

# LAWYER

THE HILLSBOROUGH COUNTY BAR ASSOCIATION  
TAMPA, FLORIDA | SUMMER 2017 | VOL. 27, NO. 6

## PRESUMED INNOCENT



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A NOVEL BY

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SCOTT TUROW



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# Medical Error

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

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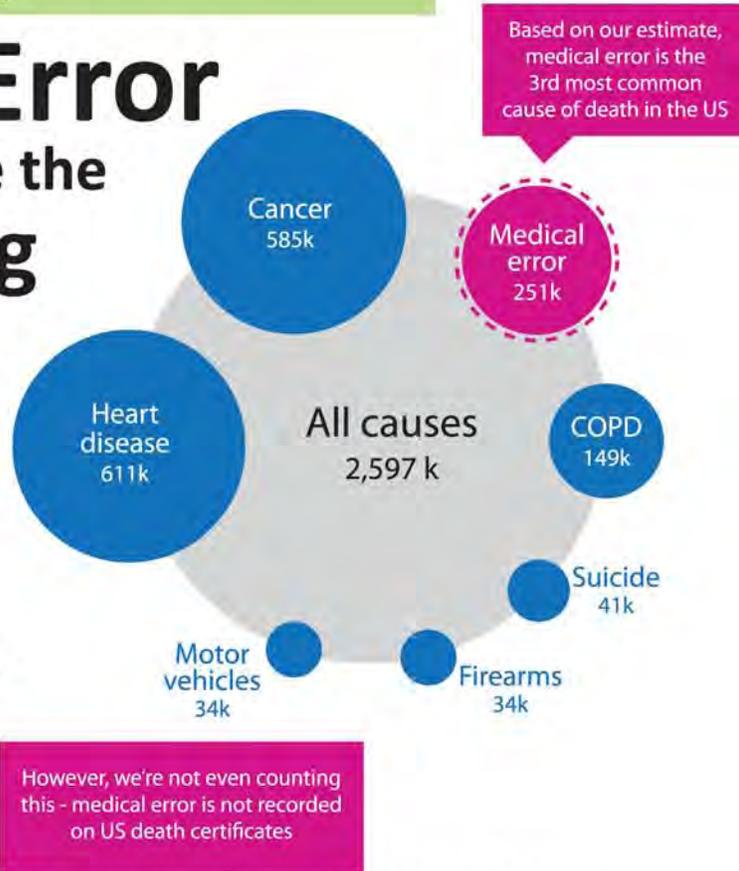


Fig 1 Most common causes of death in the United States, 2013<sup>2</sup>

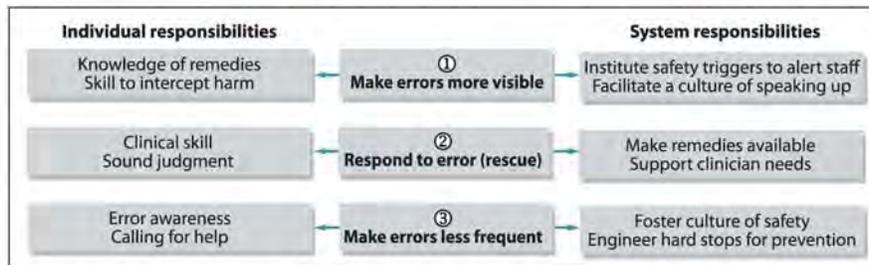


Fig 2 Model for reducing patient harm from individual and system errors in healthcare

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# LAWYER

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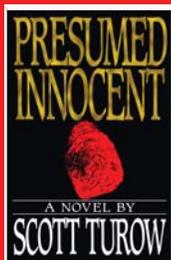
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## ABOUT THE COVER

For the last issue in this series, we are highlighting the best-selling legal novel "Presumed Innocent," written by Chicago defense attorney and former U.S. prosecutor Scott Turow. The suspenseful story, published in 1987, tells the story of a chief deputy prosecutor who is charged with a brutal crime and draws upon Turow's legal experiences to convey a realistic and gripping story. The book was adapted into a film in 1990, starring Harrison Ford. Published by Farrar, Straus and Giroux, 1987.

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## Doing Our Part to Preserve Democracy

**What do you call 120 lawyers volunteering for Law Week and more than 165 volunteering for Read to Dream? A good start.**

I don't know about you, but I can't stand lawyer jokes. It's not because I don't have a sense of humor. I do. In fact, that's why I don't like them. They're never funny or clever, certainly not as funny or clever as the amateur comedians telling them think they are. Perhaps my least favorite is this one: "What do you call 5,000 lawyers at the bottom of the ocean? A good start!"

I thought about that joke over the Fourth of July weekend. Bear with me while I try to connect the two.

As I was making Fourth of July plans, it occurred to me that I don't do a good enough job of instilling in my daughters an appreciation for the freedoms that we enjoy. So I thought about how I could explain to a three-year-old and five-year-old the role various people have played in gaining and securing our freedom.

Of course, any discussion has to start with the founding fathers. And then there are the brave men and women who have served in our military. In fact, I originally set out to write this Editor's Message about how the freedom we enjoy today has been paid for with the blood and sacrifice of those who have served and continue to serve in our armed forces. Although it's something I've written about — though inartfully — in past issues, it can't be stated enough. But what about lawyers?

Lawyers probably aren't going to make your Top 10 list of people to remember on the Fourth of July. Hear me out, though. As I was doing the final edits of the *Lawyer*, I read John Kynes' Executive Director's Message, where

he reported on the success of the HCBA's Law Week. More than 120 HCBA lawyers volunteered to educate more than 3,900 elementary school students about this year's theme — "The Fourteenth Amendment: Transforming American Democracy."

In our last issue, Tiffany Love McElheran, in writing more fully about Law Week's success, quoted Franklin D. Roosevelt on the importance of democracy and the role education plays in safeguarding it:

"Democracy cannot succeed unless those who express their choice are prepared to choose wisely. The real safeguard of democracy, therefore, is education."

The idea that education is the real safeguard of democracy was on my mind when I read Kevin McLaughlin's outgoing President's Message on the success of the Read to Dream initiative.

More than 165 lawyers volunteered more than 200 hours reading to at-risk elementary school students. As Kevin

notes, studies show children who read regularly go on to become more productive citizens. It occurred to me that by helping kids learn to read and become more productive citizens, our HCBA lawyers are doing their part to preserve the freedom and democracy we celebrate every Fourth of July.

So I've come up with my own variation on the joke I detest. It's not funny. But it does have the benefit of being true: What do you call 120 lawyers volunteering for Law Week and more than 165 volunteering for Read to Dream? A good start.





## A Dream Come True: The Young Readers Initiative

I am proud to report that lawyers volunteered 208 hours reading to 167 children in six elementary schools.

**M**y first article of the year focused on the Read to Dream program, which was the brainchild of the late John Germany. The idea was simple: start a program whereby lawyers would spend about an hour a week simply reading to elementary school children. The hope was that exposure to literature at a young age would foster a lifelong love of reading. Studies have shown that children who read regularly do better in school, go on to work in higher paying jobs, and are generally more productive citizens. It was for this reason that Mr. Germany wanted the program to target elementary schools with high populations of poor and disadvantaged children. The program featured an eight-week session in the fall and a second eight-week session in the spring. I am happy to report that the program met and exceeded expectations by every measure.

*Continued on page 5*



Leonard Gilbert received the James M. "Red" McEwen Memorial Award in June for his assistance with the Read to Dream Initiative. The award is presented annually by the president to a member who has been instrumental in helping him during his tenure.

### EMPLOYMENT LAW

- ◆ Employee Rights
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*Continued from page 4*

While the HCBA enthusiastically participated in and supported the program, the real credit for the success of the program goes to Mr. Germany's daughters, Lindsay Robbins and Jan Gruetzmacher; his son-in-law, Jim Robbins of Hill Ward Henderson; and his longtime friend, Leonard Gilbert of Holland & Knight. Working in partnership with Lorie Tonti of the Tampa-Hillsborough County Public Library and the Hillsborough County Public Schools, these individuals created the program from the ground up and worked tirelessly to make Mr. Germany's dream a reality.

The program began at Booker T. Washington, Just Elementary, and West Tampa Elementary. These schools were chosen because 99 percent of the students are living below the poverty level and are struggling with reading aptitude (compared to students at other schools). The children selected to participate in the program were specifically targeted due to the high risk of falling behind their classmates in reading ability. By the spring semester, the scope of the program was doubled when it expanded to include Broward Elementary, Graham Elementary, and Edison Elementary. Like their peers at the original schools, the children at these schools faced the same financial and educational challenges. The fact that the school system was so eager to expand the program so quickly speaks volumes about its efficacy and the immediate, positive impact the program is having on the children.

I was truly moved by the enthusiastic support from the members of the HCBA. This program could not have worked if lawyers were not willing to put their busy lives and practices on hold for the betterment of others. I would be remiss if I did not recognize the law firms and voluntary bar associations that put together reader teams. In no particular order, they are: Holland & Knight; Hill Ward Henderson; Trenam Law; Bush Ross; Burr & Forman; Thompson, Sizemore, Gonzalez & Hearing; Carlton Fields; Wagner McLaughlin; the Hillsborough Association for Women Lawyers; the George Edgecomb Bar Association; the Tampa Hispanic Bar Association; the YLD of the HCBA; and the HCBA Board of Directors. Mr. Germany knew that if he could show us



Current President Gordon Hill recognized Immediate Past President Kevin McLaughlin for his tenure at the Installation of Officers & Directors in June.

the way to make a change in a child's life, there would be no shortage of volunteers from the legal community, and as usual, he was right.

I am proud to report that lawyers volunteered 208 hours reading to 167 children in six elementary schools. The program gave those children a total of 557 books to take home. The children were encouraged not only to read their new books on their own, but also to read with their parents, siblings, and friends, with the hope that the our young readers will themselves pay it forward by fostering and encouraging a love of reading in others. I had the pleasure of seeing firsthand how Mr. Germany's dream is being realized; even now, he is changing lives and we all owe him a debt of gratitude for daring to dream.

Writing this article is my final act as your President, and I must again express my thanks to all of you for your unwavering support and for allowing me to lead the best bar association in the country. I am truly humbled and will be forever grateful. Several people have recently commented to me that as immediate past president, I have the best job in the HCBA, but they are wrong, the best job now belongs to Gordon Hill. When I joined the HCBA over twenty years ago, the idea of serving as president seemed like an impossible dream, but as Mr. Germany would tell you, dreams can come true. Thank you.

**Mark your calendars now for the first Membership Luncheon of the new Bar Year — Sept. 20 at the Hilton Tampa Downtown.**



## A Time For Thanks

**Our success is rooted in our membership and the support of all the dedicated young lawyers that lead and participate.**

**T**he YLD's theme for the 2016-2017 Bar year was Get Connected, Get Involved! I am happy to report that we accomplished that goal, and I look forward to the YLD continuing to expand, grow, lead and make a difference in our profession and our community. Last year we saw both a substantial growth in our social media following and improvement in how we communicated with our members. In addition, after soliciting feedback from participants and young lawyers, we worked diligently to improve the quality of our programs. Almost all of our events, happy hours, lunches, community initiatives, and other endeavors had record participation and success. This success is rooted in our membership and the support of all the dedicated young lawyers that lead and participate.

This year was a success because of the hard work of hundreds. I would like to specifically thank the YLD board of directors: Traci Koster, Drew McCulloch, Maja Lacevic, Amy Nath, Alex Palermo, Adam Fernandez, Colleen O'Brien, Jason Whittemore, Jeff Wilcox, Melissa Mora, Brett Metcalf, Katelyn Desrosiers, Laura Tanner and Judge Samantha Ward, our judicial liaison. These volunteer board members are the true backbone of the YLD. Their hard work and dedication is worthy of praise.

I also would like to thank all our committee chairs and committee members who helped to make our events so successful. While I do not have space to thank every young lawyer who made a difference, I would like to

recognize the committee chairs: Don Greiwe, Harold Holder, Stephanie Generotti, Dane Heptner, Tom Curran, Yolyvee Gordon, Lyndsey Siara, Zachary Bayne, Andrew Smith, Ty Lindsey, Tiffany McElheran, Robyn Bonivich, and Melissa Gonzalez. Each one of them worked diligently to make each and every one of our events a success.

None of our success would have been possible without the amazing HCBA staff. John Kynes has proven to be an outstanding executive director, and Laurie Rideout has been a tremendous asset as the staff liaison to our board. Also, Stacy Williams has been responsible for much of our increased social media presence. She, along with the entire bar staff, has been instrumental in working and advancing our social media and

communications platform, as well as courting sponsors.

I would also like to especially thank Chief Judge Ficarrota and the judiciary for their constant support and guidance they provide to the young lawyers. The HCBA and the YLD has a very unique relationship with our judiciary. The presence of Judge Ficarrota and other judges at our events, and the eagerness with which the members of the judiciary volunteer to help the YLD and its members, played a significant role in our success. We are forever grateful to the fine Hillsborough County judiciary for the role they play in the lives and development of young lawyers.



**Immediate Past YLD President Web Melton III, YLD President-Elect Jason Whittemore, and YLD President Melissa Mora at the Installation of Officers and Directors on June 8.**

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Lastly, I would like to thank Kevin McLaughlin, the immediate past president of the HCBA, and the entire HCBA board for their support of the YLD. Their leadership and support truly allowed the YLD to thrive this year.

It has been a great year. I am honored that I was able to serve as the YLD president, and I look forward to

continuing my service on the YLD board of directors next year. I am confident my successor, Melissa Mora, will have an outstanding year. In addition to Melissa, the board of directors for the coming year is an outstanding group of individuals who will only continue to build on the success of their predecessors. I am truly excited for the upcoming year, and I would again encourage every young lawyer to continue to Get Connected and Get Involved!



## YLD Judicial Appreciation Luncheon

The Young Lawyers Division hosted a Judicial Appreciation Luncheon on May 3, and thanked the members of the judiciary in attendance for their support and guidance. As the last YLD luncheon of the Bar year, the YLD also thanked Web Melton III for his service as president for the past year. The YLD would like to thank the luncheon's sponsor:





## 2017 Liberty Bell Award Goes to USF's Erin Kimmerle; Law Day Luncheon Celebration Marks End to Banner Year

**"As long as the world shall last, there will be wrongs, and if no man objected and no man rebelled, those wrongs would last forever."**

**—Attorney Clarence Darrow**

All the boys who lived at the school called it the "White House."  
It was a small white building on the pastoral grounds of the state-run Dozier School for Boys in the Florida panhandle town of Marianna.  
Tragically, it was inside the White House where, for decades, hundreds of boys at the reform school, which closed in 2011, would endure severe beatings and abuse at the hands of the school's staff.  
In recent years, members of a victim's group called the White House Boys have come forward and shared stories of physical and sexual abuse, as well as of suspicious deaths, that occurred while they lived at Dozier.  
The details are so horrific the Florida Legislature this past spring felt compelled to offer a formal apology to the victims and their families, calling what happened at Dozier, which opened in 1900, a violation of "fundamental human decency."  
Florida House Speaker Richard Corcoran, a Republican from Land O'Lakes, stated it was "one of blackest moments on our [state's] history."  
Dr. Erin Kimmerle, a forensic anthropologist from the University of South Florida, was one of the key figures in the investigation of the school.



Mark Buell with Dr. Erin Kimmerle, the 2017 Liberty Bell Award winner

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Facing threats and intense pressure from local officials and residents who wanted to avoid any negative press about Dozier, Kimmerle in 2012 led a group of researchers who systematically mapped out a cemetery and identified 55 grave sites on the school grounds, though there were only official records for 24 burials.

For her extraordinary work in the investigation to discover the truth about what happened at Dozier, the HCBA named Kimmerle the 2017 Liberty Bell Award winner, which was announced at the annual Law Day Membership Luncheon this past May at the Hilton Downtown.

The Liberty Bell Award has been presented annually by the HCBA since 1964 and is intended to honor a citizen who does not practice law but who has worked tirelessly to preserve and strengthen our system of justice.

“Dr. Kimmerle is a local treasure,” said Mark Buell of Buell & Elligett, who introduced her at the luncheon and was part of a group that nominated her for the award.

Buell told the crowd Kimmerle’s work “has promoted greater respect for the law and a deeper sense of individual responsibility ... that citizens recognize the duty of their state to come clean about actual facts from an embarrassing period during our state’s history.”

In accepting the award, Kimmerle said she was “humbled, honored, and grateful.”

Kimmerle said her work in the investigation was “challenging, heartbreaking, but, at the same time, incredibly rewarding.”

She concluded by quoting the celebrated American lawyer, Clarence Darrow: “As long as the world shall last, there will be wrongs, and if no man objected and no man rebelled, those wrongs would last forever.”

\* \* \*

**The Law Day Luncheon also provided an opportunity to highlight the outstanding work of**

**the HCBA’s Law Week Committee, which was co-chaired by Amy Nath, Maja Lacevic, and Alexandra Palermo.**

The national Law Day theme the ABA selected this year was: “The Fourteenth Amendment: Transforming American Democracy.”

And Dane Heptner, incoming co-chair of the committee, reported that 120 HCBA volunteer lawyers helped lead mock trials, courthouse tours, and classroom discussions this past March.

More than 3,900 local students were involved in Law Week activities this year, including the art contest, Heptner added. (See photos from the Law Day luncheon on page 36.)

\* \* \*

**Meantime, the luncheon also marked the unofficial end to the 2016-17 Bar year.**

And under the outstanding leadership of President Kevin McLaughlin and the HCBA Board, there’s no doubt it has been an exciting and eventful year.

From the successful launch of the Read to Dream Initiative involving volunteer lawyers reading in local schools; all the membership

luncheons; the annual Bench Bar Conference; the Holiday Open House; all the HCBA’s diversity events; the HCBA Pig Roast and 5K Pro Bono River Run; and the Bar Foundation’s Law & Liberty Dinner, there was something for everyone.

And that does not even include all the other outstanding CLE programs, as well as all the successful events put on by the HCBA’s superb Young Lawyers Division, which was ably led by Web Melton.

Looking ahead, I’m confident incoming President Gordon Hill will continue the good work that has helped make the HCBA the wonderful organization it is today as he leads the HCBA in 2017-18.

Here’s hoping everyone has a great rest of the summer. See you around the Chet.



2016-2017 HCBA President Kevin McLaughlin

**Make sure your member profile is up-to-date! Log onto [hillsbar.com](http://hillsbar.com).**



## A Reflection on our First Months of Criminal Justice Reform

**Building a safer community while promoting justice and fairness has required new approaches and concrete changes.**

**W**e have accomplished a lot at the State Attorney’s Office during the first months of 2017, but we are just getting started. From enhancing public safety and improving juvenile justice to expanding diversion programs and increasing community engagement, we have set ambitious goals. I am pleased to share with you our progress, highlighting the changes we have made and the steps we have taken towards fulfilling our mission:

Building a safer community while promoting justice and fairness has required new approaches and concrete changes. To respond to the unique needs of our community, we must hear everyone’s voice. So we embarked on a 60-day Listening Tour, meeting with the stakeholders in our criminal justice system to discuss necessary changes and how best to address the challenges ahead. We met with community leaders, law enforcement agencies, judges and court personnel, criminal defense attorneys, the Public Defender’s Office, and third-party agencies that work closely with the State Attorney’s Office. The constructive conversations generated feedback on issues ranging from charging decisions and plea negotiations to diversion programs and operational efficiencies. You spoke, and we listened.

To build trust with our community, we regularly meet with the community through quarterly Community

Workshops, which are open to the public and streamed live on our Facebook page. These workshops engage our community with candid dialogue and transparency regarding the policies we implement and the decisions we make, while also giving residents a platform to raise issues and share ideas.

There is no substitute for enlisting others in a shared vision for the future. We restructured our office and hired key personnel to carry out the office’s vision and mission. Our newly created Chief of Policy and Communication oversees policy initiatives, communication, and community outreach. Likewise, our new Chief of Staff oversees the complex administration of our office and handles legislative affairs to make sure that our community’s needs are heard in Tallahassee. We realigned the office to incentivize hard work, critical thinking, and problem-solving, and we have elevated the status of our Problem Solving Courts: the Drug Court, Veterans Court, and the brand new Mental Health Court.

We are finding smart alternatives to prison for first-time, non-violent, and juvenile offenders to more efficiently use your tax dollars and reduce recidivism. For example, in my first few weeks in office, we declined to prosecute members of Food Not Bombs for feeding the homeless in a city park. Prosecuting



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*Continued from page 10*

people for charitable work does not further our mission and would have been an inefficient use of our resources.

We have also partnered with the Hillsborough County Sheriff's Office on several resource-intensive operations that resulted in numerous arrests, as well as the seizure of large quantities of firearms, drugs, and cash. We worked with local law enforcement agencies to review their Use of Deadly Force Policies, to ensure they promoted best practices such as prohibiting shooting at

moving vehicles, rendering first aid, and proportional response. To improve juvenile justice, we have taken action to reduce the number of juveniles charged as adults, and we have worked to expand the pilot program for civil citations for misdemeanor marijuana possession, making it a permanent policy throughout the county.

Day by day, we are doing our part to form a more perfect union by striving to promote justice here in our community. I am excited about the progress that we have already made and even more excited for our journey ahead.



## NEW ADMITTEE SWEARING-IN CEREMONY

The HCBA hosted a swearing-in ceremony for new admittees to The Florida Bar on April 13 at the George Edgecomb Courthouse. HCBA president-elect Gordon Hill and YLD president Web Melton III spoke to the new lawyers about the benefits of joining the HCBA, and Judge Christopher Nash discussed the importance of professionalism as they embark on their new careers. Congratulations to all that were sworn in! The HCBA would like to thank the ceremony's sponsor:





## Positive Outcomes for Our Children

**The dependency divisions perform the difficult case work many people cannot bear to hear, and I am thankful for their efforts.**

**A**s I mentioned in my last article, I am shining a spotlight on the good work being done in the Thirteenth Judicial Circuit Court. Our specialty court programs combine resources, innovation, and inspiration to provide essential services to those who need it most. When I think of the vulnerable and those most deserving of resources, what comes to my mind first and foremost are the children of Hillsborough County.

I am very proud of our Dependency Divisions, which are led with compassion and devotion by Administrative Judge Katherine Essrig. Judge Essrig was recently honored with the Luminary Award by the Junior League of Tampa for her tireless efforts in establishing services and programming for the children and families of Hillsborough County. She presides over the Circuit's various dependency divisions with Judges Emily Peacock, Caroline Tesche Arkin, Laura Ward, Kimberly Vance, and Robert Bauman.

Judge Essrig presides over the Juvenile Dependency Specialty Division, which is home to many innovative programs:

- The "Adoptions Needed Now Project," which works to expedite adoptions for children who are adoption-ready due to termination of parental rights.
- The Unaccompanied Immigrant Children's Court, whose cases derive from the Office of Refugee Resettlement, which consists of children who seek

citizenship while in dependency court, having already been placed with a relative or family friend in Hillsborough County.

- The Dependency & Family Court Crossover cases, which are a means to unify our family court divisions.
- The Early Childhood Court, which we affectionately refer to as Baby Court, is our most recent innovation. Baby Court offers families with children under the age of three expedited services to help reunify the family. Families with children visiting the Edgecomb Courthouse for Baby Court will soon benefit from an age-appropriate waiting room, which is scheduled to open this summer.



Judge Tesche Arkin is also planning an innovative pilot program for dependency case management. "New Tracks," as it will be called in the Thirteenth Judicial Circuit, is a form of differentiated case management, which applies time and resources to cases based on need and track

assignment. Judge Tesche Arkin envisions a four-track model during the pilot period, which will begin in her division in late summer or early fall.

The dependency divisions perform the difficult case work many people cannot bear to hear. They do so with the assistance of tireless advocates and partners who strive to make children safe and secure. I am thankful for their efforts and the services they provide to our community.

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## Thirteenth Judicial Circuit Unveils Lactation Rooms

The Court joins a small contingent of courthouses throughout Florida to offer this amenity.

**M**others who work at or visit the George E. Edgecomb Courthouse will find a welcome addition to the buildings. In celebration of Mother's Day, the Thirteenth Circuit unveiled two lactation rooms on May 12. In doing so, the Court joins a small contingent of courthouses throughout Florida that offer such an amenity.

Having spearheaded the effort, we can tell you the process of opening the lactation rooms was a six-month labor of love. When *The Florida Bar News* featured the opening of a lactation room in the Miami-Dade County Courthouse, we (as new mothers) recognized the need for such an initiative here. Without a designated space to express breastmilk, mothers, many of whom are attorneys and other professional staff who spend innumerable hours at the courthouse, were faced with the uncertainty of not knowing where they would pump.

Now, our circuit has eliminated this uncertainty. It is our hope that adding lactation rooms in our courthouse will encourage others, both in our legal community and community at large, to also support our nursing colleagues as they return to work and



Chief Judge Ronald Ficarrotta, Lyndsey Siara and Nicole Gehringer cut the ribbon on the new lactation room at the Courthouse on May 12.

undertake the challenge of balancing their personal and professional responsibilities.

The new lactation rooms are located on the sixth floor of the Edgecomb building and the fourth floor of the North Annex building, providing easy access throughout the courthouse. The lactation rooms are open to anyone: attorneys, professional staff, jurors, witnesses, and other members of the public.

“The Thirteenth Circuit recognizes the importance of offering these types of amenities, so attorneys and

*Continued on page 15*



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New Lactation Room in the George E. Edgecomb Courthouse

*Continued from page 14*

professional staff can excel in their positions without compromising family decisions,” said Trial Court Administrator Gina Justice. “We also anticipate mothers may find themselves at the courthouse for an extended period of time, whether serving as a juror or being a witness, and we want to accommodate their need for a private, clean place to nurse or pump.”

Both lactation rooms offer a comfortable chair, inviting lighting, electrical outlets, and a locking door. To use the rooms, women must simply provide identification to request a key from the Information Booth on either the sixth floor of the Edgecomb building or the second floor of the North Annex building.

In addition to these new lactation rooms, the circuit offers other notable family-friendly amenities. In recent months, the circuit installed approximately ten additional baby-changing stations to the restrooms throughout the buildings. The circuit also is adding a kid-friendly waiting area, stocked with toys and books, for children who are awaiting hearings in the newly formed dependency division specifically for children under three years old. The waiting area is slated to open this summer on the third floor of the Edgecomb building.

“Our circuit is committed to providing a full range of services to the public, and we are pleased to offer these amenities to make everyone’s time at the courthouse a little easier and more enjoyable,” said Chief Judge Ronald Ficarrotta. We encourage you to join us in these efforts and applaud your efforts to follow in the circuit’s footsteps!



*Authors: Nicole Gehringer and Lyndsey Siara - Thirteenth Judicial Circuit Court*

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# Wenzel Fenton Cabassa, P.A. Welcomes **NEW PARTNER BRANDON HILL**

Wenzel Fenton Cabassa, P.A. is proud to announce we've added another partner. We'd like to congratulate Brandon Hill who now joins the partnership of Tony Cabassa, Matt Fenton, Steve Wenzel and Donna Smith. Brandon has been recognized by Florida Super Lawyers magazine as one of Florida's "Rising Stars" for the last three years.



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Patrick Chidnese, Florida Legal Elite, *Florida Trend* magazine, "Up & Comer," 2014-2015

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## HARMLESS ERROR IN THE SECOND DISTRICT: HAS *SPECIAL* HAD AN IMPACT?

Appellate Practice Section

Co-Chairs: Jared Krukar - DPW Legal; and Heather Fesnak - Akerman LLP



**Many predicted that the new standard would significantly impact civil appeals in the Second District.**



**T**he Second District Court of Appeal historically placed the burden on the *appellant* in a civil appeal to prove “it is reasonably probable that a result more favorable to the appellant would have been reached if the error had not been committed,” else any error would be deemed harmless and the ruling on appeal affirmed.<sup>1</sup> In November 2014, the Florida Supreme Court decided *Special v. West Boca Medical Center*, in which the Court shifted the burden to the *appellee* as “beneficiary of the error” to “prove that there is no reasonable possibility that the error complained of contributed to the verdict.”<sup>2</sup> Many

(including myself) predicted that the new standard would significantly impact civil appeals in the Second District, increasing the reversal rate.<sup>3</sup> So, did it?

Apparently, no — not yet, anyways. To date, the Second DCA has cited *Special* only three times in written opinions. In fact, until this April, the Second DCA had only cited *Special* once — in a footnote, in *dicta*, noting that *Special* did not apply retroactively in that case.<sup>4</sup>

Recently, the Second DCA issued two more opinions citing *Special*. In the first, the court held that the trial court erred in excluding

certain evidence at trial, and that the appellee had failed its burden under *Special* to prove the error did not contribute to the verdict.<sup>5</sup> In the second, the court cited *Special* without providing significant analysis of the standard, stating only that there was no reasonable possibility any error that may have occurred in closing argument contributed to the verdict.<sup>6</sup>

The Second DCA has also addressed harmless error in two other civil appeals since *Special*, but without expressly referencing the new standard. In the first opinion, the

*Continued on page 19*



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court did not further describe the standard it applied when it held, “Our record does not allow us to conclude that the result would be the same even without the error.”<sup>7</sup> In the second opinion, the court found error but held it had to affirm because the absence of a transcript “frustrate[d] our ability to ... evaluate the entire case as required for a harmless error analysis.”<sup>8</sup>

The dearth of Second DCA opinions addressing *Special* suggests the new standard has had little impact to date. Statistics support this hypothesis, with the reversal rate of civil appeals remaining relatively unchanged despite *Special* being decided in November 2014:<sup>9</sup>

Year	Total	Affirmed	Reversed or reversed in part	% of total reversed
2013	777	615	162	20.8%
2014	744	576 <sup>10</sup>	168	22.6%
2015	824	646	178	21.6%
2016	880	686	194	22.0%
2017 <sup>11</sup>	335	267	68	20.3%

All evidence to the contrary, I still believe that, in time, *Special* will turn out to be tremendously significant in the Second DCA. Appellees should still thoroughly consider whether they can meet their burden under *Special* before they raise a harmless error argument on appeal. And appellants should respond to a harmless error argument with *Special*'s burden-shifting language. It is anyone's guess as to what case will ultimately require the court to fully scrutinize the *Special* harmless error standard in a written opinion.

<sup>1</sup> *In re Commitment of DeBolt*, 19 So. 3d 335, 337 (Fla. 2d DCA 2009) (*en banc*) (quoting *Damico v. Lundberg*, 379 So. 2d 964, 965 (Fla. 2d DCA 1979)).

<sup>2</sup> *Special v. West Boca Med. Ctr.*, 160 So. 3d 1251, 1265 (Fla. 2014).

<sup>3</sup> See, e.g., Ezequiel Lugo, Harmless Error Redefined, Vol. 25, No. 4 HCBA Lawyer, 22 (March-April 2015).

<sup>4</sup> *T.B. v. R.B.*, 186 So. 3d 544, 552 n.2 (Fla. 2d DCA 2015).

<sup>5</sup> *Ring Power Corp. v. Condado-Perez*, 2017 WL 1289981, at \*5 (Fla. 2d DCA Apr. 7, 2017).

<sup>6</sup> *Philip Morris USA Inc. v. Boatright*, 2017 WL 1356285, at \*5 (Fla. 2d DCA Apr. 12, 2017).

<sup>7</sup> *Winnier v. Winnier*, 163 So. 3d 1279, 1280 (Fla. 2d DCA 2015).

<sup>8</sup> *Jericka v. Jericka*, 198 So. 3d 661, 662-663 (Fla. 2d DCA 2015). This case demonstrates the interesting relationship between the differing burdens of appellants and appellees on appeal.

<sup>9</sup> Thanks to Mary Beth Kuenzel, Clerk of the Second District Court of Appeal, for providing this information. For this analysis, “civil appeals” are defined as all non-criminal and non-juvenile appeals; original proceedings are excluded. The manner of disposition includes written opinions, citation opinions, and per curiam affirmances; appeals that were dismissed, transferred, or disposed of by order are excluded.

<sup>10</sup> One case was “affirmed as modified.” It is included as an affirmation here.

<sup>11</sup> Year-to-date as of May 15, 2017.

Author: Jared M. Krukar - DPW Legal

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## LEADERS IMPROVING OUR FUTURE

Bar Leadership Institute Committee

Co-Chairs: Scott Johnson – U.S. Navy; Lyndsey Siara – Thirteenth Judicial Circuit; and Zarra Elias – Akerman LLP



**Within each of these organizations,  
leaders are pursuing a vision of improving  
our community's future.**

**A**t the Bar Leadership Institute's final three modules, members toured the Southwest Florida Water Management District's restoration sites, Bay Area Legal Services' headquarters, and Tampa International Airport's billion-dollar expansion construction site. Within each of these organizations, leaders are pursuing a vision of improving our community's future.

The Legislature created the Southwest Florida Water Management District (SWFWMD) to protect water resources, minimize flood risks, and ensure the public's water needs are met. In March, BLI members toured SWFWMD's restoration project sites at Rock Pond Ecosystem and Cockroach Bay. The tours showcased record-breaking improvements in water quality and biodiversity — the result of decades of efforts by SWFWMD's attorneys, engineers, and scientists. The SWFWMD team also highlighted the significant role volunteers play in SWFWMD's success — raising community awareness is a key part of each program.

For the April module at Bay Area Legal Services (BALS), BLI members met with president and CEO Dick Woltmann. Before

joining BALS, Woltmann's vision and work developing youth tennis programs in Ghana in the 1970s ensured the continued mission of the Peace Corps, which he was a member of during a turbulent political climate. In the 1980s, Woltmann brought his visionary leadership to BALS, where he helps the organization grow to meet our community's legal needs.

Also during the April module, Alex Srcic, an attorney working on the BALS 2017 Veterans Assistance Project, shared the inspiration she found in the leadership of her managing attorney, Tom DiFiore. Srcic now aspires to mentor others the way DiFiore has mentored her.

Another rising leader, Jennifer Cohen-Deihl, an attorney in the Seniors Division and a BLI member, shared that BALS, like SWFWMD, reaches its goals by raising awareness and engaging volunteers. Members learned about the variety of volunteer opportunities at BALS, which can be found online at [www.bals.org](http://www.bals.org).

In May, BLI members toured Tampa International Airport (TIA), where they met with Al Illustrato, executive vice president of planning development, and Michael Stephens, general counsel and



BLI class touring the Tampa International Airport.

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executive vice president of information technology, who discussed TIA's past and future impact within the community and the global aviation industry. In 1971, TIA became the first airport in the world to install an automated people mover. Since then, TIA has been one of the world's highest ranked airports for customer service satisfaction.

Leaders like Illustrato and Stephens are striving to keep TIA on top by anticipating future needs that will result from the growing number of passengers traveling through TIA each year. In 2018, TIA will complete the first phase of its 2012 Master Plan: construction of a 55,000-square-foot expansion of the main terminal, a 1.4-mile people mover, and a 2.6-million-square-foot rental car center. Before touring this one billion dollar project, which has been responsible for 9,000 jobs, BLI members viewed an exciting presentation by Stephens on the next two phases, which will include a five-star hotel, a gas station, and multi-purpose facilities. These additions will bring even more expansion and innovation to TIA.

Thanks to the planning and insight of leaders at SWFWMD, BALS, and TIA, our community's future is bright.



*Author:  
Harold Holder  
- Bush Ross*



## WELCOME TO OUR NEW MEMBERS

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## COLLABORATIVE DIVORCE FIVE YEARS LATER – A LOOK BACK

Collaborative Law Section

Co-Chairs: Ellen Ware - Ware Law Group, PA; and Kristin DiMeo - Litigation Support Advisors



**Some predictions  
have come to  
fruition; some have  
not and may not.**



**F**ive years ago, I wrote our newly formed Collaborative Law Section's column about Florida's First Collaborative Conference: "The Future is Now." The keynote speaker, Forrest "Woody" Mosten, nationally known speaker and collaborative lawyer, talked of the many advantages of the collaborative process and mentioned famous actors, Robin Williams and Roy Disney as examples of high-profile individuals who had chosen the collaborative divorce process, seeming to suggest its inevitable popularity and acceptance. He predicted collaborative law wouldn't be just a "pioneering alternative," but rather part of the *mainstream* of our legal system. He also predicted professionals would specialize in collaborative law and that it would be a component of our legal education system.

Mosten further predicted that collaborative law would become the primary dispute resolution method, observing that initial contacts by divorcing clients would be to a collaborative lawyer or mediator instead of to a litigator. This model would be like a medical patient going first to an internist and then

getting a referral to a surgeon only if necessary, rather than going to a surgeon first. Some predictions have come to fruition; some have not and may not.

Mosten's insightful observations caused me to optimistically believe that the future of collaborative law was upon us. Sadly, it will have taken Florida five years to put in place a collaborative statute and procedural rules. Our fifth annual conference theme, "Get In On The Act," refers to the Florida statute that finally legitimizes collaborative efforts to resolve family law cases in a non-judicial manner. The future will always be the future; it's coming, but not yet here.

We have learned that there are obvious challenges, including resistance from litigators and the need to educate the public. But I believe the biggest challenge is the need for many professionals to develop new skill sets. This is because the process requires professionals to understand their own reactions to conflict and to learn how to effectively handle confronting and resolving it.

Initial trainings can only do so much. They do not teach us how to be our best selves to effectively

administer this peaceful process. Acquiring the needed new skill set is a journey for most lawyers that is not an easy one. We were trained in an adversarial process, and as Sharon Ellison, keynote speaker at our fifth statewide conference, explained, we have been programmed by a language of combat and war. We need to understand and embrace her lessons on the Power of Non-Defensive Communication.

We must learn everything we can about ourselves, our process partner lawyers, our clients, conflict resolution, the *Essential Role of Dignity in Resolving Disputes*, assessment needs on clients' suitability for the collaborative process, and so much more! The successful future of collaborative divorce will depend on our commitment to seeking the education needed to skillfully

provide the best collaborative client experiences possible.



*Author: John  
Fraser Himes -  
Himes &  
Hearn, 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 April and May, 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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- Roland "Chip" Waller
- Robert Walton
- Valentina Wheeler
- Jared Wrage





It is common knowledge among construction practitioners that lien law, a creature of statute, must be strictly construed. *Aetna Casualty & Surety Co. v. Buck*, 594 So. 2d 280, 281 (Fla. 1992). Nevertheless, lien law itself provides latitude to parties in certain areas.

For example, although section 713.08, Florida Statutes, mandates that certain information must be included in the statutory claim of lien form, the failure to include that information does not defeat a lien:

[T]he negligent inclusion or omission of any information in the claim of lien which has not prejudiced the owner does not constitute a default that operates to defeat an otherwise valid lien.

A similar exception exists in section 713.06(3)(d)(4), Florida Statutes, regarding deviations from the statutory contractor's final payment affidavit form.

By including these exceptions, the legislature has indicated a preference that lienors should retain lien rights despite non-prejudicial deviations from the statutory forms. But, while lienors can take some comfort knowing that the legislature has protected them from some sloppiness, they would be ill-advised to assume that courts will offer the same leniency regarding deviations from other statutory forms.

In contrast to the express exceptions for claim of lien and final contractor's affidavit forms, the lien law does not provide an exception for deviations from the statutory Notice to Owner ("NTO") form. The NTO form, prescribed in section 713.06, Florida Statutes, requires lienors to: (i) identify the work they are doing on the owner's property and for whom they are doing the work; and (ii) include precise warnings notifying the owner of the lienor's right to lien the owner's property in the event of nonpayment. While some courts have overlooked certain minor deviations from the statutory NTO form, courts universally hold that the absence of the mandated statutory warnings renders a NTO invalid, which results in an unenforceable lien. See *Gulfside Props. Corp. v. Chapman Corp.*, 737 So. 2d 604, 607 (Fla. 1st DCA 1999) (holding that the failure to serve a NTO that included all of the mandatory statutory warnings "was fatal to establishing [the lienor's] lien against the subject property"); *Mirror & Shower Door Prods. Inc. v. Seabridge, Inc.*, 621 So. 2d 486, 487 (Fla. 4th DCA 1993)



**While lienors can take some comfort knowing that the legislature has protected them from some sloppiness, they would be ill-advised to assume that courts will offer the same leniency regarding deviations from other statutory forms.**

(holding that service of a NTO including the mandatory statutory warnings "is a prerequisite to perfecting a lien under Chapter 713"); *Allstar Bldg. Materials, L.T.D. v. Kronauer*, 724 So. 2d 616, 616 (Fla. 5th DCA 1998) (holding that deviations from the statutory NTO form, including deleting the words "IMPORTANT FOR YOUR PROTECTION," invalidated a lien).

In strictly enforcing the

lienor's obligation to include the NTO statutory warnings, Florida courts have appeared to implicitly hold that the omission of such warnings is per se prejudicial. Therefore, lienors and their counsel should carefully review their NTO form (or the form used by their chosen NTO service) to ensure it complies with the statute. The

failure to do so could be fatal to the lienor's rights.



*Author:*  
Erik Raines -  
Hill Ward  
Henderson PA

## Lincoln Award Presented to Sheila Norman

The Tampa Bay American Inn of Court recognized Sheila Norman on May 9 with its annual Lincoln Award. The Lincoln Award is the Inn's most prestigious award, which honors a member who best exemplifies the Inn's goals in promoting legal excellence, civility, professionalism, and ethics in the practice of law.

Admitted in 1990, Norman is a board-certified bankruptcy attorney at Norman & Bullington, P.A. She represented the Inn as an Amity Visitor to the British Inns of Court and at the U.S. Supreme Court at the Celebration of Excellence. Norman is a consummate professional in and out of the courtroom and is uncommonly passionate about professionalism in the practice of law. She has spearheaded the efforts to achieve and maintain platinum status for two Inns of Court, and is a member of The Florida Bar Code and Rules of Evidence Committee. Norman is a true leader in the Inn and has earned the respect and gratitude of her peers.



## Construction Section Luncheon/CLE

On April 20, Kevin Gowen with Rumberger Kirk & Caldwell gave an overview to the Construction Law Section on the topic of "Collection Law for Construction Lawyers." He discussed general post-judgment collections procedure; legal devices for collection of a Florida judgment; distinctions between lien enforcement and collection of money judgments; and federal and Florida consumer collections law.



The section would like to thank its luncheon sponsor:





The discussion about artificial intelligence (AI) in law has largely been framed around whether AI will replace lawyers and cut into law firm profit margins. But this frame only covers a fraction of the legal market canvas and misses the overarching concern for corporate clients: How will AI provide increased transparency and enhanced risk management tools for in-house legal departments?

Since 2008, corporate clients have been leveraging their purchasing power over law firms to obtain discounted rates and scrutinize invoices. While the billable hour is under siege, and firms are fighting to protect their market share, litigation has been seen as one of the last true strongholds for firms. But even large litigation departments are not immune from new performance metrics once adopted by powerful market participants.

“Every great change in law will come from transparency,”<sup>1</sup> claims Toby Unwin, CIO and co-founder of Premonition, a Miami-based, AI-infused legaltech company that was founded in 2014, and raised a seed round at a \$100 million

valuation.<sup>2</sup> Premonition has been at the forefront of using AI to analyze lower court decisions to provide insights into attorney win rates, case-duration statistics, and judicial analytics to corporate clients.

“Win rates are standard,” notes Unwin, “they’ve been adopted by enough companies, and they’re not going to go away.”<sup>3</sup> Some of the biggest insurance companies in the market have been using Premonition’s data to predict their chances of winning and to determine whether to settle cases.<sup>4</sup> If win rates are good enough for insurance companies, which drive the litigation market, it is only a matter of time before other corporate clients catch wind.

For in-house counsel, reducing litigation risk and legal spend is in their client’s best interest. Imagine if corporate counsel acquired win rate data for an important case and discovered that opposing counsel had won nine out of the last ten times in front of the presiding judge, with an average case duration of five years. This data can not only provide corporate counsel with a more forward-thinking perspective, but it also can help forecast the overall cost of litigation for their client.

Unwin also notes that there are now a dozen different companies

# AI Law

**Every great change  
in law will come  
from transparency.**

offering win rate products.<sup>5</sup> But these companies, including Bloomberg, LexisNexis and Lex Machina, are not currently equipped to or geared

toward providing metrics on lower court decisions on a nationwide or global basis. Focusing on appellate decisions and niche areas of law, these companies are like local sports news stations reporting on highlight reels. On the other hand, Premonition, armed with the largest litigation database in the world<sup>6</sup> and an AI system analyzing thousands of new cases per day, is the ESPN of law, and your clients are watching.

<sup>1</sup> Telephone Interview with Toby Unwin, CIO, Premonition LLC (Oct. 3, 2016).

<sup>2</sup> *\$100M Seed Valuation? Premonition Oversubscribes*, PR Newswire Ass’n (Nov. 4, 2015), <http://www.prnewswire.com/news-releases/100m-seed-valuation-premonition-oversubscribes-300172448.html> (“Premonition”).

<sup>3</sup> Unwin, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Premonition, *supra* note 2.



*Author: Jeff Cox, Esq.*

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**Highlights of some of the criminal justice-related bills signed into law during the 2017 legislative session.**

**T**his article highlights some of the criminal justice-related bills that were signed into law by Governor Rick Scott during the 2017 legislative session. The summaries are taken from legislative analyses. Any opinions expressed in the legislative analyses do not necessarily reflect those of the author of this article. Please read the legislation itself for a more in-depth understanding of the bills.

### **Sentencing for Capital Felonies, SB 280, signed 3/13/17, effective 3/13/17**

- SB 280 amends the death penalty sentencing statutes to require jury unanimity in death penalty sentencing procedures. In October 2016, the Florida Supreme Court, in *Hurst v. State*, held that in order for the death penalty to be imposed, the sentencing phase jury (if the jury was not waived) must vote unanimously for a death sentence. The holding in *Hurst v. State* was applied to the 2016 death penalty sentencing statutes challenged in *Perry v. State*. Amending sections 921.141 and 921.142, Florida Statutes, to require unanimity in the jury vote for death will satisfy the constitutional requirements the Florida Supreme Court announced in *Hurst* and *Perry*.

### **Public Records Exemption for Murder Witnesses, HB 111, signed 5/10/17, effective 7/1/17**

- HB 111 exempts from public records disclosure law the personal identifying information of a witness to a murder for two years from the date witness observed the murder. But a criminal justice agency may disclose the information to the parties in a pending criminal prosecution if required by law.

### **Law Enforcement Body**

#### **Cameras, HB 305, signed 5/10/17, effective 7/1/17**

- HB 305 requires law enforcement agencies to establish policies and procedures authorizing an officer to review camera footage of an incident before writing a report or providing a statement.

### **Reduction of Criminal Penalties for Certain Acts, SB 608, died in Transportation Committee**

- SB 608 would have reduced the penalties for numerous criminal acts. Notably, it would have:

- Reduced driver's license suspension for conviction of possession of a controlled substance from one year to six months
- Raised the threshold for grand theft from \$300 to \$1,000
- Deleted the felony enhancement for three or more convictions for petit theft

### **Nonjudicial Expunction of Criminal History Records,**

#### *SB 980, died in Criminal Justice Committee*

- SB 980 would have provided for, with some exceptions, non-judicial expunction of criminal history records upon application and approval by the Florida Department of Law Enforcement for any case that did not result in a conviction. There would not have been any limit on the number of nonjudicial expunctions by a person. It also would have amended some current limitations on eligibility and procedures.

### **Public Records Exemption for Dismissed Domestic Violence Protective Injunctions, HB 239, signed 5/9/17, effective 7/1/17**

- HB 239 exempts from public record requests a petition for an injunction (and its contents) for protection against domestic violence, repeat violence, dating violence, sexual violence, stalking, or cyberstalking that is dismissed without a hearing, dismissed at an ex parte hearing due to failure to state a claim or lack of jurisdiction, or dismissed for any reason

having to do with the sufficiency of the petition itself without an injunction being issued.



*Author: Adam L. Bantner, II - The Bantner Firm*

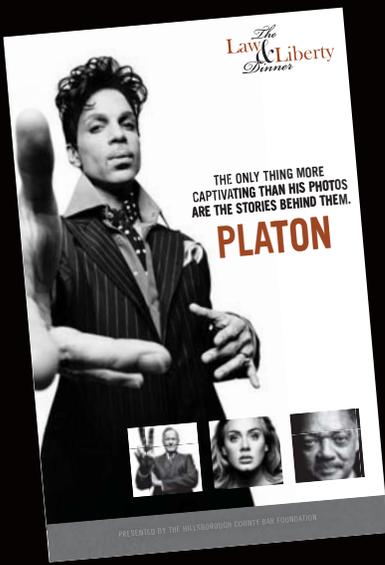
# Criminal Law Section Recognizes Brian Albritton

The HCBA Criminal Law Section awarded Brian Albritton of Phelps Dunbar LLP its annual Marcelino “Bubba” Huerta III Award for Professionalism and Pro Bono Service at its luncheon on April 20. Albritton was recognized for his commitment to the community and his clients and his high professional and ethical standards, which have made him a greatly respected attorney in the legal community. Albritton and former Huerta Award winners also gathered for a photo following the luncheon.



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## LAW & LIBERTY DINNER

The 12th Annual Law & Liberty Dinner featured one of the world's most renowned portrait photographers, Platon, who has photographed more world leaders than anyone else in history. Platon regaled the audience with his fascinating stories and photographs as part of the Hillsborough County Bar Foundation's annual fundraising event on May 18.

Local news anchor Keith Cate of New Channel 8 hosted the evening's ceremonies.

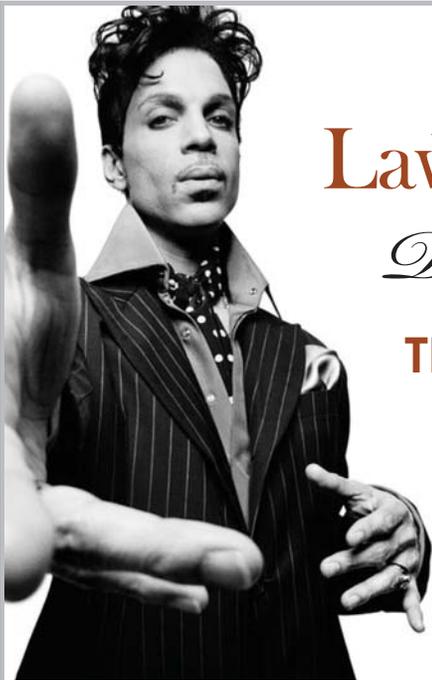
Money raised at the Law & Liberty Dinner will benefit Crossroads for Florida Kids, Inc.; Gift of Adoption Florida (Tampa); L. David Shear Children's Law Center of Bay Area Legal Services, Inc.; The Spring of Tampa Bay; Voices for Children of Tampa Bay; and the West Florida Center for Trafficking Advocacy, Inc.

The Foundation would like to especially thank the event's Elite Sponsor, The Yerrid Foundation; Premier Sponsor, The Bank of Tampa; and Platinum Sponsor, Holland & Knight.

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## 2017 Law Day Membership Luncheon

HCBA held its annual Law Day luncheon on May 11 at the Hilton Tampa Downtown. At the luncheon, attendees enjoyed an update by featured speaker Jason Licht, the general manager of the Tampa Bay Buccaneers. The Association also presented its Liberty Bell Award to Dr. Erin Kimmerlee (read more about her courageous work in the Executive Director's Message on page 8). In addition, two outstanding members of our local law enforcement were recognized with HCBA's Law Enforcement Officers of the Year Awards: Deputy Kevin Smetana of the Hillsborough County Sheriff's Office and Master Police Officer Roy Paz of the Tampa Police Department. The Law Week Committee also celebrated the winners of the Law Week art contests, and the Thirteenth Judicial Circuit recognized four retiring judges by unveiling their official portraits.



The HCBA thanks its luncheon sponsor, The Bank of Tampa, for their support and involvement.



Visit [Facebook.com/HCBATampaBay](https://www.facebook.com/HCBATampaBay) to view additional photos from the Law Day Membership Luncheon.

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Congratulations to the 2017 Law Day Art Contest winners:

**HIGH SCHOOL**

- Third Place High School Winner:  
Peter Theobald, Jr. from Blake High School
- Second Place High School Winner:  
Pierre Francois Mont from Blake High School
- First Place High School Winner:  
Taylor Fetuga from Blake High School

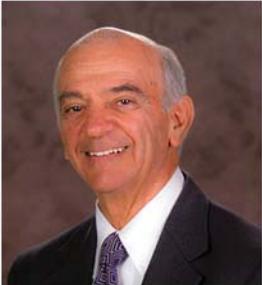
**MIDDLE SCHOOL**

- Third Place Middle School Winner:  
Preston Wood from Orange Grove Middle School
- Second Place Middle School Winner: Evan Gatscher from Orange Grove Middle School
- First Place Middle School Winner(s):  
Malik Cuyler, Aaliya Fulks, and Annibelle Tjio, from Williams Middle Magnet



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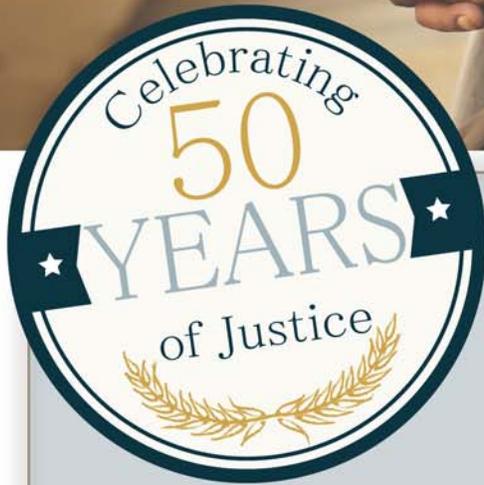
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6:00 p.m.

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## TECHNOLOGY AND DIVERSITY – CLOSING THE GENERATIONAL GAP

Diversity Committee

Co-Chairs: Timothy C. Martin - Martin Law Office; and Victoria Oguntoye - Buchanan Ingersoll & Rooney



does technology have to do with diversity?” Keynote speaker Shannon Kelly, Esq. explained how generational diversity greatly impacts our approach to

technology in the legal field, as well as our ability to relate to one another. Kelly highlighted those differences with examples of generational communication styles. A member of the traditionalist generation would say, “write me,” a boomer would say “call me,” an Xer would say “email me,” and a millennial would say “text me.” These

**Technology changes so quickly that many of us are left behind.**

phrases capture the essence of our generational communication styles and what makes us comfortable. Striving to understand these differences will

improve communication among the generations and will enable your firm to move forward with confidence.

Technology changes so quickly that many of us are left behind. Especially those of us who did not grow up with a smart phone or laptop. Many attorneys are

*Continued on page 43*

**T**he Diversity Committee recently hosted *Technically Speaking: Boomers, Xers, and Millennials – Generational Diversity and Legal Technology Competence*, a keynote address and panel discussion focusing on technology uses and concerns. You might be thinking, “What



(Above) Keynote speaker Shannon Kelly started the Diversity CLE with an overview presentation on generational diversity. (Right) Diversity Committee co-chairs Victoria Oguntoye and Timothy Martin (on ends) with the CLE speaker and panelists (l to r), Shannon Kelly, Dario Diaz, Hon. Claudia Isom and Lisa Shasteen.



*Continued from page 42*

comfortable practicing the old-fashioned way, with real highlighters, printed reams of paper, and handwritten notes. Embracing new ways can be scary and force us out of our comfort zones, but society demands it of us. Our clients also are demanding that we acquiesce to the technology available to us, or we risk losing them.

As we all now know, the Florida Supreme Court has approved a three-hour CLE increase to the three-year reporting cycle, which must be devoted to technology. We know technology is a fast-paced field that demands our attention if we plan to keep up with the world around us. There are more lawyers

than ever before in Florida, and the rise of the online, do-it-yourself legal forms increases competition. We know those form databases cannot compete with the advice and experience of a lawyer, but the traditional ways of practice will leave us at a disadvantage.

The panel discussion highlighted many common technology concerns in the practice of law. The panelists — the Honorable Claudia Rickert Isom, Lisa Shasteen, Esq., Dario Diaz, Esq., and Victoria Oguntoye, Esq. — offered their generational views on technology and some expert tips. Attendees learned how common it is for a law firm to succumb to data breaches and ransomware. Some key tips from the panelists were to use strong passwords, do a risk

assessment, and consult with someone skilled in cybersecurity to ensure your data and your client's data are protected.

Technology can make the practice of law more efficient than ever before, as long as we implement the right software for the job and secure the data. If we embrace technology, no matter our age or years of practice, we can employ it to do the automated work

while leaving the important judgment calls to the lawyer.



*Author:  
Marsha M.  
Moses - Mechanik  
Nuccio Hearne  
& Wester, P.A.*

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## THE BASICS OF STEM CELL THERAPY REGULATION

Health Care Law Section

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



**Some call for strict regulation through bodies such as FDA, while others argue strict regulation will only curtail the benefits stem cell therapies can impart.**



In recent years, clinics offering regenerative therapies (sometimes referred to as stem cell clinics) have proliferated in the United States. Now that the treatments are being offered much more widely, the Food and Drug Administration (FDA) has become increasingly aggressive in its regulation of stem cell therapies, with regulations that generally call for the same rigorous testing procedures currently required for drugs and devices.

Last September, the FDA held public hearings to address industry and stakeholder concerns regarding four draft guidance documents detailing the FDA's interpretation of stem cell regulations. Doctors, business owners, academics, and patients spoke at the two-day event and weighed in on what they think needs to change.

Currently, how a clinic or other provider of regenerative medicine therapies is regulated depends on what services that establishment offers. Some may be exempted entirely, some may be subject to the infectious disease controls, and others may be required to seek FDA approval.

To understand what services an establishment offers, three concepts are important. First, stem cells are either autologous, meaning that they come from the same individual, or allogenic,

meaning that they come from a different individual. Second, stem cells may be used for a homologous purpose or a nonhomologous purpose. A homologous use or purpose is one where the stem cells are used for the same type or purpose as the origin of that particular stem cell. Thus, a homologous use for a stem cell obtained from the bone marrow would be for a blood or hematological condition. A nonhomologous use would be for any other use or purpose. Using umbilical cord blood stem cells to treat a disease such as multiple sclerosis or ALS would be a nonhomologous use. Third, stem cells may be "more than minimally manipulated," which means the cells have been changed or altered in a significant way. With these three concepts in mind, let's turn to the regulations.

FDA regulations establish two broad categories for what it terms human cells, tissues, and cellular and tissue-based products (HCT/Ps). HCT/Ps that fall under a part of the rule known as section 361 are self-derived (autologous), minimally manipulated, and used in a homologous manner. They do not need an Investigational New Drug (IND) approval. Other HCT/Ps are governed by section 351. Section 351 products are those that are more than minimally

manipulated or ones that are used in a nonhomologous manner. These products are considered indistinguishable from drugs and must undergo a rigorous regulatory process, including an IND, preclinical safety studies, clinical trials, and marketing approval before being given to patients. This is a very big deal in terms of time, expense, and volume of paperwork.

Issues remain regarding how best to regulate the use of stem cell therapies. Some call for strict regulation through bodies such as the FDA, while others argue strict regulation will only curtail the benefits stem cell therapies can impart. But, regulations that are too lenient, it is argued, will only harm the patient seeking the therapy, as a solid evidence base will not yet have been compiled for the therapy. Finding a regulatory middle ground for unproven stem cell therapies is going to be a challenge, and undoubtedly, much more discussion will ensue as this field moves forward.

Legal counsel representing regenerative medicine companies should continue to monitor these rules for any changes that affect or improve stem cell therapy opportunities.

*Author: Thomas (T.J.) Ferrante -  
Foley & Lardner, LLP*



## Health Care Law Luncheon/CLE

On April 26, the Health Care Law Section received an informative CLE by Mike Magidson with Johnson Pope Bokor Ruppel & Burns LLP on the topic of "Lessons Learned in Representing Physicians and Other Part B Providers."

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**M**aking your client special means more than great client experience for patent attorneys; it means providing clients with an advantage when taking on a common enemy in the patent application process: time. The aptly named Petition to Make Special,<sup>1</sup> which is a valuable tool for attorneys with clients eager to press through the USPTO, allows patent applicants over the age of 65 to expedite applications.

For Tampa Bay practitioners, the Petition to Make Special takes on added significance because the Tampa-St. Petersburg area represents the “most aged [metropolitan] place”<sup>2</sup> out of the United States’ 53 largest metropolitan areas. With 18.7 percent of the Tampa-St. Petersburg population over 65, nearly one in five would-be inventors can use the Petition to Make Special.<sup>3</sup>

In the case of Nick Brestoff, the Founder of Intrapexion — the “Minority Report of Litigation,”<sup>4</sup> the Petition to Make Special was likely a contributing factor in moving his company’s patent application (U.S. Patent Application No. 15/277,458) through the USTPO in less than three months to a first Office action. The average time for first Office action for the same

class/subclass is nine months,<sup>5</sup> meaning Brestoff moved from application to approval in less than a third of the time for similar applications.

For patent attorneys, the approval of Intrapexion’s software-based patent, “Using Classified Text and Deep Learning Algorithms to Identify Risk and Provide Early Warning” (U.S. Patent No. 9,552,548), also lends other insights in the wake of *Enfish, LLC v Microsoft Corp.*, and *Bascom Global Internet Servs. v. AT&T Mobility*, in which articulating an “inventive concept”<sup>6</sup> emerged as a ray of hope against potential 35 U.S.C. § 101 challenges. In *Bascom*, the court provided that, “an inventive concept can be found in the non-conventional and non-generic arrangement of known, conventional pieces.”<sup>7</sup>

While Intrapexion uses “conventional pieces,” such as Deep Learning Algorithms and reading facts from prior cases to identify common phraseology for particular lawsuits, it’s quite non-conventional, and arguably inventive, to train an artificial intelligence system to find key words relating to specific case types, install that system locally on a company computer or in the cloud, and then leverage the system to read millions of internal communications to locate phrasing

**Don't be afraid to ask your client's age, if you're interested in making your client special.**

representing high risks of potential lawsuits.

The key takeaways for Tampa Bay practitioners? Keep an eye out for opinions on the inventive concept. And don't be afraid to ask your client's age, if you're interested in making your client special!

<sup>1</sup> 37 CFR 1.102(c)(1). *See also* M.P.E.P § 708.02,

Section II.

<sup>2</sup> Joel Kotkin, *America's Senior Moment: The Most Rapidly Aging Cities*, *Forbes* (Feb 16, 2016), <https://www.forbes.com/sites/joelkotkin/2016/02/16/americas-senior-moment-the-most-rapidly-aging-cities/#28d238d653e5>.

<sup>3</sup> *Id.*

<sup>4</sup> Jeff Cox, *AI for Legal Ops and Corporate Counsel - The First Wave*, ACC Legal Ops Observer (March 2017), available at <http://newsmanager.commpartners.com/accalegal/issues/2017-02-01.html#2>.

<sup>5</sup> First Office Action Estimator, United States Patent and Trademark Office (last accessed Apr. 11, 2017), [https://www.uspto.gov/cgi-bin/fao\\_calc/fao\\_calc.pl?class=706&](https://www.uspto.gov/cgi-bin/fao_calc/fao_calc.pl?class=706&)

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<sup>6</sup> *Bascom*, 827 F.3d at 1349.

<sup>7</sup> *Id.* at 1350.

*Author:*  
Jeff Cox, Esq.



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## PROCEDURAL PITFALLS TO AVOID!

Marital & Family Law Section

Chair: Jill Lowe - Jill G. Lowe P.A.



**H**ere are four procedural pitfalls you can easily avoid to keep yourself out of hot water with the court and your clients.

First, when you appear as new counsel in a case, you should file your notice of appearance before or at the same time you file your first pleading (or paper), or wait until the order granting substitution of counsel has been entered by the court before filing any pleading (or paper). Pre-appearance filings by new counsel are nullities, and any orders entered on pre-appearance filings are void. *Pasco Cnty. v. Quail Hollow Props., Inc.*, 693 So. 2d 82, 84 (Fla. 2d DCA 1997) (“We thus construe Florida Rule of Judicial Administration 2.060(j) [a predecessor to Rule 2.505] as requiring a notice of appearance to be filed before or contemporaneously with the initial pleading that the additional attorney files.”); *Thomas v. State*, 884 So. 2d 309, 311 (Fla. 2d DCA 2004) (holding that “trial court correctly declared the two motions to withdraw plea to be nullities because they were not filed by an attorney of record” and explaining that Florida Rule of Judicial Administration 2.060(h) “sets forth the requirements for attorneys who

wish to appear in all legal proceedings”). If you have an emergency situation and cannot wait for an order granting substitution of counsel, file a notice of appearance so that any motion or pleading is an authorized filing and any order based on that filing is valid.

Second, if you discover new evidence after the final judgment but before the time to move for rehearing expires, you must file a timely motion for rehearing under Rule 1.530/12.530 to preserve the trial court’s jurisdiction to review that newly discovered evidence; moving to set aside the final judgment under Rule 1.540/12.540 based on this newly evidence is improper. *Belk v. McKaveney*, 903 So. 2d 337, 338 (Fla. 2d DCA 2005).

Third, filing a notice of cross-notice is not jurisdictional; however, if you file your notice of cross-appeal ten days after the notice of appeal or thirty days after the rendition of the order on appeal, you should file a motion with the appellate court to accept the cross-appeal as timely or you risk having your cross-appeal dismissed. *Wilkinson v. Wilkinson*,



**Pre-appearance filings by new counsel are nullities, and any orders entered on pre-appearance filings are void.**

203 So. 3d 186 (Fla. 5th DCA 2016) (dismissing *sua sponte* cross-appeal filed a few days after the filing deadline because cross-appellant failed to seek leave of appellate court to accept cross-appeal as timely).

Fourth, if you are going to have a marital settlement agreement read into the record at the final hearing, make sure the parties are in attendance

so that the judge can (1) obtain clear and unequivocal assent to the MSA from each party under oath on the record, and (2) confirm that the parties have discussed the MSA with their attorney and fully understand its terms. Having counsel read a MSA on the record with opposing counsel agreeing the terms read properly reflect the agreed-upon MSA terms is inadequate to form an enforceable MSA. *Richardson v. Knight*, 197 So. 3d 143, 144-45 (Fla. 4th DCA 2016).



*Author:*  
Allison M. Perry  
- Florida Appeals  
& Mediations,  
P.A.

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## Marital & Family Law Luncheon

On April 6, Kristin Kirkner with Kirkner Family Law Group, P.A. gave an informative presentation to the Marital & Family Law Section on the topic of “Military Issues in Family Law: Changes and Dangers You Need to Know.”

The section would like to thank its luncheon sponsor:



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## REFLECTIONS UPON SERVICE – AN MVACer’s PERSPECTIVE

Military & Veterans Affairs Committee

Co-Chairs: Matt Hall – Hill Ward Henderson; and Colleen O’Brien – Thirteenth Judicial Circuit



**T**wenty years ago, I graduated from the U.S. Military Academy at West Point and served as a field artillery lieutenant in Germany. There, I had the pleasure of leading troops. Times were interesting because it was after the Cold War but before September 11. I learned a lot about myself and about people. It was great leading young soldiers. Yet, I felt the desire to do something different. Joining the Army Judge Advocate General (JAG) Corps was one of the best decisions I’ve made.

As a JAG, I greatly enjoyed serving our nation. It was fulfilling to handle a wide variety of legal issues, from regulatory compliance to literal life and death matters. My greatest enjoyment was always helping military commanders resolve problems so they could focus on their mission. It was truly an amazing journey.

But everyone must leave military service sometime. It was quite daunting and difficult to leave all that I have known. I feared a cutthroat world where people only care about billable hours. Thankfully, a mentor introduced me to a senior jurist and fellow veteran, who said I needed to join the HCBA. He also said that the MVAC would be a good place for me to start.

I entered my first meeting wondering how people would react

**I entered my first meeting wondering how people would react to me. They welcomed me with open arms.**



(Above) MVAC team won the first-place team award in the recent HCBA 5K Pro Bono River Run in March. (Left) MVAC members participating in a Veterans Stand-Down event in April 2016.

to me. They welcomed me with open arms. Then HCBA President Ben Hill IV sat next to me at my first lunch CLE. There, I also met future MVAC chair, Matt Hall. So many members of the HCBA have helped me. So many that it is hard to count. Then, the HCBA went further by bringing me into the Bar Leadership Institute.

I found a home in MVAC, and it has been amazing watching what the committee has done. The quantity of meetings and attendance may be higher, but the real metric is the quality of work that is being done. In addition to the Veterans Legal Assistance Registry, we proliferated service to the veteran community. Members are involved in veteran stand-down days. The Veterans Treatment Court thrives. We have increased networking, education, and service. Thankfully, there has also been an increase in mentoring, which is vital to military in transitions.

The greater HCBA has shown me significant promise too. I see

thousands of members who care about our community. We use our education to help our clients and neighbors. The Pig Roast and 5K showcase our camaraderie. We engage in healthy competition where the ultimate goal is to use our legal skills to care for the less fortunate.

I have come to realize that service has many components. I have spent the last twenty years serving our nation through military service. I now see service at all levels that focuses on our community. It is an honor to be transitioning to civilian service here. I look forward to a change

of season in my life, where I will continue to serve others with my fellow members of the HCBA.



*Author:*  
Steve Berlin -  
U.S. Army

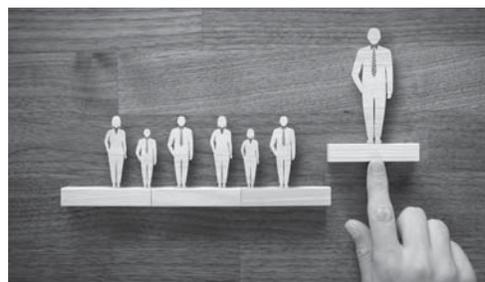
## PROFESSIONALISM FOR APPELLATE ATTORNEYS

Professionalism & Ethics Committee

Chairs: Joan Boles - Bay Area Legal Services; and Lynn Hanshaw - Langford & Myers, P.A.



**Appellate attorneys  
are held to a higher  
standard of  
professionalism.**



**A**ppellate attorneys are held to a higher standard of professionalism. In *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 569 (Fla. 2005), the Florida Supreme Court explained that appellate counsel has an independent ethical obligation that “will sometimes require appellate counsel to concede error” even though the “the trial counsel obtained a favorable result.” The Court further stated that regardless of a trial counsel’s conduct or representations, appellate counsel “has an independent ethical obligation to present both the facts and the applicable law accurately and forthrightly.” *Id.* So it is possible for attorneys representing appellees to be sanctioned for defending a trial court’s order.

Also, appellate attorneys are not excused from responding to a show cause order to show why an initial brief has not been filed by simply voluntarily dismissing an appeal. *Nocari Inv., LLC v. Wells Fargo Bank, N.A.*, 206 So. 3d 761 (Fla. 3d DCA 2016). In *Nocari Investment*, the Third District Court of Appeal sanctioned an appellate attorney who acknowledged he should have responded to a show

cause order, but protested that his failure to do so was an oversight. The court held that counsel’s explanation was inadequate. *Id.* at 762. Notably, the appellate court did not address or mention the Florida Supreme Court’s decision in *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993), which requires a trial court to consider “whether the attorney’s disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience.” As a sanction, the Third DCA referred the attorney to the Eleventh Circuit Court’s Professionalism Panel.

In *Beckles v. Brit*, 176 So. 3d 387 (Fla. 3d DCA 2015), the Third DCA imposed the same sanction for an attorney’s failure to submit an initial brief even though his client was left without resources to prosecute the appeal.

As other examples of this higher standard, appellate courts have sanctioned appellate attorneys for not informing the court of two other pending proceedings challenging the same order, *O’Connor v. Indian River County Fire Rescue*, 197 So. 3d 156, 159 (Fla. 1st DCA 2016); for appealing a temporary injunction entered at

a hearing the appellate attorney had scheduled but failed to appear at, *Maestrales v. Flaherty*, 183 So. 3d 1036 (Fla. 5th DCA 2015); for failing to timely respond to show cause orders and not having “a reliable address,” *Belkova v. Russo*, 181 So. 3d 1241, 1243 (Fla. 5th DCA 2015); for raising issues which had previously been decided in an earlier appeal, *In re A.T.H.*, 180 So. 3d 1212, 1215-16 (Fla. 1st DCA 2015); for arguing issues that were not preserved for appeal, contrary to law of the case, and not reviewable due to lack of a hearing transcript of hearing, *Cosner v. Park*, 178 So. 3d 964, 964-65 (Fla. 4th DCA 2015); for cavalier responses to show cause orders and filing numerous motions for extensions of time, *Cooper v. State*, 174 So. 3d 554, 556-57 (Fla. 2d DCA 2015); and for filing a baseless motion for

extension of lis pendens, *Massa v. McNutt*, 172 So. 3d 516, 516 (Fla. 5th DCA 2015).

*Author: Randall Reder - Randall O. Reder, PA*



**Learn more about the 13th Circuit Professionalism Panel at [hillsbar.com](http://hillsbar.com).**

## HOLDOVER TENANTS: MANAGING END OF LEASE LIABILITY

Real Property Probate & Trust Section

Co-Chairs: Kristin Morris – Shutts & Bowen; and Anthony Diecidue – Genders Alvarez Diecidue



**Sometimes the most peaceful landlord/tenant relationships lead to the largest holdover liability.**



The end of the lease term may be the last thing on your client's mind when negotiating a commercial lease, but standard holdover provisions that double, or otherwise increase, rent for holdover tenants can create substantial liability for tenants, as well as headaches for landlords.

Section 83.06, Florida Statutes, gives a landlord a statutory right to demand double rent as a penalty if a tenant refuses to surrender possession at the end of the lease term. In *Lincoln Oldsmobile, Inc. v. Branch*, 574 So. 2d 1111, 1113 (Fla. 2d DCA 1990), the Second DCA affirmed that notice was required before a tenant could become liable for double rent under section 83.06.

But *Lincoln Oldsmobile* only applies to a demand for double rent as a penalty under section 83.06. Commercial leases with terms lasting for more than a few years almost universally provide for an automatic increase in rent over the term of the lease, and frequently provide for an additional automatic increase or a penalty rental rate for the holdover tenant. *Lincoln Oldsmobile* does not address

automatic increases that are built into the lease.

Section 83.06 is not a bar on the parties setting their own lease terms to govern holdover: "The character, terms, and conditions of a holding over may be governed by an express provision in the original lease." *Rosamond v. Mann*, 80 So. 2d 317, 319 (Fla. 1955) (quoting 32 Am. Jur. *Landlord & Tenant* § 948).

So what happens when a tenant holds over after the expiration of the lease term, sometimes for years? Take a hypothetical lease that provides for an annual increase in rent at a set rate for each year of a ten-year term. Our hypothetical lease further provides for an automatic 25 percent increase in rent if the tenant holds over. Is the automatic increase a penalty that requires notice or is it an increase in rent that the tenant is automatically liable for without notice from the landlord? Case law does not provide a standard to determine when an automatic increase becomes a penalty and therefore subject to the statutory notice requirements.

Further, the tenant cannot rely on landlord's acceptance of the

tendered amount as a defense to liability for the increase. See *Tropical Attractions, Inc. v. Coppinger*, 187 So. 2d 395, 396 (Fla. 3d DCA 1966). Most leases provide that acceptance of partial payment does not constitute waiver of all amounts due under the lease.

When negotiating, drafting, and litigating rent due from a holdover tenant, parties need to consider whether the lease language provides a penalty for a holdover tenant or merely an automatic increase. Because this issue can arise after a tenant has held over for a long period of time, sometimes the most peaceful landlord/tenant relationships lead to the largest holdover liability. Ultimately, signing a lease renewal with defined rent terms is a tenant's best defense, and a landlord will be best positioned if they give notice of any rent increases — even automatic increases built into the lease.



*Author:*  
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## RPPTL Luncheon/CLE

David W. Morgan from Fidelity National Title Insurance Company spoke on May 15 to the Real Property, Probate & Trust Law Section regarding the Fourth Revised Mutual Indemnification Agreement. During the CLE, he covered what an indemnification is, types of indemnity, conditions precedent & limitations of the treaty, and matters covered by the treaty.

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**The *Stein* case highlights the challenges defendants face when the government advances speculative loss theories in fraud cases.**



The Eleventh Circuit recently vacated and remanded the sentence of Mitchell J. Stein, who was convicted on securities fraud and related crimes stemming from charges he fraudulently inflated the stock price of Signalife by issuing phony press releases and purchase orders. The district court originally imposed 204 months' imprisonment and over \$13 million in restitution under the Mandatory Victims Restitution Act of 1996 ("MVRA"). The Eleventh Circuit held it was error to conclude that more than 2,000 investors relied on the defendant's fraud when "the only evidence supporting this finding was the testimony of two individuals that they relied on Mr. Stein's false press releases and generalized evidence that some investors may rely on some public information." *United States v. Stein*, 846 F.3d 1135, 1140 (11th Cir. 2017). The *Stein* case highlights the challenges defendants face when the government advances speculative loss theories in fraud cases.

In criminal cases, the court's "loss" computation impacts both defendants and victims. The court's first step is to calculate the U.S. Sentencing Guidelines' range, which is merely advisory but drives the discussion at sentencing. Loss

computed under § 2B1.1 of the U.S. Sentencing Guidelines is the most significant guideline factor in these cases. With several exceptions, the guideline range in a securities fraud case will be determined by the greater of "actual loss" or "intended loss." "Actual loss" is the "reasonably foreseeable pecuniary harm that resulted from the offense." U.S. Sentencing Guidelines Manual § 2B1.1 cmt. n.3(A). Although § 2B1.1 contains guidance on how to compute loss in cases involving the fraudulent inflation of a security, there is no bright-line rule. *Id.* at cmt. n.3(F)(ix). In certain situations, the court can use gain as an alternative to loss for guidelines purposes.

The Eleventh Circuit recognizes that actual loss and restitution under the MVRA are computed in similar ways. Thus, restitution ordered to victims often tracks actual loss. The court may make a "reasonable estimate of the loss." But the court "cannot 'speculate about the existence of facts and must base its estimate on reliable and specific evidence.'" *Stein*, 846 F.3d at 1152. Moreover, the government must prove both "but-for" and proximate causation. *Id.* at 1153.

Mr. Stein argued that the government failed to prove either "but-for" causation (that over 2,000

investors relied on his fraudulent information) or proximate causation (that the loss could be attributed to other factors). The Eleventh Circuit agreed, instructing that on remand the government would have to prove reliance with direct evidence from each investor or with "specific circumstantial evidence," from which the court could reasonably conclude that all investors relied. *Id.* at 1153-54 (declining to adopt the civil proximate cause standard from *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005)). The Eleventh Circuit also held that when the defendant argues other market events contributed to the loss, the district court must find by a preponderance of evidence that the intervening events were reasonably foreseeable or otherwise subtract the financial impact of those events from the loss amount. *Id.* Only time will tell whether the government can prove actual loss under these

standards or whether they might rely on an alternative, such as gain.



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To learn more about writing an article for the *Lawyer* magazine, contact [stacy@hillsbar.com](mailto:stacy@hillsbar.com).



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# Trial & Litigation Section Awards Luncheon

The HCBA Trial & Litigation section presented its annual awards on May 4 at a luncheon at the Chester Ferguson Law Center. The recipients recognized with this year's awards were:

- **Herbert G. Goldberg Award:**  
James W. Clark
- **James Kynes "In the Trenches"  
Award:** Michael J. Peacock
- **Michael Fogarty "In the Trenches"  
Award:** Margaret D. Mathews
- **Court Family Award:** Laura Martin  
(J.A. to Judge Lemar Battles)
- **Annual Essay Scholarship**  
Contest Winner: Agata T. Kuzniar  
(winning essay is on page 65)

**Congratulations to the winners!**



## THE FEDERALIST SOCIETY

Senior Counsel Section

Co-Chairs: Thomas Newcomb Hyde, Attorney at Law; and David Rieth - Rieth & Ritchie, P.A.



In May, attorney Morgan Streetman, the president of the Tampa Bay Lawyers Chapter of the Federalist Society, spoke at the Senior Counsel Luncheon to over 30 people, including United States District Court Judge Elizabeth Kovachevich; Second District Court of Appeals Judges Edward LaRose and John Badalamenti; Hillsborough County Circuit Court Judges Edward Bergman and Bernard Silver; and County Court Judge Michael Williams.

The Federalist Society was founded in 1982 at the University of Chicago Law School and Yale Law School under the leadership of Professor Antonin Scalia at Chicago and Professor Robert Bork at Yale. Today, there is a Federalist Society Student Chapter at every law school in Florida. There are also Lawyers Chapters in Jacksonville, Miami, Orlando, Tallahassee, and here in Tampa Bay.

At the May Senior Counsel luncheon, Streetman discussed the organization and its history. The Federalist Society for Law and Public Policy is a group of conservatives and libertarians interested in the state of legal order in the United States. The Society is founded on three core principles: the state exists to preserve freedom; the separation of governmental

powers is central to our Constitution; and that it is emphatically the province and duty of the judiciary to say what the law is, not what the law should be.

The Federalist Society contends, as Streetman explained, that the American legal system is best understood in accordance with a textualist or originalist interpretation of the U.S. Constitution. Referring to the Federalist Society, Professor Samuel Issacharoff of New York University School of Law, said, “They believe that the text of the Constitution strictly limits what Congress and judges can do. So they embrace a whole series of doctrines that say Congress can’t do anything unless it’s specifically authorized in the Constitution. And then administrative agencies can’t do anything unless Congress has specifically authorized it by law.”<sup>1</sup>

Streetman quoted directly from “The Federalist No. 78,” written by Alexander Hamilton under the pseudonym “Publius,” to describe the legislative, executive, and judiciary powers as outlined in the U.S. Constitution:

“The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated.



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**“The judiciary has neither  
force nor will, but  
merely judgment.”**

**— Alexander Hamilton**

The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.”<sup>2</sup>

Thus, Hamilton explains that the judiciary has neither force nor will, but merely judgment.

The Tampa Bay Lawyers Chapter of the Federalist Society was founded in 1996. Their luncheons have featured speakers such as Supreme Court justices, professors of law, government attorneys, and other legal experts. One need not be a member to attend the luncheons. Additional information on the organization is available at: [www.fed-soc.org/chapters/detail/tampa-bay-lawyers-chapter](http://www.fed-soc.org/chapters/detail/tampa-bay-lawyers-chapter).

<sup>1</sup> The Conservative Pipeline to the Supreme Court,” Jeffrey Toobin, *The New Yorker*, Annals of the Law (April 17, 2017), available at <http://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court>.

<sup>2</sup> “The Federalist No. 78, The Judiciary Department,” Alexander Hamilton, *Independent Journal* (June 14, 1788), available at <http://www.constitution.org/fed/federa78.htm>.

*Author: Thomas Newcomb Hyde - Attorney at Law*

## YLD Paddleboard Their Way to Wellness

The YLD held their second annual Paddleboarding and Wellness CLE on April 1 at Urban Kai in downtown Tampa. The event included a two-hour program, in which local attorney Bruce Denson discussed professionalism and wellness and provided instruction on the mechanics of paddleboarding. Then the attendees jumped in (literally) to practice their paddleboarding skills.

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## Solo & Small Firm Section Luncheon/CLE

On May 16, the Solo and Small Firm Section held a very timely CLE on understanding and preventing cyber attacks & ransomware. The presenters, Robert Atherton and Felix Negron of Zymphony Technology Solutions and ThreatSHIELD Security, discussed the rise of ransomware and cyber attacks, how hackers attack, and their twelve recommended layers of security.



The section would like to thank its luncheon sponsor:



## GENDER BIAS IN THE LAW

Solo & Small Firm Section

Chair: Amanda Uliano – Law Office of Amanda Uliano, P.A.



**Sexual harassment, pay differences, and other gender-related offenses still exist in today's society, even in the legal arena.**



Lawyers live in modern times and theoretically conduct themselves in a civilized, professional manner. Nonetheless, in September 2016, the American Bar Association adopted a new anti-discrimination rule, Rule 8.4(g). The new rule provides, it is professional misconduct to:

*It is professional misconduct for a lawyer to: (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.*

What does it say about the legal profession that the governing body felt the need to create a rule specifi-

cally outlawing discriminatory or harassing conduct? Sexual harassment, pay differences, and other gender-related offenses still exist in today's society, even in the legal arena, which holds itself to a heightened standard of professionalism.

Last year, The Florida Bar's Young Lawyers Division released its findings from a 2015 YLD Survey on Women in the Legal Profession (see The Florida Bar news release dated February 26, 2016). The survey of over 400 female attorneys revealed many had suffered harassment and gender bias. This bias came from a variety of sources, including the court, opposing counsel, and even employers. Also, according to the survey, 21 percent indicated they were not paid fairly in comparison to male attorneys.

Both men and women should be aware of these issues. Both should

be open minded about subjects such as parenting, managing work expectations, and identifying biases when working together.

With the *ABA Journal* announcing in an article last spring that women may ultimately outnumber men attending law schools in 2017, times surely are changing (see *ABA Journal* online article March 16, 2016). One wonders if these women will face the same hurdles and struggles that their female predecessors experienced.

By drawing awareness to these issues, we can be mindful of them and hopefully eliminate them in the future.

*Author:  
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The University  
of Tampa*



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**In the end, what had  
terrified me  
became a blessing.**



**I**t was a very difficult decision for me. After law school, I took a job with a good firm, and 14 years later, I was still practicing with the same lawyers and doing the same and only legal job I had known. I was fortunate to become a full partner, and it was comfortable.

Then it happened. I started growing unhappy with my work. I loved my partners and the firm, but not my practice. I began to wonder if I hated my job, and I realized that I needed a change. As happens to many of us, I was burnt out. But I had a mortgage, car payments, and a wife and three kids — two of whom were three-month-old twins. I am not a risk taker, at least not with my family's finances. Leaving would mean abandoning the security and comfort of a stable income and everything I had known professionally.

I agonized over the decision for more than a year. Finally, I decided to believe in myself. And I made the change. After 14 years as a defense attorney, I left my firm and began representing plaintiffs. I “switched sides.” I

was terrified on the day I quit, but I knew there was no turning back and that I would not fail.

Now that I have settled in, I realize how much the change has breathed new life into my career. I have regained my passion for practicing law, especially for trying cases. In the end, what had terrified me became a blessing. My only regret is that I did not make a change sooner.

I'm not the only defense lawyer to make the change. It strikes me that I have yet to meet a plaintiff's lawyer who switched to the defense after becoming desperately unhappy. Why is that? Perhaps it has to do with how you feel when you help a person instead of fighting against them. There is no joy in saving an insurance company's money by fighting against a family who is hurting because they lost a loved one. In fact, there were many times I felt guilty for getting a “good result” for the defense.

Not only does helping people make me happy, but I am no longer doing work I dreaded. No billable hours, no reports and

summaries due under arbitrary deadlines, no insurance companies cutting my bills for no reason but my phrasing, and most importantly no thankless victories.

In one short year in my new life, I have already been able to help so many people, and I wake up every morning happy and fulfilled. I have met such amazing people at my new firm, many of whom have become my close friends. They are great people and great lawyers, and I wish I had gotten to know them earlier in my career.

I am now exactly where I always wanted to be in my life, personally and professionally. I am so thankful to have found my true calling in helping people. If you are unhappy in your work, I encourage you to take the chance

and make the switch because it may well be the best thing you ever do.



*Author:  
Brandon R.  
Scheele - Morgan  
& Morgan*

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## THE IMPORTANCE OF JURY TRIALS TO AMERICAN JURISPRUDENCE

Trial & Litigation Section - Annual Student Jury Essay Contest Winning Essay

Chair: Caroline Johnson Levine - Office of Attorney General

**Jury trials are important because they provide the American people the protections that citizens of other countries lack.**



*The following is the winning essay from the HCBA Trial & Litigation Section's annual student jury essay contest. Congratulations to Agata Kuzniar for the winning submission.*

I believe that jury trials are important to American Jurisprudence because they provide the means through which a true democracy can be expressed. While many countries have a democratic legal system, the outcome of cases is decided by judges who are also triers of facts. At first glance, such legal systems appear democratic in nature. Nonetheless, the idea of true democracy is for the voices of citizens to be heard. In order for this to occur, citizens must be provided with the ability to participate in the decision-making process rather than allocating all of the power in an elite group of individuals. Jury trials are a crucial component of a true and well-functioning democracy.

As a current law student born and raised in Poland, I became fascinated with the American legal system. Poland, like most

European countries, follows civil law. Polish citizens do not have the right to ask for a jury of their own peers, and there is no presumption of innocence until proven guilty. I have always admired the American legal system for providing its citizens with the opportunity to fight for their rights. The American legal system is the reason why I decided to follow my dreams to study law in America. To this day I still feel assurance and pride when I read the Bill of Rights as it is unimaginable to me to lack the basic rights protected by such a document. Sadly, many people outside of America are not afforded such protections. Thus, jury trials are important because they provide the American people the protections that citizens of other countries lack.

The U.S. Constitution is a unique document that many countries should envy and the American citizens should be proud of. It represents the Founding Fathers' idea of constructing a document that protects individual liberties and creates an effective government. The only way for such

ideas to work is for the citizens to have the ability to be an active voice in the governing process by not only casting a vote, but also by actively participating in the decision-making process. Non-jury trials would be contrary to the idea of a well-balanced democratic government that the Constitution is meant to create. Moreover, jury trials prevent tyranny by not placing decision-making power in the hands of very few individuals, such as judges and lawyers. Hence, jury trials provide citizens with the opportunity to be a part of a true democratic governing process. In addition, jury trials increase the public's confidence in the appearance of justice and provide for the more open and accountable institution that the public desires the judicial system to be. Consequently, jury trials are a crucial component of a well-functioning democracy because they provide the means through which a true democracy can be expressed.

*Author: Agata T. Kuzniar - Stetson University College of Law (Candidate for Juris Doctor 2019)*

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## Labor & Employment Law Section Luncheon/CLE

On April 3, the U.S. Equal Employment Opportunity Commission Miami District Office Director Mike Farrell provided a detailed discussion to the Labor & Employment Law Section on the EEOC's New Strategic Enforcement Plan and the priority issues identified in the Plan for the next five years. He also discussed local priority issues that are of particular interest to employers and employees in Florida.



The section would like to thank its luncheon sponsor:



## Pirate Plunder Party

The HCBA Community Services Committee held their fourth annual Pirate Plunder Party on May 6 at A Kid's Place of Tampa Bay. Volunteers and the committee members organized a variety of great games and activities for the kids, including a photo booth, face painting, balloon artist, petting zoo, bouncy house and DJ, and provided great food, toys and decorations to make the event festive. The Community Services Committee is grateful to the many sponsors and volunteers that helped make this event possible for the deserving children at A Kid's Place.



## SHIFTY BURDENS, TRIGGERING EVENTS & TWO-TIERED ANALYSIS

Workers' Compensation Section

Co-Chairs: Anthony V. Cortese - Attorney at Law; and Don Bennett - Banker Lopez Gassler P.A.



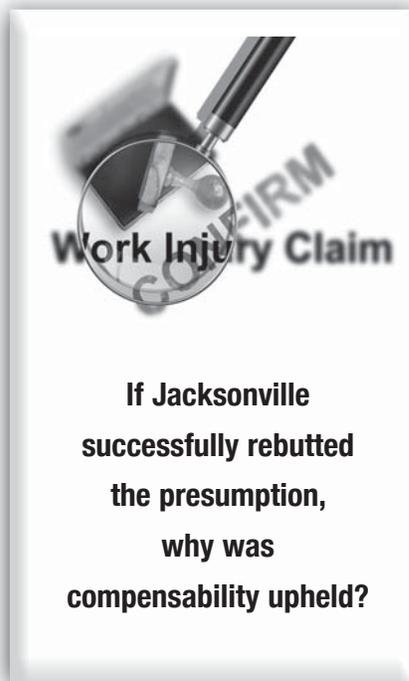
**O**n April 13, 2017, the First District Court of Appeal decided *City of Jacksonville v. Ratliff*, 2017 WL 1371508 (Fla. 1st DCA Apr. 13, 2017), which deserves a detailed review by all workers' compensation practitioners for four reasons. First, the opinion provides a detailed analysis and history of the "Heart and Lung presumption" set forth in section 112.18, Florida Statutes. Second, the opinion explains the varied and complicated burdens of proof that apply in workers' compensation cases. Third, it applies the multiple burdens of proof as they shift in presumption claims (and all occupational disease claims). Fourth, the court addresses "triggering events" for cardiac claims, and again explains how burdens of proof shift for claims based on triggering of a pre-existing, dormant condition.

Ratliff, a firefighter for 26 years, suffered a myocardial infarction (MI) at work during an "extremely stressful" meeting. His employer initially authorized treatment by a cardiologist, who noted a pre-existing history of diabetes, high cholesterol, smoking, and a family history of early onset coronary artery disease (CAD). According to the cardiologist, the history

of diabetes, smoking, and CAD (known as "risk factors") had risen to the level of causative factors for the claimant's CAD and MI and were unrelated to his work. Thus, the employer denied the claim.

So the claimant brought a "pure presumption" claim under section 112.18, Florida Statutes. That is, he established the four elements required under the statute, but he offered no actual medical evidence of occupational causation for his CAD or MI. His independent medical examination (IME) physician acknowledged the pre-existing risk factors, although he opined that no one could identify, with any degree of medical certainty, which risk factors *caused* the MI or CAD. The employer agreed that the claimant had established the "heart-lung" presumption; however, it argued the presumption was rebutted through the treating cardiologist's testimony. The Judge of Compensation Claims disagreed and awarded compensability.

In affirming the JCC order, the First DCA noted that because the claimant brought a presumption-only claim (i.e., pure presumption), the employer's burden on rebuttal was to provide "competent



evidence" that the disease was not work-related. The First DCA made clear that the major contributing cause burden, found elsewhere in Chapter 440, did not apply. Because the employer offered testimony by the claimant's IME that causation was unknown, as well as testimony by the treating

cardiologist that the cause was pre-existing and non-occupational, the First DCA held the employer met this burden.

So if Jacksonville successfully rebutted the presumption, why was compensability upheld? Well, the First DCA explained its reasoning in 19 pages and this column is limited to 500 words, so do read the opinion. But the answer lies in the "necessity of application of a two-tiered rebuttal analysis" when heart disease results from a combination of an underlying condition with a "triggering event," such as the

extremely stressful meeting underpinning the *Ratliff* claim.



*Author: Gray Sanders – Barbas, Nunez, Sanders, Butler & Housepian*

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**Desperately Seeking Black's Law Dictionary, 3rd Edition,** published in 1933. We are seeking my father's misplaced copy. It may have a black or navy cover. His name would be noted inside - Arthur Parker. He graduated in 1949 from UF Law School. His dictionary holds tremendous sentimental value to his grandson, now a practicing attorney. If it's on your shelf, please notify us at Mbmutarelli1953@cox.net.

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**For the Month of** February 2017

**Judge:** Hon. Declan Mansfield

**Parties:** Kathleen Ruiz v. Donald Willey and Lawrence Seigel, M.D.

**Attorneys:** for plaintiff: Christopher Boyd; and for defendant: Matthew Mudano and Tawna Schilling

**Nature of Case:** Rear-end motor vehicle case resulting in \$190,000 in medical bills and C5-6 cervical fusion surgery. Plaintiff sought \$700,000 in damages.

**Verdict:** Jury awarded \$20,335.61 in past medicals. No permanency caused by the accident. Defendant's Motion for Attorney's Fees and Costs pending.

**For the Month of** June 2017

**Judge:** Hon. Paul L. Huey

**Parties:** Mary Lima, as personal representative of the Estate of Johnny Lima, v. R.J. Reynolds Tobacco Company and Philip Morris-USA, Inc.

**Attorneys:** for plaintiff: Steve Yerrid, Scott Schlesinger, Steven Hammer, Jonathan Gadanski, Brittany Chambers, Celene H. Humphries, Maegen P. Luka, Thomas J. Seider; and for defendant: Mark A. Belasek, Denis L. Murphy, Joyce D. McKinnis, Paul Reichert, Stephanie E. Parker, Troy A. Fuhrman, Bruce R. Tepikian, Lindsey K. Heinz, Terri L. Parker, Cathy A. Kamm and Razvan Axente

**Nature of Case:** Engle Progeny Case

**Verdict:** \$3 million compensatory (60% negligence on RJ Reynolds Tobacco Company, 40% on plaintiff — \$1.8 million post reduction); \$12 million punitive damages.

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**Ceci Berman** - Ceci Berman of **Brannock & Humphries** was listed in *TAMPA Magazine* as voted number one in appellate practice by her fellow Tampa Bay lawyers.

**Steven L. Brannock** - Steven L. Brannock of **Brannock & Humphries** recently presented at The Florida Bar's City, County and Local Government Law Section on "What Lies Beneath? Latent Defects in Pipe Construction: A 6-year Story of Construction Litigation Told from the Trenches."

**Karen M. Buesing** - Tampa attorney Karen Buesing has been appointed to a three-year term on the board of The Florida Bar Foundation, a statewide charitable organization with the mission of providing greater access to justice. Buesing has also been appointed to the board of **Metropolitan Ministries**. A partner with **Akerman LLP**, Buesing has counseled and represented management in employment law matters for more than 30 years.

**Katherine E. "Katie" Cole - Hill Ward Henderson** is pleased to announce the appointment of Katherine E. "Katie" Cole to the St. Petersburg College District Board of Trustees. Governor Rick Scott appointed Cole to fill a vacant seat, beginning her term March 24.

**Victoria Cruz-Garcia - Givens Givens Sparks'** attorney, Victoria Cruz-Garcia, attended the Schreck Moot Court Competition at the University of Nevada at Las Vegas Boyd School of Law with a group of Western Michigan Cooley Law School students who were competing in the second annual event. An adjunct professor

with the Cooley Law School, Cruz-Garcia was one of two coaches for the students participating in this year's competition, which hosted law students from around the country in April.

**Landis "Lance" Curry - Hill Ward Henderson** shareholder Landis V. "Lance" Curry, III was recently appointed chair of the Appellate Court Rules Committee effective July 1. He was appointed to this position by The Florida Bar President-Elect, Michael J. Higer.

**Christopher M. Delp - Shumaker, Loop & Kendrick, LLP**, is pleased to announce that Tampa associate Christopher M. Delp spoke at the Sarasota Manatee Manufacturers' Association meeting on March 15. Delp discussed "Going Solar: Legal Considerations for Industrial Power Users."

**Irene Bassel Frick - Akerman LLP** appointed Irene Bassel Frick as office managing partner of the Tampa office. She will continue serving clients through her litigation practice, while guiding the firm's strategic growth in the local market.

**Matthew Hall** - Attorney Matthew F. Hall of **Hill Ward Henderson** was recently appointed vice chair of the Federal Court Practice Committee effective July 1. He was appointed to this position by The Florida Bar President-Elect Michael J. Higer. The committee serves as the Bar's liaison to the federal courts, federal bar organizations in Florida, the Eleventh Circuit Judicial Conference, and others interested in federal practice. Hall, a U.S. Army veteran, also recently

joined a fellow UF Levin College of Law graduate and veteran in creating the first endowed scholarship available exclusively to military veterans and service members at Levin College of Law.

**Ted Hamilton - Wetherington Hamilton** founding attorney Ted Hamilton was named to the Commercial Law League of America's board of governors.

**Michele Leo Hinston** - The law firm of **Shumaker, Loop & Kendrick, LLP**, is pleased to announce that partner Michele Leo Hinston was the program chair of the 28th Annual Southern Surety & Fidelity Claims Conference held in April in Nashville, Tennessee.

**Celene Humphries** - Celene H. Humphries of **Brannock & Humphries** presented at the Florida Justice Association's Workhorse CLE Seminar on "The Consumer Expectation Test and Product Liability Law in Florida - History and Progeny - Jury Instructions and Verdict Form."

**Michael J. Labbee - Quarles & Brady LLP** is pleased to announce the appointment of Michael J. Labbee to the Florida Bar Standing Committee on Admiralty Law.

**Sarah Lahlou-Amine - Vaka Law Group** is pleased to welcome Sarah Lahlou-Amine, vice chair of the Florida Bar's Appellate Section, to the firm as partner. Lahlou-Amine's extensive legal experience, leadership skills and innovative legal strategies are a

*Continued on page 71*

*Continued from page 70*

great asset to the firm's appellate and insurance practice areas.

**J. Suzanne Lehner** - In January 2017, J. Suzanne Lehner became the managing partner of the Tampa office of **Simon Reed & Salazar**.

**Dennis LeVine** - Partner in the **Kelley Kronenberg** Tampa office, Dennis LeVine has been appointed to the Committee on Chapter 7 Issues for the Commission on Consumer Bankruptcy, created by the American Bankruptcy Institute (ABI). The Commission is a 15-member expert panel that aims to modernize the consumer bankruptcy system. LeVine is one of 10 attorneys appointed to the Chapter 7 Issues Committee supporting the newly created Commission.

**Matthew S. Mudano** - Matthew S. Mudano has become Of Counsel to **Cole Scott & Kissane** in its Tampa Office. Mudano will serve in the firm's Trial Department focusing in the areas of insurance defense, medical malpractice defense and complex commercial matters.

**Woodrow "Woody" Pollack** - a shareholder in the Intellectual Property & Technology Practice of international law firm **Greenberg Traurig**, has been appointed to The Florida Bar's Intellectual Property Certification Committee.

**Mark J. Ragusa - Gunster** is pleased to announce that shareholder Mark J. Ragusa has been appointed incoming chair of

The Florida Bar's Clients' Security Fund Committee.

**Maria del Carmen Ramos** - The law firm of **Shumaker, Loop & Kendrick, LLP** is pleased to announce that Tampa partner Maria del Carmen Ramos was selected *TAMPA Magazine's* Top Lawyer 2017 in the category of Immigration as voted on by her peers.

**Hala Sandridge** - Tampa attorney Hala Sandridge took office July 1 as the first vice president of The Florida Bar Foundation, a statewide charitable organization whose mission is to provide greater access to justice. Sandridge, co-managing shareholder of the Tampa office of **Buchanan Ingersoll & Rooney**, practices in the area of appellate law.

**Mark A. Sessums** - Mark A. Sessums of **Sessums Law Group, P.A.**, was chair of the trial advocacy-themed Institute of the Florida Chapter of the American Academy of Matrimonial Lawyers in Orlando.

**Dipa Shah - Shumaker, Loop & Kendrick, LLP**, is pleased to announce that Tampa attorney Dipawali "Dipa" S. Shah has been elected to the board of directors of the American Lung Association for Tampa Bay.

**Robert Shimberg - Hill Ward Henderson** is pleased to announce that shareholder Robert Shimberg has been awarded a "Leader and Game Changer Award" for his contributions to the nonprofit organization, Men of Vision (MOV). Shimberg and his wife Michelle created a summer

job program for the young men of MOV and helped facilitate their efforts to earn a job with some of their firm's clients that are partnering in their efforts.

**Murray Silverstein** - Tampa attorney Murray Silverstein has been reappointed by The Florida Bar to a three-year term on the board of The Florida Bar Foundation, a statewide charitable organization whose mission is to provide greater access to justice. Silverstein is an attorney at **Greenspoon Marder, P.A.**, where he focuses his practice on commercial litigation and class actions.

**Alison Verges Walters** - a partner in the Tampa office of full-service business law firm, **Kelley Kronenberg** was named one of the 25 Most Influential Women in Collections by *Collection Advisor Magazine*, a national magazine designed exclusively for collection professionals.

**David B. Weinstein** - David B. Weinstein, managing shareholder of the Tampa office of international law firm **Greenberg Traurig, P.A.**, was appointed to the board of directors for Big Brothers Big Sisters of Tampa Bay.

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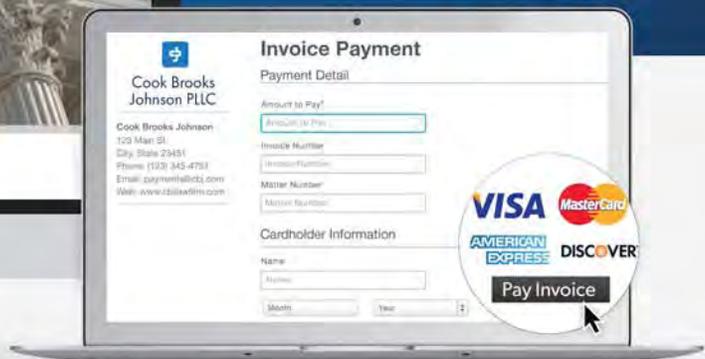
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