YES!

We are still accepting referrals in the area of medical malpractice after yet another session of legislatively created barriers to patients' access to our courts.

Gunn Law Group, P.A. remains committed to

ACCOUNTABILITY IN MEDICINE

The social cost of medical mistakes should not be borne by patients whose lives are crippled, while insurers, hospitals and clinics continue to grow and economically prosper.
One of Florida’s best-known beaches, Daytona Beach has attracted cars to its wide, packed-sand coastline since the early 20th century. Cars and motorcycles have been an inextricable part of the beach’s history and development.

Fort Lauderdale, shown right and on Page 68, became a favorite destination of college students for spring break in the 1950s.

Special thanks to Raymond T. (Tom) Elligett, Jr., for supplying these and many of the other beautiful vintage postcards featured on the covers and inside the Lawyer this year.
ANOTHER ORAL ARGUMENT ARTICLE...
Appellate Practice Section by Duane A. Daiker

IT IS FULL STEAM AHEAD FOR THE COLLABORATIVE PROCESS!
Collaborative Law Section by Christine Hearn

STILL CANNOT ESCAPE BEING AN UNLICENSED CONTRACTOR
Construction Law Section by Jeffrey M. Paskert and Dara L. Dawson

FAREWELL, CONTRACT ECONOMIC LOSS RULE?
Construction Law Section by Mark A. Smith

THANK YOU FOR A SUCCESSFUL YEAR
Corporate Counsel Section by Eric Almon and Patricia Huie

FDUTPA IN THE HANDS OF THE ATTORNEY GENERAL
Criminal Law Section by A. Tyler Cathey

SUPREME COURT TACKLES IP ISSUES
Intellectual Property Section by Dineen Pashoukos Wasylik

ELEVENTH CIRCUIT DECIDES FLSA RETALIATION ISSUE
Labor & Employment Section by Scott T. Silverman

CAST OF CHARACTERS: PROFESSIONALS IN FAMILY LAW CASES
Marital & Family Law Section by Richard J. Mockler and Christine L. Derr

UTILITY OF STATE APPELLATE COURT MEDIATION
Mediation & Arbitration Section by Hilary High

CITIES CANNOT CIRCUMVENT “FIRST IN TIME, FIRST IN RIGHT”
Real Property Probate & Trust Section by William J. Podolsky, III and Derek Larsen-Chaney

EMERGENCY MEDICAL CONDITION: PIP’S NEW FACELIFT TO REDUCE LITIGATION?
Solo/Small Firm Section by Michael L. Broadus

HOSPITALS & INDEPENDENT CONTRACTORS: A SPLIT WORTH RESOLVING?
Trial & Litigation Section by David W. Hughes

REALIZING THE DREAM: EQUALITY FOR ALL
Law Week Committee by James A. Schmidt

WHEN AND HOW SHOULD A LAWYER WITHDRAW AS COUNSEL?
Professionalism & Ethics Committee by Hugh D. Higgins and Michael L. Forte

THE HILLSBOROUGH COUNTY BAR ASSOCIATION
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(All plus tax.) Write to HCBA, 1610 N. Tampa Street, Tampa, FL 33602. The lawyer is published as part of the HCBA’s commitment to provide membership with information relating to issues and concerns of the legal community. Opinions and positions expressed in the articles are those of the authors and may not necessarily reflect those of the HCBA. Submissions of feature articles, reviews, and opinion pieces on topics of general interest to the readership of the Lawyer are encouraged and will be considered for publication.
As the Bar year comes to a close, I find myself extremely grateful for my experiences as editor of the Lawyer magazine. I have had the privilege of reviewing each of the seven issues we published this year, and each review left me with a real sense of pride to be associated with such an esteemed membership. Our magazine authors profiled some giants of our legal community this year: among them, Florida Bar President Gwynne Young (see John Kynes’ Executive Director’s Message in the September-October 2012 issue), Judge E.J. Salcines (see Bob Nader’s HCBA President’s Message in the March-April 2013 issue), and Second District Court of Appeal Judge Daniel Sleet (see Raymond T. (Tom) Elligett’s article, on behalf the appellate practice section, in the May 2013 issue). The sad news of Judge Don Castor’s recent passing gave us all cause to reflect on the myriad accomplishments of his professional and personal lives. The news reminded me of the inspiring afternoon I spent this past fall with HCBA President Bob Nader getting to know some of the incredible attorneys of Bay Area Legal Services, which boasts Judge Castor as its first executive director.

The substantive law articles produced by HCBA section members have been a pleasure to read as well. I hope that, like me, you found them informative and beneficial to your practice. I can think of a few occasions in which an issue at work arose that jogged my memory of something I had read about in this magazine!

Of course, in addition to providing substantive legal information, the Lawyer magazine showcased work our members do in the community at large. The community service, pro bono, and educational work our members produced this year despite busy schedules (through such activities as Steak and Sports Day, Law Week, the Family Forms Clinic, the “Before the Law Was Equal” documentary on the desegregation of the Hillsborough County legal community, and CLE luncheons, to name just a few) is truly admirable. In addition to developing camaraderie within our organization, these activities promote the value of our membership throughout Hillsborough County.

I cannot end the Bar year without thanking some of the huge group of people who made the publication of the Lawyer magazine possible this year. HCBA President Bob Nader and HCBA Executive Director John Kynes have been a constant source of guidance all year, and since accepting the editor position, I have effectively had HCBA communications coordinator Wendy Whitt on speed-dial to discuss all things related to magazine content. Tom Elligett has provided wisdom and has been a remarkable resource for the stunning postcard images featured in our magazine this year. Our Lawyer magazine editorial board has been insightful and always willing to help. Free Press Publishing Company produced beautiful magazines that our organization is proud of, and our advertisers helped keep us operational. I am indebted to all of the authors who submitted articles this year. Issue after issue, I was so pleased to see the enthusiastic responses to our requests for articles and to read so many excellent pieces. Finally, I thank our readers. I hope that you enjoyed reading this year’s issues of the Lawyer magazine as much as I did. Have a great summer!
The Curtain Falls. The Drama’s Done. By the time you read this article (if you happen to), my term will have ended and my laudable successor and friend, Susan Johnson-Velez, will have taken over the helm as president of our pre-eminent Hillsborough County Bar Association.

What was the experience like? How High the Moon! You see, words cannot describe what an honor it has been to lead this professional organization for a year while serving our rank-and-file membership and working with, on an almost daily basis, the incredible staff members of our nationally renowned and respected bar association. Never in the “Coney Island of My Mind” could I have foreseen years ago when I began my legal career, much less predicted as a long-ago initial cast member of the Law Follies, that I would have been blessed with this grand opportunity. I have been particularly privileged to have collaborated and teamed up with the hard-working officers and directors of our executive board, the resolute lawyers who comprise our accomplished Young Lawyers Division, and the dedicated co-chairs of the HCBA’s many sections and committees, all of whom have generously given of themselves and volunteered their time to make this 2012-2013 Bar year so uniquely successful.

For me, the HCBA is like family. The friends I have had the good fortune to make, coupled with the familiar acquaintances and faces I have gotten to know and recognize, from my fellow lawyers and colleagues, to the community of judges here in Tampa who are so inextricably a part of the HCBA, to the administrators and young law students of both Stetson College of Law and the Thomas M. Cooley Law School, to the officers and paralegals of the JAG Offices of both MacDill Air Force Base and CENTCOM, have been transcendent and inspirational.

Make no mistake! The job was monumental. There were times when I felt “down for the count.” However, whenever I joyously celebrate and reflect upon this once-in-a-lifetime experience, I will always hear music down deep in my heart, where the music is sweet and the words are true. As to our diverse and glorious membership, a raised glass and a sincere toast, because “The Song Is You.”

I would like to extend my special personal and heartfelt thanks to the following individuals for their Continued on page 6

MEDIATION

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HCBA PRESIDENT’S MESSAGE
Bob Nader, The Law & Mediation Offices of Robert J. Nader

Continued from page 4

achievements and gracious assistance that they provided throughout my tenure:

• Judge E.J. Salcines, my advisor and close friend, for his boundless enthusiasm and the significant contributions he delivered throughout the year;

• Gwynne Young, for her ongoing participation and involvement in the HCBA as she valuably served her term as president of the Florida Bar Association;

• Pedro Bajo, Jr., for his considerable availability, rewarding advice and mentorship;

• Victoria McCloskey and Rachael Greenstein, for their extraordinary work in the creation of the HCBA historical documentary and legacy, “Before the Law Was Equal”;

• Amy Nath, for her superb performance as a first-year editor of our extraordinary magazine, the Lawyer;

• Tom Elligett, former HCBA president, for his astounding and entertaining vintage postcard collection that transformed the covers of each publication of our legal periodical;

• Kristen Chittenden, for her stellar efforts and creativity related to the new and improved Law Follies 2013 — Follies Gone Vegas — with whom I had the distinct pleasure of producing this entertainment spectacle, and to all of its diligent cast members;

• Lt. Colonel B. J. Cottrell, who ensured that the JAG Office of the 6th Air Mobility Wing at MacDill remained actively involved with and committed to the HCBA and who helped to arrange the guest speakers for this year’s Law Day Luncheon;

• Kelly Zarzycki Andrews, my friend and this year’s program chair for the membership luncheons;

• Chief Judge Manuel Menendez, Jr., whom I have known since that legendary “Bus Ride” to Gainesville, for his years of dedication and support of the HCBA;

• United States Circuit Court Judge Charles Wilson for helping to facilitate the lovely tribute to former Judge Donald Castor, who sadly passed in April;

• The Chairs of the Judicial Pig Roast Committee and 5K Pro Bono River Run for making this year’s

Continued on page 7
consolidated happening the best yet;
• The Chairs of the Diversity Committee, especially Victoria McCloskey, for revamping the annual diversity event so that it became truer to its original inception;
• Susan Johnson-Velez for her support and valued input and for graciously standing in for me whenever requested;
• All of the Generous Sponsors of our many events held throughout the year, especially The Bank of Tampa, C1 Bank, the Lee D. Gunn Law Group, and Steven Yerrid; and
• John Kynes, Laurie Rideout, Michele Revels, Wendy Whitt, Yolanda Lee, and all of the hard-working folks on the second floor of the Chester H. Ferguson Law Center Law Center who, while granting me their undying assistance, made this engine run.

To all of these wonderful people and for all of the phenomenal occasions and events toward which they parlayed and devoted their energies, I am most grateful.

If anyone should inquire down the road about whether I enjoyed my brief role as the somewhat fearless leader and face of this great organization, my response would go something like this — “I Reluctantly Relinquished the Reins of the Presidency to My Successor.” I would also add, as Cole Porter once penned, It Was Great Fun, But It Was Just One Of Those Things.

Finally... thank you, my dearest Vivian, for all you have humbly sacrificed over these many years for your three attorney children, Bobby, Joyce, and George, who have been long-standing members of the HCBA.

So Farewell, Happy Trails... and GOODNIGHT, MRS. KITTLE... wherever you are!
Another Great Year for the YLD!

We accomplished a great deal in such a short period of time, and our organization has much to be proud of this year.

It is hard to believe that the HCBA YLD program year has ended. We accomplished a great deal in a short time, and our organization has much to be proud of this year. One of the biggest honors the YLD received in 2013 is the Florida Bar Young Lawyers Division’s Affiliate of the Year Award because of all the YLD’s recent achievements. Here are some of the highlights:

The YLD kicked off the year with the annual Golf Tournament at the Rocky Point Golf Course. We had more players than in any of our past tournaments, and we raised a significant amount of money to support the YLD’s events and programs.

The YLD also hosted four luncheons on a variety of topics. Florida Supreme Court Justice Peggy Quince was our first speaker of the year and informed our group about the importance of merit retention. Lori Taplow spoke with the YLD in December regarding suggestions for creating balance between your personal life and career. The YLD put on a panel discussion in February.

Continued on page 9
YLD Quarterly Luncheon

The YLD Quarterly Luncheon held May 7, 2013, featured keynote addresses from Judge Ronald Ficarrotta and Judge Matthew Lucas. The annual YLD awards also were announced.

Award recipients:

- Robert W. Patton Outstanding Jurist Award: Judge Samantha L. Ward
- Outstanding Young Lawyer: Laura E. Ward

Left: Judge Matthew Lucas of the Thirteenth Judicial Circuit discusses pro bono service at the YLD Quarterly Luncheon on May 7, 2013.

Right: Laura Ward, recipient of the 2013 Outstanding Young Lawyer Award, and HCBA Executive Director John Kynes.

Thank you to our sponsor: The Bank of Tampa
MacDill’s Col. DeThomas Highlights Law Day Luncheon; TPD Chief Castor Wins Liberty Bell Award

“Freedom isn’t free, and it’s important that we don’t forget that.”
— Col. Scott DeThomas, commander of the 6th Air Mobility Wing at MacDill Air Force Base

That was the message delivered by Col. Scott DeThomas, commander of the 6th Air Mobility Wing at MacDill Air Force Base, during his keynote address to the 450 HCBA members who attended the HCBA’s annual Law Day Luncheon on May 21 at the downtown Hilton.

Referencing this year’s Law Day theme related to equality and freedom, Col. DeThomas reminded the audience about the U.S. military’s efforts around the globe to support and defend democracy.

More and more nations around the world are establishing democratic forms of government because they want the same freedoms we enjoy, DeThomas said.

But, he added, defending democracy sometimes comes at a great cost, including the 6,000 U.S. troops who have lost their lives during the conflicts in Iraq and Afghanistan.

Not every member of the military understands all the political and cultural nuances of the Sunni or Shiite tribes that exist in Afghanistan, DeThomas said, but “they do know they are willing to sacrifice and serve their nation to protect the freedoms we enjoy day in and day out.”

DeThomas said he appreciates the common “mission” the military shares with the judiciary and the legal community regarding “adherence to the rule of law.”

Concluding his remarks, DeThomas also thanked the HCBA members present for their continued support of the 10,000 active duty members of the military who work at MacDill, as well as for their families.

In addition to DeThomas’ keynote address at the luncheon, the 2013 Liberty Bell Award was presented to Tampa Police Chief Jane Castor.

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EXECUTIVE DIRECTOR’S MESSAGE
John F. Kynes, Hillsborough County Bar Association

Continued from page 10

The Liberty Bell Award is presented annually to a citizen who does not practice law but who has worked tirelessly to preserve and strengthen our system of justice.

Chief Castor is a “role model who leads by example,” said Jim Shimberg, general counsel with the Tampa Bay Lightning organization, who made the introduction and worked closely with Castor when he served as Tampa city attorney.

“In her 29 years with the Tampa Police Department, she has made outreach to citizens and respect for the law the centerpiece of her work,” Shimberg said, “And, in doing so, she has made Tampa a safer and more secure place for all its citizens.”

Shimberg said Castor displayed extraordinary leadership and diplomatic skills in dealing with the many protesters who were at the Republican National Convention held in Tampa last summer.

The convention was a success and arrests were limited, Shimberg said, because Castor “treated the protesters with respect and allowed them to exercise their First Amendment rights.”

In accepting the award, Castor made a point to thank her law enforcement colleagues for their sacrifice and work serving the community every day.

“I simplify my life by doing the right thing for the right reason,” Castor said. “That has been a guiding principle for me during my career.”

Meantime, the Law Day Luncheon also marks the unofficial end to the 2012-13 Bar year.

And, under the outstanding leadership of HCBA President Bob Nader, there is no doubt it has been an exciting and eventful year.

Even while working as a solo practitioner, and also dealing with some health issues along the way, Bob has been able to help the HCBA move forward and build on the organization’s many strengths.

Bob’s personal commitment to solidifying the HCBA’s relationship with the leadership and staff at the Judge Advocate General’s Office at MacDill is a prime example of his leadership success this year.

From the membership luncheons throughout the year, the Bench Bar Conference and Judicial Reception, the Holiday Open House, the Diversity Networking Event, the Law Follies, the Tampa Bay Lightning game, the premiere of the “Before the Law was Equal” diversity documentary, the Judicial Pig Roast and 5K Pro Bono River Run, the Law Day Luncheon, and the Bar Foundation’s Law & Liberty dinner, there was something for everyone. (See Law Day photos on Page 42 and Law & Liberty photos on Page 30.)

And this does not include all the other outstanding CLE programs and other events held throughout the year sponsored by the HCBA’s numerous committees and sections, as well as the HCBA’s superb Young Lawyers Division, which was ably led by President Rachael Greenstein.

I personally want to thank all the HCBA board members for their support and guidance throughout the year.

And I’m confident incoming President Susan Johnson-Velez will do an outstanding job leading the HCBA in 2013-14.

Additionally, I know the hard-working HCBA staff members 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.
Invoking The Rule

The rule of sequestration is not merely a procedural rule about the conduct of a trial, but a rule that helps to ensure fairness in a trial.

Frequently, witnesses can be seen lining the hallways of the Hillsborough County Courthouse Annex, awaiting their turn to give evidence at trial. Although these witnesses have been ordered to appear in court, the rule has been invoked.

Under Florida Statute § 90.616, “[a]t the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses.” This is known as invoking the rule. The purpose of this rule of sequestration “is to avoid a witness coloring his or her testimony by hearing the testimony of another,” thereby discouraging “fabrication, inaccuracy and collusion.” Charles W. Ehrhardt, Florida Evidence § 616.1, at 506 (1998 ed.). As such, witnesses are also prevented from discussing the nature and substance of their testimony while outside of the courtroom.

There are exceptions to this rule. One notable exception in criminal cases includes “the victim of the crime, the victim’s next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless, upon motion, the court determines such person’s presence to be prejudicial.” This exception is not absolute and the presence of witnesses in this category cannot interfere with the defendant’s constitutional right to a fair trial.

If the court believes that a witness has violated the rule of sequestration, remedies may include contempt proceedings against the witness or cross-examination regarding that conduct. While the court may also exclude the testimony of the witness who has violated the court’s order of sequestration, disqualification is not automatic. The court must first determine that “the witness’s testimony was affected by other witnesses’ testimony to the extent that it substantially differed from what it would have been had the witness not heard the testimony. Because of the Sixth Amendment ramifications, the court must carefully apply this test before it excludes any material testimony offered by a defendant in a criminal case, and should also consider whether the violation of the rule of sequestration was intentional or inadvertent and whether it involved bad faith on the part of the witness, a party, or counsel.”

The rule of sequestration is not merely a procedural rule about the conduct of a trial, but a rule that helps to ensure fairness in a trial. As state attorney, I have an obligation to ensure that the convictions that my office obtains through jury trials are based upon truthful testimony elicited during a fair trial.

1 Knight v. State, 746 So. 2d 423, 430 (Fla. 1998).
2 Florida Statute § 90.616(2).
3 Florida Statute § 90.616(2)(d).
4 See, Cain v State, 758 So. 2d 1257, 1258 (4th DCA 2000);
Davis v. State, 875 So. 2d 359, 372 (Fla. 2003).
6 United States v. Schaefer, 299 F.2d 625, 631 (7th Cir. 1962).
7 Wright v. State, 473 So. 2d 1277, 1280 (Fla. 1985).
THANK YOU 2012-2013 HCBA
Section & Committee Chairs
WE APPRECIATE YOUR HARD WORK AND COMMITMENT.

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Judge Ashley B. Moody

LAW WEEK
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Kevin McLaughlin

WORKERS’ COMPENSATION
George Cappy and Mike Winer
Advice on appellate oral argument is a popular topic because oral argument can be a very intimidating experience. Even experienced lawyers usually have few opportunities to practice this mysterious craft. Though every appellate lawyer will likely have a slightly different list of top suggestions for oral argument, these are some of the most commonly heard bits of good advice for your next argument.

Arrive Early
Oral argument is stressful enough without the added pressure of arriving late to an unfamiliar courthouse. Allow plenty of time for travel, especially if the argument is out of town. It is far better to spend some extra time in the parking lot studying your notes than to arrive at the last minute, or miss the argument altogether.

Know the Record
A strong working knowledge of the appellate record is essential. The panel will often seek clarification of any disputed record issues at oral argument. Questions about record facts not discussed in the briefing are fairly common. An appellate lawyer’s inability to answer questions about the record can seriously undermine the credibility of the argument. Even if you were not the trial lawyer, you have to put in the time to master the record.

Do Not Rely Heavily on Notes
Although there is nothing wrong with having an outline of key points at the podium, you should not have to rely heavily on your written materials. Oral arguments are very interactive, and rarely proceed in a predictable fashion. You have to be prepared to alter your planned argument to best suit the flow of questions from the court—which often means speaking extemporaneously. Use your notes as a tool, not as a crutch.

Continued on page 15
Answer the Questions

One of the worst mistakes lawyers make is avoiding or postponing questions from the panel. Sometimes lawyers do not want to answer difficult questions, or just do not want to change the order of their planned argument. Whatever the reason, this is an unworkable strategy. When a judge asks a question, addressing that specific issue must be your top priority. Even if the answer is harmful to your argument, you must confront the issue openly. Admitting potential problems with your case, but explaining them away as best you can, is the most effective tactic, and will earn the court’s respect.

Know When to Stop

As lawyers and advocates, we often want to use all of our allotted time at oral argument. However, fight the urge to “fill” your time. When you have made your planned argument and answered any questions, sit down. Rehashing points already made, or continuing to argue well-established points, is counterproductive. The panel will appreciate your confidence in your position, and your respect for the court’s time.

The next time you are preparing for an oral argument, consider this list of well-established tips. Oral argument is considered by many to be the pinnacle of advocacy, and can be very rewarding. So prepare, relax...and remember to enjoy the experience!

Author:
Duane A. Daiker,
Shumaker, Loop
& Kendrick, LLP

PRO BONO UPDATE:
Gold Letter Recipients

The following attorneys were recognized at the 2013 Thirteenth Judicial Circuit Pro Bono Awards Ceremony held on April 25, 2013, for their donation of 100 pro bono hours or more in 2012. Their names were not listed as Gold Letter Recipients in the last edition of the Lawyer:

■ Patrick Skelton
■ Rachel May Zysk
IT IS FULL STEAM AHEAD FOR THE COLLABORATIVE PROCESS!

Collaborative Law Section

There has been a flurry of activity within our collaborative community, and the HCBA Collaborative Law Section, only in its first year as Florida’s first bar collaborative law section, is gaining momentum! Fraser Himes and Caroline Black, next year’s section chair, spoke at the March section luncheon about the importance of using a comprehensive and effective participation agreement (the agreement of the parties and their lawyers not to go to court). They emphasized that collective understanding, informed consent, and commitment to every provision in the agreement is imperative to a successful collaborative case.

Tampa Bay’s two local practice groups recently co-hosted a successful two-day basic training with 70 attendees and a one-day advanced training with more than 50 attendees. Many local professionals are now educated in the process and eager to practice their new skills. On April 4, the Tampa Bay Collaborative Divorce Group held a facilitated retreat designed to rejuvenate and focus the group’s energies. Members spent

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Charles W. Ross, Esq.
Certified Circuit and Federal Mediator

- Florida Supreme Court Certified Mediator for Circuit Civil, Federal, and Appellate Mediations
- Civil Trial Lawyer since 1979; Martindale-Hubbell attorney rating—AV
- Graduate of Harvard Law School Advanced Mediation Program for Lawyers (2001)
- Selected for Membership in Florida’s Legal Elite and Best Lawyers in America
- Member of National Academy of Distinguished Neutrals
- Handled over 3,000 mediations including commercial litigation, construction claims, employment disputes, business torts, personal injury lawsuits
- No travel charges for Florida mediations
- Private mediation facility in St. Petersburg, Florida

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Continued from page 16

the afternoon brainstorming strategies to maximize their potential, and several tasks were delegated to convert their ideas into action. Linda Wray, the current treasurer of the International Academy of Collaborative Professionals (“IACP”), spoke at the April 10, 2013, meeting of the Collaborative Divorce Institute of Tampa Bay, explaining the results of an extensive IACP research project as well as ethical considerations in collaborative cases. In attendance were members of both local collaborative practice groups, many new trainees, Judge Paul Huey, and numerous other professionals interested in the process. The Collaborative Family Law Council of Florida worked diligently on the Inaugural Collaborative Law Conference, held May 17-18 in Tampa at the Grand Hyatt. The conference, featuring renowned speakers such as Woody Mosten, IACP President Catherine Conner, and Florida Supreme Court Justice Barbara Pariente, provided in-depth workshops on cutting-edge topics and an excellent opportunity to network with collaborative professionals from around the state.

The Training and Certification Subcommittee of the Mediation and Arbitration Section of the Florida Bar is rapidly developing standards for Board Certification by the Supreme Court in Collaborative Law. Several professionals at the local and state level are implementing pro bono and reduced-fee initiatives and are hoping to develop uniformity in this area throughout the state.

One of the benefits of being a member of the Collaborative Law Section is sharing information, knowledge, and materials with fellow members. Practitioners need not “reinvent the wheel” when taking on a collaborative case. Most section members know that well-accepted versions of the participation agreement and Code of Conduct are readily available. Written protocols also exist and have been, or will soon, adopted by our local practice groups. The protocols are the “Rules of the Road” for the collaborative process and should be followed with uniformity and consistency.

The synergy between our local and statewide collaborative practice groups and the state council creates an environment ripe for growth. The HCBA Collaborative Law Section will play a key role in local application and development of the collaborative process as its use expands.

Author:
Christine Hearn,
Himes &
Hearn, P.A.

PRO BONO UPDATE:
Ask-a-Lawyer Volunteers Recognized for 2012 Pro Bono Service

The following Ask-a-Lawyer volunteer attorneys were recognized recently for their donation of 20 hours or more of pro bono service in 2012. Their names were not listed in the last edition of the Lawyer:

- Dale Steven Appell
- Mark J. Aubin
- Thomas Hyde
- A.J. “Stan” Musial, Jr.
- Rinky Parwani
- Lawrence Samaha
- William Schwarz
however, to clarify that the statute prohibits only the unlicensed contractor, and not the party that hired it, from enforcing the construction contract.

Recently, the Florida Supreme Court continued this trend, and specifically held that an unlicensed contractor cannot employ the common law defense of in pari delicto to escape liability. See Earth Trades, Inc. v. T&G Corp., 2013 WL 264440, — So. 3d — (Fla. Jan. 24, 2013). In Earth Trades, a general contractor hired an unlicensed subcontractor to perform site work, knowing at the time that the subcontractor was not licensed. A dispute arose, and the general contractor sued the unlicensed subcontractor and its surety. The subcontractor and its surety moved for summary judgment, arguing that the general contractor was barred from enforcing the contract because the parties were in pari delicto, equal wrongdoers, as the general contractor knowingly had hired an

Continued on page 19
unlicensed subcontractor. Both the trial court and the Fifth District Court of Appeal rejected the subcontractor’s argument.

The Florida Supreme Court affirmed, primarily based upon the fundamental principles underlying the in pari delicto doctrine, and the intent behind Section 489.128. First, the Supreme Court explained that in pari delicto applies only if parties participated in the same wrongdoing and share substantially equal fault. The court then focused on the language of Section 489.128, as amended, which provides:

As a matter of public policy, contracts entered into on or after October 1, 1990, by an unlicensed contractor shall be unenforceable in law or in equity by the unlicensed contractor. The Supreme Court reasoned that the Legislature intended to penalize unlicensed contractors as wrongdoers, and expressly did not alter any rights or remedies available to the other contracting parties. The court determined that an unlicensed contractor is the primary wrongdoer, and a party that knowingly hires it is not equally at fault. Accordingly, the court held that a party’s knowledge of a contractor’s unlicensed status is insufficient, as a matter of law, to place the parties in pari delicto, making this defense unavailable to unlicensed contractors and their sureties.

This holding re-emphasizes Florida law and public policy protecting the public against unlicensed contractors, and penalizing contractors that choose not to obtain required licenses. Unlicensed contractors cannot enforce contracts, cannot sue to recover payments or assert lien rights, and face criminal prosecution and costly administrative fines. The Earth Trades decision clearly removes one argument some unlicensed contractors previously had raised to avoid the consequences of their omissions.

Authors:
Jeffrey M. Paskert and Dana L. Dawson, Mills Paskert Divers P.A.

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Theodore C. “Ted” Taub

for more than 50 years of service in the legal profession. Ted has represented numerous private and public sector clients in connection with the acquisition and development of real estate and other matters. He was active in state and local governmental affairs, and was the City Attorney for the City of Temple Terrace for over forty years and served as Chairman of the Tampa Hillsborough Expressway Authority. Ted is nationally recognized for his expertise in land use law. We congratulate him on a distinguished career and for his generosity in sharing his talents with our younger lawyers.

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The Economic Loss Rule ("ELR") limits the circumstances in which a tort claim will lie if the plaintiff suffers only economic losses. Since adoption by Florida courts, the ELR’s application has been labeled everything from “somewhat ill-defined” (Moransais v. Heathman) to a “confusing morass” by the Florida Supreme Court.

Indemnity Insurance Co. of North America v. American Aviation, Inc.

Since Indemnity Insurance, application of the ELR was limited to circumstances in which: (1) the parties are in contractual privity; or (2) the defendant manufactures or distributes a defective product that damages only itself (subject to several established exceptions). In March 2013, the Florida Supreme Court made a substantial shift in Florida’s application of the ELR. In Tiara Condominium Association, Inc. v. Marsh & McLennan Companies, Inc., the court expressly held the application of the ELR is limited to products liability cases.

Tiara arose from the Eleventh Circuit’s certification of a question to the court regarding the professional services exception to the ELR. In its decision, the court focused on perceived problems in the development in the ELR. The court rejected the “contractual privity” aspect of the ELR clarified in Indemnity Insurance, and stated “the application of the economic loss rule is limited to cases,” explaining it adopted the

Continued on page 21
contractual privity rule “to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort.” The majority stated that expansion of the rule beyond these origins was unwise and unworkable in practice.

Justice Barbara J. Pariente concurred and stated that in order to bring a valid tort claim, a party still must demonstrate that the tort is independent of any breach of contract claim. Justice Pariente stated that when parties have negotiated remedies for nonperformance of a contract, one party may not seek a better bargain by turning a breach of contract claim into a tort claim. The majority determined that it is common law principles of contract, not the economic loss rule, that produces this result.

Dissenting, Justice Ricky Polston stated, “without justification, the majority greatly expands the use of tort law at a cost to Florida’s contract law” and the ruling “obliterates the use of the doctrine when the parties are in contractual privity, greatly expanding tort claims and remedies available without deference to contract claims.” Justice Charles T. Canady noted the majority’s opinion unsettled Florida law and failed to explain how the economic loss rule is workable and wise in the products liability context, but not so in the context of contract-based relationships.

The effects of this decision remain to be seen. Defendants challenging tort claims previously covered by the ELR will now have to rely on the “basic common law principles” to which Justice Pariente referred. This may result in confusion in the courts if arguments based on these principles are adopted unevenly. For now, counsel will need to be watchful to prevent “contract law from drowning in a sea of tort” as the Tiara dissenters warned.

Author:
Mark A. Smith, Carlton Fields, PA.
Thank you for a successful year
Corporate Counsel Section
Chairs: Eric Almon – Holland & Knight, LLP; and Patricia Huie – Intelident Solutions, Inc./Coast Dental Services, Inc.

This has been an exciting and productive year for the Corporate Counsel Section. Our primary goal was to initiate and maintain informal contacts among the attorneys practicing within corporations and in corporate practice in the Tampa Bay area. At the same time, we were focused on increasing membership participation in the Corporate Counsel Section. Thanks to the support of everyone at the HCBA, we have been successful on both fronts.

In October, we held a panel discussion titled “Corporate Counsel and Diversity: A View from the Inside Out.” Our panelists included lawyers Leslie Stein, Neil Archibald, Carly Todd, and Luis Viera, each of whom shared different perspectives on corporate diversity issues with the audience. The moderator for the panel discussion was Victoria McCloskey, who is co-chair, along with Luis Viera, of the HCBA Diversity Committee. We would like to extend special thanks to Victoria and Luis for their guidance in developing the discussion and providing these two new co-chairs with valuable advice.

In January, we held a discussion titled “Cover Your Assets: Corporate Counsel’s Guide to Recognizing and Protecting Your Company’s Intellectual Property.” Todd Timmerman and Suzi Marteny provided several case studies outlining common intellectual property scenarios, followed by an engaging discussion with those in attendance. This interaction highlights how the Corporate Counsel Section can bring experts and practitioners together to discuss practical solutions to difficult legal issues.

In March, we were fortunate enough to host Mac McCoy and Joanna Garcia, who delivered a wonderful presentation, “Legal Ethics in the New Digital Frontier: 15 Potential Ethical Pitfalls for In-House Counsel Using Social Media.” The presenters are extremely knowledgeable about this emerging topic and provided excellent advice in a fun and informative discussion.

Finally, in May we held a panel discussion titled “The Five Qualities of Highly Effective Outside Counsel.” Our panelists, Harold Oehler, Kelly Lefferts, and Kenneth Turkel discussed the qualities that in-house counsel value most in outside counsel, including effective marketing strategies, expectations of corporate counsel, best billing practices, the hiring process, common missteps by outside counsel, and keys to building a long-term relationship.

We would also like to thank the many members who volunteered to author articles for the HCBA Lawyer magazine, some of whom we had to turn away for lack of print space. It is wonderful to see that the Corporate Counsel Section membership is so engaged and interested in sharing its perspective and insight.

On a final note, we would like to express our sincere appreciation for the opportunity to serve as co-chairs of the Corporate Counsel Section. We are amazed by the breadth of knowledge and experience that the Corporate Counsel Section membership has to offer, and we are excited to see that membership continues to grow.

Authors: Eric Almon, Holland & Knight, LLP; and Patricia Huie, Intelident Solutions, Inc./Coast Dental Services, Inc.
THE HCBA LEADERSHIP INSTITUTE IS NOW ACCEPTING APPLICATIONS!

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- Identify areas in which participants would like to provide volunteer service to their community.

The Leadership program consists of learning modules and culminates with the completion of a community service project chosen, managed, and completed by Leadership participants. The Leadership program has been designed to help participants gain and develop skills, knowledge, and relationships that will help them emerge as future HCBA and Tampa community leaders.

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FDUTPA IN THE HANDS OF THE ATTORNEY GENERAL
Criminal Law Section
Chairs: Mark P. Rankin – Shutts & Bowen LLP; and Joseph C. Bodiford – Bodiford Law, P.A.

The Attorney General (“AG”) is responsible for protecting consumers from fraud and enforcing Florida’s antitrust laws. The AG has a battery of enforcement mechanisms, the most potent of which is Florida’s Deceptive and Unfair Trade Practices Act (“FDUTPA”). Protecting your client during an AG economic-crimes investigation requires a thorough understating of FDUTPA, insight into how the AG investigates and litigates these cases, and a strong yet nimble defensive game plan.

FDUTPA investigations can spring from consumer complaints, concerned competitors, or attorneys wishing to bring consumer-related issues to the AG’s attention. FDUTPA also provides authority for the AG to commence an investigation on its own accord if it has reason to believe a violation may be occurring. While the AG’s claim may ultimately not be viable, the investigation alone can wreak

With the AG, subpoena response times are short, relevance is assumed, and the burden is considered the cost of doing business.

Continued on page 25

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havoc on your client’s business. Subpoena response times are short, relevance is assumed, and the burden is considered the cost of doing business.

Beyond self-initiating investigations, FDUTPA also allows the AG to seek injunctive relief, damages, and declaratory judgments. While some investigations take months or years, the AG often seeks a temporary injunction to stop ongoing violations. If the AG obtains an injunction, the fallout can be substantial and can include appointment of a magistrate or receiver, freezing assets, specific performance, striking or limiting contractual provisions, divesture of any interest in any enterprise (including real-estate), dissolution, and reorganization. Additionally, civil penalties may be assessed at up to $10,000 per violation with attorneys' fees and costs tacked on. Because penalties are assessed per violation, the size of these penalties mounts quickly.

Understanding what does and does not work in defending FDUTPA investigations is critical in representing your clients. FDUTPA is a strict liability statute meaning good faith arguments are a dead-end. Similarly, compliance with industry-wide custom is not a viable defense. The fact that your client serves only businesses and not individuals is irrelevant, and the fact that your client has plenty of satisfied customers will not help either, as the existence of some satisfied customers is no defense to liability. Further, to the extent a corporate officer participates directly in a violation, the corporate veil may not insulate him or her from liability. Finally, assuming that the AG must prove every individual transaction as deceitful is a foolhardy strategy. The AG can prevail with a representative sample — usually by compiling customer affidavits — showing that a reasonable consumer would likely be misled by an act or practice.

Most cases the AG pursues are resolved before litigation through an Assurance of Voluntary Compliance (“AVC”). An AVC is usually conditioned upon a commitment to reimburse consumers or government entities, make contributions, pay civil penalties, pay attorneys’ fees and costs, or take other appropriate corrective action. While an AVC cannot serve as evidence of a prior violation under FDUTPA, a subsequent failure to comply with one is prima facie evidence of a FDUTPA violation.

Well-informed counsel can advise businesses on navigating an AG investigation and defending potential litigation.

Others include RICO, Antitrust, Civil Theft, and False Claims.

4 Investigative subpoenas under FDUTPA may provide for no less than five days response time, excluding weekends and legal holidays, Fla. Stat. § 501.206(1).
5 Bankers, 694 So. 2d at 73; F.T.C. v. Invention Submission Corp., 965 F.2d 1086, 1090 (D.C. Cir. 1992); cert denied, 507 U.S. 910 (1993).
7 Fla. Stat. § 501.207(1).
8 Fla. Stat. § 501.207(3).
10 Id. at 1104.
11 Id. at 1099.
12 Id. at 1099. Id. at 1099.
13 P.F. Collier & Son Corp. v. F.T.C., 427 F.2d 261 (6th Cir. 1970).
15 Id. at 1104.
16 Id. at 1104.
17 Id. at 1099.
18 Florida Stat. § 501.207(6).
19 Id.
Follies Gone Vegas

HCBA President Bob Nader and show directors Kristen Chittenden and Danny Camacho revived the Law Follies in 2013. A talented cast of lawyers and judges seemingly transported the rapt audience from Cohen Hall to a Vegas nightclub with their singing, dancing, and other outstanding performances.

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On July 3, 2012, Reed Hastings, chief executive officer of media-giant Netflix, Inc., posted on his Facebook page news that Netflix’s monthly viewing exceeded a billion hours for the first time — a significant milestone for Netflix. From the time of the Facebook post to the close of trading the following day, Netflix’s stock rose from $70.45 a share to $81.72 a share.

Following Hastings’ post, the Securities and Exchange Commission Division of Enforcement (“SEC”), pursuant to Section 21(a) of the Securities Exchange Act of 1934, launched an investigation into Netflix and Hastings. The results of the investigation were released by the SEC on April 2, 2013, in Release No. 69279 (the “Report”). In the Report, the SEC explores the impact of Regulation Fair Disclosure (17 C.F.R. §243.100 et seq. “Reg FD”) on social media channels and offers new guidance to public companies desiring to utilize the ever-evolving modes of social media as a means of disseminating information to the public.

Generally speaking, Reg FD prohibits public companies from disclosing material, non-public information to a select group of individuals where it is reasonably foreseeable that such persons will trade on the disclosed information. Reg FD also provides for certain ameliorative actions a public company can take in the event of inadvertent disclosure. Reg FD is intended to promote transparency and equality of access to information with respect to the trading markets. Hastings’ Facebook post was problematic in that, among other things, Netflix had not previously used Hastings’ Facebook page as a means of disseminating information to the public and, consequently, the post may have yielded inequality to information in the marketplace. It follows then that, without advanced notice, employing social media as an outlet for disseminating material information (in other words, making a public disclosure) runs afoul of Reg FD and is not an acceptable method of disseminating information.

As the Report suggests, however, social media may well be a useful tool to public companies for communicating with the marketplace, if employed properly. The SEC acknowledged in the Report that they “do not wish to inhibit the content, form, or forum of any such disclosure [disclosures made through social media channels] and we [the SEC] are mindful of placing additional compliance burdens on issuers.” The SEC goes on in the Report to urge issuers to take necessary steps to “alert the market about which forms of communication a company intends to use for the dissemination of material, non-public information, including social media channels that may be used...” In other words, social media sites such as Facebook and Twitter may be employed for communicating with the marketplace provided these sites, and the communications therefrom, comply with Reg FD and other securities laws. More specifically, the public needs to know in advance which social media sites a company intends to utilize for the dissemination of material information.

The takeaway message then for public companies is this: First, be sure to carefully conduct a Reg FD analysis before employing any social media channels as a means of communicating with the marketplace; second, be sure to adequately disclose or identify specific social media sites the company will use to disseminate material, non-public information (public companies should consider listing these germane social media sites in their press releases and SEC filings and including links on their company website); and finally, companies should adopt policies specifically relating to personal social media sites for individuals, specifically officers and executives, employed by the company (the best practice and most conservative course of action may very well be prohibiting personal disclosure of company information).
New Admittee Swearing-In Ceremony

Congratulations to the newest members of the Florida Bar! The new admittees were sworn in on April 19, 2013, at the George Edgecomb Courthouse.

Judge Ronald Ficarrotta presided over the ceremony, and Judge Frances Perrone spoke about the importance of practicing with professionalism and ethics.

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The Hillsborough County Bar Foundation’s Law & Liberty Dinner featured Coach Mike Krzyzewski, Duke University men’s basketball coach and the winningest coach in NCAA Division I men’s basketball history.

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Coach K posed for pictures with sponsors and other attendees at the VIP reception preceding the dinner.

The Foundation offered outreach grants to provide financial support to the Bay Area Legal Services L. David Shear Children’s Law Center, The Spring of Tampa Bay’s After Hours Personal Protection Injunction Program, and Voice for Children benefiting the Guardian ad Litem program.

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SUPREME COURT TACKLES IP ISSUES
Intellectual Property Section

Although the United States Supreme Court is taking fewer and fewer discretionary review cases each year, the number of intellectual property cases subject to high court scrutiny has increased. Perhaps reflecting the increasing importance of intellectual property in our global economy, the Supreme Court in its October 2012 term took five intellectual property cases. As of this writing, all five cases had been argued, and three decided.

*Already, LLC v. Nike, Inc.*, 133 S. Ct. 721 (2013). In January, the court held that a covenant not to sue a competitor for trademark or trade dress infringement mooted the competitor’s declaratory judgment action. Nike had sued Already for trade dress infringement. Nike later decided to dismiss the case, but Already refused to dismiss its counterclaims for declaratory judgment. Nike then executed a unilateral covenant not to sue, and the Supreme Court held that Nike’s covenant was sufficient to moot any case or controversy. While the case was decided in the trademark infringement context, it has the potential to have far-reaching effects.

*Gunn v. Minton*, 133 S. Ct. 1059 (2013). In February, the court considered whether a state law claim alleging legal malpractice in the handling of a patent case must be brought in federal court. Minton, a patent holder who had lost his infringement action, sued his attorneys for malpractice in state court. When he lost that claim, too, he argued on appeal that the state court lacked subject matter jurisdiction over his malpractice claims because they arose under the patent laws, 28 U.S.C. §1338(a). The Court acknowledged the “case within a case” nature of the malpractice claim, but nonetheless held that there is no exclusive federal jurisdiction.

*Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013). The court next decided whether the first sale doctrine under the Copyright Act applied to works lawfully made outside of the United States and then re-sold within the United States. Kirtsaeng purchased textbooks abroad, then re-sold them within the United States. The publishers, citing the importation ban in 17 U.S.C. § 602(a)(1), sued for infringement. The court held that the importation ban did not apply to copies lawfully made and purchased abroad, and instead the re-sales were protected by the first sale doctrine, 17 U.S.C. § 109(a).

*Bowman v. Monsanto Co.*, No. 11–796, (U.S. Argued February 21, 2013). The next patent case concerns the extent to which a patentee can control downstream use of a patented invention. Bowman argued that the patent in Monsanto’s “Round-Up Ready” soybean seeds was “exhausted” once planted and harvested, and that therefore he should be allowed to replant the resulting seeds without infringing the patent.

*Association for Molecular Pathology v. Myriad Genetics*, No. 12-398 (U.S. Argued April 15, 2013). In *Myriad*, the court is being asked to answer the deceptively simple, yet hugely consequential question: Are human genes patentable? The ultimate decision will have a broad effect on the research industries.

Decisions in *Bowman* and *Myriad* are expected soon.

Author: Dineen Pashoukos Wasylik, Dineen Pashoukos Wasylik, P.A.

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Deciding an issue of first impression, on February 13, 2013, in Moore v. Appliance Direct, Inc., 708 F.3d 1233 (11th Cir. 2013), the Eleventh Circuit held that courts have the discretion to award liquidated damages in Fair Labor Standards Act (“FLSA”) retaliation suits. Unlike suits for minimum wage or overtime wages, where such damages are mandatory, absent a showing of reasonable good faith by the employer, plaintiffs in a retaliation case under the FLSA must show that the circumstances justify such an award.

In Moore, delivery truck drivers brought an overtime wage lawsuit. During the pendency of that litigation, they were terminated. Thereupon, they brought a second suit, alleging that their terminations were in retaliation for their overtime claims.

The truck drivers prevailed at trial on their retaliation actions, but the court declined to award liquidated damages (which are an equal amount of proven damages as a measure to punish the defendant for violation of the law). The drivers appealed this aspect of the lower court’s ruling, asserting that the award of such damages is mandatory in retaliation cases, absent a showing of reasonable good faith action by the employer, just as it is in overtime and minimum wage actions.

The Eleventh Circuit observed that the plain language of the retaliation statute directed that courts shall impose such relief as may be appropriate to effectuate the purposes of the law; while, in contrast, the overtime and minimum wage statute stated that courts shall impose an additional amount as liquidated damages. Thus, the imposition of liquidated damages was clearly meant by Congress to be discretionary.

Therefore, the Eleventh Circuit concluded that the award of liquidated damages, as well as any other damages for retaliation, is discretionary upon a determination of whether doing so would be appropriate under the facts of the case.

At least two cases have applied Moore. In Stevenson v. Second Chance Jai Alai, LLC, 2013 WL 1344500 (M.D. Fla. April 2, 2013), Judge Roy Dalton, Jr., concluded that an absence of good faith was a factor in determining whether to award liquidated damages for anti-retaliation provisions and serve to deter employers from future violations, where the jury found that “but for” protected activity, plaintiffs would not have been terminated. Id. at *9.

The important point for employers is to establish facts that would make an award of damages inappropriate. Employers must be ready to defend any actions taken against employees who have made FLSA complaints. If an employer can show that it had reasonable grounds for the action, apart from asserted retaliation for protected activity, the employer may be able to avoid damages. Documentation is, of course, critical.

Author: Scott T. Silverman, Akerman Senterfitt LLP
This year’s Law Week theme was: “Realizing the Dream: Equality for All.” It was a fitting theme as we reflected on the 150th anniversary of President Abraham Lincoln’s Emancipation Proclamation, and the 50 years that have passed since Dr. Martin Luther King, Jr., remarked on a hot August day in 1963, that the promissory note of America had been returned, “marked, insufficient funds.”

Exploring such a weighty theme was a demanding experience. Polarizing topics such as gay rights and universal health care reveal how adults have differing opinions about what the word “equal” means and when it ought to be applied. But what about the students? Couldn’t we also expect different ideas from a high school student from a predominantly black neighborhood in East Tampa, a middle school student from one of our barrios, or an elementary school student surrounded by the microcosm of South Tampa — each with differing opportunities, access and means?

This year’s student participation confirmed that diversity in ways that would probably surprise you. The essays and art were colored with perspectives that were uniquely born from the imagination of this generation. Equally thrilling was the fact that some of the students are now repeat winners of our awards, and return year after year, hungry for another lesson in the law.

If the promissory note that Dr. King spoke of remains unpaid, the members of our bar association showed themselves to be proud obligors. They arrived this year in large numbers with open calendars to volunteer and encourage our public school youth to wonder for themselves what “the dream” means.

But ultimately, the efforts of the students and attorneys will be viewed as one effort, undertaken to ensure that a nation dedicated to the proposition that all men are created equal can long endure.

Thank you to all of the students and attorneys who made this Law Week a memorable, teachable experience.

Thank you to all of the students and volunteers who made this Law Week a memorable, teachable experience.

Author: James A. Schmidt, James A. Schmidt, P.A.

THANK YOU

Thank you the proctors of the Florida Bar Examination on February 26-27, 2013, at the Tampa Convention Center:

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- James Thorpe, Jr.
- Bethanne Walz
2013 Law Day Membership Luncheon

Hillsborough County Bar Association members, guests, sponsors, and award recipients packed the ballroom at the Hilton Tampa Downtown on May 21, 2013, to commemorate the rule of law and its place in American society.

Col. Scott V. De Thomas, commander of the 6th Air Mobility Wing at MacDill Air Force Base, delivered the keynote address, reminding everyone that “freedom isn’t free.” Other special guests included the recipients of the HCBA law enforcement awards. Chief Judge Manuel Menendez, Jr., presented Deputy Douglas Duvall of the Hillsborough County Sheriff’s Office and Detective Tim DeGusipe of the Tampa Police Department with this year’s awards. Student essay and art contest winners — as well as their families — also attended. Read the essays on pages 45-47.

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Law Week Competition Student Award Winners

- **PEER MEDIATOR OF THE YEAR:**
  Johnathan Broxton, Wharton High School

- **PEER MEDIATION ESSAY CONTEST WINNERS:**
  Wildens CaJuste, Steinbrenner High School
  Amaka Eziakonwa, Benito Middle School
  Ben Sherwin, Colleen Bevis Elementary

- **ART CONTEST WINNERS:**
  **HIGH SCHOOL**
  First Place: Ayanna Sykes, Blake High School
  Second Place: Celena Hamon, Blake High School
  Third Place: Shannon Barnett, Blake High School

  **MIDDLE SCHOOL**
  First Place: Sadie Testa-Secca, Martinez Middle School
  Second Place: La Danus Knight, Franklin Boys Prep Academy

  **ELEMENTARY SCHOOL**
  First Place: Paulina Rochelle, McKitrick Elementary School
  Second Place: Syann Jackson, Ippolito Elementary School
  Third Place: Nicole Guerra, Ippolito Elementary School

Peer Mediator Essay Contest winners, from left: Johnathan Broxton, peer mediator of the year; Wildens CaJuste, high school winner; Amaka Eziakonwa, middle school winner; and Ben Sherwin, elementary school winner.

Art Contest winners, from left: Paulina Rochelle, elementary school; Sadie Testa-Secca, middle school winner; Celena Hamon, high school winner; Ayanna Sykes, high school winner; and Shannon Barnett, high school winner.
Equality for All; Realizing the Dream

What is equality? Equality is the state or quality of being equal. I admit I was not one who looked at people as equal. I made people feel inferior, worthless, and below my level. I was so arrogant that I didn’t realize that we all are equal and should all be treated with same respect.

You’ve got me I’ve been caught read handed! As a young Adolescent I felt I couldn’t be touched I was in my prime, but a few trips to the JAC center and the facial expressions of my parents changed my mind expeditiously.

As I matured I wanted to try new things, because I was so antisocial it was hard, I began doing minor things because I knew it was like learning how to swim I wasn’t about to just dive in without testing the water. Everything was going great I became more sociable with my peers and once I opened up I could tell I fit right and everybody treated me with the same respect I did the same as well. Now I am a senior at Wharton High School also I am a mediator for an outstanding mother and teacher Mrs. Martha Scholl. I can say she has made me a better person and has opened a lot of doors that I closed a long time ago and I would like to thank her for that. When I started mediating I saw a lot of younger teens making the same mistakes I was making and I assured myself that any students entering Mrs. Scholl’s office would leave there being friends or being able to live at Wharton without the drama.

Majority of my mediations I can say have been resolved and both students involved felt that I was absolutely correct and I have changed some students in a positive way. Most of my mediations consisted of bullying and name calling which shouldn’t be tolerated in a society where we are all seen to be a whole or rather equal. Seeing that I am an elder at school students sometimes come to me with their problems because they know I’m a straight forward guy and I can relate to them in a way. Equality is something I never seen as possible because nothing or nobody is perfect, I learned that our founding fathers built this land on the principles that we as American’s are an independent country, but Abe Lincoln also stated that we are the people. Also Rev. Dr. Martin Luther King Jr. stated that we should be judged by the content of our character meaning if your wrong admit it and try to fix it because at the end of the day we are equal, not only on earth, but also in Gods eye.

In closing I have explained in the paragraphs above that I have Realized the Dream that we are all equal and should be treat as equal.

Realizing the Dream; Equality For All

As a young child, I always seemed to be the voice of reason when everyone else was on the verge of acting up with adrenaline pumping not thinking straight I was always the voice of reason the one to say “Don’t do that” or “walk away”. My journey as a peer mediator has not been an easy one it has been filled with a lot of ups and downs but as much as I have taught and help peers, friends and other young people I have learned a lot from them as well. Ever since we were young children our dreams were to all walk across the stage together and graduate. We knew that with hard work we could accomplish our goals and all go further in our education.

Working as a peer mediator I have learned that you cannot always tell everything someone is going through by how they act in school. Once there was a quite kid in my class named Paul I will never forget him. He would come to class every day and never say anything he would mean that he was a bad person. We had just been coming from lunch one day and the kids were picking on Paul nonstop that day he ended up running out of the classroom eyes full of tears. This was the last straw I stood up and asked them why do they feel so insecure that they had to make fun of Paul everyone was shocked that I stood up told them to but enough was enough. I waked outside and told Paul that he should start sitting with me I explained that kids like those will always live on the pain of other people and that he should not let anything they tell him get to his head. The teacher let us stay outside and talk for the rest of the day. Turns out Paul truly had it rough his step farther would come home and beat his mother right in front of him every day. His step farther was a bad drunk and Paul and his mother was trying to get away from him. Here I am 14 years old mad because I couldn’t go to a party Friday night or because my mom wouldn’t give me any money to waist on something pointless. Here’s someone I was in class with everyday who kept a smile on his face living with things children should never have to go through. Paul and I became good friends and 4 years later to this day he still calls me and thanks me for standing up for him that day.

I realized at a young age that I had to get good grades to be successful in life. A powerful saying I heard as a child that has always stuck with me is “If you want to be

Continued on page 46
successful as much as you want to breathe then you will be”. We all may not have been born into the same situation but education has always been able to level the playing field. Once you have your degree people can no longer gave the audacity to tell you what you could or couldn’t be realizing the dream and aiming for the stars will always get you far. A great man by the name of Martin Luther King once said that he had a dream a visionary in his own time shot dead in his prime, think if Martin Luther King never dared to dream he would of never have paved the way for you and me.

Helping these young men have not only taught me to have tremendous amount of patience’s but showed me that Martin Luther king’s dream was meet and hard work and determination can help any goal get set. Its 2013 and my fellow brothers and I will be graduating from high school next year then it’s off to college with new goals with everything starting over again.

MIDDLE SCHOOL PEER MEDIATOR ESSAY CONTEST WINNER

Amaka Eziakonwa, 8th grade, Benito Middle School

Realizing the Dream; Equality For All

Peer mediation, I think, is a wonderful elective and is necessary in each and every school.

I joined Peer Mediation because I thought it would be a great way to help out my fellow peers with whatever conflict they have. I detected how much conflict there is at Benito Middle School and how frequent the fights are here and I thought Peer Mediation would be able to lessen the amount of conflict there is.

Peer Mediation is important because it gives people a way to resolve their problems without physically fighting and suffering the consequence. Instead of getting, maybe, ten days of out-of-school suspension, people could talk out their problems in a more peaceful matter, get their disagreement resolved, and still not have to face the consequence of in-school-suspension or out-of-school suspension. Peer Mediation shows people there is a different way to solve your conflicts than fighting. It helps build community between the students in the classroom and throughout the whole school. Peer Mediation could also help prevent escalating conflicts. There could have been a misunderstanding between something or a false rumor spreading about somebody. When the students come to Peer Mediation they could find out that it was a mistake without being physical. That helps get rid of an unnecessary fight that could have happened and also get rid of a suspension that would have gone on their permanent record.

In addition, Peer Mediation is important because it gives people a chance to come up with their own solutions. That means they don’t need to depend on other people to solve their conflict for them. They can come up with a solution they are comfortable with and they do not feel like the solution is being forced on them. When they learn how to solve a conflict on their own, they can spread their knowledge to other people and help them out with their conflicts.

Peer Mediation has made me become a better person overall. I have learned the challenges some of my schoolmates are facing and realized if they can overcome it, so can I. Peer Mediation has also taught me there is always a way to find a solution to any problem on my own. It has made me look at my conflicts from a different perspective and handle them in a different way.

All in all, I’m glad I joined Peer Mediation and I feel it is a great elective to put in all schools. I’m glad I received the opportunity to have this experience.

Continued on page 47
Equality For All

No matter what gender, race, or ethnicity everyone should have equal rights. That’s what mediation is all about. If anyone in our school has a problem with another person we can help in a peaceful way, talking it out and finding a resolution to stop this from happening again. In my perspective, a student mediator should be calm and respectful of their “patients” by listening very carefully, paraphrasing, and just asking the questions and let the kids do the talking and resolving. After all it’s them who have to solve their problems if it happens again anywhere out of school so let them make an agreement right there and then. So far, I’ve only had one mediation in which one girl made a list of who they liked and hated or disliked. One boy spotted the list and saw his name under the hate column. They then resolved their issue by throwing away the list and promising not to write another one ever again. Of course this information is classified so mediators must not share them with other students. Also, bullying is a huge issue in the U.S.A. This is a hard issue to fix because many children just walk by when someone is being bullied and is in a very tough situation to out of physically or even emotionally. Mediators are not the only people who can stop bullying everyone can be just speaking up and telling an adult. Just because someone thinks you look weird or a bully thinks you don’t wear good clothes doesn’t mean they should pick on you. Everyone can make a change about bullying. This way everyone can solve their own problems if needed and the world can be a better place. Hopefully, soon there will be no more bullies because kids made a change in their attitude and behavior. When I mediate children and help them I have a warm, great feeling in my heart. It feels wonderful to know that you’ve made a contribution to the world, that you’ve helped someone solve their problem, and to know that your giving equality to everyone and stopping people from giving unequal rights to each other. We mediators don’t just mediate kids we also recycle and help the community. We recycle so the world is clean and utilities can be reused so the world doesn’t waste. This also makes citizens feel nice about looking and feeling their surroundings. This also gives me a positive feeling that shows I am great and making a change. We also help the community be supporting local events and especially the Moffitt Cancer Center. Our school hosts many drives — coin and food — for cancer survivors and for citizens of Tampa who are poor and possibly homeless. Mediators should ALWAYS give back to the community. This is another very important quality mediators need. I know everyone can do this and get that amazing feeling inside and together we all can change the world.
A family law matter may present a variety of issues, including analysis of financial transactions, business valuations, real property issues, criminal activity, domestic violence, as well as health and mental health issues. Accordingly, the family law attorney must be ready to draw upon a wide array of professionals to assist in these areas in order to properly represent the client’s interests.

Protecting the interests of the children involved in a family law case should be the foremost concern. Where a parenting plan is at issue, the court is permitted to appoint a guardian ad litem to act as the next friend of the children, investigator, or evaluator. See Fla. Stat. § 61.401. The guardian ad litem is not an attorney or advocate for the children. Id. The appointment of a guardian ad litem is mandatory where there is a verified, well-founded allegation of child abuse. Id.

Where parents are experiencing more routine conflict, the court may appoint a parent coordinator, who is trained in both mediation and conflict resolution strategies. See Fla. Stat. § 61.125. The parent coordinator provides parents an alternative dispute resolution process. Id. A parent coordinator cannot be appointed without the consent of both parties when there is a history of domestic violence. Id. When tasked with establishing or potentially modifying a parenting plan, the court is also permitted to appoint a psychologist, clinical social worker, or therapist to conduct a social investigation. See Fla. Fam. L.R.P. 12.360 and 12.363.

Independent professionals are also involved in the search for truth regarding financial issues. A party’s claim for alimony may justify a compulsory examination if the party seeking alimony places his or her mental or physical health at issue. See Fla. Stat. § 61.08. In alimony cases, the court may also order a vocational evaluation to assess a party’s earning capacity. See Fla. Fam. L.R.P. 12.360.

A forensic accountant may assist the court in determining the parties’ respective need and ability to pay alimony. The parties may stipulate to the appointment of a neutral joint financial expert, the parties may have their own independent financial experts, and, in some cases, the parties may have both. Where the court is tasked with equitably dividing a party’s ownership of a business, the forensic accountant or other valuation expert may identify the portion of the business that is properly characterized as marital and provide a valuation for the business. Experts may also testify on proper valuation of intellectual property, real estate, jewelry, antiques, or other property.

Other attorneys may also play a critical role. An experienced practitioner knows when to consult co-counsel on corporate, real estate, criminal, and other matters related to the family law case. And a skilled mediator can help give the perspective necessary to resolve a highly contested case.

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In the appellate community, there is a sense that appeals are beyond a mediated resolution: The appel lice “won” — he will not now relent. Mediation did not work below. The parties knew the costs and risks of an appeal, and forged ahead. Mediation would waste time and money. The First and Fourth District Courts of Appeal (“DCA”) mediation programs died on the vine, proving mediation is unavailing. Yet, as discussed below, the Fifth DCA has had a successful program since 2001, and there are valid reasons to consider the potential benefits of appellate mediation.

The programs in the First and Fourth Districts ended for reasons unrelated to success. They were state-run with state-employed mediators, and ended following state budget cuts. On the other hand, in the Fifth DCA parties choose and pay an outside mediator. Without bureaucratic and budgetary hindrances, the program has developed successfully since 2001. “A success rate of thirty to fifty percent defeats the theory that appellate mediation doesn’t work,” says The Honorable William D. Palmer, a Fifth DCA judge since 2000, and chair of the Florida Supreme Court Committee on ADR Rules & Policies since 2009. Regardless of venue, there are reasons to consider appellate mediation:

- It offers a chance to educate parties about jurisdictional limitations, standards of review, merits and unpredictability, and ramifications of various outcomes.
- It offers flexibility unavailable in appellate court, where review is limited to issues on appeal. For example, a court reviewing a custody schedule may only approve it or refer it back to the trial court. However, mediation offers an opportunity to devise an alternative schedule.
- It offers time-told mediation benefits — self-determination, risk elimination, education, cost reduction, confidentiality, and finality.
- It gives an appellant an opportunity to conclude an appeal short of voluntary dismissal if an appeal has become unattractive.

Mediating an appeal may give parties benefits ranging from the opportunity to learn about an opponent’s position, to global resolution of the entire case.

Mediation & Arbitration Section Chairs: Charles Wachter - Holland & Knight LLP; and Stephen Tabano - Trenam, Kemker, Scharf, Barkin, Frye, O’Neill & Mullis, Professional Association

3 Telephone Interview with the Hon. William D. Palmer, Judge, 5th District Court of Appeal (Apr. 12, 2013); FRESOLUTION CENTER, FLORIDA MEDIATION & ARBITRATION PROGRAMS: A COMPENDIUM, pp. 6-12.
5 Interview with Judge Palmer.
6 Absence of a formal program does not prohibit mediation. An appellate court may refer an appeal to mediation at any time, tolling appellate deadlines. Fla. R. App. P. 1.700(d).

Author: Hilary High, Hilary High, P.A.

The mediation & arbitration section welcomes you. Call 813-221-7777.
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A typical motion to withdraw as counsel cites irreconcilable differences as the basis for withdrawal. Though irreconcilable differences may be a justification for withdrawal, it is only one of several permissible grounds. Horan v. O’Connor, 832 So. 2d 193 (Fla. 4th DCA 2002). Florida Rules of Professional Conduct 4-1.16(b) sets forth five permissible grounds for withdrawing from representation: “(1) withdrawal can be accomplished without material adverse effect on the interests of the client; (2) the client insists on taking action that the lawyer considers repugnant, imprudent, or with which the lawyer has a fundamental disagreement; (3) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (4) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (5) other good cause for withdrawal exists.”

In addition to the permissible grounds for withdrawal, there are several instances in which counsel must withdraw: “(1) the representation will result in a violation of the Rules of Professional Conduct or law; (2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; (3) the lawyer is discharged; (4) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud; or (5) the client has used the lawyer’s services to perpetrate a crime or fraud, unless the client agrees to disclose and rectify the crime or fraud.” FRPC Rule 4-1.16(a).

Although the court needs sufficient information to determine whether counsel has permissible grounds for withdrawal, the withdrawing attorney must be sensitive to the duty to maintain client confidences as required by FRPC Rule 4-1.6. Generally, the court should not withhold approval unless doing so “would interfere with the efficient and proper functioning of the court.” Fisher v. State, 248 So. 2d 479, 486 (Fla. 1979) (noting examples such as attempting to withdraw on the eve of trial or withdrawing pleadings that subject a client to default judgment).

In cases where the client disputes withdrawal, further details regarding the basis for withdrawal may be needed. However, there is a heightened risk that the lawyer-client relationship may devolve into “an all-out attack by each party on the credibility of the other.” Bowin v. Molyneaux, ___ So. 3d ___, 37 Fla. L. Weekly D2641a, Case No. 5D12-2589 (Nov. 9, 2012).

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The Florida Supreme Court in City of Palm Bay v. Wells Fargo Bank confirmed that Florida municipalities may not establish superpriority status for code enforcement liens in order to trump earlier recorded mortgages. In 1997, Palm Bay passed Ordinance 97-07 (“Ordinance”), which provided that Palm Bay’s code enforcement liens are equal to other government liens and “superior in dignity to all other liens, titles, and claims.” In 2007, Wells Fargo sued to foreclose its mortgage recorded in 2004. Wells Fargo named Palm Bay as a defendant based upon two Palm Bay code enforcement liens recorded after the Wells mortgage. Citing the Ordinance, Palm Bay argued its liens were superior to the mortgage despite the mortgage’s earlier recordation. The trial court rejected Palm Bay’s assertion, reasoning that the Legislature’s refusal to grant code enforcement liens priority over a prior recorded mortgage indicated the Legislature’s intent to apply the common law principle of “first in time, first in right” to such liens.2

Palm Bay argued before the Fifth District Court of Appeal (“DCA”) that it had the authority to codify its superpriority status pursuant to the home rule powers granted by the Florida Constitution. While acknowledging that the Constitution provides municipalities with broad powers, the DCA clarified that ordinances must yield to state statutes. The DCA explained that the Ordinance conflicted with Florida Statute § 695.11, which codified the “first in time, first in right” rule.3

In a 5-2 decision, the Florida Supreme Court affirmed the DCA’s ruling.4 Justice Charles T. Canady, writing for the majority, explained that the Florida Constitution provides that municipalities may exercise home rule powers “except as otherwise provided by law.”5 This preemptive clause “establishes the constitutional superiority of the Legislature’s power over municipal power.”6 The majority rejected Palm Bay’s argument that enactment by the Legislature of certain exceptions to “first in time, first in right” provided justification for municipalities to act similarly. The court reasoned that the prohibition against local governments carving out exceptions to state laws is a fundamental principle of preemption.7

Similarly situated banking institutions and title associations supported Wells.8 Conversely, numerous Florida municipalities and the Florida League of Cities supported Palm Bay.9 Though municipalities will doubtlessly bemoan the court’s narrow interpretation of home rule powers and its negative effect on revenue collection, City of Palm Bay greatly diminishes the risks lenders have faced since the introduction of superpriority.

The broadest effect of City of Palm Bay may result from the court’s confirmation that state preemption of home rule powers over a given subject need not be explicit so long as it is clear.10 While Justice James E.C. Perry, in dissent, argued that a hodgepodge of statutes with numerous exceptions indicated an absence of a statewide scheme to regulate priority,11 Justice Canady reasoned that the hodgepodge approach is the
Continued from page 54

scheme. As such, any exception to “first in time, first in right” must find its genesis in the Legislature.

2 City of Palm Bay v. Wells Fargo Bank, N.A., 57 So. 3d 226, 226-227 (Fla. 5th DCA 2011).
3 Id. at 227.
4 City of Palm Bay, 38 Fla. L. Weekly S322a.
5 Id.
6 Id.
7 Id.
8 See e.g., Brief for Florida Bankers Association as Amicus Curiae Supporting Respondent, City of Palm Bay v. Wells Fargo Bank, N.A., 38 Fla. L. Weekly S322a (Fla. May 16, 2013).
9 See e.g., Brief for City of Casselberry, et al. as Amici Curiae Supporting Petitioner, City of Palm Bay v. Wells Fargo Bank, N.A., 38 Fla. L. Weekly S322a (Fla. May 16, 2013); Brief for Florida League of Cities as Amicus Curiae Supporting Petitioner, City of Palm Bay v. Wells Fargo Bank, N.A., Fla. L. Weekly S322a (Fla. May 16, 2013).
10 City of Palm Bay, 38 Fla. L. Weekly S322a.
11 City of Palm Bay, 38 Fla. L. Weekly S322a.

“Before the Law Was Equal”

The YLD and Diversity Committee held a premiere for “Before the Law Was Equal,” a documentary chronicling the desegregation of the local legal community, on April 10, 2013.

The debut, held at the Tampa Bay History Center, culminated more than a year of interviews and research.

The hour-long film includes interviews with Judge Don Castor, William Reece Smith, Jr., Judge E.J. Salcines, Judge John F. Germany, Judge Mary S. Scriven, and lawyers Lansing Scriven, Gwynne Young, Delano Stewart, Fraser Himes, and Warren Dawson. The film will be available for loan to school and community groups.

Many thanks to the production team of Rachael Greenstein, Victoria McCloskey, Dara Cooley, Luis Viera, Tammy Briant, and Stan Arthur for their commitment to the project.

Authors: William J. Podolsky, III, Phelps Dunbar LLP; and Derek Larsen-Chaney, Phelps Dunbar LLP

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EMERGENCY MEDICAL CONDITION: PIP’S NEW FACELIFT TO REDUCE LITIGATION?
Solo/Small Firm Section
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In the late 1960s, the Florida Legislature became concerned about the volume of lawsuits stemming from auto accidents. Insurance companies had increasingly denied injury claims and the only recourse for claimants was to file suit to recover medical and disability damages. In response, the Legislature sought to create a “no fault” insurance law that would allow every auto policyholder to collect injury damages from their own insurance company by providing an easier avenue to collect damages for injuries.

In 1972, the Florida Legislature enacted its first Personal Injury Protection (“PIP”) law that now requires every auto insurance policy to provide up to $10,000 of “no fault” coverage for medical expenses incurred. PIP coverage also provides a disability benefit that covers up to 80 percent of lost wages resulting from an auto accident and a $5,000 death benefit. While providing a base coverage to policyholders who suffer injuries, the number of auto injury related lawsuits has increased significantly since the PIP law has been in place.

Over the past 10 years, the PIP law has received intense scrutiny and was almost allowed to expire in October 2007. Debate continued as to whether the absence of the PIP law would decrease litigation, but minor reforms have maintained its existence. On January 1, 2013, the PIP law received a major facelift. The public has received guidance on the first component, which now requires policyholders to receive medical treatment within 14 days of an accident or they will forfeit medical expense coverage under PIP.

However, there is a second component that has not received as much press. Claimants must now be treated by a medical doctor, osteopathic physician, dentist, or physician assistant (under the supervision of a medical doctor). These are the only medical professionals under the new PIP law who can make a determination as to whether a claimant has an “emergency medical condition.” The significance of this medical conclusion is the ability to collect up to the full $10,000 in PIP coverage if an “emergency medical condition” exists and $2,500 if one does not.

An “Emergency Medical Condition” is defined by the Florida Legislature as “a medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that absence of immediate medical attention could reasonably be expected to result in any of the following: serious jeopardy to patient health, serious impairment of bodily functions, serious dysfunction of any bodily organ or part.” Fla. Stat. § 395.002(8)(a), (2012).

I understand that an injury requiring a basic Band-aid would not meet the definition of an “emergency medical condition.” But how does one apply the Legislature’s definition to a soft tissue injury in which the patient complains of severe pain? Whether PIP’s new facelift will reduce accident-related litigation remains to be determined. Rest assured there will be new litigation arising from the definition itself.

Author:
Michael L. Broads, Legal Advocate Group, P.A.

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Florida’s Second and Fourth District Courts of Appeal are split on whether hospitals are vicariously liable for the negligence of independent contractor physicians under the doctrine of non-delegable duty. Though the general rule in Florida is that hospitals are not liable for the negligence of physicians with hospital privileges, the non-delegable duty doctrine creates direct duties for hospitals to provide adequate physician services.

In *Wax v. Tenet Health Systems Hospitals, Inc.*, the Fourth District found that hospitals could be vicariously liable for the acts and omissions of an independent contractor anesthesiologist; four years later, in *Tarpon Springs Hospital Foundation, Inc. v. Reth*, the Second District disagreed and certified a question of great public importance to the Florida Supreme Court—an overture the court denied.

In *Wax*, a patient was admitted to a hospital for elective outpatient hernia surgery. Twenty minutes into surgery an emergency code blue was declared, and the patient died. The patient’s personal representative filed a suit against the hospital and others under the Wrongful Death Act.

The issue on appeal was whether provisions of the Florida Statutes and Florida Administrative Code imposed upon the hospital an “expressed legal duty to furnish anesthesia services to its surgical patients ‘consistent with established standards.’” The court held that the provisions did “impose [such a] duty for non-negligent anesthesia services on all surgical hospitals” because the relationship between hospital and patient was “important enough . . . that it should be deemed non-delegable without the patient’s express consent.” Accordingly, the *Wax* court found “a statutory and a contractual basis for the hospital’s duty of providing non-negligent, competent surgical anesthesia services.”

Alternatively, in *Reth*, on almost identical facts, the Second District reasoned that while provisions of the Florida Statutes and Florida Administrative Code require hospitals to “competently and adequately staff an anesthesia department,” the “duty to practice anesthesiology in a non-negligent manner is owed by the patient’s physician and nurse anesthetists, not the hospital, and that the statutes and rule do not create a non-delegable duty to provide ‘competent emergency treatment based upon an implied contract’ when a patient ‘generally has little, if any, control over who will be the treating physician.’”

Alternatively, in *Kristensen-Kepler*, a wrongful death suit against an ambulatory surgical center for a negligently performed elective outpatient procedure, the court held that *Wax* did not “impose a duty for non-negligent anesthesia services on all hospitals,” when “a patient has chosen to perform an elective procedure.”

While the Fourth District has somewhat clarified the application

Continued on page 59
of Wax, the unresolved split leaves trial courts statewide wondering which rule to follow. In the interim, the unresolved split exposes hospitals to additional avenues of attack and creates statewide uncertainty in medical malpractice lawsuits.


2 See generally Roessler v. Novak, 858 So. 2d 1158 (Fla. 2d DCA 2003).

3 955 So. 2d at 9 (“We conclude that because the statute and regulation impose this duty for non-negligent anesthesia services on all surgical hospitals, it is important enough that as between the hospital and its patient it should be deemed non-delegable without the patient’s express consent.”)

4 40 So. 3d at 824 (“Thus, we reverse the denial of the Hospital’s motion for directed verdict and remand for the trial court to enter judgment in the Hospital’s favor. In doing so, we certify conflict with Wax v. Tenet Health System Hospitals, Inc., 955 So. 2d 1 (Fla. 4th DCA 2006), to the extent that it determined a hospital has a nondelegable statutory duty to provide nonnegligent anesthesia services to patients.”)

5 Wax, 955 So. 2d at 3.

6 Id.

7 §§ 768.16-768.26, Fla. Stat. (2011). The allegations in Wax included the following: (1) the negligent performance of a pre-surgical consultation and assessment, (2) the negligent administration and management of anesthesia, and (3) negligent attempts at failed resuscitation. Wax, 955 So. 2d at 3.

8 Section 395.002(13)(b), Florida Statutes defines a “hospital” as an establishment that regularly makes “treatment facilities for surgery.”

9 Section 395.1055(1)(a), Florida Statutes, requires the Agency for Health Care Administration (AHCA) to adopt rules that include “reasonable and fair minimum standards for ensuring that ... [s]ufficient numbers and qualified types of personnel and occupational disciplines are on duty and available at all times to provide necessary and adequate patient care and safety.”

10 Rule 59A-3.2085(4), Florida Administrative Code, provides that “Each Class I and Class II hospital, and each Class III hospital providing surgical or obstetrical services, shall have an anesthesia department, service or similarly titled unit directed by a physician member of the organized professional staff.”

11 Wax, 955 So. 2d at 9 (citing § 395.1055(1)(d), Fla. Stat.).

12 Id.

13 Id.

14 Id. at 11.

15 Reth, 40 So. 3d at 824-27. Reth involved a medical malpractice action filed by the personal representative of Mr. Reth’s estate against an anesthesiologist, nurse anesthetists, an anesthesia practice, and a hospital. In its suit, plaintiff asserted that negligent anesthesia services provided during surgery resulted in Mr. Reth’s death. Regarding the cause of action against the hospital, Reth alleged that the hospital was “liable for the conduct of [the] nurse anesthetists . . . under a theory of a non-delegable duty” by asserting that “sections 395.002(13)(b), 395.1055(1)(a), (d), Florida Statutes (2005), and Florida Administrative Code Rule 59A-3.20835(4) created an express legal duty for the Hospital to furnish nonnegligent anesthesia services to its surgical patients.” Id.

16 Id. at 828.

17 85 So. 3d 502 (2012).

18 Id. at 503.

19 Id. at 505 (emphasis added).

20 39 So. 3d 518 (2010).

21 Id.

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Hill Ward Henderson
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■ FIRM SOLUTIONS, LLC is a business consulting firm specializing in customized outsourcing solutions for the legal industry as well as internal business process optimization. Our firm’s partners have over 30 years of combined experience in the legal profession, serving clients nationwide. Originally developed to host large law firms in the mortgage banking arena, our team has progressively developed process enhancing initiatives designed specifically for small to medium size law firms. With our services, our clients have the opportunity to outsource key business practices as a means to increase process efficiency as well as time management. These practices range from e-filing pleadings with the Clerk of the Court through CourtXpress, Human Resource services, Training, Flexible workforce/staffing, Accounting functions, and document management through our Virtual Mail Room. Our team strives to provide quality services while alleviating unnecessary burdens from our clients, allowing them focus on their core competencies. At Firm Solutions, we let lawyers practice law.

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The Trial & Litigation Section held its last quarterly luncheon of the year on May 1, 2013. The section handed out its annual awards recognizing outstanding work.

AWARD RECIPIENTS:

- **Michael A. Fogarty Memorial In the Trenches Award**: Bradley E. Powers
  - The award recognizes excellence in civil litigation.

- **James H. Kynes Memorial In the Trenches Award**: Edward J. Page
  - The award recognizes excellence in criminal litigation.

- **Herbert G. Goldburg Memorial Award**: William C. Frye
  - This award marks his distinguished legal career exhibiting fairness, integrity, courtesy, zeal, forensic skill, legal acumen, good sense, and respect for fellow lawyers.

- **Court Family Award**: Ginger Schechter
  - The award is given for service above and beyond the call of duty to the bench, bar, and public.

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Top: Bradley E. Powers, recipient of the Michael A. Fogarty Memorial In the Trenches Award, and his family.

Center left: Trial & Litigation Section Chair Kevin McLaughlin and William C. Frye, recipient of the Herbert G. Goldburg Memorial Award.

Center right: Ginger Schechter, judicial assistant for Judge Ashley Moody, recipient of the Court Family Award.

Bottom: Edward J. Page, recipient of the James H. Kynes Memorial In the Trenches Award, and his family.

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Erin Smith Aebel, partner in the Tampa office of Shumaker, Loop & Kendrick, LLP, has been selected chair of the Tampa Bay American Diabetes Association Community Leadership Board. Aebel also has been appointed to the Florida Bar Health Law Certification Committee.

Burr & Forman LLP is pleased to announce that Tampa partner William (Bill) J. Schifino, Jr., has been elected to the board of trustees of the University of Florida’s Levin College of Law. Schifino will serve a five-year term, beginning in September 2013.

Mary Li Creasy, partner and co-chair of the Employment and Labor Law practice group at Shumaker, Loop & Kendrick, LLP, has been appointed chair of the Labor and Employment Law Board Certification Committee for The Florida Bar for 2013-2014.

Mediator/lawyer Hilary High recently spoke on a panel at the Working Women of Tampa Bay luncheon about “leaning in” to one’s career.

Tammy B. Denbo, partner in Masten, Peterson & Denbo, LLC, recently received the FBI Director’s Community Leadership Award (DCLA) for community service in 2012.

Shane Costello has joined Hill Ward Henderson. He is an associate in the firm’s Real Property Litigation Group.

Julio C. Esquivel, a partner in the Tampa office of Shumaker, Loop & Kendrick, LLP, and a member of the firm’s national management committee, has been elected to the Board of Directors of the Gasparilla Music Festival.

Vanessa Goodwin, associate in the Tampa office of Shumaker, Loop & Kendrick, LLP, has been appointed to the board of directors of Are You Safe, Inc.

R. Lawrence Heinkel welcomes Lydia M. Gazda to Heinkel Law Group.

Shumaker, Loop & Kendrick, LLP, is pleased to announce that Duane A. Daiker, partner in the Tampa office, spoke at the 24th Annual Southern Surety & Fidelity Claims Conference April 17-19, 2013, in Charleston, S.C. The topic was “Preventing and Defending ‘Strike Suits’ Against Sureties.”

Jeanne T. Tate, P.A., a local adoption attorney, is proud to announce that Steven Hurwitz, who practices in the Tampa office, has been recognized by The Florida Bar as Board Certified Adoption Attorney.

Shumaker, Loop & Kendrick, LLP, is pleased to announce that Brian C. Willis, associate in the firm’s Tampa Office, was part of a presentation by Connect Tampa Bay at the NAIOAP Tampa Bay Watch meeting in April. The topic was “Transportation Options for Tampa Bay.” Willis also spoke about transportation at Ignite Tampa Bay in April.

Stathia Sferios has joined the Tampa office of Shumaker, Loop & Kendrick, LLP, as an associate in the Bankruptcy, Insolvency and Creditors’ Rights and Commercial Litigation departments.

After 15 years with Wilkes & McHugh, P.A., in Tampa, Jim Freeman has left the firm to open Freeman Mediation Services in St. Petersburg.

Gwynne A. Young, Carlton Fields’ Tampa shareholder and president of The Florida Bar, received the Achievement Award from the Hillsborough Association for Women Lawyers (HAWL) on May 8, 2013.

Edward J. Page, a Carlton Fields’ Tampa shareholder, is celebrating his 25th year of continuous board certification in Criminal Trial Law by The Florida Bar and by the National Board of Trial Advocacy (NBTA).
For the month of: February 2013
Judge: Honorable Steven Selph
Parties: Michaela Wren vs. Destiny Hall
Attorneys: For Plaintiff: Brook Nutter & Frank Miranda; For Defendant: Scott K. Hewitt & Stacy Yates
Nature of Case: Motor vehicle accident resulting in neck and back surgery
Verdict: Defense verdict; motion for fees and cost pending

For the month of: March 2013
Judge: Honorable Richard Tombrink
Parties: Wayne Vance and Darla Vance vs. Tower Hill Insurance Company
Attorneys: For Plaintiff: K.C. Williams; For Defendant: Chris Marone and Dan Ewin
Nature of Case: Sinkhole claim was denied by Defendant. Neutral evaluator set forth by Department of Financial Services also testified there was no sinkhole damage.
Verdict: For the plaintiff in the amount of $260,000. Plaintiff’s motion for attorney’s fees, costs and interest pending.

For the month of: April 2013
Judge: Honorable William Levens
Parties: Dylan Rivera vs. Concord Management and Brandon Crossing Partners
Attorneys: For Plaintiff: R. Stanley Gipe; For Defendant: Richard B. Mangan and R. Clifton Acord
Nature of Case: Premises liability matter involving a traumatic brain injury to a 2½-year-old.
Verdict: Defense verdict

For the month of: May 2012
Judge: Honorable James Arnold
Parties: Terrence D. Bolden vs. Kathy Moats and Bobby Moats
Attorneys: For Plaintiff: Stanley Gipe; For Defendant: Karen Barnett
Nature of Case: Motor vehicle accident. Negligence admitted. TMJ surgery
Verdict: Defense verdict. No causation. Defendant’s motion for fees and costs pending.

Jury Trial Information

Lawyers for Literacy

About 40 volunteers read to the students at the county's Head Start and Early Head Start centers on April 24, 2013.
The HCBA donated 1,500 books to the centers.
Weeki Wachee is one of Florida’s oldest roadside attractions. The spring at Weeki Wachee is so deep that the bottom has never been found. The strong current makes the synchronized ballet moves performed by the attraction’s famous mermaids even more of a feat. Tourists have been enjoying the mermaid shows from the underwater theater since 1947. Today, Weeki Wachee Springs is a state park.

Fort Lauderdale’s shores no longer are filled with the throngs of college students who once inhabited them. Since 1985, the city has focused on attracting families and European tourists.
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