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ABOUT THE COVER

This Bar year, we will be highlighting famous legal literary works on the cover of the Lawyer magazine. We start off with one of the most well-known, To Kill A Mockingbird. The unforgettable novel of a childhood in a sleepy Southern town and the crisis of conscience that rocked it, To Kill A Mockingbird became both an instant bestseller and a critical success when it was first published in 1960. It went on to win the Pulitzer Prize in 1961 and was later made into an Academy Award-winning film, also a classic.

Cover art source: Grand Central Publishing (Hachette Book Group)
THE FUTURE LOOKS BRIGHT FOR COLLABORATIVE PRACTICE
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RIP & TEAR COVERAGE: INSURERS RESPOND WITH EXCLUSIONS
Construction Law Section by Debbie Sines Crockett and David A. Zulian

NEW OVERTIME REGULATIONS CALL FOR PREPARATION AND COMMUNICATION
Corporate Counsel Section by Andrew Froman

SHOULD JURORS HAVE A SAY IN A FEDERAL SENTENCE? AT LEAST ONE JUDGE SAYS YES.
Criminal Law Section by Mark Rankin

PRE-CLAIM REVIEW HOME HEALTH DEMO: ARE RAPS AT RISK?
Health Care Law Section by Jamie A. Klapholz

THE SUPREME COURT’S NON-DECISION ON DAPA
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WELCOME BACK!
Marital & Family Law Section by Jill Lowe

BENEFITS OF GETTING INVOLVED IN THE MEDIATION & ARBITRATION SECTION
Mediation & Arbitration Section by Amy Tamargo

DODD-FRANK CONCERNS WITH LOANS SECURED BY RESIDENTIAL REAL ESTATE
Real Property Probate & Trust Section by Brittany Bustillo

NO LIMITS FOR THE UPCOMING BAR YEAR
Securities Section by Dan Dietrich and Rob K. Jamieson

BUILDING CONNECTIONS
Solo & Small Firm Section by Amanda Ullano

RESOLVING THE NON-FILING OF FEDERAL TAX RETURNS
Tax Law Section by Brian R. Harris

DILIGENT REPRESENTATION
Trial & Litigation Section by Caroline Johnson Levine

WHAT FOLLOWS WESTPHAL
Workers’ Compensation Section by Anthony V. Cortese

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You know you’re getting old when you realize you’re just like your parents. My mom is a voracious reader. As a kid, I dreaded trips to the mall because my mom would spend what seemed like hours poring over books in Waldenbooks or B Dalton Bookseller while I perused the latest *Sports Illustrated*. Unlike my wife, who would tote home stacks of books taller than she was from the library, I wasn’t much of a reader as a kid. But my mom must have rubbed off on me. Not long ago, I realized that I, like my mom, routinely spend what seems like hours poring over the last releases or clearance bargains at the bookstore (they still exist) or on Amazon.

I’m fortunate that I (eventually) inherited my mom’s love of reading. The benefits of reading, of course, go without saying. As parents, my wife and I try to instill in our kids a love of reading. Admittedly, though, reading bedtime stories some nights, particularly after a long day at work, can be a challenge. Some nights, when we’re way past bedtime, my oldest daughter will want me to read *The Little Mermaid* for the 50th time — in a row. Other nights, my youngest daughter will insist I read *The Three Little Pigs*, only to promptly take the book from my hands, fast forward all the way to the end, and then give it back to me and insist I “read” it again, which we repeat over and over. Whenever I find myself frustrated with story time, however, I try to remind myself how fortunate I am to be able to share my love of reading with my kids the same way mom did with hers.

Sadly, there are too many children who don’t know the joy of reading. Perhaps their parents are unable to read, so they’ve never been read to. Or maybe their parents are too tired to read to them after a double shift at work. Whatever the reason, I don’t think it is hyperbole to say that the consequences of young children not being read to can be disastrous.

That’s why I was excited to see incoming HCBA President Kevin McLaughlin’s message announcing the new “Read to Dream” initiative, which will set aside two eight-week sessions where volunteers spend 30-45 minutes reading to local elementary children struggling with reading.

I know we are all busy, particularly those of you in private practice who have to juggle client demands, business development, and other professional obligations with your personal responsibilities. But I hope you will consider volunteering for the Read to Dream initiative. I know I will. My love of reading didn’t come from someone telling me it was important to read; it came from my mom reading to me and me seeing how important reading was to her. Perhaps years from now, one of these young kids will trace their love of reading back to a volunteer who spent time reading to them.
Read to Dream: The Young Readers Initiative

I have no doubt that the next John Germany is out there waiting to be discovered, it is up to us to help find him or her.

One of things that makes being a lawyer so interesting is the wide variety of characters and personalities you encounter. Lawyers come from all walks of life with diverse genders, races, religious beliefs, political views, and educational backgrounds. However, if I had to identify one unifying trait common to most lawyers, it would be a love and respect for the written word. After all, the supreme law of land in the United States of America is our written Constitution, and our entire body of common law is based on prior written decisions. Perhaps more than anything else, it is our love of reading that unites us and draws us to this noble profession.

The late John Germany was a lawyer who knew the value of reading and the importance of instilling this value in children at a young age. Thanks to the vision and generosity of Mr. Germany, the HCBA is proudly partnering with the Hillsborough County Public Library, Hillsborough County Schools, and the Germany family in an exciting new initiative to foster a love of reading in elementary school children. The program is called “Read to Dream” and was born out of the simple gesture of someone giving Mr. Germany a book he could call his very own when he was a small child. Mr. Germany wanted to pass along his love of reading to a new generation of kids, especially the poor and disadvantaged.

Mr. Germany set aside money in his will for this very purpose. His vision was that lawyers would go to elementary schools and spend time simply reading to children, and that each child, like the young John Germany, would receive books of their very own. Beginning this school year, there will be two eight-week sessions, one in the fall and one in the spring. Volunteers will spend half an hour to forty-five minutes each week reading to and interacting with the children at Just Elementary, Booker T. Washington Elementary, and West Tampa Elementary. These schools were chosen because 99 percent of the students are living below the poverty level, and they are struggling with reading aptitude as compared to students at other schools. The children selected to participate in the program have been specifically chosen due to their high risk of falling behind their peers in reading ability.

These children go to schools right in our backyard, but are swimming upstream due to circumstances entirely beyond their control. The genius of this program is that we have the rare opportunity to make a lifelong, positive impact on a child’s life by giving just a little bit of our time once a week. We have had a tremendous outpouring of support from local law firms and other voluntary bar associations, but our goal is to not only sustain the
Continued from page 6

program, but to expand it to other schools with children in need. If you are interested in getting involved, you can contact me by phone (813-225-4000) or by email (Kevin@wagnerlaw.com) or visit our website (www.hillsbar.com) for more information. I have no doubt that the next John Germany is out there waiting to be discovered, it is up to us to help find him or her.

You may have noticed the art on this edition of the Lawyer features the cover of the beloved classic, *To Kill a Mockingbird*. In light of our belief in and support for the “Read to Dream” program, I thought it was appropriate to feature great legal books on the magazine covers this bar year. The book that introduced us all to Atticus Finch, the noble trial lawyer who has likely inspired more people to become lawyers than any other person, real or imaginary, seemed like the obvious first choice. If you have thoughts for future covers, I would love to hear them.

I am truly blessed to have a talented and committed board of directors who will work tirelessly for you to make sure this is an outstanding bar year. With over thirty sections and committees, our chairs are excited about providing our members with outstanding legal education programs, community service and pro bono outreach, and networking and social events. Our Executive Director John Kynes and dedicated bar staff will continue to ensure that we have the best bar association in America. We also greatly appreciate any feedback, good or bad, you can provide. If you have ideas for making us better, please let me know. Finally, I need to thank the entire membership for the support and confidence you have shown in me by allowing me to serve as your President. I look forward to working with all of you to make this a truly memorable year.

HCBA WELCOMES NEW MEMBERS

JUNE & JULY 2016

(HCBA Logo)

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Christopher Bauer  
Christina Benitez  
Heather Brock  
Chad Burgess  
Christopher Cavaliere  
Shannon Clancy-Kimball  
Kamela Corbett  
Tamara Cribben  
Daniel Cull  
Christopher Cutler  
Danielle Diaz  
Stephen Douglas  
Ronald Elliott  
Andrew Froman  
Jeffrey Fuller  
James Guerin  
David Heedy  
Sean Hernandez  
Jose Herrero  
Erin Hesbeens  
Manuel Iravida  
Donald Kelly  
Stephen Kelly  
Frank Kemey III  
Christopher Kokotilo  
Matthew Lapointe  
Walter Little  
Andrew Lynn  
Ryan McConell  
Medisa Memic  
Liz Miller  
Kristin Mora  
Jessica Murray  
Kevin O’Brien  
Kristen O’Donnell  
Haley Park  
Raciel Perez  
Amanda Porupski  
Stephen Putnoki-Higgins  
Anitra Raiford  
Cynthia Rayhom  
Dale Rickert  
Samuel Rosati  
McKensey Smith  
Gabriel Srine  
Melaina Tyon  
Stephen Udagawa  
Edwin Valen  
Robert Vaughn Jr.  
Steven Vazquez  
Zachary Watt  
Jon Wax  
James Wilkinson  
Kathryn Williams  
Ashley Zohar
Get Connected with the YLD

The YLD wants to empower and assist you as you embark upon and build your legal career.

The Hillsborough County Young Lawyers Division wants to help the young lawyers of Hillsborough County and Tampa Bay get connected and get involved. As the new YLD President, I would like to personally invite every lawyer under the age of 36 who has been practicing for less than five years to connect with the YLD.

Being a young lawyer is not easy. As young lawyers, we are constantly striving to learn and improve the skills necessary to be an effective attorney while facing time pressures and demands, which at times can be overwhelming. While this is going on, many of us are either expected or want to establish our own business and connections, so that we can set ourselves up for long-term legal success.

The YLD wants to empower and assist you and other local young attorneys as you embark upon and build your legal career by connecting you to resources, the community, other attorneys, and business contacts, as well as providing support. To do this, we offer an ever-expanding list of programs and events that you can take advantage of to make those important connections. These include:

Get Connected With Peers:
• Quarterly Happy Hours (Year-round)
• Quarterly Lunches (Year-round, first one on Oct. 19, 2016)
• Golf Tournament (October 14, 2016)
• Cornhole Tournament (Winter)

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• Pig Roast (March 11, 2017)
• Coffee at the Courthouse (Winter)
• Wellness Events

Get Connected Professionally:
• Judicial Shadowing Program (Winter)
• State Court Trial Seminar (Early summer)
• Mentoring Program (Year-round)

Get Connected With the Community:
• Wills for Heroes, where lawyers get together and help our veterans with their estate planning (Year-round)
• Family Forms Clinic, where we assist low-income families with simple family law questions (Year-round)
• Attorney Ad Litem Program, designed to help children without a voice in the court system (Year-round)
• Holidays in January, a special day of fun and gift-giving for at-risk kids (Winter)
• Steak and Sports Day, another opportunity for members to interact with and give a day of fun to at-risk kids (Spring)
• Law Week, to expose local children to and educate them about the practice of law (Spring)
• Mock Trial Competition, designed to expose and excite high school students about the practice of law (Winter)

This is only a partial list, as our programs will expand throughout the year. All of these programs are run by committees and volunteers. However, you do not need to be currently involved to attend. Everyone is welcome!

If you would like to find out the dates of these events or would like to volunteer, please connect on our website at www.hillsbar.com (click the “Young Lawyers Division” link under the “For Attorneys” tab) or on Facebook at www.facebook.com/Hillsboroughbaryld. I look forward to seeing each of you this year.
Tampa’s Bill Schifino, Jr. Leading Florida Bar’s Team Forward; Kevin McLaughlin Takes the Helm at HCBA


These are all characteristics friends and colleagues have used to describe Tampa attorney Bill Schifino, Jr., who is managing partner of Burr & Forman LLP’s Tampa office.

They also note he has a habit of climbing to the top of almost any organization or community endeavor he is involved in.

For instance, Schifino served as president of the HCBA’s Young Lawyers Division (1994), the HCBA Board of Directors (2004), and the HCBA Bar Foundation (2014).

So it was not surprising when Schifino moved up the leadership ladder and in June was sworn in by Florida Supreme Court Chief Justice Jorge Labarga as the 68th President of The Florida Bar, which has more than 103,000 members.

Schifino was introduced at the installation ceremony at the Bar convention in Orlando by his 83-year-old father, well-known Tampa securities lawyer Bill Schifino, Sr.

The elder Schifino talked about his son’s commitment to his family, especially his wife, Paola, and their three children.

In his remarks, Bill Junior thanked his father for inspiring him to become a lawyer, and for his support and guidance over the years. And he recognized his mother, Lois, and thanked her for the example she set for him growing up in Brandon while raising five active children.

He also recalled the life lessons learned and personal values instilled in him, while attending and participating in athletics at Jesuit High School in Tampa.

He said he hoped to incorporate the same team-oriented approach he learned at Jesuit to dealing with Bar issues.

“Our Bar needs to function as a team ... to meet the challenges our profession faces,” he said. “In the end, we all have the same goal in mind: how best to serve our citizens and our members.”

Bill Junior earned his J.D. at the University of Florida College of Law and his B.A. from Tulane University.

According to Bill Junior, the Bar will focus on five core issues: changes in the profession and technology; the Constitution Revision Commission; access to legal services; diversity and inclusion; and providing more value to its members.

“As we travel this road together, we should never fear new ideas,” 56-year-old Bill Junior told the large crowd attending the installation ceremony.

He added: “We should never fear healthy, robust debate and dialogue. Let’s instead navigate, engage, adapt, and lead those ideas, those challenges, and those opportunities. For they are our challenges. Our opportunities.”

A large contingent of Bill Junior’s family, friends, and professional colleagues traveled to Orlando from Tampa for the ceremony.

Continued on page 11
Afterwards, at a special luncheon in Bill Junior’s honor, Rob Williams, a longtime friend and a colleague at Burr & Forman, made some brief remarks and led the group in wishing him a successful year leading the Bar.

Good luck, Bill. Your friends at the HCBA are behind you.

* * *

New HCBA President Kevin McLaughlin says one of the best pieces of advice his father, Tampa lawyer John McLaughlin, gave him after he finished law school was to become a member of the HCBA.

“He told me the HCBA was the lifeblood of Tampa’s legal community. That was true 20 years ago, and it’s true today,” Kevin said. “I couldn’t imagine practicing law without the HCBA.”

Kevin shared that story with the 300 or so people gathered at the Ferguson Law Center in June at the HCBA’s Installation of Officers and Directors.

John McLaughlin introduced Kevin at the installation event and shared some humorous stories about raising five rambunctious boys, of which Kevin is the middle child.

He also highlighted Kevin’s commitment to his family — his wife, Daun, and their two children.

John and Kevin have been practicing law together for 20 years at the Wagner McLaughlin firm, located in South Tampa.

“As I look at the list of people who have come before me, I am truly honored,” Kevin said after being sworn in by Thirteenth Circuit Chief Judge Ron Ficarrotta.

Kevin was raised in Tampa and attended Jesuit High School. He earned his J.D. from Stetson College of Law and his B.A. from Wake Forest University.

In addition, Kevin served as president of the HCBA’s Young Lawyers Division in 2006.

In his remarks, Kevin talked about leading the HCBA this year, and he said the HCBA’s emphasis on professionalism and civility is what helps to set it apart.

He also previewed a new public service initiative the HCBA will help kick off in the fall that is focused on improving the reading and language skills of local disadvantaged youth.

The reading program was the brainchild of the late Judge John Germany, who was a well-known champion of childhood literacy.

* * *

The fall season and a new Bar year also brings new opportunities for HCBA members.

So stay connected with your colleagues, and take advantage of the numerous educational and CLE programs offered throughout the year.

Plus, make it a point to attend the HCBA’s 20th Annual Bench Bar Conference and Judicial Reception scheduled for November 10, which is always a highlight in the fall.

See you around the Chet.
In May, the Hillsborough County Bar Association hosted a Continuing Legal Education program on “Ending the Criminalization of Mental Illness.” The program highlighted the impact individuals suffering from mental illness have on the criminal justice system and the challenges of appropriately coping with these individuals. The challenges of dealing with this issue are vast, and a variety of resources and approaches are needed to improve this situation while keeping our community safe. One of the approaches discussed during the program was Crisis Intervention Training or CIT.

CIT is a community policing model in which law enforcement officers or other first responders undergo intensive training on how to effectively interact with individuals who have a mental illness and are in crisis. There is a focus on de-escalating situations and diverting individuals to treatment or other community resources when possible. Essential elements include educating law enforcement about mental illness, training in techniques designed to de-escalate a crisis situation, and providing information regarding available mental health resources within the community. This training provides tools for law enforcement officers who are responding to a potentially dangerous and violent situation, as well as less extreme situations where accessing mental health services is appropriate.

Hillsborough County has an established CIT program. The Hillsborough County Sheriff’s Office (HCSO) conducts a 40-hour training class that includes education on mental illness. The training discusses available community resources and legal issues, as well as techniques for dealing with individuals in mental health crisis in a variety of scenarios. While the course is coordinated and sponsored by the HCSO, it is open to and attended by officers from other law enforcement agencies in hopes of training as many officers as possible. In 2015 alone, more than 250 officers completed the HCSO’s CIT training; since 2010, the training has been provided to more than 1,200 officers.

As part of CIT, my office and the Office of the Public Defender partner to discuss some of the ways mental illness is addressed through the Baker Act, as well as in the criminal justice system. Other community agencies provide speakers on specific topics relating to their areas of expertise. The training received by these law enforcement officers is taken back to their agencies to be applied on the street and in the jails during their daily interactions.

My goal for the citizens of Hillsborough County is for our community to be a safe one. I support programs that help achieve that goal. The problem of mental illness in our society, as well as in our criminal justice system, is both large and complex. Crisis Intervention Training is a small, but much needed, part of that solution. The tools provided to law enforcement through this training make our community safer for all of us.

1 For additional information about Crisis Intervention Training, please visit the CIT Center sponsored by the University of Memphis at http://www.cit.memphis.edu/ (last visited 7/13/2016).
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It has produced untold savings for attorneys in both time and money (of course, time is money.) But before we forget how things were in the dark ages just a couple of years ago, it’s important to remember how we got here and the challenges we faced.

Because there is still more work to do, and we are all in this together.

Last year, about 1.5 million court documents were filed with my office electronically. We are on pace to exceed that number this year. Since limited e-filing began four years ago, about five million documents have been filed. The days of hiring a runner to race to the courthouse to file a case are long gone.

With the introduction of HOVER (Hillsborough Online Viewing of Electronic Documents) last year, most court documents are available online. More than 2,200 lawyers have registered to use HOVER, giving them access to unredacted documents in cases where they are the attorneys of record.

Registered lawyers also

Continued on page 15
get expanded access to family law and probate cases. My office provided training for HCBA members, yet only about half the members have registered. If you haven’t already, please go to hover.hillsclerk.com to register.

If real estate is your focus, you can file and review deeds, mortgages, and foreclosures online. You can also bid on foreclosed property through our website. By the end of the year, all tax deed auctions will also be done online.

Of course, we still do a lot of business over the counter, particularly at the Customer Service Center at the George E. Edgecomb Courthouse. As I’ve written before, we consolidated our service operations from five buildings downtown to one, and we are continuing to cross-train our employees to handle most court functions.

All of these improvements have come while we were forced to trim our court budgets by 25 percent, or 141 positions since 2007. We are facing more budget cuts in the coming fiscal year, which begins October 1. We are always trying to improve the work we do, but that is going to be much more difficult without adequate funding.

So I ask your help. Please tell our lawmakers how important it is that they reallocate resources so that the court system gets much needed funding. As I said, we are all in this together.

Blast from the Past: Attorney’s Registers

There was a time when attorneys had to register with the Clerk’s Office to practice law in Hillsborough County. The Clerk of the Circuit Court’s Office recently found old Attorney’s Register books, some dating back to the 1800’s, which are among the millions of documents stored in their records warehouse in Brandon. They would love to get more background information on how these registers were used and memories from those who might have signed them. If you can help, please contact Tom Scherberger at the Clerk’s office at thomas.scherberger@hillclerk.com.
Paul Revere’s ride on the night of April 18, 1775, alerted Samuel Adams, John Hancock and others that the British were coming. He was arrested by the British after his ride but released in time to see part of the battle at Lexington Green.

The ability to see danger and communicate clearly are just two of the skills Buell & Eligett’s lawyers deploy for their clients and co-counsel.

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Having received rave reviews last year, we will again be hosting a “View from the Box” session in the afternoon, which will give attendees a chance to hear from former jury members on civil and criminal cases. Also back by popular demand, the “View Toward the Bench” sessions will provide lawyers and judges the opportunity to candidly talk about practice-specific topics in round-table discussions, with segments focused on civil, criminal, appellate, federal, and family law.

And for our conference finale, we will wrap up our technology and ethics theme with a plenary session from cybercrimes specialist Steven Bradley on how investigators, prosecutors and other professionals can identify, preserve, and present digital evidence in order to strengthen cases.

The Bench Bar Conference is the HCBA’s signature educational event of the year, and as always, the committee seeks to keep the channels of communication open between the bench and bar, with its primary focus on improving the justice system. Working together, we can make positive changes in our court system.

In the spirit of collaboration between the bench and bar, we also invite you to join us at the Judicial Reception immediately following the conference.

So please save the date for the Bench Bar Conference, Membership Luncheon & Judicial Reception on November 10. Look for more information about specific course offerings and registration instructions in email blasts from the HCBA and on hillsbar.com. We look forward to seeing you!

Author: Judge Samantha Ward, Thirteenth Judicial Circuit
Celebrating Judge Jim Whatley’s Legal Legacy

“Our oath and common sense compel professional behavior. Disparaging your opponent and equating the trial judge to a Biblical donkey do not play well.”

Judge Jim Whatley will be missed by his family, friends, former colleagues, and those who practiced before him. Born in Miami in 1947, he died in May, just before his 69th birthday. He is survived by his wife, two children, and two grandchildren. We could not do justice to the loss to his family, so we will focus on his talents and impact on the law in Florida.

A double Miami Hurricane, Jim earned his law degree in 1972, entering private practice in Miami that year. In 1982, he moved to Sarasota, where he continued his trial practice. He was Board Certified in Civil Trial Law by The Florida Bar, served as president of the Venice-Englewood Bar Association, and was a founding member of the John Scheb American Inn of Court in Sarasota.

Governor Bob Martinez appointed Judge Whatley to the circuit bench in 1989, and Governor Lawton Chiles elevated him to the Second District Court of Appeals in 1995, where he served until retiring from the court in 2012.

As is typical for our Second DCA judges, Jim participated in legal education of lawyers and law students while on the court and, after “retiring,” continued to engage Stetson Law students as a guest speaker. Jim was a regular in the Stetson Appellate Practice class on ethics.

By request, he always had to tell the story of how a potential client had come to him about a personal injury case that looked very promising. The potential client asked if Jim had professional liability insurance. Jim said he did. When the client asked if he could have a copy of the policy, Jim told the would-be client he would need to go elsewhere for representation. The man was upset, saying Jim “had” to take the case. Jim declined. Later Jim ran into another lawyer who had taken the case, obtained a good recovery, and then had been sued by the client. Jim summed it up by quoting the wisdom of a former senior partner from his first firm: a good case with a bad client is a bad case.

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Continued from page 18

We came across a handout from a seminar presentation Jim made in 2001, which he titled “My favorite part of being an appellate judge — oral argument.” He began by saying that when he moved from the trial bench to the appellate court, he missed the personal contact with lawyers. Thus, he explained, he looked forward to appellate oral arguments. This concise document is filled with gems of advice on how to present oral argument. They include:

- **Client Control:** If your client accompanies you, the client must be an observer and not a participant — no gestures or commentary.
- **Anticipation:** Anticipation is the first cousin of preparation. Expect to be interrupted with questions; anticipate what questions will be asked; and be ready to field them — like a shortstop fielding ground balls.
- **Playing Aces:** An appellant should concentrate on the one or two best issues; raising a multitude of issues diminishes those with merit.
- **The High Road:** Our oath and common sense compel professional behavior. Disparaging your opponent and equating the trial judge to a Biblical donkey do not play well.
- **The Message:** Tell the panel the precise relief you are seeking — do not make the judges guess.

- **Enjoy Yourself:** Unlike the stress of trial with witness examinations, objections, and admitting evidence — those things have all been completed. Oral argument should be more relaxed.

As advocates who both benefitted from and were the object of his pointed questioning, we found it more relaxing when the other side was being grilled. While counsel probably thought they knew where Jim “was going,” that was not always the case. He cautioned the Stetson appellate class that not every question is hostile, so lawyers should try to recognize when a judge is throwing them a “softball” — perhaps to make a point to another judge on the panel.

Another of Jim’s remarks that stands out is that, when in private practice, he never requested an extension for a brief. He felt a lawyer should not undertake a matter unless he or she could complete it within the expected time frame. Fortunately for many of us, there has been no elimination of extensions at the Second DCA.

Comments from his colleagues reinforce his emphasis on moving cases to conclusion. Judges Casanueva and Black both note Jim felt it was important to resolve legal issues promptly, so parties could have certainty and move on with their lives.

Continued on page 20
Regarding oral argument, Judge Black says Jim was always prepared and was perhaps the best judge on the court at getting the litigants to the main point as quickly as possible after the argument began. One of his favorite opening lines was, “What is the very best case you have that you believe supports your position?” And Jim would typically know whether the cited case actually held what it was cited for. And if it did not, it could be a long day for the unfortunate advocate.

His fellow judges’ remembrances say much about Jim’s and the Court’s collegiality. Judge Black recalls that Jim “welcomed the input of all points of view and treated those of differing opinions with respect. However, if he thought he was right, he would argue tenaciously for his viewpoint.” Judge Black remembered one en banc case involving riparian rights where the vote was 13 to 1 — against Jim’s position. Judge Black says Jim would often joke later that “he loved his colleagues on the Second DCA, even though they were clueless about riparian rights.”

Judge Casanueva recalled a case when the panel retired after oral argument to discuss the outcome. “As the panel compared thoughts and proposed analysis, I noted that Jim was writing on his legal pad. As we concluded our discussion, he announced that he had taken what had been said, as well as his thoughts, and authored the first draft of the court’s opinion. Needless to say, it issued quickly.”

Jim and Judge Casanueva carpooled for many years. Judge Casanueva relates that on one drive they discussed an opinion Judge Casanueva was working on that was not writing clearly or neatly. “Judge Whatley offered insightful comments as well as an analytical path and, upon my arrival in Tampa, the revisions were made allowing the opinion to circulate.”

During that time, Judge Casanueva said he learned how close Jim was to his children, Angela and Derrick. “It was the unusual day when he did not speak to one or both of his children. He shared their respective college years and their following professional years.”

Judge Black describes Jim as a loyal friend who would do anything for you. He continued: “As you may or may not know, he actually introduced me to my wife, Colette, so Judge Whatley will always have a special place in our hearts. He will be greatly missed.”

Judge Khouzam recalls: “Judge Whatley was a pleasure to work with. He was upbeat, with a quirky and quick sense of humor and the ability to make time fly when he sat center chair during oral arguments. One might wonder about that last observation, but a few lawyers understood how Judge Whatley ran the clock. On a case where he thought a lawyer was repeating the arguments or beating the proverbial horse to death, Judge Whatley would say ‘time is up’ perhaps a little more quickly than the clock would indicate. As he might later observe to his colleagues, ‘If the fish is in the boat, I turn it around and bring it back to port!’”

She continues: “He was also known for peppering lawyers with questions even before they could get up to the podium. He was never reluctant to challenge the weakness in an argument. For a lawyer who would get exasperated, he would sometimes explain: ‘If you’re on a sinking ship, wouldn’t you want to know where the holes are?’ He was a gentleman, very old-school, and truly one-of-a-kind. He will be missed.”

We were fortunate to have Judge Jim Whatley’s service on the appellate bench and as a role model. Judge Khouzam is correct — he will be missed.

Authors:
Raymond T. (Tom) Elligett, Jr. and Amy S. Farrior - Buell & Elligett, P.A.
ABOTA Seminar

The American Board of Trial Advocates (ABOTA), Tampa Bay Chapter, joined with the HCBA, the Thirteenth Judicial Circuit Professionalism Committee and the Sixth Judicial Circuit Professionalism Committee in hosting its annual CLE seminar on June 3. Held at the Stetson University College of Law and the Chester H. Ferguson Law Center, the half-day event focused on the theme of “Practicing with Ethics, Civility, and Professionalism.” The keynote speakers were Judge Donald M. Middlebrooks, U.S. District Court/Southern District of Florida; Karen Connolly Levey, Chief Deputy, Ninth Judicial Circuit; and Benedict P. Kuehne, The Law Offices of Benedict P. Kuehne, P.A.
The Law Library Renovation Promises to be Exciting

As we look forward to the coming bar year, the Law Library turns a new page in its history as well. Last year, I reported on the dramatic changes that had taken place since the Law Library came under the auspices of Hillsborough County’s Library Services. Since then, the library has become increasingly integrated into our county library system. As a result, we have seen a spike in visitation and usage. The library is now embarking on a layout redesign and renovation that will provide a more efficient and comfortable environment for its users.

The renovation project includes a repositioning and shortening of its stacks to allow for easier navigation, in addition to natural light through the space. New furniture will provide a greater variety of comfortable, ergonomic seating. Another feature will be workstations that are powered with USB and electrical outlets, which will allow multiple devices to be used at the same time without compromising space and connection. This is in addition to the faster internet service that was introduced last year.

The floor plan also is being redesigned to create three new private conference rooms, which brings the total number of conference rooms to five. The largest conference room can hold up to twenty people. The smaller rooms can be easily configured into classroom or conference settings, which can be used to conduct depositions or hold meeting or study sessions. In the end, the library will have more distinct spaces, such as a computer area, quiet area, chat area, and vending/café area.

The library also will have a popular materials collection and a location for public library holds, pick ups, and returns. These features allow a person to get more work and research done at the library, adding to its integration with the county library system.

We expect the library to have its grand re-opening sometime in October. Once the date is set, we will be sure to share the details of the event. Thank you for your continued patronage and support.

Author: James A. Schmidt, Esq. - Chairman of the Law Library Advisors

Sponsorship opportunities available for YLD Golf Tournament on Oct. 14 and Bench Bar Conference on Nov. 10. Contact Stacy at stacy@hillsbar.com for more information.
# Introducing the 2016-2017 HCBA Section & Committee Chairs

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The HCBA’s Bar Leadership Institute (BLI) celebrated another class of leaders at its closing ceremony on May 25. This year’s class enjoyed a full calendar of events organized by former BLI graduates Thomas Curran, Katelyn Desrosiers, and James Giardina. The BLI year kicked off with an educational tour of the Sam M. Gibbons Federal Courthouse in March.

In April, MacDill Air Force Base hosted a bus tour with a special presentation by the military working dogs, 360-degree views atop the air traffic control tower, and a demonstration of the capabilities of the on-base fire department equipment. For its final module, the class toured the Orient Road Jail with the Hillsborough County Sheriff’s Office legal counsel, and had the opportunity to do ride-alongs with Sheriff’s deputies.

In addition to the modules, the class enjoyed fellowship at HCBA membership luncheons and social events, attended YLD and HCBA harbor tour of the Port of Tampa Bay. The class was treated to a roundtable discussion with Tampa Bay Lightning Executive Vice President and General Counsel Jim Shimberg, followed by a Lightning game. BLI members also visited Moffitt Cancer Center with an introductory session presented by the Center’s in-house General Counsel L. David de La Parte, followed by a walking tour of the facilities, including the genetics research labs. Additionally, Judge Catherine Peek McEwen led the class on a “behind-the-scenes” tour of the Sam M. Gibbons Federal Courthouse in March.

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Continued from page 24

Board meetings, and volunteered at the HCBA’s Dining with Dignity event.

This year’s class and its programming have again highlighted the BLI’s success as a leadership training ground. As BLI approaches its tenth anniversary, its value to our legal community can be seen from the top down. BLI was developed in 2007, under the leadership of then-HCBA President Caroline Black Sikorske. Modeled after formidable programs like Leadership Tampa and Leadership Florida, BLI was formulated as a way to educate lawyers about opportunities for leadership in the Bar.

Created with the primary goal of identifying and developing young attorneys that have the potential to grow into future leaders, BLI has been doing just that since its inception. In fact, our newest HCBA president, Kevin McLaughlin, was a member of the inaugural BLI class, along with our president-elect, Gordon Hill. Speaking about the program, McLaughlin said, “The BLI provides a singular opportunity to work with lawyers from diverse legal backgrounds, as well as to observe and interact with some of the top minds in the fields of healthcare, finance, government, law enforcement, and the military.”

BLI also has graduated Board of Director members, committee and section chairs, and countless other leaders within the Bar and beyond. The value of the program is evidenced in the growing number of applicants, as BLI continues to attract many worthy candidates, creating a competitive selection process. Applications are rolled out each summer. Apply. You won’t regret it. Our Bar and community need people like you to lead us into the future. And the Bar Leadership Institute is waiting to help make you a part of the growing legacy of leadership.

Author: Lyndsey E. Siara – Thirteenth Judicial Circuit

The HCBA would like to thank the Bar Leadership Institute’s sponsor:
Celebrating Service and Success

As we celebrate our 15th year in Tampa, Phelps Dunbar is proud of the continued success we have helped our clients achieve, the service we have offered the Tampa community and the recognition our lawyers and office have received:

- 7 lawyers in Florida Trend 2016 “Legal Elite”
- 18 lawyers in 2016 Florida Super Lawyers including three top 50 lawyers in Tampa and two top 100 lawyers in Florida
- 13 Tampa lawyers in The Best Lawyers in America© 2016 edition
- 5 areas of practice and 4 lawyers from Tampa recognized in Chambers USA: America’s Leading Lawyers for Business 2016
- 11 practices in Tampa ranked in U.S. News & World Report and The Best Lawyers in America© 2016 “Best Law Firms”

To learn more about our practice areas in Tampa, contact:

Dennis McClelland
Office Managing Partner
813 472 7865 direct
dennis.mcclelland@phelps.com
We are honored to chair the HCBA Collaborative Section for 2016-2017. Hillsborough County has been at the forefront of Florida efforts to advance the collaborative process, and in the coming year, we hope to foster a continuation of those efforts.

Collaborative practice around the world owes its start to Minneapolis attorney Stu Webb’s transformative concept — when a divorcing couple’s two attorneys commit to forgo litigation in favor of becoming “settlement specialists,” magical things happen. Following Stu’s epiphany in the early 1990s, word gradually spread across the country, eventually reaching the ears of Hillsborough attorneys like Nancy Harris, Fraser Himes, and Ky Koch, all of whom encouraged local colleagues to expand their skills to include collaborative practice. By 2001, Hillsborough County had its first active collaborative practice group. In 2016, the County is now home to three practice groups, including one that has moved the focus beyond family law to other civil matters. The Hillsborough County Bar Association’s Collaborative Section provides a forum for all of us — whether or not we are members of particular practice groups — to come together for camaraderie and shared learning.

As collaborative practice has expanded across the state, so has the call for the passage of a Florida statute modeled on the Uniform Collaborative Law Act. After years of persistence by several of our Hillsborough County colleagues and others across the state, this spring the Legislature unanimously approved and the Governor signed the Collaborative Law Process Act, making Florida the 15th U.S. jurisdiction to enact a statute modeled on the uniform law.

Major kudos are owed to local attorneys Cole Jefferies, Nancy Harris, and Caroline Sikorske for their dedication — the statute would not have been enacted this year without their tireless efforts.

The CPLA goes into effect, as §61.55-§61.58, Fla. Stat., 30 days after the Florida Supreme Court adopts consistent rules of procedure and professional responsibility. The most commonly lauded effect of the CPLA will be to legitimize and provide credibility to collaborative practice, but the benefits of the new statute go well beyond its public relations aspects. The CPLA establishes a clearly enforceable evidentiary privilege, and the rules of professional responsibility called for by the CPLA will similarly ensure disqualification of collaborative attorneys — without the previous heavy reliance on a court’s interpretation of a participation agreement.

In addition, coupled with the rules of professional responsibility envisioned by the CPLA, the law will lay to rest any lingering concerns about ethics¹, and provide clear expectations about attorneys’ ethical and professional responsibilities in the collaborative process. Finally, the CPLA will provide us with a uniform framework for practicing collaborative law.

After more than a decade of expansion in Florida, collaborative practice has taken a valuable leap forward with passage of the CLPA. The future of collaborative practice is bright.

¹ ABA Formal Opinion 07-447 analyzed the implications for collaborative law practice under the Model Rules of Professional Conduct and found no ethical issues, so long as the client has given informed consent.

Authors: Ellen Ware - Ware Law Group, PA and Kristin DiMeo - Litigation Support Advisors
HCBA Speakers’ Bureau

Thanks to HCBA members of the Lawyer Referral & Information Service who provided their expertise to the Greater Tampa Sertoma Club in June: Alan Borden of Debt Relief Legal Group spoke about identity theft and Jamila Little of Little Law, P.A. spoke on DUI issues. If you are a member of a community or service group that needs a speaker, please refer them to the HCBA Speakers’ Bureau page on the HCBA website: www.hillsbar.com.

YLD State Court Trial

The Young Lawyers Divisions hosted its annual State Court Trial Seminar on June 10 at the George E. Edgecomb Courthouse. Speakers included Judge Tibbals, Judge Nash, Judge Vance, Chris Knopik, Kevin McLaughlin, C. Howard Hunter, Christine Marlews, Richard Gilbert, Joe Varner, and Dale Swope.

The YLD would like to thank the event’s sponsor: NorthStar Bank.
The courts and insurance companies continue their give and take on insurance coverage related to construction defects. Commercial general liability (CGL) policies provide coverage for “property damage” that is caused by an “occurrence.” In Florida, thanks to United States Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007), construction defects are a type of “occurrence.” And while there isn’t coverage for the cost to repair or replace the defective work itself, standard CGLs provide coverage for “property damage” caused by that defective work — i.e., the “resulting damage to other property.” Id. at 889. But what about the damages caused by the repair and the cost to “rip and tear” through non-defective property/work to get to the defective work?

Last year, Carithers v. Mid-Continental Casualty Co., 782 F.3d 1240 (11th Cir. 2015) and Pavarini Construction Co. v. Ace American Insurance Co., 2015 WL 9686009 (S.D. Fla. Oct. 30, 2015) addressed the issue of and expanded coverage for “rip and tear” damages. In Carithers, the Eleventh Circuit held there was coverage for the cost to demolish and repair a defective balcony, because rebuilding the balcony was necessary to repair other covered property damage. 782 F.3d at 1251. In Pavarini, the Southern District found coverage for the costs to fix the “defective subcontractor’s work” because “it is undisputed that the same effort was required to put an end to on-going damage to otherwise non-defective property.” 2015 WL 968009, at *4. Perhaps the most interesting aspect of Pavarini is footnote 6, which was in response to the assertion that the cost to mitigate damages are not covered, since J.S.U.B. did not mention these types of costs: “On the contrary, J.S.U.B. stands for the proposition that claims for repairing structural damage caused by defective work of subs may be covered. As a natural corollary, coverage may exist for the costs to repair defective work in order to prevent future structural damage and covered loss. Id. n.6 (emphasis added).”
The insurance industry was quick to respond. Beware of specially created endorsements that limit or completely eliminate coverage for Rip & Tear damages. Here are a few sample manuscript endorsements below.

Only time will tell what coverage may exist for Rip & Tear damages.

**EXCLUSION – RIP & TEAR**
The following is added to ….. Exclusions:
Rip and Tear
(1) Damages arising out of an expense incurred in removing concrete or concrete products from any structure or building due to defective concrete or for improperly mixed, manufactured, poured, formed, cured, or installed concrete;
(2) Any expenses for replacing forms, reinforcements, piping and wiring that are destroyed during the course of removing defect concrete products; or
(3) Any expenses for returning the structure or building to the condition that existed prior to the installation of the concrete products.

**RIP & TEAR EXCLUSION – CONCRETE PRODUCTS**
This insurance does not apply to any liability for “property damage” for “ripping and tearing expenses” and “restoration expenses.”

The following definitions apply:
“Ripping and Tearing expenses” shall mean the actual expenses incidental to the intentional destruction and removal of “concrete products” which are found to be “defective.”
“Restoration expenses” shall mean such additional expenses paid as are necessary to place the structure in the same condition existing at the time such “concrete products” were determined to be defective; but in no event shall they include the cost of the “concrete products” themselves or labor incidental to their replacement.
“Concrete products” shall mean poured concrete, concrete block and mortar and prestressed structural concrete.
“Defective” shall means “concrete products” which, upon testing by an accredited independent testing agency, do not meet the contractual specifications relating to compressive strength required for the specific construction in which such materials were incorporated.

Authors: Debbie Sines Crockett and David A. Zulian - Cheffy Passidomo, P.A.
NEW OVERTIME REGULATIONS CALL FOR PREPARATION AND COMMUNICATION

Corporate Counsel Section
Co-Chairs: Michael Stein – CNA Insurance and Jillian Feltham - Laser Spine Institute

In May, the U.S. Department of Labor finalized a much-anticipated rule raising the minimum salary threshold for exempt workers under the Fair Labor Standards Act (FLSA), which will likely expand overtime benefits to many more U.S. workers. The new regulation will nearly double the salary threshold below which salaried workers are guaranteed overtime pay from $24,500 a year to $47,476 a year.1

These changes only affect salaried workers who classify as exempt: managers, administrative workers, workers who use advanced degrees in their jobs, or workers who perform outside sales work. Their salaries are intended to cover all hours worked each week, no matter how many.

To maintain “exempt” status, the workers must be paid the new minimum salary level. If employers do not raise these workers’ salaries, the workers will become eligible for overtime pay starting December 1, 2016. Now is the time to prepare for these changes.

First, management must understand how many hours per week these employees are working. If they are not regularly working more than 40 hours, the employer can worry less about overtime costs. If these employees are regularly working more than 40 hours, wages for overtime may be a significant expense.

If these employees are not currently recording their hours, employers will need to implement a time clock system.

Some employers may have only a handful of workers who earn less than $47,476.00 a year but regularly work more than 40 hours a week. Paying these employees time-and-a-half for overtime hours worked may be more economical than increasing their salaries to meet the new threshold.

Budgets will need to be scrutinized, and perhaps increased, to afford either higher salaries or overtime pay for those whose salaries are not increased. Employers should also review the duties each worker is performing to determine whether:

1) the worker is actually performing the duties of an exempt employee; and
2) any responsibilities can be reassigned to someone else to balance the workload.

Reassigning work might make the most economic sense. In some cases, hiring another employee or two may be necessary to take tasks away from these now non-exempt employees and keep them below 40 hours.

Besides ensuring employee pay complies with the new FLSA regulations, corporate counsel will need to coach management and human resources personnel on how to clearly explain the changes to workers.

Some of these changes may not be popular with affected workers. For workers making less than $47,476 a year, employers will need to determine hourly rates aligned with their salaries and number of hours worked. Being converted to hourly pay may be seen as less prestigious. Having to record one’s hours, or having one’s responsibilities reduced, may be perceived as a punishment or demotion.

Communication with employees will be key. Besides ensuring employee pay complies with the new FLSA regulations, corporate counsel will need to coach management and human resources personnel on how to clearly explain the changes to workers. If managers are not trained to communicate the changes, they may be looking at an influx of employee complaints, or even wage and hour claims.

1 With an anticipated cost of living increase added, the new annual salary threshold likely will exceed $50,000.00.

Author: Andrew Froman - Fisher Phillips LLP
3 Business Jury Trials So Far in 2016
3 Verdicts Awarding 100% Damages

The Contingency-Fee Business Litigation Attorneys

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

May 13, 2016
Description: Breach of Contracts
Damages Requested: $782,560
Jury Verdict: $784,898

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

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United States District Judge James Gwin of the Southern District of Ohio recently presided over the trial and sentencing of Ryan Collins, who was convicted of child pornography offenses. It was not unusual that Judge Gwin grappled with the question of how much prison time to impose or that he considered the factors set forth in 18 U.S.C. § 3553. What was unusual, however, is that his consideration of those factors included what the jurors believed to be a fair and just sentence.

After the jury returned a guilty verdict, Judge Gwin polled the jury, asking them to “[s]tate what you believe an appropriate sentence is.” Jurors’ answers ranged from no prison time to the mandatory minimum 60 months. Only one juror recommended more than 30 months in prison. The mean of the jurors’ suggested sentences was 14.5 months; the median was 8 months. The United States Sentencing Guidelines, which are notoriously harsh in such cases, suggested a sentence of between 262 and 327 months — or roughly between 22 and 27 years of imprisonment.

Judge Gwin revealed the jurors’ preferences at sentencing and promised to use that information as one of the many factors he would consider in fashioning a sentence that was, as § 3553 requires, “sufficient, but not greater than necessary.” The government objected to the jurors’ opinions being considered at all. Judge Gwin overruled that objection and stated that jurors’ opinions “reflect … how off the mark the Federal Sentencing Guidelines are.” He sentenced Mr. Collins to 60 months in prison.

The government appealed, arguing that it was inappropriate for a court to consider jurors’ wishes as a factor at sentencing. In a published and unanimous opinion, the Sixth Circuit affirmed, holding that Judge Gwin did not abuse his discretion by considering the jurors’ opinions. See United States v. Collins, __ F.3d __, 2016 WL 3583999, at *2-3 (6th Cir. June 29, 2016). The appeals court noted that the jurors’ opinions were just one of several factors Judge Gwin considered. Id. Further, he did not discuss punishment with the jurors until after the verdict, thereby not tainting the jury’s fact-finding duties with sentencing considerations. Id. at *2. The appeals court also cited federal law that expressly grants broad latitude to sentencing judges. Indeed, “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court … may receive and consider” at sentencing. 18 U.S.C. § 3661.

Finally, and perhaps most importantly, the Sixth Circuit cited the Sentencing Commission’s own mission, which, as directed by Congress, is to take “the community view of the gravity of the offense” into account when crafting the guidelines. 28 U.S.C. § 994(c)(4). As the appeals court recognized, jurors are uniquely positioned to provide the community’s view of the offense and the need for punishment.

In the right case, it is worth asking the court to poll the jurors as to their opinion on sentencing. A sympathetic and perhaps well-meaning defendant may have been found guilty of violating the law. And that conviction may result in an unwarranted and astronomical sentence. Yet, while jurors may have been willing to convict, they may have favorable opinions as to the defendant’s sentence, and may well suggest far less time than the Guidelines.

Author:
Mark Rankin - Shutts & Bowen, LLP
DIVERSITY IN THE BAR
Diversity Committee
Co-Chairs: Timothy C. Martin - Martin Law Office and Victoria Oguntoye - Buchanan Ingersoll & Rooney

Ask a dozen people to define the word “diversity,” and you will get a variety of (maybe a dozen different) responses. Diversity in the legal profession has historically included race and gender, and while these categories are still very relevant today, the concept of diversity now encompasses additional categories such as disability, nationality, veteran’s status, gender identity, and sexual orientation, to name a few.

As HCBA Diversity Committee 2016-2017 co-chairs, we are excited to facilitate the Bar’s ongoing commitment to recognize and embrace the diversity of all our members, to foster an inclusive environment, and to help demonstrate to those outside of the Tampa Bay area what we can offer as a legal community.

The true diversity of the Bar’s membership may not be readily noticeable, unless you dig a little deeper than mere outward appearance. Arguably, the most apparent identifying feature of an individual is their race, or perhaps, age, gender, or maybe even the resemblance of individuals in a group setting. However, people who look similar could still be quite diverse in their economic backgrounds, religions, personal beliefs, experiences, and more.

Diversity, variety, tolerance — whatever label you want to use — should be welcomed and accepted. It is often because of such distinctions that we — whether as individuals, society as a whole, or the Bar in particular — learn and grow.

Diversity is not about exclusion of individuals or groups because of their perceived homogeneity. Instead, diversity is about acceptance and inclusion of everyone — the old guard, the vanguard, and the avant-garde, and all the subtleties in between.

The Diversity Committee will continue efforts to educate and bring awareness of diversity and inclusion to our members, the legal profession, and the community at large. As a professional organization comprised of members who live, work, and represent others within the community, the Bar embraces its responsibility to promote inclusion within our own organization.

As the newly appointed co-chairs of the HCBA Diversity Committee, our goals are to:
• support, coordinate, and implement programs that explore, highlight, and promote diversity issues for the Bar;
• continue to support and encourage the recognition of equity and diversity issues as key components when organizing speakers, CLE programs, and similar activities; and
• participate and collaborate with other sections and committees on diversity issues.

Plans are already underway for a continuing legal education seminar, a guest speaker at a Bar membership luncheon, and the annual diversity networking social. These events are perennial staples of the HCBA Diversity Committee. We could not be more honored to serve the committee and the Bar this upcoming year.

Authors: Timothy C. Martin - Martin Law Office and Victoria Oguntoye - Buchanan Ingersoll & Rooney

If we cannot end now our differences, at least we can help make the world safe for diversity.
— John F. Kennedy
[Commencement address at American University, June 10, 1963]
HCBA Installation of 2016-17 Officers & Directors

Hillsborough County Bar Association President Kevin McLaughlin and the 2016-17 Board of Directors were sworn in on June 9 during a ceremony at the Chester H. Ferguson Law Center. John McLaughlin, Kevin McLaughlin’s father and fellow partner at law firm Wagner McLaughlin, introduced him, before he was sworn in by Chief Judge Ronald Ficarrotta.

Outgoing HCBA President Carter Anderson also recognized HCBA members and staff who supported him during his term, including John Schifino, whom he presented with the James M. “Red” McEwen Award. Web Melton III, the incoming YLD president, also recognized last year’s YLD president Dara Cooley, before he and the YLD Board of Director also were sworn in by Judge Ficarrotta.

The HCBA would like to thank C1 Bank for sponsoring this great event.

Photography is courtesy of Thompson Brand Images. Thompson Brand Images is a benefit provider for the HCBA. www.thompsonstudiophoto.com. Visit Facebook.com/HCBATampaBay to view additional photos from the Installation.
On June 10, 2016, the Centers for Medicare & Medicaid Services (CMS) announced its latest anti-fraud initiative, a three-year Medicare pre-claim review demonstration for home health services beginning in Illinois on August 3, 2016, and in Florida on or after October 1, 2016 — and expanding to Texas, Michigan, and Massachusetts thereafter.

In the targeted states, CMS will only pay the full amount on a claim that has been provisionally approved by the Medicare Administrative Contractor. Home health agencies (HHAs) must submit pre-claim review requests along with all documents supporting medical necessity, including a Plan of Care (POC) with a physician signature. The demonstration effectively creates an earlier deadline for the certifying physician to sign the POC, which has caused concern among HHAs that already devote significant man-hours to the pursuing of timely POC signatures from physicians who do not have “skin in the game.”

CMS emphasizes that an HHA can make unlimited resubmissions of a provisionally denied pre-claim review until the final claim is submitted. But this has caused some to question whether the demonstration will interfere with the split percentage payment approach CMS uses to ensure that HHAs have adequate cash flow. Under the split percentage payment approach, an HHA submits a request for anticipated payment (RAP) at the start of an episode, and CMS advances payment of 60 percent in an initial episode and 50 percent for episodes thereafter. An anticipated payment will be canceled and clawed back, however, “unless the claim is submitted within the greater of 60 days from the end of the episode or 60 days from the issuance of the [RAP].”

CMS has declined to extend the RAP cancellation period to account for potential delays associated with unlimited pre-claim review resubmissions. CMS has declined to extend the RAP cancellation period to account for potential delays associated with unlimited pre-claim review resubmissions. CMS asserts that Medicare Administrative Contractors will make every effort to issue pre-claim review decisions within 10 business days for initial requests and 20 business days for resubmissions. But implementation of these turnaround times may not be sufficient to protect HHAs from increased RAP cancellations if problems persist with securing timely POC signatures.

Continued on page 39

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Author:
Jamie A. Klapholz - Allen Dell, P.A.

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1 Medicare Program; Pre-Claim Review Demonstration for Home Health Services, 81 Fed. Reg. 37598-01 (June 10, 2016).
2 Id. at 37599.
4 See 42 C.F.R. 409.43(c)(3) (requiring that a Plan of Care be signed by a physician before the final claim for each episode of care is submitted).
7 Open Door Forum, supra note 5.
8 Medicare Benefit Policy Manual, Pub. 100-02, Ch. 7 at § 10.5.
9 42 C.F.R. § 409.43(c)(2).
10 Open Door Forum, supra note 5.
11 Id.
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SEPT - OCT 2016 | HCBA LAWYER
YLD Hosts Steak & Sports Day

About 50 kids from The Children’s Home enjoyed a fun afternoon on June 18 during the Young Lawyers Division Steak & Sports Day. This year’s event featured three former Buccaneers players – Chris Hovan, Kevin House, and Jerry Bell – who played catch and hung out with the kids. The kids also enjoyed steaks from Timpano’s, a cake from Wright’s Gourmet and other goodies, and had fun playing on a water slide, obstacle course, and bungee trampoline jumper. The YLD would like to thank all who supported this great event!
On November 20, 2014, President Obama issued a highly controversial executive action directing the Department of Homeland Security (DHS) not to deport certain undocumented parents of U.S. citizens and legal permanent residents and instead allow them to apply for deferred action. This program, known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), would allow eligible individuals to stay in the United States temporarily without fear of deportation, as well as obtain work permits. In addition, many eligible individuals would be able to obtain driver’s licenses. But DAPA would not grant permanent residency or citizenship.

Shortly after DAPA was announced, Texas and 25 other states sued in federal district court to block its implementation. Florida was among the states joining in the lawsuit. The district court enjoined DAPA’s implementation until the lawsuit could be decided on the merits. The Obama administration appealed the injunction to the Fifth Circuit Court of Appeals and, after a divided Fifth Circuit affirmed, later petitioned the United States Supreme Court for certiorari review.

The Obama administration contended that the President’s actions were a lawful use of prosecutorial discretion under the federal government’s exclusive authority to enforce immigration laws. The states, on the other hand, contended that the President lacked constitutional authority to grant work permits to individuals approved for deferred action and that that benefit needs to be tied to standard lawmaking procedures.

In June, the Supreme Court issued what many are calling a “non-decision” in this case. It was only nine words long: “The Judgement is affirmed by an equally divided court.” As a result of the 4-4 decision, the lower court injunction stands, blocking the implementation of DAPA until the lawsuit is decided on the merits.

Unfortunately, the Supreme Court’s decision brings us no closer to reaching a resolution on the ultimate issue in the case: Is DAPA an unconstitutional overreach of executive authority? In the meantime, up to five million immigrants who would be eligible for DAPA are waiting for a decision that ultimately may become moot; if a final decision is not reached before a new administration comes into office, continuation of DAPA would be in the hands of the new President.

Had there been nine justices on the Supreme Court, we would have had a definitive decision on the scope of the President’s executive authority. And we would have had some explanation for why the justices voted the way they did. Well, we may still have that chance. The Justice Department has just filed a petition for rehearing specifically asking for a full nine-member court to hear the case. Stay tuned!

Author: Daniela Hogue – Maney Gordon Zeller, P.A.
Interested in joining the HCBA Lawyer Referral & Information Service? Call (813) 221-7780.
Welcome to another exciting year at the HCBA’s Family Law Section. Before I discuss our goals and aspirations for this year, I would like to introduce myself. I have been practicing family law for over twelve years. I am board certified in marital and family law and a certified family mediator. My practice is limited to mediations and collaborative divorce. My family and I moved to Tampa from Naples about five years ago. While in Naples, I served as the chair for the Collier County Bar Association’s Family Law Section.

First and foremost, as it relates to the section’s goals, we will strive is to increase the section’s membership. I have noticed that many attorneys practicing family law in Hillsborough County are not members of the Family Law Section. It is our goal to reach those attorneys by inviting them to attend informational meetings about our section.

The second goal is to expand our current pro bono project. Last year was the inaugural year for the pro bono day event hosted at the George Edgecomb Courthouse. We invited pro se individuals to meet one-on-one with family law attorneys for general family law advice. The event was well attended by the general public. We will host the same event again this year, as well as a second pro bono day event in the fall to address parenting issues.

Our last goal is to resume our mentoring program. In the past, our mentoring program involved law school students. This year, the mentoring program will involve seasoned family law attorneys mentoring younger family law attorneys, as opposed to law students. We believe this type of mentoring program will directly benefit the section and our members.

We are planning numerous events for the upcoming year, including happy hours, a holiday party, the Judicial Appreciation Lunch, and our membership lunches. This year, all of our happy hours and parties will include a charity. Keeping with the section’s tradition, not only will we socialize with our members, but we will give back to the community.

As many of you know, our luncheons provide an exceptional opportunity to meet and network with section members, or even catch up with friends. The presentations also are a great value. The presentations this year will cover ethics, guardian ad litem, parent coordination, work/life balance, and our annual judicial roundtable discussion.

We hope to see each of you at our luncheons and other events.

There are many opportunities for members to get involved, such as sponsoring our happy hours or other events. We also invite each of you to consider joining a committee, which include the pro bono, membership, social, and mentoring committees. As you can see, we are a very active section, and you will get out of your membership what you put into it.

I look forward to leading this remarkable section.

Author: Jill Lowe – Jill G. Lowe P.A.
BENEFITS OF GETTING INVOLVED IN THE MEDIATION & ARBITRATION SECTION
Mediation & Arbitration Section
Co-Chairs: Amy Tamargo - Tamargo Mediation, PLLC and Kari Metzger - Metzger Law Group, P.A.

I am delighted to be co-chairing the HCBA's Mediation and Arbitration Section with Kari Metzger this year. Our goal is to provide our members with fellowship and networking opportunities, as well as provide quality continuing legal education and continuing mediator education. Whether you are a mediator, an arbitrator, or an attorney who participates in the ADR process, we invite you to join us!

There are many ways you can get involved. We will host luncheons on September 14, November 9, February 7, and April 19 at the HCBA Chester H. Ferguson Law Center. We plan to provide informative speakers on topics such as marketing your mediation practice, as well as panel discussions featuring experienced ADR professionals and attorneys who can answer questions about some of the difficult situations we sometimes face as mediators and arbitrators. Please let us know if there are any topics or speakers you would particularly like to hear, or if you would like to speak at one of our luncheons. We also welcome submission of articles for the Lawyer magazine. We appreciate your ideas and participation.

Another way to get involved is to participate in the section's pro bono efforts. The Mediation and Arbitration Section has teamed up with the U.S. District Court for the Middle District of Florida to create a pro bono mediation initiative. The initiative has built a roster of mediators who agree to mediate federal cases on a pro bono basis. In order to qualify, mediators must be certified pursuant to Middle District Local Rule 9.02. Middle District judges and magistrates, as well as lawyers and parties involved in pro bono cases, have access to the roster. These users contact mediators directly to schedule mediation. When contacted, roster members are not obligated to accept the mediation, allowing a mediator to decline a case he or she does not feel comfortable mediating, such as a case involving unfamiliar or complex subject matters or legal concepts. If you are a certified federal court mediator who would like to be included on the roster, please let us know. We also welcome your ideas for other pro bono projects that would be served by the unique skills of our section’s members.

If you have suggestions or if you would like to volunteer for one of the opportunities outlined above, please feel free to contact me, Amy Tamargo, at tamargomediation@gmail.com, or Kari Metzger at kam@metzgerlaw.net. We look forward to another exciting year for the Mediation and Arbitration Section.

Author: Amy Tamargo - Tamargo Mediation, PLLC

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JUDGE MANNING: THOUGHTFUL PATRIOT AND SON OF QUEENS
Military & Veterans Affairs Committee

When MVAC asked me to write the first in a series of profiles on our local judges who are veterans, I was honored to write the story of a man I call a friend, Hillsborough County Judge Daryl Manning.

Judge Manning is many things: a lawyer and judge; a father and son; and a veteran. All of these identities come from his experience where he was born and raised: Queens, New York — specifically, the borough of Jamaica, Queens. Everything this humble man has done throughout his life originates from Queens. Like his hero and fellow New Yorker, General Colin Powell, Judge Manning owes all that he has to his roots.

First begin with his family.

His father, Willie Manning, was a New York City unionized transit worker. His mother, Barbara Manning, was a nurse. Judge Manning lives a life worthy of their sacrifices. He also has a sister who is a medical doctor and Emory University professor. And there is the pride of his life, his two daughters: One is a second year law student, the other a college sophomore studying biology.

Then continue with his service as an American soldier.

Judge Manning’s patriotism is one that loves not only America, but also loves his fellow Americans. His is a thoughtful patriotism that breathes life into our best aspirational values. This patriotism led Judge Manning, as a 17 year old, to go with his mother to sign up for the United States Army. And Judge Manning notes that he signed up in 1985: a time when patriotism was heralded in popular culture.

He was not immune to this national sentiment. While serving, Judge Manning knew of those who came before him: the heroic 369th Infantry Regiment (“The Harlem Hellfighters”), the Tuskegee Airmen, and great Americans like Jackie Robinson. His service record includes combat in the Gulf War; return tours to Iraq from 2003 to 2005 and 2010; and service in 2011 in Afghanistan. For this, he received two Bronze Stars.

And if every career has a day that stands out above all others, for Judge Manning that day was September 11, 2001. On that day, he would begin 15 years and counting of deployments that would define his life. He recalls that day well: A trial he was involved in was stopped because of the terror attacks, and within months, his unit was called up for service.

And then there are his experiences as a lawyer and judge. Judge Manning — like a good American — uses the law to promote the greater good.

As a Florida Attorney General, he advocated for victims of abuse; he took a leadership role with the Florida Bar Examiners and served on a local Grievance Committee. While a Judge Advocate in the military, he promoted the American way overseas and saw judges operating under the worst conditions.

We end at where we began: Queens. Judge Manning is still — at heart — that patriotic kid from Queens who cheers the New York Mets and dreamed of wearing his country’s uniform. It was at 17 when he began to give back to a nation that had given him so much, and he has not stopped since.

Author: Luis E. Viera – Ogden & Sullivan, PA.
Judge Manning Recognized with 2016 President’s Award of Merit

Hillsborough County Judge Daryl Manning received The Florida Bar President’s Award of Merit at The Florida Bar’s annual convention in June. In presenting the award, Ramón Abadin, the 2015-2016 Florida Bar President, expressed appreciation for Judge Manning’s work as chair of the Board of Bar Examiners to “elevate the relationship between The Florida Bar and the Board of Bar Examiners, and his focus on keeping the Board user-friendly and transparent, open to technology, and prepared for change.”

Judge Daryl Manning at his Investiture at the Edgecomb Courthouse in February 2016

McLeroy Recognized with Florida Bar Foundation’s Medal of Honor Award

HCBA member Kathleen Schin McLeroy with Carlton Fields received The Florida Bar Foundation’s 2016 Medal of Honor Award, the Foundation’s highest honor, at The Florida Bar Foundation’s Annual Reception and Dinner in June.

McLeroy was honored for her innovative ideas to increase Interest on Trust Accounts (IOTA) revenue, her successful efforts to preserve county funding for legal aid, her leadership of organizations supporting pro bono at the national, state and local level, as well as more than 20 years of direct services to pro bono clients. She currently co-chairs The Florida Bar Standing Committee on Pro Bono Legal Services; serves on The Florida Bar’s Vision 2016 Commission; and chairs the inaugural board of directors of the Florida Justice Technology Center (FJTC).
WHY WAS THE PANEL FORMED?

Since 1996, the Thirteenth Judicial Circuit has been a respected leader on issues of professionalism and the elevation of the practice of law.

In 2013, the Florida Supreme Court issued an opinion that each judicial circuit in the state would establish a local committee specifically to address issues of professional conduct.

We are pleased to announce that the Thirteenth Judicial Circuit (Hillsborough County) “Local Professionalism Panel” has now been activated and is here to help!

This is a non-punitive, confidential program intended to mentor and advise attorneys who may need further direction on the professionalism and courtesy expected of an attorney in accordance with the Oath of Admission to the Florida Bar.

As noted, the Supreme Court in 2013 – following the recommendation of the Commission on Professionalism – ordered that local committees be set up in each Circuit, as part of an effort to improve professionalism.

Complaints about a lawyer’s conduct may be made to the local panel or to The Florida Bar’s Attorney Consumer Assistance Program (ACAP). Most issues are expected to be resolved informally, but the court reiterated, as has been done in previous Bar grievance cases, that egregious unprofessional conduct would be subject to discipline.

Complaints that do not result in Bar action will be referred to local committees such as this Local Professionalism Panel for review. Likewise, cases fielded by the local committees that involve more serious violations are expected to be referred to the Bar.
THANK YOU!

The Hillsborough County Bar Association appreciates those attorneys who participate in our Lawyer Referral & Information Service.

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The Loan Originator Rule in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act")\(^1\) has created a great deal of confusion for private lenders making loans secured by residential real estate. The rule generally provides that if a loan will be secured by real property that the borrower will use for residential purposes, then the party who arranges the loan is deemed a “loan originator” and must provide certain disclosures and have a mortgage originator license. Penalties for violating the Act include borrowers being able to recover costs and damages from lenders, forfeiture of down payments or finance charges, and the creation of an affirmative defense to a lender’s foreclosure action. A careful reading of the Act reveals exceptions that should provide comfort to private lenders making loans for commercial purposes. Below are three examples of loans secured by residential real estate that are excluded from the reach of the Act:

1. A private lender makes a loan to a limited liability company for the purchase of residential real properties with homes on them. The borrower will demolish the homes and build spec homes for resale purposes. None of the individual members of the limited liability company will reside in the homes to be demolished or in the spec homes. The Act does not apply to this transaction since the borrower is not a consumer (i.e. the borrower is not a natural person).\(^2\)

2. A private lender makes a loan to a developer to construct residential homes on vacant lots for resale. The loan is secured by the vacant lots and homes. The individual developer will not reside in any of the homes. The Act does not apply to this transaction since the loan is being made primarily for business or commercial purposes.\(^3\)

3. A private lender makes a loan to an individual who intends to acquire residential condominium units for his investment portfolio. All of the units are leased to families who reside in the units. The borrower will assume the leases upon acquisition of the units and, upon expiration of the leases, lease the units to new tenants to secure a rental income stream. The loans for each of the units will be secured by the unit, and the borrower will not reside in the units. The Act does not apply to this transaction since the borrower does not intend to reside in the units (i.e. the loans are being made for investment purposes).


\(^3\) 12 C.F.R. § 226.3(a)(1); 15 U.S.C. § 1603(1).

Author: Brittany Bustillo – Shutts & Bowen LLP

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Welcome back! The summer is behind us, so we can now all look forward to what the fall and winter months have in store for us. We are not talking about the presidential race or football rankings, but rather the current state of the securities industry. Rob Jamieson and I have the pleasure of serving as co-chairs of the Securities Law Section for the 2016-2017 Bar year. We will do our best to successfully navigate the Section through the coming year.

Since being re-established, our Section membership has grown, and we hope to continue that trend into the future. With that in mind, we will be working hard to convince those who are not currently Section members why they should join. We need all the help we can get, so please spread the word and tell your colleagues to come and join us for some of the great events we expect to host this year. Our Section has the benefit of having a diverse membership, including representatives for plaintiffs, claimants, defendants, respondents, regulators, financial institutions, investment banks, compliance departments, as well as registered representatives and advisors. We believe that connecting such a diverse group is one of our Section’s greatest benefits, and we hope to increase our membership’s diversity.

Our primary goal for the upcoming year, however, will be to continue drawing upon our representative groups to facilitate well-rounded discussions and foster the beneficial exchange of information and ideas relevant to the securities industry. We will continue to engage representatives of the Financial Industry Regulatory Authority and the U.S. Securities and Exchange Commission, among others, because we believe that an open dialogue between the industry and its regulators offers significant benefits to all. In addition, as evidenced by reading the articles submitted on the Section’s behalf last year, there are a number of hot topic issues that are gaining momentum in the industry, not the least of which is the ongoing analysis of the new fiduciary standards of conduct. As Section members, we have the valuable opportunity to address these issues in an open forum that allows us to hear from all sides. We hope that you all seize these opportunities and make the most of them. We also welcome your input.

We look forward to working with the Section members over the next year and welcome any feedback, comments, suggestions, and ideas you might have as to how we can improve the Section and what the Section can do to benefit you.

Authors: Dan Dietrich - Burr & Forman LLP and Rob K. Jamieson - Wiand Guerra King

Update to Weighted Scales of Justice in SEC Administrative Proceedings? published in the HCBA LAWYER, Summer 2016, Vol. 26, No. 6:

On June 17, 2016, the Eleventh Circuit decided to join several other circuits by ruling that federal courts lacked jurisdiction to adjudicate constitutional challenges to the SEC’s in-house proceedings prior to the SEC issuing a final order. This ruling requires parties to defend a possibly unconstitutional prosecution in the SEC’s courts before seeking relief in federal courts.

While the Eleventh Circuit’s decision was disappointing to some critics, not all hope is lost. The case Bennett v. SEC (15-2584) is currently under review by the Fourth Circuit and oral argument is scheduled for late October 2016. This case could provide the Circuit split needed to spur the Supreme Court to grant certiorari and provide a highly sought-after review of the SEC’s expanded powers under Dodd-Frank.
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THANKS TO ALL OUR FOX 13 ASK-A-LAWYER VOLUNTEERS!

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

- Dale Appell
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- Rinky Parwani
- Lawrence Samaha
- William Schwarz
- Shaina Thorpe
- Roland “Chip” Waller
- Robert Walton
Welcome to the start of a new year for the HCBA's Solo & Small Firm Section. I am excited to continue on the avenue we set forth last year on Building Connections.

As a solo or small firm practitioner, we are in the unique role of being attorneys and business owners. In order to grow and succeed, we must depend on a steady influx of clients. These clients may not come to us directly; instead, they find often their way through a colleague or fellow section member. Before you can be on the receiving end of that referral, you must build a personal connection with the referral source.

Networking can be the most daunting task for new — and established — solo and small firm practitioners; however, it is also one of the most important things we must do. Strong referral relationships take time to build and must be nurtured. An authentic interpersonal relationship is founded on mutual care and common interest. Being active in the HCBA, and in particular our section, is a great and easy way to start the process.

We will have five lunch meetings this year, each with an informative CLE presentation: September 27, November 15, January 25, March 21, and May 16. These lunches are not just a means to earn that all-important CLE credit. They also provide an invaluable opportunity to network with your fellow practitioners, gain new perspectives, and grow your resources of referrals and collaborators.

As we have seen, the Solo and Small Firm Section encompasses a truly diverse membership, with practitioners in a variety of substantive law areas and practice settings. Although this can sometimes present a challenge when defining ourselves as a group, our diversity affords us a unique path to grow our businesses in new and unexpected ways through collaboration and education.

Are you your own PR person?

Share your achievements in the Lawyer magazine's Around the Association column by emailing stacy@hillsbar.com.
The non-filing of federal income tax returns is a relatively common situation encountered by practitioners, and it can raise a number of different issues. As most people know, the non-filing of tax returns can be a crime. See e.g., 26 U.S.C. § 7203. For those that are worried about criminal liability from such a non-filing of tax returns, the IRS has a process where taxpayers can voluntarily come forward to criminal investigation agents and disclose the non-filing, file the tax returns, and pay the tax. Although this carries some risk, following these procedures generally results in a recommendation against prosecution. While the government does institute a modest number of criminal prosecutions each year for failure to file, the vast majority of such non-filed returns are resolved in the civil arena.

Most taxpayers choose to resolve the non-filing of returns by filing them late. This can result in failure-to-file penalties and, if tax is due, failure-to-pay penalties. 26 U.S.C. § 6651. Taxpayers who can establish that the late filing was due to “reasonable cause and not due to willful neglect” may be able to get these penalties waived, although they will still owe interest on any outstanding amounts. Filing a return, albeit late, has the added benefit of starting the statute of limitations for the amount of time that the IRS has to audit that tax return and to assess additional tax. 26 U.S.C. § 6501. The statute of limitations is three years from the filing date of the late filed return, but there are several provisions that can potentially extend this to six, or even more, years.

Nonresident aliens (generally taxpayers who are not U.S. citizens or residents) are subject to a very different tax regime and unique provisions in the Internal Revenue Code. Like citizens, nonresident aliens are entitled to claim deductions and credits on their tax return, but only if they have filed a “true and accurate return.” 26 U.S.C. § 874. The corresponding treasury regulations require that, in order to claim deductions or credits, the return must have been “timely filed.” This generally means within sixteen months of the due date of the return. A nonresident alien who files a return more than sixteen months late may lose the ability to claim any deductions or credits on the return, which in turn could significantly increase the amount of tax owed. Thus, nonresident aliens face additional punitive measures for untimely returns.

As a practitioner, it is important to help clients stay in compliance with their various income tax return filing obligations.
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The Florida Supreme Court acted to protect some of our state’s most vulnerable citizens from draconian cuts in benefits for injured workers in *Westphal v. City of St. Petersburg, SC13-1930, 2016 WL 3191086 (Fla. June 9, 2016).* In doing so, it signaled a willingness to consider whether the Florida Workers Compensation Act and its provisions continue to provide a reasonable alternative to a tort remedy.

In *Westphal*, the claimant, Bradley Westphal, was a 53-year-old firefighter who suffered a severe back injury moving furniture while fighting a fire. Despite multiple spinal surgeries, he was not at maximum medical improvement (“MMI”) within 104 weeks of disability, the deadline for temporary indemnity benefits. As a consequence, the Judge of Compensation Claims ruled that Westphal could not receive additional temporary indemnity after 104 weeks. He also ruled that permanent total disability benefits could not begin until maximum medical improvement, even though no one disputed that he was totally disabled and awaiting another surgery.

On appeal, the Florida Supreme Court noted that Westphal fell into a “statutory gap” — the period after temporary benefits expire but before claimants are entitled to permanent benefits when they reach MMI — that caused him to be “completely cut off from disability benefits for an indefinite amount of time, unless and until he could claim entitlement to permanent total disability benefits at some future date. *Id.* at *3.* And even then, the Court noted “he would be without any ability to recover disability benefits for his time in the statutory gap.” *Id.*

This statutory gap came about as result of the Florida Legislature reducing the availability of temporary benefits. In 1990, temporary benefits were reduced from 350 weeks to 260 weeks; three years later, they went from 260 weeks to 104 weeks. According to the Court, “benefits have progressively been reduced over the years and the statutory scheme changed to the detriment of the injured worker. But there must eventually come a ‘tipping point,’ where the diminution of benefits becomes so significant as to constitute a denial of benefits, thus creating a constitutional violation.” *Id.* at 25. In the Court’s view, “[w]e have now reached that point at which the claimant’s cause of action has effectively been eliminated.” *Id.* at *28.*

After noting that two years is not a reasonable period for the most severely injured workers to achieve MMI, whereas five to seven years is reasonable, the Court held that the 104-week limit was unconstitutional because the system must provide “full medical care and wage-loss payments for total or partial disability regardless of fault” in order to be constitutional. *Id.* at *4.* Having determined the 104-week limitation was unconstitutional, the Court determined the proper remedy was to revive the pre-1994 statute, providing for 260 weeks of temporary benefits. Judge Lewis, however, suggested in a concurring opinion that the entire act be invalidated: “The reality is that Workers’ Compensation benefits have been steadily chipped away and reduced by the Legislature to such an extent that intelligent, able jurists have now concluded enough is enough and declared the entire statutory scheme unconstitutional.” *Id.* at *40.*

One takeaway from the Court’s decision in *Westphal* is that other provisions that diminish a claimant’s benefits also may be invalidated by the Court. Four examples specifically mentioned by the Court are the nearly unfettered right of employers and carriers to select the treating physician; creation of the “major contributing cause” standard; repeal of an employee’s right to opt out of workers’ compensation and elect a tort remedy; and the requirement that employees pay copayments after reaching MMI. But perhaps the most important takeaway is that the Court may have sent a message to the Legislature not to try to undo the appellate decisions made this year, or else Judge Lewis’ suggestion of invalidating the entire act may be what follows.

*Author: Anthony V. Cortese - Attorney at Law*
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<td>December 2015</td>
<td>Honorable Rochelle Curley</td>
<td>Earle Webb Moffitt, II vs. Allstate Fire and Casualty Insurance Company</td>
<td>For plaintiff: Christopher A. Boyd, Esquire; For defendant: Courtney I. Flandreau, Esquire and Julie M. Myer, Esquire</td>
<td>Shoulder, neck, back injuries and post-traumatic tinnitus, following a rear-end MVA. Plaintiff was insured with Allstate for UM benefits in the amount of $50,000.00.</td>
<td>Verdict: $454,930.06 (Past Medical - $44,930.06, Future Medical - $160,000.00 and Pain and Suffering - $250,000.00)</td>
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<td>May 2016</td>
<td>Judge Thomas H. Minkoff</td>
<td>Keith Howell and Beth Anne Howell vs. Citizens Property Insurance Corporation</td>
<td>For plaintiff: K.C. Williams, Esquire; For defendant: Michael Bradford, Esquire and Julie Aiello, Esquire</td>
<td>Sinkhole claim denied by Citizens. Neutral Evaluator also rendered opinion that no sinkhole loss.</td>
<td>Verdict: $75,310.00</td>
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Erin Smith Aebel - The law firm of Shumaker, Loop & Kendrick, LLP, is pleased to announce that Tampa partner Erin Smith Aebel, co-chair of the Tampa Health Law Department, has been appointed as vice chair of The Florida Bar’s Health Law Certification Committee.

Jolyon Acosta - Bush Ross shareholder Jolyon Acosta has recently graduated from the Florida Fellows Institute of the American College of Trust and Estate Counsel.

Christopher Codling - Givens Givens Sparks attorney Christopher Codling was a guest speaker covering the topic of personal injury at the George Edgecomb Bar Association 2016 Legal Rights Community Workshop on May 14 at the New Hope Missionary Baptist Church.

Michael G. Cooke - Michael G. Cooke, an attorney in the Tampa Environmental Practice of Greenberg Traurig, P.A., has been appointed to the State & Federal Government Administrative Practice Certification Committee of The Florida Bar. Cooke will serve a three-year term beginning July 1, 2016.

Michael P. Falkowski - Abbey Adams & Mueller, LLP is pleased to announce that Michael P. Falkowski has become a partner with the firm.

Greenberg Traurig, P.A. - Greenberg Traurig, P.A. has been selected as the winner of the Big Brothers Big Sisters of America 2016 Common Good Award for providing more than one million dollars in pro bono legal services to the organization. The award was presented on June 29 at the Big Brothers Big Sisters of America National Awards Gala in Orlando.

Paige Greenlee - Tampa attorney Paige Greenlee has been reappointed by The Florida Bar to the board of The Florida Bar Foundation, a statewide charitable organization whose mission is to provide greater access to justice.

Mark Hanley - Bradley Arant Boult Cummings LLP is pleased to announce that Tampa partner Mark A. Hanley has been elected as a fellow in the American College of Labor & Employment Lawyers.

Taylor Russo Hess - The Trenam law firm is pleased to announce the addition of new associate Taylor Russo Hess, who will practice in the Private Client Services Group.

Andrew Jenkins - Bush Ross shareholder Andrew Jenkins is a graduate of The Greater Tampa Chamber of Commerce’s 2016 Leadership Tampa Class.

Michele Leo Hintson - The law firm of Shumaker, Loop & Kendrick, LLP is pleased to announce that Tampa partner Michele Leo Hintson has been appointed to serve on The Florida Bar Professional Ethics Committee for the 2016-2019 term.

Wesley Jones - Bush Ross associate Wesley Jones is a recent graduate of the 2016 Tampa Connection Class.

Jennifer J. Kennedy - Abbey Adams & Mueller, LLP is pleased to announce that Jennifer J. Kennedy has become a partner with the firm.

David Kronenfeld - David Kronenfeld has joined Macfarlane Ferguson & McMullen, focusing his practice on Business & Corporate, Finance, Mergers & Acquisitions, and Tax & Planning.

Dennis A. Lopez - Dennis A. Lopez & Associates is proud to announce that its founder, Dennis A. Lopez, was recently appointed to the Code and Rules of Evidence Committee of The Florida Bar.

C. Douglas McDonald - Carlton Fields is pleased to announce that C. Douglas McDonald Jr. was elected to serve as president for the Ferguson-White Inn of Court. His term began June 1, 2016, and runs through May 30, 2017.

Lindsay A. Moczynski - Givens Givens Sparks attorney Lindsay A. Moczynski was a guest lecturer on the topic of family law at the Clearwater campus of St. Petersburg College on June 13.

Dilip Patel - Buchanan Ingersoll & Rooney announces that Dilip Patel has joined the firm as counsel in its Tampa office, in the area of immigration law.

Libby Ridley - Bush Ross associate Libby Ridley is a recent graduate of the 2016 Tampa Connection Class.

Michael B. Schwartz - The Trenam law firm is pleased to

Continued on page 69
As announced in the previous page:

**Sylvia H. Walbolt - Carlton Fields** is pleased to announce that Sylvia H. Walbolt, Tampa shareholder and co-chair of the firm’s National Appellate Practice and Trial Support group, will receive the 2016 John Paul Stevens Guiding Hand of Counsel Award from the American Bar Association’s Death Penalty Representation Project on September 15 in Washington, D.C.

**Sylvia H. Walbolt - Carlton Fields** is pleased to announce that Sylvia H. Walbolt, Tampa shareholder and co-chair of the firm’s National Appellate Practice and Trial Support group, will receive the 2016 John Paul Stevens Guiding Hand of Counsel Award from the American Bar Association’s Death Penalty Representation Project on September 15 in Washington, D.C.

**Dineen Pashoukos Wasylik - DPW Legal**, owner of **DPW Legal**, was elected president of the Women Lawyers of Pasco, the Pasco County chapter of the Florida Association for Women Lawyers.

**Straley & Robin** - Straley & Robin is pleased to announce that the firm name has been changed to **Straley Robin Vericker**.

**Continued from page 68**

announce the addition of new associate Michael B. Schwartz, who will practice in the Private Client Services Group.

**Straley & Robin** - Straley & Robin is pleased to announce that the firm name has been changed to **Straley Robin Vericker**.

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Membership Luncheon featuring Bill Schifino, Jr.,
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OCTOBER 14
YLD Golf Tournament, Temple Terrace Golf & Country Club

NOVEMBER 10
Bench Bar Conference, Membership Luncheon &
Judicial Reception, Hilton Tampa Downtown

DECEMBER 1
Holiday Open House, Chester H. Ferguson Law Center

JANUARY 11
Diversity Membership Luncheon, Hilton Tampa Downtown

FEBRUARY 18
Diversity Networking Social, Chester H. Ferguson Law Center

MARCH 11
Judicial Pig Roast/Food Festival & 5K Pro Bono River Run,
on the grounds of Stetson Law Tampa Campus

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