One day a hurricane, fire or flood will destroy the home or business of a valued client and an insurance carrier will attempt to deny or limit the claim.

When YOUR client needs to fight back, turn to Gunn.

Gunn Law Group has the depth of resources and breadth of experience to hold insurance companies to their promises.

INSURANCE COVERAGE
BAD FAITH
MEDICAL MALPRACTICE
SERIOUS PERSONAL INJURY
PRODUCTS LIABILITY

Client Referrals...One of the Most Important Decisions You’ll Ever Make
NOV 2011 | HCBA LAWYER

IN THIS ISSUE

divisions

3 EVENTS AROUND THE HCBA
Editor’s Message
by Grace H. Yang

4 RULES TO LIVE BY
HCBA President’s Message
by Pedro F. Bajo, Jr.

6 THE YLD’S RENEWED FOCUS ON PRO BONO
YLD President’s Message
by Laura E. Ward

8 READY, SET, CHANGE
Executive Director’s Message
by John F. Kynes

10 SOLICITATION VS. CONSPIRACY
State Attorney’s Message
by Mark A. Ober

12 RESIDENTIAL MORTGAGE FORECLOSURE MEDIATION PROGRAM UPDATE AND TIPS
Hillsborough County Bar Foundation
by Kristen Politz and Darlene L. Kelly

14 MARIE FOLSOM RECEIVES COURT FAMILY AWARD
From the Courthouse
by Hon. Katherine G. Essrig

about us

HILLSBOROUGH COUNTY BAR ASSOCIATION

Chester H. Ferguson Law Center
1610 N. Tampa Street, Tampa, FL 33602
Telephone (813) 221-7777, FAX (813) 221-7778

Editor
Grace H. Yang

Executive Director
John P. Kynes

ADVERTISING
PR/Communications Coordinator
Dawn S. McConnell, CAE
dawn@hillsbar.com, (813) 221-7779

Officers & Directors
President
Pedro F. Bajo, Jr.
President-Elect
Robert J. Nader
Immediate Past President
Amy S. Farrior
Secretary
Alysa J. Ward
Treasurer
Robert J. Scanlan
Ex-Officio
Russell M. Blain
J. Carter Andersen
Colette K. Black
Deborah C. Blews
Benjamin H. Hill, IV
S. Gordon Hill
Susan E. Johnson-Velez
Kevin M. McLaughlin
Kristin A. Norse
John A. Schifino
Laura E. Ward

(All plus tax.) Write to HCBA, 1610 N. Tampa Street, Tampa, FL 33602.

The Lawyer is published as part of the HCBA’s commitment to provide membership with information relating to issues and concerns of the legal community. Opinions and positions expressed in the articles are those of the authors and may not necessarily reflect those of the HCBA. Submissions of feature articles, reviews, and opinion pieces on topics of general interest to the readership of the Lawyer are encouraged and will be considered for publication.

features

28 LEADERS:
WARREN HOPE DAWSON
by Raymond T. (Tom) Elligott, Jr.

35 15TH ANNUAL BENCH BAR CONFERENCE
by The Hon. Emily A. Peacock and The Hon. Caroline J. Tesche

events

52 HCBA LEADERSHIP INSTITUTE CLASS OF 2011-2012
IN THIS ISSUE

sections

18 TREAD CAREFULLY: PRESERVATION OF ERROR IN FLORIDA
Appellate Practice Section by J. Logan Murphy

22 TEEING UP A LOWER BURDEN OF PROOF FOR INDEMNITY CLAIMS
Construction Law Section by Desiree D. Noisette

24 CALL FOR UNITY IN THE CRIMINAL COURTS
Criminal Law Section by Joseph C. Bodiford

27 TOTAL “TAKINGS” WHEN THERE IS AN UPSIDE-DOWN MORTGAGE
Eminent Domain Section by Daniel R. Feinman

42 BACKGROUND CONCENTRATIONS IN GROUNDWATER
Environmental and Land Use Section by Douglas Grant

44 NEW DECISION GIVES HOPE TO PATENT TROLL DEFENDANTS
Intellectual Property Section by William (Ty) Giltinan

46 NLRB REQUIRES ALL EMPLOYERS TO POST A NOTICE OF EMPLOYEE RIGHTS
Labor & Employment Section by Scott T. Silverman

48 SAME-SEX MARRIAGE IN FLORIDA: PART I
Marital and Family Law Section by O. Kim Byrd and Matthew L. Lundy

50 PARTICIPATING IN THE FORECLOSURE MEDIATION PROGRAM
Mediation and Arbitration Section by Lynwood P. Arnold, Jr.

54 A REVIEW OF HILL V. DAVIS
Real Property Probate & Trust Section by Matthew J. Zipay

56 DISABILITY INCOME INSURANCE: WHAT EVERY ATTORNEY NEEDS TO KNOW
Solo/Small Firm Practitioner Section by Jeffrey D. Brown

58 CLARIFICATION OF ECONOMIC SUBSTANCE DOCTRINE, PART 2
Tax Law Section by V. Jean Owens

59 D’AMARIO COMES CRASHING DOWN
Trial & Litigation Section by Jaret J. Fuente

60 ILLEGAL ALIENS: EMPLOYERS HIRE THEM, THEY BUY THEM
Workers’ Compensation Section by Michael G. Rabinowitz

committees

17 SPEAK UP FOR THOSE WHO CANNOT SPEAK FOR THEMSELVES
Thirteenth Judicial Circuit’s Pro Bono Committee by J. Michael Shea

20 PHILANTHROPY’S MANY FACES
Community Services Committee by Sarah M. Hammett

26 LOCAL BAR TAKES STAND FOR CHILDREN WITH AUTISM
Diversity Committee by Luis E. Viera and Jorge Santeiro

in every issue

11 BENEFIT PROVIDERS

15 100 CLUB

41 NOVEMBER CALENDAR

47 DECEMBER CALENDAR

62 AROUND THE ASSOCIATION

63 JURY TRIAL INFORMATION

64 CLASSIFIED ADVERTISING

64 ADVERTISER INDEX

about the cover

Veritas et Justitia. Audrey Flack’s sculpture based upon classical themes of justice, is a contemporary take on traditional Greco-Roman Sculpture. Designed to create a strong public image at the entrance to the George E. Edgecomb Courthouse the artwork reflects the idea that Truth is embodied in all of us.

To create the statue, a small scale maquette was used to make a full sized clay model along with wax and plaster casts. Molten bronze was poured into the casts which were then welded together and polished smooth. The surface was chemically treated with a patina for color, and gold leaf was applied for highlights.

Audrey Flack is a pioneer of Photorealism and an internationally recognized painter and sculptor. Her works are displayed in the collections of major museums including the Metropolitan Museum of Art, The Museum of Modern Art, the Solomon R. Guggenheim Museum, the Whitney Museum of American Art, and the National Museum of Art in Canberra, Australia.

PHOTO BY DAWN MCCONNELL
editor's message
Grace H. Yang, GrayRobinson, P.A.

Events Around The HCBA

The Hillsborough County Bar Association organizes a great variety of events—seminars, CLE courses, workshops, and social events—throughout the year. We try to mention as many events as possible in the magazine so that readers can make plans to attend some.

I hope many readers in particular attended the Membership Cookout on October 20th and enjoyed everyone’s company and good food! I like our membership lunches at the Hyatt, but the cookout at the HCBA building was a nice change. In addition, golfers enjoyed the Young Lawyers Division Golf Tournament on October 14th. Thanks to all involved with organizing both events. We will include some pictures from both events in the next issue.

The HCBA is preparing for another big event in November—the Bench Bar Conference. This issue has a feature article and the schedule for the Bench Bar Conference. For our bar members who represent clients in the courts and interact regularly with our local judges, the Bench Bar Conference is an event not to be missed. The conference offers valuable opportunities to learn and network together, enhancing the professionalism and collegiality of our local bar association. Our sincerest thanks to the judges, all sponsors, and other supporters of this event.

I commend our members in the judicial system. They continue to tackle complex legal issues, make the tough decisions, and administer justice while burdened with heavy workloads and limited resources.

I also commend our readers who continue to give generously of their time and energy to many worthy causes. The HCBA participated in Make A Difference Day and delivered gifts to veterans who are patients at the James A. Haley Veteran’s Administration Hospital in Tampa. The Diversity Committee is co-sponsoring a Sensory Friendly Santa event on December 17th. The YLD is sponsoring a toy drive. The Thirteenth Judicial Circuit Pro Bono Committee continues to coordinate pro bono projects and to encourage more participation. Please see more in this issue for details.

New to the magazine is a message from Executive Director John Kynes. John has been busy working with the staff, the officers, and the board on a variety of different issues since he joined us in July. We hope to bring additional updates from John in future issues.

Happy Thanksgiving to everyone. May you enjoy the company of family and friends; some delicious food; some good sports to watch; some good shopping deals; and some recharged energy after the holiday!
RULES TO LIVE BY

Nothing can put a damper on a year’s anticipation quicker than scheduling a “couples” shower during the FSU/Miami or Florida/Georgia football games.

For this month’s article, I have decided to exercise my unfettered discretion and address an issue which is near and dear to virtually all lawyers’ hearts: scheduling anything of substance during football season. During my campaign for the Presidency, I asked my constituents what I can do to make their lives a little better. The overwhelming

Continued on page 5

WE’VE GOT YOU—AND YOUR CLIENTS—COVERED

Storm Damage | Fire | Water Loss | Mold | Sinkhole
Business Interruption | Life Insurance | Disability Insurance

Over the years, attorneys have turned to Danahy & Murray for guidance with complex insurance claims, litigation and resulting bad faith cases. As experienced trial lawyers exclusively representing Florida policyholders, we are ready to assist you and your clients in the pursuit of justice. We are available for referrals and to serve as co-counsel, bringing our experience as policyholder advocates to your insurance related cases. When a valued client comes to you with a specialized insurance matter, consider us your partner.
response was to address the issue of scheduling conflicts during football season.

Football season is a hallowed time of year for many. For those of you unfamiliar with football season (and apparently there are many of you out there, as noted by the many conflicts on my social and professional calendar), it commences generally on Labor Day weekend and ends with the Super Bowl at the end of January. Furthermore, football season consists not only of professional football, but also college football and, for purists such as Ken Turkel, high school football. However, for purposes of our analysis, we will confine the season to include only pro and college ball. Following is what I hope will be adopted by all as a way of life; but if not, then perhaps it can serve as a bit of advice to help us focus on what is really important.

First things first. Never, ever schedule a wedding, or worse, a “couples” shower during football season. Absolutely taboo and verboten! Football fanatics spend all year waiting for the leaves to begin changing color, which signifies that football season is in full bloom. Nothing can put a damper on a year’s anticipation quicker than scheduling a “couples” shower during the FSU/Miami or Florida/Georgia football games. Those individuals who somehow are coerced into attending these “functions” during football season many times do so with a portable radio to listen to the particular game they are being forced to sacrifice. A word of advice—don’t do it. If you do, you deserve for no one to show up.

Moreover, for those of you married folk, no holiday shopping on a weekend during football season. True participation in football season requires a substantial financial investment, not to mention an even greater emotional investment, which one cannot forego to spend an afternoon bonding at the mall. The bonding effort will surely fail because the individual missing the game will either (a) be miserable and impart his/her misery on the offending party or (b) will simply manage a way to watch the game in the TV section of the mall. Shopping during football season—bad idea—don’t do it.

For legal practitioners out there, scheduling anything of substance, whether it is a deposition or hearing, on any Monday or Friday during football season is forbidden. The reason is that football season generally requires weekend long commitments commencing on early Friday afternoon and terminating on late Sunday evening. For obvious reasons, anything of substance scheduled on either that Friday or the following Monday will clearly interfere with an individual’s enjoyment of his or her football weekend. In the interest of a little professional courtesy, let’s take care of all of our business Tuesday, Wednesday, or Thursday of the week during football season. Mondays and Fridays are okay once football season ends.

In order to make our football season a perfect success, we require some cooperation from the judiciary. My respectful request to the judiciary would be that they refuse to schedule any trials during football season. A trial during the middle of football season can clearly ruin the entire season because of the time required to prepare for and recover from trial. In fact, I propose to Judge Menendez that we close the courthouse in its entirety during football season to preclude even the modicum of a chance that a trial should pop up during football season. I can only presume that the Legislature is already considering such a proposal in lieu of adequately funding the judicial branch.

I hope that some of these tidbits about football season and its importance to society in general will help to enlighten those of you who may not have given proper consideration to its significance. Special thanks to Ben Hill who contributed significantly to the mores expressed in this article. Ben asked that I provide some space for him to issue a comment or two on this matter himself. As Ben stated, “[w]hen Pedro approached me regarding this topic and solicited my input, I was able to provide him with a personal experience of mine. Prior to my marriage to my lovely wife, Michelle, we were engaged in extensive negotiations regarding the terms of our prenuptial agreement. After numerous drafts and the advice of numerous counsel, we found that the only matter we could agree on was that we would not permit other so-called ‘engagements’ to interfere with our participation in and enjoyment of football season.” Ben and Michelle are an example of two individuals who have truly contemplated the significance of football season and understand its solemn position in our society.
It’s that time of the year again. Football season is well underway, the air is slightly cooler (at least on a few days), and the holidays are right around the corner. It is particularly important this time of year to remember the responsibilities and obligations that we have as lawyers to those less fortunate. One way to do so is by renewing our commitment to performing pro bono work. Young lawyers in the past have shared with us a reluctance to undertake pro bono work for a fear that it may ultimately pull them away from too many billable hours or get them involved in an area of law they know nothing about. If you share these concerns, the YLD has just the pro bono project for you.

Please help the YLD renew our commitment to pro bono and join us at our BALS monthly Family Law Forms Clinic on November 29th from 5:30 p.m. to 8:30 p.m. (BALS) and has renewed its focus on providing pro bono services to those in need in our community. Through this partnership, the YLD staffs BALS’ Family Law Forms Clinic one night each month. For those of you not familiar with this project, the Family Law Forms Clinic is a clinic operated by the Bay Area Volunteer Lawyers Program. The YLD coordinates young lawyer volunteers to assist pro se family law litigants in completing court approved family law forms. BALS has a tremendous, unmet need for assistance with family law cases. Participating in this monthly clinic is one way the YLD can help. The YLD involvement allows BALS to offer an evening clinic and provide assistance to those individuals who cannot attend the daytime clinics.

We are extremely proud of and excited about our partnership with BALS on this project, but we cannot be successful without YOUR help. No prior family law experience is needed, and trained attorneys work in the clinic to field any questions that may arise. Volunteers receive a training packet and watch a short training video, for which they will receive one hour of CLE credit. This is not an advice clinic. Our volunteers simply assist in filling out straightforward family law forms. Young lawyers can sign on to assist with just one night or can commit every month. We started the program on October 24th with great volunteer turnout. The next YLD Family Law Forms Clinic night will be held November 29th from 5:30 p.m. to 8:00 p.m. at the George Edgecomb Courthouse, 2nd Floor, Room 207. The YLD will circulate signup sheets to our members a couple of weeks before each clinic. More detailed information is available on the YLD website (www.hillsbar.com). Please help the YLD renew our commitment to pro bono and join us at our BALS monthly Family Law Forms Clinic!

I would be remiss if I fail to mention that there are many other pro bono opportunities available. The YLD will provide information about other pro bono opportunities at each of our YLD quarterly luncheons. Additionally, we will host a luncheon in the spring to provide more detailed information about other available pro bono programs.

The YLD is also sponsoring a December toy drive. Next time you run to the store, please purchase a toy or two to bring with you to our December quarterly luncheon to benefit a less fortunate child.

We look forward to working with you on these exciting projects.
The careful growth and preservation of our natural habitats is imperative. At Sabal Trust, we take a similar view of wealth. Protecting our clients’ interests, while growing and preserving assets for future generations, is of paramount importance.

As the largest employee-owned trust company in the state, Sabal Trust has been providing trusted wealth advice to affluent individuals and families in Florida for nearly 30 years. You can feel confident in knowing that you will always have access to an owner of the firm and, like your portfolio, you can count on us to be here today and many tomorrows.

Our experience, our resources and our commitment to building and preserving client prosperity is unmatched. A wealth of information awaits you online at sabaltrust.com.
Ready, set, change.
That’s the headline from a recent cover story in the ABA’s Bar Leader on the future of bar associations and how they can better help their members adapt to an ever-changing legal profession.

Change is inevitable in every area of life and can be a scary thing for many—particularly in these turbulent economic times.

In today’s 24/7 media onslaught, it’s impossible to avoid a constant barrage of messages—both positive and negative—related to change, whether it be in business, politics or the legal profession.

The challenge confronting bar leaders, writer Robert J. Derocher notes, is their willingness to embrace change and aggressively confront sometimes painful programming decisions and to consider new business strategies.

Failure to do so, he warns, puts bar associations at risk.

Despite the challenges, Derocher believes bar associations are well positioned to remain relevant and to make a difference in the lives of current and potential members for years to come.

He cites a number of longtime bar association advisers and strategists to make his case.

“There are fundamental and irreversible changes that have resulted in a totally new landscape for what associations were designed to do,” says veteran strategist Harrison Coerver.

“It’s not that the old model was bad. It’s just a different environment now.”

Continued on page 9
With these challenges, however, also come opportunities for innovation and success.

Michael Rogers, a noted business consultant and columnist, predicts those bar associations that can harness their knowledge of the legal profession and combine it with technology will do well.

Some important strategies to thrive amid change are: fostering the use of technology, offering strong CLE, and involving more young lawyers in leadership positions.

Other trends and opportunities discussed include the trend of more lawyers going solo as well as the continuing drive toward specialization.

Not surprisingly, critical to the effort of managing change starts with having strong board leadership and staff who are ready to take on difficult issues. It also involves talking to and actually “listening” to association members.

Along these lines, the HCBA conducted a membership survey this past spring. The results were presented to the HCBA board at its planning retreat in August.

Among the highlights of the 43-question member survey:

• 85% say they either somewhat or strongly agree the HCBA provides valuable membership benefits and activities.
• 76% say they have taken a CLE course through the HCBA in the last two years.
• 90% say they regularly read the Lawyer.
• HCBA members indicated they have an interest in a wide range of program opportunities, with CLE seminars leading the way.
• The frequency and method of communication also continues to be an important issue for HCBA members.

Typical of the comments made as to why the HCBA was important to them, one member said it is “a great place to build relationships with other lawyers.”

Another responded: “I appreciate the sense of community I feel as an HCBA member.”

As the new executive director for the HCBA, I am committed to preserving the strong organizational values and mission in the community that helped make the HCBA what it is today.

At the same time, we will be considering changes and upgrades in different programs to create even greater value for all HCBA members in the future.

This includes efforts to improve the performance of our Lawyer Referral Service and continued focus on providing quality CLE. It also involves increased attention to new technology and communication with our members through various media platforms, including social media.

I welcome your ideas related to these efforts. Call me directly at 813-221-7775 if you’d like to talk, or email me at jkynes@hillsbar.com.

See you around the Chet.
State Attorney’s Message
Mark A. Ober, State Attorney for the Thirteenth Judicial Circuit

Solicitation vs. Conspiracy

It is most common for solicitors to get caught when they encourage or hire “the wrong person”—someone who has no desire to engage in the criminal conduct with them. The solicitor gets charged, but because the criminal act did not occur, he is not subject to the same punishment as the underlying crime. If the individual encouraged or hired to commit the crime tells the solicitor he agrees to participate, but in reality has no intention of committing the crime, he or she is not guilty of a crime. This scenario happens when an individual believes he or she is hiring a “hit man” to murder someone. “The crime of solicitation is completed when the actor with intent to do so has enticed or encouraged another to commit a crime; the crime need not be completed.” State v. Johnson, 561 So. 2d 1321, 1322 (Fla. 4th DCA 1990).

In cases where a solicitation or conspiracy exists, the perpetrator or perpetrators can relieve themselves of responsibility for the crime if they abandon the plan entirely. That is, if one solicits another to commit a crime, that solicitor must subsequently persuade the other not to commit the crime or take measures to prevent the occurrence of the offense. The same is true in a conspiracy, meaning that those involved must completely abandon the criminal agreement or prevent the commission of the offense.

My office will continue aggressive prosecution of individuals who choose to participate in this type of criminal activity in our community.

Remember those terms? If you are not in the habit of using these terms, it is easy to confuse them or to even believe they are analogous. However, they have very different and distinct meanings.

Solicitation exists when one person commands, encourages, hires, or requests another person to engage in criminal conduct. The person who solicits another is the one who is committing the criminal act. The individual commanded, encouraged, or hired to do the unlawful deed is not subject to prosecution unless that person in turn agrees to do the unlawful act, which would turn the arrangement into a conspiracy. A conspiracy requires an agreement between two people. A conspiracy exists in Florida when two or more people agree to commit a crime. If out-of-court statements are offered to prove the making or terms of a conspiratorial agreement, then they are “verbal acts” not excluded under the hearsay rule. See Charles W. Ehrhardt, Florida Evidence § 801.6 (2011 ed.). The statements are not being introduced to prove the truth of the matter asserted, but because the act of uttering the words gives rise to legal consequences. See Banks v. State, 842 So. 2d 939 (Fla. S. Ct. 2003).
HILLSBOROUGH COUNTY BAR ASSOCIATION

BENEFIT PROVIDERS

Listed below are companies that have agreed to participate as a HCBA Benefit Provider. They offer all HCBA members a special discount or value added service especially for you, an HCBA member.

**AFFINISCAPe** A Law Firm Merchant Account through our benefit provider enables your practice to accept credit cards in a professional manner and in compliance with trust accounting procedures. Why turn away potential clients simply because they can not pay a retainer in advance? Go to http://hillsbar.affiniscape.com for more information.

**THE BANK OF TAMPA** With assets in excess of $975 million, The Bank of Tampa is the largest independently owned bank in Hillsborough County. More than 450 Hillsborough County law firms rely on The Bank of Tampa for their banking and financial services needs. We understand the distinctive needs of legal professionals and have been using our special knowledge and expertise to help attorneys and their practices succeed for more than 25 years. The Bank of Tampa has been the designated financial services benefit provider for the Hillsborough County Bar Association since 2005. For HCBA members, The Bank of Tampa offers a free personal checking account with no minimum monthly balance requirement and no monthly maintenance fee; free standard checks; no foreign ATM fees; no additional surcharge fees incurred at over 1,000 Publix Presto! ATMs; free Visa Check Card with special daily spending and withdrawal limits; Free Personal Online Banking and free CheckFree® Web electronic bill payment service at www.bankoftampa.com, and other HCBA member-only benefits. For more information, contact Jeff Parker, jparker@digitallegal.net, 813.222.1322.

**DIGITAL LEGAL** Digital Legal uses the latest technology to provide electronic discovery and litigation support services. Our consultants can help your firm identify, preserve, collect, process, review, produce and present electronic evidence. We also create load files for evidence review tools like Summation and Concordance and offer technical assistance with these applications. Our traditional document services include imaging, OCR, coding, copying, & high speed printing. Bar members are entitled to one free hour of technology and project management consulting - a $150 value. Contact Jud Parker, jparker@digitallegal.net, 813.222.1322.

**FREEDMAN’S OFFICE SUPPLIES** On the 10th (if the 10th falls on a Saturday or Sunday the discount would be honored on the Friday before) of every month, Freedman’s offers 10% off your entire order: anything out of its supply catalog (over 30,000 items). Freedman’s provides a free price analysis specific to your account, a free usage report (every three months). Freedman’s will look at all of your buying habits to see if there is opportunity to save you money and provide each account with a local Sales Representative and a local Customer Service Representative. Each account has a personal driver. Your driver will place your product in the desired area. Freedman’s also provides home-made cookies baked daily just to say thank you for being a Freedman’s Customer. Contact: Tracey Bastic, tbastic@freedmansonline.com or 813-882-0032.

**GUARDIAN LIFE INSURANCE COMPANY** The Nation’s Premier Individual Disability Income Policy for Attorneys is now available to HCBA Members... with an exclusive 10% permanent discount! Long recognized as the nation’s premier disability income protection plan for attorneys, The Guardian Individual Disability plan leads the industry with its “true own occupation” definition of disability, high benefit limits and other forward thinking features that will ensure your peace of mind now and as your practice grows. To learn more, contact Jeffrey D. Brown, Program Coordinator, at the Guardian’s West Central Florida agency (813) 289-8500.

**JOHN BOYER, INC.** offers HCBA members a permanent 15% reduction in asset management fees and will waive the initial financial planning fee for new clients. John Boyer, Inc. is an independently owned fee-based Registered Investment Advisor. The firm’s mission is to simplify its clients’ lives by getting their financial house in order. It offers a full range of personalized financial services, from retirement, estate and tax planning to investment management, asset protection and wealth preservation. Principal John Boyer, who established the firm in 1995, is a Certified Financial Planner with over 20 years of experience. Contact Terrell Boone, Wealth Advisor at 813-254-9500 or Terrell@johnboyerinc.com.

**LNS TECHNOLOGIES** is a leader in IT & Network Systems infrastructure services and solutions. Since 1994, LNS has consistently provided our legal clients with the latest technology and support tools allowing their businesses to operate efficiently. LNS Technologies’ scalable, IT solutions and services increase productivity, reduce costs, and optimize asset utilization to derive maximum value from your IT investment. All HCBA members receive a FREE computer and network system health check upon request. Please contact Sales at (813) 221-1315, or email your request or requirement to: info@LNStech.com. Visit our website at: http://www.LNStech.com.

**SALTMARSH, CLEAVELAND & GUND** Saltmarsh, Cleaveland & Gund is now a HCBA Benefit Provider! Saltmarsh offers HCBA members a 10% discount off standard hourly rates on all Litigation Support and Business Valuation Services. Founded in 1944, Saltmarsh is a large regional full-service accounting and consulting firm, which has developed a special niche in providing services to attorneys and law firms. www.saltmarshcpa.com *Regulated by the State of Florida. Contact Lee Bell (813) 287-1111.

**THOMPSON STUDIOS** We are proud to offer you an excellent photography resource for all law firms and individual photos. Thompson Studios is an all-digital, world-class photography studio. In studio or on location, we will capture all your photographic visions... and we guarantee you’ll have fun doing it. Thompson Studios will come to your office for firm photos and headshots for your convenience. As a HCBA member, we offer you $100 off your location photo session. Keep us in mind for holiday and special occasion photos as well. Please contact Kim at Thompson Studios at 813-994-2000.

**Trial Consulting Services, LLC (TCS)** provides wide-ranging services and solutions to support every aspect of your case. Our services include exhibit boards, trial graphics, animation, medical illustrations, electronic trial presentation, video depositions, DVT, mock trials, CLE seminars and more. Our expert team is experienced in all practice areas of law. Visit our website at www.trialcs.com for a complete listing of services and testimonials. All HCBA members receive a 10% discount on all trial research including mock trials.

**YTB TRAVEL SERVICES** Book your travel where it makes a difference! Visit the Hillsborough County Bar Association travel website at: www.ytbtravel.com/hillsbar • You’ll find the same airlines, hotels, rental cars, cruises and more. • You’ll get deeply discounted travel prices! • Each time you book travel, a portion of the travel commissions will go to HCBA! It’s that simple! www.ytbtravel.com/hillsbar. Use this website for all your travel needs as well as sending flowers and gift baskets and purchasing concert and event tickets.
Since the inception of the Thirteenth Circuit RMFMP on August 2, 2010, over 5,500 residential mortgage foreclosure cases have been filed in Hillsborough County.

The Hillsborough County Bar Foundation, the Program Manager of the Residential Mortgage Foreclosure Mediation Program (“RMFMP”), extends its thanks to the judges, mediators, attorneys, and homeowners who have helped make the first year of the program a success.

The RMFMP was created by the Florida Supreme Court as a mechanism to assist homeowners facing foreclosure and to serve as a case management tool assisting the Court with the large volume of foreclosure cases filed in recent years. Each of the twenty circuits adopted an Administrative Order, based on a Florida Supreme Court Administrative Order, defining their respective programs. Locally, Administrative Order S-2011-010 governs the Thirteenth Circuit’s Program. Foreclosure cases involving a residential homestead property are required to be referred into the RMFMP. Each borrower participates in financial counseling, conducted by a HUD certified credit counselor through our business partner, the Center for Financial Counseling. Documents are exchanged before mediation is conducted.

Since the inception of the Thirteenth Circuit RMFMP on August 2, 2010, over 5,500 residential mortgage foreclosure cases have been filed in Hillsborough County. The RMFMP conducted its 500th mediation in September 2011. In order

Continued on page 13
Continued from page 12

to make the next 500 mediations even more successful, here are some tips for attorneys and mediators involved in the RMFMP:

Defense Attorneys

- Serve the Program Manager with a Notice of Appearance to facilitate your client’s participation in the program. If you do not, the Program Manager will not know to contact you on behalf of your client and will assume your client is not represented by counsel.
- Advise the Program Manager if your client will not be participating in the RMFMP in order to facilitate the progression of the case.
- Submit updated financials from your client prior to mediation so the Program Manager can supply them to the lender.

Plaintiff Attorneys

- Submit accurate contact information for the borrower and notify the Program Manager directly if you obtain new information. Note, pursuant to Thirteenth Judicial Circuit Administrative Order S-2011-010, the RMFMP timeframes will be held in abeyance until complete and accurate borrower information is provided.
- Requests for additional financial documents should be forwarded to the Program Manager prior to mediation to allow time for collection of information. Note, the borrower is only required to submit the information noted in the Administrative Order.
- Comply with a borrower’s request for plaintiff’s disclosure to avoid cancelled mediations, payment of additional fees, and/or Notices of Non-Compliance being filed with the Court.

Mediators

- Review Mediator Ethics Advisory Committee (MEAC) opinions pertaining to the RMFMP.
- Be familiar with the various workout options available to borrowers.
- Recall your obligation to attend a second mediation session, if required, even though you will not receive payment for the second session.
- Be patient if you have not been assigned a case. Our pool of mediators is large, thereby preventing swift rotation.

Unfortunately, the foreclosure crisis is not over. The Program Managers throughout the state of Florida regularly meet to discuss the RMFMP to improve the program. We value your opinions. Please contact us if you have any ideas for improvement.

Authors:
Kristen A. Foltz and Darlene L. Kelly,
Hillsborough County Bar Foundation

---

Providing Forensic Accounting and Litigation Support to the Tampa Bay Legal Community since 1985
PERZEL & LARA FORENSIC CPA’S, P.A.
Hillsborough 813-891-4100 Pinellas 727-466-0777
www.perzellara.com

Certified in Business Valuations, Forensic Investigation, & Economic Damages

<table>
<thead>
<tr>
<th>Business Valuations</th>
<th>Family Law</th>
<th>Forensic Investigation</th>
<th>Litigation / Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Built-in Gains Tax</td>
<td>Allimony &amp; Child Support</td>
<td>Complex Fraud Schemes</td>
<td>Criminal/Civil Litigation Support</td>
</tr>
<tr>
<td>Divorce Litigation</td>
<td>Business Valuation</td>
<td>Embezzlement</td>
<td>Damage Claims</td>
</tr>
<tr>
<td>Estate &amp; gift taxes</td>
<td>Division of Marital Assets</td>
<td>Hidden Asset Tracing</td>
<td>Economic Loss Analysis</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>Financial Affidavit</td>
<td>Money Laundering</td>
<td>Insurance Claims</td>
</tr>
<tr>
<td>Goodwill Valuations</td>
<td>Lifestyle Analysis</td>
<td>Mortgage Fraud</td>
<td>Breach of Contract</td>
</tr>
<tr>
<td>Mergers &amp; acquisitions</td>
<td>Pension Valuation Allocation</td>
<td>Ponzi Schemes</td>
<td>Lost Profit Analysis</td>
</tr>
<tr>
<td>Minority Discounts</td>
<td>Settlement Planning</td>
<td>Securities Fraud</td>
<td>Patent, Trademark , Cyber Piracy</td>
</tr>
<tr>
<td>Patent, trademark</td>
<td>Tax Analysis</td>
<td>shareholder/partner Disputes</td>
<td>Personal Injury</td>
</tr>
<tr>
<td>Shareholder/Partner Disputes</td>
<td>Tracing Hidden Assets</td>
<td>Fraud Deterrence</td>
<td>shareholder/partner Disputes</td>
</tr>
</tbody>
</table>

---

hillsborough county bar foundation
Russell M. Blain, HCBF President, Stichter, Riedel, Blain & Prosser, P.A.
Marie Folsom Receives Court Family Award

Marie Folsom is the recipient of the 2011 Hillsborough County Bar Association Trial and Litigation Section’s Court Family Award. This award is presented annually to a state or federal court support staff member who has demonstrated ongoing courtesy, consideration, and professionalism towards members of the bar. Ms. Folsom, who has served as my judicial assistant for the past twenty-one years, was presented with the award by Section President Ron Hanes at the Section’s annual awards luncheon on May 3, 2011, at the Chester Ferguson Law Center.

Prior to her tenure as a judicial assistant, Ms. Folsom served as an employee of the Hillsborough County Clerk of Court for eleven years, including assignment as a courtroom deputy clerk to many current and previous members of the Thirteenth Judicial Circuit judiciary. In both her current and past positions, Ms. Folsom has been an exemplary public servant. She is always willing to provide whatever assistance she can to everyone with whom she interacts, including members of the bar, members of the general public, other court staff, and employees of the clerk’s office. She not only extends herself to assist others, but she usually does so with a smile, a witty quip, and a twinkle in her eye.

The Court Family Award holds special significance as it is the only award presented by the Trial and Litigation Section to a non-lawyer. Ms. Folsom is indeed deserving of the award, and congratulations are extended to her for her receipt of this distinguished award.

Author: Hon. Katherine G. Essrig, Circuit Court Judge, Thirteenth Judicial Circuit

THANK YOU TO ASK A LAWYER LIBRARY SERIES VOLUNTEERS

Lyndy Jennings and Linda Faingold

Contact the HCBA Lawyer Referral & Information Service to volunteer!
Call 813-221-7783 or Email Cathy@hillsbar.com
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.
Alley Clark Grewe
Almerico & Mooney
Alvarez Garcia
Arauza Assuncion, LLP
Anthony & Partners, LLC
Anthony J. Spada P.A.
Austin, Ley, Roe & Patkos, P.A.
Baccarella & Baccarella, P.A.
BajoCuva
Banker 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
Broad and Cassel
Buell & Elliott, P.A.
Bush Ross
Butler Pappas Weithruller Katz Craig, LLP
Caglioneone, Miller & Anthony, P.A.
Carey, O'Malley, Whitaker & Mueller, P.A.
Carlton Fields, P.A.
Carman & Corn, 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.
Clark of the Circuit Court's Office
Cody Fowler Davis Trial Attorneys, P.A.
Cordell & Cordell, P.C.
County Attorney's Office
Cristal Law Group
Gross / Mannell Nicholas & Bell, LLP
Dorothy & Murray, P.A.
Davidson McWhirter, P.A.
de la Parte & Gilbert, P.A.
Dennien, Ragano, PLLC
Dennis LeVine & Associates, P.A.
District Court of Appeal
Donica Law Firm, P.A.
Dorman & Gutman, P.L.
Escobar, Ramirez and Associates
Fernandez & Hernandez, LLC
Fet & Gomez, P.A.
Fisher and Frommer
Fisher Law Group
Florida Default Law Group, P.L.
Fowler White Boggs P.A.
Fuentes & Kreischer, P.A.
Fuller Holoonback & Malloy, P.A.
Gallagher Keenan, P.A.
Gardner Brewer Martinez Monfort, P.A.
Gattin & Birch, P.A.
Geyford Merlin Ludovic Diaz & Bain
Genders-Alvarez-Diecidue, P.A.
George & Titus, P.A.
Gibbons, Tucker, Miller, Whatley, & Stein, P.A.
Givens Law Group
Glenn Rasmussen Fogarty & Hacker, P.A.
Guemmer & Ritt
Gunn Law Group
Hancock & Hancock, P.A.
Harmon, Woods, Parker, Hendricks & Abruzo, P.A.
Harris and Hunt, P.A.
Hillsborough County Sheriff's Office
Hill Ward Henderson
Himes & Hearn, P.A.
Hines Norman Hines, P.L.
Holcomb & Matys, P.L.
Hunter Law Group
James, Hoyer, Newcomer & Smijianich, P.A.
Jayne M. Lambert P.A.
Johnson, Fanling, Skafidas & Wright, P.A.
Jeanne T. Tate, P.A.
Johnson, Pope, Bokor, Ruppel & Burns, LLP
Jorgensen & Ozbyowski, P.A.
Joryn Jenkins & Associates
Jung & Slisco, P.A.
Kadyk Deliseis & Espat P.A. Cap Trust
Keith P. Ligot, P.A.
Kels & Oakley, P.L.
Knopik Deskins Law Group
Kunkel, Miller & Hament, P.A.
Kynes, Markman & Freeman, P.A.
Lauro Law Firm
Law Office of Donald P. Decort, P.A.
Law Office of Kevin M. Gilhod
Law Office of Patricia Gomez, P.A.
Law Office of Robert M. Geller
Law Offices of Butler & Boyd, P.A.
Law Offices of Darrin T. Mish, P.A.
Law Offices of Emma Henness, P.A.
Law Offices of Jacob I. Reiber
Leon & Berg, P.A.
Levine, Hirsch, Segall, Mackenzie & Friedsam, P.A.
Lopez, Kelly & Bible, P.A.
Lukas, Sawinicki Perez, Petillo & Gold
Lynette Sion-Laguna, P.A.
Mac A. Greco, Jr., P.A.
Manson Law Group, P.A.
Mark Bentley, P.A.
Marlowe McNabb, P.A.
Martinez, Odom Law Group
Mary Beth Corn, P.A.
McCumber, Daniels, Buntz, Hartig & Puig, P.A.
Michael P. Maddux, P.A.
Mike Murtpurg, P.A.
Morgenstern & Herd, P.A.
Older, Lundy & Weissman, Attorneys at Law
Phillip A. Baumann, P.A.
Pitts & Dowell, Markowitz & Murphy
ReliaQuest Legal Services
Resnick & Serrano, P.A.
Robert W. Driscoll, P.A.
Riet & Ritchie, P.A.
Rommell, Kirk & Caldwell, P.A.
Saday & Saxe, P.A.
Scratt Law Group, P.A.
Schip Law Group
Schrupp Law Firm
Sessions Fishman Nathan & Israel, LLP
Shuck, Hardy & Bacon, LLP
Sioco Law
Sparkman & Sparkman, P.A.
Spector Gadon & Rosen
Stanton Cronin Law Group, P.L.
Stetson University College of Law
Stichter, Riedel, Blain & Prosser, P.A.
Stone & Walder, P.L.
Streiley & Robin
Sykes Enterprises, Inc.
Tampa Law Advocates, P.A.
Terrana Perez & Salgado, P.A.
The Bowes Law Group
The Criminal Defense Group, P.A.
The Davis Law Group, P.A.
The Diecidue Law Firm, P.A.
The Fernandez Firm
The Foster Law Group, P.A.
The Plante Law Group, PLC
The Thorpe Law Firm
Thomas & LoCicero
Thompson & Brooks
Thompson, Sizemore, Gonzalez & Hearing, P.A.
Thorn Whittington, LLP
Thorn | Lawrence, P.L.
Timothy G. Anderson, P.A.
Tison Law Group
Trentalange & Kelley, P.A.
Trombley & Hanes, P.A.
U.S. District Court
United States Bankruptcy Court
Wagner, Vaughan & McLaughlin
Walters Levine Klingsmich & Thomson, P.A.
Walton Lantaff Schroder & Carson LLP
Weekley | Schulte | Valdes, L.L.C.
Wenzel, Fenton, Cabassa, P.A.
Whitney Bard Mediaion Group, Inc.
Wilson Law Group, P.A.
Williams Schifno Mangone & Steady, P.A.

FOR YOUR FIRM TO BE LISTED HERE, CONTACT DAWN McCONNELL, DAWN@HILLSBAR.COM
When your capital works harder
you can rest easier

Improve your cash flow and strengthen your business.
Cash flow is essential to the success of your business. Fifth Third’s comprehensive suite of Cash Management solutions can help maximize your receivables for quicker access to capital. Our local team of experienced business bankers will take the time to listen, so we can recommend a customized solution for your specific business needs. So, let’s start the conversation today. Stop in your local Fifth Third Bank, call us or visit 53.com/workingcapital.

Steven Mitchell
Vice President
Business Banking
(813) 968-2370
Steven.Mitchell@53.com

Fifth Third Bank is proud to support the Hillsborough County Bar Association.
**thirteenth judicial circuit’s pro bono committee**

**Speak Up for Those Who Cannot Speak For Themselves**

The headline you just read comes from Proverbs 31:8. It is the calling of St. Michael’s Legal Center for Women and Children, Inc. (SMLC).

In its fourth year, SMLC is a mission of Christ the King Catholic Church in Tampa and serves persons in Hillsborough, Pinellas, Pasco, Hernando, and Citrus counties. SMLC started as a small teaching project to assist paralegal students in obtaining hands-on experience while assisting women and families in their effort to collect child support. As the needs of the poor became more evident, SMLC expanded the type of cases we handle to include family law, foreclosure defense and other property matters, creditors rights, and bankruptcy. We do not discriminate based on religion, race, color, sex, or national origin.

SMLC provides services to the family who cannot afford legal services and falls into the gap between just above the poverty line and a sustainable family income, the “working poor.” Bay Area Legal Services provides legal services to those whose income is not more than 125% of the poverty level, but many families cannot afford a lawyer, even with a $30,000 annual income for a family of four. For this reason, SMLC chose to set its upper income limit at 225% of the poverty level.

As a pro bono law firm and a mission of the Catholic Church, SMLC is governed by the canons of the Florida Bar and the Catholic Church. When choosing cases, we refer to these two sets of canons.

SMLC has received volunteer support from lawyers, paralegals, non-lawyers, religious organizations, paralegal and criminal justice majors, and law students. It serves as a clearinghouse for lawyers and paralegals interested in providing pro bono services. Our goal is to connect those in need and those who want to provide legal service to the community.

For any great society to sustain itself, its legal system must be open and accessible to all. The challenge for us in the legal system is to make our system fair and accessible to those who cannot afford our services.

SMLC fills a growing need in our society. Although the HCBA and judiciary have taken great strides to assist local pro se litigants, there is a substantial need for the members of our profession to provide pro bono help, because many cases are far beyond the capability of the non-lawyer to litigate. As the demand for our services continues to increase, so does our need for more volunteers. We welcome your inquiries as to how your group can help us meet the goals, objectives, and challenges of providing legal services to the needy. We need help not only from those who are able to provide professional services, but also from community organizations, corporations, and religious institutions. If you or your organization are interested in volunteering or are interested in having one of our staff members speak to your group about our program, please telephone our Director of Volunteers at (813) 289-3585.

For any great society to sustain itself, its legal system must be open and accessible to all. The challenge for us in the legal system is to make our system fair and accessible to those who cannot afford our services. This is the objective SMLC strives to achieve.

**Author:**

*J. Michael Shea, JD, Director of St. Michael’s Legal Center*
TREAD CAREFULLY: PRESERVATION OF ERROR IN FLORIDA
Appellate Practice Section
Co-chairs: Marie A. Borland, Hill Ward Henderson, and Kristin A. Norse, Kynes, Markman & Felman, P.A.

Preservation of error for appeal is crucial. No matter the merits of your case, appeals can rise and fall on whether the ruling you are challenging is properly preserved. And while preservation of error has always been a requirement, recent decisions from the Florida Supreme Court reflect increasing concern for specific and proper preservation. In Aills v. Boemi, 29 So. 3d 1105 (Fla. 2010), the Court concluded that counsel did not preserve his trial objection for appellate review because he was not sufficiently specific in stating his legal objection. During trial, defense counsel objected to plaintiff’s argument in closing that postoperative negligence had occurred, on the grounds that there was no evidentiary basis in the record to support the argument. On appeal, the Second District reversed the trial court’s order denying the defendant’s motion for new trial, but on a different basis: that the issue of postoperative negligence had

Continued on page 19
neither been pled in the complaint nor tried by consent. “The Florida Supreme Court quashed the district court’s ruling, concluding that defense counsel’s objection was not preserved for appellate review because he did not “advance the specific ground of objection relied upon by the district court for reversal.” These expectations of specificity are now par for the course, and Aills has already been cited as requiring specific and accurate objections to preserve issues for appeal. See, e.g., Lewis v. Sun Times Corp., 47 So. 3d 872, 874 n.2 (Fla. 3d DCA 2010).

Not only must objections be specific, but their form must be proper. In Companioni v. City of Tampa, 51 So. 3d 452 (Fla. 2010), the Supreme Court made clear that a party objecting to attorney misconduct during closing argument must also timely move for a mistrial in order to preserve that objection for appeal. Even though defense counsel objected multiple times to misconduct during closing (all of which were sustained), and had moved for a new trial on the basis of those objections, the trial court denied the defendant’s motion because it had not “moved for a mistrial” as well. The district court reversed, concluding that “a motion for a mistrial is not a prerequisite to moving for a new trial.” The Supreme Court disagreed, holding that even when a party’s objection to attorney misconduct is sustained, the party “must also timely move for a mistrial.”

Any trial lawyer should be well aware of the strict guidelines governing preservation of error or should contact an appellate practitioner who can help. Particular rules govern preservation of error in areas ranging from motions in limine and Frye challenges, to jury selection and jury instructions. Making specific and proper objections could be the difference between a well-taken appeal and an appeal rejected in the spirit of Aills and Companioni. Tread carefully.

Author:
J. Logan Murphy,
Hill Ward Henderson
PHILANTHROPY’S MANY FACES
Community Services Committee

The concept of philanthropy includes many types of giving. Most of the time, “philanthropy” is used as synonymous with “fundraising.” Of course, monetary donations are a huge part of philanthropy, but donating time is often the most beneficial philanthropic gesture for both the volunteer and the beneficiary.

The HCBA encourages its members and their law firms to engage in both kinds of philanthropy: fundraising and volunteering. Clearly, it is far simpler to put cash to work. Many needed items must be gathered—cash, new and used goods, food, supplies—and so fundraising focuses on those. The benefits of volunteer involvement, however, are more directly rewarding to the volunteer. It is important to recognize, too, that any successful philanthropic endeavor.

Continued on page 21
Continued from page 20

requires volunteers to put cash donations to work.

Whether you choose to volunteer your time or money, or drive donations, the HCBA encourages you to become actively involved in our community service events this year. Studies show that annual donors can lose interest over time, but that being asked to share their time and talent revitalizes their commitment—even if they do not accept the invitation. It is therefore important to renew our encouragement to past donors to jump in and lend a helping hand.

On that note, the HCBA has several exciting events planned, and there are many opportunities for you to get involved. One event that we recently added to our repertoire is the Day at the Buccaneers to benefit the Foster Angels program. We will be taking 18-20 foster children and their parents to a Buccaneers game, and we will need four to six volunteers to join the families at the game. The Buccaneers are donating 24 tickets for the event. The Bucs have indicated we will likely only get one to two weeks' notice of the game to which we are invited. So, the Foster Angels will be on standby, and we will probably do a first come, first served e-mail to the committee to see who would like to volunteer. Reach out to Sarah Hammett at shammett@saxongilmore.com or Zach Glaser at zglaser@sponslerbennett.com if you would like to be added to the committee’s email list.

As for our recent efforts, the Make a Difference Day event in October was a resounding success again this year. Through donations from HCBA members, we filled 38 veterans’ wish lists. We delivered wish list donations to the veterans at the James A. Haley Veterans Hospital on Make a Difference Day and shared our time with the veterans, many of whom have no living relatives. Special thanks go out to Jan L. Brown and the Tampa Bay Paralegal Association for their above-and-beyond assistance with this worthy event.

Other exciting programs we may help with include Lawyers for Literacy, Alpha House, Dress for Success, Faith Café to Feed the Homeless, and Toys for Tots. Stay tuned for more information and enjoy your Thanksgiving holiday!

Author: Sarah M. Hammett, Saxon, Gilmore, Carraway & Gibbons, PA.
Settlements are common place in complex construction defect litigation disputes due in part to the economy and encouragement of alternative dispute resolution under Chapter 558, Florida Statutes. In many instances, the primary parties to a defect case—the owner and contractor, for example—may settle underlying defect claims, leaving the contractor to “pay and chase” its subcontractors and suppliers for recovery of settlement and defense funds. As a result, downstream common law and/or contractual indemnity claims become key bases for recovery. Florida’s “vouching in” law can serve as a mechanism to lower the burden of proof on indemnity claims from actual liability to potential liability—if certain key factors are met. Every district in Florida applies the general rule of vouching in: “that an indemnitee who has notice of the suit filed against the indemnitee by the injured party and who

Continued on page 23

The Tampa Bay Catholic Lawyers Guild
Cordially Invites You to Attend
THE RED MASS
For Lawyers, Judges, Legal Staff and Law Enforcement of All Religious Affiliations
To be celebrated on
Wednesday, November 30, 2011, 12:00 Noon – 1:00 PM
at
Sacred Heart Catholic Church
509 N. Florida Avenue, Downtown Tampa, Florida

OPEN TO MEMBERS OF ALL FAITHS
The Red Mass for Lawyers, Judges and Legal Staff is a tradition with origins dating back to the 13th Century. It is a celebration that invokes the guidance of the Holy Spirit on the deliberation of the Courts and on the endeavors of all members of the legal profession. As long as the time of Edward I in England, the entire bench and bar, along with government officials, attended this special Mass in procession together at the beginning of each term of Court. The celebrant wore red vestments and the Judges of the High Court wore red robes, hence the popular name, Red Mass. This tradition continues to this day as the U.S. Supreme Court celebrates this Mass annually prior to each new session.

The celebrant, Bishop Robert Lynch is inviting all judges of the Sixth and Thirteenth Judicial Circuits of Florida and the federal Middle District of Florida as guests of honor and as participants in procession with him at the beginning of the liturgy. Bishop Lynch and the Tampa Bay Catholic Lawyers Guild warmly extend invitations to all members of the legal profession and government officials, regardless of religious affiliation, to attend.

Questions? Please call: Karl Stevens, President, Tampa Bay Catholic Lawyers Guild, at (813) 988-0824
is afforded an opportunity to appear and defend it is bound by a judgment rendered against the indemnitee as to all material questions determined by the judgment.” Where the underlying claim is settled for a reasonable amount and the party seeking indemnity provided the indemnitor with notice and an opportunity to defend, then “the party seeking indemnification must establish that the settlement was based on his potential liability to the plaintiff.” If notice and an opportunity to defend were not properly given, or the settlement amount was not reasonable, then “the settling indemnitee must show that it was actually liable to the plaintiff.”

The check list below provides suggested tactics to tee up application of the potential liability burden:

(1) Provide written notice and an opportunity to defend early. For example, include language giving downstream parties notice and an opportunity to defend pre-suit, such as during the Chapter 558 process.
(2) Provide early written notice and opportunity to participate in settlement discussions and mediation. In Camp Dresser, three weeks’ notice of mediation was considered reasonable. Of course, the earlier the notice, the better.
(3) Have your expert ensure that the settlement is reasonable. If an expert is retained at the time of settlement, have the expert confirm that the settlement amount is reasonable prior to entering into the settlement.
(4) Structure the settlement agreement to clearly identify the claims covered. The court will need to have clear evidence that the claim subject to indemnity was included in the settlement.

The benefits of triggering the potential liability burden are significant in construction defect cases. For one, the party seeking recovery may have the opportunity to ride the coat tails of the opposing expert in the underlying defect lawsuit in proving potential liability. In addition, because “it is for the court to determine whether actual liability or potential liability is the indemnitee’s burden,” an indemnitee may obtain settlement leverage or secure early confidence in recovery through dispositive motion practice. Overall, an indemnitee may obtain significant settlement and trial leverage by following the simple steps to trigger the potential liability burden of proof when seeking recovery from downstream indemnitors.

1 Ashtead Group, PLC v. Rentokil Initial, PLC, 7 So. 3d 606, 609 (Fla. 2d DCA 2009). See also Heapy Engineering, LLP v. Pure Lodging, Ltd., 849 So. 2d 424 (Fla. 1st DCA 2003); Atlantic Coast Development Corp. v. Napoleon Steel Contractors, 385 So. 2d 676 (Fla. 3d DCA 1980); Olin’s Rent-A-Car System, Inc. v. Royal Continental Hotels, Inc., 187 So. 2d 349 (Fla. 4th DCA 1966); Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 So. 2d 1072, 1079 (Fla. 5th DCA 2003).
2 Camp Dresser, 853 So. 2d at 1072 (emphasis in original).
3 Id. (emphasis supplied).
4 Id. at 1083. Of course, summary judgment on liability may be a long shot given that “questions pertaining to whether there was ‘potential liability’ often involve questions of fact.” Id. at 1083-1084.

Author: Desiree D. Noisette, Hill Ward Henderson
This is a call for unity. It’s time for all criminal practitioners—prosecutors and defense attorneys alike—to make every effort to work together for the betterment of our criminal courts. We have recently seen why unity is so important.

In July, Florida witnessed a rarity in criminal law: Federal District Court Judge Mary Scriven in *Shelton v. Secretary, Department of Corrections* found that Florida’s drug possession law is facially unconstitutional. An analysis of *Shelton* is beyond the scope of this article. However, suffice it to say, tens of thousands of drug cases all over Florida were potentially impacted by this order.

Immediately, the criminal courts were abuzz about this monumental issue. There were questions as to whether *Shelton* was binding on the circuit courts, whether the issue had already been addressed by Florida’s appellate courts, and how our local judges would rule. There was an even more serious question that went unaddressed: how to mount a coordinated attack on pending drug cases.

Before you could say don’t do it, defense attorneys were filing motions to dismiss before this judge and that, thinking that because a Federal judge said the law was unconstitutional, Tampa’s judges would simply fall in line.

But there had been virtually no discussion amongst the criminal law crowd about analyzing how to best proceed as a group for the benefit of all our clients. There were small throngs of us who valiantly tried to pull everyone together via emails, listservs, phone calls, and text messages. Some participated (including the Office of the Public Defender); some did not. It took weeks to figure out which attorney had filed what motion before what judge. There was one big meeting several weeks after the *Shelton* decision, attended by attorneys and judges from all over the Bay area.

Sadly, it was too late; random motions had already been filed and denied. Ultimately, no Hillsborough county judge has granted a motion to dismiss based on *Shelton*. We’re pretty much done here locally, the issue having been snuffed out as quickly as it flamed up.

We could have done something truly unprecedented on a huge issue like this one. There could have been a concerted effort to approach the judiciary and ask for a consolidated motion hearing to study and review the issue. None of us were ever really on the same page.

The time for a meaningful global dialogue about a critical issue was missed.

Situations calling for unity have come along from time to time (i.e., jail access issues, courthouse security policies, courtroom policies and procedures, etc). When they do, it is critical that criminal law practitioners work together with each other and with the courts to propose global solutions that benefit us all.

This is the very purpose of the Criminal Law section of the HCBA. I urge all criminal practitioners to join the Criminal Law section and get involved. Together, we can find solutions that are in the best interest of justice and our criminal courts.

Author: Joseph C. Bodiford, Bodiford Law, P.A.

Join your colleagues at the Criminal Law Section CLE Seminar on December 7, 2011.
When Law Partners Need Real Estate Partners, They Call Us.

With more than 50 combined years of assisting law firms with their relocations, renegotiations, and renewals, we’re the real estate team trusted by the best firms in the business. Ask your peers about our award-winning results—we’re certain you will like what you hear.

A few of the distinguished law firms we are proud to have represented include:

Akerman Senterfitt – Tallahassee
Barr, Murman & Tonelli, P.A. – Tampa
Fowler White Boggs P.A. – Tampa, Tallahassee,
    Jacksonville, Ft. Lauderdale, Ft. Myers
Macfarlane Ferguson & McMullen, P.A. – Tampa
Squire Sanders – Tampa
Williams Schifino Mangione & Steady, P.A.– Tampa

Contact the market experts.

Andy May
andy.may@cushwake.com
813.204.5305

Barry Oaks
barry.oaks@cushwake.com
813.204.5307

Bill Reeves
bill.reeves@cushwake.com
813.204.5362

Proud to support the Hillsborough County Bar Association.
This year, the Diversity Committee is co-sponsoring an exciting event that reaches out to children with Autism. On December 17, 2011, the Lawyers Autism Awareness Foundation (LAAF) is holding a Sensory Friendly Santa event at the Chester H. Ferguson Law Center.

Autism is a neurological disorder characterized by impaired social communications, processing deficits and other restrictive or repetitive behavior. Autism is believed to affect 1 in 110 children, including 1 in 70 boys.

Many children on the Autism spectrum suffer from Sensory Processing Disorders. Because of this, many of these children and their families rarely leave their homes for family outings that we often take for granted. Events like going to church, the mall or a baseball game are often out of reach for these families.

Therefore, at the Sensory Friendly Santa event, children with Autism will enjoy a “sensory friendly” atmosphere allowing them to participate in what so many children who celebrate the Christmas tradition take for granted: Sitting on Santa’s lap and telling him what they want for Christmas.

As one can imagine, this is a gift not only for the children, but also for their families. While nobody knows for certain what causes Autism, we do know that Autism can cause helplessness, isolation and dislocation. Many parents feel helpless against a condition that they never anticipated. The autistic child may experience isolation, as such children often suffer disproportionately from bullying and ridicule. The result is a sense of dislocation for many families dealing with unprecedented challenges.

Numerous organizations, including many generous law firms, understand we all have a stake in helping those with special needs and have come together to raise funds for this event. Groups as diverse as the Tampa Firefighters Local 754, the Ferguson White American Inns of Court and the Center for Special Needs Trust Administration also have taken a stand for children with Autism spectrum disorders. In addition to the Sensory Friendly Santa event, LAAF will fund grants for children with Autism who need basic behavioral, speech and occupational therapy but, due to inadequate insurance, are unable to afford this.

We write this column as proud parents of young boys who have been diagnosed with Autism.

Authors:
Luis E. Viera, Ogden & Sullivan, P.A., and Jorge Santeiro Jr. (shown), Kubicki Draper

spectrum disorders. Our boys have made miraculous gains thanks to the love of family and the very therapies for which we are raising funds.

This is a cause that is central to the mission of the Diversity Committee. Just as we should be mindful of differences based on race or gender in our profession, we should also be mindful of the physical and mental limitations that many have. In the HCBA, there are many attorneys with children and other family members with special needs, including those with Autism, Down’s Syndrome or a developmental disability. It is important that we acknowledge their work, sacrifice and unique love.

Therefore, with your help and continued fundraising efforts, our Bar will make great strides towards improving the lives of children with Autism in our community.

LOCAL BAR TAKES STAND FOR CHILDREN WITH AUTISM
Diversity Committee
Many homeowners who took out mortgages for the purchase/ refinancing of homes during the housing boom now find themselves in a tenuous position: the balance of what is owed to the mortgagee is greater than the value of the home itself. Whether or not a homeowner decides to walk away from a house that is “upside-down” is a decision many homeowners are faced with; a decision that a homeowner gets to make after weighing all of the factors involved (can they procure a short sale, will they face a deficiency judgment, etc.) But what if the homeowner isn’t able to make that decision? What if a condemning authority decides that such a homeowner’s property is needed for a public purpose and decides to exercise its Eminent Domain power and take that property?

Article X, Section 6 of the Florida Constitution requires that “full compensation” be paid to an owner of property whose land is taken by a condemning authority. This provision seeks to ensure that the homeowner is fairly compensated and is “made whole.”

Jacksonville Expressway Authority v. Henry G. Dupree Co., 108 So.2d 289 (Fla. 1959). Practically speaking, when an Eminent Domain case is settled at mediation or decided by a jury, the compensation paid to a homeowner often boils down to a battle of expert appraisers. Section 73.091(1) of the Florida Statutes allows for a landowner to hire an expert appraiser and calls for the condemning authority to pay for that appraiser’s services. The condemning authority generally hires an independent appraiser to value the property as well.

Furthermore, in almost every mortgage there is what is known as a Condemnation Clause which allows the mortgagee to recover any award paid to a borrower/homeowner for an Eminent Domain taking up to the value of the balance owed on the mortgage. If both appraisers assess the fair market value of a property and that value is less than what is owed on the balance of the mortgage, a “taking” leaves the mortgagee with an award that is less than what is owed to them. The mortgagee may then seek a deficiency judgment against the borrower/homeowner who lost his property to the condemning authority even though that borrower had every intention of continuing to pay down the balance of the mortgage. 

Shavers v. Duval County, 73 So.2d 684 (Fla. 1954) states that when a taking happens, a mortgagee must “look to the money instead of the real estate” but does not speak to a deficiency against the mortgagor, because in that case, the value of the property satisfied the mortgage.

Because the statutory and common law have not directly addressed this issue, determining just compensation for a homeowner in this situation remains unclear. Ultimately, a government agency exercising Eminent Domain powers (especially one with a voting constituency) needs to contemplate earnestly the ramifications of leaving a taxpayer in its jurisdiction facing a deficiency if the award paid to a property owner is less than what is owed to a mortgagee.

Author: Daniel R. Feinman, Esq., Kass Shuler, PA.

Save the Date – Eminent Domain CLE Luncheon – December 7, 2011
The career of Warren Hope Dawson proves that perseverance can be an important quality of leadership. From Warren’s beginnings in the small Polk County town of Mulberry, to a student leader at Florida A & M, to his leadership as a commissioned officer in the Army, to championing civil rights and furthering minority representation in the Florida Legislature, Warren has persevered. Among Warren’s most impressive long term efforts was his 27-plus years as lead counsel in a school desegregation case; but we’re getting ahead.

Growing up in the era when racial segregation was the rule, Warren attended public schools in Polk County. He went on to be only the second black graduate of a Polk County

Continued on page 29
Warren was a commissioned officer in the United States Army, serving on active duty from 1961 to 1963. He demonstrated leadership first as a platoon leader and later as a company commander. After the Army came law school, and in 1966, a return to the Tampa area as a lawyer for the National Labor Relations Board (NLRB). In 1967, Warren began serving as an assistant city attorney for the city of Tampa—a first for a black lawyer in the south.

In 1974, Warren began a 27 year journey as legal counsel in the case Manning v. The School Board to ensure balanced integration in Hillsborough County public schools. In the early 1980’s, in a first degree murder case, State of Florida v. Nathaniel Sanders, he successfully attacked the racially discriminatory process of selecting a grand jury foreman.

Continued from page 28

Warren was a commissioned officer in the United States Army, serving on active duty from 1961 to 1963. He demonstrated leadership first as a platoon leader and later as a company commander. After the Army came law school, and in 1966, a return to the Tampa area as a lawyer for the National Labor Relations Board (NLRB). In 1967, Warren began serving as an assistant city attorney for the city of Tampa—a first for a black lawyer in the south.

In 1974, Warren began a 27 year journey as legal counsel in the case Manning v. The School Board to ensure balanced integration in Hillsborough County public schools. In the early 1980’s, in a first degree murder case, State of Florida v. Nathaniel Sanders, he successfully attacked the racially discriminatory process of selecting a grand jury foreman.

Continued on page 30
Beginning in 1980, Warren informally commenced an effort to change how the local city and county officials were elected. In 1988, he formally intervened in a federal voting rights case, Warren v. City of Tampa, and greatly influenced the abolition of at-large elections of the Tampa City Council and the Hillsborough County Commission. In similar fashion, but without the necessity of a lawsuit, Warren also co-led the successful effort to persuade the Florida Legislature to change from multi-district to single member districts, leading directly to greater minority representation on the Council, the Commission, and in both houses of the Florida Legislature. In the arena of community advocacy, he significantly contributed (without being a member) to the good decision of Ye Mystic Krewe Of Gasparilla to diversify its membership. He motivated the city as a whole to reject the idea of downtown Tampa hosting a for-profit attraction that was to feature a ship previously used to transport African slaves. Over the years, Warren, like most leaders, has shown real courage. He has never been afraid to speak up, including in the presence of perceived power.

Warren’s broad legal career has also included serving as President of the National Bar Association, the Howard University National Law Alumni Association, and a cooperating attorney with the NAACP Legal Defense & Education Fund, Inc. Ebony magazine recognized him as one of the “100 Most Influential Blacks In America.”

On the subject of deserved recognition, Florida Agricultural and Mechanical University (FAMU) honored Warren Hope Dawson when it conferred upon him the Degree, Honorary Doctorate of Humane Letters at its recent Summer Commencement. That degree reiterated what those familiar with Warren and his accomplishments already knew: he is widely recognized as a leader—and in particular—as a leader committed to the pursuit of justice and equality for all.

Our former HCBA presidents speak of Warren’s positive impact. Terrell Sessums has know Warren.
for many years—since Terrell’s days in the Senate. He describes Warren as hard-working and energetic, active as a lawyer and in the community, and well-deserving of the recent honor bestowed by FAMU.

William Reece Smith has served as president of the HCBA, the Florida Bar, and the American Bar Association. Reece observes that, at times, Warren has been viewed as controversial, but his influence on the legal community and community at large has been positive. He has done many good things and is recognized as a lawyer who strives to represent his clients well.

Past HCBA and Florida Bar President David Shear says, “Warren has been a longtime colleague and friend whom I have always admired. He has been forthright and spoken with a clear voice regarding his commitments to the community and to fairness and equality for all. It is a privilege for me to be associated with him.”

James A. Hammond Elementary School in northwest Hillsborough County is named after James Hammond, who was born in Tampa, is retired from the military, and has been active in the community all life. Mr. Hammond has known Warren since Warren came to Tampa. He describes Warren as courageous in dealing with serious discriminatory issues that many might have shied away from, and creating positive changes in Tampa. He notes Warren came from a modest background and pulled himself up by the bootstraps—even though he may not have had boots at the time. He observes Warren’s contributions to our community are not limited to the legal arena, but include assisting local kids.

That many of our younger members have not known the type of discrimination that existed when Warren Dawson was growing up is due in part to his leadership in our legal community and our community as a whole. Both have benefitted from his perseverance.

Author:
Raymond T. (Tom) Elligett, Jr., Buell & Elligett, P.A.
Cases in other states?

If you need the resources of a national law firm, with coast-to-coast experience, then consider Wilkes & McHugh, P.A. With lawyers presently licensed in 23 states, we may have the financial and technical resources you need to successfully represent your clients — even those who are thousands of miles away.

Wilkes & McHugh, P.A. has been handling serious injury, medical malpractice, nursing home abuse, wrongful death and trucking accident cases for over 25 years — and we’re still going strong!

We are pleased to offer referral fees as permitted by the Florida Bar as well as appropriate state bars throughout the country.

Serious Injury.
Wrongful Death.
Trucking Accidents.
Nursing Home Abuse & Neglect.
Wilkes & McHugh, P.A.
has you covered.

Lawyers licensed in 23 states.

Coverage of nearly 70% of the U.S. population.

Offices in 7 states.

25 years

WILKES & McHUGH, P.A.

800.255.5070

www.wilkesmchugh.com

One North Dale Mabry Highway, Suite 800, Tampa, Florida 33609

Lexington, KY | Little Rock, AR | Los Angeles, CA | Memphis, TN
Philadelphia, PA | Phoenix, AZ | Pittsburgh, PA | Tampa, FL | Tucson, AZ

With lawyers licensed in 23 states.
3,000 hours
$150,000 costs
5-year recovery horizon

Can you afford to litigate brain and spine injuries?

Brain and spinal injuries are complex, expensive and time-consuming matters. As specialists in head, neck and back injuries, the attorneys—and support staff—of Clark & Martino have the expertise, knowledge and manpower to pursue multi-million dollar results.

Over the past 5 years, we’ve paid more than $5 million in referrals.* In many cases, the referral fees are more than the referring attorney would have recovered on their own. Plainly, turning over the case to Clark & Martino can be the smart decision for your clients and firm.

When a valued client comes to you after an accident that may have caused brain or spine injury, the best way you can help them is by referring them to us now. Rest assured, you can do that with complete confidence in our abilities and integrity.

Visit CMreferral.com to learn more about our practice, attorneys and record.

813-579-4603 · www.CMreferral.com

* Referral fees paid in accordance with Rule 4-1.5 of the Florida Bar Rules of Professional Conduct.
On November 17, 2011, the Hillsborough County Bar Association is sponsoring its Fifteenth Annual Bench Bar Conference. The theme of this year’s conference, Partners in Justice: Meeting Our Challenges, seeks to explore the new changes and challenges to the judicial system and to the practice of our profession as we proceed through the second decade of the new millennium. The Bench Bar Conference is designed to give lawyers and judges an opportunity to get together to share their thoughts, concerns and expectations candidly, and to discuss ways to improve our judicial system, particularly this year in light of our economy, and the use of media, social media and electronic information.

Collaboration between the bench and bar, fostering our shared commitment to improving the administration of justice, enhancing the rule of law, and practicing

Continued on page 36
Continued from page 35

with professionalism (fairness, integrity and civility) are important goals that the HCBA promotes with this conference.

This year, for the second time, we are very excited to offer a large variety of breakout sessions at the conference. Attendees can select their own “course” from a variety of offerings. Each course includes a qualified faculty and one or more members of the judiciary.

In the morning, the breakout sessions will focus on offering advice and counsel designed for paralegals, legal assistants, legal administrators, judicial assistants and attorneys who are fairly new to practice. From 8:30 A.M. to 11:30 A.M., the subject matters of the eight breakout sessions will include e-filing in federal and state courts, writing and managing email, cyber investigations, juror use of electronic communications, ethics, legal IT, and basics of the Rules of Civil Procedure and basics of preparation for any court appearances. We urge all attorneys and firm administrators to encourage their support staff and new lawyers to join us for the morning breakout sessions.

Our regular HCBA Membership luncheon is from 12:00 P.M. - 1:00 P.M.

In the afternoon, we are offering eight breakout sessions for all practitioners. Judges and attorneys will offer insight into a variety of practice areas, such as family law, real property probate and trust law, worker’s compensation, bankruptcy and foreclosure, and appellate practice. These sessions all promise to be timely and relevant to your practice.

The closing plenary session features a panel to lead discussions about our profession as we appear to the public in various media. The panel is comprised of Sue Carlton St. Pete Times), Warren Elly (formerly Fox 13), Hon. George Greer (6th Judicial Circuit, retired), John Fitzgibbons, Esq., and Chief Jane Castor (Tampa Police Department). The panel will discuss our roles as partners in justice, the tensions between the media and the courts, the ethical issues facing attorneys and judges in our relationship with the media, and the media’s influence on our jobs. Conference participants and judges will be seated together to discuss the issues raised by the panel. Be sure to come with questions you would like to pose to panel members because we will have time for questions from the audience.

This Conference’s goals seek to keep the channels of communication open between the bench and bar, with its primary focus on improving the justice system for all. Working together, we can make positive changes in our court system. Please join us as we continue to strengthen the bond between the bench and bar and to prepare the system to best meet the coming external and internal challenges to our profession. 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.

Authors: HCBA Bench/Bar Committee Co-chairs: The Hon. Emily A. Peacock and The Hon. Caroline J. Tesche, 13th Judicial Circuit
You can trust us with your most valuable asset.
Your reputation.

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

The attorneys of Cody Fowler Davis are among the most credentialed and trial-experienced personal injury advocates in Florida. We built our knowledge and experience predominantly representing defendants – now we focus on plaintiffs. Our deep, first-hand knowledge of how insurers evaluate, negotiate, defend and resolve claims is an invaluable advantage that keeps us one step ahead.

Cody Fowler Davis has the resources to pursue high value cases to the best possible outcome. Our personal management of all cases keeps our clients informed, involved and confident. Our professionalism, respect and diligence is a positive reflection on you.

Call 813-425-1518 to speak to Cody Davis or Jonathan Brozyna. Or visit CFDreferral.com to learn more about their practice, certifications and experience.

Referral fees paid in accordance with rule 4-1.5 of the Florida Bar Rules of Professional Conduct.
Hillsborough County Bar Association
Invites You to Attend Its
15th Annual Bench Bar Conference
“Partners in Justice: Meeting our Challenges”
November 17, 2011
Hyatt Regency Tampa Downtown

Morning Session: 8:30 a.m. – 11:30 a.m.
Young Lawyers, Paralegals, Legal Assistants, Legal Administrators, Judicial Assistants

Session A (9:30 – 10:20):
The Thirteenth Judicial Circuit’s New E-Filing System
Things You Should Know Before Coming to Civil Court
Cyber Investigations and Its Impact on Today’s Law Firms
Compelling E-Mail Communications for Today’s Law Firm Professional

Session B (10:30 – 11:20):
Is “Just Say No” Adequate? – Juror Use of Electronic Communications
Rules of Civil Procedure 101
The New Litigation Support Project Management Toolbox
Every Day Ethical Considerations – What We Should all Know

Afternoon Session: 1:30 p.m. – 5:30 p.m.
Attorneys and Judges

Session A (1:30 – 2:20):
Pitfalls in Practice and Procedure in Tampa Workers’ Compensation Cases, E-Filing,
New Rule Proposals and the WC/Circuit Civil Litigation Interface
Ethics and Professionalism in Family Law Practice
Electronic Evidence: Authentication and Admissibility
Nuts and Bolts Symposium for Probate, Guardianship & Trust Attorneys

Session B (2:30 – 3:20):
Play it Safe and Secure for You, Your Staff and Your Clients
Myths, Obstacles and Solutions in Resolving Homeowner Mortgage Debts in State and
Bankruptcy Courts for Consumer Plaintiff’s, Defendant’s and Family Law Attorneys
Preparing Error-Free Orders and Judgments
Mastering the Rules to Perfect Your Game

Afternoon Plenary(3:30 - 5:30):
A Panel Discussion on the Role of Media and Ethics in Our Justice System
Featuring: Sue Carlton, St. Petersburg Times; Warren Elly, formerly Fox 13;
Chief Jane Castor, Tampa Police Department; John Fitzgibbons, Esq. and
The Honorable George W. Greer, 6th Judicial Circuit Retired

Join us for the HCBA Membership Luncheon at 12:00 p.m. and Judicial Reception at 5:30 p.m. too!

Please visit www.hillsbar.com or call 813-221-7777 for more information.
Thank you to our

Bench Bar Sponsors!

**Diamond**
- The Yerrid Law Firm

**Platinum**
- The Bank of Tampa
- Bricklemyer Smolker & Bolves, P.A.
- Community Bank
- Trial Consulting Services, Inc.
- Trial & Litigation Section
- Wagner, Vaughan & McLaughlin, P.A.
- Williams Schifino Mangione & Steady P.A.

**Gold**
- Butler Pappas Weihmuller Katz Craig LLP
- Clark & Martino, P.A.
- DLA Piper LLP (US)
- Givens Law Group
- Hill Ward Henderson P.A.
- LexisNexis
- Mason Black & Caballero PA
- Mills Paskерт Divers
- Shook, Hardy & Bacon L.L.P.
- Shumaker, Loop & Kendrick, LLP

**Silver**
- Addison & Howard, P.A.
- Bush Ross, PA
- Carlton Fields
- Cole, Scott & Kissane, P.A.
- Danahy & Murray PA
- GrayRobinson, P.A.
- Harris and Hunt, P.A.
- John Boyer, Inc.
- Johnson Pope Bokor Ruppel & Burns, LLP
- Kynes, Markman & Felman, P.A.
- Ogden Sullivan & O’Connor, PA

**Bronze**
- Buell & Eligett
- Law Office of Robert J. Nader
- Rumberger, Kirk & Caldwell, P.A.

Support the Bench Bar – Become a Sponsor!
Call 813-221-7779 or Email dawn@hillsbar.com
Dynamic and Forward Thinking

With skill and confidence, the attorneys of Williams Schifino assist their clients to achieve optimal results in the face of almost any corporate challenge. Our expertise and passion are embodied by our attorneys named to this year’s Best Lawyers® list.

Congratulations to William J. Schifino, Jr. on being selected as a Best Lawyer® for Commercial Litigation and Litigation- Securities.

Congratulations to Scott I. Steady on being selected as a Best Lawyer® for Environmental Law.

Congratulations to Robert M. Stoler on being selected as a Best Lawyer® for Personal Injury Litigation.

Client-Driven. Results-Focused.

Williams Schifino Mangione & Steady, P.A. is a corporate law firm serving the Gulf Coast business community in:

Litigation • Land Use and Zoning • Business Transactions • Real Estate and Lending • Securities • Environmental

One Tampa City Center  Suite 3200  Tampa, Florida 33602  (813) 221-2626  wmslaw.com
November 2011

HCBA Calendar of Events

Sun  Mon  Tue  Wed  Thu  Fri  Sat
1  2  3  4  5
12:00 - 1:00 p.m.  7:00 - 9:00 a.m.  
Health Care Law  Ask A Lawyer  
Lunch & CLE  Fox Channel 13
12:00 - 1:00 p.m.  8:00 a.m. -  
Intellectual  Military Liaison  
Property Lunch  Committee CLE
1:00 - 5:00 p.m.  12:00 p.m.  
Intellectual  Real Property  
Property CLE  Probate & Trust

6  7  8  9  10  11  12
Election Day  12:00 - 1:00 p.m.  12:00 - 1:00 p.m.  12:00 - 1:00 p.m.
Judicial  Solo & Small  Real Property  
Luncheon & CLE  Firm Lunch &  Probate & Trust

13  14  15  16  17  18  19
12:00 - 1:00 p.m.  12:00 - 1:00 p.m.  8:30 a.m. - 5:30 p.m.
Senior Council  Construction  Bench Bar  
Lunch  Law Lunch &  Conference &  
CLE  Judicial  Budgeting (Hyatt)
Reception (Hyatt)  12:00 - 1:00 p.m.
Family Law  Membership  
Quarterly Lunch  Luncheon (Hyatt)

20  21  22  23  24  25  26

27  28  29  30

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 are held at the Chester H. Ferguson Law Center unless otherwise noted.
BACKGROUND CONCENTRATIONS IN GROUNDWATER
Environmental and Land Use Section

In March 2009, the Florida Department of Environmental Protection (FDEP) published a draft guidance document describing procedures for comparing background concentrations of groundwater constituents to site chemical concentrations (Draft Guidance for Comparing Background and Site Chemical Concentrations in Groundwater, FDEP, March 2009). The guidance, which remains draft, is particularly applicable when site constituents of concern (COC) are suspected of being present at concentrations above various criteria, including naturally occurring levels or concentrations that are endemic to the geographic area due to man-made enrichment (termed “anthropogenic background concentration”). However, the guidance is not widely publicized and applied.

The FDEP’s proposed process to evaluate background groundwater concentrations compared with site concentrations includes the following key elements:

Continued on page 43
BACKGROUND CONCENTRATIONS IN GROUNDWATER
Environmental and Land Use Section

Continued from page 42

- Background sampling locations should be geographically close to the investigation site but not within areas suspected to be impacted by site activities or other specific activities, except for regionally-broad conditions.
- Monitoring wells used to establish background conditions should be located hydraulically up gradient or side gradient to the investigation site and the well screen intervals must be comparable with those wells used to establish onsite groundwater quality.
- Groundwater sampling is to be conducted for the COCs suspected of being naturally occurring from three background groundwater monitoring wells generally on a quarterly basis for a one-year period.
- The sampling protocols must match the FDEP standard operating procedures or alternative procedures approved for the site investigation.
- General background studies published in the literature cannot be used as the basis of comparison with site concentrations except to evaluate if site-specific data are within the range of observed values for the region. In other words, published literature alone, without conducting a site-specific background investigation, cannot be used to establish if certain COCs are naturally occurring or are at anthropogenic background concentrations. Data sets that meet the aforementioned conditions are evaluated using a “basic approach” or statistically. The basic approach defines the upper end of the range of background concentrations as the lower of either the maximum background concentration or twice the mean background concentration. Statistical methods may vary and certain methods are described in the draft guidance.

Golder has applied the draft guidance for several projects; each is pending FDEP concurrence on the proposed background concretions. In one case, a COC may be deleted from ongoing monitoring at a manufacturing facility and a site-specific background concentration for a second COC may be used, which will result in the reduction in size of a contaminant plume, compared to the contaminant plume size based on groundwater cleanup target levels listed in Chapter 62-777, FAC. In another case, the newly established background concentrations for COCs may result in the approval or conditional approval of mine reclamation.

Author: Douglas Grant, Golder & Associates, Inc.

Senior Council Luncheon

Susan A. MacManus, Ph.D., Distinguished Professor of Public Administration and Political Science at USF, and renowned author and media analyst, was the featured speaker at the Senior Council Section Luncheon on September 13, 2011. “The Current Political Landscape” was the topic for the event held at the Chester H. Ferguson Law Center.

Dr. MacManus (center) is pictured with Richard C. Woltmann and Judge Donald C. Evans, co-chairs of the Senior Council.
In what may signal a turning of the tide of troll litigation, the Federal Circuit recently upheld an order awarding more than $600,000 in legal fees to the defendant in a patent infringement suit. *Eon-Net, L.P. v. Flagstar Bancorp*, Fed. Cir. No. 2009-1308 (July 29, 2011). “Troll” is a euphemism for a company whose only business is filing infringement suits. The more polite term is “non-practicing entities” (“NPEs”), because they do not practice their intellectual property (“IP”) themselves by offering goods or services. Instead, their sole business is to obtain IP rights (usually patents), and then file, or threaten to file, infringement claims against defendants engaged in more traditional commerce. In most cases, the NPE offers to settle early for a licensing fee that is substantially less than litigation costs. Economically, it’s “a deal you can’t refuse,” and most defendants pay the fee, even when they have excellent non-infringement and invalidity arguments.

*Eon-Net*, a classic NPE, had filed over 100 lawsuits, almost all of which resulted in early settlements. The license fee, calculated to be far lower than the cost of litigation, was typically $25,000-$100,000. Unlike *Eon-Net*’s other targets, however, Flagstar chose not to pay the fee, believing the claim was baseless. Instead, Flagstar pursued the case long enough for the court to determine how broadly the patent claims would be interpreted (the *Markman* process). After construing the claims, the court agreed that Flagstar didn’t infringe. Flagstar then moved for sanctions both under Rule 11 and as an exceptional case under the Patent Act. The trial court granted the motion and awarded Flagstar more than $600,000 in legal fees. Now, in a somewhat scathing, but non-precedential opinion, the Federal Circuit has upheld that award.

The Federal Circuit decision highlights useful strategies for defendants who feel they are being unjustly targeted in troll litigation.

---

**NEW DECISION GIVES HOPE TO PATENT TROLL DEFENDANTS**

Intellectual Property Section


---

For more than 25 years, W. H. Simon & Company, P.A., CPAs, have been representing our clients (and yours) before the IRS.

When the IRS calls your client, call us. We have a proven track record. Managed by a former IRS executive that knows the inside of IRS.

To our referring Attorneys, CPAs and Enrolled Agents, we would like to thank you for sending us your clients with IRS situations requiring our experience.

W. H. Simon, CPA & Former IRS Executive

Eric Schimek, CPA & Former Revenue Agent

Call W. H. Simon & Company, P.A.
727-791-7879
www.WHSimon-CPAs.com
NEW DECISION GIVES HOPE TO PATENT TROLL DEFENDANTS

Continued from page 44

The Federal Circuit agreed both that this was an exceptional case and that Eon-Net had violated Rule 11. The court’s reasoning largely focused on two issues: Eon-Net’s tactics (including arguing for an unreasonable claim interpretation, destroying documents, and not participating in the Markman process in good faith), and its failure to investigate Flagstar and properly compare the accused product to the patent claims prior to filing. In particular, the court cited Eon-Net’s failure to do an objective comparison of reasonably construed claims against Flagstar’s system before filing. The court went on to discuss the unfair advantage NPEs have during litigation, especially in discovery. While a defendant might have to produce millions of pages of documents relating to its sales and operations, the NPE has very little to produce because it does not sell anything. All of these factors weighed significantly in Flagstar’s favor.

It’s too soon to say whether Eon-Net signals court attitudes toward NPE litigation are changing, but it does provide some hope for their targets. More importantly, the Federal Circuit decision highlights useful strategies for defendants who feel they are being unjustly targeted in troll litigation, including demanding that the NPE disclose the details of its pre-filing investigation, and arguing for limiting discovery to claim construction issues prior to the court’s Markman order.

Author: William (Ty) Giltinan, Carlton Fields
On August 25, 2011, the National Labor Relations Board (the “NLRB”) issued a final rule requiring employers subject to the National Labor Relations Act (the “NLRA”), which is the overwhelming majority of businesses, to post a notice that informs employees of rights under the NLRA, together with NLRB contact information and basic enforcement procedure information.

Employers, both union and non-union, must begin posting the notice on November 14, 2011. Federal contractors will be deemed to have complied with this duty by posting the notice of employee NLRA rights that is already required by the Department of Labor.

The notice must be posted in all places where notices to employees concerning personnel rules or policies are customarily posted. All employers who post notices to employees on an internet or intranet site must also post the NLRB’s notice on those sites. Copies of the notice will be available on the NLRB website and from NLRB regional offices by November 1. Translated versions also will be available and must be posted in another language where at least 20% of employees are not proficient in English and speak the other language.

Even non-union employees have rights under the NLRA. Accordingly, the notice tells employees that they have the right to: 1. organize a union; 2. form, join or assist a union; 3. bargain collectively; 4. discuss terms and conditions of employment or union organizing; 5. take action with one or more co-workers to improve working conditions; 6. strike and picket; and 7. not do any of these things.

In addition, the notice states that it is illegal for an employer to: 1. prohibit employees from soliciting for a union during non-work time and from distributing union literature during non-work time in non-work areas; 2. question employees about union activities; 3. take or threaten adverse action against employees based on union activity; 4. threaten to close the workplace if workers choose a union; 5. promise or grant benefits to discourage union support; 6. prohibit union paraphernalia except in special circumstances; and 7. spy on or videotape peaceful union activities.

Finally, the notice informs employees that, if they select a union, the employer and union must bargain in good faith, that employees have six months to bring a charge to the NLRB, and that employees may obtain reinstatement and lost wages and benefits for unfair labor practices.

The rule states that a failure to post is an unfair labor practice and, upon a failure to post, the NLRB may order the employer to post a notice and/or remedial notice, toll the statute of limitations for unfair labor practice charges, and consider knowing and willful failure as evidence of unlawful motive. However, the NLRB may not impose a fine.

It is time for employers to plan their response to employee inquiries that this notice will instigate. Employers must be prepared to provide accurate, lawful answers to employee questions about their NLRA rights.

Author: Scott T. Silverman, Akerman Senterfitt

Save the Date – Labor & Employment Section Luncheon – December 6, 2011
<table>
<thead>
<tr>
<th>Sun</th>
<th>Mon</th>
<th>Tue</th>
<th>Wed</th>
<th>Thu</th>
<th>Fri</th>
<th>Sat</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>6</td>
<td>7</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>5</td>
<td></td>
<td>12:00 - 1:00 p.m. Labor &amp; Employment Lunch</td>
<td>12:00 - 1:00 p.m. Criminal Law Lunch &amp; CLE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>11</td>
<td>13</td>
<td></td>
<td>14</td>
<td>8</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>12</td>
<td>13</td>
<td>12:00 - 1:00 p.m. Judicial Luncheon &amp; CLE</td>
<td></td>
<td>12:00 - 1:00 p.m. Eminent Domain Lunch &amp; CLE</td>
<td>10</td>
</tr>
<tr>
<td>11</td>
<td>12</td>
<td>13</td>
<td>14</td>
<td>15</td>
<td>16</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>18</td>
<td>19</td>
<td>20</td>
<td>21</td>
<td>22</td>
<td>23</td>
</tr>
<tr>
<td>18</td>
<td>19</td>
<td>20</td>
<td>21</td>
<td>22</td>
<td>23</td>
<td>24</td>
</tr>
<tr>
<td>25</td>
<td>26</td>
<td>27</td>
<td>28</td>
<td>29</td>
<td>30</td>
<td>31</td>
</tr>
</tbody>
</table>

HCBA Office
Closed this Week

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 are held at the Chester H. Ferguson Law Center unless otherwise noted.
SAME-SEX MARRIAGE IN FLORIDA: PART I
Marital and Family Law Section
Chair: Christine L. Derr, Law Office of Christine L. Derr, P.A.

The state of Florida does not recognize same-sex marriage.1 However, with the recent changes in New York’s state laws on same-sex marriage, it is possible that Florida could follow suit. Thus, it is worth considering what this change might mean to the family law community. This article is a two-part discussion. In this first part, we will discuss some aspects of what it means to be married in a general legal and economic sense. In the second part of this article, we will explore some of the changes that would necessarily follow the legalization of same-sex marriage.

Perhaps the first benefits that come to mind for financial-minded practitioners are those related to taxes. Aside from the obvious fact that a married couple’s tax bracket changes because they can file jointly, a heterosexual married couple with a child is entitled to claim an earned income credit pursuant to 26 U.S.C. §32, establish a head of household pursuant to 26 U.S.C. §2, thereby increasing the couple’s standard of living.

All too often, family law attorneys lose sight of the many benefits that inure to married couples solely by virtue of the fact that they are married, without more.

Continued on page 49
SAME-SEX MARRIAGE IN FLORIDA: PART I
Marital and Family Law Section

Continued from page 48

deduction, and claim a child tax credit pursuant to 26 U.S.C. §32.² Further, a married couple can transfer property from one spouse to the other without any tax consequence, including after one of the parties has passed away, pursuant to 26 U.S.C. §1041 and 26 U.S.C. §2056.

Perhaps most importantly, being married creates a world of rights in the estate and family law domains. Under Florida law, if one spouse dies intestate, the surviving spouse receives the deceased spouse’s entire estate if there are no children.³ Often overlooked and perhaps taken for granted by most married couples is the fact that a married couple in Florida has the rights outlined in Chapter 61 of the Florida Statutes. This means that spouses without taking any action other than getting married, have a statutory claim to all property acquired during the marriage, including arguably increases in value of non-marital property, and to support for themselves and their children. Further, only a spouse, former spouse or child can go after creditor-exempt qualified retirement assets by obtaining a Qualified Domestic Relations Order, which are often extremely valuable.⁴

Private companies also incentivize their employees and customers with benefits for spouses and married couples. Employers that provide health, dental, vision, life, and/or car insurance, often give this benefit to the employee’s spouse at a reduced premium relative to policies for individuals. Further, employers can provide health insurance to an employee’s spouse without any negative tax consequences to any party.⁵

The list goes on, and for lack of space, we have barely scratched the surface. All too often, family law attorneys lose sight of the many benefits that accrue to married couples solely by virtue of the fact that they are married, without more. Same-sex couples locked out of marriage are not only locked out of the social institution, but also a world of legal and economic benefits and safeguards.

¹ Even prior to the enactment of the laws presently in effect, Florida had placed a statutory ban on same-sex marriage.
² These tax laws are not applied in the same manner to same-sex married couples, who are provided with far less of a tax advantage for non-biological and adopted children. Further, because of the Defense of Marriage Act, same-sex married couples are not considered married pursuant to most federal laws.
⁴ See ERISA § 206 (2010).
⁵ Employer-provided health benefits provided to a same-sex partner or spouse are taxable as income to the employee.

Authors:
O. Kim Byrd, Esq., The Givens Law Group
and Matthew L. Lundy, Esq., Older, Lundy & Weisman

Robert H. Bonanno, Esquire
Mediator/Arbitrator
Telephone No. (813)769-3701
www.TampaMediation.com

> Downtown Tampa Facilities Available
> Convenient Online Calendar
> Over 37 years legal experience
> Certified Florida Circuit Civil & Federal Mediator
> Member Florida Circuit-Civil Mediator Society
> Resume’ and rates available on website
> Available to serve as Special Master
The borrower, borrower’s attorney, if any, and lender’s attorney must attend mediation in person. The plaintiff’s representative may appear telephonically. The Program Manager “takes roll” before the mediation to ensure compliance, including that the plaintiff’s representative has full settlement authority and, in a substantial departure from the normal mediation confidentiality provisions, is directed to report any nonappearance to the court. Typically, mediation lasts about two hours for the initial conference, plus an additional session, if needed.

Mediators are selected by blind rotation, unless the parties select familiarize themselves with both administrative orders, including the exhibits to AOSC09-54.

Under the administrative orders, all parties to a mortgage foreclosure involving homestead real property are deemed to have stipulated to mandatory mediation unless opted out in writing. The cost of the mediation and mandatory foreclosure counseling is $750, paid by the plaintiff and added to any eventual judgment.

Both plaintiff and borrower must exchange financial information and documentation prior to the mediation. Borrower’s counsel should ensure that the appropriate documents are requested and that they are produced prior to the mediation.

The borrower's attorney is directed to report any nonappearance to the court.

Typically, mediation lasts about two hours for the initial conference, plus an additional session, if needed. Mediators are selected by blind rotation, unless the parties select.
Continued from page 50

a mediator. As circuit civil mediators are no longer required to be lawyers, it is not unusual for there to be a non-lawyer mediator. The issues can be complex, including issues involving mortgage securitization and various government assistance programs. Although participating mediators must attend a one-day training seminar, don’t assume that the mediator will have experience in mortgage law, let alone real estate law or even the law generally, beyond that seminar.

Although the parties are able to select a mediator if they wish, an ethics opinion (MEAC 2010-008) presents difficulties. Under it, any mediator previously adverse to a party has a non-waivable conflict and may not serve. As a result, mediators with foreclosure experience are conflicted out from participating in mediations involving financial institutions that the mediator/attorney has been adverse to in the past, even if that conflict was unrelated to foreclosure. Therefore, the more mortgage foreclosure experience a mediator/attorney has, the more likely he/she will be unable to serve as a mediator in a mortgage foreclosure mediation.

On September 26, 2011, the Supreme Court announced that, after collecting a year’s worth of data on the statewide program, it was requesting public comment on the program’s success.

Stay tuned!

Author: Lynwood F. Arnold, Jr.

Lynwood F. Arnold, Jr.
The HCBA welcomed the new Leadership Institute class at an orientation session on September 7, 2011 at the Chester H. Ferguson Law Center. The Institute identifies and develops young attorneys of diverse backgrounds who have the potential to become future leaders of the HCBA. This year, the Institute will be led by Chair Robin Horton of the Second District Court of Appeal and the executive committee comprised of Danny Alvarez of The Alvarez Law Group, Casey Reeder of Hill Ward Henderson, and Michael Stein of Haas, Lewis, DiFiore & Amos, PA.

Congratulations to the HCBA Leadership Institute Class of 2011-2012

- Kathryn Boucher, JAG Office, MacDill AFB
- Jonathan Gilbert, Feldman, Fox & Morgado, PA.
- Kimberly Jones, Phelps Dunbar
- Michael Kamprath, Thresher & Thresher, PA.
- Michael Kangas, Philip A. Bauman, PA.
- Matthew West Kindel, Yesner & Boss, PL.
- LaKisha Kinsey-Sallis, Thompson, Sizemore, Gonzalez & Hearing, PA.
- Kelli Mitchell, Allen Dell, PA.
- Amy Rani Nath, BayCare Health System, Inc.
- Sherri Ohr, AG Office, MacDill AFB
- Jeffrey Patenaude, Thompson, Sizemore, Gonzalez & Hearing, PA.
- Jared Reeves, JAG Office, MacDill AFB
- Jason Whittemore, Wagner, Vaughn & McLaughlin
- Cynthia Winter, Anton Castro Law, LLC

Thank you to our Leadership Institute Sponsor!
Your relief from all Arbitration, Mediation and Trial-Related symptoms so you can rest medicine.

Uses
- mediations
- mock trials
- discovery
- trial research
- depositions
- electronic presentation
- exhibit boards
- document services
- focus groups
- video production

Ask a consultant before use

Trial Consulting Services, LLC
(813) 874-2527  www.trialcs.com
Tampa  Ft. Lauderdale  Miami  Orlando  Jacksonville  New York
A person who is not domiciled in Florida is not permitted to serve as personal representative of a Florida estate unless the person meets one of the specifically defined relationships to the decedent set forth in section 733.304, Florida Statutes. Also, Section 733.212(3), Florida Statutes, provides that an interested person must object to the qualifications of a personal representative within three months after service of the notice of administration.

In Hill v. Davis, 36 Fla. L. Weekly S487a (Fla. Sept. 1, 2011) the Florida Supreme Court addressed the question of whether an objection to the qualifications of a personal representative is barred by the three-month filing deadline, even when the personal representative was never qualified to serve.

The decedent, Katherine Davis, died in 2007 in Florida. The decedent’s stepson, Douglas Davis, a resident of New York, was nominated as personal representative in the decedent’s will. After his appointment by the court, Davis served a copy of the notice of administration on Solveig Edna Hill, the decedent’s mother. Almost a year later, and after filing several motions challenging the validity of the will, Hill filed a motion challenging Davis’ qualifications to serve as a nonresident personal representative. Hill’s motion contended that Davis was unqualified to serve as a nonresident personal representative. Hill alleged that the decedent’s husband was not the decedent’s spouse at the time of her death because he had predeceased her and, therefore, Davis was not a lineal descendant of the decedent’s spouse for purposes of section 733.304.

The probate court found that Davis was qualified to serve as a nonresident personal representative and that Hill’s objection was barred because it was not filed within the statutory three-month time frame. On appeal, the First District affirmed the probate court on the grounds that Hill’s objection was barred by the statutory three-month time limit in section 733.212(3). The First District did not address the issue of whether Davis was actually qualified to serve. The First District then certified conflict with the Third District’s decision in Angelus v. Pass, 868 So.2d 571 (Fla. 3d DCA 2004) which held that there was no time limit when the personal representative was never legally qualified to serve as personal representative at any time.

The Florida Supreme Court held that Section 733.212(3) bars an objection to the qualifications of a personal representative, including an objection that the personal representative was never qualified to serve, if the objection is not timely filed, except where fraud, misrepresentation or misconduct with regard to the qualifications is not apparent on the face of the petition or discovered within the statutory time frame.

The Supreme Court stated in its opinion that it was significant that nothing was concealed or misrepresented (as apparently occurred in Angelus) and that Hill knew at the beginning of the administration that Davis was the son of the decedent’s late husband. Therefore, Hill had no excuse for not objecting within the required time frame.

This case highlights the importance for an estate beneficiary to seek counsel regarding the qualifications of the personal representative within the three-month objection period. Otherwise, a later objection or removal action may be barred.

1 One of the exceptions under Section 733.304 allowing a nonresident to serve is where the person is a lineal descendant of the decedent’s spouse.

Author:
Matthew J. Zipay,
Fowler White Boggs
Chester H. Ferguson Law Center is the perfect place for your mediation, business meeting, wedding and reception, or holiday party. The 17,000 sq. ft. building is extremely versatile and available for rental.

Call for availability
813-221-7777
**W**ould you ever show up in the courtroom—or at a client meeting—without properly preparing your case or researching your client’s situation?

Of course not. In fact, for most lawyers, the idea of being poorly prepared at a crucial moment is the stuff of nightmares.

Perhaps you believe that you’re fully covered by a group policy your firm has purchased. However, the truth is that while group disability income insurance is often relatively inexpensive and easy to administer, it can also fall short just when you need it most—leaving you unprepared and in for some unpleasant surprises when it’s too late to correct the situation.

**Learning to speak the lingo**

The right disability income insurance (DI) policy can help you keep your household going, even if you suffer a long-term disability. The following terms are part of the language:

Continued on page 57
Continued from page 56

describing high-quality policies and are what you should look for to get coverage you can count on:

- “Own-occupation”: Own-occupation or “ Own-occ” coverage defines “totally disabled”—and therefore eligible for benefits—as being unable due to injury or sickness to perform the material and substantial duties of your own occupation even if you are at work in another capacity. As a highly skilled professional who has invested so much in education and training, you want to make sure you have genuine own-occupation coverage so that, even if you can teach, for example, in your field—but cannot practice law—you are still eligible for benefits. Group coverage is rarely true own-occupation coverage.

- Non-cancellable: To avoid the possibility of losing your coverage just when you need it most, choose a policy that’s non-cancellable and guaranteed renewable to age 65—with premiums also guaranteed until age 65. With group coverage, you run the risk of being dropped and left unprotected at a time in your life when, due to your age or to a change in your health, it would be very difficult to qualify for coverage from another provider.

- Residual Disability coverage: Through a rider, a good individual DI policy can provide you with protection against the income loss you may suffer as a result of partial (residual) disability—even if you have never suffered a period of total disability. This kind of residual coverage is not available with most group plans.

- A choice of “riders”: Riders offer optional additional coverage such as Future Increase Options and Cost of Living Adjustments, or “COLA.”

Take the time to consider upgrading your DI coverage today. Having the right DI coverage could be vitally important to your economic wellbeing in the future—and help protect one of your most valuable assets: the ability to earn an income by practicing law.

The truth is, successful professionals need far more complete DI coverage than is provided through their firm’s group policy.

Author:
Jeffrey D. Brown,
Guardian Life/Berkshire Life

---

THANK YOU
ASK-A-LAWYER VOLUNTEERS

Dale Appell
Tom Hyde
Dina Sheridan Busciglio
Anissa Morris
Hernando Bernal
Brent Rose
Denny Morgenstern
Betsey Herd

David Veenstra
William Schwarz
Linda Faingold
Kim Monticello
Efrain Aponte
Rinky Parwani
Jesus Elizarraras

To volunteer for Ask A Lawyer programs, please contact Cathy Fitch at 813-221-7783 or cathy@hillsbar.com
The background of the Economic Substance doctrine in the last issue brings us to a recent Tax Court opinion issued by Judge Joe Goeke in *Historic Boardwalk Hall, LLC New Jersey Sports and Exposition Authority, Tax Matters Partner v. Commissioner* and found at 136 TC No.1 dated January 3, 2011.

The facts involve Historic Boardwalk Hall, LLC (Hall), New Jersey Sports and Exposition Authority (NJSEA), and Pitney Bowes (PB). The formation was to allow PB, a private party, to earn historic rehabilitation credits from the rehabilitation of a governmentally owned building, East Hall.

Among the financial projections forming the basis for PB’s capital contribution of over $18 million was that revenue would increase 3% per year. PB received 99.9% ownership interest and NJSEA the remaining 0.1%.

The Internal Revenue Service challenged the transaction on several fronts, including economy substance and sham transaction.

The Service reallocated item of income or loss from PB to NJSEA and determined that PB had no meaningful stake in the success or failure of Hall and that Hall should be disregarded.

The Tax Court cited a Third Circuit opinion in analyzing whether a transaction has economic substance by determining whether it had an objective economic substance and a subjective business motivation.

In discussion of the role of the 3% return and the expected tax credits, the Court determined that they should be viewed together. As so viewed, the transaction did have economic substance. Even ignoring the tax credits, the court opined that PB’s interest was more like equity than debt because it was not guaranteed a 3% return.

The court cited with approval a circuit court opinion to the effect that a transaction does not become a sham merely because it is likely to become unprofitable on a pre-tax basis. Further it raised an anticipated future factor of the role of Congress’ intent to create tax benefits and incentives for the purpose of changing investor conduct.

The Court indicated that the absence of pre-tax profitability does not show whether the transaction had economic substance beyond the creation of tax benefits where Congress has purposely used tax incentive is to change investor’s conduct.

This case did not address section 7701 (o) of the Internal Revenue Code. It was tried before enactment of Section 7701 (o), which became effective March 21, 2010. However, to the extent that the Service’s interpretation of Section 7701 (o) is dependent on relevant case law under common-law economic substance doctrine, the case is most relevant.

The real question is: what is the role of congressionally created tax incentives (such as rehabilitation credits) that are utilized in a transaction where there are no other discernable economic incentives? While the Tax Court didn’t precisely address this situation, its reliance on the “viewed together” language implies that neither the credits, nor the 3%, standing alone, would pass. There seems to be a good argument that credits and other tax incentives are needed for the investor to invest; otherwise there would be no need for them if there was sufficient non-tax economic incentives.

Perhaps a transaction can change an investor’s economic position (in a meaningful way) and have a substantial non-tax purpose, yet would not attract investors without the tax incentives. In a sense, the “viewed together” concept avoids “splitting the baby” with independent quantitative proof of the role of each incentive. Hopefully, taxpayers will not be required to make such a quantitative analysis.

Author: V. Jean Owens, Owens Law Group, PA.
Effective June 23, 2011, the Legislature amended Florida’s comparative fault statute to include the following provision for product liability actions:

“(3) Apportionment of damages. – In a negligence action, the court shall enter judgment against each party liable on the basis of such party’s percentage of fault and not on the basis of the doctrine of joint and several liability…

(b) In a products liability action alleging that injuries received by a claimant in an accident were enhanced by a defective product, the trier of fact shall consider the fault of all persons who contributed to the accident when apportioning fault between or among them. The jury shall be appropriately instructed by the trial judge on the apportionment of fault where there are allegations that the injuries were enhanced by a defective product....” §768.81(3)(b), Fla. Stat. (2011).

A products liability action is “a civil action based upon a theory of strict liability, negligence, breach of warranty, nuisance, or similar theories for damages caused by the manufacture, construction, design, formulation, installation, preparation, or assembly of a product. The term includes an action alleging that injuries... were greater than... the claimant would have received but for a defective product....” §768.81(1)(d), Fla. Stat. (2011).

The amendment effectively overrules the Florida Supreme Court’s decision in D’Amario v. Ford Motor Co., 806 So. 2d 424 (Fla. 2001) and changes crashworthiness litigation in Florida. The “crashworthiness doctrine” imposes liability on automobile manufacturers for defects that enhance injuries. See D’Amario, 806 So. 2d at 433 (citing Jimenez v. Chrysler Corp., 74 F. Supp. 2d 548, 565 (D.S.C. 1999)). It applies if a defect, not causally connected to an initial collision, results in injuries greater than those that would have resulted from the collision absent the defect. Id.

In D’Amario, for example, an intoxicated driver collided with a tree. His injured passenger sued Ford, claiming his injuries resulted from a fuel tank system defect and that, but for the defect, he would not have been injured. D’Amario followed the minority view and held that principles of comparative fault involving causes of the first collision generally do not apply in crashworthiness cases. See D’Amario, 806 So. 2d at 441. As a result, Ford was not entitled to include the intoxicated driver as a Fabre defendant or introduce evidence of his negligence.

In amending section 768.81, however, the Legislature expressly stated that it “intends that this act be applied retroactively and overrule D’Amario... That minority view fails to apportion fault for damages consistent with Florida’s statutory comparative fault system, codified in §768.81, Florida Statutes, and leads to inequitable and unfair results, regardless of the damages sought in the litigation. The Legislature finds that, in a products liability action as defined in this act, fault should be apportioned among all responsible persons.” Ch. 2011-215, §2, Laws of Fla.

Author:
Jaret J. Fuente,
Carlton Fields

The amendment effectively overrules the Florida Supreme Court’s decision in D’Amario... and changes crashworthiness litigation in Florida.

We all know that it is unconstitutional to deny death benefits to the beneficiaries of “aliens not residents (or about to become nonresidents) of the United States or Canada.” The Florida Supreme Court declared section 440.16(7) of the Florida Statutes unconstitutional. See De Ayala v. Florida Farm Bureau, 543 So.2d 204 (Fla. 1989). It would therefore seem that all other legal obstacles to illegal aliens receiving workers’ compensation benefits would also fail.

There is a double edged sword of employers hiring illegal aliens and then denying them workers’ compensation benefits based on their immigration status. If an employer declares an injured worker is an illegal alien, the question is: how did that individual get on your job site? If an employer is paying an illegal alien under the table, then the employer exposes itself to civil liability with the Internal Revenue Service and possible criminal liability for hiding payroll information from a carrier [see § 440.105(4)(b)(6), Fla. Stat.]. With all of the case law supporting benefits for aliens, it seems like a futile position for employers to take.

Of course, the First District Court of Appeal has done its part to impart that wisdom onto employer/carriers. From ordering medical benefits to deported injured workers to finding that providing a false social security number at the time of hire is not a form of misrepresentation, the Court supports the holding in the De Ayala decision. Now, we have another case to drive the point home.

Recently, in HDV Construction v. Aragon, 66 So.3d 331 (Fla. 1st DCA 2011), an employer fought a permanent total disability claim on the grounds that the claimant was an illegal alien. The claimant, relying on proper case law, proved to the judge that the employer knew all along that he was an illegal alien and therefore the employer could not deny benefits based on immigration status.

There is strong language in this opinion that states that despite a claimant’s illegal status, Florida industry cannot pass its responsibility to injured workers onto society or taxpayers as a whole. This is the core principle of the Florida Workers’ Compensation statute. It is important for employers to understand that tactics like asserting an illegal alien’s average weekly wage of $0.00 because the alien did not declare any earnings to the IRS and asserting fraud for an employee providing a false social security number are probably not going to work.

When an employer hires illegal aliens, it’s as if it is hiring legal ones. If those illegals are injured, then the employer buys them.

Author: Michael G. Rabinowitz, Banker Lopez Gassler PA.
Expectations will please *rise*.

Community Bank is a **proud new sponsor**
of the Hillsborough County Bar Association.

**Now is when. Community Bank is where.**
For commercial or residential financing that is easy to navigate and quick to close, contact us today.

HCBA@CommunityBankNow.com • (727) 456-5810 • (877) 266-2265
CommunityBankNow.com

checking • savings • money markets • mortgages • business loans • SBA loans • association and treasury services • and a host of other sophisticated banking products you might not expect

17 locations across Pinellas, Hillsborough, Manatee, Charlotte and Pasco counties
Jennifer G. Roeper, a shareholder with the law firm of Fowler White Boggs, was recently selected for Leadership Tampa Class of 2012, a leadership program of the Greater Tampa Chamber of Commerce.

Mason Black & Caballero PA is pleased to announce that Jennifer A. Ficarrotta recently joined the firm as an associate.

Circuit Judge Gregory Holder has been named chairperson of the Florida Committee for Employer Support of the Guard and Reserves, a volunteer organization within the Department of Defense. The appointment was made by Acting Assistant Secretary of Defense for Reserve Affairs, David L. McGinnis.

Jourdan Haynes, an associate with the law firm of Fowler White Boggs, was recently selected to participate in the Tampa Connection Class of 2011-2012.

Karen M. Buesing, shareholder with the Akerman Senterfitt Labor & Employment Practice Group, has been elected as a fellow of the College of Labor and Employment Lawyers.

GrayRobinson shareholder Kim H. Vance has recently been reappointed to the Tampa Bay Regional Planning Council by Florida Governor Rick Scott for a term ending in October 2012.

Clark & Martino is proud to announce that partner and president Anthony T. Martino has been elected by the Second District Court of Appeal Judicial Nominating Commission to serve as its Chairman for the coming year.

Ford & Harrison LLP, a national labor and employment law firm, is pleased to announce that Shane T. Muñoz has been elected CLE Director of The Florida Bar’s Labor & Employment Section.

Shumaker, Loop & Kendrick, LLP is pleased to announce that partner Gregory C. Yadley has been elected Chair of the Middle Market and Small Business Committee of the American Bar Association Business Law Section.

Thirteenth Judicial Circuit Judge Ron Ficarrotta was formally sworn in as Chair of the Florida Conference of Circuit Judges by Florida Supreme Court Chief Justice Charles Canady after being unanimously elected by his peers at the Annual Education and Business Conference held in Marco Island.

Nava Ben-Avraham has joined Burr & Forman LLP as an associate in the Central Florida office. She focuses her practice on financial services litigation and has additional experience in bankruptcy litigation and product liability defense.

Christopher Paradies, Ph.D., a shareholder in the law firm of Fowler White Boggs, has been appointed Chair of the Applied Medicine and Human Performance sector for the Tampa Bay Regional Business Plan and to the Tampa Bay Partnership’s Executive Committee.

Thompson, Sizemore, Gonzalez & Hearing P.A. is proud to announce that shareholder Gregory A. Hearing has been appointed Chair of the Labor & Employment Section of The Florida Bar.

Vivian Arenas-Battles of de la Parte & Gilbert, P.A. has been named Chair of The Florida Bar’s Eminent Domain Committee. Vivian is a shareholder with the firm and practices in the areas of eminent domain, environmental and administrative law.

Ford & Harrison LLP, a national labor and employment law firm, is pleased to announce that Dawn Siler-Nixon, Diversity & Inclusion Partner, has recently been appointed as the American Bar Association AIDS Coordinating Committee Chair.

Carlton Fields is pleased to announce that Tampa shareholder George Meyer was appointed chair of The Florida Bar’s Real Property, Probate and Trust Law Section.

The law firm of Trenam Kemker is pleased to announce that Ian C. Larson has joined the firm as an associate. Ian will practice in the area of business transactions.

HCBA Intellectual Property Section Co-chair Woodrow H. “Woody” Pollack was recently promoted to of counsel at GrayRobinson.

Joshua Smith, a shareholder with the law firm of Fowler White Boggs, was selected for Leadership Tampa Bay, Class of 2012.

Clinton Paris JD ‘00, MBA ’00 is the new Stetson Lawyers Association president.

Attorney Patrick Poff of Trenam Kemker Scharf Barkin Frye O’Neill & Mullis, P.A. has been certified by The Florida Bar in the area of Construction Law.
**JURY TRIAL INFORMATION**

**For The Month of:** March 2011.
*Judge:* Honorable William Law.
*Parties:* Tracy Woods vs. Florida Dept. of Transportation, Lake County & Ranger Construction Industries.
*Attorneys:* For Plaintiff: David Moffet; For Defendant: Robert Dietz for FDOT, Joshua Frick for Lake County, Barbara Taggart for Ranger Const. Ind.
*Nature of Case:* Plaintiff’s motorcycle slipped on roadway gravel, resulting in two leg fractures.
*Verdict:* For FDOT resulting in a $30,000.00 judgment against the plaintiff for fee & costs. Judgment against Lake County for $23,207.76, Plaintiff 75% negligent, and Lake Co. 25% negligent.

**For The Month of:** April 2011.
*Judge:* Honorable Pamela Campbell.
*Parties:* Frederick Smith vs. GEICO.
*Attorneys:* For Plaintiff: Stephen Barnes; For Defendant: Joseph F. Kinman, Jr.
*Nature of Case:* Uninsured motorist claim from auto/bus collision.
*Verdict:* $20,000 past medicals. No permanent injury.

**For The Month of:** May 2011.
*Judge:* Honorable Elizabeth A. Jenkins.
*Parties:* Marcella Pourmoghani vs. Hillsborough County Sheriff’s Detention Deputy & Hillsborough County Sheriff’s Office.
*Attorneys:* For Plaintiff: Virlyn Moore; For Defendant: Thea G. Clark & Jason G. Cordillo.
*Nature of Case:* Civil rights violation, excessive force alleged in HCSO jail.
*Verdict:* Defense verdict, no excessive force occurred.

**For The Month of:** June 2011.
*Judge:* Honorable Robert M. Evans.
*Parties:* Enoch Plancher, as Personal Representative of the Estate of Ereck Michael Plancher, II, deceased vs. UCF Athletics Association, Inc.
*Attorneys:* For Plaintiff: Steve Yerrid, David D. Dickey, J.D. Dowell and Jeff Murphy; For Defendant: Daniel A. Shapiro, Anne Sullivan, Kevin S. Taylor and Jorge Martinez.
*Nature of Case:* Negligent athletic supervision; Failure to inform and treat sickle cell student-athlete.
*Verdict:* For Plaintiff $10,000,000.00.

**For The Month of:** July 2011.
*Judge:* Honorable Lee E. Haworth, Sarasota County Circuit Court.
*Parties:* Deborah E. Darling vs. Gary A. Roberts.
*Attorneys:* For Plaintiff: Charles Livingston and John Ervin; For Defendant: Chuck Baval and Melissa Krepps.
*Nature of Case:* Non-disclosure, Florida Deceptive & Unfair Trade Practices Act (FDUTPA) and punitives against builder; $4.0M home; alleged mold and defects.
*Verdict:* For the defense on all counts; directed verdict on punitive damages. Motion for fees and costs on rejected proposal for settlement and FDUTPA count is pending.

**For The Month of:** August 2011.
*Judge:* Honorable David Demers (Pinellas).
*Parties:* Gayle DeRycke, as Personal Representative of the Estate of Douglas DeRycke vs. Packaging Corporation of America.
*Attorneys:* For Plaintiff: Steve Yerrid and David D.Dickey; For Defendant: Jeff Winkler and Eric Kuwana.
*Nature of Case:* Motor vehicle wrongful death; Scope of employment, dinner with Defendant’s executive found social not business activity.
*Verdict:* For the Defendant.

**For The Month of:** August 2011.
*Judge:* Honorable George Maxwell, III.
*Parties:* Benjamin Hintz vs. Emily Boozer & Otto Boozer.
*Attorneys:* For Plaintiff: Hendrik Uiterwyk; For Defendant: Virgil Wright.
*Nature of Case:* Plaintiff was rear-ended on a scooter without helmet.
*Verdict:* $14,905,484.29.

**For The Month of:** August 2011.
*Judge:* Honorable Richard Nielsen.
*Parties:* Oaks III Condo Assoc. vs. Arrow Pest Control.
*Attorneys:* For Plaintiff: Peter Cardillo; For Defendant Daniel Gerber.
*Nature of Case:* Termite damage.
*Verdict:* Settlement $750,00.00.

**For The Month of:** September 2011.
*Judge:* Honorable Sam D. Pendino.
*Parties:* Washington vs. Williams.
*Attorneys:* For Plaintiff: Joseph Vecchioli; For Defendant: Brandon Scheele and Michael Bird.
*Nature of Case:* Admitted liability rear-end accident. Low back surgery.
*Verdict:* $9,470.81.
COMMUNITY ASSOCIATION LAWYER - Tired of making a fraction of your billings? Community Association Law Group is seeking members to open local offices. Candidates must have a minimum of five years experience and portable business. Send resume in confidence to ceri@thehoalawyer.com.

TO PLACE YOUR CLASSIFIED AD, email dawn@hillsbar.com.

SUPPORT THE HCBA TICKET BANK for THE CHILDREN’S CANCER CENTER

Donate tickets to sporting events, concerts, movies and more! Bring smiles, laughter and everlasting memories to families battling their children’s life-threatening illnesses.

TO DONATE TICKETS CONTACT THE HCBA AT 813-221-7777 OR DAWN@HILLSBAR.COM
Did the vehicle lack a side impact airbag?

While the technologies necessary to incorporate side impact airbags for occupant protection have existed since the late 1990's, many vehicles today continue to be built without side airbags for side impact protection. Such systems have been proven to provide invaluable and necessary head protection, and the failure to incorporate such airbags in many cases results in needless catastrophic brain injuries and deaths.

If your client has been involved in a side impact accident and sustained a catastrophic or fatal head injury, the Didier Law Firm can help you evaluate whether the installation of an airbag could have made a difference.

You may have a product defect case.

ASK THE QUESTION.

Call 407.895.3401 or visit ProductSafetyAttorneys.com/SideAirbags

Let us evaluate your product defect claim today.
As one of the best policyholder advocates in the nation, Chip Merlin relies on The Bank of Tampa for his firm’s large capital requirements and their other banking needs. “We rely on them for everything from remote deposit capture to personal banking,” says Merlin. “Many of our clients have regulatory or contractual requirements that insurance recoveries be placed into trust. Both parties always agree on The Bank of Tampa.”

If your business could benefit from a bank with a strong financial commitment, please visit any of our nine offices.

The Bank of Tampa provides every service we need.


The Bank of Tampa’s Rick Bourkard and Chip Merlin at Merlin Law Group’s Harbour Island office.