

# LAWYER

THE HILLSBOROUGH COUNTY BAR ASSOCIATION  
TAMPA, FLORIDA | JAN - FEB 2019 | VOL. 29, NO. 3



# 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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*- Lee D. Gunn IV*



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## ABOUT THE COVER

We are continuing our theme this Bar year of commemorating important historic industries in Florida, and highlighting the commercial fishing industry in this issue. The photo of the cover shows shrimp boats docked at a Panama City Beach marina in the mid-20th Century. The photo was taken by photographer Jerry Francis Simon. He was the photographic director for the Florida Development Commission and was assigned to former Governor Claude Kirk as his personal photographer. There was a boom in Florida's shrimping industry in the 1940s and '50s, as the population of the state increased dramatically after World War II, and demand for shrimp around the country increased. In its heyday, the Florida industry involved thousands of people around the state, with tons of shrimp being caught in Florida waters and shipped to restaurants and dinner tables around the world via the railroad and the growing interstate road system.

Photo used with permission from the State Archives of Florida online Florida Memory collection.

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## Wishing You a Joyful New Year!

**“[J]oy is something that we can always hold onto.”**

“Had it. Lost it.” That was Klay Thompson, all-star shooting guard for the Golden State Warriors, talking to ESPN about his team’s quest for joy during a rare four-game losing streak. The Warriors, winners of three of the past four NBA championships, operate on four core values: the first is joy.

When discussing the importance of joy, Kevin Durant, another Golden State Warrior all-star, mused about the distinction between joy and happiness: “I feel like a lot of people confuse joy and happiness. I think happiness is a feeling that is fleeting. It means you can go back and forth all the time. I feel like joy is something that you can stand on.”

Until reading those comments, I always assumed happiness and joy were the same.

But it turns out Durant is on to something. According to psychologists, happiness tends to be temporary, while joy tends to be longer lasting. More important, happiness tends to be based on external events. We are happy when things (jobs, relationships, etc.) go our way. Joy, however, is internal.

And it exists even when things don’t go our way. Durant explained how joy has been crucial to the Warriors’ ability to grind their way through the ups and downs of an 82-game season year after year and why it was so important for them to find their joy: “[W]hen you’re enjoying what you do, you don’t mind the adversity, the tough times, the challenges. The little obstacles you got to climb to get to where

you want to go. I think joy is something that we can always hold onto.”

Thompson was more to the point about how having joy can change your perspective on things: “It’s been a while since we’ve been on a losing streak like this, but at the end of the day it’s not the end of the world. We still play basketball for a living and make people happy, so it’s pretty easy to find joy in that.”

All this got me to thinking that maybe I need to join the

Warriors on this elusive quest for joy. As lawyers, it’s hard not to get caught up focusing on — and linking our happiness to — things like billable hours, collections, books of business, outcomes of cases, etc. Although, for me, working for a judge lessens some of those external factors. With the internal peace that comes from having joy, it’s easier to say, to borrow from Klay Thompson: “At the end



of the day, our hours, or collections, or book of business, or the outcome of a case is not the end of the world. As lawyers, we still get to make a living helping people. So it’s easy to find joy in that.”

At the end of last school year, my oldest daughter came home and hung up a sign she had made at school. It read: “Be Joyful.” (She goes to a school run by Salesian Sisters, an order of nuns known for their cheerfulness and joy). We took the sign down to hang up our Christmas decorations. But you better believe it’s going back up January 1 as a reminder of the elusive quest to find joy. Here’s wishing you a joyful New Year!



## Destigmatizing Mental Health and Wellness: A Discussion Among Lawyers

**On April 30, HCBA is partnering with the HAWL to host a Mental Health and Wellness Town Hall Meeting.**

According to a 2016 study published by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs, 21 percent of licensed, employed attorneys are clinical problem drinkers, 28 percent struggle with some level of depression, and 19 percent suffer from anxiety.<sup>1</sup> These percentages far outpace those of the general population. Most troubling, the suicide rate for lawyers is double that of the general population.<sup>2</sup> These statistics do not describe a healthy profession. Too many of our colleagues are suffering and we need to get to work and find a solution.

We have chosen a stressful profession. To get here, we endured three tough years of law school, a grueling bar exam (or two), and long work hours necessary to establish a practice. We often find ourselves in highly competitive and adversarial arenas. Many of us are driven by tight deadlines, billable demands, collection requirements, and an increasing amount of nonbillable obligations. We gladly shoulder our clients' burdens and make ourselves available 24/7. We're taught to identify vulnerabilities and weaknesses in our cases and our

opponents' cases, and to anticipate everything that can go wrong. Even though our true tasks are to solve problems and help others be successful, we too often fall back on pessimisms. It's no wonder we're facing such challenges to the health and wellness of our bar.

In July of 2017, the Florida Bar Board of Governors created a Special Committee on Mental Health and Wellness of Florida Lawyers. Now a standing committee chaired by Florida Bar President-Elect Designate and Board of Governor Dori Foster-Morales, the committee members are working to destigmatize mental illness within our legal community, educate lawyers, judges, and employers on how to identify and address mental health issues among lawyers, and create "best practices" on how to address mental health issues. Dori and the entire committee have been working diligently and have done a fantastic job getting the message out. For more information and to explore resources provided by The Florida Bar, take a moment to visit the committee's website at [www.floridabar.org/member/healthandwellnesscenter/](http://www.floridabar.org/member/healthandwellnesscenter/).

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*Continued from page 4*

The topic of mental health and wellness in the profession is getting some much-needed attention, but there's more to do. On April 30, 2019, the HCBA is partnering with the Hillsborough Association for Women Lawyers (HAWL) to host a Mental Health and Wellness Town Hall Meeting. Florida Bar President-Elect John Stewart and Committee Chair and President-Elect Designate Dori Foster-Morales are joining us at the Town Hall and will share their knowledge regarding mental health and wellness in the profession, and will give a presentation about The Florida Bar's efforts to address and foster discussion regarding lawyer health. An open forum will follow the presentation during which attendees can share with John and Dori their own experiences and what they suggest for



The Florida Bar going forward. Mandi Clay, vice president of programs for HAWL, and Carter Andersen, past president of the HCBA, are passionate about lawyer health and have graciously agreed to co-chair and coordinate our Town Hall. We hope to use this opportunity to bring Hillsborough attorneys together to discuss this important topic in an open and candid manner.

Lawyers must be more open about mental health and wellness. We have generally not been the best of resources for each other and it's time for that to change.

<sup>1</sup> Available at <https://www.hazeldenbettyford.org/about-us/news-media/press-release/2016-aba-hazelden-release-first-study-attorney-substance-use>.

<sup>2</sup> Dori Foster-Morales, *Mental Health and Wellness: Destigmatizing the Discussion and Promoting Solutions*, The Florida Bar Journal, January 2019 Volume 92, No. 1, p. 8.

## SEXUAL HARASSMENT AND EMPLOYMENT RETALIATION LAW

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## Halfway Home

**The YLD is halfway through what is shaping up to be another outstanding year.**

**T**he first half of the YLD's Bar year has come and gone, but not without leaving its mark. Whether it was our members "braving" 90 degree heat in October at the Patio for our Fall Happy Hour (it's a tough job, but someone has to do it), or coming together to learn about and support our local pro bono organizations and charities, our members came out in droves to support the YLD's mission.

One of the highlights of the first half of the Bar year was the YLD's annual Pro Bono/Local Charity Luncheon held on Halloween. While there were no costumes, the YLD was pleased to welcome more than a dozen Hillsborough County organizations that support the legal and charitable needs of our community. Representatives from each organization took time out of their busy schedules to educate our membership on opportunities to use their skills as attorneys and give back to the community. As is the tradition, the lunch was catered by Inside the Box — an innovative café that donates one meal to Metropolitan Ministries for every meal purchased by the YLD. (Photos from the YLD Pro Bono/Local Charity Luncheon on page 18.)

On November 9, the YLD hosted its annual golf tournament. The success of this event is critical to the YLD's ability to fund its charitable programs throughout the year. This year, the tournament was once again held

at Temple Terrace Golf & Country Club — a course that opened in 1922 and is listed on the National Register of Historic Places. We welcomed over 90 golfers plus sponsors for a great afternoon of golf in support of the YLD. As always, Temple Terrace Golf & Country Club provided an exceptional environment for our tournament. (Photos from the Golf Tournament on page 36.)



YLD Board Members Tiffany McElheran, Katelyn Ferry, and Chris Arnold (not pictured) read to local students at Graham Elementary on November 8 as part of the Read to Dream program.

The YLD celebrated the end of 2018 with its annual holiday happy hour on December 12 at the newly opened Sparkman Wharf. Our members were able to enjoy the beautiful weather and celebrate the end of a great year while looking forward to the new year.

### **A Look Ahead to 2019**

The winter and spring are filled with a number of opportunities to come out and support the YLD. Whether you are looking to volunteer or network, the YLD has an event for you to get involved in.

We will kick off our winter schedule with Holidays in the New Year on February 2. Holidays in the New Year benefits A Kid's Place — a non-profit that provides foster care and loving homes to abused, neglected, or abandoned children. The YLD picks up the tab for the kids so they can enjoy a day of fun at Extreme Adventure Sports Park.

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One of the YLD's premier networking events of the winter is our annual Coffee at the Courthouse on February 5. The event provides a unique opportunity for our members to meet our local judiciary outside the courtroom. We are excited to be partnering with the Hillsborough Association for Women Lawyers for this year's event.

If coffee or early mornings aren't your thing, please consider joining us for our YLD Quarterly Luncheon on February 28, which will feature guest speaker Jennifer Strouf — founder of Improv4Lawyers. Improve4lawyers is an innovative way for lawyers to sharpen their advocacy skills outside of the traditional CLE programs.

Other events to keep an eye out for in the coming months include the YLD Winter/Spring Happy Hour, YLD Steak and Sports Day, and the YLD's Annual Cornhole for a Cause benefitting Big Brothers and Big Sisters of Tampa Bay.

As always, the YLD appreciates the support of its many sponsors. None of the work the YLD does to help the Hillsborough County community would be possible without each of these sponsors' support!

### Spring/Summer YLD Save the Dates

- April 20—Wills for Heroes Volunteer Opportunity
- June 14—YLD Annual State Court Trial Seminar and YLD Happy Hour



## YLD Holds Fall Happy Hour

The Young Lawyers Division welcomed back its members for the start of the new Bar year at its fall happy hour on October 18. The members gathered at The Patio Tampa to catch up and network.

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happy hour's sponsor:

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## HCBA Re-releases “Before the Law Was Equal” Documentary Film on YouTube

**“We hope that by re-releasing this important historical film ... many more people will have the opportunity view it and learn more about the struggle for equal opportunity and civil rights in Hillsborough County’s legal community.”** — HCBA President John Schifino

### *Documentary Focuses on the Desegregation of Hillsborough’s Legal Community*

Tampa attorney Marsha Rydberg became the HCBA’s first female president in 1991, and she has been recognized as a trailblazer in Hillsborough County’s legal community.

Rydberg also won the HCBA’s Outstanding Lawyer Award in 2014.

But, Rydberg’s career path was riddled with significant obstacles along the way.

Foremost among them were the discriminatory hiring practices and other societal attitudes that made it especially difficult for women and minorities entering the workplace.

Even after graduating first in her law school class at Stetson in 1976, Rydberg had difficulty getting a job interview, much less a full-time position.

But Rydberg persevered and she did not lose sight of her goal of becoming a successful attorney and making a positive difference in the community.

Rydberg’s personal recollections about her career have been chronicled — along with a group of other local legal trailblazers — in the HCBA’s documentary film “Before the Law Was Equal.”

The historical film debuted in 2013 and recently was re-released on the HCBA’s YouTube channel, which can be accessed on the HCBA’s website.

The goal of the film — which was produced by the HCBA’s Young Lawyer Division and Diversity Committee — was to capture an oral history from those

who experienced discrimination in the 1950s, 1960s, and 1970s, and to memorialize their stories for future generations.

“The HCBA is proud to re-release the documentary film ‘Before the Law Was Equal’ providing a historical narrative of the desegregation of Hillsborough County’s legal community,” said HCBA President John Schifino.

“We hope that by re-releasing this important historical film on the popular video-sharing platform YouTube... many more people will have the opportunity to view it and learn more about the struggle for equal opportunity and civil rights in Hillsborough County’s legal community,” Schifino added.

Besides Rydberg, the hour-long film features: the

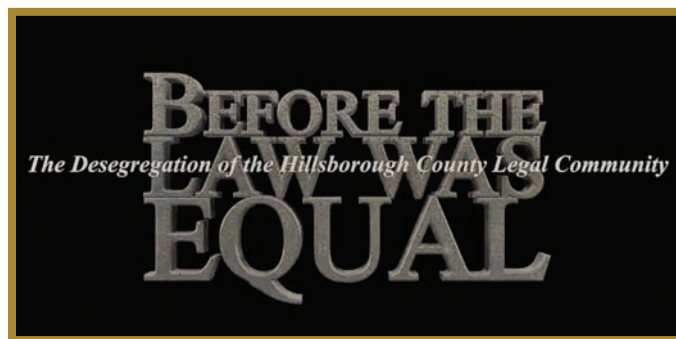
late Judge Don Castor, Judge E.J. Salcines, the late Judge John F. Germany, Judge Mary Scriven, the late William Reece Smith Jr., Lanse Scriven, Gwynne Young, Delano Stewart, Fraser Himes, Carolyn House Stewart, and Warren Dawson.

The idea for the documentary project — which took about a year to complete — dates back to 2012, said Victoria Ferrentino, who along with Luis Viera co-chaired the HCBA’s Diversity Committee at the time.

With support from then-HCBA President Bob Nader, YLD President Rachael Greenstein and Ferrentino spearheaded the project, with the assistance of Stan Arthur, a local filmmaker affiliated with Stetson law school.

“Everyone we reached out to was excited to participate,” Ferrentino told me.

*Continued on page 9*





Right: Panelists at the Diversity Summit in 2012, who were interviewed as part of the "Before the Law Was Equal" documentary. From left to right: Judge E.J. Salcines, Carolyn House Stewart, Marsha Rydberg and Warren Dawson.



*Continued from page 8*

The Florida Bar and American Bar Association supported the project with grants, and several local law firms made generous donations, which made financing the film possible.

In the fall of 2012, the YLD and Diversity Committee organized a "Diversity Summit" at the Ferguson Law Center.

Moderated by then President Bob Nader, the panel discussion on diversity issues was recorded, and excerpts were later included in the film.

Along with Greenstein, Ferrentino, and Nader, the film's production and research team included: Dara Cooley, Luis Viera, Tammy Briant, Judge Catherine Peek McEwen, Danny Alvarez, Jacqueline Simms-Petredis, Lynwood Arnold, Janae Thomas, Harley Herman, and Patricia Gomez.

Ferrentino told me she and Greenstein spent many long days paring down and editing the more than five hours of interview footage to under one hour.

The film premiered in April 2013 at a special evening event at the Tampa Bay History Center with hundreds of HCBA members and guests in attendance.

And later that year, the film was shown at the Gasparilla International Film Festival held at the Centro Ybor movie theatre complex in Ybor City, with a panel discussion about the film held afterwards.

At the conclusion of one of the diversity panel discussions, Warren Dawson, one of featured participants, summed up the project and the progress that has been made in area of equality and civil rights: "Much progress has been made, but there is still much work to be done."

See you around the Chet.

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## 2018 Year in Review

**Nearly 300 dedicated public servants work hard every day to make our criminal justice system better.**

**W**e are making progress on the path of criminal justice reform in Hillsborough County. I am proud of our progress in 2018. We are advancing our core mission of public safety, fairness, and justice. We are embracing methods to lessen the impact of low-level, non-violent offenders on an already overburdened criminal justice system. We are dedicating our resources to prosecuting and convicting violent criminals who are a threat to public safety. As we close the second year of my administration, I am pleased to report to you on our efforts:

### **Prosecutorial:**

- We implemented the Reduced Impaired Driving Program (RIDR) to address the plague of drunk/impaired driving in our county. This program aggressively targets and reduces impaired driving through enhanced sanctions like alcohol monitoring



devices and an education program for first-time offenders who have not injured a person or property.

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Meaningful sanctions reduce the likelihood of future criminal violations and promote public safety.

- We expanded our civil citation program for adult, first-time offenders committing misdemeanors. Our goal is to hold offenders accountable without the arrest, prosecution, and conviction that will ultimately jeopardize their job or housing. Nine hundred people participated in 2018.
- We created the first-ever conviction review unit in our county to further protect the integrity of our system. This unit will review the rare circumstance where a person is wrongfully committed to ensure that the actual perpetrators are held accountable.
- We handled nearly 55,000 cases in 2018.

#### **Preventative Public Safety Steps:**

- We convened our school system stakeholders to address school safety following the tragedy at Marjory Stoneman Douglas High School.
- We helped our criminal justice partners implement sensible steps to keep guns out of the hands of mentally unstable individuals who pose a threat to our community and themselves.

#### **Community Outreach:**

- We hosted the first-ever Hillsborough County expungement clinic. This allowed people to have a criminal record sealed or expunged if they were arrested, but not prosecuted, for a criminal violation. We created a single location for nearly 200 citizens to complete the fingerprinting, application, and notarization, so they could help put past mistakes behind them and benefit our community.
- We created a community council that engages community members in candid discussion with our team about public safety and our policies. These leaders provide an honest assessment of programs, promote accountability, and increase understanding of our criminal justice system. We are proud to have these volunteers who represent the diversity of our great county.

#### **Transparency:**

- We have partnered with the MacArthur Foundation to study better ways to measure prosecutorial success. The MacArthur Foundation is part of a nationwide effort to study the challenges and successes of prosecutors. This groundbreaking effort will make our office stronger and our community better.
- We continue to handle a huge volume of public records requests — nearly 800 in 2018. Making information available and providing insight into our work allows the community to better understand the role of the State Attorney's Office.

Over and above these specific policies, our nearly 300 dedicated public servants work hard every day to make our criminal justice system better. We are standing up for victims and holding offenders accountable, and building a safer, stronger community.

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## What's New in the New Year

**The Thirteenth Circuit is planning for addressing the needs of the community we serve in way that can provide positive impact.**

**H**appy New Year! With the New Year comes a few changes in the Thirteenth Judicial Circuit. Change can either be an unwelcome enemy or an embraced event. Some of what we are experiencing is bittersweet, while other events provide an opportunity to forge new ground.

We recently bid farewell to four distinguished colleagues who have begun experiencing the joys of retirement: Judges Claudia Isom, Gaston Fernandez, Robert Foster, and Herbert Berkowitz. With over 70 years of judicial experience combined, we will miss their knowledge and dedication. But most of all, we'll miss their daily friendship and collaboration. Filling the spaces they leave behind is not an easy task, one that necessitates the reevaluation of judicial assignments. Several judicial reassignments are taking place, making room for three new colleagues resulting from the mid-term elections (and another pending appointment as I write this article).

- Robin Fuson worked in the Office of the State Attorney for eight years before venturing into private practice, where he represented clients in criminal,

civil, family, and domestic violence matters. Judge Fuson is assigned to Family Law Division A.

- Lisa Allen hails from Ansa Assuncao LLP, where she was a civil litigator involved in commercial and business disputes, including employment, insurance, and business tort claims, in addition to contract and real estate litigation. Judge Allen is assigned to the newly created County Civil Division S and Domestic Violence Division K, where she will work in conjunction with Judges Frances Perrone and Jared Smith.
- Jack Gutman has been both a state prosecutor and criminal defense attorney in Hillsborough County. He also has civil experience having served in the Office of the Attorney General and in private practice, primarily in the area of eminent domain litigation. Judge Gutman is assigned County Criminal Division A.

I look forward to their service with the best circuit in the state of Florida.

I am also happy to announce that I will preside over the new Juvenile Mental Health Delinquency Division B

*Continued on page 13*



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*Continued from page 12*

as of January 1, 2019. The Juvenile Mental Health court will initially address the needs of juveniles found incompetent to proceed. By agreement of parties and the court, those with behavioral or mental health issues may be transferred to Juvenile Mental Health Delinquency Division B before being found incompetent. Children in Division B will be evaluated for services, provided service referrals, and be monitored for progress.

That sounds like a lot of change, and it is. It also proves that the Thirteenth Circuit is planning for addressing the needs of the community we serve in a way that can have a positive impact. May the coming days and months bring you much success and happiness.



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# SAVE *the* DATE **hcba events**



## **January 9, 2019**

Diversity Membership Luncheon at the Hilton Tampa Downtown

## **April 13, 2019**

Pig Roast/5K Pro Bono River Run, Stetson University College of Law Tampa Campus

## **May 2, 2019**

Law & Liberty Dinner at the Hilton Tampa Downtown

## **May 8, 2019**

Law Day Membership Luncheon at the Hilton Tampa Downtown



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## Legal Giants - Shaping Generations By Guidance & Example

**A great leader inspires and motivates others to be great.**

The Thirteenth Judicial Circuit Professionalism Committee proudly presented the Fifth Annual Professionalism Awards at the Bench Bar Conference on October 3, recognizing two superb lawyers who personify the values of professionalism.

After 46 years of practice, Robert “Rob” V. Williams of Burr Forman continues to serve our profession and the local community with tremendous enthusiasm, care, and honor. Nominated by Jacqueline Simms-Petredis and Justin Bennett and with extended support from colleagues and members of the judiciary, Rob Williams received outstanding accolades for his decades of accomplishments and dedication to his family, career, and community on a daily basis. As Mrs. Simms-Petredis eloquently declared, “He is a legal giant in the Tampa community and State of Florida.”



Judge Gregory Holder and Chief Judge Ronald Ficarrotta present Robert Williams of Burr Forman with its Professionalism Award for a lawyer in the private sector.

Mr. Williams’ legal accomplishments encompass successful results for countless clients, and more importantly, direction and mentorship to an endless number of young lawyers. He leads within his law firm and through service roles, including president of the Tampa Bay Chapter of the Federal Bar Association, president of the Hillsborough County Bar Foundation, president of DACCO, and chairman of the board of trustees of the Hillsborough County Hospital Authority, among other organizations and leadership positions. Serving in these capacities, he has set an example for colleagues to emulate, and therefore, his work ethic and professionalism shall continue for

*Continued on page 17*



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*Continued from page 16*

future generations of lawyers. Mr. Williams' wife and daughter remain a priority, as he gracefully balances a demanding professional calendar with time for routine family dinners and his daughter's activities. Judge Gregory Holder summarized it best in his award presentation, "Rob epitomizes ethics, integrity, and professionalism in his every action both within and outside of the courtroom."

Jay Pruner received this year's recognition in the government sector. After 31 years of practice, with many of those as Hillsborough's top homicide prosecutor, Pruner's career is simply unmatched. As Michelle Doherty noted in her nomination, "Homicide trials are stressful for a myriad of reasons, but Jay always treats the court, the victim's family, defense counsel, and the defendant with the respect and decorum required by our profession." Mr. Pruner's stellar reputation extends beyond the courtroom. He is beloved and admired by generations of current and past assistant state attorneys, support staff, and scores of defense counsel. This is attributable to his legal acumen, quick wit, and constant willingness to share his knowledge and experience with others.

In addition to his lifetime commitment to public service and keeping our community safe, Mr. Pruner shares his knowledge by routinely, formally and informally, teaching young prosecutors and law enforcement officers. He also has found a harmonious work-life balance, keeping his wife and two sons a top priority. Both of his sons followed in their father's



Thomas Palermo and Michael Sinacore with the U.S. Attorney's Office congratulated their colleague Jay Pruner with the State Attorney's Office after he received the Professionalism Award for a lawyer in the public sector.

footsteps joining the legal profession, with his oldest working alongside his father as a Hillsborough Assistant State Attorney. Ms. Doherty noted and Chief Judge Ron

Ficarrotta echoed in his presentation to Mr. Pruner, "A great leader inspires and motivates others to be great, and Jay is a natural born leader."

Cheers and gratitude to both recipients for setting a stellar example in your professional and daily lives.



*Author: Hon. Frances M. Perrone –  
Thirteenth Judicial Circuit Court*

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## YLD Celebrates Pro Bono

The Young Lawyers Division held a special luncheon on October 31 to raise awareness among its members of the many pro bono opportunities available with local agencies. The event was a great success, with more than dozen agencies in attendance. Thank you to everyone that attended.







## HCBA PRO BONO RIVER RUN – A DECADE OF SERVICE

5K Run Committee

Chairs: Hon. John Conrad & Miriam Valkenburg – Thirteenth Judicial Circuit Court



Last year, we celebrated the tenth year of the HCBA Pro Bono River Run. The goal of this Run is to raise awareness of the need for free legal services for the many people in our community who do not have the funds required to obtain counsel. By pledging their own pro bono hours and encouraging others to pledge hours to support their run, participants in the Run fill an important void by allowing access to our legal system to everyone regardless of their economic stature. By virtue of their involvement, these runners immediately become pro bono advocates. Over the past 10 years, the Run has generated more than 17,000 hours of pro bono service.

### 5K for 5K Challenge

As we turn the page into the next ten years, it is essential that we continue to center the focus of our River Run on awareness and commitment from HCBA members to the calling of pro bono service. To this end, we are creating the Pro Bono 5,000 Hour Service Challenge for this year's Run (#5K for 5K). The goal is simple — we hope that participants in this year's Run will generate pledges of at least 5,000 hours of pro bono service. In order to achieve this goal, we will be offering a reduced registration fee of \$25 for every



**For this year's Run, we are creating the Pro Bono  
5,000 Hour Service Challenge (#5K for 5K).**

runner who pledges at least 25 hours of pro bono service. Given that we have a capacity of 350 runners every year, the goal of 5,000 hours is achievable.

### How To Find Pro Bono Opportunities

One of the common questions from new participants is where and how can I perform pro bono service. An amazing list of pro bono opportunities is available on the Thirteenth Judicial Circuit website at: [www.fljud13.org/Portals/0/Forms/pdfs/Pro\\_Bono\\_Opportunities\\_HillsCity.pdf](http://www.fljud13.org/Portals/0/Forms/pdfs/Pro_Bono_Opportunities_HillsCity.pdf). These opportunities include Ask A Lawyer, Project H.E.L.P., Crossroads for Florida Kids, Inc., Are You Safe, and the Family Forms Clinic. There truly is something for everyone on this list. So all we need is your willingness

to commit. The best part of your participation is receiving the reward that comes from helping others who need your time, talent, and ability in resolving legal matters that dramatically affect their daily lives.

### Updated Race Route and Times

This year's Run will be held on Saturday, April 13, 2019, beginning at 10:30 a.m. Because of the significant development that has occurred along the prior race route, we will not be able to use the route going across the bridge. This year's route will be located entirely along the Tampa Riverwalk, beginning and ending at Water Works Park (out and back). The race will be chip-timed for the competitive at heart. After

*Continued on page 21*



*Continued from page 20*

you finish the “new” River Run, you can enjoy the Annual Pig Roast, which will begin at Noon at Stetson University’s Tampa Law Center. The Pig Roast is free for HCBA members and their families.

So grab your running shoes and come down to Tampa’s Riverwalk for an exciting race, a fun afternoon, and the opportunity to become an advocate for pro bono services! We hope to see you there!

*Authors: Hon. John Conrad & Miriam Valkenburg – Thirteenth Judicial Circuit*



## Judicial Pig Roast & 5K Pro Bono River Run

**NEW DATE  
AND TIME!**



### Saturday, April 13, 2019

**On the grounds of the Stetson Tampa Law Campus**

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## A REMINDER ON REHEARING

Appellate Practice Section

Chairs: Tom Seider – Brannock & Humphries and Joe Eagleton – Brannock & Humphries



**Appellate litigants considering these post-opinion [motions for rehearing] should be circumspect and frank about compliance with the applicable rules.**



Motions for rehearing and rehearing *en banc* are subject to clear but exacting requirements under Florida's Rules of Appellate Procedure. Two recent decisions from the Third and Fifth District Courts of Appeal remind litigants to review the rules carefully before submitting either of these post-opinion motions.

Rules 9.330 and 9.331, Florida Rules of Appellate Procedure, govern motions for rehearing and rehearing *en banc*, respectively.<sup>1</sup> As to the former, Rule 9.330(a) requires a movant to “state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended.” Although the rule was amended in 2000 to remove an express prohibition on re-arguing the merits, the Committee Notes confirm that the purpose of the

motion remains the same. A proper motion directs the court to overlooked points of law or fact; it does not express “mere disagreement” with the outcome of the appeal. Although a motion for rehearing may occasionally be appropriate after issuance of a per curiam affirmance without an opinion, those rare circumstances usually exist only where an intervening change in the law has occurred.<sup>2</sup>

Motions for rehearing *en banc* are subject to even greater constraints. Rule 9.331(d) delineates the only two permissible grounds for such a motion: “that the case or issue is of exceptional importance or that such consideration is necessary to maintain uniformity in the court’s decisions.” Counsel must include a statement designating one or both

of these grounds and, in case of the latter, identify the potentially conflicting decisions.

In a pair of recent decisions, two District Courts of Appeal disapproved of motions that deviated from these rules. In *Jedak Corporation v. Seabreeze Office Associates, LLC*, the Fifth District Court of Appeal addressed an emergency motion for rehearing and rehearing *en banc*.<sup>3</sup> The court disapproved of the motion for rehearing as “consist[ing] primarily of prohibited re-argument.” As to the motion for rehearing *en banc*, the court issued a show cause order indicating that sanctions would be appropriate under the court’s inherent authority and section

*Continued on page 23*



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Continued from page 22

57.105, Florida Statutes, for violating Rule 9.331. In *Aquasol Condominium Association, Inc. v. HSBC Bank USA*, the Third District faced a potentially broader range of ostensibly improper misconduct but reached a similar result. The court focused in particular on potential violations of Rule 9.330 based upon a party's failure to specify the points of law or fact that the movant believed the court overlooked.<sup>4</sup>

Appellate litigants considering these post-opinion motions should be circumspect and frank about compliance with the applicable rules. The rules provide clear guidance to ensure that these avenues for relief remain open in meritorious situations.

<sup>1</sup> The authors would be remiss not to mention that the response times stated in these rules will change effective January 1, 2019. See *In re Amendments to the Florida Rules of Civil Procedure*, SC17-882, 2018 WL 5289342 (Fla. Oct. 25, 2018).

<sup>2</sup> See *McDonnell v. Sanford Airport Auth.*, 200 So. 3d 83, 85 (Fla. 5th DCA 2015); *Marion v. Orlando Pain & Med. Rehab.*, 67 So. 3d 264, 265 (Fla. 5th DCA 2011).

<sup>3</sup> 248 So. 3d 242, 244 (Fla. 5th DCA 2018).

<sup>4</sup> 43 Fla. L. Weekly D2271 (Fla. 3d DCA Sept. 26, 2018).



Authors: Stacy Blank and Patrick Chidnese – Holland & Knight LLP



## Appellate Section Luncheon

The Appellate Section held an informative CLE on the topic of “The Dos and Don’ts of Oral Argument” with a panel of judges from the Second District Court of Appeal on October 17. Thank you to the three judges who kindly participated: Judge Matthew C. Lucas, Judge Samuel J. Salario, Jr., and Judge Craig C. Villanti. Appellate Section Co-Chairs Tom Seider and Joe Eagleton of Brannock & Humphries moderated the session.



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## BLI TEACHES THE IMPORTANCE OF BATTLE BUDDIES IN THE LEGAL PROFESSION

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Chairs: Nicole Gehringer – Harris, Hunt & Derr, P.A.; Donald C. Greiwe – de la Parte & Gilbert, P.A.; and Sara R. Lui – Hill Ward Henderson



The Bar Leadership Institute offers more than just leadership lessons. It offers lessons that will help us be more effective lawyers and members of our community. It is these valuable lessons that encourage us to become leaders, so that we may pass on the knowledge we gain. It is a task that we no longer just feel the desire to accomplish, but also the need to accomplish.

Our first learning module was at the Veterans Treatment Court and I found myself in awe of the program that Judge Michael Scionti was running. It offers a second chance for veterans in the criminal justice system by providing them with the support and guidance they need to cope with re-assimilating into society, while also struggling with issues such as post-traumatic stress disorder. While court was in session, Judge Scionti spoke about how during service, everyone is paired with a “battle buddy,” but that the need for battle buddies transcends one’s time in service, which is why his program pairs mentors with participating veterans: “The men and women of the VTC Mentor Corps serve as “battle buddies” for participating veterans and are the heartbeat of the court. Their compassion, dedication, and tireless efforts help save the lives of countless

veterans at a time when they face some of their most difficult challenges.”

I am embarrassed to admit that before the first module, all I knew about the Veterans

Treatment Court was the mere fact that it existed. When I found myself excitedly talking about my learning module with colleagues immediately afterwards, I learned that I was not alone in my lack of knowledge about the program.

But, it is such an important program that attorneys need to know about, because their clients may have their cases transferred to the Veterans Treatment Court. As such, I now feel compelled to discuss the program with every attorney I encounter. Being a regular volunteer at Project HELP, a free legal clinic for Tampa’s homeless population, I noticed that there was a question on the intake form regarding whether the client was a veteran, but until now, I never understood its gravity and importance.

Sometimes we do not suffer from lack of opportunities, but rather lack of awareness of such opportunities.



BLI visiting the Veterans Treatment Court.

**Sometimes we do not suffer from lack of opportunities, but rather lack of awareness of such opportunities.**

We have also had the incredible opportunity to visit Moffitt Cancer Center and the Port of Tampa. I am so excited to see what the rest of the year has in store for our BLI Class. But, what I am most excited about is the newfound knowledge that I will be able to share with my colleagues and others in the legal community.

I guess that is why we have chosen to go through this program — not only so that we can become leaders in this profession, but so that we can enlighten our colleagues about the programs and opportunities that we have learned about. After all, we all need battle buddies.



*Author: Natasha Khoyi - Booth & Cook, P.A.*



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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.

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## FILING A LAWSUIT NO LONGER REQUIRED TO SATISFY STATUTE OF REPOSE

Construction Law Section

Chairs: J. Derek Kantaskas – TMD Companies, LLC & Gregg E. Hutt – Trenam Law



**Recently, the Fourth DCA held that a pre-suit notice of defects under Chapter 558 also qualifies as commencing an action under the statute of repose.**



There is a ten-year statute of repose for construction defects in Florida. This statute of repose in section 95.11(3)(c), Florida Statutes, requires a property owner to commence an “action” for construction defects no later than ten years after certain events occur, typically at or around the completion of construction. Historically, courts have interpreted an “action” to include only a civil lawsuit or an arbitration proceeding.

The Fourth District Court of Appeal recently, however, expanded this definition. In *Gindel v. Centex Homes, et al.*, 43 Fla. L. Weekly D 2112, the Fourth District held that service of pre-suit notice of defects under Chapter 558, Florida Statutes, also qualifies as commencing an “action” under the statute of repose.

In *Gindel*, homeowners sued the builder of their homes for alleged construction defects. Before filing suit, they served a pre-suit notice of defects on the builder, as Chapter 558 requires. They served this pre-suit notice within the ten-year repose period. After the repose period expired, the homeowners filed a civil lawsuit against the builder. The trial court held that the statute of repose barred the homeowners’ claims because the homeowners did not file their lawsuit within the repose period.

The homeowners appealed the trial court’s ruling to the Fourth District. They argued that they satisfied the statute of repose when they provided pre-suit notice of defects to the builder pursuant to Chapter 558. The Fourth DCA agreed with the homeowners and reversed the trial court’s ruling. The Fourth DCA held that the homeowners timely commenced an “action” under the statute of repose when they provided the pre-suit notice of construction defects that Chapter 558 requires.

To reach this conclusion, the Fourth DCA reasoned that the statute of repose broadly defines an “action” to include any “civil action or proceeding.” It found that the pre-suit procedures under Chapter 558 qualify as a “proceeding” under this definition. The Fourth DCA also equated the pre-suit procedures in Chapter 558 with the strict pre-suit requirements for medical malpractice, which the Florida Supreme Court previously found qualified as an “action” under the two-year statute of repose for medical malpractice claims. The Fourth DCA further commented that “Chapter 558 was not intended as a stalling device in order to bar claims,”

and that construction defect claimants should not be penalized for “rightly complying with the mandates of the statute.”

*Gindel* raises numerous questions. Is any attempted Chapter 558 notice sufficient or must it strictly comply with Chapter 558 to satisfy the statute of repose? Does the date the notice is sent or received determine timeliness? Is the claim still timely if the defendant never receives the notice? If the claimant does not file suit within the repose period, must the recipient of the notice still file a lawsuit to ensure that its third-party claims are not time

barred? Stay tuned, because Florida courts inevitably will have to answer these and other critical questions if *Gindel* remains the law in Florida.



*Authors:  
Dara L. Dawson  
and Jeffrey  
M. Paskert -  
Mills Paskert  
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## Construction Law Section CLE/Luncheon

The Construction Law Section held an interesting CLE/luncheon on November 15 on the subject of "Copyright Protection for Architectural Designs: A Vanishing Species?" Frank R. Jakes, Esq. with Johnson Pope Bokor Ruppel & Burns, LLP presented on the topic, discussing the differences between copyright, trademark, and patent law; the direction that the courts are taking on the issue; examples from the real world; and important architectural work cases from different jurisdictions.



Thank you to LexisNexis for sponsoring this luncheon.



## DIVERSITY AND FAIRNESS IN THE JUDICIAL NOMINATION PROCESS

Diversity Committee

Chairs: Marsha M. Moses – Law Offices of Kubicki Draper and Abraham Shakfeh – Shakfeh Law, LLC



**The 13th Circuit JNC values diversity and strives to ensure a diverse selection of the most qualified candidates are submitted to the Governor for consideration.**



Florida law governing the composition of the Judicial Nominating Commission (JNC), which is predominately composed of practicing Florida Bar members directs the Governor to ensure that “to the extent possible, the membership of the commission reflects the racial, ethnic, and gender diversity, as well as the

geographic distribution, of the population within the territorial jurisdiction of the court for which nominations will be considered.” Fla. Stat. §43.291(4). Thus, the Governor is directed to ensure that each JNC reflects the general diversity of its given jurisdiction.

Florida’s Judicial Nominating Commissions are constitutionally-created bodies designed to

nominate candidates for judgeship to the Governor for appointment. Fla. Const. Art. V, §11. The Thirteenth Circuit JNC is charged with nominating at least three and no more than six candidates for each judicial vacancy on the Thirteenth Circuit. Although all nine members of the JNC are

*Continued on page 29*

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- Nursing Home
- Medical Malpractice
- Product Liability
- Aviation



## DIVERSITY AND FAIRNESS IN THE JUDICIAL NOMINATION PROCESS

Diversity Committee

*Continued from page 28*

appointed by the Governor, four are appointed from among candidates nominated by The Florida Bar.

The role of the JNC is to be the non-political, local vetting process. While there is no statutory or constitutional authority governing the precise guidelines the JNC should use when evaluating candidates for nomination, JNC rules of procedure set forth several factors to consider when nominating candidates.

Those rules require the JNC to consider various personal attributes including personal integrity, standing in the community, moral conduct, ethics, commitment to equal justice, competency and experience, knowledge of the law, professional reputation, and general intelligence. Finally, candidates are weighed and deliberated on patience, courtesy, civility, temperament, decisiveness, impartiality, and administrative ability.

The Thirteenth Circuit JNC values diversity and strives to ensure that diverse, highly qualified candidates are submitted to the Governor for consideration, giving the Governor the ability to select qualified candidates while making diversity on the bench a priority.

Members of the JNC are dedicated to an open application process to ensure that questions from all applicants are addressed. The JNC also is committed to outreach with various local bar organizations including the Hillsborough County Bar Association, Hillsborough County Association for Women Lawyers, George Edgecomb Bar Association, Tampa Hispanic Bar Association, and others. With the goal of fairness and impartiality, the JNC has adopted a practice of “standardizing” the interview stage of the application process by asking the same first three questions of each applicant.

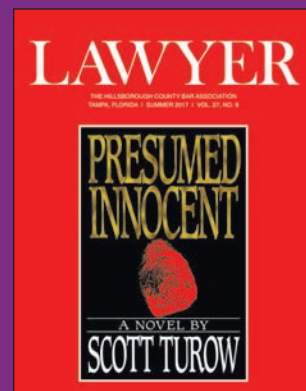
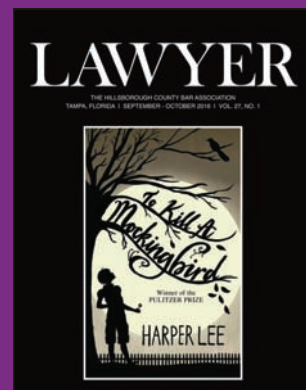
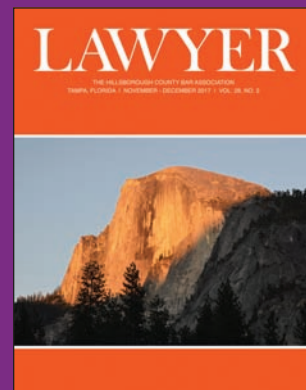
The Thirteenth Circuit JNC prides itself on its commitment to diversity and its history of nominating highly qualified, diverse candidates. In the past eight years, it has nominated candidates for 21 different openings on the Thirteenth Circuit, resulting in the appointment of 12 men and nine women, of which three self-identify as Hispanic and one who self-identifies as African American.

It is the Thirteenth Circuit JNC’s experience and commitment that its nominees reflect not only the most qualified applicants, but also the diverse population of Hillsborough County, which the nominees will be serving. The Thirteenth Circuit JNC will remain committed to a process that continues to stimulate and nominate a diverse pool of highly qualified applicants to the Governor.

*Authors: Gil Singer - Marcadis Singer, P.A., assisted by Bob Lindeman - Marcadis Singer, P.A. & Carter Andersen - Bush Ross, P.A.*



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## 8th Annual Sensory Friendly Santa Event

HCBA was proud to be a sponsor again this year for the 8th Annual Sensory Friendly Santa Event on December 1, put on by the Lawyers Autism Awareness Foundation and held at the Chester Ferguson Law Center. This free event is open to the public, and supported by local lawyers, law firms and community groups. The local judiciary also participates, with Judges Rex Barbas and Nick Nazaretian acting as jolly old Saint Nick! Thank you to everyone that participated and helped ensure the spirit of the holidays was enjoyed by all children!







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## BIOBANKS, BROAD CONSENTS, AND WAIVERS: WHAT THE REVISED COMMON RULE MAY CHANGE

Health Care Law Section

Chairs: TJ Ferrante – Foley & Lardner LLP & Kevin Rudolph – Shriners Hospitals for Children



**Institutions now will have to confirm that the proper broad consents were obtained from all individuals whose biospecimens may be used in an identifiable manner in a secondary research study.**



**B**iobank. For some, the term conjures up an image of a highly futuristic lab with vaults, tubes, and cryogenic chambers billowing dry ice smoke everywhere. For others, the word is just a fancy way of describing an old freezer in the back of a lab containing a bunch of leftover test tubes haphazardly organized. Although the reality lies

somewhere in between for most biobanks, the revised Common Rule issued by the United States Department of Health and Human Services (HHS), with its latest effective implementation date of January 21, 2019, requires certain changes to the informed consent process for obtaining samples from

human subjects. One particular change is to “broad consents” for human subject samples to be used in future research efforts.

Under the earlier version of the Common Rule, many institutions used variations of “broad informed

*Continued on page 33*

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*Continued from page 32*

consents” to obtain samples, or biospecimens, from individuals that they then “banked” for future unspecified research purposes. (Hence, the term biobank.) The revised Common Rule, however, puts in place a specific regulatory framework for the “broad consent” process, contained at 45 C.F.R. § 46.116(d), which may impact biobanks. The new “broad consent” process essentially allows an alternative to the typical informed consent process (defined in 45 C.F.R. § 46.116(b)-(c)) for these biospecimens to be used in future research, or secondary research, as HHS has labelled it.

Without delving into the technical elements of the new “broad consent” process, one change is that when individuals opt-out of consent for secondary research, the relevant institutional review board (IRB) overseeing such secondary research cannot later issue a waiver of consent to permit these individuals’ identifiable banked biospecimens to be used in a future research study. This creates a mechanism whereby those who have opted out via the broad consent process must have their refusals continually tracked to ensure their samples are not used in an identifiable manner in any secondary research. Although many institutions likely already implemented these safeguards, the reality is that they no longer can rely on a waiver of consent from the IRB for all of the samples to be used in a secondary research study. Institutions now, according to the regulation, will have to confirm that the proper “broad consents,” or “opt-ins,” were obtained from all individuals whose biospecimens may be used in an identifiable manner in a secondary research study.

HHS has released questions and answers surrounding the “broad consent” process, but has yet to issue comprehensive guidance on “broad consents” and how they tie into the existing, and future, framework for biobanks. With this new “broad consent” process, institutions will have to ensure that opt-ins and opt-outs are documented for all future secondary research involving banked biospecimens. Although HHS has stated that the use of individuals’ biospecimens in a nonidentifiable manner still is permissible, the advent of genome sequencing raises significant questions about what is nonidentifiable. For institutions, the challenge will be ensuring that the correct pathways are followed for all secondary research involving biospecimens, so that their highly futuristic lab (or old freezer) operates properly as a biobank.

*Author: Kevin Rudolph – Shriners Hospital for Children*



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# Thanks to All our FOX 13 Ask-a-Lawyer Volunteers!

The attorneys from the Lawyer Referral & Information Service were on the job once again in October and November, answering phones as part of Fox 13's Ask-A-Lawyer program. We appreciate all those who volunteered to take calls and help out local residents.



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## FOX 13 ASK-A-LAWYER VOLUNTEERS





# YLD Golf Tournament

The HCBA Young Lawyers Division had a great turnout for their annual golf tournament on November 9. More than 90 golfers came out for the YLD's signature fundraising event at the Temple Terrace Golf & Country Club. Congratulations to the winning team from U.S. Legal Support: Dan Bittle, Anthony Vento, Peter Tragos, and Frank Miranda.

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**The seemingly random nature of the exemptions, and the fact that are being made by a government agency instead of Congress, raises serious constitutional questions.**



**T**he Digital Millennium Copyright Act was enacted in 1998 with the aim of bringing the nation's copyright laws into the digital age. One of the most controversial aspects of the Act was the anti-circumvention provision outlined in 17 U.S.C. §1201. Section 1201 forbids circumventing an access-control device to gain access to copyrighted material. These “digital locks” are encountered, for example, when trying to alter a computer program or copy a song or video. Users who violate §1201 can be subject to severe civil and even criminal penalties. These penalties apply even if the purpose of breaking the lock is otherwise lawful. For this reason, many view §1201 to be unconstitutional.

Every three years, the Copyright Office examines §1201's impact on the ability of users to engage in lawful, non-infringing uses of copyrighted materials. The Copyright Office then promulgates certain exemptions to §1201. Last October, the Copyright Office finalized its “Seventh Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention” and adopted or expanded upon several important exemptions to §1201. The exemptions include:

### **Unlocking Cellular Devices:**

An earlier rule allowed users to unlock cellular devices, such as

cellphones and tablets, for the purpose of switching the device to an alternative wireless network (i.e. “unlocking”). The current rule has been expanded so that it is applicable to both new and used devices alike.<sup>1</sup>

### **Jailbreaking Digital**

**Assistants:** The Copyright Office also expanded the ability to jailbreak various electronic devices such as smartphones and smart televisions. Jailbreaking is a process whereby a user gains root access to the operating system of the device so that software can be added or removed. A prior ruling of the Copyright Office allowed various classes of devices to be modified in this way. The current rule expands this ruling so it applies to voice assistant devices, such as the Amazon Echo® and Apple HomePod®.<sup>2</sup>

### **Motorized Land Vehicles:**

§1201 also applies to the computer software now commonly found in cars and trucks. The Copyright Office previously extended an exemption to allow users to access such software for the purpose of repairing the vehicle. This exemption has been expanded and clarified to allow users to also access the various diagnostic data generated by such systems.<sup>3</sup>

### **Maintenance and Repair:**

The Copyright Office has also issued a rule that is broadly applicable to a wide range of devices provided that

the access is needed for the purpose of “diagnosis, maintenance, or repair.” This rule is presumably applicable to smartphones, home appliances, or other home systems.<sup>4</sup>

Despite these positive developments, many of §1201's prohibitions remain in place — many inexplicably so. For example, the exemptions for motorized land vehicles are just that, and strangely do not apply to boats or planes. Perhaps most puzzling, §1201's prohibition against distributing circumvention tools, such as jailbreaking kits, remains in place. The seemingly random nature of the exemptions, and the fact that they are being made by a government agency instead of Congress, raises serious constitutional questions.

<sup>1</sup> Section 1201 Rulemaking: Seventh Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention at 6, *available at* [https://www.copyright.gov/1201/2018/2018\\_Section\\_1201\\_ActingRegisters\\_](https://www.copyright.gov/1201/2018/2018_Section_1201_ActingRegisters_)

Recommendation.pdf

<sup>2</sup> *See id.* at. 7.

<sup>3</sup> *See id.*

<sup>4</sup> *See id.*



*Author:  
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*— Todd Alley, on behalf of himself, Clark, and Greiwe.*



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## ACCOMMODATING PREGNANCY-RELATED LIMITATIONS

Labor & Employment Law Section

Chairs: Cynthia Sass – Law Offices of Cynthia Sass, P.A. & Jason Pill – Phelps & Dunbar, LLC



**Although pregnancy is not a “disability” under the ADA, the ADA still impacts pregnancy-related impairments and must be considered when addressing workplace needs of pregnant employees.**



**F**ederal and state laws protect employees during and after pregnancy. To understand the protections, employers must familiarize themselves with both the Americans with Disabilities Act (ADA) and the Pregnancy Discrimination Act (PDA). In recent years, Congress broadened the ADA’s definition of disability, extending protections to certain pregnancy-related impairments and therefore requiring employers to accommodate them. The PDA, too, protects employees during and after pregnancy, but its reach is less clear. The PDA does not explicitly require employers to accommodate employees because of pregnancy or pregnancy-related limitations, but it still may be interpreted against employers that fail to provide certain pregnancy-related accommodations.

With the passage of the ADA Amendments Act of 2008, Congress expanded the definition of “disability” under the ADA, making it easier for individuals to

establish that they have a disability that falls within the meaning of the statute. As a result, while pregnancy itself is not a disability within the meaning of the ADA, some pregnancy-related impairments such as preeclampsia, gestational diabetes, and pregnancy-related sciatica, that were not previously considered disabilities under the ADA now appear to fall within the ADA’s coverage, entitling employees to a reasonable accommodation (absent undue hardship).

But what about those pregnancy-related limitations that do not fall within the ADA’s expanded definition of “disability”? Must employers accommodate those limitations under the PDA? The answer is far from clear.

The PDA provides that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ...

as other persons not so affected but similar in their ability or inability to work.” 42 U.S.C. § 2000e(k). The Eleventh Circuit Court of Appeals has interpreted this provision as requiring employers to provide employees with pregnancy-related limitations the same accommodations that it provides employees with other types of limitations. *See Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1261 (11th Cir. 2017). For instance, an employer who disciplines an employee because of her lactation schedule, but allows nonpregnant employees to change their work schedules for other temporary medical conditions, may be found in violation of the PDA.

Adding to the complex world of pregnancy accommodation, many state laws also prohibit pregnancy-based discrimination.

*Continued on page 43*

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## ACCOMMODATING PREGNANCY-RELATED LIMITATIONS

Labor & Employment Law Section

*Continued from page 42*

The Supreme Court of Florida and the Florida Legislature have recently weighed in. In *Delva v. Continental Group, Inc.*, 137 So. 3d 371 (Fla. 2014), the Florida Supreme Court held that the prohibition against sex discrimination in the Florida Civil Rights Act (FCRA) includes pregnancy discrimination. Following *Delva*, the Florida

Legislature amended the FCRA to explicitly prohibit pregnancy discrimination. See § 760.10, Fla. Stat.

And so, there is no easy answer when it comes to the accommodation of pregnancy-related limitations. To ensure they are on the right side of the law, Florida employers faced with requests for pregnancy-related accommodations should, at a minimum, review the ADA, PDA,

and FCRA to determine whether a reasonable accommodation is

warranted and ensure that workplace policies are being applied evenly.



*Author:*  
*Julie A. Girard - Phelps Dunbar LLP*



## Labor & Employment Law Section CLE

On November 8, the Labor & Employment Law Section met to receive an update on what is happening at the National Labor Relations Board. The featured speaker on the topic for the CLE was David Cohen, who is the regional director of Region 12 and Subregion 24 for the National Labor Relations Board. The Section appreciates Mr. Cohen taking the time to speak to the group.

Thank you also to Seacoast Bank for sponsoring this informative luncheon.



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## PERMANENT ALIMONY IN FLORIDA

Marital & Family Law Section

Chair: Chris Givens - Givens Givens Sparks, PLLC



is optional in all situations. For marriages of “long duration,” permanent alimony “may be awarded ... if such an award is appropriate” under the circumstances.<sup>1</sup>

Despite the neutral statutory language, every district in Florida continues to apply a strong presumption in favor of permanent alimony for long-term marriages.

**D**espite the legislature’s frequent attempts to rein it in, permanent alimony remains alive and well in Florida. This is especially true in cases involving long-term marriages (generally marriages lasting 17 or more years), even though Florida’s current alimony statute reads as if a permanent alimony award



**Every district in Florida continues to apply a strong presumption in favor of permanent alimony for long-term marriages.**

While this presumption is rebuttable, the case law consistently reaffirms the strength of the presumption. Thus, if there is any possibility that the lesser-earning spouse might be unable to meet his or her financial needs in the future, Florida appellate courts tend to hold that the failure to award permanent alimony constitutes an abuse of discretion.<sup>2</sup>

*Continued on page 47*

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*Continued from page 46*

This does not necessary mean that the permanent alimony award will be substantial. Alimony must always be based not only on the recipient spouse's need, but also on the payor spouse's realistic ability to pay. But, even in cases where the traditionally higher-earning spouse does not have the ability to pay alimony, Florida appellate courts expect that the trial court will enter a "nominal" alimony award — usually \$1 per month for life — so that the needy spouse can return to court for an upward modification in the future.<sup>3</sup>

The presumption in favor of permanent alimony is strong enough that even in cases where the trial court finds that there will

likely be no future need for alimony, the Florida appellate courts often require entry of a nominal award just in case the needy spouse fails to become self-supporting in the future.<sup>4</sup>

In summation, at present there is a strong likelihood that a court will award permanent alimony in any case where the marriage exceeded 17 years and where one spouse historically helped to financially support the other spouse. If there is any doubt as to whether such an award is appropriate, the trial court will err on the side of awarding permanent alimony.

<sup>1</sup> § 61.08(8), Fla. Stat. (2018)

<sup>2</sup> See, e.g., *Ayra v. Ayra*, 148 So. 3d 142, 144 (Fla. 2d DCA 2014) (trial court required to award at least

nominal alimony where there was, among other things, a possibility that wife would be unable to meet her future needs).

<sup>3</sup> See, e.g., *Nourse v. Nourse*, 948 So. 2d 903, 904 (Fla. 2d DCA 2007) (explaining purpose of nominal alimony award).

<sup>4</sup> See, e.g., *Liebrecht v. Liebrecht*, 58 So. 3d 415, 418 (Fla. 2d DCA 2011) (although trial court found that wife could meet her future needs, it should

have awarded nominal permanent alimony in case wife was unable to do so).

*Author: Mark Baseman - Felix Baseman*



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## MEDIATING A PROPERTY INSURANCE CLAIM

Mediation & Arbitration Section

Chairs: Kari Metzger - Metzger Law Group P.A. & Jim Matulis - Matulis Law & Mediation



**It all comes down  
to thinking about,  
and preparing for,  
the mediation ...  
before  
the mediation.**



**I**t had been a very long day. I had just returned to the office after conducting an Examination Under Oath on a large hurricane claim. I was tired. I was hungry. And I had over 100 e-mails to read.

I scanned through my incoming pleadings. And there it was: an Order of Referral to Mediation. Great. Now I had to prepare for that.

As a younger lawyer (a long time ago), I never really appreciated the mediation conference. Why can't you just go in there and give them a number, and if they don't take it, you walk? Simple. To the point. No fuss.

As I got older, I realized there was so much more to the process. The nuances of negotiation. The politics in both rooms, and between each side. And the ability to talk to the other side to learn about their case, and yours. Over time, I began to love the process. So I no longer litigate insurance claims, I mediate them. Here are some lessons I have learned as a mediator.

### **Documentation**

I cannot stress how important it is for the insured to document the claim. Do it early. Do it often.

Insurance companies want — and require — pictures, repair and replacement estimates, and receipts. Having these documents, and having them in the claim file early, helps the adjuster in getting more authority to pay the claim.

Most insurers will have meetings with the adjuster/litigation representative, and/or the defense attorney, in advance of the mediation conference. This is when they discuss the authority to be given for the mediation. The more the adjuster can answer questions about the damages, and the more documentation she is able to show from the claim file, the more authority will be provided.

Now, on the insurer side, I would also tell you that you need to read the documentation. Countless mediations have ground to a stop so that the claim representative could read through documentation previously submitted by the insured.

### **Analyze the Coverage Issues and the Damages Before the Mediation**

Of course, before we even try to calculate the true damages, the parties must understand the coverage issues. For the carrier, that

means detailed coverage position letters. The insured must understand the carrier's position on what is covered, and what is not. And more importantly, why. And ... in English please.

I think it is important for the insured to break down the damages in detail and under the specific coverage provisions in the policy. The insured should set forth what is being claimed for the Structure, Contents, Extra Expense and Business Interruption, ALE (Additional Living Expenses), and the consequential and "bad faith" damages as well as fees and costs. Again, the parties may never agree, but at least you can break down the claims into different elements to see what can be done, even if it means resolving some of the claims, but not all.

It all comes down to thinking about, and preparing for, the mediation ... before the mediation.



*Author: Gerald T. Albrecht - Albrecht Mediation Services*

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/rezəˈlōʊSH(ə)n/ *noun*. 1. The action of solving a problem, dispute, or contentious matter.  
2. Detail you can see. 3. Determination.

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## JUDGE JARED SMITH: A MILITARY VETERAN ON THE BENCH

Military & Veterans Affairs Committee

Chairs: David Veenstra – Hunter Law, P.A & Alexandra Srsic – Bay Area Legal Services, Inc.



**T**he pain of 9/11 was palpable and raw. Jared Smith watched it all from Kansas where he was then a clerk at the Kansas Supreme Court. He felt a call to serve and remembered receiving a recruiting brochure from the Air Force's Judge Advocate General's (JAG) Corps. He went through the competitive application process and was selected to join the Air Force JAG Corps. He and his wife Suzette embarked on their next chapter — life of military service.

It did not take them long to realize that they were not in Kansas anymore. Then-Lieutenant Smith completed the Air Force's initial officer accession training program at Maxwell Air Force Base, Alabama, and his first duty assignment was to MacDill Air Force Base. At MacDill, his duties included serving as the Chief of Legal Assistance, Chief of Adverse Actions, and Chief of Claims. He also was part of the MacDill Air Force Base Disaster Control Group and served on the MacDill's multi-functional team planning and implementing the massive AirFest 2004 event. During his time at MacDill, he was selected by the Air Force for promotion to captain.

In 2005, the Smiths were re-assigned to Goodfellow Air Force Base, Texas, where he served as the Chief of Adverse Actions. At both assignments, he also served as a Special Assistant U.S. Attorney, prosecuting crimes arising on the exclusive federal jurisdiction and prosecuting courts-martial. Captain Smith completed his military service in 2006.

The Smiths had fallen in love with the Tampa Bay area during Judge Smith's assignment to MacDill, so they returned after they left the Air Force. He resumed the civilian practice of law by joining the law firm of Rumberger, Kirk & Caldwell, P.A. He began his practice initially as a civil litigator and built a construction law practice, developing a strong reputation in the community and earning his board certification.

Judge Smith's legal career and focus of service changed in March 2017, when Florida's Governor Rick Scott appointed him to serve as a Hillsborough County Court Judge. He subsequently won a contested election in August 2018. Judge Smith proudly sits as part of



**He felt a call to serve  
and remembered  
receiving a recruiting  
brochure from the Air  
Force's Judge Advocate  
General's (JAG) Corps.**

the Unified Family Court and County Civil divisions. He joins a dozen military veterans who ably serve on the bench in and for Hillsborough County.

There is much more to Judge Smith than his accomplished legal career, however. He married his law school classmate, Suzette, who it should be noted actually graduated tied with Judge Smith in his law school class (which was no easy task considering he was

third in the class). They are blessed with four wonderful children.

They are also active in their faith community, where Judge Smith serves as a deacon at Idlewild Baptist church in Lutz.

The Military & Veterans Affairs Committee is pleased and grateful that Judge Smith also makes time to routinely participate in the various activities and events put on by the committee, and we look forward to

his presence on the bench and amongst our community of attorneys.

*Author:  
Steve Berlin –  
Rumberger Kirk  
& Caldwell*



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## Adopt-A-Veteran Initiative

The Community Services Committee once again collected donations from HCBA members for its annual Adopt-A-Veteran initiative with the James Haley Veterans Hospital in October, in honor of Veteran's Day. Thank you to everyone that donated items!

HCBA member Chris Arnold with Metzger Law Group helped coordinate the pick-up of some of the donations at the Chester Ferguson Law Center by two representatives from the Veterans Hospital.



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## ABSOLUTE POWER NO LONGER NECESSARY

Real Property Probate & Trust Section

Chairs: Kristin Morris – Shutts & Bowen & Elaine McGinnis – Law Office of Elaine McGinnis, P.A.



**Effective March 2018, an absolute power to invade principal is no longer a requirement to decant a trust that is administered in the state of Florida.**



**D**ecanting a trust, generally, involves a trustee “pouring” trust assets from one trust to another under the trustee’s discretionary authority to make distributions to or for the benefit of one or more beneficiaries.

A recent amendment to Section 736.04117, Florida Statutes, has expanded the ability of trustees to decant trust principal. Prior to the amendment, a trust could only be decanted by a trustee who had an “absolute power” to invade the principal of the trust. A power to invade principal that is limited to specific or ascertainable purposes is not an absolute power to invade. As a result, the standard power to invade trust principal for the “health, education, maintenance, and support” of a beneficiary had previously barred trustees from decanting trusts.

Effective March 2018, an absolute power to invade principal is no longer a requirement to decant a trust that is administered in the state of Florida.

Unless the trust instrument expressly provides otherwise, a trustee who has a non-absolute power to invade trust principal may now decant all or part of the

principal of the first trust subject to such power into one or more second trusts. In exercising such power:

(1) The second trust, in the aggregate, must grant each beneficiary of the first trust beneficial interests in the second trust that are substantially similar to the beneficial interests they had under the first trust.

(2) If the first trust grants a power of appointment to a beneficiary of the first trust, the second trust must grant such power of appointment in the second trust to such beneficiary, and the class of permissible appointees must be the same as in the first trust.

(3) If the first trust does not grant a power of appointment to a beneficiary of the first trust, the second trust may not grant a power of appointment in the second trust to such beneficiary.

(4) The term of the second trust may extend beyond the term of the first trust, and, for any period after the first trust would have otherwise terminated, in whole or in part, under the provisions of the first trust, the second trust may, with respect to the property subject to such extended term, include language

providing the trustee with the absolute power to invade the principal of the second trust during such extended term. The second trust may also create a power of appointment (if the power holder is a current beneficiary of the first trust) or expand the class of permissible appointees in favor of which a power of appointment may be exercised.

A trustee who intends to decant a trust must give written notice at least 60 days prior to the exercise of the power to invade trust principal to all qualified beneficiaries of the first trust, all trustees of the first trust, and any person who has the power to remove or replace the trustee of the first trust. The notice requirement is satisfied when all of these persons are provided copies of the proposed instrument exercising the power to decant, the existing trust agreement, and the proposed second trust agreement.



*Author:  
Matthew  
Schnitzlein -  
Allen Dell*

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## MY! HOW TIMES HAVE CHANGED!

Senior Counsel Section

Chair: Thomas Newcomb Hyde – Attorney at Law



**H**opefully, younger lawyers not in the Senior Counsel Section will read this and learn a little bit of the history of practicing law here.

After beginning my career as a prosecutor, I have now specialized in divorce for decades. Times have changed during my career. Let's start with this: When my career started, women lawyers made up less than 10 percent of the profession. Now that number is approaching 40 percent. George Edgecomb was the only black lawyer in the State Attorney's Office, and there were only a handful of black lawyers in the area. There had never been any black judges nor women judges in the Thirteenth Circuit.

There were no security devices in our courthouse. There were no separate Family Law divisions. There was no mediation. In most family law cases, the rules of evidence were only followed loosely. The judges and the lawyers looked at this court of equity as more of a "Let's let everything into evidence and then we can make a fair ruling based on everything." We spent a full four hours arguing about the amount of child support that should be ordered. There were no law firm websites, computers, or cell phones.

**The rules of evidence are followed now in the Family Law divisions as strictly as they are in the General Civil division, and the skills of Family Law trial work are much more closely aligned with those of General Civil litigation. This has been the single biggest local improvement to the court system during my career.**



Partially because of some death threats against local lawyers by pro se divorce parties on the opposite sides of cases, but mainly because of court-related shootings in other parts of the state, Judge Ralph Steinberg recommended that we pursue obtaining metal detectors and security staff to screen people entering the courthouse.

Back then, the general civil judges were handling divorce matters along with everything else. Based on the initiation by Chief Judge Arden Merckle (who, unfortunately, later ended up serving a prison term for bribery), on February 1, 1982, the court started Family Law divisions where the judges could devote all of their time to staying current on changes in family law statutes and rules of procedure. The rules of evidence are followed now in the Family Law divisions as strictly as they are in the General Civil division, and the skills of family law trial work are much more closely aligned with those of general civil litigation. This has been the single biggest local

improvement to the court system during my career.

After the creation of the Family Law division, Judge Ralph Steinberg later initiated setting up the courthouse mediation system.

The legislature wised up and followed the example of Arizona by creating child support guidelines. Now, each lawyer uses the same software that the judges have and merely inputs the incomes and other data required. Everyone comes up with the same number for child support and we don't waste lots of court time (and client money) arguing about it.

When I started, all the documents created by the office were done by IBM Selectric 2 typewriters. Documents filed with the court contained lots of "white out" places. When a letter was typed, there were two carbons made. One went to the file and one went to the client.

The Florida Bar did not allow advertising of any kind. It was thought that lawyers were above that. Now we are somewhat

*Continued on page 63*



## MY! HOW TIMES HAVE CHANGED!

Senior Counsel Section

*Continued from page 62*

restricted in what we can say in advertisement, but, in general, are allowed to compete with each other like people in other professions do. We all can see how that has helped marketing genius, John Morgan, build his personal injury practice empire.

Without websites, the way a divorce practice grew was recommendations made to people

in the community by other lawyers, mental health professionals or (mostly) by satisfied former family law clients. In family law offices now, marketers tell us that we can't exist without website marketing. As for that and other IT issues, my grandsons not only know more about electronic technology, they have helped me many times with how to use the various types of communication on my cell phone.

My, how times have changed! Just think of what it is going to be like when you are old enough to be in the Senior Counsel Section.

Enjoy your career!

*Author:  
Stann Givens –  
Givens Givens  
Sparks*



## Senior Counsel Section Luncheon

The Senior Counsel Section and other members and guests received an update at its luncheon on November 19 on the exciting developments taking place downtown with the Water Street Tampa project. The speaker for the luncheon was David Bevirt, who serves as the executive vice president of corporate leasing and strategy for Strategic Property Partners and the lead for leasing efforts on the office portion of the nine million square feet, 50-acre development.



## THINGS TO BE ON ALERT FOR AS A SMALL FIRM PRACTITIONER

Solo & Small Firm Section

Chairs: Matthew Crist – Crist Legal | PA & Gian-Franco Melendez – Law Office of Gian-Franco Melendez, LLC



**Peer-to-peer online networking is rapidly replacing traditional phone-in searches, and may be the difference to your firm's success.**



**Y**ou've taken the leap and opened your own firm. After the congratulations and accolades from your peers, now comes the hard part: running an actual functioning business. Here are a series of simple suggestions and things to watch out for as you engage in this endeavor:

### **Hiring and Retaining Staff**

It may at first seem impractical financially to take on staff when starting a small firm. No money is initially coming in, and payroll has to be made each month regardless. If your practice has a significant caseload and can handle bringing on support personnel, invest in a PEO, or Professional Employer Organization. This entity runs payroll for you and ensures you are compliant with the IRS when it comes to payroll deductions. But, restrain the impulse to offer creative compensation to say a veteran paralegal in lieu of traditional salary and benefits; Florida Bar Rule 4-5.4(a) clearly prohibits sharing attorney's fees earned with non-lawyers.

### **Protecting your Firm's Assets**

As you no longer have the safety net of a larger firm, malpractice

insurance is one of the single most maddening monthly expenses a small firm has, but it is essential to insulate yourself and your firm from significant liability. No matter what, there is always a risk that your client will not be happy with the outcome of the case and be tempted to file a complaint with the Florida Bar. These things happen. Protect yourself against that possibility and invest in malpractice insurance.

### **Biting Off More Than You Can Chew**

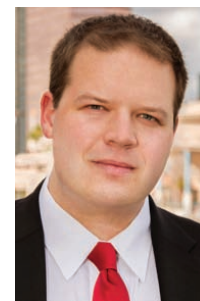
Piggybacking off of the brief mention of client retention, always be careful straying outside of a comfortable practice area. Legal malpractice attorneys will advise you that you are held to the standard of a reasonable practicing attorney in that field of law. If you miss a deadline because you incorrectly analyzed a statute you weren't familiar with, that will fall on deaf ears with your malpractice insurance carrier. If you are a personal injury attorney but looking to dip your toe into family law, a suggestion is co-counseling

with an existing family law firm; that firm may have resources to expend, and guidance on how to navigate a new area of law for you.

### **Cultivating your Image**

Networking and client engagement are essential to a small firm's growth. Reach out beyond just legal networking mixers to local professional association circles. The connections and potential clients at these events are sophisticated, and much more likely to have fruitful ends. To wit, your image on social media will also be crucial. Invest your time in your web presence by creating a firm Facebook page, a firm Twitter, and even an interactive element to your firm's webpage. Peer-to-peer online networking is rapidly replacing traditional

phone-in searches, and may be the difference to your firm's success.



*Author: Trescot Gear – Gear Law, LLC*

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In its recent opinion clarifying Florida's standard regarding the admissibility of expert evidence, the Florida Supreme Court essentially told the Florida Legislature to stand down.

The 4-3 decision in *DeLisle v. Crane Co.*, No. SC16-2182, 2018 WL 5075302 (Fla. Oct. 15, 2018) (which remained subject to revision or withdrawal pending release for permanent publication as of this article's submission), reviewed the Fourth District Court of Appeal's reversal and remand in a personal injury action based on asbestos exposure. The Fourth DCA found that the trial court "failed to properly exercise its gatekeeping function" as to several testifying experts.<sup>1</sup>

Before quashing the Fourth DCA's decision, the Court provided a lengthy discourse on the interaction between it and the Legislature in implementing evidentiary rules, maintaining that, where rules constitute substantive law, they are the responsibility of the Legislature, but clarifying that procedural rules remain within the judiciary branch's domain.<sup>2</sup>

The Court then reaffirmed longstanding precedent adopting the standard articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which requires general acceptance in the scientific community for the admission of expert scientific evidence. *DeLisle* cited concerns

about reliability in rejecting the Supreme Court's *Daubert* standard. The Legislature attempted to embrace *Daubert* in section 90.702, Florida Statutes (2013).<sup>3</sup> Under *Daubert*, relevant scientific evidence is admissible if it is derived from scientific methodology, even if not generally accepted; judges are assigned gatekeeping roles to ensure the reliability and relevance of expert testimony.<sup>4</sup>

Returning to the separation of powers doctrine, the Court determined that the revision to § 90.702 does not create, define, or regulate a right, thereby rendering it procedural rather than substantive.<sup>5</sup> Since the statute conflicts with the Court's previous decisions pronouncing the *Frye* test a procedural rule, the Court deemed it unconstitutional.<sup>6</sup> And so for now, *Frye* remains the law of the land in determining the admissibility of new or novel scientific evidence.

The *DeLisle* opinion issued a reminder that *Frye* applies only to testimony based on "new or novel scientific techniques," and trial judges retain broad discretion to determine the subjects on which experts may testify. In the underlying trial for example, the Court stated that the disputed medical causation testimony was not new or novel and thus not subject to *Frye* analysis.<sup>7</sup>

Of note, the Court cited concerns about the length and expense of *Daubert* proceedings inhibiting



**For now, *Frye* remains the law of the land when it comes to evaluating new or novel scientific evidence.**

access to the courts.<sup>8</sup> Justice Pariente's concurring opinion expanded on this concern, with Justice Labarga concurring.<sup>9</sup> Justice Labarga wrote a separate concurrence addressing the propriety of jurisdiction, with which Justice Pariente also concurred,<sup>10</sup> while Chief Justice Canady dissented on jurisdictional grounds with Justices Polston and Lawson concurring.<sup>11</sup>

<sup>1</sup> *Crane Co. v. DeLisle*, 206 So. 3d 94, 100–103 (Fla. 4th DCA 2016) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

<sup>2</sup> *DeLisle*, 2018 WL 5075302, at \*3 (citations omitted).

<sup>3</sup> *Id.* at \*4–6.

<sup>4</sup> *Daubert*, 509 U.S. at 587–595.

<sup>5</sup> The Court declined to adopt chapter 2013-107, section 1, Laws of Florida, to the extent it was procedural, in 2017. See *DeLisle*, 2018 WL 5075302, at \*2.

<sup>6</sup> *DeLisle*, 2018 WL 5075302, at \*6–7.

<sup>7</sup> *Id.* at \*8.

<sup>8</sup> *Id.* at \*8, n. 3.

<sup>9</sup> *Id.* at \*9–13 (Pariente, J., concurring).

<sup>10</sup> *Id.* at \*13–14 (Labarga, J., concurring).

<sup>11</sup> *Id.* at \*14–15 (Canady, J., dissenting).



**Author:**  
**Bridget**  
**McNamee -**  
**Johnson**  
**Jackson, LLC**



## UPDATE ON JUDGES OF COMPENSATION CLAIMS AND CASELAW

Workers' Compensation Section

Chair: Anthony Cortese – Attorney at Law



**O**ur CLE luncheon with the Tampa Judges of Compensation Claims will start at Noon on February 25, with the Honorable Mark Massey moderating the topics and introducing the new replacements for our two local retiring Judges of Compensation Claims. We hope you can join us at this important luncheon.

Regarding recent caselaw, temporary partial indemnity benefits were at issue in two state workers compensation and federal longshore appellate decisions. In *Sarasota County School Board v. Brockman*, 248 So. 3d 270 (Fla 1st DCA 2018), the First District Court of Appeals reversed an award of temporary partial disability benefits to a claimant, where the order below did not make specific factual findings on the nexus between the injury and lost wages. The claimant was a school custodian with almost 30 years of employment, and a few compensable injuries, who was six months from the date of full retirement when she had another work injury. She returned to restricted duty at full pay with her employer and retired when her pension vested. When she filed a claim for temporary partial disability, her employer/carrier denied the benefits on the basis that her retirement was an intervening cause that broke the chain of

causation between her injury and her loss of wages.

In a more detailed order on remand, *Brockman v. Sarasota County*, OJCC Case No. 16-013511 (August 24, 2018), it was found that the claimant's assertions were credible, that she faced a choice between retirement or termination due to work-injury related absences, and that her head custodian did not comply with her work restrictions, which affected her job performance. After the injury but before retirement, her employer had taken her to a hearing over her absences and job performance under *NLRB v. J. Weingarten, Inc.* 420 U.S. 251 (1975), and she contended she would have worked until age 62 if she hadn't face termination. Temporary partial benefits were awarded based on this nexus.

In another recent case regarding a longshore claim, an employer denied jurisdiction as well as entitlement to temporary indemnity benefits. *Dwayne Victorian v. International-Matex Tank Terminal*, BRB 17-0584 (July 24, 2018). The claimant worked at a waterfront terminal engaged in receiving and shipping certain materials, as well as storage and manufacturing using some of those materials. The claimant was injured during a manufacturing activity that the employer contended should be



**Join us at our CLE  
luncheon with the  
Tampa Judges of  
Compensation Claims  
on February 25.**

covered only by state workers compensation. The Benefits Review Board affirmed the finding of the Administrative Law Judge that the terminal and the employment as a whole was shipping. Therefore, it was covered under the Longshore Act, even though certain activities, like manufacturing, might not be covered if they occurred away from the waterfront.

The employer also denied temporary indemnity benefits on the basis that, although the injury precluded the claimant from returning to work for the employer, their vocational evaluator found suitable alternative employment with other entities, which the claimant could perform despite his injuries. The Administrative Law Judge did agree that suitable alternative employment had been located, but because the claimant exercised due diligence in applying for every position located by the vocational evaluator and performed his own unsuccessful job search, he was entitled to ongoing temporary total indemnity benefits. The Benefits Review Board affirmed this decision.

We look forward to an interesting year with the Workers Compensation Section and hope to see everyone at the February 25 luncheon.

*Author: Anthony V. Cortese - Attorney at Law*



## Trial & Litigation Section Holds Candidate Forum

On October 10, the Trial & Litigation Section held a candidate forum for various local races to allow its members an opportunity to meet and learn more about candidates running in the general election. In addition, Will Spicola from the General Counsel of the Constitution Revision Commission held a Q&A on the proposed constitutional amendments on the ballot.

The Trial & Litigation Section thanks the luncheon attendees and speakers and its sponsor: Synovus Bank.

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**Willard A. Blair – Shumaker, Loop & Kendrick, LLP** congratulates Tampa partner Willard A. Blair, who has been elected to the advisory board of the Alliance of Merger & Acquisition Advisors (AM&AA). The AM&AA is an international organization serving the educational and resource needs of the middle market M&A profession.

**Mandi Ballard Clay – Shumaker, Loop & Kendrick, LLP's** Tampa associate Mandi Ballard Clay presented to the Carrollwood Bar Association on October 11, 2018, on the topic of "Lawyers, Interrupted," regarding the mental health and wellness of attorneys and the steps being taken to improve and raise awareness about mental health issues among attorneys.

**Samantha Culp – Carlton Fields** welcomes Samantha M. Culp, who has joined the firm as an associate in its Tampa office. She is a member of the firm's Real Property Litigation section.

**Wiline Justilien Davis – Shumaker, Loop & Kendrick, LLP's** Tampa associate Wiline Justilien Davis spoke about her military experience and the need for the services that Bay Area Legal Services provides to the Tampa Bay community at The Collective's "Maritime Happy Hour" networking event on October 11, 2018.

**Joseph T. Eagleton – Joe Eagleton of Brannock & Humphries** recently presented "Finality in Family Law: Appealing Orders in Cases That Never End" for The Florida Bar Appellate

Practice Section's Family Law Appeals webinar.

**Hill Ward Henderson – Hill Ward Henderson** is pleased to announce the addition of associates **Dalton Allen** and **Travis Foels** to the firm's Litigation Group.

**Connolly McArthur – Hill Ward Henderson** congratulates Senior Counsel Connolly McArthur, who has been elected to the Religious Community Services, Inc. (RCS) Pinellas Board of Directors.

**Jounice Nealy-Brown – Gunster** welcomes Jounice Nealy-Brown, who has joined the business litigation practice as an associate in the firm's Tampa office.

**Andy Peluso – Hill Ward Henderson** is pleased to announce that associate Andrew E. "Andy" Pelsuo has been selected to join AMIkids Tampa's Board of Trustees.

**Cara L. Powell – Open Palm Law** welcomes the addition of new Associate Cara L. Powell, Esq., a family law attorney, to their firm.

**Sam Queirola – Shumaker, Loop & Kendrick, LLP** is pleased to announce the expansion of its firm-wide real estate and land use practice with the addition of attorney Samuel P. Queirola.

**Lauren Raines – Quarles & Brady LLP** congratulates Lauren Raines, a partner in the firm's Litigation and Dispute Resolution Practice Group, who has been elected to the board of directors for the After-School All-Stars Tampa Bay. The After-School All-Stars Tampa Bay provides comprehensive after-school programs that keep

children safe and help them succeed in school and life.

**Mindi M. Richter – Shumaker, Loop & Kendrick, LLP's** Tampa partner Mindi M. Richter moderated the Tampa Bay Chapter Federal Bar Association (TBCFBA) Brown Bag Lunch, focused on Injunctive Relief in Intellectual Property Cases. She was joined by judges and practitioners from the Middle District of Florida.

**Robert A. Stines – Freeborn & Peters LLP** is pleased to announce that Robert A. Stines, a partner in the firm's Tampa office and a member of its Emerging Technologies Industry Team, has earned the Certified Information Privacy Professional (CIPP/US) credential through the International Association of Privacy Professionals (IAPP).

**Susan Tillotson Bunch – Thomas & LoCicero PL** in Tampa congratulates Susan Tillotson Bunch, who has earned the designation of Privacy Law Specialist from the American Bar Association (ABA) and administered by the International Association of Privacy Professionals (IAPP). Part of the inaugural ABA/IAPP class of 27 practitioners, Bunch is the first Florida Bar member to be so designated.

**Douglas A. Wallace – Doug Wallace of Brannock & Humphries** recently joined the Financial Industry Regulatory Authority's roster of arbitrators. Wallace is pleased to now be available to serve as a public arbitrator.



## For the month of September 2018

**Judge:** Hon. Elizabeth G. Rice

**Parties:** Jonnie Mae Smith v. United Services Group and LSREF2 Clover Property 18, LLC

**Attorneys:** for plaintiff: Robert W. Hitchens; for defendant: Anthony J. Petrillo

**Nature of case:** Personal injury claim due to slip and fall accident

**Verdict:** Directed verdict in favor of defendants, United Services Group and LSREF2 Clover Property 18, LLC, regarding negligence issues of actual notice and regularity of spills. This was followed by a jury verdict in favor of defendants on remaining issue of constructive notice.

## For the month of October 2018

**Judge:** Hon. Gregory Holder

**Parties:** Kathy Ortiz v. Belle City Amusement, Inc.

**Attorneys:** for plaintiff: Scott R. Jeeves and Chris A. Cotton; for defendant: Edward F. Gagain, III

**Nature of Case:** Plaintiff alleged defendant negligently maintained a walkway at the Florida Strawberry Festival, causing her to fall and fracture her elbow.

**Verdict:** Defense verdict after plaintiff asked for \$995,603.76 in past and future damages.

## For the month of October 2018

**Judge:** Hon. Jack Day

**Parties:** Jennifer Anderson v. Amy Schroth and Patricia Weimer

**Attorneys:** for plaintiff: Rob Healy and Evan Bassett; for defendant: Robert Blank and Michael Forte

**Nature of case:** Rear-end collision resulting in two back surgeries

**Verdict:** Defense verdict



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