“WE...HOLD THAT THE CAP ON WRONGFUL DEATH NONECONOMIC DAMAGES provided in section 766.118, Florida Statutes, violates the Equal Protection Clause of the Florida Constitution.”

- McCall v. United States of America, 2014 WL 959180, 1 (Fla.).

This 2003 law was passed after extensive lobbying efforts by the insurance industry. As Justice Lewis notes, “Indeed, between the years of 2003 and 2010, four insurance companies that offered medical malpractice insurance in Florida cumulatively reported an increase in their net income of more than 4300 percent.”

"The issue today is the same as it has been throughout all history, whether man shall be allowed to govern himself or be ruled by a small elite."

- Thomas Jefferson

As it has been throughout our State’s history, the Florida Supreme Court protected the rights of Florida’s families against the assault by a small elite.
This photo shows the detail of HCBA member Alex De Maio’s Karagouna costume, a traditional female costume from Thessaly, Greece. It is a simplified version of a brightly colored wedding dress. It usually includes a long, dark tunic with black fringe and black arm bands, a light-colored petticoat with embroidery, a red vest with woven gold thread, a colorful apron worn around the waist, and a gold belt with jewels. There is also a traditional war dance named the Karagouna, which is danced mainly by females. As part of St John’s Greek Church’s Greek festival every November, the dance troupe Panigyri, which means festival, performs this dance as well as many others several times throughout the weekend of festivities. In addition to the adult dance troupe, the church also has a children’s and a teenage dance troupe. During the annual festival, which raises money for the church, all the troupes help share the Greek culture and provide entertainment for the visiting public. Opa!
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2 S U M M E R  2 0 1 4 | H C B A  L A W Y E R
It is hard to believe that the summer months are already here. With the beginning of the wonderfully—or unbearably, depending on your perspective—hot days, lemonade, and “summer blockbuster” movies, I conclude my year as the editor of this great publication. I have thoroughly enjoyed working with the Hillsborough County Bar Association employees and volunteers, chatting with the dedicated section chairs, and spending time with the members. I have also enjoyed reading the thoughtful and insightful articles submitted for the Lawyer magazine and assisting with putting together what I hope you found to be seven phenomenal issues. It is impossible to hold this position without being enriched by the experience and reflecting on the lessons learned along the way. As I bid you adieu as editor, I want to share a few of those lessons with you:

1. **Even when you think you have nothing to say, you have something to say.** I usually have an opinion, or at least a defined point of view, on most topics that pertain to or affect my law practice. So when I began this year as editor, I thought that the easiest of all of my responsibilities would be to write the Editor’s Message for each publication. It was not. Between my career as a private practice real estate litigator, my children and family, and life in general, the creativity did not always flow as easily as I would have liked. In fact, there were times when I thought that I had nothing to say or write about. I was always wrong. In talking with the HCBA’s public relations and communications coordinator, spending time with colleagues, or reading the news, an interesting and relevant topic would always appear. Your inner creativity is there; sometimes you just have to find alternative ways to bring it out. This rings just as true for writing legal briefs as it does for writing editor’s messages.

2. **Diversity is a great teaching tool.** As editor, I had the opportunity to critically read the thoughts of attorneys and students from different practice areas and careers, to interact with professionals from all different walks of life, and to work closely with people with vastly different perspectives and talents. I loved every minute of it, but most important, I learned so much. Variety is the spice of life. I held this belief long before becoming editor, but it was greatly reinforced during my time in this position.

3. **It is great to be a member of the HCBA.** I have been a member of the HCBA for as long as I can remember, and even served as co-chair of the HCBA Real Property, Probate and Trust Law Section. As editor of the Lawyer magazine, I experienced firsthand all of the hard work that goes into making this Bar association as beneficial and informative to its members as possible. It has been a pleasure being a part of the team. Thank you for the experience.

I hope that you enjoy this year’s last issue and savor the Florida summer!
In the Blink of an Eye

So what am I going to do with myself next year? I’m excited to say that I have absolutely no idea. Luckily, I’m not the type of person who has to know exactly what’s going to happen next.

“I sit at my desk and listen
I sit and start to think
That time is such a silly thing
It passes in a blink”

Such is one verse of a poem my son recently penned for Jesuit High School’s literary magazine. Of late we have been traveling parallel paths, he and I, as we both contemplate the end of a certain memorable period in our lives and the beginning of a new chapter. To be sure, his near future is a bit more certain than mine — he will soon be graduating from high school and embarking on all the adventures Gainesville has to offer. Meanwhile, back in Tampa, I face the life of relative leisure lived by the HCBA’s immediate past president coupled with the life of an empty nester.

Someone less adventurous than I might be apprehensive about the concurrency of these two events. Indeed, I find myself answering the rather nervously asked question, “What are you going to do with yourself next year?” with much greater frequency these past few months. And my daughter has suggested that I consider bringing a chaperone with me when I move Julian in August — apparently she thinks that, in what is sure to be my distraught state, I will drive off one of the many cliffs between Gainesville and Tampa, Thelma and Louise-style. I want all of you to rest assured that your anxiety on my behalf, though much appreciated, is nevertheless unwarranted ... more on that shortly.

Before I speak more about new adventures, I must expend a few words thanking those who played such an important role in the ones that are quickly drawing to a close. I do not know exactly who it was, but many thanks to the person who fifteen years ago thought to ask me to serve as co-chair of the Gender, Ethnic and Racial Equality (now Diversity) Committee. Serving in that role is what caused me to catch the HCBA “bug,” which continues to “infect” me to this day. To all of the recent past HCBA presidents, especially John Bales, Mike Hooker, Lanse Scriven, Bill Schifino, Tom Bopp, Caroline Black, Amy Farrior, Pedro Bajo, and Bob Nader, who kept me involved in so many different ways all these years. It was their examples that inspired me to pursue this office, and even in retrospect, I couldn’t be happier that I did. To the many friends and colleagues who answered my plea to become or remain involved in the HCBA as chairs of our many sections and committees during my term at the helm — we could not have had such a successful year without your commitment and dedication. And, to the entire HCBA staff whose tireless work throughout the Bar year made all things possible.

Many tend to focus on all the demands this office places on one’s life. But the opportunity to face those demands with the support of those above, and many more who are too numerous to list, made my term far more enjoyable than you might think possible.

Finally, and most notably, to the two most important people in my life: my children. Ten years ago, in my farewell article as editor of this publication, I described them as my daily joy and inspiration, and they continue to be today. So I must again say thank you to Catalina and Julian for all that you are and all that you do. Being your mom has been my best job and greatest adventure ... so far.

So what am I going to do with myself next year? I’m excited to say that I have absolutely no idea. Luckily, I’m not the type of person who has to know exactly what’s going to happen next. I’m generally content with following the path that lays itself out in front of me. That approach seems to have worked well to this point. Certainly it has led to more surprises and better things than I could have ever planned.

So, as I bid farewell to the “blink” that has been this Bar year, and open my eyes to the young adults that Cat and Julian have become, what I see are the endless possibilities that await me. And who wouldn’t be thrilled about that? Allons-y!
Fifty years ago, the American Bar Association created the Liberty Bell Award as a way for Bar associations across the country to recognize and honor local citizens who do not practice law but who have worked tirelessly to preserve and strengthen our justice system. The award is presented each year as part of Law Day celebrations, which are traditionally held in the month of May.

The Hillsborough County Bar Association embraced the award from the start, and it presented its first Liberty Bell Award to Robert Thomas in 1964. Other notable winners since then include: Rev. A. Leon Lowry (1980); William F. Poe (1984); Gen. H. Norman Schwarzkopf (1991); Bob Gilder (1999); Jan Kaminis Platt (2000); Tony Dungy (2001); Monsignor Laurence Higgins (2010); and Jane Castor (2013).

The HCBA’s annual Law Day Luncheon this year took place on May 13, and the 2014 Liberty Bell Award was presented to Betty Castor. In announcing Castor as the winner, retired Appellate Judge E.J. Salcines highlighted Castor’s many accomplishments, and he praised her extraordinary commitment to education and to public service.

Salcines noted several of Castor’s “firsts,” including the fact that she made history in 1972 by becoming the first woman elected to the Hillsborough County Commission. Castor also became Florida’s first female Cabinet member in 1986 when she was elected commissioner of education. And, in 1993, Castor was chosen to be the first female president of the University of South Florida.

In accepting the award, Castor praised the lawyers in attendance for their work to help the less fortunate and their commitment to pro bono service. “You are the backbone of our civil society,” Castor told the crowd.

In addition, at this year’s Law Day Luncheon, the 2013 Outstanding Lawyer Award was presented to Bill Schifino Jr. The award is given to an HCBA attorney who, among other things, has exhibited superior legal ability, has demonstrated true professionalism and is respected for ethical practice, is recognized by the public and the legal community for serving as a mentor to others, has performed service to the community on a personal level, and has been actively involved in the HCBA and Bar-related activities. Schifino is the managing partner of Burr & Forman’s Tampa office and concentrates his practice in the areas of securities and business litigation.

Longtime colleague and friend Rob Williams introduced the surprised Schifino as the winner. Williams said he always has admired Schifino’s unique ability “to engage other people in a way that endears him to other people and to work with him to get things done.”

Williams praised Schifino for his professionalism and superior legal ability, and he noted his tireless work over
Continued from page 6

the years on behalf of the HCBA and The Florida Bar. In 1996, Schifino was selected as the HCBA’s Outstanding Young Lawyer, and he served as HCBA president in 2004. Schifino is also the incoming president of the Hillsborough County Bar Foundation.

Williams also noted Schifino’s extensive community service involvement, including his longtime service as a board member of the local Boys & Girls Club.

The Law Day celebration also provided an opportunity to spotlight the good work of the HCBA’s Law Week Committee, which was co-chaired by Kelly Zarzycki Andrews, Amy Nath, and Maja Lacevic. The Law Day theme the ABA selected this year was “American Democracy and the Rule of Law: Why Every Vote Matters.”

Nath, one of the co-chairs, said about 90 HCBA volunteer lawyers helped lead mock trials, courthouse tours, and classroom discussions during Law Week. More than 3,300 local students were involved this year, she said. “Our committee is so proud of the number of local students we are able to reach each year,” she said.

Meanwhile, the Law Day Luncheon also marks the unofficial end to the 2013-14 Bar year. And under the outstanding leadership of Susan Johnson-Velez, it has been an exciting and eventful year for sure.

From the membership luncheons, the Bench Bar Conference & Judicial Reception, the Holiday Open House, the Diversity Networking Social, the Judicial Pig Roast/Food Festival & 5K Pro Bono River Run, and the Hillsborough County Bar Foundation’s Law & Liberty Dinner, there was something for everyone.

This does not include all the other outstanding CLE programs and other events held throughout the year by the HCBA’s numerous committees and sections, as well as the HCBA’s superb Young Lawyers Division led by Jacqueline Simms-Petredis.

I want to thank all the HCBA board members for their guidance throughout the year, and I’m confident incoming President Ben Hill IV will do a great job leading the HCBA in 2014-15.

Additionally, I know the hard-working HCBA staff will continue to serve the HCBA membership to the best of their ability.

Here’s hoping everyone has a great summer.

See you around the Chet.
Florida’s beautiful weather and amazing waterways create a boater’s paradise. They also mean that our area has a large number of boaters, both experienced and inexperienced. Frequently, alcohol is also a part of many boating experiences. This can create dangerous situations on the water. Although many people are aware of laws prohibiting driving under the influence of alcohol or controlled substances (DUI), they are not as familiar with laws regulating boating under the influence (BUI).

Florida Statute § 327.35 prohibits boating while under the influence of alcoholic beverages or controlled substances to the extent that a person’s normal faculties are impaired or with a breath alcohol level of .08 or higher. This statute is very similar to the DUI statute, with some notable differences. While the DUI statute is directed toward a defendant who is driving or in actual physical control of a vehicle, the BUI statute regulates the operation of a vessel. Operating a vessel has a broad definition and

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includes being in charge of, in command of, in actual physical control of, exercising control over, having responsibility for a vessel’s navigation or safety while the vessel is underway, or controlling or steering a vessel being towed by another.2

Both statutes provide that a person who is under lawful arrest is deemed to have consented to the administration of an approved chemical or physical breath test.3 In a BUI case, this implied consent occurs when a person operates a vessel within this state.4 A refusal to submit to a breath test can result in a $500 civil penalty, in addition to any criminal sanctions.5 A second refusal can be charged as a first-degree misdemeanor.6

Like DUI, BUI contains minimum mandatory sanctions to deter people from committing this crime.7 A BUI conviction will result in a mandatory adjudication of guilt that cannot be expunged.8 Mandatory reporting probation, community service hours, and fines are also required.9 A person convicted of BUI will be required to complete a boating safety course and contribute to the Brain and Spinal Cord Rehabilitation Trust Fund.10 Prior convictions may trigger minimum mandatory jail time.11 A previous conviction for DUI is considered a prior conviction under the BUI statute.12 The BUI charge becomes a felony charge if it causes or contributes to causing serious bodily injury to or the death of another.13

As your state attorney, I work to keep the residents of Hillsborough County and visitors to our area safe. Be smart when out on our waterways — follow the rules of navigation and designate an operator who is not impaired.

1 Fla. Stat. § 327.35(1).
2 Fla. Stat. § 327.02(27).
5 Fla. Stat. § 327.35215.
6 Fla. Stat. § 327.359.
7 See Fla. Stat. § 327.35.
8 See Fla. Stat. § 327.36.
9 Id.
10 Id.
11 Id.
12 Fla. Stat. § 327.35(6)(i).
Judge Kovachevich: Off the Record

The following is an edited excerpt of an interview with the Hon. Elizabeth A. Kovachevich, United States District Court Middle District of Florida, Tampa Division, conducted by Michael S. Hooker.

Q. Judge, I understand that you are a native of Illinois. How did you end up in Florida?

A. On my 13th birthday in 1949, December 14, my family moved to Florida because my father had had pneumonia two winters’ previously and his good friend, a doctor, told him he would never survive another winter in Illinois. So, a big decision: The family moved to Florida in 1949.

Q. I understand that when you were growing up, your family had some involvement in the theater business. Is that right?

A. That’s correct. My grandfather, my mother’s father, was a coal miner, as was my other grandfather. My mother’s father saved up his money, and he was able to get into the saloon business. He got a franchise for Schlitz beer, and he went from that. He saved his money, and this was at a time when silent movies were just the “in thing” for people for entertainment. He had an opportunity to get into that, to get money from the bank because he had a good reputation for having developed into a good businessman. He bought a theater that had been used as an opera theater and had 1,700 seats, and he started putting in talking movies. To run the business — to show you the confidence that the father had

“Well, I think you have to be a little bit like an umpire who is there, doing the calls. … You’ve got to be able to call the balls and strikes. Make the call and walk away tough.”

Continued on page 11
in the daughter, his oldest child — my mother quit school in the ninth grade and went in and managed the theater. She had two brothers, but her father said, “No, they don’t know what they’re doing; you do.” She managed that theater for 36 years.

Q. Did you ever work there?

A. I worked there after school. I was taking tickets, ushering, up in the projection room, repairing the film, lining up and organizing the film to take to the railway station. I’d go with my uncle who would drive the car, but I’m making sure that it was all organized. I would bring my school books to the theater, and I’d be working there at night doing my homework.

Q. Are you still a fan of classic cinema today?

A. Well, let us just say, the classic cinema, yes. Turner Classic Movies, yes. Some of this other now, no.

Q. I know you had a very stellar academic career. You went to St. Petersburg Junior College, and you graduated very high in your class well at the University of Miami.

A. Right. Well, I was fortunate to go to St. Paul’s High School in St. Petersburg where the nuns, who came from Allegheny, New York, brought with them the New York State Board of Regents exams. This is important because New York state, at that time — this was in the 1950s — was the best school system in the United States, and here we are, kids at this little high school in St. Petersburg, Florida, getting these New York state exams! Those were the exams that we took. We even had students who came from Tampa to go to St. Paul’s school. When I graduated valedictorian from high school, I went to St. Petersburg Junior College to save my money to go to the University of Miami. I graduated valedictorian from St. Petersburg J.C. and went down to Miami, and I graduated first in my class of business administration. There were about 224 students in that class. I attribute all of my success to the foundation that I got from those nuns and taking those exams. When we started college, all of us, we were about a year ahead of everybody else.

Q. You then went to Stetson College of Law, and you graduated in 1961?

A. Yes, I tied for second in the class, and then I worked for two people: John DiVito, who became the attorney for the Catholic Diocese of St. Petersburg, and for Roy Speer, who was one of the two people who founded Home Shopping Network.

Q. You were in private practice for about 12 years?

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A. Eleven or 12 years, something like that.

Q. Do any of the cases that you handled as a private practitioner stand out?

A. Well, there’s one that has to. That was the General Motors case. It brought national attention here to Clearwater, Florida, because Bob Nunez, who was a former assistant United States attorney and was in private practice, was the main attorney in that case. I was co-counsel. It was really an enormous experience. It was the biggest trial that had been held in this area at that time.

Q. And what was the subject matter of that trial?

A. It was the Corvair vehicle. … General Motors was sued for the design of the Corvair, and the Firestone tire company was sued for its product performance, and it was a mammoth trial.

Q. Wasn’t that at the time of the “Unsafe at Any Speed” allegations by Ralph Nader?

A. That’s correct. After a six-week jury trial and a deliberation, there was a defense verdict for General Motors.

Q. I understand that you were elected to the Sixth Judicial Circuit in 1972 and that you were the first female judge in that circuit?

A. First in that circuit, and to my knowledge, the first in this area because I’ve discussed this with Judge Bucklew — she was appointed in 1982, and she was the first in her circuit.

Q. Were there any barriers to entry into the judiciary back then?

A. Well, I had been a member of the St. Petersburg Bar

Continued on page 13
Continued from page 12

Association for all those years and had become secretary of the St. Pete Bar, and when the opportunity for the judgeship came — this was a brand new judgeship — there were people that were highly supportive of me that wanted me to run for elective office, and I said if I do anything it would be for a judgeship — something to which I had never, ever aspired. I didn’t consider myself, being honest with you, worthy to be able to offer myself for something like that. But people encouraged me, and I thought, well if you really want me to do it, I will do it, and it was a hard-fought campaign. I’ll be honest with you, the lawyers did not want a woman judge. And it was a little difficult.

Q. You’ve been on the bench for over 40 years?

A. Yes.

Q. What in your view is the most important character trait for a judge?

A. Well, I think you have to be a little bit like an umpire who is there, doing the calls. It’s a very professional setting. Everybody’s professionally doing their job. You’ve got to be able to call the balls and strikes. Make the call and walk away tough. And I think that if you have an inability to do that, then you’re going to have a lot of trouble maintaining your stability in being a judge. Now, do I think that every call I’ve made is a perfect call in retrospect? I don’t know; other people would have to judge that. I gave it the best call I had at the time.

Q. When you sentence a criminal defendant, and someone’s liberty is at stake, can you talk a little about the deliberative process that you go through?

A. The deliberative process is the very last word that I hear in that courtroom because I don’t come in there with any preconceived notions about which way I’m going to rule. … You happened to mention criminal practice, I hear what the defense attorney has to say on behalf of the defendant. I hear the prosecutor. I get whatever comment I get from probation, and then the last word comes from the defense attorney. And it’s not until I get that last word at the time of the sentencing — whatever it is that’s being presented to me — do I make up my mind. There’s a pre-sentence report, the statements that come in from people, you may have victims in the case, you may have people who have something important to say, the defendant may write something, the defendant … may say something, or they may do both — they may write and then they may say something. Not until I hear the last do I make up mind …

Q. Judge, currently our country is going through some tough economic times and has been for a few years now. How do you think that has impacted the practice of law?

A. Well, here again, when I started practicing law, the lawyer’s word was his bond. I mean, that’s it! You could call a lawyer up and say: “I’ve got this I’ve got to do. Can you give me some more time on this?” “Sure.” They’d make their own little notations; I’d make mine. You didn’t have to have a paper trail. But take the current practice. Even with the local practice, you have to have a paper trail to protect everybody, to make sure that people are being civil with one another. And do I see in the local practice people who are coming in front of me, things that I find disturbing! Some of the hearings that I have experienced are greatly disturbing to me! If you don’t think that judges don’t have a score card of the people who are “problem people,” you’re wrong.

Q. Judge, what do you think of the most recent standing orders that allow attorneys now to bring cellphones and other electronic devices into the federal courthouse here in Tampa?

A. I’m going along with it, the policy … and so long as we don’t have a problem with a jury. Do I think that there is harm that could come in a given case? Some of the cases that we had years ago where taking pictures of witnesses would have been a real problem. If you tried to slip witnesses or jurors out the back way, maybe you were protecting their identity, but there is certainly no way to protect the identity of people now. You may tell people “Don’t take a picture of somebody in the courtroom,” but who’s there to police that from happening, especially if they’re in the back section. That to me is of concern.

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Q. I know you were instrumental in securing funding for new federal judgeships here in the Middle District of Florida, Tampa Division, a few years ago. Why was that so important to you?

A. At the time that I made a speech, I had just become the chief judge in 1996. I made it in front of the Federal Bar, and I told them that we were at 1,100 cases per judge, and we were going to go to 1,300 cases per judge. ... I said, “Folks, we’ve gotta do something about this.” I went to Washington, D.C., to the Administrative Office of the U.S. Courts and the Chief Judges’ Conference. I had all of these stats, and we were going nowhere with getting any judgeships. It was everybody sitting there obediently waiting for something to happen. And I told them, I said, “I can’t wait. My district’s suffering, my judges are suffering, the practice is suffering, I’m telling you right now I’m breaking ranks, and I’m going after those judgeships.” And they laughed. Well, after we got going, the Tampa Federal Bar, Fort Myers Federal Bar — and Jacksonville and Orlando Bars on board, Congressman Young, God bless him, he helped us — we had a whole army of people go up, including judges; he introduced us to key people of the Appropriations Committee at the time, and the key people in the Senate and other contact persons. I had the backing of Connie Mack and Bob Graham, who were the senators at the time, and they said, “You know, this is going to be hard.” I said, “I know it. I’ve got an army coming with me. I’ve got squads of people.” We went up there, and we just, we just hit it hard. It wasn’t singularly me. I was just kind of like making sure everybody was in the right place at the right time. And we collectively got those four U.S. district judgeships for the Middle District of Florida.

Q. You started the internship program at Stetson College of Law at the federal courthouse. What was your objective when you decided to start that program?

A. Michael Trentalange, a Stetson student, took the initiative and applied, and he said, “I’d like to work, you know, free of charge as an intern for you.” And I’d never had an intern. My judicial assistant encouraged me to give him an opportunity. I said, “OK, we’ll give him a try.” So that’s how the program started. That was 1989 when Michael came, and we have had over 1,000 people come through that program, before I turned it over to Judge Porcelli. Other students came from Stetson and all over the country — Florida, Miami, Notre Dame, Cornell, California, Vanderbilt, Virginia, and even from Harvard and Yale; you name it, they came from everywhere for the summer.

Q. Judge, back a few years ago, you were instrumental in bringing a stream of U.S. Supreme Court justices to Tampa to speak at the annual Federal Bar Association Dinner. How did you pull that off?

A. Well, in 1997, I was the chief judge and I had had contact previously with Justice Thomas, and he was kind enough when I contacted him to say “yes” he would come. We had the Red Mass, at Sacred Heart, in a rain storm; Thomas came sloshing down the road to get to the church to lead us in the oath, and then he gave the speech for 900 at the Tampa Convention Center. It was a glorious day for the legal profession and for the Federal Bar. Because of that, I was able to get Scalia to come the next year, in 1998, and then Rehnquist in 1999. They each gave Federal Bar speeches. Subsequently, when I was no longer a chief judge, I was able to communicate with Justice Alito, and he said he would come in 2004.

Q. Judge, final question. If you had it to do all over again, would you still chose to be a lawyer and later a judge?

A. Well, “the judge” was just an opportunity that came and people encouraged me. I would have been an attorney, and when I had my office, I specialized in anything that came through the door, A to Z. And I actually did everything. I did admiralty, bankruptcy to zoning, all the way across the spectrum. I did a whole bunch of different work, and I think that was good for me. And I think that helped prepare me to be a judge. But I never aspired to be a judge. It’s a great honor and a privilege to be a judge, and I never forget it. And I think about it every time I put on the robe. I never forget it. It’s a privilege to do this.

Author: Michael S. Hooker - Phelps Dunbar LLP
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Many practitioners use social media for advertising and to grow their practice. Unfortunately, there are some instances where being friends with someone on Facebook could have a detrimental effect on business. One such scenario involves being friends with members of the judiciary on Facebook. Most attorneys are aware of rules regarding ex parte communication with jurors (see Florida Rule of Professional Conduct 4-3.5(d)), but what about a judge? What happens if you went to law school with someone who is now a judge? What if he or she is a personal friend of yours? Can you be Facebook friends or connect via other electronic social media (ESM)? A recent case in Florida has been getting attention regarding this issue and suggests that judges may be better off being friendless (at least on Facebook).

In January, the Fifth District Court of Appeal evaluated a case where a woman sought to overturn the lower court’s ruling that denied her motion to disqualify the judge in her divorce case. Prior to entry of final judgment in her divorce case, the petitioner, Sandra Chace, received a friend request from the presiding judge. She declined the friend request, and when final judgment was entered, Chace claimed she received most of the marital debt and the judge awarded her ex a large alimony award. Chace filed a motion to disqualify the judge as she felt the judge retaliated against her for denying the request. This motion to disqualify was ultimately denied. When she appealed the ruling, the Fifth District quashed the order denying Chace’s motion to disqualify, stating, “Petitioner has alleged facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial.”

The American Bar Association stated in its Formal Opinion 462, “All of a judge’s social contacts, however made and in whatever context, including ESM, are governed by the requirement that judges must at all times act in a manner ‘that promotes public confidence in the independence, integrity, and impartiality of the judiciary,’ and must ‘avoid impropriety and the appearance of impropriety.’” In relying on the Model Code of Judicial Conduct, the ABA concludes, “[W]hile sharing comments, photographs, and other information, a judge must keep in mind the requirements of Rule 1.2 that call upon the judge to act in a manner that promotes public confidence in the judiciary.”

This case reveals some of the potential issues that can arise out of ESM. Although it only discusses Facebook, people should be aware of the application to other ESM sites (e.g. Twitter, Instagram, etc.). It is a fine line to determine what could be perceived by another as improper. It may be a best practice to not risk putting a judge in a bad position by trying to avoid any appearance of impartiality, even if that means missing their next selfie or posting about what they ate for breakfast.

1 Chace v. Loisel, 39 Fla. L. Weekly D 221 (Fla. 5th DCA Jan. 24, 2014).
2 Id.
3 ABA Formal Opinion 462, Judge’s Use of Electronic Social Networking Media, (Feb. 21, 2013).
4 Id.

Author: Kristen A. Foltz - Hillsborough County Bar Foundation and University of Tampa

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WHEN IS IT TOO LATE FOR THE TIPSY COACHMAN?
Appellate Practice Section
Chairs: Ezequiel Lugo - Butler Pappas Weihmuller Katz Craig, LLP; and Dineen Pashoukos Wasylik - Dineen Pashoukos Wasylik, P.A.

In general, claims not raised in the trial court will not be considered on appeal.¹ However, there are exceptions to this rule, one of which is known as the “tipsy coachman” doctrine. The tipsy coachman doctrine provides that when a trial court reaches the right result for the wrong reasons, that result will be upheld if there is any basis in the record to support it.²

Although the tipsy coachman doctrine is well established, courts are not in agreement on the deadline for invoking it. In some cases, courts have applied the tipsy coachman doctrine based on issues raised as late as on motion for rehearing,³ while in other cases, issues raised for the first time at oral argument were held to be too late.⁴

For example, in Jaworski v. State, when the appellee asserted a new ground for affirmance in a motion for rehearing, the Fourth District granted rehearing and affirmed the trial court’s decision based on that newly raised issue.⁵ The court explained that “[a]s an appellate court … we are obligated to entertain any basis to affirm the judgment under review, even one the appellee has failed to argue. … In other words, an affirmance is required if any theory, whether argued or not, would sustain the judgment.”⁶

In contrast, the First District in Powell v. State refused to apply the tipsy coachman doctrine after briefing had ended.⁷ In Powell, the appellee argued in its motion for rehearing that the court was required under the tipsy coachman doctrine to consider an issue that the appellee had raised for the first time at oral argument.⁸ The court rejected that argument, reasoning that such a rule would unfairly limit appellants’ ability to respond to the newly raised issues, requiring appellants to use their last few minutes of oral argument to attempt to respond to those issues, rather than the issues that were actually briefed.⁹ The court also noted that application of the tipsy coachman doctrine so late in an appeal would incentivize appellees to ambush appellants at oral argument with previously unraised issues.¹⁰

The diverging opinions as to the proper timing of appellees’ tipsy coachman arguments create a pitfall for attorneys. Practitioners should be aware of this uncertainty in the law and plan accordingly to ensure their arguments are heard. As the First District stated in Powell, “the tipsy coachman doctrine ‘does not rescue parties from their own inattention to important legal detail.’”¹¹

¹ See Dade County School Board v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999).
² Id. at 644-645.
³ See, e.g., Jaworski v. State, 804 So. 2d 415 (Fla. 4th DCA 2001).
⁴ See, e.g., Powell v. State, 120 So. 3d 577 (Fla. 1st DCA 2013); E.K. v. Dep’t of Children & Fam. Servs., 948 So. 2d 54 (Fla. 3d DCA 2007).
⁵ Jaworski, at 419.
⁶ Id.
⁷ Powell, at 593.
⁸ Id. at 590.
⁹ Id. at 591.
¹⁰ Id.
¹¹ Id. at 593, quoting E.K., 948 So. 2d at 57.

Author: Michael R. Bray - de la Parte & Gilbert, P.A.
Judicial Luncheon and CLE

A crowd of attorneys gathered on April 15 for an HCBA Judicial Luncheon and CLE on “Motions: How to Present, Persuade and Defend in Motion Practice,” presented by the circuit civil bench. The HCBA appreciates the participation of Judge Charles E. Bergmann, Judge Martha J. Cook, Judge Paul L. Huey, Judge Claudia R. Isom, Judge William P. Levens, Judge Bernard C. Silver, Judge Michelle Sisco, Judge Mark R. Wolfe, and all who attended!

PROJECT H.E.L.P. KICKS OFF IN TAMPA

Each year, the American Bar Association selects five cities across America to launch Project H.E.L.P., which offers free legal clinics for the homeless. Tampa is one of the cities selected for 2014 — and the only city in Florida.

“The ABA chooses cities with a high homeless population but with no free legal clinics to support that population,” said Jennifer Roepen, an immigration partner at Shumaker, Loop & Kendrick and an ambassador to Metropolitan Ministries. Roepen is coordinating the volunteer attorneys for the project in Tampa, and Metropolitan Ministries has offered its location for the free legal clinics.

The clinics will be offered once a week on Tuesday nights in Tampa, staffed by different law firms in the area.

“Sometimes there are very basic legal issues that homeless people face that are a hindrance to getting back on their feet. For example, if someone can’t afford to pay a simple loitering ticket, it can turn into an arrest warrant. If a lawyer can get involved, it may allow that person to get to a shelter and get a job — something they may not be able to do with an outstanding arrest warrant,” Roepen explained. Other common issues include domestic violence, social security, stolen or missing driver’s licenses, or identity theft.

Project H.E.L.P. (www.homelesslegalprotection.com) was started in New Orleans in early 2004 by a newly appointed federal district court judge, Jay Zainey. H.E.L.P. has since expanded to more than 15 cities, and the list continues to grow.

TO VOLUNTEER FOR PROJECT H.E.L.P. IN TAMPA, CONTACT JENNIFER ROEPER AT (813) 227.2259 OR JROEPER@SLK-LAW.COM.
A Kid’s Place in Brandon is a nonprofit center for abused, neglected, and abandoned children that is designed to resemble a true neighborhood street (five houses built in a semicircle). It is an amazing place where kids can relax, refocus, and heal after suffering abuse, neglect, and abandonment. Twelve kids live in each house, and the focus is to keep siblings together in the same home.

To help these amazing children feel like kids for a day, the Community Services Committee (CSC), in conjunction with A Kid’s Place, threw them their very own Pirate Party on May 3. This was the CSC’s most challenging but deserving event to date, and it was a resounding success thanks to all who donated or came out to help! We had some amazing activities, and everyone had a blast — kids and the CSC’s volunteers included.

We played pirate games such as Pirate Balloon Burst, Find a Pirate Ducky, and Poke the Pirate Corn-Hole, and we allowed every little scallywag to pick prizes out of our treasure chest after “winning” each game. We dressed the little buccaneers as pirates (hats, eyepatches, sashes, swords, tattoos, etc.) and let them make their very own pirate treasure chests in our craft section. Bouncy houses were donated by Jungle Jim’s Party Rentals and StimuLite-LED. Smokey Bones of Brandon served up the grub, and Outrageous Cakes created smashing pirate cupcakes and cookies. We had a face painter and balloon artist, and each child received a swag bag! Sixty little swashbucklers and 45 adult pirates were seen laughing throughout the day. In fact, laughter was heard throughout A Kid’s Place, and it was heard often!

The CSC is humbled and overwhelmed by the amount of donations and volunteer support that we received for this event. This party was a great success due to the support and generosity of our volunteers and donors. The CSC would like to thank all our volunteers and the Hillsborough County Bar Association, as well as the following donors: Friedman Law Associates, PL/FL Legal Group (especially Melissa Gonzalez); Law Offices of Lisa Esposito, P.A.; Jungle Jim’s Party Rentals; StimuLite-LED; Smokey Bones Bar & Fire Grill of Brandon, and General Manager Tishara Griffis; Outrageous Cakes; Hill Ward Henderson; Larson & Johnson PL, Mary Simmons/CPA-TPA; Olsen Meddin Law Firm; Krista Marie Sellars Memorial Foundation; Kevin and Jane Sigl; Doreen Blessing; The Greens Family of Tennessee; Fran Reiter; Kelli Link; Elizabeth Belcher; and Damien Rodriguez and family. We hope we didn’t forget anyone!

Please consider helping these amazing kids in any way you can! For more information about A Kid’s Place, please visit: www.akidsplace.org.

For more information about joining the CSC or to volunteer, please contact CSC Chairs Lisa Esposito, (813) 223-6037 or lisa@lesposito.com, or Lara LaVoie, (813) 638-1357 or lmlavoie11@gmail.com.

Authors: Lara M. LaVoie - LaVoie & Kaizer, P.A.; Lisa Esposito - Law Offices of Lisa Esposito, P.A.
Dining with Dignity

Thanks to all those who joined in the Community Services Committee’s efforts during Dining with Dignity Week at Trinity Café! The committee appreciates all those who took the time out of their day to serve sit-down meals to the homeless and working poor of Hillsborough County.

Construction Law Section CLE

The HCBA Construction Law Section hosted a CLE on April 17 to address “Insurance Coverage Perspectives on Risk Transfer in Construction Cases.” Guest speaker Mark A. Boyle, of Boyle, Gentile, Leonard & Crockett, gave an overview and outlined updates for Florida.

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One of the most important aspects of construction defect litigation is the participation of the parties’ commercial general liability (CGL) insurance carriers. Indeed, many (if not a majority of) cases are settled using CGL dollars.

Therefore, savvy parties will typically frame their pleadings to trigger a CGL carrier’s duty to defend. Under Florida law, “[i]t is well settled that an insurer’s duty to defend its insured against a legal action arises when the complaint alleges facts that fairly and potentially bring the suit within policy coverage.” Jones v. Florida Ins. Guar. Ass’n, Inc., 908 So. 2d 435, 442-43 (Fla. 2005) (further providing that “the insurer must defend even if the allegations in the complaint are factually incorrect or meritless.”). Therefore, simply by alleging facts in a complaint’s “four corners” that implicate an insured party’s CGL policy, an insurer will typically be required to provide a defense until it is established that there is no indemnity obligation (e.g., via a declaratory judgment action).

In a recent unpublished decision, the Eleventh Circuit Court of Appeals in Composite Structures, Inc. v. Continental Insurance Company, 2014 WL 1069253 (11th Cir. 2014), chipped away at this longstanding...
general rule. In doing so, it has provided insurance carriers with additional ammunition to avoid defense obligations.

In *Composite Structures*, an insured sought to obtain a declaratory judgment holding that its CGL insurer had a duty to defend the insured against personal injury claims in an underlying litigation. In the underlying case, two people sued the insured for damages flowing from alleged excessive carbon monoxide exposure. The insured did not dispute that its policy’s pollution exclusion applied; however, there was an exception to the pollution exclusion that could have applied under certain circumstances that were not evident from the underlying complaint *(i.e., the insured’s timely notice to the carrier)*. Applying Florida law, the Eleventh Circuit recognized that “an insurance company’s duty to defend an insured is determined solely from the allegations in the complaint against the insured[.]” *Id.* at *3* *(citing Lawyers Title Ins. Corp. v. JDC (America) Corp., 52 F. 3d 1575, 1580-81 (11th Cir. 1995)).* Notwithstanding this general rule, the court noted an exception “where an insurer’s claim that there is no duty to defend is based on factual issues that would not normally be alleged in the complaint.” *Id.* *(quoting Higgins v. State Farm Fire and Cas. Co., 894 So. 2d 5, 10 at n. 2 (Fla. 2005)).* The Eleventh Circuit affirmed the Middle District’s order of summary judgment in favor of the insurer, noting that “because the date of written notice to the insurance company is not a fact that would normally be alleged in the complaint,” the court was permitted to consider that fact in assessing the insurer’s duty to defend.

Undoubtedly, carriers will be advocating for published opinions consistent with *Composite Structures* — both in federal and state courts. Attorneys should therefore be aware that the four corners of a complaint may not always define the field on which an insurer’s duty to defend is determined.

**Author:**

Erik P. Raines – Hill Ward Henderson
A benefit corporation is a for-profit entity that is operated to produce a public benefit in addition to a profit. The corporation’s board is required to balance stockholders’ interests, the best interests of those materially affected by the corporation, and the public benefit(s) identified in the certificate of incorporation. The idea was originated by the “B Lab,” a 501(c)3 that drafted a model benefit corporation statute and lobbies for its enactment. The statute requires a benefit corporation to report how it furthers the stated benefit and how shareholders are able to hold the corporation accountable for failure to pursue that benefit. Twenty states have now adopted this legislation. Even Delaware has adopted a variation of the benefit corporation statute provided by B Lab. Currently, there are bills in the Florida House and Senate that would bring benefit corporations to Florida.¹

Proponents of the benefit corporation argue that the existing legal framework does not accommodate a for-profit company that desires to benefit society. Dodge v. Ford ² is cited as proof that corporations cannot “do good” because they are forced to pursue shareholder wealth maximization in myopic fashion. The court specifically stated that “[t]he discretion of directors is to be exercised in the choice of means to attain [profits for the stockholders], and does not extend to a change in the end itself, reduction of profits, or the non-distribution of profits among stockholders.”

Given this holding, it is argued that the only way to break the stranglehold of *Dodge v. Ford* is through the benefit corporation. Although this may be true in some states, Florida, unlike Delaware, already has legislation that allows corporations to consider and pursue public benefits. Florida Statute 607.0830(3) allows directors to “consider such factors ... including the long-term prospects and interests of the corporation and its shareholders, and the social, economic, legal, or other effects of any action on the employees, suppliers, customers of the corporation or its subsidiaries, the communities and society in which the corporation or its subsidiaries operate.” In *Kloha v. Duda* (246 F. Supp. 2d 1237, M.D. Fla.), the directors of a Florida corporation exercised their business judgment in deciding to sell certain assets instead of closing an unprofitable branch of the business. The court protected the directors from liability under the statute because the directors stated they continued to run the unprofitable branch to ensure employment for family members.

Proponents of benefit corporations note that Florida’s present statute allows directors to take these considerations into account, but the new statute would require directors to balance these things against the single-minded pursuit of profit. This distinction may not have much meaning given that corporations that don’t want to “do good” will not become benefit corporations and will not be affected by the mandatory language of that statute. Whereas, companies that do want to “do good” are currently able to do just that in Florida.

¹ FL Senate Bill 654 and House Bill 685.
² 170 N.W. 668 (Mich. 1919).

Author: Clara Arrington - Stetson University College of Law, candidate for J.D. in May 2014
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Nearly everyone carries a cellphone these days, and most phones contain vast amounts of information about a person’s life. Not surprisingly, cellphones have become important sources of evidence in the investigation of criminal activity. Cellphones not only contain the information entered by the user but also emit or store data unknown to the user that has evidentiary value. As the technology of cellphones evolves, courts will face new issues of evidentiary reliability and constitutional protections.

Last fall, in Gosciminski v. State, 132 So. 3d 678 (Fla. 2013), the Florida Supreme Court considered the admissibility of evidence of a defendant’s location based on cell tower signals to prove that a defendant was in certain locations at certain times during the morning of a murder. The state’s expert testified about a diagram indicating the area in which the defendant was located based on cell tower signals between the phone and nearby cell towers. In concluding that any challenge to the testimony went to weight rather than admissibility of the evidence, the court noted that cellphone records and cell tower site information have been routinely admitted in Florida for years.

Although cell tower information has been admitted in Florida courts for some time, the Gosciminski court did not address how Florida’s recent adoption of the Daubert standard may impact the admissibility of such evidence in the future. In United States v. Evans, 892 F. Supp. 2d 949 (N.D. Ill. 2012), the court found a particular cell site methodology unreliable under Daubert. Conversely, United States v. Machado-Erazo, 950 F. Supp. 2d 49 (D.D.C. 2013), recognized that other cell site methodologies have “clear[ed] the hurdle imposed by Daubert.”

Whether offering or challenging this evidence, these cases teach that we must pay close attention to the purpose for which the evidence is offered and whether the methodology employed supports that purpose. Michael Cherry, a Virginia-based consultant, and Edward Imwinkelried, a law professor at the University of California at Davis, are good resources for further research on this topic.

In addition to cell site evidence, information obtained from the search of a suspect’s cellphone is also an emerging topic. The U.S. Supreme Court heard oral argument in Riley v. California and United States v. Wurie in April. Both cases center on the authority of law enforcement, without a search warrant, to search a suspect’s cellphone at the time of arrest. Interestingly, Wurie involves an outdated flip phone. The Riley case involves a more current smartphone with the capability of storing more data. The evolution of technology may play a role in the Fourth Amendment analysis of these cases. Also, the court will only consider the relatively limited issue of whether the specific evidence obtained from the cellphones in those cases violated Fourth Amendment rights. The court’s ultimate decision may leave open the possibility for future litigation based on new technology or different types of evidence. At the time of the submission of this article for publication, the court had not decided Riley and Wurie. If the court issues the decisions in the meantime, look them up as I am sure they will be a good read.

As the technology of cellphones evolves, courts will face new issues of evidentiary reliability and constitutional protections.

Author: Matt Luka - Trombley & Hanes
Criminal Law Section CLE

The HCBA’s Criminal Law Section hosted a CLE luncheon on “Referral Fees, Referral Services and Lawyer Advertising” on May 6. Guest speaker Sheila M. Tuma, chief branch discipline counsel of The Florida Bar, discussed ethics and professionalism rules regarding entering into referral fee/co-counsel arrangements in criminal cases, the proper use of referral services, and changes to the rules regarding lawyer advertising.

Thanks to all who attended and to the luncheon sponsor:

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Cultural competency is the ability to adapt, work, and manage successfully in new and unfamiliar cultural settings. Culturally competent people can “grasp, reason, and behave effectively” when faced with culturally diverse situations where assumptions, values, and traditions differ from those to which they are accustomed. They recognize that culture may impact the way people from different backgrounds perceive the same facts. When several competing interpretations of a situation may be valid, they can place apparent contradictions in cultural contexts and deal with the ambiguity.

Being culturally competent does not mean fully understanding the cultural norms and dynamics of every person with whom a lawyer interacts. It also isn’t about adopting a particular set of beliefs or learning a language. Rather, cultural competence is a way of approaching any new and different cultural situation. People who are culturally competent are aware of their own cultural backgrounds; they also recognize that culture influences behaviors, thoughts, ways of communicating, values, traditions, and institutions. Culturally competent professionals know that the choices people make are powerfully affected by culture and that every person is subject to many cultural influences.

American diversity programming deals with cultural differences, but the focus is on diversity within the context of American culture. Cultural competence places diversity in a global framework. It involves the ability to function in settings where American values and norms do not prevail, and it refers to the ability to navigate through a strange environment when you are the cultural outsider.

Improving cultural competence is one key to greater profitability. In a survey of 450 managers in multinational companies, effective management of cultural diversity in a global setting was highly correlated with financial success as measured by profit per employee. In companies with proficient cross-cultural management, the survey found that foreign office profits increased through higher productivity, more cross-selling, client expansion, work referrals from other offices, and leveraging of global resources.

Given the increasing global focus of our legal profession to meet the increasing needs and demands of our clients, focusing on cultural competency is critical. It will be important to understanding not only how our own culture impacts on our interactions but how we can utilize our knowledge of another’s culture to influence business outcomes, i.e., negotiations, depositions, trials, etc.

An initial step toward cultural competence involves what Verna Myers, principal of Verna Myers Consulting Group, LLC, a nationally recognized expert, calls learning the B-A-S-I-C-S. Do not assume you understand an individual’s culture or withdraw from racial and ethnic differences or try to avoid them because you are unsure what is expected. Instead, “B - Breathe: Suspend all judgments; A - Assumptions: Question your assumptions; S - Self-Awareness: Stay self-aware about what you are bringing to the dynamic; I - Information: Get information before making conclusions or deciding next steps; C - Culture: Accept that all cultures are equally valid; S - Steps: Take steps toward the person or interaction rather than away from the situation.” Cultural competence is a journey, not a destination. I hope you join me on that path.

Author:
Dawn Siler-Nixon - FordHarrison LLP
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Trial & Litigation Section Awards Ceremony

The HCBA Trial & Litigation Section honored some outstanding individuals at its annual awards ceremony on May 7.

The award recipients were:

- **HERBERT G. GOLDBURG AWARD: TOM GONZALEZ**
  
  The Herbert G. Goldburg Award is the highest award given by the HCBA Trial & Litigation Section to a trial lawyer who, during the course of a distinguished career, has exhibited fairness, integrity, courtesy, zeal, forensic skill, legal acumen, good sense, and respect for fellow lawyers.

- **MICHAEL A. FOGARTY MEMORIAL AWARD: KAREN BUESING**
  
  The Michael A. Fogarty Memorial “In the Trenches” Award for Civil Trial Practice is given to a civil trial lawyer who demonstrates excellence and integrity in civil trial advocacy, and ongoing efforts and recent or current accomplishments in the representation of clients in the civil court system.

- **JAMES H. KYNES MEMORIAL AWARD: RON HANES**
  
  The James Kynes Memorial “In the Trenches” Award for Criminal Trial Practice is given to a criminal trial lawyer who demonstrates ongoing efforts and recent or current accomplishments in the representation of clients in the criminal court system.

- **COURT FAMILY AWARD: KIM CASH**
  
  The Court Family Award is given to a deserving member of the state or federal court support staff who has demonstrated ongoing courtesy, consideration, and professionalism toward members of the Bar.

  Also at the awards luncheon, Trial & Litigation Section Chair Brad Kimbro was recognized for his leadership of the section this year, and Chief Judge Manuel Menendez joined in the celebration via video.

  The HCBA appreciates Trial Consulting Services for its efforts in videotaping the luncheon.
The Trial & Litigation Section would also like to extend a special thank you to the luncheon’s sponsor:

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Clients 1st. Community 1st.
Law & Liberty Dinner

The Hillsborough County Bar Foundation’s Law & Liberty Dinner this year featured actor, comedian, political commentator, author, and lawyer Ben Stein. The guest speaker, whose monotone voice and deadpan sense of humor were made famous through his role in “Ferris Bueller’s Day Off,” discussed the economy, politics, and life in general during the foundation’s annual fundraising dinner on May 15.

News Channel 8’s Keith Cate hosted the evening’s ceremonies, which also included the presentation of the Hillsborough County Bar Foundation’s inaugural William Reece Smith Jr. Humanitarian Award. The award was presented posthumously to Smith in recognition of his extraordinary commitment to charitable work, public service, and humanitarian activities.

Money raised at the Law & Liberty Dinner went to Bay Area Legal Services David L. Shear’s Children’s Law Center, Hillsborough Voices for Children, and The Spring of Tampa Bay. Thanks to the event’s marquis sponsor, The Centers; premier sponsors The Bank of Tampa and The Yerrid Law Firm; and all of those who supported these great charities!

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New Admittee Swearing-In

New admittees to The Florida Bar gathered at the George Edgecomb Courthouse on April 17 for a celebratory swearing-in ceremony by the judges of the Thirteenth Judicial Circuit. The Hon. Manuel Menendez Jr. presided over the ceremony, which also featured words of advice from Judge Chris Nash, General Counsel David Rowland, HCBA President Susan Johnson-Velez, and HCBA YLD President Jacqueline Simms-Petredis. Congratulations to all who were sworn in, and thank you to the ceremony’s sponsor:
2014 Law Day Membership Luncheon

The Hillsborough County Bar Association honored some outstanding individuals at its annual Law Day Luncheon on May 13 at the Hilton Tampa Downtown. Longtime educator and public servant Betty Castor received the Liberty Bell Award, and Bill Schifino Jr. was surprised with the Outstanding Lawyer Award.

In addition, Chief Judge Manuel Menendez Jr. recognized the Law Enforcement Officers of the Year: Deputy Brooke Melton of the Hillsborough County Sheriff’s Office and Detective Sharla Canfield of the Tampa Police Department. Local students were also praised for their participation in Law Week activities, including art and essay contests (See pages 38-39).

PEER MEDIATION ESSAY CONTEST WINNER
Saylor Webster, 5th Grade - Bevis Elementary

As a peer mediator, I am often faced with situations that involve making judgments regarding the steps leading to an equitable solution between two students. Often times, as I am in the middle of mediation, the challenge of resolving a problem reminds me of the struggles faced by the many Americans, African-Americans, during a period in our Nation’s history known as the Civil Rights movement. One might argue the challenge I face in no way compares to the severity of the situation faced by the African Americans during the Civil Rights movement in the South, I couldn’t disagree more.

The essence of the conflict faced by two people — whether elementary-aged or adults, black or white, today or in the 1960s — deserves the attention and effort of a mediator for an equitable solution to be reached. When I am mediating a disagreement between two students, I pride myself of the fact I see the two individuals equally and without regard to their gender, race, or popularity among their peers. I must, for this is the reason I became a peer mediator and a title I hold with high regard. After all, my knowledge of and the skills I possess with regard to conflict resolution and my belief we all deserve to be treated equally are the principles that guide peer mediators and the intent of the United States government when the Civil Rights Act was passed in 1964.

Continued on page 39
Since my involvement in the peer mediation program at my school, I too have learned a great deal. When I was younger, I might have held firm to my position, now I take a moment to consider opposing viewpoints before simply disregarding them; I am reminded and humbled by the words spoken by my fifth grade teacher, “Placing yourself in the shoes of others is important before passing judgment.” I will have to admit, at first I thought I understood what this meant, having a firm grasp of figurative language, but I soon realized there were instances when I, too, was just as guilty as others when passing judgment. Without a doubt, the peer mediation program at my school has helped me as well. If only more people stopped for a moment, placed themselves in the shoes of others, and worked harder at understanding, an equitable solution really wouldn’t be so hard to achieve.

**PEER MEDIATION ESSAY CONTEST WINNER**

Logan Holland, 11th Grade - Durant High School

“So long as I do not firmly and irrevocably possess the right to vote I do not possess myself. I cannot make up my mind — it is made up for me. I cannot live as a democratic citizen, observing the laws I have helped to enact — I can only submit to the edict of others.” — These words are part of the speech “Give us the Ballot” given by Martin Luther King Jr. that addressed the absence of voting equality. Without the right to vote, Americans would have no power and no say in their governance. That is what each vote is, that is what every ballot is: power. With this power, the masses can influence legislation, they can vote in the people who best represent their own ideals, and they can remove those who do not. Among other things, the leaders of the Civil Rights Movement won the right to vote. Those leaders wanted everyone to have a say, and as a peer mediator, this is also my goal. My goal is to provide both sides of the conflict the chance to verbalize their opinion, and to give both parties the power to decide what the resolution to the conflict will be.

I have been a peer mediator since the fourth grade and have completed hundreds of mediations. I have witnessed the difference between having a conflict resolved in an administrator’s office versus by a mediation between the parties. In an administrator’s office, the students’ problem does not matter, the adult decides their fate. It is easy for a principal or some other staff member to make a quick decision to suspend one or both students, but very rarely does that actually solve the problem. In a peer mediation, both parties are able to talk openly about what happened and how it made them feel. Through this discussion, they often develop a feeling of empathy. When opposing sides learn to understand one another, they are often able to forgive one another and resolve the differences that caused the conflict. The resolution for each case is unique, but one aspect remains the same: the solution is a cooperative effort of both parties. It is democracy in its purest and simplest form.

In a mediation, every opinion matters. Just like in our government, where every vote matters. Every opinion and vote is important because each give the people the power. In a mediation, the people involved decide their own fate, and only have themselves to blame if the agreement does not work for them in the future. In a monarchy, if there are problems within the country, they should be blamed on the monarch. In a true democracy in which everyone has the right to vote, the problems can only be blamed on the voters. The sovereignty resides in the people, so the people must use their power to facilitate the changes they desire. “Give us the ballot and we will no longer have to worry” — Martin Luther King Jr.

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Congratulations to Pro Bono Winners!

The Thirteenth Judicial Circuit Pro Bono Committee recognized some amazing attorneys and organizations at the seventh annual Pro Bono Services Awards Ceremony on April 24.

And the winners are:

- Wesley “Wes” Tibbals
  - HCBA Jimmy Kynes Pro Bono Service Award
- Elizabeth L. “Betsey” Hapner
  - Outstanding Pro Bono Service by a Lawyer
- Sara Alpert
  - Outstanding Pro Bono Service by a Young Lawyer
- Jan L. Brown
  - Outstanding Pro Bono Service by a Paralegal
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NECESSITY FOR A TAKING: ACTUAL OR ENGINEERED?
Eminent Domain Section
Chairs: Meredith Delcamp - Buchanan Ingersoll & Rooney PC | Fowler White Boggs; and Kenneth Pope - Hillsborough County Attorney’s Office

Florida law unquestionably favors a condemnor’s discretion to identify and select parcels necessary for condemnation. A condemnor’s discretion is broad, but it is not unbridled. To establish the necessity for selecting a parcel for condemnation, a condemnor must prove that it reasonably considered five factors outlined in Hillsborough County v. Sapp, 280 So. 2d 443 (Fla. 1973). The factors identified in Sapp are alternative routes, costs, environmental impacts, planning, and safety of the proposed right of way. Id.

A condemnor’s evaluation of costs and alternative routes can be bitterly contested when a property owner feels that its property is the subject of “engineered necessity.” Engineered necessity is the condemnation of an entire parcel in order to avoid payment of business damages to an owner for which it would be entitled if only a portion of the property were condemned. This concept is borne out of Florida law that only allows for the recovery of business damages in cases of a partial taking. See Fla. Stat. § 73.071(3)(b), (2014).

The controversy surrounding engineered necessity is the result of since-repealed Florida Statute § 337.27(2) (1997), which allowed the Florida Department of Transportation to condemn an entire parcel of property in order to save costs by avoiding payment of business and severance damages that would result from a partial taking. Takings under this statute became known as Fortune Federal takings after the Florida Supreme Court found § 337.27(2) to be constitutional in the case of FDOT v. Fortune Federal Sav. & Loan, 532 So. 2d 1267 (Fla. 1988).

Eleven years later, in 1999, the Florida Legislature expressly repealed § 337.27(2) through House Bill No. 591 and Laws of Florida Chapter 99-385. Rather than killing the idea behind engineered necessity, the repeal of § 337.27(2) birthed a new era of it. After 1999, takings designed to avoid business damages that were once accomplished in the open through Fortune Federal takings are now accomplished surreptitiously through an evaluation of the Sapp cost factor with the same purpose of eliminating business damages. Regardless of the process, the Florida Legislature has been clear that avoidance of business damages alone cannot be justification for a taking.

Landowner attorneys should take care to examine a condemnor’s cost justification for the selection of a parcel for a whole taking if there is a question as to whether a partial taking would be more appropriate. A blatant example of engineered necessity will show itself in a cost analysis of a parcel that solely evaluates the acquisition cost of a partial versus whole taking of that particular parcel. A proper analysis will show an evaluation of multiple cost items between alternative routes or sites rather than the evaluation of just the acquisition cost of one parcel against itself. By the same token, condemning authority attorneys are smart to review decisions by right-of-way personnel in order to make sure that parcels were selected based on proper criteria and analysis. Failure to make such a review can result in contentious and expensive litigation for condemnors.

Author:
Blake H. Gaylord - Gaylord Merlin Ludovici and Diaz

HAVE A COLLEAGUE WHO’S NOT A MEMBER OF THE HCBA?
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HEALTHCARE MARKETING: MAINTAINING LEGAL COMPLIANCE
Health Care Law Section
Chairs: T.J. Ferrante - Carlton Fields Jorden Burt, P.A.; and Sara Younger - BayCare Health System

The environment for providing health care services is becoming increasingly complex and competitive. Before entering into any arrangement for marketing, advertising, or similar communications services, health care providers should carefully consider how the arrangement must be structured to avoid running afoul of applicable laws. Although the facts and circumstances of each particular marketing arrangement require thoughtful review, the following general guidance will assist providers in structuring marketing arrangements in a manner that complies with the applicable legal framework:

- Providers should structure marketing arrangements to meet safe harbors under the Anti-Kickback Statute¹, such as the employment or personal services and management contracts safe harbors.
- If a marketing arrangement appears to implicate the Stark Law², providers should structure the arrangement to meet an exception under the Stark Law, such as the employment relationship exception, personal services arrangements exception, or nonmonetary compensation exception.³
- Providers should not appear to endorse certain health care products or services in order to avoid “white coat” marketing.
- Payments for services rendered under a marketing arrangement should be for fair market value. Providers should document the fair market value determination, as well as the performance of the services rendered.
- Payments under a marketing arrangement should not include commissions or compensation that reflect the generation of business by the health care provider. Instead, a time-based marketing fee, such as an hourly or annual fee, that is owed by the practice regardless of any increase in patient flow is recommended.
- Providers should not provide gifts to potential referral sources. The government has long taken the position that, generally, free gifts to beneficiaries violate the Anti-Kickback Statute because such gifts may induce beneficiaries to purchase additional or unnecessary items or services.
- Providers should structure their marketing activity so as not to be interpreted as offering or paying “remuneration” to Medicare or Medicaid beneficiaries in an effort to influence the beneficiaries’ choice in selecting health care providers.
- Providers should tailor their marketing services to conform to the requirements of the HIPAA privacy regulations. In particular, where protected health information is to be used as part of a marketing activity, health care providers should ensure that adequate individual authorization has been obtained or, if not, that the activity is exempt from the provisions concerning marketing.

As market forces such as reimbursement cuts, caps, and other CMS initiatives continue to put financial pressure on health care providers, it is important for the health care provider to be creative and innovative in marketing to consumers and other referral sources. However, what are common marketing practices in other industries may pose significant risks in the health care industry. Therefore, to avoid governmental scrutiny, it is crucial that all marketing programs and business arrangements be established and implemented properly.

1 42 U.S.C. § 1320a-7b.
3 For example, if the real purpose of a hospital advertisement is to reward the physicians or drive services to the physician’s practice, and not to show off the hospital’s services, then the physician should bear a proportional percentage of the cost of the advertising.

Author: Thomas (T.J.) Ferrante - Carlton Fields Jorden Burt
Health Care Law Section CLE

The HCBA Health Care Law Section hosted a CLE luncheon featuring guest speaker Jenna Simpson-Oliver on May 6. Simpson-Oliver, with the law firm Allen Denn, discussed “Keeping the Money: The OIG’s 2014 Work Plan on Auditing Meaningful Use Requirements and Payments to Physicians and Hospitals.”

The Health Care Law Section would like to thank the luncheon sponsor:

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Ask-a-Lawyer Library Series

Leslie Longa, Irene Rodriguez, and Miriam Velez-Valkenburg took time out of their busy schedules on March 28 to participate in pro bono work as part of the HCBA’s Ask-A-Lawyer Library Series. The three attorneys met with members of the public at the West Tampa Branch Library to discuss family law issues, workers’ compensation, and consumer problems. If you would like to participate in a community library consultation, please call Lupe Vazquez-Mitcham at (813) 221-7780.
THE AMERICAN INVENTS ACT WAS RECENTLY ENACTED, AND IT CREATED ANOTHER WAY TO CHALLENGE A PATENT’S VALIDITY THROUGH ITS TRANSITIONAL PROGRAM FOR COVERED BUSINESS METHOD PATENTS, WHICH ALLOS FOR COVERED BUSINESS METHOD REVIEW. THE CBM REVIEW, IMPLEMENTED IN SEPTEMBER 2012, IS AN ADMINISTRATIVE TRIAL BEFORE THE PATENT TRIAL AND APPEAL BOARD AND IS SCHEDULED TO SUNSET IN SEPTEMBER 2020.

UNLIKE AN EX PARTE REEXAMINATION, A CBM REVIEW IS AN ADVERSARIAL PROCEEDING THAT ALLOWS THE ALLEGED INFRINGER TO PARTICIPATE. INSTEAD OF RESTRICTING CHALLENGES TO PRIOR-ART, THE PATENT CAN BE CHALLENGED ON ANY GROUND THAT IS A CONDITION FOR PATENTABILITY. A PETITION FOR CBM REVIEW CAN BE FILED AT ANY TIME EXCEPT DURING THE TIME THAT A POST-GRANT REVIEW PETITION CAN BE FILED, AND THE BOARD MUST REACH A DECISION WITHIN A YEAR AFTER THE PROCEEDINGS ARE INSTITUTED. THE CBM REVIEW IS ONLY AVAILABLE TO THOSE WHO HAVE BEEN SUED OR CHARGED WITH INFRINGEMENT, AND IT IS RESTRICTED TO COVERED BUSINESS METHOD PATENTS.

IN CONSIDERING WHETHER TO EVALUATE A PETITION FOR CBM REVIEW, THE BOARD DETERMINES WHETHER IT IS “MORE LIKELY THAN NOT” THAT AT LEAST ONE CHALLENGED CLAIM IS UNPATENTABLE. IF THE BOARD COMES TO A FINAL DECISION, THE PETITIONER IS ESTOPPED FROM CHALLENGING THE VALIDITY OF THE PATENT ON THE GROUNDS RAISED IN THE CBM REVIEW IN A SUBSEQUENT DISTRICT COURT ACTION AND IS ESTOPPED FROM RAISING ANY GROUNDS IN A SUBSEQUENT USPTO PROCEEDING THAT “REASONABLY COULD HAVE BEEN RAISED.”

THE LIMITATION THAT THE PATENT BE A COVERED BUSINESS METHOD PATENT IS STILL NOT CLEAR. A COVERED BUSINESS METHOD PATENT IS “A PATENT THAT CLAIMS A METHOD OR CORRESPONDING APPARATUS FOR PERFORMING DATA PROCESSING OR OTHER OPERATIONS USED IN THE PRACTICE, ADMINISTRATION, OR MANAGEMENT OF A FINANCIAL PRODUCT OR SERVICE, EXCEPT THAT THE TERM DOES NOT INCLUDE PATENTS FOR TECHNOLOGICAL INVENTIONS.” 37 C.F.R. § 42.301(a).

Since implementation of the CBM Review, the board has applied a broader interpretation of financial product and a narrow interpretation of the technological invention exception. Specifically, in a decision from October 2013, the board concluded that the act does not require a “nexus” to a “financial business” and that “financial product or service” is to be interpreted broadly. Consequently, it is not limited to the products or services of the “financial services industry.” In fact, the board held that “a patent need not be used by a financial services company or involve a traditional financial services business to qualify as a covered business method patent.” As a result, the scope of the CBM Review could subject a large number of patents that are tangentially related to financial services to further validity challenges.

Author: Kristin Shusko – GrayRobinson, P.A.
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Family law practitioners are exposed to a wide array of issues, including divorce, timesharing, child support, and various others. There are many emotions that are involved in family law cases, and it is very important that practitioners are able to understand and manage their clients. Divorce is one of the most stressful life events an individual can experience, and it involves a process similar to those grieving the loss of a loved one.

The Swiss American psychiatrist Elisabeth Kubler-Ross\(^1\) identified five stages an individual goes through when grieving loss. She based her experiences with terminally ill people and later expanded her theory to apply to people experiencing any form of personal loss. These stages can be experienced in any order, and not all individuals will experience each stage. The end result, however, is the same for most people. It involves healing, which ultimately leads to growth and renewal.

**Denial** is a common first response that individuals experience. In family law cases, more often than not, one spouse is more ready for a divorce than the other, leaving the other spouse in a state of disbelief and denial. Your client may be filled with feelings of shock, confusion, and low self-esteem.

**Anger** is a common response, and many of your clients will experience some level of anger during their divorce. Your client may be angry their marriage failed, that their spouse is making things difficult, that they will have to share their time with their children, that their spouse has moved on to another relationship, etc. Your client may be filled with feelings of blame, hurt, and bitterness.

**Bargaining** is the stage in which clients will try to undo the damage that has been done. This stage is generally the result of the person feeling that he or she has reached the emotional breaking point and just wants to get life back to normal. Some clients in this stage may attempt to reconcile and call off the divorce, while others will progress to the next stage.

**Depression** is expected for clients involved in a divorce or child custody dispute. They may find themselves unable to sleep or work. Clients may have feelings of loss, loneliness, emptiness, and isolation during this stage.

**Acceptance** is considered the light at the end of the tunnel. In this stage, clients accept what has happened, and they are ready to co-parent. There may be times of sadness or anger, but your client is ready to move on and plan for the future.

It is important as family law practitioners to help your clients recognize that grieving is a natural reaction to divorce. Setting clear expectations with your clients will help them move through the divorce process efficiently and in a healthy manner. If you find that your client appears to be “stuck” in a stage and not progressing, referral to a mental health practitioner may be necessary.


Author: Jennifer L. Mockler - Mockler Psychology, P.A.
April CLE Luncheon

Chair Courtney Bowes welcomed sponsor John Boyer of Financial Divorce Consulting and guest speaker Briggs Stahl of Stahl Consulting, who discussed a summary of Daubert challenges at the luncheon on April 3. The CLE focused on the five stages of grief and featured guest speakers Jennifer L. Mockler and Ellie Probasco.

Thanks to the luncheon and CLE sponsor:

Judicial Roundtable

The HCBA’s Marital & Family Law Section featured a judicial roundtable discussion at its quarterly luncheon on May 1. The event was an opportunity for the judges to share words of wisdom with the attorneys who often appear before them in court.

The Marital & Family Law Section would like to thank the luncheon sponsor:
Abraham Lincoln wrote, “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man.” The Preamble to the Florida Rules of Professional Conduct, consistent with Lincoln’s words, counsels the lawyer as a negotiator to seek an advantageous result for the client consistent with requirements of honest dealing with others. The Florida Rules of Professional Conduct also give direction on how the application of legal ethics can lead to success at mediation.

Competence
Be prepared. Lawyers often arrive at the mediation unprepared, not ready to competently and diligently represent their clients. The lawyer’s first duty under Rule 4-1.1 is competence. That is, the lawyer must have the knowledge, skill, thoroughness, and preparation reasonably necessary to provide competent representation. The successful lawyer prepares for mediation as if preparing for trial. Competent handling of a particular matter at mediation includes inquiry into and analysis of the factual and legal elements of the problem. The successful lawyer must unearth all of the facts that can be admitted into evidence, prepare a detailed analysis of the case, and create a persuasive theory on how to reach a settlement agreement.

Communication
Communicate. Properly communicating with clients increases the chances of success at mediation. Under Rule 4-1.4, a lawyer must promptly inform the client of any decision or circumstance with respect to which the client’s informed consent is required, and the lawyer must reasonably consult with the client about the means of negotiating a settlement. A lawyer must provide a client with a professional assessment of the advantages and disadvantages of a proposed settlement so the client can make a fully informed decision. When meeting with the client, the lawyer discusses the negotiation strategy, starting points, concessions, and aims for the settlement zone. This enables the lawyer to act with commitment to the interests of the client at mediation. Remember, the decision on whether to pursue settlement discussions belongs to the client who needs the information in order to make that decision. In fact, in accordance with Rule 4-1.2, a lawyer must abide by the client’s decision whether to settle a matter.

Truthfulness in Statements to Others
Tell the truth. Under Rule 4-4.1, a lawyer must not knowingly make a false statement of material fact or law. Nevertheless, an attorney is under no obligation to tell what the client will accept to settle, either to the opposing party or to the mediator. The comment explains that under the generally accepted conventions in negotiation, certain types of statements such as a party’s intentions as to an acceptable settlement are not taken as statements of material fact.

Applying legal ethical principles can lead to successful compromises at mediation if we are thoroughly prepared, properly communicate, and are committed to telling the truth.

Author:
Thomas Newcomb Hyde - HCBA Mediation and Arbitration Law Section’s Representative to the Thirteenth Judicial Circuit Professionalism Committee

1 Florida Rules of Professional Conduct, Rule 4-1.1.
2 Ibid. Rule 4-1.1 Comment.
3 Ibid. Rule 4-1.4.
4 Ibid. Rule 4-1.2.
5 Ibid. Rule 4-4.1.
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The Thirteenth Judicial Circuit is working diligently to ensure that the practice of law is accomplished with professionalism and civility. On November 1, Administrative Order S-2013-071 established a Local Professionalism Panel (LPP). The LPP is a wonderful method to address an attorney’s unprofessional conduct in a confidential and non-punitive manner before the attorney’s conduct rises to the level that may necessitate an investigation by The Florida Bar.

Any member of the public may file a complaint with the LPP regarding an attorney (respondent) who has engaged in unprofessional behavior. Subsequently, the LPP may simply appoint one of its members to informally contact the respondent in order to resolve the unprofessional behavior. For more egregious behaviors, the LPP will meet with the respondent in order to provide counsel and advise a better course of conduct or provide information and training resources to the respondent. Gently informing lawyers that incivility is actually not an acceptable practice can be incredibly effective, as The Florida Bar’s “Hawkins Commission of Review of the Discipline System” reported that 90 percent of lawyers who had been referred to practicing with professionalism programs had no subsequent disciplinary history.

William Kalish, of Akerman LLP, is the chair, and Edward Waller, of Buchanan Ingersoll & Rooney/Fowler White Boggs, is the training coordinator for the LPP subcommittee. Each LPP will consist of one judge and two attorneys who have been thoroughly trained to conduct LPP’s in a consistent and effective manner. Please contact Kalish at William.Kalish@akerman.com to begin an LPP referral or learn more about the program.

Importantly, the LPP will not conduct a disciplinary hearing. Rather, the real benefit of the LPP is its intent to conduct an interactive non-punitive discussion between the parties. This can provide an attorney with an opportunity to receive mentoring from experienced attorneys who wish to provide guidance and information as to a better method of presenting oneself in the courtroom and in the public arena. Lawyers who would like to utilize the benefits of the LPP should view the panel as a career development opportunity for the respondent, where LPP members can provide suggestions to help educate and mentor the respondent that there exist better methods to handle stressful situations.

Professionalism and civility issues are becoming more important to the legal community, as Supreme Court Justice R. Fred Lewis recently spoke about professionalism at the Lawton Chiles Middle Academy, and it was apparent how important he felt that unprofessional behavior is damaging the practice of law and the reputation of lawyers in society. Justice Lewis made it clear that when he began practicing law, it was considered a gallant profession where practitioners balanced advocacy with polite rhetoric. It is the hope of many lawyers that there can be a brighter future where practicing with professionalism is of paramount importance.

Author: Caroline Johnson Levine - Office of the Attorney General
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At the end of a protracted litigation, whether by trial or late-stage settlement, have you ever thought: There has got to be a better way to resolve disputes? Have your clients? If you answered yes to either of these questions, then it is time for you to consider adding collaborative law as a dispute resolution service you offer your clients.

Collaborative law is an alternative dispute resolution process in which the parties, their lawyers, and the collaborative facilitator all agree that should the dispute not settle, the lawyers and collaborative facilitator will not represent the parties in any subsequent court proceeding or lawsuit. Throughout the collaborative law process, the parties agree to exchange information, may bring in trained third parties (expert witnesses, mediators, etc.) to help the parties evaluate the value of the case, and ultimately settle the matter. Although collaborative law has its roots in family law, it is expanding to civil matters.

Collaborative law is well-suited for probate litigation. Probate disputes often arise between family members who have an interest in preserving the familial relationship. The Ohio State Bar Association noted, “Few probate matters are completely decided in court, and settlements are often reached only when the parties’ emotional and financial resources are exhausted. Collaborative law settlements tend to be more satisfactory to the parties, and thus more stable and enduring, and the process generally is less stressful and less expensive.”

Sherrie R. Abney and Melanie Atha are two attorneys using their collaborative law training in probate cases.

Sherrie R. Abney, author of “Civil Collaborative Law: The Road Less Traveled” and “Avoiding Litigation,” is an attorney in Texas and one of the founding members of the Global Collaborative Law Council. Abney attributes the collaborative process as creating an environment of empathy, which then paved the way toward win-win settlements. Although there are different collaborative models, Abney uses the model (or a modified model) that best fits the needs of the case at hand. Melanie Atha is an attorney with the firm of Cabaniss, Johnston, Gardner, Dumas & O’Neal LLP in Alabama. In her probate litigation, Atha attributes her ability to help the parties move through their emotional baggage toward resolution on her collaborative law training.

In cases where the parties have a goal in preserving their relationship going forward, Atha advises that collaborative law gives the attorneys a chance at achieving this goal.

Although Abney, Atha, and all those practicing collaborative law are innovators and pioneers, they are not alone. The Uniform Collaborative Law Act has been enacted in seven states plus the District of Columbia and has been introduced in eight other states, including Florida. The American Bar Association and our local Hillsborough County Bar Association have Collaborative Law Sections. The Global Collaborative Law Council and the International Academy of Collaborative Professionals (IACP) are professional organizations with worldwide reach. For instance, the IACP has 5,000 members internationally.

Continued on page 59
IS COLLABORATIVE LAW RIGHT FOR YOUR PROBATE PRACTICE?
Real Property, Probate & Trust Law Section

Continued from page 58

For more information on collaborative law, consider joining the HCBA Collaborative Law Section.

1 See the OSBA 7/29/2012 issue of the “Law You Can Use” prepared by Columbus attorney Tom H. Nagel, available at: https://www.ohiobar.org/ForPublic/Resources/LawYouCanUse/Pages/ Collaborative-Process-Used-To-Settle-Probate-Disputes.aspx.

2 I would like to express my gratitude with Ms. Abney and Ms. Atha. They were very generous with their time and insights on collaborative law.


Author: Kerry Raleigh Tipton - Kerry Raleigh Tipton, P.A.
If the ambitious plans of the Solo/Small Firms Section have been accomplished, by now you should be sitting back in your chaise lounge chair, with the only care in your world being trying to remember whether you ordered a Mai-Tai or Pina Colada. We hope.

This year the section carried out its ambitious plan to help its members become more efficient through using the vast resource of non-lawyers at their fingertips. The theory is that we, solo and small firm lawyers, need to use our external resources more than any other stripe of lawyer, in order to maintain a competitive edge against larger, more sophisticated organizations. And we figured that non-lawyers, in their many versions, would be a great resource to start with.

Over the course of our four lunch meetings, we heard from an auditor, a certified fraud examiner, a panel of three valuation experts (each with their own specialty), and a panel of three business coaches. We almost made it through the year with only non-lawyer speakers, but in full disclosure, this last panel included two lawyers. But one of them is a full-time business consultant, and the other wore his coaching hat for the afternoon.

Let us recognize and give thanks to this year’s brave speakers. First, Patrick Dougherty, an MBA, CPA, and auditor with The Florida Bar, gave us a terrific presentation on law firm accounting. We co-produced this program with the Real Property, Probate and Trust Law and Marital & Family Law Sections. (Thank you for all of your cooperation and support!)

Secondly, Laura Krueger-Brock, CPA, CFE, and shareholder with CBIZ Mayor Hoffman Mann, spoke to our group about the scope of services that fraud examiners get into. This interesting discussion included several examples of family and business law cases where she was engaged to assist attorneys in sleuthing out the facts.

Our panel of valuation experts gave us a valuable hour of their services, each sharing with us a slice of how they approach the tricky question of making the valuations that so often we rely on in our litigation and transactions. Matthew Griffith, MAI and principal with Whitewater Realty Advisors, gave us his perspective on the real estate market and his business of valuing commercial real estate. Joni Herndon, a state-certified residential real estate appraiser, shared her thoughts on the residential market. And Tammy Blackburn gave us a primer on how she values personal property (inventory, equipment, etc.).

And our last lunch, themed on attorney entrepreneurship, was led by Sherida Ferguson, a certified financial planner and owner of SL Ferguson Wealth Management Services, who discussed financing basics. Bill Yanger, attorney and self-taught online marketer, shared his secrets on law firm marketing. With persuasion, Yanger explained the importance of having an online presence and the law firm’s webpage. He cited how his own efforts have led him to develop a practice that includes many clients outside of Florida and the United States who have matters pending in our local courts. Michael Marget, attorney turned business consultant and owner of 4 Law Firm Services, explained the benefits of outsourcing resource-draining tasks such as managing your own accounting and IT needs.

In all, it was a productive and educational year. We hope this effort has helped you learn something that benefited you in your practice and perhaps achieved that goal of giving you the edge you need. If so, then even if you are not reading this from your lounge chair, with only trifles for concerns, you must be on your way.

Author: James A. Schmidt - James A. Schmidt, P.A.
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The Florida Supreme Court recently issued its eagerly anticipated decision on caps on noneconomic damages in medical malpractice cases. In *Estate of McCall v. U.S.*, 2014 WL 959180, — So. 3d — (Fla. March 13, 2014), the court held the statutory cap on wrongful death noneconomic damages under Fla. Stat. § 766.118 violates the Florida Constitution’s Equal Protection Clause. Let the argument begin: Is *McCall* limited to wrongful death, or has it laid the groundwork for unconstitutionality of all § 766.118 caps?

This decision will invite much dissent as to surviving sections of § 766.118 because of the opinions’ piecemeal nature. The decision was announced in an opinion written by Justice Fred Lewis in which Justice Jorge Labarga concurred. The opinion focused on the part of § 766.118 that limits all noneconomic damages in wrongful death and catastrophic injury cases against doctors to $1 million, no matter how many claimants. Justice Lewis ruled the law’s disparate treatment of multiple survivors/claimants, like a large family, versus a single survivor/claimant violates fundamental notions of equal protection. He also reasoned the Legislature failed to establish a legitimate relationship between caps and the goal of reducing medical malpractice insurance premiums.

Justice Barbara Pariente refused to endorse Justice Lewis’ “independent evaluation and reweighing” of the Legislature’s factual findings as to a medical malpractice crisis. She instead wrote a concurring opinion joined by Justices Peggy Quince and James Perry. The concurring opinion agreed that capping noneconomic damages in wrongful death cases lacks a rational relationship to the goal of reducing medical malpractice premiums. Might that same lack of rational relationship apply to personal injury medical malpractice cases?

Justice Lewis noted the analyses for personal injury damages and wrongful death damages are different. He limited his analysis to wrongful death, rewording the certified question. He then declined to answer the other certified questions, such as whether the caps on damages violate the Florida Constitution’s Access to Courts and Right to Jury Trial protections. Answering those questions could have put to rest whether caps on damages in personal injury medical malpractice cases are also unconstitutional. The court left those questions for another day to avoid the charge of issuing an advisory opinion.

The plurality and concurring opinions give plenty of hints as to whether the analysis applies to all § 766.118 caps. The most striking example arises from the opinions’ illustration of the unfair and illogical impact resulting when caps are applied to cases with multiple “claimants/survivors” as compared with cases involving only one claimant. The same analysis used to strike down caps in wrongful death cases would apply to catastrophic cases. Imagine a catastrophic injury to a minor child in a medical malpractice case against a doctor that renders that minor child quadriplegic. The catastrophically injured child would have to share the limit of $1 million with her parent claimants. Compare that to a case where a single adult is similarly rendered quadriplegic. She would be entitled to the full $1 million. Why is her injury worth more than the catastrophically injured child? This reflects the same unfair and illogical incongruity among claimants that led five justices to hold the cap unconstitutional in wrongful death cases. The cap in such a catastrophic injury case seems ripe for the challenge and could lead to § 766.118 being struck down in its entirety.

**Author:**
Charles T. Moore - Morgan & Morgan
In the recent decision of the First District Court of Appeals in "Southeast Milk v. Fisher," Case No. 1D13-4411 (1st DCA, April 14, 2014), the court ruled that an employee’s misconduct may be the basis of denial of temporary partial benefits. The facts of the case are particularly interesting and raise other legal questions for workers’ compensation and labor law practitioners, particularly considering the recent Second District ruling in "Hornfischer v. Manatee County," Case No. 2D13-374 (2nd DCA, February 12, 2014).

In "Southeast Milk," the claimant was a truck driver injured on November 9, 2012. He was restricted to light-duty work, and the employer offered him regular hours and regular pay to come into the office to watch safety videos. He came to work on two days and then did not, and he was fired by the employer for unauthorized absences, which the employer asserted constituted employee misconduct. The JCC awarded temporary partial and stated in the order that the award would be the same whether or not there had been employee misconduct. The First District reversed, stating that if misconduct was found, the statute precludes an award of temporary partial benefits under F.S. 440.15(4)(e)(2012).

Misconduct is defined in section 440.02(18) of the act as willful and wanton or intentional and substantial disregard of an employer’s interests or of the employee’s duties. The employer argued that an unexcused absence is in disregard of the employer’s interest and employee’s duties. The employer in "Southeast Milk" didn’t bother to find productive, light-duty work for the injured worker to do, the employer told him to sit in a room and watch safety videos, which the employee will likely say was a humiliating waste of time. The employer advanced no productive need for this artificial job, and it is clear that this was an effort very soon after the injury to terminate indemnity to an unrepresented injured worker. Does the employer have a valid interest in having an injured employee sit around and watch safety videos day after day? If not, an artificial job cannot be used to terminate indemnity benefits.

The artificial job offer, and the termination that follows, occur because the claimant made a valid workers’ compensation claim, which can be the basis of a wrongful termination claim.

In the background is the law against coercing and firing an employee for making a valid workers’ compensation claim under F.S. 440.205. Employers who offer these types of artificial, sheltered jobs typically only offer these jobs to employees injured on the job. The artificial job offer, and the termination that follows, occur because the claimant made a valid workers’ compensation claim, which can be the basis of a wrongful termination claim. "Hornfischer v. Manatee County," Case No. 2D13-374 (2nd DCA, February 12, 2014). A claim for wrongful termination can be made for compensatory and punitive damages in circuit court, which may in some cases be the best method and forum for an injured worker to be fairly compensated for the loss of earnings that follows a job injury.

Workers’ compensation and labor lawyers will have to consider both methods of recovery for their clients in these situations.

Author: Anthony V. Cortese - Anthony V. Cortese, Attorney at Law
Stephen J. Bagge has joined Carlton Fields Jorden Burt as an associate in Tampa. He practices in the firm’s National Trial Practice, Business Litigation Section.

Kalei McElroy Blair from Gilbert Garcia Group has joined the team at Wetherington Hamilton P.A. and brings more than seven years of experience in the fields of real estate litigation, landlord tenant law, collections, estate planning and probate, commercial litigation, construction law, and civil trial practice.

Chad E. Burgess and Andrew E. Peluso have joined Hill Ward Henderson as associates in the firm’s Litigation Group. Burgess’ practice includes the defense of medical malpractice, hospital liability, products liability, and premises liability claims, along with a diverse array of personal injury cases. Peluso’s practice focuses primarily on general commercial litigation.

Blair H. Chan III of the Tampa firm Givens Givens Sparks has been selected by other attorneys and judges to the highest AV (Preeminent 5.0 out of 5) rating given by Martindale Hubbell, the oldest attorney rating firm in the country. Chan concentrates on divorce law.

Douglas Christy has become a partner in the firm of Wetherington Hamilton P.A. Christy has been a part of the firm for more than five years.

Wetherington Hamilton is a boutique Tampa firm specializing in homeowners’ association and condo law, commercial litigation, real estate, estate planning, and construction litigation.

Nathaniel L. Doliner, a shareholder at Carlton Fields Jorden Burt’s Tampa office, received the Tampa Bay Cardozo Leadership Award from the Cardozo Society of Tampa Bay on May 1. Doliner received the award in recognition for his outstanding commitment to the legal community and to the Tampa Jewish Federation. The Cardozo Society of the Tampa Jewish Federation is an honorary society for Jewish attorneys in the Tampa Bay area that celebrates the legal profession’s commitment to the principles of the federation.

Amy L. Drushal of Trenam Kemker has been elected to the Council for the American Bar Association’s (ABA) Law Practice Division. This appointment follows Drushal’s leadership and active involvement in the organization for the past nine years. The Law Practice Division supplies members of the ABA with information and resources related to the business of law. Drushal focuses her practice on commercial litigation matters with an emphasis on bankruptcy, creditors’ rights and insolvency, appellate, and employment issues.

Michael L. Forte of the Tampa office of Rumberger, Kirk & Caldwell, P.A., has been selected to serve on the editorial board of The Florida Bar Journal.

Jeremy M. Halpern, an associate in the Tampa office of Shumaker, Loop & Kendrick, LLP, has been elected to the Board of Consultants of The Florida Orchestra. Halpern’s practice with the Financial Institutions Practice Group focuses on representing financial institutions and other lenders in connection with construction loans, revolving lines of credit, and other credit arrangements secured by real estate, as well as representing national and regional clients in a broad range of sophisticated financing transactions.

Jerry M. Gewirtz, chief assistant city attorney for the city of Tampa, has been appointed by the Supreme Court of Florida to the Supreme Court Committee on Standard Jury Instructions-Contract and Business Cases.

Ted Hamilton of Wetherington Hamilton P.A. was selected as a keynote speaker at the National Association of Credit Managers Spring Meeting on the topic of financial statement analysis.

David T. Knight, a shareholder with Hill Ward Henderson’s commercial litigation group, has been elected as the Florida state chair for the American College of Trial Lawyers. The American

Continued on page 68
College of Trial Lawyers is composed of the best of the trial bar from the United States and Canada and is widely considered to be the premier professional trial organization in America. Knight was also recently sworn-in as the chair of Bay Area Legal Services. Bay Area Legal Services is a nonprofit, public interest law firm that provides civil legal assistance to low-income residents in the Tampa Bay region. Knight’s areas of practice include litigation in all federal and state courts, arbitrations, and administrative proceedings.

Eric Koenig and Stephanie Crane Lieb of Trenam Kemker have received the rating of AV Preeminent from Martindale Hubbell. Koenig is a shareholder and works in the firm’s commercial litigation practice group. Lieb is a shareholder in the bankruptcy, creditors’ rights, and insolvency practice group. Both are based in the Tampa office.

Kevin McCoy, a Tampa associate at Carlton Fields Jorden Burt, has been reappointed to a three-year term as a board of director of Bay Area Legal Services. Bay Area Legal Services’ board members serve as ambassadors, educating the community and building relationships that support the organization’s mission.

Harold Oehler, general counsel of Lazydays, was selected by the Tampa Bay Business Journal as the Overall Top Corporate Counsel of the Year for the Tampa Bay area. The inaugural Top Corporate Counsel Awards program recognizes in-house attorneys in seven counties throughout the Tampa Bay area who are leaders in their company, organization, or industry; exhibit high ethical standards; and possess exemplary professional skills.

Jennifer G. Roeper has joined Shumaker, Loop & Kendrick, LLP’s Tampa office as a partner and co-chair of the newly formed immigration practice group. Roeper is certified by the Florida Bar in Immigration and Nationality Law. Roeper handles all aspects of immigration law, including temporary visa processing, applications for permanent residence, and naturalization.

Ethen R. Shapiro, a shareholder in Hill Ward Henderson’s litigation group, was recently named the program chair for the 2014-2015 Defense Research Institute’s (DRI) Medical Liability and Health Care Annual Meeting and Seminar in San Francisco in March 2015. The seminar offers two days of targeted instruction on emerging topics in the medical malpractice and health care law field.

Shannon Sheppard has been promoted to equity shareholder at Smolker, Bartlett, Schlosser, Loeb & Hinds, P.A., a Tampa law firm concentrating in real estate and property rights representation. Since 2004, Sheppard has concentrated her practice in the area of commercial real estate transactions.

Kelly A. Thompson has joined the Tampa office of law firm of Shumaker, Loop & Kendrick, LLP, as an associate in the health law department.

Wm. Cary Wright, a shareholder at Carlton Fields Jorden Burt, has been honored by the Construction Law Institute of the Real Property, Probate and Trust Law (RPPTL) Section of The Florida Bar for his longtime commitment to professionalism, ethics, and dedication to mentoring and volunteerism in the field of construction law. Wright received the Lifetime Achievement Award from the Construction Law Institute at its seventh annual Construction Law Institute Conference held March 20-22 at Rosen Shingle Creek Resort in Orlando. Wright is the second lawyer at the firm to receive this award. Tampa shareholder George Meyer received the Lifetime Achievement Award in 2012.

Leticia “Letty” Valdes has joined Lorenzo and Lorenzo, P.A., as a trial attorney in its Tampa office. Valdes joins the firm’s torts practice with a focus on personal injury.

Gregory C. Yadley, a partner in the Tampa office of Shumaker, Loop & Kendrick, LLP, made a presentation titled “Offering Securities Publicly in Private Placements” on April 10 at the American Bar Association’s Business Law Section Spring Meeting in Los Angeles. He is chairman of the ABA’s Middle Market and Small Business Committee and chaired a session of that committee in Los Angeles. Yadley currently serves as one of 21 members of the SEC Advisory Committee on Small and Emerging Businesses.
Freeman Mathis & Gary, LLP, is pleased to announce that it opened a new office in Tampa/St. Petersburg on April 1. The Tampa office will serve clients throughout Central Florida. FMG will now operate a total of eight offices across the country: Atlanta; Forest Park, Ga.; San Francisco; Los Angeles; Orange County, Calif.; Philadelphia; Moorestown, N.J.; and Tampa. Jeremy Rogers, a former attorney at Spector Gadon & Rosen, will be joining the firm as resident partner for the Florida office. His practice will concentrate on management and professional liability, including employment, errors and omissions, directors and officers, legal malpractice, miscellaneous professional liability, and architects and engineers.

Trenam Kemker was recognized by the Daily Business Review with the 2014 Litigation Department of the Year award for General Litigation. Trenam Kemker was named to the elite short list of Florida firms for its high volume of litigation victories over the previous year. The firm was honored at an awards ceremony March 26 in Tampa.

Trenam Kemker was recognized by the Daily Business Review with the 2014 Litigation Department of the Year award for General Litigation. Trenam Kemker was named to the elite short list of Florida firms for its high volume of litigation victories over the previous year. The firm was honored at an awards ceremony March 26 in Tampa.

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CONTINUE FROM PAGE 68

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For the month of: February 2014  
Judge: Honorable Mark Wolfe  
Parties: Carolyn Craig vs. Maria Del Carmen Morana  
Attorneys: For plaintiff: Ryan Cappy and Keith Ligori; for defendant: Emory Wood  
Nature of case: Auto accident resulting in shoulder surgery.  
Plaintiff’s motion for attorney fees, cost and interest pending.  
Verdict: $475,070.10

For the month of: March 2014  
Judge: Honorable J. Dale Durrance  
Parties: Eleanor Comkowycz by and through her son James Comkowycz vs. Life Care Centers of America, Inc.  
Attorneys: For plaintiff: Thomas S. Harman and Steve D. Parker; for defendant: Bowen Brown and Donald Fann  
Nature of case: Nursing home negligence; 83-year-old fell and fractured hip.  
Verdict: $1,000,000 for the plaintiff. Plaintiff filed a proposal for settlement for $500,000 one year before trial. Defendant offered $500,000 on day of trial and $600,000 on day two of trial.  
For the months of: April and July 2013  
Judge: Honorable Robert A. Foster Jr.  
Parties: AAP Contracting, Inc. vs. Toner Holdings, LLC  
Attorneys: For plaintiff: Ken Ward; for defendant: Robert Vigh, Marvin Solomon, and Robert Solomon  
Nature of case: Breach of contract, failure to pay for construction service  
Verdict: $89,864 awarded to plaintiff in attorney’s fees. Motion for appellate fees pending for the plaintiff in the amount sought of $35,229.72. Nothing awarded to defendant on counter claim.

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