Medical Error is estimated to be the third leading cause of death in the U.S.

Accountability encourages safer patient care.

Fig 1 Most common causes of death in the United States, 2013

Based on our estimate, medical error is the 3rd most common cause of death in the US

However, we're not even counting this - medical error is not recorded on US death certificates

Fig 2 Model for reducing patient harm from individual and system errors in healthcare

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ABOUT THE COVER

This issue’s cover highlights another famous legal literary novel, A Civil Action. This non-fiction novel written in 1995 by Johnathan Harr recounts an infamous water contamination case that took place in Woburn, Massachusetts, in the 1980's. The book became a national bestseller and won the National Book Critics Circle Award for non-fiction. The story also was popularized in a 1998 film starring John Travolta and Robert Duvall. Published by Penguin Random House, 1995.
MAY IT PLEASE THE COURT:

DO’S & DON’TS FOR TRIAL LAWYERS AT ORAL ARGUMENT
Appellate Practice Section
by Dawn A. Tiffin

COLLABORATIVE DIVORCE IS NO CROCK
Collaborative Law Section by Honorable Stevan T. Northcutt

FLA. SUPREME COURT INDICATES POTENTIAL RETURN TO FRYE FOR EXPERT TESTIMONY
Construction Law Section by Frank T. Moya

LEGAL WORKPLACE ISSUES TO MONITOR IN 2017
Corporate Counsel Section by Andrew Froman

THE FIGHT AGAINST COMPOUND DRUG FRAUD CONTINUES
Health Care Law Section by Clark Bolton

NEW STANDARD FOR DESIGN PATENT INFRINGEMENT DAMAGES
Intellectual Property Section by Ryan M. Corbett

IS THE BATHROOM BATTLE THE NEXT BIG EMPLOYMENT LAW FIGHT?
Labor & Employment Section by Lisa McGlynn

MORE THAN JUST A SUBSTANTIAL CHANGE?
Marital & Family Law Section by Deborah L. Thomson

SAFEGUARDING MEDIATION FROM MISLEADING INFORMATION
Mediation & Arbitration Section by John W. Windle

POST-JUDGMENT LIENS ARE DISCHARGED UPON FORECLOSURE SALE
Real Property Probate & Trust Section by Wesley K. Jones

STEPPING OUTSIDE YOUR COMFORT ZONE
Securities Section by Jordan D. Malich

JOHN BINGHAM AND THE FOURTEENTH AMENDMENT
Senior Counsel Section by Thomas Newcomb Hyde

LEGAL TECHNOLOGY - IT’S A BRAVE NEW WORLD
Solo & Small Firm Section by Amanda M. Uliano

FLORIDA SUPREME COURT DETHRONES DAUBERT
Trial & Litigation Section by Morgan W. Streetman

WHEN THE LITIGATION COSTS OUTWEIGH THE POSSIBLE BENEFIT
Workers’ Compensation Section by Anthony V. Cortese

THE LEADERSHIP OF GENERALS AND GENERAL COUNSEL
Bar Leadership Institute Committee by Chance Lyman

MODERN FAMILY BUILDING IN FLORIDA
Diversity Committee by Stephanie Favilli Bodolay

COMMUNITY INVESTMENTS THROUGH KNOWLEDGE AND EDUCATION
Law Week Committee by Tiffany Love McElheran

MVC PANEL TO MACDILL ATTORNEYS - LIFE AFTER JAG
Military & Veterans Affairs Committee by Steve Berlin

THE THIRTEENTH JUDICIAL CIRCUIT 2017 PRO BONO SERVICE AWARD WINNERS
Pro Bono Committee, Thirteenth Judicial Circuit by Rachel May Zysk

PUTTING PROFESSIONALISM INTO PRACTICE
Professionalism & Ethics Committee, by Richard Martin and William Kalish

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By now, surely you’ve heard who won the big basketball championship game. No, not March Madness. I’m talking about the law league championship. For the few of you who haven’t heard, a one-loss BCD team beat the undefeated Justice League for the championship before a raucous crowd of twelve. The Justice League started off hot and jumped out to an early lead, but BCD pulled ahead in the second half and held on for a narrow victory.

Now for the rest of the story...

The BCD squad featured HCBA President Kevin McLaughlin, while the Justice League was led by me. And when I say “led by me,” I mean I signed the team up for the league. As for playing ability, I’m at the point in my career where I was probably the eleventh guy in a ten-man rotation. In any event, I had suggested to some around the HCBA (jokingly, of course) that when my team won, I was going to use my editorial discretion to write a whole feature on my team and the game. Since my team lost, I felt it only fair to acknowledge Kevin’s victory.

But the real reason I’m writing about law league basketball has to do with something I learned during the season. In the November issue of the Lawyer, Kevin talked about how lucky we are to practice with the next generation of lawyers. Talking about the swearing-in ceremony for lawyers who passed the July bar exam, where newly admitted lawyers pledged fairness, integrity, and civility to opposing parties and their counsel, Kevin remarked, “I came away with the overwhelming sense that these young lawyers not only believed steadfastly in the words they had just spoken, but that they were committed to living up to the high standards expected of them.”

I got a chance to witness that first-hand this season. My team mostly consisted of recent graduates (Josh Gehres, Schuyler Gray, Matt Lastinger, and Mike LeFevour) or lawyers who were new to the area (Kevin Golembiewski, Danny Waldman, and Matt Hale). We also had two younger lawyers who have practiced in Hillsborough for a few years (Drew O’Malley and Matt Livesay). Over the years, I’ve had the good fortune to play with some really nice guys over the years (my former teammates on Sweep the Leg, chief among them).

But these young guys may be some of the nicest I’ve played with. In fact, several guys on Kevin’s team told me after the game that my team was the nicest group of guys they played all year (which was nice to hear, although I’m not sure I’m quite at the “It’s not whether you win or lose, it’s how you play the game” stage in life).

In his November President’s message, Kevin commented that the next generation of lawyers is one (of many) reasons to be optimistic about the HCBA’s future. If the guys on my law league basketball team are any indication, I couldn’t agree more. And since all our players should return, I’m just as optimistic about next year’s law league basketball.
The Bench and the Bar

We are very lucky to have such a healthy relationship with our judges, but we are always looking for ways to improve.

If you happen to be one of the people that has read the HCBA President’s Message this year, you may have noticed that I have made challenging the unfounded attacks on our judiciary a recurring theme in some of my articles. Our courts and our judges are under constant threat of underfunding, as well as brazen intrusion into a supposedly co-equal branch of government through the proposed imposition of term limits and, more recently, the possibility of legislative review of judicial rulings. These threats have the potential to diminish the judiciary’s primary role — the full and effective administration of justice. Also vital to the full and effective administration of justice is a healthy working relationship between our judges and the lawyers who appear before them on behalf of their clients.

I may sound like a broken record, but the HCBA and the local bench have a truly unique relationship, and our members enjoy unparalleled support, cooperation and camaraderie with our judges. All of our judges are members of the HCBA, and not a week goes by that one of them is not speaking at a CLE or attending one of

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our many events. This is best demonstrated by the fact that we had over 40 judges participate in our annual Bench Bar Conference this year. However, like any relationship, we must always strive for improvement. With that goal in mind and before I leave office, I am establishing a Presidential Special Committee on Bench Bar Relations.

I would like to take credit for the idea of this special committee, but all the credit goes to one of our most active members, Steve Yerrid, who recently approached me to discuss the creation of this committee. Because of his unique perspective as one of the nation’s preeminent trial attorneys, Steve — better than many — recognizes that an ongoing candid and constructive dialogue is essential for a well-functioning judicial system. Simply put, there are things we as lawyers do well and things judges would like to see us do better. Likewise, there are things judges do well and things we as lawyers would like to see them do better.

The problem is that there does not currently exist an established forum for the bench and the bar to have an open and honest exchange of ideas. This committee is being created for that very purpose. Because of the nuanced working relationship between lawyers and judges, it can be difficult for lawyers to make suggestions or raise concerns about judges, and it can be just as difficult for judges to do the same with lawyers. I believe this committee offers a unique opportunity for both our bench and our bar to address issues of mutual concern.

The members of the committee will include the Chief Judge of the Thirteenth Judicial Circuit and President of the HCBA as ex officio members; trial judges from the Thirteenth Judicial Circuit; and a small number of HCBA attorney members. The attorney members will be equally represented on the committee by those principally representing plaintiffs and those principally representing defendants. The committee will meet on a quarterly basis, and more often as needed. The committee will have a focus on important issues such as preparation, professionalism, and other concerns that exist for both lawyers and judges. The committee also will serve as a conduit for addressing specific concerns that lawyers and judges can bring to the attention of the committee representatives anonymously.

I want to extend my thanks to Steve Yerrid and Chief Judge Ronald Ficarrotta for their proactive approach to improving bench-bar relations and for graciously agreeing to serve on the committee. I plan to make the attorney appointments to the committee in the coming weeks. If you have an interest in serving, please contact me (Kevin@wagnerlaw.com). I pledge that the committee will strive towards inclusion and will seek the input of everyone in order to learn and implement ideas, approaches, and methodologies that will best achieve our goals. As I said, we are very lucky to have such a healthy relationship with our judges, but we are always looking for ways to improve. I have no doubt that the work of this committee will make our lives easier. But more importantly, when lawyers and judges are working toward the same end, the real winners are our clients.
We are all busy, but it is important to remember how fortunate we are and to take time to help those in need. If every member of the HCBA engaged in one pro bono activity a year, we could make a huge difference. Pro bono work is not just limited to representing a person in court. There are dozens of opportunities in Hillsborough County for you to give back to the legal community, regardless of what area of law you practice or how much time you have. There are many opportunities available in Hillsborough that take only an hour or two.

If you are looking for a way to get involved, start with Bay Area Legal Services. The organization’s website, www.bals.org, includes links for volunteer opportunities in Hillsborough and will provide you with information regarding on-going pro bono projects. Many of the projects only take a couple of hours of your time, and opportunities exist for all types of lawyers. Many require little to no experience, because training is provided. To make things easier, I wanted to highlight some of the less time-consuming pro bono opportunities offered through organizations in Hillsborough to encourage you to take a minute for a pro bono project before the end of the year:

- **ASK A LAWYER.** Answer calls from local residents seeking legal help while appearing on Fox 13’s morning television show, coordinated by HCBA’s Lawyer Referral & Information Service. This occurs on the first Thursday of every month from 7 - 9 a.m. Contact Lupe Vasquez-Mitcham at 813-221-7783 or at lupe@hillsbar.com.
- **CLIENT INTAKE.** Interview and advise legal aid applicants at the courthouse two evenings a month from 5:30 - 8 p.m. Go to www.bals.org/pro-bono-registration to register.
- **iLAWYER.** Provide legal services to pro bono clients via Skype in the comfort of your own home or office. This project is held one evening a month from 5 - 7 p.m. Please contact Linda Anderson at landerson@bals.org or 813-232-1222, ext. 128.
- **LOW-INCOME TAX PANEL.** Assist eligible clients with their income tax issues. Go to www.bals.org/pro-bono-registration to register.
- **TAMPA BAY BANKRUPTCY BAR ASSOCIATION’S PRO BONO CLINIC.** Provide limited advice/information and/or assist with preparation of court documents for pro se bankruptcy litigants. The clinic is open on Monday and Wednesday afternoons from 1 - 4 p.m. Contact tbkprobonoclinic@gmail.com for more information.
- **TEEN COURT.** Serve as a judge or mentor to help first-time juvenile offenders in teen court, through this court-sponsored diversionary program. Contact Pam Stokes at 813-272-5953 or via email at stokespl@fljud13.org.
- **GUARDIAN AD LITEM PROGRAM.** Volunteer to become an appointed guardian to young children in need. Visit www.galtampa.org for information.
- **FAMILY FORMS CLINIC.** Help pro se litigants complete family law forms. The clinic is offered at the courthouse weekly. The YLD hosts an evening clinic once a month Bay Area Legal Services staff is on hand to answer questions. No family law experience is needed. There is a 30-minute training DVD. Visit www.bals.org/pro-bono-registration to register.
- **WILLS FOR HEROES.** Provide essential legal documents free of charge to first responders in Hillsborough County. The project uses volunteer
Continued from page 6

attorneys and paralegals to provide wills, living wills and powers of attorney at scheduled events. Contact Katie Everlove-Stone at katie@everlovelegal.com.

These programs are just a few of the many pro bono opportunities that require only a limited time commitment by the attorney. There are numerous other programs on Bay Area Legal Services’ website. All of the programs listed provide training and do not require any expertise in the particular matter or area of law. These pro bono projects are great opportunities to get involved in pro bono projects and give back to the community and profession, without a significant time commitment. I would encourage everyone reading this magazine to take a minute for pro bono service with one of the above programs, or another one that better suits your interest. If each one of us took a couple of hours out of our year to assist those in need of pro bono legal services, the impact on the community would be monumental.

YLD Quarterly Luncheon

On February 15, the YLD talked about paying down their student loan debt at their quarterly luncheon with speakers Kevin A. Caldwell from Raymond James & Associates, Inc.; Laura Zuppo with Stetson University College of Law; and Laura Bare with Cooley Law School. In the spirit of the reducing debt topic, the young lawyers had pizza for lunch just like their law school days.
Fight for Legal Services Funding in Washington Sparks Memories of Reece Smith’s Visionary Leadership

“Meeting the legal needs of the poor is not a race for the short winded.” — the late William Reece Smith, Jr.

What would Reece Smith think? That’s the question that first crossed my mind when I heard the Trump administration had proposed to defund the Legal Services Corp. in its 2018 draft budget sent to Congress in March. Of course, I already knew the answer.

After pondering for a moment the implications of eliminating the successful legal-aid program created in 1974 to help the poor, Smith — who passed away in 2013 at age 87 — would have leaped into action.

Smith would be working the phone, reaching out to lawmakers, and mobilizing Bar leaders from around the country to help save the program so near to his heart.

This is what Smith did years ago, in 1981, during Ronald Reagan’s first term as president, when Smith happened to be serving as president of the American Bar Association.

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Now’s the Time to Renew Your HCBA Membership!

The 2017-18 Bar year starts on July 1. Renew your membership now and stay connected to Hillsborough County’s legal community!


GO TO HILLSBAR.COM TO LEARN MORE AND RENEW TODAY!
EXECUTIVE DIRECTOR'S MESSAGE
John F. Kynes - Hillsborough County Bar Association

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By all accounts, Smith is credited with rallying public support and forging a legislative compromise that would end up saving the LSC.

For those new to the HCBA, a little background.

William Reece Smith was a proud son of Plant City, a star athlete at South Carolina, a Navy officer in World War II, a law school graduate from the University of Florida, a Rhodes Scholar, and a longtime managing partner at Tampa’s Carlton Fields law firm, which he joined in 1953.

The embodiment of a true leader, Smith served as president of the HCBA, The Florida Bar, the ABA, and the International Bar Association.

“Reece Smith was one of the lions of The Florida Bar,” Martha Barnett, a partner in Holland & Knight’s Tallahassee office, said at the time of his death. Barnett served as ABA president in 2000-01.

“He stood for the ethical obligation of lawyers as professionals, and he lived that,” Barnett added. “He understood the value of diversity and put those ideals into practice.”

As this publication goes to print, it’s unclear what action Congress may take related to the LSC. But legal aid organizations around the country are busy educating supporters and the public about the impact of potential cuts.

“Funding for legal services every year is a struggle. This year it’s a fight,” said Linda Klein, the current ABA president, as she addressed hundreds of Bar leaders gathered in Chicago for an ABA conference in March.

Locally, Bay Area Legal Services was created in 1967 to provide legal assistance to low-income residents. It now serves a five-county region in the Tampa Bay area.

Dick Woltman — who joined BALS in 1976 and became CEO in 1980 — recently told me he is deeply concerned about losing funding from LSC, which provided $3.4 million in grant money to BALS this year.

“It is our largest and most significant funding source,” Woltman said, “If we lose LSC funding as envisioned in the Trump administration’s budget, our services would be reduced by at least 50 percent.”

BALS reports it responded to more than 58,000 callers seeking legal services last year, and that it assisted more than 17,000 local individuals and families.

Florida Bar President Bill Schifino also issued a statement on funding for LSC.

“Defunding LSC would cause a loss of more than $21 million a year to Florida’s already stressed legal aid system, leaving vulnerable children, seniors, veterans, and many other Floridians without advocates to protect their legal rights,” Schifino said.

Schifino also highlighted a recent study commissioned by The Florida Bar Foundation that found a seven-fold financial return on investment in civil legal services.

Later this year, on September 28, BALS will be having its 50th Anniversary Gala Dinner at Higgins Hall to celebrate its long history and to raise money for its future work.

I can’t think of a better way to honor the memory and vision of Reece Smith than by supporting BALS at this special event. I hope you to see you there.

See you around the Chet.
To accomplish its goal of promoting safety and justice, an effective criminal justice system must see beyond conviction and incarceration. It must also reduce recidivism, rehabilitate, and re-integrate offenders back into society. For too long, our criminal justice system has failed those in its confines who suffer from mental illness. Annually, an estimated two million people with mental illness are booked into jails in our country — many for non-violent offenses.

Last year, the Hillsborough County Bar Association raised awareness of this issue in our legal community during the Law Day Membership Luncheon and CLE on “Ending the Criminalization of Mental Illness.” And by enacting section 394.47892, Florida Statutes, the Florida Legislature has recognized the value of creating mental health courts at the local level.

This statute authorizes the creation of mental health court programs “under which a defendant in the justice system assessed with a mental illness shall be processed in such a manner as to appropriately address the severity of the identified mental illness through treatment services tailored to the individual needs of the participant.” Here in Hillsborough County, we have addressed this need by developing and implementing our own mental health court (MHC).

Hillsborough County’s MHC is a problem-solving court that seeks to bring mental health treatment into the courtroom. Spearheaded by Chief Judge Ronald Ficarrotta — and supported by our Public Defender, community partners, and treatment providers, as well as my office — the MHC allows individuals charged with certain crimes to participate in a diversion program that incorporates a treatment plan into the sanctions. Before entering the MHC, the individual is assessed by treatment providers, and a treatment plan is developed.

Compliance with that treatment plan is monitored by the court and can be altered to meet the needs of the individual. Those participating in the MHC are supervised by the Department of Corrections to ensure community safety. A large portion of the court proceedings are confidential due to the sensitive nature of the proceedings and the treatment plans being discussed. This intensive program provides the monitoring and treatment offenders need, while reducing the likelihood that they will re-offend.

Because its focus is on mental health and not solely on criminal charges, the MHC also is able to monitor court cases for persons with developmental disabilities who are receiving services under Chapter 393, Florida Statutes, and through the Agency for Persons with Disabilities. Although these cases are not criminal in nature, the relationship between treatment providers and the court can benefit the involved individuals.

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Too frequently, those suffering from mental illness find their way into the criminal justice system. We have implemented a way to handle those cases in a manner that serves our entire community — balancing safety and accountability with appropriate services to those in need. By allowing offenders to access treatment services while receiving the support needed to make positive decisions, we seek to change behavior and improve our community. I challenge my prosecutors to view each case they have, not as a person to be prosecuted, but as a problem to be solved. Our mental health court is a critical component of those solutions.


Hillsborough County Animal Abuser Registry

The ordinance marks an important step in the County’s effort to prevent convicted animal abusers from possessing or working with animals.

In September 2016, Hillsborough County became the first county in Florida to establish an animal abuser registry. The ordinance, which took effect in Hillsborough County in November 2016, marks an important step in the County’s effort to prevent convicted animal abusers from possessing or working with animals.

Historically, injunctions prohibiting persons found to have violated civil or criminal animal abuse laws from possessing or working with certain animals have been granted on an ad hoc basis. The Animal Abuser Registry ordinance now provides a more consistent process for doing so. It also provides a more accessible way for persons involved with pet adoption to determine if a prospective adoptive owner has been convicted of an animal abuse crime and are prohibited from owning a pet.

For purposes of the Animal Abuser Registry ordinance, “animal abusers” are defined as persons convicted of the following crimes:

• Cruelty to animals under section 828.12, Florida Statutes;
• Fighting or baiting animals under section 828.122;
• Killing a dog or cat with the intent to sell or give away its pelt under section 828.123;

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- Killing or aggravated abuse of horses or cattle under section 828.125;
- Sexual activities involving animals under section 828.126;
- Confinement of animals without sufficient food, water, or exercise under section 828.13.

The new ordinance requires animal abusers to register in person for the Animal Abuser Registry within 10 business days of their conviction. Under the ordinance, a Hillsborough resident convicted of animal abuse in any Florida county:
- cannot own, possess, or live in the same home or on the same property as an animal while on the Registry;
- cannot work with a companion animal, with or without compensation, while on the Registry; and
- must renew their registration annually while on the Registry.

Those convicted of animal abuse will remain on the Registry for the following time periods after their release from incarceration or, if not incarcerated, from the date of their conviction:
- Misdemeanor Animal Abuse: 3 years
- Felony Animal Abuse: 5 years
- Second or subsequent conviction of Misdemeanor or Felony Animal Abuse: 10 years

The Animal Abuser Registry contains the names, residences, photos, and other related information of people living in the county who are convicted of an offense on or after November 1, 2016. The ordinance requires any Hillsborough County resident or vendor to check the Registry for any transaction involving an animal, and it bans the sale, adoption, transfer, or exchange of any animal to a person on the Registry. When buying from a commercial operation, pet buyers must sign an affidavit affirming they do not meet the criteria to be on the Animal Abuser Registry.

At the end of February 2017, two people were on the registry.

More information is available by calling the Registry Manager at (813) 272-5760 or emailing RegistryManager@HCFLGov.net.
Meet the Judges: Judge Rex Barbas — New Circuit Civil Administrative Judge

His overarching goal is to simply ensure that things run smoothly — from both the attorneys’ and judges’ perspectives.

Whether or not you’re new to this legal community, you might find yourself lacking when it comes to knowing much beyond the basics about our judges. Reading the exposés of and interviews with federal district and appellate judges, well-written by Tom Elligett, Michael Hooker, and others, has always left me enlightened, having learned about judges I might not otherwise have occasion to. But it also left me wondering about our own Thirteenth Circuit judges. I realized I know little about so many of them, which is a bit amusing for me to admit, since I work for and with a number of them. If I don’t know much, I know I cannot be the only one. Fast-forward, and here we are to what I will call the new “Meet the Judges” segment. You will see these a few times a year, so keep an eye out for them.

There is something innately fascinating about judges. Of course, we all crave to know more — whether it’s PDF or Word preference, what they do when they are not judging, or their favorite color. They make important decisions; ones you hope are in your favor. If there is something to be known about them that would help in that regard, it is certainly worth learning.

Or if you are like me, it is more about getting to know them as people. Knowing enough about someone to make a connection, so I can take the conversation beyond mere pleasantries the next time I run into them in the Edgecomb elevator or out and about in our community. But if you are an old hat who has the luxury of knowing history’s stories, don’t turn the page just yet.

Because this first feature is about Judge Rex Barbas — the newly appointed Circuit Civil Administrative Judge, who will take over the duties when Judge William Levens retires in mid-May. And you may be interested to hear his approach to this new role, and how it impacts you.

Continued on page 15
Judge Barbas admitted that he was a bit surprised when Chief Judge Ronald Ficarrotta initially approached him about the role: “I hated the administrative side of things when I was in a firm,” chuckled Judge Barbas, finding the humor in his new title. But on a more serious note, he was able to articulate the reasons he suspects he was slated for the position. “I’m a consensus-builder,” he said.

You won’t find him dictating to his colleagues. While he intends to get everyone to agree on issues that arise, he ultimately believes the judges should be able to do their own thing — “whatever works for them,” he said, so long as that course of action does not impede the administration of justice. So if you were hoping he would resolve the ever-present paperless-or-not quandary, or the “why can’t they all have the same preferences?” grievance, keep wishing. After all, the judges of the circuit are each individually unique pieces to the larger puzzle.

Judge Barbas believed his experience — both as a trial lawyer and a judge — was part of the vote of confidence for this new post. As a former board certified civil trial attorney, he vividly recalls his trial lawyer experience, having been a founding partner of Mitcham, Weed & Barbas, now known as Barbas, Nunez, Sanders, Butler & Hovsepian. Now a trial judge for 20 years, one who tries many cases, he recalled a friendly little competition with Judge Daniel Perry a few years ago to see who could try more cases. In a five-year period, he presided over 249 trials. But Judge Perry beat him. By one trial.

A self-proclaimed “Type B” personality, Judge Barbas probably was not slated for this new role for his paper-organization skills, as is quite evident from the looks of his office desk. “Can’t you tell?” he laughed, surveying his office and chambers. (They say the smartest people have the messiest desks.) That’s why he always keeps a “Type A” around him, one of whom is his treasured judicial assistant, Hillary Belliveau. Judge Barbas says the Type A’s in his life keep him out of turmoil, by keeping him organized.

It must not be that bad though, because at the sound of her name, Hillary quickly piped up that he is “amazing to work for.” Which you can understand when he began rattling off the qualities of a “Type B” — easygoing, unstructured, and open to new ideas. Others might add personable, quick-witted, warm, and always willing to help, if we’re talking specifically about Judge Barbas.

There is just something approachable about Judge Barbas. And quite possibly his most enduring quality? He is not intimidating in the least. He is so cool, calm, and collected about how he gets his point across, and he will pause whatever it is that he is doing to have a sincere conversation with you. Case in point, our conversation that provided me the content for this article. He unknowingly solidified this assessment of him during our discussion.

As he was pointing out his various wall décor, he came to a framed picture of a newspaper article and a man on a motorcycle. He told me how Judge Claudia Isom plays a “Guess the Judge”-type game during her diversity presentations in which she shows the audience various pictures and asks them
Continued from page 15

to decide whether the person depicted is a judge. One of the pictures she uses is of Judge Barbas on his motorcycle many years ago. Unbeknownst to me, Judge Barbas was an avid motorcyclist; so much so that he’s attended numerous Sturgis-like motorcycle rallies in Daytona and Key West.

He recalled, to the best of his recollection, that no one in Judge Isom’s audiences has pegged him, riding on his motorcycle, as a judge. He found that humorous. I thought it proved my point — that he is friendly, welcoming, and easy to talk to, and others sense that too. Although he still loves motorcycles, he stopped riding them after a bad accident in 2008 forced him off the bench for almost a year. When I asked him if he had gotten back on his bike after being injured, he quickly lightened the mood by quipping, “Well, my brother told me he wouldn’t take care of me like that again.”

His biggest fear in taking on his new role as administrative judge? “Following Bill’s lead,” and being compared to him, of course. He paused and jokingly added, “I don’t do a good Clinton,” referring to Judge Levens’ somewhat notorious impersonation at the annual Law Follies comedy show. But he plans to harness his personality and unique skill set as he follows in Judge Levens’ steps.

Judge Barbas believes that flexibility will be critical in his new role. And when you are shepherding sixteen or so colleagues, all with their own ideas and opinions, the necessity of that quality seems quite evident. Conducive to his personality, he is open to new ideas, and plans to “think outside the box.”

This is where the Bar comes into play for him. He wants the judiciary to be reflective of the Bar, and will be looking to you for suggestions and input. I gathered that he had a specific plan percolating for how he was going to about getting this feedback. But he was cagey about what topics he plans to seek your input on, in hopes that he really will have an open, productive dialogue about how to improve things — both for the judiciary and the Bar, and the public they serve.

His overarching goal though is to simply ensure that things run smoothly — from both the attorneys’ and judges’ perspectives.

This feature would not be what I intended if I did not tell you something on the personal side. In addition to his day job, Judge Barbas is an artist; a true Renaissance man! In hindsight, his “funky” — Hillary’s word, not mine — neckties kind of give him away in that regard. I was vaguely familiar with his artistic side, but me knowing as little as I did in the way of details, he quickly directed my attention around the walls of his chambers, where every wall displayed one of his objects d’art. He began telling me about his passion for painting, including the different styles and subjects that he and his wife, Donna (pictured on page 14), also an artist, each paint.

He shared with me a sampling of his artwork, the joy just radiating from him as he talked about it. I was shocked to learn that he had not had any formal training; both he and Donna are primarily self-taught artists. His paintings are remarkable. The Ybor City rooster, pictured with this article, might be my favorite! And Hillary let me in on a little secret: “All of his paintings have a hidden image or meaning,” she whispers to me.

So of course I could not help but spend an hour browsing his collection and studying his paintings in an attempt to find the hidden pictures. Perhaps this is most evident in his painting entitled “Trinity” (also pictured on page 14) — take a deep look at the sail and the hidden image will reveal itself, and its connection to the painting’s title will become clear. His egrets, pelicans, and beach scenes also will steal any native Floridian’s heart.

Florida’s imagery isn’t his only muse though. Portraits of various people are etched on yellow legal pads and corners of notebooks strewn about his desk. He showed me the faces of random people he drew after recent encounters. These are not your average, mindless doodles; the detail is uncanny. Not surprisingly, sketching is one of the ways he focuses at times. I wish he had sketched me during our conversation; it certainly would have been frame-worthy.

When the opportunity presents itself, and you find yourself bumping into Judge Barbas around Edgecomb, you might be inclined to ask him how his new role is going. “Have you gotten all your colleagues to agree on x, y, z?” you’ll ask. He will chuckle, in his signature way, and engage in some friendly banter about the topic du jour. But if you really want to grab his attention, and see his face light up, just ask him about the subject for his next painting. I will feel good knowing I imparted some useful knowledge. I hope you will read my next feature, as we continue to “Meet the Judges.”

Author: Lyndsey E. Siara - Thirteenth Judicial Circuit

[Image of Judge Barbas]
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Judicial Luncheon

On March 8, the HCBA held its ever-popular Annual Thirteenth Judicial Circuit Civil Division Update and CLE. Several topics were discussed, such as jury selection for multi-week trials, the latest administrative updates, and JAWS technology. The panelists included Chief Judge Ron Ficarrotta; Judge William P. Levens; Judge Rex Martin Barbas; Judge Emmett L. Battles; Judge Martha J. Cook; Judge Robert A. Foster; Judge Greg Holder; Judge Claudia Rickert Isom; Judge Elizabeth G. Rice; and Judge Michelle Sisco. Thank you to Judge Isom for helping organize this event and to the judges for attending!
It is tempting for trial lawyers appearing at oral argument to argue just as they would to a jury. But the Second District Court of Appeal warns against this. Oral argument is not a trial, and appellate judges are not jurors. A trial lawyer must prepare for oral argument with a different set of objectives in mind. Following are some useful tips for the trial lawyer — and solid reminders for the appellate lawyer — appearing at oral argument in the Second District.

- **DO** familiarize yourself with the court’s rules, policies, and customs. The Second DCA posts “Practice Preferences,” an “Oral Argument Notice,” and “Internal Operating Procedures” on its website for the convenience of lawyers and the public alike. The Marshal’s office can answer questions about the operational aspect of oral argument. Lawyers who regularly appear before the Second DCA also can be a useful resource.

“Lawyers at oral argument are addressing issues of legal error, not persuading a jury.”
— Judge Morris Silberman

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- DON’T neglect to prepare your client. Explain how oral argument works and discuss proper courtroom attire and behavior. If your client is a non-incarcerated party in a criminal appeal and plans to attend, it is courteous to inform the Marshal and opposing counsel in advance. Likewise, if you’re aware of any security risk posed by either party or potential public attendees, let the Marshal know.

- DON’T be surprised if you get few, or no, questions from the panel. Judge Susan H. Rothstein-Youakim advises lawyers to “strongly resist the urge to fill in the silence.” In her experience, “continuing to talk rarely results in anything good.”

- DO give deference to the court. When a judge asks you a question, stop talking, listen, and then do your best to respond. The question is meant to help the judges analyze your case, not to be rude or otherwise disrupt your argument.

- DON’T be dramatic. Judge Morris Silberman emphasizes that lawyers at oral argument are addressing issues of legal error, not persuading a jury. He encourages advocates to “stay away from sweeping generalities, arguing credibility, and making personal attacks about the integrity of the opposing party, opposing counsel, or the trial judge.” Judge John L. Badalamenti adds that “emotional and animated displays from counsel are distracting to the panel and may inadvertently diminish the strength of a legal argument.”

- DON’T discuss information outside the appellate record. Trial lawyers are most susceptible to disclosing extra-record material because they have more background knowledge of the case. But Judge Rothstein-Youakim advises that “if something is not in the record, it does not exist. What was going on ‘behind the scenes’ in the trial court may be fascinating, but any time you spend on it during the argument is distracting and a waste of your 20 minutes.”

The trial lawyer that uses these tips will be well prepared to make the leap from jury trial to oral argument. And the Court will surely be pleased.

Author:
Dawn A. Tiffin
Office of the Attorney General

Appellate Breakfast

The Appellate Law Section held a CLE Breakfast on February 15 to receive a State of the Second District Court of Appeal update with Chief Judge Craig C. Villanti and Clerk Mary Beth Kuenzel. A panel discussion (above) also was held to give insight about what happens behind the scenes of the Court with Judge Darryl C. Casanueva, Judge Matthew C. Lucas, Sarah Corbett, Jay Thomas, and moderator Christopher D. Donovan.
Kicking off 2017 with a class community service project, the members of the Bar Leadership Institute (BLI) joined the Shriners Hospitals for Children to assist with the annual East-West Shrine Game players’ visit. During the event, the hospital’s patients were able to meet and interact with college football players and coaches who participated in the 92nd East-West Shrine Game the following week. While taking the opportunity to serve the community and support the Shriners in their endeavor to bring hope and healing to children in need, the class also was able to observe the impressive organizational skills exhibited by the event’s leaders.

Continuing with the BLI’s mission, class members next had the chance to sit down and discuss leadership principles with a panel of general counsel representing some of the major organizations in the local Tampa public and private sectors. Panelists included Tyler Cathey, general counsel and chief operating officer of Franklin Street; Kelly Lefferts, U.S. general counsel and secretary of Bloomin’ Brands; Gerard Solis, general counsel of the University of South Florida; and Michael Stephens, general counsel and vice president of information technology with the Hillsborough County Aviation Authority and Tampa International Airport.

As the panelists agreed, the demands on general counsel vary from hour to hour. They are constantly presented with unique challenges and often unfamiliar subject matter. In discussing how they

Continued on page 23
THE LEADERSHIP OF GENERALS AND GENERAL COUNSEL
Bar Leadership Institute Committee

Continued from page 22

each lead their respective teams, the panelists emphasized the importance of communication. While a good leader needs to be a good speaker, perhaps more important, a good leader needs to let others speak. By listening to others, leaders not only gain the institutional knowledge of those who have come before them, they also discover the strengths and weaknesses of the various team members.

BLI’s next module brought the class to MacDill Air Force Base, where there is likely no better example of the importance of leadership. Indeed, the very foundation of any military rests on strong leadership and obedience. While touring the base, the BLI class heard from firefighters with the base’s Crash Fire Station, the crew of a KC-135 Stratotanker, and members of United States Central Command (CENTCOM).

Brigadier General Paul Bontrager, deputy director for operations with CENTCOM, shared his leadership insights with the class. He explained that a good leader cannot have a my-way-or-the-highway attitude, because that attitude will inevitably alienate some portion of your team. Instead, a good leader must act as a servant and adapt to the needs of those being led.

In perhaps his most memorable comment, he explained that to be a great leader you need a strong personal “board of directors” — a group of your most trusted friends and associates that you have chosen to combat your hubris. Your board helps you see yourself clearly, identify your weaknesses, and stay grounded. After listening to his comments, one cannot help but conclude that Gen. Bontrager’s leadership provides a great service to our county and sets an outstanding example for aspiring leaders.

Author: Chance Lyman - Florida Second District Court of Appeal
Frankly, I’m writing this article because I was roped into it by one of the section co-chairs who shall go nameless, but is the one to whom I am married. I’m under no illusion about why Nameless Person Who Cannot Be Denied “asked” me to do this — she had no volunteers. But she also understands that I possess some qualities that lend themselves to the task. For one thing, I’ve been doing law stuff for 40 years, much of that time in divorce appeals either as an attorney or as a judge. I know tons of family law, then, and I’ve even made some of it (although she and I frequently disagree about the extent to which I truly understand the topic).

But my best qualification is my view that family law is a crock. Here’s why:

When I first became involved in family law cases, they were almost entirely discretionary. There were a few rules regarding property ownership and distribution, but even some of that was left to the individual judge’s discretions. Resolving support obligations and issues of child custody and visitation were almost entirely matters of judicial discretion. Thus, judges had broad flexibility to decide issues attendant to dissolutions of marriage. This was considered necessary so that judges could achieve justice in individual situations. But, of course, no two judges were alike. So, results in similar circumstances varied widely. At bottom, the legal scheme for dissolving marriages was arbitrary.

Over the years, family law decision-making has become far more regimented. There are strong equitable distribution principles dictating the division of property. There are child support guidelines and statutory directives governing alimony. Statutory presumptions largely guide children’s living arrangements, and mandatory parenting plans divvy up responsibilities for overseeing children’s lives. But, in my view, the scheme is as arbitrary as it ever was. The reason is that no two families are alike. Any case can involve an infinite variety of personalities and family dynamics; it is wrong to expect that applying a circumscribed set of predetermined decision-making formulas and after the dissolution of their marriage. In this, I think, family law fails us. The cost of this form of justice is the multitude of lives lived according to the strictures of law and not as they would be lived if people had their own say about it.

It’s far better to collaborate. With a team of attorneys and neutral financial and mental health professionals helping them, the parties can devise their own form of justice, one that makes them safe and secure. One that gives them an opportunity to seek their own kind of happiness, regardless of what the law would impose on them. We should have been doing this all along.

Author: Honorable Stevan T. Northcutt - Second District Court of Appeal

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The Daubert standard was upheld in 1993, when the U.S. Supreme Court held that Federal Rule of Evidence 702 provided the applicable standard for admitting expert testimony. Under Daubert, trial courts are to serve as a “gatekeeper” when evaluating an expert witness to ensure that the witness’ testimony is based upon a reliable foundation. Trial judges applying the Daubert standard must first determine whether the methodology used by the expert witness in formulating her opinion is scientifically valid. Daubert identified several non-exclusive factors a trial court should consider in making that determination: whether the methodology used by the expert has been or is amenable to testing; whether the methodology has been subjected to peer review or publication; the methodology’s known and potential error rate; and whether the methodology has been generally accepted in the relevant scientific community.

Twenty years later, the Florida legislature adopted the Daubert standard when it passed House Bill 7015 (2013), which amended sections 90.702 and 90.704, Florida Statutes, to mirror Federal Rule of Evidence 702. Before that legislation was passed, Daubert’s predecessor, Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), was the standard of review used by all Florida state courts. A much less stringent standard, the Frye test for admissibility was a two-pronged analysis: (1) whether the scientific theory or discovery from which the expert derived her opinion was reliable; and (2) whether the opinion is accepted in the applicable scientific field.

In re: Amendments to the Florida Evidence Code declined to adopt the Daubert standard to the extent that it is procedural, noting as “grave constitutional concerns” Daubert’s potential to undermine the right to a jury trial and restrict access to courts. But, in both concurring and dissenting with the majority, Justice Ricky Polston posed several questions about these “grave” concerns. Notably, should Florida elect to revert to Frye, it would be in the minority of states that has not adopted the federal Daubert standard.

Justice Polston also expressed doubt that the entire federal court system and the 36 states that have adopted Daubert have continually denied parties’ right to a jury trial and access to courts.

In addition to Justice Polston’s concerns, In re: Amendments to the Florida Evidence Code leaves much doubt as to whether expert challenges are being appropriately evaluated by Florida courts. This will undoubtedly be magnified in construction defect cases, which are highly expert-driven. Whether Daubert or Frye is the appropriate standard remains to be seen until a “proper case or controversy” is brought before the Florida Supreme Court. Once such a case is presented, Daubert will only survive if the Court finds that the test is substantive as opposed to procedural in nature.

Author: Frank T. Moya - Litchfield Cavo, LLP
Construction Law Section Half-Day CLE

The Construction Law Section held their annual Half-Day CLE/Luncheon on February 16. Bob Koning spoke about building codes; John Lamoureux and Stephanie Ambs spoke on the topic of select bankruptcy issues for the construction lawyer; Ed Cheffy discussed the top ten ethical challenges a construction lawyer can face; and Debbie Sines Crockett gave an overview of insurance for construction defects.

Construction Luncheon

On March 16, Debbie Sines Crockett, Esq. examined the case of Sebo v. American Assurance Home Company with the Construction Law Section. Topics covered included facts regarding the Sebo case, concurrent causation v. efficient proximate cause, anti-concurrent causation language, and the Second DCA’s and Florida Supreme Court’s opinions.

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The end of 2016 brought a considerable amount of uncertainty regarding various workplace issues, from the abruptly halted FLSA overtime changes to employers’ rights in regulating divisive political speech after a heated election.

A few months into 2017, a number of legal workplace issues remain in the spotlight for employers. Here are a few key issues to monitor as the year progresses:

**Medical Marijuana**
Florida’s medical marijuana law, Amendment 2, was passed months ago, yet employers’ rights and responsibilities for regulating medical marijuana use are not yet clear.

The amendment legalizes use of medical marijuana for individuals with specific diseases and conditions, but it does not require employers to accommodate “on-site medical use of marijuana.” Employers can prohibit medical marijuana use in the workplace, especially if it presents a safety hazard, but the law does not indicate if employers must accommodate users who have the drug in their system while at work.

The state is expected to clarify the law in the coming months. In the meantime, employers may still be able to rely on federal law to dismiss an employee using or carrying marijuana at work.

**Pay Equity**
This year, employee pay practices related to gender equality will be monitored like never before.

To address gender discrimination, the Equal Employment Opportunity Commission recently revised its EEO-1 form, which collects data on employee gender, ethnicity, and other classifications, to also include detailed information on compensation. This change means salary disparities among men and women could be under the microscope.

Although the first report isn’t due until March 2018, it will require data from 2017. The form is required...
for all businesses with more than 100 workers. Corporate counsel should be taking steps to ensure compliance.

**LGBT Discrimination**
While President Trump has said he opposes same-sex marriage, he has generally maintained an air of indifference toward discrimination of the gay community, stating he feels the matter should be handled at the state level. His stance may work in favor of those supporting Florida Senate Bill 120, the Florida Competitive Workforce Act, which would prohibit discrimination based on sexual orientation and gender identity or expression in Florida workplaces.

The bill, which was tabled in 2016, will be important for employers to monitor this legislative session.

**Pregnancy Discrimination and Maternity Leave**
The Pregnancy Discrimination Act states that employers cannot refuse to hire a woman because of her pregnancy “as long as she is able to perform the major functions of her job.” But some of Trump’s critics believe his platform on maternity leave could increase pregnancy discrimination in the workplace, regardless of the law.

Trump’s platform calls for six weeks of paid maternity leave for working mothers by extending unemployment insurance benefits to women whose employers do not offer paid maternity leave. Some opponents say the plan would hurt female workers of childbearing age by making it costlier for employers to hire them.

Employers who do not have a maternity leave policy in place should consider implementing one this year.

**Author:** Andrew Froman - Fisher Phillips

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**Please note:** In the previous issue, the incorrect photo and author for the article “The ESPN of Law – Clients are Watching” were provided. The correct author was Jeff Cox, Esq. We are running Andrew Froman’s article originally planned for the previous issue above, and will run Jeff Cox’s corrected article again in the July-August issue. We apologize to both authors.
A
sisted reproductive technology (ART), which involves processes like in vitro fertilization and gamete donation to have a child, contributes largely to modern family building. Increases in medical infertility contribute to ART use, but so does social infertility, i.e. same-sex couples. ART allows same-sex couples to legally have a child genetically related to at least one of them.

Historically, same-sex couples have not had the same rights when using ART to have a child. The reason for this disparate impact stems from the restrictive language in Florida’s gestational surrogate statute, which grants legal parental status to a married “man” and “woman.” For a same-sex couple using a gestational surrogate to be listed as the parents on their child’s birth certificate, a preplanned adoption was required for the biological parent, and then the non-biological parent had to adopt afterwards in order to be added on the birth certificate and for legal parentage. This was a lengthier process for something that was more easily granted to heterosexual married couples under our surrogacy statutes.

But, in the landmark case Obergefell v. Hodges, the U.S. Supreme Court held that the constitution guarantees same-sex couples the fundamental right to marry. That same year, Florida’s same-sex marriage ban was ruled unconstitutional in Brenner v. Scott. Consequently, Florida courts now permit same-sex married couples to become legal parents via surrogacy notwithstanding the plain language of the statute.

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Additionally, the Florida Bureau of Vital Statistics has updated its forms used to obtain the birth certificate accordingly and now includes the term “parent” instead of only “mother” and “father.”

Obergefell and Brenner also helped secure same-sex couple’s use of donated gametes. Historically, with two women, only the birth mother would go on the birth certificate. Today, assuming marriage, both women will automatically go on the birth certificate without the need for adoption.

The definition of parent has inevitably evolved. A parent includes a person who intends to parent a child born through ART or natural reproduction. Our statutes must reflect the same. Currently no cases deem Florida’s surrogacy statute, which restricts use to a married “man” and “woman,” unconstitutional. Despite recent advances there is still room for progress here. Our next step towards equality is modifying our statutes to protect everyone’s fundamental right to procreate, regardless of sexual orientation.

Whatever the path, know your options and seek legal counsel for the safest and happiest journey forward.

1 § 742.13(10), (11), Fla. Stat.; “In vitro” refers to a laboratory procedure performed in an artificial environment outside a woman’s body. “In vitro fertilization embryo transfer” means the transfer of an in vitro fertilized preembryo into a woman’s uterus.

2 Gamete refers to both egg and sperm, otherwise known as “sex cells,” which can combine to form an embryo. § 742.14, Fla. Stat.; Florida’s gamete donation statute states in part: The donor of any egg, sperm, or pre-embryo ... shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children ....

3 CDC, https://www.cdc.gov/art/smart/projects.html (last visited March 6, 2017); ART contributed to 1.2% of Florida births in 2011.

4 § 742.13(2), Fla. Stat.; “Commissioning couple” means the intended mother and father of a child who will be conceived by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parents.

5 There may be legal reasons for a non-biological parent to adopt; however, it is no longer a requirement; speak with your attorney regarding the pros and cons of an adoption process, especially for couples residing in other jurisdictions.


8 T.M.H. v. D.M.T., 79 So. 3d 787, 803 (Fla. 5th DCA 2012).

Author:
Stephanie Favilli
Bodolay - Law Offices of Robert T. Terenzio
THE FIGHT AGAINST COMPOUND DRUG FRAUD CONTINUES
Health Care Law Section
Co-Chairs: T.J. Ferrante - Foley & Lardner LLP; and Sara Younger Sefried - Baycare Health Systems

I

s the compound drug fraud crisis that peaked in the past 36 months finally under “control”? The answer to that question is a qualified yes, because “control” is a relative term in the business of fighting healthcare fraud. The fight continues today to maintain control.

Compound drug fraud schemes come in various permutations, including lack of medical necessity, anti-kickback (Stark) violations, failing to collect co-payments, bribery, improper marketing, and outright fraud. Experienced government prosecutors and healthcare fraud investigators were often surprised at the extreme audacity of some compound schemes by pharmacies and their marketing companies. Notably many of these marketing firms had no pharmaceutical experience; in fact, their field reps ran the gamut from active-duty military personnel to stay-at-home moms.

The United States Supreme Court’s decision in Thompson v. Western States Medical Center, 535 U.S. 357 (2002), helps contextualize the situation. Previously, the United States Food and Drug Administration barred compound drug pharmacies from advertising specific drugs. In Thompson, the Court found that prohibition infringed on the pharmacies’ First Amendment right to commercial free speech. After Thompson, compound pharmacies were free to advertise and market their products.

From 2006 to 2015, the use of compound topical creams and jells under Part D Medicare skyrocketed by 3,466 percent. In 2015, Tricare paid out $1.75 billion for compounded drugs, an 18-fold increase from 2012. This dramatic escalation was observed across the board by both public and private payers.

In response to this massive spend, Express Scripts, the nation’s largest Pharmacy Benefit Manager, launched a program in 2014 to counter this surge by moving 1,000 ingredients onto an excluded list. The company alleged that 95 percent of the billing for compound drugs was unnecessary. In addition, Tricare and many private payers implemented a new pre-authorization process to mitigate against fraud and abuse.

In 2015, the U.S. Attorney’s Office for the Middle District of Florida entered the compound drug fight in a significant way. Using the False Claim Act, the office recovered more than $35 million for the Tricare program. In October 2016, the Middle District posted a press release announcing it had “recovered almost $70 million in fines and penalties over the past 18 months.”

Alongside the extensive civil actions taken, the Middle District actively pursued criminal charges and forfeitures against individuals. For example, several indictments alleged violations of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7(b)(2)(A), with a corresponding request for forfeiture of property under 18 U.S.C. § 982(a)(7). The need to remain vigilant is critical because the U.S. is projected to experience a 34 percent increase in spending on medicines from 2015 to 2020.

Continued on page 35
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2 High Part D Spending on Opioids and Substantial Growth in Compounded Drugs Raise Concerns: HHS OIG Data Brief, June 2016, 6.
5 Id.
8 United States Settles False Claims Act Allegations Against Compound Pharmacy Owner For $4.25 Million, Department of Justice, U.S. Attorney’s Office, Middle District of Florida, Press Release (October 21, 2016).
9 Indictment, United States of America v. Cordova Hill, Oct. 12, 2016, ECF No. 8:16-cr-00436.

Health Care Law Luncheon

On February 22, speaker Joy Easterwood with Johns Hopkins All Children’s Hospital gave a timely presentation to the Health Care Law Section regarding HIPAA audits, a re-cap of privacy enforcement actions in 2016, and new regulations on the horizon in 2017.

The section would like to thank its sponsor:
NEW STANDARD FOR DESIGN PATENT INFRINGEMENT DAMAGES

On December 6, 2016, the Supreme Court issued a landmark ruling in the closely watched Samsung v. Apple case that changed the long-standing rule for calculating damages for infringement of a design patent. 137 S. Ct. 429 (2016). Unlike utility patents, which cover the functionality of an invention, design patents cover the invention’s appearance. Section 289 of the Patent Act states that an infringer who sells “any article of manufacture to which [a patented] design or colorable imitation has been applied shall be liable to the owner to the extent of his total profit.” 35 U.S.C. § 289.

Apple’s design patents cover smartphones having a black rectangular front face with rounded edges and a raised rim, as well as a grid of 16 colorful icons on a black screen. In 2011, Apple sued Samsung alleging that various Samsung phones infringed Apple’s design patents. Samsung was found to have infringed Apple’s design patent, so the district court ruled that Samsung was liable to Apple for the total profits from the sales of its infringing smartphones, which amounted to $399 million. The Court of Appeals for the Federal Circuit affirmed the award, holding that the entire smartphone is the only possible “article of manufacture” for purposes of calculating damages under § 289, because consumers could not separately purchase the components of the smartphones covered by Apple’s design patents.

In a unanimous decision, the Supreme Court reversed, holding that the “article of manufacture” recited in § 289 can be a component of an end product sold to the consumer, and is not required to be the end product itself. The Court reasoned that the term “article of manufacture” has a very broad meaning, which encompasses both a product sold to a consumer, as well as a component of that product. The Court noted that the broad definition is consistent with other sections of the Patent Act, which permit patents to be granted on individual components of a multi-component product.

Although the Court reversed the Federal Circuit’s decision that the “article of manufacture” under § 289 must be the end product that is sold to the consumer, the Court expressly declined to articulate a standard for determining the relevant “article of manufacture” for purposes of § 289, remanding that issue to the Federal Circuit.

The Court’s decision marks a significant shift from previous design patent damages jurisprudence, which has long awarded damages based on profits from sales of the end product. The new standard could severely limit damages for design patent infringement, though the extent of the limit will likely depend on how lower courts determine what constitutes the relevant “article of manufacture” under § 289.

The Court’s ruling also leaves open the question of how to calculate the “total profits” on a component of a multi-component product.

On February 7, 2017, the Federal Circuit passed on these questions, and remanded to the district court. Regardless of what the lower court finds, this issue will continue percolating through other district courts, and will almost certainly end up back at the Federal Circuit.

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Law students from across the state joined with law firms, Bar associations, and other legal organizations at the HCBA Diversity Networking Social on February 18. The popular event gave students a chance to network with members of the local legal community and meet with potential mentors. A big thanks goes to the Diversity Committee for planning such a great event, and to the sponsors for participating and giving of their time.

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Solo and Small Firm Luncheon

The Solo and Small Firm Section discussed the topic of “Gender in the Law” at their CLE on March 21. Speakers Kristen Foltz, Esq. and Section Chair Amanda Uliano, Esq. reviewed professional responsibility rules and covered gender and communication differences, applicability of theory to law firm practice, and the best practices for small firms and solo practitioners.

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IS THE BATHROOM BATTLE THE NEXT BIG EMPLOYMENT LAW FIGHT?

One of the most pressing, and uncertain, issues regarding employment discrimination deals with transgender rights. Just this March, the U.S. Supreme Court remanded *GG v. Gloucester County School Board*, a case that would have been the Court’s first significant ruling on gender identity issues, back to the Fourth Circuit for further consideration.

That case involves Gavin Grimm, or “G.G.” in court records, a transgender high school student. Before the start of his sophomore year, Gavin asked that he be identified using male pronouns and that he be allowed to use the boy’s restroom. Initially, the school board granted his request. But after members of the community began voicing concerns about bathroom privacy and safety, the school board ultimately implemented a policy that limited students’ use of restrooms according to their “corresponding biological genders.” At the same time, the Department of Education’s Office of Civil Rights provided an opinion stating “a school generally must treat transgender students consistent with their gender identity.” Gavin filed suit in June 2015 alleging that the school board impermissibly discriminated against him on the basis of his sex. After the district court dismissed Gavin’s lawsuit, the Fourth Circuit reversed the district court’s decision and ruled in Gavin’s favor. Specifically, the Fourth Circuit held that the district court failed to give weight to the Department’s interpretation of “sex” in its opinion letter.

In October 2016, the Supreme Court agreed to hear the case. Oral arguments were scheduled to take place in March 2017. But on February 22, 2017, the Trump Administration withdrew the opinion letter that was the crux of the appellate court’s opinion. The Supreme Court then remanded the matter back to the Fourth Circuit for further consideration.

While the remand from the Supreme Court proved an anti-climactic conclusion (at least for now), the case has brought a heightened sense of awareness to transgender issues — including within the workplace. Because of the lack of clarity on the federal level, there is much confusion regarding an employer’s obligations towards transgender employees, particularly in regards to bathroom usage.

Despite the lack of clarity in the law, the EEOC has taken the position that the definition of “sex” under Title VII is expansive enough to include gender identity, and OSHA has issued guidance for “Restroom Access for Transgender Workers” that provides that all individuals should be allowed to use the restroom that corresponds with the gender they identify with. While more legal guidance will certainly come one day, the current best practice for employers is to allow all individuals to use the bathroom corresponding to the gender they identity with. The U.S. Supreme Court will likely weigh in on this issue one day, but employers would likely prefer not to be the test case.

Author:
Lisa McGlynn - Fisher Phillips
equal rights, liberty, freedom, democracy — these are all words that have significant meaning in our daily lives. And these concepts impact not only how we perceive the world, but the opportunities and protections that we are afforded, and the privileges we have become accustomed to.

It can be difficult to really appreciate how fortunate we are to be a part of American Democracy — and the importance of securing its future. “Democracy cannot succeed unless those who express their choice are prepared to choose wisely. The real safeguard of democracy, therefore, is education.” — Franklin D. Roosevelt.

With education in mind, it is paramount that our community’s bright, young future leaders understand, and respect, and have positive experiences with the legal system. In doing its part to promote education of the legal profession, the Hillsborough County Bar Association, along with the Young Lawyers Division, hosts Law Week each year for over 3,800 elementary, middle, and high school students within Hillsborough County.

This year’s theme, “Transforming American Democracy,” focused on the 14th Amendment and careers in the law. More than 120 lawyers and judges throughout the community volunteered to educate students on due-process rights, individual rights, privileges of citizenship, and equal protection under the laws through classroom discussions, courthouse tours, and mock-trial experiences. Students were able to witness actual proceedings in the courtroom, learn and discuss relevant legal issues, and practice newly learned legal skills as characters in the State v. Jack Robinson trial (a parody based on the children’s story “Jack and the Beanstalk”), where students could act as the bailiff, judge, prosecutor, defense lawyer, defendant, victim, and jury members in a fun skit that allowed students to represent and understand the various roles in a courtroom.

Through the Law Week experience, a diverse group of students from approximately 70 schools were engaged, immersed, and inspired by the law, not only as a profession, but also in the key role it plays in ensuring and defending the individual rights and freedoms secured by the 14th Amendment.

On behalf of the Hillsborough County Bar Association and the Young Lawyers Division, thank you to all who dedicated their time and skill to help make Law Week an incredible success. These investments toward the education of the youth in our community are truly invaluable. And the significance of positively introducing students to the legal profession promotes an unparalleled foundation for understanding and respecting the law.

“The function of education is to teach one to think intensively and to think critically. Intelligence plus character — that is the goal of true education.” — Martin Luther King, Jr. Through our profession’s support, we are able to enhance the education of our local students and encourage their participation as informed and involved leaders in the future.
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A bad agreement is better than a good lawsuit,” so says the famous Italian proverb. Mediation and settlement agreements are highly favored in Florida — courts encourage them and respect the rights of parties to make their own agreement. See Sedell v. Sedell, 100 So. 2d 639, 642 (Fla. 1st DCA 1958). But what happens when one party seeks to reduce a child support amount that was agreed to by parties (and not pursuant to the guidelines) at mediation and incorporated into a written agreement resolving all issues between the parties? Does a court have the authority to reduce that child support amount based on a change in the ability to meet the agreed payments. On initial appeal, the Third District Court of Appeal held that where “the amount of child support is based on an agreement between the parties as incorporated into a final judgment of marriage dissolution, a heavier burden rests upon the party seeking a modification of such child support than would otherwise be required in the absence of such an agreement.” Tietig v. Boggs, 578 So. 2d 838, 839 (Fla. 3d DCA 1991).

The Florida Supreme Court agreed, holding that “where a party seeks to reduce his child support obligations, the best interests of the children cannot be jeopardized and there is no reason to depart from the application of the heavy burden rule.” Tietig, 602 So. 2d at 1251. “[I]n cases where judgments for child support are based on settlement agreements, the heavy burden rule is inapplicable only when an increase in child support is sought.” Id. Although this language provides some guidance that more is required when a party seeks a reduction, the Court did not explain exactly what this “heavy burden rule” requires.

The lesson here? If parties agree to a child support amount as part of a complete agreement, but that amount is not calculated based on the guidelines, it is important to advise your client that the court’s ability to modify it at a later date will depend on what type of modification is sought. For an increase in support, a simple substantial change of circumstances is required, because there is no apparent potential threat to the best interest of the children. But when parties agree to child support as part of a total agreement, and one party seeks a reduction, a much heavier burden is required given the concern over the children. Although not specifically defined, this “heavy burden” seems to be determined on a case-by-case basis and requires more than just a substantial change.

Author: Deborah L. Thomson - The Women’s Law Group, P.L.

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At a time when allegations of “fake news” and “alternative facts” are abundant in the media, it is important to make sure your case does not get influenced by false or misleading information, especially during what is normally a critical point in the case: mediation. Many mediators are not only tasked to handle a large volume of cases for their mediation practice, they are also busy attorneys with a variety of other issues to focus on. So some mediators might not get the chance to learn every detail of your case, particularly the relevant caselaw. In these instances, mediators can potentially be misled by attorneys who simply indicate they have a case that is “on point” without offering further proof.

A few months ago, I observed a mediation where potentially misleading information won the day. Upon arrival, the mediator discussed the facts of the case with me. He indicated that typically he reads the mediation report, but in this particular case, he did not have time to study each case cited at length. The facts of this case were significant in that the insurance carried had filed a declaratory judgment action. Because the declaratory judgment action was included in the mediation, there were five attorneys present, each with a party or an adjuster that spent time and resources traveling to the mediation.

We all crammed into the biggest conference room available, and the parties stated their arguments for the mediator. Afterwards each party was separated so the mediator could engage in separate caucuses with each party. Discussions made it clear that all parties wanted to settle — except for one. The mediator cautiously advocated for settlement by discussing the merits of the case at trial, but the dissenting attorney fought back, citing caselaw he insisted was on point and controlling. But the attorney did not recite the facts of the cited case with any specificity and was only able to indicate that it was the “Williams” case and that it was “on point.”

This vague and potentially unfounded recital of caselaw ground the entire settlement negotiation to a halt. Regardless of the merits of the cited authority, the mediator had to go to all of the other parties and indicate there was one party who was not agreeable to the settlement and that it was because of the alleged “Williams” case. Each party took the case at face value and assumed that since a party cited to a case, that it must be real. If the worst is assumed in this situation, the parties and adjusters spent valuable time and resources traveling to the mediation, only to have their time wasted with a misleading citation. To prevent against circumstances like this, it would be advantageous to appear at mediation with a laptop or other mobile device from which a legal research site could be accessed.

Preparation is the best way to defeat “fake” or misleading arguments, and coming prepared to counter misleading legal arguments is a good way to be prepared.

Author: John W. Windle - Metzger Law
The MVAC visited MacDill Air Force Base in February to impart an important message to the military lawyers (JAGs) stationed there — there is Life After JAG. MVAC co-chair Matt Hall moderated a panel of three MVAC members who are former JAGs and who successfully translated their military legal practice to civilian practice.

Judge Gregory Holder opened with his impressions, while also sharing the importance of networking and finding the right fit. John Vento of Trenam related, through story, the various post-military paths of successful former JAGs practicing in the local community. Finally, solo practitioner Greg Orcutt shared his transition and experiences as well.

JAGs from the various legal offices participated in the interactive discussion. Military attendees included Florida-licensed JAGs who are imminently transitioning, young counsel serving a four-year tour, and even a law student recently accepted into the Army’s JAG Corps. These lawyers greatly benefited not only from the sage advice shared by the panel, but also from the advice of the civilian attendees. HCBA past president Ben Hill IV, former State House Representative Kevin Ambler, COL (Ret.) Hal Youmans, and recently retired JAG Ronald Roodhouse, among others, were on hand to give one-on-one advice. Following the event, the MVAC hosted a social at 81Bay to facilitate more camaraderie.

Judge Holder stated, “JAG experience provides the depth and breadth of core competencies that pave the way for transition to the civilian legal world. I am extremely pleased that the men and women of our JAG components continue to be welcomed by our Tampa Bay legal community. We all serve this nation, our state, and our community.”

JAGs develop skills early in their career that are usually reserved for much senior attorneys at private law firms. They are executive communicators who advise executives of 3,000-person organizations with budgets in the tens of millions. As general counsel, they routinely help their clients solve complex problems that garner national headlines. As criminal trial advocates, they receive superior advocacy training and get first-chair felony experience months into practice. The panel encouraged JAGs to exploit these skill sets, and reinforced the importance of networking for JAGs as they thought of the transition to a civilian practice.

The MVAC seeks to help JAGs transition, whether they are serving a tour at MacDill or are Florida attorneys stationed elsewhere. “Life After JAG” is part of a developing program aimed at mentoring our military and veteran attorneys. Please contact the MVAC if you would like to help mentor JAGs or other legal professionals who are veterans.

Steve Berlin is retiring after 20 years of service this summer and will join Rumberger, Kirk & Caldwell’s Tampa office in August.

“Life After JAG components continue to be welcomed by our Tampa Bay legal community.” — Judge Holder
Unresolved legal issues can lead veterans to isolation, depression, homelessness, or worse.

Join us September 28, 2017 in bringing justice to those who fought for us.

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Celebrating 50 YEARS of Justice

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LIEUTENANT GENERAL JAMES BENJAMIN PEAKE, USA RET, M.D.

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The tenth annual Circuit Pro Bono Services Awards Ceremony was held on April 20, 2017. The ceremony was dedicated to the memory of attorney Blaise Gamba, whose long-term commitment to pro bono legal services and leadership in recruiting other attorneys helped to ensure that poor residents of Hillsborough County had access to the judicial system and legal recourse for their problems. The following were honored for their outstanding contributions of pro bono legal services for the poor: attorneys Harley Herman, Lisa Beggs, Mark Wolfson, and Ella Shenhav; Parwani Law, P.A.; and the George Edgecomb Bar Association. Circuit practitioners who donated more than twenty hours of pro bono legal work also were recognized. The award nominations were submitted to the Thirteenth Judicial Circuit Pro Bono Committee, chaired by Judge Christopher C. Nash. The ceremony was hosted by the Committee, the Bay Area Legal Services’ Volunteer Lawyers Program (BAVLP), and the HCBA, and was sponsored by Carlton Fields P.A., Foley Lardner LLP, Zuckerman Spaeder LLP, Shutts & Bowen LLP, and Vaka Law Group.

The Hillsborough County Bar Association’s Jimmy Kynes Pro Bono Service Award
Harley Herman has been leading by example for more than 40 years. Based out of Plant City, where he served as the 2015 president of the Plant City Bar Association, Mr. Herman practices

Continued on page 58

Award winners (left to right): Rinky Parwani, Parwani Law, P.A.; Ella Shenhav; Harley Herman; Mark Wolfson; Theresa Jean-Pierre Coy, George Edgecomb Bar Association; and Lisa Beggs.

“Government is supposed to serve everyone equally, regardless of income or race. At least that’s what youngsters are taught in civics class. It’s a good thing there are people like Harley Herman around to make that happen in the real world, even if it takes a lawsuit.”

— Mike Archer
in the areas of elder law, estate planning, landlord-tenant, and small business formations and disputes. While attending the University of Florida Levin School of Law, he represented more than 30 pro bono clients. He was just getting started. Since law school, Mr. Herman has served poor clients as a lawyer, administrator, and board member of legal services organizations throughout Florida.

In a small firm practice, he has continued to seek justice for poor people through his pro bono representation of individuals and organizations.

In 1991, Mr. Herman took on City Hall. The NAACP requested his assistance in trying to preserve an African-American residential and business district. The historical district was to be demolished to make room for a hospital. The minority businesses would be closed, and no alternative housing was proposed for the residents. The case ended up taking nearly a decade of extremely hard work, as well as personal and professional sacrifices. Mr. Herman never complained, and after he obtained a successful resolution, he did not gloat. Rather, as he explained in 1999 to a newspaper reporter, he simply hoped other local governments took note that their decisions should consider the situations of all citizens — not just developers and the affluent.

In 2013, Mr. Herman moved his practice to Hillsborough County and began volunteering for the BAVLP by assisting low-income clients in foreclosure proceedings, probate matters, real property disputes, and tort litigation. In the last two years alone, he has devoted hundreds of hours to the program. In addition to his pro bono service with the BAVLP, Mr. Herman is a contributor to programs run by the George Edgecomb Bar Association and the Tampa Hispanic Bar Association. He mentored younger Spanish-speaking attorneys in pro bono cases involving Spanish-speaking clients, allowing those attorneys to take on more complex cases. Recently, he organized an event honoring the UF Levin School of Law’s Cuban Lawyers Program, which assisted Cuban exiles who were attorneys in Cuba to pass the Florida Bar. He also has served in leadership roles for the Florida Bar, including as chair of the Equal Opportunity Law Section, and assisted with the Lawyers Helping Lawyers program.

Outstanding Pro Bono Service by a Lawyer

Lisa Beggs, an attorney with Zuckerman Spaeder LLP for nearly twelve years, practices in the area of white collar criminal defense litigation. Ms. Beggs has shown extraordinary dedication to pursuing equal access and zealous representation for dependent children through Crossroads for Florida Kids. In less than four years, Ms. Beggs has dedicated approximately 800 pro bono hours (350 in 2016) of service to her young clients and their difficult and complex issues. She has advocated for her young clients in dependency, delinquency, criminal, and Baker Act proceedings, as well as to education officials, medical professionals, and the Agency for Persons with Disabilities.

Ms. Beggs has represented some of the most vulnerable children in our community’s foster care system. She strives to make those children feel just a little bit better about their current circumstances by showing them that they have a true advocate and that she will not abandon them. She does so with her legal acumen and her time. That involves courtroom proceedings and adversarial meetings, as well as staying the night in the hospital with a frightened client or connecting over Starburst candies and a game of UNO.

When asked about her pro bono service, Ms. Beggs referenced a quote by Maya Angelou: “Do the best you can until you know better, then when you know better, do better.” Ms. Beggs noted that she applies that principle in her roles as a lawyer and a working mother. When it comes to her child clients, Ms. Beggs hopes that, through the justice system, she can provide them with a fair shot at a life of stability, success, hope, and, most importantly, happiness.

Outstanding Pro Bono Service by a Lawyer

Mark Wolfson, an attorney with Foley & Lardner, P.A., has 34 years of legal experience and serves as the firm’s pro bono chair. He practices in the area of corporate bankruptcy and complex commercial litigation.

Mr. Wolfson has been lead counsel on multiple complex workouts which collectively involved well over a billion dollars in real estate and corporate loans. Throughout his career, he has applied the same ingenuity and passion to his countless pro bono clients, including individuals and non-profit organizations.

Mr. Wolfson has consistently shown creativity, a willingness to
help when others will not, and an ability to obtain successful resolutions. While serving on the BAVLP pro bono panel (where he has volunteered since 1995), Mr. Wolfson noticed that there were multiple guardianship matters needing pro bono counsel. After learning that it was difficult to find pro bono counsel for those matters, Mr. Wolfson took every case on the list. In a probate case, Mr. Wolfson’s unprecedented procedural due process argument won the day, and a deceased’s child was able to afford braces.

Through BALS’ Judge Don Castor Community Law Center’s Community Counsel Program, he provides pro bono transactional legal assistance involving complex real estate and contractual matters to nonprofit organizations in Hillsborough and Pasco Counties that serve the poor and distressed communities. In conjunction with the ABA’s Military Pro Bono Project, he obtained a successful resolution for a soldier facing a lien on his real property. In another matter through the ABA’s Project H.E.L.P. (Homeless Experience Legal Protection) clinic at Metropolitan Ministries, where he provides legal counsel to homeless individuals, Mr. Wolfson successfully fought for the return of his client’s dogs. The client thanked him profusely, saying, “my dogs are my only real comfort other than my faith.” Mr. Wolfson also continuously mentors less experienced pro bono attorneys within and outside of his firm.

When asked about his pro bono service, Mr. Wolfson explained that he enjoys complex cases with unusual legal issues and high emotions, because that is where he can do the most good. He noted that a recent hug from his clients’ son — a 21-year-old non-verbal, severely disabled young man — inspired him to take his next case. It is clear that Mr. Wolfson makes a difference wherever he places his energy, and our community would not be the same without him.

**Outstanding Pro Bono Service by a Young Lawyer**

Ella Shenhav is an attorney at Shutts & Bowen LLP, where she is a member of the Business Litigation Practice Group and the firm’s Pro Bono Committee, and the head of the Tampa office’s Pro Bono Committee. Ms. Shenhav focuses her practice on complex multi-faceted commercial litigation, in both state and federal courts.

Ms. Shenhav has handled well over thirty pro bono cases in her seven years of practice. Those cases included domestic violence restraining orders, bankruptcy, housing/landlord-tenant disputes, complex immigration, veteran re-integration issues, and human trafficking victims. Additionally, Ms. Shenhav has performed extensive research for a non-profit organization seeking to eradicate forced marriage in the United States, and for a non-profit that sought the prosecution of a Salvadorian ex-officer who was eventually charged with crimes against humanity and state terrorism. Ms. Shenhav also is the director of the Tampa chapter of Project H.E.L.P., a pro bono weekly clinic that offers legal advice and services to homeless and indigent clients. Recently, Ms. Shenhav led Shutts in staffing the clinic for an entire month.

**Outstanding Pro Bono Service by a Law Firm**

To paraphrase Shakespeare, although Parwani Law is a small firm, it has shown fierce dedication to pro bono legal work since opening its doors in Tampa in 2008. Most recently, the firm agreed to represent a woman and her son in seeking the termination of the young boy’s father’s parental rights. The father was incarcerated for the attempted murder of the boy’s mother after brutally beating her in a public parking lot. The boy witnessed the attack from his car seat, and was found splattered with his mother’s blood. The woman suffered devastating injuries to her eyeball, orbital bones, nasal cavity, and teeth, and required extensive surgery. For two years, Parwani Law dedicated its resources to ensuring the man’s parental rights were terminated. Following a three-day trial, the petition was granted.

The firm, led by nineteen-year practitioner Rinky S. Parwani, consistently takes pro bono cases every year and contributes legal services through the BAVLP, Wills for Heroes, Ask-a-Lawyer, the Nativity Legal Ministry, and the Tampa Bay Bankruptcy Bar Association’s Bankruptcy Clinic.

**Outstanding Pro Bono Service by an Organization**

The George Edgecomb Bar Association (GEBA) was founded by local attorneys in 1982 to promote the development of African-American lawyers and to improve legal services for the community. GEBA has a strong tradition of assisting, educating, and empowering individuals and
families who do not know where to turn when facing legal and financial crises. For more than a decade, Geba has hosted Legal Redress Workshops in churches and community centers located in predominately minority neighborhoods throughout Hillsborough County, to do just that.

Through its workshops, GEBa has provided opportunities for diverse attorneys to interact with the community by providing legal education and pro bono legal services. The attorneys provide the community with targeted information regarding timely and relevant topics, including immigration, criminal law, employment and housing discrimination, tenant rights, wrongful termination, bankruptcy, property and foreclosure law, and family law. The workshops also connect citizens with existing pro bono resources designed to assist with legal disputes or issues.

The attorneys lead classes lasting 60 to 90 minutes on a legal topic with a portion of the time dedicated to answering questions from the audience. GEBa also provides complimentary breakfast and lunch at the workshops, and the lunch usually features a presentation on a topic with broad appeal to the audience. Examples of past presentations include an overview of assistance available through Bay Area Legal Services and a viewing of “Before the Law Was Equal,” a documentary produced by the Hillsborough County Bar Association’s Young Lawyers Division that recounts the racial and gender inequality existing in the local bar in the 1960s and the great strides towards that diversity that have been made since then.

GEBa has been hosting the workshops at least once a year since 2004, and GEBa’s attorneys have contributed nearly 2,000 hours of time.

1 Mike Archer, “Pine Street Case Teaches Lessons,” The Lake Sentinel (Mar. 21, 1999).
2 Id. “When government is approached by a group of people who honestly believe they have been mistreated, don’t make them feel like a band of con artists trying to nail the city”).

Author: Rachel May Zysk - The Suarez Law Firm

The Thirteenth Judicial Circuit Pro Bono Committee commends the extraordinary service of the 2017 award recipients.

Lapel Pin Recipients
20-49 Pro Bono Hours in 2016
Deborah Adles
Stephanie Amb
Wallace Anderson
Dale Appell
Jordan August
Razvan Axente
Deborah Baker
Thomas Baker
Amy Bandon
Jason Baruch
Zachary Bayne
Sean Becker
George Bedell
David Befeler
Cecilia Bidwell
Stacy Blank
Dane Blunt
Robyn Bonovich
Alan Borden
Yova Borovska
Christopher Branton
Cathleen Bremmer
Michael Broadus
Heather Brock
Courtney Bueno
Karen Buesing
Robert Buesing
Aubrey Burris
O. Kim Byrd
Patricia Calhoun
Amanda Chazal
John Clabby
Shannon Clancy-Kimball
Justin Cochrane
Matthew Cogburn
Jeanne Coleman
Chris Coutroulis
Curt Creely
G. Thomas Curran, Jr.
Jamal Daoud
Blake Delaney
Wendy DePaul
Katelyn Desrosiers
Michelle Drab
Nicole Duga
Marc Edelman
Zara Elias
Kathryn Everlove-Stone
Keith Fendrick
Roxanne Fixsen
Megan Flatt
Robert Freedman
Richard Fuego
Brannon Gary
Jon Gatto
Karen Gatto
Daniel Genet
James Giardina
Leonard Gilbert
William Giltinan
John Grandoff
Frank Greco
G. Gregory Green
Rachael Greenstein
Christopher Griffin
Jacob Hanson
Amy Denton Harris
Barbara Hart
Jourdan Haynes

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THE THIRTEENTH JUDICIAL CIRCUIT 2017 PRO BONO SERVICE AWARD WINNERS
Pro Bono Committee, Thirteenth Judicial Circuit
Chair: Hon. Christopher C. Nash - Thirteenth Judicial Circuit

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Erica Healey
Ryan Hedstrom
Sara Hellman
Dane Hептнер
Elizabeth Herd
S. Gordon Hill
Michael Hooi
Jessica Hoyer
Frank Hu
Stacey Hudon
Tyler Hudson
Lauren Humphries
Thomas Hyde
Klodiana Hysenlika
Joryn Jenkins
Nehemiah Jefferson
Michael Kangas
Derek Kantaskas
Roy Kielich
Latour Lafferty
John Lamoureux
Robert Lang
George Matthew Lastinger
Conrad Lazo
Haksoo Stephen Lee
Edgel C. Lester, Jr.
Jack Levine
Richard Linquanti
Jamila Little
Thomas Little
Walter Little
Laurel Lockett
Erica Mallon
Fred C. “Kip” Marshall
Richard Martin
Erin McCormick
Andrew McCumber
Paul McDermott
Honoroble Catherine McEwen
Brenda McMeekin
Elizabeth McRae
Stephanie Miles
Michael Millett
Dennis Morganstern
John Mulvihill
W. Edwards Muniz
Karan Nayee
Victoria Oguntoye

Laura Panaggio
Starr Parker
Terri Parker
Andrew Peluso
Kelley Petry
Jon Philipson
David Punzak
Jason Quintero
Robert Rainey
Susan Renne
Lee Rightmyer
Daphne Robinson-Shaw
Lawrence H. Samaha
Gary Sasso
Elizabeth Scarola
William Schwarz
Allison Selby
Susan Sharp
Kevin Shuler
Kenneth Siegel
Allison Singer
Jonathan Siragusa
Lori Skipper
Christopher Smart
Jane Sobotta
Marty Solomon
Traci Stevenson
Scott Stichter
Amy Stoll
Lauren Stricker
Charles Stutts
Kevin Sutton
Lauren Taylor
Kenneth Tinkler
Ashley Trehan
Sunjay Trehan
Matthew Tyson
Lauren Valiente
Joseph Varner
Naalti Vats
Steven Vazquez
John Vento
Edward Waller, Jr.
Roland Waller
Robert Walton
Morris “Sandy” Weinberg, Jr.
Randolph Wolfe
Barbara Yadley
Gwynne Young

50-99 Pro Bono Hours in 2016

Adam Alaee
Michael Barnett
Erica Bartimmo
Judd Bean, II
Jason Brant
Nicholas Brown
Amanda Chafin
Marina Choundas
Louis Conti
Kamala Corbett
L. Carina Cutter
Fentrice Driskell
Nancy Faggianelli
Elizabeth Fontugne
Helen Fouse
Oxalis Garcia
Michelle Gilbert
Paige Greenlee
Caycee Hampton
Lynn Hanshaw
Melody Harness
Marcos Hasbun
R. Alan Higbee
Hugh Higgins
John Hittel
Erin Hoyle
Kiahhn’ Jackson
Lorien Johnson
Suzanna Johnson
Cathy Kamm
Cristin Keane
Donald Kirk
David Knight
Edward Koren
Dominic Kouffman
Amber Kourofsky
Nathaniel Lackman
Sarah Lahlou-Amine
Domenick Lazzara
Jordan Lee
Anne Leonard
Dallas LePierre
Lesly Longa
Robert Lovett
Ellen Lyons
William Malachowski
Stephanie Martin

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### The Thirteenth Judicial Circuit 2017 Pro Bono Service Award Winners

**Pro Bono Committee, Thirteenth Judicial Circuit**

Chair: Hon. Christopher C. Nash - Thirteenth Judicial Circuit

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<td>Lily McCarty</td>
<td>Megan Oroniec</td>
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<td>Anthony Palermo</td>
<td>Rinky Parwani</td>
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<td>Melinda Harris</td>
<td>Harley Herman</td>
<td>Benjamin H. Hill, III</td>
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<td>Nicholas Horner</td>
<td>George B. Howell, III</td>
<td>Jenay Iurato</td>
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<td>Sarah Kay</td>
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<td>Joseph H. Lang, Jr.</td>
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<td>Timothy Martin</td>
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<td>Ella Shenham</td>
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<td>Mamie Wise</td>
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<td>Rachel May Zysk</td>
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PUTTING PROFESSIONALISM INTO PRACTICE
Professionalism & Ethics Committee
Chairs: Joan Boles - Bay Area Legal Services; and Lynn Hanshaw - Langford & Myers, P.A.

L
awyers in Hillsborough County are known for their professionalism. The Thirteenth Judicial Circuit was the first Florida court to create a professionalism committee twenty years ago, then called the Peer Review Committee. Since inception, the Committee and the Local Professionalism Panel sub-committee have fielded complaints from lawyers, judges, and the public about unprofessional conduct by local lawyers.

While “professionalism” seems amorphous, the Florida Bar has adopted numerous professionalism standards, including the creed of professionalism and the professionalism expectations promulgated by the standing committee on professionalism. The Hillsborough County Bar Association also has adopted standards of professional courtesy for conduct in litigation and for transactional attorneys.

These standards mean nothing if they’re not practiced and if our lawyers don’t help courts police unprofessional practice. Most recent panel referrals have come from judges. But we all know the majority of issues happen outside of court. If you encounter a colleague who engages in a pattern of repeated unprofessional conduct, we encourage you to consider filing a complaint with the Local Professionalism Panel. Professionalism complaints can be submitted by e-mail to either William Kalish (williamk@jpfirm.com) or Richard Martin (richard.martin@akerman.com), this committee’s co-chairs.

We ask that you provide sufficient information and supporting details to enable the screening committee to evaluate the complaint. Once submitted, an attorney from the Local Professionalism Panel will contact you for additional information.

Let’s all do our part to continue Hillsborough County’s reputation for professionalism!

Authors:
Richard Martin - Akerman LLP & William Kalish - Johnson Pope Bokor Ruppel & Burns LLP


The professionalism panel is a confidential mechanism for resolving professionalism complaints that do not rise to the level of a grievance. When conduct goes unreported and unaddressed, it often later results in Florida Bar disciplinary proceedings. The professionalism panel’s goal is not to intervene in case-specific situations, but to identify lawyers with either little experience or a pattern of repeated unprofessional behavior, and encourage them to change their behavior.

Complaints received by the panel are reviewed by a screening committee of lawyers and judges who determine the appropriate course of action. The resolution — which is completely confidential — may come in several forms: a one-on-one counseling with a lawyer or a judge; or counseling with a panel of a judge and two local lawyers. The goal is to change behavior. The process is neither punitive nor disciplinary. Records are not maintained, and the counseling does not result in any disciplinary record with the Florida Bar. The records of the panel are confidential. Panel members do not disclose the identity of the complainant, and they avoid discussions of case-specific details.

We have repeatedly heard that the bar is not aware of this avenue for addressing unprofessional behavior. Most recent panel referrals have come from judges. But we all know the majority of issues happen outside of court.

If you encounter a colleague who engages in a pattern of repeated unprofessional conduct, we encourage you to consider filing a complaint with the Local Professionalism Panel. Professionalism complaints can be submitted by e-mail to either William Kalish (williamk@jpfirm.com) or Richard Martin (richard.martin@akerman.com), this committee’s co-chairs.

We ask that you provide sufficient information and supporting details to enable the screening committee to evaluate the complaint. Once submitted, an attorney from the Local Professionalism Panel will contact you for additional information.

Let’s all do our part to continue Hillsborough County’s reputation for professionalism!

Authors:
Richard Martin - Akerman LLP & William Kalish - Johnson Pope Bokor Ruppel & Burns LLP

These standards mean nothing if they’re not practiced and if our lawyers don’t help courts police unprofessional practice.
Lenders, title insurance companies, and investors can breathe again! On January 25, 2017, the Fourth District Court of Appeal (for good reason) withdrew its August 24, 2016 decision in Ober v. Town of Lauderdale-by-the-Sea.1 In doing so, the Fourth District made it clear that liens placed on real property after the entry of a final judgment of foreclosure, but before a judicial sale are discharged under Section 48.23(1)(d), Florida Statutes.2

Here is a brief summary of the relevant facts in Ober: On November 26, 2007, a bank recorded a lis pendens on real property as part of a foreclosure action. On September 22, 2008, the trial court entered a final judgment of foreclosure in the bank’s favor. But the foreclosure sale did not take place until September 27, 2012. During the gap between the final judgment and the sale, the Town of Lauderdale-by-the-Sea placed seven code enforcement liens on the property. The purchaser of the foreclosed property then filed a quiet title action to extinguish the post-judgment code enforcement liens. The municipality counterclaimed to foreclose its post-judgment liens. The trial court sided with the municipality and entered a final judgment of foreclosure on its post-judgment liens. The purchaser appealed.

In its initial opinion dated August 24, 2016, the Fourth District surprisingly agreed with the trial court’s ruling and held that the post-judgment liens survived the foreclosure sale and could be foreclosed. The Fourth District reasoned that the lis pendens terminated thirty days after the entry of the final judgment of foreclosure (rather than the issuance of the certificate of title) and did not affect the validity of liens recorded after the final judgment.

The Fourth DCA’s initial opinion sent shockwaves throughout the mortgage lending, title insurance, and real estate investing industries across the state. Mortgage lenders, title insurers, and investors believed the Fourth DCA’s ruling would have had the following unintended consequences:

- Encourage delayed recording of liens;
- Increase in foreclosure costs because of the need to pull additional title updates during a pending foreclosure action;
- Decrease in investment in foreclosed properties because of increased risk;
- Decrease in fair market bids at foreclosure sales;
- Decrease in available surplus proceeds following a sale;
- Increase in title insurance company’s exposure to post-judgment claims;
- Increase in deficiency liability; and
- Increase in re-foreclosures.

But, on rehearing, the Fourth District withdrew its earlier ruling. The court held that a lis pendens does not terminate at final judgment in a foreclosure case. So the code enforcement liens placed on the subject property between the entry of the final judgment and the foreclosure sale were discharged.3

In reaching its January 25, 2017 opinion, the court placed significant weight on many of the arguments raised in the amicus briefs filed in support of the purchaser’s motion for rehearing.4

The municipality is seeking to overturn the January 25 decision by certifying the issue to the Florida Supreme Court as a question of great public importance. On March 22, 2017, the Fourth District granted the municipality’s motion for certification.5 For the time being, however, banks, title companies, and investors can be at ease because the power of the lis pendens has been restored to the status quo.

Continued on page 65
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1 No. 4D14-4597, 2017 WL 361127 (Fla. 4th DCA January 25, 2017).

2 Id. at *2. Lien holders wishing to preserve enforcement rights and avoid having their liens extinguished upon a foreclosure sale may still protect their rights by acting diligently and intervening in the foreclosure proceedings within thirty days after the recordation of the notice of lis pendens. Id.

3 Id.

4 Most notably, the Fourth District agreed with the Florida Land Title Association’s reading of section 48.23(1)(d), Florida Statutes: “A proper reading of section 48.23(1)(d) is, as the Florida Land Title Association suggests, that ‘when a foreclosure action is prosecuted to a judicial sale, that sale discharges all liens, whether recorded before the final judgment or after, if the lienor does not intervene in the action within 30 days after the recording of the notice of lis pendens.’” Id.

5 In its March 22, 2017 per curiam decision, the Fourth District certified the following question to the Florida Supreme Court: “Whether, pursuant to Section 48.23 (1)(D), Florida Statutes, the filing of a notice of lis pendens at the commencement of a bank’s foreclosure action prevents a local government from exercising authority granted to it by Chapter 162, Florida Statutes, to enforce code violations existing on the foreclosed property after final foreclosure judgment and before judicial sale, where the local government’s interest or lien on the property arises after final judgment and did not exist within thirty (30) days after the recording of the notice of lis pendens.”
Boyle & Leonard, P.A.
Attorneys at Law

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A lawyer whose practice mainly focuses on securities and financial services litigation, my workday typically involves some form of a financial or securities-related dispute requiring certain perspective and knowledge. Armed with a business background and an MBA, I am prepared to handle these kinds of disputes. But several years ago, I stepped outside this “comfort zone” to handle a pro bono case that is now one of my most rewarding experiences as a lawyer — even though this particular endeavor was far removed from the familiar confines of the business world. As a result of these efforts, my client’s life sentence without parole was commuted, and he is now a free man.

In 2014, the U.S. Department of Justice announced a clemency initiative to address budgetary and overcrowding concerns by seeking to reduce the number of nonviolent drug offenders in prison — which had soared from 40,000 prisoners in 1980 to over 500,000 in 2009. According to the Federal Bureau of Prisons, nearly half of all federal prisoners are serving a drug-related prison sentence. The DOJ’s Clemency Initiative introduced new and more expansive criteria it would consider when weighing clemency petitions from federal inmates. These criteria included the inmate’s criminal history, conduct in prison, and whether the inmate would have received a substantially lower sentence if convicted of the same offenses today.

Through the Clemency Project 2014, an initiative backed by such organizations as the ACLU and ABA, I was trained to assist an inmate seeking clemency. I was then assigned the case of a potential clemency candidate — “John” — who was in the 25th year of a life sentence without parole after being convicted at trial of a single drug offense back in 1980. While the typical sentence for that offense normally ranged from 10-20 years, the combination of several prior low-level drug offenses and the prosecution’s pre-trial filing of two “851 enhancements” meant that the sentencing judge was required to hand down a mandatory life sentence. Ironically, nearly all of the other 14 individuals charged in the indictment — many with significantly higher culpability in the alleged scheme — received much lower sentences and had long been out of prison. Given “John’s” age and the finality of a life sentence, this was literally a Hail Mary pass to prevent “John” from dying in prison.

For several years, I worked on gathering evidence, researching sentencing guidelines, and ultimately submitting a Petition for Clemency to the DOJ’s Office of Pardon Attorney. In October 2016, I received word that President Obama had commuted “John’s” sentence and ordered his release in February 2017. I felt truly fortunate to deliver the words that I had rehearsed over the previous two years. There are not many people outside the judiciary who will ever have the chance to tell an inmate that their sentence has been commuted. It is a powerful feeling to tell someone that their liberty, taken away from them over a quarter-century ago, will soon be restored. And while we may sometimes get wrapped up in our particular practice area, this journey has confirmed for me that some of our greatest experiences come from stepping outside of our “comfort zone.”

Author: Jordan D. Malich - Wiand Guerra King P.A.
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In 1866, Ohio Congressman John A. Bingham realized he had a new mission. He had been an ardent abolitionist before the Civil War. Now the war was over. The Thirteenth Amendment had abolished slavery. But Bingham knew that legal action must be taken to protect the freed slaves in the former Confederate states. His mission was the adoption of the Fourteenth Amendment to the Constitution of the United States.

It was Bingham who drafted the Fourteenth Amendment’s crucial language: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

In March, the Hillsborough County Bar Association invited lawyers to volunteer in classrooms across the county to speak to the students about the 2017 Law Week theme, “The 14th Amendment: Transforming American Democracy.” Approximately 70 lawyers volunteered to speak at about two dozen middle schools and high schools throughout Hillsborough County.

The Fourteenth Amendment truly transformed the Constitution by applying all of the Bill of Rights’ protections to the states. Specifically, Section 1 of the amendment includes the citizenship clause, the privileges or immunities clause, the due process clause, and the equal protection clause.

Under the citizenship clause, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”

The privileges or immunities clause declares that, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .” The due process clause, echoing the Declaration of Independence and the Fifth Amendment, states, “nor shall any State deprive any person of life, liberty, or property, without due process of law.” Finally, in the equal protection clause we find, “nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws.”

Attorney and historian Richard K. Fueyo contends that the emphasis in the Fourteenth Amendment is clearly on persons and citizens. It confers citizenship on all persons, both of the United States and of the state in which they live. With the adoption of the Fourteenth Amendment, none of these persons could be deprived of the Bill of Rights’ protections by any state without due process of law. Every person is guaranteed equal protection under the law.

Congressman Bingham believed that the privileges and immunities of citizens were chiefly defined in the first eight amendments to the Constitution. But these eight amendments never were limitations on the power of the states until made so by the Fourteenth Amendment.

The Fourteenth Amendment serves as the cornerstone of landmark civil rights legislation, the foundation for numerous federal court decisions protecting fundamental rights, and a source of inspiration for all those who advocate for equal justice under law.

The Fourteenth Amendment was ratified on July 9, 1868.

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2 Privileges or Immunities, The Heritage Guide to the Constitution (2012), http://www.heritage.org/constitution/#/amendments/14/essays/169/privileges-or-immunities


Author: Thomas Newcomb Hyde - Attorney at Law
Senior Counsel Luncheon with Dennis Archer

The Senior Counsel Section, along with other HCBA members, gathered on March 15 to hear from presenter Dennis W. Archer, Esq., who is the former mayor of Detroit, former ABA president, and former justice of the Michigan Supreme Court. Archer presented on the topic of “Current Challenges for the Legal Profession.”

The City of Tampa Mayor Bob Buckhorn also attended and welcomed the former fellow mayor at the luncheon.
Metadata. Ransomware. Cybersecurity. These sound like villains from a super hero comic. But they are actually part of a greater issue impacting the legal profession — technological competency.

In 2013, the Florida Bar established the Vision 2016 Commission to perform an in-depth review of four general areas that will impact the future of the legal profession: legal education, technology, bar admissions, and access to legal services. Throughout the Commission’s work, much discussion was had among attorneys and local bar associations regarding the future of bar admissions and in particular the topic of reciprocity. What didn’t garner as much attention was the Commission’s focus on technological issues.

The Commission determined that many lawyers lacked basic technological competence in their practice. As John Stewart, chair of Vision 2016’s Technology Committee told the Florida Bar News in June 2015, lawyers “don’t even know enough to know what we don’t know.” To help combat this issue, the Commission set forth several recommendations to help lawyers navigate this brave new world. These recommendations include establishing committees dedicated to technology, preparing e-etiquette guidelines, and making technological competency a professional requirement.

In response to these recommendations, the Florida Supreme Court approved proposed amendments to two Rules Regulating the Florida Bar: Rule 4-1.1 on competency and Rule 6-10.3 on minimum continuing legal education standards.

The comment to Rule 4-1.1 was amended to clarify that competent representation involves safeguarding confidential information, including electronic transmissions and communications, and that in order to maintain competency, lawyers should engage in continuing study and education “including an understanding of the benefits and risks associated with the use of technology.” To that end, the Supreme Court approved increasing the minimum CLE requirement to 33 hours and mandating that three of those hours be dedicated to technology. With this new mandate, Florida has become the first state to require technology CLE credits for its attorneys.

The new CLE requirement went into effect on January 1, 2017, and each lawyer will be required to abide by these new minimum standards in their next three-year reporting cycle following January 2017.


Author: Amanda M. Uliano - Law Office of Amanda M. Uliano, P.A.

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THANKS TO ALL OUR FOX 13 ASK-A-LAWYER VOLUNTEERS!

The attorneys from the Lawyer Referral & Information Service were at it once again in February and March, answering phones as part of Fox 13’s Ask-A-Lawyer program. We appreciate all those who volunteered to take calls and help out local residents!

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On February 16, 2017, the Florida Supreme Court appeared to reverse what has been nearly a half-decade dalliance with Daubert in Florida’s state trial courts. Colleagues in many practice areas anticipated the decision, and a goodly number took the time to comment to the rules committee and the Court. After a deliberative analysis by the rules committee and then a full briefing, comment period, and oral argument, the Court issued its rules decision on Daubert in In re Amendments to Florida Evidence Code, No. SC16-181, 2017 WL 633770 (Fla. Feb. 16, 2017).

On June 5, 2013, Governor Scott signed legislation amending section 90.702 of the Florida Evidence Code to replace Frye as the standard for expert witness testimony. At the signing, Gov. Scott said “Florida was the only state in the South that did not use this common sense method [Daubert] for determining who is an expert.” As former Chief Judge Shepherd of the Third DCA observed, the purpose of amending section 90.702 was to “tighten the rules for admissibility of expert testimony.”

Florida trial courts mostly did not miss a beat and began applying Daubert immediately. Since then, practitioners have reported significant difficulties managing the Daubert standard in state court proceedings. In practice, it has created a significant increase in the burden and focus on the “qualification” of an expert’s opinion and the question whether the opinion is “the product of reliable principles and methods.” The scope of inquiry and challenge to each expert and to each opinion has, according to some, increased the time commitment and out-of-pocket costs of a simple personal injury lawsuit by about 40%.

The reaction of Florida practitioners to the Daubert standard in state courts has been mixed. In general terms, it seems that plaintiffs’ lawyers oppose Daubert because it makes their cases too costly and needlessly imposes on the jury’s duty to evaluate evidence. On the other hand, criminal defense attorneys seem to generally support the adoption of the Daubert standard because it gives them a stronger argument to exclude state crime lab and other law enforcement evidence.

At oral argument, Mr. Hogan of the rules committee argued that “The jurisprudence of this court … doesn’t make Florida a haven for junk science, but that is the way that this matter got through the Legislature.” The opposition to Daubert has primarily been based on three objections: (1) it decreases access to civil justice; (2) it undermines the right of trial by jury; and (3) it is inefficient and expensive. In the end, the Court did as some Justices indicated and acted only within the confines of the rule-making process. The Court decided that, to the extent the legislative amendments were procedural, the Court declines to adopt those amendments. But the Court did not answer the corollary question, which Justice Pariente verbalized: “What part is procedural, what part is substantive in this legislation?” For that final answer, the Court reminds us, we will need to wait for a “proper case or controversy.”

1 Perez v. Bell South Telecom., Inc., 138 So. 3d 492, 497 (Fla. 3d DCA 2014)

Author: Morgan W. Streetman - Streetman Law
S
ome of the delays, costs, and unfairness inherent in the current workers’ compensation system were illustrated in the recent case of City of Hialeah v. Bono, 1D16-957 (January 19, 2017), and the decisions below in OJCC 14-004166 (February 3, 2016) and (March 3, 2017). The outcome may be as nonsensical as the litigation itself.

Bono had worked for the city for nine years when on December 2, 2013, he injured his right shoulder at work operating a leaf blower. After an MRI showed a torn rotator cuff, the authorized orthopedic surgeon, Dr. Rosabal, diagnosed a torn rotator cuff, related it to work, and prescribed an arthroscopic surgery, which the carrier initially authorized.

Bono made the “mistake” of requesting a one-time change of physicians, and the carrier sent him to Dr. Azar, who holds himself out as a hand specialist. Dr. Azer said the torn rotator cuff required surgery, but that it was a temporary exacerbation of an undiagnosed, unidentified preexisting condition. So, the carrier did not authorize the surgery. Bono then went to a more highly qualified orthopedic surgeon, Dr. Fernandez, for an IME, who said what Dr. Rosabal said, that it was a torn rotator cuff related to the work incident. The carrier raised a preexisting condition and a misrepresentation defense, and litigation escalated.

Bono’s employer had him continue to work in light duty while the carrier retained investigators to perform surveillance on multiple occasions, including while claimant was at work. This led to two depositions of Bono, other depositions, litigation, and a trial followed by an appeal and remand for proceedings that continued until March 3, 2017. At the end of the proceedings, after the facts and opinions became more complicated, the misrepresentation defense was rejected, as was the opinion of Dr. Azar, and the carrier was ordered to authorize the arthroscopic surgery.

A cynic could say that by exercising his “right” to a one-time change of physicians, the claimant got four years of litigation. The employer paid Bono to work in light duty work for four years instead of getting him back to full duty, and now it will have to pay for all the attorneys and litigation costs incurred over four years. Under current law, the nonsensical outcome may be that Dr. Azar, the one-time change physician and hand specialist whose opinion of an undiagnosed, unidentified preexisting condition was discredited by the other physicians and the judge, would be authorized to perform the surgery.

The relatively low cost of arthroscopic surgery raises doubts as to the advisability of defense litigation like this. The decisions and the appeal focus on the language and meaning of the misrepresentation defense in an appropriate analysis of the law and facts. Neither mentions the frustrated intent of the act, listed in Section 440.015, Florida Statutes, “to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker’s return to gainful reemployment at a reasonable cost to the employer.”

Author: Anthony V. Cortese - Attorney at Law

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A cynic could say that by exercising his “right” to a one-time change of physicians, the claimant got four years of litigation.
For the month of February 2017  
Judge: Hon. Robert Foster  
Parties: Santiago Velazquez and Wilson Alas Rodriguez v. Shultz Trucking, Inc. and Michael John Schultz  
Attorneys: for plaintiff: Timothy F. Prugh and Juana Rojas; for defendant: Kenneth Olsen and Laura Glass  
Nature of case: Motor vehicle collision on disputed liability involving four vehicles.  
Verdict: 70 percent liability against defendants, 30 percent liability against Fabre defendants. Trial pending on issue of damages and motion for fees.

For the month of March 2017  
Judge: Hon. Paul Huey  
Parties: Estate of Andrew Robinson v. Dustin Davis and Leedy Electric West  
Attorneys: for plaintiff: Keith Goan; for defendant: Paul Weekley and Megan Collins  
Nature of case: Motorcycle accident resulting in the death of 20-year-old Andrew Robinson  
Verdict: Defense verdict

For the month of March 2017  
Judge: Hon. Pamela A.M. Campbell  
Parties: Maggiore Shore Apartments, LLC v. AAA+ Mr. Roofer of Pinellas, LLC and Gary Porter  
Attorneys: for plaintiff: Daniel A. Martinez; for defendants: Edward F. Gagain, III  
Nature of case: Plaintiff alleged defendants negligently performed re-roofing project at apartment complex that resulted in complete flooding of complex. Plaintiff sought $967,000.00 in damages.  
Verdict: For the defense.

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**EMPLOYMENT LAW**

- Employee Rights
- Victims of Sexual Harassment
- Unpaid Overtime
- Whistleblowers
- Discrimination/Retaliation
- Breach of Employment Contracts

**The Fraley Law Firm, P.A.**

*Ronald Fraley, an AV rated attorney, has practiced Employment Law in Tampa for almost 30 years.*

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**AROUND THE ASSOCIATION**

**Rosemary Armstrong** - The Girl Scouts of West Central Florida presented a 2017 Women of Distinction Award to Rosemary Armstrong, who founded **Crossroads for Florida Kids** among other achievements, on March 21.

**Ceci Berman** - Ceci Berman of **Brannock & Humphries** recently presented “You Lost! Now What? Appellate Issues: Is your order final?” at the ABI Alexander L. Paskay Memorial Bankruptcy seminar. Berman also presented “The Unwritten Rules of Appellate Practice” at The Florida Bar Appellate Practice Section’s Hidden Essentials of Appellate Practice seminar.

**Steven M. Berman** - The law firm of **Shumaker, Loop & Kendrick, LLP** is pleased to announce that Tampa partner Steven M. Berman was a guest lecturer at the University of Florida College of Law Advanced Problems in Bankruptcy seminar on February 24. Berman’s topic was “Corporate Ownership Disputes in Connection with Chapter 11 Bankruptcy.”

**Robyn A. Bonivich** - announces the opening of her new firm, **Robyn’s Law, PLLC**, practicing in the areas of marital and family law.

**Stephanie M. Braat** - The Law Firm of Chris E. Ragano, P.A. announces the addition of associate attorney Stephanie M. Braat to its practice. The firm is located in South Tampa and practices in the areas of marital and family law.

**Ryan Cappy** - Ryan Cappy is pleased to announce the opening of his law firm, **The Law Offices of Ryan Cappy**. A native of Tampa, Cappy’s practice is dedicated to serving those impacted by personal injury.

**Jeffrey A. Collier** - Stearns Weaver Miller welcomes shareholder Jeffrey A. Collier to its Tampa office.

**G. Thomas Curran** - Tampa associate G. Thomas Curran, Jr., with **Shumaker, Loop & Kendrick, LLP**, recently served as a panelist at Hilton Grand Vacations’ Vacation Ownership Financial Services Operations Conference on March 10 in Orlando.

**Heather DeGrave** - Walters Levine & Lozano is pleased to announce that Heather A. DeGrave has become a partner of the firm.

**Scott Dibbs** - Hill Ward Henderson is pleased to announce that Scott Dibbs was recently named Best Attorney by the NAIOP Tampa Bay Commercial Real Estate Development Association. NAIOP Tampa Bay is the area’s leading trade organization representing developers, owners, investors and other professionals in commercial real estate.

**Tyler A. Hayden** - Smolker, Bartlett, Loeb, Hinds & Sheppard, P.A. welcomes Tyler A. Hayden to the firm as an associate attorney.

**Benjamin Hill, III** - Hill Ward Henderson is pleased to announce that founding shareholder, Ben Hill, III was recently honored with the Distinguished Citizens Award. The award is presented by the Greater Tampa Bay Area Council Boy Scouts of America annually to one local or statewide community leader.

**Michele Leo Hintson** - Tampa partner Michele Leo Hintson with the law firm of **Shumaker, Loop & Kendrick, LLP** spoke at the monthly meeting of the Professional Association of Health Care Office Management (PAHCOM) Tampa Chapter on February 20.

**Celene H. Humphries** - Continued on page 79
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**Brannock & Humphries**
recently presented on “Florida Civil and Criminal Practice, and Writs” at The Florida Bar Appellate Practice Section’s Appellate Board Certification Boot Camp webinar. Humphries also presented on appellate perspectives at The Florida Bar’s Basic Trial Practice seminar.

**Erica Loren Jozwiak - Patsko Law Group, PLLC** welcomes Erica Loren Jozwiak to the law firm as an associate attorney in the Civil Litigation Practice Group.

**Julia C. Mandell - Carlton Fields** is pleased to announce that Julia C. Mandell joined the firm as of counsel in its Tampa office. Mandell will be a member of the firm’s Government Law and Consulting practice group.

**Edmund McKenna - Ogletree Deakins** is pleased to announce that Edmund (Ed) McKenna has been named managing shareholder of the firm’s Tampa office.

**Katie Molloy - Katie Molloy** has been elevated to shareholder in the local office of the law firm Greenberg Traurig, P.A.

**Robert L. Olsen - Allen Dell** is pleased to announce that Robert L. Olsen has joined the firm as a shareholder, where he represents clients in commercial litigation & transactions, and trusts & estates litigation.

**Eliot Peace - Bradley Arant Boult Cummings LLP** welcomes Eliot B. Peace to the firm’s Tampa office as a member of the Litigation Practice Group.

**Logan Murphy - Hill Ward Henderson** is pleased to announce that Logan Murphy was recently elected secretary of the American Bar Association Young Lawyers Division.

**Joseph T. Patsko - announces the formation of Patsko Law Group, PLLC.** Patsko is a board-certiﬁed civil trial lawyer and has over 30 years of experience in civil trial litigation.

**Woodrow “Woody” Pollack - Greenberg Traurig, P.A.** has expanded its Intellectual Property Practice with the addition of Woodrow H. Pollack as a shareholder in the Tampa office.

**Maria del Carmen Ramos** - The law firm of Shumaker, Loop & Kendrick, LLP is pleased to announce that Tampa partner Maria del Carmen Ramos received the JD Supra Readers’ Choice Award in the “Top Author: Immigration” category for the second year in a row.

**Heidi Hudson Raschke - Carlton Fields** is pleased to announce that it has elevated Heidi Hudson Raschke, of counsel, in the firm’s Tampa office, to shareholder.

**Thomas P. Scarritt, Jr. - Scarritt Law Group, P.A.** has been recognized as a Paul Harris Fellow by the Rotary International Foundation. Scarritt is currently a member and vice-president of the Tampa Ybor City Rotary.

**Allison Stevenson - Hill Ward Henderson** is pleased to announce their newest associate, Allison Stevenson, is joining the firm’s litigation group.

**Gregory C. Yadley -** Tampa partner Gregory C. Yadley with Shumaker, Loop & Kendrick, LLP chaired the 35th Annual Federal Securities Institute on February 7 in Miami. Additionally, Yadley moderated a securities law panel and participated on an ethics panel.

To submit news for Around the Association or Jury Trial Information, please email Stacy@hillsbar.com.

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