FIRST COAST | PREMIERE 2016

ATTORNEY AT LAW

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MAGAZINE®

John M. Phillips
Attorney of the Month

Lindsay L. Tygart
Rising Star

Barry S. Sinoff
A Tribute to an Icon

Kathy Para
Attorney Spotlight

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EDITORIAL

SPECIAL SECTIONS

Welcome to the premiere of Attorney at Law Magazine First Coast. Our magazine will focus on sharing the local stories of lawyers and law firms. It will highlight rising stars and legal legends.

We will also bring you updates from local professionals on their areas of expertise in columns and tips and tricks on marketing and practice management. Be sure to check out our website, which will be an extension of this publication. It will include an interactive digital magazine, a portal to post your press releases, the latest interviews with profiled professionals and much more.

I want to take this opportunity to extend my deep appreciation to the legal community of Jacksonville, the contributing editors, the sponsors and the advertisers. Without you the First Coast Edition would not be possible.

During my journey to launch the magazine, I had the opportunity to meet so many of you, who generously gave of your time and advice. The legal community is rich with "campfire tales," and the First Coast is no exception. I love hearing them all and look forward to hearing more.

This month, we have the honor of sharing the story of the late Barry Sinoff. I only met him a few weeks ago, but we spent hours chatting. He would make a friend of any stranger with his warm smile and his welcoming demeanor, a true gentleman in every sense of the word.

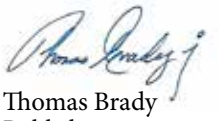
I will always look back at our visits as some of my favorite memories in launching the magazine. He would sit me down with a pad and pen and tell wonderful stories of his past filled with fun and great admiration for his peers.

"Lawyers, we may have a bad reputation," he laughed, "but there is no one better to share a drink or meal with. The stories they will tell." He was so right.

I am dedicating this premiere issue to Mr. Barry S. Sinoff. In our lifetime we meet a few people who affect us to our core; Barry is one of those people. A wonderful man, he will be missed by all.

I hope you enjoy this first issue and look forward to many more.

Sincerely,



Thomas Brady
Publisher

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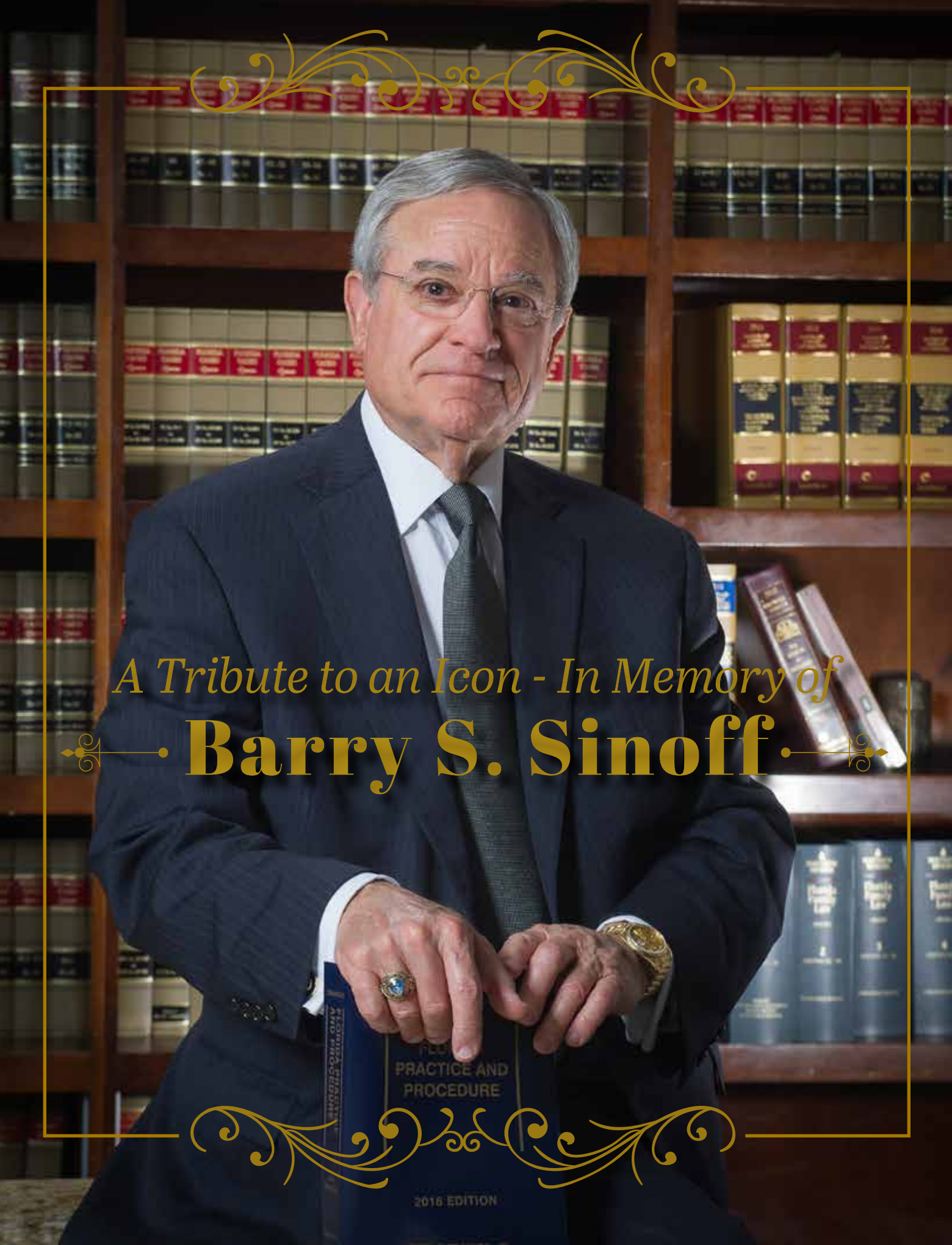
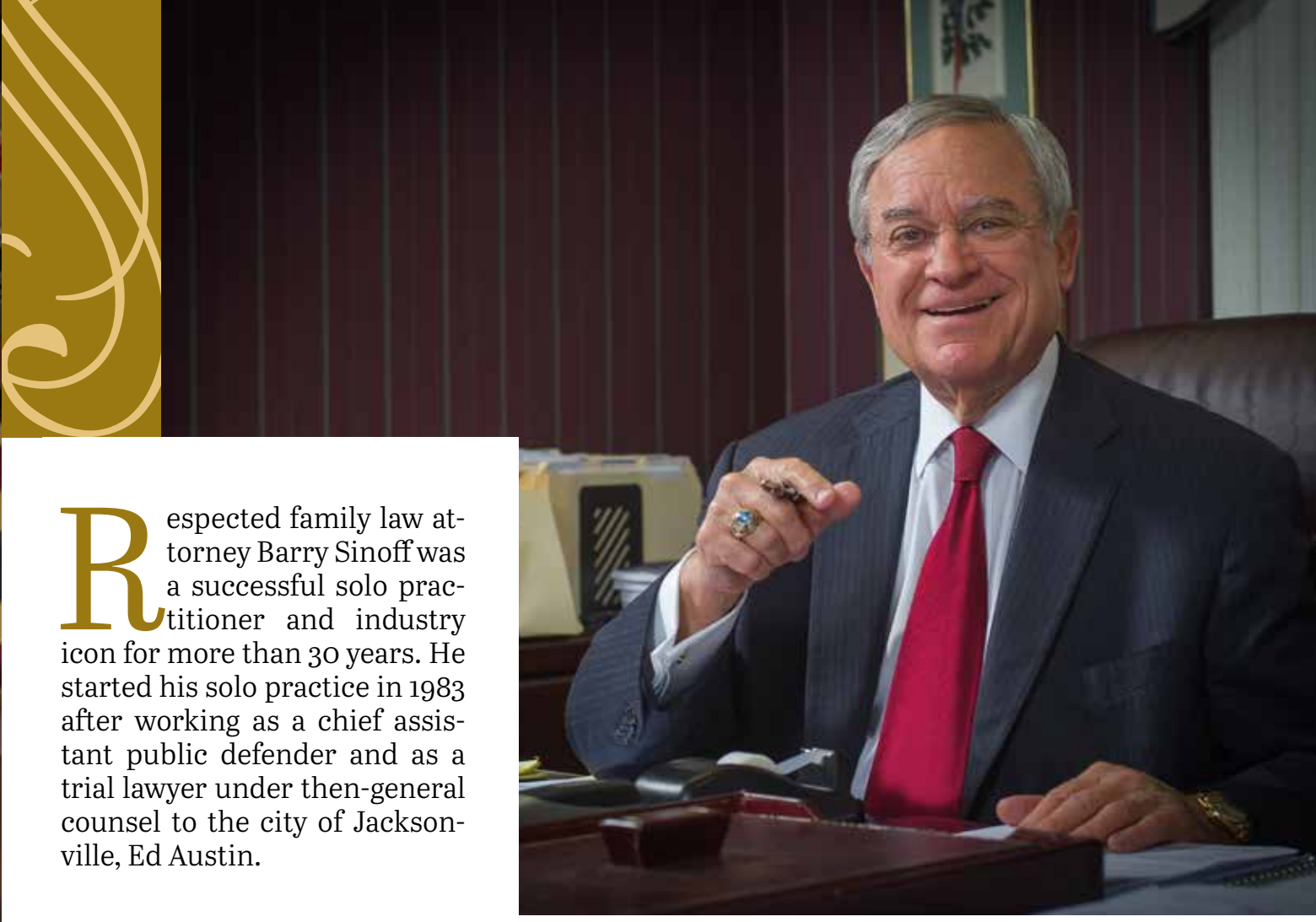


A Tribute to an Icon - In Memory of

Barry S. Sinoff



Respected family law attorney Barry Sinoff was a successful solo practitioner and industry icon for more than 30 years. He started his solo practice in 1983 after working as a chief assistant public defender and as a trial lawyer under then-general counsel to the city of Jacksonville, Ed Austin.

On Tuesday, March 22, 2016, Barry Sinoff passed away following a stroke.

Over his career, he had made a name for himself as a go-to practitioner for the high-end family law client, managing divorce cases with assets in excess of $1 million. He represented the who's who list of Jacksonville from prominent business leaders to professional athletes.

He has led the family law community within Jacksonville. All those who knew him can attest to his professionalism and his devotion to his clients.

In addition to earning the respect of his peers, Sinoff had received a number of accolades that matched his level of success in the courtroom and at the mediation table. In 2002, he received the Hernandez Professionalism Award from the Florida Family Law American Inns of Court.

He had also been regularly honored by his inclusion in the Best Lawyers in America list.

Sinoff also received well-earned recognition from his many clients. Heart-felt thank you letters and regular referrals reminded him of the good work he did "shepherding" his clients through some of the most difficult times of their lives.

His father, Bernard "Barney" Sinoff was a WWII veteran and described by Sinoff as the generation Tom Brokaw wrote about. Sinoff was heavily influenced by the patriotism of his father and sought to emulate his love of country in his own career.

Sinoff utilized his platform as an attorney to protect those who needed protection and to battle "bullies" of all shapes. As a criminal defense attorney and then as a plaintiff's attorney, he advocated for individuals who may have been drowned out by the system. As a family law practitioner, he strived to level the playing field for marital partners who felt intimidated by their spouse.

Until the very end, Sinoff enjoyed the daily challenge presented by the practice of law. He planned to continue representing select cases with the help of his senior paralegal, Patricia Abraham. The two had worked together for almost 30 years. He spoke highly of her skill.

Because of his success and the name he had created for himself, Sinoff was regularly referred by his fellow practitioners and was able to shape the practice he wanted in recent years.

Sinoff is survived by his wife, Carole, his two sons, Brad and Adam as well as his grandchildren.

He described his family as his biggest joy and highest priority.

He met his wife as a junior at the University of Florida. They were married in August 1965 while Sinoff attended law school. The couple celebrated their 50th wedding anniversary last year.

Both of his sons are graduates of the University of Florida. In his interview with this magazine before his passing, he said he was very proud of the good citizens they've become.

We wish to share our condolences with the Sinoff family and with the legal community that he represented for more than 45 years.

The Pathway of Undocumented Immigrants

By Rodney G. Gregory, J.D., L.L.M.

Our first seven presidents – George Washington, John Adams, Thomas Jefferson, James Madison, James Monroe, John Quincy Adams and Andrew Jackson – were foreign born "undocumented immigrants." Most transitioned into citizenship because they were residing in a territory when it was adjudged to be the "United States." It wasn't until Martin Van Buren was elected as our eighth president that America had its first native born president. The "Magnificent 7" came to America before there was a country or an immigration policy.

There is an estimated 11.4 million undocumented immigrants (UI) living in the United States. The top countries of origin (as of 2012) are Mexico (59 percent), El Salvador (6 percent), Guatemala (5 percent), Honduras (3 percent), Philippines (3 percent), and Europe, Canada, Africa, et. al (11 percent). From these numbers, only an estimated 1 million UIs have been deported under the Obama administration's immigrant enforcement program called "secure communities," which includes, in its calibrations, the status of immigrants booked into county jails in participating jurisdictions. The approximate number of today's foreign born population in the United States documented and undocumented is 40 million. 662,483 UIs were apprehended in 2013; 64 percent were from Mexico. However, 438,421 UIs were removed from the United States. Seventy-two percent were repatriated to Mexico, 11 percent to Guatemala, 8 percent to Honduras and 5 percent to El Salvador.

Against this heady review of key members of population percentages in the United States associated with immigration (documented and undocumented), startling underreported costs reveal the biggest surprise. Consider the following:

- UIs paid an estimated $11.2 billion in taxes in 2010.
- Half of all UIs pay some form of federal taxes.
- As of 2010, uninsured UIs cost taxpayers $4.3 billion annually in health care costs.
- If all current UIs were legalized, the federal government could accrue an additional net tax revenue of $4.5 billion to $5.4 billion over three years.
- An additional $1.5 trillion would be added to the U.S. GDP over 10 years with the passage of a comprehensive immigration reform plan (like Obama's plan, which hasn't been passed by Congress), if it legalized all UIs currently living in the United States.
- The majority of UIs pay income taxes using individual taxpayer identification number (ITINs) or false social security numbers.
- An estimated 75% of UIs pay payroll taxes.
- The majority of taxpayers using incorrect or false social security numbers are UIs. This group contributes approximately $7 billion to social security and $1.5 billion to Medicare.
- Tax revenue contributing UIs on the local, state and national levels are ineligible for most government benefits, including Social Security, Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), Medicaid, Medicare and food stamps.

Considerable discussion about the alleged adverse effects of undocumented workers on U.S. workers has been largely exaggerated. Immigration has little to no negative impact on native-born workers; even those who compete directly with immigrants. Contrary to assertions within the current political realm, workers whose wages are affected the most from UI's employment are other foreign-born workers. Ironically, there's some evidence that some workers' wages benefit from the influx of immigrants. Further, the prevailing opinion among most employers and economists is that UIs fill important gaps in the U.S. labor markets. Additionally, UI productivity in low skill, low-wage jobs create spillover effects in the economy.

Another misleading stereotype concerns the assumption that immigrants do not make learning English a priority. According to surveys, 57 percent of foreign-born Latino immigrants believe immigrants have to speak English to assimilate into American society. Further, about 52 percent of foreign-born Latinos living in the United States speak Spanish and English. Finally, according to the same survey, 96 percent of foreign-born Latinos believe it is very important to teach English to children of immigrants. Also, don't doubt native Spanish-speakers' interest and motivation to learn English. They dominate English as a second language (ESL) classes throughout the country. Nationwide, ESL

Rodney G. Gregory is the president and senior litigator at The Gregory Law Firm. His extensive experience and unique skill set in trial practice, includes concentration in the practice areas of complex, criminal and family litigation and probate. He is active in civic, community and professional activities on international, national, state and local levels. He has appeared extensively in print and electronic media discussing litigation matters, high profile cases, community issues and other matters of civic concern. Outside of the practice, Gregory enjoys family time, fitness training, Jacksonville Jaguars football, HBO/Showtime/ESPN Boxing, theatrical movies, reading, traveling and mentoring youth students.

programs for adults are overbooked, overcrowded and have resulted in long waiting lists. For example, 57.4 percent of ESL providers through the United States reported waiting lists for prospective students, with some wait times ranging from weeks to three years. In New York City alone, waiting lists have been replaced with a lottery system that turns down three out of four applicants.

The following legal immigration statistics reported by CNN (as of 2013) articulates the UI's immigration statistics with clarity:

- 990,550 people were granted lawful permanent residence in the United States.
- 40% were "green card" recipients or LPRs, born in Asia. 32% were born in North America. The top countries of origin are Mexico (14%), China (7.2%), India (6.9%), Philippines (5.5%) and the Dominican Republic (4.2%).
- The top U.S. states for legal permanent residency are California (19.4%), New York (13.5%), Florida (10.4%), Texas (9.4%) and New Jersey (5.4%).
- New LPRs are probably female and married, but younger on average than native-born residents.
- 2.7 million UIs were legalized under the 1986 Immigration Reform and Control Act.
- 779,929 people became naturalized U.S. citizens in 2013, with the greatest percentages from these birth countries: Mexico (12.7%), India (6.4%), Philippines (5.6%), Dominican Republic (5.1%) and China (3.9%).
- Residents from North America have a 10-year wait time in LPR status, three years longer than the median.

From the statistics, the following immigration facts are evident:

- Immigrants create jobs as entrepreneurs and taxpayers without competing for jobs with native-born workers.
- Immigrants increase productivity and stimulate investment, slightly boosting the wages of most Americans.
- Immigrants replenish the U.S. labor force as baby boomers retire.
- UIs pay billions of dollars in taxes each year, without receiving benefits.
- Documented immigrants face stringent eligibility restrictions, but UIs aren't eligible for public benefit programs.
- Immigrants buy homes and assimilate into U.S. society.
- Immigrants have lower incarceration rates than native-born Americans (only about 0.7% - five times lower than the 3.5% incarceration rate for young native-born men).

Pervasive misinformation, much of it politically driven, guides the perception of many native-born observers of the U.S. immigration process. Immigrants, documented and undocumented, significantly benefit the U.S. economy. Job creation complementing the skill sets of the U.S. native workforce has a net positive impact on the overall wage rates.

The inherent dignity of UIs must be recognized and a pathway to citizenship allowed for all who want to contribute positively to our society.

I Didn't Know I Had to Report It

By Thomas A. Delegal, III

Your client has a good job at a hospital and no criminal record, but did something dumb and was arrested. You found several inconsistencies in the evidence and spent enough time reasoning with a tough prosecutor to negotiate a great deal for your client. She pled no contest to a lesser offense and adjudication was withheld with a very minor penalty.

A job well done!

However, six months later, the same client calls you and complains that her license to practice as a respiratory therapist is unexpectedly being investigated for failing to report the plea. You didn't represent her with regard to her occupational license, but it doesn't change the fact that the client now blames you for the possible loss of her career. Although it may be unfair, criminal practitioners are increasingly required to know all the repercussions of various pleas and when to advise a client to report an arrest, conviction or plea.

Many lawyers are not aware that clients engaged in a variety of professions who plead to criminal offenses are required to report those pleas to Florida licensing agencies. Some licensing boards limit the types of criminal pleas that can result in discipline, but almost all require reporting of the plea itself. For nurses, contractors, CPAs, teachers, cosmetologists and other licensed professionals, there is a reporting requirement after any criminal plea.

Generally, licensing boards require that any pleas be reported, including pleas of no contest. Failure to report within 30 days is generally grounds for disciplinary action; although, the specific reporting requirements differ.

Reporting is relatively easy for persons licensed by Florida agencies. Failing to report can result in significant penalties and there are rarely any available defenses for failure to report. Additionally, when a client has licenses in multiple states, there is often an obligation to report a criminal disposition in each of those states. Unfortunately, licensed professionals sometimes fail to report to all the states in which they are licensed.

A particularly nasty feature of most licensing statutes is the fact that discipline in one state can automatically result in discipline in another. Therefore, if your Florida client reports a criminal disposition in Florida, but is also licensed in the state of California or Michigan and fails to report to that state, another state's disciplinary action can result in a penalty to the Florida license. Such a domino effect can severely hamper a client's ability to pursue his or her profession and thus, practitioners need to be careful to comply with all licensing requirements.

Just because a criminal offense is reported, however, doesn't mean that the client's license will be revoked, or even disciplined. Generally, a license may only be disciplined when the criminal offense directly affects the conduct of the profession. Ultimately, it may take a hearing before an administrative law judge with the Division of Administrative Hearings to determine whether the offense is related to the profession, or whether the evidence is sufficient to establish a violation. There are some substantial defenses available in license-discipline proceedings, including the right against self-incrimination and the right to have the case proven by clear and convincing evidence.

In the majority of cases, penalties less than revocation are imposed and it is often the case that lesser penalties can be negotiated. Additionally, some cases are diverted at the probable cause stage, or probable cause is not found after an investigation. Of course, administrative cases against licensees arise out of a variety of situations, not just criminal dispositions, but criminal pleas are a major source of license discipline.

"Many lawyers are not aware that clients engaged in a variety of professions who plead to criminal offenses are required to report those pleas to Florida licensing agencies."

Thomas A. "Tad" Delegal, III is board certified by the Florida Bar in both labor and employment law as well as state and federal administrative practice. Mr. Delegal is the only attorney in Florida who has received certification in both specialties. Mr. Delegal regularly lectures on employment law issues before both employer and employee organizations. As a certified employment law expert, Mr. Delegal and his office monitor the constantly changing state of Florida and United States employment law, and provide advice and litigation services to clients on a variety of issues, which affect employers and employees.

Changing Your Logo

By Blake Houser

"HOW TRAGICALLY EASY IT IS TO STAMPEDE INTO CHANGE. BUT WHAT GOLDEN REWARDS AWAIT THE ADVERTISER WHO HAS THE BRAINS TO CREATE A FAVORABLE BRAND IMAGE - AND THE STABILITY TO STICK WITH IT OVER A LONG PERIOD."

David Ogilvy from Ogilvy & Mathers was founder of an advertising agency that dominated between the 1950s to the early 70s. He created successful advertising campaigns for Rolls Royce, American Express, Dove and Shell to name a few. He is often referred to as the "father of advertising."

In 1955, Ogilvy stated the following so beautifully about changing your brands image, "How tragically easy it is to stampede into change. But what golden rewards await the advertiser who has the brains to create a favorable brand image – and the stability to stick with it over a long period."

Most printers *won't* tell you that changing your logo might not be a good idea. Printers make more money when you change your brand's design. Obviously, everything needs to be reprinted from letterheads and business cards to pocket folders and promotional items.

As you can imagine, this creates a rather large order for a printer. In many cases there are sufficient reasons to change a company's logo. Either your company is changing directions, going after a new market, or the logo was never well thought out in the first place. Often there are complete logo changes for no other reason than something new is wanted or "we want it to be more modern."

From every direction, people are being pulled to change their logo. It's easy to jump on this bandwagon. The problem with this is it defeats the purpose of creating a consistent recognized brand. You lose all the momentum you built up over years of consistently displaying your logo on business cards, websites, newsletters, etc.

SHOULD I CHANGE MY LOGO?

Here are three questions to ask yourself before changing your logo. Has my company completely changed directions or in a different market than when it originally started? Is my brand no longer relevant in my industry? Was there no though put into my original logo?

If you answered "yes" to any of these questions, it's worth considering a logo change.

I have considered changing our logo, but I always ask myself, "Do I *need* to change my logo or do I *want* to change my logo?" If I *need* to change it, I will change it immediately. However, if I *want* to change it, that's just a "want."

Remember: your logo is not your brand, *but* it is a huge part of it.

Blake Houser is client service manager for Wells & Drew Companies. He has been in the family business for over 20 years. His experience in the engraved stationery business began in the shipping department and includes outside sales, online marketing, customer service and author of the Wells & Drew Newsletter. He works out of Davie, Florida.

SHOULD I CHANGE MY LOGO?

HAS MY COMPANY COMPLETELY CHANGED DIRECTIONS OR IN A DIFFERENT MARKET THAN WHEN IT ORIGINALLY STARTED?

IS MY BRAND NO LONGER RELEVANT IN MY INDUSTRY?

WAS THERE NO THOUGHT PUT INTO MY ORIGINAL LOGO?

Lindsay L. Tygart
Rising Star
On Public Service

AALM: When did you first know you wanted to become an attorney? What is your main focus?

Tygart: I think deep down I knew I wanted to be an attorney from a very young age. I come from a family of attorneys. My dad, my two brothers and two of my uncles were circuit court judges here in Jacksonville. I majored in dramatic art and art history in college because I knew I could major in anything and still go to law school. Being a lawyer lets me do what I love – help people, use critical thinking and analysis, and talk.

Today, my practice centers around representing injured people and their families, specifically in medical malpractice and nursing home neglect cases. I love what I do and I feel very fortunate that people who are in a tough predicament place their trust in me to help them. After all, I became a lawyer to help people and ensure that individual rights are protected.

AALM: Do you have any mentors or professors that encourage you?

Tygart: Oh absolutely! You cannot have a successful legal career without having someone to talk with and bounce ideas off. It is essential. Whether it is a case related question or an ethical dilemma, it is so important to have someone you respect and trust to assist with those issues. I have been incredibly fortunate to have some amazing mentors. First and foremost, my dad, Tom Tygart, who instilled in me the love of the law and the passion of helping people. Tom Edwards, who has the most brilliant legal mind. He is an expert at thinking outside the box on issues, framing cases for the jury, and analyzing the law. Eric Ragatz, who has the most incredible work ethic and who somehow manages to be a great husband, dad, boss, and friend, all while running a law firm and handling a full caseload.

AALM: What do you find particularly rewarding about being an attorney?

Tygart: I became an attorney to help people and fortunately, for me, I am able to do this on a daily basis in my practice. However, being an attorney has afforded me so many additional opportunities that I never knew even existed. I was lucky to get involved with the Jacksonville Bar Association when I first started practicing. Through my service with the association and, specifically, the young lawyers section, I have met the most innovative and compassionate people while working with so many programs that benefit local citizens. For the past nine months, I have had the privilege of serving as the president of the young lawyers section. This past year, we put on some truly remarkable charity events, raising thousands of dollars for good causes.

Throughout high school and college, I did a lot of volunteer work and I knew I always planned to continue my public service, but never knew that being a lawyer would provide me such rewarding opportunities, which are truly good for the soul.

AALM: What do you enjoy doing outside of work? Hobbies? Sports?

Tygart: I love spending time with my family. My husband and I had our first baby girl, Salem Grace, in March 2015 and she is the light of our lives. She is a little over a year old now and just being able to watch her grow up and discover new things is the most amazing gift. Most of our free time is spent with her and our two black lab rescues, Mia and Molly. But my husband, Fraz, and I also love to travel and spend time with our friends. We also love college basketball. March Madness is our favorite time of the year!

To get in touch with Lindsay Tygart, visit www.EdwardsRagatz.com.

The Do's & Don'ts for Using Legal Graphics

By Jeff Davis

1. Don't wait until trial to take advantage of visuals that could have increased a case's value sooner in the negotiating phase. Trial exhibits should be used as tangible objects for you to lobby with in demand letters, video depositions and mediations.

2. Don't make the mistake of showing your expert medical illustrations or an animation for the first time while the camera is rolling in a video deposition or even worse, when your expert is already talking in front of the jury. You never know what they might say, so let the expert see the exhibit in advance so that your exhibit provider can make any revisions ahead of time and your expert can say how accurate the depictions are and that they worked alongside the illustrator in making sure that the illustration is accurate

3. Don't assume that the person you are showing a demonstrative to has any idea what any of the subject matter means. If you assume anything at all, assume that the person looking at your exhibits will have an eighth grade education and keep everything as simple and easy to understand as possible.

Jeff Davis is the founder of Legal Art Works. Jeff has a Bachelor of Fine Arts degree from Savannah College of Art and Design with a focus on visual presentations. He obtained his master's degree in medical illustration from the Rochester Institute of Technology with his master's thesis focused specifically on medical illustration in the legal field. Jeff's illustrations have been published in textbooks and magazines internationally. He was personally selected by the Mayo Clinic's head of radiology to illustrate hundreds of MRI interpretations for the textbook MRIs of the musculoskeletal system. For more information, please visit www.legalartworks.com

"STUDIES HAVE PROVEN THAT PEOPLE RETAIN FAR MORE INFORMATION VISUALLY THAN THEY DO BY JUST HEARING IT ALONE."

4. Don't overlook demonstrating all of the stages of your client's story, not just showing the obvious injury. (1) Show happy, healthy and active photos before any injury; (2) visually explain how the actual accident or fall took place with a computer animation or a diagram; (3) use post-accident injury photos and color illustrated diagnostic films/medical illustrations to clearly show the injury; (4) illustrate the steps of the subsequent surgical procedure; (5) demonstrate the post-operative hardware after a surgery in color illustrated post-op diagnostic films; and (6) share actual photos of the client's current condition today.

5. Don't commit copyright infringement by using images from a medical textbook that prohibits such use as stated in the front of the book**.** Not only is it against the law, but in many cases, you are showing an illustration that is demonstrating what you need in your case and a million other areas of anatomy that *don't* have anything to do with your case, which might make the subject matter even more confusing.

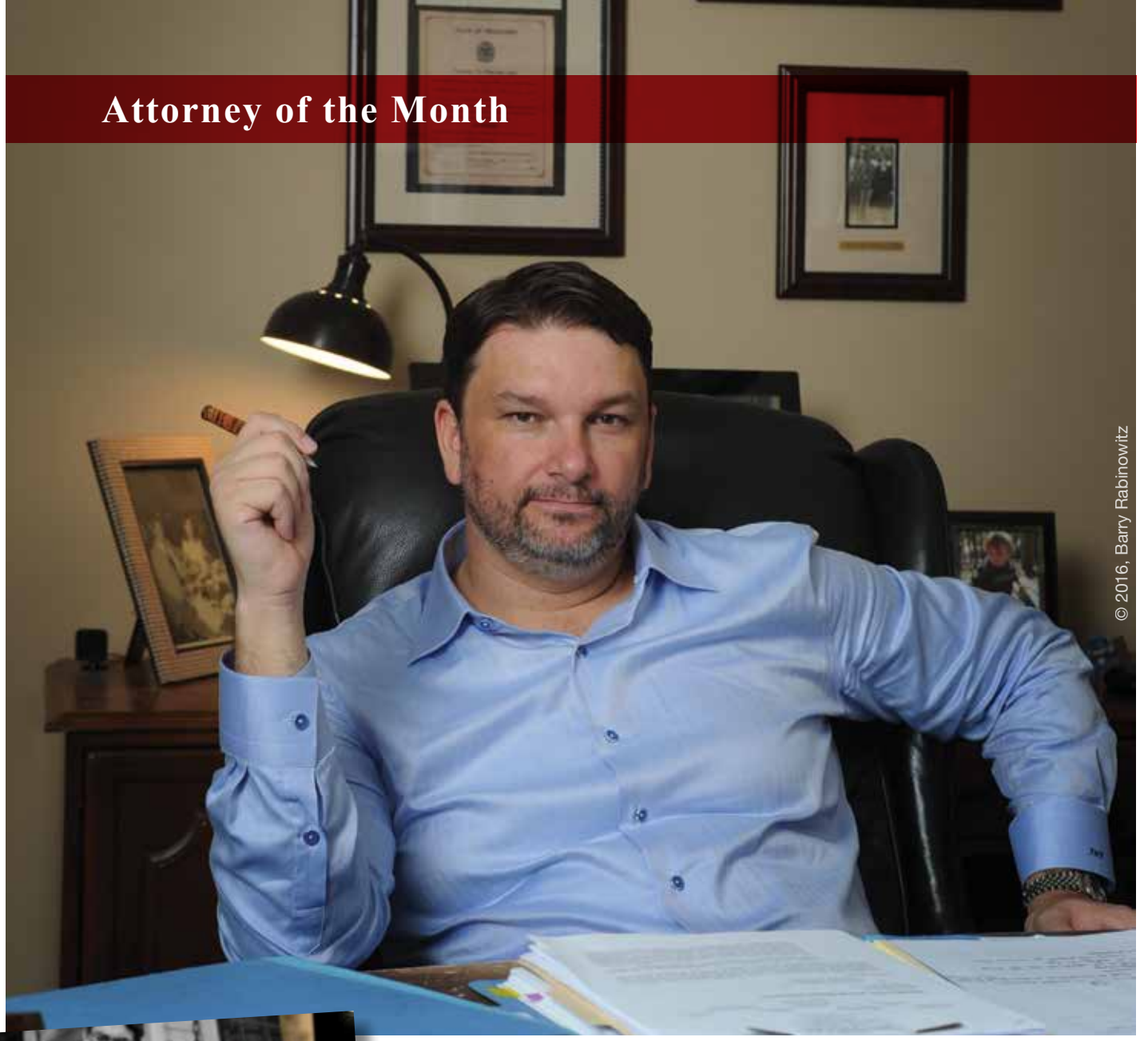
6. Don't wait until the last second to bring on an exhibit designer. Give your exhibit provider a good amount of time to create the exhibits. The more time they have, the more time they can spend on researching for accuracy and adding the bells and whistles that give it a professional custom-made look. Most importantly, the more time you have, the more time that you and your expert will have to make any revisions.

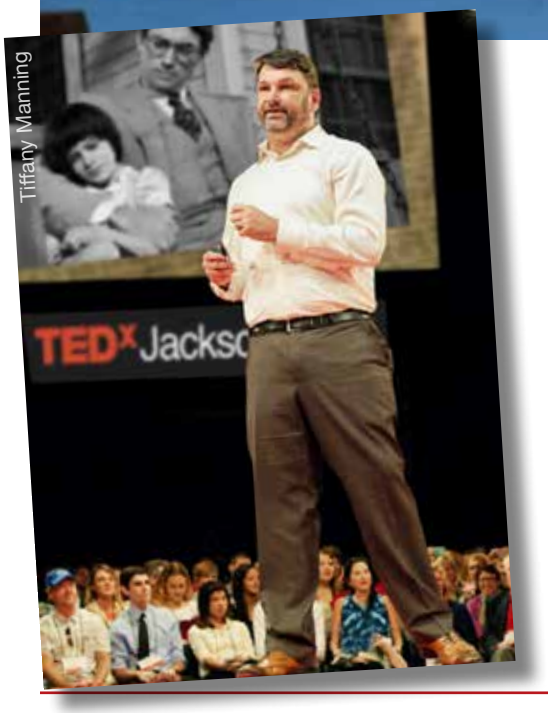
7. Don't forget to let your exhibit team know when you need your demonstratives. When you need them and when the exhibit provider plans to finish them might be a disastrous gap in time. If you call them on a Monday and the trial isn't for three weeks, but a pre-trial exhibit exchange is scheduled for the very next Monday, make sure that they aren't planning to finish the project a few days before the actual trial.

8. Don't mail originals whenever possible. If you are going to FedEx MRIs, X-rays, photos or medical records, try to send duplicates to prevent a shipping nightmare. If you have a backup of everything, your materials will still be able to be used as evidence.

9. Don't give an entire presentation using only one media. You never know if your audience will receive the information the most effectively by seeing it on a screen or on traditional boards. The most effective technique is using various methods for showing information. If the audience starts to lose interest by watching a PowerPoint, switch your media to a big blow-up to bring them back.

***Do* use visual demonstratives** to make your case's complex information easier to understand, more persuasive and more memorable. Studies have proven that people retain far more information visually than they do by just hearing it alone.





Tiffany Manning

John M. Phillips

A Walk in Someone Else's Skin

By Elizabeth Morse

As a young man, John M. Phillips remembers hearing stories about his grandfather and great-grandfather – a lawyer and judge, respectively, in Mississippi – and was inspired by their work. They went into all types of homes and accepted what people could pay, and let morality be their guide. Growing up in Alabama, Phillips found the character of Atticus Finch from Harper Lee's "To Kill a Mockingbird" resonates well with the philosophy he strives to fulfill each day. He credits his grandfather, great-grandfather, Atticus Finch and his mother's ability to tell a story as the reason he chose law and became a trial lawyer.

"We've all heard the saying about walking a mile in someone's shoes. To walk in someone's skin is a very different issue ... "

Coming out of law school, Phillips said finding a job was mostly about where he could get hired. After a one-year judicial clerkship, he was presented an opportunity to work for an insurance defense firm. He spent eight years doing so, reaching named partner at Dore, Lanier & Phillips before eventually transitioning to representing victims while practicing with Morgan & Morgan. Phillips stated that the firm wasn't for him in the sense that it was too big and not personal enough. He felt that the emphasis on quantity eventually outweighed the quality of the work he could perform, so he branched out and decided to open his own firm. Quotas, forced trial requirements and a constant focus on money shaped his first decade in the practice – a model he was determined to get away from. Phillips' office now has a staff of about 14 people and feels as if he's reached more of a pinnacle of his profession. His firm doesn't even charge clients for postage and lawyers attend every client meeting.

Like Atticus, Phillips is a family man, saying, "Being a lawyer is not all that I am; it is what I do." In 2011, he lost his mother, only days after showing her sonogram photos of his soon-to-be first child, Bennett Busby Phillips. Bennett carries his mother, grandfather and great grandfather's surname, Busby, and Bennett is Latin for "little blessed one." Phillips' wife and best friend, Angela, has stood by his side, planned charity events for the firm, been to court to sit with clients and helped keep their family balanced despite the immense growth in Phillips' law practice since opening in 2011.

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Compassion Rules in Practice

"You never really understand a person until you consider things from his point of view ... until you climb into his skin and walk around in it." This advice from Atticus Finch is well-received and accepted by Phillips. He quoted this in his recent TEDx Talk where he described growing up in Alabama, including several years in Monroeville where Harper Lee grew up and set her novel.

"We've all heard the saying about walking a mile in someone's shoes," Phillips said. "To walk in someone's skin is a very different issue, especially when it is a different color than yours."

Phillips became more aware of his skin in a recent case, which escalated him to a national stage. He represented the family of a young black teen shot and killed by a white man. The victim, Jordan Davis, was killed while sitting in his car listening to loud music. Loud music and the lack of benefit of the doubt and self control initiated a confrontation, which led Michael Dunn to open fire on the vehicle, resulting in Davis' death. It was the first of several funerals Phillips would attend as a "family lawyer."

Ultimately, Dunn was convicted, the family received a fairly unprecedented civil settlement from both Dunn's auto carrier and one from the family's uninsured motorist carrier and more importantly, Jordan Davis became part of a national conversation about race and equality. The case was the subject of two documentaries. "3 ½ Minutes, 10 Bullets" delves into the details of Davis' life and death and the murder trial of Dunn. It was on the Academy Award's shortlist for Best Documentary. "Armor of Light" premiered at Tribeca and talks about the movement Jordan caused, including amongst Phillips' family. Phillips noted that the level of loss and love that he experienced during the span of those few months allowed him to better understand the loss the Davis family felt.

"Unless you are a parent who has lost a child, it is still impossible to truly walk around in someone's skin," he said.

One thing clients see in Phillips is he understands that a monetary recovery isn't the only goal. He recently brought a claim against the Department of Motor Vehicles after it kept producing tragic mistakes on licenses. A legally blind man, Andrew Flaherty, moved to Florida and went to the tax collector's office to obtain a state identification card. While there, he asked to be registered as an organ donor. Instead of organ donor, the innocuous looking number "943.0435" was typed on his license. When Flaherty later tried to access entry to the base at NAS Jacksonville with his brother, he was threatened and detained, as that code wrongly indicated he was a registered sex offender. The same thing happened to an Orlando mother who had "sexual predator" printed on her license. After filing suit in the first case, Phillips put a foot down and demanded the DMV change the system within 10 days to prevent more "Scarlet lettering" of innocent Florida residents. The state complied and admitted that this had happened to over 200 people. He was able to secure a settlement for Flaherty's family and the state portal now has protections to make sure no one is accidentally labeled as a sexual offender ever again.

"We made our name taking cases others wouldn't," Phillips said. "Flaherty approached one of the advertising personal injury firms before he came to us. We seem to do more with less, as we aren't confined to looking at cases as inventory or based on a profit motive."

Phillips will soon be featured on ABC's "20/20" based on another case which reached unchartered territory. It also showcased Phillips' devotion to protecting his clients and the people in his community. A Jacksonville mother posted photos of her daughter's mouth on social media, depicting a dental appointment where her daughter was only supposed to have work

At a Glance

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(904) 444-4444
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Other Location

Jacksonville Beach, FL

Practice Areas

Personal Injury
Wrongful Death
Civil Rights
Criminal Defense
Family Law

Education

Juris Doctor, University of Alabama School of Law, 2000
Bachelor of Arts in Political Science and Criminal Justice, University of Alabama, 1997

Honors & Awards

Board Certified by the Florida Bar, Civil Trial Law
Best Lawyer, Folio Weekly
Best Lawyer, Jacksonville Magazine
Righteous Crusader, Folio Weekly
No. 1 Lawyer, Void Magazine
Top Lawyer, 904 Magazine
Face of Justice on the First Coast, 904 Magazine
Martindale-Hubbell AV-Preeminent Rated
Top 100 Trial Lawyer, National Trial Lawyers Association
Top 40 Under 40, American Society of Legal Advocates

Professional Memberships

Alabama Bar
Florida Bar
Georgia Bar
U.S. Supreme Court

done on one tooth and was now missing eight teeth. The girl's mouth was bleeding, her forehead was bruised and she was disoriented after the unconsented procedures and rushed to the emergency room. She was one of several victims of a pediatric dentist who was alleged to perform myriad unnecessary procedures and who has since been charged with multiple counts of Medicaid fraud.

Phillips ended up representing 104 children. Most of the victims were on Medicaid and many others had varying disabilities. Ultimately, the dentist was forced to retire and was arrested. And, although Phillips couldn't talk about the specifics of some, he helped the families obtain justice and "amicably resolved" 104 cases of dental malpractice in less than a year.

He didn't stop there. Every year, Phillips' office hosts a Toys for Tots fundraiser. Phillips wanted to do something extraordinary to make it a little more special for the 104 children he represented. He had 20 tons of snow delivered to his law office's front lawn and shaped it into a snow slide. Many of the 104 children he represented in the dental malpractice case, as well as his own two children – who had never seen snow before – were able to play together.

"Seeing those smiles – even though many were toothless – was special," Phillips recounted. Phillips has a unique perspective of his service as a personal injury attorney in the respect of defining the words he fights for everyday – justice.

"Justice is spelled one way," he explains, "but it is defined many different ways and is different to every family, every victim. Our goal isn't just financial recovery; it is justice by every measure we can find. Even in the simple car accident case, people can be treated better."

Future of The Law Offices of John M. Phillips

"There is always someone that needs help," Phillips explained. His firm has evolved from his specialty of personal injury to add criminal defense and family law. Phillips knows that in order to stay on top of the ever-changing field of law, he must adapt to where the clients in need are. While he still specializes in personal injury and wrongful death cases and became one of the youngest lawyers in the area to be board certified in civil trial law, his office has grown to what he calls a "specialized, general practice" of law.

Phillips admittedly stole a line from Harper Lee, paraphrasing, "We make sure our family and firm know that there is only one type of folks in this world – 'folks.' Race, religion, sexual orientation, ability to pay, socioeconomic factors and the like don't decide who we can help. Our ability to tell their stories decides who we help."

"We also help other lawyers tell their stories," Phillips continued. "Between the speeches, documentaries and trials, it is a busy life. Our goal is to keep telling stories." He was also recently appointed by Jacksonville's Mayor to the Human Rights Commission, where he serves as a voluntary commissioner and stated that he was following in the footsteps of his mother's father and grandfather. He also has photos of them hanging above his desk.

"If it is a sin to kill a mockingbird because they sing their hearts out for us and leave the world better," Phillips suggested, "maybe we can emulate that. We can tell stories and fight for those who need help and leave the world in a little better place than we found it. Even if we fail, we sang the best song we could sing."

People, Machines and Environment

By Robert Spohrer

Florida is a center of commercial, military and private aviation. Although statistically safe, air travel is extremely unforgiving of carelessness. Mishaps are usually a result of the failures of people (pilots, mechanics and air traffic controllers) and/or machines (the airframe, engines and their components) combined with the environment (weather, geography, etc.). Aviation law encompasses aspects of labor, tort, contract, environmental, international, land use and administrative law.

Investigation

Exhaustive investigation of flight theory, regulations, aeronautical engineering, pilot training, maintenance and weather phenomena must be undertaken. The investigation of an air disaster involves multiple disciplines and experts. Aircraft, engine and pilot logs must be examined. Air traffic communications, radar data, weather data, black box and other objective data must be collected. The National Transportation Safety Board (NTSB), tasked by Congress with the duty to investigate such claims, is helpful but not infallible. Victims have no say in its processes and NTSB investigators often sequester the most critical evidence for years.

Robert "Bob" Spohrer is the managing partner of Spohrer & Dodd, a nine-lawyer firm located in Jacksonville, Florida. Spohrer is board certified in both civil trial and aviation law and has litigated commercial, military and general aviation accident cases for over 30 years. He is one of four licensed pilots and three board certified aviation lawyers in the firm. Bob and his partners handle a broad national and international docket and currently have cases pending involving fixed wing and rotorcraft crashes in Florida, Georgia, Colorado, Arizona, Kenya, South Africa and Afghanistan.

Strategy

Like the factual investigation, strategic legal planning is critical. The viability of a claim rests on a well-coordinated pre-suit investigation. Strategic decisions made before filing suit determine or greatly influence outcome, especially regarding venue selection, choice-of-law, inclusion of parties, causes of action, claims, potential defenses, special legal doctrines, and personal and subject matter jurisdiction.

Case in Point

Imagine if an aircraft manufactured in Kansas, departs from Miami enroute to Quebec and crashes in Georgia, killing occupants from Florida, Georgia and North Carolina. The court must decide which laws govern liability and damage aspects of the claim. The court may apply "depecage," the law of one state to liability issues and other states' laws regarding calculation of damages.

A choice of law analysis is critical to recoverable damages. A claim for a deceased minor, for example, under Georgia law may have substantially more value than the same claim under Florida law. An adult son's claim for his lost father who was married at the time may have no value under Florida's Wrongful Death Act, or his non-economic damages will be capped at $250,000 if Kansas law is applied.

Comparative Negligence

The pilot of an aircraft has ultimate responsibility for the safety of flight. Hence, a state's comparative fault scheme can radically affect viability. Under North Carolina law, a comparative negligence of a pilot may completely bar recovery while, in Florida, it merely reduces the recovery proportionately. In Georgia, the pilot's survivors must prove the pilot had less fault than a comparatively negligent manufacturer to recover. If the accident was related to a defect in the aircraft, special laws concerning strict liability and warnings may determine the outcome. Some states limit product claims to aircraft newer than 10 years while federal law imposes a statute of repose that, in some cases, completely bars claims for general aviation aircraft and components more than 18 years after their first sale.

Special Legal Doctrines

The identity of the defendants affects the viability of a claim. The manufacturer

of an Army helicopter may enjoy complete immunity if it strictly conformed to government approved specifications, even if its helicopter was proven defective. Civil procedure may also play a role. If an airplane fuel pump was negligently designed by an out-of-state defendant, recent Supreme Court decisions affecting the reach of Florida's Long Arm Statute may deprive a Florida court of personal jurisdiction, necessitating an out-of-state forum, or worse, requiring separate claims in multiple federal venues. If the crash occurs offshore, federal maritime law may preclude any state law remedies.

The Forum Non-Conveniens Doctrine is commonly invoked by defendants to dismiss and transfer actions involving foreign accidents or victims. If the mishap involved air traffic control errors, the claim may implicate the Federal Tort Claims Act, which can dictate both the forum and choice-of-law issues, implicate special defenses available only to the government, limit fees and trigger comprehensive pre-suit obligations. Such claims may include both FAA and private contract controllers, further complicating the litigation. An airline's involvement can also affect outcome. Courts often find that Congress has intentionally, or impliedly intended, for the FAA's airline regulations to preempt a private cause of action in some circumstances.

The modern regulation of aircraft, airspace and those involved in aviation is evolving. Developments in private space flight and even autonomous, unmanned aircraft will create challenging cases going forward. Air crash litigation presents multiple challenges for the practitioner. The outcome for the client, however, is well worth the time, energy and effort.

Kathy Para

The Best Seat in the House

AALM: What was the greatest lesson you learned in law school?

Para: I credit law school with several lessons and self-realizations that continue to serve me well. These lessons included learning that I'm not the smartest, but that I'm smart enough; don't get behind on your reading; try to think independently, the majority isn't always right; and, question everything when examining the facts and procedures, don't assume.

AALM: What experiences have taught you the most?

Para: In my early work life I helped start an afterschool remedial reading program and morning preschool in an inner-city neighborhood. This shaped my view of poverty, my ability to consider alternatives, and the importance of simply listening and being present. I saw that a person doesn't have to have a lot to give a lot. It was often unclear which of us were the givers and which were the receivers.

AALM: What first drew you to your firm? Tell us about your role there.

Para: I am a third career attorney. I've been fortunate to have had some fulfilling opportunities in my work life. When I graduated from law school, I worked as a contract attorney with JEA doing Department of Energy reporting, drafting requests for proposals, and public bid evaluations. At the same time, I served as a pro bono attorney for Jacksonville Area Legal Aid (JALA). My pro bono involvement was the work that was the most satisfying to me and that fit with my reasons for going to law school. When the opportunity to work at JALA to help expand its capacity to serve the poor with pro bono involvement was offered, I jumped on it. My job as the director of pro bono is very broad and I work to coordinate outreach events, provide resources to pro bono attorneys, and support the pro bono efforts of voluntary bar associations and law firms.

AALM: What do you find particularly rewarding about being an attorney?

Para: It's my job to be a conduit connecting willing volunteers to low-income persons in need of civil legal assistance. I often tell people that I have the best seat in the house. In my work, I see attorneys stepping up every day to assist with an outreach event, represent a person who otherwise would have no voice in court, or to support another pro bono attorney. These volunteers have a generosity of spirit that is humbling and inspiring and in response, the vast majority of the clients they are serving are deeply grateful. Pro bono attorneys change lives and stabilize families and I am privileged to be part of that.

AALM: What do you find particularly challenging about your practice?

Para: Legal services organizations are faced with drastically underfunded programs. They are able to serve about 20 percent of the eligible people who seek their services. Funding for legal services, to be

sustainable, has to come from a broad base of stakeholders. When city governments, private corporations and bar associations don't do their part, it means that access to justice is only available to those who can pay. It means that only one side of a legal issue is heard which is an unacceptable injustice. It erodes the principles on which our judicial system and our country are founded – liberty and justice for all.

AALM: How would you describe the culture of the JALA?

Para: JALA is a large, nonprofit law firm. We have about 25 staff attorneys and an equal number of support staff. We have offices in Jacksonville, Green Cove Springs and in St. Augustine, but we serve a 17-county region along with our sister legal services organization, Three Rivers Legal Services. JALA has a long and rich history of service to the poor in northeast Florida. I am surrounded by creative, courageous advocates and truly am honored to be part of this organization.

AALM: Are there any changes coming in the future that you're excited about?

Para: Presently, I serve as president of the Florida Pro Bono Coordinators Association. This year the association is expanding its membership to include pro bono coordinators from law firms, law schools and other organizations. I am also very excited about the creation of the Access to Justice Commission of Chief Justice LaBarga. The representatives and subcommittees of the commission are addressing the need for greater access to our courts for all people. Although the challenge is great, meaningful change will happen when we communicate, pool resources, and address the lack of access on the state level.

AALM: Are there any flaws in the legal profession that you see? If so, how would you fix them?

Para: Legal representation is unaffordable for large segments of our population. Could you afford to hire an attorney? I'm pretty sure I could not. As a profession, we have to address access from many different angles while protecting the public from the unlicensed practice of law. We can learn from other states that provide more opportunities for limited representation and guidance for pro se litigants. The goals are always to serve the litigant well, to provide mechanisms to relieve overcrowded court dockets, and to ensure that more people with meritorious matters get their day in court.

There are so many ways to provide pro bono legal service. Attorneys can present at Ask-A-Lawyer, Lawyers in Libraries and at group information clinics. They can serve as an expert resource attorney for another pro bono attorney. They can assist a low-income person with a legal matter. Pro bono assistance is a great way to develop as a professional, network with other attorneys, and serve your community. Get involved!

At a Glance

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(904) 356-8371
www. jaxlegalaid.org

Education
Juris Doctor, Florida Coastal School of Law
Bachelor of Arts, University of Central Florida

Professional Memberships
Florida Pro Bono Coordinators Association, President
Florida Bar Association
The Jacksonville Bar Association
Jacksonville Women Lawyers Association
National Association of Pro Bono Professionals

Honors
Jacksonville Woman Lawyer of the Year
Jacksonville Bar Association Committee Chair of the Year
The Kay B. Meyers Pro Bono Coordinator Award
The Liberty Bell Award
The Florida Bar President's Pro Bono Service Award

Community Involvement
Florida Coastal School of Law Board of Visitors
Leadership Jacksonville
Riverside Presbyterian Church

Hobbies
Time With Family
Walking & Exercise
Kayaking
Reading

Favorite Quote
Never doubt that a small group of committed individuals can change the world, it's the only thing that ever has.

– Margaret Mead

Mediation – It's Not Just for Litigation Anymore …

By Blane G. McCarthy

This might sound familiar: Plaintiff's counsel demands $25,000. Carrier offers $2,500. Counsel counter-demands $19,500 to which carrier counter-offers $4,500. A second counter-demand of $16,000 is met with a counter-offer of $6,001. Both sides scream, "No more!" A lawsuit is filed, which carrier sends to its counsel. The attorneys fully litigate the case, consuming much time, resources and funds in the process. The court orders mediation, at which a settlement is reached – 10 months after the lawsuit was filed and for an amount between the parties' last negotiation positions.

While the details may vary, statistics from the Jacksonville division of the Fourth Judicial Circuit Court confirm the frequency of such a scenario. In 1999, there were 7,680; in 2000, there were 8,450 and in 2001, there were 8,845 circuit civil lawsuits filed. During those same respective years, there were only 69, 68 and 82 jury trials held for circuit civil cases. The vast majority of those lawsuits settled at mediation or shortly thereafter because of progress made or information learned. It's no wonder that mediation is lauded and ordered by our local judiciary.

Indeed, there are many valid reasons to litigate, such as accessing subpoena power and other discovery tools. Often, this tactical litigation results in one party conceding its position and resolving the matter toward the other party's favor.

More often, however, litigation is pursued simply because it is seen as the next step when presuit negotiations stall. At mediation, the litigants discover the benefit of having a neutral third party to gather all of the decision-makers in a collaborative, rather than competitive setting to work toward a mutually agreeable result. Yet, they also discover that accumulated litigation expenses and attorneys fees impede their ability to reach that mutually agreeable result.

Litigants generally prefer to resolve their own disputes when faced with the alternative of trusting the task to six strangers. Yet, their litigation often frustrates that objective.

More and more, savvy disputants and their counsel are turning to mediation *before* litigation.

There are many potential benefits to the plaintiff's attorney. Advanced costs and the risk of not being reimbursed are minimized. Attorney fees generated from presuit mediations are often more profitable per case-hour than fees generated from court-ordered mediations, despite the slightly higher contingency fee percentage. Litigation efforts and resources are focused on the cases that warrant such efforts. Time is freed to handle more cases, leading to more potential referrals from those additional clients, perpetuating and growing the firm's revenues, stability and status.

Likewise, there are many potential benefits to the defense attorney. Counsel is able to generate more business and revenue by offering assistance in presuit mediations at an hourly or flat rate. The client's legal costs and fees are minimized as litigation is averted. Corporate representatives and adjusters can document proficiency and cost-efficiency in claims handling, prompting them to see counsel as a proactive advocate who, in this era of cost-cutting and shifting allegiances, is a less expendable asset deserving of loyalty.

Most important are the potential benefits to the disputants themselves. Less time is consumed in the legal and negotiation process. Disputants are educated as to the strengths and weaknesses of their cases. Costs and attorney fees are minimized. Disputants get their "day in court," while maintaining control over the outcome. They feel their counsel truly and cost-effectively worked toward their best interests and frequently share this praise with others in need.

So, the next time your presuit negotiations stall, think twice about pulling the lawsuit trigger and consider trying presuit mediation. There is little to no downside. An impasse does not negatively change your client's status and you can file a Rule 1.700(b)(1) motion to dispense with court-ordered mediation to avoid duplicating the time and money previously expended.

While it may not be for every case, mediation is certainly not just for litigation anymore.

"Litigants generally prefer to resolve their own disputes when faced with the alternative of trusting the task to six strangers. Yet, their litigation often frustrates that objective."

This article is one in a series of periodic articles concerning mediation topics such as use, legal developments and negotiation tactics. Blane G. McCarthy is a Jacksonville civil trial lawyer and certified circuit civil mediator. For questions, comments or suggestions on future articles, please call (904) 391-0091 or email at bgmccarthy@sprintmail.com.

Understanding and Litigating Forum Selection Clauses

By Michael L. Duncan, Esq.

In business transactions, drafters often include certain "boilerplate" terms within the transaction documents, including forum selection or venue clauses. These provisions typically attempt to mandate the location where any litigation arising from the transaction must occur. However, when not clearly drafted, these provisions can lead to the initial stages of litigation becoming consumed in a battle over where the case may proceed.

No matter what substantive law applies to the merits of the case, Florida courts apply Florida law in addressing forum selection clause disputes. See *Golden Palm Hospitality, Inc. v. Stearns Bank Nat. Ass'n*, 874 So.2d 1231 (Fla. 5th DCA 2004) (Florida courts look to Florida law in resolving validity of forum selection clause, even if the contract contains a choice of law provision applying the law of another jurisdiction).

Whether a forum selection clause is enforced by the court typically turns on whether the clause is permissive or mandatory. While it seems that careful drafting should significantly reduce the risk of disagreement over whether a venue clause is permissive or mandatory, this issue is litigated with surprising frequency in Florida.

The essential question in discerning whether a forum selection clause is mandatory or permissive is whether the clause, by its express terms, provides that suit may be filed only in the forum named in the clause. If the venue clause unambiguously restricts the parties to a particular forum or geographic region within which to litigate, then the clause is mandatory. However, if the forum selection clause is ambiguous, or merely provides for consent to a specific jurisdiction or venue without expressly excluding litigation in another forum or venue, then the clause is permissive. The critical inquiry is whether the plain language of the agreement indicates "exclusivity."

If a venue selection contains mandatory language or "words of exclusivity," then Florida courts will enforce the provision absent showing that it is unreasonable/unjust. Words such as "must" and "shall," used properly, will demonstrate the venue selection clause is mandatory. For example, the court held as mandatory a clause stating that "[a]ny proceeding of any nature arising out of this Agreement shall be instituted only in the courts by the State of New Jersey." *Estate of Stern v. Oppenheimer Trust Co.*, 134 So.3d 566 (Fla. 3d DCA 2014). Similarly, a clause stating "This Agreement ... shall be governed by and construed in accordance with the laws of the State of Florida. The parties hereto consent to Broward County, Florida as the proper venue for all actions that may be brought pursuant hereto." was found to be mandatory. See *Golf Scoring Sys. Unlimited, Inc. v. Remedio, 877 So. 2d 827* (Fla. 4th DCA 2004). Another example of a mandatory forum selection clause is "[a]ny controversy relating to this agreement ... shall be held in Minneapolis, Minnesota. The parties hereby submit to jurisdiction for any enforcement of this agreement in Minnesota." See *Sonus-USA v. Thomas W. Lyons, Inc.*, 966 So. 2d 992 (Fla. 5th DCA 2007).

Conversely, permissive language, such as use of the term, "may," without any language of exclusivity, or a simple consent to jurisdiction without excluding litigation in another forum will usually defeat an argument that a venue provision is mandatory. For example, a provision providing, "[i]f there is a lawsuit, Borrower agrees upon Lender's request to submit to the jurisdiction of the courts of STEARNS County, the State of Minnesota" was found to be permissive and not mandatory. See *Golden Palm Hospitality, Inc. v. Stearns Bank Nat. Ass'n*, 874 So.2d 1231 (Fla. 5th DCA 2004). A provision stating, "[a]ny litigation concerning this contract shall be governed by the law of the State of Florida, with proper venue in Palm Beach County," was ruled to be permissive. See *Regal Kitchens, Inc. v. O'Connor & Taylor Condo. Constr., Inc.*, 894 So. 2d 288 (Fla. 3d DCA 2005). Also, the clause, "[t]his instrument shall be construed in accordance with the laws of Massachusetts. The Guarantor hereby consents to the jurisdiction of the state and federal courts of the Commonwealth of Massachusetts," was found permissive. See *Shoppes Ltd. P'ship v. Conn*, 829 So. 2d 356 (Fla. 5th DCA 2002).

Finally, even presuming the venue provision contains mandatory language, it may be found invalid if the court determines it was based upon fraud, was the product of overwhelming bargaining power of one party and was sole basis upon which jurisdiction was conferred. See *Golden Palm Hospitality, Inc. v. Stearns Bank Nat. Ass'n*, 874 So.2d 1231 (Fla. 5th DCA 2004). This is challenging to prove, as one must demonstrate that the clause itself was the product of fraud.

Obviously, this discussion underscores the importance of diligent drafting on the front end. However, this analysis hopefully confirms that should litigation arise, careful attention should immediately be directed to the language of any forum selection provision and considered in developing litigation strategy

Michael L. Duncan, Esq., of Duncan Trial & Family Law, is an AV-Preeminent rated trial attorney, Mr. Duncan has extensive courtroom experience representing clients in business and other types of disputes in federal and state courts, including contract disputes, fiduciary duty breaches, partnership disputes, trade secret misappropriation, tortious interference, fraud, franchise disputes, and non-compete and confidentiality agreements. He also handles family law matters such as divorce, custody and support disputes, paternity matters and domestic violence issues. He has been repeatedly honored as one of Florida Trend's Legal Elite and is a fellow in the Litigation Counsel of America

How Technology Impeached a Witness

By Julian Perez

With today's technology it has never been easier to remove the credibility of a witness. As a trial technician, I recently assisted a defense attorney in discrediting the opposing counsel's expert witness to the point of impeachment.

Jane, the defense attorney, previously took the deposition of the opposition's expert, Dr. Smith. During the deposition, Dr. Smith answered a few questions in ways that didn't entirely support the plaintiff's position.

During trial preparation, my software allowed us to quickly search for keywords and phrases within the transcript and create excerpts with corresponding videos. We were able to organize the excerpts into categories, such as "contradicting statements," "claims that support us," and "opinions that are likely to change at trial." With an arsenal of videos to display, Jane was confident for cross-examination.

As anticipated, Dr. Smith changed some of his previous positions on the case. Most importantly, his new opinion on causality and how it was related to the accident. Fortunately, we were prepared. We knew exactly where to find the excerpts needed because they were organized in my trial software.

Once Dr. Smith had concretely confirmed his new position, Jane questioned him on his previous statements. He quickly countered that the context of his statement was being incorrectly portrayed. Using the trial software, we were able to display the transcript pages containing the contradictory statements and highlighted the sections of importance. Jane then followed up with the classic question, "How can your views change so significantly with no additional information?"

Once again, Dr. Smith avoided answering the question, claiming his tone was being incorrectly interpreted. Jane confidently played each video excerpt to the jury. Each excerpt was synchronized allowing the jury to read along without missing a single spoken word, hearing and seeing Dr. Smith's response. For added impact, we included a clip of the doctor being sworn in at the deposition emphasizing he was under oath during his previous statements.

At this point, Dr. Smith was visibly flustered and backpedaling. He requested the videos be replayed hoping for a reason to discredit them. Jane was happy to oblige considering the videos were supporting her position. My trial software allowed me to quickly jump between clips, pause as needed, display the transcript and highlight key statements. Dr. Smith was unable to substantially retort his previous claims and firmly stuck to his new opinion. Jane appeared comforted by the jurors' inquisitive gazes and head shakes as she questioned Dr. Smith.

After showing that Dr. Smith's previous statement had been given under oath and offered no substantial evidence supporting his change of opinion, Jane moved forward with the motion to impeach his testimony on the grounds of an inconsistent statement. The judge approved the motion and Dr. Smith's testimony was dismissed. Opposing counsel losing their expert's testimony led to a quick deliberation by the jury that resulted in victory for our client.

Trial technology assisted us in winning the case and it could help you too. Trial technology is further empowered when run by a trial technician, such as myself. Trial technicians are a group of highly trained professionals that specialize in a variety of services including the creation of demonstrative exhibits, such as 3-D printer objects, trial boards and animations, audio/visual support including the setup of projectors, televisions and computers, and trial presentation where a trial technician uses software to enhance an attorney's case. If you want to be a step ahead in your next trial, consider the help of a trial technician.

Julian has a degree in psychology and sociology providing him with a unique understanding of how people process and retain information, allowing him to assist clients in tailoring their trial presentation to have the most impact. He is a key member of Orange Legal's in-house video production team. Julian is trained in trial technology, video editing, graphic design, video transcript synchronization, West Publisher and on-site audio visual support. Julian teaches an accredited CLE course, "Enhancing Your Trial Presentation" that he designed to educate legal professionals on their options for how to visually engage a jury with an aesthetically appealing presentation.

The Role of the Constitution in Private Law: U.S. & South Africa

By Christopher Roederer

It has been over 25 years since Nelson Mandela's release from prison, marking the beginning of the end of Apartheid in South Africa. Apartheid included a pervasive set of policies segregating "whites" from "non-whites" and further segregating the "non-white" population. These policies determined where one could live, what education one received, who one could marry, what property could be owned, what jobs or occupations one could have and what civil and political rights one had.

Under Apartheid, South Africa strongly separated public law (i.e., criminal law, administrative law and constitutional law) from private law (i.e., contracts, property law and delict (torts)). To this day, some law schools teach them in separate departments. This is consistent with classical liberal ideals that see an expanded role of government in public law areas with minimal government intrusion into private law matters. South African private law was not too far out of step with English and U.S. private law (at least prior to the developments in the United States during the '60s and '70s). Some have even argued that private law was relatively unscathed by Apartheid and thus, while there is a clear need for public law transformation, there is no such pressing need for private law change. If this were true, the U.S. model may be attractive.

> "Prior to the Thirteenth Amendment, persons acting in their private capacity were not bound by any provision in the Constitution and with a few notable exceptions constitutional rights have had no bearing on private common law rules."

The U.S. Constitution largely follows the classic liberal model with a somewhat limited set of political rights set out in the Bill of Rights and a limited set of enumerated powers set out for the branches of the federal government in Articles I, II and III. Prior to the 13th Amendment, persons acting in their private capacity were not bound by any provision in the Constitution and with a few notable exceptions constitutional rights have had no bearing on private common law rules. The few notable exceptions include defamation law, intentional infliction of emotional distress and punitive damages. *See*, e.g. *New York Times Co. v. Sullivan* (1964), *Hustler Magazine v. Falwell* (1988) and *BMW of North America, Inc. v. Gore* (1996) and their lines of cases.

Six years after Mandela's release, South Africa adopted its final, democratic Constitution in 1996. Rather than choose the U.S. path, the drafter's of South Africa's constitution sought to constitute a state where human rights would permeate both public and private spheres. Rather than settling for a limited number of political and civil rights, they included an extensive set of cultural and socio-economic rights, for instance, the right to a healthy environment, to housing, health care, to food, water and social security, education, as well as rights for cultural, religious and linguistic communities and special rights for children. *See* sections 24-31 of the constitution).

Rather than adopt the liberal notion that private law is separate from the constitution and that individuals have no constitutional duties, the constitution explicitly allows for its provisions to bind private parties and it adopts mechanisms to bridge the public law/private law divide so that all of South African law is harmonized with the values of the constitution. Section 8(2) of the constitution allows for the rights in the Bill of Rights to directly bind the conduct of private persons and corporations. Further, section 8(3) requires that: "When applying a provision of the Bill of Rights to a natural or juristic person . . . a court in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law. . ." Section 39(2) goes further, requiring that "[w]hen interpreting any legislation, and when de-

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veloping the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

While more can be done to harmonize the private law with the constitution's values, to promote freedom, dignity, equality and access to justice, there have been significant changes over the past 20 years. Common law developments have included expanding the doctrines of vicarious liability, expanding the notion of duty or wrongfulness in delict actions (the analogue to tort law), expanding invasion of privacy actions, allowing for class action suits, providing more protection for publishers in defamation cases, expanding the role of *res ipsa loquitor* in products liability cases and more strictly construing waiver of liability clauses in contracts. There have also been several legislative changes that have brought the common law into harmony with the constitution in the areas of employment law, equality legislation, contingency fees, class actions and consumer protection law.

"While more can be done to harmonize the private law with the constitution's values, to promote freedom, dignity, equality and access to justice, there have been significant changes over the past 20 years."

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