THIS YEAR MARKS 35 YEARS AS A MEMBER OF THE FLORIDA BAR.

It is a time to pause and express my thanks to the judges who presided over my cases, the lawyers with whom I have litigated, and my current team. You have made me a better lawyer over these many years.

A special thanks to my referring counsel for entrusting me with your clients.

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I LOOK FORWARD TO WORKING TO KEEP YOUR TRUST FOR ANOTHER 35!
- Lee D. Gunn IV
This issue features a photo commemorating Tampa's own famous historical industry, the cigar industry. The photo shows an interior view of the Cuesta-Rey Cigar Company, taken in Ybor City in 1929. Note the lector reading from the raised platform at the right. Historically, lectors or readers in a cigar factory entertained workers by reading books or newspapers aloud. Ybor City was founded as an independent town in 1885 by a group of cigar manufacturers led by Vicente Martinez-Ybor and was annexed by Tampa in 1887. Ybor City continued to grow and prosper through the 1920s when this photo was taken, by which time its factories were producing almost half a billion hand-rolled cigars every year, giving Tampa the nickname of “Cigar City.” The photo is part of the Burgert Brothers historical photograph collection, which chronicled life in the Tampa Bay area from the late 1800s to the early 1960s. Photo used with permission from the State Archives of Florida online Florida Memory collection.
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“I was up all night with severe nerve or phantom pains. Let me tell you, you shouldn’t feel pain in body parts that you no longer have.”

That was a tweet I stumbled across a few days ago. In fact, I read it, ironically enough, just hours after waking up complaining about the awful night’s sleep I had gotten because my oldest daughter had decided to sleep at the foot of my bed, keeping me from stretching my legs out. The tweet was by retired Marine SSgt. Johnny “Joey” Jones.

SSgt. Jones, a bomb technician, lost both his legs eight years ago in a bomb blast while serving in Afghanistan. On August 6, 2010, SSgt. Jones was defusing bombs in a bazaar to protect Afghan civilians, when he stepped on an improvised explosive device, triggering an explosion that resulted in him losing both his legs — one below the knee and the other above — and suffering severe damage to both wrists and his right forearm.

After more than 20 surgeries and two years of grueling rehab at Walter Reed Medical Center, SSgt. Jones is walking again with the help of prosthetic limbs. Today, he devotes his life to making life easier for our wounded warriors.

After reading SSgt. Jones’ tweet, I couldn’t help but feel a bit guilty. A few months ago, as part of a work retreat, I helped write greeting cards to servicemembers serving overseas. It wasn’t easy coming up with the right words to express my gratitude for their service. So when I was done, I confess feeling a bit satisfied that I had done my part.

But after reading SSgt. Jones’ tweet, a “thank you for your service” card hardly seems enough for a veteran who feels pain in body parts he no longer has. And it’s not just the physical injuries taking their toll on veterans.

According to a recent study by the American Psychiatric Association, more than 300,000 veterans of the wars in Afghanistan and Iraq have been diagnosed with post-traumatic stress disorder, a number that surely undercounts the number of veterans who suffer from PTSD. Want to hear a more startling — and heartbreaking — statistic? In 2012, more military deaths were caused by suicide than combat.

That’s why veterans don’t want my greeting card or a “thank you for your service” column, although I’m sure they’d appreciate the sentiment. They want their life back.

Recently SSgt. Jones was kicked off a ride at Six Flags, after walking up an enormous hill, because he didn’t have “real” legs. In talking about his experience, SSgt. Jones said, “There are thousands and thousands of us who are in this situation because of our service to our country. We’re just trying to reclaim a sense of normalcy.”

Thank you to all the HCBA members who are doing their part to help our veterans reclaim a much-deserved sense of normalcy.
What can the HCBA do for you? Give the Bench Bar Conference a Try

Thank you to Steve Yerrid and the Yerrid Law Firm for stepping up as our Diamond Sponsor once again, and thank you to all of our sponsors for supporting the Bench Bar Conference.

On October 3, 2018, the HCBA hosted its 22nd Annual Bench Bar Conference, membership luncheon, and judicial reception. This year proved to be an exceptional conference with over 400 lawyers and judges attending the CLE programs (our most ever), 550 attending our luncheon (a sellout), and 250 attending the judicial reception (again, our most ever).

The day began with two break-out sessions — Building Deposition Skills in Civil Cases and Building Deposition Skills in Criminal Cases. During the civil session, Chris Knopick, Joe Varner, and Brad Kimbro led a discussion on preparing for depositions, taking depositions, and managing difficult situations during depositions. On the criminal side, Lynn Goudie and Kim Kohn led the discussion on preparing for and taking a deposition in the criminal arena. These five seasoned trial lawyers provided tremendous insight, tips, and suggestions that proved

Continued on page 5
informative to all attending the sessions, including the most experienced conference attendees.

After the morning sessions, Professor Luis J. Virelli, III, a professor at Stetson University College of Law, presented the always-popular “Review of the U.S. Supreme Court.” During his discussion, Professor Virelli examined impactful decisions from the U.S. Supreme Court’s previous term, and gave us a heads-up on important cases to come. This discussion began years ago as a small break-out session with the Honorable Michael Allen, then an assistant dean at Stetson. The growing popularity of this session over the years has made it a must-see plenary session for all conference attendees.

Following Professor Virelli, Dr. Susan MacManus, distinguished Professor Emerita with the University of South Florida, and Florida’s most-quoted political scientist, provided a detailed look at the upcoming election. Among other things, Dr. MacManus dissected the many proposed constitutional amendments on the ballot and discussed the amendments’ many implications.

At noon, 550 judges and lawyers joined us for the HCBA’s second membership luncheon of the year, a sold-out event with a busy agenda. After thoughtful introductions by Judge Frances Perrone, Chief Judge Ron Ficarrotta, and Judge Greg Holder, the Thirteenth Judicial Circuit honored Rob Williams and Jay Pruner with its 2018 Professionalism Award. The Hillsborough County Bar Foundation also awarded $100,000 to six local programs that provide assistance to the poor, disabled, and disadvantaged in our community, after which our keynote speaker, Dr. MacManus gave an easy-to-understand explanation of why Florida has become the “swingingest” of purple states in the country.

Following lunch, dozens of judges took time out of their busy schedules and participated in the HCBA’s annual “View to and From the Bench” session. Conference attendees then had the choice to attend one of two sessions. During the first, “Deconstructing Jury Decision Making,” former jurors answered questions about their courtroom experience. Gloria Gomez from Fox 13 News moderated the session and then shared the story on her 5:30 news segment that evening (Thank you Gloria!).

The second, “Arbitration: Be Careful What You Ask For,” was moderated by Scott Ilgenfritz, Laura Prather, Chris Shulman, and Paul Ullom, four attorneys at the top of the arbitration game in Florida. They gave a thorough overview of the arbitration process and provided important tips of the trade.

The conference concluded with a plenary session led by Professor Charles W. Ehrhardt, Professor Emeritus at Florida State University College of Law. Professor Ehrhardt, who authored Florida Evidence, the leading treatise on the subject, spoke about impeachment of witnesses and effective methods to rehabilitate impeached witnesses. Professor Ehrhardt is a legal giant in the state of Florida and what a privilege it was to have him join us at the conference.

Thank you to Steve Yerrid and the Yerrid Law Firm for stepping up as our Diamond Sponsor once again, and thank you to all of our sponsors for supporting the Bench Bar Conference. (Photos from this year’s Conference and the full list of sponsors start on page 34.) A special thank you also to Judge Samantha Ward and her co-chair, Tom Palermo, for leading the Bench Bar Conference to new heights in 2018. We’re looking forward to more great things for our attendees at the 2019 conference. We hope you can make it.
The Collective

The Collective is an innovative networking initiative to support Bay Area Legal Services and its mission.

Someone much wiser than me once said that there are three gifts in charitable giving: (1) the gift of time; (2) the gift of talent; and (3) the gift of treasure. Ideally, we as young lawyers aspire to give each of these gifts through pro bono services.

We all have an obligation to provide support and legal services to members of our community who can’t afford an attorney. Because of the unique demands on young lawyers, however, we often struggle to find the opportunity to donate our time, talent, and treasure to community members most in need of our help. When given the choice to provide pro bono services or to meet our commitments to our jobs and families, many of us often realize we really don’t have much of a choice.

Fortunately, Bay Area Legal Services, a nonprofit law firm whose goal is to provide legal support to the most vulnerable members of our community, has come up with an innovative networking group that makes it easier for young lawyers to support BALS’s vision of eliminating “barriers to justice through high quality legal services, education, and community partnerships.”

It’s called The Collective.

The Collective is a networking group geared toward young leaders in the legal community who believe in BALS’s mission and who recognize our fundamental duty as lawyers to improve access to justice. For young lawyers, it’s a simple and low maintenance way to network while promoting legal services for local citizens in desperate need of legal help. The Collective aims to bridge the gap between young civic-minded leaders and the established network of BALS supporters who have paved the way to promote civil legal aid in the Bay Area. It also serves as an entryway for young attorneys to make their mark and get involved in philanthropy.

The Collective is affordable. For as little as $21 a month (70 cents a day), members and guests receive the benefit of bi-monthly happy hour events at local venues. Not only do members get the opportunity to build their professional network, but they know their monthly contribution is going directly toward supporting BALS’s mission. The money raised by The Collective goes to worthy causes such as protecting foster children and our senior citizens from abuse, providing access to health benefits for our veterans, preventing homelessness for families, and protecting domestic violence survivors.

The Collective is still only in its first year, but its success is evident. At the first two events, The Collective hosted over 75 community members. Although in its infancy, The Collective has proven to be a remarkable option for young lawyers willing to use their time, talent, and treasure to support a great cause.

For more information on how you can join the Collective, please contact Alexandra Pullara, Marketing Specialist for Bay Area Legal Services, at (813) 232-1222, ext. 156 or e-mail her at apullara@bals.org. You may also learn more about The Collective by visiting www.bals.org/support-us/donor-societies/the-collective. You can also find The Collective on Facebook.
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C hampion for the underdog. Relentless advocate. Voice for the voiceless. Dedicated to protecting the most vulnerable. These are all characteristics that have been used to describe the late Barry Cohen, one of Tampa’s legal legends, who died this past September of leukemia at the age of 79.

Cohen had a larger than life personality and a unique style all his own — in and out of the courtroom — and his impact on Tampa’s legal community will not soon be forgotten.

And no doubt everyone associated with the HCBA and the Bar Foundation, and all those who visit the Chester H. Ferguson Law Center, will continue to feel Cohen’s presence well into the future.

That’s because, as I’m sure most know, a large portrait of Cohen hangs in Cohen Hall, the large banquet room named for him at the Ferguson Law Center. Cohen was a one of the strongest supporters of the HCBA having its own building, and he was one of the largest financial benefactors of the project, which was completed in 2008.

And his portrait in the Cohen Hall is a constant reminder of his dedication to the enduring principles of fairness and equal justice under the law for all.

More than 400 people attended Cohen’s memorial service at the Bryan Glazer Family Jewish Community Center in September.

Cohen’s widow, Barbara, family members and close friends eulogized Cohen and talked about his dogged determination, his generous heart and compassion for others, and his keen sense of humor.

“Barry Cohen’s legal skills were matched only by his willingness to take on the causes of those who have no voice in the judicial system,” said Tampa Mayor Bob Buckhorn.

“Barry’s love of the law was equally matched by the size of his heart,” Buckhorn added.

Tampa attorney Steve Yerrid talked about Cohen’s illustrious legal career and some of the memorable cases he handled over the years.

“Barry was one of the finest trial attorneys who ever walked into a criminal courtroom,” Yerrid said of his close friend.

Yerrid also told those gathered about the tremendous grace, strength and courage Cohen showed in his final days as he battled the disease that ultimately took his life.

Finally, at the end of the memorial service, they played a recording of the song “My Way” sung by Frank Sinatra. After the song ended, people started to filter out, and everyone smiled.

They all agreed it was a fitting way to end the service, and to remember their good friend and a life well lived.

Continued on page 9
Kudos to everyone involved in the planning of the HCBA’s 22nd Annual Bench Bar Conference held on Oct. 3, and for making it such a tremendous success.

More than 400 people attended the day-long conference, which was a record, and hundreds of others enjoyed mingling with their friends and colleagues at the annual Judicial Reception held at the end of the day.

Keynote speaker political scientist Dr. Susan MacManus from USF spoke to a sold-out crowd of 550 people at the noontime Membership Luncheon.

Judge Samantha Ward and Thomas Palermo were the co-chairs of the Bench Bar Committee this year, and the committee spent months planning the conference agenda.

The conference theme this year was: Building Blocks for a Better Practice.

Of course, none of this could happen without the generous support of all the HCBA’s generous sponsors. So, thank you to all our sponsors for supporting this wonderful event, and especially our Diamond Sponsor: the Yerrid Law Firm.

See you around the Chet.
and heard firsthand the casualties of the criminal justice system’s unimaginable mistakes. Mistakes do happen.

Last October, I attended a conference where I faced this stark reality. I heard directly from innocent individuals whose wrongful convictions landed them on death row. Prosecutors convicted the wrong person. As a prosecutor who believes so deeply in our system, I found it gut wrenching. Even though our office had nothing to do with any of the exonerees’ cases, it was hard not to feel partially responsible.

This past April, we brought three death row exonerees to Tampa through an organization called Witness to Innocence (WTI) to share their stories with members of my office and local law enforcement. We are proud to have been the first prosecutor’s office in the nation to partner with WTI on this important issue. My team saw

Continued on page 11

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not to mention the best efforts of prosecutors and investigators, wrongful convictions unfortunately exist. Although wrongful convictions are rare, prosecutors still need to take proactive steps to mitigate mistakes from occurring and to fix them when they do.

That is why the State Attorney’s Office is establishing a Conviction Review Unit (CRU), a specialized section within the Office to prevent, identify, and remedy wrongful convictions by conducting fact-based reviews of convicted defendants where plausible claims of innocence are raised. These units have emerged over the past decade, with approximately 35 of them currently in operation across the country, including major cities such as Brooklyn, Chicago, and Houston.

How a CRU (a/k/a Conviction Integrity Unit) operates may vary between offices, but the structure is generally the same. There is a screening process to identify common aspects of wrongful convictions, such as failure to conduct DNA or other forensic testing, faulty eyewitness identification, questionable confessions, or changed testimony from critical witnesses. Cases that pass the initial screening proceed to review by an attorney, often with the help of an investigator or other staff. The review process essentially involves re-investigating the case, including witness interviews, forensic testing, evaluating existing evidence, or finding new evidence. The review may be as narrow as a single issue or as broad as the entire investigation and prosecution. Sometimes the review reaffirms the conviction; sometimes it does not move the needle either way; and sometimes it raises serious questions about the conviction or even exonerates the defendant. In those instances, the office would usually dismiss the charges.

The concept of prosecutors overturning their own convictions may sound odd, but wrongful convictions are contrary to the very fiber of our criminal justice system. They punish the innocent while the actual perpetrators go free, undermining public safety and the integrity of our system. Once we recognize the incontrovertible truth that our justice system is imperfect and that wrongful convictions are a consequence of that imperfection, then it becomes a moral imperative to do what we can to prevent and remedy wrongful convictions. After all, a prosecutor’s job is to seek justice, and that search does not end simply because the case is closed. Our duty to seek justice continues — always.
The Marriage of Dependency Court & Automation: A Meaningful Pair

Although these may seem like small steps in the right direction, the impact is significant and growing.

Marriage can be complicated. Two unique beings merge to complement each other in a meaningful way. Sometimes it works out; sometimes it doesn’t. In the Thirteenth Judicial Circuit, we have married two very unique beings: dependency court and automation. And the officiant, Judge Emily Peacock, makes it work every day in her courtroom.

The result of this union is the Florida Dependency Court Information System (FDCIS). FDCIS is a collection of data derived from the Clerk’s Office, the state’s Comprehensive Case Information System (CCIS), the Department of Juvenile Justice, the Department of Children and Families, the state’s Guardian ad Litem Program, and others. It functions operationally in conjunction with the court’s Judicial Automated Workflow System (JAWS).

The goal of FDCIS is to provide judges uniform, reliable data within allowable timeframes. Because children generally have fewer personal identifiers (e.g., social security numbers, driver’s license numbers, etc.) than adults, they can be difficult to positively identify. But when names and birthdates are correlated with positively identified family members and the case histories of those families, the data becomes more reliable. Reliable data regarding juvenile delinquency, homelessness, criminal history, and dependency history across the state enables Judge Peacock to make informed decisions about the cases before her.

Using both FDCIS and JAWS in her courtroom, Judge Peacock makes rulings and issues orders in real time. JAWS allows her to electronically sign an order finalizing an oral ruling before the parties leave her courtroom. Printed copies are immediately provided to those in need. This can enable children to receive timely referrals to service providers, enroll in school, and obtain necessary medical care. Temporary custodians can act swiftly to acquire school and medical records. The need to expeditiously adjudicate dependency cases cannot be denied. Although these may seem like small steps in the right direction, the impact is significant and growing. The judges of the dependency divisions are reviewing the outcomes of this marriage to determine if such a merger would be appropriate for them.

FDCIS was a collaborative effort of many visionary partners, including Judge Peacock; Angie Smith of our Office of Court Administration; George Roberts of the Office of the State Courts Administrator; Doug Bakke of the Clerk’s Office; and Stephanie Bergen and Tiffany Short of the Office of the Attorney General. I thank them for their dedication and service to the families and children of our community.
Congratulations to the 2018-19 Bar Leadership Institute Class

Justin Bennett
Anthony Bradlow
Katari Buck
Joshua Coldiron
Antoine Daniels
Melissa Isabel
Amanda Keller
Natasha Khoyi
Haksoo Lee
Jamila Little
Kendra Lyman
Kate Newton-John
Christian Nunez
Brett Owens
Matthew Parrish
Erin Rackauskas
Ryan Reese
Abraham Shakfeh
Matthew Stefany
Jennifer Touse
Garrett Tozier
Alicia Whiting-Bozich
Andrew Woodbury
CONGRATULATIONS TO NEW BAR ADMITTEES

Thirteen admittees to The Florida Bar gathered at the George Edgecomb Courthouse on September 21 for a celebratory swearing-in ceremony by the judges of the Thirteenth Judicial Circuit. The Hon. Ronald Ficarrotta presided over the ceremony, with the Hon. Daryl Manning discussing the importance of professionalism. HCBA President John Schifino and YLD President Jason Whittemore also spoke to the new admittees about the benefits of joining the HCBA.
Congratulations to all who were sworn in, and thank you to the ceremony’s sponsor:

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Supporting One Another in the Legal Community

Mark Rankin’s kindness and compassion inspires and gives lawyers a good name.

Lawyers can do amazing things. One lawyer in particular, my partner at Shutts & Bowen LLP, Mark Rankin, has done something truly incredible. On August 16, 2018, Mark donated a kidney to my father-in-law, Mac Wachtler, and saved his life.

Mark didn’t know Mac when he sent a text to the number on the flyer created by my mother-in-law, Bonnie, who was desperate to find a matching donor for Mac, who had been suffering from a degenerative kidney disease for years. As the rigorous testing progressed, Mark and Mac got to know each other, as did our families. On the day of the surgeries, we all sat in the hospital waiting room, together with Mark’s wife Lauren Stricker, our colleague at Shutts (and a hilarious and wonderful person), anxiously awaiting news. Both surgeries were successful; Mark has returned to work, and Mac is recuperating and regaining his strength.

Our office has always placed a strong emphasis on helping the community through pro bono and charitable activities, and Mark has given his time generously to various pro bono causes. But only an incredibly selfless and generous person could make the sacrifice that Mark has made for someone he didn’t even know. His kindness and compassion inspires and gives lawyers a good name.

Author: Ella Shenhav - Shutts & Bowen LLP
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The Derouin opinion is a useful tool for trial and appellate lawyers alike to keep in their respective tool bags.

**Lesson 1:** Because a party’s right to sue is measured by the facts as they existed at the time of suit, a complaint filed before a necessary element or event has occurred cannot be resuscitated by post-suit activities.

In 1929, the Florida Supreme Court held that “the right of a plaintiff to recover must be measured by the facts as they exist when the suit was instituted.” The principle, while never overruled, has not often been repeated by Florida state courts. The Second DCA reaffirmed the principle in *Derouin*. It held that a post-suit offer to mediate could not satisfy a pre-suit condition to offer a face-to-face meeting incorporated into the contract at issue.

**Lesson 2:** When the law is unsettled as to whether a particular defense should be raised as a “specific denial” or an “affirmative defense,” the safest play is to plead it as both.

In *Derouin*, the plaintiff’s complaint alleged that it had satisfied all conditions precedent. As the Second DCA noted, the case law was somewhat unsettled as to whether the defendants’ answer needed to “specifically deny” that allegation or to raise it as an affirmative defense. The Second DCA held “we need not weigh in on the conflict,” because the defendants raised it both ways in their answer. Thus the defendants satisfied their pleading burden.

**Lesson 3:** A plaintiff must file a new reply in response to an amended answer containing affirmative defenses, else any avoidance is waived.

In the trial court, the defendants obtained leave of court and filed an amended answer with a new affirmative defense (noncompliance with conditions precedent). The plaintiff did not file a new reply in response to the amended answer. Yet the trial court ultimately ruled in favor of the plaintiff based on an avoidance of the affirmative defense.

The Second DCA reversed: “Because Universal failed to address the waiver issue by reply to an affirmative defense, the trial court could not award Universal relief on such a basis.”

**Lesson 4:** A specific denial shifts the burden of proof to the plaintiff.

The Second DCA held that the defendants’ specific denial shifted the burden of proof back to the plaintiff bank to prove it satisfied conditions precedent to foreclosure. The plaintiff, however, failed to present sufficient evidence to prove it complied with a particular pre-suit meeting requirement incorporated into the contract at issue (somewhat unique to foreclosure cases but potentially analogous to other areas of law, e.g., insurance coverage litigation).

The Second DCA held the plaintiff to its burden in this case, reversing for entry of an order of involuntary dismissal.

**Lesson 5:** “Trial by consent” is not automatic in the absence of a contemporaneous objection.

On appeal, the plaintiff argued that its unpleaded avoidance was tried by consent when it presented evidence relevant to that avoidance without contemporaneous objection.

The Second DCA rejected this theory, holding that failing to object to introduction of evidence that is also related to a pleaded issue is not implicit consent to try an unpleaded...
Continued from page 18

issue. The court also held that the defendants’ objections at the outset of trial, as well as in post-trial memoranda requested by the trial court, were sufficient to avoid any trial by consent.15

In conclusion, the Derouin opinion is a useful tool for trial and appellate lawyers alike to keep in their respective tool bags. It collects and refreshes older principles, giving practitioners the opportunity to raise them anew in future cases.

1 I represented the successful appellants in this appeal, so Appellate Section Chairs Joe Eagleton and Tom Seider approached me to write a brief synopsis for the Lawyer. I agreed so long as I was authorized to blame them for the article. The deal was struck and here we are.

Voges v. Ward, 123 So. 785, 793 (Fla. 1929).

Derouin, 2018 WL 3999415, at *5.

Id. at *3.

Id.

Id. at *2.

Id.

Id. at *4.

Id. at *5.

Id. at *5 – 6.

Id. at *7.

Id. at *6.

Id. at *6 – 7.

Id.

Author:
Jared M. Krukar - DPW Legal

Want to advertise your business to THOUSANDS OF ATTORNEYS in the Tampa Bay area? Call (813) 221-7777 for more information.
For many of us, collaborative practice means a process that involves attorneys, a neutral mental health professional and a neutral financial professional.

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Ron Ousky, former president of the International Academy of Collaborative Professionals, urges us to engage in “flexible team models” customized to meet each family’s unique circumstances.  

For example, it all started with the attorney-only model. In this model, each client is represented by an attorney. There are no neutrals or other professionals. This model might be good for families in short-term marriages with no children and few assets and debts.

In parts of California and other places, the two-coach model is predominant. This is where there is a neutral financial professional, and each client has a separate, aligned mental health professional, or “coach.” It oftentimes will also involve a neutral child specialist, who is also a mental health professional, who speaks directly with children and serves as their voice during team meetings. This model may be perfect for families that need more support, such as when there is a severe mental health or personality disorder, when there is a history of domestic violence or other imbalanced power dynamics, or when children are facing major health or behavioral issues.

There is also the option of collaborative mediation. This is where, instead of using the typical neutrals, a mediator or co-mediators are used. Consider this model when a client has an aversion to mental health professionals, wants the security of long-tested mediation confidentiality rules, or simply wants an experienced lawyer as a neutral.

Finally, you may offer unbundled collaborative services. This is where the clients mainly meet and work with a neutral mental health professional and financial professional, and only use the attorneys when needed or at the end to draft agreements. This model works where there are fewer resources or the clients need less direct legal support.

In each of these models, both clients are represented by an attorney, and there is a written participation agreement that includes a withdrawal clause that says the attorneys cannot engage in litigation.

Many clients may not want or need our mainstream model of collaborative practice, or they may need more support than our model provides. We can customize these and other models to help more families and build successful collaborative family law practices.

1 Ronald D. Ousky, Developing a Range of Collaborative Models: One Size Does Not Fit All, in Building A Successful Collaborative Family Law Practice (Forrest S. Mosten & Adam B. Cordover eds., 2018).


5 See Adam B. Cordover & Rachel Moskowitz, Co-Mediation to Collaborative Mediation: A Case Study in Client-Focused Dispute Resolution, Commentator Magazine (Summer 2018).

6 Ousky, supra note 1.
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Distinguishing suretyship from insurance takes a herculean effort — even more so when trying to determine when a surety’s obligation is triggered. In *Lexon Insurance Company v. City of Cape Coral*, the Second District Court of Appeal differentiated surety contracts from insurance contracts by explaining that a surety bond is breached when the bond principal breaches its obligation — not when the surety denies a claim. 238 So. 3d 356 (Fla. 2d DCA 2017), review denied, 2018 WL 3282013 (Fla. 2018).

The *Lexon* case involved bonds governing a 400-plus acre development. In June 2006, Lexon, as surety, issued two subdivision bonds totaling $7.7 million that named the developer as principal and the City as the obligee. In March 2007, the contractor for the project stopped work because the developer stopped paying on the parties’ contract. By June 2007, the City had stopped performing inspections at the property. But the City waited until October 2012 to sue Lexon for breach of contract and for declaratory relief. Lexon moved to dismiss the City’s claim as untimely. The trial court, however, characterized the bonds as an insurance contract and ruled that the bonds were not breached until Lexon denied the claim. In doing so, the trial court rejected Lexon’s argument that because the surety bonds are a contract, the principal

Continued on page 23
breached the contract in early 2007, thereby rendering the City’s claims time barred.

The Second District Court of Appeal disagreed, holding that the five-year statute of limitations for an action based in contract was applicable to the City’s breach of contract claim and that the City’s bond claim accrued when the developer abandoned the project in March 2007.

The Second DCA relied on well-settled law that the surety’s liability to the obligee is based on the liability of its principal. Lexon Ins. Co., 238 So. 3d at 359 (relying on Am. Home Assurance Co. v. Larkin Gen. Hosp., Ltd., 593 So. 2d 195, 198 (Fla. 1992)). In Lexon, the bonds obligated the principal, the developer, to construct improvements on the project. When the developer failed in its obligation, the City’s cause of action accrued.

While surety bonds are a type of insurance contract, the unique and distinct nature of the surety contract bases the surety’s liability on the liability of the principal. The principal’s default “was the act that breached the bonds and started the running of the statute of limitations” — not the City’s demand for damages. Id. at 360. So the statute of limitations began to run in March 2007, when the developer abandoned the project.

Suretyship is undoubtedly a difficult area of law to navigate, but the Lexon case further clarifies and provides more certainty as to when a surety’s obligation under a bond begins to accrue.

*Author: Angie M. VandenBerg - Moyer Law Group*

### Construction Law Section Luncheon

On September 20, the Construction Law Section held their first luncheon of the new Bar year, where they received an informative presentation on construction defect cases involving roofing. The speaker, Lance Manson, who is a senior consultant and registered roof consultant at Delta Engineering and Inspection, Inc., discussed ways to measure and vet experts for roof construction defects cases, and the investigative tasks required for each roof system type. Manson also gave examples of various cases that illustrate the importance of an expert’s experience and the method of investigative tasks used to prepare for a successful litigation.
M any recent articles have highlighted the continued need for diversity and inclusion efforts within the legal profession. Mainstream and legal publications alike recognize that although diversity efforts in the legal field have made some progress, the hiring and promotion of those attorneys lag far behind the influx of women and people of color into the field. These groups continue to face barriers across the spectrum.

The American Bar Association recently issued a joint report from the Commission on Women in the Profession and the Minority Corporate Counsel Association titled, “You Can’t Change What You Can’t See: Interrupting Racial and Gender Bias in the Legal Profession.” The report details the bias women and minority lawyers continue to endure. It offers two toolkits, one for law firms and the other for in-house counsel departments, to interrupt bias in all aspects of hiring, assignments, performance evaluations, compensation, and sponsorship.

Although the study confirms that more women and minorities are in high stakes workplaces that hold prestige, the roles they play are limited. For example, women of color reported experiencing the highest level of bias at 63 percent; 67 percent said they were held to higher standards than their colleagues; and 70 percent said they received less pay than their colleagues with similar experience and seniority. The report suggests using metrics to encourage fairness in all facets of employment. It also emphasizes that although an organization’s initial efforts may not succeed, it should continue to use different methods to gain success.

Michele Coleman Mayes, the former chair of the Commission, and a keynote speaker at the HCBA’s Diversity Luncheon several years ago, originally envisioned the study. She recognizes that although efforts targeted at helping individual lawyers overcome barriers in the workplace are helpful, they are “only half of the equation.” Rather than putting weight on the individual, she encourages organizations to look at their practices and implement concrete measures that disrupt bias. Notably, Hillarie Bass, the immediate past president of the ABA and speaker at last year’s HCBA Diversity Luncheon, is taking her own firm steps in that direction: she is leaving a career in BigLaw to establish a non-profit organization dedicated to tackling issues facing women and minorities in the workplace.

On a local stage, the HCBA Diversity Committee actively seeks to interrupt bias and promote diversity and inclusion. And the HCBA believes in partnering with programs that share in that vision. The Diversity Access Pipeline (DAP) is a new initiative in Tampa Bay that tackles this issue head-on. DAP seeks to promote diversity, create access, and feed the pipeline — one student at a time. The pilot program, executed through the George Edgecomb Bar Association, identifies diverse law students for vigorous training in leadership, mentoring, lawyer wellness, legal writing, and other essential skills for success. DAP also partners with Bar associations, including the St. Petersburg Bar Association and the HCBA, to create leadership opportunities and mentoring relationships, and it provides a $1,500 bar preparation scholarship at the end of the program. For more information on DAP, visit www. DiversityAccessPipeline.com.

Author: Sumayya Saleh - Office of the Public Defender, Thirteenth Judicial Circuit of Florida
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Thanks to All our FOX 13 Ask-a-Lawyer Volunteers!

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Fall Membership Luncheon

HCBA welcomed 500 members to its fall membership luncheon on September 9. Members enjoyed a fascinating talk by best-selling author and television executive producer, Michael Connelly. At the luncheon, HCBA welcomed several guests, including representatives from the Greater Tampa Chamber of Commerce and the City of Tampa government.

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Fall Membership Luncheon continued from page 31

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22nd Annual Bench Bar Conference, Membership Luncheon & Judicial Reception

The HCBA Bench Bar Conference, Membership Luncheon & Judicial Reception enjoyed record attendance yet again this year as more than 500 attorneys, judges, and other legal professionals came out for a day of great CLE programming and networking on October 3.

The Conference featured a plenary session with noted law professor Charles W. Ehrhardt from the Florida State University College of Law, who presented on the impeachment of witnesses. In addition, the attendees enjoyed the ever-popular “View To and From the Bench” panel discussions with the local judiciary, and a well-attended “Deconstructing Jury Decision Making” jury panel feedback session. At noon, the Membership Luncheon featured well-known political analyst Dr. Susan MacManus as the keynote speaker, who discussed the November mid-term elections and the Florida political landscape. The Hillsborough County Bar Foundation also presented six local charities with checks totaling $100,000.

The conference ended with attorneys, judges, and friends of the legal community mingling at the Judicial Reception in the evening.

The HCBA would like to thank the members of the Bench Bar Committee for all their hard work. A special thanks also goes out to all of the events sponsors, specifically our Diamond Sponsor:

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Whether a party’s use of a purported trademark constitutes “use in commerce” is a question that often trips up even experienced trademark practitioners. The Eleventh Circuit recently clarified the difference between “use in commerce” for purposes of establishing extraterritorial enforcement jurisdiction and “use in commerce” for purposes of determining protectable trademark rights. The takeaway: a foreign company can establish U.S. common law rights, even without U.S. sales, if “advertising, publicity, and solicitation” in the name of the mark demonstrates use “sufficiently public to identify or distinguish the marked goods in an appropriate segment of the public mind.”

The foreign mark owner in Direct Niche, LLC v. Via Varejo S/A, 898 F.3d 1144 (11th Cir. 2018) met that test. The case came to the Eleventh Circuit in the context of a declaratory judgment action under the Anticybersquatting Consumer Protection Act (ACPA), 15 U.S.C. § 1114(2)/(D)(v). Brazilian company Via Varejo owned the Casas Bahia chain of more than 750 Brazilian retail stores. The company owned registered trademarks in more than 40 countries (but not, at the time the case was brought, in the U.S.), and it sold consumer goods online through its website, casasbahia.com.br.

Direct Niche purchased the domain casasbahia.com at a premium at an online auction and used the domain to serve up advertisements — receiving more than 3.5 million hits over a 2-year period and generating more than $15,000 in advertising revenue. Not surprisingly, Via Varejo brought a UDRP proceeding against Direct Niche, and the panel ordered transfer.

More surprisingly, Direct Niche responded with a declaratory judgment action. Direct Niche argued that because Via Varejo did not operate in the U.S. or ship goods to the U.S., it did not use the mark in commerce in the U.S. And because, in Direct Niche’s view, Via Varejo did not have a U.S. registered or common law mark, Direct Niche contended its actions did not violate ACPA.

The trial court found Via Varejo’s use sufficient to establish common law rights. Direct Niche appealed, arguing that the “substantial effects” test set forth in Steele v. Bulova Watch Co., Inc., 344 U.S. 280 (1952) demonstrated that Via Varejo’s operation of Brazilian stores and a Brazilian website did not have “substantial effects” on the United States.

On appeal, the Eleventh Circuit noted that the jurisdictional analysis in Bulova Watch is not the same as the “use in commerce” test for ownership. The court reaffirmed its ownership test: a mark owner must prove adoption and “use in a way sufficiently public to identify or distinguish the marked goods in an appropriate segment of the public mind as those of the adopter of the mark.”

Once it affirmed the legal test, the Eleventh Circuit reviewed the facts for clear error and upheld the trial court’s fact findings. In particular, the trial court was persuaded by evidence that Via Varejo sold advertising on its site to U.S.-based companies, and that the Casas Bahia website received millions of visits yearly from U.S.-based IP addresses. The Eleventh Circuit held those factual findings were not clearly erroneous.

Author:
Dineen Pashoukos Wasylik - DPW Legal
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Traditionally, tattoo owners were perceived as unscrupulous characters. Right or wrong, tattoos have, at times, been stereotypically associated with criminals and gang members. But in the last decade, tattoos have become mainstream, particularly among members of Generations “Y” and “Z.” Despite the ubiquity of tattoos, some employers do not consider them an asset in the workplace, and understandably, employers have reservations when hiring tattooed employees in positions that involve customer contact.

In these situations, the open display of a tattoo may not be conducive to the message the employer is trying to convey to the public. So some employers ask their employees to conceal their tattoos during work hours in order to project an approachable and friendly environment to customers. While some employees take no issue with these requests, other employees may react negatively and fervently protest their employer’s efforts to hamper their self-expression.

From an employment law standpoint, employers generally have broad discretion in making employment decisions based on tattoos. But in some scenarios, restrictions on tattoos in the workplace could violate Title VII of the Civil Rights Act of 1964 and possibly constitute religious discrimination. For example, in EEOC v. Red Robin Gourmet Burgers, Inc., 2005 WL 2090677 (W.D. Wash. Aug 29, 2005), the EEOC alleged that Red Robin, a gourmet burger restaurant chain, engaged in unlawful religious discrimination when they refused to accommodate a religious practice and fired an employee for not covering up his tattoos. In that case, employee Edward Rangel was hired as a server at a Red Robin restaurant in Bellevue, Washington. Rangel asserted that he was an adherent of the Kemetic religion, an ancient Egyptian faith. As part of his religious practice, Rangel received religious inscriptions in the form of tattoos on his wrists. The inscriptions symbolized Rangel’s religious dedication, and his religious practices made it a sin to deliberately conceal the inscriptions.

Red Robin fired Rangel for violating the company’s dress code, which prohibited him from having visible tattoos. Rangel sought an exemption from the dress code, but Red Robin refused to provide it or any alternatives. Title VII requires employers to make reasonable accommodations to sincerely held religious beliefs unless it would cause undue hardship to the business. Red Robin maintained that allowing any exceptions to its dress code policy undermine its “wholesome image.” But the United States District Court for the District of Washington rejected Red Robin’s argument on summary judgment, ruling that Red Robin was required to support its undue hardship claim with more than hypothetical hardships based on unproven assumptions. Red Robin ultimately settled the lawsuit before trial for $150,000 and entered into a consent decree with the EEOC.

The lesson here is that Title VII takes a broad view of religion, and tattoos that are part of a religious practice may need to be accommodated if they do not impose an undue hardship. Purely secular tattoos, however, do not implicate Title VII, and employers are free to make decisions on that basis or require employees to cover up tattoos at work.

Author: Matthew S. Perez - Phelps Dunbar LLP
The attorney’s charging lien is an equitable right — recognized for more than a century — to have the costs and fees due for services rendered in an action secured by the judgment or recovery in that action. A charging lien need not be adjudicated or enforced before entry of the final judgment. To perfect a charging lien on judgment proceeds, an attorney need only give timely notice.

Although an attorney must give notice to perfect a charging lien, the interest created by a valid attorney’s charging lien arises by operation of law and relates back to the commencement of the attorney’s services. So it has priority over any judgment lien obtained after commencement of the attorney’s services. In re Washington, 242 F.3d 1320, 1323 (11th Cir. 2001) (citing Miles v. Katz, 405 So. 2d 750, 752 (Fla. 4th DCA 1981)). This is significant because perfection of liens that arise by operation of law are not subject to the automatic stay in bankruptcy, and unlike judicial liens, they cannot be avoided in bankruptcy either.

The automatic stay under Bankruptcy Code § 362, which goes into effect immediately upon the commencement of a bankruptcy case, ordinarily bars any act to perfect a lien against property of a debtor’s estate. But Bankruptcy Code § 362(b)(3) provides an exception for liens that cannot be avoided in bankruptcy. In other words, the automatic stay does not bar an attorney from perfecting a charging lien after a bankruptcy case has been filed so long as the charging lien cannot be avoided by a trustee in bankruptcy.

Bankruptcy Code § 546 provides that a trustee in bankruptcy may not avoid an interest in property (e.g., an attorney charging lien) if generally applicable law permits the perfected lien to be effective against a previously acquired interest in the property. Some bankruptcy courts outside Florida have ruled that a charging lien does not fall within § 546 (meaning it can be avoided and perfection is therefore subject to the automatic stay) when a state statute provided for a charging lien and the statute did not provide that the lien related back. In re Hall, 2011 WL 4485774, at *5 (B.A.P. 9th Cir. Aug. 22, 2011); In re Veazey, 272 B.R. 486, 492-93 (Bankr. D. Kan. 2002). Because charging liens in Florida, however, relate back to the commencement of the attorney’s services, they cannot be avoided in bankruptcy, and perfection of the lien would not be subject to the automatic stay.

While it is always a better practice to be paid up front, too often in family law cases we see assets dwindle before our eyes. And either ethical considerations or judges prevent access to those assets for payment. Rather than watch accounts receivable that may never be collected grow, it is the better practice to assert a charging lien so that you can be paid from the proceeds of your work. Take the time to perfect a charging lien.

Author: Paul S. Maney - Paul S. Maney, P.A.
HONORING OUR VTC COMMUNITY HEROES
Military & Veterans Affairs Committee
Chairs: David Veenstra – Hunter Law, P.A & Alexandra Srsic – Bay Area Legal Services, Inc.

On October 12, Julie Reyes, Founder of the Diversity Action Coalition, a 501c3 whose mission directly supports our local military and veteran community programs and initiatives, hosted the Fourth Annual Thirteenth Judicial Circuit’s Veterans Treatment Court (VTC) Heroes Gala Dinner and Awards Event. Held at the Hilton Tampa Downtown, the event was a celebration of our local community veterans who give of their own time and experiences to help mentor other veterans who are in trouble with the law and enrolled in the VTC.

The event also recognized the veteran mentors’ families who support those who continue to serve and pay it forward, and our local organizations that comprise the greater VTC community team. The evening’s events started with traditional military custom, including the posting of the colors (Bloomingdale High School Junior ROTC), the singing of the National Anthem (Plant High School Pink Panthers), and the Missing Man Table ceremony. The crowd also enjoyed opening remarks by our VTC Judge, Hon. Michael J. Scionti, and were thrilled to have the former (eighth) U.S. Secretary of Veterans Affairs, Hon. Robert McDonald, provide the keynote address.

The evening’s ceremony culminated in the presentation of awards in three categories: the Legacy Award, Inspiring Mentor Award, and Community Advocate Award. The winners, nominated and voted by the VTC’s Senior Mentors, were Judge Michael J. Scionti, Jim Salgado, and President Jeff Day of the Argosy University Tampa Campus.

Former Secretary McDonald also visited the VTC in session earlier in the day and shared some words of wisdom with the court. He met with VTC Judge Michael J. Scionti, former VTC Judge Gregory P. Holder, Public Defender Julianne Holt, State Attorney Andrew Warren, and Court Administrator Gina Justice, and listened to the testimonial of a graduating veteran from the VTC program. We appreciate Secretary McDonald’s participation and support of the VTC’s mission.

In the five years since it was established, the Thirteenth Judicial Circuit’s VTC and supporting Volunteer Mentor Program have evolved into arguably the largest combined docket and mentor corps in the nation. Over 400 VTC programs in over 46 states currently comprise this national program.

With a success/graduation rate that exceeds 80 percent and current cost savings of more than seven million dollars per annum in county taxes, it is an acknowledged fact that this treatment and rehabilitation court works, as we continue to seamlessly and successfully re-integrate the VTC veterans back into the very local communities that they earlier swore to defend and to protect.

"VTCs save lives." — Former US Secretary of Veterans Affairs Robert McDonald

Author: Dj Reyes, Colonel USA (retired) - VTC Mentor Program, Thirteenth Judicial Circuit’s Veterans Treatment Court
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As of October 1, 2018, Florida businesses that lease commercial real property in Florida may apply to the Florida Department of Revenue to receive a tax credit on the sales tax that is customarily paid by tenants on commercial leases. Tenants can receive up to a dollar-for-dollar credit against the state sales tax that would otherwise be collected by the landlord and remitted to the Department. The credit would be based upon the amount of money donated to specific nonprofit charitable organizations that offer educational scholarships in Florida under the “Florida Sales Tax Credit Scholarship Program,” codified as Section 212.099, Florida Statutes (2018).

The state tax credit is equal to 100 percent of the “eligible contributions” made to a nonprofit scholarship funding organization (SFO) that is part of the Gardiner Scholarship Program or the Florida Tax Credit Scholarship Program, as defined in Section 1002.395(2)(f), Florida Statutes (2018).

All tenants are eligible, but they must apply to the Department of Revenue to reserve tax credits because they are approved on a first-come, first-served basis. The application requires tenants to provide the following:

- fiscal year of the contribution;
- name of the SFO;
- contribution/corresponding credit amount;
- address of the property subject to tax; and
- federal EIN of landlord.

If the Department approves the application, it must provide a copy of its approval letter to the tenant and the SFO. When the SFO receives eligible contributions, it must provide a separate certificate of contribution to tenants, which must include the following:

- tenant’s name;
- tenant’s federal EIN;
- contribution date and amount;
- name of SFO; and
- landlord’s federal EIN.

Tenants must deliver the Department’s approval letter and the SFO’s certificate to their landlords, and upon receipt, landlords must reduce the commercial rent tax collected by the amount of the eligible contributions indicated on the Certificate. The reduction may not exceed the amount of the approved tax credit or the amount of tax otherwise collected by the landlord. If tenants are unable to use all of the tax credits in a particular fiscal year, they may carry forward any unused credit for up to 10 years.

Tenants may not transfer their tax credits or carry-forwards to another entity unless they intend to convey or transfer effectively all of their business’s assets, together with their interests in the commercial lease that is the subject of the tax credit. Tenants must be mindful that no credits are available for local or county discretionary sales surtaxes and, therefore, must continue remitting this portion of tax on rent to their landlords.

1 A “charitable organization” must be a state university or an independent college/university that is eligible to participate in the William L. Boyd, IV, Florida Resident Access Grant Program. See §§ 1002.385 and 1002.395, Fla. Stat.

2 An “eligible contribution” is a monetary contribution from a tenant to a SFO. It is important to note that tenants are not able to designate a specific student as the recipient of the eligible contribution.

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David has been practicing law in Tampa and courts throughout the state of Florida for forty-four years. He has concentrated his practice in commercial litigation cases including areas of special expertise in breach of contract, business torts, deceptive and unfair trade practices, antitrust, interference with contacts and prospective business relationships, breach of fiduciary duties by officers, directors and others, professional malpractice, defamation and securities fraud.

David has tried many cases to conclusion before juries, state and federal judges, administrative judges, and arbitration panels. For many years, he has been certified by the Florida Bar in civil trial law, business litigation, and antitrust law.

David’s professional accomplishments have been recognized by prestigious legal groups such as:

- American College of Trial Lawyers
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  - Florida Chair (2013 - 2015)

- Board Certified by the Florida Bar in:
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  - Business Litigation Law (1996 - 2021)
  - Antitrust and Trade Regulation (2006 - 2021)

- Best Lawyers in America (2003 - Present)
  - Business Litigation
  - Construction Law

- Florida Trend Legal Elite (2008 - Present)
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- Florida Super Lawyer (2006 - Present)

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Health Care Law Section Luncheon

On September 26, the Health Care Law Section held its first luncheon of the year, where they received a CLE presentation on best practices for private equity healthcare transactions. The presenter, Maja Lacevic, Esq. with Trenam Law, provided an introduction on the topic, with a particular focus on acquisitions of physician groups by private equity firms.

The Health Care Law Section thanks its luncheon sponsor:
Adopted by the Department of Labor in 2016, the “Fiduciary Rule” attempted to extend a fiduciary standard to registered representatives handling ERISA plans and IRAs. Among other things, the Fiduciary Rule would have prevented registered representatives from earning commissions unless they agreed to a “best interest” contract with clients that limited compensation and required various conflict disclosures. Unsurprisingly, the rule had negative market consequences. MetLife, AIG, and Merrill Lynch withdrew from certain segments of the market, while experts theorized that smaller, independent broker-dealers and RIA firms were forced to close their doors because of the significant financial burden of compliance.

Less than two years after going into effect, the Fiduciary Rule was vacated by the United States Court of Appeals for the Fifth Circuit in a 2-1 decision in Chamber of Commerce of the United States v. It remains to be seen whether Regulation Best Interest will be adopted with or without modification. Continued on page 51
Continued from page 50

U.S. Dep’t of Labor, 2018 WL 3301737 (5th Cir. 2018), which held that the Department of Labor exceeded its authority under Title I of ERISA when it enacted the Fiduciary Rule. The action was spearheaded by several industry groups, including the U.S. Chamber of Commerce and Securities Industry and Financial Markets Association.

While many industry participants welcomed the decision to vacate the Fiduciary Rule, the SEC proposed a new regulation immediately on the heels of the Fifth Circuit’s ruling. In fact, before the Fifth Circuit issued its mandate, the SEC had responded with its long anticipated “Regulation Best Interest” under the Securities Exchange Act of 1934. According to the proposal released on April 18, 2018, the Regulation Best Interest requires broker-dealers and registered representatives, when recommending any securities transaction or investment strategy to a retail customer, to act in the best interest of the customer without placing the financial or other interest of the broker-dealer or representative ahead of the customer’s interest. And while the Fiduciary Rule required only disclosure of conflicts of interest, Regulation Best Interest requires broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to identify, disclose, and mitigate, or eliminate, material conflicts of interest arising from financial incentives associated with such recommendations.

Industry participants have criticized the SEC’s proposed regulation on the basis that creating a duty to mitigate or eliminate conflicts would subject broker-dealers to a higher standard than investment advisors, and that the requirement is ambiguous, making compliance challenging. On the other end of the spectrum, House and Senate Democrats (in a letter to SEC Chairman Jay Clayton) criticized Regulation Best Interest for not going far enough and posited that brokers would be subject to a weaker standard than investment advisors.

Facing conflicting criticism, it appears the SEC has proceeded with caution through enhanced vetting of the proposed regulation. The SEC received nearly 4,000 submissions during the comment period and hosted seven roundtable discussions in various U.S. cities to obtain feedback on the proposed regulation. It remains to be seen whether Regulation Best Interest will be adopted with or without modification. But once adopted, it will likely be here for the long haul (unlike the DOL fiduciary rule) as a valid exercise of the SEC’s regulatory authority.

Author: Michael Mariani - Wiand Guerra King

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THE STORY OF MAGNA CARTA
Senior Counsel Section
Chair: Thomas Newcomb Hyde – Attorney at Law

In 1215, King John of England was in trouble. He had imposed heavy taxes on the English barons to pay for his expensive wars in France. When the barons refused to pay, King John punished them and arbitrarily seized their properties. So, when the barons revolted and captured the city of London, King John had to negotiate. The two sides met at Runnymede, a meadow along the Thames River about halfway between Windsor Castle, where the king’s forces were encamped, and London, which was controlled by the barons. The Archbishop of Canterbury, Stephen Langdon, drafted an agreement, or charter, which demanded that the king commit in writing with his royal seal to a list or rights and obligations. Written on parchment in Latin, Magna Carta has become a symbol of liberty and freedom. Its central tenet is that everyone, including our leaders, must obey the law.

In September, Second District Court of Appeals Judge Anthony Black recounted the story of Magna Carta to an audience of judges and lawyers at the Senior Counsel luncheon. Judge Black explained that while most of the charter dealt with medieval rights and customs, it also pronounced that all free men had a right to justice and a fair trial. Unfortunately, “all free men” only included the powerful barons and churchmen. Most of King John’s subjects were poor peasants ruled over by their landlords.

Judge Black discussed the legacy of Magna Carta, especially to the English colonies that became the United States. The principles of limits on government announced in the great charter are echoed in the Declaration of Independence. Judge Black compared the fight of the barons in 1215 with the plight of the American colonies in 1776. Just as the English barons complained of King John’s abuses, so did the American revolutionists condemn the injustices of King George III.

Judge Black described how Magna Carta influenced the United States Constitution and the Bill of Rights. For example, Article III of the Constitution states that, “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.” The Fifth Amendment states that no person shall “be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.” Compare these with clause 39 of Magna Carta:

No free man is to be arrested, or imprisoned, or disembodied, or outlawed or exiled or in any other way ruined, nor will we go or send against him except by the legal judgment of his peers, or by the law of the land.

Magna Carta continues to maintain a powerful influence on our law. In Hamdi v. Rumsfeld, 542 U.S. 507 (2004), the United States Supreme Court, in an opinion involving the power of the executive to hold a U.S. citizen indefinitely, Justice Sandra Day O’Connor wrote, “we are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons’ insistence, confined executive power by the law of the land.”

The Senior Counsel Section is grateful to Judge Black for speaking at its luncheon and sharing his insights into this historic document.

Author: Thomas Newcomb Hyde – Attorney at Law
Senior Counsel Luncheon Welcomes Judge Black

On September 13, the Senior Counsel Section received a special presentation from Second DCA Judge Anthony Black, who spoke on the subject of Magna Carta and its implications for the legal system and role of government. Thank you to Judge Black for taking the time out of his busy schedule to speak to the Section membership!

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Some people think of solo practitioners as the lawyers who could not make it in the big firms, the renegade lawyer who will not conform, or the lawyer who is not serious about practicing law. These perceptions could not be more wrong. Solo and small firm lawyers are not just lawyers who could not cut it in the “big law” sandbox. They are entrepreneurs looking to find a new path to success through their own efforts.

Although solo practitioners often practice in one or two specific areas, they can offer their clients a wide range of legal services by establishing a referral network with other solo practitioners or hiring contract lawyers when their clients have new needs.

There are many moving parts to establishing a small firm, and a strategic business plan is the roadmap for where you want to take your practice. In writing your strategic business plan, there are several ways to keep your overhead low and at the same time make your firm efficient and productive:

1. **Technology.** There are many software programs available that can facilitate work, including for email, case management, client relations management, docketing, billing, accounting, and the like. Be sure to ask colleagues or others for referrals because salespeople will tell you anything just to get you to buy their program.

2. **Staffing.** With remote access and virtual assistance available, it is not necessary to spend a lot of money on payroll, benefits, parking, etc. Often an in-office legal assistant is all you need for on-staff help. Any administrative or timekeeper functions, including administrators and paralegals, can be outsourced less expensively than in-house staff.

3. **Office space.** Solo and small firm practitioners can reduce their rent overhead by leasing professional offices together. This way, each lawyer gets a professional office and can share common areas with other attorneys and split the rent. In terms of client referrals, you should consider renting space with other lawyers who practice in different areas.

4. **Virtual offices are more common today than ever.** With remote capabilities, fax, Skype, FaceTime, and email, lawyers can effectively work from home. You can rent an executive room or conference room space on a per-hour or per-day basis where you can meet clients when necessary.

When you go out on your own, you don’t work for your firm, you ARE the firm — whether you are at the office, at home in the evenings, spending time with your family, or on vacation. Work/life balance is important for everyone. As a solo practitioner, it can be tricky to achieve that balance because you don’t want to miss a telephone call that may be a potential new client. Nor do you want to wait too long to answer that email. By using the right resources, you can be an efficient, productive, cost-conscious, and profitable solo or small firm practitioner and, as a result, successful and happy with your law career.

Author:
Elizabeth Miller
— Management Consultant

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One of the more exciting tax planning opportunities made available by the passage of the 2017 Tax Cuts and Jobs Act relates to the ability to shield gain from the sale of property by reinvesting proceeds from such gain into what are known as “qualified opportunity zones,” which are low-income communities designated by each state.

Under Internal Revenue Code §§ 1400Z-1 and 1400Z-2, a taxpayer can sell property of any type and defer gain from the sale by reinvesting the gain in a “qualified opportunity fund” within 180 days of the sale. A qualified opportunity fund is a partnership or corporation that invests 90 percent of its assets into a business within a qualified opportunity zone. Among other requirements, at least 50 percent of the qualified business’s total gross income must be derived from the active conduct of a qualified business (specific businesses such as golf courses, country clubs, massage parlors, and racetracks are excluded).

By reinvesting the proceeds into a qualified opportunity fund, a taxpayer can defer gain until the sooner of when its interest in the qualified opportunity fund is sold or December 31, 2026. In addition to this general gain deferral, the tax code provides that property that is held for five years or seven years will have a basis increase resulting in a portion of the pre-rollover gain being entirely excluded (ten percent and an additional five percent, respectively). As a potentially even more dramatic benefit, property held within a qualified opportunity fund for ten years will have its basis increased to its fair market value at the time of ultimate sale (meaning that gains within the opportunity fund would be excluded from income).

So where do we go from here? Congress has provided a significant tax benefit intended to encourage investment in low-income communities, and several areas within Hillsborough County have been designated as qualified opportunity zones. Still, commenters note several open items that will need to be resolved before taxpayers en masse feel comfortable taking advantage of the provision.

Among those items that remain unresolved (as of the date of this writing) and may reasonably delay a taxpayer’s desire to deploy capital for purposes of taking advantage of the new provisions, taxpayers will need clarity as to: (a) whether depreciation recapture, which recasts certain capital gains as ordinary income to the extent previously depreciated would be eligible for exclusion; (b) given that the applicable statute directs that “substantially all” of a business’s tangible property must be “opportunity zone business property,” what proportion satisfies the “substantially all” requirement; and (c) whether residential rental property qualifies as an opportunity zone business.

Proposed guidance is expected to be forthcoming from the Department of Treasury and the Internal Revenue Service. Such guidance should foster additional confidence and certainty with respect to the practical benefits of an already rather enticing new tax planning opportunity.

Author:
Steven D. Shapiro – Barnett, Bolt, Kirkwood, Long & Koche, P.A.
If a client came to you describing a car crash with an “amateur cabdriver” ten years ago, you probably would’ve wondered about the client’s mental state, but today, you wouldn’t bat an eye. What if your client is one of these “amateur cabdrivers”? While you want to make sure your client gets the treatment he or she needs, you must make sure you’ve got an accurate picture of the insurance coverage available if an automobile crash involves an Uber, Lyft, or taxi cab, which isn’t always clear.

Transportation network companies (TNCs) like Uber and Lyft have become commonplace to anyone with a credit card and a smartphone. By 2017, Uber had completed four billion rides since it was founded eight years earlier, while its competitor, Lyft, doubled its annual growth to 375.5 million rides in 2017 alone. That’s a lot of miles driven. And it doesn’t even include “old” ride sharing like taxicabs, which still can be a price-competitive solution over the new TNCs.

All three, however, often involve drivers using unfamiliar roads, which can lead to crashes. Even though litigators typically know what to do with taxicab cases, they don’t necessarily know what coverages are applicable for TNCs because of the new and changing legal requirements.

In 2017, Florida began to regulate TNCs on a statewide level with the adoption of section 627.748, Florida Statutes. Section 627.748 sets forth financial, as well as regulatory, requirements for TNC drivers, either while giving prearranged rides or while the application is just engaged, mirroring other coverages put in place in other states.

If a TNC driver causes a crash, there is a significant difference in insurance coverage for bodily injury if the driver is logged in to the TNC versus when the driver is engaged in a prearranged ride. But even within the TNCs, there are different coverages beyond the minimum requirements. Lyft maintains personal injury protection (PIP) coverage while Uber does not. Both TNCs carry uninsured motorist (UM) coverage for occupants on a paying fare, but Lyft maintains some UM coverage for its drivers who have the application on but have no riders.

Contrast these coverages with traditional taxicabs, which have only one level of mandatory bodily injury coverage in far lower amounts than a TNC driver engaged in a prearranged ride, but higher than when the TNC driver is just logged on. And taxicabs do not maintain any PIP coverage.

What does the bevy of coverages mean to you as a representative of an injured party when dealing with a TNC? If your client was injured in a crash — either as a passenger in a TNC or as an occupant of another vehicle — with a TNC driver, it’s reassuring that there will be some form of bodily injury or UM coverage. But it will be important to ascertain which TNC was involved (as many drivers will use both applications at the same time) and, most important, what phase of work the TNC driver was in at the time of the crash.

1 § 627.748(1)(c), Fla. Stat.
3 https://www.consumerreports.org/personal-finance/uber-vs-taxi-which-is-cheaper/.
9 § 324.032(1)(a), Fla. Stat.
10 § 627.733 (1)(b), Fla. Stat.
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Michael Bradford - Michael J. Bradford, a shareholder in the Tampa office of Marshall Dennehey Warner Coleman & Goggin, has been approved by the Board of Directors of the Maritime Law Association of the United States (MLA) to join as an Associate Member. The MLA was founded in 1899 as a professional organization concerned with improvements in maritime law.

Steven L. Brannock - of Brannock & Humphries recently participated in a panel discussion for the Florida Bar’s DCA Judges Conference on “Emerging Trends in the Practice of Law.”

Caitlin Costa - Golden Scaz Gagain, PLLC is pleased to announce that Caitlin Costa has joined the firm as an associate attorney. Costa will practice in the firm’s general liability practice group.

Andrew Gay - Carlton Fields is pleased to announce that Andrew O. Gay has joined the firm in its Tampa office as a member of the firm’s Construction practice.

Vivian Cortes Hodz – Congratulations to Vivian Cortes Hodz of Cortes Hodz Family Law & Mediation, P.A., who will serve as chair of the 2019 Voluntary Bar Leaders Conference. This annual conference, organized by the Florida Bar Voluntary Bar Liaison Committee, brings together local and specialty Bar leaders to network, learn and share best practices. The conference will be held in Tampa in July 2019.

Celene H. Humphries - of Brannock & Humphries recently presented at the Florida Justice Association’s Christian D. Scarcy Voir Dire Institute on the subject of “Trial Support Counsel – The Unsung Hero of Your Trial Team.”

C. Howard Hunter - Hill Ward Henderson is proud to announce that shareholder C. Howard Hunter has been named 2018 Trial Lawyer of the Year by the Florida Chapters of the American Board of Trial Advocates (FLABOTA). Hunter was presented with the award at the 21st Annual FLABOTA Conference on July 21 in Boca Raton.

Lorien Smith Johnson - Lorien Smith Johnson announces the opening of Lorien S. Johnson, PLLC. Johnson, an AV-rated attorney, will focus exclusively on Estate Planning and Probate.

Frank T. Moya - Carlton Fields is pleased to announce that Frank T. Moya has joined the firm in its Tampa office as a member of the firm’s Construction practice.

Patrick Reed - Burr & Forman LLP announces the addition of Tampa-based associate Patrick Reid, who joins the firm’s Intellectual Property and Cybersecurity Practice Groups.

Allison M. Stevenson - Hill Ward Henderson is proud to announce that associate Allison M. Stevenson has been appointed co-chair of the Florida Association for Women Lawyers (FAWL) Legislative and Lobby Days Committee.

Natalie Thomas - Quarles & Brady LLP congratulates Natalie Thomas, an attorney in the firm’s Litigation and Dispute Resolution Practice Group, who has been appointed to the board of directors for The Helen Gordon Davis Centre for Women.


Douglas A. Wallace - of Brannock & Humphries recently presented a webinar on the subject of “En Banc Proceedings in Florida’s District Courts of Appeal” for the Appellate Practice Section of The Florida Bar.

To submit news for Jury Trials, please email Stacy@hillsbar.com.
To view additional HCBA news and events, go to www.facebook.com/HCBAtampabay.
### JURY TRIALS

**For the month of** August 2018  
**Judge:** Hon. Brian J. Davis, USDC – Middle District - Jacksonville  
**Parties:** Cathy Deck v. PetSmart, Inc.  
**Attorneys:** for plaintiff: Steven Earle; for defendant: Edward F. Gagain, III  
**Nature of Case:** Plaintiff alleged back injury following slip and fall accident and underwent SI joint fusion surgery. Plaintiff asked jury to award $2,161,000.  
**Verdict:** Plaintiff assigned 51 percent comparative fault; final judgment after reduction for comparative fault and collateral source set-offs was $49,750.

**For the month of** September 2018  
**Judge:** Hon. Michael E. Raiden  
**Parties:** Jackson v. Harwood  
**Attorneys:** for plaintiff: Mark A. Sessums; for defendant: William G.K. Smoak  
**Nature of Case:** Motor vehicle accident  
**Verdict:** Settlement of $535,000

### LABOR & EMPLOYMENT ATTORNEY.
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