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BARRISTER

JUNE 2019

SATURDAY, JUNE 22, 2019 | The Ritz-Carlton, Fort Lauderdale

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ON THE COVER
Join us June 22nd for our Annual BCBA Installation -- THE Legal social event in Broward County -- at our new venue, The Ritz-Carlton Fort Lauderdale. Read more on page 13.

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letter from the president

Edwina V. Kessler

It is hard to believe that my term as President of the Broward County Bar Association is almost over. It has been a whirlwind of a year and it's hard to summarize what a learning experience it has been in this allotted space. I'm very proud to be a member of this association. It is an association that allows attorneys to expand their legal knowledge, their practice, and mingle with others in our field. We host approximately 150 events a year, which are filled with the Who's Who of Broward County including distinguished judges and respected attorneys. Even more, by offering quality educational seminars, networking events, mentorship programs, the BCBA has become a mainstay for the legal community in Broward County.

The BCBA is also expanding into the community at large by partnering with other voluntary bar associations, and in October 2018 sponsored the first mentoring picnic. We had a great turn out and many students found a mentor. We also partnered with the Broward County Women Lawyers Association and the 17th Judicial Circuit for the very successful Women Pioneers in our Legal Community. For the first time, we cohosted an event with the Fort Lauderdale Chamber of Commerce and Broward Days. We continued to partner with the Judiciary on many events including the Judicial Jaunt Series. Thank you to all the Judiciary that participate in the BCBA events. B-Connected, our online CLE program, was launched as well as the Job Board. There is so much more, but in short, the BCBA has become a relevant pillar in our community.

These events and relationships would not be possible without the great staff of the BCBA. They are always proposing new ideas for events and ways to improve the value of the BCBA membership. So, how do I adequately express my gratitude to Braulio Rosa, Executive Director; Lauren Riegler Capote, Event and CLE Manager; Debbie Rivero, Bookkeeper & Administrative Assistant; Patricia R. Hernandez, Membership Coordinator; Andrea Salazar, Event Assistant and the LRS department Lyssette Bedon and Malaine Moran? They are, by far, some of the most hard-working and conscientious teams I have had the privilege to work with, and there are no words that can fully express my gratitude and appreciation to the BCBA staff for all the assistance they have provided me throughout this year.

Thank you to the Board of Directors who showed up to the meetings and expressed their opinions. I have enjoyed working and getting to know you all. I could not have done this without the support and guidance of our current Executive Committee: Past President, Tom Oates; President–Elect Michael A. Fischler; Treasurer, Robert C. L. Vaughan and Secretary Jaimie Finizio Bascombe. I will continue to provide my support to the Executive Committee. The BCBA will be in good hands with Michael as President. I also want to welcome Alison F. Smith, incoming Secretary, to the Committee. Thank you to all of the committee and section chairs for your commitment to providing the BCBA members informative programs. Thank you to Past Presidents John Jordan, Robin Moselle, Charles Morehead, and Tom Oates for your leadership and guidance. It is with an extremely heavy heart that I am thanking Charles, who has recently passed. He was a skillful litigator, and an ardent defender of the BCBA and Florida lawyers. While president he argued, and won, the fight regarding the lawyer referral service in front of the Florida Supreme Court. That is just one of the small victories of his overall career. His quick wit, his sharp mind, and his litigation skills will be missed.

I would also like to thank all the members of the BCBA. Without your attendance and enthusiastic participation, there would be no BCBA.

Finally, I would like to invite you all to join me on the evening of June 22nd at our Annual Installation Gala, where I will pass the gavel to our incoming president, and the next year's Board will be sworn in. The theme of this year's Gala is Casino Royale, and it promises to be a night of glamour, fun, dancing, and games of chance. Registration is still open, so don't miss Broward County's Legal social event of the year!

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letter from the young lawyers' president

Brent M. Reitman

It has been a long road, but alas (and for those of you who have borne with me, thank you), this is my final President's Message for the Barrister, as we head toward the Installation Gala on June 22, when the current constellation of Directors of the Young Lawyers Section of the Broward County Bar Association will be discharged, and a new configuration will be installed to begin the next term.

These being my final words on behalf of the Young Lawyer's Section, I want to first thank the Broward County Bar Association and its staff, specifically Braulio Rosa and Lauren R. Capote, who have labored and anguished to ensure that the plethora of programming that we have sought to create has been nothing less than unequivocally successful. We are tremendously lucky to have them.

Additionally, this year would not have been the success that it was, without my Co-Directors on the Board. Words are insufficient to express my gratitude for the amazingly talented Board of Directors of the Young Lawyers Section. The job of a young attorney never seems to get any easier, but despite the tremendous time constraints that their careers lay upon them, the other 14 members of the Young Lawyers Board never cease to amaze me. Under mounting pressure and even higher expectations, the YLS Board continues to volunteer their time at an exceptional rate to ensure that our organization is second to none. I am so proud of what we have been able to accomplish, and even more eager to be outdone by the amazing Board of Directors set to be installed for next year!

This year, we raised a record amount in charitable proceeds at our Golf Tournament for the benefit of Experience Camps, we hosted the first-ever Veteran's Stand Down event to help assist at-risk veterans of our Armed Forces, and held our first Law-LaPALOOZA event where we provided a full day of CLE credits for our members.

Finally, the success this year of the Young Lawyers Section would not have been possible if not for the Judiciary of Broward County. Having been involved with Young Lawyers throughout the state, I have yet to see another county with a Judiciary so involved and supportive of its local bar associations. I would be remiss if I did not candidly admit that every single one of our events this year was enhanced by the presence and support of our Judiciary. Be it starting their dockets late in order to attend our "Breakfast with the Judiciary" events, or giving up their weekends to have a Holiday in February for foster children, or playing in our Golf tournaments, or volunteering their time to lecture for Law-LaPALOOZA, our success is due, in large part, to the wonderful judiciary of our Circuit who have dedicated their time and effort in order to support our Young Lawyers and our community.

I am so grateful for all your support throughout this past year, and I hope that the momentum that we have created takes our Community and future Young Lawyers to great new heights in the upcoming year. B

Private Foundation Alternatives: How Clients Can Give With Fewer Hassles

by David Ratcliffe

Charitable giving should be satisfying, fun, enriching and rewarding for clients. Many individuals and families who desire to engage in charitable giving, and have the resources available to them, create a private foundation. They often begin with great enthusiasm. They are eager to have flexibility in selecting charities to support and to involve family members in their philanthropy. But unfortunately, many later learn they are not ready to take on the many tasks of administering a private foundation.

Their enthusiasm may wane as managing a private foundation becomes divisive and burdensome. Especially for smaller private foundations, the administrative costs and difficulties, unfortunate family dynamics, succession management planning, and government regulations may dampen what should be an exercise rooted in the joys of giving and making a difference.

What are the alternatives for those who no longer want to run a private foundation?

Distribute assets to charities

One way to terminate a private foundation is to give its assets as grants to public charities. That allows the private foundation's management to offload their administrative and regulatory oversight duties and still support charitable purposes similar to those that inspired the creation of their foundation. The trustees or board would need to approve voluntarily terminating the private foundation by distributing all of its assets to the charities, file a final 990 PF, and follow state law that may mandate additional steps to terminate the foundation's legal status.

However, when a private foundation terminates this way, its trustees or board members will likely lose their ability to participate in future grantmaking that results from the transfer. They give up their ability to ensure that grants will be made based on the charitable purpose of the original private foundation.

Convert to a community foundation Fund

There is an alternative strategy for terminating a private foundation while maintaining the long-term philanthropic strategy and ability to guide giving decisions. To do it, clients can use their private foundation's assets to create a charitable fund at a community foundation. Community foundations are local, grantmaking public charities spread across the country. Charitable funds at community foundations enable individuals, families, and businesses to support philanthropy that reflects their values, passions and goals – while the community foundations deal with the administrative responsibilities of managing the funds.

Creation of an endowed donor-advised fund at a community foundation comes with the authority to make grant recommendations. A client can still advise where they would like grants to go, chose a level of participation in the process, and leave it to a community foundation to handle the regulatory, administrative, and grant-documentation duties.

Another option is to dedicate the fund to specific issues and causes. This sets the parameters for awarding grants and leaves it to a community foundation's expertise to allocate resources for maximum impact. And, support for those issues and causes continues in perpetuity – all in the name of the client's original private foundation.

So, if administrative responsibilities diminish the joy of philanthropy for a client, converting a private foundation to a charitable fund at a community foundation is something to consider. It is a way to create powerful, charitable impact on important issues, with prudent costs and fewer headaches. B

David Ratcliffe, a philanthropic services executive for the Community Foundation of Broward, is the former managing director and national philanthropic manager for U.S. Trust. He has 35 years of experience in the financial services industry. David can be reached at dratcliffe@cfbroward.org or 954-761-9503.

Modern Day Crime: Fraud

by Arielle Demby-Berger

The crime du jour is fraud, particularly white-collar. Just tune into Netflix or open your local paper - the Fyre Festival, the college admission scandals, Bernie Madoff, our very own local Rothstein, socialite Anna Delvey, and Elizabeth Holmes of Theranos. What is America's obsession with fraud and white-collar crime? What peaks our collective interests?

Over the past seven years, I have exclusively handled Medicaid Fraud cases in the Attorney General's Office. I have listened to countless jailhouse calls, statements from cooperating defendants, and undercover calls. The most important fact that I gleamed: fraudsters are just like us! Let that sink in for a moment. Fraudsters are not people lurking in the outskirts of society. They are our families and friends, our doctors, dentists, physical therapists, and bankers.

When we hear of a violent crime, we are horrified for the victims, but we do not associate with the criminal. They are not someone we would ever imagine dealing with in our day-to-day life. There is dichotomy between "those types of criminals" and us. What about your local pediatrician? You see him out in the community, you entrust him with the care of your children. Most likely, he does not set out to be a criminal. It is a slow insidious process. At first, he may notice that his neighbor, the dermatologist, seems to be doing a lot better than him. Maybe he makes a mistake on the billing. He puts down an hour visit instead of a half hour. He realizes this once the bill comes back. He made a minor mistake; but, instead of calling the insurance company and saying, "you overpaid me X," he thinks, "what's the big deal? I do work extremely hard and insurance companies reimburse at a notoriously low rate." So, next week he then purposely adds 3 additional hours. "What's the harm?" he thinks. This is how it usually starts. Crime, especially white collar, is usually a slippery slope.

Another thing that makes fraud more palatable is that it is often mislabeled as a "victimless crime." A victim of fraud is not as easily identifiable as a victim of other crimes. Partly, one might think, is the insurance company a sympathetic victim? Absolutely not! However, there are long term consequences of fraud that do have a more pronounced impact. Take for instance a pharmacist I prosecuted. She was moonlighting at a local hospital while owning her own pharmacy. She stole the names and Medicaid ID numbers from several people receiving expensive anti-rejection medications post organ transplants and pretended to order and fill them at her pharmacy. One parent went to her local pharmacy to fill her son's prescription and they said, "it was already filled." It took a lot of scrambling and a police report to get her son's medication. There could have been so much more harm done. When I first started working in Medicaid Fraud, we had just finished a batch of cases in which HIV infusion medications were being watered down. Can you imagine what those victims went through!?

Fraud is not a victimless crime. Ask the victims from Bernie Madoff's schemes. Many lost their entire life savings. The motive is always greed. I would argue that criminals who commit fraud do more harm than some other criminals. Their crimes are well planned and the coverups rather elaborate. Many violent crimes are horrific but some are heat of the moment crimes where a person snaps. Fraud is a meticulous crime that takes time to plan. Many white-collar criminals are just that, white-collar. The doctor, the lawyer, the banker. They should know better. They are in professions of trust, and to prey upon that trust makes them sometimes even more culpable. So, while we are fascinated by the newest scheme, just realize that there is not something sexy or exciting about fraud. At the heart of it all, it is still a crime. B

Arielle Demby-Berger is an Assistant Attorney General and Special Assistant Statewide Prosecutor at the Office of the Attorney General, Medicaid Fraud Control Unit.

Shake, Rattle & Roll with the BCBA on June 22, 2019

by Yanina Zilberman

On Saturday June 22, 2019, get ready to "shake, rattle, and roll" (kudos to Bill Haley and his Comets) and put on your "P-p-p-poker face, p-p-p-poker face" (kudos to Lady Gaga), as the Broward County Bar Association holds its 2019 Annual Installation Dinner & Gala, with a special twist. Casino Royale is the theme of this year's event, which is brought to you by the Officers and Directors of the Broward County Bar Association and Young Lawyers' Section. James Bond will be there in spirit as we celebrate the outstanding 2018-2019 Officers and Directors of the BCBA and Young Lawyers' Section, and the induction of esteemed colleagues as the 2019-2020 Officers and Directors, in an authentic casino setting. There will be poker and card games galore, with an opportunity to show off your gaming acumen. This year's glamorous celebration, which will take place at The Ritz-Carlton in Fort Lauderdale starting at 6 P.M., will include a cocktail reception, a delicious three-course dinner, and dancing and live entertainment. Registration and tickets are available online at browardbar.com/calendar, where you can take advantage of Early Bird Pricing. Each ticket purchase includes valet parking, two drink tickets, delicious bites, dinner and entertainment! Sponsorships are also available. Join us on June 22 for an unforgettable fusion of good-spirited celebration, gaming, dining, and dancing. B

Yanina Zilberman is an Associate Attorney at Egozi & Bennett, P.A, where she practices real estate, commercial, and appellate litigation. She can be contacted at yanina@egozilaw.com.

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Legal Aid Service of Broward County (LAS) and **Coast to Coast Legal Aid of South Florida (CCLA)** are pleased to announce the recipients of their 2019 Annual Recognition Awards. The awards were presented during a Law Day Luncheon co-hosted with the Broward County Bar Association on Friday, May 3, 2019.

To learn more about Legal Aid Programs in Broward and our honorees visit **browardlegalaid.org**

A Mediator's Neutrality

by Darlene R. Gimble

Just as it is important for a judge to avoid the appearance of impropriety, it is also important for a mediator to avoid any instance where their neutrality in the mediation process can be questioned.

In Florida, a mediator should avoid e-filing the Petition for Dissolution of Marriage and opening up the file with the Clerk of Court in a pro se mediation. The Clerk of Court does not understand that you are acting in this particular situation solely as mediator and potentially may list you as counsel for the Petitioner. This opens the door for the Respondent pro se party to claim subsequent to the mediation that you were acting in both roles as counsel and as mediator for the other party. The Petitioner can then be subject to defending against Respondent's Motion to Set Aside the MediatedSettlement Agreement claiming it is a post-nuptial agreement and the mediator may besubpoenaed to testify. This brings about all kinds of issues of confidentiality and whether or not the mediator acted properly in their role as mediator or provided legal advice to one of the pro se parties. Mediators can avoid this situation by instructing the parties once they have reached a mediated agreement to use the instructions and forms available on www.flcourts.org and search for the Family Law Self Help Forms. The parties can file in person at the courthouse using these forms and file along with an Acceptance of Service of Process avoiding the delay and expense of being required to serve the Petition for Dissolution of Marriage.

Further, in order to limit the exposure to potential accusations of impropriety, the mediator should send intake sheets to both parties, collect the same amount of information from the parties, and refrain from comment prior to mediation on the underlying dispute other than the intent to work towards a compromise at mediation. Although a retainer agreement or engagement letter is not required by the Model Standards of Conduct for Mediators, it is a best practice to inform the parties in writing of your role as mediator, your procedures, the fees involved, and collection of those fees. Prior to
the start of mediation collect the signed writing and keep it on record, while any notes and other documentation retained should be shredded following the close of the final session of the mediation.

When an attorney has been hired as a mediator, there is a clear rule that exists restricting you from providing legal advice. This can be addressed and resolved in your opening statement, "Although I am a practicing attorney, that is not my role here today. You have brought your own counsel and they will be instructing you on the law and potential outcomes. I do not have my attorney hat on today…". This statement or other variation for a pro se mediation is recommended. You must elicit information in order to bring the parties to points of realization and eventually a compromise. A party's attorney will be the one advising its client instructing on the law which is imperative to the integrity of the mediation process. Along with the integrity of the mediation process, take all steps necessary to protect against any question as to your integrity. Remember, always err on the side of caution!

Darlene R. Gimble, Esq. of Gimble Law, P.A. has extensive experience in Family law, Commercial litigation, Corporate Law and is a visionary in assisting her business clients.
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The Telephone Consumer Protection Act: A Powerful Consumer Protection Statute Lurking in the Shadows of Mobile Marketing

by Brendan A. Sweeney

Imagine for a moment that a long-term client calls her attorney to discuss some items, and, in passing, the client advises her attorney that she really has been bringing in new customers lately. The attorney congratulates her, and asks how she is drumming up so much new business? The client in turn advises the attorney that she is using cutting edge mobile marketing activities that are regularly sending promotional text messages to current and potential clients. The client asks the attorney if there are any legal issues with this type of marketing, and the attorney responds no. The client then tells the attorney that her telephone number won't stop ringing with new prospective clients. The attorney hangs up the phone and then continues with the day.

Well, the attorney in this scenario better call that client back and advise her of the implications of a very strong consumer protection statute– the Telephone Consumer Protection Statute. In 1991, Congress passed the act, codified at 47 U.S.C. § 227, to address "[v]oluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes." Congress later amended the act via the Junk Fax Protection Act of 2005 and the Truth in Caller ID Act of 2009. However, for the most part, the original statute has not been amended.

The act regulates calls or transmissions made using an automatic telephone dialing system, as well as certain artificial or prerecorded voice calls. Unless a recipient has given prior written consent for telemarketing calls or provided the recipient's number to a creditor, the caller may not:

- Make pre-recorded voice calls or calls via an automatic telephone dialing system to a recipient's cell phone or other mobile device. The act defines ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C § 227(a)(1);
- Send text messages from an automatic telephone dialing system;
- Make pre-recorded voice calls that are non-emergency to a recipient's residential phone line; or
- Send faxes for the collection of a debt.

In addition, a recipient has the right to revoke consent.

If a company violates the act, the recipient can file a private lawsuit against the company and seek: (i) injunctive relief; and (ii) the greater of actual damages or $500 for each violation of the Act. 47 U.S.C. § 227(b)(3).

Additionally, the act provides that a court, "in its discretion," may award treble damages if the defendant "willfully or knowingly" violated the statute. What constitutes a "willful and knowing" violation of the TCPA depends on the court in which the action is filed. Notably, some courts hold that a defendant must know that its actions violate the act, while other courts require only that a plaintiff show the defendant willfully or knowingly sent the unsolicited fax or made the prerecorded call.

Common defenses to claims usually concern whether express consent was provided, whether the consumer has an arbitration agreement, and whether the technology utilized in contacting the consumers is considered an automatic telephone dialing system.

The amount of claims filed throughout the country has been steadily increasing in recent years. Consumer attorneys will often file a class action lawsuit based upon minor violations of the act in efforts to increase the value of their claims. The case law interpreting the act is always evolving due to the changing technological landscape. Attorneys need to be aware of the basic principles of the act and the potential implications of mobile marketing activities. B

Brendan A. Sweeney, Esq., LL.M., Sweeney Law, P.A., is an AV Preeminent Martindale Rated Attorney, that has been selected as a Florida Super Lawyer and Florida Legal Elite in 2019.

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Secrecy or Not, a Sale is a Sale, Says U.S. Supreme Court

by Chris Traina

In a recently-issued opinion, the U.S. Supreme Court rejected the notion that a secret sale of an invention prior to applying for a patent was anything but a sale under U.S. patent law.

The case, *Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA Inc.,* concerned a drug for treating chemotherapy-induced nausea and vomiting. Helsinn Healthcare S. A. ("Helsinn"), a Swiss drug manufacturer, produces the product. Helsinn contracted with Minnesota-based MGI Pharma Inc. ("MGI"), which markets and distributes pharmaceutical products. The terms of the arrangement provided that Helsinn would produce the drug, but would retain ownership of the patents. MGI in turn would purchase the drug exclusively from Helsinn and distribute it within the U.S.

The companies publicly announced that they had entered an arrangement for the production and distribution of the drug. However, the terms of the contract required that the companies keep the details of the product secret. Two years after the companies joined efforts, Helsinn filed the first of several U.S. patent applications covering the drug, and the ones at issue in *Helsinn* ultimately issued as patents.

In time, the drug attracted attention from competitors Teva Pharmaceutical Industries Ltd. and Teva Pharmaceuticals USA Inc. ("Teva") which are, respectively, an Israeli drug manufacturer and its U.S. affiliate. Teva sought approval from the Food and Drug Administration to manufacture a generic version of the drug at issue.

Helsinn sued, alleging patent infringement, and in response Teva challenged the validity of the patent. Teva asserted that the patent was invalid due to Helsinn's contract to sell the drug to MGI more than a year before Helsinn filed the patent application.

For all its complexities, patent law is premised on a very basic *quid pro quo:* if an inventor teaches the public how to do something new, in exchange the inventor gets the right to exclude others from exploiting the invention for a period of years. Or, stated in the reverse, if the invention is not new, the inventor cannot be given a right to exclude others.

Clearly, timing plays a big factor in whether something is new. If an inventor puts their invention in the public space before seeking a patent, U.S. law gives the inventor a one-year grace period, after which the invention is no longer "new" and no patent can be awarded.

The long-settled law was that any sale of a claimed invention, whether public or private, more than a year before submitting an application was a statutory bar to obtaining a patent. 35 U.S.C. §102 (pre-AIA); *Pfaff v. Wells Elecs,* 525 U.S. 55, 68, 119 S. Ct. 304, 312 (1998).

Pfaff, quoting Learned Hand in *Metallizing Engineering Co. v. Kenyon Bearing & Auto Parts Co.,* 153 F.2d 516, 520 (CA2 1946), explains that:

> It is a condition upon an inventor's right to a patent that he shall not exploit his discovery competitively after it is ready for patenting; he must content himself with either secrecy, or legal monopoly.

In 2011, Congress passed the Leahy–Smith America Invents Act (AIA), representing the largest change to U.S. patent law in nearly 60 years. Among the major changes was an overhaul to what constitutes a bar to patentability.

The AIA amended the statute to read, in relevant part, "A person shall be entitled to a patent unless…the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention."

The addition of the language "otherwise available to the public" was at the heart of the dispute in *Helsinn*. The district court concluded that in passing the AIA, Congress changed the on-sale bar to only apply to public sales that disclose the details of the product. Since the Helsinn-MGI arrangement kept such details confidential, the district court reasoned, the sale did not invalidate the patent.

However, the Federal Circuit reversed, concluding that the public disclosure of the existence of the sale from Helsinn to MGI was enough, regardless of whether the details or makeup of the drug were secret. As a result, the Federal Circuit invalidated Helsinn's patent.

In its unanimous opinion, the Supreme Court affirmed the outcome. Its opinion, though, reaches more broadly than the Federal Circuit's. The Supreme Court essentially rejected Helsinn's argument that the AIA deviates from precedent interpreting the on-sale bar.

"The addition of 'or otherwise available to the public' is simply not enough of a change for us to conclude that Congress intended to alter the meaning of the reenacted term 'on sale,'" Justice Thomas wrote.

The opinion will have grave consequences for patent owners who read meaning in the AIA's addition of "otherwise" and, believing secrecy was sufficient, delayed filing until post-sale. For others, at least, the opinion comes as welcome clarity almost a decade later. B

Mr. Traina is a partner and registered patent attorney at Garrity Traina, PLLC. His practice includes protection, registration, and litigation of patents, trademarks, copyrights, and trade secrets

The 2019 Hurricane Season is here, is your home protected?

by Omar Giraldo

The 2019 Hurricane Season officially kicks off June 1 and ends on November 30. The latest projection estimated 13 named tropical storms, with 5 of them becoming hurricanes. There are several things you can do prior to a named storm to ensure your home is protected.

Preparation

Review your insurance policy and ensure you have the right coverage. Ensure that a separate flood policy has been purchased if your home sits on a flood zone. Review your deductible for a Hurricane related loss. This deductible is typically significantly higher than a standard loss deductible. It may be prudent to talk to your agent to see what the premium changes would be in exchange for a lower deductible. If your home has a carport or screened enclosure, make sure these separate structures are covered under your policy. READ YOUR POLICY to see what is covered in the event of a loss, to determine if you need to purchase an additional endorsement. Gather any documentation regarding improvements to your home that have taken place in the last couple of years. This could be crucial to providing evidence of damages if a named storm hits.

Know Your Policy

Know the definition of and difference between "dwelling," "contents," "other structures," and "alternative living expenses," as well as what your individual coverage is for each—if any:

- ***Dwelling***: Generally speaking, this will be to cover the repairs needed for your home;
- ***Contents:*** Generally speaking, this will be your personal property, and such items may include clothing, furniture, some major appliances and so on;
- ***Other structures:*** This may include your fence or other items such as a detached garage—be mindful of what your policy will cover here and how much; and
- ***Alternative living expenses (ALE):*** Also referred to as "loss of use," this particular coverage is the amount your carrier will pay for you to stay in a motel, hotel or alternative living arrangement if you are unable to stay in your home because of loss from "a covered peril."

Named Storm Approaching

Save a digital copy of all your insurance documents, as well as a digital copy to a smartphone. Keep the physical copy in a waterproof bag. This will assist in quickly obtaining them, should you need to report a claim if you suffer a loss. Document the condition of your home and its belongings. A quick walk around the inside and outside of the property with a video on your smartphone will work well. This will provide documentation of your personal belongings that may be damaged in a loss, as well as the condition of your home. Protect your home by ensuring that all the hurricane protection devices are properly installed and secured.

Post Storm

Determine if your property has suffered any damage that is immediately apparent. Sometimes the damage is not immediately apparent and storm winds could compromise the integrity of your roof. The law allows that a claim be reported to your insurance carrier within 3 years of the named storm making landfall. A roof leak that does not make itself apparent until a year after the storm may have been caused by the storm, and thus covered.

Make sure to consult with an insurance attorney to determine what your rights are when presenting an insurance claim to your carrier.

Omar Giraldo is a founding partner of VG Law Group and assists property owners in making claims against their property insurance carriers. He can be reached at ogiraldo@vg.law

Case Law Update

by Debra P. Klauber

Trial court to (hopefully) address constitutionality of "same specialty" requirement in medical negligence cases. A number of recent appellate decisions have dismissed medical malpractice cases where the pre-suit expert retained by the plaintiff was not in the "same specialty" as the named defendant. On rehearing in one such case, the Fifth District remanded the matter with a specific instruction asking the trial court to address the plaintiff's constitutional arguments, if they have been properly raised. *Riggenbach v. Rhodes,* 5D18-1889, 44 Fla. L. Weekly D832 (Fla. 5th DCA March 29, 2019).

Third District rejects four nondelegable duty theories of liability against hospital for its purported responsibility for independent contractor physicians. Under the particular facts of this case, which involved a patient who died after being treated in both the emergency room and the intensive care unit, the Third District concluded that there was no express nondelegable duty (where the incapacitated patient's father signed the consent forms), and no common law nondelegable duty (which had not been properly raised by the patient's family on appeal). The Third District also concluded that there is no statutory nondelegable duty in Florida (aligning itself with the Second District and certifying conflict with the Fourth District on this issue), and no implied contractual nondelegable duty between hospitals and their emergency room patients (again certifying conflict with the Fourth District). Absent a Florida Supreme Court decision, the court expressed that it was "averse to expanding, by judicial dictate, the liability of Florida's hospitals." *Tabraue v. Doctors Hosp., Inc.,* 3D16-1661, 44 Fla. L. Weekly D810 (Fla. 3d DCA March 27, 2019).

Appellate court reverses attorney fee award based on failure to admit the truth of requests for admission where requests addressed the ultimate issue rather than relevant facts. The Fifth District has specifically addressed the question of whether a request for admissions that asks a party to "admit" the ultimate issues in the case can be used to recover attorney's fees at the conclusion of the case. The answer is a resounding no. Where the requests for admission go to the ultimate issues in the case (negligence, causation, damages), which are hotly contested and in dispute, a fee award is not proper. *Sentz v. Tracy,* 5D18-964, 44 Fla. L. Weekly D829 (Fla. 5th DCA March 29, 2019).

Fifth District addresses the issue of third party spoliation and the duty to preserve evidence. The Fifth District reiterated that a duty to preserve evidence may arise in third-party spoliation cases based on the existence of a contract, statute, or properly-served discovery request. Where the alleged spoliator was a witness in the case who had been served with a subpoena for deposition (without a preservation request or a duces tecum) before destroying the computer at issue, the court found that there was no duty for her to have preserved potentially relevant evidence. The court refused to accept the underlying plaintiff's argument that a duty arose when the spoliator had knowledge of or could have foreseen that the litigation would take place. Concluding that such a broad pronouncement would be "tantamount to declaring a general legal duty on any nonparty witness to anticipate the needs of others' lawsuits," the court affirmed a summary judgment in favor of the purported spoliator. *Shamrock-Shamrock, Inc. v. Remark,* 5D18-1987, 44 Fla. L. Weekly D1093 (Fla. 5th DCA April 26, 2019).

Florida Constitution does not allow qualified patients and their caregivers to grow, cultivate and/or process their own marijuana. Although the Florida Constitution has been amended (Article X, section 29) to allow the use of medical marijuana by qualified patients, and holds that such use is not subject to criminal or civil liability under Florida law, it does not allow them to grow, cultivate or process their own marijuana for personal use. Simply put, without the ability to regulate the cultivation practices, the state agencies would not be able to ensure that qualified patients are safely using that marijuana. *Florida Dept. of Health v. Redner,* 1D18-1501, 44 Fla. L. Weekly D873 (April 3, 2019). B

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MEDITATION APP REVIEWS

By Joshua Lida

You may have noticed the topic of maintaining mental health for attorneys has become more prevalent within legal circles.[1] Some attorneys have turned to meditation apps as ways to de-stress and work on their mental health. We had 4 attorneys review 4 different meditation apps to inform the BCBA members of some common apps.[2] Information and feedback on these apps are outlined below.

A special thanks goes to Kathleen Pena, Esq, and our anonymous app reviewers for their help and contributions to this article.

Simple Habit

Subscription options: free; $11.99 monthly; $95.99 yearly; and $299.99 lifetime.

Reviewer's exposure: Used the app daily on an iPhone 7.

Review: The Simple Habit app allows users to search for meditations based on how they are feeling (anxious, tired, etc.). There are also additional search functions and varying levels of meditation practices for beginners and more advanced users. While people can use the app for free, not all the content is available without a premium subscription.

Our reviewer has had an easier time falling asleep since using the app and has found that the app helps ease their anxiety in the morning. The app also helped our reviewer's focus. Further, our reviewer found that on particularly stressful days, the ability to open the app and perform a 5 to 10 minute meditation practice was helpful.

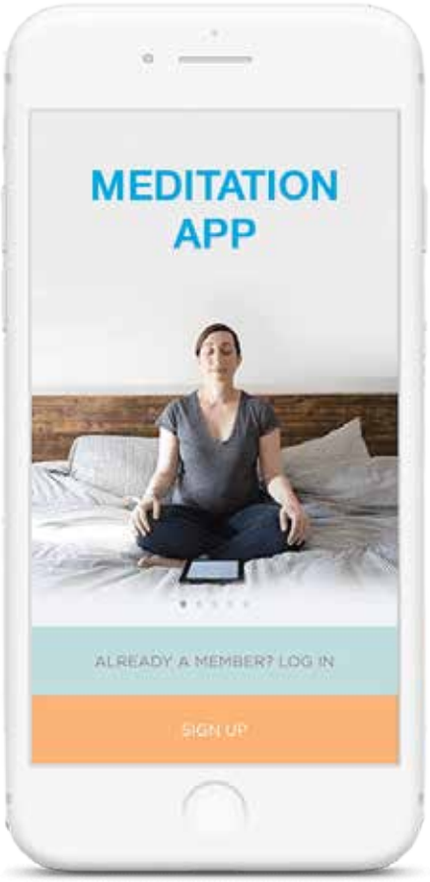
Our reviewer stated: "Overall, I love the app and will continue to use it after this review."

Calm

Subscription options: 7-day free trial; $59.99 yearly; and $399.99 lifetime.

Reviewer's exposure: Used the app twice weekly on an iPad.

Review: The Calm app has "increased focus" and "lessened stress" for our reviewer. Our review found the app lived up to their expectation by helping relieve additional



stress so that they could be better focused. Our reviewer goes on to state the app and meditation helps "declutter the brain and utilize the problem-solving areas of the brain to the fullest extent possible, it is important to focus on solutions."

Overall, our reviewer was very satisfied with the app and has indicated they will continue to use the app after the publishing of this article.

Insight Timer

Subscription options: free; $59.99 yearly; and other additional in-app purchases.

Reviewer's exposure: Used the app 3 to 5 days a week and at night on a Samsung Galaxy 9 Note phone.

Review: Our reviewer stated: "It kept me confident and secure. I was able to lower my anxiety and stress levels by meditating." Our reviewer further stated: "I would rate this app at least an 8. There were different types of meditations and classes to use, a community to connect with, a timer for music, and regular meditation that were good quality." Our reviewer states they will look to other apps to see if there is one which is more user-friendly.

Breethe

Subscription options: free; $399.99 lifetime; additional subscription options.

Reviewer's exposure: Used the app on an iPhone app 2 to 3 times a week during the day and every night to fall asleep.

Review: A feature of this app which the reviewer particularly enjoyed is the Open Eyes component. The reviewer stated: "I like that I can access the app and check in with my breathing while waiting for a hearing and no one knows I am meditating. Due to the open eyes apps I use, I am better able to manage my stress and anxiety."

Our reviewer liked the app and will continue to use the app.

The above-mentioned apps are just a small sampling of the meditation and mindfulness apps out there. The BCBA encourages attorneys to do their own research and see what works for them if interested in meditation practices. B

[1] The Florida Bar and Young Lawyers Division of the Florida Bar both have Mental Health Wellness and Health and Wellness portions dedicated on their websites respectively to highlight the importance of attorneys' health.

[2] The pricing information in this article was taken from each respective app's website and/or the Apple app store page. There may be additional pricing options.

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June

6 YLS Networking Happy Hour
Time: 6:00 p.m. – 8:00 p.m.
Venue: 27 Bar & Lounge
Cost: Free BCBA Members; $10 Non-Members

7 Human Trafficking & Domestic Violence Summit
Time: 8:30 a.m. – 12:00 p.m.
Venue: Jury Assembly Room – Main Courthouse
Cost: No Cost; Open to the Public

12 Bankruptcy CLE: Bankruptcy and the Advantages of E-Discovery
Sponsored by: Contact Discovery Services
Time: 12:00 p.m. – 1:30 p.m.
Venue: BCBA Conference Center
Cost: Free Bankruptcy Section Member; $15 BCBA Member; $30 Non-Member

14 The Investiture of The Honorable Mariya Weekes
Time: 1:30 p.m.
Venue: Broward County Courthouse – Jury Assembly Room (#03320)

14 2019 Taste of the Caribbean
Time: 5:30 p.m. – 8:30 p.m.
Venue: BCBA Conference Center
Cost: $25 General Admission

14 YLS Breakfast with the Judiciary
Sponsored by: Sanchez Fischer Levine, LLP
Time: 7:45 a.m. – 8:45 a.m.
Venue: Broward County Courthouse - Law Library
Cost: $5 BCBA Member; $15 Non-Member; Free Law Students/Interns/Clerks & Judiciary

22 2019 Annual BCBA Installation Casino Royale Gala
Black Tie
Time: 6:00 p.m. – 11:00 p.m.
Venue: The Ritz-Carlton, Fort-Lauderdale
Cost: $100 BCBA Member; $125 Non-Member
Sponsorships Available!

27 YLS Networking Happy Hour
Benefiting Voices for Children
Time: 6:00 p.m. – 8:00 p.m.
Venue: Rec Room
Cost: Free BCBA Members; $10 Non-Members

Save the Date!
Visit our online Calendar for more information.

October 18, 2019
2019 Bench and Bar Convention
Time: 7:30 a.m. – 6:00 p.m.
Venue: Signature Grand

December 5, 2019
BCBA Annual Holiday Party

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