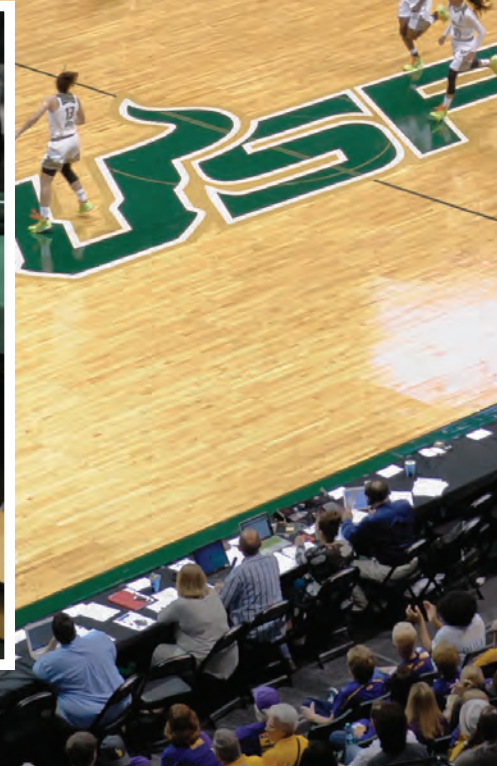



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TAMPA, FLORIDA | JANUARY - FEBRUARY 2016 | VOL. 26, NO. 3





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It's That Time of Year Again

This year, I'm going to take advantage of at least one of the many pro bono or volunteer opportunities highlighted in the *Lawyer*.

By the time you're reading this, I'm ordinarily well on my way to breaking my New Year's resolutions. Every year, I make out the same list of (mostly meaningless) resolutions — I'm going to go the gym, eat healthier, read more, etc. — only to give up on most of them by mid-January. This year, my wife came up with an idea that was novel to me but probably shouldn't be: Perhaps I'd actually stick to my resolutions if they were about improving others, not myself. So I followed my wife's advice and came up with a list of New Year's resolutions that are focused on others. I thought I'd share two:

Be a Mentor. On page 58 of this issue, Judge Perrone wrote a great article about Don Stichter, who was recently presented with the second annual professionalism award by the Thirteenth Judicial Circuit's Professionalism Committee. Among the many reasons Mr. Stichter deserved the award was the fact that he is universally praised for his formal and informal mentoring of young lawyers throughout the local Bar.

As a law clerk, I am fortunate to have the opportunity to work with a number of extremely talented interns and young lawyers. One of the biggest complaints I hear from them is the lack of mentoring available for young lawyers. Admittedly, I don't always make time to mentor younger lawyers. It's easy to get so caught up with my work that I forget to give an intern feedback on an assignment, reach out to a former intern or colleague to see how they're

doing in practice, offer some encouragement and advice to a law student looking for a job, or just listen. But if a legend like Don Stichter can find the time to do it, then I can too. So this year, I'm going to make an effort to be a better mentor to my interns and other young lawyers.

Do Pro Bono or Volunteer. I can hardly open an issue of the *Lawyer* without coming across a worthy pro bono project or request for volunteers. This issue is no different. Matt Luka has an excellent article on

page 23 seeking pro bono volunteers for the Clemency Project 2014. And in most issues, the Community Services Committee highlights a way for HCBA members to give back to the community. But despite the glaring need for pro bono assistance and a wealth of opportunities, the sad truth is I have made little effort to volunteer. Of course, I've justified my lack of pro bono work by convincing myself it's not something law clerks

can do. In actuality, the Code of Conduct for Judicial Employees does permit law clerks to do certain types of pro bono work. So this year, I'm going to take advantage of at least one of the many pro bono or volunteer opportunities highlighted in the *Lawyer*.

One of the most common tips for keeping New Year's resolutions is to share them with others. By sharing two of my resolutions with you, I hope it will force me to actually follow through with them. And perhaps it will give some ideas to others who are trying to come up with their own resolutions. Best wishes for the New Year!





The Path From Service to Leadership: Doing Small Things with Great Love

"We, the unwilling, led by the unknowing, are doing the impossible for the ungrateful. We have done so much, for so long, with so little, we are now qualified to do anything with nothing." — Mother Teresa

Mother Teresa of Calcutta started with nothing and impacted millions of people through service and leadership. How did she do it? We know that Mother Teresa's work started with one person — Mother Teresa refused to walk past a sick and dying person on a street in Calcutta, and in her own words, she helped just one person. With that start, Mother Teresa's loving service to the poor eventually grew to a worldwide community of support for the poor, the hungry, the sick, and the homeless. Mother Teresa's path to being one of the most respected and effective world leaders was grounded in service.

I met Mother Teresa twice as a teenager (first in 1985 and again 1988), and both times Mother Teresa impacted me powerfully with her example, words, and smile. Mother Teresa spoke about the power and gift of a smile — if you

can give nothing else to another person, you can always give them a smile. I think about Mother Teresa's powerful words almost every day. Mother Teresa's inspirational teachings can be applied in so many areas of our lives:

In this life we cannot do great things. We can only do small things with great love.

If you can't feed a hundred people, then feed just one.

Do not wait for leaders; do it alone, person to person.

— Mother Teresa

Some of the greatest things about our legal community are the acts of service that our colleagues perform, often with little recognition or credit. I want to recognize four of our colleagues for their service and leadership in three very important areas.

Sacha Dyson, of Thompson, Sizemore, Gonzalez & Hearing, P.A., and Lara LaVoie, of LaVoie &



Continued on page 5



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Continued from page 4

Kaizer, P.A., are currently the co-chairs of the HCBA Community Services Committee. This year, Sacha suggested that in addition to everything else the CSC does, the committee could adopt and lead the HCBA's efforts to present The Florida Bar Benchmarks programs to the greater Tampa community. In recognition of the important role that attorneys play in adult civics education, The Florida Bar created Benchmarks: Raising the Bar on Civics Education, which provides presentations and activities that attorneys can use to teach adult civic and community groups about the government and the courts. Sacha has coordinated our efforts to train lawyers and to present topics at local libraries and in a series of presentations at USF! Meanwhile, Lara LaVoie and other committee leaders have been out in the community planning and implementing the CSC's ongoing programs: Adopt a Veteran, Elves for Elders, Dining with Dignity, and a Pirate Plunder Party at A Kid's Place. Thank you Sacha and Lara for your service and leadership!

In December at the Federal Bar Association (Tampa Chapter) Annual Meeting, Anne-Leigh Moe was sworn in as president of the chapter. I recall about eight years ago when Anne-Leigh first volunteered to serve on an FBA committee, and I have observed Anne-Leigh's service to the FBA in many ways throughout the years. One pro bono service opportunity Anne-Leigh took on during this time was a civil rights (Bivens Act) case for a federal prisoner. United States District Judge Virginia Covington presided over the case, and at the annual meeting, Judge Covington presented Anne-Leigh with the FBA Pro Bono Award for Service and Excellence. Anne-Leigh's path from service to leadership is a great example of the good things lawyers do for our community.

Kevin Johnson, also with Thompson, Sizemore, Gonzalez & Hearing, P.A., recently led The Florida Bar's efforts to create the Florida Bar Practice Resource Institute. The PRI was designed to tackle some key challenges that Florida lawyers face on issues related to technology and practice management. Kevin chaired The Florida Bar's Special Committee on Technology and Office Resources to build a website that would deliver helpful content in five key focus areas: technology, management, marketing, accounting/finance, and new practice. The PRI went live in January 2015 at www.floridabar.org/PRI. The site has the most up-to-date information, available in several different formats that the end user can select based on whether he or she prefers to read written answers, listen to a podcast, watch a video, or even interact with a practice-management advisor via live chat. It also features a searchable Knowledge Base that contains multiple tips for working with common office software programs. The Special Committee on Technology and Office Resources is now a standing committee of The Florida Bar, and Kevin is the chair. The committee continues to improve the PRI website as it receives feedback from Florida Bar members. This is a great effort by The Florida Bar to help Florida lawyers, particularly small firms and solo practitioners.

Sacha, Lara, Anne-Leigh, and Kevin did not act alone in the areas where they serve. They have committee members, board members, or consultants who helped them achieve great things. But they did raise their hands – they did volunteer to serve – and that set them on the path to leadership. I would argue that they each found their path to leadership not by waiting for others to lead but by doing small things with great love – similar to feeding just one person – by serving others.

HAVE AN EMPLOYMENT/EMPLOYEE BENEFITS CASE? NEED A MEDIATOR?



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Mr. Taldone is a certified circuit and county mediator and was an in-house employment lawyer for a Fortune Global 500 company. Admitted to practice law in Florida (1997), New York (1980), New Jersey (1983), and California (1985).

Mr. Taldone is not a Florida Board Certified Labor and Employment lawyer.



Resolve to Get Involved in YLD Activities This Year

**Now is the time to plan for the months ahead!
YLD leaders are already organizing several
great events for the second half of the Bar year.**

Happy New Year! A change in the calendar always lends itself to a moment of reflection, and as we begin the new year I can't help but think about — and more importantly appreciate — the hard work and dedication of my fellow YLD board members and the co-chairs on each of our committees. Here's who they are and what they'll be up to in 2016:

- Colleen O'Brien and Web Melton are the YLD board liaisons for the **Member Services Committee**, which is co-chaired by Ashley Hayes and Jake Hanson. In 2016, the committee will host Coffee at the Courthouse on January 26, a Paddle-Boarding Wellness Event in mid-to late April, and will support the 5k Pro Bono River Run and Pig Roast on March 5.
- Adam Fernandez and YLD Past President Anthony "Nino" Martino are the YLD board liaisons for the **Professionalism and Ethics Committee**, which is co-chaired by Lexie Larkin and Nathan Frazier. This committee will host the State Court Trial Seminar in June.
- Melissa Mora and Brett Metcalf are the YLD board liaisons for the **Youth Projects Committee**, which is co-chaired by Jamie Meola. The children at A Kids Place will benefit from the Holidays in the New Year event on February 20 at Tampa Grand Prix. The

committee will also host Steak-n-Sports Day to benefit underserved children.

- Tammy Briant and Melissa Mora are the YLD board liaisons for the **Long-Range Planning Committee**, which is chaired by Lexie Larkin. This committee is drafting proposed changes to the YLD bylaws and developing a membership survey
- Jason Whittemore and Jeff Wilcox are the YLD board liaisons for the **Events Committee**, which is co-chaired by Zachary Bayne and Andrew Smith. This committee will host Cornhole for a Cause benefiting Big Brothers Big Sisters in late March.
- Laura Tanner and Traci Koster are the YLD board liaisons for the **Pro Bono Committee**, which is co-chaired by Ella Shenhav and Katelyn Desrosiers. This committee will continue the monthly family forms clinic.
- Amy Nath, Alexandra

Haddad, and Maja Lacevic are the YLD board liaisons for the **Law-Related Education & Mock Trial Committee**, and Clint Morrell and Nicholas Williams co-chair the Simms Mock Trial, scheduled for early February. This committee will also host Law Week on May 23.

Now is also the time to plan for the months ahead! The YLD board already has two membership luncheons scheduled and many other opportunities for young lawyers to become involved. Keep your calendars open and find us on Facebook for event reminders!



Turn to pages 14-15 for photos from the YLD Golf Tournament.

YLD CELEBRATES PRO BONO

The Young Lawyers Division celebrated pro bono week early in 2015 with a special luncheon on October 22. The YLD hosted about a dozen agencies that need pro bono attorneys and tried to match them with volunteers. The event was a great success, and the YLD would like to thank The Bank of Tampa for sponsoring.





Jeff Vinik's Keynote Remarks Regarding Downtown Plans Highlight 19th Annual Bench Bar Conference

"We are on the map, we are resonating, and I couldn't be more bullish for the outlook for this area." — Lightning owner Jeff Vinik

Sharing his grand vision to make Tampa's Channelside area the "next great urban waterfront district," Jeff Vinik's keynote address to HCBA members was one of the highlights of the 19th Annual Bench Bar Conference and Judicial Reception held on October 27 at the Tampa Hilton Downtown.

When Vinik purchased the Tampa Bay Lightning in 2010, he promised to transform the franchise into a "world-class" organization, on and off the ice, and to make a significant positive impact in the Tampa Bay community. Now, just five years later, I think it's unanimous: Mission accomplished.

On the ice last season, the Lightning battled to get into the NHL playoffs and eventually won the Eastern Conference Championship, beating the New York Rangers in seven hard-fought games. Then they played the Chicago Blackhawks in the Stanley Cup Finals, losing the series in six games.

In the community, the Lightning Foundation has donated more than \$6 million to more than 200 local nonprofits through its Community Heroes program in which a representative from a charity is presented a \$50,000 check at each home game.

In his remarks to the 650 luncheon attendees, Vinik said the first phase of the downtown development is estimated to be \$1 billion, with another \$1 billion targeted for phase two of the project. He said phase one will be

under way in 2016 and will include: the University of South Florida Morsani College of Medicine; 1,000 new residential units; new commercial office space; upscale retail and restaurants; significant roadway improvements; and a new four-star hotel.

In addition, Vinik said Strategic Property Partners, the real estate company he controls with Cascade Investment, has partnered with New York-based Delos

on a wellness initiative that will make the district the first WELL-certified neighborhood in the world. This means all the buildings will have to meet certain environmental and health criteria that will improve the overall quality of life of the people who live and work in the district. The criteria include walkability, green space, air and water quality, and fitness.

"All of us can change this area, the

way we think about it, the way it is branded. I know this is doable," Vinik told the crowd.

In the meantime, Vinik said he has received a tremendous response from corporate leaders in his travels around the country to recruit companies to locate in Tampa and the downtown district. "We're very confident that over time we're going to bring thousands of high-paying jobs to the Tampa Bay area," he said.

Later, taking a moment to reflect on his new work as a developer, Vinik joked: "In my previous life, I was a



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money manager in business and always kept my head down and was focused on performance. I had no idea that next thing you know I would become a salesperson.”

Concluding his remarks, Vinik sounded an optimistic tone: “We are on the map, we are resonating, and I couldn’t be more bullish for the outlook for this area.”

* * *

The theme for this year’s Bench Bar Conference was “Breaking Good: Prioritizing Professionalism in Advocacy.”

Thirteenth Judicial Circuit Judges Samantha Ward and Lisa Campbell were the conference co-chairs. Both judges worked for months with the other dedicated Bench Bar Committee members; the HCBA’s CLE director, Monique Lawson; and other HCBA staff members planning the conference.

“Our committee is challenged annually to develop programs and sessions that are of interest to a large cross-section of attorneys, but remain practical and relevant to their practice areas,” Judge Ward said. “We tried to create an environment where members of the Bar feel free to express concerns and criticisms to the Bench, and not vice-versa with the usual ‘judicial pet peeves.’”

There were a record number of attendees at the various CLE breakout and plenary sessions held throughout the day.

“The feedback from attorneys has been phenomenal,” Ward said.

One highlight, Ward said, was a jury panel session where recent jurors came and answered questions from attorneys about their jury experience. “It was my favorite part of the conference this year, and we are working to explore and expand this concept for future sessions,” Ward said.

Later in the day, more than 400 HCBA members enjoyed the camaraderie provided at the annual Judicial Reception at the Hilton.

Special thanks and gratitude go out to the many generous sponsors that helped make this year’s conference possible, and especially the Diamond Sponsor, Steve Yerrid and The Yerrid Law Firm.

Planning is already under way for the 20th annual conference next fall.

See you around the Chet.



HCBA WELCOMES NEW MEMBERS

OCTOBER AND NOVEMBER

M. Kristen Allman	Elba Martin-Schomaker
Arthur Alves	Julius Matuszewicz
Ryan M. Angel	Natalie McEwan
Valeen Arena	Tim Alan McHaffie
Rebecca Arends	Ryan Mitchell
William Ayers	Megan Wilson Murray
Debra Bernal	Charlotte Elise Murrell
Daniel C. Brown	Elizabeth Polchinski
Chris Bucalo	Mathew Poling
Aubrey Burris	Elizabeth Pophal
Erin L. Centrone	Jacqueline Prats
Monica Christopher	Madison Randall
Ina Crawford	Tristan John Reiniers
Jorge Adrian Diaz	Brandon Robbins
Grant Dostie	Jerry R. Rosen
Joseph Eagleton	Maxine S. Rosen
Ethan Blackwell Evans	Mica Suzanne Rosier
Shaun Hargadine	Michael Schmiz
Susan G. Haubenstock	Melanie Senosiain
Kimberly Andreu Hendee	Kevin Slattery
Jackson Keith Hilliard	Timothy Sweeney
John Hittel	Dustin Symes
Erin Hoyle	Dennis Szafran
Ferdian Jap	Margaret R. Taylor
Nehemiah Jefferson	Jason Michael Thomassy
Madison E.M. Kebler	Dawn Tiffin
Michael J. Labbee	John Tison
Richard Polk Lawson	Mathew Joseph Tyson
Leighton Leib	William Joseph Tyson
Crawford Long	Kimberly Van Der Riet
Rita Lowman	Anna M. Wiand
Chance Lyman	Carly Wilson
Jennifer Mantoni	



Motions to Dismiss

Pre-trial motion practice can serve to further the interests of justice in an efficient manner.

In the interest of judicial economy, the Florida Supreme Court has promulgated Florida Rule of Criminal Procedure 3.190(c)(4), which permits parties to present the undisputed facts of a case to the court for a pre-trial determination of whether the facts support a prima facie case of guilt. Rule 3.190(c)(4) is eminently useful in avoiding trial where the parties agree on the facts but disagree as to how the applicable law pertains to these facts.

Procedurally, the defendant must: (i) file a written motion outlining all of the facts of the case and (ii) execute an oath that these facts are true. The burden is on the defendant to specifically allege and swear to the undisputed facts in a motion to dismiss. The defendant may not swear that the facts are true and correct "to the best of my knowledge." The penalty for perjury applies to the sworn motion. The state then must be given the opportunity to demur or traverse that defendant's motion.

If the state disagrees with the defendant's version of the facts or believes that the defendant omitted material facts, the state may file a traverse. If the state files a proper traverse, the court must deny the motion to dismiss. When filing a traverse, the state must deny with specificity the facts contained in the motion or allege with specificity the facts omitted.

If both parties agree on the material facts of the case but disagree on the application of the law, the state may

file a demurrer. This permits the court to determine whether the facts support a prima facie case of guilt. An appropriate case for a demurrer might be where a defendant has been charged with carrying a concealed weapon (e.g., a knife), and the state and defendant agree to the description of the knife, but the defendant argues that the knife is a common pocket knife. The state

may demur, agreeing to the dimensions of the knife but maintaining that it is a jury question as to whether the knife and the manner in which it was carried meet the statutory criteria for a weapon. The court may then turn to legal precedent and issue a ruling. A pre-trial ruling on this issue may save the court from trying the case because a ruling against the defendant may trigger a plea, whereas a ruling against the state would



terminate the prosecution.

When considering a defendant's motion to dismiss charges, all questions and inferences from the facts must be resolved in favor of the state. The trial court is not permitted to make factual determinations or consider either the weight of conflicting evidence or the credibility of the witnesses.

Pre-trial motion practice can further the interests of justice in an efficient manner. As such, the lawyers in my office are trained to prosecute cases with the utmost regard for expediency and judicial economy, while still seeking justice.

**Encourage your fellow government attorneys to join the HCBA
for 50 percent off in the second half of the Bar year.
Use promo code MIDYEARIG at checkout on hillsbar.com.**

Holiday Open House

The Hillsborough County Bar Association hosted about 300 lawyers, judges, family members, and friends at the Holiday Open House on December 3. Attendees enjoyed a festive atmosphere as they gathered to celebrate, mingle, and catch up before the year came to a close. The open house was a great success, thanks largely in part to the generosity of our sponsor: The Bank of Tampa.





Moving Forward on Multiple Fronts

A recent advance is our ability to now provide attorneys of record with remote viewing capabilities of court records.

This is an exciting time at the clerk's office. We are moving forward on multiple fronts to provide better service thanks to recent technological enhancements.

One recent enhancement is the ability to provide attorneys of record the capability of viewing court records remotely. I am proud to say that the Hillsborough Online Viewing of Electronic Records (H.O.V.E.R) System was actually developed in-house by the clerk office IT staff. And we already have well over 600 registered users of the system who have viewed more than 9,000 images. It is our hope that this new system will be useful for attorneys who want to access court records remotely. You can register for the H.O.V.E.R. System by visiting our website at www.hillsclerk.com.

Customer service will also be enhanced significantly through the establishment of our new Court Customer Service Center. Our office recently held the grand opening for this Customer Service Center, as well as the Hillsborough County Sheriff's Office Probation Services Division. Both operations are on the first floor of the George Edgecomb Courthouse. The Customer Service Center represents the consolidation of all of our court-related services in a one-stop location — no easy task for us to implement, I can assure you. It took several months

of hard work to put in place. The new Customer Service Center has more than 30 service windows, as well as a queuing system in place, to make sure that customers get the right clerk representative to assist them. This is a new concept for us, so please be patient as we go through a few growing pains.

On still another front, the clerk's office now offers a Property Fraud Alert, a free service to help people protect their property from fraud by monitoring documents, such as deeds and mortgages, recorded in Hillsborough County. According to the FBI, property and mortgage fraud are the fastest-growing white-collar crimes in the country. The Property Fraud Alert is designed to prevent scammers from renting or selling property illegally to an unsuspecting customer, sometimes collecting thousands of dollars in the process. You can register for this service at www.hillsclerk.com.

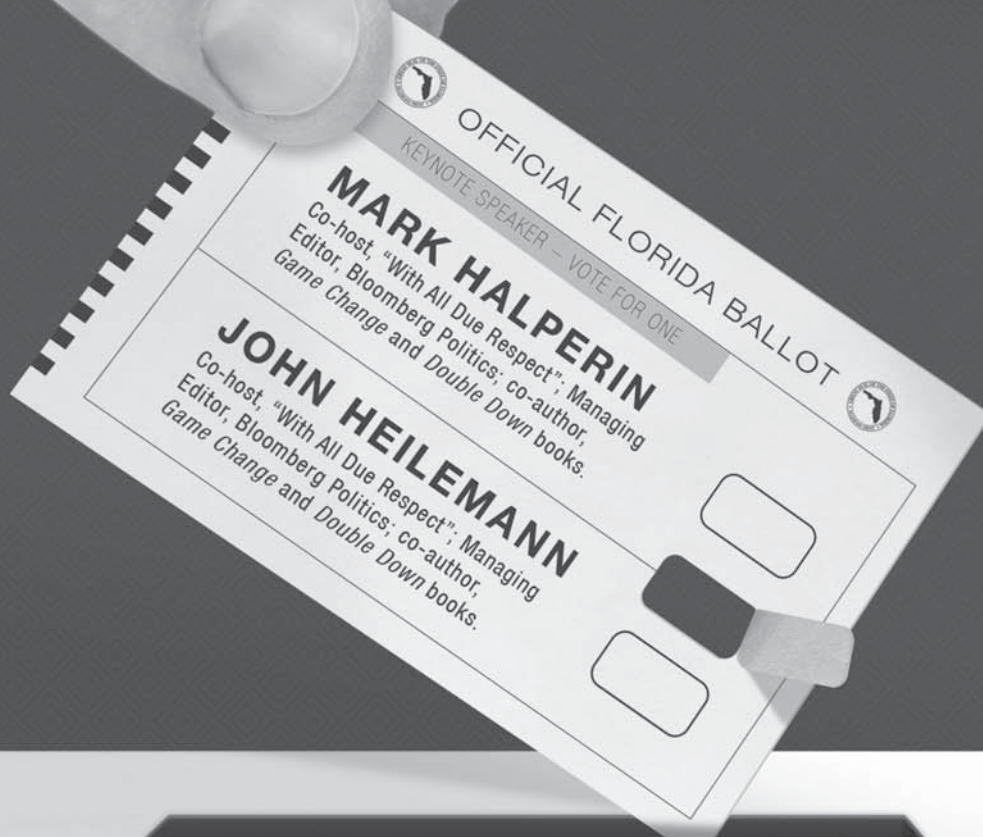
Speaking of our website, and last but certainly not least, the clerk's office is in the process of redesigning our website — a massive but necessary task because we have implemented so many online services since our last redesign several years ago.

These are some of our new initiatives as we continue to modernize the clerk's office to meet your needs as effectively as possible. There are more coming — so please stay tuned!



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YLD GOLF TOURNAMENT

The HCBA Young Lawyers Division had a great turnout and enjoyed the start of beautiful fall weather for the annual golf tournament on October 16. About 90 golfers came out for the YLD's signature fundraising event at the Temple Terrace Golf & Country Club. Congratulations to the winning team:

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The YLD would like to thank this year's generous sponsors:

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INTRODUCING MARY BETH KUENZEL, CLERK OF THE SECOND DISTRICT COURT OF APPEAL

Appellate Practice Section

Chairs: Jared Krukar - Butler Weihmuller Katz Craig, LLP; and Mariko Outman - Florida Second DCA



The first clerk of Florida's Second District Court of Appeal was Joseph Gillen. Some 50 years later, Mary Beth Kuenzel, the cousin of Gillen's granddaughter, has become the court's sixth clerk. Although she revealed this bit of history at her induction ceremony, Mary Beth began her remarks on a somber note by recognizing Jim

Birkhold's dedicated service and many contributions to the court before his sudden death.

Mary Beth is certainly qualified to lead the court's clerk's office. She has served the court for more than 20 years as a staff attorney. She has worked on numerous committees within the court, including its social media and practice preferences committees. Before joining the court,



The reality of the constitutional officer's responsibilities involves much more than logging cases in and out and collecting fees.

Mary Beth received her bachelor's degree from FSU and worked for the Florida House of Representatives, where she eventually served as the director of communications in the Speaker's Office. She later attended Stetson University College of Law, graduating in 1993. Mary Beth lives in St. Petersburg with her husband,

Continued on page 17

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Continued from page 16

Kevin, an architect, artist, and attorney (in that order).

Although Mary Beth has been the clerk for only a short time, she credits the deputy clerks for their helpfulness, professionalism, and great institutional knowledge. Anyone who has practiced before the Second DCA can agree on the unsurpassed quality of the deputy clerks. During that short time, she has already identified two challenges facing the court and how practitioners can help.

The first challenge is the “proper classification of appeals and original proceedings, as they come in the door.” According to Mary Beth, that “determination is made in a vacuum, but it determines many

things, from the type of record to filing deadlines.” Mary Beth says appellate lawyers can help the clerk’s office with the initial classification by explaining the basis for jurisdiction in a notice of appeal or petition and by setting forth the pertinent dates if, for example, rendition was tolled.


The second challenge Mary Beth identified is technology. Technology, of course, is a beneficial tool. But Mary Beth admits that it has made some things more complicated because the clerks are asked to help attorneys and pro se litigants figure out how to do things from an information technology standpoint. “It has also changed expectations about how quickly things should be done,” says Mary Beth. “The appellate court clerks are still in the development process of e-filing,

e-records, and easy accessibility. We can receive e-filings, but we’re still sending out paper copies of orders and the like.” Mary Beth also observes, “As we approach electronic viewing of records (and we’re not there yet), appellate lawyers can help the clerk’s office and their clients by ensuring that confidential information is properly noted, redacted, and protected.”

The HCBA’s Appellate Practice Section welcomes Mary Beth Kuenzel as the clerk of the Second District Court of Appeal.



*Author:
Valeria Hendricks -
Florida Second
District Court
of Appeal*



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MODEST MEANS MODELS AND YOUR COLLABORATIVE PRACTICE

Collaborative Law Section

Chairs: Jeremy Gluckman - Jeremy Gluckman, P.A.; and Christine Hearn - Himes & Hearn



Have you ever considered developing “Modest Means” collaboration models to grow your practice? These models make the collaborative process more accessible to your divorce clients and will increase your collaborative practice. If you are not offering these reduced-cost services, here are four Modest Means Models you may want to consider:

The Pro Se Collaboration Model provides flat fees that are affordable. A full team in this model has a meeting with the clients to prepare a pro se case. The team meets with the divorcing parties at a single meeting for three to five hours. At the meeting, the team will provide and develop necessary pleadings, parenting plans, and marital settlement agreements for pro se filing. Parties are encouraged to prepare for the meeting by reviewing the necessary documents online before the meeting. The entire team then works through any

issues the parties have and helps them complete the relevant pleadings and documents for a pro se filing.

The Combined Income Model, like the Pro Se Collaboration Model, provides affordable flat fees, but those fees are set for you and other members of the team based upon the combined incomes of the parties. Several income ranges may be identified with different flat fee amounts. For example, if the parties had a combined annual income of \$80,000, then they could be offered a flat fee option of \$2,000 per attorney and \$1,500 for each of the neutrals. Once the appropriate fees are determined, the team spends whatever time is required to complete the case.

The Combined Limited Time and Income Model is a third flat-fee model. For parties below a specified combined family income level (e.g. \$100,000 per year) and net worth (e.g. \$125,000), flat fees are set for each of the four members of the collaborative team, with a condition that the collaborative dissolution must be completed by a specific date. You can limit the number of collaborative meetings over the

Expand your collaborative law practice to benefit you and clients of modest means.

time period, but there are no limitations on the time each collaborative professional will spend to complete the case. If the case is not resolved by the specified date, the team

withdraws, or through agreements between team members and the parties, you may add a specific number of additional work hours or a new completion date. The team may also consider hourly rates if the case is worked for an added time period and the team is willing to add those hours.

The Reduced Fee Rate Model, unlike the other three models, does not involve a flat fee. Instead, hourly rates will be set for all members of the collaborative team, but the hourly rates will be reduced. Several reduced hourly rates can be established based upon varied ranges of income.

Not all clients have unlimited funds to proceed in a collaborative divorce. So we hope this gives you more options in growing your practice and effectively serving the needs of a broader range of clients.

Author: Jeremy Gluckman - Jeremy E. Gluckman, P.A.



Are you getting emails about upcoming section events? If not, you may need to update your profile at hillsbar.com.

COMMUNITY SERVICES COMMITTEE COLLECTS DONATIONS FOR LOCAL VETERANS

The Community Services Committee rounded up donations for veterans as part of James A. Haley Veterans' Hospital's Make a Difference Day on October 24. CSC volunteers worked with members of the Military & Veterans Affairs Committee to "adopt" veterans in need of basic items such as T-shirts and toiletries. The HCBA appreciates all those who participated in this great service project!



COLLABORATIVE LAW SECTION HOSTS PANEL

The Collaborative Law Section hosted guest speakers Ellen Ware, Michael Lundy, Tina Tenret, and Kim Costello at a luncheon on October 28. The section would like to thank Jay Langford from Westshore Financial Group for sponsoring the event.



THE RIPPIN' AND THE TEARIN'

Construction Law Section

Chairs: Erik Raines - Hill Ward Henderson; and Edward J. Kuchinski - Sivyry, Barlow & Watson, P.A.



Last year, the Eleventh Circuit Court of Appeals issued a key opinion in *Carithers v. Mid-Continent Casualty Company*, 782 F.3d 1240 (11th Cir. 2015), in which the court applied Florida law to determine the scope of coverage available under a post-1986 CGL policy issued by Mid-Continent Casualty Company (Mid-Continent) to a homebuilder, Cronk Duch. The Carithers sued Cronk Duch for the following construction defects: faulty electrical systems, incorrect application of exterior brick coatings, improperly installed tile, and a faulty balcony that permitted extensive water intrusion. Mid-Continent refused to defend defendant Cronk Duch. As a result, the Carithers and Cronk Duch entered into a consent judgment, which assigned Cronk Duch's rights to the Carithers so the homeowners could pursue the judgment amount from Mid-Continent.

The Carithers filed an action against Mid-Continent, where the parties ultimately filed cross-motions for summary judgment on the issue of whether Mid-Continent owed a duty to defend Cronk Duch in the underlying, initial litigation. That issue turned on what the proper trigger for determining whether property damage occurred during the policy period. The district court granted summary judgment in

favor of the Carithers, finding that the proper "trigger" is the date of the *actual* damage ("injury-in-fact"), rather than when the damage is discovered or could have been discovered by reasonable inspection, as argued by Mid-Continent ("manifestation"). The Eleventh Circuit affirmed the district court's ruling that Mid-Continent owed a duty to defend.

The question of the proper "trigger" on coverage, however, appears to still be in doubt in Florida as the Eleventh Circuit limited its decision "to the facts of this case, and express[ed] no opinion on what the trigger should be where it is difficult (or impossible) to determine when the property was damaged." *Id.* at 1247. Simply put, the court held that the district court "did not err in applying the injury-in-fact trigger in this case." *Id.* at 1246.

After the duty to defend determination, the coverage issue was decided following a bench trial. The trial court found that, among other things, Mid-Continent was liable for the "rip and tear" costs to repair a defectively installed balcony (which was not property damage because it was the defective work of a subcontractor) because the balcony had to be replaced in order to repair damage to the



The trial court found ... Mid-Continent was liable for the "rip and tear" costs to repair a defectively installed balcony.

garage (which was property damage). Essentially, the Carithers were entitled to the "rip and tear" damage of the balcony to get to the property damage.

The Eleventh Circuit held that the district court did not err in awarding damages for the cost of repairing the balcony, finding that under Florida law the Carithers had a right to "the costs of repairing damage caused by the defective work."

Id. at 1249 (citing *United States Fire Insurance Co. v. J.S.U.B.*, 979 So. 2d 871 (Fla. 2008)). The Eleventh Circuit was not persuaded by Mid-Continent's contention that the Carithers should not be able to recover for any defective work, even where repairing that work is a necessary cost of repairing work for which there is coverage.

Although *Carithers* is another decision pointing toward injury-in-fact trigger analysis, litigants will have to rip and tear their way through the next decision to find out for sure.



Authors:

Erin E. Banks and
J. Derek Kantaskas -
Carlton Fields
Jorden Burt, P.A.



CONSTRUCTION LAW SECTION GETS PRACTICE POINTERS

The Construction Law Section hosted a luncheon October 15 featuring guest speakers Brandon Held and Emily W. Morrell. Held and Morrell discussed statutes of limitations, gave an update on Florida law, and shared practice pointers and traps for the unwary. The section would like to thank First Citrus Bank for sponsoring this event.

First Citrus Bank



FLORIDA LAW PROVIDES BUSINESSES CIVIL REMEDY FOR HACKING

Corporate Counsel Section

Chairs: Michael Stein - CNA Insurance; and John Bencivenga - Helios



As splashy headlines of corporate hacking and cybersecurity theft continue to make front-page news, businesses are increasingly focused on protecting their critical digital assets. Legislators have taken note and passed Florida's Computer Abuse and Data Recovery Act (CADRA), which became effective October 1. §§ 668.801-805, Fla. Stat. CADRA gives Florida businesses a new arrow in their quiver to combat unauthorized computer access by providing a cause of action for the recovery of monetary damages, injunctive relief, and attorneys' fees.

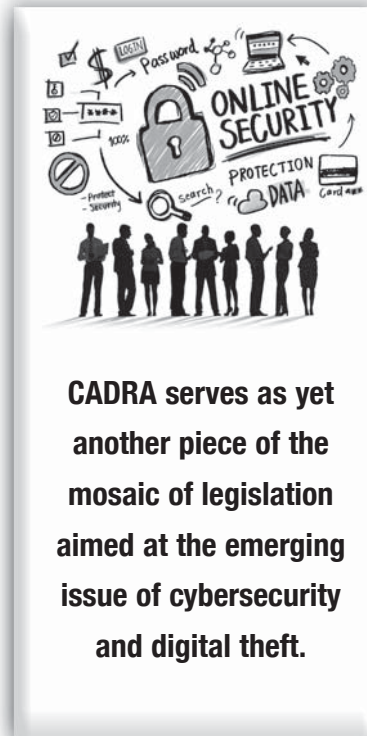
The legislature previously attempted to address "computer-related crime" by passing the Florida Computer Crimes Act (FCCA). §§ 815.01-07, Fla. Stat. The FCCA was largely a criminal statute that offered civil relief only after a criminal conviction. Recognizing some of the FCCA's shortcomings, CADRA creates a cause of action for aggrieved businesses that suffer harm from unauthorized computer access by an individual who does not have access or exceeds his or her access to a business's computer systems.

A CADRA violation occurs when an individual "knowingly and with intent to cause harm or loss": (i) obtains information from a protected computer without

authorization, causing resulting harm or loss; (ii) causes the transmission of a program, code, or command to a protected computer without authorization, causing resulting harm or loss; or (iii) traffics in any technological access barrier through which access to a protected computer may be obtained without authorization.

§ 668.803(1)-(3), Fla. Stat. "Without authorization" means access to a protected computer by someone who is not an "authorized user." Authorized users can be directors, officers, employees, third-party agents, and other individuals with a business's express permission to access protected computers. § 668.802(1), Fla. Stat. But this authorization ends upon the business's revocation of permission by any means.

Importantly, CADRA's protections extend only to a "protected computer," which is defined as a computer that is "used in connection with the operation of a business and stores information, programs, or code in connection with the operation of the business" and "can be accessed only by employing a technological access barrier." § 668.802(6), Fla. Stat. CADRA provides a non-exhaustive list of "technological access barriers" that must be employed, such as a "password, security code, token, key fob, access device, or



similar measure." Invariably, there will be additional technological measures that fall within this definition under the "similar measures" catchall, but in the absence of judicial guidance, businesses would be wise to rely on one or more of the enumerated "barriers" to ensure CADRA protection.

In the event of a CADRA violation, a plaintiff may recover actual damages, including lost profits and

economic damages, recovery of the violator's profits, and injunctive relief to prevent further violations and recover stolen information. The prevailing party is entitled to recover reasonable attorneys' fees.

CADRA, which serves as yet another piece of the mosaic of legislation aimed at the emerging issue of cybersecurity and digital theft, comes a little over a year after the enactment of Florida's Information Protection Act of 2014 (FIPA), § 501.171, Florida Statutes. The FIPA heightened the notification requirements for data breaches impacting Florida residents. These new laws reflect an increased emphasis on cybersecurity and are a harbinger of possible, additional

legislation designed to protect businesses and consumers from evolving digital threats.



Author: Jason Pill - Phelps Dunbar, LLP

THE CLEMENCY PROJECT NEEDS YOUR HELP

Criminal Law Section

Chairs: Matt Luka - Trombley & Hanes; and Justin Petredis - The Law Office of Justin Petredis, P.A.



You may have recently read news reports about the release of federal inmates under the president's clemency power. For much of our country's history, the president's clemency power has been exercised sparingly, often reserved for high-profile cases or political favors. Many in the criminal justice system, however, have come to realize that, due in part to the Federal Sentencing Guidelines and strict mandatory minimums, numerous sentences handed down over the past 30 years are unnecessarily harsh and have had a detrimental effect on society. More than a year ago, the Obama administration made an unprecedented request for clemency petitions for inmates who are currently serving a federal sentence and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense today.

Thousands of inmates potentially qualify for relief, but most of these inmates cannot afford an attorney. And public defenders' offices simply do not have the budget or resources to handle such an extensive initiative. So pro bono attorneys are needed. Clemency Project 2014 is a national pro bono effort to recruit and train lawyers on how to screen for eligible inmates and represent eligible inmates in the clemency process.

Representing a client in this initiative does not require a court appearance or even a face-to-face meeting with the client. The primary responsibility of the attorney is to write a memorandum and collect certain records necessary to support the petition. A checklist of the required records, along with sample memoranda, are available. Our Federal Public Defender for the Middle District of Florida is a terrific proponent of this program and has already prescreened cases and can provide step-by-step instructions on how to prepare a petition. If you are interested in pro bono service, this is a manageable and rewarding program that has a predictable time commitment.

For those wondering why they should spend their time helping a criminal, in order to even qualify for clemency, an inmate must be a non-violent, low-level offender without a significant criminal history who has served at least 10 years of his or her prison sentence. Most of these inmates are drug offenders who have spent more than a decade in prison. To have a second chance at life would mean everything to the inmates and their families. Also, from a purely economic perspective, it costs our country almost \$30,000 a year to house one federal inmate. You do the math.

Time is of the essence with this initiative because we cannot be



**Time is of the essence
with this initiative
because we cannot be
certain the next
president will continue it.**

certain whether the next president will continue it. The goal is to have petitions submitted no later than March in order to give the government time to review them before President Obama leaves office.

You need not have handled criminal cases to be eligible or capable of participating in this work. The

training program is available on the Internet, so you can complete the program at any time. Clemency Project 2014 staff and volunteers are available to provide resources and guidance to you as you analyze the cases, and the project has developed a toolkit of templates to streamline the process. For those attorneys who currently serve as members in good standing on a Criminal Justice Act Panel, you need not complete the training if you can provide a copy of your CJA appointment letter. Please contact me if you would like more information. To volunteer for this important project, please visit the Clemency Project 2014 website at www.clemencyproject2014.org or email volunteer@clemencyproject2014.org. You can also volunteer at clemencyproject@nacdl.org or contact the Office of the Federal Public Defender for the Middle District of Florida.

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

WE ARE LAWYERS. WE KNOW HOW MUCH THE WRONG WORDS MATTER.

Diversity Committee

Chairs: Jessica Costello - Office of the Attorney General; and Victoria Cruz-Garcia - Givens Givens Sparks



A couple of years ago, a family friend, Tyler Crose, who happens to have Down syndrome, posted something on Facebook that made me cry: “Do. Say. The. R. Word. Me. Cry.” Words are powerful. Words are beautiful. Words hurt. The words Tyler wrote stuck with me and, in part, served as the inspiration for this article.

Many people know that I have a brother, John, who also has Down syndrome. John is “lower-functioning” than his friend Tyler, so my family — most vocally and most often, my mother — has been John’s voice through the years as we have advocated for his education, services, and quality of life. Although I have



**“Do. Say. The. R. Word.
Me. Cry.”**

— Tyler Crose, Clearwater

always felt confident advocating for John in these areas, discussing the “R-word” has always made me uncomfortable.

I remember one of the first times — and the last — I used the “R-word” to refer to something negatively. I was a young teen,

*Continued on
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Continued from page 24

and I will never forget how my dad's face looked like I had slapped him. He immediately yelled at me that I was to never use that word in that manner again. He didn't have to explain why. Even though I was using the word just like many others as a common slang term and "didn't mean to" offend John or the many other people who live with disabilities every day, I did.

Tyler is brave. Tyler's "crusade" to stop the use of the "R-word" leads him to speak up like my dad did when he hears someone say it. I am not brave. Despite the sting I feel when I hear someone use the "R-word" derogatively, I haven't found the right approach to explain why there are so many better ways

to make a point in a way that doesn't belittle and demean a large population of incredible people. So this is my chance.

As lawyers, we choose our words carefully. We do it to craft our claims and confront the opposing side's arguments. We do it to benefit our clients and ourselves. And as lawyers, and more importantly as people, we should make similar choices in our everyday language — we owe it to ourselves and our profession to be better. I highly doubt most lawyers would think it appropriate to use the "R-word" disparagingly in correspondence, court filings, or oral arguments. There are far better and more appropriate words to convey what you mean. If something is pointless,

misguided, or irrelevant — why not say that?

We are better than words that insult, upset, and offend others, especially those who often do not have a voice to share how hurtful those words are. People often say they "don't mean any offense," but the reality is your words have meaning and cut deep. If you wouldn't say the "R-word" around someone who has a disability, then I submit that you shouldn't say it at all. Tyler would be the first to tell

you and say it better than I ever could: "Do. Say. The. R. Word. Me. Cry."



Author: Cathy Kamm - Shook, Hardy & Bacon

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RECENT AMENDMENT ALLOWS HEALTH CARE SURROGATES AUTHORITY TO ACT IMMEDIATELY

Elder Law Section

Chairs: Debra Dandar - Tampa Bay Elder Law Center; and Susan Haubenstock - Law Office of Susan Haubenstock



You don't have to be a doctor to know the aging process varies significantly from one person to the next. Some aging individuals are first confronted with a physical disability, while others face cognitive impairment long before experiencing physical ailments. Just as the status of a physical disability may fluctuate, so too may the capacity of a person diagnosed with certain mental conditions, such as dementia. Before the legislature amended section 765.202, Florida Statutes, this past summer, a health care surrogate could not act on behalf of the principal until the principal was determined incapacitated. This hard and fast approach created headaches for those acting on behalf of principals with fluctuating capacity levels because it necessitated a redetermination of incapacity each time a surrogate needed to make a medical decision for the principal.

But with the recent amendment to section 765.202, which went into effect on October 1, 2015, a principal may now give his or her health care surrogate immediate authority to act even though the principal may still have capacity. In the event a health care surrogate disagrees with a competent principal's health care decision, the principal's wishes

control the outcome.

The amended statute also provides that the principal may allow his or her health care surrogate to access and receive a competent principal's medical records and health care information.

This authority may be given to a surrogate exclusively or in conjunction with the power to make health care decisions for a competent principal. Granting the surrogate permission to access this information at all times allows the surrogate to stay apprised of developments in the principal's condition. Moreover, advancing the principal's medical information to the surrogate better prepares the surrogate to make difficult health care decisions on behalf of the principal.

The amendment also benefits a principal who may be faced with navigating new or confusing treatment options. The legislature added a finding to the statute that plainly states that "some competent adults want a health care surrogate to assist them with making medical decisions." As medical technology and treatments advance, certain principals will greatly benefit from a surrogate's guidance when trying to determine the best course of action.



A principal may now give his or her health care surrogate immediate authority to act despite the principal still having capacity.

The amended statute includes a sample format to present these options to the principal. It provides that the surrogate does not have authority to access the principal's health care information or make health care decisions until the principal becomes incapacitated, unless the

principal has initialed the box explicitly granting that power. Forms that do not specifically address the ability of a surrogate to access medical information or to make health care decisions for a competent principal effectively require the principal to be incapacitated before the surrogate can act.

When a client arrives to execute his or her health care surrogate designation, the attorney should be prepared to discuss the options available to the client now. If asked by a client how to proceed with these elections, consider how each power operates in light of the circumstances unique to that client. An open dialogue with your client addressing these factors should guide him or her to an appropriate decision.

Author: Jacqueline O. Ellett - All Life Legal, P.A.



Join your colleagues by making a commitment to sustained giving in support of Bay Area Legal Services and give voice to the voiceless. To become a sustaining law firm, each firm must donate \$350 per attorney.



Thank You 2015 Sustaining Law Firms!

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OCR HIPAA COMPLIANCE AUDITS 2016: ARE YOU AUDIT READY?

Health Care Law Section

Chairs: T.J. Ferrante - Foley & Lardner LLP; and Sara Younger Seifried - BayCare Health Systems



On September 10, 2015, the Department of Health and Human Services Office of Inspector General (OIG) recommended that the Office for Civil Rights (OCR) strengthen its oversight of covered entities' compliance with the HIPAA Privacy Rule.¹ The OIG made the following recommendations to OCR after conducting its study:

- (1) Fully implement a permanent audit program;
- (2) Maintain complete documentation of corrective action;
- (3) Develop an efficient method in its case-tracking system to search for and track covered entities;
- (4) Develop a policy requiring OCR staff to check whether covered entities have been previously investigated; and
- (5) Continue to expand outreach and education efforts to covered entities.²

In response to the report, OCR agreed with each of OIG's recommendations, and OCR Director Jocelyn Samuels announced that in early 2016, OCR will launch Phase 2 of its

audit program.³ The audit program will measure compliance by covered entities and business associates with HIPAA's privacy, security, and breach notification requirements through a combination of desk reviews of policies and on-site reviews.⁴ Unlike the pilot audits in 2012, which were conducted by a consulting firm that OCR hired, the next round of audits will be performed by OCR staff.

In anticipation of the upcoming audits and to avoid potential issues, covered entities should assess their preparedness and HIPAA compliance by using the existing protocol and other guidance available on the OCR Health Information Privacy website.⁵

Additionally, covered entities and business associates should invest time in identifying and closing any HIPAA compliance gaps and ensuring that they have the proper risk analysis, risk management, and breach reporting plans in place. Addressing the following common areas of concern can help with assessing preparedness:⁶



Having the right supporting documentation in place can go a long way toward helping a covered entity survive an OCR audit.

- Has a risk assessment of the potential risks and vulnerabilities to the confidentiality, integrity, and availability of electronic Protected Health Information been implemented and documented?⁷
- Is a breach reporting plan in place for responding to breaches of Protected Health Information?
- Are written

policies and procedures in place that address privacy and security standards and the weaknesses identified in the risk assessment?

- Is a training program in place with documented training for new and existing staff?
- Is a HIPAA-compliant Notice of Privacy Practices provided to patients, and is the notice available on the covered entity's website?
- Are appropriate agreements in place with business associates?

In preparation for the OCR audits, covered entities should be

Continued on page 29

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Continued from page 28

able to provide evidence that: (1) a risk analysis assessment has taken place; (2) policies have been adopted to reduce risks and vulnerabilities to a reasonable level; (3) HIPAA training has been conducted; and (4) the notices have been delivered. Having the right supporting documentation in place can go a long way toward helping a covered entity survive an OCR audit, even where operational compliance may not always be 100 percent.

¹ U.S. Dept. of Health and Human Servs., OEI-09-10-00510, OCR Should Strengthen Its Oversight of Covered Entities' Compliance with the HIPAA Privacy Standards (2015).

² *Id.* at 11-12.

³ Letter from Jocelyn Samuels, Director of OCR, to Daniel R. Levinson, Inspector General of the Dept. of Health and Human Servs. (September 23, 2015).

⁴ *Id.*

⁵ Health Information Privacy, <http://www.hhs.gov/ocr/privacy/> (last visited on Nov. 11, 2015).

⁶ U.S. Dept. of Health and Human Servs., Guidance on Risk Analysis Requirements under the HIPAA Security Rule (July 14, 2010), available at www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule/rafinalguidancepdf.pdf.

⁷ 45 C.F.R. § 164.308(a)(1)(ii)(A).



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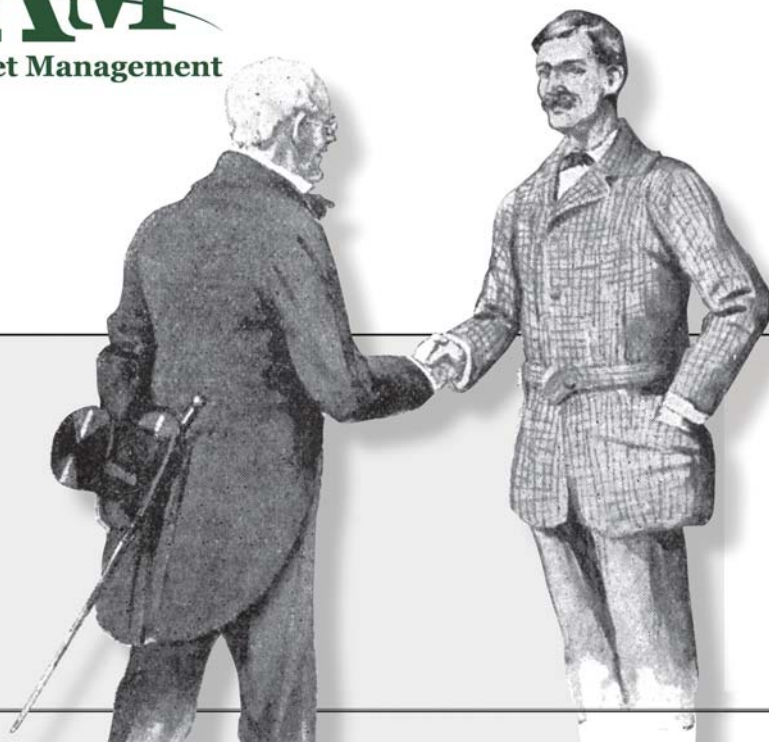
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SECURITIES LAW AND CORPORATE COUNSEL SECTIONS TEAM UP

The Corporate Counsel and Securities Law sections teamed up for a joint luncheon and CLE called “Let Bylaws Be Bylaws” on November 9. The luncheon featured a panel of speakers including Judge Samuel Salario, Christopher O’Reilly, Michael Altschuler, Richard Leisner, Chris Polaszek, and Mike Matthews. The sections would like to thank the luncheon’s sponsor: NorthStar Bank.



INTELLECTUAL PROPERTY SECTION LEARNS ABOUT COUNSELING STARTUPS

The Intellectual Property Section hosted a luncheon on October 7 that focused on teaching attorneys how to counsel entrepreneurs and startup companies. The luncheon featured panelists Stephanie Ashley from USF Connect, Lynn Shultz from the Hillsborough County Economic Development and Entrepreneur Collaborative Center, and Linda Olson from Tampa Bay WAVE.



The section appreciates the support of the luncheon's sponsor:



SOLO PRACTITIONERS DISCUSS GOING VIRTUAL

The Solo & Small Firm Section hosted a luncheon on November 17 featuring guest speaker Jay Quigley, founder of Tampa Independent Paralegals. Quigley talked about virtual law practices and how attorneys can use current technology to achieve success while attaining the ever-elusive "work-life" balance. The section would like to thank the luncheon sponsor: Case Record Solutions.



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Intellectual Property Section

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Anyone petitioning for inter partes review (IPR) of patent claims by the U.S. Patent and Trademark Office (PTO) with the intention to bypass federal court should be forewarned: Such action does not circumvent scrutiny by the U.S. Court of Appeals for the Federal Circuit. Under 28 U.S.C. § 1295 (a)(4)(A), the federal circuit has exclusive jurisdiction over appeals from the PTO's Patent Trial and Appeal Board (PTAB), including jurisdiction over appeals of the PTAB's final written decisions on IPRs.¹

Although the federal circuit largely rubber-stamped the PTAB's IPR decisions in 2015, the court

did not affirm all. In two appeals, the federal circuit substantively challenged — and rejected — the PTAB's findings. Such action by the federal circuit is noteworthy in light of the substantial deference the court gives to the PTAB's factual findings.

In *Microsoft Corp. v.*

Proxycorr, Inc., the federal circuit reversed the PTAB, in part, for the first time in an appeal of an IPR.² Specifically, the court remanded with regards to the PTAB's claims construction findings. The court first rejected the patent owner's argument that the broadest reasonable interpretation (BRI) standard of claims construction used by the PTAB should not

Microsoft and Belden teach key lessons on the federal circuit's legal analyses but are largely important for their results. They signal that the federal circuit still has the last word on patent claim validity.

apply in IPR proceedings.³ The federal circuit had, in a case decided after the parties had fully briefed that appeal,⁴ that the PTAB properly adopted the BRI standard. Although the court affirmed the PTAB's use of the BRI standard, it found the PTAB's construction of certain

terms were unreasonably broad and vacated the board's unpatentability findings on that ground.⁵

The federal circuit's second reversal of the PTAB's factual findings involved an obviousness determination. In *Belden Inc. v. Berk-Tec LLC*,⁶ the federal circuit rejected the PTAB's conclusion

Continued on page 37



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Continued from page 36

that two patent claims were not obvious. The PTAB had determined that there was no motivation to combine two prior art references to teach the two claims. The federal circuit disagreed, finding the PTAB had made a series of incorrect factual conclusions and that the undisputed record evidence pointed clearly to a motivation to combine the references. The court did not, however, vacate and remand to the PTAB to make appropriate findings. Instead, the court found the record was sufficient to reverse the board.

Although *Microsoft* and *Belden* teach key lessons on the federal circuit's legal analyses, they are largely important for their results. They signal that the federal circuit still has the last word on patent claim validity. Practitioners in IPR proceedings would do well to bear in mind that they may still have to litigate in federal court.

¹ *Belden Inc. v. Berk-Tek LLC*, 610 F. App'x 997, 1001 (Fed. Cir. 2015).

² 789 F.3d 1292, 1308 (Fed. Cir. 2015).

³ *Id.* at 1297.

⁴ *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268 1275-79 (Fed. Cir. 2015).

⁵ *Microsoft*, 789 F.3d at 1298-99.

⁶ 610 F. App'x 997, 1005 (Fed. Cir. 2015).

Author: Kathy Wade - Fee & Jeffries, P.A.

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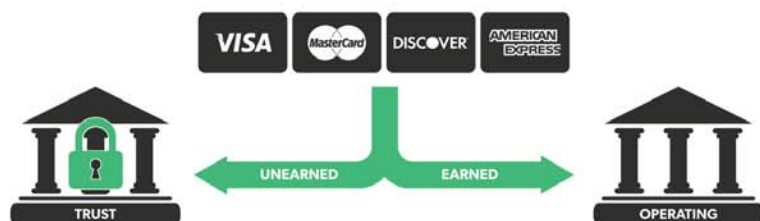


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Bench Bar Conference, Membership Luncheon & Judicial Reception

The HCBA Bench Bar Conference, Membership Luncheon & Judicial Reception enjoyed record attendance again this year as attorneys, judges, and other legal professionals came out for a day of great CLE programming and networking on October 27.

The conference began with an entertaining Ethics Breakfast led by Caroline Johnson Levine, followed by multiple breakout sessions with an array of special guests. In a new twist this year, attendees were treated to a special “View from the Box” session, which featured former jurors who volunteered to share their experiences and feedback from trial. Overall, the “Breaking Good” theme of prioritizing professionalism was a big hit.

About 600 people came out to see Jeff Vinik of the Tampa Bay Lightning speak at the Membership Luncheon. Vinik discussed his vision for downtown Tampa and the hockey team. Also at the luncheon, Hillsborough County Bar Foundation President Roberta Colton presented four local charities with checks totaling \$100,000. And the Thirteenth Judicial Circuit Professionalism Committee awarded Don Stichter with the 2015 Professionalism Award. (See page 58.)

The conference ended with attorneys, judges, and friends of the legal community mingling at the Judicial Reception in the evening.

The HCBA would like to thank the members of the Bench Bar Committee for all their hard work. A special thanks also goes out to all of the event sponsors, specifically our Diamond Sponsor: The Yerrid Law Firm.



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In the next two issues of the magazine, we'll have articles that delve into the “View from the Box” Session, where jurors were asked questions such as: What did you like best about the lawyers? What did the judges do that you appreciated? What were things that need to be improved? Stay tuned!







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FIFTH CIRCUIT TAKES ANOTHER JAB AT THE NLRB

Labor & Employment Section

Chairs: DeeAnna Hays - Ogletree, Deakins, Nash, Smoak & Stewart, P.C.; and Jamie Marcario - Greenberg Traurig, P.A.



The Fifth Circuit stepped into the ring for another round, knocking down yet another National Labor Relations Board (NLRB) decision that class- and collective-action waivers are unlawful. Recently, in *Murphy Oil USA, Inc. v. NLRB*, the Fifth Circuit again reversed the NLRB, rejecting the board's argument that arbitration agreements requiring employees to waive their right to pursue class and collective actions are unlawful.¹

Previously, the Fifth Circuit, in *D.R. Horton, Inc. v. NLRB*, reversed the NLRB's position on this precise issue.² Rather than seeking certiorari review by the United States Supreme Court, the NLRB simply issued its decision in *Murphy Oil* less than a year later, reaffirming its reasoning and result in *D.R. Horton*. In *Oil*, the NLRB again insisted that the National Labor Relations Act (NLRA) provides a substantive right to engage in collective action and, as such, is a contrary congressional command that precludes application of the Federal Arbitration Act (FAA), thus prohibiting the application of class- and collective-action waivers.

The Fifth Circuit's reversal of the NLRB decision in *Murphy Oil* delivers a hard uppercut to the board. Relying upon its earlier determinations in *D.R. Horton*

that: the NLRA did not contain a congressional command overriding the FAA and that the use of class-action procedures was not a substantive right under the NLRA, the Fifth Circuit simply stated that its decision in *D.R. Horton* was issued less than two years ago and that the Fifth Circuit would not repeat its analysis.³

Even in the aftermath of the Fifth Circuit's *Murphy Oil* decision, the NLRB continues to assert that it is an unfair labor practice for employers to: (1) have employees sign arbitration agreements waiving their right to bring complaints on a class or collective basis, or (2) seek the enforcement of such agreements in any forum. The Fifth's Circuit's recent decision and the NLRB's insistence on its contrary position has labor and employment law practitioners wondering how many rounds this matchup will last before the Supreme Court is given the opportunity to resolve the split between the NLRB and the courts.

In *Murphy Oil*, the petitioner also requested that the Fifth Circuit sanction the NLRB for its blatant defiance of the Fifth Circuit's *D.R. Horton* decision. However, recognizing that the NLRB did not always know which circuit's law would be applied on a petition for review,⁴ the Fifth Circuit refused to condemn the NLRB's nonacquiescence with *D.R. Horton*.⁵ Although the Fifth Circuit's decision not to sanction the NLRB may appear to give the board the opportunity to bob and weave its argument through the other

The Fifth Circuit's reversal of the NLRB decision in *Murphy Oil* delivers a hard uppercut to the board.

circuits, the Second, Eighth, Ninth, and Eleventh Circuits have already implicitly or explicitly agreed with the Fifth Circuit's decision in *D.R. Horton*.⁶ Hopefully, given these circuit court decisions, the NLRB will

weigh-in for a final matchup and seek certiorari review by the Supreme Court.

¹ 2015 WL 6457613, at *3 (Oct. 26, 2015).

² *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

³ *Murphy Oil*, 2015 WL 6457613, at *3.

⁴ An employer can seek review of a board decision in the circuit where the unfair labor practice allegedly took place, in the United States Court of Appeals for the District of Columbia, or in any circuit in which it transacts business. 29 U.S.C. § 160(f).

⁵ *Murphy Oil*, 2015 WL 6457613, at *4.

⁶ *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014), cert. denied 134 S. Ct. 2886 (2014); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013); *Owen v. Bristol*

Care, Inc., 702 F.3d 1050, 1053-55 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013).



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BANKRUPTCY AND DOMESTIC SUPPORT OBLIGATIONS

Marital & Family Law Section

Chair: Seth Nelson - Seth Nelson, P.A.



An ex-spouse has fallen behind on alimony and now filed bankruptcy. That alimony will be discharged in the bankruptcy case, right?

Not so fast. An ex-spouse cannot simply walk away from alimony, whether past, present, or future, by filing a bankruptcy case. Under Bankruptcy Code § 523,¹ a debtor is not entitled to discharge any debt for a domestic support obligation, including alimony.²

In fact, a bankruptcy court will not consider modification of alimony or other domestic support obligations,³ like child support. This complete hands-off approach might seem harsh to some at first, but Congress wrote the Bankruptcy Code so that a person could not use “the protection of a bankruptcy filing in order to avoid legitimate marital and child support obligations.”⁴

An ex-spouse is not without recourse, however. Rather than file for bankruptcy, an ex-spouse may still turn to the state divorce court itself to modify the alimony and child support for the same financial

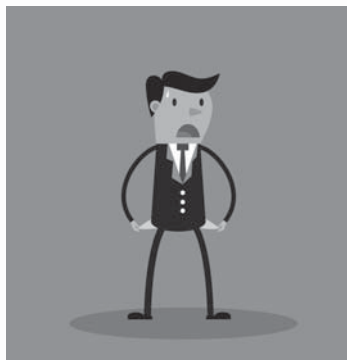
reasons that would lead to or underlie a bankruptcy filing.

Also, there is still some hope in bankruptcy. In certain limited instances, an ex-spouse in bankruptcy might argue that “what they owe” is not truly alimony or a domestic support obligation. For example, what if the state divorce court orders the ex-spouse to pay the other ex-spouse’s attorneys’

fees and costs? If the fees and costs awarded are punitive and not in the nature of support, then it may be possible to modify or discharge that obligation in bankruptcy.

Bankruptcy courts look at the substance of the support obligation, largely disregarding what the parties call it.⁵ The question is whether the obligation is “in the nature of support.” A debt is “in the nature of support” if, at the time the debt was created, the parties intended the obligation to function as support. The key determination in whether a debt is non-dischargeable alimony or a domestic support obligation under the Bankruptcy Code is the intent of the parties.

In short, an ex-spouse cannot simply throw up his or her hands



An ex-spouse cannot simply walk away from alimony, whether past, present, or future, by filing a bankruptcy case.

and file bankruptcy to avoid or modify alimony. Bankruptcy courts will only recharacterize and discharge a domestic support obligation if evidence shows that it is not in the nature of alimony, maintenance, or support.

¹ 11 U.S.C. § 523(a)(5).

² 11 U.S.C. §§ 523(a)(5), (15).

³ “Domestic support obligation” is a broad term defined by the Bankruptcy Code and includes alimony, child support, and anything that is in the nature of alimony, maintenance, and support. 11 U.S.C. § 101(14A).

⁴ *In re Proyect*, 503 B.R. 765, 773 (Bankr. N.D. Ga. 2013) (quoting H.R. Rep. No. 103-835, at 54 (Oct. 4, 1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3363).

⁵ *Cummings v. Cummings*, 244 F.3d 1263, 1265 (11th Cir. 2001).

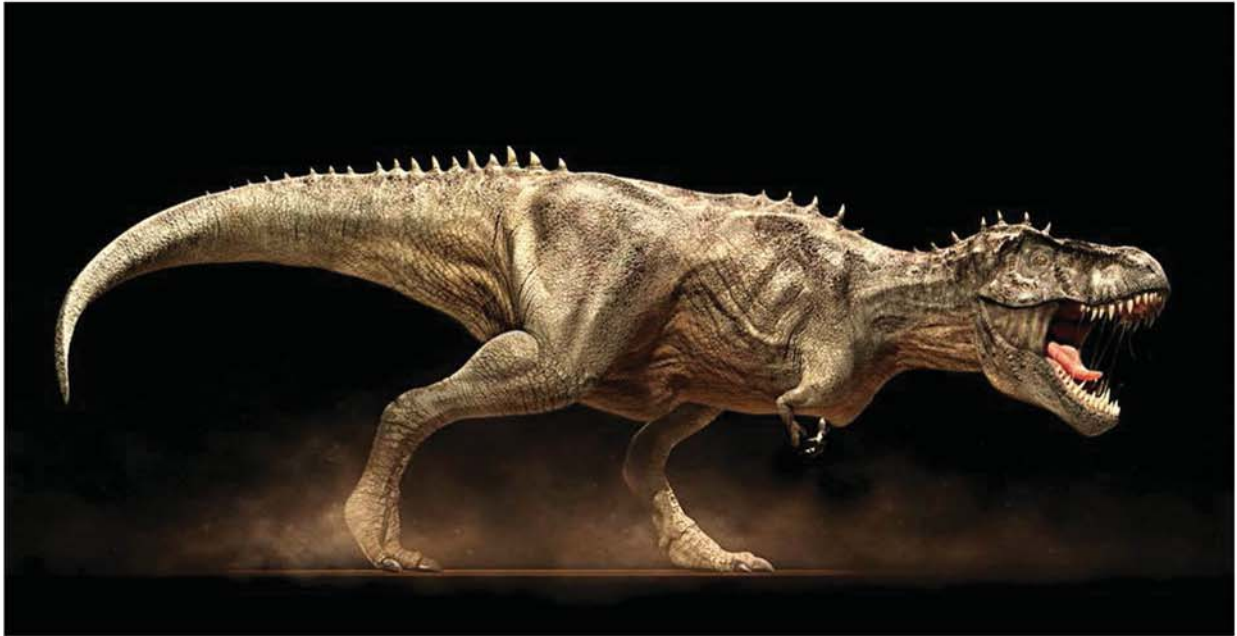


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Alfred Villoch III -
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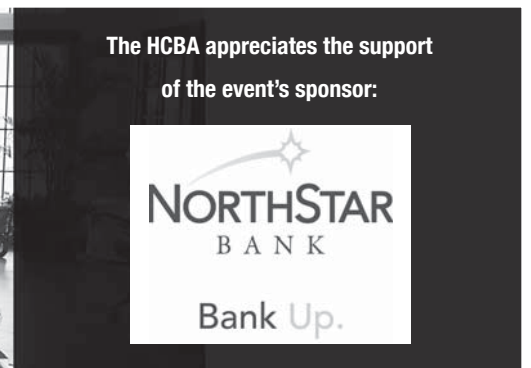
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HEALTH & WELLNESS EXPO

HCBA members and their staff took advantage of free flu shots, health screenings, and special discounts during the Second Annual Health & Wellness Expo on November 9. The expo featured more than a dozen organizations, including OneBlood, Tampa General Hospital, LifeLink, Insurance Office of America, Florida Orthopaedic Institute, Passport Health, Massage Envy, Bain Complete Wellness, Yogic Healers, the YMCA, LA Fitness, Explosive Performance, Fitlife Foods, Sam's Club, and the HCBA 5K Pro Bono River Run Committee.



SHOULD YOU ALLOW A PARTY TO ATTEND MEDIATION TELEPHONICALLY?

Mediation & Arbitration Section

Chairs: Benjamin S. Jilek - Bush Ross, P.A.; and Amy Mahan Tamargo - Tamargo Mediation, PLLC



Often times, parties have trouble scheduling mediation because: (i) one of the parties resides out of state; (ii) in the case of personal injury litigation, the insurance adjuster is located out of state; or (iii) in a multiple party case, it is simply too difficult to find a date when all parties and their counsel are available. In those situations, counsel may request that personal attendance at the mediation be waived and that the person or representative who cannot appear in person be allowed to attend telephonically. This request is often granted as a professional courtesy. Before agreeing to permit a party to appear telephonically at mediation, however, counsel should bear in mind that if the mediation agreement is not signed

by all parties at the mediation, any settlement reached could later fall apart.

Florida Rule of Civil Procedure 1.730(b), titled "Completion of Mediation," requires mediated settlement agreements to be in writing and signed by the parties:

If a partial or final agreement is reached, it shall be reduced to writing and signed by the parties and their counsel, if any.

Based on this rule, if a settlement agreement is reached at mediation, but one or more of the parties is only represented by counsel at mediation or attends telephonically, and that party does not sign the agreement by the time the mediation is terminated,



The mediation agreement should either be faxed or emailed to the absent party and signed and returned before the mediation is terminated.

the settlement agreement is not legally binding.

Florida courts have consistently held that a supposed settlement agreement resulting from mediation cannot be enforced absent the signatures of all parties. In *Gardner v. Wolfe & Goldstein, P.A.*, 168 So. 3d 1281 (Fla. 4th DCA 2015), the Fourth District Court of Appeal reversed

a trial court order enforcing a mediated settlement agreement because one of the parties had not signed the agreement. In so doing, the Fourth DCA relied on its decision in *Dean v. Rutherford Mulhall, P.A.*, 16 So. 3d 284, 286

Continued on page 55

HAVE AN INSURANCE CASE?

NEED A MEDIATOR?

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Mr. Taldone is a certified circuit and county mediator. Admitted to practice law in Florida (1997), New York (1980), New Jersey (1983), and California (1985). Mr. Taldone is licensed in Florida as a health and life (including annuities & variable contracts) agent.

Mr. Taldone is not Florida Board Certified in any area of law.

Continued from page 54

(Fla. 4th DCA 2009), where it also reversed a trial court order enforcing a mediated agreement that was not signed by one of the parties.

The Third District Court of Appeal reached the same result 15 years earlier in a case where a party did not sign the mediated settlement agreement but his lawyer did. In *Gordon v. Royal Caribbean Cruises, Ltd.*, 641 So. 2d 515 (Fla. 3d DCA 1994), Royal Caribbean sought to enforce an agreement that had been reached with Edgar Gordon at a mediation conference. Although Gordon had not signed the agreement, his lawyer did in Gordon's presence. The Third DCA held that the signatures of the parties are necessary under Rule 1.730(b), and "an attorney's signature alone, albeit in the presence of his client, is wholly insufficient under Rule 1.730 to create a binding mediation agreement." *Id.* at 517.



One suggestion on how to ensure that a mediation agreement is binding while accommodating the scheduling and transportation issues of all parties is to require that the mediation agreement be either faxed or emailed to the absent party and signed and returned before the mediation is terminated.

Author: Kari A. Metzger - Metzger Law Group, P.A.



BLI VISITS PORT OF TAMPA BAY

The HCBA Bar Leadership Institute class took an educational harbor tour of the Port of Tampa Bay on October 14. The class got to enjoy the sights and sounds of Florida's largest and most diversified seaport during this informative harbor excursion aboard the beautiful Bay Spirit II. The HCBA appreciates this year's BLI sponsor:



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THE IMPACT OF THE OPM DATA BREACH

Military & Veterans Affairs Committee

Chairs: Matthew F. Hall - Hill Ward Henderson; and Colleen O'Brien, 13th Judicial Circuit



At some point in their careers, nearly all members of the military file a Standard Form 86 (SF 86) through the Office of Personnel Management (OPM) in order to have their personal backgrounds reviewed before they are granted a security clearance. The SF 86 requests personal information such as the member's Social Security number, passport information, residence information for 10 years, schools attended, employment history, family member and relative information, foreign contacts and travel, criminal history, use of alcohol and illegal drugs, financial history, and any other associations. Understandably, OPM needs this information to properly assess whether an individual can be trusted with handling information of serious importance to the United States. Unfortunately, in April 2015, the OPM discovered that the background investigations of 4.2 million current and former federal government employees had been stolen by a massive cyber-penetration of OPM's data files.

Two months later, OPM revised its estimate upward and concluded that data on up to 1.1 million fingerprints and approximately

21.5 million Social Security numbers from nearly 20 million individuals who applied for background investigations, as well as nearly 2 million non-applicants, was compromised, making it arguably one of the largest security breaches in federal history. While the OPM security breach mainly affected active-duty military personnel, because the security breach

was so large, it includes veterans, spouses of active-duty members and veterans, and family members and associates of active-duty military members and veterans, as well as other federal employees.

Beginning in August 2015, OPM began providing individuals whose personal information had been compromised with instructions on what they needed to do to protect themselves. To its credit, OPM is offering those impacted with three years of credit monitoring, identity monitoring, identity theft insurance, and identity restoration services for themselves and their dependent children under the age of 18 through ID Experts, an identity theft protection company. For some of the services, the affected individual should be automatically



In April 2015, the OPM discovered that the background investigations of 4.2 million current and former federal employees had been stolen.

enrolled. But some services offered require the person to register at <https://www.opm.gov/cybersecurity> with a PIN the individual should have received from OPM through the mail.

Most military members or veterans impacted by this breach likely won't suffer any damage and will just need to remain vigilant about their cyber identity now that their personal information

has been compromised. However, attorneys advising military members, dependents, or veterans who are injured, even if enrolled and benefitting from the identity protection services offered through OPM, should review the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680; the Military Claims Act, 10 U.S.C. § 2733; and the Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. § 3721 to determine if the damages the individual suffered could be

recovered with a properly filed claim under one of those statutes.



Author: Scott G. Johnson - U.S. Central Command

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RPPTL SECTION LEARNS ABOUT AUTHORIZED SIGNATORIES

The Real Property, Probate & Trust Law Section hosted a luncheon on October 8 featuring guest speaker David Morgan, who discussed “Who has the power? The search for the illusive authorized signatory.” The section appreciates the support of the luncheon’s sponsor: Westshore Financial Group.



*Make it your
New Year's Resolution
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- Join a new section or committee
- Volunteer at the Diversity Networking Social on February 13
- Host a food booth at the Judicial Pig Roast/Food Fest on March 5, or run in the 5K Pro Bono River Run
- Participate in a Community Services Committee project

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RECOGNIZING PROFESSIONALISM AS A FOUNDATION FOR A SUCCESSFUL CAREER

Professionalism & Ethics Committee

Chairs: Joan Boles - Bay Area Legal Services; Caroline Johnson Levine - Office of the Attorney General



The Thirteenth Judicial Circuit Professionalism Committee proudly presented Don M.

Stichter with the second annual professionalism award. The award recognizes consistent honesty, integrity, fairness, courtesy, and an abiding sense of responsibility to comply with the standards and rules of professionalism in the practice of law. These criteria precisely summarize Mr. Stichter's reputation and dealings with the courts, opposing counsel, and parties.

Mr. Stichter personifies professionalism and serves as a role model not only to legal colleagues, but to many members of our community. His leadership began early in life when he served as president of his high school class. At Colgate University, he competitively swam and performed with the famous Colgate "13" singing group. After graduating college in 1951, Mr. Stichter joined the Navy and bravely volunteered to serve on what is now known as the Navy Seals (then the Underwater Demolition Team). Mr. Stichter and his wife of 55 years, Ellen, raised four children. One son, Scott, now practices law with him.

Mr. Stichter's legal career began in the Antitrust Division of the Justice Department and continued as a Chief Assistant United States Attorney in Tampa handling criminal and civil cases. Moving to

private practice, he handled a wide variety of cases in state and federal courts before narrowing his focus to bankruptcy.

Judge Michael Williamson, chief judge of the United States Bankruptcy Court for the Middle District of Florida, attributes a great deal to Don Stichter for building the collegiality and professionalism of the local bankruptcy bar. He is recognized for building a culture of

professionalism at his firm, Stichter Riedel, Blain & Postler. Judge Williamson noted, "Mr. Stichter proved to local lawyers you can build a go-to law firm on professionalism." U.S. Bankruptcy Judge Catherine Peek McEwen praises Mr. Stichter as a model of the civility pledge recently added to the oath of admission to The Florida Bar. Judge McEwen recognizes Mr. Stichter as "a consummate professional and a gentleman in every sense of the word."

While he has served as counsel on many high-profile and high-stakes cases, Mr. Stichter nevertheless consistently provides pro bono representation. In fact, Mr. Stichter routinely volunteers for the Bankruptcy Bar's Pro Bono Clinic and often covers if a volunteer cancels due to an emergency.



"Mr. Stichter proved to local lawyers you can build a go-to law firm on professionalism."

**— Chief Judge
Michael Williamson**

His firm's efforts were recognized in 2014 with the Florida Supreme Court Chief Justice's award for pro bono services.

Mr. Stichter served as HCBA president and continues to exceptionally contribute. Many lawyers praised Mr. Stichter's formal and informal mentoring of young lawyers throughout the local Bar.

In addition to his practice of law, Mr. Stichter remains active — swimming, playing multiple musical instruments, racing

sailboats, playing tennis, singing, reading, and teaching Sunday school. He currently performs with the Tampa Community Band and, until recently, volunteered as a diver cleaning saltwater tanks for The Florida Aquarium. He has also led efforts to preserve historic buildings in downtown Tampa.

Leadership, military service, graciously assisting others — these activities shape Don Stichter's daily routine. He sets a tremendous example of achieving success through integrity, professionalism, and service to others.



*Author:
Frances Perrone -
Hillsborough
County Court Judge*



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WHAT NOTICE IS DUE TO ASCERTAINABLE CREDITORS IN ESTATE PROCEEDINGS?

Real Property, Probate & Trust Law Section

Chairs: Mike Kangas - Philip A. Baumann, P.A.; Kristin Morris - Shutts & Bowen



Recently, the Florida Supreme Court held that “claims of known or reasonably ascertainable creditors of an estate who were not served with a copy of the notice to creditors are timely if filed within two years of the decedent’s death.” *Jones v. Golden*, 2015 WL 5727788, at *7 (Fla. Oct. 1, 2015) (emphasis added). The decision ends the conflict between the Fourth District Court of Appeal’s ruling in *Golden* and the decisions of the First and Second District Courts of Appeal in *Morgenthau v. Andzel*, 26 So. 3d 628 (Fla. 1st DCA 2009) and *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2d DCA 2012), which both held that unless reasonably ascertainable creditors filed a motion for an extension of time under section 733.702(3), Florida Statutes, claims filed three months after the first publication of the notice to creditors are forever barred.

The Florida Supreme Court’s decision involved three particular provisions of Chapter 733, Florida Statutes: sections 733.2121, 733.702, and 733.710. Section 733.2121(1) sets forth the duty of a personal representative to promptly publish a notice to creditors, which “must state that creditors must file claims against the estate with the court during the time [limitations] periods

set forth in § 733.702, or be forever barred.” § 733.2121(1), Fla. Stat. (2005) (emphasis added). Section 732.2121 also requires that a personal representative make a “diligent search to determine ... creditors who are reasonably ascertainable” and “promptly serve a copy of the notice on those creditors.” § 733.2121(3), Fla. Stat. Section 733.702 is a “statute of limitations” that limits the time for creditors to file claims against the estate to three months after the first date of publication of the notice to creditors. *Golden*,

2015 WL 5727788, at *8; see also § 733.702, Fla. Stat. (2006). Section 733.710 is a “jurisdictional statute of nonclaim” that limits the liability of the personal representative and the beneficiaries of the estate for “any claim[s] ... against the decedent” to a period of two years from the decedent’s date of death. *Golden* 2015 WL 5727788, at *6; see also § 733.710(1), Fla. Stat. (2001).

In *Golden*, the decedent, Harry Jones, died in February 2007. The



Harry’s personal representative published the notice to creditors in June 2007. Harry’s personal representative, however, failed to serve a copy of the notice to creditors to Harry’s ex-wife, Katherine Jones, or to Katherine’s guardian. In January 2009, Katherine’s guardian filed a statement of claim against Harry’s estate.

probate of his estate was opened in April 2007. Harry’s personal representative published the notice to creditors in June 2007. Harry’s personal representative, however, failed to serve a copy of the notice to creditors to Harry’s ex-wife, Katherine Jones, or to Katherine’s guardian. In January 2009, Katherine’s guardian filed a statement of claim against Harry’s estate. Katherine died in 2010, and Edward Golden was appointed curator of her estate.

Golden argued Katherine’s guardianship was a reasonably ascertainable creditor. Harry’s personal representative argued “Katherine was not a reasonably ascertainable creditor and that her guardian’s claim was time-barred under section 733.702 and 733.710.” *Golden*, 2015 WL 5727788, at *3-4 (emphasis added). Relying on section 733.702 and

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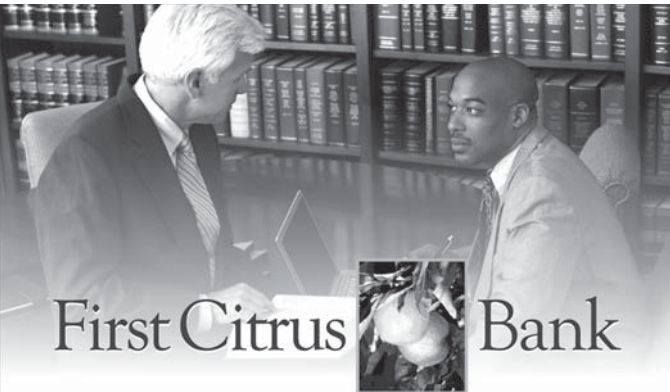
733.710, as well as *Morgenthau* and *Lubee*, the probate court struck the claim by Katherine's guardian as untimely. *Id.* at *4.

On appeal, Golden argued that since Katherine was a known or reasonably ascertainable creditor and the notice was never properly served on her, the three-month limitations period in section 733.702(1) never began to run, and as a consequence, the claim by Katherine's guardian could only be barred by the two-year statute of nonclaim in section § 733.710. The Fourth District agreed with Golden's argument. The Supreme Court ultimately affirmed the Fourth

District in *Golden* and disapproved the decisions of the First District in *Morgenthau* and the Second District in *Lubee*. *Id.* at *18.



Author: Robert S. Walton -
Law Office of Robert S. Walton, PL.





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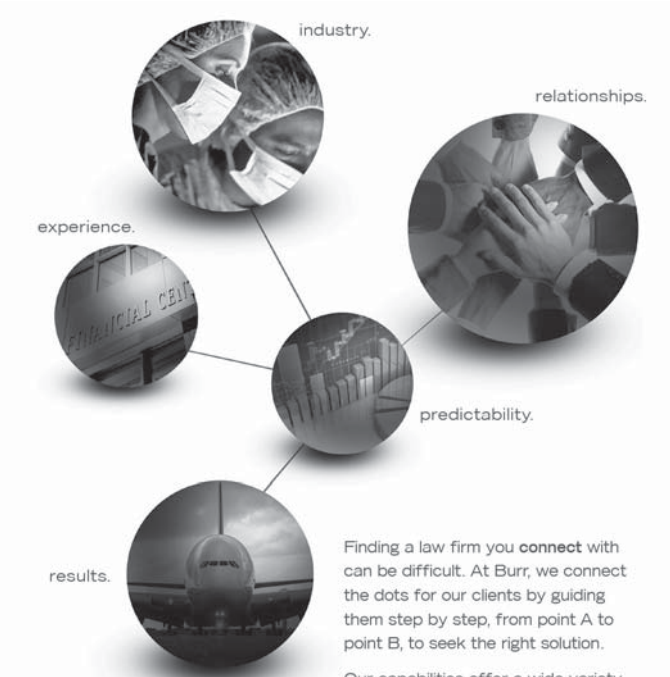
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No industry is immune from cyber-attack by sophisticated computer hackers looking to take advantage of weak firewalls and system controls. We regularly read headlines about large companies (i.e., Sony Pictures, Staples, The Home Depot)¹ that suffer a breach that reveals their customers' non-public, personally identifiable information. In June 2015, the Federal Office of Personnel Management's computer systems were breached, exposing 21.5 million federal employees' non-public, personally identifiable information.² These breaches lead to rampant fraud and identity theft, which cost these companies, and the government, hundreds of thousands of dollars.³

The vast majority of Americans who own securities hold them at broker-dealers or registered investment advisors (RIAs).⁴ These financial institutions are required to have policies and procedures in place to ensure compliance with

securities rules and regulations. More specifically, Rule 30(a) of Regulation S-P under the Securities Act of 1933 requires broker-dealers and SEC RIAs to adopt written policies and procedures reasonably designed to protect client records and information and to ensure the security and confidentiality of these records.⁵

The purpose of Regulation S-P is to provide protection for financial and personal customer information held by financial institutions.

On September 22, 2015, in the first enforcement case of its kind, the SEC entered into a settlement order with R.T. Jones, a St. Louis-based SEC RIA, for its alleged failure to establish cyber-security policies and procedures in advance of a breach.⁶ In this enforcement action, the SEC found that R.T. Jones was unable to prevent a data breach that compromised the non-public, personally identifiable information of nearly 100,000 individuals.⁷ As part of the settlement, the firm agreed to cease



Securities regulators have made it clear that cybersecurity, in the context of customer protection, is one of their highest regulatory priorities.

future violations of Regulation S-P, to appoint an information security manager, adopt written security policies, and pay a \$75,000 fine.⁸

Securities regulators have made it clear that cyber security, in the context of customer protection, is one of their highest regulatory priorities.⁹

The R.T. Jones enforcement action signals a shift in regulatory attention to this previously overlooked and under-examined issue. As we can anticipate increased cyber-attacks across all industries, we can anticipate increased regulatory attention from securities regulators in this space. From a consumer standpoint, you should inquire with your broker-dealer and RIA to see what policies and procedures they have in place to ensure your personal information is not vulnerable to risks associated with cyber-attacks.

Continued on page 63

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Continued from page 62

¹ Kevin Granville, *9 Recent Cyberattacks Against Big Business*, N.Y. Times, February 5, 2015, http://www.nytimes.com/interactive/2015/02/05/technology/recent-cyberattacks.html?_r=0.

² Julie Hirschfeld Davis, *Hacking of Government Computers Exposed 21.5 Million People*, N.Y. Times, July 9, 2015, <http://www.nytimes.com/2015/07/10/us/office-of-personnel-management-hackers-got-data-of-millions.html>.

³ Ponemon Institute Research Report, 2015 Cost of Data Breach Study: Impact of Business Continuity Management (June 2015).

⁴ Jesse Bricker et al., *Changes in U.S. Family Finances from 2010 to 2013: Evidence from the Survey of Consumer Finances*, 100 Federal Reserve Bulletin No. 4 (September 2014), available at <http://www.federalreserve.gov/pubs/bulletin/2014/pdf/scf14/pdf>.

⁵ 17 C.F.R. 248.1, et. seq.

⁶ Press Release, U.S. Securities & Exchange Comm'n, SEC Charges Investment Adviser With Failing to Adopt Proper Cybersecurity Policies and Procedures Prior To Breach (Sep. 22, 2015), available at <http://www.sec.gov/newes/pressrelease/2015-202.html>.

⁷ *Id.*

⁸ *Id.*

⁹ See, e.g., U.S. Securities & Exchange Comm'n, National Exam Program: Examination Priorities for 2015, <http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf>; Fin. Indus. Regulatory Authority, 2015 Regulatory and Examination Priorities Letter, available at <http://www.finra.org/industry/2015-exam-priorities-letter>.



Author: Matthew Schwart – Cole, Scott & Kissane



TEAMING UP TO HELP FAMILIES BEFORE DISASTER STRIKES

In remembrance of the 10th anniversary of Hurricane Katrina, the Hillsborough County Bar Association and Bay Area Legal Services teamed up to help low-income families in clearing titles to their homes pre-disaster. On October 2, the HCBA and BALS offered a free training course for pro bono attorneys entitled “No Place Like Home ... If You Can Prove Title.”

In the wake of Katrina, thousands of families in Louisiana, Mississippi, and Alabama were represented by pro bono attorneys in clearing the titles to their homes. This local initiative aims to help families address title issues before a disaster strikes to ensure they would be eligible for FEMA assistance or other post-disaster grants and loans to fix their homes.



THE NUREMBERG JUSTICE MINISTRY TRIAL OF 1947

Senior Counsel Section

Chair: Thomas Newcomb Hyde, Attorney at Law



In 1941, 76-year-old Leo Katzenberg, a prominent Jewish businessman in Nuremberg, Germany, rented an apartment in his house to Irene Seller, a non-Jew who was the 30-year-old daughter of Leo's non-Jewish friend. Leo, who had rented the apartment to Irene as a favor to his friend, was eventually accused of having a sexual affair with her. While Leo and Irene admitted kissing with Irene on Leo's lap, an investigator found no evidence of sexual intercourse. Nonetheless, Leo was arrested for race defilement in violation of a 1935 Law for Protection of German Blood forbidding relations between Jews and Aryans. Both Leo and Irene denied the accusations, claiming they were like father and daughter.

So began the presentation by Second District Court of Appeal Judge Edward LaRose to over 50 people, including 15 judges, at the Senior Counsel Section Luncheon on "The Nuremberg Justice Ministry Trial of 1947" at the Ferguson Law Center. Judge LaRose described

how Leo was tried before the Nuremberg Special Court, which had been established in 1933 with jurisdiction over cases involving inciting disobedience of governmental orders, sabotage, and acts contrary to public welfare. Leo's case was tried by Judge Oswald Rothaug, a rabid Nazi who referred to Leo as "an agent of world Jewry" and a "syphilitic Jew." In a trial without due process, Leo was convicted and sentenced to death by Judge Rothaug. Leo was beheaded in 1942.

In the spring of 1945, the victorious Allies organized an International Military Tribunal to try Nazis responsible for the atrocities in Europe. The most famous Nuremberg trials involved Rudolf Hess, Albert Speer, and Herman Goering. But other lesser officials were also tried. In the Nuremberg Justice Ministry Trial of 1947, Judge Rothaug was on trial for convicting and sentencing Leo to death without due process of law. (The story is fictionally recounted in the 1961 film *Judgment at Nuremberg* with Burt Lancaster in the role of Judge Rothaug and Judy Garland as Irene.)

Judge Rothaug's lawyer argued that Rothaug should not be bound

"The Special Courts were not legitimate courts, but vehicles for suppression whose victims included Jews, Poles, and gypsies."

by *ex post facto* laws, that he was just following orders, and that he was bound by legislative acts. The prosecutor pointed out that Rothaug had acquiesced in the Nazification

of the judiciary into a political tool for the Nazis. The Special Courts, he added, were not legitimate courts, but a vehicle for suppression of expression whose victims included Jews, Poles, and gypsies. There was no semblance of due process and no appeal.

Judge LaRose discussed the legacy of the Nuremberg trials and asked difficult questions to ponder: What does the Justice Ministry Trial of 1947 say to us as lawyers and judges in a diverse, pluralistic, and ever-shrinking world beset by violence, prejudice, and inequality? Do we reject the existence of natural law? How do we react to an unjust law? Do we work to repeal it, commit civil disobedience, work to limit its reach, or resign? Should we defer to civil government in the hope that, over time, laws will be just? To what extent do our actions or inaction perpetuate unjust laws?

Author: Thomas Newcomb Hyde - Attorney at Law

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HEALTH CARE LAW SECTION HOLDS CLE

Attorneys Maja Lacevic and Justin Saar were the guest speakers at the HCBA's Health Care Law Section CLE on September 30. They talked about the pros and cons of multidistrict litigation proceedings and offered helpful advice on what to discuss with clients before defending a case.



The section thanks those who came out to the event,
and a special thanks to
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MARITAL & FAMILY LAW SECTION HOSTS LUNCHEON

The HCBA Marital & Family Law Section hosted a luncheon on September 30 featuring speaker Caroline Black Sikorske, who discussed proactive management of the family law practice.

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On October 1, 2015, amendments to Chapter 558, Florida Statutes, the “Construction Defects” statute, went into effect. Originally created in 2003, Chapter 558 requires pre-suit notice and an opportunity to inspect and propose a resolution before commencement of construction defect lawsuits. It is intended as an alternative method to resolve construction disputes and protect the rights of property owners. § 558.001, Fla. Stat.

Although well-intended and capable at facilitating pre-suit dialogue, some of the statute’s requirements have created confusion among practitioners in application. The legislature recently attempted to clarify the statute by amending it to provide as follows:

§ 558.001 (Legislative Findings & Declaration) -

Amended to add insurers of contractors, subcontractors, suppliers, and design professionals as parties who should be provided an opportunity to resolve claims through confidential settlement negotiations before litigation.

§ 558.002 (Definitions) -

Amended the definition of “Completion of a building or improvement” to mean the issuance of a certificate of occupancy, whether temporary

or otherwise, that allows for occupancy or use of the entire building or improvement.

§ 558.004 (Notice and opportunity to repair) -

- Subsection (1) dealing with the subject of pre-suit notice was split into three parts (a, b, c), and part b now requires greater detail from claimants,

providing that: “Based upon at least a visual inspection ... the notice of claim must identify the location of each alleged construction defect sufficiently to enable the responding parties to locate the alleged defect without undue burden.

The claimant has no obligation to perform destructive or other testing for purposes of this notice.”

- Subsection (4) now provides that: “The written response must include one or more of the offers or statements specified in paragraphs (5)(a)-(e), as chosen by the responding contractor, subcontractor, supplier, or design professional, with all of the information required for that offer or statement.”
- Subsection (13) now provides that providing a copy of a



Chapter 558 is intended as an alternative method to resolve construction disputes and to protect the rights of property owners.

notice of claim to an insurer shall not constitute a claim for insurance purposes unless the terms of the policy specify otherwise.

- Subsection (15) now includes among records to be exchanged upon request: photos and videos of the alleged construction defect identified in the notice of claim and maintenance records and other documents related to the discovery,

investigation, causation, and extent of the alleged defect identified in the notice of claim and any resulting damages. It also now states: “A party may assert a claim of privilege ... with respect to any of the disclosure obligations specified in this chapter.”

These changes should assist in requiring greater detail from claimants and providing clarity with respect to the nature of responses

to be provided and documents to be exchanged. Time will tell if this ultimately renders the amended statute more effective.



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UPDATE ON PENDING CASES BEFORE THE FLORIDA SUPREME COURT

Workers' Compensation Section

Chairs: Anthony V. Cortese - Anthony V. Cortese, Attorney at Law; and Irene M. Rodriguez - Irene M. Rodriguez, PA



At the time this article was written, major issues in state workers' compensation appeals were still pending before the Florida Supreme Court. All section members who have their email addresses registered with the HCBA workers' compensation section will receive an email alert when each of those decisions is released. In the meantime, tensions are rising with the Florida Supreme Court's grant of certiorari review in *Stahl v. Hialeah Hospital*, and major changes to the procedural rules governing Longshore and Defense Base Act claims and case law interpreting those acts are affecting specialists who practice in that field.

In *Stahl v. Hialeah Hospital*, 160 So. 3d 519 (Fla. 1st DCA 2015), the First District Court of Appeal argued that the 1994 addition of a \$10 copay for medical visits after the claimant attains maximum medical improvement and the 2003 elimination of permanent partial disability benefits made the workers' compensation law an inadequate exclusive replacement for a tort action. The Florida Supreme Court's decision to grant certiorari review in *Stahl* could have significant implications for the two other workers' compensation

cases pending before the Florida Supreme Court: *Westphal v. City of St. Petersburg* and *Castellanos v. Next Door*.

By way of contrast, the Longshore Act and Defense Base Act provide generous medical and indemnity benefits without the limitations of Florida workers' compensation statute. 33 U.S.C. §§ 907 and 908. But those acts do not permit the claimant to avoid exclusivity or immunity issues. *Munn v. Kerry*, 782 F.3d 402 (9th Cir. 2015) (holding that family members of three security guards kidnapped and murdered in Iraq could not pursue tort actions in civil court because those claims are precluded by the Longshore and Defense Base Acts). And recent decisions under the Longshore Act continue to make it more difficult for a claimant to obtain attorney fees from an employer or carrier under section 28(a). 33 U.S.C. § 928(a).

By providing minimal initial medical care, an employer or carrier can avoid fee shifting under section 28(a). *Asadi v. Tradesman International*, 2014-LHC-01003 (March 5, 2015). But a claimant will still be able to shift his or her attorney's fee to the employer or carrier so long as he or she satisfies



Major changes to the procedural rules governing Longshore and Defense Base Act claims and case law interpreting those acts are affecting specialists who practice in that field.

all of the formal requirements of section 28(b), including an informal conference, certain District Director recommendations, and refusal by the employer/carrier to comply with those recommendations. *Id.* A claimant should oppose a procedural effort by the employer or carrier to circumvent this initial procedure. *Rendon v. L-3 Communications*, 2015-LDA-00529 (June 30, 2015).

Longshore and Defense Base Act practitioners should also note that new procedural rules became effective over the summer. The changes are substantial, including new filing and conference requirements, limitations on discovery, and other procedures for hearings. The rules are available at <http://www.oalj.dol.gov/librules.htm>. It has long been held that failure to follow the rules or pretrial orders hearings can support various sanctions, such as excluding certain evidence or witnesses, dismissing claims, or striking defenses. *See Williams v. Marine Terminals*, 14 BRBS 728 (1981) and *Durham v. Embassy Dairy*, 19 BRBS 106 (1986).

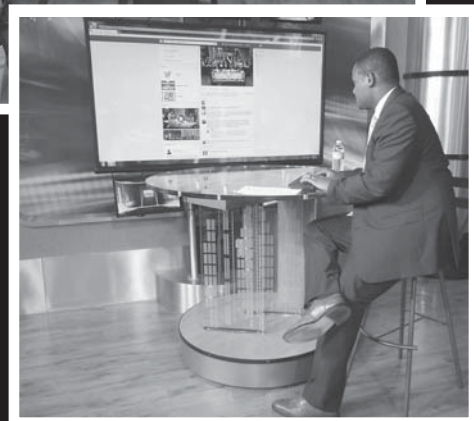
Author: Anthony V. Cortese - Anthony V. Cortese, Attorney at Law

ASK-A-LAWYER IS BACK ON FOX 13!

The volunteers from our Lawyer Referral & Information Service made a triumphant return to Fox 13's Ask-A-Lawyer program in November. The segment had been on hiatus while the station revamped the set, but the phones were ringing non-stop for our "Welcome Back" program. The HCBA appreciates all the attorneys who came out to answer phones and chat with people on Facebook! If you'd like to join the Lawyer Referral & Information Service, call (813) 221-7780.

Thanks to all who volunteered in November:

Dave Appell	Tom Hyde	Lawrence Samaha
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Michael Broadus	Stan Musial	Chip Waller
James Giardina	Kemi Oguntebi	Robert Walton
Lynn Hanshaw	Rinky Parwani	Dan Weisman
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WORKERS' COMPENSATION SECTION HEARS ABOUT MOSAIC CASE

Steve Yerrid and David Dickey from The Yerrid Law Firm spoke to the Workers' Compensation Section on October 28 about the firm's \$64 million verdict in the case of a man who was seriously injured when a building collapsed on him near the entrance of a mine owned by Mosaic Fertilizer. The section would like to thank Yerrid and Dickey for taking the time to talk about this major case.





HEALTH CARE LAW SECTION GETS OVERVIEW OF MEDICARE PROGRAM

The Health Care Law Section hosted a CLE luncheon on November 18 with guest speaker Jon T. Gatto of Carlton Fields Jordan Burt. Gatto gave an overview of the Medicare Advantage Program. The section would like to thank NorthStar Bank for sponsoring this event.



FAMILY LAW SECTION LEARNS ABOUT ESTATE PLANNING

The Marital & Family Law Section featured guest speaker Ian Giovenco at a luncheon on November 20. Giovenco discussed probate and estate planning matters in family law cases. The luncheon was followed by a CLE featuring a panel discussion on administrative child support proceedings. The section would like to thank the event's sponsor:





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RPPTL SECTION LUNCHEON

The Real Property, Probate & Trust Law Section hosted a luncheon on November 12 featuring guest speaker Tamara Cribben, who discussed the Office of the Public Guardian in Hillsborough County. The section would like to thank the luncheon sponsor: C1 Bank.



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FREE TIPS AND NEWSLETTER

Florida Lawyers Mutual Insurance Company (FLMIC) was created by The Florida Bar and is celebrating its 25 years of service in 2014. FLMIC offers HCBA members a free copy of its quarterly Advisor e-newsletter as well as bi-monthly risk management tips. To receive either or both, email your request to Mary F. Jones at maryj@flmic.com.



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Protect one of your most valuable assets ... your income! HCBA members receive a 10 percent permanent discount on Individual Disability Income Insurance through the Berkshire Life Insurance Company, a wholly owned stock subsidiary of The Guardian Life Insurance Company of America. Products, provisions, and availability may vary. For information, please contact Jay Langford at (813) 289-3632 x125 or jay_langford@glic.com.



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From exhibit boards to trial graphics and other professional presentations, this expert team provides a wide range of services. HCBA members receive a 10 percent discount on all trial research including mock trials. Visit www.trialcs.com for a list of services.

For the month of August 2015

Judge: Hon. Claudia Isom

Parties: Arielle Barrett v. Plant City Spirits, LLC

Attorneys: For plaintiff: Ronald W. Fraley; for defendant: Michael Nelson

Nature of case: Sexual harassment and retaliation

Verdict: \$75,000.00; motion for award of attorney's fees and costs.

For the month of August 2015

Judge: Hon. Mark R. Wolfe

Parties: Michael Kwashnak v. Amy Menna

Attorneys: For plaintiff: David Papa and Frank Currie; for

defendant: Mary Thomas and Jason Salgado

Nature of case: Premises liability. Plaintiff sought \$2.2 million for injuries and damages from defendant's bamboo tree

Verdict: Defense verdict. No liability.

For the month of September 2015

Judge: Hon. Mary S. Scriven

Parties: Bartosz Pilipajc v. Atria Group, LLC

Attorneys: For plaintiff: Gil Sanchez Valencia; for defendant: Luke Lirot and Thomas Little

Nature of case: Fair Labor Standards Act (minimum wage and overtime claim)

Verdict: Jury verdict for the plaintiff; \$11,609.60 total amount awarded plus mandatory statutory fees and costs.

For the month of October 2015

Judge: Hon. Rochelle T. Curley

Parties: Fitweb Limited v. Frank Menke, III

Attorneys: For plaintiff: Donald W. Scarlett Jr. and Andrew Casanueva; for defendant: Shane B. Vogt

Nature of case: Plaintiff sought \$995,000 at trial against defendant who defaulted on fraud claims while pro se.

Verdict: Defense, \$0.00; no causation; defendant's fee claim settled.

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Directory

Erin Smith Aebel, a partner in the Tampa office of **Shumaker, Loop & Kendrick, LLP**, and co-chair of the Tampa Health Law Department, moderated a panel on “Decoding Health Care - Modern Healthcare Technology: Curiosity Creates Cures” on October 20 at the Westin Harbour Island.

Ryan Angel recently joined **Hill Ward Henderson** as an associate. His practice will focus on general corporate advice, as well as mergers and acquisitions.

Ed Carbone, managing partner of the Tampa office of **Roig Lawyers**, has been selected to serve a two-year term on the American Society for Healthcare Risk Management (ASHRM) Journal Editorial Review Board.

Ronald B. Cohn, **Edmund S. Whitson**, and **W. Patrick Ayers** have joined the Tampa office of **Burr & Forman LLP**. All three attorneys bolster the firm’s Creditors’ Rights & Bankruptcy practice. With these additions, Burr & Forman now has a total of 22 attorneys in Tampa and more than 80 attorneys firmwide licensed to practice in Florida.

Duane A. Daiker, a partner at **Shumaker, Loop & Kendrick, LLP**, spoke at the Tampa Bay Paralegal Association

Annual Seminar on November 6. Duane’s topic was “Florida Appellate Practice.”

Domenick DiCicco has been appointed Group General Counsel for **Cunningham Lindsey**. Cunningham Lindsey is one of the leading global loss adjusting and claim management companies.

Timothy Ford, a shareholder at **Hill Ward Henderson**, was recently selected to participate in Leadership Tampa’s 2016 Class.

Fentrice Driskell, a shareholder at **Carlton Fields Jorden Burt**, received the 2015 Leaders in Law award from the Florida Association for Women Lawyers (FAWL). This award honors FAWL members who have made a significant impact in their communities, made meaningful contributions to their communities through legal service or volunteer activities, and have served as a positive role model for FAWL members.

Joe Eagleton recently joined **Brannock & Humphries**. Eagleton worked with Justice Barbara Pariente for three years at the Florida Supreme Court before joining the firm.

Donald Greiwe, a graduate of the University of Florida Levin College of Law, has joined

the law firm of **de la Parte & Gilbert, P.A.**, practicing primarily in the areas of civil and business litigation, appeals, and commercial transactions.

Harold Holder III has joined the law firm of **Bush Ross, P.A.** as an associate attorney. Holder received his B.S. from the University of Florida in 2011 and his J.D. from the University of Florida in 2015. Holder’s practice will focus on general commercial litigation.

Daniel E. Johns has joined the **Trenam** law firm as an associate and will practice in the Business Transactions Group. Johns received his undergraduate degree from Florida State University in 2011 and his J.D. from the University of Florida Levin College of Law in 2015.

Monica Hernandez Johnson has joined the Tampa office of **Shumaker, Loop & Kendrick, LLP**, as an associate in the Community Associations practice.

Andrew J. Mayts Jr., shareholder in **GrayRobinson’s** Tampa law office, has been appointed to the Thirteenth Judicial Circuit Nominating Commission.

Continued on page 79



For more HCBA news, go to www.facebook.com/HCBAatampabay. To submit news for Around the Association, email Corrie Benfield at corrie@hillsbar.com.

Continued from page 78

Natalie L. McEwan, previously a paralegal, has joined **the Tampa office of Shumaker, Loop & Kendrick, LLP**, as an attorney in the immigration practice area. She received her J.D. from Stetson University College of Law and her B.A. from Boston University.

Matt Mueller, Of Counsel in **Wiand Guerra King's** Tampa office, presented a CLE webinar on October 14 sponsored by The Florida Bar Tax Section entitled "The Tax Professional as Client: Practical considerations for representing accountants, return preparers, and other tax professionals in civil and criminal tax cases."

Alexandra Palermo, commercial litigation attorney at **Burr & Forman**, recently helped facilitate the Women in Leadership panel at the University of South Florida Center for Leadership and Civic Engagement.

Mathew S. Poling has joined the Tampa office of **Shumaker, Loop & Kendrick, LLP**, as an associate in the real estate practice.

Jacqueline Prats has joined the **Trenam** law firm as an associate and will practice in the Commercial Litigation Group. Prior to joining the firm, Prats was a federal judicial intern at the U.S. District Court, Middle District of Florida, and served as a summer associate at Trenam.

Caroline Black Sikorske of **Mason Black & Caballero PA** has been elected to the American

College of Family Trial Lawyers (ACFTL). The ACFTL is a select group of 100 of the top family law trial lawyers from across the United States.

Jacqueline Simms-Petredis of **Burr & Forman LLP** recently helped facilitate two presentations on professionalism in the legal industry. First, she served on a panel discussing "Young Lawyer Professionalism" at the Fall 2015 Practicing with Professionalism seminar presented by The Florida Bar Continuing Legal Education Committee and the Young Lawyers Division. Simms-Petredis also spoke at the Tampa Bay campus of the Western Michigan University Cooley Law School, discussing professionalism in action.

Stefan V. Stein, shareholder and member of the Intellectual Property and Technology Group in **GrayRobinson's** Tampa law firm office, was appointed to the International Trademark Association's (INTA) Emerging Issues Committee for the 2016-2017 term.

Anna M. Wiand has joined **GrayRobinson's** National Regulated Products Team. Wiand recently served as regulatory counsel for the FDA Office of Regulatory Affairs, Office of Policy and Risk Management, in Rockville, Maryland.

Brian Willis, an attorney with **Shumaker, Loop & Kendrick, LLP**, was a guest speaker at Tampa's Urban Core Board Member Roundtable on October 7 hosted by the Skypoint condominium in downtown

Tampa. The roundtable covered upcoming development projects in Tampa's urban core and a condominium legal update. Willis also spoke about Hillsborough's history of small-town urbanism at Pecha Kucha Night Tampa Bay. Pecha Kucha Nights take place in over 800 cities around the world and are informal and fun gatherings where creative people get together and share their ideas.

Thomas M. Wood, a partner in the Tampa office of **Shumaker, Loop & Kendrick, LLP**, has been elected chairman of the board of directors for the MacDonald Training Center. Wood previously served as chair from 2007 to 2009 and has served on the board since 2003.

Buchanan Ingersoll & Rooney has announced the opening of its newly consolidated office in Tampa. The firm, which previously had two Tampa offices located in the BMO Harris Plaza and Sun Trust Financial Centre, has now consolidated to a single location at SunTrust Financial Centre, 401 E. Jackson St., Suite 2400. More than 50 attorneys will work out of the new space, which encompasses more than 32,000 square feet over two floors.

Greenberg Traurig has moved its Tampa office into its new "Class A" space occupying the 19th floor of the Bank of America Plaza. The 10-year lease deal for 20,000-plus square feet was signed as part of the firm's long-term commitment to the Tampa Bay area and to accommodate future growth.

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Ronald Fraley, an AV rated attorney, has practiced Employment Law in Tampa for over 25 years.



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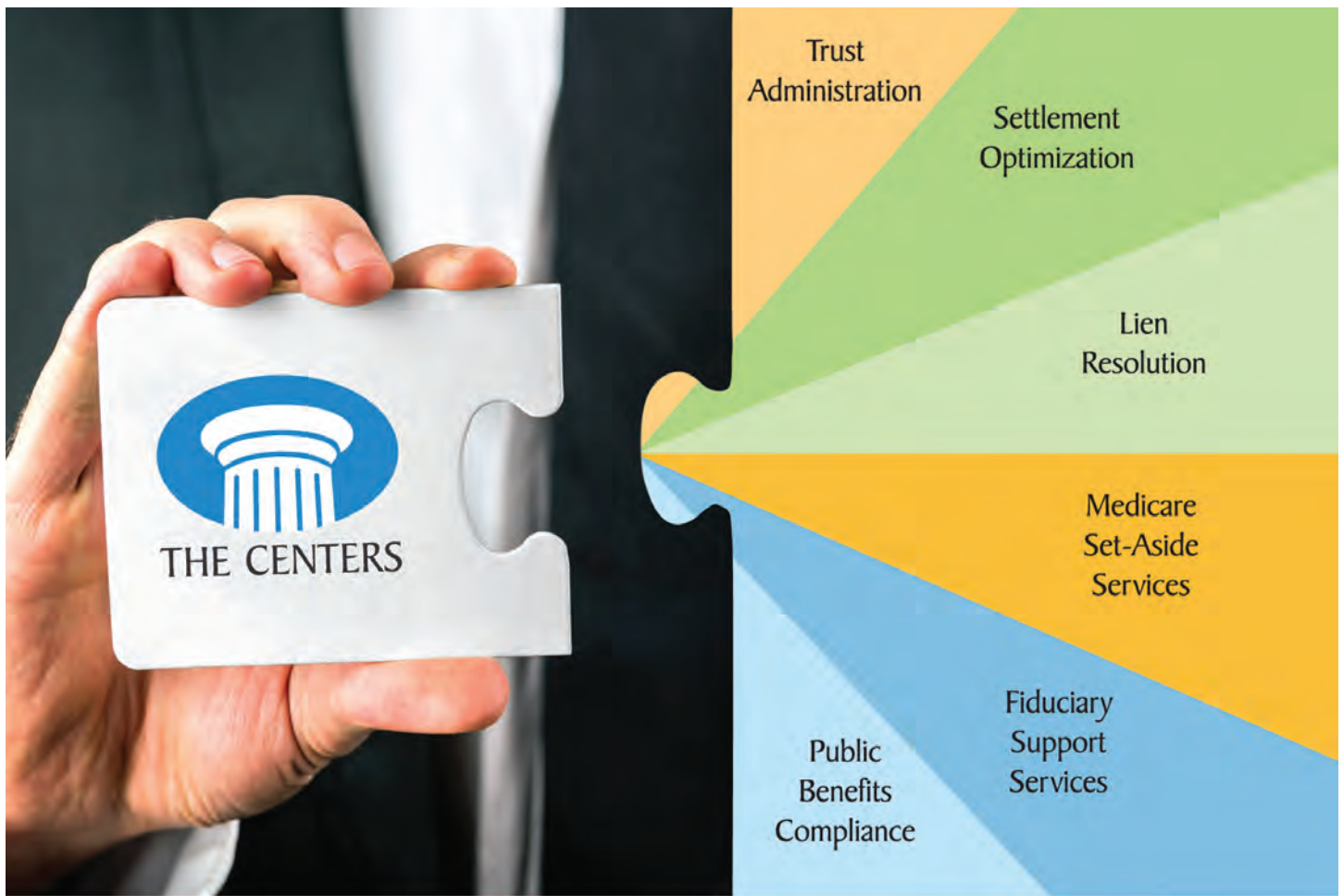
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