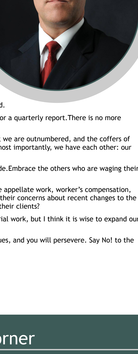
JUSTICE ASSOCIATION NEWS

2ND QUARTER 2019

Message from the President

June 2019 - Timothy Murphy



To the 2019 Members of the Palm Beach County Justice Association:

A few years ago, the former President of the Florida Bar, Eugene Pettis, said during his induction speech, **"We cannot allow our members to sleep during this time of seismic change."** Yes, he was speaking to all Florida attorneys, but I hope we can all agree that this message rings true today for the Personal Injury Plaintiff attorney.

No matter which side you fall on the political spectrum, there is no denying that the battlefield is shifting, morphing before our very eyes. Our judiciary has been changed at the highest levels, and cases and holdings, which we have taken for granted, now face the very real prospect of reversals. Corporations and institutions are given unprecedented access to information that was previously protected. The litigation environment is changing, and we are the last guardians and protectors of the ones most affected by these changes, the individuals in their fight for significance against corporate greed.

Without our efforts, our clients are reduced to numbers counted on a spreadsheet, metrics for a quarterly report.There is no more important time for the plaintiff counsel than today.

As I said before, we are an *Army*, a sword and a shield to protect Justice. It is no matter that we are outnumbered, and the coffers of our enemies are overflowing. We will persevere. We have truth and we have courage. And, most importantly, we have each other: our brothers and sisters in the fight, in the trenches, with us shoulder to shoulder, every day.

I want to remind everyone that it is not only the plaintiff personal injury attorneys on our side.Embrace the others who are waging their own battles against corporate greed.

Reach out to the attorneys who are related to your cases, such as the attorneys who practice appellate work, worker's compensation, trust and estates, PIP, etc. Get to know their practices. Where are their struggles? What are their concerns about recent changes to the judiciary or changes in legislation that are affecting their practices and their ability to help their clients?

We are a community of plaintiff's attorneys, an exclusive division- the screaming eagles of trial work, but I think it is wise to expand our reach to others who are waging the same battle, just on a different front.

The takeaway? Yes, we are in some dark times, but hang in there! Stay true to your core values, and you will persevere. Say No! to the next insufficient offer, file that Complaint and Notice for Trial, and fight the good fight.

You are not alone. We are in this together. Help is on the way.

Yours truly,

Timothy Murphy, President, tmurphy@plofl.com

Young Lawyers Corner

By Ashley Eagle, Young Lawyers Board Chair
aeagle@rightfojustice.com

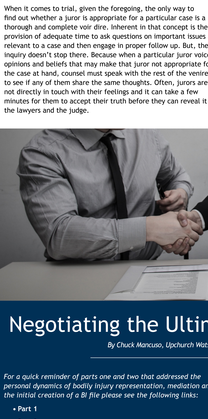
It is well-known that many attorneys struggle with mental health or substance abuse problems as a result of the stress of our profession. Not only do attorneys have to endure long working hours and the adversarial nature of litigation, but many young lawyers are fraught with an overwhelming amount of student loan debt. All of these factors combined creates a burden on maintaining a healthy mind and body.

The Florida Bar designated May as Health and Wellness Month and encouraged attorneys to make mental health and wellness a top priority. To further this mission, the PBCJA Young Lawyers Board held a CLE luncheon titled "Bolay and Chill," which took place on May 31. Matt Cardone, a Vedic meditation teacher, provided an informative presentation on the importance of meditation in maintaining chill in a stressful environment. He also walked the participants through the following exercises: mindfulness, meditation, and transcendental meditation. At the end of the luncheon, everyone discussed how they felt a little more "chill" and that the exercises were beneficial.

The YLB remains busy planning other exciting events for the remainder of the year. In September, we will team up with the Palm Beach County Bar Association - South County in hosting a joint happy hour at Copperpoint Brewing Company. This event will allow attorneys in our organization to socialize with others that practice in different areas of law. Our goal is to create an opportunity to help build a potential referral network, which is important for many young lawyers trying to grow in their career. Please be on the lookout for more information regarding this event.

Time Limits on Jury Selection

By Sean C. Domnick, Shareholder, Domnick Cunningham & Whalen, sean@dcwlaw.com



The Seventh Amendment to the United States Constitution states that "The right of trial by jury shall be preserved." Similarly, Article I, section 22 of the Florida Constitution guarantees that "The right of trial by jury shall be secure to all and remain inviolate." The fair and impartial jury is crucial to the administration of justice under our legal system. It is the foundation upon which our society places its confidence in the justice system.

Article I, section 22 of the Florida Constitution guarantees the right to an **impartial** jury. *State v. Neil*, 457 So. 2d 481 (Fla. 1984). That is, a panel of jurors that does not come into any case with preconceived biases on material issues. As the *Neil* court noted, "A cross-section of the fair and impartial is more desirable than a fair cross-section of the prejudiced and biased." Of great importance is the right to determine whether there is a reasonable basis for fear that a particular juror can't be fair. *Johnson v. Reynolds*, 121, So. 793, 796 (Fla. 1929).

We live in the most polarizing of times. Americans have rarely disagreed more than we do today. We disagree about just about every aspect of our lives. Worst, we watch TV 24 hours a day reinforcing these disagreements. People have strong opinions. Not only do they have strong opinions, but, they often believe that people with opposing opinions are inherently bad people. A multitude of studies reveal that when someone has a strong opinion on an issue, they filter any facts that don't agree with that opinion and only accept those facts that reinforce their already held beliefs. This is known as confirmation bias.

When it comes to trial, given the foregoing, the only way to find out whether a juror is appropriate for a particular case is a thorough and complete voir dire. Inherent in that concept is the provision of adequate time to ask questions on important issues relevant to a case and then engage in proper follow up. But, the inquiry doesn't stop there. Because when a particular juror voices opinions and beliefs that may make that juror not appropriate for the case at hand, counsel must speak with the rest of the venire to see if any of them share the same thoughts. Often, jurors are not directly in touch with their feelings and it can take a few minutes for them to accept their truth before they can reveal it to the lawyers and the judge.

To do this properly--to best represent your client--takes time. Florida courts, time and time again, have held that arbitrary restrictions on the time to conduct voir dire are improper. *See O'Hara v. State*, 642 So. 2d 592 (Fla. 4th DCA 1994); *Ritter v. Jiminez*, 343 So. 2d 659(Fla. 3d DCA 1977).

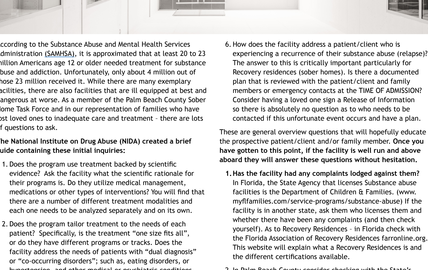
Think of some of the issues that we face in a typical automobile case that require exploration in voir dire:

1) No property damage and someone was hurt
2) Causation
3) Burden of Proof
4) Pre-existing injuries
5) Letters of Protection
6) Bias against lawsuits/lawyers
7) Immigrant client
8) Seat Belt Defense
9) Malingering
10) Familiarity with injuries
11) History of Lawsuits
12) Jobs in Insurance industry
13) When something bad happens it is God's will

A fair inquiry requires time. No one is advocating for a jury selection that goes on forever, nor one where the lawyers are trying to indoctrinate the panel before the case starts. A poorly done voir dire should not be condoned by anyone. However, where the voir dire is being conducted properly, in an effort to determine who should be stricken for cause and to determine how to best use the available peremptory challenges, arbitrary time limits are just that--arbitrary. Justice cannot be sacrificed on the altar of expediency.

We spend hundreds of hours and tens of thousands of dollars, often hundreds of thousands of dollars, before we get to trial. It is our clients' only chance at justice. It makes no sense that after all of that time and effort, at the most important moment of the case in which we decide the judges of the facts, that our time to conduct a meaningful voir dire should be arbitrarily capped. Put simply, there is no "one size fits all" when it comes to picking a jury.

It is up to us as lawyers to be prepared to ask appropriate questions with appropriate follow up. It is up to the Court to ensure that we do that. However, each case is its own. Each venire is its own, and comes with its own set of beliefs and ways of communicating those beliefs. If you feel that arbitrary time limits are being set, be prepared to argue for more time. Make a record of the areas of inquiry that you have left to go over. Make a record of the follow up questions you have for the answers that have been given. Always be respectful of the courts, but remember that we must be prepared to argue for the time necessary to ensure we can make informed decisions about the who will sit on our juries. Your client's future depends on this preparation.



Negotiating the Ultimate Settlement, Part 3

By Chuck Mancuso, Upchurch Watson White & Max, Cmancuso@uww-adr.com

For a quick reminder of parts one and two that addressed the personal dynamics of bodily injury representation, mediation and the initial creation of a Bi file please see the following links:

- **Part 1**
- **Part 2**

In part three we will discuss basic tactical decisions that will enhance the value of a claim for litigation and mediation.

Most severe accidents usually generate media coverage. It's not always apparent online, on TV or in print, but this coverage often contains some of the first photographs and video documentation regarding the liability and damages aspects of your case.

With every file opening you should send an information request to area media outlets (TV and newspapers) and request copies of video and photo material that may have been generated from the accident. Much of this content is not only created by the media outlet but also submitted to the outlet for online publication by scene witnesses who provide supplemental photographs and video. A media search of the television, radio, and newspaper websites contains a trove of information. The cost to collect this information is nominal.

TV news video and public video supplied to the stations provide you with some of your most helpful and compelling information for those accidents that have warranted coverage. Just because an initial cursory search does not disclose information does not mean it does not exist. It only means the outlet may have decided not to use the material for public consumption. Often, various videos will come to fruition and you may edit the material appropriately to create a timeline of events but also a very personalized history of the severity of the accident.

In part two of the series we discussed the importance of getting to the scene of a serious accident as soon as possible to document the physical attributes of the scene, preferably with your expert witness or investigator. This includes securing information for their later review.

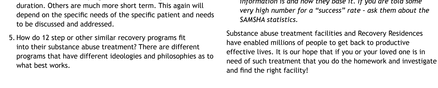
It is imperative you immediately put a request out to all possible parties and passengers of vehicles for the retention and/or inspection of their individual cell phones. These requests are no longer looked upon by the courts as a fishing expedition. In Antico v. Sindt Trucking Inc., 148 So.3d 163, (Fla. 1st DCA 2014), the DCA permitted opposition to search and perform a specific data recovery process on individual phones. The search is no longer a fishing expedition or violation of privacy as the exact technical logical information requested does not bear content (emails, texts) of information but also may contain speed, location and direction surrounding the accident.

"Shoulda, coulda, woulda" are not part of the well prepared attorney's lexicon during the negotiation or mediation process.

Charles A. Mancuso (chuckmancuso.com) is a South Florida-based mediator and shareholder with Upchurch Watson White & Max. The firm's areas of practice include mediation, arbitration and e-discovery. For more information, visit www-adr.com or call 800-863-1462.

Things that Substance Abuse Treatment Facilities and Recovery Residences Don't Want to Tell You - But You NEED to Know

By Susan B. Ramsey, Romano Law Group, susan@romanolawgroup.com



According to the Substance Abuse and Mental Health Services Administration (SAMHSA), it is approximated that at least 20 to 23 million Americans age 12 or older needed treatment for substance abuse and addiction. Unfortunately, only about 4 million out of those 23 million received it. While there are many exemplary facilities, there are also facilities that are ill equipped at best and dangerous at worse. As a member of the Palm Beach County Sober Home Task Force and in our representation of families who have lost loved ones to inadequate care and treatment - there are lots of questions to ask.

The National Institute on Drug Abuse (NIDA) created a brief guide containing these initial inquiries:

1. Does the program use treatment backed by scientific evidence? Ask the facility what the scientific rationale for their programs is. Do they utilize medical management, medications or other types of interventions? You will find that there are a number of different treatment modalities and each one needs to be analyzed separately and on its own.
2. Does the program tailor treatment to the needs of each patient? Specifically, is the treatment "one size fits all", or do they have different programs or tracks. Does the facility address the needs of patients with "dual diagnosis" or "co-occurring disorders"; such as, eating disorders, or hypertension, and other medical or psychiatric conditions.
3. Does the program adapt treatment as the patient's needs change? How does the treatment facility do these assessments and make these referrals. For example, if it becomes evident that a patient is in need of additional medical or psychiatric services, how do they ensure that happens in a timely and appropriate manner?
4. Is the duration of the treatment sufficient? Specifically, different programs have different ideology regarding this issue. There are some programs that are many months in duration. Others are much more short term. This again will depend on the specific needs of the specific patient and needs to be discussed and addressed.
5. How do 12 step or other similar recovery programs fit into their substance abuse treatment? There are different programs that have different ideologies and philosophies as to what best works.
6. How does the facility address a patient/client who is experiencing a recurrence of their substance abuse (relapse)? The answer to this is critically important particularly for Recovery residences (sober homes). Is there a documented plan that is reviewed with the patient/client and family members or emergency contacts at the TIME OF ADMISSION? Consider having a loved one sign a Release of Information so there is absolutely no question as to who needs to be contacted if this unfortunate event occurs and have a plan.

These are general overview questions that will hopefully educate the prospective patient/client and/or family member. **Once you have gotten to this point, if the facility is well run and above aboard they will answer these questions without hesitation.**

1. **Has the facility had any complaints lodged against them?** In Florida, the State Agency that licenses Substance abuse facilities is the Department of Children & Families. (www.myflfamilies.com/service-programs/substance-abuse) If the facility is in another state, ask them who licenses them and whether there have been any complaints (and then check yourself). As to Recovery Residences - in Florida check with the Florida Association of Recovery Residences farronline.org. This website will explain what a Recovery Residences is and the different certifications available.
2. In Palm Beach County consider checking with the State's Attorney's office Sober Home Task force. www.sa15.state.fl.us/stateattorney/SoberHomes prior to a loved one residing in a Recovery Residences.
3. **Ask what the "success rate" of their program is?** *According to the SAMHSA National Survey on Drug Use and Health estimates that relapse rates for addictive diseases usually range in the range of 50 to 90% and there are numbers of different factors relating to this. So you want to ask what this particular facilities follow-up studies are, follow-up information is and how they base it. If you are told some very high number for a "success" rate - ask them about the SAMSHA statistics.*

Substance abuse treatment facilities and Recovery Residences have enabled millions of people to get back to productive effective lives. It is our hope that if you or your loved one is in need of such treatment that you do the homework and investigate and find the right facility!

A Methodology in Biomechanical Engineering Evaluations of Injury Causation Mechanisms in Slip/Trip/Fall Accidents and Claims

By Dr. Farhad Booeshaghi, P.E., Global Engineering Scientific Solutions, fbooeshaghi@gess1.com

"Our greatest glory is not in never falling but in rising every time we fall" - Confucius

"Everyone falls down. Getting back up is how you learn to walk" - Walt Disney

"Every fall doesn't necessarily result in an injury" - Dr. B.

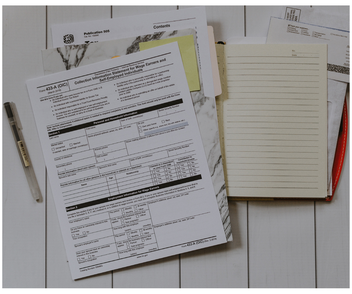
Falling and getting injured can happen to the best of us. In our daily activities there exists a plethora of conditions that may result in an individual falling and sustaining an injury. Examples of some external contributing factors include slippery floors, uneven surfaces, shoe characteristics, tripping points, travel path obstructions, handrail/guardrail placement, inconsistent riser heights or tread depths, overly sloped ramps, broken sidewalks, and lighting conditions to name a few. In addition to external factors, the human factors element must also be considered. Characteristics such as age, weight, physical conditioning, walking speed, inattentiveness, carrying objects or visual obstructions, may also play a role. At times, there may be a dispute as to the liability for the fall and the cause of the injury. In such cases, an engineering and scientific evaluation of the event may be needed to assist with the liability and causation determinations. Entities such as insurance professionals, risk managers, municipalities, law enforcement agencies, attorneys, legal scholars, and everyday individuals may be interested in such determinations. As such, there exists a field known as forensic science and engineering. Forensic engineers assist with the technical evaluation of liability and causation contentions.

Through the study of topography, examination of physical evidence and the measurement of a surface's slip-resistance, Global Engineering's team of forensic professionals are uniquely qualified to identify the liability and causation of slips, trips and falls. We explore a variety of human factors contributions and examine how the human anatomy and its relationship to our process of movement and manners of ambulation impact us. We explore and identify hazards that may result in a fall, examine the corresponding risks associated with fall hazards, and identify the kinematics of associated motion and the biomechanics of injury causation.

Contact us to learn how Global Engineer (GESS) can assist you with the technical evaluation of your case.

Florida Supreme Court invalidates a Hospital lien:
Lee Memorial Health System, v. Progressive Select Ins.Co

By Michael S. Bendell, Board Certified Civil Trial Lawyer, Michael Bendell, P.A., bendell.law@gmail.com



In Lee Memorial Health System, v. Progressive Select Ins. Co., 43 Fla. L. Weekly S661a (Fla. 2018), the Florida Supreme Court upheld the lower court in invalidating a hospital lien in Lee County. In a car versus a pedestrian context, a public hospital sued Progressive for impairment of a recorded hospital lien, where Progressive paid the full $10,000 PIP to the hospital, but settled and paid the $10,000 bodily injury limits to the pedestrian's attorney.

On motion for summary judgment, Progressive argued that the LMHS Lien Law is "unconstitutional as a special law pertaining to the creation, enforcement, extension and/or impairment of liens based on private contracts in violation of Article III, §11(a)(9), of the Florida Constitution." Id. The trial court and the Second District agreed. *See Lee Memorial Health System v. Progressive Select Ins. Co.*, 230 So. 3d 538 (Fla. 2 d DCA 2017).

The Supreme Court reasoned:

> Lee Memorial contends that the contract must be public because Lee Memorial is a public entity. However, the term "private" in this constitutional provision modifies the contract, not the parties who have entered the contract. The subject matter of the contract is the provision of and payment for medical services, not the administrative operation of Lee Memorial.

The Supreme Court stated that:

> The question presented for our decision is whether those liens are "based on private contracts." We conclude that they are, as illustrated by the facts of this case, involving a lien based on a contract for the receipt of and payment for medical treatment between Lee Memorial and a patient. We therefore conclude that the LMHS Lien Law is unconstitutional.

Contrasted with *Shands*

The Supreme Court previously considered a similar case. In *Shands Teaching Hospital & Clinics, Inc v. Mercury Ins. Co. of Florida*, 97 So.3d 204 (Fla. 2012), the Supreme Court stated:

> In this case we consider the constitutionality of the Alachua County Lien Law, chapter 88-539, Laws of Florida (Lien Law), and the Alachua County Hospital Lien Ordinance, Alachua County Code sections 262.20-262.25 (1997) (Ordinance), both of which establish certain lien rights for charitable hospitals in Alachua County. We have for review the decision of the First District Court of Appeal in Mercury Insurance Co. of Florida v. Shands Teaching Hospital & Clinics, Inc., 21 So.3d 38 (Fla. 1st DCA 2009), which reversed the trial court's judgment for Shands Teaching Hospital and Clinics, Inc. (Shands) and held that the Lien Law and Ordinance were unconstitutional under the prohibition on "special law[s]" pertaining to "liens based on private contracts" contained in article III, section 11(a)(9) of the Florida Constitution. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.
>
> For the reasons set forth below, we conclude that the Lien Law is unconstitutional under article III, section 11(a)(9) of the Florida Constitution. We hold, however, that the Ordinance is not unconstitutional and that the First District should have upheld the trial court's judgment on the basis of the Ordinance.

(EA) Accordingly, the presence of a local ordinance can save an otherwise unconstitutional hospital lien law under *Shands*.

How to use *Lee Memorial*

Lee Memorial has applications to other[1] hospital lien laws where the hospital lien is based on any Special Act, and not saved by *Shands*. Post-judgment, if you cannot resolve the hospital lien, you should move for leave to file a supplemental complaint to join the hospital as a party to the lawsuit under Rule 1.190(d), alleging in a declaratory count that the special law upon which the hospital lien is based:

> is unconstitutional as a special law pertaining to the creation, enforcement, extension and/or impairment of liens based on private contracts in violation of Article III, §11(a)(9), of the Florida Constitution.

Because such hospital lien laws typically have provisions for recovery of attorney's fees, an action to invalidate a hospital lien should be taken with caution. If the hospital prevails, the hospital will be seeking attorney's fees from your client under the Special Act. On the other hand, if you invalidate the Special Act, you will have no attorney's fees provision upon which you can recover attorneys' fees, unless you can find attorney's fees language in the admissions agreement form. Accordingly, Lee Memorial should be considered anytime a Hospital Lien is based on a Special Act.

[1] Other than Palm Beach County where *Schwartz v. GEICO*, 712 So.2d 773 (Fla. 4th DCA 1998) makes this attack unnecessary.

Medical expert witnesses specializing in oncology present many options for trial attorneys

By Adam Taranto, Mednick Associates, adam@mednickassociates.com

Oncologists come in many different sizes and when a litigator requires an oncology expert witness there are many questions to ask. Mednick Associates outlines their search process.

Legal cases involving oncology issues are bound to be emotional and straining on both the plaintiff and defendant. Since most people know someone who has died or beaten cancer, opinions on oncology cases are far and wide. As a trial attorney, understanding the nature of the case and identifying the correct expert needed, can be challenging at times.

Mednick Associates, a leading medical expert witness and legal nurse consulting firm, works with and locates numerous oncologists who are able to provide objective opinions on legal cases in a wide array of oncology specialties. How they do this is outlined below.

1. Medical or Surgical: Many oncology cases require a medical and surgical oncologist to review and opine. The difference lies in the specialty. A medical oncologist will opine on the nature of the cancer and the diagnosis, while the surgical oncologist will focus on the surgery related to the cancer. At times, they may disagree, which is why Mednick Associates makes sure to screen the case through the both experts in order to present a consolidated opinion to their client.
2. What type of oncologist: Many cancers present in specific parts of the anatomy and numerous physicians can opine on the specific cancer. However, some such as liver cancer, may present as the cancer spreads throughout the body. Knowing the source of the cancer is important as an oncologist who specializes in liver cancer, may not be appropriate even though the patient presents with liver cancer. Mednick Associates, through their staff RN's, reviews the pertinent medical records, determines the true source of the cancer and finds the appropriate oncologist to opine. This saves time and money for their clients by avoiding unnecessary case reviews
3. Is a non-oncologist required: Many times the damages associates with an oncologic case stem from issues caused by the cancer, but out of the realm of an oncologist, in terms of an opinion. Sometimes, endocrinologists, general surgeons, or general internal medicine experts are required to opine on subsequent care, treatment or follow on procedures.

Mednick Associates handles hundreds of oncology cases per year, whether malpractice, tort or product liability related. With a network of over 75 oncologists and growing, they are able to screen cases quickly, identify the appropriate oncology expert witness and have a case reviewed for a plaintiff or defense attorney. Their experts are physicians first and only devote a small amount of their practice to legal work. This characteristic of their experts allows for a highly credible expert in the courtroom or deposition. To contact them for further information on oncology or other medical expert specialties, please call 203.966.3000 or reach them online at www.mednickassociates.com.