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Med Mal Arbitration Caps
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Case Law Update
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Early Preparation is Key
Deborah Ward

Calendar of Events

ON THE COVER
Did you know as a member of the Broward County Bar Association you can use our Lawyers’ Lounge at the Central Courthouse? Learn more about this great member benefit on page 9.

Photo courtesy of FaneFoto. For contact information see page 16.
We had an outstanding night at Pier 66 for the 2018 Installation Dinner & Gala. Thank you to all of our sponsors. Your support makes our event a great success. Thank you to the BCBA staff: Executive Director Braulio Rosa, Event & CLE Manager Lauren Riegler, and Event & Publications Coordinator Amanda Marks for all of your hard work in organizing the event. The Gala was sold out with 400 attendees, and, as you can see from the photographs in this issue, the theme was a Masquerade Ball. It was wonderful to see the various creative and beautiful masks on display. The band was excellent, and the dance floor was full to the very end of the night. Can’t wait to see what the theme will be next year! I’d also like to thank Carey Fischer for his piano entertainment during the cocktail hour. Carey has been performing during the cocktail hour for numerous years, and it’s always a special addition to the event. I would like to welcome our new Board members: Jamie Alan Cole (Central), Brian M. Karpf (Central), Michele McCaul Ricca (Northeast), Alan Danz (Southwest), and Alejandro Larrazabal (West).

In July Michael Fischler, President Elect, Braulio Rosa, Lauren Riegler, and I attended the Florida Bar Voluntary Bar Leader Conference. This is an annual gathering of voluntary bar associations from across the entire state. The event is a great way to make great connections with other voluntary bar associations as well as with Florida Bar leadership. The conference featured Florida Bar President Michelle Suskauer, who discussed her plans for the year.

The month of August is traditionally the month that the BCBA plans the association’s events and programs for the entire year. For the last few years, the Board Directors has discussed the need for long-term strategic planning. As such, this year, we are hosting a day and half long strategic planning effort at our Board of Directors’ Retreat. In preparation for the session, we have sent out short surveys to various stakeholders. While in the past, we have held smaller strategic planning sessions, I look forward to seeing what suggestions the survey brings and brainstorming with our Board of Directors and other stakeholders to develop a longer-term vision and plan. Strategic planning will address the needs of our members to ensure that the services we provide will continue to bring value well into the future.

If you have not been to the Lawyers’ Lounge lately, as you can see from the cover, it looks a little different. Thank you to Ben Farbstein for loaning the BCBA the artwork. If you have never stopped by the lounge, I encourage you to do so. It really does have the fastest internet connection in the Building. We hope to continue to improve and add to the lounge—the next addition hopefully will be a computer.

This publication would not be possible without our advertisers, sponsors and those that contribute by providing ideas and/or articles. Thank you to the Publicity Committee for all you do! If you would like to get involved in the Publicity Committee or to advertise, please contact Amanda Marks at amanda@browardbar.org.
31st Annual Charity Golf Tournament

The Broward County Bar Association Young Lawyers Section is proud to announce Experience Camps as its charitable beneficiary for the 31st Annual Charity Golf Tournament! Proceeds from this tournament and related events will be donated to Experience Camps.

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I certainly hope that everyone is off to an amazing summer thus far and have not let the erratic or often painful weather slow anyone down.

As a young lawyer coming out of law school, I was absolutely thrilled when Michael J. Satz, State Attorney for the Seventeenth Judicial Circuit, gave me my first job. Being a prosecutor for Broward County was one of the most educational, rewarding, and meaningful experiences of my life and certainly, what I believe to be an incredible way to begin a career.

As a relatively inexperienced prosecutor, the learning curve is quite drastic as you are given a tremendous amount of responsibility in protecting the public and making sure that justice is done – juxtaposed against a background of very little experience and minimal life experiences.

So, it was in that setting that one of the most often repeated phrases was said to me by a Defense attorney: “Back when I had your job, I would [insert extremely good or extremely poor advice on the situation]” Such was a phrase that was uttered on so numerous of occasions that it became “expected” in almost any situation. So expected, in fact, that when such advice was accepted and things went “poorly” nobody ever wanted to hear the excuse: “…but Defense counsel told me…”.

This was a tough situation as a young attorney. While it was true that as a prosecutor, many of the defense attorneys that you dealt with from day to day were in fact former prosecutors. But, how does one know when to take the good advice and when to reject bad advice? When is someone is trying to take advantage of your inexperience versus when is someone offering genuinely good advice that should be heeded? To be fair, the instances where bad advice was offered were few compared to the pearls of wisdom that experienced and trustworthy colleagues would offer. However, when bad advice was accepted, the results were usually so catastrophic that those moments are the ones that really stand out in memory.

Accepting advice coming from a source of familiarity is something that people inherently want to do. It is like taking golf swing advice from the person in the round who is playing the best. While it may seem like the thing to do at the time – in may not pay off in the long run.

Eventually, the correct response to any of these situations is a function of time, knowledge, and experience.

This experience, one that I have personally lived through, and one which I am sure countless others have found themselves, is the reason that the Young Lawyer Section is so proud of our membership services such as the Bootcamp Series.

The Bootcamp series is a series of short interactive sessions which young lawyers can hear from judges, practitioners, and contemporaries on how to avoid making decisions of inexperience and to accelerate the learning process. In some of the interactive sessions, participants get to argue with judges and move various items into evidence and deal with live-time objections. In fact, the YLS Bootcamp was voted the 2017 Member Service Project of the Year by the Young Lawyers Division of the Florida Bar and has been a continual success for our members.

However, this year, we are going to take our member services to new heights. This year, we will be endeavoring on our most ambitious member service project yet – the Young Lawyer’s Bench and Bar Convention.

Instead of merely offering a few topical areas per year (which is the unfortunate limitation of the Boot Camp construct) we plan on having plenary and breakout sessions that tackle a variety of legal areas and situations including emerging topics in the law that could inspire young lawyers. There will be a full-day of seminars aimed to accelerate the learning process and build comfort and familiarity between young lawyers and our esteemed judiciary. We look forward to seeing you there!
Annual Roger H. Staley Real Property Seminar

What is the tie between this Seminar, the Broward Bar Foundation, Attorneys’ Real Estate Council of Broward County, and you?

*It is your desire to learn and the passion Mr. Staley had for these organizations and in educating inquiring minds.*

Friday, September 21, 2018
8:30 a.m. - 3:00 p.m.
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Questions? Contact Lauren Riegler at lauren@browardbar.org

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TAKE ADVANTAGE OF
THE BCBA LAWYERS’ LOUNGE

by Nancy Brodzki

I’m going to let you in on the best-kept secret in our BCBA community. You can thank me later. Tucked away inside the Clerk’s office to the right of the attorney’s window, on the first floor of the west wing of our courthouse, is the Broward County Bar Association’s “members only” lawyers’ lounge. In this comfortable, well-appointed room, you’ll find couches and tables, desks, high-speed internet (the fastest in the courthouse by far) and a free-standing printer/copier/scanner. As members, you will be given the wi-fi password along with a personal code for the printer/copier/scanner, which will be automatically billed to your BCBA account at the incredible low price of $0.10 per copy! Such a deal! (Please contact Patricia Hernandez our Membership Coordinator at patricia@broward-bar.org to set up your code.)

Whether your office is across the street from the courthouse or in another county, this quiet yet comfortable work space is perfect for that break during trial to work on your closing, or to meet with opposing counsel to work out an agreement, or to print out documents just emailed to you from the office. The convenience is unbeatable. And for those members who work primarily in the west wing, it is an excellent alternative to the law library.

I would be remiss if I didn’t mention that we have our Clerk of Court, Ms. Brenda D. Forman, to thank for providing the space for this lounge within the Clerk’s office. The BCBA is fortunate to have such a good working relationship with the Clerk’s office, the Office of Court Administration, as well as our Chief Judge, Jack Tuter. These relationships help us provide even more services to our members and to the community at large.

So, take a few minutes next time you’re at the courthouse to pop in to the BCBA Lawyers’ Lounge, and see what you’ve been missing!

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The Florida Medical Malpractice Arbitration caps on intangible damages were declared unconstitutional recently by Miami-Dade County, Circuit Judge Jose M. Rodriguez in response to Dr. Taylor Poole’s post-trial motion to reduce the jury’s verdict to the level of the caps. These caps are the last remaining vestiges of the statutory scheme designed to limit intangible damages in medical malpractice cases.

The Florida Legislature passed the statutes authorizing the Arbitration caps over thirty years ago in response to concerns about a medical malpractice crisis. The supporters of the caps argued that medical malpractice insurance was becoming astronomically expensive. This made acquiring the coverage more difficult. They added to their arguments that verdicts in medical malpractice cases were too large. The supporters believed that doctors were leaving the state because they couldn’t afford malpractice insurance and were afraid of the verdicts. This, it was argued, would make it increasingly difficult for the citizens of the state to have access to quality health care. Following years of public discussion of the issues, the Legislature, about fifteen years ago, capped the recoverable intangible damages in all medical malpractice cases, regardless of whether anyone elected to arbitrate their claims. These statutes, when taken together, constitute a statutory scheme employed by the Legislature to limit the damages that could be recovered for pain and suffering in all medical malpractice cases.

The public debate wasn’t quieted by this Legislation and eventually a case challenging one of the caps made it to the Florida Supreme Court.

In McCall v United States of America that Court declared the general caps on intangible damages unconstitutional in wrongful death/medical malpractice cases. The McCall Court held that the caps violated the Equal Protection Clause of Florida’s constitution. The majority opinion devotes quite some time to debunking the medical malpractice crisis argument made by the caps supporters. The same logic led to the decision in North Broward Hospital District v Kalitan. That case held that the general caps in personal injury/medical malpractice cases were also unconstitutional. They were also in violation of the Equal Protection Clause. The only caps left are those under the Arbitration statutes.

There’s very little precedential value, strictly speaking, to Judge Rodriguez’s order because it’s a single Circuit Court opinion. However, the opinion is detailed and contains findings of fact and a sophisticated legal analysis. It appears that Judge Rodriguez relied in part on the notion of “doctrinal developments” since the decisions declaring the arbitration caps constitutional. The doctrinal developments that permit a lower court to deviate from precedent if since the precedent doctrinal developments had occurred that indicate that the superior court would rule differently now. Judge Rodriguez didn’t believe the so-called medical malpractice insurance crisis was really a crisis at all or didn’t believe that it was still in existence. In relying on these conclusions, Judge Rodriguez was, in effect, echoing the view already articulated in both McCall and Kalitan. Finally, he indicated that if McCall and Kalitan Courts held that capping the recovery in medical malpractice cases was arbitrary, irrational and fundamentally offensive to the notions of equal justice, a law that allowed a defendant to have the power to limit a plaintiff’s recovery was equally, if not more, arbitrary, irrational and offensive.

The decision isn’t a surprise in light of the previous decisions in McCall and Kalitan. The trend is clearly away from caps and towards treating medical malpractice plaintiffs in the same way that plaintiffs in other kinds of personal injury and wrongful death cases are treated. There’s a growing view that singling out medical malpractice plaintiffs and limiting their intangible damages just isn’t fair.
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Case Law Update

by Debra P. Klauber

The filing of a motion to enlarge the time to accept a proposal for settlement does not automatically toll the 30-day deadline for accepting that proposal.

The Florida Supreme Court addressed a conflict between the Second and Fifth District Courts of Appeal, holding that a motion to enlarge does not, itself, toll the time for accepting a proposal for settlement. The Florida Supreme Court also concluded that its ruling shall apply to all pending cases, notwithstanding an argument that this new ruling be applied prospectively given the differing opinions of the intermediate appellate courts. Koppel v. Ochoa, SC156-1474, 43 Fla. L. Weekly S225 (May 17, 2018).

Circuit court holds medical malpractice arbitration caps unconstitutional.

Following a jury verdict which awarded $500,000 to the plaintiffs in a medical malpractice lawsuit, the defendant doctor sought to amend the judgment and reduce the award so that the noneconomic damages were capped at $350,000. The reduction was based on the fact that the plaintiffs had rejected the doctor’s presuit offer to arbitrate the claim. Following the rationale from recent appellate and Florida Supreme Court decisions related to the medical malpractice caps, Miami-Dade Circuit Judge Jose Rodriguez entered an order finding that the caps applicable to noneconomic damages following a presuit offer to arbitrate are unconstitutional and violate the equal protection clause. DeFranko v. Poole, Miami-Dade Circuit Case 16511-CA-15, June 28, 2018.

Appellate court refuses to enforce arbitration clause in lawyer’s retainer agreement.

The Fourth District held that an arbitration clause in a lawyer’s retainer agreement was unenforceable because it violated the Rules Regulating the Florida Bar. Because the retainer agreement never put the client on notice that she should consider consulting with another lawyer before signing an agreement with a mandatory arbitration requirement, it was deemed invalid and her lawsuit for malpractice against the attorney was reinstated by the appellate court. Owens v. Corrigan, 4D17-2740 (Fla. 4th DCA June 27, 2018).

Employer did not breach a legal duty to employee in providing her with alcohol and then allowing her to travel home without supervision.

The personal representative of the estate of a deceased employee, who was struck by a train while walking home after being served alcohol at work, attempted to sue her employer for negligence. The estate claimed that the employer should have monitored her safety or provided her with transportation home. Both the trial court and the appellate court concluded that although there is a special relationship between an employer and an employee and a corresponding duty to protect the employee within the scope of her employment, no such duty extends beyond the workplace, when an employee is traveling home. Where the employee was voluntarily intoxicated, and the employer did not place her in a dangerous instrumentality, the employer had no legal duty to her at the time of the tragic accident when she opted to walk along the train tracks. Salerno v. Del Mar Financial Service, LLC, 4D17-305, 43 Fla. L. Weekly D1249 (Fla. 4th DCA June 6, 2018).

Reminder: you cannot appeal an order awarding attorneys’ fees without getting a final order on the amount thereof.

The appellate courts continue to reiterate that an order determining one party’s right to recover attorneys’ fees, which does not set the amount of those fees, is a nonappealable, nonfinal order that is not ripe for review. Acosta v. Tower Hill Signature Ins. Co., 43 Fla. L. Weekly D779, 3D16-3855 & 3D17-605 (Fla. 3d DCA April 11, 2018); Igberaeze v. Village of Stoneybrook II Condo. Assn., Inc., 43 Fla. L. Weekly D669, 2D17-1676 (Fla. 2d DCA March 28, 2018).

Debra P. Klauber, Esq., a partner with Haliczer Pettis & Schwamm, oversees the firm’s trial support and appellate practice and provides guidance to litigators throughout Florida. Debbie can be reached at 954-523-9922 or dklauber@hpslegal.com.
The BCBA recently donated 30 coffee makers to the 17th Judicial Circuit for the courtroom jury rooms. THANK YOU to our sponsors who made this possible! They are Shutts & Bowen LLP, Cohen Blostein & Ayala, P.A., and Krupnick Campbell Malone Buser Slama Hancock Liberman.

Pictured (L to R) are managing partners Joe Goldstein (Shutts & Bowen), Jay Cohen (Cohen Blostein & Ayala PA), Executive Director Braulio N. Rosa, and Immediate Past President Thomas D. Oates. Seated is Chief Judge Jack Tuter.
Hurricane Season: Early Preparation is Key

by Deborah Ward

Procrastination is not an uncommon trait, but one we should avoid for hurricane season. Many of us who have been through multiple hurricane seasons and hurricanes in South Florida, including Hurricane Andrew, know the importance of being prepared. But, how prepared are we really? Last year, we were fortunate not to sustain a direct hit from Hurricane Irma, but its effects were felt. Many were left without electricity, and some without clean water, for at least several days. Some were left without power for more than a week. Preparing early for your home and family is key to minimizing stress during these intense times of the year.

Hurricane supplies for your home and family can be gathered prior to hurricane season. **Essentials** include:

- Full 1-month supply of prescription medications, including your insurance policies (ensure they are kept dry (place in plastic zipper bag or container) and safely stored. You may want to scan them and email them to yourself as well).
- Full propane tank and spare tank (BBQ is a great alternative cooking source); and
- Copies of all vital documents, including medical records, insurance policies (ensure they are kept dry in a safe place).

Other important reminders are for items and things we don’t usually think of, including when planning for children, pets, or the elderly:

- Wrench or pliers to turn off utilities;
- Paper products such as utensils, plates and paper towels;
- Sunscreen and insect repellent;
- A list, on paper, of vital contacts’ information and numbers (in case you cannot use your cell phone or computer to access this information. Provide a copy to your family and support network);

**Children**

- Infants: diapers, formula, bottles, wipes, diaper rash cream;
- Toys, board games, books;
- Include pediatrician contact information in your vital contact list, as discussed above;

**Pets**

- Leash and collar with identification;
- Travel carrier if needed;
- Medications or support items for pets that suffer from anxiety during storms;
- Copy of shot records, vital documents;

**Elderly**

- Plan: If loved one is not staying with you, make sure there is a plan in place, including evacuation to safe location to accommodate any medical needs. Discuss the plan with friends, family, and your loved one to ensure a support network is established. Discuss with elderly members how they should stay informed during the storm, including worst case scenario where phone contact is available;
- Hearing aids and batteries;
- Medical equipment and supplies;
- If they require routine medical treatments, discuss with their clinic and/or medical provider plan including identifying back-up providers.

Don’t forget to **Make a Plan** with your family, office and support network. Your plan should include:

- Where and when you will meet in the event you get separated or communication is lost;
- The safest and quickest way out of your home or neighborhood (review this with your family);
- If you are in an evacuation zone, ensuring your home is protected and knowing where you plan to evaluate to; and
- Arrangements for those who have any special needs.

Although this list is expansive, it is not complete. Make sure you are knowledgeable and up to date about hurricane preparation and safety. Prepare ahead of time and accommodate for your family’s individual needs.

For more information, visit:

[https://www.ready.gov/hurricane-toolkit](https://www.ready.gov/hurricane-toolkit)


[https://www.cdc.gov/features/hurricane-preparedness/index.html](https://www.cdc.gov/features/hurricane-preparedness/index.html)

[https://www.weather.gov/wrn/hurricane-preparedness](https://www.weather.gov/wrn/hurricane-preparedness)


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August

1 Northeast Broward Luncheon PIP with Judges Lee & Davis
   Time: 12:00 p.m. – 1:30 p.m.
   Venue: ROIG Lawyers
   Cost: $15 BCBA Members; $25 Non-members

9 YLS Happy Hour
   Time: 7:00 p.m.
   Venue: Lauderdale Yacht Club
   Cost: No Charge
   Bring school supplies to receive drink ticket!

24 Investiture of The Honorable Tarlika Nunez-Navarro
   Time: 1:30 p.m.
   Venue: Broward County Courthouse Room #16175

September

6 Family Mediation Training
   Hosted by: Florida Mediation Training Center
   Training Dates: September 6, 7, 8, 15 & 16
   Time: 8:30 a.m. – 5:45 p.m.
   Cost: $875

21 Annual Roger Staley Memorial Seminar
   6 General, 1 Ethics, & 1 Technology CLE Credits
   Time: 8:30 a.m. – 3:00 p.m.
   Venue: BCBA Conference Center
   Cost: $95 BCBA Member; $125 Non-Member

25 The Evolution of Self-Driving Vehicles
   Time: 12:00 p.m. – 1:30 p.m.
   Venue: Kelley/Uustal
   Cost: $15 BCBA Member; $25 Non-Member

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

31st Annual YLS Charity Golf Tournament
Benefitting Experience Camps
Sponsorships Available!
Date: November 10, 2018
Time: 8:00 a.m.
Venue: Jacaranda Golf Club
Cost: $150 Single Player; $500 Foursome

2018 BCBA Annual Holiday Party
Date: November 29, 2018
Time: 5:30 p.m. – 8:00 p.m.

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