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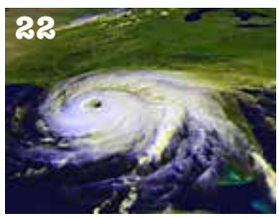
ON THE COVER
New Professionalism & Civility Magistrate Program: (Bottom row left to right) Gary C. Rosen, Judge Jeffrey R. Levenson, Chief Judge Jack Tuter, Judge Sandra Perlman, Jamie A. Cole. (Top row left to right) Jay Kim, D. David Keller, Ira L. Libanoff, David W. Black, and James S. Haliczer. Learn more about this new program on Page 14.

inside this issue



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letter from the president

Thomas Daniel Oates

As my Presidency ends, it is hard to believe it has been almost a full calendar year since my term began. This year has been full of new events, setting record membership numbers, advancing the mission of the Broward County Bar Association (BCBA) and emphasizing our presence as the preeminent Voluntary Bar in the State of Florida. Over the course of my tenure in leadership, I've come to understand that other voluntary bars look to Broward County as the example of how it's done. Through our dedication to innovation, our presence can be felt throughout the State.

This year the BCBA participated in some program firsts and new initiatives, of which I am extremely proud. Chief among them was the February 16th event, Broward Legal Firsts: A Celebration of the Black Legal Community, inspired and chaired by the Honorable Judge Ilona Holmes. Along with the efforts of our Criminal Law Section we hosted Professor Charles W. Ehrhardt for an evidence CLE, and offered free admission to government employed attorneys. A new pilot was started, the Professionalism and Civility Magistrate Program, the purpose of which is to promote the appropriate level of professionalism and civility among the lawyers practicing in our Circuit. We also made significant investments in audio and visual equipment in the Bar Conference Center to accommodate video-recorded CLE events to expand access to our members.

However, there is one truth I cannot avoid. I could not have done this without my executive committee, Winney Kessler (President-Elect), Michael Fischler (Treasurer), Robert Vaughan (Secretary), and Charles Morehead (Immediate Past President). These individuals were a constant source of support along with our dedicated Board of Directors, Section and Committee Chairs, and Bar staff. When President, you quickly recognize that despite how easy our Executive Director, Braulio Rosa, makes the daily Bar operations appear, there is no single person who dedicates more time or effort to our organization than him. We are fortunate to have a steadfast Executive Director who places the importance of furthering our organization as his top priority.

At this month's Installation Gala I will proudly introduce our next President, Edwina "Winney" V. Kessler. Winney is a fellow Gator graduate and partner at Catri, Holton, Kessler & Kessler P.A. I will continue to provide the same level of dedicated support to Winney, as she has provided me with over the last several years. I have no doubt that the BCBA is in good hands. With Winney's leadership the BCBA will continue to be a respected leader among our peers, and will continue to grow the broad range of offered events and programs.

The Broward County Bar Association has never been stronger than it is today. With almost 3,400 members, 160 CLE seminars annually, a robust and profitable lawyer referral service, together with an unmatched staff, makes our bar simply the best it can be.

I look forward to seeing all of you at the 2018 Annual Installation: Masquerade Gala, on June 23, 2018 at the Pier Sixty-Six Crystal Ballroom. My apologies in advance for my inability to hide my excitement as I take on my next role; Immediate Past President!

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letter from the young lawyers' president

Sara M. Sandler

"Sometimes the light's all shining on me. Other times I can barely see. Lately it occurs to me, what a long strange trip it's been." As this year comes to a close, I can't help but reflect on all the Young Lawyers Section has accomplished. It has truly been an incredible year – one that I am extremely proud of and one that I hope you, the Broward legal community, is proud of too. For the third year in a row, YLS was named the Florida Bar Young Lawyers Divisions' Affiliate of the Year, a true honor. And, while this recognition is certainly one to be proud of, it is only one of several defining moments of our year.

Over the last year, YLS has helped to raise and donate close to $100,000 for 16 local charities here in Broward County and supported numerous organizations through school supplies drives, our annual toy drive, a pet supplies drive, and our snack drive to benefit the Fort Lauderdale Police Department. YLS members have read to hundreds of pre-K and kindergarten students throughout Broward County through our Read for the Record and Lawyers for Literacy programs. We have supported local foster children through our Holiday in February event and were event able to be a part of National Adoption Day, where over 60 Broward County children were adopted. This past year also saw Broward County's talent shine in our Thriller Dance Challenge and our charity fashion show, Catwalk Conquers Cancer. YLS came together with other local voluntary bar associations when our community needed it most – putting together a Hurricane Irma Relief Drive and raising funds for the family of Sergeant La David Johnson. We helped make handmade pillows for kids being treated at Nicklaus Children's Hospital and encouraged Random Acts of Kindness over the holidays with our RAK Up Some Kindness campaign.

Aside from our efforts in the community, YLS also provided our membership with numerous networking and CLE opportunities, including our award-winning Boot Camp Series, CLE luncheons, quarterly breakfasts with the judiciary, and our sweatworking events. We are honored that so many of our local judiciary and esteemed Broward attorneys participated in and spoke at many of our events, providing great opportunities for our members and showing such great support for our organization.

Of course, none of this could have been done without our incredible and dedicated Board of Directors, each of whom has dedicated countless hours to the community and our membership. Nor would we have been so successful without the invaluable assistance and support of Braulio Rosa, Amanda Marks, Lauren Riegler, and the entire BCBA staff.

I hope you all have found this past year fulfilling. I hope you have enjoyed these monthly YLS updates interwoven with some Grateful Dead philosophy. Most importantly, I hope you continue your support of and involvement in the Young Lawyers Section and the Broward legal community. With the leadership of our incoming President, Brent Reitman, next year promises to be another engaging and successful year full of quality programming, events, and volunteer opportunities that I hope you have come to expect from your Young Lawyers Section, so stay tuned. Get a sneak peak of what's in store for next year by attending the BCBA's annual Installation Dinner taking place on Saturday, April 23, 2018. It promises to be, as always, an incredible evening.

It has been a true honor getting to lead this amazing organization and I thank you all for allowing me to do so.

Until next time, keep truckin'.

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FLORIDA CONSTRUCTION LAW UPDATE

by Jared Guberman

1. A case out of the Florida Supreme Court will likely have a big impact on the duty of insurers to defend in Florida construction defect cases. *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.,* 232 So. 3d 273 (Fla. 2017), held that the notice and repair process set forth in Chapter 558, *Florida Statutes*, is a "suit" within the meaning of the commercial general liability policy issued by Crum & Forster Specialty Insurance Company ("C&F") to Altman Contractors, Inc. ("Altman") because the Chapter 558 presuit process is an "alternative dispute resolution proceeding" as defined in the policy's definition of "suit."

Altman was the general contractor for the construction of a high-rise residential condominium in Broward County, Florida, Sapphire Condominium ("Sapphire"). Altman was insured by C&F for the Sapphire project. The policy provided in pertinent part:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

Under the policy "suit" was defined as "a civil proceeding in which damages because of 'bodily injury,' [or] 'property damage' . . . are alleged" which includes "[a]n arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or [a]ny other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent." The policy did not define civil proceeding or alternative dispute resolution proceeding.

Sapphire served Altman with numerous Chapter 558 notices of claim. When Altman notified C&F of Sapphire's claims and demanded C&F to defend and indemnify it, C&F denied that the notices of claims invoked its duty to defend because the notices did not constitute a "suit." After an analysis of Chapter 558, the Florida Supreme Court concluded that the Chapter 558 process does not constitute a "civil proceeding," but is an "alternative dispute resolution proceeding" within the plain meaning of the policy term. As a result, an insurer has a duty to defend the insured at a much earlier stage in the process.

2. The time to bring construction related lawsuits must not be overlooked. Section 95.11(3)(c), *Florida Statutes*, sets forth the statute of limitations applicable to construction defect claims. There is a four-year statute of limitations on actions founded on the design, planning, or construction of an improvement to real property. The time of commencement begins on the latest of the following trigger dates: actual possession [of the property] by the owner; issuance of a certificate of occupancy; abandonment of construction if [the job was] not completed; or date of completion or termination of the contract between the engineer, architect, or licensed contractor.

This year the Fourth District Court of Appeal, in *Inlet Marina of Palm Beach, Ltd. v. Sea Diversified, Inc.*, 237 So. 3d 395 (Fla. 4th DCA 2018), addressed the statute of limitations in section 95.11(3)(c).

Inlet Marina of Palm Beach, LTD. ("Marina") sued the engineer alleging causes of action arising from the engineer's design of a concrete runway slab upon which forklifts transport boats from a boat barn to the water launch area. The slab developed cracks, spalling, and other deterioration over a period of time. The engineer filed a motion for summary judgment, arguing that the four-year statute of limitations barred the Plaintiff's causes of action. The circuit court granted the engineer's motion. The Marina appealed.

Pursuant to section 95.11(3)(c), Florida Statutes, " [a]n action founded on the design, planning, or construction of an improvement to real property" shall be commenced within four years from "the date of completion or termination of the contract between the professional engineer... *except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence."*(emphasis added). The court found that based on *Performing Arts Ctr. Auth. v. Clark Constr. Grp., Inc.,* 789 So.2d 392, 394 (Fla. 4th DCA 2001), whether the facts and circumstances were sufficient to put the Marina on notice that a cause of action existed before the four-year limitations period expired should be a question for the jury. As a result, there was a genuine issue of material fact as to when the Marina discovered, or should have discovered, the design defect in the runway slab with the exercise of due diligence precluding summary judgment. B

Jared Guberman, Esq. is a construction litigation attorney with Ferencik Libanoff Brandt Bustamante & Goldstein, P.A. in Fort Lauderdale. He may be contacted at 954-474-8080 or by e-mail at jguberman@flblawyers.com

"Tell me what's changed"

by Arthur Garcia, Jr. and Shelley H. Leinicke

It was a disappointing day for Dennis who just finished representing a client in mediation and was on his way to the Grub Stop when he bumped into Patti. Sensing Dennis' frustration, Patti offered to join him. While talking over the Grub Stop's distinctive tea, Dennis blurted out, "I am tired of hearing, 'Tell me what's changed.' I hear this at every mediation; then the settlement offer is scarcely better than the pre-suit offer."

Mediator Mike, also enjoying the tea – raspberry is his favorite – overheard and asked to join the conversation. It was notetaking time again.

Mediator Mike asked if they remembered the famous line from the movie Jerry Maguire. Of course, said Dennis: "Show me the money!"

"Not that one. The other one: 'Help me help you,' " Mike said." 'Tell me what's changed' is another way of saying 'Help me help you.' "

Attorneys and claims representatives report up a ladder to reach the source of their settlement authority. No one on that ladder wants to seek new authority after a case has been evaluated without additional support. Well before mediation, present all circumstances that changed from those that formed the original evaluation, including medical records, complete medical bills to include the total amount billed, amounts still owed and collateral source liens, diagnostic studies and changes in earnings and earning capacity.

Update discovery. If there are witnesses whose testimony you want considered, take their depositions. Announcing in mediation what a witness might say is neither enough nor in time for consideration and evaluation. Ensure there is no outstanding discovery pending that has been directed to your client and that all answers are complete. Discovery responses that may not have been complete when originally answered should be updated.

How the changed information is presented can be as important in the negotiation process as the updates themselves. Send all updated information in a well prepared and professional-looking settlement brochure. Point out all new information and changes from earlier submissions that you think merit further consideration. With the settlement brochure, include the demand your client will make at mediation and, if it's different from prior demands, explain why.

With this new information, the defense representatives are now armed to report up the ladder so better settlement authority can be sent down and you won't again hear, "tell me what's changed." B

Art Garcia and Shelley H. Leinicke are South Florida-based mediators with Upchurch Watson White & Max Mediation Group. The firm's areas of practice include mediation, Arbitration and e-discovery. For more information, visit uww-adr.com or call 305-266-1224.

Broward County Circuit Court's New Professionalism and Civility Magistrate Program

by Gary C. Rosen and Jamie A. Cole

In 2013, the Florida Supreme Court in *Florida Bar v. Norkin*, 132 So. 2d 77, 89 (Fla. 2013), stated that it was "profoundly concerned with the lack of civility and professionalism demonstrated by some Bar members," and referenced a survey that showed that over two-thirds of the Florida Bar members who responded believed that "in recent years, relationships between attorneys have become more adversarial."

Unfortunately, since then, the situation has gotten even worse, and things are no better in Broward County. Nearly all Broward litigators have experienced or heard anecdotes about lawyers who have discredited themselves and the legal profession with abhorrent behavior. Whether it is obstreperous conduct during depositions, foul or insulting language with adversaries, or simply refusing to follow normal protocols and courtesies in scheduling hearings or depositions, unprofessional behavior is a problem that has not been effectively tackled by professionalism panels that lack any enforcement authority or even the ability to require lawyers to appear before them. Broward judges are now about to try a new solution. This month, three divisions of the Broward Civil Circuit bench are participating in a pilot professionalism and civility magistrate program, enlisting the services of some of Broward's experienced civil litigators to hear referred matters relating to professionalism and civility, and issue reports and recommendations of sanctions arising from that conduct.

The idea for the program emerged from the Broward County Bar Association's Large Law Firm Managing Partners Committee about a year ago. Over the past several months, a small working group has developed the concept with an eye toward deterring those few lawyers whose behavior repeatedly strays outside professionally acceptable boundaries. These managing partners have enlisted colleagues who have at least 20 years of civil litigation experience and are located here in Broward County to serve as magistrates. The magistrates are volunteers and will serve for no compensation.

On May 2, 2018, Chief Judge Tuter issued Administrative Order #2018-35-Civ detailing the program. The stated purpose of the program is "to promote and better enforce the appropriate level of professionalism and civility among the lawyers practicing in the Civil Circuit divisions of Broward County Circuit Court." A participating judge may refer a matter to a volunteer magistrate if in the court's judgment the conduct of an attorney should be examined. The purpose of the magistrate program is not to address routine matters; rather, the only types of matters that are to be referred to a magistrate are those that concern "[b]ehavior involving issues of civility in the courtroom, discovery or other interaction between counsel that undermines the integrity or professionalism of the Bar, including:

i. Non-routine discovery disputes involving conduct that has occurred more than once
ii. Non-routine discovery disputes where one party/counsel's conduct is the subject of multiple motions
iii. Conduct that is the subject of a sanctions motion that the trial court determines has prima facie merit based on written submissions
iv. Repetitive disregard for scheduling protocols.

All filings with the magistrate shall be through the electronic filing system and will be a matter of public record. Following submission of written submissions by all parties, a hearing will be held before the magistrate, and a report and recommendation will be issued. The magistrate process is designed to work expeditiously, with the total time from referral to the issuance of a report and recommendation estimated to be no more than 45 days.

Admittedly, this magistrate program is an experiment that may require modification and adjustment. However, the ultimate goal of a more professional and civil practice of law in this circuit is well worth the effort. B

Gary C. Rosen, Esq., Managing Shareholder and Chief Executive Officer of Becker, oversees the firm's governance while playing a leading role in recruitment, marketing and other business functions . Gary can be reached at 954-987-7550 or grosen@beckerlawyers.com..

Jamie Alan Cole, Esq., is the Broward Managing Director and a Member of Weiss Serota Helfman Cole & Bierman, PL, and is the Chair of the Large Law Firm Committee of the BCBA. He practices primarily in the areas of litigation and local government law and can be reached at 954-763-4242 or jcole@wsh-law.com.

Mysterious Masquerade Ball Beckons Broward's "In" Crowd

by Jeni Meunier

The Broward County Bar Association's Installation Dinner & Gala is the preeminent chance to come "incognito." There is an opportunity to be as suave as The Phantom of the Opera, as romantic as Romeo and Juliet, as shadowy as the Lone Ranger or as naughty as Fifty Shades of Grey. Masquerade masks are a societal tradition made popular for many years by the prosperous class attending balls. This will be a night that you don't want to miss as we party in a mysterious delight to the live entertainment by Private Stock Band. Join us Saturday, June 23 from 6:30 to 11:00 p.m. at Pier Sixty-Six Hotel & Marina, Crystal Ballroom. The Masquerade Ball is proudly brought to you by the Officers and Directors of the Broward County Bar Association & Young Lawyers Section. Register online at browardbar.org/calendar. $100 BCBA Member, $125 Non-Member, Sponsorships Available. Come in your masquerade mask to secretly disguise your identity. This will be an opportunity to express yourself freely, say what you think or give your voice to your opinions all behind a secret identity! Come party down in mystery!! B

Jeni Meunier is a Senior Consultant at Logicforce. LOGICFORCE consults with law firms specializing in IT optimization, cyber security, eDiscovery, digital forensics, document management and document review. Jeni can be contacted at JMeunier@ Logicforce.com or (754) 666-5900.

Masquerade Gala

2018 - 2019 Incoming Presidents

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The Joseph J. Carter Professionalism Award
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Jeffrey M. Wank

The Stephen R. Booher Award
The Honorable Raag Singhal

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Workers Compensation Section

Committee Chair of the Year
Brian K. Hole
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The Executive Director's Award
Jamie Alan Cole & Gary C. Rosen

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Saturday, June 23, 2018
6:30 p.m. - 11:00 p.m.
Register at browardbar.org/calendar | Sponsorships Available!
Questions? Contact Lauren Riegler at lauren@browardbar.org

Fourth DCA Comes to Broward CLE

by Sarah T. Weitz

"The difference between the right word and the almost right word is the difference between lightning and a lightning bug." [1]

With these words by Mark Twain, Dean Olympia Duhart of Nova Southeastern University Shepard Broad College of Law opened an afternoon of discussion about legal writing, oral advocacy, and ethics on April 4, 2018 at the Signature Grand. The BCBA's Appellate Practice Section was proud to host judges of the Fourth District Court of Appeal and legal writing professors Dean Duhart and Professor Heather Baxter at its "Fourth DCA Comes to Broward" CLE, followed by an evening reception.

The Honorable Burton C. Conner, the Honorable Dorian K. Damoorgian, and the Honorable Alan O. Forst discussed issues that keep appellate practitioners up at night and outlined the court's internal procedures. Judge Damoorgian clarified the oral argument selection process, informing attendees that if any one judge on a panel wants oral argument the court will schedule it. When deciding whether to grant oral argument, the judges particularly look for factual disputes and novel legal questions that would benefit from discussion.

Judge Connor noted that 80% of appeals are decided on the briefs alone. He also discussed how the court handles motion practice and record issues. The court receives 40-70 motions each week, 30% of which are for extensions of time. Motions are forwarded to the motions panel once the non-moving party's response time expires.

Judge Forst presented legal ethics from an appellate perspective. Statewide, the annual number of ethics complaints has decreased since 2013—an encouraging trend. He reminded attendees that the preamble to the Rules of Professional Conduct acknowledges the line between advocacy and ethics, noting that attorneys bear "special responsibility for the quality of justice" while zealously representing clients.

All three judges emphasized the role of personal responsibility in ethics and professionalism. Civility often requires parties to pause before responding to aggravations. The use of email in the practice of law has reduced time for thought, which in turn may invite incivility. Every attorney must make a habit of pausing before sending an impulsive note. Additionally, since personal bonds enhance civility and may reduce unprofessional conduct, the judges encouraged attorneys to attend bar events and establish those collegial relationships.

Dean Duhart and Professor Baxter presided over a game of "Attorney Survivor" which tested attendees' grammatical knowledge through ten challenging rounds. Along the way, they identified the top ten legal writing mistakes practitioners make, including the misuse of "that" vs. "which" and inconsistent subject-verb agreement. They also discussed misplaced modifiers and the abuse of nested modifiers, legalese, and nominalization—all common features of ineffective writing. Only two attorneys "survived" through the final round, but every attendee left with ways to improve his or her written advocacy.

The Appellate Practice Section thanks Judge Conner, Judge Damoorgian, Judge Forst, Dean Duhart and Professor Baxter for their valuable contributions to this CLE. The Section also thanks the CLE's sponsors. B

This article is submitted on behalf of the BCBA Appellate Practice Section, Michele K. Feinzig, Esq. of the Law Offices of Robin Bresky, Chair, and Louis Reinstein, Esq. of Kelley Kronenberg, Vice Chair. For more information about the Appellate Practice Section, please check the BCBA calendar, or email mfeinzig@breskyappellate.com or LReinstein@kelleykronenberg.com.

[1] Mark Twain, quoted in George Bainton's The Art of Authorship, pp. 87–88 (1890).

Sarah T. Weitz is an associate with Weitz & Schwartz, P.A., a Fort Lauderdale firm focusing on transactional and litigated real estate matters. Ms. Weitz devotes her own practice to appellate matters and trial support. She has handled appeals before all five of Florida's District Courts of Appeal, the Florida Supreme Court and the Eleventh Circuit Court of Appeal. Additional information about the firm is available at www.weitzschwartz.com and Ms. Weitz can be reached at sarahweitz@weitzschwartz.com.

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The Tax Law has Changed for Attorneys, and it May Not Help Many of Them

by Ron Michelson and Howard E. Hammer

While elected officials have applauded the largest tax cut in decades, attorneys and their firms may have little to cheer about. Lower corporate tax rates probably won't help their firms, in part because of the way business entities are structured, and lawyers and their firms are losing important tax benefits under the new rules.

Individuals may gain from lower rates, but law firms won't see the same benefits. Apple and other large companies will save a lot on taxes because the rate on C corporations has dropped to 21 percent.

Most firms are set up as LLPs or LLCs, and often attorneys have S corporations or sole proprietorships. The new tax law does little to nothing to help them. Here's why: Those legal entities pass through income to the individual who pays taxes on it at his or her rate. Any tax savings come at the personal, not corporate level.

Second, the 20 percent deduction from those entities for qualifying taxpayers may not help. Once annual income exceeds $157,500 for an individual or $315,000 for a joint return, it phases out over the next $50,000 in income for an individual and $100,000 for couples. A married attorney filing jointly who brings home $415,000 per year may receive no tax benefit from the deduction.

Are there any loopholes? Maybe. While the tax act was once touted as a way to file one's return on a postcard, the formula for the 20 percent deduction barely fits on a sheet of legal paper. The 20 percent deduction is calculated for certain attorneys as the lesser of the qualifying law practice income, net of deductible expenses, or the taxpayer's total income minus capital gains.

Attorneys whose taxable incomes stay under the caps may see some benefit, but with a caveat: The deduction is balanced against wages paid by the law firm and the individual's share of the firm's qualified depreciable property. The rules are so complicated that planning is needed to structure the deduction for maximum benefit.

A managing partner with a sharp pencil might be inclined to convert her or his firm to a C corporation to take advantage of the same tax break that many Fortune 500 companies now enjoy. There are two problems with this strategy: First, there's an exception for personal service corporations which, as the name implies, include legal services. Net business income is taxed at a flat 35 percent, the second-highest personal tax rate.

Second, companies like Apple are taxed on their profits, and shareholders are taxed again when they receive their portion of the earnings. The tax savings can evaporate once Uncle Sam completes that double dip and the firm, or an attorney who elects to go the C-corp route, pays the filing and recordkeeping fees needed for operating the corporation.

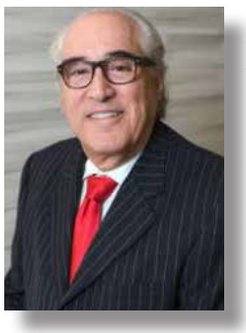
Congress also changed a rule that most affects rainmakers, eliminating the deduction on entertainment expenses. Want to schmooze a prospective client over a round of golf? No longer can he or she write off green fees, cart fees and a fresh box of balls.

However, lawyers can deduct 50 percent of meal expenses. So, put away the clubs and head straight for the clubhouse dining room.

Two new rules will likely change the way firms finance their operations. First, the act limits the deduction on interest expense to 30 percent of a business's earnings. The rule, which applies through 2021, is calculated before depreciation, amortization and depletion are figured in. Small firms with less than $25 million in average annual gross receipts for a three year period ending with the prior year are exempt from the cap.

Second, law firms can no longer apply an operating loss back three years to generate a tax refund on those years' profits. Under the new law, losses are now carried forward indefinitely. Thus, firms will need to carry larger reserves for down year.

So, where are the much-touted savings? They're at the individual level. With lower tax brackets, attorneys are more likely to see the benefits when they fill out their 1040s. B



Howard E. Hammer, CPA is a principal and Ron Michelson, CPA is a director in the Tax Planning, Compliance and Accounting Services Group at Fiske & Company. Established in 1972, Fiske & Company is one of South Florida's leading CPA firms, offering accounting, tax, audit and consulting services to individuals and businesses, as well as to legal and financial professionals seeking expert advice and support on behalf of their respective clients. In addition to tax and accounting, the firm focuses its practice on business valuation, litigation support and forensic accounting. Fiske & Company maintains offices in Fort Lauderdale, Kendall, Downtown Miami and Boca Raton. For more information, visit their website at www.fiskeco.com.

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BCBA Member Gordon James in front of City Hall in Toledo, Spain

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Case Law Update

by Debra P. Klauber

Florida Supreme Court addresses critical issues in medical malpractice cases involving presuit requirements and the admissibility of evidence.

1. Distinguishing between ordinary negligence and medical malpractice. The Florida Supreme Court recently issued two decisions in medical malpractice. In the first, the court once again attempted to explain the distinction between a case of ordinary negligence, which happens to arise in the medical context, and a true medical negligence case that requires a plaintiff to comply with the presuit requirements applicable to such claims. The case involved a residential treatment facility that, although it was not a health care provider, did render psychiatric, psychological, medical, speech therapy, and educational services to its residents. The plaintiff was injured during a tactical hold technique used to control her after she had eloped off campus. The court found that the plaintiff stated a claim for ordinary negligence because proving it would not require testimony from a medical expert on the professional standard of care. The court again emphasized a desire to limit medical malpractice claims to those that are directly related to medical care or services, which require the use of medical judgment and skill, so that plaintiffs with ordinary negligence claims are not subjected to the complex presuit procedures that are necessary in medical malpractice claims. *The National Deaf Academy, LLC v. Townes,* 43 Fla. L. Weekly S193, SC16-1587 (Fla. April 26, 2018).

2. Addressing admissibility of testimony about what a subsequent treater "would have done" if the earlier health care providers had acted differently. In the second decision, the Florida Supreme Court made it abundantly clear that testimony from a subsequent treating physician who cared for the injured plaintiff about what he or she "would have done" under different circumstances is "irrelevant and inadmissible" at trial. Several dissenting Justices suggested that the majority was improperly relying on precedent that dealt with the burden of proof and the issue of causation, rather than the admissibility of evidence. Nevertheless, the majority held that the introduction of a subsequent treating physician's answers to hypothetical questions -- about how his own treatment might have changed if any previous treating healthcare providers had acted differently -- creates reversible error. *Cantore v. West Boca Medical Center, Inc.,* 43 Fla. L. Weekly S188, SC 15-1926 (Fla. April 26, 2018).

Appellate court approves the use of a "partial verdict" by a deadlocked jury. The First District affirmed the trial court's decision to accept a "partial" verdict by a jury in a tobacco case after the jury was deadlocked on some of the issues. By the jury's questions, it appeared that they had found liability, but could not agree on the issue of comparative fault. Ultimately, the jury was able to agree on two of the six questions: that the decedent was a member of the Engle class, and that the tobacco company's conspiracy to conceal was the legal cause of his death. Over the tobacco company's objection, the trial court accepted the partial verdict and scheduled another trial to resolve the remaining issues, and the tobacco company appealed. The First District affirmed the acceptance of the partial verdict, in what appears to be the first appellate decision to do so in the civil context. *Philip Morris USA, Inc. v. Brown,* 43 Fla. L. Weekly D813, 1D15-2337 (April 18, 2018).

Satisfying the requirement to transfer a case on the basis of forum non conveniens. The Third District issued a detailed decision that provides an excellent guideline for parties seeking to transfer jurisdiction for the convenience of the witnesses and parties. In this case, the appellate court affirmed the trial court's refusal to transfer the case from Miami-Dade County to Collier County, finding it was not an abuse of discretion given the lack of evidence presented by the defendants to support the motion. The appellate court concluded that the defendants had not met their burden of establishing "substantial" inconvenience or "undue expense." The court explained that it is critical for the court considering the transfer to know (by affidavit or other record evidence) who the trial witnesses will be, and the significance of their testimony, i.e., whether they are key or material witnesses, in addition to proof about the inconvenience and expense with which they will be faced. *Marques v. Garcia,* 43 Fla. L. Weekly D824, 3D16-1920 (Fla. 3d DCA April 18, 2018). B

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.

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Preparing Your Practice for the Inevitable: Hurricane Season is Upon us!

by Braulio N. Rosa

PRE-HURRICANE

Protecting your data is essential. Secure your information in at least two separate geographic locations. The first is on your ***hard drive*** *at the office*. A backup should also be saved at a ***remote hardened and secure site that*** has its own backup and power.

A third location for very important files could also be saved on a ***large capacity flash drive*** or ***external hard drive*** that you keep secured at home.

Ensuring communications infrastructure

For the office, most now use "internet" lines to access the internet with their computer and for telephone services (VoIP). For this reason, two separate providers for internet and communications access is ideal. One can be dedicated for VoIP and the other for internet access. If one goes down, there should be a fail-over, and the other line takes over.

For solo smalls or frugal practitioners, your primary communications tools will be your cell and office phone. Separate providers for each is ideal, just in case one goes down. As a backup to your office provider, set up your cell phone as a hotspot for your computer to access the internet.

Developing a communications strategy

Having every important stakeholders' contact information is a must: staff, clients, vendors, Bar Association, courthouse, etc. Save it on your smart phone, flash drive, computer, and on a secure site in the cloud. If you have lots of employees and vendors, develop a phone-tree to facilitate communications.

Securing your office

Before the storm, back up all your data. Unplug and lift computers off the ground and place them on the desk. Cover them in plastic. Make sure you unplug all electric equipment to protect from surges when the electricity returns. Any paper files should be secured too. Take special measures to protect insurance documents, company checks, etc.

Be ready to work from elsewhere

You may not be able to use your office. Arrange beforehand to situate your practice at a temporary site. You can secure temporary office space at a place like Quest Work Spaces that rents offices by the day, week or longer. For solo small practitioners, work out an arrangement with a colleague who may have some extra space. Hopefully, you have secured your data in multiple places, so you can work from virtually anywhere.

Staff Policies: They need to know their responsibilities

Ensure that you have policies to determine:

- When you release staff to secure their personal property and effects.
- When staff needs to return to work post storm. What are the parameters and who contacts who.
- How staff is paid or not during the storm if work is missed during regular hours.

During the runup to the hurricane, you should:

- Stay abreast of courthouse operations and deadlines via BCBA emails and website. The BCBA closely coordinates with the 17th Circuit and 4th DCA during these scenarios.
- Monitor local news and NHC

POST HURRICANE

By monitoring local news, Broward County Bar Association, and other entities, assess the situation.

- Determine where you will be working: office, remote office, home.
- Determine when staff can return to work.
- Monitor courthouse operations via BCBA emails and website: deadlines, orders, etc.

Contact other stakeholders including clients and vendors and advise them of your status and how it relates to them. Check to see how they are, and if they need any assistance from you. Common recovery issues:

- ❍ Dealing with insurance claims: property damage, FEMA
- ❍ Labor issues: employees issues
- ❍ Personal Injury: mold issues, premise liability
- ❍ Land Lord-Tenant: units not being repaired after storm

This should serve as a refresher or primer for hurricane preparedness for lawyers. In no way is this to be taken as all-inclusive. You should do your homework and plan for the inevitable. B

June

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

5 CLE: Forensic Accounting - How to Detect and Stop Fraud
Sponsored by: Fiske & Company
Time: 12:00 p.m. – 1:30 p.m.
Venue: BCBA Conference Center
Cost: $15 BCBA Member; $25 Non-Member

6 Bankruptcy CLE: Special Category Debtors
Time: 12:00 p.m. – 1:30 p.m.
Venue: BCBA Conference Center
Cost: $15 BCBA Member; $25 Non-Member

8 Elder Law CLE: Mental Health, Developmental Disabilities & Violence
4 General & Mental Health Awareness CLE Credits
Time: 9:00 a.m. – 1:00 p.m.
Venue: BCBA Conference Center
Cost: $60 BCBA Member; $75 Non-Member

8 2018 Taste of the Caribbean
Time: 5:30 p.m. – 8:30 p.m.
Venue: BCBA Conference Center
Cost: $25 General Admission

13 Government CLE: The Opioid Epidemic
Time: 12:00 p.m. – 1:30 p.m.
Venue: BCBA Conference Center
Cost: $15 BCBA Member; $25 Non-Member

22 The Reenactment of the Trial of Minoru Yasui
Time: 9:00 a.m. – 11:45 a.m.
Venue: Broward County Courthouse
This event is FREE and open to the public

23 2018 Annual BCBA Installation Masquerade Gala Dinner
Black Tie
Time: 6:30 p.m. – 11:00 p.m.
Venue: Pier Sixty-Six Hotel & Marina
Cost: $100 BCBA Member; $125 Non-Member
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