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

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


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ABOUT THE COVER

Continuing with our highlighting of famous legal literary works, this month’s cover features the book cover of Devil in the Grove, winner of the Pulitzer Prize for general nonfiction by Gilbert King. The book is a gripping true story of racism, murder, rape, and the law, based in Groveland, Florida, in 1949. It brings to light one of the most dramatic court cases in American history, and offers a rare and revealing portrait of Thurgood Marshall that the world has never seen before.

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One of my daughters’ favorite games is reenacting *The Three Little Pigs*. The game involves my wife, unhappily cast in the role of the Big Bad Wolf, trying to find my daughters, who hide under their blanket, usually with hands and feet popping out every side. Although it’s not quite how the story goes, I swoop in at the last minute to save them from the Big Bad Wolf right after she blows their blanket off. Once we’re done, my oldest daughter asks me what would happen if a big bad wolf really did come to the door. I try to explain to her that, for reasons that aren’t yet apparent to her, it would never happen. In the end, she assures me she’s not worried because she knows I’d protect her from the big bad wolf.

That’s one of the (many) great things about having kids: to your kids, you are a superhero who isn’t afraid of anything. Secretly, I wish that were true. Growing up, I thought it would be cool to be a fighter pilot (that was my backup plan in case I didn’t make it to the NBA). To this day, I’m still fascinated by AirFest at MacDill Air Force Base, especially when they have the stealth fighter or bomber there. As I’ve gotten older, I enjoy reading books about the exploits of Navy SEALs, Delta Force operators, and the Night Stalkers. There’s only one thing that kept me from becoming some sort of real hero, like a Navy Seal, Delta operator, or Night Stalker.

Courage.

I remember my mom suggesting to me while I was in high school that I should consider joining the military when I graduated. It would be a great way to help pay for college, which I really didn’t have the money for. And while I don’t think she knew I wanted to, it would be my chance to fly a fighter jet. Except the problem was I didn’t think I was tough enough to make it through basic training, let alone have the courage to fly a jet (which I had no reason to think I had any aptitude for) that people would be shooting at! People join the military for a lot of reasons — love of country, a sense of duty, family tradition, as a way to pay for college, etc. — but everyone who signs up must have the courage to pay the ultimate price for others.

In his hit song, *American Soldier*, Toby Keith sings about the courage of the American soldier (really all service members):

> You can bet that I stand ready
> When the wolf growls at the door
> *** *** ***
> When liberty’s in jeopardy
> I will always do what’s right,
> I’m out here on the front lines,
> So you can sleep in peace tonight.

My oldest daughter is right: there is someone with courage who stands ready to protect her when the wolf growls at the door. As we celebrate Veteran’s Day, it’s my job to teach her who that really is.
To Opposing Parties and Their Counsel, I Pledge …

A recent encounter with a group of brand new lawyers leads me to believe that the future of the profession is in very capable hands, especially here in Hillsborough County.

If you asked, I think many people would tell you that their least favorite time of the year is election season, especially in a presidential election year. The airwaves and our mailboxes are full of advertisements disparaging one side or the other as morally bankrupt or politically inept. Political discourse seems to be at an all-time low, and it can feel like this overwhelming negativity is the new norm in our society. I cannot help but notice that some of that negativity has bled over into the practice of law. Ask any practitioner with a little mileage on their odometer and they will likely bemoan the erosion of collegiality and professionalism prevalent in the next generation of lawyers. While there may be some truth to that, I suspect that older generations have always been critical of the generations that follow. After all, it is human nature to glamorize the past and to have trepidation about where the changing world may take us. I have never been described as a cockeyed optimist, but a recent encounter with a group of brand new lawyers leads me to believe that the future of the profession is in very capable hands, especially here in Hillsborough County.

On September 23, the HCBA and the judges of the Thirteenth Judicial Circuit hosted a swearing in ceremony for lawyers who had just passed The Florida Bar Examination. (Photos from swearing-in ceremony on page 16.) Chief Judge Ficarrotta presided in ceremonial session, as close to thirty lawyers became the newest members of The Florida Bar. I, along with Judge Christopher Nash, David Rowland, emeritus member of the Florida Board of Bar Examiners, and Melissa Mora, YLD president-elect, had the opportunity to address the audience on the importance of practicing with professionalism and the critical role the HCBA can play in developing and maintaining an outstanding reputation.

In preparing my remarks, I spent some time reading and re-reading the Oath of Admission and kept coming back...
Continued from page 4

the most recent addition to its language, “To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.” This pledge was not part of the Oath when I was admitted, and I did not give it as much consideration as I should have when it was added in 2011.

I could not help but be awed by the nobility of the ideals contained in those twenty-four words. It is one thing to aspire to fairness, integrity, and civility; it is another thing altogether to demand it, especially when it comes to dealings with your opposition. No other profession sets the ethical bar so high. I also was struck by the fact that, in my experience, the vast majority of HCBA lawyers have always tried to meet and exceed this standard, which takes me back to my renewed sense of optimism about the next generation of lawyers.

After the ceremony, the HCBA hosted a reception attended by the judges, the lawyers, and their families. It was during this reception that I had the opportunity to interact with our newest colleagues. To a person, each one of them expressed to me how moved they were by the ceremony and the gravity of the Oath they had just taken. 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 also realized that it is incumbent on our membership to help them to do so by leading by example and instilling in them the belief that “fairness, integrity and civility” are not just words, but a way of life.

By the time you are reading this, the presidential election will have been decided and even if the candidate you were, perhaps begrudgingly or lukewarmly, supporting did not win, the sky will not have fallen. Mercifully, at least we will be free from negative television advertisements and mailers until the next election. Now seems like as good as time as any to focus on how lucky we are to practice law, to practice law in Hillsborough County, and to practice with the next generation of attorneys who are every bit as committed to civility and professionalism as the rest of the HCBA. If you ask me, these are some pretty good reasons to be optimistic about the future.
Get Connected with the Youth on Solid Ground Pro-Bono Project

Attorneys can make an enormous impact in the life of a child — and it only requires the commitment of a few hours of time.

Since the HCBA allows me to write on pretty much anything I want as President of the Young Lawyers Division, I figured I would use this article to promote a pro bono project that I care a great deal about — the Youth on Solid Ground Pro-Bono Project.

The Florida Young Lawyers Division, in collaboration with the Florida Bar Foundation and the Florida Pro Bono Coordinators Association, is launching a program to help fill the access-to-justice gap for low-income families in Florida by providing short, online training (CLE credit) for attorneys. With this training, attorneys can assist children and families secure non-contested, routine temporary custody orders that will allow children in the state of Florida to obtain the care and resources they need.

Unfortunately, in many families, parents are not able to care for and act on behalf of their children because they lack the means to do so. This may be because the parent is disabled, dealing with an illness, on military deployment, or incarcerated. Children rely on loving adults and nourishment to grow and thrive. Yet, often a family member serving as a temporary caregiver has not completed the proper paperwork to ensure that they are able to take the necessary actions to meet the child’s needs at home, at school, and in health care settings.

With a temporary relative custody order in place, a child’s extended family member, often a grandparent, aunt, uncle, or older sibling, will have the legal ability to perform basic parental functions, such as enrolling the

Continued on page 7
child in school, meeting with teachers, consenting to basic medical care, and meeting with medical providers. In short, the program puts children on solid ground by providing them with the resources they need to ensure their education, housing, and health needs are being met.

By participating in The Youth on Solid Ground Pro-Bono Project, attorneys can make an enormous impact in the life of a child — and it only requires the commitment of a few hours of time. Attorneys will be provided with training, and put in contact with local pro bono coordinators to assist families and children in need of a temporary custody order. Attorneys interested in helping should visit http://flayld.org/youth-on-solid-ground/ to sign up. There are only two steps on the website, then the attorney is ready to help:

STEP 1: View a Free Training Seminar with CLE Credit

At the Youth on Solid Ground Pro-Bono Project website, a training video is available that will give the attorney the training needed. The attorney also will get 2.5 hours of CLE credit for the 1.5 hour training session.

STEP 2: Sign up to Assist

After the attorney is trained, the attorney can click the link to find the pro bono coordinator in the attorney’s area. If you are in Hillsborough, you can contact the Bay Area Volunteer Lawyers Program at (813) 226-8685 Ext. 101 or nlugo@bals.org.

Hopefully we have strong participation as a legal community to generate a positive impact on the lives of children in the Hillsborough County area.
Good Night, Sweet (Nigerian) Prince, Hello Ransomware: More Email Scammers Targeting Florida Lawyers

Nowadays, it’s a little more tricky to determine which unsolicited emails are genuine and which are not.

Lately, it seems Florida lawyers have been the target of an increasing number of email scams.

While this may not be surprising, especially given the technology-driven world we live in, what makes these malicious emails particularly troublesome is the email scammers appear to be getting more sophisticated and deceptive in their efforts.

And the scammers clearly know how to get the attention of busy attorneys.

Long past are the halcyon days of ridiculous-sounding offers from fictitious, wealthy Nigerian royalty willing to forward thousands of dollars if only you will hit reply and set up a bank account in Africa by providing your Social Security number and other personal information.

No problem here, right? You immediately hit the delete key. You obviously know there are no riches waiting to be had in inheritance money, and you certainly are aware you haven’t won a foreign lottery.

It brings to mind the old saying: If an offer sounds too good to be true, then it probably is.

Nowadays, however, it’s a little more tricky to determine which unsolicited emails are genuine and which are not.

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

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And the software often embedded in these malicious emails — known as ransomware — can be downright scary.

This malicious software can take over your computer and destroy your files unless you pay a “ransom” to the sender.

Unfortunately, Florida Bar members in recent months have been the target of a series of fraudulent emails that look all too real, and which can create major headaches and computer problems for people who open them, not to mention the firms they work for.

Jonathon Israel, formerly the IT operations manager at The Florida Bar, and now the director of the Bar’s Practice Resource Institute (PRI), told me not only has there been an increase in the number of reported email scams, but the scams also are more sophisticated in how the emails are designed and worded.

“They’ve definitely done their homework,” Israel said, referring to the scammers and the legal-sounding language used in their fraudulent communications.

Israel said he can understand how the emails can sometimes dupe busy attorneys.

Lawyers are seen as “easy targets,” Israel said, because many work as solo practitioners, or in smaller firms, and they may not have the IT security protocols in place that larger firms may have.

One recent fraudulent email received by Bar members had the subject line “Florida Bar Complaint - Attorney Consumer Assistance Program,” and another had the subject “Notice of Past Due License Renewal #00000.”

Also, this past summer, Bar members received an email purportedly from the Florida Attorney General’s Office.

The email erroneously informed the lawyer recipient they had been sued by the state of Florida, and it included a link to a complaint possibly containing malware.

Tampa attorney Kevin Johnson, with the firm Thompson, Sizemore, Gonzalez & Hearing, previously was chair of the The Florida Bar’s Technology Committee, and was instrumental in developing the Bar’s PRI website.

As bogus emails targeting Florida lawyers are uncovered, The Florida Bar sends out alerts, and warns members to exercise caution when opening emails from unknown senders.

Israel of the Bar’s PRI said Bar members should report any suspicious emails to Abuse@floridabar.org.

As Bogus emails targeting Florida attorneys are uncovered, the Florida Bar sends out alerts, and warns members to exercise caution when opening emails from unknown senders.

Israel of the Bar’s PRI said Bar members should report any suspicious emails to Abuse@floridabar.org.

In addition, he said the PRI has posted tips, videos, and links to other resources on its website for members to use to protect their computers from malware. The webpage can be found at www.floridabar.org/PRI.

So consider this a friendly warning, and be careful out there.

See you around the Chet.
Protecting our Children

Within my office, a unit of specialized prosecutors is assigned to handle sex offenses, as well as crimes against children.

As computers and the internet have taken on a larger role in our society, the danger to our children posed by this technology has also grown. Internet crimes against children include cyberbullying, child pornography, and traveling to meet a minor to engage in illegal acts. While exact numbers for these types of crimes are unknown, the National Center for Missing and Exploited Children reported receiving 4.4 million reports on their CyberTipline in 2015.1

As part of our goal of creating safer communities, not only does my office prosecute these types of crimes, but we also work within our community to prevent them. Within my office, a unit of specialized prosecutors is assigned to handle sex offenses, as well as crimes against children. Attorneys in this unit frequently go into our schools to educate students and parents about the dangers of cyberbullying and internet predators. Both parents and students are armed with knowledge to protect against these dangers and avoid exploitation.

My office also works closely with our law enforcement partners to build stronger investigations for prosecution. My prosecutors regularly participate in law enforcement training, keeping officers updated on the current state of the law regarding sex offenses. They also review probable cause for search warrants in these types of cases and provide advice during operations targeting sex offenses.

My office is also a member of the West Central Florida Internet Crimes Against Children Task Force (WCF-ICAC). The Internet Crimes Against Children Task Force Program (ICAC) was established by Congress.2 ICAC is a network of state and local task forces, including WCF-ICAC, that brings together prosecutors and federal, state, and local law enforcement agencies to work together on investigating and prosecuting these crimes.3 The purpose of ICAC is to “help regional, state, local, and tribal law enforcement agencies acquire the knowledge, equipment, and personnel resources they need to prevent, investigate, and stop sexual crimes against minors.”4 Internet crimes often span multiple jurisdictions. So ICAC fosters cooperation between jurisdictions in investigations. ICAC also assists agencies in developing strategies and responses when investigating these crimes.

Growing out of that work, my office has also become a part of the Digital Forensics Development Committee. This committee includes other prosecutors in our area, local law enforcement agencies, and federal authorities. This committee will focus on the standards law enforcement should use when analyzing digital media in cases involving computer crimes against children.

As your State Attorney, I want to protect our community, including its most vulnerable citizens, our children. As criminals become more sophisticated in their use of technology, my office and our law enforcement partners work together to create effective investigations and to build stronger prosecutions.

1 Key Facts, National Center for Missing and Exploited Children, http://www.missingkids.com/KeyFacts (last checked...
Sept. 6, 2016. (The CyberTipline includes reports of all types of suspected child sexual exploitation, not just that involving the use of the internet).


An Interview with the Honorable Charles Wilson

The following is an edited excerpt of an interview with the Hon. Charles Wilson, Eleventh Circuit Court of Appeals, conducted by Mike Hooker.

Q. Judge, I understand that you spent a significant portion of your childhood in Tampa and went to high school at Jesuit. Can you tell us a little about growing up here?

A. I was born in Pensacola where my father practiced law. My parents divorced when I was about eight years old. My mother brought me and my sister to Tampa, which was her home, and I was introduced for the first time to a lot of cousins. We enjoyed family gatherings on the weekends, which were usually centered around good food, and I joined a local Cub Scout troop. We were enrolled in Catholic schools, and I attended Jesuit High School, which was just a sensational experience for me. I made a lot of great friends there, many of whom are still good friends today.

Q. I understand that for a time your father was the only African-American lawyer practicing in Florida’s Panhandle and that he worked during the ’50s and ’60s to desegregate public institutions there. How did you father’s civil rights leadership influence or impact you growing up?

A. I was very young at the time of the civil rights movement and, of course, had moved back to Tampa, and he continued to practice in Pensacola, so there was a lot taking place that I did not understand. But I can say that my appreciation for the law developed at an early age. My first visit to a courthouse occurred when I was about seven years old; I accompanied my dad to court and remember him introducing me to fellow lawyers as his bodyguard. He eventually moved to Tampa to practice corporate law.

Q. You ventured to the Midwest for college and law school. What took you to Notre Dame for your higher education?

A. When you grow up attending Catholic schools like I did, Notre Dame is a school that’s always on your radar as you’re getting ready for college. We went on a college tour the summer before my senior year in high school, and I visited several colleges. When we arrived at Notre Dame and I got out of the car, I saw that golden dome shining against that bright blue sky, and that was all she wrote!

Q. Your private practice experience was probably different from that of most federal judges. You actually hung out your shingle as a sole-practitioner just a couple of years out of law school?

A. I had completed a federal judicial clerkship, spent a few months in the Hillsborough County Attorney’s office, and I was anxious to practice law and try some cases. So I opened my own practice with a $10,000 loan from the old Atlantic Bank. Looking back, it was one of the best things that I think I ever did as a lawyer. I had a general practice, so I was exposed to a lot of different areas of the law. I was in probate court and family court; I tried civil and criminal cases in both state and federal court; and I had some cases before the Social Security Administration. I filed
Continued from page 12

a few Chapter 7 and 13 petitions in the United States Bankruptcy Court. There isn’t a whole lot that comes across my desk right now that I haven’t seen already. So it’s been very beneficial to me in my legal career to have such a diverse legal background.

Q. Since then, you’ve served as a county court judge, a federal magistrate judge, and as U.S. Attorney for the Middle District of Florida. By most accounts, the U.S. Attorney’s Office was going through some turmoil when you took over that position. Why did you decide to take on that job?

A. I was recruited for the position by Janet Reno, who was the Attorney General of the United States. She called and asked if I would be willing to travel to Washington to discuss the prospect of leaving my position as a magistrate judge and take on the responsibility of serving as the United States Attorney. I could tell she had done her homework on me before the interview. Of course, the decision to take the job was a “no brainer” because it was a great opportunity, and you don’t say “no” to the Attorney General of the United States when called upon to serve your country and community.

Q. What are you most proud of about your tenure as the U.S. Attorney?

A. I think when I left the office after five years, morale was very high, and the office was highly regarded as an institution in the community. In addition to the excellent lawyers who were already there, I’m proud of the fact that I was able to recruit a lot of excellent lawyers who provided representation to the United States with great distinction.

Q. I understand that you did not actually start your career with the idea of becoming a judge. What made you decide to take the leap to the bench?

A. There was a vacancy on the Hillsborough County Court when Judge Susan Bucklew was appointed by former Governor Bob Graham to the Circuit Court, and I was encouraged to apply for that vacancy by the Chief Judge at the time, Guy Spicola.

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Q. You were appointed to the Eleventh Circuit at the remarkably young age of 44. What do you think contributed to what some would call a meteoric rise to the appellate bench?

A. I have been very fortunate, even though I have actually had my share of career disappointments. But as I counsel my law clerks, if you do your best with every task, on every job, the future will take care of itself. Success takes place when preparation intersects with opportunity. I applied several times unsuccessfully for a position as an Assistant United States Attorney, but later in life I was selected to serve as the United States Attorney. Three times I applied without success for a position as a United States District Judge, and yet later, I was fortunate to be selected by the President to serve on the Court of Appeals. Looking back, I also appreciate the significance and importance of contributing to the Bar and to civic and charitable organizations in my community. I still cherish my service as President of the Young Lawyers Division of the Hillsborough County Bar Association and my service on the Board of Governors of the Young Lawyers Division of The Florida Bar. Serving the Bar and the community not only gives you a voice in the affairs of the profession, and an opportunity to serve, but also enhances your career.

Q. Maybe as a twist of fate, you were selected to replace retiring Judge Hatchett, who you had previously clerked for. What did it mean for you to be chosen as your mentor’s replacement?

A. It meant a lot. Just to be associated with an iconic figure like Joseph Hatchett was a big benefit to my career. He was the first African-American to serve on the Florida Supreme Court, as well as the United States Court of Appeals for the Fifth and Eleventh Circuits. He has such a great reputation in the state and in the country. He was always available for advice and counsel when I needed to make a career decision.

Q. Upon your appointment to the appellant bench, you became only the second African-American judge to serve on the Eleventh Circuit, and you were one of the few African-American U.S. Attorneys nationwide at the time you held that position. Did you consider yourself a trailblazer in that respect?

A. No, I don’t really consider myself a trailblazer, but I have an appreciation for the responsibility that comes with service in these capacities, and obviously I do not want to embarrass or disappoint the people who played a part in my professional accomplishments and who have recommended me for these positions.

Q. What was the biggest adjustment you had to make to transition from being a trial judge to now serving as an appellate judge?

A. The biggest adjustment is getting used to navigating the dynamics of group decision-making. Unlike a trial judge, or a United States Attorney, I must convince one other person, and in some instances six other persons, before a decision is reached. And I have to consider their views as well. Fortunately, I work with gifted and honorable colleagues on the Eleventh Circuit, and we work very hard to reach a consensus.

Q. Most people have at least some personal or political ideology, even if it remains private and restrained. How do you separate your personal or political ideology from the issues you have to decide on the Eleventh Circuit?

A. I call them as I see them. I have no social or political views that are so strong that I cannot set them aside and decide cases fairly and impartially. Some might consider that more of a vice than a virtue, but it’s always been very helpful to me. I also like to think that I’m about as non-ideological as you can get — I try to find practical solutions that follow the law.

Q. The Eleventh Circuit just recently held oral arguments here in Tampa for the first time in many years; do you think that we can look forward to more oral arguments here in the future?

A. I hope so. I was able to convince two of my colleagues, Judges Tjollat and Martin, to travel to Tampa to conduct an oral argument in a death penalty appeal earlier this year. Although these cases are not pleasant, the judges were very pleased to travel to Tampa and enjoyed the gracious hospitality extended by the Federal Bar Association.

Q. Some observers opine that oral argument does not usually change the court’s mind. How often have your initial impressions or thoughts about a case changed during an oral argument?

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A. More often than you might think. Unlike other circuits, most Eleventh Circuit appeals are decided on the non-argument calendar, so the fact that an appeal is scheduled for an oral argument is an indication that at least one member of the Court, usually several members of the Court, have some concerns about the case and are not leaning in a particular direction.

Q. What advice would you give to a lawyer who is preparing to argue a case before the Eleventh Circuit?

A. The best way to prepare for an oral argument in the Eleventh Circuit is to come prepared to answer the Court’s questions, rather than re-articulate or regurgitate what’s already in the briefs. Usually the first few questions you get provide a signal about the concerns the Court has about the appeal.

Q. What is the biggest mistake you see lawyers make in connection with appeals before the Eleventh Circuit?

A. I think lawyers have a tendency maybe to write a little bit too much in an effort to “cover all the bases.” Some of the best briefs that I’ve read are the succinct ones that get straight to the heart of the matter, and often times I see winning issues buried in a multiple-issue brief. Brevity is appreciated.

Q. What keeps you grounded?

A. Well, the courthouse can be a pretty intimidating place for those who enter it. I was taught that it’s important to treat everybody who enters the courthouse with courtesy, dignity, and respect, and I try to do that.

Q. Can you tell us a little about your family? How long have you been married; how many children do you have?

A. Belinda and I are celebrating our 35th wedding anniversary this year. We have two daughters, both lawyers. I am also proud of the fact that they both have degrees from Notre Dame.

Q. That’s a nice transition. You’re a self-described avid – your friends would even say fanatical – fan of Notre Dame athletics. Is there any particular Notre Dame game or season that stands out for you?

A. We won two National Championships when I was in school there, which was pretty exciting, once when I was in college, and the other when I was in law school. But the game that stands out most is the 1993 game against Florida State in South Bend. Florida State was the “best college football team there ever was,” and we beat them pretty convincingly. But the sports writers awarded the National Championship to Florida State anyway — it was Bobby Bowden’s first National Championship.

Q. Speaking of college football, I understand that you still follow it very closely and actually compile an annual preseason Top 20 List. How do your predictions usually turn out?

A. Correctly. Here’s one for you: Texas vs. Notre Dame in a rematch for the National Championship, in Tampa in January!

Q. You have a reputation for being even-tempered and humble; what keeps you grounded?

A. I enjoy reading, especially biographies. I recently finished the biography of John Adams, the first lawyer president, by David McCullough, and before that, Ron Chernow’s biography of Alexander Hamilton. I’ve read several Thomas Jefferson biographies … I’m in the middle of a novel about life in Ybor City in the 1900’s written by Jack Fernandez (the title is Café Con Leche), and I’m just about finished with Harper Lee’s second novel, Go Set a Watchman.

Q. Do you have any favorite movies?

A. Rudy! Rudy (Daniel Ruettiger) was my classmate at Notre Dame, Class of 1976. I didn’t know him, but I remember seeing him around.

Q. Last question – what have you found to be the single most fulfilling aspect of your legal career?

A. I really enjoy having an impact on young lawyers, especially my law clerks who are right out of law school. I have the luxury of hiring the best and the brightest who finish at the top of their class from elite law schools. It’s really gratifying to play a part in their orientation to the practice of law and serving as a mentor to them, while they are here and years after they leave.

Author: Michael S. Hooker - Phelps Dunbar, LLP
CONGRATULATIONS TO NEW ADMITTEES

Thirty admittees to The Florida Bar gathered at the George Edgecomb Courthouse on September 23 for a celebratory swearing-in ceremony by the judges of the Thirteenth Judicial Circuit. The Hon. Ronald Ficarrotta presided over the ceremony, and HCBA President Kevin McLaughlin and YLD President-Elect Melissa Mora spoke to the new admittees about the benefits of joining the HCBA.

Congratulations to all who were sworn in, and thank you to the ceremony's sponsor: STETSON LAW
On July 5, 2016, the Honorable Susan Rothstein-Youakim was sworn in as the Second District Court of Appeal’s newest judge.

Born in Sarasota, Judge Rothstein-Youakim comes from a family of lawyers — her father, two sisters, and husband are all lawyers. She graduated cum laude with a B.A. in Russian from Duke University in 1990, and received her Juris Doctor in 1993 from the University of Florida’s Levin College of Law, where she was Executive Articles editor on the Florida Journal of International Law.

After law school, Judge Rothstein-Youakim moved to Tampa and began her legal career as a law clerk to the Honorable Charles R. Wilson, who was then a federal magistrate judge but currently serves on the United States Court of Appeals for the Eleventh Circuit.

In 1995, Judge Rothstein-Youakim joined the Appellate Division of the U.S. Attorney’s Office for the Middle District of Florida in Tampa. There, she handled criminal, civil, and post-conviction appeals in the Eleventh Circuit, personally drafting more than 600 briefs and presenting approximately 60 oral arguments. Looking back on her career as a federal prosecutor, she is most proud of her work on cases involving crimes committed by internet predators and other crimes committed against children.

As a federal prosecutor, she served as an instructor at the U.S. Department of Justice’s National Advocacy Center in Columbia, South Carolina, as well as a mentor to elementary school, college, and law school students. She has also been active in the Bruce R. Jacob-Chris W. Altenbernd Criminal Appellate American Inn of Court. In 2015, she received the Inn’s “Altenbernd Award for Excellence,” which is given to the member whose service exemplifies the ideals that the Inn seeks to encourage: professionalism, ethics, civility, and legal skill.

She didn’t realize it at the time, but receiving the Altenbernd Award would foreshadow the next step in her career. About a year after she received that award, Judge Altenbernd retired from the Second DCA. She applied for the open position and was ultimately selected by Governor Rick Scott. Judge Rothstein-Youakim said, “I am very honored to have been chosen to pick up where Judge Altenbernd left off. I have big shoes to fill, and can only hope to make the type of contribution to the Court and the State of Florida that he has made.”

Now, after working at the Second District for a few months, she is very excited about her new position and the challenges that lie ahead. So far, her favorite part is the people — the Second DCA’s judges and staff are very collegial, work well together, and are committed to following the law. She also is pleased to be working with her two staff attorneys (Robin Orr and Garrett Tozier) and judicial assistant (Rita Jones), who are indispensable to her at the Court.

We welcome Judge Rothstein-Youakim to the Second DCA and look forward to her serving the citizens of Florida for many years to come.

Author:
David M. Caldevilla - de la Parte & Gilbert, P.A.
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The HCBA’s Bar Leadership Institute (BLI) has welcomed twenty-four outstanding attorneys to its 2016-2017 class. This diverse class of new members was hand-selected not only for their qualifications, but also for their demonstrated interest in maintaining or initiating leadership activities within our Bar community. The diversity of this BLI class matches that of the HCBA as a whole. Members hail from small, medium, and large firms, and include a solo practitioner as well. The military and government sectors enjoy robust employment, intellectual property, and commercial litigation. Other, more niche areas such as taxpayer representation and collection and compliance work are included as well.

The 2016-2017 class kicked off the year with an opening reception and orientation, followed by an inspiring panel of Bar leaders who relayed their paths to leadership within the Bar and discussed their leadership philosophies with the BLI class.

Many thanks to our participants and sponsors for their support of BLI! The 2016-2017 BLI class will enjoy an exciting lineup of modules this year with long-standing and new community partners, all of which we are sure will be educational and inspiring, sparking that fire to serve our Tampa Bay legal community.

Join us in welcoming the members of the 2016-2017 Bar Leadership Institute.

Author: Lyndsey E. Siara - Thirteenth Judicial Circuit
The BLJ thanks its sponsor:

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Most family law attorneys who have taken an introductory collaborative law training course are sold on the concept. It is great for clients because they work together, focus on the future, and leave their marriage better prepared for life after divorce. And it is great for attorneys because we get to team with practitioners we know, like, and respect in a non-adversarial setting, oftentimes alongside experts in family dynamics and finance.

And yet, I hear the same comment all the time, “I just can’t seem to get a collaborative case.”

So, how do you get one?

Well, you don’t. Collaborative divorce is not yet well known enough by the general public, so you should not expect clients to come into your office asking for it. One day soon that will change, but we are not there yet.

So rather than focusing on how to “get” collaborative cases, you should focus on how to “create” collaborative cases. You have knowledge that the general public does not. Because most people only know what they see on TV and movies (or the worst-case scenarios they have heard from family and friends), they expect that divorce means that you make arguments in front of a judge, and then let a judge decide the issues.

The first step needed to create collaborative cases is to tell every client about it. If you believe that most clients would be best served by staying out of the court system, and that long-lasting decisions should be based on long-term interests rather than threats, you should talk to each client about collaborative practice. If they don’t know about it, they can’t choose it.

While speaking with each client, it also is essential to listen. Most will tell you that, of course, they are interested in the collaborative process, but there is no way that their spouse would be open to it. Find out why, and help the client develop a strategy and message that informs the spouse. You can provide the client with written materials to pass on, or identify a trusted friend or relative who can talk to the spouse. Another suggestion is to write an e-mail to your client that addresses the interests of each spouse and how they might be best addressed privately, and suggest they forward it to the spouse.

Additionally, provide your client with contact information for collaboratively-trained attorneys for their spouse. Lists can be found at the websites of Next Generation Divorce or the Tampa Bay Academy of Collaborative Professionals.

On a wider view, encourage your fellow attorneys to take an introductory collaborative training course. I have found that whether a case goes collaborative has very little to do with the client. Instead, it has to do with whether their spouse also chooses a collaboratively-trained attorney. In my experience, if the other attorney is collaboratively trained, and I and the other attorney talk about it, there is an 80-90% chance that the case will go collaborative.

So, yes, it takes a little more work, but you can create collaborative cases.

Author: Adam Cordover – Family Diplomacy: A Collaborative Law Firm

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As co-chairs of the Community Services Committee, Sacha and I want to thank all of our extraordinary volunteers for their continued commitment and dedication. With their help over the years, the committee has been able to host a number of inspiring events and impact the lives of those in our community.

We were able to jump start this year with our participation in the James A. Haley Veterans Hospital’s Make a Difference Day on October 22, which was chaired by attorneys Mary Snyder and Tristan Wolbers. With the partnership of the Military and Veterans Affairs Committee, as well as the help of our generous volunteers and donors (including many familiar faces from last year), we succeeded again this year in fulfilling the wish lists of many veterans! For those of you who are not familiar with this project, it benefits veteran heroes who live in foster homes, instead of nursing homes, and have very limited funds. We collect items on their “wish lists,” which include many basic necessities — such as blankets, underwear, sweatshirts, toothpaste, and shaving cream — and arrange for personal delivery of these gifts. Several of the veterans have reported that these personal visits are the highlight of their day. This is an annual project of the committee, so we hope you will consider joining us next year for this wonderful event.

Please save the dates for our remaining events this year. In December, the CSC will, once again, be taking part in the Elves for Elders event, where we will be collecting gifts and donations for remarkable seniors living in nursing homes who have little resources and depend on the State for their care. We will then be visiting one of these nursing homes to help spread our holiday cheer. Please also mark your calendar for the week of March 20, 2017, when the committee will be organizing a week of Dining with Dignity at Trinity Café. In this event, volunteers give just a few hours of their time to serve sit-down meals prepared by a professional chef to the homeless, hungry, and working poor.

Our final event in April 2017 will be a carnival for the children at A Kid’s Place, a non-profit home for children who have been abused and neglected. We encourage you to take part as we put smiles on the faces of some very deserving kids and, most importantly, allow them to just be kids for a day.

We hope you will join us — you can volunteer for one event or you can volunteer for all of them. Come out, meet some new friends, and make a difference in someone’s life. You might find that you actually end up gaining more than you give.

For more information, please visit the committee’s webpage on the HCBA website (www.hillsbar.com), subscribe to our blog, or attend one of our monthly meetings (the first Wednesday of each month).

Authors: Lara M. LaVoie - LaVoie & Kaizer, P.A. and Sacha Dyson - Thompson, Sizemore, Gonzalez & Hearing, P.A.
Confronted with a question intersecting state insurance law and a state statute for which there is no guidance from Florida courts, the Eleventh Circuit has certified a question to the FSC.


THE GENERAL CONTRACTOR, ALTMAN CONTRACTORS, INC., APPEALED THE DISTRICT COURT’S ORDER TO THE COURT OF APPEALS, ARGUING THAT THE CHAPTER 558 PROCESS MEETS THE POLICIES’ DEFINITION OF “SUITE” BECAUSE IT IS A “CIVIL PROCEEDING” OR “PROCEEDING,” AS DEFINED BY BLACK’S LAW DICTIONARY AND MERRIAM-WEBSTER’S DICTIONARY OF LAW. AND IT ARGUED, EVEN IF IT IS NOT, THE CHAPTER 558 PROCESS NONETHELESS CONSTITUTES A “SUITE” BECAUSE IT IS AN “ALTERNATIVE DISPUTE RESOLUTION PROCEEDING.” _ALTMAN CONTRACTORS, INC. V. CRUM & FORSTER SPECIALTY INS. CO., __ F.3D __, 2016 WL 4087782 (11TH CIR. AUG. 2, 2016). ALTMAN ALSO ARGUED THAT WITHOUT THE BENEFIT OF INSURER PARTICIPATION AND DEFENSE DURING THE CHAPTER 558 PROCESS, POLICYHOLDERS MAY DECLINE TO PARTICIPATE IN THAT PROCESS AND EVEN INVITE LITIGATION IN ORDER TO TRIGGER INSURER PARTICIPATION, THEREBY UNDERMINING THE INTENT OF CHAPTER 558. _ID._

CRUM & FORSTER, ON THE OTHER HAND, ARGUED THAT IMPOSING A DUTY TO DEFEND DURING THE CHAPTER 558 PROCESS WILL FUEL AN INSURANCE CRISIS BY DRAMATICALLY INCREASING THE COST OF INSURANCE, AND LIMITING ITS AVAILABILITY. _ID._ CRUM & FORSTER’S POSITION WAS SUPPORTED BY THE AMERICAN INSURANCE ASSOCIATION AND FLORIDA INSURANCE COUNCIL, WHICH ARGUED THAT IF INSURERS MUST APPOINT COUNSEL AT THE CHAPTER 558 STAGE, CLAIMANTS ARE LIKELY TO RETAIN COUNSEL AS WELL, AND ONCE THEY DO, THEIR LEGAL FEES WILL MAKE IT MORE DIFFICULT TO SETTLE CASES, THEREBY FRUSTRATING THE INTENT OF CHAPTER 558. _ID._

“The Eleventh Circuit certified the following question to the Florida Supreme Court: “Is the notice and repair process set forth in Chapter 558 of the Florida Statutes a ‘suit’ within the meaning of the CGL policies issued by Crum & Forster to Altman Contractors?” _ID._ At the time of this article, briefing is underway before the Florida Supreme Court. Stay tuned.

Author: Jaret J. Fuente - Carlton Fields

JOIN A SECTION OR COMMITTEE AT HILLSBAR.COM.
Construction Section Luncheon Features Noted Speaker

Fred Dudley of Dudley, Sellers, Healy & Heath, P.L. in Tallahassee spoke to the Construction Law section on September 15 on the subject of what to do when the Florida Department of Business & Professional Regulation investigates your client. Dudley is a Board-certified construction lawyer with over 46 years of experience in real estate and construction law. He also is a member of the Executive Councils of both the Real Property, Probate and Trust Law Section and the Administrative Law Section, and served 16 years in both the Florida House of Representatives and the Florida Senate, where he was the chair of the Senate Judiciary Committee. Thank you to everyone who attended the luncheon!
Although the 2016 presidential election is reaching its conclusion this month, the never-ending political cycle suggests both the 2018 and 2020 campaigns will ramp up soon. Employers of all sizes have increasingly been faced with addressing political speech in the workplace. Many corporations may have a vested interest in supporting particular candidates or legislation their employees disagree with. Employees may believe their free speech protections extend to political speech in the workplace, while employers may believe they can control such exercise of speech and political activities by disciplining their employees, including terminating them. Let’s look at some misconceptions about political speech in the workplace, and steps that can be taken to mitigate disputes between employers and employees on this issue.

Do employees have a right to discuss politics in the workplace? If the employer is a private company, the answer is generally, no. The First Amendment applies to the actions of governmental entities—not private employers. Thus, the First Amendment does not provide a right to express political opinions in the workplace. Nor does it prohibit an employer from regulating such political discussions, which means an employee can be fired or otherwise disciplined for political activity in the workplace.

But there are a couple of limited exceptions. First, there are some states that provide legal protection for some political activity. While Florida does not have any laws protecting political speech in the workplace, employers who operate in numerous states should be aware of the laws in all of the states where they maintain offices. (Florida does have protections related to off-duty political/voting preferences). Second, the National Labor Relations Act (NLRA) restricts an employer’s ability to limit non-supervisory employees’ communications both inside and outside the workplace regarding terms and conditions of employment, including wages. The National Labor Relations Board (NLRB), which enforces the NLRA, interprets the scope of protected communications broadly.

The NLRB has noted that protected communications can include communications where an employee raises issues to improve conditions for a whole class of employees, which could be construed to include protected political activity *only* in such cases where the activity has a sufficient nexus to the employee’s terms of

Continued on page 29
employment. Therefore, employers need to be careful regarding limiting political communications related to an employee’s terms and conditions of employment, or they could find themselves subject to an unfair labor practice claim. Determining what political speech is protected under the NLRA, however, continues to be difficult and is subject to numerous legal challenges.

For instance, statements that a particular candidate or amendment will promote better wages may relate to the terms and conditions of employment. Also, while an employer can restrict political displays at work, the NLRA permits an employee to wear a union button that contains a political message.

Employers should consider enacting policies limiting or prohibiting purely political workplace speech to avoid discussions that could result in other claims by employees, such as discrimination claims arising out of comments between employees and their supervisors. Prohibiting purely political discussions at work can prevent a charged environment that could otherwise lead to allegations of bullying, harassment, and discrimination. Again, any policies restricting political speech need to be compliant with the NLRA and the varying laws in the states with company offices. Additionally, any restrictions enforced by employer must not violate any discrimination laws (including gender, religion, race and/or other protected categories).

Author: Michael Stein, Esquire
SECOND DCA REJECTS HOSPITAL NON-DELEGABLE DUTY CLAIM

Health Care Law Section
Co-Chairs: T.J. Ferrante - Foley & Lardner LLP; and Sara Younger Seifried - Baycare Health Systems

n the last decade, hospitals have faced a plethora of legal theories advanced by plaintiffs seeking to hold them legally responsible for the alleged medical malpractice of non-employee physicians. Chief among the crop of theories seeking to assign liability to hospitals is the concept of non-delegable duty.

Many plaintiffs have begun to claim that such a duty exists, arising out of contract or regulation. Plaintiffs claim that hospital consent forms — usually one-sided authorizations for treatment and acknowledgement of disclaimers and notices — constitute a hospital’s voluntary undertaking to provide physicians’ medical care to the patient. Many plaintiffs also have attempted to transform Medicare Conditions of Participation in the Code of Federal Regulations into a legal duty upon hospitals to guarantee physicians’ medical care.

Last month, the Second District Court of Appeal issued a sweeping opinion dispensing with both of these theories, as well as a claim based on apparent agency, in a decision much-welcomed by the defense bar. In *Godwin v. University of South Florida Board of Trustees*, Case Nos. 2D14-2588, 2D14-2962 2016 WL 4446483 (Fla. 2d DCA Aug. 24, 2016), the court adopted three main holdings.

The first, which is somewhat fact-specific, confirms that section 1012.965, Florida Statutes, defeats a claim for apparent agency seeking to hold a teaching hospital liable for the actions of a medical school employee practicing in the teaching hospital as part of clinical medical education, so long as the documentation requirements of the statute are satisfied.

The second holding confirms that if a hospital’s admission paperwork does not contain an express undertaking on the part of the hospital to provide physicians’ medical care, no non-delegable duty arises which would make the hospital legally responsible for the actions of those treating physicians, regardless of their employment status. The Second DCA observed that section 1012.965, as well as language in the admission documents informing the patient that the physicians providing care are not employed by the hospital, are effective to delegate any duty and discharge any liability that may have otherwise arisen.

The third holding, with broader application for Florida hospitals generally, confirms that the Medicare Conditions of Participation — specifically 42 C.F.R. § 482.12 — do not impose a non-delegable duty on hospitals to guarantee the non-negligence of the medical care provided in the hospital by independent contractor physicians.

The *Godwin* court also recognized the intended quality assurance evaluation purpose of the Medicare Conditions of Participation and expressed an unqualified statement of non-preemption. Each of these analyses will likely provide a useful analogy for striking other attempts at creating a regulatory foothold for non-delegable duty in the independent contractor context.

The Second DCA’s *Godwin* decision represents long-awaited appellate approval of the arguments advanced for years in defense of hospitals across the country. Now enshrined in binding appellate authority for Florida courts, the *Godwin* decision will be heavily relied upon by hospitals in defense against claims seeking to hold them liable for the actions of physicians whom the hospital does not employ.

Authors: Jacqueline R.A. Root & Edward J. Carbone - ROIG Lawyers
HCBA & YLD BOARDS PLAN FOR THE YEAR AHEAD

The Hillsborough County Bar Association Board of Directors and the Young Lawyers Division Board of Directors joined forces for a retreat on August 26-27 at the Hyatt Clearwater Regency Hotel. Both boards discussed its plans and programs for the upcoming Bar year, and how to improve member engagement. Florida Bar President Bill Schifino, Jr. also briefly spoke to the group about his goals and priorities for The Florida Bar this year.

The board members would like to thank the retreat sponsor:

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Florida Bar President Speaks at Membership Luncheon

Approximately 500 attendees came out on September 21 for the HCBA’s first membership luncheon of the Bar year, which featured Florida Bar President and HCBA member Bill Schifino, Jr. HCBA President Kevin McLaughlin and HCBA Programs Chair Jessica Goodwin Costello started off the luncheon with introductions, recognizing special guests from MacDill Air Force Base and the Greater Tampa Chamber of Commerce and the members of the 2016-17 Bar Leadership Institute class, as well as the Lawyer Referral & Information Service.

Young Lawyers Division President-Elect Melissa Mora discussed plans the YLD has for the upcoming year, and Judge Samantha Ward promoted the 20th Annual Bench Bar Conference & Judicial Reception on November 10.

During his keynote presentation, Schifino discussed his experience thus far as the Florida Bar president and his priorities for the upcoming year, including narrowing the justice gap, the Constitution Review Process, reducing gender bias, and embracing technology as a profession.

The HCBA would like to thank the luncheon’s sponsor: The Bank of Tampa.
New Patent Applications: Avoiding “Alice” Rejections

The software patent universe, and in particular financial technology (FinTech) software (sometimes referred to as “Covered Business Methods”), appeared to suffer a setback when the U.S. Supreme Court issued its decision two years ago in Alice Corp. v. CLS Bank International 134 S. Ct. 2347 (2014). In Alice, the Supreme Court held that a method of managing risk in financial trading using a computer was not patent-eligible. But the Court also suggested that inventions that improve the functioning of a computer or improve other technology would still be patent-eligible. These rejections are known as “Section 101” or Alice rejections, based on that case’s interpretation of 35 U.S.C. § 101.

Within the U.S. Patent Office, there are nine different Technology Centers (TCs) that review patent applications, each dedicated to a different technology area. TCs are divided into art units dedicated to specific types of inventions. As a former patent examiner in TC2100, I have found that different TCs, and art units within those TCs, can have somewhat differing standards. For example, TC3600 has become notorious for rejecting applications at a very high rate based on Alice.

As such, part of the patent strategy for software and FinTech applicants is structuring applications to be aimed at steering them away from TC3600. For example, TC2100 handles computer architecture and software, while TC2400 handles computer networks and security. Both have lower rates of Alice-based rejections than TC3600, even though they often handle very similar subject matter.

Factors Weighing Against §101 (Alice) Compliance

Disclosures that include lots of business lingo such as “advertisement,” “customer,” “monetary amount,” “purchase,” “payment,” “click-through rate,” and “obligation” are more likely to be subject to an Alice rejection. Thus, a good patent disclosure should be more focused on the technical means by which these economic effects are achieved.

The astute patent author also should try to steer their application into a target-specific art unit (non-business method art unit), such as Art Unit 2673, which examines patent applications directed to facsimile and static image presentation topics. Accordingly, if the invention somehow involves facsimile and static images, even if the invention also does commercial or financial processing, still use “facsimile” and/or “static images” in the title and elsewhere.

Factors Increasing Chances of §101 (Alice) Compliance

The patent author also should aim their specification toward whichever of their proprietary processes that occur outside of a computer, such as controlling rubber molding process; or controlling a compounding extrusion device (e.g. US Patent No. 7,070,404, which was issued to me).

An astute inventor additionally should disclose all novel GUI (graphical user interface) elements or machine-human interactions and include in their provisional filings all GUIs they have already created or may consider using in the future. An example mobile phone GUI is shown in the included graphic above – on the left in its original format, and on the right in the format required by the U.S. patent statutes.

Further, where possible, the patent drafter should make it clear that any processing is part of a low-level process that would not ordinarily be performed by humans, thus not “mental steps.”

Author: Chris Tanner — Tanner Law
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Marriages don’t always last forever, and neither do divorces. What happens when a previously divorced couple remarries — and then divorces a second time? A crucial determination that must be made is whether the marital settlement agreement from their first divorce, which may have resolved issues such as equitable distribution and alimony, is binding on the parties in their second divorce. The seminal case on this issue is *Cox v. Cox*, 659 So. 2d 1051 (Fla.1995).

In *Cox*, the parties were married and divorced twice. In the first dissolution, they entered into a settlement agreement that was incorporated into the final judgment of dissolution. Among other things, the agreement distributed the couple’s property, but it did not address the husband’s then future military retirement benefits. Importantly, it was silent as to the effect reconciliation or remarriage would have on their agreement.

During the second divorce, the wife requested her share of the husband’s military retirement. The husband argued that their prior agreement, which did not distribute any of his retirement to her, was dispositive. The Florida Supreme Court held that, unless there is an explicit statement in the agreement that the parties intended otherwise, reconciliation or remarriage abrogates the executory provisions of a prior marital settlement agreement. *Id* at 1054. But the Court held that the executed provisions of a prior agreement are not affected by reconciliation or remarriage, absent a reconveyance or a new written agreement to the contrary. *Id*. Because the Court concluded that Mr. Cox’s future military retirement benefits were, by definition, executory, and because there was no explicit language that the executory provisions would survive reconciliation, the retirement benefits could be distributed to the wife. The Court in *Cox* did not specify what would constitute an “explicit statement” sufficient to have the agreement survive reconciliation.

In another instance, in *Slotnick v. Slotnick*, 891 So. 2d 1086 (Fla. 4th DCA 2004), the parties’ agreement from the first divorce resolved alimony and property distribution and stated that it was “binding on the parties permanently and irrevocably and shall survive…any lawsuit involving the parties.” *Id* at 1087. The First District Court of Appeal held that this was not sufficient to survive remarriage, noting that the words reconciliation and remarriage were nowhere in the agreement. *Id* at 1088. The First DCA held that the wife was therefore free to seek alimony and distribution of property acquired during both marriages. If a quit claim deed has been executed, such that a subsequent reconciliation does not affect the enforceability of the transfer, the issue remains as to the increase in equity after transfer. The Fourth District Court of Appeal further clarified this issue in *Matos v. Matos*, 932 So. 2d 316 (Fla. 4th DCA 2006), holding that when property has been transferred, the increased equity in the house after the transfer is still executory, and therefore subject to equitable distribution. *Id* at 320.

When drafting marital settlement agreements, clients should be counseled on the effects that reconciliation could have on the agreement, and appropriate language should be added to the agreement to protect the client’s interests.

**Author:**
*Lara G. Davis – The Women’s Law Group, P.L.*
The use of drones is quickly evolving. Long gone are the days of drones being exclusively used by the military. Also gone are the days of drones being primarily used as toys or for recreation (like flying over the White House?). From delivering packages, to premises inspections, to real estate agents taking aerial footage of homes, drones (technically “Unmanned Aircraft Systems” or “UAS”) are now a tool for business. This expanded commercial use of drones means new regulations and risks, but also new insurance options.

New Regulations

Drones are aircraft regulated by the FAA. Effective August 29, 2016, 14 C.F.R. Part 107 became the governing regulations for non-hobby UAS/drone operations. These new regulations have the potential to greatly impact drone use — and create traps for unknowing operators. Significantly, Part 107 creates a new Remote Pilot in Command (RPC) license for UAS operators. The RPC qualifications are much less burdensome than traditional manned aircraft pilot’s licenses, as the pilot/operator is not required to obtain a medical certificate, pass a vision test, or demonstrate any flight proficiency. Instead, operators essentially take a short Initial Aeronautical Knowledge Test and pass a TSA background check.

Beyond the new license, Part 107 includes predictable regulations, such as take-off weight and maximum speed restrictions. But it also includes less intuitive restrictions, like limiting flights to the operator’s unassisted visual line of sight (VLOS) and permitting daylight operation only. Use of lights, binoculars, cameras, or other devices does not alter these VLOS and daytime-only restrictions. While this article cannot go beyond highlighting a few provisions in Part 107, it is essential that drone operators (and attorneys with clients considering or using drones) become familiar with Part 107 and ensure compliance. The FAA has made clear that it believes it has exclusive jurisdiction over commercial operation of drones, and Part 107 is the agency’s first major effort to regulate drones as distinct from other aircraft. Part 107 further demonstrates the drones have arrived.

With that Arrival, New Risks, New Coverage

Commercial drone use also increases the level and types of risk of drone operations. While violating FAA regulations is a bird of its own feather, what about liability for drone accidents — including injuries to people and...
Continued from page 38

damage to property. This is not just damage caused by impact; what if a real estate agent’s drone malfunctions and crashes through electrical lines, starting a fire that destroys the house he is marketing? What if a drone used for a plant inspection crashes and causes a temporary shutdown of operations? Most liability insurance expressly excludes damages caused by aircraft — Exclusion (g) in the standard ISO Properties CGL policy. Remember, drones are aircraft.

But drone insurance is available. A company regularly using drones and operators contracting their services full time may consider an aviation endorsement to their existing policy. But what about insurance for those folks who only occasionally use drones, like real estate agents or attorneys (consider, for example, the benefits of aerial footage of accident scenes)? Well, the industry is reacting to address these needs. At least two traditional aviation insurers now offer affordable small aircraft liability coverage by the hour. Drone operators can even purchase this hourly coverage at the time of the flight through a phone app.

Yes, the drones are here, and their arrival brings new regulations and risks, and an insurance industry evolving to keep pace. However, it cannot be understated that everyone considering using drones in their business (whether it be daily, occasional, or even just a one-time use) must understand the applicable regulations and risks, and insure themselves accordingly.

Author: Matthew F. Hall - Hill Ward Henderson
When considering settling any claim on a minor’s behalf, whether a personal injury claim or otherwise, you must always ask three questions:

- Is court approval of the settlement required?
- Is a guardianship of the property required?
- Is the appointment of a Guardian Ad Litem required?

The chart at the right should help address these questions and make it simpler to determine when you need court approval of the settlement, a minor guardianship of the property, or the appointment of a Guardian Ad Litem (GAL).

<table>
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<tr>
<th>Settlement Amount</th>
<th>Court Approval Needed</th>
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<tr>
<td><strong>$15,000.00 or less</strong></td>
<td><strong>Natural Guardians</strong></td>
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<tr>
<td><strong>$15,000.00 or greater</strong></td>
<td><strong>GAL</strong></td>
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**Notes regarding the chart:**

- Regardless of settlement amount, if a lawsuit was filed, approval of the settlement is necessary. (§ 744.387(3)(a), Fla. Stat. (2002))

- Approval of the settlement shall take place in the civil division for pending cases and in the guardianship court in the county where the minor resides if claim settled pre-suit. (Fla. Prob. R. 5.636)

- If an allocation of settlement funds is ever to a person other than the minor (i.e., parent), a Guardian Ad Litem must be appointed.

- See definition of who is a natural guardian in cases involving divorced parents or shared custody arrangements. (§ 744.301(1), Fla. Stat. (2015)). Natural Guardian does not include grandparents; thus, the above requirements will not apply if minor is in legal custody of a grandparent or other non-parent.

- The above figures apply to all settlements in the aggregate; so if you have multiple sources of payment, the total of all the settlements apply to these rules. (§ 744.301(2), Fla. Stat. (2015))

- Jurisdictions vary on whether a minor guardianship of the property is required when all the net settlement funds are used to purchase a structured settlement annuity that does not start making payments until after the age of majority.
The Florida Board of Bar Examiners and the Hillsborough County Bar Association thank the following volunteers for their assistance in proctoring the Bar examination held in July at the Tampa Convention Center. The success of the examination would not be possible without volunteers, and we appreciate their support!

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The U.S. Court of Appeals for the Eleventh Circuit became the first federal appellate court in the nation to rule that a five-year statute of limitations applies to SEC claims for equitable disgorgement and declaratory relief, providing defendants an important bulwark against untimely SEC claims. A 2013 United States Supreme Court decision, SEC v. Gabelli, confirmed that the five-year statute of limitations set forth in 28 U.S.C. § 2462 applies to SEC claims seeking civil penalties. But that opinion did not address whether § 2462 applies to other remedies commonly sought by the SEC, such as equitable disgorgement, declaratory relief, or injunctive relief. In SEC v. Graham, the Eleventh Circuit held that 28 U.S.C. § 2462 precludes SEC claims for equitable disgorgement and declaratory relief (but not injunctive relief), if the SEC waits more than five years to pursue them.

Section 2462 sets forth a five-year statute of limitations for suits seeking “any civil fine, penalty, or forfeiture, pecuniary or otherwise,” except as otherwise provided by law. In Gabelli, the Supreme Court held that § 2462 applies to SEC requests for civil penalties and that the SEC cannot invoke the discovery rule when faced with § 2462. Since then, courts have wrestled with the breadth of § 2462.

The Eleventh Circuit’s decision in Graham began three years ago when the SEC brought suit against former officers of Cay Clubs Resorts and Marinas, which allegedly offered and sold unregistered securities. In addition to seeking civil monetary penalties, the SEC also sought injunctive relief, declaratory relief, and equitable disgorgement. Because the alleged violations occurred more than five years before the SEC filed suit, the defendants raised § 2462 as a defense. Citing Gabelli’s broad rationale, the district court dismissed all of the SEC’s § 2462 claims, and the SEC appealed.

The Eleventh Circuit first addressed whether § 2462 applied to injunctions and declaratory relief. The court explained that it had previously held that § 2462 did not apply to injunctive and declaratory relief. The court explained that it had previously held that § 2462 did not apply to injunctive and declaratory relief. Furthermore, the Eleventh Circuit stated that “a penalty addresses a wrong done in the past,” and because injunctive relief is forward-looking, § 2462 did not apply. Declaratory relief, however, was held to fall within § 2462’s ambit because declaratory relief “redress[es] previous infractions rather than … ongoing or future harm.”

Regarding equitable disgorgement, the Graham Court concluded that, while § 2462 does not specifically list disgorgement as within its reach, there is no meaningful difference between “disgorgement” and “forfeiture,” as the latter term is used in § 2462. The Eleventh Circuit is the first and, so far, the only federal appellate court to apply § 2462 to the remedy of equitable disgorgement.

The SEC often seeks equitable disgorgement, declaratory relief, and injunctive relief as a matter of course. Graham mandates that SEC claims for equitable disgorgement and declaratory relief are subject to § 2462’s five-year statute of limitations, thereby providing an additional defense against stale SEC claims.

2 SEC v. Graham, 823 F.3d 1357 (11th Cir. 2016).
3 Graham, 823 F.3d at 1360 (citing Nat’l Parks & Conservation Ass’n v. Tenn. Valley Auth., 502 F.3d 1316, 1326 (11th Cir. 2007); United States v. Banks, 115 F.3d 916, 919 (11th Cir. 1997)).
THANKS TO ALL OUR FOX 13 ASK-A-LAWYER VOLUNTEERS!

Attorneys from the Lawyer Referral & Information Service once again got up before dawn to start answering phones as part of Fox 13’s Ask-A-Lawyer program. We appreciate all those who volunteered to take calls in August!

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The Fisherman Charged under the Enron Statute — Yates v. United States

In the summer of 2007, commercial fisherman John Yates was 100 miles due west of Tampa, fishing the federal waters of the Gulf of Mexico aboard the fishing boat, Miss Katie. Captain Yates and his crew had already caught several hundred red grouper, which were on ice in the hold below deck.

Yates's trouble began when Florida Fish and Wildlife Commission officer John Jones boarded his vessel. The inspector measured Yates's catch, then issued him a civil fishing citation for harvesting 72 undersized red grouper (approximately 19 instead of 20 inches long). The officer placed the fish in a box and instructed Yates to turn them in when he returned to shore. When the Miss Katie returned to port, another federal officer randomly examined three of the offending fish again. He discovered none were undersized. He soon learned that Yates had instructed the crew to throw the undersized fish overboard and replace them with larger fish. At that time, no one would have dreamed that Captain Yates’s case would have ended up before the United States Supreme Court.

Second District Court of Appeal Judge John Badalamenti, who represented Yates before the Supreme Court, related this fisherman’s tale to the Senior Counsel Section in September in his presentation entitled “The Fisherman Charged under the Enron Statute — Yates v. United States.” Judge Badalamenti explained that after the Enron document-shredding scandal, Congress passed the Sarbanes-Oxley Act of 2002. The Act included a provision making it a crime punishable by up to 20 years in prison to knowingly alter, destroy, falsify, or make a false entry in any record, document, or “tangible object” in order to obstruct a federal investigation.

In 2010, almost three years after instructing his crew to throw the undersized grouper overboard, Yates was indicted under that provision of the statute. Yates was convicted at trial and lost his appeal to the Eleventh Circuit Court of Appeals. By the time the case reached the Supreme Court, the issue was whether the grouper were “tangible objects” under the Enron statute, which subjected Yates to up to 20 years in prison. The Supreme Court overturned Yates’s conviction and held that the phrase “tangible object” for the purpose of the statute “is better read to cover only objects one can use to record or preserve information, not all objects in the physical world,” and certainly not a fish.

Judge Badalamenti explained that at oral argument some of the justices posed pointed questions to the government lawyer, concerning prosecutorial discretion. Justice Antonin Scalia asked, “What kind of mad prosecutor would try to send this guy up for 20 years?” Chief Justice John Roberts, on Yates being given explicit instructions by a law enforcement officer to preserve the evidence, stated, “You make him sound like a mob boss.” And Justice Samuel Alito told him, “You are really asking the Court to swallow something that is pretty hard to swallow.”

Throughout his presentation to the Senior Counsel Section, Judge Badalamenti passionately underscored the importance of the attorney-client relationship and the duty of lawyers to fight diligently for their clients, which Judge Badalamenti did in convincing the Court not to swallow this fish tale.

Author: Thomas Newcomb Hyde - Attorney at Law
Labor & Employment Section Luncheon

The Labor & Employment Section held its first luncheon of the Bar year on September 12. Richard C. McCrea of Greenberg Traurig and Loren Donnell of Burr & Smith spoke on the U.S. Department of Labor’s final rule updating overtime pay regulations, and how members can prepare their clients for implementation.
3 Business Jury Trials So Far in 2016
3 Verdicts Awarding 100% Damages

The Contingency-Fee Business Litigation Attorneys

January 29, 2016
Max King Realty, LLC
v. Lamar LLC, et al.
Description: Damage to Real Property
Damages Requested: $423,000
Jury Verdict: $423,000

May 13, 2016
Safe American Security, Inc., et al.
Description: Breach of Contracts
Damages Requested: $782,560
Jury Verdict: $784,898

March 22, 2016
Florida Outdoor Properties, Inc.
v. American Citrus Products Corp., et al.
Description: Real Estate Commission
Damages Requested: $427,800
Jury Verdict: $427,800

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Doing more with less ... the solo and small firm practitioner mantra. The need for maximum efficiency and process improvement has become an endless challenge for law firms today. Nowhere is that more evident than in the solo, small, and sometimes even medium-size law firm.

Solo and small firms need to stay competitive in the legal market. That means providing good service and giving clients value for their legal dollar. Reduced revenues often means reduced staffing, which results in an unsustainable model for law firms. The one thing that no law firm can afford to sacrifice or compromise on is meeting clients’ expectations — not in terms of outcome, because no one can guarantee what will happen, but in terms of quality of service.

When a client needs legal services, the business value of the service and the firm’s profitability can be reduced as a result of failing to meet client demands. This can significantly affect a firm’s revenues. Clients are very tech savvy these days but also cost conscious. If we consider our clients’ needs, problem solving and process improvement can increase client development, growth, and retention opportunities for solo and small firms.

You can begin addressing problem solving and process improvement by measuring the performance of all processes in your office. Is your case management software being used to its fullest potential? Are your forms up to date and actually used as forms with templates and merge codes? Or is your staff reinventing the wheel every time a letter or pleading needs to be generated?

Are you using accounting software for office bookkeeping, trust accounting, and maintaining client ledgers, thereby reducing the errors made by entering the same information in different places? Can you easily access information for a client?

What are the steps involved in problem solving and process improvement? They are:

- Define the problem.
- Measure the performance of the processes currently being used.
- After identifying the problem, control it by implementing solutions designed to eliminate the problem and improve the process.

The benefits of this problem solving and process improvement include:

- Better client service, which equals improved client satisfaction;
- Improved efficiency and higher levels of production;
- Reduced errors in work product; and
- Lower costs, which means increased profitability.

There’s only one way to get out of the “Our firm is so busy we can certainly benefit from problem solving/process improvement, but we are so busy that we do not have time to undertake process improvement” vicious cycle: Just do it!!

Author: Elizabeth M. Miller - Independent Law Firm Administrator
Real Property Probate & Trust Section Luncheon

The Real Property Probate & Trust Section kicked off the Bar year with its first luncheon on September 8, hearing from its co-chair Anthony Diecidue, Esq. of Genders Alvarez Diecidue on how to handle untimely creditor claims. Thank you to everyone who attended!

The section also would like to thank its luncheon sponsor:

Thirteenth Judicial Circuit Pro-Bono Committee

The Thirteenth Judicial Circuit Pro-Bono Committee, chaired this year by Judge Christopher Nash, held its first organizational meeting at the Chester Ferguson Law Center on September 23. The Florida Supreme Court requires that each judicial circuit have a pro bono committee, which provides oversight and direction of pro bono legal services for the indigent in Hillsborough County. The HCBA is proud that its Board of Directors and all of its committees, divisions, and sections have a representative on the committee. Other local bar associations and pro bono and legal assistance providers in the circuit also provide representatives for this important local collaborative effort.
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- Elder Law
- Employee Benefits & Wrongful Termination
- Guardianships, Wills, Estates & Probate
- Immigration & Naturalization
- Landlord or Tenant Rights
- Personal Injury
- Medical & Dental Malpractice
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The Trial & Litigation Section annually holds an essay contest for law students, for which the winner receives a $1,000 scholarship. This year’s winner, who was recognized at the May Trial & Litigation Section Awards Luncheon, is Cindy Pritchett from Western Michigan University Cooley Law School. Her winning essay is below.

I believe that jury trials are important to American Jurisprudence because they are the backbone of our existence: a privilege and a right to choose a fair and impartial jury from among our peers to listen, to evaluate, and to decide a person’s fate.

This luxury is not available to every person throughout the world. Our system may have stemmed from Britain’s legal structure, but when the pilgrims and founding fathers developed the American legal system, the fundamental role of a jury trial matured. These great decisions were not the product of one individual determining our nation’s future; instead, it was truly a collaborative effort to debate and to decide the construction of the foundation to which we still rely. A system of checks and balances fashioned a valuable, although not entirely predictable, component to our judicial process: the jury trial.

This notion transcends as a case climbs through the upper tiers of the reviewing courts; a higher court’s authority requires an exponential increase in the number of judges necessary to uphold the law. Yet, these highly educated judges have restrictions, when reviewing what transpired in the cases below. They do not rebuff the jury’s reasoning, but consider if a true error was made and if any rational jury could have reached the same result. Lacking a gross error to warrant a reversal, judges respect the jury’s original verdict.

Like the cracked Liberty Bell, no judicial system is perfect. When an attorney and his client demand a jury trial, they need Lady Justice, Lady Liberty, and Lady Luck on their side.

When an attorney and his client demand a jury trial, they need Lady Justice, Lady Liberty, and Lady Luck on their side.

The right to a jury trial is a privilege as part of our nation’s birthright and heritage created by our forefathers. As Thomas Jefferson stated, “I consider trial by jury as the only anchor yet imagined by man by which a government can be held to the principles of its constitution.”

The founders of our great country fought for this valuable freedom to select a fair and impartial jury, a collaborative group of our peers for generations to come.

Author:
Cindy Pritchett - Western Michigan University Cooley Law School
Trial & Litigation Section Luncheon

The Trial & Litigation Section had an entertaining presentation from Tampa Bay Times reporter and author Craig Pittman at its first luncheon of the Bar year on September 29. Pittman spoke about his latest book “Oh Florida: How America’s Weirdest State Influences the Rest of the Country.” Inkwood Books also was on hand at the luncheon, offering the book for sale to attendees.

The section wishes to thank its luncheon sponsor: TCS.
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Ms. Holtzman is available to serve as a Circuit Civil mediator and to conduct workplace investigations. She can be reached at gail.holtzman@jacksonlewis.com or (813) 512-3215.

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Scott A. Arthur - Gunn Law Group announces that Scott A. Arthur has become a shareholder at its firm.

Jaide L. Beverly - Shumaker, Loop & Kendrick, LLP, is pleased to announce that Jaide L. Beverly has joined the Tampa office as an associate attorney in the Health Care Practice Group.

Bush Ross, P.A. - Bush Ross, P.A. is pleased to announce that Marjorie S. Hensel, Lori A. Heim, and Yolyvee Y. Gordon have joined the firm’s Professional Liability Practice Group.

James E. Felman - James E. Felman of the law firm of Kynes, Markman & Felman, P.A. has been elected to the Board of Directors of the International Society for the Reform of Criminal Law.

Ted Hamilton - Wetherington Hamilton founding attorney Ted Hamilton has been appointed as the editor in chief of the Commercial Law World Magazine, a publication of the Commercial Law League of America. Commercial Law World, formerly known as Debt3, is a bimonthly publication published by the CLLA featuring the latest news from the bankruptcy, collections, credit and debt industry.

Vivian Cortes Hodz - of Cortes Hodz Family Law & Mediation, P.A., was appointed as a liaison to the Florida Bar Board of Governors on behalf of the Tampa Hispanic Bar Association for 2016-2017.

Natalie Khawam - The Whistleblower Law Firm was recognized by the U.S. Department of the Army for their work for and support of the United States military. Khawam was presented with a flag flown over Afghanistan during Operation Resolute Support, in appreciation for their efforts.

William R. Lane, Jr. - a partner in Holland & Knight’s Tampa office, William R. Lane, Jr. has become chair of The Florida Bar Tax Section. He will serve as chair until June 30, 2017.

Vin Marchetti - Stearns Weaver Miller shareholder Vin Marchetti was elected chairman of the Tampa Sports Authority Board of Directors.

Ryan J. McConnell - Ryan J. McConnell has joined Hill Ward Henderson as an associate in the firm’s Real Estate Group.

Harold “Hal” Mullis - Trenam Law announces that firm president and founding shareholder Harold “Hal” W. Mullis has been awarded with the President’s Fellow Medallion by the University of South Florida, an honor given by USF System President Judy Genshaft to highly distinguished individuals.

Jane A. Rose - Jane A. Rose of the Hillsborough County Attorney’s Office has been appointed to membership on the Florida Board of Bar Examiners by the Supreme Court of Florida.

Elizabeth A. Scarola - Carlton Fields is pleased to announce that Elizabeth A. Scarola has joined the firm’s Tampa office as an associate. Scarola will practice in the firm’s Health Care practice group.

Suzanne Eldridge Ward - The Trenam law firm is pleased to announce that Suzanne Eldridge Ward has joined the firm and will practice in the Private Client Services Group.

For more HCBA news, go to www.facebook.com/HCBAAtampabay. To submit news for Around the Association or Jury Trial Information, please email Stacy@hillsbar.com.
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JURY TRIALS

For the months of April and May 2016
Judge: Hon. Mark Wolfe
Parties: Samuel Johnson, Jr. v. Frankie Tolison, High Reach Company, and Silverking Contracting
Attorneys: For plaintiff: Hendrik Uiterwyk, John Hamilton, and Andrew Bennett; For defendants: Gary Vasquez, Jonathan Wright, Gregory Jones, and Andrew Russo
Nature of case: Motorcyclist sustained multiple fractures and injuries resulting from a rear-end collision with a parked tractor-trailer.
Verdict: Gross verdict of $3,023,659.17. Net verdict of $1,269,936 for plaintiff based upon finding that plaintiff was 58 percent negligent. Plaintiff’s motion for attorneys’ fees is pending.

For the month of September 2016
Judge: Hon. Claudia R. Isom
Parties: Judy Juanell Harlow v. Bright House Networks, LLC
Attorneys: For plaintiff: David Bulluck; For defendant: Daniel L. Liebowitz and Sarah Wade
Nature of case: Auto accident of 65-year-old plaintiff with pre-existing conditions and fall after accident.
Verdict: $2,199,000

For the month of August 2016
Judge: Hon. John Schaefer
Parties: Ken Spry v. Dr. Monte Venis, D.C.
Attorneys: For plaintiff: Wil Florin and Eric Czelusta; For defendant: Kenneth A. Scaz
Nature of case: Chiropractic malpractice resulting in a stroke and neurological deficits — jury demand for $3 million in damages.
Verdict: Defense verdict

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