ACCOUNTABILITY IN MEDICINE

An overworked ER fails to diagnose an impending stroke;
An understaffed pharmacy misfills a prescription;
A radiologist viewing scans from home misses a tumor;

The social cost of medical mistakes should not be borne by patients whose lives are crippled, while hospitals and clinics continue to grow and economically prosper.

Despite the liability limitations, increasing expense, and complexity of representing injured patients, Gunn Law Group remains committed to advocating for the rights of medical negligence victims.
NOV 2010 / HCBA LAWYER

THANKFUL TO BE AN AMERICAN
Editor’s Message by Grace H. Yang

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From the Courthouse by The Honorable Tom Barber

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From the Clerk of the Circuit Court by Pat Frank

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Executive Director
Connie R. Pruitt

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Cover art: Costa Rica Red, a woodpecker enjoys a bountiful feast of palm tree seeds. A watercolor on canvas board, the inspiration was the Mt. Arenal area of Costa Rica.

About the Artist: A native Floridian, Donna Morrison’s first artistic love is old world Florida. She is recognized for her realistic representations of Florida which include such subject matter as water birds, landscapes and orchids as well as cows and native plants. Donna also finds inspiration in natural settings, creatures and people discovered all around the world in her travels and experiences.

www.donnamorrison.net
Grace H. Yang, GrayRobinson, P.A.

Thankful to be an American

America has attracted millions of immigrants to her shores over the centuries.

When people ask you where you are from, what do you say? Depending on the situation, I say that I am from Tampa (my hometown since August 1997) or New Jersey (my home state from the age of 5 until August 1997).

In the early 1970s, my parents applied for visas to immigrate from Taiwan to the United States. Like many immigrants, my parents saw greater opportunities for themselves by moving to a different country. Life in a new country was challenging. My parents had studied some English in Taiwan. Still, they faced many language and cultural barriers when they first settled here.

I remember watching television shows and cartoons with my parents to learn more English. I remember studying new words with them. We would wonder why mice is the plural of mouse, but house is not the plural of house, for example. We would read grammar and vocabulary books to try to understand the rules and the many exceptions for the English language.

I remember quizzing my parents in American history to help prepare them for their U.S. citizenship interviews and tests. My parents were so proud to become naturalized U.S. citizens. They missed their families, their friends, and the native foods in Taiwan. They missed the ease of communication in a native language. For them, however, attaining citizenship was worth the sacrifices and life changes. I am grateful for their decision to move to the United States.

America has attracted millions of immigrants to her shores over the centuries. I wonder about how brave and/or scared the earliest settlers must have felt to leave their native lands to travel to unknown parts of the world. They, and settlers after them, must have felt that the sacrifices and life changes would be worthwhile. Do your roots trace back to recent settlers or many generations of Americans? Our diverse backgrounds weave many different threads to create a rich fabric in our society.

Our political leaders are currently grappling with the illegal immigration issue, plus a myriad of other challenges. Our country is not perfect. There are no easy answers or quick fixes. Still, I remain hopeful that our leaders in the executive, legislative, and judicial branches of government are able to work together to create solutions.

We are lucky to enjoy many freedoms and opportunities in the United States. I think about the many men and women who serve our country in so many areas and roles to help protect our way of life. They and their families sacrifice, and I am thankful that they believe the sacrifices are worth any hardships they may face.

What will you be thankful for when you celebrate Thanksgiving? May you all enjoy your Thanksgiving wherever you may be and have the freedom to enjoy it however you wish!
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<table>
<thead>
<tr>
<th>Total Operating Account Balance</th>
<th>$50,000 - $149,999</th>
<th>$150,000 - $499,999</th>
<th>$500,000 or more</th>
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<tr>
<td>Monthly Maintenance for 1 Wholesale Lockbox address</td>
<td>Free</td>
<td>Free</td>
<td>Free</td>
</tr>
<tr>
<td>% Savings of total Gross Service Charges of Current Bank</td>
<td>10% Savings</td>
<td>15% Savings</td>
<td>25% Savings</td>
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Lunch: One of the Best Things About Being a Lawyer

We make time to interact with other lawyers because it is at occasions, such as lunch, that we form the collegial bonds that encourage us to practice law with and against those lawyers in a professional and civil manner.

When my children were very young, they thought the only reason I practiced law was so I could go out to lunch every day. They regularly shared this opinion with others. Ah, from the mouths of babes! At that time in my life, lunch was a salvation because it allowed me to hear the sound of adult voices taking part in adult conversation. Twenty years later, though, my children would probably say the same thing, or they would at least include lunch as one of my primary career incentives. But let’s face it, lunch is still one of the best things about being a lawyer!

Now that’s not to say I don’t enjoy the intellectual challenge of the law as well. I do! Even lunch, as wonderful as it is, would not have enabled me to work in this profession for so many years had I found it otherwise unfulfilling. However, as we all know, law can be a difficult task master, and stress is law’s regular companion. That’s why lunch is so important. No matter how stressful the day, you can almost always count on lunch to relieve some tension—at least for a little while.

Lawyers have many opportunities for lunch. We have lunch with our partners, lunch with our clients and, my favorite, lunch with our colleagues in the legal community. Lawyers are keen on having meetings during lunch in the name of efficiency, but there’s something about having food during a meeting that makes any discussion more palatable.

I don’t know if members of other professions regularly have lunch with each other. My husband is a doctor, and he never has lunch with other doctors. He claims he doesn’t have time for lunch, which is probably true. But law is different. We make time to interact with other lawyers because it is at occasions, such as lunch, that we form the collegial bonds that encourage us to practice law with and against those lawyers in a professional and civil manner. You are far less likely to be discourteous to another lawyer if the two of you have shared a meal. (The level of civility may increase dramatically if the other lawyer has pointed out that you have a huge piece of salad stuck in your teeth before anyone else noticed!)

For those of you who now realize you may have neglected one of the most important and enjoyable features of practicing law, you’re in luck. Opportunities for lunch (and all that goes with it) abound at the HCBA! Indeed, one of the HCBA’s best and most eagerly anticipated lunches is just around the corner —namely, the general membership lunch, followed by the annual Bench/Bar conference on November 16, 2010.

If there’s anything better than having lunch with other lawyers, it’s having lunch with lawyers AND judges!

See you at lunch! (And if I ever have food stuck in my teeth, please tell me! I’ll do the same for you!)
The Holiday season is upon us! I hope you have plans to spend this Thanksgiving holiday with family, friends, and loved ones, and I hope you find yourself in thanksgiving for many of life’s blessings. So many of us are so blessed. What better way can we, as young lawyers, pay it forward, than to donate our time (and talents) by helping out those in need?! As another year will soon be coming to an end and we begin to contemplate new goals and resolutions for the New Year, I hope you will join me in pledging to make 2011 the year where we find that extra time and make the extra effort to take on just ONE pro bono case.

Let’s Give Thanks and Give Back

I hope you will join me in pledging to make 2011 the year where we find that extra time and make the extra effort to take on just ONE pro bono case.

As a young lawyer, there is not much time to consider anything other than billable hours, paying back student loans, family obligations, and oh, let’s not forget sleeping and eating. But as a young professional, we all should strive to make that time,

Continued on page 7
and commit to pro bono work for the benefit of those less fortunate and for the benefit of our community.

On June 23, 1993, the Supreme Court of Florida issued its opinion adopting the new pro bono rules effective October 1, 1993. These pro bono rules provide more definition and structure to the lawyer’s responsibility to provide pro bono legal services to the poor. Rule 4-6.1 establishes an aspirational professional responsibility to perform annually twenty (20) hours of pro bono legal services for the poor or to contribute annually $350.00 to a legal aid organization.

The Young Lawyers Division is committed to promoting the efforts of the American Bar Association and The Florida Bar by promoting and encouraging young lawyers in Hillsborough County to give back by taking on pro bono work. This year, YLD Board Members Michelle Ralat (Older, Lundy & Weisman) and Paige Greenlee (Hill, Ward, Henderson) will be working closely with the newly appointed Pro Bono Committee Chairs, Shannon Zetrouer (Butler, Pappas) and Rinky Parwani (Parwani Law, P.A.) to plan new pro bono initiatives for young lawyers, as well as coordinate and implement training sessions for existing pro bono projects we have promoted in the past. Our goal this year is to offer young lawyers as many opportunities as possible to give back for the good of our community and profession.

In the new year, please stay in tune with our division for ways you can make a difference and assist citizens of our community in need. In the meantime, I would encourage you to visit www.Floridaprobono.org, the web page of the Florida ONE Campaign, which is the initiative to encourage every Florida lawyer to take on just ONE pro bono case. I look forward to seeing you at our pro bono events in 2011!

What: YLD Quarterly Luncheon
When: December 16, 2010, 12:00 noon
Where: Chester H. Ferguson Law Center
Speaker: William “Bill” A. Gillen, Jr.
Chairman of the Tampa Downtown Partnership Board
When a suspect has been taken into custody and a law enforcement agency seeks to question the suspect about a criminal investigation, the officer will read Miranda rights to the suspect. The suspect will then make an important choice: talk to the police, remain silent, or request an attorney. The choice is individual and will be determined by the suspect based upon his desire and best interest.

If a suspect chooses to answer questions, he may do so knowing that if he changes his mind, he may then invoke the right to remain silent or elect the right to have an attorney present.

In order to invoke the Fifth Amendment rights articulated in the Miranda warnings, the suspect must do so with clear and unambiguous language.

Our United States Supreme Court in Davis v. United States, 512 U.S. 452 (1994) noted: “Invocation of the Miranda right to counsel ‘requires at a minimum, some statement that can be reasonably construed to be an expression of a desire for the assistance of an attorney.’ McNeil v. Wisconsin, 501 U.S., at 171 (1991). But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.”

Continued on page 9

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W.H. Simon, CPA & Former IRS Executive
Eric Schmitz, CPA & Former Revenue Agent

State attorney’s message
Mark A. Ober, State Attorney for the Thirteenth Judicial Circuit
Police have no duty to clarify a suspect’s equivocal or ambiguous assertion of rights and may continue questioning until a suspect makes a clear assertion of the right to counsel. The Florida Supreme Court clearly endorses this notion stating, “to require the police to clarify whether an equivocal statement is an assertion of one’s Miranda rights places too great an impediment upon society’s interest in thwarting crime.” State v. Owen, 696 So. 2d 715 (Fla. 1997). Owen goes on to cite the statement in Traylor v State, 596 So. 2d 957 (Fla 1992) that “the state’s authority to obtain freely given confessions is not an evil, but an unqualified good.” The Owen case makes clear that the Davis rule applies to the invocation of the right to remain silent.

When a suspect chooses to speak with police after waiving his constitutional rights, our society has the right to expect that law enforcement officers will interview the suspect and gather all potential evidence available to solve crimes. Suspect interviews can be the key to solving a crime and often lead to successful prosecutions.

My office works closely with law enforcement agencies to craft interview policies and procedures that conform to applicable laws. We take our responsibility seriously to keep the citizens of the Thirteenth Judicial Circuit safe. We know that effective interrogation is a powerful tool, and we will take full advantage of the right to question a cooperating suspect.

NEW ATTORNEYS JOIN THE FLORIDA BAR

The Judges of the Thirteenth Judicial Circuit officiated the Swearing-In Ceremony for 39 new attorneys on September 24, 2010 at the George Edgecomb Courthouse. With a full courtroom, the Florida Bar admittees were welcomed by Kenneth G. Turkel, HCBA Immediate Past President, and YLD President Jaime R. Girgenti. The Honorable Herbert J. Baumann, Jr. administered the legal oath and encouraged the new members to become involved in the Tampa Bay legal community. Family and friends gathered after the ceremony for a reception sponsored by Stetson University College of Law and the HCBA.
from the courthouse
Chair: The Honorable Tom Barber, Circuit Court Judge, Thirteenth Judicial Circuit

Judicial Participation in Election Canvassing Boards

For the past twenty years, County Judge James Dominguez has served as the Chair of the Hillsborough County Canvassing Board.

Each of Florida’s 67 counties has an election Canvassing Board that is charged with the important task of overseeing the tabulation of ballots and submission of election returns to the Florida Department of State. Little was known about these organizations prior to the 2000 Presidential election when their work was put under a microscope for the whole world to see. In the nearly ten years that have passed since the 2000 election, the work done by Canvassing Boards has been largely forgotten. Likewise, the role of County Judges as Chairs of Canvassing Boards in their respective counties is not widely understood by lawyers or the general public.

The Canvassing Board’s membership is specified by statute and includes three members. “The county canvassing board shall be composed of the supervisor of elections; a county court judge, who shall act as chair; and the chair of the board of county commissioners.” § 102.141(1), F.S. Sometimes the supervisor of elections or a county commissioner cannot serve on the Canvassing Board because they are up for election themselves. When this happens, other judges may be called upon to staff the Canvassing Board in addition to the county judge who is serving as the Chair.

The Canvassing Board in each county is responsible for submitting preliminary and final election returns to the Department of State, Division of Elections in Tallahassee. The Department of State then uses these numbers to determine the official election results. Another important duty of the Canvassing Board is to review the validity of absentee and provisional ballots. This aspect of the Canvassing Board’s work resulted in the famous “hanging chad” controversies in 2000. Canvassing Boards also certify the accuracy of the machines used to count ballots, and they must oversee any election recounts. The Canvassing Board is required by statute to submit a detailed report on the conduct of the election to the Division of Elections.

For the past twenty years, County Judge James Dominguez has served as the Chair of the Hillsborough County Canvassing Board. During this time, he has developed a high degree of knowledge and expertise in this area of law as well as a broad understanding of the election process.

Continued on page 13
Over the course of Judge Dominguez’s service, numerous County Commissioners and five different Supervisors of Elections have served on the Canvassing Board (Robin Krivanek, Pam Iorio, Buddy Johnson, Phyllis Busansky and Earl Lennard). During his years of service, Judge Dominguez has gained a reputation for fair, efficient and nonpartisan administration of elections. Even in 2000 when every conceivable aspect of every Canvassing Board’s work throughout Florida was being scrutinized, Hillsborough County experienced very little controversy.

When Judge Dominguez is unavailable, various other county judges have performed Canvassing Board duties over the years. In 2010, a number of County Commissioners are on the ballot and cannot serve on the Canvassing Board. As a result, County Judge Margaret Courtney has joined Judge Dominguez on the Canvassing Board for this election.
To paraphrase a line from Casablanca, I view the opportunity to write this column as the continuation of a “beautiful friendship.” So many of you are my friends, which gives us a special connection. Also, as members of the Hillsborough County Bar Association, you are a key constituency of the Clerk’s Office. It is invaluable for us to have this channel several times a year.

I don’t have to tell you that these are challenging times. We are all impacted by this economic downturn, which appears resistant thus far to an upward trend. Not surprisingly, the Clerk’s Office reflects this spiral. We have been forced to implement a Reduction in Force, as well as other cost-cutting measures, in order to balance our budget. To give you an example, we had 961 funded positions in October 2006; today that number is reduced by 140 positions, down to 821, and these are across-the-board. What these numbers mean to you is that we have far less people to serve you in our various divisions, and our response time might not be as rapid as you or I would like.

The harsh reality is that the prognosis does not look good for us to add positions. If anything, we may be forced to suffer even more reductions. Collections in this office, as in clerk offices throughout the state, have been down because of the economy. We expect the trust fund set up to fund the Clerk’s operations to be impacted by that downturn. In our office alone, our reduction could hit close to $4 million by the end of this year, which would cripple our operations as our total budget is approximately $29 million.

The good news is that the Age of Technology has finally arrived at the Clerk’s Office. We are on track to implement a new and state of the art comprehensive courts system, which is long overdue. Also, we are in the process of putting e-filing in place in our courts, starting with Probate and Mental Health next year, following our successful pilot project in Complex Business Litigation, our first foray in that direction.

While we have ambitious plans to serve you better, we may no longer be able to provide the same level of service we have in the past. We have a lot of serious question marks surrounding the future of the Clerk’s Office, an independent Constitutional office which we believe provides essential services to this community and to our target constituencies, particularly the legal community. We may ask your assistance in the not too distant future to help us make our case prior to next year’s session of the Florida Legislature.

I believe that ours is a reciprocal relationship. It truly is a pleasure to serve you, and I look forward to our working together as a team to meet your needs. Please know that my door is always open to you. I appreciate any feedback or suggestions you may have.
THURSDAY, MARCH 24, 2011
6:00 P.M.
GRAND HYATT TAMPA BAY

featuring

GUEST SPEAKER
Doris Kearns Goodwin
PULITZER PRIZE-WINNING HISTORIAN

One of the most recognized historians of the day, Doris Kearns Goodwin provides trenchant, informed and enthralling commentary on current events by demonstrating how history has answered similar questions. With a deft wit and an uncanny ability to weave stories that put you “right in the room” as history occurs, Goodwin offers extraordinary insight into the lives of the leaders who have shaped the United States. Goodwin’s Team of Rivals: The Political Genius of Abraham Lincoln inspires business and political leaders of today by teaching Lincoln’s quiet but powerful leadership qualities—including his wisdom in building and maintaining teams in the midst of critically trying circumstances and his ability to overcome obstacles. Author of several best-selling books, Goodwin won the Pulitzer Prize for No Ordinary Time: Franklin and Eleanor Roosevelt: The Home Front in World War II. She also penned a touching memoir, Wait Till Next Year, about a love of baseball she shared with her father. A contributor, both on and off the air, to the PBS documentaries LBJ, The Kennedys, FDR and Baseball, Goodwin is the person most turned to for a keen historical perspective on political and current events.

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JUDGE TONY BLACK JOINS THE SECOND DCA
Appellate Practice Section
Chairs: Duane A. Daiker, Shumaker, Loop & Kendrick, LLP, and Marie A. Borland, Hill Ward Henderson

If the Second District Court of Appeal had a softball team, some might think that team had just picked up a ringer. They might be correct, except that Judge Tony Black’s significant athletic ability did not factor into Governor Crist’s selection. Instead, it was Judge Black’s legal acumen, contemplative approach, and sterling reputation as a trial judge that led to his elevation.

Originally from the Midwest, Judge Black earned an accounting degree from Arizona State University, graduating in 1978. While working for two years in Price Waterhouse’s Chicago office, he became a certified public accountant. Next, he attended the University of Illinois College of Law, entering private practice in Chicago.


Judge Black’s diverse background and high energy level have prepared him for his role as our newest appellate judge.

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Judge Black observes that the main difference between judging on the appellate bench versus the trial bench is that he has more time to think about his decisions as an appellate judge. He appreciates the time to consider his decisions because he understands that his written opinions are going to be relied on and scrutinized. He appreciates the difficulty that trial judges face because of the volume of important decisions that have to be made quickly in order to keep the wheels of justice turning.

As far as advice for appellate litigants, Judge Black admonishes that, as with all aspects of the practice of law, there is no substitute for thorough preparation.

Judge Black brings a broad range of experience to the Court. Beyond his accounting and civil litigation experience, he sat as a circuit judge in the felony, family law, and juvenile dependency divisions. If they do start DCA softball teams, in the words of John Fogerty, put him in coach, he is ready to play.

Author:
Raymond T. (Tom) Elligett, Jr., Buell & Elligett, P.A.
STAND BY A CHILD IN NEED: BE A GUARDIAN AD LITEM
Community Services Committee

A CHILD IN HILLSBOROUGH COUNTY NEEDS YOU.

More than 2,500 abused, neglected or abandoned children are in Hillsborough County’s dependency care system. Of those, more than 800 are making their way through that system alone, without a Guardian Ad Litem (“GAL”) to speak for them. Imagine being a child in an already unstable environment —

Mom may be on drugs, Dad missing, there may be physical abuse in the house, or all three. But at least you’re a family. Then, there is a knock on the door in the night and a stranger hands you a garbage bag for your things and whisks you away. The stranger won’t—can’t—tell you when or if you’re coming back or anything meaningful about where you are going.

There are lots of people participating in deciding what you do and when and with whom. You have a case manager who is trying hard to figure out whether your parents should get you back and what they should have to do to earn the right to have you again. But that person has myriad responsibilities including creating assessments and case plans, monitoring parents’ progress, interfacing with foster parents and

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HABITAT FOR HUMANITY OF HILLSBOROUGH

Trenam Kemker lawyers and staff traded in the law books for hammers and nails to celebrate the firm’s 40th anniversary by taking part in a Habitat for Humanity of Hillsborough Corporate Day. Forty employees of the firm spent a Saturday building a home in the Seminole Heights area of Tampa.
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the Department of Children and Family Services, the foster care agency and the judge.

There is no one who speaks for your interest alone. You are a child, and you stand alone. It should not be that way, but it is.

It’s a question of money. The GAL program of the 13th Judicial Circuit is part of the statewide GAL Office charged with achieving a legislative mandate to provide GAL representation for all dependency children. Unfortunately, the GAL program has never been funded to achieve that mandate. In the past three years, the state has significantly reduced funding. Today, more than 800 children are in Hillsborough County’s dependency court system with no one to advocate for their interests.

You can help change that. The Community Services Committee of the HCBA is calling for volunteers to stand by a child in need. Granted, this is not an easy volunteer position. Volunteers must complete a training program (8 hours for attorneys, available on DVD, and 30 classroom hours for non-attorneys over the course of five weeks.) GALs interview family members, foster families and others, then make independent recommendations to the court. Volunteer GALs must see their assigned children at least once a month, prepare reports, and attend periodic court hearings.

While serving as a GAL may not take a lot of hours, volunteers must endure the emotional challenge of working with troubled youths and an overburdened court system.

It’s worth it. Those who serve regard it as a rewarding and worthwhile experience, and it has a lasting impact on the children.

Will you stand by a child in need? If so, please contact Betsy Smith, Executive Director of Voices For Children (director@vcfgal.org; 813-275-9300), which partners with the GAL Program in Hillsborough County to recruit and train volunteers.

Author:
Karen M. Buesing,
Akerman Senterfitt

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Some recent cases have further illuminated the interaction of arbitration clauses in construction-based cases.

In Commercial Interiors Corp. of Boca Raton v. Pinkerton & Laws, Inc., 19 So. 3d 1062 (Fla. 5th DCA 2009), a painter subcontractor brought suit against a general contractor for failure to pay, and the case was moved to arbitration. The defendant moved to dismiss the case based on the failure of the plaintiff to meet local licensing requirements. The arbitrator found that as the plaintiff had not violated the state licensing requirements of Section 489.128, the contract and the arbitration clause were legal and enforceable. The trial court set aside the arbitrator's order and dismissed the case, holding that the arbitrator had misapplied Section 489.128 and that the contract was unenforceable. However, the appellate court reversed, stating instead that it was within the arbitrator's authority to rule on the plaintiff's licensing status and the legality of the contract without the intervention of the trial court and that no grounds existed for set aside.

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under Section 682.13 for the trial court to overturn the arbitration.

The court in *Royal Palm Collection, Inc. v. Lewis*, 36 So. 3d 168 (Fla. 4th DCA 2010) held that a contractor had a right to enforce an arbitration award by obtaining an entry of final judgment of foreclosure, despite the arbitration award being unclear on the matter of the contractor’s construction lien. While the arbitrator indicated that the lien met the statutory time requirements, the award did not directly address the validity of the lien or the amount of the lien. Based on the arbitration award, the trial court awarded the contractor a judgment for money damages based in contract theory but refused to grant foreclosure. The appeals court stated that the contractor was entitled to enforce the arbitration award through foreclosure of its lien because, contemporaneous with confirmation of an arbitration award, a trial court may adjudicate enforcement of a lien for the purpose of enforcing a judgment and, despite a requirement to arbitrate, a contractor retains the right to enforce an arbitration award with a lien.

*Rodriguez v. Builders Firstsource - Fla., LLC*, 26 So. 3d 679 (Fla. 4th DCA 2010) dealt with the issue of whether arbitration clauses required arbitration for claims relating to mold. The homebuyers brought action against a builder for the negligent design and construction of a home causing mold infestation. The trial court compelled arbitration based on the purchase agreement. The builder maintained that the mold claims were based on common law duties and not the purchase agreement containing the arbitration clause, and therefore the mold claims were not arbitrable. The appellate court upheld the trial court’s ruling despite recent cases holding that mold issues in construction cases were not arbitrable. The court explained that arbitration clauses that pertain to “this Contract or the purchase of the Unit” do not encompass claims based on mold issues, but arbitration clauses that pertain to the “construction” of a residence could be grounds for compelling arbitration for disputes based on mold.

Author: Scott W. Machnik, Marlowe McNabb, P.A.
ALTERNATIVE FEE ARRANGEMENTS – EFFECTIVE AND EFFICIENT

Corporate Counsel Section
Chairs: Nicole D. Strothman, Ideal Image Development Inc.; Stanley K. Kinnett, Brown & Brown; and A. Courtney Cox, Wellcare Health Plans Inc.

Often times a disconnect exists between lawyers and clients regarding the value of legal services provided. These disconnects have been exacerbated in recent years by the struggling economy and a failure by many law firms to adjust their business practices. For example, some law firms have continued to impose annual hourly rate increases.

The appropriate response of many corporate legal departments has been to demand a reduction in hourly rates and to aggressively manage performance. There is also an increased interest in alternative fee structures, but some law firms and clients remain hesitant.

Corporate legal departments can and should demand that outside counsel be open to alternative fee arrangements. Not every legal service is susceptible to a non-hourly arrangement, but many are. Traditionally, there are two alternative fee arrangements: flat fee and contingency.

Flat fee arrangements work best in scenarios where the client and lawyer agree on a price for a specific deliverable. In the litigation context, the specific deliverable could be preparing the complaint, taking a deposition, or handling the litigation through trial. Applying a flat fee to certain tasks or phases of the litigation not only caps the client’s invoice, it requires the lawyer and client to perform a value-based analysis of the work being requested or recommended so a decision can be made—in advance—whether the proposed strategy makes economic sense.

The traditional contingency model, in contrast, is one where the lawyer gets paid only upon successful recovery. Nearly any claim that seeks money from a financially solvent defendant can be pitched to outside counsel on a contingency basis. However, there are hybrid forms that oftentimes work best in the commercial litigation context.

For example, if the litigation will likely consume years and hundreds of thousands of dollars in costs, one hybrid structure is for the law firm to accept reduced hourly rates or a flat fee, the client pays costs, and there is a percentage-based “success fee” upon recovery.

In cases where the client is the defendant rather than the plaintiff, one hybrid structure is for the law firm to accept reduced hourly rates or a flat fee with the law firm earning a “success fee” based upon a range of outcomes, from a favorable summary judgment or verdict to an adverse verdict or settlement below an established threshold.

The fundamental purpose of alternative fee arrangements is to save the client money. Desirable consequences include better alignment of the interests of client and lawyer and more effective utilization of resources. Law firms that are interested in establishing long-term and mutually beneficial relationships with their clients will be excited to discuss the opportunity to try alternative fee arrangements.

Author: Matthew J. Meyer, Esq., Ansa Assuncao, LLP

MARK YOUR CALENDAR
CORPORATE COUNSEL SECTION MEETING, JANUARY 13, 2011
HILLSBOROUGH COUNTY BAR ASSOCIATION
invites you to attend the
NOVEMBER MEMBERSHIP LUNCHEON

Featured Speaker:
Judge Chris Altenbernd
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♦ Tuesday, November 16, 2010 at 12:00 Noon
♦ Hyatt Regency Tampa, 211 N. Tampa Street
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Join us for the Bench Bar Conference (registration fees required) & Judicial Reception
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Join your section members for the event!
November 16, 2010
Call for Nominations: 2010 Bubba Huerta Award

Criminal Law Section
Chair: Mark P. Rankin, Shutts & Bowen, LLP

In March 2009, local defense counsel Marcelino “Bubba” Huerta III, passed away at the too-young age of 56. For his professionalism, good heart, and friendly personality, Bubba was universally respected throughout the Tampa Bay area by defense counsel, prosecutors, and judges alike. His quiet commitment to pro bono service was not known to many, but appreciated and admired by those who knew him best. With his passing, the Hillsborough County Bar Association lost a friend, and the criminal justice system lost a great lawyer and public servant.

Last year, in Bubba’s memory, the Criminal Section of the Hillsborough County Bar Association created the Marcelino “Bubba” Huerta III Award for Professionalism and Pro Bono Service. This award is presented to an attorney who exhibits the professional practice, the dedication to pro bono service, and the diligent work in the pursuit of equal justice that made Bubba a remarkable lawyer. The award recipient is selected by a committee consisting of local, state and federal criminal practitioners. In 2009, the Bubba Huerta Award was presented to James Felman of Kynes, Markman & Felman.

The process has begun to select the recipient of the 2010 Bubba Huerta Award. Please nominate an attorney who exemplifies the professionalism and pro bono spirit that made Bubba Huerta exceptional. Your nomination can be submitted by emailing me at mrankin@shutts.com.

Author: Mark P. Rankin, Shutts & Bowen, LLP

Save the date!
HCBA Holiday Happy Hour & Shopping Extravaganza

When: Wednesday December 8, 2010
5:30pm - 7:30pm
Where: Chester H. Ferguson Law Center
1610 N. Tampa Street, Tampa, FL 33602

—Please RSVP—
www.hillsbar.com 813-221-7773 hcbarsvp@hillsbar.com
Dear Hillsborough County Bar Member:

Over the past several months, our Hillsborough County Bar Association has joined together with The Committee for Community Support to provide each of us with an opportunity to support local Law Enforcement in the wake of recent tragedy to its own. To date $8,650 has been donated through this effort. We urge you to join the list of your fellow members in making your tax exempt donation to the Hillsborough County Bar Foundation to benefit The Gold Shield Foundation, Inc. and the families of officers David Curtis and Jeffrey Kocab.

The Gold Shield Foundation, Inc. was established in 1981 by George M. Steinbrenner and others, when two Hillsborough County firefighters and one police officer were killed in the line of duty, leaving behind widows and dependent children. The Gold Shield Foundation was founded in support of our community officers to insure that the families of these and subsequent fallen heroes in Hillsborough County receive early financial assistance and funds toward a college education.

Please join in showing our local community that we truly care.

The Hillsborough County Bar, Committee for Community Support
Steve Yerrid, The Yerrid Law Firm, P.A.
Bill Kalish, Akerman, Senterfitt, L.L.P.
Betsey Herd, Morgenstern & Herd, P.A.
Ken Beytin, Burton, Beytin & McLaughlin, P.A.

WE ARE PLEASED TO RECOGNIZE THOSE WHO HAVE SUPPORTED THIS PROJECT, AND WE LOOK FORWARD TO RECOGNIZING ADDITIONAL CONTRIBUTORS.

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- WILLIAM A. GILLEN, JR.

THE MISSION OF THE HILLSBOROUGH COUNTY BAR ASSOCIATION IS TO INSPIRE AND PROMOTE RESPECT FOR THE LAW AND THE JUSTICE SYSTEM THROUGH SERVICE TO THE LEGAL PROFESSION AND TO THE COMMUNITY.
You could feel it in the way she greeted you—as if you were her best friend—or in the way she tackled every Bar-related duty as if it were the most important project on her always-full plate.

You could tell it in the gusto with which she skied the slopes—no less than thirty around the globe—and how she traveled to every continent, always the vivacious ambassador.

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You could see it in how she danced with her beloved husband Bill, often and everywhere: with a visible joy and zest that was itself a celebration of living.

Ruth Whetstone Wagner loved people, and she loved life. Whether representing a client wronged by corporate interests, advising political candidates, or raising money for the performing arts locally or nationally, Ruth approached every facet of life with a passion that will long be remembered. She died on September 15, 2010 following a battle with amyotrophic lateral sclerosis (ALS). She left her mark on those of us, far and wide, who knew and loved her.

We will no doubt remember her, among other places and times, whenever we visit the site of one of her proudest contributions: The Wagner Lounge at the Chester H. Ferguson Law Center. Ruth and Bill were among the earliest and most fervent supporters of the building program. They even ran a full-page ad in the Lawyer, back in 2000, promising a case of champagne to lawyers who collected the most pledges for the new building.
“Ruth and I were passing out lots of champagne in response,” Bill recently remembered, with a poignant chuckle.

The room which bears the Wagner name was to be called the “Pub” — until city licensing rules interfered and a less libational-sounding moniker had to be found. As the building reached completion, however, Ruth felt that the “Lounge” still didn’t capture the essence of her vision, so she had a plaque installed, which reads: “Dedicated to all those who enjoy the practice of law ... after work.”

“It explains Ruth’s philosophy,” Bill explained. “The practice of law can accomplish great things for lawyers, clients, and society, but it must also be fun.”

Ruth’s sparkling humor was again on display the night, in 2001, her bar committee chose Tony Dungy to receive the Liberty Bell Award. Introducing him from the podium, Ruth held the packed house rapt as she listed the many qualities and contributions that merited Dungy’s selection.

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“Oh, and he runs a football team, too,” Ruth added dryly, to the audience’s delight.

After earning her J.D. in 1986, Ruth practiced many years as a partner with Bill, Bill’s son Alan, and their colleagues at Wagner, Vaughan & McLaughlin. She served on more than twenty justice-related committees, including as trustee of the Hillsborough County Bar Foundation and the Civil Justice Foundation in Washington.

Her political spirit took front-seat in 2002, as she helped first in Bill McBride’s gubernatorial bid and later as administrator for Alex Sink’s successful run for chief financial officer. A close confidante of Sink until the end, Ruth counted as her friends Bill Clinton and Joe Biden, among other national figures.

All the while, and closer to home, she made the rest of us feel like family.

“Ruth went out of her way to make you feel special,” explains her former partner Kevin McLaughlin. “She had a gift.”

A gift indeed, one we will miss — and remember.
Tampa Mayor Pam Iorio, in a recent proclamation, declared September 26, 2010 to be “C.A.R.E. Day.” The date of September 26th is significant in that this was the date in 2007 that C.A.R.E.—the shorthand description of Credit Abuse Resistance Education—was first presented at a local high school. C.A.R.E. is a national effort to provide a free financial literacy program to students to make them aware of the dangers of credit abuse. C.A.R.E. has a presence in all 50 states and the District of Columbia.

Under the leadership of the Honorable K. Rodney May and with the active participation of the other bankruptcy judges in the Tampa Division of the United States Bankruptcy Court for the Middle District of Florida, a volunteer group met in June 2007 to spearhead bringing the program to students in our community. Many of the first volunteers were members of the Tampa Bay Bankruptcy Bar Association (TBBBA).

The group formed subcommittees to formulate a PowerPoint presentation to be used during the presentation, to choose give-aways for the students, to investigate avenues for bringing the program to area schools, to research funding opportunities for the program and to recruit a troupe of volunteers to go into area schools. Each subcommittee performed its task wonderfully, and the program was up and running with the first presentation being given in a matter of months at Brandon High School on September 26, 2007.

Continued on page 31
Since then, the C.A.R.E. program has soared. At the forefront of the economic crisis due to the nature of their practice, members of the TBBBA are donating hundreds of hours to local high school and college students, teaching them about credit and credit card debt and empowering them with knowledge of fiscal responsibility—knowledge that will help those students make wise financial choices in the future. These credit lessons could not come at a better time for this future generation! The TBBBA has presented the C.A.R.E. program to 20 high schools, career centers, and vocational schools throughout Hillsborough County. In addition, the University of Tampa has invited C.A.R.E. volunteers to present each semester to all of its incoming freshmen.

C.A.R.E. organizers estimate that the program’s volunteers have reached over 5,000 students during the past three years. Volunteers have also presented the program during the Great American Teach-In and Law Week. In addition, C.A.R.E. has been presented to participants of the Connect by 25 Youth Summit sponsored by the Junior League of Tampa Bay. Connect by 25 is a non-profit organization that assists children in the foster care system to learn life skills which will help them succeed when they exit the foster care system. From time to time, representatives from the George Edgecomb Bar Association have partnered with the TBBBA to help fill volunteer spots.

C.A.R.E. volunteers—all of the bankruptcy judges in Tampa and some 60 lawyers so far—have received rave reviews from both students and faculty. The volunteers have enjoyed reaching out to the students in our community. All the C.A.R.E. volunteers deserve an incredible amount of praise for their commitment to the program.

If you are interested in volunteering for C.A.R.E., please contact C.A.R.E. program chair Barbara Hart at Stichter, Riedel, Blain & Prosser, P.A., (813) 229-0144. The program also welcomes new opportunities to present, so please keep us in mind if you know of any school or other organization—such as Boy Scouts or youth groups at synagogues and churches—that would benefit from the C.A.R.E. program.

Authors:
Elena Ketchum and Barbara Hart, Stichter, Riedel, Blain, & Prosser, P.A.
June 10, 2010

Dear YLD Members:

Thank you, thank you, thank you! On behalf of the children we serve in the Tampa Bay area, we truly appreciate your generous contribution of $1,100.00 to Big Brothers Big Sisters of Tampa Bay, Inc. received on 5/25/2010 in support of Cornhole For A Cause.

Your donation will allow us to continue doing what we love to do: help change the way children grow up in our community by pairing them with caring adult mentors.

We hear from parents of our Littles who see the impact first-hand. “My daughter Ashley and I have lived in several shelters; it’s been a long hard road for her. But the one constant in Ashley’s life—her Big Sister Judy—has helped tremendously. Judy keeps my daughter’s spirits up and she always tells Ashley she has the potential to do whatever she wants to do in life.” Our volunteers help our Littles grow academically and socially.

For more information on how your donation is helping to make a difference in our community, please visit our website, www.bbsfl.org. You’ll find wonderful stories about our Bigs and Littles, as well as information about upcoming events and other ways to stay connected with our agency.

Thank you again, and we truly appreciate your continued support. Feel free to call if you have any questions or concerns, 813.769.3604. It is noted that you received no goods and/or services in exchange for your donation.

Very truly yours,

De Anna Sheffield Ward
Chief Development Officer and VP of Partnership

dsw:ct
The 2011 5K Race to the Courthouse

“This race is a Race with a Purpose…”

The 2011 5K Race to the Courthouse Committee is off and (pardon the pun) running! This race is a Race with a Purpose… promoting pro bono service and recognizing our attorneys who volunteer pro bono hours to the people of Hillsborough County. Attorneys and other runners are encouraged to pledge pro bono service or find attorney “sponsors” to donate pro bono hours as part of the race. Circuit judge Ashley Moody came up with the idea for the Race to the Courthouse after she and her mother, attorney Carol Still Moody, ran a marathon in 2008 to celebrate her mother’s recovery from breast cancer. Judge Moody was inspired by all the passion and energy of the runners and thought it would be a worthy cause to try and channel some of that energy to encourage pro bono efforts by volunteer attorneys in Hillsborough County. Her mother, who is the Managing Attorney of the Senior Advocacy Unit of Bay Area Legal Services and who has dedicated her entire legal career to assisting those in need, quickly agreed, and they started forming a committee. The first race was held in March, 2009. It attracted approximately 140 runners, including approximately 25 local state and federal judges and generated over 100 hours in pledged pro bono service hours. The 2010 race, chaired by Colette Black, registered more than 200 runners with over 800 hours pledged. This year’s committee is co-chaired by circuit judge Claudia R. Isom and appellate judge Marva L. Crenshaw who look forward to its continued success and popularity. Please contact Judge Isom, (813) 7272-5211 if you would like to volunteer on this committee.

Author: The Honorable Claudia Isom, 13th Judicial Circuit
Over 400 attendees filled the Regency Ballroom to listen to Florida Supreme Court Justice James E.C. Perry, the featured speaker. The James M. “Red” McEwen award was presented to Lara Tibbals by outgoing president Ken Turkel, recognizing her outstanding assistance and support during his term.

Good times and good deeds were remembered as the 2010 Judicial Pig Roast and 5K Race to the Courthouse award recipients were acknowledged. Best Pig Sty AND Best Pig Slop honors went to Trenam Kemker, and the Runner Up for both categories was Adams and Reese. For the 5K Race to the Courthouse the most Pro Bono hours were raised by Bay Area Legal Services, and the team race winners were Adams and Reese, Covington’s Krewe and Team Dolgin. The top individual performers in the race were Judge Manual Menendez, Judge Virginia Covington, Chris Mihokovich, and Trisha Cohen.

Thank you to our sponsors Lydian Bank & Trust and Stetson University College of Law for contributing to a wonderful event.
Unsecured Creditors Obtain a Victory with the
Eleventh Circuit’s Tennyson Decision

One of the most common questions our clients ask is “How long must I stay in Chapter 13?” For most people, the answer is straightforward—the “applicable commitment period” is three to five years depending on the debtor’s income. However, what happens when a debtor does not have “disposable income” to pay unsecured creditors but falls into the five-year commitment period? This issue was recently resolved by the 11th Circuit Court of Appeals in In re Tennyson, No. 09-14628, 2010 WL 2793941 (11th Cir. July 16, 2010).

Mr. Tennyson was an “above median” debtor, meaning his income was greater than the median income for his state. He was required to calculate his “disposable income” using a predetermined set of expenses found in 11 U.S.C. § 707(b)(2)(A) and (B). Mr. Tennyson’s “disposable income” was negative $349.30, and he proposed a repayment plan of 3 years which did not repay his unsecured creditors in full. Id. at *1. The Chapter 13 trustee objected to confirmation of his plan.

Continued on page 37
“Applicable commitment period” is defined in 11 U.S.C. § 1325(b)(4) which provides that unless unsecured creditors are paid in full the “applicable commitment period” for below median debtors is three years and the “applicable commitment period” is five years for above median debtors.

The Chapter 13 trustee argued that because Mr. Tennyson was an above median debtor, the “applicable commitment period” was five years, without regard to whether he had disposable income, unless he paid his unsecured creditors in full. Id. at *2.

In contrast, the bankruptcy court expanded the analysis of the issue and considered the use of the term “applicable commitment period” under 11 U.S.C. § 1325(b)(1) which provides that:

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless...
(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
(B) the plan provides that all of the debtor’s projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Analyzing this provision, the bankruptcy court adopted the “monetary view” and held that the statute only required a debtor to use the applicable commitment period as a multiplier for disposable monthly income to calculate the minimum amount due to unsecured creditors.

The opposing majority view, adopted by the 11th Circuit, takes a “temporal view” of the term “applicable commitment period” and concludes that the “applicable commitment period” is a fixed number of years, not a multiplier of months. The additional time that a plan continues under this view provides unsecured creditors the opportunity to ask the court to modify a plan under § 1329 to provide for payments to unsecured creditors based on an increase in the debtor’s income.

Authors:
Camille J. Iurillo and Sabrina C. Beavens, Iurillo & Associates, P.A.
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Vehicle manufacturers are not yet doing enough to reduce the risk of post-collision fuel-fed fires when it comes to such combustible fluids, despite awareness of the risks posed by same.

Automotive manufacturers concede that a vehicle occupant should not survive a car accident only to burn to death in a fire caused by the undesired release of fuel. Auto safety designers charged with addressing this fundamental fire safety concern have approached the risk of post-crash fuel-fed fires by focusing on the prevention of the release of the fuel itself, the elimination of inadvertent ignition sources, and the protection of the passenger compartment itself from fire.

When it comes to gasoline, the most effective approach to preventing post-accident fires has been the use of fuel system designs that focus on the containment and management of the gas inside of the tank and fuel lines to prevent undesired release. The failure to use proper designs and available fuel management safety devices can render such systems unreasonably dangerous and defective. While gasoline release cases have long been the focus of litigation, some post-crash fuel-fed fire incidents may not involve gasoline at all, but, rather, may be the result of the release of other “fuels” that are prevalent in all cars, namely “combustible fluids” such as brake and transmission fluid, that can also leak and be ignited in an accident.

Rollovers, Side Impacts, Filler Necks and Other Fire System Defects

According to the U.S. Fire Administration, 57% of fatal vehicle fires are the result of a collision. Rollover fires are more frequent than fires in rear collisions and about half as frequent as fires in frontal collisions. Moreover, most rollover fires occur with the vehicle on its side or roof. Consequently, vehicle orientation needs to be considered in a fire suppression system. Also, because of the known frequency of rear impacts, tank locations close to the rear bumper or tanks at crumple points are intrinsically dangerous. Similarly, the fuel tank should not extend to the...
reservoirs for the combustible liquids are compromised or broken in a crash, they can release their contents onto the exposed hot surfaces caused by the shifting of the manifold and cause a fire. That being true, in frontal crashes involving fires, all of the “fuel” systems must be considered to determine if reasonable steps were taken to prevent the injury or death that may have resulted.

Vehicle manufacturers are not yet doing enough to reduce the risk of post-collision fuel-fed fires when it comes to such combustible fluids, despite awareness of the risks posed by same. Although automotive technology has improved dramatically over the past 20 years, fuel system integrity with respect to combustibles has not kept pace with other advancements, and we as counsel must remain aware of the state-of-the-art when reviewing these matters.


Author: Henry “Hank” Didier, Didier Law Firm, P.A

Don’t Forget about Combustible Fluids

In many instances, legitimate cases are being overlooked because they involve post-collision fires where no damage or compromise of the gas tank or gas lines is found. Usually, in such cases, non-gasoline fires are simply not pursued by attorneys or their experts as they do not fall within the well known theories surrounding “gasoline” fires. However, the very analysis and effort that goes into gasoline fire prevention can be equally employed to prevent post-crash fires caused by the lack of containment and management of the combustible fluids. While not flammable, combustible liquids found in the engine compartment such as brake fluid, transmission oil, engine oil and radiator fluid, can and will ignite if exposed directly to a significant heat source.

In front-end accidents, engine manifolds can shift exposing extremely hot cylinder heads to the combustible fluids which are often stored in the engine compartment. When these storage reservoirs for the combustible liquids are compromised or broken in a crash, they can release their contents onto the exposed hot surfaces caused by the shifting of the manifold and cause a fire.
Florida SJI Committee Alters Florida Insurer Bad Faith Law

Part 1 of 2

The Florida Bar Standard Jury Instructions Committee has recommended a complete new wardrobe for the Standard Instructions in Florida Civil Cases. On March 4, 2010 the Florida Supreme Court authorized the publication of these new clothes and some new proposed “Standard Instructions,” in an enormously long opinion, In re jury Instructions in Civil Cases.1

The Standard Instructions are all renumbered and regrouped. “Insurer’s Bad Faith” is now addressed in several proposed Standard Jury Instructions (“SJI”) 404.1 through 404.13, inclusive. Several of the proposed changes do not appear to be substantive changes concerning insurer bad faith claims, but some may have the effect of changing the outcome of jury trials in bad faith cases. Newly proposed SJI 404.2 provides that “(Claimant)[Defendant] must prove [his][her][their] claim(s) [and defenses] by the greater weight of the evidence.” Whatever the substantive accuracy or inaccuracy of this assertion, it is a change from the current opening instruction, MI

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3.1 b, which does not advise the jury of who has what burden of proof, but instead instructs the jury on what they should determine from all that they have seen and heard during the trial: “If the greater weight of the evidence does not support the claim of (claimant), your verdict should be for (defendant). However, if the greater weight of the evidence does support the claim of (claimant), your verdict should be for (claimant).”

The jury in an insurer bad faith case is likely to be confused by this unnecessary change in language from SJI MI 3.1 b, to proposed SJI 404.2, above. It is not the jury’s job to determine whether one party or another has met her, his or its burden of proof. That is the judge’s job. Rather, the jury’s job is to review all the evidence, regardless of who introduced it, and then determine on the full record whether or not the “greater weight of the evidence” supports the claim.

The proposed SJI 404.2 evidences an effort to be fair by eliminating that part of the current Instruction that the jury’s “verdict should be for (claimant)” if the jury determines that the manifest weight of the evidence supports the claim in the given case. There are defenses based on alleged facts to consider too, which the proposed change would include and the current SJI MI 3.1 b does not address. Inherently, SJI MI 3.1 b is premised on an idea that all defenses that may be available in insurer bad faith cases must always be based on law rather than on fact, so this is a good change to recommend to that extent, but not in the proposed language.

(1) (Fla. Case No. SCO9-284, Opinion Filed March 4, 2010). This opinion and its appendix of proposed new Standard Jury Instructions is also published as In re Standard Jury Instructions in Civil Cases, 2010 WL 727521 (Fla. March 4, 2010).


Author: Dennis J. Wall, Esquire, Dennis J. Wall, Attorney At Law, A Professional Association

The Yerrid Law Firm is a proud Diamond Sponsor of the Bench Bar and Judicial Reception.
ABA Honors Sylvia Walbolt with 2010 Pro Bono Publico Award

Carlton Fields is pleased to announce that shareholder Sylvia H. Walbolt is honored with one of five 2010 Pro Bono Publico Awards from the American Bar Association (ABA) Standing Committee on Pro Bono and Public Service. Walbolt was recognized on Monday, August 9, 2010 at the Pro Bono Publico Awards Assembly Luncheon during the ABA 2010 Annual Meeting in San Francisco, California.

ABA President Carolyn B. Lamm introduced the 2010 awards program. “Sylvia Walbolt believes strongly in her professional responsibility to work for the poor and to protect the rights of those who cannot afford counsel,” said Lamm. “Her dedication to addressing inequities in the justice system serves as an inspiration to all of us in the legal profession.”

The Pro Bono Publico Awards honor individuals or organizations in the legal community that enhance the human dignity of others by improving or delivering volunteer legal services to the poor or disadvantaged. William Reece Smith, Jr., chair emeritus of Carlton Fields, received the Pro Bono Publico Award in 1994. This is significant as no other law firm has had two attorneys receive such a prestigious award from the ABA. Smith is a fixture at the Equal Justice Conference every year and at other activities in the pro bono community, as well as a former president of the ABA.

Board Certified in Appellate Law and Antitrust Law, Walbolt handles appeals in both federal and state courts in all areas of

Continued on page 45
The Pro Bono Publico Awards honor individuals or organizations in the legal community that enhance the human dignity of others by improving or delivering volunteer legal services to the poor or disadvantaged.

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Amanda Uliano leads the HCBA continuing legal education endeavors as the CLE Director. Her collaboration with the sections, committees and leadership of HCBA results in over 50 education programs each year.

An attorney for seven years, Amanda presently pulls double duty working with HCBA part time, while continuing her own practice, Law Office of Amanda M. Uliano, P.A., focusing on business and litigation. She was previously with Foley & Lardner, LLP.

George Washington University provided Amanda's education foundation with a Bachelor of Arts degree in History. A proud member of the Cameron Crazies and a founder of the Duke Law Drama Society, she is a graduate of Duke University School of Law. As an avid sports fan, Amanda is looking forward to the Duke Blue Devils defending their men's basketball National Title!

Staying true to her community, Amanda serves on the Board of Directors of Dress for Success Tampa Bay and is a member of the Interbay-Glover YMCA “Let’s Have a Ball” committee.
On November 16, 2010, the Hillsborough County Bar Association is sponsoring its Fourteenth Annual Bench Bar Conference. The Bench Bar Conference is designed to give lawyers and judges an opportunity to get together to share their candid thoughts, concerns and expectations, and to discuss ways to improve our judicial system. The Conference provides a unique venue for lawyers and judges who normally don’t have the opportunity to openly speak outside of a courtroom setting, to come together, address common problems and, perhaps, construct solutions. The HCBA looks to continue this important tradition and collaboration between the bench and bar and to foster our shared commitment to improving the administration of justice and enhancing the rule of law.

This year, we are very excited to offer a large variety of breakout sessions at the conference. During the breakouts, judges, lawyers and some of HCBA’s standing committees will discuss current trends and practice tips in many different practice areas.

In the morning, the breakout sessions will focus on offering advice and counsel for paralegals and legal assistants, the people upon whom so many of us rely. From 9:00 a.m. to 12:00 p.m., the subject matters of the eight breakout sessions will include client service, litigation support,
Continued from page 46

ethics, recent developments for paralegals, appellate practice, and a broad overview of litigation from Judge Greco. We urge all attorneys and firm administrators to encourage their support staffs to join us for the morning breakout sessions.

In the afternoon, we are offering eight breakout sessions for the practitioners. Judges and attorneys will offer insight into a variety of practice areas, such as family law, real property probate & trust, worker’s compensation, federal practice, and appellate practice. We are also offering sessions on the role of cross examination in your cases, pro bono opportunities, and 40 Law Practice Tips in 50 Minutes.

In addition to our breakout sessions, we will continue our tradition of round table discussions. In the afternoon, judges and lawyers again will have the opportunity to sit face to face as peers in a round table format to discuss issues that are critical to the profession and the administration of justice in Hillsborough County. Lawyers and judges can continue their collaborative effort to improve the workings of our profession and can continue the important work of improving public confidence in the bench and bar, and in our system of justice.

“The HCBA Bench-Bar Conference is an outstanding opportunity for a lawyer to meet informally with members of the judiciary to gain valuable insights into the judicial system, and to exchange ideas as to how our excellent court system can be made even better,” said conference co-chair and Chief Assistant City Attorney, Jerry Gewirtz.

First held in 1997, this Conference continues to be a critical step in the process of keeping the channels of communication open between the bench and bar, with its primary focus on improving the justice system for all.

We have all seen how attorneys and judges working together can collaborate to make positive changes in our court system. We hope that you will join us as we continue to strengthen the bond and continue the dialogue between the bench and bar. In the spirit of collaboration between the bench and bar, we invite you to join us at the Judicial Reception, which will immediately follow the conference.

Author:
John A. Schifino, Esq., Williams Schifino Mangione & Steady P.A.
## Hillsborough County Bar Association Presents

### 14th Annual Bench Bar Conference

**November 16, 2010**  
**Hyatt Regency Downtown Tampa**

### MORNING SESSION

**Young Lawyers, Paralegals, Judicial Assistants and Legal Support Professionals**

<table>
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<tr>
<th>Time</th>
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<tr>
<td>9:00 - 10:00</td>
<td>Welcome and Plenary Session: Legal Ethics for Support Professionals</td>
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</table>
| 10:10 - 11:00 | Breakout Sessions

**A. Create Lasting Impressions - A Win-Win Result for You and Your Firm**  
The philosophy of professional service for the client as well as the professional reputation of the attendee.

**B. Lit Support - How it Helps**  
Introduce the role of litigation support and how it impacts a firm’s operation.

**C. Overall Support and Contracting**  
Provide an overview of contracts and the laws affecting their drafting and enforcement.

**D. (Almost) Everything You’ll Want to Know Before Coming to Civil Court**  
Provide an in-depth explanation of filing small claims, county and/or civil cases in the 13th Judicial Circuit.

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| 11:10 - 12:00 | Breakout Sessions

**A. Paralegal or Trial Consultant?**  
Discussion of the contrasting roles of a paralegal and trial consultant from trial preparation through verdict.

**B. Appellate Practice for Law Firm Administrative Professionals**  
A brief primer and Q&A session for law firm administrative professionals who practice before the Second DCA.

**C. 21st Century Paralegal**  
Overview of the modern day role of the paralegal and the technology available to paralegals and law firms.

**D. (Almost) Everything You’ll Want to Know Before Coming to Civil Court**  
Provide an in-depth explanation of filing small claims, county and/or civil cases in the 13th Judicial Circuit.

### AFTERNOON SESSION

**Attorneys and Judges**

<table>
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<th>Time</th>
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| 12:00 - 1:00 | HCBA Membership Luncheon  
**Speaker: The Honorable Christopher Altenbernd** |
| 1:10 - 2:00 | Breakout Sessions

**A. Pro Bono for Every Lawyer**  
Discussion of the opportunities that pro bono services offer a lawyer and the ethical concerns of pro bono service.

**B. 40 Law Practice Tips in 50 Minutes**  
Discussion of relevant tips in the areas of general law practice, human resource management, financial management and more.

**C. Federal Civil Practice for the State Court Practitioner**  
Inform and educate state court practitioners on the “dos and don’ts” of local federal civil practice.

**D. Practice and Procedure in Tampa Workers’ Compensation Cases, E-Filing, New Rule Proposals and the WC/Circuit Civil Litigation Interface**  
Provide an overview and discussion of Worker’s Compensation practice and procedure.

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| 2:10 - 3:00 | Breakout Sessions

**A. Issues of Concern to the Judiciary in Probate, Trust and Guardianship Proceedings**  
Provide insight from judges and magistrates into issues involving probate, trust and guardianship proceedings.

**B. Family Law – Recent Changes in Alimony Statutes**  
Provide an overview of the recent changes in the alimony statutes.

**C. Cutting Edge Cross Examination Techniques**  
Provide an overview of the principles and techniques of effective Cross-Examination.

**D. Appellate Practice – What Every Trial Lawyer Should Know**  
Discussion with appellate judges, who have trial court experience, geared towards the trial lawyer and occasional appellate practitioner.

(From 1:30 – 3:00 Traditional Round Table Discussion with Judges will be held for those participants who do not attend a breakout session)

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<th>Time</th>
<th>Event</th>
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<tr>
<td>3:10 - 4:00</td>
<td>Plenary Session - Legal Ethics for Today’s Lawyers</td>
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<tr>
<td>4:00 - 5:00</td>
<td>Plenary Round Table Discussion with Judges</td>
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<tr>
<td>5:00 - 6:00</td>
<td>Judicial Reception</td>
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Thank you to our
Bench Bar Conference & Judicial Reception

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The First Annual Joint HCBA / TBBBA Bankruptcy Seminar

Members of the Hillsborough County Bar Association and the Tampa Bay Bankruptcy Bar Association gathered for the First Annual Joint HCBA / TBBBA Bankruptcy Seminar held at the Chester H. Ferguson Law Center on September 15, 2010. The Honorable Michael G. Williamson provided a State of the Bankruptcy Court, and The Honorable James M. Barton, II presented the status of the New Mediation Order and Mandate from the Florida Supreme Court. Knowledge of Reverse Mortgages was shared by Mark Rodriguez, Senior Lending President, and Rose Bobier, Senior Lending Community Affairs Director. Mediator James O’Neal Williams directed the Mediating Mortgage Foreclosure Issues discussion. Consumer and Commercial breakout sessions were lead by Bill Maloney of Bill Maloney Consulting and Keith Fenderick of Holland & Knight. CB Richard Ellis Senior Managing Director, Raymond Sandelli, offered the luncheon keynote presentation enjoyed by the members of both associations.
As we contemplate diversity, we need to move from discussing the issues to putting them into action. Generational Diversity is the basket that holds all of the diversity balls. However, it is not always included in the forefront of diversity.

In any large organization today, including law firms, you will find at least four distinct generations working side by side. Below is a summary of each.

**Traditionalist/Matures/WWII Generation (1946-1964).** This group shared the experience of the Great Depression, World War II, the atomic bomb and the GI Bill. This experience fostered the general characteristics of being conservative, fiscally prudent, loyal and hardworking. Some characteristics of those in this generation include: focus on traditional gender roles, “adaptive”, respectful of authority and institutional leadership, belief in formality, private and cautious.

**Baby Boomers (1954-1964).** Baby Boomers shared the experience of the Vietnam War as well as the civil and women’s rights movements. Baby Boomers experienced post-war financial growth and became home owners and college graduates as a result of the GI bill. These experiences have defined this generation as ambitious, having a strong work ethic and loyal to employers. Gender roles changed with working couples and there was a focus on college education. This generation is characterized as idealists, free spirited, experimental, cause-oriented, ambitious and workaholics.

**Generation X (1965-1981).** Mothers in the workplace, an increase in divorce rates, the end of the Cold War and the inception of the Internet define this generation. As the first generation of “latch key kids,” members of this group tend to be highly independent. This generation has been viewed as cynical and distrustful of institutions. It is less focused on gender roles and emphasizes work-life balance. They are seen as “reactive,” self-reliant, resilient, adaptable, entrepreneurial, risk takers, change-oriented and less formal.

**Generation Y/Millennials (1982-2000).** The expansion of technology and the tragedy of 9/11 mark their experience. This generation is known to be an overly indulgent, yet socially conscious group. Some of their characteristics include: being self-oriented, focusing on social/global causes, accepting non-traditional gender roles, would rather email you than talk in person and are categorized as “civic.” This generation values meaningful work over money. They also have high expectations and are not willing to settle.

Sociologists, psychologists, and everyday managers have identified important differences between these generations in the way they approach work. Focusing on Generational Diversity through education and understanding will bridge a wide communication gap and will likely help bring into focus the basis of unaddressed perceptions related to race, ethnicity, gender, religion, handicap and sexual orientation. Effective communication skills are the building blocks for any successful organization. We would all be wise to understand the differences among us and utilize that knowledge through effective communication in our practice and daily lives.

**Author:** Dawn Siler-Nixon, Esq., Ford and Harrison LLP
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Florida Statute 127.01 explicitly prohibits counties from taking federal or state land. Furthermore, the statute prohibits counties from taking land in other counties for the purpose of creating a recreational facility.


2 The Florida Bar, Florida Eminent Domain Practice and Procedure § 2.7 (7th ed. 2008) citing Florida East Coast Railway Co. v. City of Miami, 321 So.2d 545 (Fla. 1975); Florida East Coast Railway Co. v. City of Miami, 372 So.2d 152 (Fla.3d DCA 1979).

3 The Florida Bar, Florida Eminent Domain Practice and Procedure § 2.6 (7th ed. 2008).

4 The Florida Eminent Domain Practice and Procedure § 2.7 (7th ed. 2008).

5 The Florida Bar, Florida Eminent Domain Practice and Procedure § 2.7 (7th ed. 2008) citing Florida East Coast Railway Co., 372 So.2d 152.


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CAN AN EMINENT DOMAIN CONDEMNOR ALSO BE A CONDEMNEE?
Eminent Domain Section

Continued from page 54

7 The Florida Bar, Florida Eminent Domain Practice and Procedure § 2.9 (7th ed. 2008) citing Housing Authority of City of Fort Lauderdale v. State Dept. of Transportation, 385 So.2d 690 (Fla. 4th DCA 1980); Florida East Coast Railway Co. v. City of Miami, 372 So.2d 152 (Fla. 3d DCA 1979).
8 Kirkland v. City of Lakeland, 3 So.3d 398, 400 (Fla 2d DCA 2009) and Prosser v. Polk County, 545 So.2d 934 (Fla. 2d DCA 1989).

Authors:
Ken Pope and Michael Tebbi,
Hillsborough County Attorney’s Office

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If you would like to volunteer for these programs please contact Pat at 221-7783 or email pat@hillsbar.com

Library Programs
Like it or not, the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act (collectively, the “PPACA”), is set to take effect in 2014. Many states, including Florida, have initiated lawsuits challenging the constitutionality of the PPACA. One of the first cases to be heard in court was the suit brought by the Commonwealth of Virginia. In its motion to dismiss, the United States challenged Virginia’s standing to bring the suit. The court found that the Virginia statute at issue conflicted with the PPACA’s mandatory coverage provision, providing Virginia with standing to challenge the PPACA’s constitutionality.

In what could have provided a similar argument, Florida’s Legislature attempted to include a constitutional amendment on November’s ballot that closely mirrored many of the provisions of Virginia’s statute. The proposed amendment was passed during the 2010 Florida legislative session. However, in a lawsuit challenging the inclusion of the proposed amendment on the November ballot, Florida voters alleged that the ballot summary failed to comply with the requirements of Florida Statutes. The Florida Supreme Court affirmed the circuit court’s decision that the ballot summary did not satisfy the statutory or constitutional requirements for accuracy.

In an effort to correct the “misleading” ballot summary, the Florida Department of State and the Secretary of State sought to replace the ballot summary with the text of the amendment, much like the Florida Supreme Court ordered in ACLU v. Hood, No. SC04-1671 (Fla. Sep. 2, 2004). However, the Florida Supreme Court distinguished Hood and ruled that it did “not have the authority to substitute the language that three-fifths of the members of the Legislature have voted to place on the ballot.” The Court held its “only recourse [was] to strike the proposed constitution amendment from the ballot, thereby removing it from a vote of the electorate.” As a result of this lawsuit, Florida voters will not vote on proposed Amendment 9, and Florida will have one less basis for arguing its standing to challenge the PPACA.

The Florida Supreme Court . . . ruled that it did “not have the authority to substitute the language that three-fifths of the members of the Legislature have voted to place on the ballot.”
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 ATTACK OF THE TROLLS 2 - RISE OF THE FALSE PATENT MARKING TROLL

Intellectual Property Section

It’s not easy being a patent owner these days. Patents are expensive to acquire, very expensive to assert against an infringer, and always subject to various attacks once asserted.

On top of that, patent holders who deal in products in the United States that are covered by a patent will likely want to comply with the marking statute, 35 U.S.C. 287. Under the marking statute, patent holders must mark their products with the patent number or the “patent pending” status. If they don’t, they can only recover damages from an infringer after providing notice of the infringement and only then for post-notice infringement.

But there’s more. What if a patent holder continues to mark products with the patent number after the patent expires, such as by continuing to use the same mold to make the product that contains the then-expired patent number? Thanks to a recent development, the patent holder can now be faced with a suit for “false marking” and be exposed to significant damages. The false marking statute provides that: “Whoever marks upon, or affixes to ... any unpatented article, the word ‘patent’ or any word or number importing that the same is patented, for the purpose of deceiving the public ... Shall be fined not more than $500 for every such offense.” Historically, courts did not construe the statute to apply the $500 penalty to each item sold. So if you mismarked 21 billion coffee lids with an expired patent, you did not typically face significant liability.

But in December 2009, the Federal Circuit decided Forest Group v. The Bon Tool Company. In doing so, the court construed the statute to mean that an “offense” occurred for “each article that is falsely marked.” Now, the maker of 21 billion falsely marked coffee lids can face a potential exposure of up to $500 for each lid sold, or over 10 trillion dollars—precisely the scenario that one manufacturer, Solo Cup, faced after Forest Group.

Now, the maker of 21 billion falsely marked coffee lids can face a potential exposure of up to $500 for each lid sold, or over 10 trillion dollars—precisely the scenario that one manufacturer, Solo Cup, faced after Forest Group.

Statute. It remains to be seen, however, whether this high bar will send the trolls running to find something productive to do instead. Regardless, the wise manufacturer may want to check its marked products to ensure they are covered by valid patents.

Author: Jim Matulis, Conwell, Kirkpatrick, P.A.
In what it called an issue of “first impression under Florida law,” the Fourth District Court of Appeal in a recently published decision addressed for the first time whether the administrative findings and conclusions of the EEOC or similar enforcement agencies are admissible in a subsequent jury trial under the Florida Civil Rights Act (“FCRA”) or similar state statutes.

On appeal, Byrd argued that the trial court abused its discretion by admitting into evidence the no reasonable cause determination letter. The Fourth DCA held the admission an abuse of discretion. Declining to follow federal case law, the majority of the Fourth DCA instead fashioned its own standard for admissibility based on its view that Florida evidentiary rules differ from the Federal Rules. The Court held that reasonable cause determination letters will seldom pass the test of admissibility under §§ 90.803 and 90.403, Fla. Stat., even where, as in Byrd, the letter was the result of an investigation and specific factual findings by the Broward County Civil Rights Division. The Court stopped short of saying they are never admissible but it is hard to imagine, after reading the decision, when they could be.

In his concurring opinion, Justice Taylor urged the Court to formally adopt a per se rule of inadmissibility for no cause determinations, noting the unfair prejudice and delay such admission inevitably causes and noting that the statutory language in the FCRA already bars admissibility of “cause determinations” by the FCHR, except to establish the right to maintain the right of action.

The dissent went in the opposite direction. Noting that evidentiary rulings, in the first instance, are best left to the discretion of the trial judge, the dissent argued that the admission was not harmful because the jury verdict, which found that Byrd was not terminated at all, differed from the agency’s findings.

Currently the only Florida appeals court case on this issue, Byrd stands for the proposition that “no cause” determinations will seldom be admissible in state court employment trials, and signals that “cause determinations” will be per se inadmissible, at least in employment cases under the FCRA.

Author:
Tracey K. Jaensch,
Ford & Harrison LLP
Effective July 1, 2010, the Florida Legislature has both codified case law and added new law with regard to Florida Statute 61.08.

First, the statute added three factors regarding need and ability determination.

- Section (e) was expanded to include “the earning capacities, educational levels, vocational skills, and employability of the parties ....”
- Section (g) is new and provides for the court to consider “the responsibility each party will have with regard to any minor children they have in common.”
- Section (h) requires the court to look at “the tax treatment and consequences to both parties of any alimony award ....”

Second, the new statute clarifies the term of marriage stating “that a short term marriage is a marriage having a duration of less than seven years, a moderate term marriage is a marriage having a duration of greater than seven years but less than seventeen years and a long term marriage is a marriage having a duration of seventeen years or greater.” It is unclear how a seven year marriage would be categorized as the statute does not cover that year. This clarification by statute is a rebuttal presumption and, therefore, should carry great weight with the court.

Third, the court outlines the four different types of periodic alimony that are available for the trial court to award.

Bridge-the-gap alimony is limited to less than two years and terminates upon the death of either party or upon the remarriage of the party receiving alimony. Such alimony may not be modifiable in amount or duration.

The rehabilitative alimony section codifies existing case law requiring a specific rehabilitative plan in order to obtain this type of alimony. Rehabilitative alimony may be modified or terminated based upon a substantial change of circumstances, noncompliance with the rehabilitative plan, or completion of the plan.

The new type of alimony introduced to us is durational alimony. This alimony fills in the gap between bridge-the-gap and permanent periodic alimony. It provides for support for a marriage of short or moderate duration. It will terminate upon the death of either party or upon the remarriage of the party receiving alimony. The amount of durational alimony may be modified or terminated based upon substantial change of circumstances. The length of durational alimony may not be modified except under substantial circumstances and is limited to the length of the marriage.

Finally, permanent periodic alimony is awarded for a marriage of long duration, a marriage of moderate duration if appropriate considering the factors in this statute, or following a marriage of short duration if there are exceptional circumstances. As always, this type of alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. It may also be modified or terminated based upon substantial change in circumstances or upon the existence of a supportive relationship in accordance with Florida Statute 61.14.

Author:
Paul E. Riffel,
Paul E. Riffel, P.A.
Technology has certainly invaded all areas of our lives—including our social lives. Keeping up with friends by visiting in person or by telephone has become outdated. Today, we are thrust into social networking websites such as Facebook, LinkedIn, Twitter, Foursquare, MySpace and Friendster, to name just a few. Interestingly, these social networking sites have segued into our business/professional lives to the extent that they raise ethical issues for attorneys, judges and now mediators. What happens when a certified mediator “friends” a mediation client or attorney who participated in a previous mediation with the mediator or when the mediator permits clients or attorneys to add the mediator as their “friend”?

Not surprisingly, such questions have come under review by the Florida Mediator Ethics Advisory Committee. In a recent opinion, the Committee opined that “[y]es, a certified mediator may designate clients (parties) or attorneys who participate in mediations with the mediator as ‘friends’ on a social networking site, and permit the clients or attorneys to add the mediator as their ‘friend’. However, the mediator should keep in mind that doing so may limit the clients with whom the mediator may work in the future.”

In arriving at its opinion, the Committee focused on the Rules for Certified and Court-Appointed Mediators dealing with impartiality and conflicts of interest. Generally, a mediator shall maintain impartiality throughout the mediation process, and a mediator shall withdraw from mediation if the mediator is no longer impartial.

In today’s busy internet world, it is not improbable that a mediator would not even remember those he/she has “ friended” or that the mediator may block others from viewing the “friends” selected. However, potential mediation clients/attorneys who do view a mediator’s “friends” could reasonably gain the impression that the mediator may lack, or be seen as lacking, impartiality and neutrality, thus resulting in a conflict of interest.

Rule 10.340 (a) provides that a mediator shall not mediate a matter that presents a clear or undisclosed conflict of interest. Further, the burden of disclosure of any potential conflict of interest rests on the mediator per Rule 10.340(b). Of particular note, however, is the fact that even if the mediator provides appropriate disclosure, if a conflict of interest clearly impairs a mediator’s impartiality, the mediator shall withdraw regardless of the express agreement of the parties. Rule 10.340 (c). A conflict of interest which clearly impairs a mediator’s impartiality is not resolved by mere disclosure to, or waiver by, the parties.

Although the Committee did not specifically address the extent to which a mediator must search for social network “friends”, the Committee Notes to Rule 10.340 point out that a mediator who is a member of a law firm or other professional organization is obliged to disclose any past or present client relationship that firm or organization may have with any party involved in a mediation. As a result, when in doubt, it is probably wise for a mediator to err on the side of full search, disclosure and withdrawal.

Author: Louise B. Fields, Louise B. Fields, LLC
# HCBA Calendar of Events

**November 2010**

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<td><strong>Election Day</strong>&lt;br&gt;12pm Judicial CLE with Judge Peacock and Judge Ward</td>
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<td><strong>9</strong>&lt;br&gt;8:30am Judicial Shadowing Project (Edgecomb Courthouse)&lt;br&gt;12pm Senior Council Section Lunch&lt;br&gt;12pm Solo Section Lunch&lt;br&gt;1pm—5pm Lawyer Charm School CLE</td>
<td><strong>10</strong>&lt;br&gt;12pm Intellectual Property Section Lunch</td>
<td><strong>11</strong>&lt;br&gt;Veterans Day&lt;br&gt;12pm RPPTL Section Lunch</td>
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|     | **12**<br>9am Bench Bar Hyatt Downtown<br>12pm Membership Luncheon Hyatt<br>1pm Bench Bar Hyatt<br>5:00pm Judicial Reception Hyatt | **13**<br>12pm Marital & Family Law Quarterly Meeting |     |     | **14**<br>12pm Construction Law Lunch & CLE | **15**<br> | **16**<br> **17**<br> **18**<br> **19**<br> **20**<br> **21**<br> **22**<br> **23**<br> **24**<br> **25**<br> **26**<br> **27**<br> **28**<br> **29**<br> **30**<br> | **Thanksgiving**

RSVP for events online at www.hillsbar.com, by calling 813-221-7777 or emailing hcbarsvp@hillsbar.com.
Walk-ins are charged an additional $5 fee, and seating is not guaranteed for walk-ins.
Please note** Events may change from time of print. Call 813-221-7777 for updated event information.
All events held at the Chester H. Ferguson Law Center unless otherwise noted.
The Military Liaison Committee is planning for a terrific year ahead. We are in the planning stages of developing a mentoring program for HCBA attorneys interested in learning more about legal practices involving veterans’ affairs. The committee also plans to partner with other HCBA committees to share knowledge and best practices on legal issues affecting both active duty and retired military members. We plan to continue to host at least one Military Law CLE this year. The committee is also working on organizing a tour of MacDill Air Force Base. If you are interested in joining the Military Liaison Committee or would just like to be involved in any of the initiatives listed above, please contact Cynthia Kearley at: kearleys@mac.com or call 703-229-7061.

Author: Major Cynthia T. Kearley, United States Air Force

The HCBA Board of Directors met for the annual planning retreat on August 20th. In addition to the officers and directors, the HCBA committee and section chairs were invited to contribute ideas from throughout the membership. The Hyatt Regency Clearwater provided a creative location removed from the everyday office distractions. The number one discussion item was the website enhancement possibilities outlined by Intus Technologies.
December 2010

HCBA Calendar of Events

1
12pm Eminent Domain Lunch & CLE
12pm Health Care Lunch
12pm RPPTL Lunch

2
7am Ask-A-Lawyer

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7
12pm Judicial Lunch/CLE with Judge Isom
12pm Criminal Law Lunch/CLE
12pm Labor & Emp. Lunch
12pm Tax Law

8
12pm Mediation & Arbitration Lunch
5:30pm-8:30pm HCBA Happy Hour & Holiday Shopping Extravaganza!

9
12pm Diversity Committee Meeting

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12pm Past Presidents Luncheon

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12pm YLD Quarterly Luncheon

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Please note** Events may change from time of print. Call 813-221-7777 for updated event information.
All events held at the Chester H. Ferguson Law Center unless otherwise noted.
The Florida Legislature made several changes to the Probate and Trust Codes this year. The following is a brief summary of three of the most notable changes.

**Trustee’s responsibility for life insurance policies:** Irrevocable life insurance trusts (ILITs) are a common estate planning technique used to avoid paying estate taxes on life insurance proceeds. Often, the settlor of the trust selects the insurance policy, but Fla. Stat. § 518.11, known as the Prudent Investor Rule, imposes responsibility on the trustee to determine the quality and appropriateness of the policy, as well as to monitor the policy to ensure it remains a viable investment for the ILIT. The trustee of the ILIT often is not qualified to perform those functions, but failure to do so is a violation of the Prudent Investor Rule and can expose the trustee to liability. New Fla. Stat. § 736.0902 relieves the trustees of any duty to determine whether the policy is, or remains, a proper investment of the trust.

For the statute to apply to policies in the ILIT, either the ILIT must expressly make the statute applicable to policies owned by the trust, or the trustee must give qualified beneficiaries written notice that the statute will apply to the trust. Beneficiaries have 30 days to object if they wish; otherwise, the statute will automatically apply.

**Judicial construction of wills and trusts with formula tax provisions:** In order to deal with the uncertainty created for decedents dying in 2010 when there is no estate tax in effect, new Fla. Stat. §§ 733.1051 and 736.04114 allow a personal representative, trustee, or a beneficiary to petition the court to construe the terms of a will or trust which allocate shares based on a formula using the federal estate or generation-skipping transfer tax exemptions. This statute is effective as of January 1, 2010, and terminates on the earlier of December 31, 2010, or the date the estate and generation-skipping transfer taxes are reinstated by Congress. If so petitioned, the courts may consider a broad array of evidence to determine the decedent’s “probable intent.” Importantly, the statute allows the court to consider evidence “even though the evidence contradicts the apparent plain meaning of the [will/trust].”

**Homestead property rights:** In the past, when a married person with children or other descendants died in Florida owning a primary residence in his or her sole name and failed to make a qualified devise of the property in accordance with Fla. Stat. Chapter 732, the homestead automatically passed to the spouse and descendants, with the spouse taking a life estate and the descendants taking a vested remainder interest. Under new Fla. Stat. § 732.401(2), the spouse instead can elect to take a 50% tenancy in common interest with the descendants owning the other 50%. The election must be filed within 6 months of the decedent’s date of death. Once made, the election is irrevocable.

**Authors:**
Katie Everlove-Stone
and
Stephen D. Dunegan,
Akerman Senterfitt
The Senior Council welcomed Susan A. MacManus, Ph.D. as the speaker for its September 14th luncheon. Dr. MacManus is a Distinguished Professor of Public Administration and Political Science at the University of South Florida. “The Current Political Landscape,” encouraged discussion among HCBA members during the event at the Chester H. Ferguson Law Center.
As summer nears an end, the final flurry of activity necessary to put together another successful bar year is in full swing. From President Amy Farrior down to the Section Chairs, the final pieces of the HCBA 2010–2011 puzzle are presently being put in place by our bar leaders. The same goes for the Small and Solo Practitioner Section, except that this year is no ordinary year. Thanks in large part to the dedication of both this and last year’s HCBA President, the Small and Solo Section has been, and will continue to be, provided more support than ever before. As a result, we have many exciting initiatives in the works and events planned for the upcoming year. One initiative is the Start-Up Packet for all HCBA Small and Solo members who seek to start up their own practice or complement their existing one. Other initiatives include dedicated space within the bar building itself for our Section members and better communication and cross-marketing via the web. As for our activities, a number of events are in the planning stages, including joint functions and happy hours with other sections and luncheons showcasing exciting speakers. Our hope is to not only provide much needed support and attention to the multitude of small and solo lawyers here in our home circuit, but also to create a more cohesive and community-based bar association for Hillsborough County. In strengthening the membership base of our community, we aim to solidify both our collective resolve as small and solo practitioners, as well as that of the HCBA membership. In that regard, we need you to provide direct support and indirect support in the form of new member encouragement. Although the sheer fact that you are reading this column is a strong indication of your current membership, you likely have a number of colleagues, partners or friends who are not presently members. For anyone you know who is not a member, encourage membership. Anthony Garcia, my dedicated co-chair, and I welcome any suggestions, comments and inquires about our Section and what the future holds for it. Feel free to contact us or forward potential members to our attention. Anthony Garcia’s contact information may be found on his website (www.AlvarezGarcia.com), or he can be reached by phone at (813) 259-9555 and via email at agarcia@alvarezgarcia.com. My contact information is also on my firm website (www.fantauzzilaw.com) or I can be reached by phone at (813) 258-0696 and via email at afantauzzi@fantauzzilaw.com. Our strength and voice as a Section begins with membership, so please encourage HCBA members and non-members to join our Section. Both Anthony Garcia and I are looking forward to this brand new bar year and our brand new section, but, more importantly, so should you!

Author: Anthony Fantauzzi, The Fantauzzi Law Firm

Mark Your Calendar for the Solo/Small Firm Practitioner Meeting on January 11th.
HCBA members from the Solo/Small Firm Practitioners section participated in “Recent Changes to Rules Governing Lawyer Advertising and Web Presence” on September 14th at the Chester H. Ferguson Law Center. Sheila Tuma, Bar Counsel of the Orlando Branch of the Florida Bar, presented valuable resources to assist attorneys with advertising including filing requirements, ethics, exemptions, and internet ads.
CLASSIFICATION OF SINGLE MEMBER LLCs
Tax Law Section

On August 24, 2009, the U.S. Tax Court in Pierre v. Commissioner, 133 T.C. No. 2 (2009) issued an opinion as to an issue of first impression, to wit, whether the check-the-box regulations require one to disregard a single member limited liability company (“LLC”) in deciding how to value and tax a donor’s transfer of an ownership interest in the LLC. The interest stirred by this question is reflected in the majority opinion agreed to by ten judges, a concurring opinion agreed to by nine judges and two dissenting opinions, one agreed to by six and the second by three. This was a case with a two part opinion, the latter of which was issued May 13, 2010.

The facts are fairly straightforward. Mrs. Pierre formed a single member LLC on July 13, 2000. On July 24, she created a trust for her son and one for her granddaughter. On September 15, she transferred $4,025,000.00 in liquid assets to the LLC. On September 27, she transferred her entire interest in the LLC equally to the two trusts. She treated a 9.5% membership interest as a gift to each trust and took back two promissory notes for a sale of 40.5% membership interest to each trust. She reported the two 9.5% interests as gifts and took a discount of 36.55% on each gift.

The Internal Revenue Service treated the gifts of LLC interests as gifts of the liquid assets and allowed only a reduction for the value of the notes. The theory was that as a single member LLC is “treated” as a disregarded entity under the check-the-box regulation, the transfers should be “treated” as transfers of liquid assets and the LLC entity disregarded for gift tax purposes as well as income tax purposes.

Historically, the check-the-box regulations were issued to simplify the classification of hybrid entities after many years of struggling with applying the many tests of the Kintner regulations.

Thus, the Tax Court addressed whether the solving of the classification issue (admittedly for income tax purposes) also should be applied to disregard the LLC in determining what state law property interests were being transferred for gift tax valuation purposes.

The issue turned on the ramifications of the term “classification.” This issue was not addressed by the check-the-box regulations, so this Court decided that the “long established federal gift tax valuation regime” should not be overturned as to single member LLCs and that such a position would be “manifestly incompatible” with the Federal Estate and Gift Tax statutes.

The majority limited “classification” regarding federal tax purposes to federal income tax purposes. The dissent challenged this limitation.

Consequently, the court valued the transfers as transfer of LLC interests and not as separate liquid assets.

The bifurcated opinion issued on May 13, 2010 concluded that the step transaction doctrine applied, and therefore the gifts of 9.5% and sale of 40.5% should be stepped together as transfers of two 50% interests in the LLC. The court found no separate nontax reason for splitting the gift transfers from the sale transfer. Therefore the gifts were 50% of the LLC less the value of the two promissory notes. The court allowed a minority interest discount of 8% and a marketability discount of 30%.

I posit that we have not seen the end of the issues raised in this case.

Author: V. Jean Owens, Owens Law Group, P.A.

MARK YOUR CALENDAR FOR THE TAX LAW LUNCHEON ON DECEMBER 7TH.
Hillsborough County Bar Association 100 Club

Law firms with 100% membership in the HCBA

12th Judicial Circuit
13th Judicial Circuit Court
13th Judicial Circuit Court Plant City
2nd District Court of Appeal Lakeland
Addison & Howard, P.A.
Allen Dell, P.A.
Americo & Mooney
Alvarez Garcia
Ansara Assistcaco, LLP
Anthony & Partners, LLC
Anthony J. LaSpada P.A.
Austin, Ley, Roe & Patsko, P.A.
Baccarella & Baccarella, P.A.
Bajocava
Banier Lopez Gassler, P.A.
Barker, Rodems & Cook, P.A.
Barnett, Bolt, Kirkwood, Long and McBride, P.A.
Bavel Judge, P.A.
Bay Area Legal Services Plant City
Bay Area Legal Services Wimauma
Belz and Ruth
Bivins & Hemenway, P.A.
Boire & DePippo, P.L.
Bradford & Bradford
Brannock & Humphries, P.A.
Brennan, Holden & Kavouklis, P.A.
Attorneys at Law
Brewer Perrotti Martinez Monfort, P.A.
Broad and Cassel
Buell & Elliott, P.A.
Bush Ross
Butler Pappas Wehrmuller Katz Craig, LLP
Cagianone, Miller & Anthony, P.A.
Carey, O'Malley, Whitaker & Mueller, P.A.
Carlton Fields, P.A.
Carman & Com, P.A.
Caveda Law Firm, P.A.
Cedola and Vincent P.L.
Cheeseman & Phillips, P.A.
Christopher N. Ligori, P.A.
City of Tampa
Clark & Martino, P.A.
Clerk of the Circuit Court's Office
Cordell & Cordell, P.C.
County Attorney's Office
Cristal Law Group
Cruser Mitchell Nicholas & Bell, LLP
Danahy & Murray, P.A.
Davidson McWhirter, P.A.
de la Parte & Gilbert, P.A.
Dennen, Ragano, PLLC
Dennis LeFevre & Associates, P.A.
District Court of Appeal
Decina Law Firm, P.A.
Dorman & Gutman, P.L.
Escobar, Ramirez & Associates
Fernandez & Hernandez, LLC
Foi & Gomez, P.A.
Fisher and Frommer
Fisher Law Group
Florida Default Law Group, P.L.
Fuentes & Kreischer, P.A.
Fuller Holtonback & Malloy, P.A.
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Culminating a four-year project, the Florida Supreme Court this year approved a comprehensive revision and reorganization of Florida’s standard jury instructions for civil cases. In June 2010, our section published an article notifying the HCBA of the recent overhaul. As announced in that article, the new instructions completely replace existing standard civil jury instructions.

The instructions have been reorganized according to a new template into separate sections. Full sets of instructions have been prepared for all substantive areas of law covered by the instructions. Because attention is most focused at the outset of a communication, the instructions first inform jurors about the rules they must apply, then the issues they must decide. “Plain English” has been employed to enhance juror understanding and “legalease” avoided. Standard instructions are made uniform across all substantive instructions. Applicable standard instructions are also reproduced within each substantive section, lessening the need to refer to other sections for a complete set of instructions.

In addition, the template reorders the instructions following the normal sequence of a trial. Yet, the trial judge retains discretion as to the timing of the instructions. The Supreme Court Committee strongly recommends that jurors receive instructions on the law at the beginning of the case, before the taking of evidence, and has provided commentary and notes under combined “Notes on Use.” The committee also recommends that the jury be instructed before final argument. The Florida Supreme Court approved all of the committee’s proposed amendments except the proposed definition of “greater weight of the evidence.” A trial court is required to use the standard jury instructions or declare on the record the reason for any alteration. Still, special or case-specific instructions may still be appropriate.

The amendments are not merely stylistic or organizational. Instructions on matters of substantive law were significantly revised and updated. Over the course of this and next year, our section will publish a series of articles addressing some of the more noteworthy changes to the instructions. We hope you find the information useful and welcome requests for articles concerning specific revisions. Stay tuned.

1 See Larry S. Stewart, The Rebirth of the Florida Standard Civil Jury Instructions, 84 Fla.BarJ. No. 5 (May 2010).

Author: Mahlon H. Barlow, Sivyer Barlow & Watson, P.A.
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Bay Area Legal Services is proud to celebrate the tenth anniversary of its Legal Information Center located at the George E. Edgecomb Courthouse. More than 57,000 pro se litigants have received assistance at the Center since it began operation in October 2000. The Center is supported by the Clerk of the Circuit Court, Fowler White Boggs and TECO Energy.

Charles N. Castagna has been appointed by Florida Supreme Court Chief Justice Charles T. Canady to a four year term on the Mediator Ethics Advisory Committee (MEAC) for the Central Division beginning July 1, 2010.

Carlton Fields Tampa shareholder George J. Meyer was recently appointed Chair-Elect of the 10,000-member Real Property, Probate and Trust Law Section of The Florida Bar.

Ogletree, Deakins, Nash, Smoak & Stewart P.C., one of the nation’s largest labor and employment law firms, is pleased to announce that Phillip B. Russell has joined the firm’s Tampa office.

Rhea F. Law, Chair of the Board, and CEO of Fowler White Boggs was awarded the University of South Florida President’s Fellow Medallion by President Judy Genshaft at the USF graduation ceremonies on August 7, 2010.

Bavol Judge, P.A. is pleased to announce that Cheryl J. Lister has joined the Firm as Of Counsel.

Michael S. Hooker, a shareholder in the Commercial Litigation practice group of Glenn Rasmussen Fogarty & Hooker, P.A., has been elected Treasurer of the Board of Trustees for the Henry B. Plant Museum.

Carter B. McCain has joined de la Parte & Gilbert, P.A. with Of Counsel status.

Robert Maxim Stoler, a shareholder with Williams Schifino Mangione & Steady P.A., was recently elevated from “Associate” to “Advocate” member of the American Board of Trial Advocates.

Charlie Crist has appointed Zuckerman Spaeder LLP partner Jack E. Fernandez to Florida’s Thirteenth Circuit Judicial Nominating Commission.

Judd W. Goodall has joined the firm of McCumber, Daniels, Buntz, Hartig & Puig, P.A., as a partner in the Tampa, Florida office. Mr. Goodall focuses his trial practice on first-party insurance defense and insurance coverage.

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JURY TRIAL INFORMATION

For The Month of: August 2010.
Judge: Honorable Lowell Bray
Parties: Estate of Kimberly Delancey vs. Carlton Arms.
Attorneys: For Plaintiff: Barry Cohen, Bruce Kleinburg;
For Defendant: Brandon Scheele, Michael Bird.
Verdict: Defense verdict.

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