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**DIVISIONS**

5  REFLECTIONS AND THE YEAR AHEAD
   Editor’s Message
   by Amy R. Nath

6  BROOKLYN BORN, TAMPA RAISED
   HCBA President’s Message
   by Bob Nader

8  GET INVOLVED WITH THE YOUNG LAWYERS DIVISION THIS YEAR!
   YLD President’s Message
   by Rachael L. Greenstein

10  THE FLORIDA BAR’S NEW “COACH K”
    Executive Director’s Message
    by John F. Kynes

12  CHECK POINTS — KEEPING OUR STREETS SAFE
    State Attorney’s Message
    by Mark A. Ober

**FEATURES**

3  2012-2013 HCBA BOARD OF DIRECTORS

26  LEADERS: STEVE YERRID: LEADING BY EXAMPLE
    by Raymond T. (Tom) Elligett, Jr.

30  INSTALLATION OF 2012-2013 HCBA OFFICERS AND DIRECTORS

34  “THE OUTLAWS” SOFTBALL TEAM — THEN AND NOW
    by Judge Susan C. Bucklew

37  STAFF SPOTLIGHT

**EVENTS**

7  JUDGE RALPH C. STODDARD PRESENTED 2012 ABRAHAM LINCOLN AWARD

38  SAVE THE DATE: BENCH BAR CONFERENCE AND MEMBERSHIP LUNCHEON — OCTOBER 30, 2012
    by Judge Emily Peacock and Judge Caroline J. Tesche

46  FLORIDA BAR RECOGNIZES WORK OF HCBA DIVERSITY COMMITTEE CO-CHAIRS

**ABOUT THE POSTCARDS**

This issue’s cover is from a 1945 postcard produced by the Curt Teich Company, a major manufacturer of postcards from 1898 to 1978. This highly stylized card is referred to as a “linen” postcard, popular in the 1930s and 1940s, before “chrome” postcards became the dominant medium. The Curt Teich Postcard Archives are housed at the Lake County Discovery Museum. For more information, visit www.lcfpd.org/teich_archives.

The St. Petersburg Alligator Farm & Zoo, shown right and on page 55, was located at 36th Avenue South and Sixth Street.

Postcards courtesy of Raymond T. (Tom) Elligett, Jr.
SECTIONS

16 A PRIMER ON MANDATORY E-SERVICE FOR APPELLATE ATTORNEYS  
Apellate Practice Section by Kristin A. Norse

18 JOIN THE NEW COLLABORATIVE LAW SECTION!  
Collaborative Law Section by Fraser J. Hirnes

22 THE HIGH HURDLE TO A SPOLIATION CLAIM: IS THE EVIDENCE CRUCIAL?  
Construction Law Section by J. Derek Kantaskas and William B. Collum

24 FLORIDA SUPREME COURT UPHOLDS CONTROVERSIAL DRUG STATUTE  
Criminal Law Section by Mark P. Rankin

26 ASSESSING THE CONDEMNATION CLAUSE IN YOUR CLIENT’S MORTGAGE  
Eminent Domain Section by Lewis E. Garlisi

45 JUSTICES UPHOLD MANDATE, STRIKE DOWN MEDICAID EXPANSION  
Health Law Section by Jessica Cohen

46 NEW EXECUTIVE ORDER BRINGS RENEWED HOPE TO YOUNG UNDOCUMENTED IMMIGRANTS  
Immigration & Nationality Section by Yahima Hernandez and Christine Smith

48 DOMAIN NAMES, DEFENSIVE REGISTRATION, AND BAD FAITH  
Intellectual Property Section by Dineen Pashoukos Wasylik

49 THE SUPREME COURT ISSUES ITS FIRST EXEMPTION DECISION  
Labor & Employment Section by Scott T. Silverman

50 LOOKING FORWARD TO ANOTHER EXCITING YEAR  
Marital & Family Law Section by Alexander Caballero

51 SPEAK NO EVIL—INCREASE YOUR EFFECTIVENESS AT MEDIATION  
Mediation & Arbitration Section by Jay Frank Castle and Dedra Newman Castle

52 MOREY V. EVERBANK: LIFE INSURANCE AND CREDITORS’ CLAIMS  
Real Property Probate & Trust Section by Katie Everlove-Stone

53 THE YEAR AHEAD AT A GLANCE  
Solo/Small Firm Section by James A. Schmidt

54 TOP TAX EFFECTS OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT  
Tax Law Section by Justin J. Klatsky

55 RULE AMENDMENTS PROVIDE FOR ELECTRONIC SERVICE, FILING, AND DISCOVERY  
Trial & Litigation Section by Brad Kimbro and Paul McDermott

56 NEW EXECUTIVE ORDER BRINGS RENEWED HOPE TO YOUNG UNDOCUMENTED IMMIGRANTS  
Immigration & Nationality Section by Yahima Hernandez and Christine Smith

58 RESUME

COMMITEES

14 CELEBRATING PRO BONO WEEK, LAUNCHING CROSSROADS FOR FLORIDA KIDS  
Pro Bono Committee’s Message by Allison W. Singer

20 TOOLS YOU NEED TO SUCCEED: A GUIDE FOR GIVING BACK  
Community Services Committee by Sarah M. Glaser and Zachary J. Glaser

40 TIME TO PUT AN END TO THE USE OF THE “R WORD”  
Diversity Committee by Marcos Hasbun

IN EVERY ISSUE

17 HCBA 100 CLUB
19 HCBA BENEFIT PROVIDERS
37 SAVE THE DATES
59 AROUND THE ASSOCIATION
60 CLASSIFIED ADVERTISING
60 ADVERTISING INDEX

THE HILLSBOROUGH COUNTY BAR ASSOCIATION

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THE HILLSBOROUGH COUNTY BAR ASSOCIATION

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Reflections and The Year Ahead

A healthy period of reflection can be an important step in recognizing both our professional and personal trajectories.

Welcome to the 2012-2013 Bar year! As the summer draws to a close, I hope you feel rejuvenated by any excursions you may have gone on and are looking forward to the new year.

A common observation among attorneys is that, once law school ends, our days “roll together” without the structure of exam periods and vacations that the academic year can provide. Soon enough, we realize that years passed by in our respective practices and, for whatever reason, we barely noticed.

A great thing about the fall is that it marks a number of new beginnings: among them, the Bar year, the academic year, and for many of our employers, the fiscal year. Fall, therefore, also offers an excellent opportunity to reflect. In the midst of fielding phone calls and putting out the fires that can arise regularly in our busy practices, it can be difficult to find the time, and even the will, to sit back and consider where the past year has taken us. But a healthy period of reflection, to take stock of the experiences had and the lessons learned over the year, can be an important step in recognizing both our professional and personal trajectories. In other words, we can help determine where we are going by taking a look at where we have been. And, of course, that period of reflection will offer some concrete answers when we inevitably ask ourselves, “Where did the last year go?”

Reflection is a key theme in some of this issue’s articles and in this year’s Lawyer magazines generally. On page 6, check out President Bob Nader’s tales of growing up here in the Tampa area. Also, enjoy the story on page 34 of a recent reunion of the former members of an all-female attorney and physician softball league; you should find some of the members very familiar! Finally, I hope this year’s cover image theme, Old Florida postcards, will give many of you cause to reflect on an important period in our state’s history.

Moving forward into this Bar year, I am grateful for the guidance I receive regularly from President Bob Nader and Executive Director John Kynes; their enthusiasm is contagious, and I will enjoy reading their messages in this magazine throughout the year. I also consider myself extremely lucky to work closely with the HCBA’s new Communications Coordinator, Wendy Whitt. Since starting her HCBA work in May, Wendy has proven herself to be patient, professional, and a huge asset to our organization. Finally, I thank all of this issue’s contributing authors, and I truly look forward to working with the authors who will provide the content in coming issues. If you would like to submit an article to Lawyer magazine, please keep the following submission deadlines in mind:

<table>
<thead>
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<tr>
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Best wishes for a fantastic year!
Brooklyn Born, Tampa Raised

“All these were honored in their generation and were the glory of their times.”

—Lawrence Ritter citing Ecclesiasticus 44:7

I remember when family friends and relatives called out to my father, his name never conjured up the image of a two-time Super Bowl winning quarterback. Although I always thought the name Eli was pretty cool, it wasn’t common, and neither was my dad. From St. Augustine, the oldest city in the United States as it is known, Eli Nader became a hot-shot fly boy World War II pilot who trained at Maxwell Air Force Base in Alabama and was deployed to the European Theater. There, in his P-51 Mustang, named after his fiancée, Vivacious Vivian, he successfully had a kill and a half against his Luftwaffe Nazi adversaries.

Although he passed away many years ago, his wife, my mom, Vivian, was there rooting me on at the installation of HCBA officers and directors in June. Vivian Nader remained a widow for all these years, and I am pleased to say she is the proud mother of three lawyers who are long-time members of our extraordinary Bar organization.

I was born in Brooklyn, N.Y., when it was the world, or so it seemed. It is where the maternal side of the family was from. Having a hankering for the warm weather and familiarity of the south, Eli moved his family to Tampa, much to the initial consternation of Vivian. When Dad was to be discharged from the Army Air Corps (the military branch of the Air Force had not yet been established), he brought his young bride to Tampa, where he was relieved of his duty at old Drew Field, part of which fills the current runway of Tampa International Airport. To her, with the swarming mosquitoes and suffocating heat, Tampa was closely proximate to the Devil’s playground.

Soon after arriving in Tampa, we moved to Temple Terrace, a sleepy suburban village unknown to the world, where my brother, George, my sister, Joyce, and I were raised. However, I would visit Brooklyn each summer to hang out with my buddies with the accents and collect Topps Baseball Bubble Gum Cards.

Continued on page 7
Like most offspring of the “Greatest Generation,” we attended public grade school in an area that was a long Chevy drive to downtown Tampa when it was the sole commercial center of Hillsborough County and home to several movie theaters, including the still-standing Tampa Theatre, where having skipped school one afternoon I saw “From Russia With Love,” my favorite James Bond film. I also recall one of my elementary school teachers repeatedly emphasizing, between short story writing assignments and having her classroom warble selections from H.M.S. Pinafore (“When I was a lad I served a term as office boy to an attorney’s firm...”), that anyone can become “president.” She never said president of what, and, therefore, she was right. I guess the song and her sage advice foreshadowed things to come.

Like millions of baby boomers, the Nader siblings attended state universities, got degrees and fell into our initial careers. While at the University of Florida, I got my first taste of theater and being on stage, which served me well as a tenured performer in the HCBA’s Law Follies. And like thousands of baby boomers, we chose the legal profession as our final career move.

Although I have practiced law for three decades, in Florida and Texas, my greatest joy in the profession is having become involved with the HCBA. The many attorneys and judges I have met through our association have been invaluable and an inspiration.

I look forward to reaching out to you through these journal articles. My next one is titled “The Bus Ride.” Finally, I want to thank former HCBA presidents Tom Bopp, Ken Turkel, Amy Farrior, and Pedro Bajo, Jr., for their mentorship and support, and to also express my sincere appreciation to Connie Pruitt, John Kynes and all of the wonderful staff members of the HCBA with whom I have had the distinct privilege of working over the years. From them, I have learned that voluntary Bar work is as satisfying and joyous as the time I had the pleasure of singing with The Temptations.

Judge Ralph C. Stoddard
Presented 2012 Abraham Lincoln Award

Judge Ralph C. Stoddard is the recipient of the 2012 Abraham Lincoln Award presented by the Tampa Bay American Inn of Court. The annual award is given to the member who best exemplifies the goals of the Inn in promoting legal excellence, civility, professionalism, and ethics in the practice of law.

Judge Stoddard, of the Thirteenth Judicial Circuit, joined the Tampa Bay Inn of Court in 2005 and has held several positions.

The award was accompanied by a contribution to the Hillsborough County Bar Association Foundation. Judge Stoddard’s name will be placed on a commemorative brick in the walkway outside the Chester H. Ferguson Law Center.

Pictured from left to right: Judge Claudia Isom; Judge Emmett L. Battles, President of the Tampa Bay Inn of Court; J. Meredith Wester, Treasurer of the Tampa Bay Inn of Court; Judge Ralph C. Stoddard, winner of the 2011 Abraham Lincoln Award; Brian Oblow, Secretary of the Tampa Bay Inn of Court; David Banker, Executive Director of the Tampa Bay Inn of Court; and Judge Lisa Campbell, Immediate Past President of the Tampa Bay Inn of Court.
So here we are. Another year begins for the Hillsborough County Bar Association Young Lawyers Division (“YLD”) and you are asking yourself, “How can I get more involved?” Well, we have lots of options for you this year!

As the incoming president, I am excited about continuing the great community events and volunteer opportunities our organization has established in recent years as well as contributing to a few new ones. Some of our continuing projects include Steak and Sports Day, Holidays in January, the Robert J. Simms Mock Trial Competition, and Law Week. Another project we host annually is our Cornhole for a Cause tournament benefiting Big Brothers Big Sisters.

In addition to these community events, we offer our members ways to give back through pro bono service including our new partnership with Bay Area Legal Services in the Family Forms Clinic. This program, which was initiated last year, has been a huge success and is a wonderful way for young lawyers to give back to the community by using their legal expertise to help those in their time of need.

Also, the YLD provides numerous opportunities for our members to expand their legal knowledge and hone their practical skills through programs such as Judicial Shadowing, Coffee at the Courthouse, the State Court Trial Seminar, and CLE luncheons.

And if all of these events were not enough to encourage your involvement, we also sponsor many networking events including luncheons, quarterly happy hours, and our Annual YLD Golf Tournament. This year’s YLD Golf Tournament is scheduled for November 2, 2012, at the Rocky Point Golf Course. Last year the tournament sold out and we are expecting the same again this year, so look for our announcements about registration and take advantage of our early bird discount. The event is open to everyone so encourage your shareholders, colleagues, and clients to join us!

In addition to all of this great programming, the YLD will be assisting the Thirteenth Judicial Circuit in its efforts to establish a circuit-wide mentoring program for young lawyers. The goal of the program is to match young lawyers with experienced attorneys in the HCBA who can provide guidance regarding professionalism in the practice of law.

Another great project that the YLD is working on in partnership with the HCBA Diversity Committee is the Historical Narrative Diversity Documentary. The documentary focuses on desegregation in the Tampa Bay legal community and will be unveiled to our membership and the community at a screening event this year.

If you are interested in helping plan any of these projects or events, join one of our committees. We can always use more volunteers, so please get involved. We look forward to having you as a part of our organization and helping us continue to make a difference this year!
ANNUAL YLD GOLF TOURNAMENT
Friday, November 2, 2012
Rocky Point Golf Course

11:30 a.m. – 12:45 p.m. Registration & Lunch
1 p.m. Shotgun Start Scramble
6 p.m. Dinner & Prizes

Open to all HCBA members, the judiciary and the public.

Register by October 2, 2012, and pay $75 per golfer.
After that, the cost is $85 per golfer.

Reserve your foursome today!
Register by email at hcbarsvp@hillsbar.com
or call 813-221-7777 for more information.

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Jeff Wilcox at jwilcox@hwhlaw.com, or Wendy Whitt at wendy@hillsbar.com.
Former HCBA and Foundation President Gwynne Young has long admired Duke University’s men’s basketball coach Mike Krzyzewski for his leadership ability and team approach to success.

Now, as Florida Bar president, Young says she intends to lead the Bar in a similar fashion as “Coach K,” the winningest coach in NCAA Division I men’s basketball history.

“There are five fundamental qualities that make every team great: communication, trust, collective responsibility, caring, and pride. I like to think of each as a separate finger on the fist. Any one individually is important. But all of them together are unbeatable,” Young quoted the venerable coach at her installation as Florida Bar president in June.

Florida Supreme Court Chief Justice Charles T. Canady swore in Young as the Bar’s 64th president at the Bar’s annual convention in Orlando.

Young is the fifth woman to lead what is now the nation’s third-largest Bar.

The other past Florida Bar presidents from Tampa are Benjamin H. Hill III (1991); Leonard H. Gilbert (1980); David Shear (1979); J. Rex Farrior, Jr. (1975); Wm. Reece Smith, Jr. (1972); and John M. Allison (1951).

A large contingent of Young’s family, friends and professional colleagues from around the country traveled to Orlando for the installation ceremony, and for a special luncheon in her honor afterward.

Susan Bucklew, a longtime friend and senior judge in the U.S. Middle District of Florida, and Thirteenth Judicial Circuit Chief Judge Manuel Menendez, Jr., were among those who made the trip.

Gary Sasso, president and CEO of Carlton Fields, where Young has worked for 35 years, introduced Young at the installation ceremony and praised his longtime friend and colleague for her professional tenacity as well as for her personal compassion.

Continued on page 11
Young, in her remarks, recalled her deep North Carolina family roots and, with some emotion, talked about the strong influence her late mother, Alice, played in her life, particularly after her father died suddenly when she was only 6-and-a-half years old.

A graduate of Duke University and the University of Florida College of Law, Young became the first female assistant state attorney in the Hillsborough County State Attorney’s Office in 1974, working under then-State Attorney E.J. Salcines.

Continuing her remarks, Young acknowledged and thanked a number of people who had inspired and helped provide special guidance to her through the years. They included her step-father, Judge C. Luckey, Jr., the longtime public defender of the Thirteenth Judicial Circuit, and her colleagues Gary Sasso, Sylvia Walbolt, and Wm. Reece Smith, Jr.

Additionally, Young outlined the strategic goals for the Bar during her term, including the Bar’s diversity and inclusion initiatives.

Other priorities include securing adequate funding from Florida’s courts, and working to ensure sufficient funding of legal services to the poor.

Young has been heavily involved in pro bono service throughout her career, and in 2003 she was awarded The Florida Bar President’s Pro Bono Service Award.

At the same time, Young says she will continue to travel the state and work with outgoing President Scott G. Hawkins to educate voters about Florida’s judicial merit retention system, leading up to the election in November.

David Shear, of the Gunster law firm, who served as president of the HCBA (1971) and The Florida Bar (1979), also attended the installation.

“Gwynne is a superb attorney, and a compassionate and caring person who has made a real difference in her profession and her community,” Shear told me. “I know she will be an outstanding president of the Bar.”

Good luck, Gwynne. Your friends at the HCBA and Foundation will be behind you.

See you around the Chet.
Check Points—Keeping Our Streets Safe

One tool used by law enforcement to detect impaired drivers and other traffic law violators is the roadblock or checkpoint.

Under the United States Constitution, the Fourth Amendment guarantees “(t)he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” This amendment protects “the privacy and security of individuals against arbitrary invasions by government officials.” Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967) at 1528. Though the Fourth Amendment applies to numerous situations involving contact between law enforcement and individuals, one area of special application involves motorists, road safety, and the use of checkpoints.

Since the first reported car crash in the United States in 1896, the number of traffic crashes and fatalities has increased exponentially. In 2010, Florida reported 235,461 traffic crashes, with 2,444 fatalities resulting from those crashes. Our law enforcement agencies work hard to enforce our traffic laws in an attempt to reduce these numbers. One tool used by law enforcement to detect impaired drivers and other traffic law violators is the roadblock or checkpoint.

In Delaware v. Proust, 440 U.S. 648 (1979), the United States Supreme Court addressed the issue of the use of discretionary spot checks by law enforcement. In that case, the Court held that the stop of the motor vehicle and its occupant was a seizure under the Fourth Amendment. Id. at 653. The court applied a balancing test and found that the government’s

Continued on page 13

SEPTEMBER CLES

September 6 ........ YLD/Diversity Committee Diversity Summit (noon to 2 p.m.)
September 12 ...... Health Care Law CLE Luncheon (noon to 1 p.m.)
September 19 ...... Solo Practitioners CLE Luncheon (noon to 1 p.m.)
September 19 ...... Immigration CLE Luncheon (noon to 1 p.m.)
September 20 ...... Construction Law CLE Luncheon (noon to 1 p.m.)
September 26 ...... Tax Law CLE Luncheon (noon to 1 p.m.)
interests in enforcing traffic laws did not outweigh the privacy interests of an individual lawfully operating a motor vehicle. *Id.* at 663. The court indicated that there may be means to accomplish this end, which did not involve the “unconstrained exercise of discretion” such as roadblock-type stops. *Id.*

The Florida Supreme Court addressed the issue of roadblocks in *State v. Jones*, 483 So. 2d 433 (Fla. 1986). The Florida Supreme Court found that the roadblock used in that case violated the Fourth Amendment, but indicated that roadblocks could be permissible where proper criteria were applied. The court went on to recognize that the state had a “compelling interest in protecting the public from drunk drivers.” *Id.* at 439. The court stated that written guidelines that minimized the discretion of officers were an essential component for a constitutional checkpoint. *Id.* at 438. Additional criteria that could affect the validity of the checkpoint included proper lighting and sufficient warning of the checkpoint, clearly identified law enforcement officers, and the degree of intrusion upon the motorists. *Id.* at 439. The court did not require law enforcement to publish notice to the public before a checkpoint, but did indicate that this could be a helpful procedure. *Id.*

Based on the criteria set forth by the Florida Supreme Court, our local law enforcement agencies work together to set up periodic, constitutionally valid checkpoints to detect impaired drivers and other traffic law violators. Our local law enforcement partners regularly release information about upcoming checkpoints to the local media. Please remember to always wear your seatbelt, drive safely, and don’t drive while intoxicated.

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Crossroads for Florida Kids is aimed at increasing representation of foster children in Hillsborough County.

From October 21-27, the Thirteenth Judicial Circuit will join the American Bar Association and others around the country in celebrating Pro Bono Week. The purpose of this annual celebration is twofold: (1) to recognize attorneys already performing pro bono service, and (2) to recruit additional attorneys to take on pro bono efforts. The Circuit’s Pro Bono Committee is enthusiastically planning a week of events including pro bono trainings, one-time clinics, and volunteer recognition. At the time of this submission, we are reaching out to Hillsborough County Bar Association Section leaders, as well as other local bar associations, to encourage each to host a pro bono event during October.

The Pro Bono Committee is also launching a new project to coincide with the celebration. Crossroads for Florida Kids is aimed at increasing representation of foster children in Hillsborough County. In dependency proceedings in Florida, the child is the only person in the courtroom without a statutory right to direct representation by counsel. Rather, a child is entitled to a Guardian Ad Litem (GAL) who makes recommendations as to what is in the child’s best interests. This is certainly critical, but there are times when it is not enough. For example, what happens when a child disagrees with the GAL’s recommendation, when the GAL has a conflict or when the child has civil legal needs outside of the dependency proceeding?

Organized providers are doing what they can with the resources they have to meet the need, but funding cuts have recently made their jobs even harder. In the meantime, we can work to change those statistics. More importantly, we can work to change children’s lives by stepping up to represent them in dependency proceedings and related matters.

We hear you. You don’t practice children’s law. You wouldn’t even know where to start. Neither did we, until we talked to experts Rebecca Bell and Robin Rosenberg. As it turns out, they are willing to help us learn how to comprehensively and effectively represent foster children. Better yet, they are willing to support us along the way. So we are jumping in to represent the kids who need us most, to meet them at the crossroads, and, we hope, to make this crucial point in their lives a little easier to navigate.

We are in the process of creating teams of lawyers to handle our first cases, ideally consisting of one litigator, one transactional attorney, and a facilitator from the Pro Bono Committee (to link the lawyers with supporting resources and handle administrative issues). Will you join us? To learn more, including how to register for the first Crossroads for Florida Kids training, as well as the other Pro Bono Week events, go to www.probono.net. See you there!

Author: Allison W. Singer, Assistant City Attorney for the City of Tampa

The HCBA Board of Directors extends its appreciation to The Bank of Tampa and Trial Consulting Services for their generous support of the annual board retreat.

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As every member of the Florida Bar should have heard by now, the Florida Supreme Court has enacted a rule to make e-service mandatory in most Florida judicial proceedings. The Supreme Court’s decision, and the text of the new and amended rules, can be found at http://www.floridasupremecourt.org/decisions/2012/sc10-2101.pdf. The main provisions are now found in Florida Rule of Judicial Administration 2.516.

Appellate attorneys who appear in a case will now be required to designate a primary email address, and may designate up to two other email addresses, for receiving email service. Once this occurs, service on that lawyer must be accomplished by email at each of the provided email addresses. Attorneys must also include their designated email addresses on their filings. If an attorney fails to designate appropriate email addresses, service to the email address listed in the Florida Bar’s records will be deemed sufficient.

To comply with the rule, a service email must:

- Include a subject line that reads: “SERVICE OF COURT DOCUMENT” (in capital letters), followed by the case number.
- Include in the body of the email the court in which the case is pending, the case number, the names of the initial party on each side, the title of each document served with the email, and the sender’s name and telephone number.
- Attach the documents to be served in PDF format.
- Be no larger than five megabytes in size.

Service by email is deemed complete when the email is sent. The good news for appellate attorneys, though, is that e-service does not deprive you of the extra five days for mailing! Under Rule 2.516(b)(1)(D)(iii), “E-mail service is treated as service by mail for the computation of time.”

If a sender learns that the email did not go through, the sender must “immediately send” another copy by email or other authorized means of service.

There are some exceptions to the rule. The initial document filed in a proceeding, such as a notice of appeal or a petition for writ, must be served both by email and on paper. A lawyer without email or Internet access can ask to be excused from the application of the rule. Pro se litigants have the option of email service, but are not required to participate. For those persons, service by mail will continue. But for most appellate attorneys, email service will now be the norm.

Author: Kristin A. Norse, Kynes, Markman & Felman, P.A.
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Law firms with 100% membership in the HCBA

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JOIN THE NEW COLLABORATIVE LAW SECTION!
Collaborative Law Section

Recently, the Hillsborough County Bar Association Board of Directors unanimously approved the formation of the Collaborative Law Section. The presence and activities of the Collaborative Law Section will further advance public and professional awareness and recognition of the collaborative law movement and will supply a unifying structure and educational forum for the two existing local collaborative law practice groups and other subsequent practice groups that might form.

HCBA President Bob Nader has appointed me chair and Caroline Black Sikorske vice-chair of the section. We invite interested members of the HCBA to attend our first section meeting at noon on September 20, 2012, at the Bar offices. We will have our first program and discuss section organization, objectives, and projects. There will be a charge for lunches, but there will be no section dues, so those interested in joining will not have to pay extra to participate. Non-lawyer affiliate members of the Bar interested in collaborative law are also encouraged to attend. You do not have to be trained in collaborative law to join the section.

The collaborative law movement, already an international and national phenomenon, is well under way and gaining steam locally. There are two collaborative law practice groups in the Tampa Bay area consisting of about 50 trained lawyers and multiple trained collaborative professionals from the mental health and financial disciplines who serve as neutral team members to facilitate communications and financial problem-solving.

A statewide conference will be held in May in Orlando, which will be another major step toward developing uniform standards for collaborative law training and help move us toward a collaborative law rule of procedure and possibly a statute.

Though the collaborative law movement has made the most progress in the family law arena, the collaborative process may have a significant impact as an alternative dispute resolution process in other practice areas. Lawyers for both parties, neutral professionals, and the clients sign a participation agreement, which is a contract to settle without going to court and to be transparent and open about financial matters. If the lawyers and parties cannot get the case settled, those lawyers cannot go to court. The case is settled and a written agreement prepared before the case is filed; however, if parties want to use the collaborative process in a case already filed, the case can be abated.

Collaborative law is a client-centered rather than court-directed approach, and designed for people who want to achieve a private, respectful end to their marriage.

Author: Fraser J. Himes, Himes & Hearn, P.A.

Check out the Events Calendar on www.hillsbar.com
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Next, you need a target group that you want to help. You must know something about the needs of that group. For example, if you want to target the homeless youth of Hillsborough County, then you will need to understand that their basic needs are shelter, food, and financial independence.

Next, you need a goal. Target one or two of the key needs of your group and learn a little about how to meet those needs. For example, your goal may be to target one need of our homeless youth: their need to become employed. You, as an employment law attorney, may be in a special position to help due to your numerous contacts in human resources departments.

Next, you need a plan. There are generally four ways you can give back:
1. Give your time;
2. Give your money;
3. Give non-monetary donations; and
4. Give your knowledge.

Utilize your special knowledge and skills to help you form your plan and put it in motion. Structure the plan around (1) your schedule, (2) your budget, and (3) your skill set. So if you are an employment attorney, and your goal is to help meet the needs of homeless youth by helping them become employed, you may decide to set up an employment clinic to answer questions from homeless youth and give them information that will help them get jobs. If your schedule, budget, and knowledge base enable you to do that, you are well on your way.

The last step is the most rewarding: Promote your plan in your community and watch it become a reality. If you have a cause that you would like to promote, contact Sarah M. Glaser at sglaser@saxongilmore.com or Zach J. Glaser at zglaser@sponslerbennett.com for support and assistance.

Authors: Sarah M. Glaser, Saxon, Gilmore, Carraway & Gibbons, P.A.; Zachary J. Glaser, Sponsler, Bennett, Jacobs & Adams, P.A.
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THE HIGH HURDLE TO A SPOLIATION CLAIM: IS THE EVIDENCE CRUCIAL?
Construction Law Section
Chairs: Jason J. Quintero - Carlton Fields, P.A.; and Jeffrey M. Paskert - Mills Paskert Divers P.A.

From moldy lunch boxes to deformed 2x4s, determining what paper, electronic data, materials, tools, and equipment might be relevant to a pending construction-related claim, and require preservation, is a daunting task. The problem is compounded once construction is completed and the project is turned over to the owner while a claim related to the project is pending (or in some instances, contemplated). In the midst of cleaning the job site, evidence related to the claim can oftentimes be discarded and forever lost. When discovered in litigation, in comes the spoliation claim from opposing counsel and up goes the tension.

A spoliation claim in federal court consists of establishing three elements by the movant: (1) the alleged spoliated evidence existed, (2) there was a duty to preserve that evidence, and (3) “the evidence was crucial to the movant being able to prove its prima facie case or defense.” Upon successfully proving these elements, sanctions will only be imposed when the spoliator acted in bad faith, which may be proven either by direct or circumstantial evidence.

The lynchpin to the successful spoliation claim — and the best area for staking out an opposition — usually depends upon proving the third, “essential” element, that the evidence is “crucial” to the moving party’s case. If a moving party cannot show that the spoliated evidence is crucial to its case, its motion for sanctions should

Welcome New Florida Bar Admittees

On September 21, 2012, HCBA members are invited to the Swearing-in Ceremony at the George Edgecomb Courthouse in Courtroom 1. The ceremony will begin at 3 p.m.

Continued on page 23
Continued from page 22

be denied. A recent federal
magistrate order demonstrates the
significant impact of this element
on a spoliation claim.

In Vanliner Ins. Co. v. ABF Freight
System, the movant sought the
electronic maintenance records
for a tractor that had been involved
in an accident.6 While the movant
(a defendant/cross-claimant)
received the maintenance records
for the tractor in written discovery,
ABF had apparently failed to
preserve the Electronic Control
Module (“ECM”) data relating to
maintenance.7 Following the tractor
accident, ABF hired a separate
company to preserve the ECM
data, but the only data preserved
was accident-related and did not
include historical maintenance
information.8 Noting that the
movant had already been provided
an alternate means of securing the
records it sought, although not in
the movant’s desired electronic
format, the court found the spoliated
electronic data not “crucial to . . .
[the] prov[ing] [of] its prima facie
case or defense.”9 Additionally, as
an aside, the court noted the timing
of the filing of the motion “on the
eve of trial” as evidence that the
electronic data was not crucial
because the party had been able to
develop its case in preparation for
trial in the absence of this data.10

The Vanliner order illustrates the
last, high hurdle that a party
seeking sanctions for spoliation
must successfully jump. Clearing
this hurdle involves an examination
of the evidence available to the
parties, its relevance to the claims
and defenses,11 and, intriguingly,
even a party’s timing in pursuing
its sanctions.

1 Spoliation is defined as “the
intentional destruction, mutilation,
alteration, or concealment of
evidence.” Vanliner Ins. Co. v. ABF
Freight System, Inc., 2012 WL 750743,
at *1 (M.D. Fla. Mar. 8, 2012)
(internal quotations omitted).

2 Id. (internal quotations omitted).

3 Id. (citing United States v. Lanzon,
639 F.3d 1293, 1302 (11th Cir. 2011)).

4 Id. (sanctions may include “(1)
dismissal of the case; (2) exclusion of
expert testimony; or (3) a jury
instruction on spoliation of evidence
which raises a presumption against
the spoliator.”)

5 Id. *2.

6 Id. **2-3.

7 Id.

8 Id. *2.

9 Id. *3 (internal quotations omitted).

10 Id.

11 See also QBE Ins. Corp. v. Jorda
Enterprises, Inc., 2012 WL 948838 (S.D.
Fla. Mar. 20, 2012) (denying sanctions
because the non-available 2x4 board
used to “jam” an allegedly defectively
installed pipe into place following
a hurricane is not crucial to
the defense where the
defective pipe
is available) (emphasis in
original).

Authors: J. Derek
Kantaskas, Carlton
Fields, P.A. and
William B.
Collum, Carlton
Fields, P.A.

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FLORIDA SUPREME COURT UPHOLDS CONTROVERSIAL DRUG STATUTE
Criminal Law Section
Chairs: Mark P. Rankin – Shutts & Bowen LLP; and Joseph C. Bodiford – Bodiford Law, P.A.

In July, the Florida Supreme Court in State v. Adkins, No. SC11-1878, ruled by a 5-2 vote that Florida’s strict liability criminal drug statute is constitutional. That statute, at Section 893.13 and modified by Section 893.101, requires no mens rea for conviction of felony drug possession. In 2003, the Florida Legislature expressly eliminated intent as an element of this offense. In Florida, unlike any other state, a defendant who lacks knowledge of his or her possession of illegal drugs is left to prove lack of intent by a preponderance of the evidence.

The Adkins majority upheld the law because of the defendant’s right to present an affirmative defense of lack of knowledge. Justice Charles Canady wrote: “Any concern that entirely innocent conduct will be punished with a criminal sanction under chapter 893 is obviated by the statutory provision that allows a defendant to raise the affirmative defense of an absence of knowledge of the illicit nature of the controlled substance. In the unusual circumstance where an individual has actual or constructive possession of a controlled substance but has no knowledge that the substance is illicit, the defendant may present such a defense to the jury.” The majority rejected the argument that the Florida Legislature shifted the burden of proof to defendants.

In a dissenting opinion, Justice James E.C. Perry objected to the Florida Legislature’s stripping of mens rea from the statute, stating he could not “overstate [his] opposition to the majority’s opinion.” The dissent noted numerous instances where completely innocent and, more importantly, common situations could result in criminal charges under the statute. The dissent further opined that

Continued on page 25
Continued from page 24

the statute effectively shifts the burden of proof to the defendant. The innocent, the dissent points out, are “presumed guilty” by mere possession of illegal substances, then left to prove their innocence.

Putting aside the constitutional questions raised by Florida’s strict liability felony drug statute, many believe the law is simply bad criminal justice policy. Such critics argue that any felony statute that subjects individuals to lengthy, sometimes mandatory, prison sentences, should require the state to prove knowledge and intent. In any event, such a strict liability statute puts a great deal of power in the hands of prosecutors to make proper charging decisions that prevent prosecution of the innocent. Once that decision is made, the statute then leaves the state unburdened by the need to prove the most basic of elements: that a defendant knew he or she was possessing illegal drugs.

Just last year, U.S. District Judge Mary Scriven struck down the same criminal statute as facially unconstitutional, recognizing the constitutional flaw in Florida’s drug statute—that it criminalizes wholly innocent behavior. For example, a letter carrier who unknowingly delivers a package of cocaine to a home is guilty of a felony under the law. As of the time of the Florida Supreme Court’s decision, the Eleventh Circuit Court of Appeals had yet to rule on the government’s appeal of Judge Scriven’s ruling. The federal appeals court may reach its own conclusion and may consider different arguments than those addressed by the Florida Supreme Court. Therefore, the federal appeals court could still step in to declare the statute facially unconstitutional, bringing Florida in line with every other state on this issue.

Author: Mark P. Rankin, Shutts & Bowen LLP

PLEASE SEND IN YOUR NOMINATION FOR THE 2012 MARCELINO “BUBBA” HUERTA III AWARD

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

In Bubba’s memory, the Criminal Section of the Hillsborough County Bar Association created the Marcelino “Bubba” Huerta III Award for Professionalism and Pro Bono Service. This award is presented to an attorney who exhibits the professional practice, the dedication to pro bono service, and the diligent work in the pursuit of equal justice that made Bubba a remarkable lawyer.

The award recipient is selected by a committee consisting of local, state, and federal criminal practitioners. Prior recipients include James Felman, Michael Maddux, and Eddie Suarez.

The process has begun to select the recipient of the 2012 Bubba Huerta Award. Please nominate an attorney who exemplifies the professionalism and pro bono spirit that made Bubba Huerta exceptional. Your nomination can be submitted by emailing Mark Rankin at mrankin@shutts.com.

Nominations are due by December 1, 2012.
LEADERS:
Steve Yerrid: Leading By Example

Individually, and as chair of the Yerrid Foundation, Steve has contributed millions of dollars to charitable causes – local and national.

Many know of Steve Yerrid’s successes in the courtroom, which include more than 175 verdicts and settlements of over a million dollars. They know Governor Lawton Chiles appointed Steve to the “Dream Team” that obtained a $17 billion settlement with big tobacco, and stopped the way the industry marketed to children. They know Governor Charlie Crist appointed Steve as the governor’s special counsel for the Deepwater Horizon oil disaster. Steve contributed his time, ability, and costs pro bono to assist Floridians who had been harmed by the spill.

But not as widely known is Steve’s generosity to children and the less fortunate. Individually, and as chair of the Yerrid Foundation, Steve has contributed millions of dollars to charitable causes—local and national. One need look no further than our own Bar building—for which he was the most significant initial contributor—and numerous Bar sponsorships, to see that Steve epitomizes the concept of giving back.

Steve earned his law degree from Georgetown University Law Center, after graduating from Louisiana State University with a major in history. Steve now teaches at Georgetown Law.

Continued on page 27
Steve Yerrid with participants in the 2011 Steve Yerrid Kids Fishing Derby at the Vinoy Yacht Basin in St. Petersburg. About a hundred children being treated at local hospitals and outpatient clinics spend a day fishing with celebrities, professional guides, and media personalities.

Continued from page 26

as a visiting professor. Many Florida lawyers have had the opportunity to view Steve’s always entertaining talks. But Steve has also authored three books. My partner, Mark Buell, has Steve’s book, *When Justice Prevails*, on his credenza. Steve’s former partner and mentor John Germany observes that Steve has served as a mentor to numerous attorneys, not just those who have worked with him, but those who have read his books.

At our firm we also have a copy of Steve’s *The Making of a Championship Heart*, where he weaves the characteristics that make a champion with pictures of an amazing collection of New York Yankees memorabilia. With as many books as there have been on this storied baseball franchise, Steve brought a fresh approach.

Florida and national lawyers have widely recognized Steve’s legal abilities, including presenting him with the Perry Nichols Award, the HCBA Outstanding Lawyer Award, and making him a member of the “by invitation only” Inner Circle of Advocates—the top 100 trial lawyers in the country.

Early in his career, while a young lawyer at Holland & Knight, Steve gained attention from his successful “Act

Continued on page 28
Raymond T. (Tom) Elligett, Jr., Buell & Elligett, P.A.

Continued from page 27

of God” defense in the trial of the harbor pilot after the Summit Venture struck the Sunshine Skyway Bridge. Illustrative of Steve’s loyalty to those he is close to, people contacted for comments on this article remarked on Steve’s touching words at the pilot’s funeral years later.

Steve’s dedication to children’s issues is manifested in too many ways to be listed here, but includes sitting as a lifetime member on the board of the Pediatric Cancer Foundation, and originating the HCBA’s Steak and Sports day thirty years ago.

As noted, as a young lawyer, Steve worked with John Germany at Holland & Knight. John observes that Steve is brilliant, always well-prepared, and has a wonderful legal assistant who takes care of him, John describes Steve as “my friend” and a delightful person to spend time with. He notes Steve is an avid fisherman, and John is looking forward to a long-discussed fishing trip to Mexico with Steve.

George Vaka, who has worked on Steve’s appeals for years, describes him as very bright, passionate, and intense. George observes that those who know Steve only through litigation may not have seen how big a heart he has for children—as manifested through all Steve does for them through his foundation.

Rich Gilbert recently co-counseled a case with Steve. The case had been in litigation for years and Steve came in just before trial. Steve mastered the case. Rich says not only does Steve have great recall and skills, but he is aware of everything that is going on in the courtroom, and relates to juries. When a cross-exam or other matter came up and Steve said, “I’ve got this,” he did.

Steve’s most endearing quality is being a loyal friend, in Judge Herb Berkowitz’s view. Judge Berkowitz emphasizes Steve’s loyalty to his friends and people he feels worthy of regard, including his clients. He notes Steve was instrumental in having the library named for John Germany—to honor his mentor.

As those who know him well attest, it is this intense compassion for his clients and his causes—including the needs of children—that drives Steve’s generosity. For all his other accomplishments, Steve’s leadership in setting an example of “giving back” may stand as his greatest contribution to our legal and local community.

Author:
Raymond T. (Tom) Elligett, Jr.,
Buell & Elligett, P.A.

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Installation of 2012-2013 HCBA Officers and Directors

“T”he weather is frightening, the thunder and lightning seem to be having their way. But as far as I’m concerned... It’s a Lovely Day Today,” said Bob Nader, recalling the famous Irving Berlin song title in his remarks before being sworn in as president of the Hillsborough County Bar Association.

Nader and the 2012-2013 HCBA Board of Directors took office on June 25, 2012. About 250 HCBA members, friends, and family members braved the inclement weather produced by Tropical Storm Debby to attend the installation ceremony. The new board members as well as the new leadership of the Young Lawyers Division were sworn in by Chief Judge Manuel Menendez, Jr., of the Thirteenth Judicial Circuit.

Pedro F. Bajo, Jr., outgoing president, thanked the 2011-2012 Board of Directors for their service and commitment. He also recognized Lawyer editor Grace Yang for her many contributions to the magazine during her two-year tenure.

Bajo presented Judge Menendez and John F. Kynes, executive director of the HCBA, with the James M. “Red” McEwen Award. The award, named for the former Hillsborough County state attorney and civic leader, recognizes those who have offered outstanding assistance and support of the president and whose service and contributions will have a lasting positive impact on the HCBA.

Nader, who was introduced by his brother, George, also an HCBA member, praised Bajo for his service. “Although Pedro is a passionate FSU Seminole and I am a devout Florida Gator, I was privileged to work with and learn from this gentleman,” Nader said. He is intelligent, resourceful and has been totally dedicated to the HCBA for many years.”

Nader is the 112th president of the HCBA. “I am honored to be a part of the HCBA, which has been like an extended family to me,” Nader told the crowd. He recalled some of the many thrilling things that have occurred in his life, passing the Texas and Florida Bar exams and performing “My Girl” with The Temptations, among them. “But now, as Johnny Mercer once penned, ‘This Time, The Dream’s On Me.’”
Photography is courtesy of Bob Thompson of Thompson Studios. Thompson Studios is a Benefit Provider for the HCBA. www.thompsonstudiostampa.com

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It was one spring day in 1982 when a group of young women attorneys and me (then Tampa’s sole female judge) along with our colleagues in the medical profession decided that we finally had enough. We finally had enough willing and able women to each field an entire softball team, and it was time to stop sitting on the sidelines during the annual “Jawbones v. Sawbones” sporting event that previously had been giving only male doctors and lawyers bragging rights as to which profession had the better athletic prowess.

The women lawyers team, organized by Judge (then Assistant State Attorney) Susan Sexton and coached by Ken Beytin and Gray Dunlap, included myself, Miriam Mason, Kristen Gunter, Ann Arledge, Mary Quinlan, Zan Barber, Marian McCulloch, Alice Nelson, Kay McGucken, Gayle Carlson, Paula Rousselle, and Jeanne Tate. After three practices, our team confidently took the field at Henry & Ola Park to play a doctors team composed mostly of interns and residents, including Drs. Sylvia Campbell, Deborah Trehy, Kathy Lewis, Kathleen Kilbride, and Rendi Price. The women lawyers lost miserably. After the humiliating defeat, we vowed that this indignity would never be repeated. Knowing our competitive spirit, we sealed that vow by joining the city softball league and quickly agreed on the team name — “THE OUTLAWS.”

“The Outlaws” later added Karen Buesing to the roster and again played the women doctors in Jawbones v. Sawbones. Revenge was sweet. In short, the 1983 rematch game ended early, under the mercy rule, due to the domination of the Outlaw-powered women lawyers. You might think the story ends here, but this was only the beginning.

After continuing weekly softball play (and winning city league awards), “The Outlaws” challenged the area judges (all men, of course). In December 1983, the first judges v. women lawyers softball game was played at Jesuit High School. The judges team (who called themselves the “Bench Bandits”) included such
THE OUTLAWS 1983: (TOP RIGHT) Standing from left to right: Susan Bucklew, Jeanne Tate, Karen Buesing, Mary Quinlan, Unknown, Coach Ken Beytin, Miriam Mason, Robbie Colton, Unknown. Kneeling left to right: Zan Barber, Alice Nelson, Ann Arledge, Marian McCulloch, Kristen Gunter, Kay McGucken. (Marian McCulloch wears a different shirt because she is pregnant and could not fit into red uniform shirt).

THE JUDGES 1983: (RIGHT) Standing from left to right: Peter Taylor, Don Evans, Bill Graybill, Paul Elliott, Calvin Pope, Harry Coe, Ralph Steinberg, Dennis Alvarez, Guy Spicola. Kneeling from left to right: Ed Hinson, Bob Bonanno, Manny Menendez, John Gilbert, Jack Griffin.

spectacular athletes as the Honorable Manny Menendez (the only member of that team still on the bench), Dennis Alvarez, Guy Spicola, Pete Taylor, Don Evans, Bill Graybill, Paul Elliott, Calvin Pope, Harry Coe, Ralph Steinberg, Ed Hinson, Bob Bonanno, Jack Griffin, and John Gilbert. In 1984,

Continued from page 34

Continued on page 36
“The Outlaws” added rookie sensation Robbie Colton and (now U.S. Bankruptcy Judge) Catherine McEwen to the Jawbones v. Sawbones roster and again dominated the doctors. After throwing charges of foul play (in jest) to the well-practiced women lawyers, the women doctors yielded the contest for the foreseeable future.

For many years, “The Outlaws” continued to play every week in the city league and were joined by others, such as Laurel Lockett and occasionally Gwynne Young (now president of The Florida Bar), who many times heroically kept the team from forfeiting. We even had a homerun club powered by Jeanne Tate, Miriam Mason, Mary Quinlan, Kay McGucken, and Zan Barber.

Those who played on that team look back with fondness at those weekly softball games and treasure the close friendships and bond that has lasted for over thirty years. As a group, we have grown older, become more successful, and, unfortunately, do not play softball anymore, but we all remain solid teammates in life, and readily agree that we all were catapulted and far better off because of our softball days together. Recently some of “The Outlaws” — Miriam Mason, Jeanne Tate, Marian McCulloch, Susan Sexton, Robbie Colton, Mary Quinlan, Kay McGucken, Karen Buesing, and I — got together for a 30-year reunion and raised a glass to toast that wonderful time in 1982 when “The Outlaws” were born.

Author: Judge Susan C. Bucklew, U.S. Middle District Court
Save the Dates
Welcome to a new, event-filled year at the Hillsborough County Bar Association. Mark your calendars for these important membership events.

SEPTEMBER 18, 2012
Membership Luncheon
Hyatt Regency

OCTOBER 30, 2012
Bench Bar Conference,
Membership Luncheon
and Judicial Reception
Hyatt Regency

DECEMBER 6, 2012
Holiday Open House
Chester H. Ferguson Law Center

JANUARY 9, 2013
Membership Luncheon
Hyatt Regency

MARCH 23, 2013
Pig Roast / 5K
Stetson Campus

APRIL 13, 2012
Diversity Picnic
Chester H. Ferguson Law Center

MAY 21, 2013
Membership Luncheon
Hyatt Regency

Staff Spotlight: Lupe Mitcham

Lupe Mitcham joined the HCBA staff in May as the director of Lawyer Referral and Information Services.
She has lived in Tampa most of her life and has never met a stranger.
She has devoted her life to helping others. She previously worked with the University of South Florida as a victim advocate/case manager for victims of domestic violence. Before that, she worked for the Make-A-Wish Foundation, granting wishes to dying children. She also worked with her late husband, Circuit Judge Bob Mitcham.

Love of the law runs deep in Lupe’s family. She has a son, Matthew, who is a lawyer in Tampa, and a daughter, Micah, who plans to attend law school.

Lupe’s warmth, energy, and enthusiasm are infectious.

When she is not working, Lupe enjoys traveling, salsa dancing, creating new recipes, and hosting friends and family.

Her hospitality extends to the community. Interacting with the attorneys in the Ask-A-Lawyer program, attending events and doing community outreach are the aspects of her job that Lupe most enjoys.

Among her goals for the LRIS program are increasing membership and providing excellent customer service.

“Working at the Chester Ferguson Building is a wonderful environment,” Lupe said. “The staff is great, and I love learning something new each day.”

Stop by and meet Lupe when you are in the building. You’ll be glad you did.
The Hillsborough County Bar Association is proud to sponsor the Sixteenth Annual Bench Bar Conference, which promises to be bigger and better than ever. With the many changes and challenges facing our profession in the digital age, our conference theme this year of “Embracing the Future of our Evolving Profession” is particularly timely and relevant. The Bench Bar Conference is designed to give lawyers and judges an opportunity to get together to candidly share their thoughts, concerns, and expectations, and to discuss ways to improve our judicial system. Collaboration between the bench and bar, fostering our shared commitment to improving the administration of justice, enhancing the rule of law, and practicing with professionalism (fairness, integrity, and civility) are important goals that the HCBA promotes with this conference.

We heard from you that you are interested in roundtable time with federal and state court judges, as well as quality, timely substantive course selections. We are excited to offer a large variety of breakout sessions at the conference for CLE credit in several topic areas. Attendees can select their own “courses” from a variety of offerings. Each course includes a qualified faculty and one or more members of the judiciary.

In the morning, the breakout sessions will focus on offering substantive advice and practical tips designed for paralegals, legal assistants, legal administrators, judicial assistants, and attorneys who are fairly new to practice. In the afternoon, we are offering eight breakout sessions.

Continued on page 39
Continued from page 38

for practitioners of all levels of experience. Judges and attorneys will offer insight into a variety of practice areas in sessions that promise to be timely and relevant to your practice and interests.

The closing plenary session features our annual “State of the Courts” address by Chief Judge Manuel Menendez, Jr., of the Thirteenth Judicial Circuit; an ethics and professionalism section taught by top-notch local attorneys who are committed to professional and ethical practice; and the judicial roundtable component featuring timely and provocative topics. Conference participants and judges will be seated together to discuss the issues in a forum that encourages give and take with the judiciary.

This conference seeks to keep the channels of communication open between the bench and bar, with its primary focus on improving the justice system. Working together, we can make positive changes in our court system. Please join us as we continue to strengthen the bond between the bench and bar, and to prepare the system to best meet the coming external and internal challenges to our profession. In the spirit of collaboration between the bench and bar, we invite you to join us at the Judicial Reception, which will immediately follow the conference.

So save the date for the Bench Bar Conference, Membership Luncheon and Judicial Reception, all coming on October 30, 2012. This special day is earlier this year than in past years. Look out for more information about specific course offerings and registration instructions in email blasts from the HCBA and on the HCBA website. We look forward to seeing you on October 30, 2012.

Authors:
Judge Emily Peacock, 13th Judicial Circuit Court and Judge Caroline J. Tesche, 13th Judicial Circuit Court, Bench Bar Co-chairs
TIME TO PUT AN END TO THE USE OF THE “R WORD”
Diversity Committee
Chairs: Luis E. Viera - Ogden & Sullivan, P.A.; and Victoria N. McCloskey - Ogden & Sullivan, P.A.

Justice Thurgood Marshall once wrote that the plight of persons with developmental disabilities reflected a “regime of state mandated segregation...that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow.”

Though great advancements have been made, our culture regrettfully continues to tolerate ridicule of the developmentally disabled. And there is no greater symbol of this than the accepted use of the word “retarded” in our popular culture.

Words can hurt and have meaning. In recent decades, words demeaning one’s faith, race, or sexual orientation have, rightfully so, been largely deleted from our public lexicon. Yet, the ugly “R-word” persists.

We write this as attorneys privileged to have brothers with developmental disabilities. We have seen, first hand, the sting of the “R-word.” Each time we hear it, it reminds us of the daily struggles endured by our loved ones and others like them. We think of the families we have been privileged to know who have raised children with disabilities and how the use of this word demeans them. Often, people who use the “R-word” do so without malicious intent. However, the use of this word, even if done in a “joking” manner, affirms the notion that persons with developmental disabilities are somehow not worthy of respect, and not welcome in our national family and community. As Joseph Franklin Stephens, a Special Olympics athlete stated, the use of this word means that “(w)e are something that is not like you and something that none of you would ever want to be. We are something outside the ‘in’ group. We are someone that is not your kind.”

The time is long past due for the “R-word” to be placed in the trash heap of vocabulary history. When people ridicule those who have developmental disabilities, they hurt not only a person who may have a developmental disability, but they also demean an entire community. They mock families whose love for their disabled family members knows no end, and whose hope for a normal life for their child, grandchild, sibling came to a crashing halt with an unexpected diagnosis. They are reminded of society’s cruel rejection every time they hear this word. Such a cruel word undermines the most fundamental ideal of every major religious faith: that every person, regardless of who they are, has an intrinsic dignity that must be respected.

Thankfully, there has been progress. In 2010, President Obama signed Rosa’s Law, a bipartisan measure that removes the term “mentally retarded” and “mental retardation” from federal education, health, and labor laws. Organizations such as Best Buddies and the Special Olympics have led an effort to rid the use of the “R-word” from our public dialogue.

But this is a campaign that is to be won person to person. When you speak, remember the effect that your language has on others. Remember that when you joke that someone is a “retard,” you cause pain to those who have already experienced far too much pain, loneliness, and isolation.

Authors:
Marcos Hashbun, Zuckerman Spaeder LLP & Luis Viera, Ogden & Sullivan, P.A.

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The mortgage foreclosure debacle of the past several years has caused lenders to revisit the language in their mortgage documents to better protect their security interests. Lending institutions have taken more aggressive measures in drafting and enforcing the mortgage document’s condemnation clauses in eminent domain cases. The clauses generally require an assignment of a portion or all of the proceeds awarded for a taking in eminent domain. They may contain provisions for the mortgagor to pay all legal fees and costs associated with the mortgagee’s defense. A default clause is added in the event that the mortgagor fails to comply.

Your client as the mortgagor and condemnee needs to consider what rights in eminent domain are retained. A portion of the condemnation award may be necessary for implementing a cure to restore your client’s remainder property. Because this property is the lender’s security, the lender may benefit from, and therefore be amenable to, utilizing part of the award toward repairing damages caused by a taking.

This could be accomplished by holding some of the proceeds in a trust account to pay for expenses relating to a cure. Any remaining proceeds could then be applied to the mortgage.

Regarding the mortgagee’s attorney’s fees and costs, as an entity with no ownership interest, but only a “chose of action creating a lien upon the property,” (sic) the mortgagee is not entitled to recover their fees or costs from the condemnor. (Grieser v. Department of Transportation, 371 So. 2d. 164, 165 (Fla. 2d Dist. Ct. App.) (1979) Lending institutions may try to circumvent this by incorporating language into a condemnation clause obligating the mortgagor to pay. Mortgagors routinely sign such agreements with little or no idea of the implications.

Should the mortgagor/condemnee be unsuccessful in treating the lender’s legal fees as reasonable costs under Fla. Stat. §73.091, the mortgagor/condemnee may be on the hook for those fees, triggering questions of whether such contract terms are unconscionable and thus unenforceable. (See Fonte v. AT&T Wireless Services, Inc., 903 So. 2d 1019 (Fla. 4th Dist. Ct. App.) (2005) for standards constituting unconscionability.)

If the condemnation clause relating to payment of lender’s fees is both procedurally unconscionable (e.g. due to the relative bargaining positions of the parties) and substantively unconscionable (e.g. requiring your client to pay the mortgagee’s attorney’s fees in a case that was initiated through no fault of his or her own, and where the mortgagee is otherwise not entitled to reimbursement for fees and costs), the clause is legally unenforceable. Be mindful of the lending institution’s practice of drafting one-sided provisions in its standard form contracts when dealing with borrowers who may be in need of a loan to purchase a home or save a business. (See, e.g., Complete Interiors Inc. v. Behan, 558 So. 2d 48 (Fla. 5th Dist. Ct. App.) (1990) for elements constituting adhesion contracts.)

Thus, when dealing with clients with outstanding mortgages, pay attention to all clauses related to eminent domain. Initiate contact with the mortgagee before tying up deposits until matters of apportionment are settled with mortgage lenders. If settlement is unobtainable, consider the enforceability of the condemnation clause.

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JUSTICES UPHOLD MANDATE, STRIKE DOWN MEDICAID EXPANSION
Health Law Section
Chairs: Jessica S. Cohen - Physicians Independent Management Services, Inc.; and Scott A. Richards - Fowler White Boggs P.A.

As we are all aware by now, the U.S. Supreme Court recently upheld the constitutionality of a portion of the Patient Protection and Affordable Care Act of 2010 (ACA), in part, while also holding that the penalty for failure to comply with another portion of ACA was unconstitutional. The Court held that the individual mandate is constitutional; however, as Chief Justice John Roberts noted, it “is not a valid exercise of the Commerce Clause.” Instead, the Court indicated the individual mandate is constitutional pursuant to Congress’ power to “lay and collect taxes” under the Constitution. This distinction, important to legal scholars and “Obamacare” naysayers, should also be important to all Americans, who may face additional taxation in a few years for failure to have health insurance.

The Court ruled by a five to four majority, with Chief Justice Roberts, along with Justices Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor, finding ACA constitutional. The dissenting opinions came from Justices Samuel Alito, Anthony Kennedy, Antonin Scalia, and Clarence Thomas, who commented that “the federal government does not have the power to order people to buy health insurance.”

This decision means that Americans must have health insurance or pay a “[s]hared responsibility payment” (otherwise known as a tax/penalty), which will become effective in 2014. ACA provisions in effect today will remain in effect and additional provisions will become effective on the future dates stated within the law. Unless legislation is enacted prior to 2014, or unless the upcoming election results in the rewriting of ACA, employers must begin strategizing compliance with these requirements.

Although the individual mandate was upheld, Medicaid expansion was restricted by the Supreme Court’s decision. The Court ruled that the federal government may not place conditions governing the use of funds when “such conditions take the form of threats to terminate other significant independent grants” or use conditions “as a means of pressuring the States to accept policy changes.” The Court held that Congress may “offer... funds under the Affordable Care Act to expand the availability of health care,” and “require that States accept[ing] such funds comply with the conditions on their use,” but stated that Congress may not “penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.” The chief justice even went so far as to characterize this requirement as “a gun to the head.”

We expect this issue will take many twists and turns prior to the ultimate 2014 individual mandate effective date, especially during the upcoming election season. The Hillsborough County Bar Association Health Law Section will keep you posted as things progress.

Author: Jessica Cohen, Physicians Independent Management Services, Inc.

See the Tax Law article on page 56 for more on the Patient Protection and Affordable Care Act.
NEW EXECUTIVE ORDER BRINGS RENEWED HOPE TO YOUNG UNDOCUMENTED IMMIGRANTS
Immigration & Nationality Section

Our immigration system was recently enhanced. President Obama signed an executive order favoring young people he described as Americans in their hearts and minds, but not on paper. Pursuant to the order, on June 15, 2012, the Department of Homeland Security issued a memorandum specifying certain criteria to be met by these young people. Their reward: deferred action and lawful employment authorization. Andre is exactly the type of young person this memorandum aims to help. He has an impressive scholastic record and is all heart, which is fitting for a young man aspiring to become a cardiologist.

When he was 12, he and his family flew to the United States as tourists. Andre believed it was temporary. He looked forward to returning to his friends and to his cousins. Six months later, his parents delivered a blow — the family would not be going back. Andre recalls the shock, the disappointment, and the betrayal. Although only 13, he realized that he was now an undocumented immigrant. Instead of becoming bitter, Andre set his sights on becoming a cardiologist. Looking back, Andre remembers thinking, “I get to choose a dream I am willing to sacrifice for and in such an amazing country.”

Continued on page 47
Continued from page 46

Due to the obstacles, many undocumented students in the United States abandon dreams of a college education, but Andre did not. He focused on the race to earn a spot in medical school. Now the immigration race, placed second to his dream of becoming a cardiologist, might become reality. After nine years as an undocumented immigrant, he can almost feel like a winner of both races.

Andre’s road has not been smooth. Nine months ago, he faced deportation. His attorney successfully relied on his stellar academic record and his community involvement. The government terminated deportation proceedings but conferred no valid status. Andre went back to being undocumented, without work authorization or a driver’s license. The recent executive order gets Andre closer to realizing his dream. He hopes to take a break from waking up three hours early to ride a bike to the nearest bus station before arriving at school. He will finally be able to obtain a valid driver’s license. Andre currently attends classes at USF, participates in molecular level research at Moffitt Cancer Center, and volunteers at hospitals.

Deferred action candidates such as Andre must show through verifiable evidence that they:
- Arrived in the United States under the age of 16;
- Have resided in this country continuously for five years prior to June 15, 2012;
- Are currently in school, have graduated from high school, have obtained a GED certificate, or were honorably discharged from the U.S. Coast Guard or the U.S. Armed Forces;
- Have not been convicted of a felony, significant misdemeanor offense, or multiple misdemeanors; and
- Are not a threat to national security or public safety.

In Andre’s case, the policy is bound to improve American hearts.

I
s it bad faith under the Federal Anticybersquatting Consumer Protection Act (“ACPA”), 15 U.S.C. §1125(d), to own a domain name that incorporates the name of its competitor’s business just to keep the competitor from having the premium domain name?

Three years ago, the Eleventh Circuit held that maintaining a registration was not bad faith when initially registered in good faith. In *Southern Grouts & Mortars, Inc. v. 3M Co.*, 575 F.3d 1235 (11th Cir. 2009), the Court held that 3M was not cybersquatting when it continued to re-register the domain name “Diamondbrite.com,” which it had obtained when it purchased another company that manufactured a product by that name. 3M stopped manufacturing that product but reregistered the domain name to keep it from a competitor, which also sold a product named Diamond Brite.

How does the equation change when the domain name is originally purchased by a competitor with no prior rights in the trademark? In *Pensacola Motor Sales, Inc. v. Eastern Shore Toyota, LLC*, __ F.3d __, No. 10-15761, 2012 WL 2345117 (11th Cir. June 21, 2012), the Court upheld a jury verdict of no liability, but did not definitively answer the bad faith question. Eastern Shore Toyota, based upon the advice of an Internet marketing expert, purchased thousands of domain names. Some would be used “offensively” and resolved to single page advertisements, which the marketing guru called “microsites.” Others were registered “defensively” — the domain names incorporated competitors’ trademarks to keep those domain names away from competitors but were not supposed to point to any websites. As part of this program, Eastern Shore purchased several domain names that incorporated the plaintiff’s trade name, Bob Tyler Toyota. Although Eastern Shore argued it bought the domain names defensively, several of them pointed to active microsites, and Bob Tyler eventually stumbled upon the microsites and sent a cease and desist letter. Eastern Shore disabled the microsites within a day of getting the letter and fired the Internet marketing expert. Its president testified he believed the Bob Tyler domain names were only being held defensively and legally, and did not know the microsites were active.

The Eleventh Circuit upheld the jury’s verdict that Eastern Shore proved entitlement to the statutory safe harbor: “Bad faith intent...shall not be found in any case in which the Court determines that the person believed or had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful.” 15 U.S.C. § 1125(d)(1)(B)(ii). The court’s holding was limited to whether there was sufficient evidence to support a finding that Eastern Shore had a reasonable belief its registration was legal and thus not made in bad faith. It did not rule the actions were, in fact legal (or illegal), leaving that question for another day.

*Author: Dineen Pashoukos Wasylik, Conwell Kirkpatrick, P.A.*

[The court] did not rule the actions were, in fact legal (or illegal), leaving that question for another day.
THE SUPREME COURT ISSUES ITS FIRST EXEMPTION DECISION
Labor & Employment Section
Chairs: Scott T. Silverman - Akerman Senterfitt, LLP; and Ronald W. Fraley - The Fraley Law Firm, P.A.

In Christopher, et al. v. SmithKline Beecham Corp., d/b/a GlaxoSmithKline, No. 11-204 (June 18, 2012), the Supreme Court held that pharmaceutical sales representatives, also known as “detailers,” qualify for the “outside salesman” exemption to the Fair Labor Standards Act (“FLSA”) and are, therefore, not entitled to overtime compensation for hours worked over 40 in a workweek.

Because representatives do not actually sell prescription drugs, but merely try to persuade physicians in their assigned territory to write prescriptions in appropriate cases (a process called “detailing”), the plaintiffs argued that the outside sales exemption did not apply to them. The Department of Labor (“DOL”) agreed and submitted an amicus brief, which argued that the outside sales exemption applies only where the employee actually transfers title to the property in question.

The Supreme Court disagreed with the DOL and affirmed a grant of summary judgment to the defendant that detailers are exempt from overtime compensation. The Court held that deference was not required to the DOL position because it amounted to “unfair surprise” in light of the longstanding industry practice of treating detailers as exempt and the massive amount of liability sought.

The Court thought that the DOL should not have first raised its position on this issue in a brief. The Court also opined that the DOL stance was unpersuasive on the merits because it was reached without public input and was contrary to the actual language of the FLSA.

The Court then focused on a functional inquiry of whether the work of the detailers should qualify as sales, and found that the nonbinding commitments to prescribe drugs that the detailers obtained from physicians amounted to an “other disposition” of the property, in the context of the peculiar regulatory environment of the industry, so as to fall within the FLSA definition of sales. In addition, the Court reasoned that the purpose of the FLSA exemption would be met by applying it to the pharmaceutical sales detailers because the FLSA assumes that exempt employees earn well above the minimum wage, perform work that is difficult to standardize to a particular timeframe, and engage in activities that cannot be easily spread to other workers. Thus, the salesmen were not the type of workers the FLSA was enacted to protect.

Three important points arise from this opinion: (1) because the DOL is expected to recognize the Court’s criticism, employers must remain vigilant in staying abreast of the latest DOL interpretations applicable to their industry; (2) in deciding whether an exemption applies, courts should employ a functional, rather than formulaic, analysis, which will allow employers in exemption cases to argue the particular realities applicable to their industry; and (3) defendants’ arguments that the employees in question are paid well above the minimum wage, do not have a set work schedule and perform functions that cannot be assigned to other workers are entitled to careful consideration by a court when ruling on any exemption issue.

Author: Scott T. Silverman, Akerman Senterfitt, LLP

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LOOKING FORWARD TO ANOTHER EXCITING YEAR
Marital & Family Law Section
Chair: Alexander Caballero - Mason Black & Caballero, P.A.

I would like to thank my fellow section members for all their hard work over the past years, especially Immediate Past Chair Christine Derr, who did an excellent job leading the section in 2011-2012. As incoming chair of the Marital and Family Law Section, my goal is to continue the superb work that the section has done under the laudable leadership of the past chairs such as Christine by focusing on practicing with professionalism in 2012-2013.

Practicing with professionalism is of the utmost importance in marital and family law. With the stresses of the issues that family law presents, the large and ever increasing number of attorneys practicing family law, and the reduction of personal and collegial interaction, it is easy to lose sight of what should be the primary focus of all marital and family law lawyers — assisting families that are experiencing difficult times.

I hope to promote the professional practice of marital and family law during my tenure as chair through two means. First, I would like the section to offer a variety of educational and informative opportunities for our members. The section can keep its members current on the law and the professional practice of family law through continuing legal education programs, section luncheons, brown bag lunches, emails, and articles. We have first-rate family law judges who have expressed a desire to stay involved with the section, so I hope to schedule some brown bag lunches with them this year. If you would like to promote the professional practice of marital and family law by suggesting educational opportunities or authoring an article for Lawyer magazine, please let me know.

Second, I would like to see the section’s membership grow this year. The more family law lawyers involved in the section, the more successful we can be in promoting professionalism in the practice of marital and family law. The section will benefit by reaching out to non-member attorneys whose practices include family law issues and non-affiliate member professionals who address family law issues.

Please mark your calendar for the 2012-2013 Marital and Family Law Section luncheon dates: September 19, 2012; November 7, 2012; January 23, 2013; March 28, 2013; and May 23, 2013. All lunches will be at noon at the Hillsborough County Bar Association Building.

Promote professionalism by bringing a non-member guest to the luncheons.

The marital and family law seminar dates have not yet been scheduled. The goal is to schedule them by October to provide sufficient notice so everyone can attend. Please contact me with your suggestions on topics or issues that would make for informative seminars.

Please do not hesitate to contact me at 813-251-9200 or Alex@mbc-lawoffice.com with your suggestions. I look forward to working with everyone to make 2012-2013 another outstanding year for the section.

Author: Alexander Caballero, Mason Black & Caballero, P.A.

GET YOUR COURT ACCESS CARD. GO TO THE HCBA WEBSITE AT WWW.HILLSBAR.COM FOR AN APPLICATION.
Primacy theory suggests that first impressions are very powerful. Mediation typically presents the first opportunity for a lawyer to talk directly with the opposing party. Yet many lawyers often fail to take full advantage of such access to the other lawyer’s client, and instead alienate that person within just a few moments. These first impressions can make or break the chances for a successful resolution.

The opposing party is your business partner

Everyone understands that people prefer to do business with people they “like.” In fact, many lawyers’ marketing efforts revolve around this primary tenet of human commercial behavior. Yet these same attorneys will often approach mediation just as they approach litigation — as a form of combat. They emphasize the weaknesses of the other party’s positions without acknowledging any of the strengths or the underlying interests. They attack the other party with verbal and nonverbal communication.

What they fail to realize is that the opposing party most assuredly is their business partner in the conflict, and that they will need to do business with this person before the conflict can be resolved. It is crucial for counsel to exhibit the highest levels of personal grace and civility toward the opposing party. Attorneys should treat opposing parties no differently than they treat their family members or their best clients. Resolution — a “deal” — is less likely and/or takes longer to occur if the mediator is compelled to spend time and energy dispelling actual or perceived disrespect.

From “legalese” to “mediation-speak”

“Legalese” is a code — both in its provision of rules of engagement (code of conduct) and in its use of unfamiliar terms (ciphers). Attorneys use legalese in litigation because it helps them interact with one another more efficiently. But they sometimes forget that the opposing party may not understand the code. Legalese often creates an imbalanced communication dynamic. Many laypeople perceive it as condescending, elitist, and/or untrustworthy. At a minimum, we suggest that lawyers pay close attention and correct themselves as soon as they slip into legalese when interacting with opposing parties at mediation.

Even better, we suggest an alternative to legalese — “mediation-speak.” This communication technique emphasizes understanding on the part of the recipient. The speaker uses simple words and sentence structure, and breaks down complex processes into component pieces. The speaker seeks regular feedback from the recipient to ensure comprehension, and revisits topics that are confusing to the recipient. The speaker engages in dialogue rather than monologue.

As mediators, we have seen amazing transformations when parties come together and resolve previously unsolvable conflicts. Win-win solutions more often occur when attorneys treat the opposing parties as business partners rather than targets.

We hope that these suggestions are helpful to counsel seeking to be more effective in gaining favorable resolutions for their clients.

Authors: Jay Frank Castle and Dedra Newman

Castle, Level Mediation LLC
The recent case of Morey v. Everbank serves as a great reminder for estate planners to be cautious in naming a trust as the beneficiary of life insurance proceeds. 37 Fla. L. Weekly D1739a (Fla. 1st Dist. Ct. App., 2012).

In Morey, the decedent created a revocable trust that provided that the “[t]rustee shall pay to the domiciliary [p]ersonal [r]epresentative of the [s]ettlor’s estate from time to time such sum or sums as such [p]ersonal [r]epresentative may certify to be required to pay the [s]ettlor’s ‘death obligations.’” The residue of the trust assets was to be held in a subtrust for the benefit of the decedent’s children. Later, the decedent purchased a life insurance policy and named the revocable trust as the beneficiary.

When the decedent died, the trustee sought an order from the Clay County Circuit Court that the life insurance proceeds were exempt from creditors’ claims based on Florida Statute § 222.13(1).

The circuit court denied the trustee’s petition, holding that the trust provisions controlled the disposition of the life insurance proceeds, and the trust required the trustee to pay over as much of the trust principal as needed by the estate to pay the settlor’s “death obligations.”

The court reasoned that although Fla. Stat. § 222.13(1) provides that life insurance proceeds are generally exempt from the claims of creditors of the estate, when those life insurance proceeds are paid to a trust, the terms of the trust control the disposition of the funds. If, like most revocable trusts, the trust provides that trust assets are available to the personal representative to pay estate claims, then those life insurance proceeds are at risk of being paid over to the creditors.

The trustee also petitioned the court to reform the trust to provide that the insurance proceeds would be protected from creditor claims under Florida Statute § 736.0415. To reform a trust, the petitioner must prove by clear and convincing evidence that the “accomplishment of the settlor’s intent and the terms of the trust were affected by a mistake of fact or law.” The circuit court affirmed the trial court’s conclusion that the petitioner here did not present sufficient evidence for the court to conclude that the trust terms were contrary to the settlor’s intent at the time he executed the trust.

The moral of this story is to be careful when doing beneficiary designations for life insurance. If your client is concerned about beneficiaries receiving the insurance proceeds outright, then it may be worth considering preparing a separate trust to hold the life insurance proceeds. The separate trust should provide that the trust assets are NOT available to the personal representative to pay claims against the estate.

Author: Katie Everlove-Stone, Everlove Legal, PLLC
Last year, we made an effort to bring the advanced technology that is readily available to large firms to the attention of small firms and solo practitioners. Through lunch seminars on topics ranging from advanced litigation tools, social media, the newest available computer hardware, and cloud computing, we focused on alerting our section to the numerous ways to gain an advantage through greater efficiency and effectiveness. We hope our topics were insightful and of interest.

This year, we hope to assist our section members with human resources issues. We plan to cover every aspect of the business of running a law firm, from hiring and firing staff and attorneys to valuing your firm and succession planning. Our first lunch meeting on September 19, 2012, will address the hiring of employees whether staff or attorney. We will address the questions that are permissible in interviews. We will also address employee policies, wages, and the impact of the Patient Protection and Affordable Care Act on small firms.

Our second lunch meeting on November 7, 2012, will deal with the termination of employees. We will provide information regarding the entire termination process, from noncompete issues to the notification of clients. While Florida is an at-will employment state, there are still federal and state laws that may affect the rights of terminated employees. We hope to cover issues such as unemployment insurance, harassment claims, and discrimination allegations.

Our third lunch on January 16, 2013, will focus on the valuation of law firms. Whether you are considering retirement and hope to sell your practice or you have been approached by another firm hoping to acquire your client portfolio, we will look at all of the factors that need to be considered in valuing your firm. We also hope to help our members learn ways to capitalize on the goodwill that they have generated over many years of hard work.

Finally, our lunch on April 17, 2013, will cover succession issues. We will discuss turning over a firm to younger partners as well as preparing for an emergency. At some point, we all will be faced with the challenge of winding down our practice. We hope it will be by choice, but we must be prepared. We will address the Florida Bar Rules regarding trust accounts and client files as they pertain to the closing of a practice. We will present information regarding long-term disability and key man insurance.

In a nutshell, our goal this year is to assist our section members in protecting their firms and the investments they make in them. We all work very hard as solo practitioners and small firm members. And we want to make sure that our efforts are not thwarted by human resources issues that could have been easily handled with the right information and planning.

Our plan includes bringing informed speakers in all of these fields together to share their wisdom with our section members. We hope that you make it a priority to join us.

Authors: James A. Schmidt, James A. Schmidt, P.A. and S.M. David Stamps, III, S.M. David Stamps, III P.A.
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With the Supreme Court upholding most of the Patient Protection and Affordable Care Act (the “Act”) on the grounds that the Act is a legitimate use of Congress’ power to “lay and collect taxes,” this article seeks to provide a brief exploration of three of the top tax implications of the Act.

First, there is the individual mandate. Beginning in 2014, nonexempt U.S. citizens and legal residents are required to maintain “minimum essential coverage,” and if they do not, then they must pay a tax that is equal to the greater of either a certain percentage of annual household income or an “applicable dollar amount.” By 2016, the percentage amount is 2.5 percent of income in excess of the minimum income tax filing threshold and the applicable dollar amount is $695 per uninsured adult in the household (individuals under 18 computed at half the adult applicable dollar amount); however, the tax shall not exceed 300 percent of the per adult penalty ($2,085) or the national average annual premium for an applicable bronze level health plan offered through the healthcare exchange.

This tax is reported and paid as an additional amount of tax owed on the individual’s tax return; however, the enforcement power of the Internal Revenue Service as related to this tax is slightly limited by I.R.C. § 5000A(g), which provides “except as provided in paragraph (2), [the penalty/tax] shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.” I.R.C. § 5000A(g)(2) provides that failure by a taxpayer to timely pay this tax “shall not be subject to any criminal prosecution or penalty with respect to such failure” and that “[t]he Secretary shall not—

(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

(ii) levy on any such property with respect to such failure.”

Those structuring business transactions likely had the most interest in the second major change: the codification of the common law economic substance doctrine. I.R.C. § 7701(o) provides that a “transaction shall be treated as having economic substance only if—

(A) the transaction changes in a meaningful way (apart from Federal income tax effects) the taxpayer’s economic position, and

(B) the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into such transaction.” While this provision may not represent a sea change in the interpretation of the doctrine, the significance comes through the addition of 20 percent and 40 percent penalties for violations of the doctrine that are imposed with strict liability—meaning there is no allowance for a reasonable cause exception.

The third important change comes with the largest projected revenue raisers of the Act. In 2013, individuals with incomes over $200,000 and joint filers with incomes over $250,000 will face an additional 0.9 percent in Medicare tax on wages and will pay a new 3.8 percent Medicare tax on net investment income.

[Individuals with incomes over $200,000... face an additional 0.9 percent in Medicare tax on wages... and will pay a new 3.8 percent Medicare tax on net investment income.

Continued on page 57]
Continued from page 56


2 A survey of many of the tax implications of the Act can be found in V. Jean Owens, Tax Aspects of the 2010 Health Care Act and Reconciliation Act, LAWYER, June 2010, at 46.

3 Exceptions are provided for people below the income tax filing threshold, those who cannot find health care coverage for less 8 percent of household income, incarcerated people, illegal immigrants, members of Indian Tribes, and those with certain religious reasons.

4 This can be met by individual coverage or through employers, public programs, or exchanges.

5 This tax is termed a “penalty” under the Act but is deemed a tax by the Supreme Court.

6 With the same applied limitations, for 2014 the percentage amount is 1 percent of income over the minimum income tax filing threshold and the applicable dollar amount is $95 per adult, and for 2015 the percentage amount is 2 percent of income over the minimum income tax filing threshold and the applicable dollar amount is $325 per adult.

7 The Joint Committee on Taxation’s report, “Technical Explanation Of The Revenue Provisions Of The ‘Reconciliation Act Of 2010,’” As Amended, In Combination With The “Patient Protection And Affordable Care Act,” misrepresented the extent of the non-application of I.R.C. Subtitle F, because, while lien and levy are prohibited by I.R.C. § 5000A(a)(2), the rest of subchapter B of chapter 68 continues to apply; therefore, offset against refunds is another possible collection measure. See Jordan M. Barry and Bryan T. Camp, Is the Individual Mandate Really Mandatory? 135 TAX NOTES 1633 (2012).

8 This is the doctrine under which tax benefits with respect to a transaction are not allowable if the transaction does not have economic substance or lacks a business purpose.

Author: Justin J. Klatsky, Owens Law Group, PA.

Note: See the Health Care Law article on page 45 for more on the Patient Protection and Affordable Care Act.

HCBA BOARD RETREAT

The annual HCBA Board of Directors Retreat was held August 17-18, 2012, at The Ritz-Carlton in Naples.

The YLD board members also attended the annual planning session.

The retreat provided an opportunity for the two boards to share their visions and plans for 2012-2013.

HCBA President Bob Nader welcomed the board members at lunch Friday, kicking off the agenda-packed meetings that wrapped up Saturday morning.

Ex-officio directors Judge Manuel Menendez, Jr., Judge Mark R. Wolfe, and Foundation President Stan Murphy, along with Foundation Executive Director Darlene Kelly, also attended the meetings.

The retreat was sponsored by The Bank of Tampa and Trial Consulting Services.
These updates to the rules recognize the pervasiveness of digital communication in the modern practice of law.

T

his summer, the Florida Supreme Court issued a series of opinions amending the Florida Rules of Judicial Administration and the Florida Rules of Civil Procedure with respect to electronic service of court documents, electronic filing, and discovery of electronically stored information (“ESI”). These updates to the rules recognize the pervasiveness of digital communication in the modern practice of law.

Service by Email Is Now Mandatory

Service of court documents can no longer be accomplished solely by mail. Instead, effective September 1, 2012, Rule 2.516, Fla. R. Jud. Admin., requires “every pleading subsequent to the initial pleading and every other document filed in any court proceeding” in the civil, probate, small claims, and family law divisions of the trial courts, and in all appellate cases, to be served by electronic mail on any party represented by an attorney.1 Witness subpoenas and other documents requiring formal notice are exempted from the rule.

The new rule also specifies that documents served by email must be in PDF format. The subject line of the transmittal email must begin with the words “SERVICE OF COURT DOCUMENT” in all capital letters, and must be followed by the case number of the proceeding. The body of the email must identify the court in which the matter is pending, the case number, the name of the initial party on each side, the title of the document being served, and the sender’s name and telephone number. For purposes of computing time under the civil procedure rules, email service is treated as service by mail and, thus, five mailing days are added to the prescribed response deadline.

Court Documents Must Soon Be Filed Electronically

Beginning April 1, 2013, Rules 2.520 and 2.525, Fla. R. Jud. Admin., will require the electronic filing of all court documents in civil, probate, small claims, and family law divisions of the trial courts, and in appeals to the circuit courts in those cases. New electronic filing procedures take effect in the district courts of appeal and in the Florida Supreme Court on October 1, 2012. The rules allow filing by email as appropriate with the local courts but contemplate eventual use of a statewide e-portal.

The Rules Now Explicitly Recognize Discovery of ESI

Effective September 1, 2012, several rules of civil procedure explicitly account for the discovery of ESI, which must be produced in the form in which it is ordinarily maintained or a reasonably usable form. Although “reasonably usable” is not defined, production of non-searchable PDFs or TIFF images is likely inadequate. If documents are produced in native format, practitioners should recognize and consider the associated production of metadata.

Practitioners should consult the applicable rules for additional requirements relating to the new procedures. These changes reflect an important step toward the related goals of a fully electronic court system and the efficient practice of law in an electronic environment.

1 Rule 1.080, Fla. R. Civ. P., has been amended to refer to the requirements of Rule 2.516, Fla. R. Jud. Admin.

Authors:
Brad Kimbro, Holland & Knight LLP and Paul McDermott, Holland & Knight LLP
Shumaker, Loop & Kendrick, LLP, is pleased to announce that Liben Amedie, associate in the Tampa office, has been appointed to the board of directors of The Children’s Home.

Kevin Darken of Cohen & Foster, P.A., received the Distinguished District Chairman Award at the Boy Scouts of America’s Gulf Ridge Council annual recognition banquet March 31. He is the chair of the New Fire District.

Phelps Dunbar is pleased to announce that Craig Dawson has joined the firm as an associate in the labor and employment practice group.

Katie Everlove-Stone is pleased to announce the opening of Everlove Legal, PLLC, with offices in Tampa and St. Petersburg, serving clients in the areas of taxation, estate planning, probate, and guardianships.

Gunn Law Group announces the addition of attorney Samuel N. Harden to its litigation team. Mr. Harden will concentrate his practice on the prosecution of medical malpractice, nursing home liability, and insurance coverage disputes.

Hill Ward Henderson is pleased to announce the graduation of shareholder K. Tyler Hill from the Greater Tampa Chamber of Commerce’s Leadership Tampa program.

Kristin Morris, an honors graduate of the University of Cincinnati College of Law, has joined de la Parte & Gilbert, P.A., practicing in the area of civil litigation.

FordHarrison LLP is pleased to announce that Shane T. Muñoz, a Tampa-based attorney, has recently been elected Secretary/Treasurer of The Florida Bar’s Labor & Employment Law Section.

Richard A. Hirsch, of counsel to the Tampa law firm of Arnold D Levine and Associates P.A., is the recipient of the Professionalism and Civility Award presented by the Tampa Bay Chapter of the American Board of Trial Advocates.

C. Howard Hunter, shareholder in the Litigation Group and head of the Health Care Litigation Team of Tampa law firm Hill Ward Henderson, has been elected president of Florida Chapters of the American Board of Trial Advocates (FLABOTA).

The Iurato Law Firm, PL, is pleased to announce that Jenay E. Iurato has been elected president of the Stetson Lawyers Association and selected to serve as legal chair for the Junior League of Tampa, for a second consecutive year.

Carlton Fields, P.A. is pleased to announce that Tampa shareholder C. Douglas McDonald was elected to the board of directors for the Ferguson-White Inn of Court. McDonald will serve a one-year term and will be responsible for planning and organizing the Inn’s programs throughout the year. McDonald has been a Master of the Inn for six years.

George E. Spofford, IV, has joined the Tampa office of GrayRobinson, P.A. as a shareholder. Spofford brings more than 27 years of construction law experience to the team, and routinely represents clients in matters such as litigation of delay, extra work claims, breach of contract actions, mining disputes, claims preparation, bid protests, Occupational Safety and Health Administration (OSHA) matters, contract negotiation and drafting, and claims avoidance.

HCBA members: Send your updates to wendy@hillsbar.com.

Carlton Fields, P.A. is pleased to announce that Tampa Shareholder Kathy Mcлерoy was appointed to the Section Council for the Business Law Section of the American Bar Association (ABA) and co-chair of the Pro Bono Legal Services Committee of The Florida Bar.

Dennis Meyers of Meyers Law, P.A., has been appointed to the Hillsborough Metropolitan Planning Organization to serve on the Citizens Advisory Committee.

Henry Lee Paul was appointed to serve on the Supreme Court Commission on Professionalism for a four-year term starting July 1, 2012. He was also appointed to serve on the Board of Governors Standing Committee on Professionalism for a three-year term starting July 1, 2012.

Barbara J. Pittman of the Law Offices of Barbara J. Pittman, P.A., has been appointed to a five-year term on The Florida Board of Bar Examiners effective November 1, 2012.

Judge Susan Sexton, recently retired from the Thirteenth Judicial Circuit, was elected to the board of directors of the Gasparilla International Film Festival.

Adams and Reese LLP is pleased to announce the addition of partner Lynn Welter Sherman, representing financial institutions, special servicers of securitized commercial mortgages, creditors, trustees, landlords, debtors, and other parties in all aspects of Chapter 7 and Chapter 11 bankruptcies, out-of-court workouts, loan modifications and restructuring, foreclosures, enforcement of judgments, enforcement of security interests, and creditors’ rights litigation.
BARRY A. COHEN AND THE MEMBERS OF THE COHEN LAW GROUP wish to congratulate D. Keith Thomas on being elected by his peers as Florida’s Legal Elite in Florida Trend Magazine. Keith is a member of The Cohen Law Group practicing in civil trial work including trucking accidents, Dram Shop Act, auto and motorcycle negligence, personal injury, wrongful death, and negligent security. Congratulations again, Keith, and keep up the hard work!

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★ Mark E. Miller, P.A.
★ McClain, Smoak & Chistolini, LLC
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