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ABOUT THE COVER

The Tampa Bay Lightning have taken to the ice again, bringing reminders of cooler climates to Florida’s version of fall. The Lightning and the team’s owner, Jeff Vinik, have brought a lot of attention to Tampa’s downtown, and we look forward to seeing the changes on the horizon. In that vein, this year’s covers for the Lawyer magazine will pay tribute to the sports teams and venues that make the Tampa Bay area such a great place to live, work, and play.
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Almost every day, my oldest daughter, Gabriella, who is 4, asks me to tell her the Cinderella story. When I start by telling her that Cinderella’s real name is Ella but that her step-sisters call her Cinderella because she would get dirty cleaning the cinders out of the fireplace, Gaby turns story time into a one-sided version of the improv game where characters can only speak in questions.

“What are cinders, daddy?
“Um, they’re like ashes, honey.”
“Well, what are ashes?”
“Good question. It’s something left over after a fire.”

It’s at that point I realize there are some things I just know even if I can’t articulate them.

That thought occurred to me a couple of months back when I visited the Vietnam Memorial during a trip to Washington, D.C., with my daughter. As we walked along the wall, Gaby asked me if I’d help her find abuelito’s friend. My father-in-law served in the 1st Battalion, 7th Calvary — presumably as the world’s shortest infantryman (he claims all of the parachute landings caused him to shrink from 6’1 to 5’1) — during Vietnam. Unfortunately, my father-in-law, like all too many others, lost a dear friend during the war, and before we left for our trip to D.C., he told Gaby to look for his friend while we were there. Of course, she didn’t know what the wall was, and I knew that if I couldn’t explain Cinderella’s name to her satisfaction, there was no chance I’d be able to do justice to the Vietnam Memorial.

But as we searched for my father-in-law’s friend, Gaby found a note a young kid left at the foot of the wall, which she asked me to read:

As a citizen of the USA and a soon to be adult, I greatly appreciated the freedom I have in this country. I can work for my own money, get a decent education, and enjoy recreational activities without someone else telling me what I can and can’t do. I also know who I have to thank for my freedom. You soldiers who lay down your own lives and futures, your hopes and dreams, all to preserve the lives, futures, hopes and dreams of the upcoming generations of people in our nation. None of you deserve anything less than the highest honors available for your sacrifices.

I’m not sure I could put it much better.

Now that I’m a parent, I realize how fortunate I am that my children will grow up in a country where they are free to go as far as their talent and hard work (and a little luck) will take them. And I realize that’s true because people with more courage than I have — people like Col. Kenneth Davey (please see the article on page 56 of this edition); my grandfather, Mike Joseph (who served as a Seabee in World War II); and my father-in-law and the others who served alongside him in in the “Garry Owen” Brigade in Vietnam — were willing to risk their hopes and dreams for mine. I’ll never be able to adequately express my gratitude, so I’ll just simply say thank you to all the veterans who have served our country.
Florida’s Leaders Solving the Justice Gap: The Florida Commission on Access to Civil Justice and Florida’s Vision 2016 Commission

“You can’t stay in your corner of the forest waiting for others to come to you. You have to go to them sometimes.” — A.A. Milne, Winnie-the-Pooh

Admission by Motion and Reciprocity are dead in Florida. The red herring has been hooked, fileted, and fried. Florida Bar members have spoken, and by many accounts, the great public interest in preserving the rigorous standards for admission to practice in Florida courts has won the day. What’s next?

The Justice Gap

The real issue facing Florida is solving the justice gap — who will solve it? Will it be Florida lawyers? Will it be technology companies? One thing is for sure — Florida’s legal leaders are working hard to solve it! Solving the justice gap is a high priority for the Florida Supreme Court and Florida Chief Justice Jorge Labarga, as well as for The Florida Bar and President Ramón Abadin.

Abadin described the justice gap at our September 16 Membership Luncheon as the “fat middle.” Studies show that the top 10 percent of legal consumers (our clients) get legal services by paying top dollars for excellent lawyers at law firms big and small. And the bottom 20 percent of legal consumers get legal services from legal aid organizations, pro bono legal services, or contingency fee lawyers. What does that leave? The “fat middle” — could it be that 70 percent of legal consumers are left without a lawyer?

Retired Judge William Van Nortwick, who sits on the Florida Commission on Access to Civil Justice and is now practicing with Akerman in Jacksonville, echoed Abadin’s concerns about the justice gap problem in his October 1 presentation to Bay Area Legal Services at the Chester H. Ferguson Law Center:

- Only 14 percent of the people who reported having civil legal issues during the past year obtained legal help in addressing them.

Continued on page 5
HCBA PRESIDENT’S MESSAGE
Garter Andersen - Bush Ross, P.A.

Continued from page 4

- Less than 20 percent of the legal needs of low-income Americans are being met.
- When confronted with a civil legal problem, 30 percent of low-income Americans give up and seek no legal redress.
- For every client served by a federally funded legal aid program, someone else seeking help is turned away.
- In many courts, 90 percent of parties in restraining order matters are unrepresented.
- 80 percent of divorce cases in Florida had at least one pro se litigant.

Internet Technology
Abadin opened a lot of eyes with the examples of more than 50 companies selling legal forms online, and he explained the estimated size of the unserved legal market in the United States is $45 billion. He also pointed out that in the Internet marketplace, consumers have virtually unlimited access to legal information and knowledge. The balance of power has shifted from professionals (lawyers) to consumers (clients).

Many were surprised to hear from Abadin that outside equity investment in legal startup technology companies grew from $66 million in 2012 to more than $1 billion in 2014. Today, companies such as LegalZoom are creating technology-based platforms to connect consumers and lawyers. LegalZoom itself plans to have 20,000 to 50,000 lawyers on the platform within five years. The target clients are the middle-class and small businesses. Last year, LegalZoom served more than 2 million customers. Another company we all know, AVVO, had more than 70 million visits to www.Avvo.com. In 2014, AVVO connected 3.5 million consumers to lawyers and generated $8.5 billion in revenue for legal services in United States.

Abadin’s point? We have a justice gap problem. Those in need of legal services have access to the Internet. If Florida lawyers don’t solve the justice gap, Wall Street and technology startups will! What are you going to do? How should we solve the justice gap?

Leaders like Chief Justice Labarga, President Abadin, and Judge Van Nortwick are working hard throughout the state to solve the justice gap. They are going to the lawyers and the citizens of Florida and working for solutions — following the advice of Winnie-the-Pooh: “You can’t stay in your corner of the forest waiting for others to come to you. You have to go to them sometimes.” We should all thank them!

Florida Commission on Access to Civil Justice
In November 2014, recognizing that economic disparity threatens access to a fair and impartial judicial system, Chief

Continued from page 6
Justice Labarga established the Florida Commission on Access to Civil Justice. The 27-member commission includes leaders from all three branches of Florida government, The Florida Bar, civil legal aid providers, the business community, and other stakeholders. The commission is studying the unmet civil legal needs of disadvantaged, low-income, and moderate-income Floridians.

The Commission on Access to Civil Justice will submit its final report to the Florida Supreme Court, the governor, and the Florida Legislature by June 30, 2016, and that report will likely recommend a permanent access to justice commission. The commission will address the need for staffed legal aid programs, resources and support for self-represented litigants, issues regarding limited-scope representation, pro bono services, and innovative technology solutions. The website for the commission is www.flaccesstojustice.org.

The Florida Bar's Vision 2016 Commission

The Vision 2016 Commission is tackling a wide array of issues facing Florida lawyers. The commission had its inaugural meeting September 26, 2013, where then-Florida Bar President Gene Pettis appointed 68 individuals from the legal profession, public sector, and business community to perform a comprehensive three-year study of the future practice of law in Florida.

The Vision 2016 Access to Legal Services Subgroup yielded to the Florida Commission on Access to Civil Justice, and it is working under that umbrella to meet its mission. The Vision 2016 Bar Admissions Subgroup is studying several issues relating to multi-jurisdictional practice, including reciprocity/admission on motion, the disaster rule (“Katrina rule”), foreign authorized house counsel rule, foreign pro hac vice, foreign legal consultants rule, alternative business structure models, the uniform Bar examination, and the licensing of non-lawyers for specific tasks. The Vision 2016 Legal Education Subgroup is studying how to define competencies that new lawyers should have, models for legal education reform, and how to work with all stakeholders to produce lawyers with well-rounded and extensive competencies. The Vision 2016 Technology Subgroup is studying the integration of technology into law offices and courts, technology that performs legal/lawyer work, e-discovery, mandatory technology CLE, online legal service providers, and other technology issues. Check out Vision 2016 at www.floridabar.org/vision2016.

In short, Vision 2016 teaches that the future is now. And through Vision 2016, The Florida Bar is tackling the future.

Recent HCBA Resolution

In September, the HCBA made a great effort to engage and educate our members regarding Vision 2016. Together with the THBA, HAWL, GBEA, and the FBA Tampa Chapter, we co-hosted a Vision 2016 Town Hall Meeting at the Chester H. Ferguson featuring Abadin and Florida Bar President-Elect Bill Schifino. We also hosted Abadin as the keynote speaker for our Membership Luncheon in September. After learning so much about the issues, our Board of Directors submitted HCBA Resolution Number 15 - 3 commending The Florida Bar and the Vision 2016 Commission for their effort to raise awareness that the practice of law is rapidly changing and our profession is facing new challenges. We also urged the Board of Governors to continue to educate, raise awareness, and look for solutions to these challenges that will serve all Florida Bar members.

I predict that Florida — based on the efforts of leaders Chief Justice Labarga and Florida Bar President Abadin and those who follow — will lead the nation in solving the access to justice issues and the many Bar admissions, legal education, and technology issues. The Florida Commission on Access to Civil Justice and The Florida Bar’s Vision 2016 Commission are two efforts that invite all Florida Bar members to be part of the solution, and they deserve our respect and support.

What is the estimated value of the unserved legal market in the United States?

A - $75 Million
B - $3 Billion
C - $45 Billion

Answer: C - $45 Billion

Source: Presentation by Florida Bar President Ramón Abadin at the HCBA September Membership Luncheon
MEET THE BAR LEADERSHIP INSTITUTE CLASS OF 2015-2016

The Bar Leadership Institute class of 2015-2016 met for a welcome reception on September 24 at the Chester H. Ferguson Law Center. HCBA President Carter Andersen welcomed the group, which is led this year by BLI alumni Katelyn Desrosiers, James Giardina, and Tom Curran. Congratulations to those who were chosen this year:

Nery Alonso  Raquel Jefferson  Andrew Reder
Amy Bandow  Scott Johnson  Rachael Rudin
Christopher Bentley  Alissa Kranz  Sara Sanfilippo
Patricia Candamo  Lesly Longa  Maulik Sharma
Matthew Crist  Jordan Maglich  Lyndsey Siara
Tyler Egbert  Drew McCulloch  Ashley Taylor
Zarra Elias  Frank Moya  Laura Westerman Tanner
Nicholas Gaffney  Navin Pasem
Stephanie Generotti  Ashley Rector

The Bar Leadership Institute greatly appreciates the support of this year's sponsor:

The Bank of Tampa

HCBA LAWYER
have a confession. While working late into the night, plowing through page after page of tedious documents, I have muttered these words: “I have no life.” And assuming, dear reader, that you are a fellow young lawyer, I am confident you have muttered those words, too.

It doesn’t have to be this way.

We, as young lawyers, are blessed: Though most of us do not appreciate it, we have careers that allow us to not only make a living but, more importantly, an opportunity — in fact, a responsibility — to give. Remember your Oath as an Attorney: “I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone’s cause for lucre or malice.”

Pro bono work — giving — is good for your soul ... and for your career. Pro bono work provides young lawyers valuable experiences and opportunities to hone their skills for the future. Generally, young litigators in traditional law firms won’t realize these important benefits through paid work. Yet, reputable law firms and partners often encourage pro bono work by giving associates credit toward year-end goals. These partners understand that profit is not the only bottom line in a law firm. Instead, they promote multiple bottom lines — health, wellness, and pro bono service.

Pro bono work provides experience in a wider range of subject matters than standard commercial litigation, including face-to-face contact with clients and opportunities to craft and refine interviewing, counseling, and negotiating skills.

Community service makes betters lawyers. It’s that simple.

The American Bar Association deemed the last week of October as “National Pro Bono Celebration.” The Young Lawyers Division has done our part to celebrate and promote community service and pro bono work. At our quarterly luncheon on October 22, we hosted more than 10 pro bono groups and provided a platform for each to share information about their services to the community. Among the participants were Crossroads for Florida Kids, Wills for Heroes, Are You Safe, Bay Area Legal Services, Guardian ad Litem, H.E.L.P (Homeless Experience Legal Project), and the HCBA Military Veterans Advocacy Clinic. Young lawyers left armed with information to make a difference.

The YLD supports pro bono all year long. As Katelyn Desrosiers, the Pro Bono Committee chair, notes: “Lawyers are able to provide a benefit to the community that may not otherwise be available. It enables lawyers to meet other likeminded members of the profession. Most importantly, it allows our profession the opportunity to give back to those less fortunate and really change outside perceptions of judicial system. I always leave a pro bono session feeling genuinely happy and renewed.”

Please contact Pro Bono Committee Chairs Katelyn Desrosiers, kdesrosiers@butler.legal, or Ella Shenhav, eshenhav@shutts.com, for further information about pro bono opportunities, and stay tuned for photos in the next issue.
Join your colleagues by making a commitment to sustained giving in support of Bay Area Legal Services and give voice to the voiceless. To become a sustaining law firm, each firm must donate $350 per attorney.

Thank You 2015
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United States Customs undercover agent Bob Mazur sensed he and his family were in imminent danger for their lives.

You see, Mazur had previously gotten word that a contract had been put out on his life because of the intelligence he had gathered after infiltrating deep into the seedy underworld of international money laundering and drug trafficking. As a precaution, Mazur had relocated his family to a rural area 1½ hours north of Tampa.

One night, however, after driving his son home from gymnastics, he noticed a man outside in a pickup truck parked next to a nearby pond. He turned off all the lights in the house and took out his binoculars. He looked out a window at the truck and, to his surprise, saw that the man in the front seat had a pair of binoculars as well.

Fearing the worst, Mazur told his family to lie on the floor, and he quickly got out his .357 Magnum. Sneaking around back through some woods, Mazur approached the truck from behind.

Mazur confronted the stranger, who became visibly shaken. He asked what the man was doing parked next to the pond.

“I’m watching the migration of alligators,” the startled man explained, much to Mazur’s relief.

Mazur shared this bizarre encounter, as well as other eye-opening stories about his work as the lead undercover agent in the historic Bank of Credit and Commerce International (BCCI) money laundering case, at a luncheon this September at Le Meridien hotel in Tampa. The event was organized by the U.S. District Court to coincide with the release of the new book, “Fifty Years of Justice: A History of the U.S. District Court for the Middle District of Florida,” written by Florida Southern history professor James Denham.

Le Meridien hotel, which formerly served as a federal courthouse for many years, was the scene for the BCCI trial in 1990. The historic building was restored and opened as a boutique hotel in 2014.

The U.S. District Court for the Middle District of Florida, created in 1962, was carved out of the Southern District and includes 35 of Florida’s 67 counties. It stretches geographically more than 350 miles from the Georgia border on Florida’s northeast coast to south of Naples on the southwest coast.

Over the years, the district court, which is considered one of the busiest federal courts in the nation, has been the scene for many important legal proceedings. Along with the BCCI case, the district court is most recognized for the litigation surrounding the Terri Schiavo “right to die” case. Some other notable names and cases in the District Court’s recent history: Santo Trafficante, F. Lee Bailey, Denny McLain, Ted Bundy, Sami Al-Arian, hanging chads, and Baby Sabrina.

Along with agent Mazur, the Hon. William Terrell Hodges, who served as the trial judge, and Tampa lawyer Bennie Lazzara, who served as defense counsel, participated in the panel presentation about the BCCI case.

At the time, FBI Director Robert Mueller described the BCCI case as “one of the largest money-laundering
prosecutions in U.S. history.” The bank also was known to handle the money laundering needs of former Panamanian dictator General Manuel Noriega.

During the panel presentation, Judge Hodges recalled the complexity of the case and the mental and physical toll the lengthy trial took on all the participants. He said agent Mazur’s performance as a government witness — recalling every detail of his multi-year investigation — was “absolutely spectacular.” Mazur appeared on the witness stand every day for three months of the six-month trial.

Judge Hodges also explained how the trial almost got derailed because of a problem with a juror during jury deliberations. One of the jurors had to be dismissed, Judge Hodges said, because the juror had inexplicably taken a telephone number from a trial exhibit and called the number, then subsequently spoke to other jurors about the call.

Attorney Lazzara talked about the challenges faced by the defense team and the overwhelming amount of evidence presented by government prosecutors. Lazzara noted that the court had worked out a creative arrangement whereby all the international defendants in the case, along with their families, were housed in condominiums on Davis Islands under 24-hour guard for the duration of the trial.

Mazur also recounted the elaborate federal sting operation, called Operation C-Chase, that helped bring down the bad guys. The sting climaxed with an elaborate staged wedding at Palm Harbor’s Innisbrook Resort in which all the international bankers and drug dealers being investigated were invited to what they thought was Mazur’s wedding.

The night before the wedding, however, the attendees were whisked away in limousines to what they thought was going to be wild bachelor party at MacBeth’s atop the old Exchange Bank building in downtown Tampa. Instead, federal agents were waiting in the building’s parking garage, and dozens of astonished attendees were taken into custody.

Now retired from the federal government, Mazur said a movie based on the 2009 book he wrote about his undercover work and the BCCI case will be coming out in 2016. The movie, titled “The Infiltrator,” will star award-winning actor Bryan Cranston, who will play Mazur.

See you around the Chet.
Although the Office of the State Attorney is tasked with a variety of duties, it is primarily involved in the prosecution of criminal offenses. Within the mental health arena, our office handles hearings conducted under the Florida Mental Health Act, also known as the Baker Act. Baker Act hearings are civil proceedings conducted pursuant to Chapter 394.

Although an individual may seek mental health treatment voluntarily, there are situations where an involuntary examination is appropriate. Involuntary examination and treatment may be sought if: 1) a person has a mental illness and, because of that illness, has refused voluntary treatment or is incapable of making a decision regarding treatment; and 2) there is “a substantial likelihood that without care or treatment the person will cause serious bodily harm to himself or herself or others in the near future, as evidenced by recent behavior,” or it is likely that the person will suffer from neglect that “poses a real and present threat of substantial harm to his or her well-being.”

The initial involuntary examination can be initiated by a law enforcement officer, a mental health or medical professional, or through an ex parte order issued by a court and based on sworn testimony. The patient is then brought to a designated receiving facility for emergency evaluation and short-term treatment. While at the receiving facility, the patient may choose to seek voluntary treatment or may become stabilized to the point that the patient can be released. If neither

Continued on page 13

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of these actions occurs and the patient continues to
meet the Baker Act criteria, a petition for involuntary
placement must be filed within 72 hours of the patient
being admitted.\textsuperscript{7}

Once the petition is filed, the patient is entitled to a
hearing within five days.\textsuperscript{8} A magistrate is authorized to
count this hearing.\textsuperscript{9} Because of the liberty interests
at stake, the patient has a right to counsel and may be
appointed a public defender.\textsuperscript{10} The state attorney is
charged with proceeding on the petition as the real
party in interest on behalf of the state of Florida.\textsuperscript{11}
The state must present clear and convincing evidence
that the patient continues to meet Baker Act criteria.\textsuperscript{12}
This includes a determination that there is no less
restrictive alternative available.\textsuperscript{13}

The role of the state attorney in a Baker Act hearing
is to seek appropriate mental health treatment for
members of our community who are in danger or
pose a danger to others because of their mental illness.
Our office diligently prepares for these hearings and
proceeds on cases where we believe that this is the
appropriate outcome. At the same time, we comply with
the legal processes that protect the due process rights of
the patients. Our ultimate goal is always to seek justice
and maintain public safety as we litigate these cases.

\textsuperscript{1} § 27.02, Fla. Stat.
\textsuperscript{2} § 394.451, Fla. Stat.
\textsuperscript{3} § 394.463(1), Fla. Stat.
\textsuperscript{4} § 394.463(1)(b)(1), Fla. Stat.
\textsuperscript{5} § 394.463(2), Fla. Stat.
\textsuperscript{6} § 394.467(2), Fla. Stat.
\textsuperscript{7} § 394.463(2)(i), Fla. Stat.
\textsuperscript{8} § 394.467(6), Fla. Stat.
\textsuperscript{9} Id.
\textsuperscript{10} § 394.467(4), Fla. Stat.
\textsuperscript{11} § 394.467(6), Fla. Stat.
\textsuperscript{12} See Lischka v. State, 901 So. 2d 1025 (Fla. 1st DCA
2005); Boller v. State, 775 So. 2d 408 (1st DCA 2000);
Singletary v. State, 765 So. 2d 180 (Fla. 1st DCA 2000).
\textsuperscript{13} § 394.467(1), Fla. Stat.
Jim Birkhold was, superficially, a curmudgeon. At least some close friends have affectionately called him one, noting that Jim would probably approve of the description.

Jim, who had been the Second District Court of Appeal’s clerk for 16 years, passed away suddenly and unexpectedly in August of this year. His death is a tragic loss to all who knew him. Despite Jim’s gruff exterior, he was a generous, compassionate, and devoted man whose contributions to the Second District and the Florida court system will long be remembered.

Jim was known to dislike the limelight, and he had little patience for formality. But perhaps Jim — who loved to tell stories — would not mind so much if he were remembered by stories from those who worked with him.

There is no group at the court who will miss Jim more than the staff in the clerk’s office. Many of these individuals worked with Jim for all or most of his tenure as clerk. They spoke of their deep fondness and respect for him. They described Jim as compassionate, honest, intensely devoted to them and to the court, witty, incisive, protective, helpful, and soft-hearted.

They spoke of Jim’s willingness to assist anyone who requested help. Jim spent considerable time — at the counter in the clerk’s office or on the phone — responding to questions and concerns from attorneys, pro se litigants, and anyone else who called. The court’s prisoner mail was particularly important to him. Jim regularly responded to inmates to explain the procedures or the obstacles they faced or to simply provide information about case progress. He wanted them to know that someone was on the other end and had considered their problems. And Jim also helped those who did not ask. More than once, his staff saw him chase after homeless men and women who had been sleeping at the entrance to the courthouse — not to usher them away — but to give them money.

The staff in the clerk’s office also had less serious stories to share. For instance, Jim repeated a tale about a life-sized plastic cow he displayed on his home patio. The cow had become mildewed in the Florida weather. To clean it, Jim pushed it into his chlorinated pool and sunk it to the bottom using bricks. But Jim did not account for the fact that his hollow, leaky cow would slowly fill with water and ultimately weigh as much as a real cow. Upon his discovery of the thousand-pound oversight, Jim recruited his wife, Christy, to jump in and help him wrestle the beloved bovine back to safety. The plastic cow vengefully pushed Jim back into the pool upon reaching dry land, while Christy stood by laughing.

Another time, Jim tripped over one of his many prized dachshunds and broke a finger during the fall. Jim’s hand was placed in a cast with his single, broken finger sticking out as a sore reminder of his (or his dachshund’s) clumsiness. The situation became a running joke in the office — he carried his X-ray with him for days to illustrate his oral account of what had happened. One of his deputy clerks brought him a cake adorned with lady fingers, with just one sticking out.

Judges and staff attorneys, past and present, also spoke fondly about Jim. They too emphasized Jim’s devotion to the court, his patience with and respect for the public, and the fact that he took pride in making the court and its

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Jim was fond of reminiscing about his past. He once got a summer gig as an usher for NBC, and it was rumored that he twice was a member of the “Peanut Gallery” on the “Howdy Doody Show.” When Jim learned that one of the newer staff attorneys attended the World Cup on his honeymoon, Jim sent him an email illuminating the “pitifully low-octane attack” of his own 1966 college prep school’s soccer team. His email included a team photo with a young Jim Birkhold in a collared uniform and with a full head of well-coiffed, dirty blonde hair.

But the following anecdote is the one that most of those at the court thought best depicted the kind of person Jim was. Before Jim joined the court, he was an assistant public defender. For many years, and until Jim passed away, he regularly visited a former client in prison who is still serving a life sentence. Jim provided his former client money and sent him books and other things. Jim remained this man’s lifelong friend, even though he was unable to obtain the justice he thought this man deserved.

Beneath the surface, Jim wasn’t so much of a curmudgeon after all. Rather, he was a great man, a devoted servant, and a loyal friend. He, and his many stories, will not soon be forgotten.

Authors: Jared M. Krukar - Butler Weihmuller Katz Craig LLP; and Mariko K. Outman - Florida Second DCA
GIVING BACK COLLABORATIVELY
Collaborative Law Section
Chairs: Jeremy Gluckman - Jeremy Gluckman, P.A.; and Christine Hearn - Himes & Hearn

We all learned in law school that our legal system is an adversarial system. However, if you have ever thought that there might be a “better way” to go about resolving legal disputes, now is the time to consider adding collaborative law to your practice.

The Hillsborough County Bar Association, through our Collaborative Law Section, has taken on the task of promoting collaboration as a non-adversarial alternative in our legal system. Started initially in family law cases, efforts have now begun to expand collaborative practice into other areas of the law. The Tampa Bay Collaborative Divorce Group began to integrate this process into our legal community back in the 1990s. Years later, the Collaborative Divorce Institute of Tampa Bay (now known as Next Generation Divorce) was formed, and the Collaborative Law “movement” gained momentum.

The Florida Civil Collaborative Practice Group, the most recently formed collaborative practice group, is designed to promote the collaborative process as a means of resolving almost every other kind of legal dispute. One of the main goals of our Collaborative

Consider collaboration as another tool for serving your clients.

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Law Section is to act as a liaison between these three groups as we join forces on multiple projects.

To HCBA members not yet exposed to collaborative law, the process used in family law consists of two clients who each retain separate lawyers, along with a neutral mental health professional and a neutral financial professional (the full team model). Collaboration starts through a written agreement between the parties and the team. Unlike litigation, the lawyers’ only job is to help the clients settle their disputes; in fact, if the clients are unable to reach a settlement, the parties agree that the lawyers must withdraw from the case. The mental health professional acts as a facilitator throughout the process and will help the parties develop the best parenting plan possible when children are involved. The financial professional gathers relevant financial information from both parties and then helps them to divide their assets and analyze alimony and child support scenarios and alternatives.

The process involves open communication and disclosure between the clients and their lawyers, working together with the team in a collaborative manner. Through a series of meetings, the team works to ultimately reach a comprehensive settlement agreement.

Variations of this model are being developed for use in non-family disputes. In those cases, the system works a little differently, but the goal of finding the best and most workable solutions to conflicts is the same. And the results are often plans developed by the parties that judges might never have the authority or understanding to bring to an adversarial case.

In September, our collaborative groups held one of many training programs in St. Petersburg. On November 5, all of our collaborative practice groups co-sponsored a meeting with the president of our statewide collaborative association. If you would like to start learning about practicing collaboratively, sign up for our next training program.

Author: Jeremy Gluckman - Jeremy E. Gluckman, PA.
A military veteran suffering from PTSD faces the loss of his home to foreclosure.

A domestic violence victim and her children desperately seek legal protection from their abuser.

An elderly widower is victimized by financial exploitation.

A grandmother rescues her three grandchildren from neglect and needs to establish formal child custody.

A foster care child has no voice in court and needs representation.

When Tampa’s most vulnerable residents seek legal help, they turn to Bay Area Legal Services (BALS), our community’s legal aid organization entrusted to advance the causes of the underprivileged. Each year, BALS assists more than 25,000 individuals and families with civil legal matters. The difference BALS makes is significant — and often lifesaving — because the legal problems frequently affect the most basic of client needs.

Much as you plan for the future financial security of your family, you can help ensure that BALS serves our community for future generations. Legacy giving options can be surprisingly easy to arrange. The simplest is naming BALS as a beneficiary of your life insurance policy. Beneficiaries are designated by specific dollar amount or percentage portion of the premium proceeds (so the process can be additive — no need to drop family members as beneficiaries). This revocable gift can be coordinated through your employer or financial services company and typically involves a phone call or minutes on a computer. Moreover, gifts by beneficiary designation usually avoid probate.

Of course, there are many options for leaving a legacy, such as naming BALS in your will. This gift may be exempt from the federal estate tax, and the assets remain in your control through your lifetime. Other alternatives include a life income gift that allows you to give an asset while retaining the use of it for life. This gift may provide an immediate partial tax deduction.

Donors who include BALS in estate planning (and notify BALS) become members of the Legacy for Justice Society. The society keeps members up to date on BALS and recognizes donors in annual events.

Remember: It is not necessary to be a certain age, extremely wealthy, or at a particular point in your career to help ensure continued access to justice in our community. You simply need a plan.

Become a champion for justice. For more information, contact Rose Brempong, development director at BALS, at (813) 232-1343 or rbrempong@bals.org. Leave your legacy — and be the difference between justice for some and justice for all.

Authors:
Leslie Schultz-Kin - Akerman LLP; and
Kathleen Koch - Bank of America

DO YOU HAVE AN IDEA FOR AN ARTICLE?
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MVAC HOLDS FIRST MEETING OF BAR YEAR

The Military & Veterans Affairs Committee met September 9 for a luncheon to discuss its plans for the upcoming year. If you'd like to join the committee's efforts, log on to www.hillsbar.com and visit the committee's page.
The First District Court of Appeal recently issued a decision on a construction licensing issue that has industry-wide implications. See Taylor Morrison Servs., Inc. v. Ecos, 163 So. 3d 1286 (Fla. 1st DCA 2015). The case involved alleged construction defects in a single-family home in Jacksonville. Although the home did have some defects, the homeowners opted to bring not only a construction defect claim but also a claim for negligence by an unlicensed contractor under section 768.0425, Florida Statutes. A business organization is considered unlicensed if it “does not have a primary or secondary qualifying agent in accordance with this part concerning the scope of the work to be performed under the contract.” § 489.128(1)(a), Fla. Stat. Further, a “contractor shall be considered unlicensed only if the contractor was unlicensed on the effective date of the original contract for the work.” § 489.128(1)(c), Fla. Stat. (emphasis added).

Although the builder in Ecos employed several qualifying agents on the contract date, the homeowners argued, and the trial court agreed, that having a qualifying agent “in accordance with this part” meant that all of the other provisions of chapter 489 should be evaluated in determining a contractor’s licensure, including the level of the contractor’s supervision during construction and the manner in which the building permit was obtained. Accordingly, the trial court ruled that the builder was unlicensed because: 1) the qualifier who signed the building permit was no longer employed by the builder and did not authorize the use of her license; and 2) there was a lack of qualifier supervision on the project. See Ecos, 163 So. 3d at 1288-89.

The First DCA reversed because, in its view, section 489.128(1)(c) “precludes considering events that occur after [the contract date], by instructing that a contractor be considered unlicensed ‘only if’ the contractor is unlicensed at that specific time.” Ecos, 163 So. 3d at 1289. Because it “cannot be known on the contract’s effective date whether the business organization will actually ensure compliance with the permitting and supervision requirements of chapter 489,” considering such activities would require the court “to read the date requirement out of the statute.” Id. at 1290. In reaching that conclusion, the court recognized the pitfalls associated with tying licensure to ongoing activities during the course of construction (such as permitting or supervision) — namely, “a business organization’s licensure status … can change throughout the course of construction for a particular project.” Id. Ultimately, the First DCA concluded that, while contractors may be penalized under other sections of chapter 489 for how they engage in construction activities, those activities are “irrelevant to the narrow issue of whether [a contractor] is licensed” on the contract date. Id. at 1292.

As a result of the decision in Ecos, Florida contractors that are qualified on the date of a construction contract are licensed for the project.

1 The author is an attorney at Sivyer, Barlow & Watson, P.A., which represented the builder in Ecos.

Author: Carl Mitchell - Sivyer, Barlow & Watson, P.A.
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Whether in the courtroom or the boardroom, PowerPoint can enhance your presentations. However, there are five simple tips that can make your presentations even more effective:

1. **Keep it simple.**
   Keep your background simple, and use the same one throughout your presentation. A white background with black text is not recommended because it is difficult to read. Instead, use a blue or black background.
   Use consistent font size and color for headlines, subheads, and body text. Typically, a 26-point font size is the minimum recommended for body text.
   Limit your topic to one main idea per slide, with no more than six bullets.
   Use words or phrases, rather than showing your entire presentation on the slides.
   Do not read!

2. **Make it visual.**
   Pictures, graphs, or charts — with a few keywords — can often communicate what words alone cannot. Use one image per slide, unless making a comparison. Make sure you have permission to use the image.

3. **Be prepared.**
   Practice on the computer you will use for your presentation and familiarize yourself with the remote.
   Plug in your computer during your presentation, rather than relying on your battery. In addition, turn off screensavers and dialogue boxes.
   For courtroom presentations, call ahead to determine whether visual presentations are permitted. Similarly, check with your mediator to confirm presentations are allowed during opening statements.
   Finally, be prepared for the occasional computer glitch and for your presentation to function incorrectly. You may want to have a backup computer available.

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KNOCK THEM DEAD — DON’T BORE THEM TO DEATH
Corporate Counsel Section

Continued from page 22

4. Make it readable.
   Consider the room where you will be presenting. View your presentation from all angles to ensure everyone will be able to see the slides. If you are presenting to a jury, ensure the judge, opposing counsel, and their client can see the screen, or at least your monitor.

5. Avoid distractions.
   PowerPoint provides an assortment of transitions that can swirl and dissolve, and objects that can appear by spinning, shrinking, etc. Use these sparingly, if at all. If you are using videos, keep them short.

   There are simple techniques you can use after you are finished making a particular point and want the audience to focus on you rather than the slide. Press the B key on your keyboard while in PowerPoint mode to turn your screen to black, or the W key to turn the screen to white.

   By incorporating these tips, your PowerPoint slides will enhance your presentation and leave your audience with a memorable and favorable impression.


Author:
Lisa A. Pach - Colliau Carluccio Keener Morrow Peterson & Parsons/Continental Casualty Company

JEFF VINIK AND THUNDERBUG VISIT THE CHESTER FERGUSON LAW CENTER

Guess who visited the Chester H. Ferguson Law Center recently! We had a great time watching Thunderbug from the Tampa Bay Lightning jam on our piano before Jeff Vinik spoke to the Tiger Bay Club of Tampa. Go Bolts!

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This year brings a new co-chair to the Criminal Law Section. My name is Justin Petredis, and I will be joining Matt Luka, who is remaining on and continuing his years of invaluable service as section co-chair. After working as an assistant state attorney in Pasco County for eight years, I am currently a solo practitioner and (including my time as an assistant state attorney) have practiced criminal law in Florida for 11 years.

I look forward to learning from Matt this year and serving the section to the best of my abilities. Matt and I would greatly appreciate your input and support so that we can make our section the best the HCBA has to offer. We welcome your submission of articles for publication in the Lawyer magazine. If you would like more information on how to submit an article or would like assistance finding a topic, please do not hesitate to contact us.

Our section has upcoming quarterly luncheons scheduled for December 8, February 3, and April 6. We intend to offer CLE credit for those luncheons, if possible. So please add these luncheons to your calendar and watch for upcoming announcements. By the way, visiting the Criminal Law Section page on the new HCBA website is a great way to keep up to speed on updates and information regarding our section. If there is a particular topic of interest that you believe our membership would find noteworthy and educational, please do not hesitate to contact us.

We also need your help choosing this year’s recipient of the Marcelino “Bubba” Huerta III Award for Professionalism and Pro Bono Service. In March 2009, Bubba, a local defense lawyer, passed away at the too-young age of 56. For his professionalism, good heart, and friendly personality, Bubba was universally respected throughout the Tampa Bay area by defense counsel, prosecutors, and judges alike. His commitment to pro bono service was not known to many, but it was appreciated and admired by those who knew him best.

This award is presented to an attorney who exhibits the professionalism and dedication to pro bono service and diligent work in the pursuit of equal justice that made Bubba a remarkable lawyer. The recipient of the award is selected by a committee consisting of local, state, and federal criminal practitioners. In 2009, the first recipient was James Felman. Last year’s recipient was Ty Tison. The award will be presented at our February 3 luncheon. Please nominate an attorney who exemplifies the professionalism and pro bono spirit that made Bubba Huerta exceptional. Submit your nomination to justin@petredislaw.com or mluka@trombleyhaneslaw.com.

Although the Criminal Law Section does not have a section committee, we always welcome the assistance of anyone who would like to participate. Please contact us if you have any questions about the upcoming year or how you can participate. You can also contact HCBA staff if you are interested in sponsorship and advertising opportunities or would like to schedule an event at the Chester H. Ferguson Law Center. I look forward to the opportunity to serve as co-chair and hope to see you at our quarterly luncheons.

Author: Justin Petredis - The Law Office of Justin Petredis, P.A.
As attorneys, it is our duty to not only make a monetary profit, but to make a moral profit, with the benefits going to those who lack a voice. And nowhere is the need for a moral investment for the voiceless more compelling locally than human trafficking.

Human trafficking refers to trade in humans, traditionally for the purpose of sexual slavery or forced labor. Behind Tampa’s attractive beaches and cultural history lies a menacing world of sexual exploitation, rape, and slavery. Approximately 50,000 individuals are trafficked into the United States annually, and Florida is the third-highest-ranked state for human trafficking, with my hometown — the Tampa Bay area — being a top Florida destination.

Trafficking provides lavish profits of $32 billion annually in international trade. And this lucrative trade stains our community.

What is it about the Tampa area that makes it such a magnet for trafficking? Our infamous numerous sex-related businesses often serve as easy covers for human trafficking. Also, our neighboring areas — reaching from Highlands County to Polk County — are rural and include many Latino migrant families, whose family members are more susceptible to becoming human trafficking victims shipped here.

This is a moral challenge that should not go unaddressed. All sectors of our community should play a pivotal role in combating this.

Local government has a strong role to play. Just recently, the Tampa City Council looked at sensible measures to combat the so-called “Asian massage parlors,” where women typically live on site, are confined, and provide forced sex seven days a week. Police should promote the idea that when men frequent these massage parlors, they aid institutions that often engage in slavery and sexual exploitation.

Additionally, we should create a Tampa Citizens Commission on Human Trafficking to find bright and new perspectives.

Church communities should have an increased role in combating trafficking by funding ministries, such as private safe houses, where victims of human trafficking can find relief. Safe houses are often tragically underfunded. Just one year after the passage of Florida’s Safe Harbor Act, which sought to fund safe houses through increased fines on prostitution Johns, less than $10,000 in fines were collected to fund these efforts.

All churches should stamp the many faces of human trafficking on the minds of congregants.

Human trafficking is a crisis that implicates many of our identities. I write in this publication as an attorney. However, I am moved on this issue as a member of my religious faith — a Christian. And I am moved immensely, additionally, as an American. Many victims of trafficking are immigrants who were brought here with the promise of being an American.

I think of my own late father, who came to East Tampa as a Cuban exile at the age of 16. These immigrants want what my own father wanted more than 50 years ago — opportunity and respect — but instead live the nightmare of slavery, all done locally in Tampa.

These victims deserve not only our prayers but our action. Fredrick Douglas once wrote that “I prayed for freedom for 20 years” as a slave “but received no answer until I prayed with my legs.” We should be moved to act on this intolerable evil.

Author: Luis Viera - Ogden Sullivan
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THE ABLE ACCOUNT: A NEW PLANNING TOOL FOR PERSONS WITH DISABILITIES

Elder Law Section

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

On December 19, 2014, The Achieving a Better Life Experience Act of 2014 became law. Its purpose is to create tax-free investment accounts to be used by persons with disabilities for qualified disability expenses while allowing those persons to maintain eligibility for means-tested benefits. The program is modeled loosely after current section 529 savings accounts. States have the option of establishing their own ABLE programs or contracting with another state that has established one.

To be eligible for an ABLE account, an individual must be severely disabled — based on either receipt of SSI or SSDI benefits or certification by physician of a marked and severe functional limitation — before turning 26. The individual must also be a resident of the state in which he or she has the account. Individuals are limited to one ABLE account, and the total amount of annual contributions by all individuals to any one account is the yearly gift tax limit. The aggregate contributions total to an ABLE account is subject to an overall limit matching the state limit for section 529 accounts.

Contributions into an ABLE account can be made by any person, including the eligible individual. Income earned by the accounts will not be taxed. Account withdrawals, including portions attributable to investment earnings generated by the account, for qualified expenses will not be taxable either. For SSI purposes, the first $100,000 in the account balance will not count as a resource; the same is true for account withdrawals. If the balance is in excess of $100,000, the eligible individual will lose SSI benefits until brought back under the $100,000 amount. ABLE account balances and withdrawals will be excluded for the purpose of Medicaid and other benefit programs. However, if the account balance is in excess of the overall maximum allowed, then the individual will lose Medicaid benefits. If withdrawals are used other than for qualified disability expenses, penalties and tax will be imposed.

Qualified disability expenses are defined as “any expenses made for the designated beneficiary related to their disability,” including for education; housing; transportation; employment training and support; assistive technology and personal support services; health, prevention, and wellness; financial management and administrative services; legal fees; expenses for oversight and monitoring; and funeral and burial expenses.

The act does include a Medicaid payback provision. In the event the qualified beneficiary dies with remaining assets in an ABLE account, the assets in the ABLE account are first distributed to any state Medicaid plan that provided medical assistance to the designated beneficiary. The amount of any such Medicaid payback is calculated based on amounts paid by Medicaid after the creation of the ABLE account.

The IRS recently released proposed regulations for the ABLE Act. On May 21, Florida enacted the Florida ABLE Act. It is still in the implementation stage. The program will be administered by Florida ABLE, Inc., and the Florida ABLE Trust Fund will hold account moneys.

An ABLE account will be a new planning tool to address the need for sustainable funding and options for persons with disabilities. However, it has its pros and cons like any other planning tool already available. An analysis will still be needed to know when an ABLE account is the right tool, and when other options, such as a special needs trust, are more appropriate.

Author:
Elizabeth P. Allen - Gibbons | Neuman Attorneys At Law

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The HCBA Trial & Litigation Section welcomed Stetson Associate Dean Michael P. Allen, who discussed the always interesting topic of “Guns, Drugs & Money” during a luncheon on September 24 at the Chester H. Ferguson Law Center. About 80 people attended the section’s first luncheon of the Bar year, which also featured a presentation about pro bono opportunities.

The section would like to thank the luncheon’s sponsor:
On August 28, a new rule promulgated by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers took effect in Florida. The rule, called WOTUS, seeks to clarify the definition of “waters of the United States,” which is critical to those agencies’ regulatory jurisdiction under the Clean Water Act (CWA).

The CWA prohibits the discharge of pollutants into waters of the United States without a permit. The outer boundaries of what qualifies as a jurisdiction water have been unclear for decades. A series of U.S. Supreme Court cases have indicated that, while the agencies’ jurisdiction is broad, it does not extend to the outer reaches of the Commerce Clause. See Rapanos v. United States, 547 U.S. 715 (2006); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs, 531 U.S. 159 (2001); Riverside Bayview Homes, Inc. v. United States, 474 U.S. 121 (1985).

One of these cases, Rapanos, created a great deal of confusion because the plurality, a concurrence by Justice Kennedy, and the dissent all developed different jurisdictional tests. The agencies have focused on Justice Kennedy’s “significant nexus” test. Under that test, if a water has some appreciable impact on a traditionally regulated water under the CWA (like a navigable water), then that water is also jurisdictional. This has meant that many small waters and most wetlands have been subject to the “significant nexus” analysis on a case-by-case basis. This led to a great deal of informal agency guidance, including wetland delineation manuals that attempted to use scientific methods to aid decision making.

According to the EPA and the Corps, WOTUS increases regulatory certainty by reconciling past practices, science, and case law. It does so by expanding the scope of waters and wetlands that are categorically classified as jurisdictional, rather than subject to a case-by-case review. Tributaries, waters, and wetlands “adjacent” to or “neighboring” jurisdictional waters are now categorically jurisdictional. In some cases, waters and wetlands 1,500 feet from a jurisdictional water are considered “neighboring,” even if there is no hydrologic connection. See 33 C.F.R. § 328.3(c)(2). WOTUS also codifies some exclusions that are based on agency practice, including for minor ditches and small artificial ponds. See 33 C.F.R. § 328.3(b).

WOTUS has provoked fierce opposition. Legislation to block it is progressing, but it would likely face a presidential veto. At least 10 federal lawsuits are challenging the rule (with at least half the states as plaintiffs), alleging that WOTUS expands federal jurisdiction beyond the CWA’s limits. A federal judge recently enjoined the rule’s implementation in 13 states, but this did not include Florida. Therefore, while the ultimate fate of WOTUS remains unclear, what is certain is that Florida landowners will be required to comply with it in the short term. What is also certain is that this new rule will result in more Florida wetlands being categorically defined as jurisdictional rather than being subject to case-by-case analysis.

Author: Jacob T. Cremer - Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
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CONGRATULATIONS TO NEW ADMITTEES

New admittees to The Florida Bar gathered at the George Edgecomb Courthouse on September 25 for a celebratory swearing-in ceremony by the judges of the Thirteenth Judicial Circuit. The Hon. Ronald Ficarrotta presided over the ceremony, and HCBA President-Elect Kevin McLaughlin and YLD President Dara Cooley spoke to the new admittees about the benefits of joining the HCBA. Congratulations to all who were sworn in, and thank you to the ceremony’s sponsor:
FLORIDA BAR PRESIDENT SPEAKS AT MEMBERSHIP LUNCHEON

More than 500 people came out on September 16 for the HCBA’s first Membership Luncheon of the Bar year, which featured Florida Bar President Ramón Abadin. HCBA President Carter Andersen and HCBA Programs Chair Melanie Griffin kicked off the luncheon with introductions, recognizing special guests from the Greater Tampa Chamber of Commerce, the HCBA Lawyer Referral & Information Service, the Bar Leadership Institute, and the Thirteenth Judicial Circuit’s new court administrator, Gina Justice.

Before the guest speaker took the stage, the audience took a moment to recognize Judge Bernard Silver with a special portrait, and they remembered the great legacy of Tampa lawyer John F. Germany.

Looking to the future, Young Lawyers Division President Dara Cooley discussed the exciting plans the YLD has for the upcoming year, and Judge Samantha Ward promoted the Bench Bar Conference & Judicial Reception (look for photos from that event in the next issue).

Getting to the keynote presentation, Florida Bar President-Elect Bill Schifino introduced Abadin, who discussed the changing legal landscape and the Vision 2016 Commission’s suggestions. Overall, Abadin encouraged local attorneys to think about the future and share their ideas for how the profession should adjust to meet changing consumer needs in a changing marketplace.

The HCBA would like to thank the luncheon’s sponsor:
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TOWN HALL MEETING

The Hillsborough County Bar Association joined forces with the Tampa Hispanic Bar Association, Hillsborough Association for Women Lawyers, George Edgecomb Bar Association, and the Federal Bar Association’s Tampa Bay Chapter to host a town hall meeting with Florida Bar President Ramón Abadin and President-Elect Bill Schifino on September 15. The goal of the meeting was to help members learn about The Florida Bar Vision 2016 Commission’s in-depth review of four general areas that will impact the future practice of law in Florida: Legal Education; Technology; Bar Admissions; and Access to Legal Services. About 100 attorneys and judges attended the meeting, where they expressed their opinions and asked questions about the commission’s review.
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Health Care Law Section
Chairs: T.J. Ferrante - Foley & Lardner LLP; and Sara Younger Seifried - BayCare Health Systems

In order to participate in the MCCM and receive both supportive and curative care, the patient must:
(i) be eligible for hospice services under the Medicare or Medicaid Hospice Benefit;
(ii) have been living at home for the past 30 days;
(iii) be diagnosed with a terminal illness, including advanced cancer, COPD, congestive heart failure, or HIV/AIDS; and
(iv) have been hospitalized at least two times in the past 12 months for the qualifying diagnosis. In addition, the patient cannot have elected the Medicare Hospice Benefit in the prior 30 days and must receive services through a MCCM participating hospice.

CMS responded to the strong demand of hospices that wanted to participate in the MCCM by expanding it from 30 hospices in a three-year program to 141 hospices in a five-year program. The five-year model will operate in two phases: Half of the selected hospices will begin providing services under the model January 1, 2016, and the other half will begin January 1, 2018. Both phases will conclude December 31, 2020. CMS will randomly assign the invited hospices to one of the two phases. Locally, both LifePath Hospice and Suncoast Hospice were selected to participate.

Hospices participating in the MCCM will be paid a per-beneficiary per-month fee of $200 or $400 through the standard Medicare claims process. Beneficiaries participating in MCCM will not be subject to a co-pay. Hospice services will be available to beneficiaries around the clock, 365 days a year, and beneficiaries may leave the MCCM at any time. CMS estimates that up to 150,000 beneficiaries may participate in the model.

Authors:
Linda L. Fleming and Keebler Straz – Carlton Fields Jorden Burt, P.A.
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Despite the fact that parts of President Obama’s executive actions on immigration currently are being challenged in court, the administration is moving forward with its promise to modernize our immigration system.

This September, U.S. Citizenship & Immigration Services (USCIS) announced that it was working with the U.S. Department of State (DOS) to overhaul the procedures for determining visa availability for adjustment of status applicants waiting to file under either the employment-based or family-sponsored categories. The revamped procedures more closely mirror current DOS procedures for foreign nationals who seek to become U.S. permanent residents by applying for immigrant visas abroad.

By way of background, Congress sets the limits on the number of immigrant visas issued each year. In order to adjust to a legal permanent resident, an immigrant visa must be available to the adjustment applicant at the time of filing the petition and at the time of adjudication. DOS publishes a monthly Visa Bulletin that sets forth whether a visa is available (that is “C” for current), or not available (that is “U” for unavailable). In some instances, it will list a date that indicates the date of the petitions currently being adjudicated.

Generally, the dates on the monthly Visa Bulletin move forward in time. However, this is not always the case. Sometimes the dates move backward in time (or retrogress) when more people apply for a visa in a particular category or country than there are visas available for that month. Retrogression usually occurs toward the end of the fiscal year as visas approach the per-country limitations. It is not until the new fiscal year begins (October 1) that a new visa supply is made available. The new supply of visa usually results in the dates on the Visa Bulletin returning to where they were before retrogression occurred, but that is not always the case.

Beginning with the last month’s Visa Bulletin, DOS will post two charts per visa preference category as follows:

• Application Final Action Dates (dates when immigrant visas may finally be issued)
• Dates for Filing Applications (earliest possible dates when applicants may be able to apply)

In turn, USCIS will monitor visa numbers and post the latest Visa Bulletin charts for the Dates for Filing Adjustment of Status Applications at http://www.uscis.gov/visabulletininfo. Applicants can use these charts to determine whether they are eligible to file for adjustment of status.

It is expected that the revamped procedures will assist DOS to more accurately predict overall immigrant visa demand and determine the cut-off dates for visa issuance published in the Visa Bulletin. This, in turn, is presumed to ensure that the maximum number of immigrant visas are issued annually, as mandated by Congress, and minimize monthly fluctuations on final action dates.

Immigration practitioners are hopeful that these steps to modernize our antiquated immigration system will bring about much needed reform.

Author: Maria del Carmen Ramos - Shumaker, Loop & Kendrick LLP

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LRIS ATTORNEYS SPEAK TO SERTOMA CLUB

Attorneys Haksoo Stephen Lee, James Giardina, and Lynn Hanshaw, all members of the HCBA Lawyer Referral & Information Service, spoke on behalf of the HCBA Speakers’ Bureau at luncheons for the Greater Tampa Sertoma Club recently. If your community or service group needs an attorney to speak at an event, contact our Speakers’ Bureau at hillsbar.com.
Even sophisticated companies and inventors have questions about patent issues. This Q&A series addresses some of the more advanced questions about patent law.

Q: I periodically search my competitors’ published applications and found one that should not be granted as a patent. How can I communicate that to the patent office?

A: One way is to submit art that is relevant to the patentability of the pending claims to the patent office yourself. The general rule is that a third party may submit prior art in another party’s application, although only within certain time limits. The art can be submitted anonymously and must include a concise description of the asserted relevance of the documents.

Q: How does an international “place-holder” patent application work?

A: The value of a patent portfolio may partially depend upon the geographical scope of protection. One way to begin obtaining protection in a number of countries, while delaying (although not avoiding altogether) expensive filing fees and translation costs, is to file an application under the Patent Cooperation Treaty (PCT). A PCT application can designate more than a hundred countries for a single fee. The application can keep the options of pursuing international protection alive for up to 30 months after the date of filing, providing time to determine the importance of the invention, secure financing, determine whether the invention is commercially viable, and determine whether international protection is warranted — and in what countries. At the end of the 30-month period, the applicant must select the countries in which to pursue patent protection and file an application directly in those countries.

Q: Are there other place-holder options?

A: A U.S. provisional patent application acts as another “place-holder.” Because provisional applications do not require claims and there is not a required format to be used (it is possible to file a presentation or a sketch with notes), a provisional application can be prepared and filed relatively quickly. The filing fee for a provisional application is $260 or less (depending upon the size of the company). Provisional applications must still disclose the invention and enable one to make and use it, just as a “regular” (non-provisional) application, but they are not examined. To benefit from the “priority” date of the provisional application, the applicant must file a formal application that claims priority to the provisional application within one year.

Q: How can I ensure that I am not infringing someone else’s patent?

A: If you are about to launch a new product, consider a clearance study. This may be particularly important if the new product is outside the company’s traditional area of technology. A clearance study will attempt to identify patents that might pose an infringement issue with respect to the new product. Patents located during the patent search can be reviewed to determine whether the proposed new product might infringe any of those patents. If there are challenges in clearing the proposed product over one or more of the patents identified during the search, it is possible to try to “design around” the problematic patents or to conduct a validity study.

Author:
Kristin M. Crall - Kilpatrick Townsend & Stockton LLP
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Last month marked the beginning of fall. We have all been awaiting the arrival of cooler temperatures and, of course, pumpkin-spice-flavored everything. But not everything is cooling down. Some things are heating up, including lawsuits claiming violations of the Fair Credit Reporting Act (FCRA).

Haven’t heard of the FCRA? The FCRA was enacted in 1970 during President Nixon’s administration. Throughout employment history, claims under the FCRA have been scarce. Now, almost half a century later, FCRA lawsuits are spreading across the country like wildfire. These cases are so hot that one has recently made its way to the United States Supreme Court.  

So what is the FCRA? Among other things, the FCRA requires employers to take important compliance steps before obtaining and using consumer reports to make employment-related decisions such as hiring, promoting, demoting, and terminating.

What are “consumer reports?” No, not the magazine you consult to compare car features! They can include information from a variety of sources including criminal records, motor vehicle reports, credit checks, reference checks, education verification, employment verification, and professional license or certification verification.

Adding fuel to the fire, over the past few years, the United States Equal Employment Opportunity Commission has brought numerous lawsuits against employers claiming that their criminal background check and credit check policies disproportionately exclude certain protected class members. If you are an employer, here is what you need to know to stay out of the heat. Prior to obtaining a consumer report, employers must provide notice to applicants and employees that they might use information in the report to make employment-related decisions. The notice must be in writing and in a stand-alone document. Also before the employer can obtain a consumer report, the employee or applicant must provide written authorization. Before taking an adverse employment action based on a consumer report, employers must provide a copy of the consumer report and a written description of consumers’ rights under the FCRA to the applicant or employee. As referenced above, the United States Supreme Court will decide whether plaintiffs who suffer no concrete harm from FCRA violations have Article III standing to invoke the jurisdiction of federal courts. The decision will either extinguish the majority of FCRA lawsuits or spark further FCRA actions. Want whipped cream on that latte? Hope you have checked out the oral arguments in this case, set for November 2.

1 See Robins v. Spokeo, Inc., 742 F.3d 409 (9th Cir. 2014), cert. granted.
3 Employers and prospective employers should also review applicable state laws related to consumer reports.
4 The notice cannot be in an employment application. The notice should not contain any information that confuses or detracts from the notice.
5 Additional requirements apply if the only interaction with the employee or applicant is by mail, telephone, or computer.

Author:
Sara Sanfilippo – Greenberg Traurig
CORPORATE COUNSEL LUNCHEON

Attorney Luis A. “Tony” Cabassa spoke about employment law from a plaintiff’s perspective at a Corporate Counsel Luncheon on September 9. Thanks to all who attended!

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Four recent appellate cases make it clear that it is difficult to impute income to an unemployed or underemployed parent under section 61.30(2)(b), Florida Statutes. In each of the four cases, the appellate court reversed the trial court’s imputation of income. How can you present a case for imputed income that will withstand appellate scrutiny?

The child support statute provides a two-step analysis for imputing income. First, the court will impute income if it is determined that the parent’s underemployment or unemployment was voluntary, unless the court finds a “physical or mental incapacity or other circumstances over which the parent has no control.” Second, if the parent’s underemployment or unemployment is found to be voluntary, the court must move to the much more difficult step of calculating the amount of imputed income. The statute gives some guidance for this step: “the employment potential and probable earnings level of the parent shall be determined based upon his or her recent work history, occupational qualifications, and prevailing earnings level in the community if such information is available.” The appellate cases make it clear that detailed findings of fact are required in each area.

Because of that, be advised that showing past work history and income alone is insufficient to impute income. You must also prove the occupational qualifications of the parent and the prevailing earnings level in the community. The word “community” refers to the area where the parent currently lives, so evidence of jobs outside the area would not meet the statutory criteria. Also keep in mind that because section 61.30(2)(b)(1)(b) requires that due consideration be given to the parties’ time-sharing schedule, requiring a parent to relocate for employment will not stand.

When imputing income for purposes of child support, make sure that you do more than simply show a parent’s work history and income. You also need detailed findings of fact showing the following: (1) the occupational qualifications of the parent (this shows employability); and (2) the fact that there are jobs available in the local community (along with information about what those jobs pay). Providing detailed findings of these facts will help your case withstand appellate scrutiny.

1 Thompson v. Malicki, 169 So. 3d 271, 272 (Fla. 2d DCA 2015); Dottaviano v. Dottaviano, 170 So. 3d 98, 99 (Fla. 5th DCA 2015); Heard v. Perales, 2015 WL 3609104, at *2 (Fla. 4th DCA June 10, 2015); Broga v. Broga, 166 So. 3d 183, 185-86 (Fla. 1st DCA 2015).


3 Broga, 166 So. 3d at 185; Thompson, 169 So. 3d at 272.

4 Broga, 166 So. 3d at 186.

5 Id. at 187.

Author:
Paul E. Riffel - Paul E. Riffel, P.A.
Mediators and lawyers looking for guidance on ethical and unethical threats in negotiations should look to the American Bar Association (ABA) Ethical Guidelines for Settlement Negotiations. These guidelines, which explain that the “purpose of settlement negotiations is to arrive at agreements satisfactory to those whom a lawyer represents and consistent with law and relevant rules of professional responsibility,” was intended as a resource to facilitate and promote ethical conduct in settlement negotiations.¹

Impermissible Threats

Lawyers may not attempt to negotiate a settlement by extortionate means or by otherwise unlawful or unethical threats. An example of this is a threat “to publicly reveal embarrassing or proprietary information other than through the introduction of admissible evidence in a legal proceeding.”² For instance, a “lawyer’s threat to publicize embarrassing photographs of a defendant’s marital infelicities unless the defendant settled an unrelated personal injury action would be a classic instance of criminal extortion.”³ But whether a lawyer would be permitted to make the same threat in negotiating a settlement in a dissolution of marriage case involving adultery is an issue.⁴

Knowing what constitutes an impermissible threat is important because Florida Rule of Professional Conduct 4-8.3 requires lawyers to inform The Florida Bar if they know that another lawyer has committed an ethical “violation of the Florida Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer.”⁵ Even though a lawyer has a duty to report certain unethical conduct, however, “authorities have held that it is unethical for a lawyer to threaten to report another lawyer” to the Bar in order to gain an advantage in a civil lawsuit.⁶ Interestingly, with some exceptions, a lawyer is also not allowed to promise not to report “opposing counsel’s misconduct as a condition of a settlement in contravention of the lawyers reporting obligation.”⁷

In addition to being a violation of Rule 4-8.4, threats to report a party because of criminal violations may be unlawful. Threatening criminal prosecution sometimes violates criminal law. In particular, section 836.05, Florida Statutes, provides that a person using extortionate threats shall be guilty of a felony.⁸ This would include threats made by a wife’s lawyer to the husband during mediation that he would face problems with the Internal Revenue Service for certain past indiscretions if a settlement could not be reached. Furthermore, such conduct would subject a lawyer to discipline under the Florida Rules of Professional Conduct.

Permissible Threats

Not all threats, however, are prohibited in settlement negotiations. It is permissible, for instance, to threaten to file suit if the opposing party does not settle. A lawyer can also threaten to tax costs that will be incurred in going to trial if the opposing party does not settle. Finally, a party may threaten to introduce evidence information that is embarrassing to the opposing party, if legally admissible.⁹

The Ethical Guidelines for Settlement Negotiations can also provide guidance to lawyers and mediators as they resolve other concerns in applying legal ethical principles in their practice.

Continued on page 55
Continued from page 54

2 Id. at 49-50.
3 Charles W. Wolfram, Modern Legal Ethics 715 (West 1986).
5 R. Regulating Fla. Bar. 4-8.3(a).
6 Ethical Guidelines for Settlement Negotiations, at 50 (Am. Bar Ass’n 2002).
7 Id. at 44.
8 Id. at 50.
9 Ethical Guidelines for Settlement Negotiations, at 50 (Am. Bar Ass’n 2002).

Author: Thomas Newcomb Hyde - Thomas Newcomb Hyde, Attorney-at-Law

CONSTRUCTION LAW LUNCHEON

The Construction Law Section hosted a luncheon on September 17 featuring speakers Kevin Salvagni and Jack MacGiffert from Hill International Inc. Both speakers drew from their many years of experience in the construction industry to discuss the use of a joint defense among multiple subcontractors and the various elements of construction defects. Thanks to all who attended and to NorthStar Bank for sponsoring this insightful event.
Just recently, a remarkable resident of Tampa — whose sacrifice made our liberty a reality over 70 years ago — met his maker.

If I have any regret, it is that I knew this remarkable man for too short of a time. Earlier this summer, I had the unique honor of visiting with the father-in-law of one of Hillsborough County’s finest assistant public defenders, Marie Marino. I had met Marie in my volunteer role mentoring veterans who have fallen on the wrong side of the law and find themselves in the Veterans Treatment Court (VTC).

But on this particular day, I was not asked to mentor a fellow veteran in need. You see, Marie had a simple request of me — just spend time with another fellow combat veteran, her father: Colonel Kenneth W. Davey, USAF retired. He was over 100 years old and flew bombing raids from the United Kingdom, across the English Channel, over Nazi Germany, during World War II. He is part of that elite and time-honored group of Americans that Tom Brokaw once dubbed “the greatest generation.” Having also participated in initial U.S. military operations in places such as Haiti and Iraq, I felt an immediate kinship with the colonel. I was also quite excited to meet probably one of the last few warriors and heroes of the war that forever changed the history of, and cemented the eventual world preeminence of, the United States of America. To me, Colonel Davey represented “living history.”

I was mesmerized during our three-hour visit. At times when he spoke, I felt like I was watching the last scene of the movie “Saving Private Ryan,” when the now elder Ryan “re-saw” Operation OverLord, the Normandy Beach landings, and “re-heard” the final charge that his company commander, Captain John H. Miller, uttered before he passed away: “James, earn this. Earn it ...” On a more lighthearted note, we

And I heard the voice of the Lord saying, “Whom shall I send, and who will go for us?” Then I said, “Here I am! Send me.”
(ISAIAH 6:8 ESV)
why we must never forget
military & veterans affairs committee

Continued from page 56

laughed when Colonel Davey recalled his “extra duty” — escorting then Princess Elizabeth (now the Queen of England) around his Royal Air Base and his lively discussion with her. I also learned that he flew with the famed 303rd Heavy Bomb Group, based out of RAF Molesworth, U.K.

More than 61 years later, I would command the U.S. European Command’s Joint Analysis Center (JAC) in RAF Molesworth and home of the famed 303rd Heavy Bomb Group. I felt another connection with this great American.

At the end of our visit, I stood at attention, rendered a salute to a senior officer, and thanked him for not only his service to our great nation but for blessing his family, and all of us whom he has touched throughout his incredible life.

Colonel Davey looked at me, and with a gleam and fire in his eyes, slowly but ever so precisely saluted in return. It was at that moment that I felt a spiritual passing of the baton. It was as if he was telling me, and our current and future generations of servicemen and women, to “Earn this. Earn it.”

On August 15, 2015, Colonel Davey died. Those teenagers and brave Americans who were in their 20’s during World War II are now seniors in their 90’s and are leaving us. They are no longer easily found. But the world that their courage created still stands.

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When drafting a contract, it is not unusual to prioritize the substantive terms at the head of the agreement and to apply less scrutiny to the presumably less consequential provisions that form the tail. Indeed, clients demanding simplicity may grumble at the litany of “miscellaneous” subsections that appear to do little more than add length. Although it is true some terms are “more equal” than others, the omission of certain lesser provisions may create serious problems for clients.

In *Blue Lagoon Development, LLC, v. Maury*, 2015 WL 3875437, at *3-4 (Fla. 3d DCA June 24, 2015), the Third District Court of Appeal explained that, while a “time is of the essence” clause need not be expressed in a contract with respect to satisfying monetary requirements, the same is not true regarding non-monetary conditions, regardless of whether a deadline is specified in the contract.

In *Blue Lagoon*, Leon Medical Centers agreed to purchase vacant commercial land from Blue Lagoon Development, LLC, conditioned on Blue Lagoon obtaining a rezoning of the parcel by July 31, 2008. The contract did not include a “time is of the essence” clause. On July 16, 2008, the local zoning board approved Blue Lagoon’s application by resolution, which the Miami-Dade Department of Building and Zoning certified and enacted on July 23, 2008. The department’s enactment, however, was subject to a 14-day appeal period that expired August 4, 2008 — four days after the rezoning deadline in the contract.1 *Id.* at *1.

Meanwhile, on July 11, 2008, Leon purchased an adjacent, less expensive commercial parcel of land and no longer desired Blue Lagoon’s parcel. On July 31, 2008, Leon sent a letter to Blue Lagoon terminating the contract purportedly because Blue Lagoon failed to timely obtain a non-appealable rezoning of the parcel. Notwithstanding the pre-deadline approval and the fact that no appeal of the department’s enactment ever materialized, the trial court ruled that Leon’s termination notice was valid. *Id.* at *2.

The Third District reversed the trial court, in part because of the absence of a “time is of the essence” clause, explaining that the mere designation of a particular date for performance of a non-monetary condition does not make that date the essence of the contract absent a showing that reasonable delay would have constituted a material breach or caused significant injury to the party entitled to performance. *Id.* at *4 (citing *Command Sec. Corp.* v. Moffa, 84 So. 3d 1097, 1100 (Fla. 4th DCA 201)). Here, the Third District may have found off-putting Leon’s hyper-technical and “transparently makeweight” attempt at terminating an otherwise valid but later undesirable contract based on a condition that was, as the court determined, timely performed. *Id.* at *3. Still, the point is clear: A specified non-monetary condition, i.e., a rezoning deadline, may not necessarily be firm without the express confirmation that time is of the essence. With that point comes a reminder to our clients — miscellaneous non-monetary contract terms are more than mere clutter, and their inclusion or exclusion may have profound effects on what precedes them.

1 The contract did not address whether any appeal period affected the approval deadline.

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Let’s assume that you just played golf with a buddy from college who is a high-ranking sales manager for a publicly traded manufacturing company. Over drinks, he casually mentions that his company is about to sign a major contract with the Chinese government. The next day, you buy thousands of shares of stock in the company, hoping that once this information is released, the stock price will hit the roof.

Have you committed a federal crime? Well, that may depend on whether you are in New York, San Francisco, or, for that matter, Tampa. As a result of two recent significant U.S. Circuit Court of Appeals decisions, the law of insider trading has become, in a word, muddled.

The Second Circuit, in a landmark decision, United States v. Newman, 773 F.3d 438 (2nd Cir. 2014), recently turned back an effort by federal prosecutors to go after so-called “remote tippees” who received confidential information without knowing that the tipper who made the disclosure received any personal benefit. The law of insider trading developed from the courts’ interpretation of section 10(b) of the Securities and Exchange Act of 1934, which does not expressly prohibit insider trading. Instead, the law criminalizes the use of any “manipulative or deceptive device or contrivance” in connection with the sale or purchase of securities. Insider trading has been deemed such a fraudulent practice for many years. But what does a prosecutor have to prove to get a conviction for insider trading?

The Newman court made clear that there are several hurdles in a criminal case, including proof that the tipper received or expected some personal benefit in exchange for the disclosure; that is, something that is “objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature.” Newman, 773 F.3d at 446-47. The tipper must receive something resembling a quid pro quo, and the tippee must know about it. Id.

Now, enter the Ninth Circuit. In a decision written by Judge Jed Rakoff, sitting by designation (ironically, Judge Rakoff sits in the Southern District of New York, which is in the Second Circuit), the court in United States v. Salman, 792 F.3d 1087, 1093 (9th Cir. 2015), held that a mere friendship or family relationship would qualify as a personal benefit to the tipper sufficient to create a breach of fiduciary duty and violation of law. Salman took direct aim at Newman and affirmed a conviction where family members were sharing inside information, but the tipper was otherwise receiving no tangible or pecuniary benefit. Id. at 1092-93.

So, the exchange of information and trading described above might be alright in New York, but probably not in San Francisco. As far as Tampa, the Eleventh Circuit so far has not weighed in. And the confusion will continue since the Supreme Court denied certiorari in Newman.

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One of the most important and enduring legacies that you as a more experienced attorney can leave to the profession is the knowledge and pride that a young lawyer you have mentored has been successful. Mentoring young lawyers, in this writer’s opinion, should be an obligation of all members of the Bar. When I began my practice in 1979, I was extremely lucky to have a great mentor I was later proud to call a law partner, and now an old friend.

Like many lawyers, I came out of law school totally unprepared for the practice of law. My mentor showed endless patience and kindness, although I did not recognize it as such until many years later.

Generally, experienced lawyers should set the new lawyer’s expectations high and discourage mediocrity on the job. It is OK to tell a “war story or two” as that might give a new lawyer a little perspective. Mentors should understand that Millennials have a different workplace vision than Baby Boomers. “Dedicated” to a Millennial means something other than the number of hours worked, the number of hours billed, or how many Saturday or Sundays one goes to the office. The Millennial’s interpretation of dedication is based on an overall approach and job satisfaction and their belief that they are doing a good job and that they are being as effective as possible.

Mentors should encourage new lawyers not to “re-invent the wheel,” but be sure they understand how to do so, if so needed in the future. Young lawyers should be encouraged to build their own practice and not simply be “drones” for older lawyers. Encourage client interaction, Bar activities, marketing activities, and very importantly, charitable work in the community. Inculcate the idea that every generation of lawyers must give of themselves to their communities.

One self-described “wet-behind-the-ears lawyer” mentored by this author has stated that one of his earliest and most difficult lessons starting his practice was that he did not know nearly as much as he thought he did. He stated that knowing the tenets of contract formation does not necessarily translate into being an effective lawyer. This new attorney has expressed gratitude to work in a practice with experienced attorneys who go out of their way to offer guidance and advice.

One of the first lessons recounted by this new attorney is one of the most obvious. The lawyer must keep the clients constantly updated.
about their cases. He went on to state that it does little good to win a hearing without communicating to the client the meaning of the victory in real terms. Education of the client as to realistic expectations and timetables for future aspects of the litigation is equally important.

A second lesson mentioned by this new attorney is that professionalism and courtesy goes miles beyond arguing over relatively trivial matters. This new attorney has gained perspective and found it to be a good rule that he will litigate against the same attorney again in the future and that it does the attorney no favors to leave a poor impression. Through mentoring, this new attorney has better understood that communication with opposing counsel can often resolve most issues without resorting to motions or court intervention.

In summary, experienced lawyers have an obligation to mentor new lawyers, for the general improvement of the practice of law and for the mentor and the new lawyer.

Author:
Gilbert M. Singer - Marcadis Singer, P.A. Written with the assistance of Robert Lindeman - Marcadis Singer, P.A.
Small firms and solo practitioners often focus their practice on a particular area of law. So what happens when a potential client concerned with a recent DUI arrest comes to a firm that specializes in consumer protection? The consumer protection firm refers the potential client to another firm that practices criminal law. Because turning away a potential client means turning away business, however, the referring attorney often requests a referral fee.

There are other situations in which a referral may be warranted. Perhaps the case is larger than the firm can handle on its own. Perhaps the firm needs to associate local counsel. In any event, the firm enlists an outside attorney for assistance. Although referring cases is a common practice in our field, the law has a historical abhorrence of entering into an attorney-client relationship for any reason other than finding the best attorney for that client’s needs. Thus, the Florida Bar has adopted regulations regarding “the brokering of cases.”

The classic “referral fee” is a form of fee sharing or fee splitting. Attorneys who are not in the same firm may share or split fees only if the fee is reasonable and: (1) the division of fees is in proportion to the services performed by each lawyer; or (2) the lawyers have a written agreement with the client that: (a) provides each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and (b) discloses that a division of fees will be made and the basis for that division. R. Regulating Fla. Bar 4-1.5(g).

In injury or death cases in which any part of the fee is contingent, the special rules in Rule 4-1.5(f)(4)(D) apply. Generally, the payment of a referral fee to an attorney is made on a quantum meruit basis. Fla. Bar Op. 90-3 (Jul. 15, 1990). A larger fee may be appropriate, however, where it is shown that one attorney played a greater role in securing a total award. Garces v. Montano, 947 So. 2d 499, 504 (Fla. 3d DCA 2006). But if the referral was made because of a conflict of interest, the referring attorney is not permitted to receive any part of the fee for the services. Fla. Bar Op. 89-1 (Mar. 1, 1989).

Notably, any fee sharing or fee splitting situation could affect liability for malpractice. The Third DCA certified the following question as one of great public importance nearly 20 years ago: “Where there is an express or implied agreement for the payment of a referral fee, but the attorneys have not executed the written agreement required by [Rule 4-1.5(g)], is the referring attorney civilly liable in the event of legal malpractice by the working attorney?” Noris v. Silver, 701 So. 2d 1238, 1241 (Fla. 3d DCA 1997). The Third DCA answered yes, the referring attorney is liable even though the agreement is not enforceable by the referring attorney, but the Florida Supreme Court still has not weighed in.

In the end, professional referrals can be a principal cornerstone of our legal practice. Use them responsibly, and everyone wins.
O
n April 29, Chief Justice John Roberts sent a letter to the speaker of the House and the president of the Senate regarding changes to Federal Rules of Civil Procedure 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84 (in addition to the Appendix of Forms) that become effective December 1. Although some changes are minor, others are significant.

For starters, the revised Rule 1 puts an onus on the parties to ensure speedy and just resolution of disputes. This change dovetails with the changes to the discovery rules, explained below. Often overlooked by practitioners, Rule 1 is the keystone for all other rules and should be the first rule cited in any discovery motion.

Rule 26, which governs general discovery matters, now sets forth specific proportionality factors — including the importance of the issues at stake, the amount in controversy, the relative access to relevant information, the parties’ resources, the importance of the discovery in reaching a resolution, and whether the burden or expense of discovery outweighs the likely benefits — that must be considered in determining the scope of discovery. Such factors are in line with the overarching theme of the amendments — parties are to cooperate and not waste resources in the discovery phase.

The new Rule 37, which permits sanctions for discovery violations, now allows a party to compel an answer, designation, production, or inspection for the failure to produce documents. Rule 37 has also been updated to conform to today’s technologically driven world. Specifically, Rule 37(e) now deals with the failure to preserve ESI, not just a failure to produce it. The rule allows courts to sanction a party that has lost ESI that should have been preserved in anticipation of litigation. Upon a finding of prejudice, the court may fashion a cure or sanction, such as an award of the costs incurred by the opposing party as a result of the loss of data, even if the loss was unintentional. If the court determines a party intentionally destroyed ESI, it may: (i) presume the lost ESI was unfavorable to the party; (ii) instruct the jury that it must consider the lost ESI unfavorable to the party; or (iii) enter a default judgment. Rule 37(e)’s amendments underscore a party’s efforts to create and comply with a reasonable data retention policy.

Aside from changes to the discovery rules, two interesting changes have been made to Rule 4. The first has to do with waiver of service. The waiver request must now include the form appended to Rule 4, and if the defendant fails to sign the waiver, the serving party may seek to impose the costs of service upon the defendant. The second has to do with the time for service. Now under Rule 4(m), the court must dismiss the action without prejudice if service is not made within 90 days, instead of 120 days under the old rules.

The new rules have a clear theme: Streamline litigation, encourage cooperation, and reduce unnecessary expense. Although the amendments are a step in the right direction, only time will tell if the changes result in more narrowly tailored discovery requests and cooperation from counsel and the parties on discovery matters.

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Erin Smith Aebel, a partner in the Tampa office of Shumaker, Loop & Kendrick, LLP, and co-chair of the Tampa Health Law Department, was a presenter in Washington, D.C., at the annual meeting of the American Health Lawyers Association on Physician-Pharmacy Ventures: A Source of Revenue or a New Source of Risk? She also spoke at the Women Leaders in Healthcare Law Conference in September in Washington, D.C.

Adam L. Bantner, II, a criminal defense attorney with Brandon Legal Group, was recently elected president of Tampa Tiger Bay Club.

Ed Carbone, managing partner of the Tampa office of Roig Lawyers, spoke at The Florida Bar Continuing Legal Education Committee and the Health Law Section’s Seventh Annual FUNdamentals: Lawyers at the Bedside: The Intersection of Legal and Medical Ethics CLE program in September at the Orlando Airport Marriott.

Jacob T. Cremer has joined Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A. as an associate. He will continue his practice in environmental, land use, and property rights law. He was also recently selected for the 2016 class of Leadership Tampa Bay and elected to the board of directors of the Hillsborough County Farm Bureau.

Catherine (“Cat”) DiPaolo of Trenam Law received the American Bar Association Young Lawyers Division Star of the Year Award. DiPaolo is an associate in the Commercial Litigation Practice Group and is based in the Tampa office.

Michele Leo Hintson, a partner in the Tampa office of Shumaker, Loop & Kendrick, LLP, has been appointed to serve on the Board of Directors of the Pace Center for Girls - Pasco.

Mitchell I. Horowitz has been named co-chair of Buchanan Ingersoll & Rooney’s Tax Practice Group. Horowitz focuses his practice in the area of civil tax controversies with the Internal Revenue Service and Florida Department of Revenue, including U.S. Tax Court, federal district court and state court litigation, and transactional and business law representation.

Stephanie L. Kane has joined Smolker, Bartlett, Loeb, Hinds & Sheppard, P.A. Kane focuses her practice on commercial real estate with an emphasis on real estate transactions and lending.

Andrew J. Mayts Jr., a shareholder in GrayRobinson’s Tampa office, has been selected to participate in Leadership Florida’s 34th class.

Brett Preston, shareholder with the law firm Hill Ward Henderson, was recently re-elected to the board of directors for the Federation of Defense and Corporate Counsel. In addition, he was selected as the chair for the 2016 annual meeting, which will be in Quebec in late July 2016.

Hala A. Sandridge, shareholder with Buchanan Ingersoll & Rooney and chair of the firm’s Appellate Practice Group, has become a fellow with the Litigation Counsel of America, an invitation-only trial lawyer honorary society established to reflect the new face of the American Bar. Membership is limited to 3,500 fellows representing less than one-half of 1 percent of American lawyers.

Kristin Shusko, a senior associate in GrayRobinson’s Tampa law office, has been selected to participate in Leadership Tampa Bay’s 2016 Class.

Murray B. Silverstein, a shareholder in the Tampa litigation practice of international law firm Greenberg Traurig, P.A., has been reappointed by the Florida Supreme Court to serve on the Florida Courts Technology Commission. Silverstein has been an active member of the commission since 2007 and will serve for another three-year term.

Dena Thompson-Estes announces the opening of Estes Law, LLC, a law firm dedicated to providing personalized service and quality representation in marital and family law matters, collaborative divorce, mediation and other family law services in Tampa Bay and the surrounding areas.

For more HCBA news, go to www.facebook.com/HCBAtampabay.
To submit news for Around the Association, email Corrie Benfield at corrie@hillsbar.com.
Tampa Bay: In the Heart of the Third Coast

Between the influx of healthcare companies, the financial services firms that have taken root, and the real estate development happening all over, the Tampa Bay area has become one of the most dynamic forces in the Gulf region. With four busy seaports, three international airports, and over $13.3 billion in exports, the commercial opportunities are many and varied. And as a law firm long embedded in the business culture of the “Third Coast,” we are perfectly positioned to help you seize those opportunities.

Lawrence Ingram
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For the month of May 2015
Judge: The Hon. Keith Spoto of the Tenth Judicial Circuit, Bartow
Parties: Daniel Tuttle v. Prescott & Associates and David Arnett
Attorneys: For the plaintiff: Robert Thornhill III and Ryan McCarthy; for the defendant: Joseph T. Patsko and Theresa L. Donovan
Nature of Case: Personal injury
Verdict: Jury found no permanent injury and awarded plaintiff $7,673 for part medical expenses. Defendant’s motion for attorney fees pending.

For the month of July 2015
Judge: The Hon. John Lenderman of the Twelfth Judicial Circuit, Sarasota
Attorneys: For the plaintiff: Ted Eastmoore, Keith Dubose, and Patricia Crawe; for the defendant: Joseph T. Patsko and Tara Donovan
Nature of Case: Personal injury
Verdict: No liability defense verdict. Defendant’s motion for attorney’s fees and costs is pending.

For the month of August 2015
Judge: Virginia Hernandez Covington
Attorneys: For plaintiff: Richard Fee, Kathleen Wade, and Catherine Yant of Fee & Jeffries, P.A.; for defendant: Frederick Whitmer, Susan Cahoon, and Russ Korn of Kilpatrick Townsend
Nature of Case: Patent infringement
Verdict: Plaintiff awarded $2,220,850 in past damages, and defendants found to have willfully infringed one of the asserted claims.

For the month of August 2015
Judge: Pamela Campbell
Parties: Darius Warner v. Cysco West Coast FL
Attorneys: For plaintiff: Martin W. Palmer and Joseph K. Lopez Jr.; for defendant: Barr Murman and Tonelli
Nature of Case: Admitted liability auto negligence alleged to have result in loss of function of one of plaintiff’s hands.
Verdict: $773,000

For the month of August 2015
Judge: Hon. Mark R. Wolfe
Parties: Michael Kwashnak v. Amy Menna
Attorneys: For plaintiff: David Papa and Frank Currie; for defendant: Mary Thomas and Jason Salgado
Nature of Case: Premises liability. Plaintiff sought $2.2 million for injuries and damages from defendant’s bamboo tree
Verdict: Defense verdict — no liability.

To submit news for Jury Trial Information,
email teresa@hillsbar.com.
- **DECEMBER 3**
  HCBA Holiday Open House at the Chester H. Ferguson Law Center

- **JANUARY 19**
  HCBA Diversity Membership Luncheon at the Hilton Tampa Downtown

- **FEBRUARY 13**
  Diversity Networking Social at the Chester H. Ferguson Law Center

- **MARCH 5**
  Judicial Pig Roast/Food Festival & 5K Pro Bono River Run on the grounds of Stetson Law Tampa Campus

- **MAY 24**
  HCBA Law Day Membership Luncheon at the Hilton Tampa Downtown

Learn more about HCBA events at [www.hillsbar.com](http://www.hillsbar.com).

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- Lee County Legal Professionals (LCAP)
- Tampa Bay Trial Lawyers Association
- Law Week
- Tampa Bay Paralegal Association
- HCBA Board of Directors Retreat
- HCBA Diversity Committee
- HCBA Young Lawyers Division
- Bay Area Legal Services (BALS)
- Florida Paralegal Association
- Lowry Park Zoo
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