer to donate part of its downtown office space to the CLS team.

OUTSTANDING PRO BONO SERVICE BY A YOUNG LAWYER

Jillian Estes is an attorney with James, Hoyer, Newcomer & Smiljanich, P.A., where she represents whistleblowers in federal and state False Claims Act cases. She graduated summa cum laude from the University of Florida and cum laude from the University of Florida College of Law. Before law school, Ms. Estes worked in the International Division of the National Center for Missing and Exploited Children where she

Continued from page 33

Continued on page 35
developed a passion for helping families in crisis. That experience drives her commitment to providing pro bono services to families.

In the last three years, Ms. Estes has contributed over 200 pro bono hours, with close to 107 hours performed in 2011. In a recent Hague Convention case, Ms. Estes worked successfully to assist a father in Denmark seeking the return of his eight-year-old daughter. The child spent a summer in the U.S. with her mother, but when the visit ended, the mother refused to return her to Denmark. Ms. Estes represented the father through a contentious process of negotiation, mediation, and litigation that resulted in the child’s return.

Among the other pro bono matters handled by Ms. Estes is representation of a family facing foreclosure on its home. Litigation in this case has been ongoing for over three years.

OUTSTANDING PRO BONO SERVICE BY A LAWYER

Olin G. Shivers is a partner in the Tampa office of Foley & Lardner LLP and a member of the firm’s Taxation and Estates & Trusts Practices.

Mr. Shivers received both his law degree and his bachelor’s degree from Vanderbilt University. He also received an L.L.M. in taxation from New York University.

In 2006, Mr. Shivers was asked to lead the pro bono efforts of the Tampa office of his firm. Under his leadership, the office evolved from only a few attorneys contributing pro bono hours to 100% participation by its 31 attorneys, resulting in their donation of over 7,400 pro bono hours over the past thee years. Individually, Mr. Shivers has donated more than 320 pro bono hours since 2008 on 23 cases assigned to him by the BAVLP, and more hours on other pro bono matters. In 2011, he donated over 78 hours on pro bono cases and 140 hours administering his office’s program. He also encourages his attorneys to participate in other pro bono projects through the BAVLP and various organizations. Charities helped by Mr. Shivers’ efforts include those that serve the homeless, migrant farm workers, disabled individuals, and community development and faith-based organizations.
The author, Rosemary E. Armstrong, presents her pro bono service award to The Tobias Simon Pro Bono Service Award by the Florida Supreme Court. Ms. Armstrong received the court's highest public service award for her 25 years of pro bono service.
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The HCBA salutes your pro bono service in our local community!
On December 15, 2011, the war in Iraq officially ended. Of the more than one million active duty, Reservist, and National Guard troops who served in Iraq since 2003, most have reentered civilian life and the private sector workforce.

The Uniformed Services Employment and Reemployment Rights Act (USERRA), enacted in 1994, was primarily designed to clarify the reemployment rights of returning members of the National Guard, Reserves, and other Uniformed Services, but it has also significantly expanded job rights in the areas of anti-discrimination, benefit coverage, and disability protection.

USERRA requires employers to provide job-protected leave. Upon the completion of an employee’s military commitment, the law requires prompt reinstatement according to a specific notification schedule that is written into the law. Returning service members must be reemployed to the job they would have held had they remained continuously employed, or to a position of equivalent seniority, status, and pay.

The law also has very strict anti-discrimination provisions. USERRA prohibits discrimination with respect to “any benefit of employment,” and it extends this protection to any “person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a Uniformed Service.”

An employee may invoke USERRA rights at the beginning of a leave commitment by, whenever possible, giving advance verbal or written notice of his or her departure for military service. During the leave itself, employers must pay their share of health insurance premiums during leaves of 30 days or less, and provide the equivalent of COBRA continuation for longer commitments. The employee’s job itself is also protected, absent extenuating business circumstances (such as a layoff or reduction in force) that would otherwise impact the employee had he or she remained at work.

With regard to pension benefits, USERRA requires that the period of military service be counted toward eligibility, vesting, and benefit accrual purposes. Upon return from service, the employer must provide the employee with the benefit he or she would have enjoyed under the plan had he or she remained continuously employed. For 401(k) plans that require employee contributions to trigger an employer matching contribution, returning veterans have up to three times their total service period (not to exceed five years) upon returning to employment to make up any missed employee contributions.

Author: James R. Douglass, Fisher & Phillips LLP

To qualify for USERRA’s employment protections, a returning employee must:

1) Have given notice to the employer that he or she left to perform military service;
2) Military service generally must not exceed five years;
3) Completed service under honorable conditions;
4) Reported back to work within appropriate time frames based on length of service.
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Properly preparing for and conducting mediation is the best way to ensure a positive overall outcome for your client. This article suggests ways for you to prepare for and conduct a successful mediation.

Prior to mediation, meet with your client to prepare them. At the meeting, discuss realistic outcomes if the case goes to trial on each of the issues in the case. The realistic outcomes allow your client a backdrop to determine if the offers they are giving and receiving are “reasonable.”

Review different parenting plan options, including the positives and negatives of the number of exchanges, time of exchanges, and how the proposed plan will work for the kids and the realities of life. Stay focused on the practicality of the plan as opposed to the number of overnights.

Review all relevant mandatory disclosures and prepare an equitable distribution worksheet. Make sure your client understands how different values affect what they will receive and owe and what impact the numbers have on any potential equalizing payment. Of course, there may be disagreement between the parties on the monetary value of certain assets. If so, prepare your client with resolutions for these issues, such as meeting in the middle on the values of items or deciding to use a joint appraiser to get a realistic value of real property. If personal property is an issue, prepare a list of the personal property that is most important to your client.

Discuss possible alimony scenarios including how much your client may pay/receive and for how long. Focus on realistic needs and come prepared with numbers that will aid in demonstrating the need. For example, obtain health insurance quotes if one party will be obtaining their own health insurance after the divorce.

Run child support guidelines. If net income is an issue, then run the child support guidelines with different values so your client can see the difference in the “bottom line” amount of support they will either receive or pay.

It is easy to forget an item at mediation so come prepared with a list of items you need in the marital settlement agreement. For example, dependency exemption; life insurance, “right of first refusal”, and how long will one party give the other party to refinance the home.

Prepare a mediation statement to send to the mediator or give the mediator a quick phone call to discuss the issues and personalities of the parties. If you anticipate roadblocks to settlement, let the mediator know those so they can be handled appropriately.

At mediation, it is important to raise all issues that are going to be discussed at the beginning. If you forget to mention an issue at the beginning, it is much harder to settle the case at the end, so it may even be helpful to prepare a list or an outline.

Finally, be creative in crafting a solution for each family. The parties can do things the court could never do, so utilize that power in mediation to settle your case.

Author:
Seth R. Nelson,
Seth R. Nelson, P.A.
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Your client comes to you after his or her application for a development order has been denied by a local government. Your first inclination is to seek relief in circuit court. However, another non-judicial alternative is available. The Florida Land Use and Environmental Dispute Resolution Act is available to owners who have been denied development orders, re-zonings, variances, and permits, have enforcement actions, or have been granted permits with unacceptable permit conditions issued on or after October 1, 1995.

The Act does not apply to actions related to comprehensive plan amendments, and a wetland delineation report advising of possible violations is not a “development order” for purposes of the Act. Hanna v. EPC, 735 So.2d. 544, 545 (Fla. 1999).

The Act is voluntary. Any owner who believes that a development order or enforcement action is unreasonable or unfairly burdens the use of the property may request relief within 30 days of the receipt of the notice of action or order. Once a request is received, the governmental entity and the affected party must select a mutually agreeable special magistrate and must send the request to the special magistrate within 10 days. The special magistrate must be a Florida resident and must have experience in mediation and land use and environmental permitting, land planning, land economics, or local and state government organization and powers.

The special magistrate shall hold an informal hearing within 45 days after receipt of the request for relief. During the hearing, the special magistrate first acts as a facilitator/mediator in an attempt to resolve the conflict between the parties, and resolution may be achieved by modifying the owner’s proposed use of the property or adjusting the development order or enforcement action. If an acceptable solution is not reached by the parties, the special magistrate considers the facts and circumstances in the request for relief, any responses and any other information produced at the hearing in order to determine whether the action by the governmental entity or entities is unreasonable or unfairly burdens the property.

The special magistrate shall file a recommended order within 14 days after the hearing. There are practical considerations for the lawyer contemplating use of this process. The owner must exhaust all non-judicial local government appeals (if the appeals take no longer than four months) before initiating a proceeding under the Act. Also, a request for relief tolls the time for seeking judicial review of the local government action until the recommended order is acted upon by the local government or the state or regional agency. This alternative resolution process is probably most successful where parties may not have had an opportunity to get together and discuss settlement options before the local government action was taken. It is probably less desirable when parties have taken firm
positions and have no desire to spend additional time or resources trying to reach a compromise. In the latter case, parties are more likely to proceed to circuit court for resolution of their case.

1 An owner is a “person with a legal or equitable interest in real property who filed an application for a development permit for the property at the state, regional, or local level and who received a development order, or who holds legal title to real property that is subject to an enforcement action of a governmental entity.”

§70.51(2)(d), Fla. Stat.

2 §70.51(2)(a) and (30), Fla. Stat.

3 §70.51(2)(a), Fla. Stat.

4 §70.51(4), Fla. Stat.

5 §70.51(2)(c), Fla. Stat.

6 See §70.51(15)(a), Fla. Stat.

Note: parties can agree to extensions of time.

7 §70.51(17)(a), Fla. Stat.

8 §70.51(17)(b), Fla. Stat.

9 §70.51(19), Fla. Stat.

10 §70.51(10)(a), Fla. Stat.

11 §70.51(10)(a) and (b), Fla. Stat.

Author: Vivian Arenas-Battles, de la Parte & Gilbert, P.A.

There is an old adage that it is easier to keep an existing client than to get a new one. This article summarizes advice from a dozen members of our association on that topic—thank you to them for their input.

Be Responsive
Prompt, courteous and thorough communication is a must. Nothing gets a client upset more quickly than the sound of silence. Always answer the phone or return the phone call or email. Set a goal to respond to calls and emails on the day received (even if the response simply indicates that you’ll have to follow-up in greater detail later).

One the other hand, being available 24/7 for emails, text messaging, voice mail, and forwarded phone calls and messages can subject any attorney to burnout and develop unrealistic client expectations. It is not possible to reply to all messages as soon as you receive them. You have to work towards a balance in communicating.

Build Rapport - Communicate Often
Know your clients and their business. Visit their office, before you need to for a project. Meet with them. Get to know your client’s staff. Make a personal connection. This will help you relate to issues that arise in their world. If you know them and their business, they will trust you with their matters.

Show your client that you care about them. Give them a call or check in with them even when there is no pending work. Develop a personal relationship and let work follow later.

Send your client news stories or articles that relate to their interests. These can relate to their personal or business interests. If they are business articles—make sure you mention that the article is provided ‘FYI’ or as a courtesy, so they do not get the impression that they are on the clock. You want your client to feel like they are always on your mind and that you are thinking of them.

Communicate with your client with matter updates even if they have not contacted you. Every client wants to feel like they are your most important client.

Add Value
Build a rapport with your clients to become cognizant of their needs; even those that may not be overhead items such as copies, faxes, phone calls, online research, etc. Sometimes clients have to go out on a limb to hire a smaller firm, so you should try to provide solid personal service to help them justify that decision.

Say Thank You
When you conclude a matter, always thank the client for allowing you to represent them. If a client refers a potential client, give the prospect a little extra. Remember, there is no greater compliment than a referral.

You can trust us with your most valuable asset. Your reputation.

When someone who trusts you needs a personal injury attorney, refer them to Cody Fowler Davis Trial Attorneys.

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The LLC Unleashed - The S-hybrid-LLC
Tax Law Section
Chairs: Justin J. Klatsky, Owens Law Group, P.A., and V. Jean Owens, Owens Law Group, P.A.

The seminal case of Olmstead v. Federal Trade Commission, 44 So. 3d 76 (Fla. 2010) in June of 2010 sent shockwaves through the Florida business world. In Olmstead, the Florida Supreme Court ruled that charging orders are not a creditor’s exclusive remedy against LLC member’s interests in single-member LLCs, and some practitioners feared its application to multiple-member LLCs.

A year later, the Florida Legislature created the Olmstead “patch” by amending Section 608.433, Florida Statutes, to provide for charging orders as the exclusive remedy for creditors against LLC membership interests. The membership interests in single-member LLCs, however, may be foreclosed by a creditor if that creditor proves to a court that the distributions under the charging order will not satisfy the judgment within a reasonable time.

With the Olmstead patch in place, the S-hybrid-LLC provides owners with the same tax treatment and the same liability protection and provides significantly greater asset protection benefits when compared to their S corporation corporate counterparts. As with any choice of entity decision, formation as or conversion to a S-hybrid-LLC should be thoughtful and consider the increased asset protection benefits, the application of Chapter 608 rather than Chapter 607 of the Florida Statutes, and that an election is being made, rather than relying on default tax treatment.

If the corporate form takes precedence over asset protection at a later date, then the form may be changed through an incorporation of the LLC. Many entities that are already state level corporations taxed as S corporations can take advantage of the LLC protections by examining their potential conversion into an S-hybrid-LLC, as well as the possibility of adding additional members to single owner entities. As always, any newly formed or converted entity should have a thorough and robust operating agreement.

In Florida, since 2007, yearly new filings of LLCs have exceeded those of corporations. The number of LLCs in Florida is rising and should continue to do so as those entities taxed as S corporations make the transition to the more protected entity: the LLC.

1 An LLC can be taxed up to four different ways: as a sole proprietorship, a partnership, a corporation, or a corporation that has made an S election.

Continued on page 47
This article makes the assumption that the choice to make the S election is suitable for the business. Some of these considerations of LLC taxation are addressed by two previous articles: Justin J. Klatsky, *LLC Taxed as an S Corporation: Self Employment Taxes Above All (Part 1: Formation)*, LAWYER, March 2010 at 52, 53 and Justin J. Klatsky, *LLC Taxed as an S Corporation: Self Employment Taxes Above All (Part 2: Operations and Dissolution)*, LAWYER, April 2010 at 48, 49.

A charging order allows a judgment creditor to receive LLC distributions normally payable to the member, but it does not grant the creditor the right to claim the member’s right, title, and interest in the LLC to satisfy the judgment. The creditor gets a potential stream of income, which can be altered, instead of the actual membership interest.

There are significant differences in governance, duties, requirements, and applicable case law. While this should be considered, it is beyond the scope of this article.

See Chapter 608, Florida Statutes, for conversion provisions.

Provided for under Chapter 608, Florida Statutes. The Florida Department of State, Division of Corporations provides a form at: http://form.sunbiz.org/pdf/lnhs11.pdf.

This can be done in a number of ways and should be considered carefully, especially given that many practicing in this area are concerned that charging orders as the exclusive remedy will not apply to entities with clearly de minimis or “peppercorn” owners.

http://www.sunbiz.org/corp_stat.html

Author: Justin J. Klatsky, Owens Law Group, PA.
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These days, it seems like you can’t purchase a product or service without being asked, or forced, to agree to an arbitration clause. The HBO documentary called Hot Coffee colorfully illustrates the myriad areas in which arbitration clauses have infiltrated everyday life.

Now, arbitration agreements have even reached the healthcare setting. In the Florida Senate this year, a bill (SB 1316) sailed through committees. It would expressly permit doctors and hospitals to require patients to sign arbitration agreements as a condition of treatment. The bill would allow arbitrary caps on recoverable damages and permit the healthcare provider solely to control selection of arbitrators. The bill eventually stagnated on the Senate floor, but this is hardly the last of it. Is it fair game to permit such agreements in the context of a physician-patient relationship?

In Franks v. Bowers, 62 So.3d 16 (Fla. 1st DCA), rev. granted, 74 So.3d 1083 (Fla. 2011), the court said it was fair game. The First District held the arbitration agreement, which the doctor required all patients sign to be treated, was not unconscionable. To prevail on a claim that an arbitration provision is unconscionable and should not be enforced, the party must prove both procedural and substantive unconscionability per the court’s holding. The court ruled that the patient failed on both grounds, noting that Chapter 766, Florida Statutes, has a scheme for voluntary arbitration.

The Franks court also found that the arbitration agreement did not violate public policy. It distinguished nursing home cases that held arbitration agreements inconsistent with Chapter 400, Florida Statutes, contravened public policy. It noted that Chapter 400 is remedial, meant to protect nursing home residents, whereas Chapter 766 was written in response to a rise in medical malpractice insurance rates and an “overpowering public necessity.” This may be an area in which arbitration agreements are vulnerable. Chapter 766 has a remedial ring, with stated goals of promoting patient safety and reducing medical errors. If arbitration agreements diverge too far from the scheme of Chapter 766, courts may hold they violate public policy.

The Supreme Court should reverse Franks. The rights of patients injured by medical negligence are no less important than those of nursing home residents. Many courts have raised concerns about the coercive circumstances under which patients are required to sign these agreements. See, e.g., Broemmer v. Abortion Servs. of Phoenix, 840 P.2d 1013 (Ariz. 1992). Sick and vulnerable patients should be protected from having to undertake the mental gymnastics necessary to understand an arbitration clause, and the rights they are forfeiting, to receive necessary and often urgent care. Fundamental fairness is at stake.

1 See §766.207, Fla. Stat. The court did note that this arbitration scheme is voluntary, but did not find it significant that the scheme is voluntary and requires that liability be admitted, with arbitration only on damages.

Author:
Charles T. Moore,
Morgan & Morgan
If a Florida resident is offered a job in Florida by a Florida employer and injured during employment in another state or overseas, does the Florida Workers’ Compensation Act provide coverage? The answer is a resounding: “It depends.”

In *Grant v. Lockheed Martin*, 2012-LDA-00128 (2012), the claimant was hired and signed an employment contract in Florida, trained in Florida and received inoculations in Florida and a smallpox vaccination in North Carolina required for an overseas job. This Florida claimant developed a disabling heart condition diagnosed while working overseas that could be causally related to the smallpox vaccine. There was Defense Base Act (DBA) coverage of the overseas job so the injury was covered and compensable, and the benefits due were very substantial. The DBA is a federal law which covers injuries to employees of certain contractors overseas working for the United States, even if the injury is in the United States after initial processing on the way to start an overseas DBA job. *Phoenix Indemnity v. Willard*, 130 F.Supp.657(1955).

The Florida Workers’ Compensation Act does not cover a claim that is covered by the DBA. Sec. 440.09(2), Fla. Stat. On non-DBA out-of-state cases, Florida law provides coverage for out-of-state injuries “if the contract of employment was made in this state.” Sec. 440.09(1)(d), Fla. Stat. In *Ray-Hof v. Peterson*, 123 So.2d 251(Fla. 1960), the claimant was working for the employer in Florida when he was verbally offered a job in Georgia for the same employer. Even though the claimant was offered the job while he was in Florida, and the Deputy Commissioner found a contract was made in Florida, when he was injured in Georgia and made a claim, the Florida Supreme Court held that because the last act necessary for the claimant to work was to appear in Georgia, there was no Florida contract and no Florida coverage.

In *Fuller v. Chastain*, 388 So. 2d 284 (Fla. 1 DCA 1980) the claimant was hired and signed an employment contract in Florida. He then travelled to New York where he signed a new employment contract and passed certain requirements before he went to Saudi Arabia to work. When he was injured on a non-DBA job in Saudi Arabia, the injury was held to be covered by the Florida Workers’ Compensation Act. *Fuller* can be distinguished from *Ray-Hof* by the written contract, but in *Owens v. CCJ Auto Transport*, 59 So. 3d 179 (Fla.1 DCA 2011), there was no written contract. In *Owens*, the claimant was offered a job with the employer that the claimant could not start until he had first travelled to Utah to obtain the employer’s truck. He was later injured in Georgia, the same state as the claimant in *Ray-Hof*. The First District did not overrule *Ray-Hof*, but it held that, because a verbal agreement for employment was made in Florida, Florida workers’ compensation coverage applied.

Interstate and overseas work is increasing. When a Florida resident is injured in another state or overseas, a careful inquiry is necessary to determine proper coverage and jurisdiction.

Author: Anthony V. Cortese, Anthony V. Cortese, Attorney at Law
MacDill Air Force Base was the location of the HCBA Leadership Institute class on April 4, 2012. While visiting the base the participants witnessed a military working dog demonstration, toured a C-130 Hercules aircraft, listened to a presentation from the Staff Judge Advocate, and then gathered at Seascapes, the on-base beach dining facility, for happy hour. A special thank you to the 2011-2012 Leadership Institute sponsor: The Bank of Tampa.

Pictured from L-R are: Capt. Kathryn Boucher, Joe Marshburn, Michael Stein, Michael Kamprath, LaKisha Kinsey-Sallis, Jason Whittemore, Michael Kangas, Matthew Kindel, Jonathan Gilbert, Kimberly Jones, Amy Nath, Robin Horton, Casey Reeder, and Daniel Alvarez.

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Ronald W. Fraley has practiced in Tampa as a trial attorney in Employment Law representing victims of sexual harassment and discrimination. He is an AV rated attorney.

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For The Month of: November 2011.
Judge: Honorable Lowell Bray.
Parties: Joseph Barile vs. Publix Super Markets, Inc.
Attorneys: For Plaintiff: James Curtis; For Defendant: Robert Wallace & Philip Wallace.
Nature of Case: Plaintiff run over by a fleeing shoplifter which fractured his hip.
Verdict: Defense verdict; Motion for fees and cost pending. Comparative negligence against each party.

For The Month of: November 2011.
Judge: Honorable Perry Little.
Attorneys: For Plaintiff: T. Patton Youngblood, Jr.; For Defendant: David R. Bolen.
Nature of Case: Trip & fall. Defendant disputed liability, causation and damages.
Verdict: $420,250.00 for Plaintiff.

For The Month of: January 2012.
Judge: Honorable James Arnold.
Parties: Cleofas Lopez, as Personal Representative of the Estate of Christie Gonzalez vs. Christopher Parks & Big Warrior Corp.
Attorneys: For Plaintiff: Christopher Ligori & Chad Pilon; For Defendant: Bill Smoak & David McClain for Parks & Michael Reed & Wendy Accardi for Big Warrior Corp.
Nature of Case: Motor vehicle wrongful death; scope of employment; seat belt.
Verdict: For Plaintiff, $1,173,373.50. Non-party Defendant 60% negligent, plaintiff 20% negligent for seatbelt non-use; Parks 20% negligent.

For The Month of: February 2012.
Judge: Honorable Linda Babb.
Parties: Denise Isensee vs. Lorri Zelazink.
Attorneys: For Plaintiff: Timothy F. Prugh; For Defendant: Michael Rywant.
Nature of Case: Rear end motor vehicle accident resulting in 2 level anterior cervical discectomy and fusion.
Verdict: Plaintiff $931,964.95, fees and cost pending.

For The Month of: February 2012.
Judge: Honorable Herbert Berkowitz.
Attorneys: For Plaintiff: Michael Winer & Stephen Barnes; For Defendant: Dan Martinez & Kyle Maxon.
Nature of Case: Automobile accident; rear-end collision; admitted liability; contested causation and damages.
Verdict: $3,416,000.00 for Plaintiff.

For The Month of: March 2012.
Judge: Honorable Robert Foster.
Parties: Trinity Bullard vs. George Hammond.
Attorneys: For Plaintiff: Bill Daniel & Mike Mareese; For Defendant: Brandon Scheele & Matt Easterwood.
Continued from page 54

Nature of Case: Admitted liability auto accident. Low back surgery.
Verdict: $15,000.00 for Defense. Defendant’s motion for attorney’s fees pending.

For The Month of: March 2012.
Judge: Honorable Cynthia A. Pivacek (Collier County Circuit).

Nature of Case: Motor vehicle vs. bicycle accident.
Verdict: Defense verdict. Plaintiff was intoxicated and unhelmeted.

For The Month of: March 2012.
Judge: Honorable Stanley R. Mills, (Pasco).
Parties: Jeremiah Ball vs. Theresa Cruz.
Attorneys: For Plaintiff: Sumeet Kaul & Darrell Kropog; For Defendant: Leticia Valdes & Jillian Mannino.
Nature of Case: Motor vehicle rear end collision. Defendant admitted negligence.
Verdict: Defense verdict. Jury found negligence not the legal cause of injury loss or damage to Plaintiff.

For The Month of: April 2012.
Judge: Honorable William P. Levens.
Parties: Gene & Nita Bass vs. Platinum Title Services, LLC & Joellyn Robles.
Attorneys: For Plaintiff: Morgan W. Streetman; For Defendant: Aram P. Megerian, Scott A. Shelton, Abby M. Moeddel.
Nature of Case: Breach of Fiduciary Duty in Closing Real Estate Transaction.
Verdict: In favor of Plaintiffs, $530,015.79. Plaintiffs motion for attorney fees pending on their October 2009 Proposal for settlement in the amount of $200,000.


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Thirteenth Judicial Circuit Judge James M. Barton II has been named the 2012 recipient of The Florida Bar Judicial Service Award. The award honors outstanding and sustained service to the public especially as it relates to support of pro bono legal services.

Carlton Fields is pleased to announce the election of new shareholders Jon Gatto, a member of the firm’s Health Care and Business Litigation and Trade Regulation practice; Dave Walz, a member of the firm’s Products and Toxic Tort Liability, Business Litigation and Trade Regulation practice; and Richard Oliver, a member of the firm’s Health Care and Business Litigation and Trade Regulation practice.

Travis Santos, an associate at Hill Ward Henderson in the firm’s Bankruptcy and Creditors’ Rights and Commercial Litigation Groups, has joined the Big Brothers Big Sisters of Tampa Bay Board of Directors.

Judge Catherine Peek McEwen, a judicial officer of the United States Bankruptcy Court for the Middle District of Florida, has been elected to membership in the American Law Institute.

Joseph H. Varner, III of Holland & Knight was elected to the Board of Directors of Tampa Bay & Company.

Hill Ward Henderson is pleased to announce the elections of four shareholders to community boards and organizations. Gregory P. Brown, shareholder in the Litigation Group, has been elected to a three-year term on the Board of Directors of The Florida Bar Foundation. David S. Felman, shareholder and Practice Group Leader for the Corporate & Tax Group, has been elected as Vice Chairman of Florida Venture Forum. John B. Grandoff, III, shareholder and leader in the Zoning and Land Use Group, has been elected to the Board of Directors of Mental Health Care, Inc., C. Howard Hunter, shareholder in the Litigation Group and head of the Health Care Litigation Team, has been elected to The Federation of Defense and Corporate Counsel.

Trenam Kemker is pleased to announce that Business Leader® recognized attorney Alicia Koepke as one of the Top 50 Entrepreneurs in Tampa based on her outstanding leadership, dedication, determination and entrepreneurial success.

Rhea F. Law, CEO and Chair of the Board of Fowler White Boggs, has been named president of the United States Law Firm Group (USLFG), a network of independent law firms. She also was recently selected as a winner of the 2012 Glass Ceiling Award by The Florida Diversity Council.

Elizabeth P. Allen of Gibbons, Neuman, Bello, Segall, Allan & Halloran, P.A., in Tampa has earned her LL.M. in Elder Law from Stetson University College of Law and was awarded the Matthew Bender Elder Law Book Award.

Peter King of Wiand Guerra King P.L. was appointed co-chair of the Florida Office of Financial Regulation Commissioner’s Advisory Council to help combat investment fraud.

Christina North opened North Family boutique catering to the individual before, during, and after divorce.

Adoption attorney Jeanne T. Tate is the recipient of the 2012 HCBA Jimmy Kynes Pro Bono Service Award presented by the circuit judges of Hillsborough County for her volunteerism and dedication to vulnerable children.

Attorney Robert H. “Bob” Buesing of Trenam Kemker received the YMCA’s Red Triangle Award at the SunTrust Community Impact Awards for his leadership, dedicated service and devotion to the mission, which has made a significant and lasting impact on the Tampa YMCA.

Shumaker, Loop & Kendrick, LLP, is pleased to announce Brian C. Willis has joined the firm as an associate in the litigation department and Timothy M. Hughes has joined the firm as a Partner in the Real Estate Practice Group.

George F. Gramling, III of Gramling Environmental Law, P.A. has been certified by the Florida Supreme Court as a Circuit Mediator. The Gramling Environmental Law firm concentrates on environmental compliance and energy law matters.

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