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HILLSBOROUGH COUNTY BAR ASSOCIATION

Editor
Grace H. Yang
Executive Director
John F. Kynes

ADVERTISING
PR/Communications Coordinator
Wendy Whitt
wendy@hillsbar.com, (813) 221-7777

Officers & Directors
President Pedro F. Bajo, Jr.
President-Elect Robert J. Hader
Immediate Past President Amy S. Farrior
Secretary Alysa J. Ward
Treasurer Robert J. Scanlan
Ex-Officio Russell M. Blain

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

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about the cover
The frieze hangs in a Tampa courtroom. Eight other friezes depicting key moments in history, such as Abraham Lincoln signing the Emancipation Proclamation, hang elsewhere in this building. Can you identify the building? See page 55 for the answer.

PHOTO BY DAWN MCCONNELL
As I write this last Editor’s Message, I am happy to report that Amy Nath, an associate counsel at BayCare Health System and a recent graduate of the Hillsborough County Bar Association’s Leadership Institute program, will be the next magazine editor. Also, Wendy Whitt has accepted the position as the new HCBA Public Relations and Communications Coordinator. Wendy officially started on May 21, 2012. Please welcome both of them to their new roles as they carry on the proud tradition of the Lawyer magazine.

We bid farewell to Dawn McConnell, an extraordinary multitasker during her time with us. Dawn, her husband, and their son are moving to Michigan. Keith, her husband, has accepted a teaching position at Cranbrook Schools, a private college prep boarding school located in Bloomfield Hills, Michigan, near Detroit. I am very grateful that I had Dawn with me during my two years and fourteen magazine issues as editor. Thank you for your dedication, Dawn!

A magazine requires commitment from many others to progress from ideas to published works. In addition to Dawn, my family, and GrayRobinson, some others I especially wish to thank are:

1. Mary Jane Scalfari, my legal assistant at GrayRobinson. Every editor’s proof of the magazine passed through her hands as well as mine.
2. HCBA Presidents Amy Farrior and Pedro Bajo, Jr. for offering me the opportunity to be the magazine’s editor.
5. Our magazine advertisers.
6. Every author who submitted articles for publication. The articles educated and informed us.
7. Our magazine readers. I hope you will all renew your HCBA memberships and enjoy more issues in the 2012-2013 bar year! It has been a privilege to serve as your editor for two years, and I look forward to my new role on the Board of Directors. May you all have a great summer!
I Bid You All
A Fond Adieu

Time flies when you are having fun! As my lame-duck status was becoming more apparent, many commented to me, “I bet you can’t wait.” Actually, I truly enjoyed serving as HCBA President and will miss it. I am sure I will have microphone envy as Commander Bob Nader takes over as Master of Ceremonies.

It seems like yesterday that I said at the installation, “I like lawyers.” After a year, I still feel that way. It does not seem that long ago when I asked everybody to love everybody, lobbied for no substantive legal activity during football season (no such luck), reminded us all to smell the roses during the holidays, and commented on my experiences during jury duty. In my final message, I want to thank those who were instrumental in helping us to achieve our goals this year:

1) The HCBA staff: John Kynes, Laurie Rideout, Dawn McConnell, Michele Revels, Amanda Uliano, Monique Lawson, Yolanda Lee, Cathy Fitch, Nelson Mariscal, Arlene Lozano, Terri Schanken, Derek Jardeleza, Rita Zemetres, and

I truly enjoyed serving as HCBA President and will miss it.

Gatewood Bridges. Your tireless work and dedication is underappreciated by many, but not by me. I owe a debt of gratitude, especially for tolerating me throughout this year;

2) The HCBA Board: Bob Nader, Carter Andersen, Colette Black, the indefatigable Debbie Blews,

Continued on page 5
Continued from page 4

Ben Hill, Gordon Hill, Susan Johnson-Velez, Kevin McLaughlin, Kristin Norse, John Schifino, Laura Ward, Alysa Ward, and Rob Scanlan. Thanks for tolerating me and for your enthusiastic support, energy, and effort to ensure that our initiatives were implemented successfully;

3) The HCBA Committee and Section chairs for the hustle and muscle needed to operate efficiently and effectively;

4) Lara Tibbals, our Program Director, for giving so much time to setting up our lunches and speakers this year and for making sure the lunches ran smoothly and on time;

5) Amy Farrior, for not running away as soon as your term was up and for keeping me on task this year, and Tom Elligett, for your counsel these past two years;

6) Russ Blain, the Foundation President, and Stan Murphy, the Foundation President-Elect, special thanks for your leadership and fellowship in continuing to foster a meaningful relationship between the Foundation and the HCBA in order to achieve our common goals;

7) Grace Yang for agreeing to a second term as Editor of this award-winning magazine. Grace and Dawn McConnell deserve special thanks for not imploding as I missed each publishing deadline;

8) Chief Judge Menendez for his unwavering support of the HCBA and for his counsel throughout the year.

There are countless others I owe thanks to, but Grace has restricted my word count, so to those of you I could not mention by name, please note that I am deeply appreciative of your efforts and will thank you personally.

Finally, to the members, I am humbled to have the opportunity you entrusted to me. I hope I leave this office with the HCBA being a little bit better than when I was sworn in a year ago. I know I leave the office in the very capable hands of Bob Nader, who will provide outstanding leadership in the coming year. I bid you all a fond adieu.
Good Times, Good Friendships and Great Work!

It is hard to imagine that my year as president of the Young Lawyers Division is quickly coming to an end. My work over the years with the YLD Board, including this year as president, has afforded me many good times and good friendships. Most importantly, together, we have done great work!

We had great annual programs and events this year, including our golf tournament, which was the most successful one yet. Additionally, we developed several outstanding new programs of which I am especially proud. Through funds received from the American Bar Association and the Florida Bar Young Lawyers Division, we coordinated Graphic Novels for Grads. We provided young lawyer volunteers who led classroom discussions about a law-based graphic novel to approximately 1,500 Hillsborough County high school students.

Additionally, we partnered with Bay Area Legal Services and started an evening monthly Family Law Forms Clinic. With the help of a growing list of more than 30 dedicated young lawyer volunteers, the YLD assists numerous clients each month to complete various family law court forms.

The good work we accomplished this year was truly a team effort.

Also, we started the Courthouse Binders for Schools project. With the help of the Thirteenth Judicial Circuit judges and staff, we donate “leftover” binders

Continued on page 7
that have been collecting dust in the courthouse to the Hillsborough Education Foundation’s Teaching Tools for Hillsborough Schools program. Through Teaching Tools, the binders are made available to teachers at 115 Hillsborough County Title-I schools for use in their classrooms.

Each of these new programs has made and will continue to make a significant impact on our community, of which we should all be very proud. The good work we accomplished this year was truly a team effort. We had a tremendous number of dedicated committee members. I am thankful to them for their hard work. When I was sworn into office last June, I noted the importance of surrounding myself with good leaders. We could not have had the successes we have had this year without a truly amazing group of officers and a Board of Directors whose dedication to the work of the YLD is unparalleled. Additionally, I would like to thank my predecessor, Jaime Girgenti, for her support this year. Also, I cannot think of better people than my good friends Rachael Greenstein, next year’s YLD President, and Jacqueline Simms-Petredis, next year’s YLD President-Elect, to carry out the purpose of our Division.

Lastly, I would like to thank my family and my law firm for their support. I strived to balance my bar leadership duties with my law firm responsibilities and my family obligations. My responsibilities became even greater in January when my husband and I had our first baby. When I needed to attend a board meeting or bar function, my mom, dad and/or husband covered my baby duties. This was especially challenging for them during the months when my daughter refused to take a bottle! I could not have achieved what I have this year without the support of my family and colleagues at DLA Piper.

Thank you for the good times, good friendships and great work! Serving our membership as YLD President was a true honor and will be a memory I carry forever with me.
Michael Bridenback, the Thirteenth Judicial Circuit’s court administrator, went to the HCBA’s Law Day Luncheon in May prepared to help introduce the keynote speaker for the event, TV Judge Alex Ferrer. That’s the instruction he got from Hillsborough Chief Judge Manuel Menendez, Jr. He had practiced his lines and was ready to make his presentation. Little did he know, but Judge Menendez had given Bridenback that assignment just to make sure he would attend the lunch. The reason: Judge Menendez would be awarding the HCBA’s 2012 Liberty Bell Award to him in appreciation for his service to the legal system and the judicial system. “Obviously, I was preparing the wrong speech,” Bridenback joked as he accepted the award. The Liberty Bell Award is presented annually in conjunction with Law Day to honor a citizen who does not practice law but who has worked tirelessly to preserve and strengthen our system of justice under the law. Bridenback joined the circuit 18 years ago and oversees a 62-judge trial court and 200 employees.

Judge Menendez presented the 2012 Liberty Bell Award to Michael Bridenback.
He previously worked 17 years for the Office of State Courts in Tallahassee.

Over the years, Bridenback has devoted much of his time to the statewide development of mediation services, which is now an integral part of the court system.

He also has served on numerous national boards and commissions focused on effective court management and administration.

Additionally, through the U.S. Department of Justice and the National Center of State Courts, he used his experience and traveled to Romania and Kosovo to help provide guidance on court-related matters and to help strengthen democracy.

Meantime, the HCBA’s Law Day Luncheon also marks the unofficial end to the 2011-12 bar year.

What an incredible year it has been, not just for the fact that it was my first year serving as executive director, but also for the many outstanding programs and events the HCBA put on throughout the year.

From October’s Membership Cookout and the successful Bench Bar Conference and Judicial Reception in the fall to the Diversity Luncheon in January and the annual Judicial Pig Roast and 5K Race to the Courthouse in the spring, there was something for all. This does not include all the tremendous programs and events sponsored by the HCBA’s superb Young Lawyers Division and the HCBA’s numerous committees and sections, either.

Under the able leadership of HCBA President Pedro Bajo, the HCBA this year focused on stabilizing the HCBA’s finances, while continuing to build on the organization’s strengths.

These include helping HCBA members build and strengthen relationships with other HCBA members; providing timely and useful information and continuing legal education; and providing various service opportunities for members to make a positive difference in the community as a whole.

I want to thank all the HCBA Board members, and especially Immediate Past President Amy Farrior, for their support and guidance during this year of transition.

I’m confident HCBA President Robert Nader will do an outstanding job next year as well.

I also know the wonderful HCBA staff will continue to serve the HCBA membership to the best of their ability.

Here’s hoping everyone has a great summer. See you around the Chet.
A Fair Trial
Versus
THE PUBLIC’S RIGHT TO KNOW

In today’s society, events get reported in real time and often there are no attempts to verify the sources. It should come as no surprise that lawyers are turning ever more frequently to the gag order to ensure a fair trial for all. However, the use of this procedure will most certainly be met with resistance by the various media outlets.

Fortunately, Rule 4-3.6 of the Rules Regulating the Florida Bar provides a vehicle to rein in those attorneys who choose to try their case in the media without hampering the public’s right to know. This rule relating to trial publicity states:

Prejudicial Extrajudicial Statements Prohibited. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

Continued on page 11
An attorney cannot skirt this prohibition indirectly through the voice of his agents as embodied in paragraph b of this same Rule:

*Statements of Third Parties.* A lawyer shall not counsel or assist another person to make such a statement. Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements that are prohibited under this rule.

Attorneys who find themselves faced with outrageous comments by opposing counsel may present the court with an alternative to restricting the media. As the Florida Supreme Court noted many years ago in *State ex rel. Miami Herald Pub. Co. v McIntosh*, 340 So. 2d 904, 910 (Fla. 1976):

Limitations placed upon lawyers, litigants, and officials directly affected by court proceedings may be made at the court’s discretion for good cause to assure fair trials. Muzzling lawyers who may wish to make public statements to gain public sentiment for their clients has long been recognized as within the court’s inherent power to control professional conduct. The constant spotlight of public attention focused upon public officials during litigation makes it imperative that they be more subject to judicial restrictions against inflammatory and prejudicial statements than other persons.

By proceeding in this manner, the movant is not seeking a prior restraint on publication by the media but, rather, seeks to prevent interested parties from making extrajudicial comments that taint the jury pool and prevent the ability to obtain a fair trial. My office demands the highest ethical standards from every attorney privileged to work as an assistant state attorney. The state of Florida will not try its case in the press. Only when all parties receive a fair trial is justice truly served.
As Benjamin Franklin once said, “Time is money,” and we are well aware of that reality in the Clerk’s Office—even more so as we complete our transition into the age of technology. However, the journey is not without its turns in the road, as we move forward on different fronts.

When I took office in 2005, I was surprised to see how cumbersome our systems were throughout this office, especially in our Courts area. We basically had a patchwork setup in our Banner Courts system, for example, which never was designed to handle criminal cases and required a lot of “work arounds.” In order to view the information

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Our investment in technology enables us to transform our business to do more with less and to work smarter.
Continued from page 12

you needed, you had to open multiple screens, which made it a very cumbersome process. We were never able to update it to make it work efficiently. In Traffic, I found out that we were operating with a 23-year-old system, which could be counted on to break down on a regular basis, making us cringe as we never knew whether it would come back up.

Segueing to 2012, our operation is on an entirely different track—thankfully. We are completing our implementation of the Odyssey case maintenance system in our courts, and it is working! We have already completed Odyssey in Jury, Probate and Mental Health, as well as Family Law and County and Circuit Civil. We are moving toward implementation in County and Circuit Criminal, Juvenile and Traffic.

We are making this major transition with far fewer people in our courts, up to 20 percent less than we had on staff in 2009, so please be patient with us. As of this writing, we are now facing additional budget cuts imposed by the recent state budget, causing us to cut our hours in court-related services two hours a day. They will now be open from 9 a.m. to 4 p.m. We remain hopeful that this money will be restored, but we have no guarantee.

Simultaneously, we are complying with an order from the Florida Supreme Court to redact our files, which is a massive order to complete, as we have millions of documents.

Our investment in technology enables us to transform our business to do more with less and to work smarter. Along those lines, we are in the process of implementing a strategic plan to reduce redundancies and to introduce further integration with our partner agencies as we realign our work force.

I know full well that “time is money,” and my goal is to make this happen for you. The Clerk’s Office is not yet at the finish line, but we are well on our way, and that is good news for us—and for you.
Imagine residing in a foreign country that you have grown to love and have made your home. You struggle with the ability to communicate in a foreign language but are able to manage. Then, unfortunately, you are faced with a divorce. Perhaps you have been a stay-at-home mom and have had no income other than that provided by your spouse, who has now left the marital home and left you without the means to support yourself, let alone your children. Or maybe you are the hard-working father of a home where it is simply unbearable to stay, and you know that

Today, the Clerk’s office has all of the family law forms available in Spanish, thanks to the Florida Bar Foundation grant and the work of the TBHBA.

Continued on page 15
The Clerk’s office in Hillsborough County sells more than 540 packets of family law forms and dozens of individual forms. Each packet includes instructions for each form, an overview of family law procedures, a general glossary of family law terms, and step-by-step instructions to complete the packet. The instructions walk a pro se family law litigant from the first step of completing the necessary forms to commence their family law case through to the last step of preparing for the final hearing. It was through the TBHBA’s work with the clinic that the volunteers realized that the forms brought by the clients were completely in English. The volunteers would then have to translate and complete the forms and then also translate the instructions for completing the case. To remedy the need for translation, the TBHBA applied for and received a grant from the Florida Bar Voluntary Bar Association Diversity Leadership Grants program to fund some of the expenses associated with the complete translation of all of the packets. Today the Clerk’s office has all of the family law forms available in Spanish thanks to the Florida Bar Foundation grant and the work of the TBHBA.

We are very proud of the achievements of the TBHBA, and we all hope to be able to continue our service to the Hispanic Community in the Tampa Bay area.

Author: Victoria Cruz-Garcia, Cruz-Garcia Law, PA.

WE NEED YOUR INPUT!!

If you are the liaison for your Circuit pro bono project or you are the pro bono coordinator/administrator for your small, medium or large law firm or government entity, we want to hear from you! The Thirteenth Judicial Circuit Pro Bono Committee is gathering data in preparation for its 2010-2011 Circuit Report. The report is compiled with those from other circuits, and the resulting data is submitted to the Florida Supreme Court, the Florida Bar Foundation and the Florida Bar’s Standing Committee on Pro Bono.

Please provide us with the total number of attorneys from your organization who participated in pro bono activities in 2010 and in 2011. Please include the total number of pro bono hours donated, and list the pro bono projects in which your attorneys were engaged. Law firms and government entities: were there any special Collective Satisfaction Projects, pro bono service or community education projects in which your attorneys were engaged?

Now is the time to shine! Share that information with us! Please send to Nancy M. Lugo at nlugo@bals.org.
Sometimes, a statute generates more of the harm it’s supposed to minimize. Maybe that can be said about Florida’s offer-of-judgment statute. It provides in part that “[i]n any civil action for damages filed in … this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney’s fees … if the judgment is one of no liability … ”1 Instead of promoting settlement and conserving resources, however, the statute has generated independent litigation.

The Florida Supreme Court (“the Court”) recently revisited the statute in *Southeast Floating Docks, Inc. v. Auto-Owners Insurance Company.*2 There, a contract between the parties provided that Michigan substantive law would apply in any dispute under it. Auto-Owners sued Southeast in the Middle District of Florida, and Southeast served an offer of judgment, which Auto-Owners rejected. Southeast won a no-liability judgment and then tried to recover attorney’s fees under the statute. The district court denied relief for procedural reasons, and Southeast appealed. The Eleventh Circuit certified to the Court the question whether the statute applies when another jurisdiction’s substantive law governs. The answer depended on whether the statute was procedural or substantive for conflict-of-law purposes.

*Southeast* reached—and was ultimately resolved by—the Court through its discretionary jurisdiction of certified questions from federal appellate courts.3 Although the Court’s prior cases had concluded that the statute provides a substantive right to attorneys’ fees,4 no controlling precedent precisely answered the certified question. The Court recognized that the words “[i]n any civil action for damages” made the statute seem procedural, but ultimately concluded that it was substantive. The Court noted that the statute contained mandatory language distinguishing it from other procedural rules providing judicial discretion. The Court also found no public policy outweighing the freedom to contract under another jurisdiction’s substantive law. Because the statute was substantive and Michigan had no comparable statute, the Court answered the certified question in the negative. The Court’s answer was outcome determinative, not advisory. So, when the case returned to the Eleventh Circuit, that court was left with essentially nothing more to do but affirm the district court.

*Southeast*’s outcome follows from prior cases that have interpreted the statute.5 What remains to be seen, though, is how well *Southeast* serves the statute’s purposes of promoting settlement and conserving resources. Because *Southeast* appears to limit the statute’s applicability to cases where Florida’s substantive law governs, it may not serve those purposes as robustly as the Florida Legislature would have liked.

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3 Art. V § 3(b)(6), Fla. Const.
4 E.g., *Timmon v. Combs*, 608 So. 2d 1, 2-3 (Fla. 1992).
5 See, e.g., id.; *Jones v. United Space Alliance, LLC*, 494 F.3d 1306, 1309 (11th Cir. 2007) (diversity); and *Menchise v. Akerman Senterfitt*, 532 F.3d 1146, 1150 (11th Cir. 2008) (bankruptcy).

Author:
Michael J. Hooi,
Stichter, Riedel,
Blain & Prosser, PA.
HCBA LEADERSHIP INSTITUTE JOINS LAWYERS FOR LITERACY
Community Services Committee

As lawyers, we spend many days reading case law and arguing for our client’s interests before an audience of robed judges and jurors. But on May 23, 2012, members of the HCBA’s Leadership Institute and other attorney volunteers participated in Lawyers for Literacy Day, showing off their oratory skills at Head Start centers across the Tampa Bay area to an audience of eager local students.

The HCBA Leadership Institute selects diverse young lawyers across Hillsborough County and assists them in developing the interpersonal and leadership skills to emerge as future HCBA and Tampa community leaders. The Leadership Institute class has the unique opportunity of exploring interesting parts of Tampa, such as the Port Authority and MacDill Air Force Base, through modules designed to educate young leaders about the network supporting Tampa’s infrastructure. As part of this program, each Leadership Institute class adopts a community service project to support during their term. The 2011-2012 class of the HCBA Leadership Institute selected Lawyers for Literacy as its service project because of the great impact it has on the future leaders of our community.

Lawyers for Literacy is a non-profit organization of volunteer attorneys and judges with one goal in mind: helping at-risk students build a foundation for success by improving their reading skills to excel on the Florida Comprehensive Assessment Test (“FCAT”). Throughout the year, the program provides books to students and their families and tutors students in reading, reading comprehension, and for the third-grade FCAT. In conjunction with its yearly program, Lawyers for Literacy hosted its annual Lawyers for Literacy Day on May 23, 2012. The Leadership Institute and the HCBA’s Community Services Committee volunteers gathered book donations from the community, delivered the books to Head Start centers, and then spent the day reading with local students. Each student received a book to take home as a memento of the experience.

“Lawyers for Literacy Day is an important event for attorneys to give back to our community,” said Leadership Institute class member Michael Kamprath of Thresher & Thresher. “The HCBA Leadership Institute is proud to help with this important activity.”

In addition to gathering book donations and participating in Reading Day, the HCBA Leadership Institute also assisted in staffing the Lawyers for Literacy booth at the HCBA Pig Roast. They offered delicious pastries generously donated from Panera Bread and provided humorous photo opportunities for Pig Roast participants to raise money for Lawyers for Literacy. The booth also passed out cotton candy and popcorn, much to the joy of many children (and possibly dismay of their parents).

The Leadership Institute and the Community Services Committee greatly appreciate Lawyers for Literacy allowing them to assist in Reading Day, which has left a remarkable and everlasting impression on all of the volunteers.

If you are interested in learning more about Lawyers for Literacy, please contact Amy Nath (amy.nath@baycare.org). If you are interested in learning more about the Hillsborough County Bar Association’s Leadership Institute, please contact Robin Horton at hortonr@flcourts.org.

Author:
Kimberly Gracia Jones, Phelps Dunbar, LLP
FULFILL YOUR PROFESSIONAL RESPONSIBILITY - DONATE TO BAY AREA LEGAL SERVICES

In early June you received your annual Florida Bar dues statement asking you to report how you fulfilled your professional responsibility of pro bono public service (Rule 4.6-1). By making an annual donation of $350 or more to Bay Area Legal Services, you can satisfy your professional responsibility and make a valuable contribution to our community at the same time. If everyone in your law firm donates, you can join the many attorneys and firms who have supported Bay Area by becoming a Sustaining Law Firm. Fulfill your professional responsibility today – make a donation to Bay Area and ensure access to justice for the poor in our community.

Thank you to all of our 2012 Sustaining Law Firms for their loyalty and support:

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Predicting prevailing party status only becomes more difficult when there has been a settlement offer from the owner.

P
dagnostically, entitlement to attorneys’ fees in lien claims is akin to predicting the weather. While the “prevailing party” in an action brought to enforce a lien may recover reasonable attorneys’ fees, Trytek v. Gale Indus., Inc., 3 So. 3d 1194 (Fla. 2009) clouds “prevailing party” status with uncertainty. Supplanting the “net judgment” rule, Trytek ordained the “significant issues” test as the standard to determine “prevailing party” status. Under this rule, the owner/defendant may be the “prevailing party” even if the contractor/lienor obtains a judgment. Id. at 1201. Trytek also allows the court to determine that neither party is the “prevailing party,” relieving the previously mandatory decision. Id. at 1203.

Predicting prevailing party status only becomes more difficult when there has been a settlement offer from the owner—either through a simple settlement offer—or one pursuant to section 768.79, Florida Statutes. If the former, then the “litigant must have recovered an amount exceeding that which was earlier offered in settlement of the claim” to recover fees. C.U. Assocs., Inc. v. R.B. Grove, Inc., 472 So. 2d 1177, 1179 (Fla. 1985). In C.U., the Court held that the rejection of a pre-trial settlement offer of the entire unpaid balance precluded the lienor from recovering attorneys’ fees as the “prevailing party.” Id. However, to trigger this preclusion, some courts have held that the settlement offer must come before suit. See Grant v. Wester, 679 So. 2d 1301, 1308 (Fla. 1st DCA 1996); All-Brite Aluminum, Inc. v. Desrosiers, 626 So. 2d 1020, 1022 (Fla. 2d DCA 1993). Otherwise, the defendant could offer the disputed amount on the eve of trial when the lienor had already incurred significant attorneys’ fees.

If the offer is made pursuant to section 768.79 and Rule 1.442, then an interesting scenario can occur if the plaintiff obtains a judgment less than 75% of the offer. For example, if a lienor files an action on a $100,000 claim of lien and the defendant serves a proposal for settlement of $50,000, a potential quagmire occurs if the lienor obtains a judgment for $37,499 or less. Under Trytek, the court could determine that either or neither party is the “prevailing party.”

If the contractor is the “prevailing party,” then he or she would undoubtedly obtain fees. Notwithstanding section 713.29, Florida Statutes, under White v. Steak and Ale of Fla., Inc., 816 So. 2d 546 (Fla. 2002), all pre-offer costs and fees a lienor would be entitled to as the “prevailing party” would catapult the judgment above the 75% recovery threshold, meaning, if the court held that the lienor was the “prevailing party,” then the pre-offer attorneys’ fees would be added to the judgment to determine whether the judgment obtained exceeded the 75% threshold. If, however, the court were to hold that either the owner was the “prevailing party” or neither party was the “prevailing party,” then the owner would be entitled to fees under section 768.79 and Rule 1.442.

In sum, predicting fee recovery in lien claims is extremely difficult and is only more complex when accompanied by settlement offers. The only certainty is uncertainty. Advise clients to bring an umbrella even on the sunniest of days.

Author: T. Bennett Acuff, Hill, Ward, Henderson

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The first myth you have to dispel when traveling to France is that everyone there speaks English. At best, many French citizens speak broken English.

But our French hosts spoke English well enough that a recent legal information exchange between members of the Hillsborough County Bar Association—Dina Busciglio, Josh Busciglio, Gary Dolgin, John McLaughlin, Roger Vaughan, and I—conducted in Le Havre, France, was quite the tour de force.

The week-long exchange, conducted in March, was an opportunity for us to study the French legal system while allowing us to share information about our system with members of the Le Havre, France, Bar Association. Lawyers from the Le Havre Bar and their families hosted us in their homes for the week while showing us Le Havre (a city comparable in size to St. Petersburg), the surrounding area of Normandy, and Paris.

Amongst the exchange activities was a day of lectures on the two countries’ legal systems, particularly the family law, criminal law, and maritime systems, complete with translators and U.N.-style headphones for participants. We American lawyers lectured about our system, while about 15 French lawyers and judges gave lectures on the French system. About 50 lawyers and judges from the Normandy and Paris areas attended the lectures.

During our week in France, local Bar members gave us tours of local government buildings, the courthouse, city hall, and the jail. The Le Havre Bar has only 139 members, which includes all their judges. We were given an opportunity to meet nearly all their members at Bar functions given in our honor, at the fantastic dinners to which we were treated in local restaurants (the idea that French food is the best in the world is no myth!), or in the courthouse.

Continued on page 23
Le Havre is a “Sister City” to Tampa, and Gary Dolgin and I were given the diplomatic duty of presenting a letter from Tampa Mayor Bob Buckhorn to the Mayor of Le Havre. A well-attended VIP dinner including Le Havre’s mayor, the local Bar president, and the Chief Judge made this event memorable.

The legal system in France is strikingly similar to yet dissimilar from ours. I could not distinguish a “custody” hearing I attended from the many I have conducted in Tampa, save the language difference, the beautiful fireplace, the ornate chandeliers, and the age of the judge—about 24. “Lawyer” and “judge” are separate professions (and separate bar exams and law schools) in France, so judges begin judicial careers right out of “judge” school, never having practiced law. the defense does not question. Other evidence is by police report. Defense attorneys (usually appointed private counsel; there is no public defender’s office) give closings only. Defense attorneys generally had met their clients only the day before, and trial usually occurred within days of arrest.

Author: Brent Rose,
The Orsini & Rose Law Firm
New Admittee Swearing In

The Hillsborough County Bar Association’s YLD welcomed new admittees to the Florida Bar on April 27, 2012, at the George E. Edgecomb Courthouse. The judges of the Thirteenth Judicial Circuit officiated the swearing-in ceremony with Chief Judge Manuel Menendez, Jr. administering the oath. YLD President-Elect Rachael Greenstein and HCBA President Pedro F. Bajo, Jr. addressed the new lawyers.
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Proud to support the Hillsborough County Bar Association.
The HCBA Trial & Litigation Section recognized three outstanding trial lawyers on May 30, 2012, at the Chester H. Ferguson Law Center.

**AWARD WINNERS:**

• John L. Holcomb of Hill Ward Henderson received the Michael A. Fogarty “In the Trenches” Award for excellence and integrity in civil advocacy.

• James E. Felman of Kynes, Markman & Felman, P.A., received the James H. Kynes “In the Trenches” Award for excellence and integrity in criminal advocacy.

• Bennie Lazzara, Jr. of Wilkes & McHugh, P.A., received the Herbert G. Goldburg Award for a body of work reflecting dedication and commitment to advocacy in the court system.

• Hillsborough Sheriff’s Deputy Miguel Ingles, a bailiff with the Thirteenth Judicial Circuit, received the Court Family Award given to the state or federal court support staff who has demonstrated courtesy and professionalism.

Award winners are pictured from the top as listed.

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**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.
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The statewide Florida law firm of Fowler White Boggs (Fowler) and the Ft. Lauderdale based firm of Atkinson, Diner, Stone, Mankuto, & Poucho, PA (Atkinson) merged May 1, 2012. This merger is a continuation of the dynamic expansion of the Ft. Lauderdale office of Fowler which has grown to nearly 30 attorneys in less than two years. The Firm is meeting its goal of attracting quality lawyers through the addition of the highly regarded and successful Atkinson attorneys.

The Atkinson attorneys have a long standing history of excellence, community accomplishment, leadership in the legal profession, and a distinguished law practice for more than 40 years. Fowler, established in 1943, has grown from its original roots on the west coast of Florida into a strong state wide presence.

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Members of the HCBA celebrated Law Day and recognized award recipients for their many contributions to the community during the Membership Luncheon on May 8, 2012, at the Hyatt Regency Tampa.

The theme of Law Day was “No Courts, No Justice, No Freedom.” Judge Alex Ferrer, known as “Judge Alex” to viewers of his syndicated courtroom television show, delivered the keynote address.

HCBA President Pedro Bajo, Jr. recognized Law Day Chair Judge Ashley Moody and Law Week Co-Chairs Kelly Zarzycki and James Schmidt for their work.

Chief Judge Manuel Menendez, Jr. led lawyers in the Oath of Attorney to The Florida Bar and presented the Liberty Bell Award for community service to Michael Bridenback, trial court administrator for the Thirteenth Judicial Circuit since 1994.

Program Chair Lara Tibbals presented the Law Enforcement Officer of the Year Awards to Hillsborough County Sheriff’s Deputy Steven Donaldson and Tampa Police Officer Salvatore Augeri.

Law Day Membership Luncheon continued on pages 35, 37-39
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Continued from page 34

Tibbals also recognized the student award winners:

- **Peer Mediator of the Year:**
  Angelica Labkon, Adams Middle School

- **Peer Mediation Essay Contest Winners:**
  Angelique Ordoñez, King High School; Juliana Gomes, Benito Middle School; and Kyjou Young, Gibsonton Elementary School

- **Peer Mediation Art Contest Winners:**
  Paolo Amado, Blake High School; Lauren Petty, Blake High School; Hannah Cowart, Plant High School; Paula Pierce, Mann Middle School; and Sadie Testa-Secca, McKitrick Elementary School

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**Student Award Winners**

- **High School Essay Winner**
  Angelique Ordoñez, Senior
  King High School

- **Middle School Essay Winner**
  Juliana Gomes, 8th Grade
  Benito Middle School

- **Elementary School Essay Winner**
  Kyjou Young, 4th Grade
  Gibsonton Elementary School

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**High School Essay Winner**

Angelique Ordoñez
Senior, King High School

Peer Mediation is an important role. I’ve learned a lot during my experience in the last semester. To be a mediator, you have to have responsibility and maturity. You also have to keep things confidential and have respect.

Peer Mediation is an easy way out from getting suspended over petty fights and arguments. I’ve learned this past semester that usually these fights are pointless. I’ve been through enough drama to be able to give these students advice. It doesn’t take long until these students decide that the fight wasn’t worth it and they make up.

Usually the mediations are over he said/she said situations or over boys or girls. Because most of the students are
drama and the best thing to do is avoid it or ignore it and tell yourself that you’re better than that. As a senior and experiencing the same thing throughout my high school career, I’m glad to be able to tell them.

No school tolerates bullies, especially King HS. I’ve had several mediations where there is a bully and they can’t even tell their reasoning as to why they bully. I’ve been bullied countless times and it’s not a good feeling. It’s good that the students have someone to relate to and for me to be able to tell them, “sticks and stones.”

Peer Mediation was a wonderful experience. And to have the title as a mediator gives you a sense of power and influence. I feel it has also kept me out of trouble because, if I didn’t see how pointless it was, I probably wouldn’t have control over my actions. Who knows, this might lead me towards the career path of counselor. I enjoyed helping people and wouldn’t mind doing it again.

Continued on page 39
Middle School Essay Winner
Juliana Gomes, 8th Grade
Benito Middle School

Peer mediation occurs when two or more people have a conflict with each other. Instead of warning them that if they have a problem with each other again they will get the maximum penalty, my school’s faculty sends the two or more disputants to peer mediation. In peer mediation, us peer mediators try to hear each side of the “story.” Instead of judging them or telling them right from wrong, we try to make each of the disputants come up with a solution on which they both can agree on so that they can prevent future conflicts. As a peer mediator I am similar in a way to a judge or a jury in the court system. I have to be “blind,” meaning I only focus on the problem and not on the race, relationship, etc. of/with the disputant. As a peer mediator I have dealt with various types of situations. I am always opened minded and never expect the same conflicts every day because every day there is always something new. Once the disputants have come up with a solution our recorder writes down what they have come up with. We ask the disputants to make sure that what our recorder has written down is what they said. We warn them that if they violate what they have agreed upon then they will get the maximum penalty. This whole year that I have been a peer mediator I have not seen any of the same disputants come back or have a problem again in the future. This makes me feel like I am doing my job right. I try to make sure that the disputants are comfortable as much as possible. My role as a peer mediator has helped many students in my school.

Peer mediation is very similar to the court system. They both have disputants that have problems. They are both also based upon freedom and justice. In both systems the disputants have the right to speak what they feel and what they think. We also try to find justice for all of the disputants in both systems. If we didn’t have courts there would be no justice because if someone did something wrong they would get away with it. In our world today we need courts and peer mediation to better our society. I find that they both have a great influence on our people.

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Elementary School Essay Winner
Kyjou Young, 4th Grade
Gibsonton Elementary School

No courts no justice no freedom what would it be like? Well first of all without justice you would be walking on the streets one day and all of a sudden… BAM a thief steals your billfold or purse. That by chance could contain your phone your money your I.D. and possibly your driver’s license and if there’s no justice there would be no police or helpful citizen to bring justice to that thief. So that’s that for no justice. Next is no courts if there is no courts and a police man brought a serial killer or a robber or a thief was brought to justice and there’s no courts that outlaw cannot be decided to be put in jail or not or if they are guilty or not and that’s that for not having courts next is not having freedom. With no freedom we would not be able to get a lawyer because we would not be (free) to have the decision of being able to get his/her lawyer and there are other ways for no courts no justice and no freedom but it would take up this whole essay to name them all so I am going to talk about my life as a peer mediator. Peer mediators have jobs a lot like lawyers we help the people with problems at our schools to get a win/win solution. So I’m going to tell you about a time when I fixed a problem. It was a loud morning in the lunchroom when …hello I have a problem a 10 year old girl with blonde hair said. So I said ok write your problem on this purple slip and put the person that you have problems with put that person’s name on the slip AND their grade and explain your problem also. Ok She said so when she was done the slip said Chloe 4th grade and the other side said nadeli and it also said that nadeli was calling me a really bad name so later at 1:30 pm me and my partner Kevin went and got those two people and started mediation so then I said state your problem so they told me and Kevin so we said ok what do you think would be a good solution to your problem so they told me and Kevin so we said ok what do you think would be a good solution to your problem so Chloe said to become friends and so nadeli said I agree to that and that was how us peer mediators helped fix that problem and help those students in need and so that is what happened and by the way I LOVE helping students come to a solution. And So That is It For MY No Courts No Justice AND No Freedom!!!
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The Bar Foundation’s 2012 Law & Liberty Dinner held on May 10, 2012, at the Hyatt Regency continued the Foundation’s successful trend of providing an evening that was not to be missed. Camaraderie, entertainment, and insightful comments blended with humor from Pulitzer Prize-winning columnist George F. Will completed the evening, which has become the signature event of the Hillsborough legal community. Emceed again by anchor Keith Cate of NBC affiliate News Channel 8, questions from the audience about politics, current events and baseball were candidly answered by Mr. Will.

The dinner, which is the principal fundraising event for the Bar Foundation, draws support from the legal and business communities and provides the basis for the Bar Foundation’s outreach grant program. This year’s grant recipients include the L. David Shear Children’s Law Center of Bay Area Legal Services, The Spring of Tampa Bay’s After Hours Personal Protection Program, and Voices for Children benefitting the Guardian ad Litem Program. The Bar Foundation Board of Trustees, Board president Russ Blain, 2012 event chairman David Rieth, and executive director Darlene Kelly extend their sincere thanks to all of the event sponsors and attendees. Special thanks are offered to The Centers, which stepped up for the third year as the event’s Marquis Sponsor. Thanks also to The Bank of Tampa and The Yerrid Foundation, which joined the Foundation as Platinum sponsors for the first time. Plans are being formulated for next year’s event. If you would like to offer suggestions for future speakers and/or you would like to recommend a charity that provides legal-related assistance to those in need in our community for an outreach grant, please contact the Foundation.
THE HCBA COOKBOOK: INTEGRATING THE BAR
Diversity Committee

We are excited to announce that the Hillsborough County Bar Association (“HCBA”) will be publishing its first cookbook! The cookbook will be comprised of recipes submitted from the local legal community. We are soliciting recipes from everyone in the legal community, including judges, lawyers, paralegals, and administrative professionals.

The HCBA is proud to donate the net proceeds from sales of the cookbook to Bay Area Legal Services (“BALS”). It cannot be emphasized enough that BALS fills a desperately needed role within our community. BALS provides services to those most in need, not only in Hillsborough County, but also in Pinellas, Pasco, Manatee, and Sarasota counties. Between January 1, 2011, and December 31, 2012, BALS will have suffered funding cuts well in excess of $1 million. BALS will have served approximately 2,000 fewer clients in 2012 compared with 2010. Without sufficient funding, BALS will not be able to provide services to those in need.

The idea of an HCBA Cookbook originated from former HCBA President A. Dallas Albritton. His vision was that publishing a cookbook would be a successful way to integrate men and women within the HCBA. Co-Chairs Debbie Blews, John Schifino, and Carter Andersen built upon Mr. Albritton’s vision and created a diverse committee. The committee has more than 30 members. There are men, women, sole practitioners, those in large firms, government lawyers, young lawyers, judges, and others from diverse backgrounds on the committee. Also, there are at least two members who are active members from the Hillsborough Association for Women Lawyers, the George Edgecomb Bar Association, and the Tampa Bay Hispanic Bar Association.

There will be five subcommittees for the cookbook: Taste Testing/Quality Control, Solicitation of Sponsorships/Advertising, Graphics and Art Work, Editing/Publishing and Publicity Sales. We encourage and welcome anyone who wants to be a part of this dynamic project to sign up for one of these subcommittees.

A. Dallas Albritton’s vision was that publishing a cookbook would be a successful way to integrate both men and women within the HCBA.

Hillsborough County Bar Association Cookbook

Share your favorite recipe with the HCBA for a chance to win the “Best Recipe” contest.

Submit a catchy title for the “Name the Cookbook” contest.

Submit your recipes and photos to Debbie Blews at blewsd@hillsboroughcounty.org or John Schifino at jschifino@wmslaw.com

Winners to be announced at HCBA Membership Luncheon in January.

Net proceeds benefit Bay Area Legal Services.

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To fund a portion of the cookbook, the Co-Chairs applied for the Diversity Leadership grant from The Florida Bar. The remaining funding will come from sponsorships. If you are unable to serve on a subcommittee, please consider supporting this noble cause with a sponsorship contribution.

For those of you inspired by competition, there will be “Name the Cookbook” and “Best Recipe” contests. The winner of each contest will receive special recognition at the January Diversity Membership Luncheon and in the cookbook.

We think the HCBA Cookbook project will be a lot of fun! We want your recipes. We want the stories behind your recipes, too. For example, a well-known and well-respected Tampa Bay lawyer, Robert Williams of Williams Schifino, cooks his mother’s meatball soup recipe “Albondigas” with his 6-year-old daughter. We also want your photos: personal and family, and a photo of your recipe when it is cooked would be great!

Please submit your recipes, stories and photos to Debbie Blews at blewsd@hillsboroughcounty.org or John Schifino at jschifino@wsmslaw.com.

In closing, those with barbeque recipes, bring it on!

Authors:
Cynthia Oster,
Hillsborough County Attorney’s Office,
and Deborah Blews,
Hillsborough County Attorney’s Office
Fan Fiction—Boldly Going Where No One Has Gone Before

Intellectual Property Section

All this puts the film studios in an unenviable position. They do not want to incur the wrath of enthusiastic fans by shutting down these sites, but they run the risk of losing their rights by not asserting them. Copyright law, for example, contains a three-year statute of limitations. Defenses such as laches or estoppel may also apply if a copyright action is not timely asserted.

This tension was on display this spring when a script from the original Star Trek series was uncovered. As reported by The New York Times, science fiction writer Norman Spinrad wrote the Star Trek script “He Walked Among Us” in the late 1960s. The script was to showcase comedian Milton Berle in a dramatic role. Star Trek’s producer and creator Gene Rodenberry ultimately decided not to air the episode. When the script was recently unearthed by Mr. Spinrad, he decided to sell copies of it on Amazon.com, and he also offered it to the producers of Phase II.

All was good in the galaxy until the intellectual property lawyers got involved.

To the dismay of Trekkies and Scott Bakula fans alike, the last television episode of Star Trek aired in May of 2005. Die hard fans have stepped in to fill this intergalactic void by producing their own web-based episodes of the popular science fiction series. This “fan fiction” recently drew the ire of CBS Studios, Inc., the owner of the Star Trek franchise.

Fan fiction refers to literary or multimedia content generated by fans of popular fiction. Fan fiction abounds on the Internet. The most popular fan fiction subjects are Harry Potter, Star Trek, and Star Wars. Although fan fiction has been around for quite some time in literary form, it has expanded to include fan generated videos. Star Trek Phase II is a popular fan site that produces episodes of Star Trek featuring amateur actors in the roles of Captain James T. Kirk and Mr. Spock.

Film studios typically own various intellectual property associated with the original works. The film studios, for example, may claim copyright protection on the original scripts, plot lines, and characters. Fan sites rarely are licensed by the film studios. Instead, they rely on the fact that they are non-commercial sites, thereby availing themselves of a plausible fair use defense.

Notably, CBS has not threatened to shut down the Phase II site, which has been operating since 2004, and the Phase II creators have produced other episodes based upon unused Star Trek scripts. Thus, had the matter been litigated, Mr. Spinrad and the Phase II creators may have relied upon fair use, laches, or estoppel defenses. Alas, the universe will never know the outcome. Mr. Spinrad confirmed on his blog that he reached a settlement with CBS and can no longer comment on the matter.

2 http://www.startreknewvoyages.com (last visited 04/12/2012).
6 See id.
7 http://normanspinradatlarge.blogspot.com/ (last visited 04/12/2012).

Author: Michael J. Colitz, III, GrayRobinson, P.A.
On March 29, 2012, the Equal Employment Opportunity Commission (the “EEOC”) issued its Final Rule on Disparate Impact and “Reasonable Factors Other Than Age” (“RFOA”) under the Age Discrimination in Employment Act.

The U.S. Supreme Court had previously criticized the prior EEOC regulation, which had required employers to prove a “business necessity” for policies that had a disproportionate effect on workers over 40. Now, in response to a disparate impact claim, employers must show only that it reasonably designed and administered its policy to achieve a legitimate business purpose in light of the circumstances to qualify for the RFOA defense.

In summary, the employer must demonstrate: (1) that the criteria utilized in the policy or practice is related to a legitimate business purpose; (2) that managers and supervisors were given guidance or training on how to apply the factor to avoid discrimination; (3) that managers or supervisors were given limited discretion to assess employees subjectively; (4) that the adverse impact on older workers was assessed; and (5) the employer took steps to reduce harm to those in the protected age group.

On March 29, 2012… the EEOC issued its Final Rule on Disparate Impact and “Reasonable Factors Other Than Age” under the Age Discrimination in Employment Act.

The National Labor Relations Board (“NLRB”) recently voted to change its election procedures, which took effect on April 30, 2012. These changes are as follows: (1) when parties cannot agree to NLRB election terms, the new rule explicitly states that the purpose of a hearing is to determine whether a question of representation exists and gives the hearing officer the discretion to limit the hearing to matters that are indisputably relevant to the election; (2) hearing officers are given authority to control the submission and length of post-hearing briefs; (3) parties will be able to file only a single appeal of pre- and post-election issues, except in the extraordinary case where the issue would otherwise evade review; (4) the 25-day waiting period between the direction of an election and the election date is eliminated; and (5) challenges and objections to an election are determined by a Regional Director investigation without a hearing where there are no substantial or material factual issues in dispute and the NLRB review of such decisions is discretionary. In summary, these changes will cause NLRB-conducted elections to take place more quickly after filing the petition for an election.

Author: Scott T. Silverman, Akerman Senterfitt

GET YOUR COURT ACCESS CARD. GO TO THE HCBA WEBSITE AT WWW.HILLSBAR.COM FOR AN APPLICATION.
This year, once again, HCBA members collaborated to create a week of learning and enrichment for the youths of Hillsborough County. We call it Law Week. Besides being co-chair of the program, I was also a reporter on the beat, and this is my story.

It all started in the meetings. There were plenty of them—filled with pizza, soda, a healthy dose of three-ring binders, and lots of camaraderie. There were the old and the new, mingling and planning.

The meetings had their touching moments. One I recall was when a school district employee revealed that she was getting her hours (and pay) cut in half due to school district budget constraints. Those hours and pay were later reinstated, but seeing her volunteering her time in the face of such personal uncertainty was meaningful. It made me realize just how important everyone’s contribution really was.

Then there were the numbers, the sheer numbers, and the actual week itself. With the volume of courthouse tours, mock trials, and classroom speaking events, the cream really rose to the top. The attorney-volunteers who successfully pull it off year after year once again showed their mettle, assisted by a new generation of pro bono aspirants.

I cannot fully describe the scope of their effort because I did not nearly match the hours, early mornings, and long days that were spent without hesitation. Suffice it to say, Kelly Zarzycki, Amy Nath, Kevin Elmore, Lauren Raines (each of whom has earned a place in Law Week History) and an army—literally—an army of volunteers, took up the challenge with unmitigated commitment.

The result of their effort is nothing less than the accomplishment of touching the lives of at least 5,270 Hillsborough County School District students...

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curiosity in the minds of these future stewards of liberty.

There is one other item worth mentioning. After Law Week wrapped up, I did my best to ask many of the volunteers what they thought about it. I got all kinds of responses, but one theme that kept coming up was how volunteers always made great friends and contacts. Indeed, as I recall now the faces of those who participated in the meetings, I believe that I may have been seeing the future leadership of our Association. Kudos to all of you. You have made a difference!

Author: James A. Schmidt, James A. Schmidt, PA.
A cautious attorney knows that a fee should be secured by a charging lien against property awarded the client in a divorce proceeding. The requirements for such a lien, however, are not codified. Rather, they have developed through case law.

In Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, PA. Baucom, 428 So.2d 1383 (Fla. 1983), the Court recognized that an attorney has an equitable right to have his costs and fees secured to him in the judgment or recovery in the particular action. The requirements established by Sinclair are: 1) A contract between the attorney and the client, either express or implied; 2) an understanding between the parties, either express or implied, that payment is either dependent upon recovery or that payment will come from the recovery; and 3), that this equitable remedy is available when the client has disputed the amount of the fees or has attempted to avoid paying the fees.

The question becomes, what constitutes an “implied contract?” As it turns out, not much. In Conroy v. Conroy, 392 So.2d 934 (Fla. 2d DCA 1980), rev. den., 399 So.2d 1141 (Fla. 1981), the Court held that a charging lien can be established against personal property in a divorce proceeding without pleading or proving an agreement. The very nature of an attorney-client relationship is sufficient to imply a contract for a charging lien against personal property. This implication does not apply to real property, however.

The distinction between real and personal property was reinforced recently in the Second District Court case of Riveiro v. Mason and Marsh, 37 Fla. L. Weekly D268 (Fla. 2d DCA, February 1, 2012). The trial court granted a charging lien against all of Ms. Riveiro’s equitable distribution property, both real and personal. The “written contract” involved was not one signed by both parties. The “contract” took the form of a letter of agreement, signed by the attorney, in which no mention was made of a charging lien. Nor was there any evidence that Ms. Riveiro explicitly agreed to a charging lien against any of her property. Under these facts, was a charging lien implied against the personal property? Yes. Against the real property? No.

Distinguishing between personal property and real property, the Riveiro Court cited to Lochner v. Monaco, Cardillo & Keith, PA., 551 So.2d 581 (Fla. 2d DCA 1989). There, the Court expressly declined to extend Conroy to real property absent proof that the parties agreed to a charging lien against the client’s real property. Finding that there was no agreement that the attorneys’ fees would be secured by any real estate awarded to Ms. Riveiro, the Second District ordered that the charging lien against that property be dissolved.

The Riveiro case reinforces the Conroy warning: There should be a written agreement expressly including both real property and personal property. Additionally, be sure that the lien is restricted to the property awarded your client in the divorce proceeding. The distinction between real and personal property is then avoided.

Author:
Virginia R. Vetter, Virginia R. Vetter
Hillsborough County Bar Association 100 Club
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Whitney Bard Mediation Group, Inc.
Wilson Law Group, P.A.
Williams Schifino Mangione & Steady P.A.
In 1989, the collaborative law model was created by a Minneapolis practitioner named Stuart Webb as an alternative to adversarial divorce litigation. The collaborative law model emphasizes positive, transparent negotiation rather than contentious, adversarial litigation or positional, advocate-driven bargaining. Today, the collaborative law model exists in one shape or form across the United States and in more than 20 countries around the world.

Nearly 10 years after its inception, the collaborative approach began to take hold in Florida almost exclusively in the area of family law. There are now eleven active, large collaborative practice groups and organizations across the state with membership growing each year. In Hillsborough County alone there are two major collaborative groups. Today, the opportunity for training in the collaborative process is offered to practitioners all over the state. Such training in Florida was a rarity just a few years ago.

Several states have already adopted a Uniform Collaborative Law Act, such as Texas, Utah, Nevada and Washington, D.C. The purpose of the Act is to standardize Collaborative Agreements, educate the public, provide guidelines for the participants, and provide for an evidentiary privilege so that candid and voluntary disclosure is possible and protected. Other states have introduced similar proposed legislation.

There is a movement now in Florida to create a uniform rule of procedure, a rule of professional conduct, and a statute to govern the collaborative process as well as provide uniform training and certification for practitioners.

The Family Law Rules Committee proposed a new Rule of Family Law Procedure regarding the collaborative process, Rule 12.745, which was published for comment in February 2011. On November 3, 2011, the Supreme Court declined to adopt the Rule, concluding it was too premature. The Supreme Court explained that its decision was due in large part to the possibility of legislative action (adoption of the Florida Uniform Collaborative Law Act) and because Florida lacks a formal training and certification program for attorneys in the collaborative process.

According to Robert J. Merlin, co-chair of the Mediation and Collaborative Law Committee of the Family Law Section of The Florida Bar and President of the Collaborative Family Law Institute,
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the Family Law Section of The Florida Bar has a standing position in favor of adopting a Uniform Collaborative Law Act. Although the proposed legislation had a sponsor in the Senate this year, interest in the passage of a Uniform Collaborative Law Act was overshadowed by the push to revamp Florida’s alimony statute, so no further progress was made this year. Mr. Merlin is hopeful that a proposed Act will be sent to the Legislature for consideration next spring. In the meantime, the Mediation and Collaborative Law Committee of the Family Law Section is working to establish standards for training and certification so that when a statute is enacted and the rule is again considered by the Supreme Court, the other tools necessary to standardize collaborative practice in Florida are in place as well.

2 http://www.collaborativedivorce lawyersoftampabay.com/ and http:// collaborativedivorceetampabay.com/
4 Legislation has been proposed but not yet adopted in Washington, Hawaii, Maryland and Massachusetts.
5 SC11-40 Opinion - Florida Supreme Court

Author:
Jessica M. Felix,
Older, Lundy & Weisman
Takings claims often arise from factual scenarios that stretch back many years, if not decades. For example, flooding may worsen or permit denials may follow years of administrative review. In such instances, determining when the statute of limitations (“SOL”) began to run can be difficult. Also, compared with the factual background, the SOL period may be a blink of an eye, so it is important to know when the clock starts ticking.

A taking claim accrues and the SOL starts to run when the taking occurs: when the government takes private property for a public purpose without compensation. The SOL period is four years.

Physical Invasions
Florida and federal courts say the SOL for a physical invasion begins when the action is final. In other words, the invasion is at its worst, and things have stabilized. So, if 800 jets fly over a house during a four-month period, the house is probably in a flight path and the claim is probably ready.

It is important to remember that a continuing injury probably does not keep the SOL from running. Once the government’s action causing the physical invasion ceases, the statute has probably started to run.

What if the situation never stabilizes and then begins to improve? In this case, the property owner may have a temporary taking with a SOL that began to run when the situation was at its worst.

Regulatory Takings
Takings caused by government regulation likewise occur when the alleged taking is final. A facial taking occurs upon enactment of the offending regulation. An as-applied taking, on the other hand, occurs when “ripe.” Stated simply, that is when the government makes a final decision on applying the regulation, which usually requires the owner to make at least one application. “Ripeness” should be closely monitored, because once ripe, the SOL is running and further administrative proceedings may not reset the clock.

Due Process and Equal Protection
Sometimes, a taking also involves a violation of a property owner’s civil rights. In Florida, the SOL clock starts on these claims when the rights violation or injury occurs. In federal court, the clock starts when the property owner knew or should have known of the injury. Remember that these claims may accrue on a different date from the taking claim.

To allow proper analysis, property owners and their counsel should note the four Ws (who, what, when and where) for each significant date in the history of their dealings with the government.

Armed with this information, the attorney can try to make sure the SOL does not run away.

1 Sarasota Welfare Home, Inc. v. City of Sarasota, 666 So. 2d 171, 172 (Fla. 2d DCA 1995).
2 Id. Note there are also statutory claims that may have substantially shorter periods.
3 Hillsborough County Aviation Authority v. Benitez, 200 So. 2d 194, 200 (Fla. 2d DCA 1967).
4 Sutton v. Monroe County, 34 So. 3d 22 (Fla. 3d DCA 2009).
5 Heckman v. City of Oakland Park, 644 So. 2d 525 (Fla. 4th DCA 1994).

Author: Kristin M. Tolbert, Brickleymer Smolker & Bolves, P.A.
In light of the recent stagnation of our Congressional leaders from both parties, it was a citizen’s delight to learn that Senate Budget Committee Chair Kent Conrad (D-N.D.), on April 18, proposed a deficit reduction plan developed by the Bowles-Simpson bipartisan committee last year. House Budget Committee Chair, Paul Ryan (R-Wis.) immediately praised the proposal and expressed hope to build a consensus among their colleagues in both the Senate and House for a meaningful discussion and ultimate passage of a budget for the first time in three years.

In the words of Alan Simpson: “The budget resolution put forward by Chairman Conrad is based on several key principles that must be part of any responsible fiscal plan. First and foremost, it would achieve enough deficit reduction to stabilize the debt and put it on a downward path as a percent of GDP [Gross Domestic Product], preventing a fiscal crisis in the short-term and moving us toward a sustainable path over the long-term. In addition, the proposal acknowledges that any serious bipartisan plan must trim defense spending, non-defense spending, entitlement spending, and spending in the tax code.

To that end, the Chairman’s Mark includes not only spending cuts but calls for real tax reform that lowers rates, broadens the base, and helps pay down the deficit...”

Among its tax policies, it would create three individual tax brackets, lower the corporate rate to 28%, reform the mortgage interest and charitable deductions, and treat capital gains and dividends as ordinary income.

Conrad did not expect a vote in committee until after the election, thereby giving it the best chance of being adopted. With Republican Presidential candidate Mitt Romney on record favoring reduced tax rates and elimination of the estate taxes, the average citizen can look favorably toward an interesting post-election debate, whichever party wins the election.

Tax legislation, always interesting, promises to be unusually dynamic this autumn.

This issue of the Lawyer will mark the termination of my ninth year (since June 2003) as either Chair or Co-Chair of the Tax Section of this highly esteemed bar association. It has been my great honor and pleasure to have served in such capacity.

Author: V. Jean Owens, Owens Law Group, P.A.
As a general proposition under Florida law and the “American Rule,” each party must bear its own attorneys’ fees absent express contractual or statutory authority awarding fees to the prevailing litigant. In some cases, the Florida Rules of Civil Procedure also empower a court to shift attorneys’ fees as a sanction. Rule 1.380(c) permits a court to award a requesting party its attorneys’ fees incurred in proving the genuineness of any document, or the truth of any matter, after a rule 1.370 request for admission is denied. But while rule 1.380(c) appears to allow the broad shifting of fees, its scope is limited in its application.

Historically, requests that sought admissions of disputed facts at the heart of a case were objectionable. Rule 1.370 was amended in 1972, however, to permit requests directed to any matter relevant to the subject matter of the pending action. Since that time, practitioners have attempted to apply rule 1.380(c) broadly in an effort to shift attorneys’ fees to the losing party. These attempts have had limited success.

Courts have held that rule 1.380(c)’s purpose is not to provide a means to recover all attorneys’ fees and costs from the losing party. As one court noted, “expenses incurred…as a result of the opposing party’s failure to admit requests for admissions may not be assessed …for denying a request to admit a hotly-contested, central issue to the case.” To permit a contrary result would make an award of prevailing party attorneys’ fees the rule rather than the exception. Instead, it is clear that fees recoverable under rule 1.380(c) are confined to those incurred in proving only limited facts.

As noted by the Third District in 1971, a “request for admissions as to disputed facts appears to be nothing more than an attempt by one party, in anticipation of a favorable verdict at trial, to lay a foundation for transferring to the other party a large part of the costs of the lawsuit.” As that court correctly predicted, such an effort “will not be permitted” under rule 1.380(c).

Even when it does apply, an award of attorneys’ fees under rule 1.380(c) is discretionary. Thus, practitioners should use the rule’s sanction mechanism thoughtfully. It bears noting that comparable Federal Rule of Civil Procedure 37(c) is interpreted similarly, although requests for admission served under federal rule 36 are still deemed improper if they are directed to central facts in dispute.

While rule 1.380(c) cannot be applied to award attorneys’ fees to a prevailing party for the entirety of the litigation, other procedural mechanisms, such as offers of judgment, may be used to accomplish this goal. That being said, rule 1.380(c) can serve a useful purpose: if a litigant has a fact or facts that are straightforward enough to be best resolved by admission, rule 1.380(c) gives courts the power to sanction unnecessary, time-wasting denials. Thus, rule 1.380(c) can increase the efficiency of litigation, when properly applied.

1 Dade County v. Peña, 664 So. 2d 959, 960 (Fla. 1995).
2 City of Miami v. Bell, 253 So. 2d 742, 744 (Fla. 3d DCA 1971), superseded by rule as stated in Salazar v. Valle, 360 So. 2d 132 (Fla. 3d DCA 1978).
3 Salazar v. Valle, 360 So. 2d 132, 134 (Fla. 3d DCA 1978).
4 Stokes v. Clark, 390 So. 2d 489, 491 (Fla. 1st DCA 1980).
5 Arena Parking, Inc. v. Lon Worth Crow Ins. Agency, 768 So. 2d 1107, 1113 (Fla. 3d DCA 2000).
6 Arena Parking, Inc., 768 So. 2d at 1113.

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LIMITS ON USING REQUESTS FOR ADMISSION TO SHIFT ATTORNEYS’ FEES

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7 Tripp Constr., Inc. v. Verde, 789 So. 2d 1171, 1172 (Fla. 3d DCA 2001).
8 Bell, 253 So. 2d at 744.
9 Id.
10 Maynoldi v. Archbishop Coleman F. Carroll High School, Inc., 62 So. 3d 1149, 1150 (Fla. 3d DCA 2011).

11 Perez v. Miami-Dade County, 297 F.3d 1255, 1269 (11th Cir. 2002) (“The implicit message of Rule 37 is, therefore, that issues obviously subject to dispute should be resolved at trial, not in a discovery motion.”) (emphasis in original).

Authors:
Brad Kimbro and Paul McDermott, Holland & Knight LLP
DENIAL OF REMEDY TRIGGERS ESTOPPEL OF IMMUNITY DEFENSE
Workers’ Compensation Section
Chairs: Anthony V. Cortese, Anthony V. Cortese, Attorney at Law, and Michael G. Rabinowitz, Banker Lopez Gassler P.A.

Under the Florida Workers’ Compensation Act, a worker is to receive a limited, no-fault benefit in exchange for giving up the right to file a civil law suit against a negligent or grossly negligent employer. Where the Act does not provide a remedy, the Act does not provide immunity, such as a mental injury caused solely by stress, fright or excitement. Professional Telephone Answering Service v. Groce, 632 So.2d 609, 611 (Fla. 2d DCA 1994), F.S. 440.02 (1)(1994), and F.S. 440.093(1)(2003).

Changes in the law in 2003 resulted in other situations where the employer can deny a remedy based on an exclusion under the Act. F.S. 440.09(1). In Ocean Reef Club v. Wilczewski, 3 D09-2779, _So.3d_ (Fla. 3d DCA, Mar. 21, 2012), the question was whether an employer who fails to give notice of an injury and later asserts that the Act does not provide a remedy is estopped from claiming workers’ compensation immunity. The answer was in the affirmative.

In Wilczewski, two employees alleged they were exposed to hazardous chemical fumes at work and had reactions that required medical care and hospitalization. They alleged that they told their employer, but the employer did not report the injuries. They worked until 2006. About two years later, in 2008, they filed negligence lawsuits against the employer. The employer sent the complaints to its workers’ compensation carrier, which issued a denial of the claim on the basis that the injuries were not in the course and scope of employment and that the statute of limitations had passed. The majority of the Wilczewski Court ruled that if the employer failed to report the injury to its carrier, the employer was estopped from raising the immunity. The majority also indicated that the carrier’s denial of the claim as not in the course and scope of employment was inconsistent with the workers’ compensation immunity. Id.

The dissent pointed out that this was a deviation from the estoppel doctrine set forth in Byerley v. Citrus Publishing, 705 So.2d 1230 (Fla. 5th DCA 1999). There was no detrimental reliance on the denial before suit was filed in Ocean Club, which had been a component of estoppel theory, Coastal Masonry v Gutierrez, 30 So.3d 546 (Fla. 3d DCA 2010), and lack of notice had not been recognized as a substitute for detrimental reliance.

The majority distinguished Tractor Supply v. Kent, 966 So.2d 978 (Fla. 5th DCA 2007), review denied, 980 So.2d 490 (Fla. 2008), which limited use of the estoppel doctrine, but both Ocean Club and Tractor Supply focus more on whether a remedy is being totally denied under the Act than the specific language of the denial by the employer/carrier.

This doctrine is still unsettled, but this decision has much broader implications. Personal injury attorneys and workers’ compensation attorneys need to be aware of these new decisions allowing estoppel of the workers’ compensation immunity defense where there is a work injury and a total denial of the injury as not covered under the Act.

Author: Anthony V. Cortese, Anthony V. Cortese, Attorney at Law

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JURY TRIAL INFORMATION

For The Month of: March 2012.
Judge: Honorable: Jose E. Martinez, Southern District of Florida.
Parties: Wacker Chemical Corp. vs. Nebula Glass International Inc.
Attorneys: For Plaintiff: Jaime Austrich and Jason Stearns, Shumaker, Loop & Kendrick, LLP; For Defendant: Benjamin Olive
Nature Of Case: Commercial contract and product liability.
Verdict: $245,317.91 for the Plaintiff.

Mark P. Buell & Tom Eligett for CVS; Tobyn DeYoung for owner/landlord.
Nature of Case: Eminent domain action involving 6,021-square-foot strip taking and claims for severance damages and business damages.
Verdict: Business damages for CVS: $1,200,000; land and severance damages; $1,200,000 for owner/landlord.

Correction: A listing in the May issue omitted some information. Here is the complete listing:
For The Month of: April 2012.
Judge: Honorable William P. Levens.
Parties: Gene & Nita Bass vs. Platinum Title Services, LLC & Joellyn Robles.
Attorneys: For Plaintiff: Morgan W. Streetman; For Defendant: Aram Megerian and Abby M. Moeddel.
Nature of Case: Breach of fiduciary duty and negligence in closing real estate transaction.
Verdict: For Plaintiffs, $530,015.79. Plaintiffs’ motion for attorney fees pending on their October 2009 proposal for settlement in the amount of $200,000. Defendants’ motions pending, including for new trial, set-offs and application for comparative fault.
Comparative Negligence: 50% to plaintiffs; 50% to defendants.

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Member of the Public Investors Bar Association (PIABA) since 1997. Elected member of the PIABA board of directors.
The Hillsborough County Sheriff’s Hispanic Advisory Council has announced the appointment of Daniel A. Alvarez, Sr. to serve as its newest sitting member.

Luis Viera of Ogden & Sullivan has joined the Advisory Board of Best Buddies of Hillsborough County.

Williams Schifino Mangione & Steady PA is pleased to announce that Dan Dietrich has been elected as the firm’s newest shareholder. Mr. Dietrich is an attorney practicing in the litigation department, focusing on securities litigation and arbitration and business and commercial litigation.

Galloway, Johnson, Tompkins, Burr & Smith is pleased to announce the addition of Lee J. Harang to their team. Lee practices in the areas of commercial litigation, business transactions, sports and leisure law, and alternative dispute resolution.

Phelps Dunbar LLP announces that Michael S. Hooker has joined the firm as a partner and Guy P. McConnell joins the firm as counsel.

Adams and Reese is pleased to announce that litigation attorney Phillip J. Harris has joined the firm as an associate.

Adams and Reese attorney Kimberly Madison has been appointed by Hillsborough County Commissioner Al Higginbotham as his representative on the Economic Prosperity Stakeholders Committee, which makes recommendations to the Board of County Commissioners on improvements to the Land Development Code and the surrounding procedures for the betterment of the economic environment.

The law firm of Shumaker, Loop & Kendrick, LLP has announced that J. Todd Timmerman has been named Managing Partner.

Adam B. Cordover has been elected to the Board of the Collaborative Divorce Institute of Tampa Bay as Membership Chair.

Adams and Reese is pleased to announce that litigation attorney Laura Whitmore has joined the firm as an associate.

Carlton Fields is pleased to announce that Tampa Shareholder Wm. Cary Wright was recently appointed to three leadership positions: the Governing Committee of the American Bar Association (ABA) Forum on the Construction Industry; reappointed Chair of The Florida Bar Real Property Probate Trust Law (RPPTL) Section’s Construction Law Institute; and reappointed Co-Chair of The Florida Bar RPPTL Section’s Real Property/Liability Insurance and Surety Committee.

James M. Craig is pleased to announce the formation of James M. Craig, P.A. Jim will continue to practice labor and employment law on behalf of employers and to serve as a mediator.

The law firm of Shumaker, Loop & Kendrick, LLP is pleased to announce that Partner Duane A. Daiker has been appointed to serve on the Appellate Court Rules Committee of The Florida Bar for a three-year term.

Allison E. Dye was recently hired as an associate at Anton Castro Law, practicing Family Law with Partner Christina Anton Garcia.

The American Heart Association recently announced that, for the second year in a row, Jeanne T. Tate, P.A. has won the Lawyer’s Cup Challenge. This award is given to the local law firm that raises the highest amount of Heart Walk fundraising dollars for the Tampa Bay Heart Walk.

Hill Ward Henderson is pleased to announce the hiring of four new attorneys: Nicholas J. Outman will serve as an associate in the firm’s Corporate & Tax Group; Jeffrey W. Glasgow will serve as an associate in the firm’s Real Property and Commercial Litigation Groups; Stephen A. Liverpool will serve as an associate in the firm’s Real Estate and Land Use Groups; and David W. Hughes will serve as an associate in the firm’s Litigation Group.

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Continued from page 62

Ford & Harrison LLP, a national labor and employment law firm, is pleased to announce that Dawn Siler-Nixon, the firm’s Diversity & Inclusion Partner, has been honored with the 2012 Delano S. Stewart Diversity Award given by the George Edgecomb Bar Association.

Fowler White Boggs is pleased to announce that Paul R. Pizzo has been re-elected to the Board of Directors of the University Club of Tampa for a second three-year term.

Michael B. Colgan, a shareholder in the Commercial Litigation practice group of Glenn Rasmussen, P.A., has been elected to serve on The Florida Bar’s Committee on Professionalism.

Shumaker, Loop & Kendrick, LLP is pleased to announce that Steven S. Grieco, a partner in the Tampa office, has been elected to the Board of Directors and as a vice president of the Florida High School Hockey Association Inc.

Phelps Dunbar attorney Michael Brundage was named to the Florida Holocaust Museum’s Board of Directors.

Bicklemyer Smolker & Bolves P.A. is pleased to announce that Shannon Sheppard has been elected a shareholder. Ms. Sheppard represents developers and institutional investors in the acquisition, disposition, financing and development of multifamily, office, retail, hotel, and industrial assets.

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Adams and Reese associate Stephanie Martin has been appointed to the Board of Trustees of Catholic Charities for the Diocese of St. Petersburg, Inc.

Katherine Earle Yanes of Kynes, Markman & Felman, P.A., has been sworn in as President of the Hillsborough Association for Women Lawyers. Mrs. Yanes concentrates her practice in all areas of criminal defense, including investigations, trials, sentencings, appeals, and post-conviction relief.

Ford & Harrison LLP, a national labor and employment law firm, announces the addition of Loren J. Beer as an associate representing management in employment matters including disputes arising under Title VII, the Florida Civil Rights Act, the Americans with Disabilities Act, and the Fair Labor Standards Act.

Adams and Reese LLP is pleased to announce the addition of Special Counsel Tiffany Dilorio representing creditors, trustees and debtors in various bankruptcy-related matters.

Mark J. Criser, shareholder in the Litigation Group at Tampa law firm Hill Ward Henderson, has been appointed to a three-year term on The Florida Bar’s Professional Ethics Committee.

Grace Yang, a shareholder at GrayRobinson, P.A., has been elected to the Board of Directors of the Asian Pacific American Bar Association of Tampa Bay.

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