JUSTICE ASSOCIATION NEWS

2ND QUARTER 2018

PBCJA President's Message

April 2018 – Sean C. Domnick, President

Palm Beach County is home to some of the most revered and respected trial lawyers in this state. From this community, legal legends have been born, and it gives me great pride to be elected President of an organization with such a rich history of advocacy.

I now have the privilege of serving as President of a local trial bar for the second time in my career. In 1999, I served as President of the Miami-Dade Trial Lawyers Association. What I learned from that experience can best be summed up by Max DePree, "The first responsibility of a leader is to define reality. The last is to say thank you. In between, the leader is a servant."

My job is to truly serve the needs of our members in present day, not in the context of what was, but in the context of what will be. How does technology, work/life balance, understanding millennials, or navigating the political landscape impact the average member? What challenges do they face and how can we as friends and colleagues uplift each other? What can we do to successfully obtain justice for our clients and restore the lives of families who have been destroyed by negligence and greed?

As President, my goal is to elevate our members and provide them with the tools they need to succeed in serving our clients and our profession. I am confident that we are going to make tremendous strides this year that will add value to your membership and bring to life innovative strategies that will benefit our evolving practices. The main reason I am so confident is because of the dedicated and diligent attorneys you have elected to serve as your Board of Directors.

This Board is committed to action, not just ideas, and it mobilized immediately after the election to begin implementing strategies that will strengthen our organization. I am also inspired by our newly created Young Lawyers Board of Directors who are tasked with adding value for the next generation of trial attorneys. This blindingly bright group of influencers have spurred to action and are working tirelessly for the future of this organization.

Over the course of this new year, I hope you will be proud of the direction we take as a profession and as an organization. I hope you see the value of your membership and the strength of our community increase. Most of all, I hope you see leaders who understand the present day needs of our profession, who listen and embrace new ideas, and who are committed to serve the best interest of our practice and our clients.

Thank you for giving me this opportunity to serve you.

Sean C. Domnick

This is an exciting time for the PBCJA!

Under Sean Domnick's leadership – our organization has established a Young Lawyers Board of Directors. The goal of this new branch of PBCJA is to create an ongoing and permanent fixture to grow our membership organically and make sure that the young lawyers in our community have a voice in how this organization develops into the future. In order for this new project to succeed we need the help of all members to be on the lookout for young lawyers in the community who you think could be potential members and to provide your own young lawyers who are already members with the support and resources to be involved with us!

Our YLBD is working together to create new events and initiatives geared towards this portion of our membership. The events will include a social event hosted in conjunction with our local bar associations and a CLE event which will focus on a topic such as Health and Wellness within the practice of law. We are working on a Law School Outreach initiative which will involve PBCJA young lawyers attending events at local South Florida law schools so newly minted lawyers will know who we are, what we do, and why they should join once they are in practice.

Moving forward – each edition of the PBCJA Newsletter will feature an article from one of the PBCJA Young Lawyers with the aim to keep the membership updated on upcoming Young Lawyer events and happenings.

We look forward to an exciting year!

– Ben Whitman, Clark Fountain La Vista Prather Keen & Littky-Rubin

What's Happening Behind the Scenes at Insurance Companies

By Kimberly S. White
Co-Founder, CaseMetrix, LLC

Having some insight as to "What's Happening Behind the Scenes at Insurance Companies" can provide valuable insight when effectively negotiating with adjusters and claims managers.

First, imagine a room filled with cubicles containing adjusters with headsets and computers. One layer has been assigned a caseload of minor injury pre-suit claims and a working checklist of items to be addressed including sending form letters, obtaining medical bills and other documentation. The vast majority of these cases are quickly settled directly with claimants who aren't represented by counsel and who frequently take the first or second offer. Their model relies on it. The consistent comments I have heard from these adjusters is, "Most of them just want money and they want it quickly. Most of them are soft tissue cases. They aren't really hurt. We tell them if they have a lawyer, he'll take at least a third of their money."

The next layer of pre-suit cases involves claimants who are represented by counsel, so there are often demand letters in the files. I recently spoke to a group of adjusters at a claims conference and the most frequent comment was, "Most of the lawyers send a form demand letter and we really just look for the part about any real injuries and the medical bills to see what it's worth." A close second was, "I don't pay attention to limits demands. Everybody demands the full limits." When questioned about what constitutes a "real injury," they were looking for objective signs of injury with diagnostic testing and greatly discounting the validity of soft tissue claims. This is obviously disconcerting given the fact that most personal injury cases involve soft tissue injuries.

Interestingly, large insurance companies frequently audit adjusters, so they are individually incentivized to settle cases as reasonably as possible. Adjusters are given "x" authority from their claims manager on each case. Adjusters are expected to settle their cases within that authority. Monthly reports are produced on the last day of each month and adjusters know they must settle "x" number of cases by that time; therefore, it's best to communicate with adjusters the last week of the month.

Yes, there is such a thing as settlement season. Adjusters are known to offer pennies on the dollar in December because statistically, they know many plaintiffs will accept the offer. Quotas must be met. Be especially careful in evaluating cases during this time of year.

A typical scenario involves an attorney sending a demand letter once he/she obtains the medical records and bills. The adjuster then makes a terribly low offer because many attorneys will take that offer. If your client has stopped treating and you have no new medical records or bills, that case sits still and your cash flow is interrupted. The gap in treatment begins to grow which can adversely affect the value. This is the time for creativity in finding ways to get that case back on the front burner with your adjuster. If you have information on recent settlements or verdicts, forward it to the adjuster. If you're aware of a favorable witness and can send a stand-alone report, do so. If you have a verbal surgical recommendation from a doctor, obtain it in writing and forward it to the carrier immediately. The adjuster needs to have something new in order to obtain additional authority from the claims manager.

If your client has received a surgical recommendation but hasn't undergone surgery, many adjusters will treat that as a non-surgical case. In such a scenario, your client is likely unhappy with the insurer's offer. Making your client aware of case values with and without surgery can often be helpful. While you aren't qualified to give medical advice, allowing your client to view documentation of the value of a non-surgical vs. surgical back herniation can be helpful.

Be forthcoming about prior related medical conditions and slight property damage. The reality is the adjuster will have the same medical records and property damage photos as you. It's better to proactively address these issues; otherwise, you'll have that same conversation each time you communicate with the adjuster and credibility issues may develop.

Lastly, be aware that insurers keep statistics on your performance. If they're aware that you'll settle a soft tissue back case with medical bills under $5,000 for 1.2 times the meds, that's all they'll offer. Be prepared to tell them why each case is different and take steps to humanize each case.

A busy practice can sometimes force us to handle cases in a routine manner. Consider these behind-the-scenes activities at insurance companies as you're drafting your next demand letter or engaging in follow-up communications.

"Will this accident affect my insurance rates?"

By Jeffrey A. Adelman
Adelman & Adelman Attorneys at Law

One of the most frequent questions I am asked from new personal injury clients is "how will this accident affect my insurance rates?" The insurance companies have done a wonderful job of scaring customers from using their insurance benefits, even though the insurance company cannot legally punish them for doing so, such as raising rates. It is illegal for an insurance company to raise a customer's rates based on a "not at fault" accident.

Florida Statute 626.9541(o)3.a. specifically states: (o) Illegal dealings in premiums; excess or reduced charges for insurance.— 3.a.Imposing or requesting an additional premium for a policy of motor vehicle liability, personal injury protection, medical payment, or collision insurance or any combination thereof or refusing to renew the policy solely because the insured was involved in a motor vehicle accident unless the insurer's file contains information from which the insurer in good faith determines that the insured was substantially at fault in the accident."

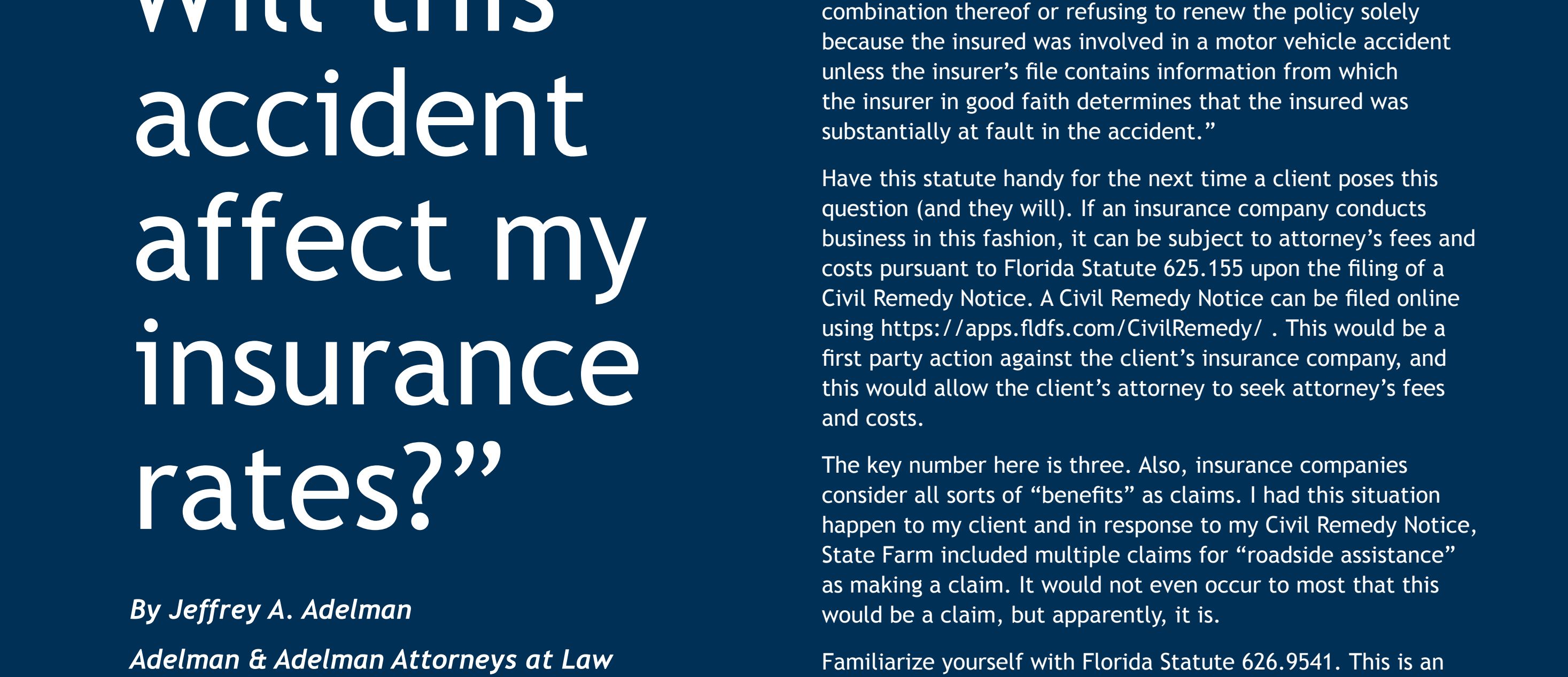
Have this statute handy for the next time a client poses this question (and they will). If an insurance company conducts business in this fashion, it can be subject to attorney's fees and costs pursuant to Florida Statute 625.155 upon the filing of a Civil Remedy Notice. A Civil Remedy Notice can be filed online using https://apps.fldfs.com/CivilRemedy/ . This would be a first party action against the client's insurance company, and this would allow the client's attorney to seek attorney's fees and costs.

The key number here is three. Also, insurance companies consider all sorts of "benefits" as claims. I had this situation happen to my client and in response to my Civil Remedy Notice, State Farm included multiple claims for "roadside assistance" as making a claim. It would not even occur to most that this would be a claim, but apparently, it is.

Familiarize yourself with Florida Statute 626.9541. This is an opportunity to potentially get another crack at the insurance company even on cases where the value of the injury claim is low. We cannot allow the insurance companies to take advantage of Florida citizens any more than they already do. All of us need to be aware of this issue, and not let the insurance companies punish our clients for using the coverage they pay thousands of dollars in premiums for a year. Protect your clients' rights, and do not allow them to be intimidated into buying into the urban legend that insurance companies have a right to raise rates even when your client is an innocent victim.

NEGOTIATING THE ULTIMATE SETTLEMENT

BY CHUCK MANCUSO
UPCHURCH WATSON WHITE AND MAX



Very often we do what we do and forget to pull back and take a good look from 30,000 feet. The importance of quality negotiation skills cannot be overlooked, especially after litigation has begun.

The Florida Office of the State Court Administrator reported 171,515 circuit civil cases filed for fiscal year 2016/17. Of those 171,515 cases filed only 614 were disposed of by a jury verdict. So, where did 170,901 cases go? Some were disposed of with dispositive motions but most resolved through negotiations.

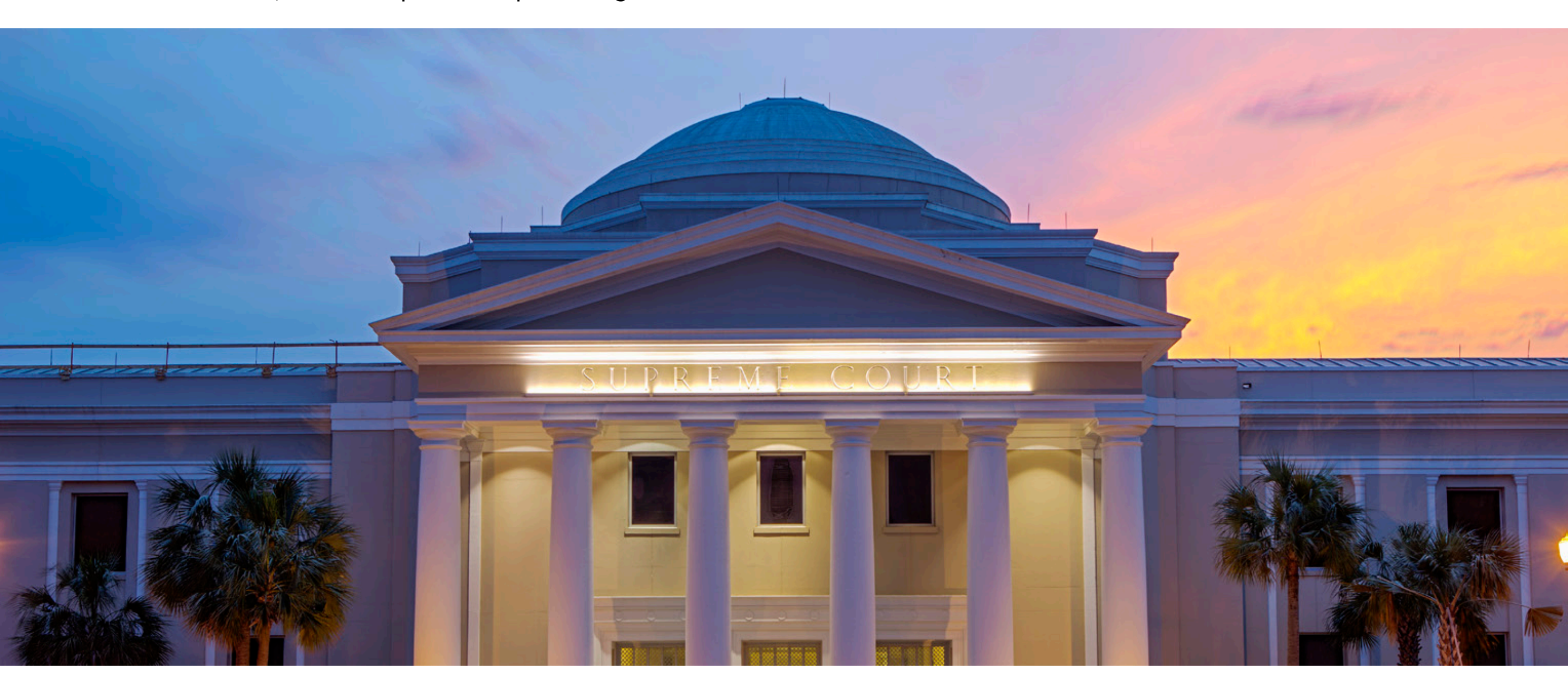
Negotiation skills are often focused on the pre-suit phase or the mediation phase. Negotiation skills should be utilized the day the case comes through your door. As every case should be prepared as if it was going to be the one of 614 that goes to trial, every case should be prepared to entertain a fruitful negotiation on any given day. "Negotiation" should not be defined as simply making offers and demands. "Negotiations" should be defined as an ongoing exchange of information that supports your position on liability and damages.

As a mediator it is apparent which attorneys have thrown the file together for mediation and those that are using mediation as the next phase of negotiating. The majority resolve at mediation for the benefit of the plaintiff when the attorney has negotiated along the way.

Your negotiation style has to be your own. Just as every great trial lawyer has their own style you should find your personal negotiation style. Some of the best trial lawyers I have seen in a courtroom have been Robert Montgomery (dec.), Willie Gary, and Sheldon Schlesinger (dec.). There could not be three more distinct personalities. If either of these gentlemen had tried to emulate the style or personality of the other I doubt they would have been as successful in the courtroom. Embrace your demeanor; embrace your character as a negotiator. Some are more aggressive than others, some are more detail oriented, some embrace the use of technology and some are better on the phone rather than a letter.

One attribute that should apply to all is openness. Candor, fairness and the willingness to maintain an open dialogue are traits that appeal to the other side. Making someone's job easier to evaluate your claim should always be a goal. Without an open dialogue and transfer of information, no negotiations can occur and there will not be a resolution.

Keep an ongoing open chain of communication. False deadlines do not work, are counterproductive and create roadblocks for communication. The only deadlines that should come in to play other than what's on the trial order should involve financial considerations. Obvious financial deadlines could include increased costs, medical expense or liquid damages.



Checking Your Privilege:

How the Supreme Court's Adoption of Section 90.5021, Florida Statutes Affects the Attorney- Client Privilege Held by Fiduciary Clients

BY: NINA SMITH & ALDO BELTRANO
Beltrano & Associates

In response to a routine e-mail disseminating estate documents, one of the more litigious beneficiaries of a probate case once demanded that all e-mails from the firm contain a disclaimer that the firm represented the personal representative, not the beneficiaries. In fact, that beneficiary quoted the Notice of Administration which had previously circulated, which included the language mandated by Probate Rule 5.240(b)(2): "the fiduciary lawyer-client privilege in section 90.5021, Florida Statutes, applies with respect to the personal representative and any attorney employed by the personal representative."1

But until January 25, 2018, this question lingered: Did the personal representative actually enjoy a fiduciary lawyer-client privilege?

Older lines of case law suggested that the answer turned on whether services were provided to the fiduciary or to the beneficiary or ward.2 The Tripp line of cases from the Second District recognized that some communications between a fiduciary and his lawyer could be privileged while others were discoverable by beneficiaries or a ward.3 In both Jacob v. Barton and Tripp v. Salkowitz, questions of discovery were resolved by an in camera inspection by the trial court to determine which communications between the fiduciary and his lawyer fell within the purview of the attorney-client privilege (and whether an exception existed), and which were fully discoverable.4

In 2011, the Florida legislature enacted chapter 2011-183, section 1, of the Florida Laws, which modified the evidence code at § 90.5021 to expressly provide that a fiduciary is the client of the lawyer he hires and is thus the holder of the attorney-client privilege.5 The legislature's adoption of the fiduciary-client privilege informed much of the rest of 2011-183. Section 8 amended the probate code at Fla. Stat. § 733.212 to require notice of the fiduciary lawyer-client privilege in a Notice of Administration6, and section 11 amended Fla. Stat. § 736.0813 to require that a trustee notify beneficiaries of the applicability of the privilege to the trustee's relationship with his lawyer as part of the Notice of Trust.7

In 2011, the Florida Supreme Court approved revisions to Rule 5.240(b)(2) of the Probate Code to conform with the new mandate of section 733.212.8 But despite the recommendation of the Florida Bar Code and Rules of Evidence Committee, the Court declined to adopt section 90.5021 as part of the evidence code in 2014, "question[ing] the need for the privilege to the extent that it is procedural."9

The Florida Constitution's unique separation of powers arrangement bifurcates lawmaking along a substantive-procedural divide; while the legislature concerns itself with the passage of substantive laws, it remains the job of the Florida Supreme Court to "adopt rules for the practice and procedure in all courts."10 Simply, the Florida Supreme Court makes the rules of the court;11 unless and until it adopted § 90.5021 as part of the evidence code, the inclusion of the attorney-(fiduciary) client privilege was effective and enforceable only to the extent that the law was substantive.

Declining to incorporate the privilege into the evidence code as a procedural rule, proponents of the rule claimed that the Florida Supreme Court had cast a shadow of uncertainty over the scope and enforceability of the attorney-client privilege as it applies to fiduciary clients. 12 Indeed, that decision was inconsistent with the Court's earlier adoption of Rule 5.240(b)(2); the Court affirmed one rule which requires not only the express acknowledgment of the attorney-(fiduciary) client privilege with respect to Personal Representatives, but mandates an explicit citation to section 90.5021, and then proceeded to not adopt that same section 90.5021 as a procedural rule of evidence.13

This dichotomy is perhaps best summarized by Robert Goldman, Esq. who, in his comments in favor of adopting section 90.5021, observed that

> *Lawyers in Florida must notify estate beneficiaries that section 90.5021 applies and establishes a fiduciary-exception free attorney-client privilege for communications between a personal representative and his or her attorney when, in fact, section 90.5021 may not even be enforceable (if it is procedural in nature). Currently lawyers cannot honestly advise a fiduciary that the privilege applies and is free from a fiduciary exception. Currently lawyers cannot honestly advise beneficiaries (even though they are required by rule to do so) that the privilege applies to communications between the fiduciary and its counsel and is free from a fiduciary exception.14*

Did the passage of section 90.5021 alone confer protection to a fiduciary's communications with his attorney? How should conflicts be addressed when those communications were demanded by beneficiaries or subsequent fiduciaries?

Since 2011, this question has arisen on a handful of occasions. In 2015, the 11th Circuit looked to the Rules Regulating the Florida Bar and found that the comment to Rule 4-1.7, which provides that "In Florida, the personal representative is the client rather than the estate or the beneficiaries," was consistent with the provisions of section 90.5021(2).15 The proponents of a finding of fiduciary duty did not identify "any contrary legal authority in Florida establishing a fiduciary relationship between a lawyer representing a trustee and the beneficiaries of a trust," and the 11th Circuit accordingly affirmed the District Court's holding that an attorney retained to represent a trustee did not owe a fiduciary duty to the trust's beneficiaries. 16

The 2016 Bivins v. Rogers case represented a marked departure from the Tripp line when the Court declined to follow that precedent on the grounds that the legislature had passed section 90.5021 in 2011. The Southern District found that the Supreme Court's decision not to adopt the statute "did not vitiate or overturn the statute" and held that section 90.5021 was "expressly incorporated" into Probate Code and Rule 5.240(b)(2), a point which "further supports the argument that it is currently in effect."17

Interestingly, both the Bain and the Bivens cases were heard by the federal district courts sitting in diversity, where "substantive state law" applies.18 Did it matter in that setting, then, that the Florida Supreme Court had not adopted section 90.5021 as a procedural rule? The Bivens case is undoubtedly ripe for discussion about the proper role of judges applying a law wholesale when it might well have been only substantively effective. But this conversation promises to be more interesting than the usual debate about judicial activism in the context of a court allegedly "reading in" legislative intent when a legislature has not acted: the Bivens case presents a unique opportunity to explore the role of a federal judge sitting in diversity issuing decisions consistent with substantive state law but in the absence of action by the state judiciary under that branch's constitutional authority.

But while those of us who enjoy a good academic debate might find the decision ripe for a constitutional discussion about federalism and separation of powers, the more salient question remains: what does the Florida Supreme Court's adoption of section 90.5021 as part of the evidence code on January 25, 2018 mean, as a practical matter, for lawyers who represent fiduciaries like guardians, personal representatives, and trustees?

If there is a procedural component to section 90.5021, the decision resolves those conflicts with Probate Rule 5.240(b)(2); it means the Notice of Administration and Notice of Trust is accurate.19 However, those practitioners handling routine probate administrations may notice very little, if any, difference in how they conduct their cases.

Given the nature of section 90.5021 as part of the evidence code, the Court's decision to adopt the law as a procedural rule will likely have the greatest impact on contested proceedings. Indeed, Robert Goldman points out in his comment in favor of adoption of the rule that "With the fiduciary exception, we regularly engaged in discovery battles over the extent of the exception, whether attorney client communications developed from a threat or fear of litigation (and was outside the scope of the exception) and other nuances."20

Insofar as section 90.5021 is procedural in nature, its adoption by the Florida Supreme Court should protect communications between a lawyer and their fiduciary client to the extent that they were not already shielded under the substantive protections of 90.5021, along with Florida Bar Rule 4-1.7.21. While this may definitively end inquiries and demands made under a fiduciary exception, it seems unlikely that the rule change will much affect the way that the estate and trust crowd practices. Beneficiaries are still entitled to accountings and such under the various probate and trust statutes, but "cannot get emails, letters, faxes, memos or even Post-it notes between a Florida [fiduciary] and the Florida [fiduciary]'s . . . lawyer."22

If there was a recognition under the Tripp analysis that at least some of a fiduciary's communications with the attorney they hired might be protected, adoption of 90.5021 seems to have confirmed that reasoning, while eliminating the "who's the real client" analysis. The interest that the fiduciary exception purportedly took into account—a "beneficiary's right to know information about an estate or trust administration and the fiduciary's duty to provide that information,"23 is provided for elsewhere in the probate and trust codes; the fiduciary duty exists separate and apart from—yet in quite nice harmony with—the fiduciary's privileged communications to his attorney.24

Given the impact of section 90.5021 throughout the Florida probate and trust codes, the adoption of Probate Rule 5.240(b)(2), and the recognition of the fiduciary-client privilege in Florida Bar Rule 4-1.7, it may be that the Florida Supreme Court's adoption of section 90.5021 simply confirmed a rule that many practitioners probably did not even realize was at issue: that a fiduciary who hires an attorney to represent them in their fiduciary capacity is the holder of the attorney-client privilege without exception.

1 FLA. R. PROB. 5.240(b)(2).

2 Jacob v. Barton, 877 So. 2d 935, 937 (Fla. 2 Dist. Ct. App., 2004).

3 See Id. (holding that the privilege belonged to the "real client" of the firm. The court noted that the trustee could be the "real client" even if the trust was paying the attorney's fees; however, the beneficiary might be the "real client" if he "will ultimately benefit from the legal work the trustee has instructed the attorney to perform." See also, Tripp v. Salkovitz, 919 So. 2d 716 (Fla. 2 Dist. Ct. App., 2006) (In part reversing the trial court's determination that the attorney-client privilege over documents relating to confidential communications between a guardian and his attorney belonged to "the Estate as the Ward's successor in interest.")

4 Id.

5 FLA. STAT. § 90.5021 (2017) ("A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under s. 90.502 to the same extent as if the client were not acting as a fiduciary.")

6 2011 Fla. Laws 183, § 8, available at http://laws.flrules.org/2011/183.

7 Id., § 11.

8 In re Amendments to the Florida Probate Rules, 73 So. 3d 205, 206 (Fla. 2011).

9 In re Amendments to the Florida Evidence Code, 144 So. 3d 536, 536-537 (Fla. 2014)

10 FLA. CONST. art. V, § 2(a) (2017).

11 See Id. While Art. V, § 2(a) provides that "Rules of the court may be repealed by general law enacted by

two-thirds vote of the membership of each house of the legislature" (emphasis added), the Constitution does not empower the legislature to create such rules.

12 In re: Amendments to the Florida Evidence Code - 2017 Out-of-Cycle Report, No. SC17-1005 at 4 (Jan. 25, 2018).

13 See generally, In re Amendments to the Florida Probate Rules, 73 So. 3d 205 (Fla. 2011); In re Amendments to the Florida Evidence Code, 144 So. 3d 536 (Fla. 2014).

14 Comments of Robert W. Goldman, Esq., In re: Amendments to The Florida Evidence Code 2017-Out of Cycle Report, ¶ 7 (Aug. 8, 2017), available at https://efactssc-public.flcourts.org/CaseDocuments/2017/1005/2017-

1005_Response_48886.pdf (hereinafter "Goldman").

15 Bain v. McIntosh, No. 14-13836 at *3 (11th Cir., Mar. 2, 2015).

16 Id.

17 Omnibus Order on Discovery Motions, Bivins v. Rogers, 207 F. Supp. 3d 1321, 1326 (S.D. Fla., 2016)

18 Bravo v. U.S., 577 F.3d 1324, 1325 (11th Cir., 2009) (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

19 See generally, Goldman, supra at 14.

20 Goldman, supra at 14, ¶ 12.

21 See Attorney Client Privilege for Florida Trustees and Fiduciaries, Pankauski Hauser, PLLC, (Dec. 31, 2013), https://www.pankauskilawfirm.com/blog/attorney-client-privilege-for-florida-trustees-and-fiduciaries/.

(Whether a beneficiary might be the "real client" became "pretty much academic after 2011" with the adoption of section 90.5021 by the legislature. Similar to the observation in Bivins, the author notes that the trust code changed in response to the adoption of 90.5021 to require trustees to inform beneficiaries in a "'notice of trust' that the fiduciary lawyer client privilege applies with respect to the trustee and any attorney employed by the trustee.")

22 Id.

23 Goldman, supra at 14, ¶ 9.

24 Id. ("Not even the fiduciary's Fifth Amendment rights will protect him or her from that duty to disclose." Citing Goethel v. Lawrence, 599 S. 2d 232 (Fla. 3 Dist. Ct. App. 1996); In re Wright, 668 So. 2d 661 (Fla. 4 Dist. Ct. App. 1996).).