Please accept my thanks for your trust in GUNN LAW GROUP, P.A.

We remain honored and thankful for the opportunity to co-counsel with so many fine lawyers in medical malpractice, insurance, and catastrophic injury cases.

Most of all, we will take pause over these holidays to even better appreciate the needs of our clients and to redouble our efforts to bring them a just result.

– Lee D. Gunn IV

Happy Holidays from All of Us at Gunn Law Group!
A SHINING EXAMPLE OF PUBLIC SERVICE
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by Ed Comey

A SALUTE TO OUR LOCAL JUDICIARY
HCBA President’s Message
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HONORING THE SACRIFICE OF FELLOW COUNTRYMEN
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A LOOK BACK

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SEPTEMBER LUNCHEON HIGHLIGHTS MISSION OF RESPECT AND SERVICE

MILITARY & VETERANS AFFAIRS COMMITTEE LUNCHEON

REAL PROPERTY, PROBATE & TRUST LAW LUNCHEON

TRIAL & LITIGATION QUARTERLY LUNCHEON

MEET THE HCBA LEADERSHIP INSTITUTE CLASS OF 2014-2015

ABOUT THE COVER
An American alligator glides through the reflection of spring-leaved cypress trees at Babcock Ranch Preserve in Charlotte County. The 10,000-acre Telegraph Cypress Swamp runs the length of the preserve before flowing into the Caloosahatchee River, Charlotte Harbor, and the Gulf of Mexico.

Photo courtesy of Carlton Ward Photography, www.carltonward.com
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A Shining Example of Public Service

“I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed ...”

It’s been more than 12 years, but I can still remember Judge James M. Barton swearing me in to The Florida Bar like it was yesterday. I practically sprinted to the courthouse with my oath of admission as soon as I was eligible to take it. Fortunately, Judge Barton was gracious enough to administer the oath to a young lawyer he didn’t know who showed up at his chambers unannounced, even taking time afterward to explain to me the responsibilities that came with this new profession I was embarking on. I’m honored to have the opportunity to return the favor by writing a tribute to Judge Barton upon his retirement.

But where do I start? I suppose I could list all the awards he’s won, like the Robert W. Patton Outstanding Jurist Award (twice). If I wanted to add a personal touch, I suppose I could tell you some things you probably already know about him: He loves New Orleans and jazz music. Even better, I could tell you some things you may not know. For instance, he was once a redhead — at least until the dye from a (good or bad) Alaskan-cruise salon experience wore off. He also has an exquisite or unrefined sense of fashion, depending on how you feel about Tabasco ties. But none of those things adequately capture Judge Barton’s legacy.

In considering what would, I’m reminded of something Malcolm Forbes said: “You can easily judge the character of others by how they treat those who can do nothing for them or to them.” Judge Barton has spent his entire judicial career helping those who could do nothing for him or to him by championing pro bono efforts so that all Florida residents would have access to justice. It would be impossible for me to list all of Judge Barton’s pro bono efforts here (I only have 500 words), and he probably wouldn’t want me to anyway.

Suffice it to say, Judge Barton’s extraordinary pro bono efforts earned him the 2012 Distinguished Judicial Service Award from the Florida Supreme Court. In bestowing the award, Chief Justice Charles Canady noted that Judge Barton served as the chairman of the Thirteenth Judicial Circuit’s Pro Bono Committee for 17 years, during which he helped build a pro bono program that is a model throughout the state. On a state level, he helped launch the ONE Campaign, which seeks to improve the poor’s access to justice by challenging every attorney to take on one pro bono client. Justice Canady said it best when he said, “Judge Barton truly is a shining example of public service.”

In humbly accepting the Distinguished Judicial Service Award, Judge Barton asked those in the audience to remember the word “one.” One client. One attorney. One promise. As Judge Barton finishes his career, I’d ask that you remember the words he had me swear to when I started mine: “I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed ...”

In the issues to come, I will pen tributes to two other retiring judges: the Hon. James D. Arnold and the Hon. Sam D. Pendino. Please turn to page 12 to read David Rowland’s “Parting Words of Chief Judge Manuel Menendez Jr.”
A Salute to Our Local Judiciary

Although our state and federal judges deserve thanks for their daily roles in public service, I want to recognize them here for what they do “off the bench” and especially for their support of the HCBA.

By now, you should be familiar with Operation Respect and Service, our theme this year to advance our Bar’s mission. In carrying it out, we have lifted up our local military and veterans and the issues they continue to face. I cannot thank enough our revamped Military & Veterans Affairs Committee (MVAC), which mobilized quickly and is now actively leading our Bar’s efforts to support the needs of those who have served, and continue to serve, our country.

Having participated in the MVAC’s organization and initial meetings, I observed firsthand the substantial involvement and commitment of members of our local judiciary (“shout outs” to Judges Greg Holder, Samantha Ward, and Richard Weis, as well as Judge-Elect Mike Scionti). In fact, our entire judiciary’s involvement in and support of various HCBA events has been such a common observation of mine during the first half of this Bar year.

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that I think it is appropriate — particularly as we progress with Operation Respect and Service and approach Thanksgiving — to pause and express our gratitude toward our robed peers.

Although our state and federal judges deserve thanks for their daily roles in public service, I want to recognize them here for what they do “off the bench” and especially for their support of the HCBA. Their service in this extra capacity helps immensely and, frankly, distinguishes our local Bar from those in other locales. Further, our judges’ involvement is another prime example of how our Bar carries out its mission of “promoting respect for the law and the justice system through service to the legal profession and to the community.” Beyond that though, judicial participation in our local Bar improves professionalism, civility, collegiality, and camaraderie among all HCBA members. For all of these reasons, the support and involvement of our judiciary strengthens our local Bar, makes practicing in our area more civil, and helps to provide better experiences to parties relying on our courts for justice.

As we show appreciation for our judiciary, I would especially encourage you to join in our Bar’s ongoing acknowledgements of four of our longtime judges who are retiring: Judge James Arnold; Judge James Barton; Chief Judge Manuel Menendez Jr.; and Judge Sam Pendino. If my math is right, these judges will have served our community from the bench for a combined total of 103 years!

As a reminder, on the evening of December 4, the HCBA and the Hillsborough County Bar Foundation will be hosting a special event at TPeepin’s Hospitality Centre to honor Chief Judge Menendez, including his contributions to our Bar, and to wish him well in his retirement. This is a free event for HCBA members and friends of the Bar. I assure you that it will be a most memorable evening.

Finally, on December 11, the HCBA Trial & Litigation Section will honor the above-referenced foursome of retiring judges at its Quarterly Luncheon. This lunch will allow these judges to take some “parting shots” from the bench, so it should be an entertaining and enjoyable occasion.

IN THE NEXT ISSUE:

Stay tuned for photos from the Bench Bar Conference, Membership Luncheon & Judicial Reception, as well as the Toast & Roast Reception for Chief Judge Menendez.
New Admittees to the Bar — Things to Think About

Participating in the swearing-in ceremony of the new admittees to the Bar got me thinking about those early days of trying to find your way through the profession. The immediate path is easy because learning the law is relatively straightforward, and simple hard work should enable you to be an adequate lawyer. However, as time goes on, you realize that professional development is critical if you aspire to be an outstanding lawyer. It is much harder to cultivate the other qualities and skills necessary to excel in this profession.

A young lawyer cannot build a reputation for excellence by being passive. Every experience shifts, shapes, and sculpts the type of lawyer you will become.

In the classic case of doing well by doing good, your career will also benefit as your reputation grows and your activities generate new opportunities.

The YLD has created programs to help young lawyers jumpstart their professional development through a wide array of opportunities to not only network with other lawyers and judges but to find mentors, to grow professionally, and to help the less fortunate in our community. These experiences will generate measurable benefits to your career development. For more information on the opportunities available, go to the YLD link found at www.hillsbar.com or visit our Facebook page.

Continued on page 7
Recent YLD Events:

- **September 26** was the YLD’s first happy hour of the year, and it was sponsored by C1 Bank. To attend the next one, please contact the Events Committee Chairs: Cameron Frye at tampapipigeico@geico.com, Alyson Bulnes at alyson@tpatrialattorneys.com, or Brett Metcalf at brett@metcalfharden.com.

- **On October 15**, the YLD conducted its first quarterly luncheon of the year, and it was devoted to pro bono. Attendees were provided an opportunity to learn more about participating in such fantastic programs as Wills for Heroes, Are You Safe, Bankruptcy Court Pro Bono Project, Crossroads for Florida Kids, The Spring, St. Michael’s Legal Center, Bay Area Legal Services, Big Brothers Big Sisters, and Homeless Experience Legal Protection. For more information on any of these programs or to get involved, please contact the pro bono committee chairs: Ella Shenhav at EShenhav@shutts.com or Katelyn Desrosiers at desroskm@fljud13.org. The YLD appreciated the support of the luncheon’s sponsor: NorthStar Bank.

- **On October 17**, the YLD held our annual Golf Tournament at Temple Terrace Golf & Country Club. Although a complete recap of the event and photos will be included in the next issue of the Lawyer magazine, we wanted to give special thanks to our generous Platinum Sponsor, C-1 Bank, and Gold Sponsor, The Bank of Tampa, as well as our host, Temple Terrace Golf & Country Club, for assisting us in putting on such a tremendous event!

  YLD members not only attend but also help plan these projects and events, so if you would like to assist, please join one of our committees. Our events can always use more volunteers and new faces as we continue to enhance our programming.

**IN THE NEXT ISSUE:**

Look for photos and sponsor recognition from the first YLD Quarterly Luncheon and the YLD Golf Tournament. If you can’t wait until then, check out the photo albums on Facebook.com/HCBAtampabay.
Honoring the Sacrifice of Fellow Countrymen

“Howver flawed our [legal] system is, our 225 years of constitutional law is the envy of people around the world who have endured centuries of something less.”


Speaking at the Hillsborough County Bar Association’s September membership luncheon on September 11 — the 13th anniversary of the 9/11 terrorists attacks — U.S. Air Force Brig. Gen. Dixie A. Morrow posed a poignant question to those in attendance: “Are we worthy of the sacrifices so many of our countrymen made 13 years ago and every year since?”

In her keynote remarks, Gen. Morrow, commander of the Air Force Legal Operations Agency, reflected on the meaning of 9/11, especially for Florida’s legal community. She also shared her experiences serving in Kabul, Afghanistan, from 2011 to 2013, where she was responsible for establishing a fair and functioning legal system in that war-torn country.

Gen. Morrow said that after many years of war, Afghanistan’s legal system, like much of the country itself, was in “complete and utter shambles.” She added it was vital to establish a legal system in Afghanistan that is “perceived to be fair” by the Afghan people themselves.

This is no small task in a country where, historically, warlords have ruled with an iron fist, Gen. Morrow said.

“However flawed our [legal] system is, our 225 years of constitutional law is the envy of people around the world who have endured centuries of something less,” Gen. Morrow said.

Although progress has been slow in bringing about change, she said, there also have been some successes, particularly for Afghan women. She noted that 13 years ago Afghan girls were not allowed to attend school, whereas today young girls are getting an education, and women have greater opportunities in business and even in the military.

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“We know that 13 years is a grain of sand in the hourglass when considering the course of human history,” Gen. Morrow said.

A graduate of the University of Florida Law School, Gen. Morrow said she was “humbled” to be back in Tampa where she began her military career as a staff judge advocate at MacDill Air Force Base.

During her remarks, Gen. Morrow took time to recognize and thank for their service a group of lawyers from U.S. Central Command and the Air Force’s 6th Air Mobility Wing at MacDill Air Force Base who were special guests of the HCBA at the luncheon. Gen. Morrow also recognized Hillsborough County Circuit Judge Gregory P. Holder, a retired colonel who spent 29 years in the Air Force and Air Force Reserves. Holder was recently honored by the Pentagon with the Office of the Secretary of Defense Medal for Exceptional Public Service for his role as state chairman of the Employer Support of the Florida Army National Guard and Reserve.

In addition, Gen. Morrow praised the effort to assist the local military community through the work of the HCBA’s reconstituted Military & Veterans Affairs Committee. This HCBA committee is chaired by Bob Nader, a former HCBA president, and the committee’s military liaison is Lt. Col. Chris Brown, the top military lawyer at MacDill’s 6th Air Mobility Wing.

“While the practice of law is our vocation, how we use our vocation to uplift and encourage others counts for something,” Gen. Morrow said.

Concluding her remarks, Gen. Morrow encouraged the luncheon attendees to support efforts that remind people around the globe about the importance of the rule in law in our society.

Said Gen. Morrow: “Every member of the legal profession should do what we can to protect the freedoms that our laws grant to us. Are we worthy of the sacrifices of 9/11 — The rule of law matters. We know it. And it is up to us to make us worthy of that sacrifice.”

See you around the Chet.
Admissibility of Business Records in Criminal Trials

Records of regularly conducted business activity or business records may be introduced in criminal trials and contain facts necessary to prove the elements of the crime charged.

Criminal trials are frequently the topic of television shows or movies. The drama of the trial is usually shown through the compelling testimony of an eyewitness, the introduction of a murder weapon, or enthralling forensic evidence. The reality of a criminal trial is often more mundane. Although all of those pieces of evidence may be a part of trial, there may be other types of evidence necessary to prove the case. Records of regularly conducted business activity or business records may be introduced in criminal trials and contain facts necessary to prove the elements of the crime charged.

Generally, a written document would be subject to the exclusion of the hearsay rule, but an exception to that rule has been created in Section 90.803(6), Florida Statutes, for certain business records. The record that is being introduced must qualify as a business record under this statute. A business record is defined as a “memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such” record. Examples of business records include medical records, repair estimates, receipts, bank records, or phone records.

Normally, a business record that meets this definition would be introduced through the testimony of a records custodian. That witness does not need to

Continued on page 11
be the person who created the document, nor does he or she need to have personal knowledge of the events recorded in the document. The witness does need to have sufficient knowledge about the practices of the business and the creation of that business’s record to testify regarding the business record.

A business record may also be introduced through certification or declaration. The certification must be sworn to by a qualified party and must certify the proper foundation for admissibility. To admit the record into evidence, the party offering the record must provide reasonable written notice to opposing counsel and must make the record available for inspection. Although this process is available to admit business records, the offering party may still want to call a records custodian to testify, so that the witness can explain the records to the jury, especially when the business relies on codes in their records.

Even though a business record appears to qualify for admissibility under section 90.803(6), it may still be challenged on other grounds and must still be otherwise admissible. My office is dedicated to protecting the public by securing convictions. Part of that process is obtaining and introducing all admissible evidence needed to support that conviction.

1 § 90.801, Fla. Stat.
2 § 90.803(6), Fla. Stat.
4 § 90.803(6)(c), Fla. Stat.
5 § 90.902(11), Fla. Stat.
There are two things that stand out as sea changes to the courts during my tenure as chief judge. First and foremost was our undergoing a big shift in how our court system was to be funded with the passage of what was then called Revision Seven to Article Five of our Florida Constitution. Revision Seven reallocated the responsibility for funding of the state court system, placing a majority of that on the state of Florida. Prior to then, we received a majority of our funding from the 67 counties. When considering implementing legislation, the Legislature began the process of designing what the court system would consist of in the future. Consequently, there was a great deal of effort focused on convincing them to include, for example, positions such as court counsel. We pushed for a court system model in which we would have certain elements included. We wanted court administration, due process positions (court reporters and interpreters), court counsel, staff attorneys, magistrates, and hearing officers — a myriad of positions that were essential to providing the public with a court system they deserved. We were largely very successful.

Continued on page 13
It is a collegial profession; it is supposed to be. Avoid getting pulled into the mud as is sometimes seen with some of our lawyers who for some reason feel like it is a trial by ambush, a war with hatchets and axes. It shouldn’t be that way.

Continued from page 12

Then, of course, we had the problem of funding the court system. Adequately funding of the court system has been a bit of a struggle through the years, especially during the most recent economic setback. We all suffered through it just like everybody else in the state and the country.

The next biggest area of change is what we are currently experiencing with our court system evolving into the electronic era — the advent of mandatory e-filing, leading ultimately to no paper court files.

What do you see as the biggest challenge facing the courts in the next five to 10 years?

Unfortunately, once again, funding appears to be the key issue. It seems like we have to re-educate the Legislature every year as to what we do, why we do it, and why we need the funding. In large part, this is because of the term limits that we have with our Legislature. There is not much institutional memory up there in Tallahassee. But getting past that, I believe we’re going to be having some issues in the future with continued increased filings. We haven’t yet finished dealing with the foreclosure mess for example; we have a backlog of cases there. Processing cases in a timely manner so that the public is able to access the courts is extremely important. We’re also going to have to learn to deal with the electronic age a little bit better.

What is your best advice for young lawyers just starting their careers in today’s legal culture?

I would advise young lawyers to seek out a mentor, someone who has some experience, who’s respected. Watch experienced lawyers perform the trade. Try to spend as much time as you can learning. Also, don’t shortchange your clients. Communicate with them. Return their phone calls. Avoid the mistake of not being answerable to your clients. Always seek to learn, to engage. Join the HCBA. Meet others in the profession; keep it collegial. It is a collegial profession; it is supposed to be. Avoid getting pulled into the mud as is sometimes seen with some of our lawyers who for some reason feel like it is a trial by ambush, a war with hatchets and axes. It shouldn’t be that way. It has always been a collegial profession, and we should all strive to maintain that.

Continued on page 14
I know you have lots of memorable stories of your time on the bench and have handled thousands of cases during your judicial career. What is one of your fondest memories of your time on the bench?

I have many fond memories, and most of them deal with the investiture ceremonies for new judges. They are always very interesting, and I always learn something I did not know about a new colleague each time. These ceremonies are also a lot of fun. I've had the opportunity to actually preside over 40 investiture ceremonies of new judges since I became chief judge, and I attended many others before then. Every single one has been a wonderful experience.

What do you think was the most impactful decision you made while on the bench?

Every decision that a judge makes has a significant impact on the litigants, if nobody else. Going beyond that, some decisions are impactful because of the impact they may have on the community as a whole or because of some precedential value. Although there may be a number of decisions that fit into that category, two come to mind as I sit here talking with you.

One is the case involving the city of Tampa's human rights ordinance. In the 1990s, the city had passed a human rights ordinance prohibiting discrimination on the basis of, among other things, sexual orientation. Subsequently, there was a petition circulating that, with enough signatures, would place on the ballot a referendum repealing that portion of the ordinance that banned discrimination based on sexual orientation. A lawsuit was commenced seeking removal of the referendum from the ballot, and I was assigned the case. And I made the decision to remove the referendum from the ballot because the law required that the wording on the ballot referendum be the exact same language as that used in the petition for obtaining signatures for the referendum. And there were some slight differences in the language. That decision was affirmed on appeal. The matter was not voted on, and the ordinance was never again attempted to be repealed.

Another case that comes to mind is one that dealt with child support enforcement orders. One of the parents had funds in a city firefighters and police union pension. An argument was made that the pension fund was exempt from garnishment because the fund was passed by special law and the special law exempted the pension fund from garnishment. I found, contrary to what other judges across the state had found, that the retirement benefits in pension funds were subject to garnishment because the general law enacted after the special law specifically included pension funds in the definition of “income.” The pension fund board of trustees appealed to the Second DCA, which reversed the decision, but the appellate court certified a question of great public importance to the Florida Supreme Court. The Florida Supreme Court noted that the trial court's finding — that when a special law and a subsequent general law conflict, the latest expression of legislative intent controls — was correct, and the Second DCA was wrong. This was another impactful decision if for no other reason it provides me the opportunity to occasionally but good-naturedly harass my colleagues at the Second DCA.

During your first few months as chief judge, I recall you saying that you had not realized the scope of responsibilities of the chief judge. What are people's biggest misperceptions about the chief judge position?

Some people have a misunderstanding that a chief judge is like the “chief” of judges and is akin to an appellate court. These folks believe that the chief judge is empowered to change a decision of a trial judge with the stroke of a pen. Thankfully, that of course, is not the case. A chief judge does have the privilege of developing relationships with our county commissioners, state legislators, state attorney, public defender, sheriff, and the clerk of court with the goal of creating the best court system in the state! But we all know that the real function of the chief judge is to sit at the head table at Bar luncheons!

The Tampa Bay area has grown tremendously during your judicial career. Our area offers a variety of activities, events, and eateries. Tell us what you like to do in your free time.

I enjoy reading novels and the daily newspapers, and on occasion I watch a little television. My favorite show, Breaking Bad, recently ended. I thought it was one of the greatest shows ever on TV. I have not gotten into another series yet, but people tell me I should watch The Wire. Because of the wonderful weather we have, I also enjoy going out for a little jog or a walk periodically during the week to get the juices flowing. Recently I took some kayaking lessons and enjoy that when there is good weather. I also enjoy going out and catching a Rays game on occasion. I haven’t played golf in years, but maybe I’ll see if I can find my clubs and take that up again. There are a whole slew of restaurants that are wonderful

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in the area, but unfortunately one of my favorite ones just closed down, that being CDB's Southside on Westshore. Hopefully at some point Pat Iacovella will relocate. And although not necessarily in the Tampa Bay area, I enjoy traveling about two hours up the road to Gainesville to enjoy intercollegiate sporting activities.

Speaking of Gainesville, your double-degree Gator background is well known, having graduated from the University of Florida in 1969 and UF’s College of Law in 1972. What many people probably do not realize is the extent to which your office is furnished with virtually every type of Gator memorabilia that exists. Where are you going to display all of these memorabilia upon your retirement?

Well, I don’t think I have all that much paraphernalia in here. But the big problem will be finding a location. Maybe I’ll have an auction or take them up to Gainesville and sell them out of the back of my truck at a Gator game. I think I’ll be allowed to keep some of the stuff in the house but not all. I’ll have to negotiate that.

**After more than three decades on the bench, what are your retirement plans?**

Three decades? Wow! My retirement plans are still a work in progress. I’d like to travel some, maybe do some teaching. I serve on some charitable boards and would like to continue with that and perhaps do some other volunteer work. I may try my hand at mediation and arbitration and maybe even practice some law. One thing I will not do is try to run a marathon! I will stick to an occasional 5K race! And I am contemplating writing a book exposing all the secrets of our court counsel!

[The author is convinced that our soon-to-be-former chief judge would be more concerned about this author contemplating writing a book concerning the judge’s secrets than vice versa!]

**Author: David A. Rowland - General Counsel, Thirteenth Judicial Circuit**

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**SPECIAL FEATURE**
David A. Rowland - General Counsel, Thirteenth Judicial Circuit

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**THE HCBA WELCOMES ITS NEW MEMBERS**

**JULY & AUGUST 2014**

- Andrew J. Alvarez
- Casey L. Andrews
- Ayana Barrow
- Amara G. Benitez
- Danielle Breedlove
- FJ J. Brooks
- Brittany Bustillo
- Mark R. Caramanica
- Sharon Carstledt Britton
- Rebecca Clark
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- Nichole R. Hanscom
- Carlos L. Hernandez
- Whitnii M. Hodges
- Aleksandra I. Jagniella
- Craig C. Kublik
- Mary Elizabeth Lanier
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- Kari Diann Marsland-Pettit
- Lara E. McGuire
- Katherine A. Mikkel
- Justin R. Moore
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- Michael L. Severe
- Abood Shebib
- Ella A. Shennan
- Keith Shevance
- Shane S. Smith
- Mark Silroud
- Chad Marshall Sweeting
- Amy Mahan Tamargo
- Henry E. Thomas
- Nalini Vats
- Vienaphone V. Vongsayprasom
- Randal S. West
- Carissa R. Wheeler

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For further information and registration, please visit [www.crc.usf.edu](http://www.crc.usf.edu). USF is an Equal Opportunity/Affirmative Action/Equal Access Institution.
A LOOK BACK

Over the past 13 years, Chief Judge Manuel Menendez Jr. has been a fixture at HCBA events, speaking at luncheons large and small, handing out awards, running races, and leading conga lines. Judge Menendez has graced the pages of the Lawyer magazine countless times. He has written articles, given interviews, and been featured in photos both posed and candid. The HCBA would like to thank Judge Menendez for his dedication to and support of the Bar over the years.
Leading the line at the 2012 Pig Roast

This photo of Judge Menendez with his family ran with his first interview as chief judge, courtesy of Tom Elligett, in the September 2001 issue of the Lawyer.

At a legislative delegation reception in 2003

Serving up slop at the Pig Roast in 2007

Playing in the HAWL vs. Judges softball game in 2003

At a trial lawyers luncheon in 2006

Hanging out at the HCBA Membership Cookout in 2011

With Supreme Court Justice Raul Cantero and Chris Knopik at a luncheon in 2006

At the Holiday Open House in 2011

Leading the line at the 2012 Pig Roast

This photo of Judge Menendez with his family ran with his first interview as chief judge, courtesy of Tom Elligett, in the September 2001 issue of the Lawyer.
Traditionally, parties seek briefing extensions in Florida state courts by motion pursuant to Florida Rule of Appellate Procedure 9.300. However, four of the five District Courts of Appeal have recently adopted an alternative procedure — extension by “notice” — that supplants the motion process in certain circumstances.

The “Notice” Process, by Court

Led by the Fourth District, the Second, Third, Fourth, and Fifth Districts each authorize a party who meets specific requirements to file a notice of an agreed or stipulated extension of time to file an initial, answer, or reply brief, in lieu of a motion. The process reduces the workload of the court in reviewing and ruling on motions, while allowing the parties to exercise increased control over their own appeals.

The courts’ administrative orders authorizing the procedure are found on their websites. They each differ slightly in their requirements and approved language. It is important to review each administrative order carefully to ensure compliance with approved procedures.

The Fourth District. In Administrative Order No. 2011-2, the court ordered it would accept “a notice” in lieu of an agreed motion for extension of time on briefs. This procedure applies only in “criminal and civil appeals,” not “adoptions, dependency, termination of parental rights, non-final orders, or any expedited appeal.” Agreed extensions by notice are authorized for up to 120 days for an initial or answer brief and up to 60 days for a reply brief, without any intervention from the court.

The Fifth District. In Amended Administrative Order AO5D13-02, the court largely adopted the Fourth District’s “notice” process but added to the excluded proceedings any “original proceeding.” The court also reduced the time available under the “notice” process to 90 days for initial or answer briefs and 60 days for reply briefs.

The Third District. In Administrative Order AO3D13-01, the court adopted the “notice” process, applying the list of excluded proceedings from the Fifth District but the 120-day and 60-day time limitations from the Fourth District.

The Second District. In Administrative Order 2013-1, the court adopted the “notice” process, adding “any domestic relations appeal with a custody or visitation matter at issue” to the list of excluded proceedings from the Fourth and Fifth Districts. However, it adopted the Fifth District’s 90-day and 60-day time limitations.

Other Appellate Courts. Neither the Florida Supreme Court nor the First District Court of Appeal has adopted any alternative procedure to a Rule 9.300(a) motion.

A motion is still required in many circumstances.

Where the parties cannot agree, the time requested exceeds the authorized amount, or a notice is not authorized for other reasons, Rule 9.300(a) controls and a motion is required. In addition, some district courts govern appellate motion practice via administrative orders or “notice[s] to attorneys and parties” located on their respective websites. Again, review of these documents is always advised to ensure compliance with local court procedures.

Author: Jared M. Krukar - Butler Pappas Weihmuller Katz Craig LLP
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Collaborative practice is a voluntary dispute resolution process in which parties resolve their dispute without resorting to litigation. Throughout the collaborative law process, the parties agree to exchange information, possibly bring in trained third parties (expert witnesses, mediators, etc.) to help evaluate the value of the case, and ultimately work toward resolving the dispute through a process of “interest-based” negotiation, seeking creative solutions that work for the parties.

The parties and their lawyers sign a Participation Agreement, which generally includes the following provisions:

1. They agree in advance that if the matter is not resolved, the attorneys involved in the process will not handle the litigation.
2. The process is transparent. Everyone agrees to informally exchange all relevant information.
3. Everything is confidential from the inception of the collaborative process.

The collaborative process has become widely used to resolve family law disputes, particularly those related to child custody. Attorneys in several states are beginning to recognize its value as a tool for resolving other disputes as well. For example, the collaborative approach extends well to employment disputes in close-knit or family-owned businesses.

A collaborative approach to resolving employment disputes makes sense for these businesses because the cost of taking those disputes to court is measured not just in terms of the company’s bottom line but in the devastating effect on the family or other close relationships that are valuable and worth preserving. In addition, the parties in a family business setting tend to have a common economic interest in resolving their dispute. The collaborative approach provides a structure for cooperation and helps avoid damage to the business and the likelihood of family members holding lifetime grudges.

This approach also reduces the stress associated with resolution of conflict and lessens the disruption to business operations normally associated with discovery requests and key people being called away to depositions, hearings, and trial. Parties to such a shared solution are more likely to feel that their voices were heard and to abide by the terms of any agreement.

The process works well for disputes related to decisions about the timing of retirement of senior employees and any related succession plan; separation of employment needing confidentiality and noncompetition agreements, and related enforcement; interactions between management and employees who are members of the family and nonrelated employees, including perceived biases; and restructuring of the business with layoffs.

However, not all disputes lend themselves to the collaborative process, and not all clients are receptive to it. Cases should be carefully screened to determine whether the process is appropriate. Attorneys on both sides of the dispute should obtain proper training in the collaborative process, explain all aspects of it to their clients, and obtain the informed consent of the clients for resolving their dispute in this fashion. More attorneys throughout the country and the world are considering the collaborative law process for their clients. Additional information is available at the HCBA Collaborative Section webpage found under the Sections & Committees portion of the HCBA website - www.hillsbar.com.

Authors:
Guilène F. Theodore - Collaborative Conflict Resolution, PLLC; and Kerry Raleigh Tipton - Law Office of Kerry Raleigh Tipton, PA
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Community Services Committee
Chairs: Lisa Esposito - Law Offices of Lisa Esposito, P.A.; and Lara M. LaVoie - LaVoie & Kaizer, P.A.

M ake a Difference Day, held the fourth Saturday in October, is a national day of giving back and helping others. For the second year in a row, I have had the privilege of co-chairing the Hillsborough County Bar Association’s Community Services Committee (CSC) and participating in the James A. Haley Veterans’ Hospital’s Make a Difference Day, which has a theme of “Homeward Bound for Those Who Served.” There were 52 veterans who were in need of “adoption” this year, a number that had unfortunately increased from last year. As we were able to do last year, with the help of many generous volunteers, we succeeded again this year in getting all 52 veterans on the list adopted!

For those of you who are unaware of this amazing project, these veteran heroes sadly have no family and no living friends. They live in small group homes because they can no longer take care of themselves. These veterans have chosen to live in foster homes rather than nursing homes, but they have very limited funds after paying for their stay in the foster home. Event organizers collected a wish list for each of the veterans. With the help of generous volunteers sharing their time and resources, gifts were assembled for personal delivery to each of the foster home veterans. The items on their “wish lists” included things that we take for granted — blankets, underwear, sweatshirts, shaving cream, CDs, hats, and flashlights — even the comfort of a stuffed animal.

Participating in this event these past two years has been such a heartwarming and rewarding experience. Once again, those who volunteered this year had the opportunity to sit down and listen to the amazing stories of these wonderful men and women who selflessly served our country. The veterans were so very grateful for the chance to spend an hour or so talking about their past and their service. For all that they have done, the least we could do was spend several hours with them and show them gratitude to brighten their day. I think I can speak for all of the volunteers when I say that we all felt so humbled and touched deeply by the experience.

We have some other incredible events planned for this year where you can possibly touch someone’s life in a very meaningful way with only several hours of your time. Please consider helping and/or giving to one of our causes. By joining the CSC, you can help really make a difference (in your life and the lives of others). Come to a meeting, volunteer for an event, or just spread the word about what we are doing! There is no commitment or donation that is too little or too late.

Please feel free to contact the HCBA; Lara LaVoie, lmlavoie11@gmail.com; or Lisa Esposito, lisa@lesposito.com, for more information.

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

“Honor to the soldier and sailor everywhere, who bravely bears his country’s cause. Honor, also, to the citizen who cares for his brother in the field and serves, as he best can, the same cause.” — Abraham Lincoln
JOIN THE CSC IN SERVING THE COMMUNITY

The HCBA Community Services Committee is hard at work planning ways to give back to the community. To join in their efforts, contact Lara LaVoie at lmavoie11@gmail.com or Lisa Esposito at lisa@lesposito.com.

HEALTH CARE LAW SECTION CLE

The HCBA Health Care Law Section hosted a CLE on September 24 to discuss “The Regulatory Impact of Medical Marijuana on Health Care Providers.” Guest speaker Brian K. Wright, of Shutts & Bowen, addressed the potential impact Amendment 2 may have on health care providers.

Thanks to the luncheon sponsor: NorthStar Bank.
The recent Florida Supreme Court opinion *Intervest Construction of Jax, Inc. v. General Fidelity Insurance Co.*, 133 So. 3d 494 (Fla. 2014) illustrates the effect contract interpretation principles can have on the evaluation and scope of insurance policies and coverage. *Intervest* concerned the application of a Self-Insured Retention Endorsement (“SIR”), and whether a general contractor or its insurer was obligated to fund a settlement for a bodily injury claim.

During construction of a home, the general contractor hired a subcontractor to install attic stairs. After construction was complete, the homeowner fell from the stairs, suffered injuries, and ultimately sued the general contractor. The general contractor sought indemnification from the non-party subcontractor under the terms of their subcontract agreement. At the time of the accident, the general contractor held a CGL insurance policy containing a $1 million SIR. The SIR amended the policy to provide coverage only after the general contractor paid $1 million toward a covered loss. The subcontractor also maintained a CGL policy, but the general contractor was not an additional insured on that policy.

The parties ultimately settled the homeowner’s claim for $1.6 million. The subcontractor’s insurer paid $1 million to the general contractor to help settle the indemnification claim, which the general contractor, in turn, paid to the homeowner. However, the general contractor and its insurer disagreed about who between them was responsible for the remaining $600,000. Eventually, each paid $300,000 and reserved their rights to seek reimbursement from the other.

In a subsequent federal court action, the general contractor and insurer pursued declaratory judgment claims, each seeking a ruling that the other was obligated to fund the $600,000 settlement payment. The general contractor argued that it had satisfied its SIR by paying the homeowner the $1 million indemnification payment it had received from its subcontractor. The insurer argued that the subcontractor’s $1 million payment did not satisfy the SIR because the money originated from the subcontractor, and the SIR policy language required the general contractor to pay the SIR out of its own funds. The federal district court granted summary judgment in the insurer’s favor, and the general contractor appealed. On appeal, the Eleventh Circuit found principles that construe ambiguous insurance policies against insurers, the Supreme Court found that the policy language allowed the general contractor to use the subcontractor’s indemnification payment to satisfy the general contractor’s SIR. As a related aside, the court also held that the policy’s transfer of rights clause did not address the priority of reimbursement, and thus, the policy language did not abrogate Florida’s “made whole doctrine,” which entitled the general contractor to be made whole first before its insurer.

Though *Intervest* leaves many questions unanswered, it underscores the importance that basic contract interpretation principles have on insurance coverage disputes.

Authors:
Jeffrey M. Paskert - Mills Paskert Divers; and Ryan E. Baya - Mills Paskert Divers

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Corporations are managed by elected directors. Shareholders, of course, are the owners of the corporation, at least for the period of time that they retain ownership of stock. Occasionally, a shareholder may file a “direct” lawsuit against the corporation, claiming that the individual shareholder has suffered a distinct injury from the other shareholders. These suits involve statutory or contract rights and seek to recoup dividends or examine corporate records.

However, a “derivative” lawsuit is one filed by a shareholder on behalf of the corporation for claims of fraud, mismanagement, or self-dealing by the directors and officers of the corporation. See Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90 (1991). Importantly, if the derivative action is successful, the corporation reaps the proceeds rather than the shareholder.

It is important to note that the derivative plaintiff, throughout the litigation, must retain a “legitimate stake in the corporation so that its interests are adequately represented.” See Timko v. Triarsi, 898 So. 2d 89 (Fla. 5th DCA 2005). In Timko, the court found that the derivative plaintiff forfeited his standing in the action upon the sale of his shares in the corporation, by stating that in creating section 607.0740, Florida Statutes, the “legislature has simply manifested its intent to place additional limits upon this preexisting right to ensure that a plaintiff's stake in the lawsuit is 'legitimate,' meaning an ownership interest that is not acquired for predatory purposes.” Id. at 91.

Section 607.07401(3), Florida Statutes, provides an avenue for directors to move to dismiss the derivative action with prejudice. In order to dismiss the action, the directors must appoint an independent investigator who will issue a written report. If the investigative report recommends dismissal and the report was made in good faith and entitled to deference under the “business judgment rule,” the court may dismiss the action. See Klein v. FPL Group, Inc., 2003 WL 22768424 (S.D. Fla. 2003).

Unfortunately, this method of dismissal has generally been difficult to obtain because the courts often question the independence of the investigators. See Kloha v. Duda, 226 F. Supp. 2d 1342 (M.D. Fla. 2002); see also McDonough v. Americom Int'l Corp., 905 F. Supp. 1016 (M.D. Fla. 1995). Another major hurdle is proving that the investigation was “reasonable and objective.” See Batur v. Signature Props. of Nw. Florida, Inc., 903 So. 2d 985 (Fla. 1st DCA 2005); see also Demoya v. Fernandez, 559 So. 2d 644 (Fla. 4th DCA 1990).

Corporations may wish to consider moving to dismiss derivative actions in order to reduce litigation costs.

Author: Caroline Johnson Levine - Office of the Attorney General
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CALL FOR NOMINATIONS: 2014-2015 BUBBA HUERTA AWARD
Criminal Law Section
Chair: Matt Luka - Trombley & Hanes, P.A.

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

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

The process has begun to select the recipient of the 2014-2015 Bubba Huerta Award. The award will be presented at our section’s February 4, 2015, luncheon meeting. Please nominate an attorney who exemplifies the professionalism and pro bono spirit that made Bubba Huerta exceptional.

Your nomination can be submitted by emailing me at mluka@trombleyhaneslaw.com or Mark Rankin at mrankin@shutts.com.

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

CRIMINAL LAW SECTION CLE

Tim Dorsey, a New York Times best-selling author, spoke at the HCBA Criminal Law Section’s CLE on September 24. Dorsey spoke about the many Florida criminal cases that provide fodder for his legal thrillers, and he gave writing tips and insight into investigations of criminal cases.

Thank you to the luncheon sponsor:

NOV - DEC 2014 | HCBA LAWYER 29
The statistics of women in the law compared with female lawyers in leadership roles are staggering. Nearly one-third of lawyers are women, and women account for approximately 45 percent of law firm associates—roughly proportionate to the percentage of female law school graduates. Yet, despite the numbers, women are not obtaining leadership positions consistent with their representation in the profession:

- Women make up approximately 19.9 percent of law firm partners.
- About 16 percent of equity partners at large law firms are women, a number that has remained unchanged for about 10 years.
- At the 200 largest law firms in the United States, 4 percent of managing partners are women.
- As of 2011, the median salary of female lawyers was 86.6 percent of the median salary of male lawyers.
- Out of the Fortune 500, 21.6 percent of general counsel are women.
- In the federal judiciary, 24.1 percent of judges are women; in the state judiciary, 27.5 percent of judges are women.

The statistics on female representation at Tampa Bay area law firms are consistent with these figures. A recent *Tampa Bay Business Journal* article reported that, overall, Tampa Bay area law firms “lag behind national statistics in diversity.”

### The Factors

Many factors may contribute to this leadership gap. Law firms that participated in the 8th Annual NAWL Survey on Retention and Promotion of Women in Law Firms identified the following barriers to women achieving equity partnership:

- lack of business development (44 percent)
- attrition, i.e., women leaving a firm or a slowdown in work among women who remain at a firm (31 percent)
- fewer sponsors and mentors (11 percent)
- work-life balance (10 percent)

Additionally, women are more than twice as likely as men to leave law firms. Of those who leave law firms, nearly one-third of female associates and another one-third of female, non-equity partners also leave firm practice entirely, as compared with 20 percent of men at each of those levels.

### Addressing the Disparity

Beginning in January 2015, the Tampa Bay Chapter of the Federal Bar Association, in conjunction with other area Bar associations and organizations, including Stetson University College of Law, the Hillsborough Association of Women Lawyers, the Pinellas County Chapter of the Florida Association of Women Lawyers, the George Edgecomb Bar Association, and the Florida Association of Women Lawyers, will host a program titled “Staying in the Game: Women, Leadership, and the Law.” The purpose of the program will be to foster dialogue in an effort to address this disparity by identifying steps that law firms, organizations, law schools, and lawyers can take to encourage female lawyers not to take themselves out of the game but instead to continue on the path toward leadership positions.

The program will begin in January 2015 with a one-afternoon CLE and roundtable discussion. Following that program, participants will be divided into smaller discussion groups that will meet quarterly throughout 2015 to discuss what law firms, law schools, organizations, and lawyers can do to encourage female lawyers not to take themselves out of the game but instead to continue on the path toward leadership positions.

At the end of the one-year project, the recommendations of each discussion group will be synthesized.
STAYING IN THE GAME: WOMEN, LEADERSHIP, AND THE LAW

Continued from page 30

in a report that will be made available to area law firms, organizations, law schools, and lawyers.

If you are interested in participating in this program, please email Erin Jackson at ejackson@tsghlaw.com or Katherine Earle Yanes at kyanes@kmf-law.com.


Authors:
Katherine Earle Yanes - Kynes, Markman & Felman, P.A.; Erin Jackson - Thompson, Sizemore, Gonzalez & Hearing, P.A.

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THANK YOU TO OUR MEMBERS WHO VOLUNTEERED FOR THE ASK-A-LAWYER PROGRAM ON FOX 13 IN AUGUST AND SEPTEMBER!

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OFF TO A GREAT START

Elder Law Section
Chairs: Elizabeth P. Allen - Gibbons, Neuman, Bello, Segall, Allen & Halloran; and Debra L. Dandar - Tampa Bay Elder Law Center

With the holiday season upon us, we would like to report on our recent and upcoming Elder Law Section meetings. We started off the year with a bang. Our first speaker was Kathleen Kowalik, DCF Medicaid specialist, accompanied by her teammate, fellow Medicaid specialist Elizabeth Thomas. Together, they presented a thorough overview of the Medicaid Institutional Care Program application process, including analysis of assets, income, transfers, technical requirements, and proper procedures to use in submitting an application through the ACCESS website. We had a terrific turnout, and many participants stayed late to ask additional questions of our speakers. Both specialists were very generous with their time, staying until all questions had been answered. We are most appreciative of their consideration in sharing their knowledge with us.

At the October meeting, Rebecca C. Bell, LLM, presented a Medicaid Managed Care Update. The information provided was important, timely, and highly relevant, and we thank her for sharing her knowledge with us. As of publication deadline, our November luncheon speaker was Diane Daniels, Medicare specialist, who planned to address various issues concerning Medicare coverage. Since seniors are reviewing their options for Medicare coverage for the upcoming year, this timely topic will help us assist our clients in making informed choices and will enable us to help clients deal with coverage issues they may face.

Our speaker for December 12 is Laura Penley, district long-term care ombudsman, who will discuss laws, rules, and issues concerning nursing homes and residents’ rights. We look forward to the opportunity to increase our knowledge in this area so that we may act as better advocates for our clients.

Additional speakers in 2015 include Dale Krause (January 9), who will discuss Medicaid and VA compliant annuities, and Travis Finchum (February 5), who will discuss SSI rules and lesser-known Medicaid programs such as QMB, SLMB, Q11, and Medically Needy, as well as answer questions regarding special-needs trusts. Tae Kelley Bronner (April 23) will address homestead issues. Tae anticipates that new homestead legislation may be passed in 2015, and she plans to provide us with an update on that topic. We are also planning to add presentations on VA benefits and probate estate issues.

Each luncheon qualifies for one hour of CLE credit and provides networking opportunities with your friends and colleagues. Networking begins at 11:30 a.m., with luncheons beginning at noon. All luncheons are held in the Chester H. Ferguson Law Center.

So please join us at our meetings, and if you have suggestions, ideas for speakers or topics, or an article submission for the Lawyer magazine, please contact Elizabeth P. Allen, eallen@gibblaw.com or 813-877-9222, or Debra L. Dandar, Debra.Dandar@TampaBayElderLawCenter.com or 813-282-3390.

We look forward to seeing you and wish each of you a very happy holiday season.

Authors: Elizabeth P. Allen - Gibbons, Neuman, Bello, Segall, Allen & Halloran, P.A.; and Debra L. Dandar - Tampa Bay Elder Law Center

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SEPTEMBER LUNCHEON HIGHLIGHTS
MISSION OF RESPECT AND SERVICE

On September 11, the Hillsborough County Bar Association kicked off the Bar year with a General Membership Luncheon honoring those who have served and continue to serve our country. Brig. Gen. Dixie A. Morrow, commander of the Air Force Legal Operations Agency, spoke to a crowd of more than 400 attorneys and judges about the work the U.S. military is doing to establish and uphold the rule of law. HCBA President Ben Hill IV also introduced the HCBA’s newly revamped Military & Veterans Affairs Committee, which aims to provide pro bono, educational, and mentoring services and outreach to veterans in the Tampa Bay area. The committee brings together the HCBA’s civilian attorneys, many of whom have served in the military, with those from the JAG offices at MacDill Air Force Base. Former HCBA President Bob Nader is chairing the committee, and Lt. Col. Christopher Brown, staff judge advocate of the 6th Air Mobility Wing at MacDill, is serving as the military liaison.

Also at the luncheon, the HCBA recognized new members of the Bar Leadership Institute and those who help the public through the Lawyer Referral & Information Service. YLD President Anthony Martino discussed the Young Lawyers Division’s plans for the Bar year, including a pro bono-themed luncheon, and Judge Caroline Tesche promoted the Bench Bar Conference’s theme of “Law Meets Technology.” Chief Judge Manuel Menendez treated the crowd to a slideshow featuring photos of Judge James M. Barton II and incoming Chief Judge Ronald Ficarrotta.

Overall, the September luncheon further introduced “Operation Respect and Service,” Hill’s themed approach for the Bar year to lift up both respect and service as elements of the HCBA’s mission.

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If the Stark law was not perplexing enough, recent decisions and settlements have made it even more puzzling. Until the past few years, the federal government primarily enforced the Stark law through false claims act cases where providers engaged in some type of prohibited relationship with a physician resulting in improper referrals from that physician and the submission of a Medicare claim.

The Omnibus Budget Reconciliation Act of 1993 amended the federal statute governing payments to states — 42 U.S.C. § 1396b. Specifically, this statute provides that no Medicaid payment shall be made for the provision of a designated health service to an individual on the basis of a referral that would result in the denial of a payment under the same terms and conditions for a Medicare claim under the Stark law. This legislation increased the existing misperception as to the application of the Stark law on Medicaid claims.

In an effort to clarify some of the confusion, the Centers for Medicare and Medicaid Services (CMS) indicated in commentary that it does not believe the rules and sanctions under the Stark law apply to physicians and providers when the referral involves Medicaid claims. This was further complicated as CMS went on to say in the same guidance that it cannot pay for Medicaid claims that violate the Stark law, but that the state could. CMS declined to finalize the proposed language and, to date, has not issued any further commentary as to the Stark law’s reach in Medicaid cases.


More recently, in United States v. All Children’s Health Systems, Inc., the court denied the defendant’s motion seeking to dismiss the action based on the defendant’s argument that the Stark law does not apply to Medicaid claims. The court, in citing to the decisions referenced herein, found that although the defendant’s argument is generally correct that the Stark law applies to Medicare claims, the referral prohibition also applies to Medicaid claims through 42 U.S.C. § 1396b(s). These decisions and recent government enforcement efforts are shedding light on the expanded application of the Stark law to Medicaid claims, once thought to only to apply to Medicare claims.

Going forward, we may see additional cases with similar results as the government makes significant effort not to pay for any false or improper claims.

In the face of the government’s heightened sensitivity to the submission of false and improper claims, the health care community should proceed with caution when navigating the winding path of the Stark law’s applicability to Medicaid claims.

1 42 U.S.C. § 1395m.
3 63 Fed. Reg. 1659, 937 (11th Cir. 2013);

Author: Melissa A. Mora - Shriners Hospital for Children
I still remember the moment I knew I wanted to be a lawyer. Three years after my family moved here from Puerto Rico in search of a better opportunity, I read Atticus Finch’s closing argument in To Kill a Mockingbird for the first time. 

We know that all men are not created equal in the sense that some people would have us believe. ... But there is one way in this country in which all men are created equal. An institution that makes a pauper the equal of a Rockefeller, the ignorant man the equal of any president, and the stupid man the equal of Einstein. That institution is the court.

After hearing Atticus Finch eloquently and powerfully explain it was our judicial system that gave meaning to Thomas Jefferson’s immortal words “all men are created equal,” I knew I was destined for law school.

For some of us, however, the idealism that led us to law school faded somewhere between graduation and the time the reality of practicing law set in. With the practice of law came billable hours, the difficulty of meeting clients’ demands, developing a book of business, and hopes of partnership. Add in the stress of juggling professional obligations with family needs, and I’ll confess that Atticus Finch’s stirring words were a distant thought that hadn’t crossed my mind in years. It became easier to forget what first convinced me to become a lawyer.

Yet, as I read more and more about the crisis at our southern border, the stories stir in me that idealism from my youth. In a way, the unaccompanied minors remind me of Tom Robinson in To Kill a Mockingbird. They are vilified by some — hopefully a small minority — because they look different. Worse, they are defenseless and voiceless. Unlike most criminal defendants, they don’t have a right to an attorney. Although many of the unaccompanied minors may be eligible for asylum or visas for victims of trafficking or other criminal activity, few may get that relief without competent counsel, which means they will be returned to countries where they are not safe.

That is why, in keeping with Chief Judge Manuel Menendez’s administrative order on pro bono service, our section members (individually or collectively) should work to ensure that the unaccompanied minors living in the Tampa Bay area (29 at last count) have adequate legal representation. During our section’s kickoff luncheon, Adriana Dinis and Sophia Lynn highlighted the overwhelming need in our community for members of our immigration bar to volunteer their time and talents to help the unaccompanied minors.

I sincerely hope you join me in that worthy cause. Only you can ensure “all men are created equal.” Only you can make an unaccompanied minor the equal of a Bill Gates. To paraphrase Atticus Finch: Our immigration system is only as sound as its immigration bar, and the immigration bar is only as sound as the lawyers who make it up.

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

To join in the Immigration & Nationality Section’s pro bono efforts, contact Mara del Carmen Ramos at mramos@slk-law.com.
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Under the Lanham Act, an infringer can be forced to disgorge profits made on sales of infringing goods. However, the issue of whether the equitable remedy of disgorgement should be decided by the court or by a jury is unsettled in the Eleventh Circuit and should be something practitioners plan for in preparing their case for trial.

An accounting for a trademark infringer’s profits is based on the equitable theory of unjust enrichment. See 15 U.S.C. § 1117(a) (providing that “the plaintiff shall be entitled ... subject to the principles of equity, to recover ... defendant’s profits”); Babbit Electronics, Inc. v. Dynascan Corp., 38 F.3d 1161, 1182 (11th Cir. 1994) (citing Maltina Corp. v. Cawy Bottling Co., Inc., 613 F.2d 582, 585 (5th Cir. 1980)). Claims that are purely equitable in nature should be decided by a court, not by a jury. Kowelsky v. First Data Corp., 534 Fed. Appx. 811, 815 (11th Cir. 2013) (citing Ford v. Citizens & S. Nat’l Bank, Cartersville, 928 F.2d 1118, 1122 (11th Cir. 1991)).

Notwithstanding the statutory pronouncement that disgorgement of profits is an equitable remedy, the Eleventh Circuit’s civil pattern jury instructions include questions asking the jury to determine the proper amount of disgorgement. See Eleventh Cir. Civil Pattern Jury Instructions (2013) at 643.

Interestingly, the comments to the pattern instructions recognize a split in authority outside the circuit exists on the issue of whether the question of disgorgement should be submitted to the jury and acknowledge that there is no Eleventh Circuit precedent on point. Id. at 653. The comments indicate that the pattern instructions do not seek to resolve the issue, only to provide guidance “to the extent that the accounting remedy is referred to a jury.” Id.

Courts in the Middle District are divided on whether to submit the issue of disgorgement of profits to the jury. Australian Gold, LLC, 2014 WL 2801257, at *1, (M.D. Fla. Jun. 19, 2014) (disgorgement of profits submitted to jury).

Given this backdrop, practitioners should be sure to consider who they want to consider their request for disgorgement of profits, as well as how they will try to persuade the court to decide the issue in their favor. One downside to submitting the issue to the jury is the lack of depth in the pattern jury instruction when it comes to disgorgement of profits. Judges are often hesitant to stray from the pattern jury instructions, making it difficult to customize the instruction to a particular case. Submission to the court, on the other hand, provides the opportunity for full briefing of the issue and the ability to further support your arguments through the introduction of testimony and relevant evidence, which likely will result in a more comprehensive presentation and, hopefully, a better result.

Author:
Eric Pellenbarg - Phelps Dunbar LLP

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On July 14, the Equal Employment Opportunity Commission issued new enforcement guidance for pregnancy discrimination. The guidance addressed a number of pregnancy-related employment issues, including when an employer is obligated to offer light duty to pregnant employees. Under the Pregnancy Discrimination Act (PDA), employers must treat pregnant employees the same “as other persons not so affected but similar in their ability or inability to work.” 42 U.S.C. § 2000e(k). Generally, if an employer provides light duty to other disabled employees, the employer must provide light duty to pregnant employees. Employers that offer light duty may place reasonable restrictions on the light duty, such as limits on the number of light-duty positions or the duration of light-duty assignments so long as the restrictions are equally applied to both pregnant and non-pregnant employees.

The law is unsettled on whether employers that only offer light duty to employees injured on the job must also offer light duty to pregnant employees who require it, even if the employer does not offer light duty to employees with non-job-related injuries.

In its July 14 enforcement guidance, the EEOC takes the position that if an employer offers light duty to any other employee, it must similarly offer light duty to pregnant employees on the same terms. The guidance states that a policy that distinguishes between pregnant and non-pregnant workers who are similar in their ability or inability to work based on the cause of the employee’s limitation violates the PDA. The EEOC also suggests in the enforcement guidance that policies limiting light duty to employees injured on the job may have an adverse impact against pregnant employees and women.

The EEOC’s position in its enforcement guidance is contrary to Eleventh Circuit precedent, which has held that employees in injured on the job may be treated differently from employees with non-work-related conditions including pregnancy. See Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1313 (11th Cir. 1999), Abbott v. Elwood Staffing Servs., 2014 U.S. Dist., 2014 WL 3809808 (N.D. Ala. July 31, 2014). The Fourth, Fifth, Seventh, and Eighth Circuits follow the Eleventh Circuit. The Sixth and Tenth Circuit follow the position in the EEOC guidance.

The Supreme Court will address the circuit split on this issue when it reviews the Fourth Circuit’s ruling in Young v. UPS, 707 F.3d 437 (4th Cir. 2013). In Young, which involved an employee challenging UPS’s light-duty policies, UPS offered light duty for individuals with workplace injuries but did not offer light duty to individuals with non-work-related injuries or physical conditions, including pregnancy. The district court held that UPS’s policy treated both pregnant workers and non-pregnant workers the same and therefore was not discriminatory. The Fourth Circuit upheld the district court’s ruling. The Supreme Court will likely hear the case during its 2015 spring term.

Author:
Andrew W. McLaughlin - Macfarlane Ferguson & McMullen

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In family law, perhaps more so than most practice areas, people sign financial agreements based on emotions, inappropriate or misguided expectations, or other reasons far afield from the terms of the deal.

People also sign agreements at very different stages of the marital relationship life cycle. A young bride-to-be may sign a prenuptial agreement thinking that her fiancé will take care of her forever. A party may sign a post-nuptial or marital settlement agreement thinking that doing so will save their marriage. Some parties to a crumbling relationship will sign an agreement due to pressure and without understanding their legal rights. Others will not sign anything until their lawyer has filed for divorce, taken extensive discovery, and thoroughly analyzed the parties’ incomes, assets, and liabilities. The stage at which a marital agreement is executed is an important factor in determining whether the agreement is enforceable.

Two parties who are married or contemplating marriage are in a fiduciary relationship that requires them to act with a heightened obligation of good faith. See Del Vecchio v. Del Vecchio, 143 So. 2d 17, 21 (Fla. 1962). These parties are not dealing at arm’s length, and courts must carefully examine their circumstances to determine the validity of their agreements.

Courts recognize that there is a “vast difference between a contract made in the market place and one relating to the institution of marriage.” Lashkajani v. Lashkajani, 911 So. 2d 1154, 1158 (Fla. 2005).

A marital settlement agreement, like any contract, may be set aside where the agreement is the product of fraud, deceit, duress, coercion, misrepresentation, or overreaching. See Casto v. Casto, 508 So. 2d 330, 333 (Fla. 1987).

Pre-marital agreements, post-nuptial agreements, and marital settlement agreements executed before the parties enter into contested litigation may also be set aside where the agreement is unreasonable or unfair and the challenging spouse did not have adequate financial disclosure. See Casto, 508 So. 2d at 334-35. In making this determination, a court will presume that any financial disclosure was unfair. The court may also look at whether there was pressure surrounding the signing of the agreement, the value of the parties’ respective interests, the disparity between the business experience of the parties, and whether the objecting party had approximate knowledge of the marital assets and liabilities at the relevant time. See, e.g., Kearney v. Kearney, 129 So. 3d 381, 386 (Fla. 1st DCA 2013).

Once the parties are “in litigation,” they are no longer dealing with one another as fiduciaries, and the agreement will not be set aside simply because the terms might be viewed as unfair. See Petracca v. Petracca, 706 So. 2d 904, 911 (Fla. 4th DCA 1998). In litigation, parties are entitled to enter into bad agreements. And, after the parties have had access to discovery procedures, any attempt to set aside a settlement agreement must satisfy the more stringent standard set forth in Florida Rule of Civil Procedure 1.540. See Macar v. Macar, 803 So. 2d 707, 712-13 (Fla. 2001).

Author:
Richard J. Mackler - The Solomon Law Group, P.A.
GO GET ME THE MONEY! - PART 1
Mediation and Arbitration Section
Chair: Hilary High - Hilary High, P.A.

The real magic in mediation happens after the parties reach their original targeted numbers and then elect to continue negotiating to close the settlement gap.

Many litigation-based mediations are purely “distributive” in nature. Settlement is achieved through negotiations that lead one party to pay money to another in order to end a lawsuit. Personal injury cases, construction litigation, employment claims, and business disputes often fall within this distributive arena, where position-based bargaining over money is the task at hand.

If the objective of such negotiations is to reach a “number,” should trial counsel inform the mediator of a party’s “bottom-line” figure? If the “best number” is disclosed to the mediator early in the mediation process, will that expedite settlement? It is my view that the answer to these questions is “no.”

In almost every mediation, the parties begin their negotiations with a final number in mind, and they usually expect that the other side must reach their figure if the case is to settle. However, the real truth is that these targeted numbers almost never work at mediation — the plaintiff’s “lowest number” is always higher than the settlement limits formulated by the defendant or its insurance carrier. If both sides simply hold their initial positions, impasse is almost guaranteed.

Since each side’s “walk-away” numbers do not overlap, focusing on these numbers as a strategy for settlement is unproductive. By revealing such information to the mediator, and by discussing the targeted outcome during mediation, the bottom-line number becomes fixed, positions harden, and the figure is given an unwarranted importance.

The real magic in mediation happens after the parties reach their original targeted numbers and then elect to continue negotiating to close the settlement gap. This occurs when lawyers and their clients use mediation to explore and re-evaluate their positions in the litigation. Discussions among the mediator, counsel, and the client about the strengths and weaknesses of the case; the risks of an unfavorable result at trial; costs of continuing the lawsuit; the challenges of collecting a judgment; and the time and emotional demands of litigation are all useful topics. The parties are encouraged to compare their settlement opportunities with the trial option and select the path that works best for them. Although the party’s right to self-determination is paramount in Florida mediations, a conversation about such issues helps the client make informed and rational decisions about settlement.

When these re-evaluations occur in an honest and open fashion at mediation, new bottom-line numbers should emerge, and they are more likely to result in settlement. Stated differently, a party’s walk-away number at the beginning of the mediation will change over time, and that figure transforms into a better figure at the end of the day if settlement is that party’s objective.

Author:
Charles W. Ross - Charles W. Ross, Esq.
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Military & Veterans Affairs Committee
Chair: Bob Nader - Nader Mediation Services; Military Liaison: Lt. Col. Christopher Brown - 6th Air Mobility Wing

One may be tenderly reminded of A.E. Housman’s immortal To An Athlete Dying Young when visiting the courtroom of the Thirteenth Judicial Circuit’s Veterans Treatment Court to observe military veterans of our community who dutifully served their country stand at the bar, approach the bench, and reveal their stories. Once superbly trained and courageous as any celebrated athlete, if not more so, these proud veterans of the Afghan and Gulf Wars and the Vietnam conflict of two generations ago have entered upon hard times. With spirit bent but not unbroken, they now step before presiding Judge Richard Weis and bravely commit to the conditions of the 12-month voluntary treatment program afforded to these soldiers of now lesser fortune with a renewed opportunity for redemption.

During the four years of World War II, 11.2 percent of the nation’s population was actively engaged in some form of military service. During the Vietnam era of over a decade, 4.3 percent of the nation’s population served. However, since 2001, only 0.45 percent of our population has served in the Global War on Terror. Hence, our nation has now asked the relative few to sacrifice in defending our country. And many of these men and women volunteers return home altered of body and spirit, suffering from military-service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological issues, resulting in offenses, charges brought, and criminal arrests. How can a community give back to its veterans in need? One way our judicial system is giving back is through Veterans Treatment Courts.

The Veterans Treatment Court of Hillsborough County (VTC) was established through a collaborative effort involving Chief Judge Manuel Menendez Jr.; the judges of Hillsborough County; the Offices of the State Attorney and Public Defender; the Offices of the Court Administrator and Clerk of the Court; state and federal Departments of Veterans Affairs; numerous veterans service organizations; and other civilian and military community partners. Through the VTC, veterans enter a misdemeanor diversion program where they accept treatment from the Department of Veterans Affairs (VA) and other providers in lieu of criminal prosecution.

After signing a participant agreement that outlines the duties of the veteran charged and the consequences of failing to comply, the would-be criminal defendant, upon acceptance into the program, is assessed and by court order given an appropriate treatment plan that is implemented using existing VA assistance packages and protocols the veteran may not have known existed or may have had trouble accessing in the past. The ultimate goal is to rehabilitate the veteran through proper diagnosis and treatment, to preclude further involvement in the justice system, and to protect the public. Upon fulfillment of those responsibilities and completion of the extended program, the veteran graduates, receives a certificate of success, and has his or her record favorably resolved.

The VTC currently adjudicates certain specified misdemeanor offenses set out in an administrative order. In the near future, the VTC will incorporate provisions of the T. Patt Maney Veterans’ Treatment Intervention Act enacted by the Florida Legislature, resulting in a significant increase in the number of veterans entering the treatment programs the court is designed to administer. As Chief Judge Menendez commented, “With the support of our criminal justice partners and the VA, we (the Thirteenth Judicial Circuit) are in

“And silence sounds no worse than cheers ... after earth has stopped the ears.”

Continued on page 49
the process of expanding our VTC to handle felony cases. Judge Weis has done a yeoman’s job for the past two years initiating our misdemeanor cases, and we are now preparing to offer eligible veterans charged with certain felony offenses the opportunity to participate in the same treatment program without compromising the safety of the public.”

In addition to the treatment plan ordered, the VTC also operates by using existing court staff and additional outside resources to mentor the veterans before the court. The mentoring coordinator, Col. (Ret.) D.J. Reyes, and other veterans serve as volunteer mentors providing supportive roles in the process. Jarred Miller, who is the VA liaison to the VTC, determines available benefits and coordinates treatment and counseling services through applicable VA programs.

As a part of its mission, the Mentoring Subcommittee of the HCBA’s Military & Veterans Affairs Committee (MVAC) is spearheading an effort to place additional volunteer mentors at the request of the VTC to act as a “battle buddy” or role model to the veterans in the program. It may be as simple as talking to your protégé about his or her progress in the program or upcoming milestones or securing feedback from the VA representatives and other support personnel with whom you may interface to determine the veteran’s status of achievement. You would then accompany the veteran at the semi-monthly court appearance intervals to provide input and the affirmative directions being taken by the veteran during the course of the program.

You are invited to get involved with this meaningful HCBA committee and become a mentor. As Judge Menendez envisions for the future, “We look forward to working with MVAC in this effort to enhance our Veterans Treatment Court, which has proven very successful in other communities.”

Authors: Bob Nader and Lt. Col. Christopher Brown, with contributions from Chief Judge Manuel Menendez Jr. and Judge Richard Weis of the Thirteenth Judicial Circuit Court
explaining that professionalism is not “simply an issue of rule-following or rule-violating.”

The opinion does not create a new code of “professional” or “unprofessional” conduct. Rather, the court adopts the existing Standards of Professionalism found in the Oath of Admission to the Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating the Florida Bar and the decisions of the Florida Supreme Court.4

Thus, members of The Florida Bar are enjoined from engaging in “unprofessional conduct.” And when the unprofessional conduct demonstrates substantial and repeated violations of the Standards of Professionalism, the unprofessional conduct can subject an attorney to discipline as a violation of Rule 4-8.4(d) of The Rules Regulating The Florida Bar.

Under Rule 4-8.4(d), a lawyer shall not “engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis.”5

The court referenced a dissolution of marriage case where the lawyer made unethical, disparaging, and profane remarks to belittle and humiliate the opposing party and her lawyer. He referred to the opposing party as “crazy” and a “nut case.” He also made facial gestures and stuck his tongue out at a deposition and called opposing counsel a “stupid idiot” who did not know the law and needed to go back to law school. These and other repeated violations were deemed to be sufficient for discipline under Rule 4-8.4(d).6

Thus, the question of resolving professionalism complaints is not simply an issue of rule-following or rule-breaking. They may be resolved in the Local Professional Panel through conversations or written communications, but it may require more severe sanctions if necessary.

1 In re: Code for Resolving Professionalism Complaints, 116 So. 3d 280 (Fla. 2013).
2 Id. at 280 (emphasis added.)
3 Id. at 281 (emphasis added.)
4 Id. at 282.
5 R. Regulating Fla. Bar. 4-8.4(d).
6 The Florida Bar v. Martocci, 791 So. 2d 1074 (Fla. 2001).

Author:
Thomas Newcomb Hyde - Thomas Newcomb Hyde, Attorney at Law

To join the Professionalism & Ethics Committee, call (813) 221-7777.
Getting good service in a downtown restaurant at lunchtime is sometimes difficult. However, getting good service in a trust proceeding is sometimes even harder, until recently.

Effective October 1, 2013, the Florida Trust Code permits service of process by any form of mail, or commercial delivery service, requiring a signed receipt in 'in rem' and 'quasi in rem' trust proceedings. § 736.02025(2), Fla. Stat. (2013). Previously, litigants seeking 'in rem' or 'quasi in rem' relief in trust matters were required to serve process as provided for in Chapter 48, just as in any other civil proceeding.

The new procedure is similar to the procedure for service of formal notice in probate proceedings under Florida Probate Rule 5.040. Like Rule 5.040, Section 736.02025 allows a plaintiff to serve process by sending a copy of the summons and complaint to the defendant or to a person authorized to receive service on behalf of the defendant as provided for in Chapter 48, Florida Statutes. However, the summons and complaint must be sent by a method that requires a return receipt. This would include commercial delivery services as well as certified mail. Proof of the service is then made by a verified statement of the person serving the summons that attaches the signed receipt or other evidence that the delivery was made to the addressee or other authorized person.

Unlike Rule 5.040, however, section 736.02025(3) also provides for service by first-class mail. This method of service is limited to 'in rem' and 'quasi in rem' trust proceedings by a verified statement stating the basis for service by first-class mail, the date of mailing, and the address to which it was mailed.

This statute will not get you that lunchtime salad any faster, but it should help a lot in your next trust proceeding. If service of process is obtained under the provision providing for service by first-class mail, proof of service is then made by a verified statement stating the basis for service by first-class mail, the date of mailing, and the address to which it was mailed.

Author: Michael R. Kangas - Phillip A. Baumann, P.A.
The Second Circuit Court of Appeals recently explored the precise boundaries of the term “customer” as it is used in the Financial Industry Regulatory Authority’s (FINRA) rules when determining whether an individual could compel arbitration. Less than one month later, a Florida state court delivered an opinion on the same issue.

In *Citi Global v. Abbar*, 761 F. 3d 268 (2d Cir. 2014), Abbar, trustee of the Abbar family trusts, lost $383 million of trust assets that had been invested through Citi UK. Citi UK was a foreign affiliate of Citigroup Global Markets Inc. (Citi NY), a FINRA member incorporated in New York. Although Abbar paid only Citi UK for brokerage services, some of the investment bankers who helped Abbar manage the investments were employed by Citi NY. When the investments lost value, Abbar commenced a FINRA arbitration against Citi NY. Citi NY filed an action in court to enjoin the arbitration, arguing that FINRA rules mandate arbitration only if the claimant is a “customer” of Citi NY. The district court concluded Abbar was not a customer of Citi NY and, therefore, not entitled to arbitrate the dispute pursuant to the FINRA dispute resolution process. The Second Circuit affirmed, reasoning that: A “customer” under FINRA Rule 12200 is one who: “(1) purchases a good or service from a FINRA member, or (2) has an account with a FINRA member.” *Id.* at 275. Although Citi NY employees provided services to Abbar, all fees for those services were paid to Citi UK, not Citi NY. The court concluded that Abbar’s customer relationship with Citi UK did not permit him to compel arbitration against a corporate affiliate. *Id.*

Florida’s Fifth District Court of Appeal recently followed suit in *Grant v. Rotolante*, 2014 WL4249753 (Fla. 5th DCA August 29, 2014). Grant, a FINRA-registered representative, and Rotolante were friends and neighbors. Rotolante solicited Grant’s advice regarding her finances. Grant gave her advice and accompanied her to meetings with her financial advisor. After suffering investment losses, Rotolante commenced an arbitration against Grant. Relying on the language of FINRA Rule 12200, the court concluded Rotolante was not Grant’s customer. She “never opened an account with Mr. Grant, deposited any money or securities with Mr. Grant, purchased or sold any securities from or through Mr. Grant, or paid Mr. Grant any compensation.” *Id.* at 6.

“The [Federal Arbitration Act] reflects the fundamental principle that arbitration is a matter of contract,” *Rent-A-Center v. Jackson*, 561 U.S. 63, 67 (2010), and whether a customer relationship has been established under FINRA regulations hinges, in part, on the existence of common law contract consideration. In both *Citi Global* and *Grant*, the would-be customer received services from a FINRA member but never paid that member for those services and, therefore, was not a customer.
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There are many opportunities to execute an unforced error in the presentation of evidence, which may result in an appellate court reversal. In Saunders v. Dickens, 2014 WL 3361813 (Fla. 2014), that an attorney’s misleading statements to the jury will result in a reversal if those statements result in harmful error.

Walter Saunders visited Dr. Dickens, a neurologist, “because he was experiencing back pain, leg pain, and unsteadiness on his feet,” and tingling and numbness in his hands. Id. at 1. Dr. Dickens believed that Saunders’ condition was caused in part by “peripheral neuropathy due to diabetes.” Id. However, Dr. Dickens did not perform any tests to confirm his diagnosis. An MRI revealed a narrowing of Saunders’ spinal canal, and Dr. Pasarin, a neurosurgeon, performed a lumbar decompression operation on Saunders. Unfortunately, the operation resulted in a progressively degenerative condition for Saunders and eventually led to his quadriplegia and death.

In Dr. Dickens’ medical malpractice trial, he “raised the affirmative defense that Dr. Pasarin’s negligence was the cause of Saunders’ injury,” and Dr. Pasarin was included in the trial as a Fabre defendant. Dr. Dickens presented expert witnesses who testified that Dr. Dickens was not negligent and that it was Dr. Pasarin who deviated from a reasonable standard of care.

In Saunders, the court discussed the “burden of proof in negligence actions.” Id. at 5. “The elements of a medical malpractice action are: (1) a duty by the physician, (2) a breach of that duty, and (3) causation.” Id. at 6; see also Gooding v. Univ. Hosp. Bldg., Inc., 445 So. 2d 1015, 1018 (Fla. 1984). The duty of a physician is to practice the standard professional level of “care, skill, and treatment that in consideration of all surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably prudent health care providers.” Saunders, 2014 WL 3361813, at 6; see also § 766.102, Fla. Stat., (2013).

In closing statements, Dr. Dickens’ attorney improperly shifted the burden of proof by arguing that a “subsequent treating physician [Dr. Pasarin] would not have treated the patient plaintiff differently had the defendant physician acted within the applicable standard of care.” Id. at 8. Further, Dr. Dickens’ attorney misstated the law by arguing that Saunders was “required to establish only that Dr. Dickens’ care fell below that of a reasonably prudent physician and that, more likely than not, adequate care by Dr. Dickens would have prevented Mr. Saunders’ devastating injuries.” Id. at 7. The Florida Supreme Court held that the trial court erred in allowing Dr. Dickens’ attorney to make those misleading arguments in closing. Id.

Saunders demonstrates that it only takes a few errant words to reverse a jury verdict.

Author:
Caroline Johnson Levine - Office of the Attorney General

Save the Date: The next Trial & Litigation Quarterly Luncheon is December 11.
TRIAL & LITIGATION QUARTERLY LUNCHEON

The HCBA Trial & Litigation Section kicked off the Bar year on October 1 with a great luncheon featuring Jeff Klinkenberg, “Real Florida” writer for the Tampa Bay Times. Section Chair Kevin Napper introduced Klinkenberg, who discussed good storytelling techniques and read excerpts from his new book, “Alligators in B Flat.” Napper also invited Hillsborough County Bar Foundation President Bill Schifino Jr. to the podium to speak. Schifino, a former HCBA president, is being encouraged to and is considering a run for The Florida Bar presidency.

The Trial & Litigation Section would like to thank the luncheon’s sponsor:
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MEET THE HCBA LEADERSHIP INSTITUTE CLASS OF 2014-2015

The Bar Leader Institute class of 2014-2015 met for a welcome reception on October 1 at the Chester H. Ferguson Law Center. Congratulations to those who were chosen this year:

- Adam Bantner
- Kevin Brick
- Patrick Causey
- Thomas Curran
- Katelyn Desrosiers
- Adam Fernandez
- Cameron Frye
- Autumn George
- James Giardina
- Jacob Hanson
- Ashley Hayes
- David Hayes
- Michelle Hutt
- Hend MacLean
- Brad McDonald
- Lisa Pach
- Katherine Scott
- Jonathan Tannen
- Robert Walton
The story was reported in the Miami Herald on Thursday, August 14, and in other newspapers throughout the state. The Florida Workers’ Compensation Law is unconstitutional. The Legislature has cheated the state’s injured workers. Such a ruling will obviously have a dramatic impact on employers, insurance carriers, injured workers, and attorneys ... or will it?

The article featured in the Miami Herald and other publications involved a ruling by Circuit Court Judge Jorge E. Cueto, sitting on the bench in Miami-Dade County in the Circuit Court of the Eleventh Circuit. The ruling was actually issued on the basis of an order on an amended motion for summary judgment. First and foremost, it should be noted that the order issued by Judge Cueto did not arise from a workers’ compensation hearing. In Florida, the Division of Administrative Hearings and, more specifically, the Office of the Judges of Compensation Claims, has exclusive jurisdiction over the adjudication of workers’ compensation claims. The matter in which Judge Cueto issued a ruling stemmed from a claim brought by Elsa Padgett, who was a Miami-Dade County government office worker. The case, formally styled Padgett v. State of Florida, Office of the Attorney General, arose from an injury suffered by Padgett when she tripped over boxes left on the floor by a co-worker on January 27, 2012. The facts of the case show that Padgett suffered a significant injury that resulted in a shoulder replacement surgery. Rather than pursue benefits through the workers’ compensation system, Padgett filed a negligence personal injury lawsuit against her employer. The suit was filed in the Eleventh Judicial Circuit Court in Miami-Dade County, which was the appropriate venue for Padgett’s personal injury claim. As one might suspect, Padgett’s employer immediately defended the case on the basis of immunity, asserting that workers’ compensation benefits were the sole remedy available to Padgett based upon section 440.11, Florida Statutes, also known as the “exclusivity” provision of the Workers’ Compensation Act.

As it stands now, the result of the order entered in Miami-Dade County is that section 440.11 has been declared unconstitutional, meaning that the Workers’ Compensation Act should no longer be the exclusive remedy for injured workers. In fact, the court found that the exclusivity provision of the Workers’ Compensation Act violated the due process clause of the 14th Amendment of the U.S. Constitution; the Access to Court’s Provision of Article I, Section 21, of the Florida Constitution; and the Florida Constitution’s right to trial by jury; and the Florida Constitution’s right to be rewarded for industry.

Although some will certainly view the order granting the amended motion for summary final judgment a victory for injured workers, in the end, its application will likely be limited. This is primarily due to the fact that the Florida Supreme Court is the ultimate authority on issues involving constitutionality. It seems unlikely that the immunity provisions of the act will be invalidated, but there are two other challenges to provisions of the act before the Supreme Court that are likely to be decided soon. Although it is clear that the headline is dramatic, it is equally as clear that the immunity provision remains valid elsewhere in the state and has not yet been stricken by the Florida Supreme Court. Regardless, this will certainly be an interesting year in Florida workers’ compensation and likely an issue that will not be put to rest for many years to come. To read more about this topic in a longer version of this article, go to hcbatampabay.blogspot.com.

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Erin Smith Aebel, a partner at Shumaker, Loop & Kendrick, LLP, and co-chair of the Tampa Health Law Department, has been named the Tampa Bay Business Journal’s 2014 Businesswoman of the Year in the Legal Services category. Aebel is a health care practice co-administrator at the firm.

Jordan D. August has joined Carlton Fields Jorden Burt as an associate in the firm’s business transactions practice group. August practices taxation and estates and trusts at the firm, representing both individuals and entities in the areas of federal and state tax law, tax controversies, estate planning, and probate administration.

Steven M. Berman, a partner at Shumaker, Loop & Kendrick, LLP, was a featured panelist at the 22nd Annual Southwest Bankruptcy Conference on Ethics: Professionalism. Berman practices as a business bankruptcy litigator at the firm.

Edward J. Carbone, a managing partner at Roig Lawyers, has been elected to a two-year term on the Florida Defense Lawyers Association Board of Directors. Carbone focuses his practice on health care law, appellate litigation, business litigation, and medical malpractice.

Debra Deardourff Faulk was recently promoted to shareholder at GrayRobinson, P.A., in Tampa. Faulk’s practice areas include intellectual property, litigation, regulated products, technology licensing, and trademark.

Rachel Feinman, a shareholder at Hill Ward Henderson, was elected as president of the Gasparilla International Film Festival. Feinman’s practice focuses on mergers and acquisitions along with corporate lending transactions.

T.J. Ferrante, an associate at Carlton Fields Jorden Burt, has been selected to serve as a board member of Junior Achievement of Tampa Bay’s JA Connections. Junior Achievement is a nonprofit organization providing a series of business, economics, and life-skills programs to enhance the education of young people. Ferrante is a member of the firm’s national health care practice group.

Continued on page 66
Continued from page 65

Michael L. Forte, a partner at Rumberger, Kirk & Caldwell, P.A., was awarded the 2014 TAQ Award from the Florida Defense Lawyers Association for outstanding service on the editorial board of the Trial Advocate Quarterly. Forte is a litigator who practices in the areas of retail and hospitality, government, and products liability.

Kevin J. Healey has joined Smolker, Bartlett, Schlosser, Loeb & Hinds, P.A., as an associate for the firm. Healey concentrates his practice on state and federal commercial litigation as well as insurance disputes.

Dominique E. Heller, an associate at Wiand Guerra King, has received an “AV Preeminent” rating from Martindale-Hubbell, one of the country’s leading peer-rating services for lawyers. The AV Preeminent is the highest possible rating for professional excellence and ethics that can be awarded. Heller’s practice includes general commercial litigation, regulatory matters, and appeals with a focus on securities and financial services litigation.

Hilary High of Hilary High P.A. in Tampa was one of three mediators in Florida admitted to the Florida Circuit-Civil Mediator Society, an association whose membership consists of Supreme Court-certified circuit-civil mediators who have proven experience in the resolution of civil and commercial disputes.

Michele Leo Hintson, partner in the Tampa office of Shumaker, Loop & Kendrick, LLP, has been named chair of the Community Advisory Board of the Leadership Council of the Junior League of Tampa Bay. She has also been certified by the Florida Supreme Court as a circuit court mediator, allowing her to mediate civil disputes in the circuit courts throughout Florida. Hintson dedicates her practice to representing businesses, insurance companies, health care organizations, and individuals in all aspects of the dispute resolution process.

Gregg E. Hutt, shareholder at Trenam Kemker, has been certified by The Florida Bar in construction law. Certification is the highest level of recognition by The Florida Bar. Hutt is a member of the construction and commercial litigation practice groups at Trenam Kemker and has been a shareholder since 2012.

Stephen A. Liverpool, an associate in Hill Ward Henderson’s land use and real estate groups, was recently appointed chair of the Young Professionals Group for the Real Estate Investment Council. Liverpool’s practice primarily involves representing clients in all phases of commercial real estate development, including leasing, investment, financing, and purchase and sale transactions.

Erin M. McKenney, an associate for Shumaker, Loop & Kendrick, LLP, has been elected to the Board of Trustees for Keep Tampa Bay Beautiful, an organization that provides environmental education and volunteer opportunities to the community. McKenney has also been accepted into the Provisional Junior League of Tampa Class for 2014-2015. The Junior League of Tampa is an organization of more than 1,800 women committed to improving communities. McKenney has been with Shumaker since April, and her practice focuses on health law.

Jeff Paskert, of Mills Paskert Divers in Tampa, has been selected to serve as co-chair on the Insurance and Surety Claims Subcommittee of the American Bar Association’s Construction Litigation Section. Paskert also recently addressed a construction industry conference in Orlando on the topic of proper selection and use of expert witnesses.

Woodrow H. “Woody” Pollack, a Tampa-based shareholder at GrayRobinson, P.A., has been named vice-chair of The Florida Bar Business Law Section Intellectual Property Committee. The Business Law Section of The Florida Bar serves lawyers, law students, and the faculty of its law schools. Pollack is a registered patent attorney who litigates patent, trademark, copyright, and other intellectual property disputes in federal and Florida state courts.

Luis Prats, a shareholder for Carlton Fields Jorden Burt, has been appointed chair of Stetson University’s Board of Trustees. His duties as chair will include serving as spokesperson for the board, acting as chair of the Executive Committee, and appointing committee chairs and vice chairs (as necessary). Prats is a board-certified construction lawyer and has been with the firm for more than 30 years.

Jared J. Perez was named member at Wiand Guerra King. Perez is currently part of the team that represents a court-appointed
receiver nominated by the Securities and Exchange Commission. Perez joined Wiand Guerra King in March 2011 and concentrates his practice on complex commercial litigation.

Maria del Carmen Ramos, a Tampa-based attorney for Shumaker, Loop & Kendrick, LLP, has been selected to Volume III of the Latino American Who’s Who, a biographical publication that distinguishes leading Latino professionals who have attained a recognizable degree of success in their field of endeavor. Ramos joined Shumaker, Loop & Kendrick, LLP, in 2004 and is a partner practicing immigration and nationality law.

Jacqueline R.A. Root, an associate at Roig Lawyers, was selected as a “Model of Success” by the Dunedin Fine Art Center (DFAC). As part of DFAC’s annual Wearable Art show, prominent young professionals in the community were chosen to model the designs and to be “Models of Success.” The event raised awareness and support for DFAC, which provides arts education for the Greater Tampa Bay area.

Jeffrey T. Shear, a shareholder at Gunster law firm, has been elected to the board of directors of the Real Estate Investment Council of Tampa Bay. Shear is a real estate attorney with experience in health care law whose practice involves the representation of developers and institutional investors in commercial and residential development.

Robert Shimberg, a shareholder at Hill Ward Henderson, was elected chair of Metropolitan Ministries. Metropolitan Ministries cares for the homeless and those at risk of becoming homeless in the Tampa Bay area. Shimberg focuses his practice on commercial litigation, corporate compliance, and governmental relations.

John V. Trujillo Jr. has joined Smoak, Chistolini & Barnett, PLLC, as a partner. Trujillo focuses his practice on the litigation of commercial debt collection, judgment enforcement, judgment collection, contract disputes, and asset/business purchase fraud matters.

Miriam Velez of Valkenburg & Velez, P.A., was elected president of the Tampa Hispanic Bar Association for the 2015 calendar year. Miriam, along with the board of directors, will be sworn in by Chief Justice Jorge Labarga at the 8th Annual Scholarship Gala Dinner.

Peter W. Zinober, shareholder at Greenberg Traurig LLC, has been reappointed for an additional one-year term as Employer Co-Chair of the ABA’s Section of Labor and Employment’s Human Trafficking Task Force. Zinober focuses his practice on discrimination and civil rights litigation in state and federal courts.

The Law Office of Gary S. Dolgin has moved to the Bank of Tampa building at 601 Bayshore Blvd., Suite 150, Tampa FL 33606. The offices can be reached via telephone at 813-223-3200 or email at office@dolginlaw.com.

Shumaker, Loop & Kendrick, LLP’s Leadership Shumaker program donated $1,700 to the Humane Society of Tampa Bay. Leadership Shumaker also donated food and other items to benefit animals in need.

Smoak & Chistolini, LLC, has combined with Tampa law firm Barnett & Associates, P.A. The consolidation evidences Smoak & Chistolini’s continued growth and complements the firm’s growing presence throughout Florida. The firm will be known as Smoak, Chistolini & Barnett, PLLC.

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**For the month of June 2014**
**Judge:** Hon. William P. Levens  
**Parties:** John Griffin vs. James Nagy  
**Attorneys:** For plaintiff: Cliff Sommers; for defendant: Brock Johnson and Matt Easterwood  
**Nature of case:** Pedestrian vs. automobile accident, neck and brace injury  
**Verdict:** Outright defense verdict on liability

**For the month of June 2014**
**Judge:** Hon. J. Dale Durrance  
**Parties:** Jacqueline Ward vs. Bruce Robinson  
**Attorneys:** For plaintiff: Welden E. Brennan and Gregory P. Abaray; for defendant: Michael L. Forte and Jessica A. Tetrick  
**Nature of case:** Auto accident involving a 5-year-old girl resulting in alleged brain damage  
**Verdict:** $3,209 (47 percent of EMS and ER bills), reduced to $0 after PIP setoff. Brennan asked the jury for $1.2 million. Defendant’s motion for attorney’s fees and costs is pending.

**For the month of August 2014**
**Judge:** Hon. Claudia R. Isom  
**Parties:** Terry vs. Hewitt  
**Attorneys:** For plaintiff: Morgan W. Streetman; for defendant: Michael Serrano  
**Nature of Case:** Battery  
**Verdict:** Principal claim $443,898.56; loss of consortium claim: $100,000

**For the month of August 2014**
**Judge:** Hon. Martha J. Cook  
**Parties:** Marion Kinter vs. Hillary Morgan, ARNP and Seffner Premier Healthcare, P.A.  
**Attorneys:** For plaintiff: Matthew Mudano; for defendant: J. Travis Godwin  
**Nature of case:** Medical malpractice action in which plaintiff claimed defendant failed to provide appropriate diagnosis and treatment plan for the plaintiff, causing plaintiff to suffer a stroke  
**Verdict:** Defense verdict

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