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TALLAHASSEE BAR BULLETIN

Quarter 2 2024

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President's Message

It is hard to believe that we are already in the second quarter of 2024. Thank you to our membership for your participation in the great events we put on in Q1 and for your continued active involvement. Spring is upon us, and we hope you all are enjoying this beautiful time of year.

It is a great pleasure to announce that Alva Smith joined the TBA team as our new Executive Director as of March 4. We are very excited to have Alva on board, and she has hit the ground running helping to modernize the TBA's finances and to maximize our good stewardship of the organization's resources, enhancing membership participation and benefits, and making sure all of our great events run smoothly. If anyone has questions for Alva, her official e-mail address is up and running: ExecutiveDirector@tba.org and, as always, I am available as well.

Our Spring membership drive is underway. If you haven't yet renewed, please remember to do so soon to enjoy all of our great events and other member benefits. Bring your friends and let's continue to grow this wonderful group and enhance our networking opportunities and opportunities to give back to the community.

As for Q2 events, TBA partnered with the Bridge to Law School program for the Table for 8 event. FSU undergraduate students, FSU law students, lawyers, and judges got to discuss the practice of law and professionalism. Through your sponsorships, students attended the event for free. We also had Law Day on May 1, with great success. Thank you to LSNF, our sponsors, and for all who participated. For upcoming events, we have a Member Happy Hour scheduled for June 6. We will also be hosting the 2024 Candidates Forum on July 24. Venue and other details for the June and July events will be announced by e-mail and posted on our website, so keep an eye out and mark your calendars to join us for these great events.

We continue to grow our low bono center service project and encourage you all to volunteer. Please reach out to Alva or me if you have questions about participating. I promise the experience is wonderful and helps all those who volunteer to remember the feeling of appreciation of all those we serve.

We look forward to seeing you soon!

Sid Bigham, TBA President
sbigham@bergersingerman.com
850-521-6728

Sidney Bigham is a partner in Berger Singerman's Government and Regulatory Team and Eminent Domain practice group. He is based in Berger Singerman's Tallahassee office where he handles eminent domain, environmental, civil, governmental, administrative, and land use litigation matters, as well as related appeals. Sid loves the Tallahassee Bar Association!

"Tallahassee Bar Association members work together to enhance the legal profession, promote fellowship among their colleagues and serve the community."

You Won't Learn This in Law School

By Douglas M. Smith and Sunita Smith

New lawyers face substantial challenges. The first few years for the neophyte are particularly difficult. One must learn the substantive law of his or her practice, applicable procedures for any number of forums (along with local rules), strategies, client management, how to deal with ornery opposing counsel, and how to internalize "everyday" practice skills (e.g., taking or defending depositions, presenting evidence, oral argument, drafting a contract), to name a few challenges. Attorneys vie with others with similar ambitions and drive, knowing that there is little room for mistakes or failures. Attorneys practice in a field where a loss or bad result will hurt a client and may affect them too.

Attorneys quickly learn they are students for life. The law is not static, and practitioners must be nimble—adapting to changes in the law and changes in their clientele. One can gain the required knowledge through formal or informal training or experience in the field. But there are certain "isms" that are not readily appreciated, particularly in one's formative years as an attorney. This article discusses several.

1. The Billable Hour. Clients don't pay us for our time. They don't pay for a deposition or a motion to compel. They pay to achieve results (e.g., win the case or implement the transaction). The cost of achieving their goals can be measured in billable hours, but the goal is not the billable hour. Attorneys, by contrast, often hyper-focus on billable hours, as that is a common metric to measure productivity and, likely, a job performance requirement. Never lose sight of what you've been hired to do (solve client problems). Keep solving client problems, and you won't have to worry about billable hours.

2. Working with Assistants. New associates often find themselves supervising and working with assistants for the first time. Those assistants are often older and more experienced than their new attorneys (and many are not afraid to show it). A legal assistant or paralegal can be an invaluable resource if employed correctly. If the attorney/assistant relationship is mismanaged, you can have a dumpster fire on your hands. Be friendly and courteous to your assistant while bearing in mind you are a supervisor and ultimately responsible for the work your assistant performs. Your assistant probably assists others, so you should plan accordingly. Talk to your assistant about matters on the immediate horizon. Avoid self-created emergencies. Coordinate with other attorneys your assistant supports so that the workload can be well managed. And remember, your assistant is not your fall guy. Your assistant's error is your error.

3. Working with Attorneys in Your Firm. Other attorneys in your firm can be valuable resources. But they also have the same pressures you face—if not more. A huge part of lawyering is figuring things out on your own. Before you "workshop" a problem with another lawyer in your firm, conduct your own research. This is your time to learn, you'll avoid interrupting a colleague to answer a question that can be found with a Google or Westlaw search. Be inquisitive. Be respectful of your colleague's time; he or she probably won't get credit or be paid for helping you out. Have a proposed plan of action before discussing a problem with a colleague. Being prepared before you seek a colleague's insight shows you care about your colleague's time, and you are genuinely in need of his or her guidance.

4. Using Forms of Others. Most firms have databases that are rife with work product developed over years of practice. It can be tempting (and even seem "efficient") to rely on forms prepared by others. Beware: If you plan to use a form prepared by another, know who prepared the form and when. Know whether the form was actually used and whether the form effectively served its purpose. Know whether the form ended up in litigation. Ensure the form is up-to-date based on applicable law. Forms can be helpful, but they are not a substitute for doing your own

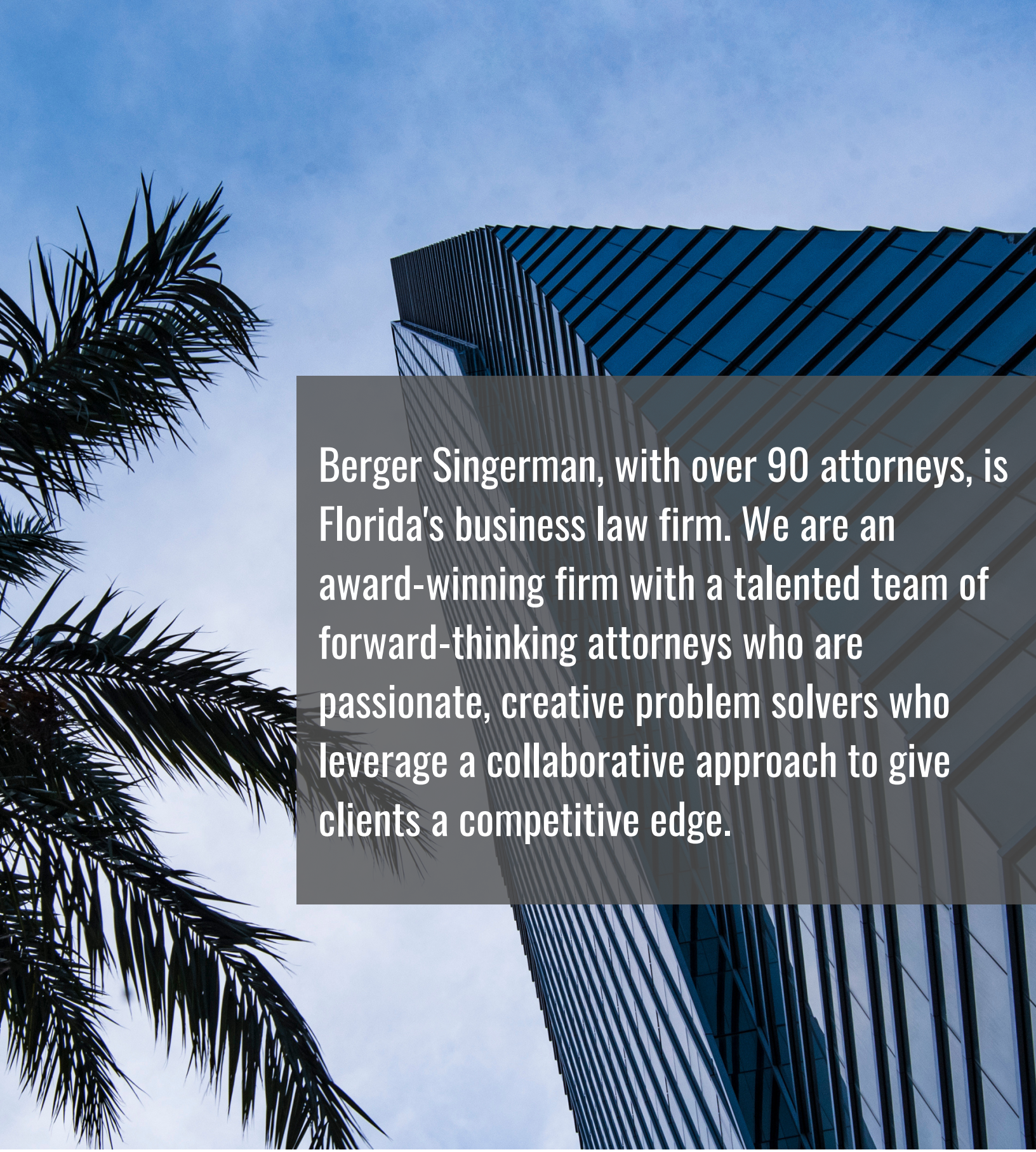
investigation and work.

5. Dealing with Opposing Counsel. The law is a competitive profession by its very nature. The need to compete is exacerbated by the personalities that flock to the profession. Resist defaulting to "combat mode" when dealing with opposing counsel. If opposing counsel is being difficult or unprofessional, avoid reciprocating in kind. Attorneys like to talk in terms of *their* case. In reality, the case is the client's case. Although professionally invested in the outcome of a case, attorneys should not become emotionally involved—particularly when dealing with opposing counsel. I can't recall ever winning a case or obtaining a better settlement or result because I was a bigger jerk than my opponent.

Practicing law in one's formative professional years can be stressful. New attorneys should focus on honing their craft while also fostering positive practices and relationships. Developing a deep knowledge of the profession and a professional demeanor will make the early years (more) manageable. Now get back to work!

Douglas M. Smith is Of Counsel with Messer Caparello, P.A., where he enjoys practicing real property, land use, commercial, and administrative litigation.

Sunita N. Smith is a partner at Kelley Kronenberg, P.A., where she has handles a wide variety of insurance cases, now focusing her practice on all aspects of general liability defense.



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Employment and Intellectual Property Law: Recent Updates

By Ruth Vafek

Within the past few months, there have been numerous developments and pending issues to watch for Florida lawyers in the areas of employment and intellectual property law and their overlap. This article summarizes a handful of those developments so that lawyers who may not practice in these areas will be aware of them and can seek out further information if necessary for their clients.

A. Pregnant Workers Fairness Act (PWFA) Regulations Finalized

The PWFA, which took effect in June of 2023, "requires a covered entity to provide reasonable accommodations to a qualified employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship on the operation of the business of the covered entity." The EEOC released its final rule implementing the PWFA on April 15, 2024, after receiving around 100,000 comments on the originally proposed rule. The final rule will take effect 60 days after its April 19 publication in the Federal Register, and can be accessed here: https://www.federalregister.gov/public-inspection/2024-07527/implementation-of-the-pregnant-workers-fairness-act.

The PWFA applies to private sector employers with at least 15 employees, employment agencies, and labor organizations, as well as public sector employers. In the final rule, the EEOC broadly defines the phrase "pregnancy, childbirth, or related medical conditions." Employment practitioners and clients look to the EEOC's rules to learn how that agency will interpret and enforce laws like the PWFA, so the final rule is an important resource. In addition to creating 29 CFR 1636, the rule contains an appendix with extensive guidance, including illustrative examples.

B. Florida Passes State Law Prohibiting Local Heat Regulation and Minimum Wage Measures

On April 11, 2024, the Governor signed into law HB 433, known as the Employment Regulations Bill.

One section of HB 433 amended section 218.077, Florida Statutes, and goes into effect September 30, 2026, to prohibit political subdivisions (e.g., local governments) from using their procurement processes to control the minimum wage or employment benefits provided by local government vendors and contractors to their employees. The previously enacted portions of section 218.077 will prohibit local governments from requiring employers doing business in that locality to pay a minimum wage beyond that already required under federal and state laws.

Another section of HB 433 prohibits political subdivisions from mandating heat exposure requirements for other employers, whether via ordinance or contract. Currently, Florida does not have any statewide standards for heat exposure or protection, but Miami-Dade County had been considering a proposed ordinance on this issue. The federal agency OSHA, which has jurisdiction over most private-sector workers in Florida, does have a "National Emphasis Program" regarding both outdoor and indoor heat-related hazards. Employers should familiarize themselves with OSHA's standards on this topic, particularly those with workers here in hot and humid Florida.

C. 11th Circuit Holds Hospitality Service Fees Are Not "Tips" Under FLSA

On April 15, 2024, the Eleventh Circuit issued its ruling in *Rosell v. VMSB, LLC*, No. 23-12658, 2024 WL 1617821 (11th Cir. Apr. 15, 2024), reaffirming a similar ruling in a prior case that an automatic charge applied to all customer

bills counts as a mandatory service charge, rather than a tip, under the federal Fair Labor Standards Act (FLSA) and the Florida Minimum Wage Act. The practical impacts of this ruling include allowing employers to use such service charges to offset their minimum wage and overtime wage obligations. Moreover, the ruling may be used in analyzing whether certain retail and service establishment employers qualify for a provision in the FLSA exempting them from paying overtime wages if the "regular rate of pay" of an employee exceeds one and one-half times the applicable minimum wage.

To Watch: Federal Trade Commission to Revisit Proposed Rule Banning Most Non-Competes

As many lawyers are aware, last year the FTC proposed a rule that would ban most noncompete agreements. After extending the public comment period, it then announced that it would revisit the issue in April of 2024. On April 16, 2024, the FTC announced that, on April 23, 2024, it would meet to vote on its proposed final rule. Notably, the proposed final rule has not yet been publicly disclosed, so it is expected that both the vote, and the disclosure of the rule that will be voted on, will occur on the same day. If a final rule is approved by the FTC that is similar to the rule proposed last year, immediate litigation regarding the rule and the FTC's authority is expected, so this will remain a topic to watch no matter

Ruth Vafek is a partner in Berger Singerman's Tallahassee office, where she focuses on Labor and Employment Law and Intellectual Property. She has extensive litigation experience in both areas; however, she especially enjoys working with clients to identify, prevent, and resolve employment and IP issues to minimize litigation risk and support clients to success. She previously worked as in-house HR consultant in a California tech company, in the restaurant industry, and with the U.S. government. And she is a Florida Supreme Court certified Circuit Civil Mediator.

Unlocking Futures: Project Clean Slate's Mission to Clear Paths for Youth

By Legal Services of North Florida

In the intricate maze of challenges facing America's youth, few hurdles loom as large as the threat of a criminal record. For one in three American adults burdened by past encounters with the law, the ominous "box" on job applications demanding disclosure of arrests casts a shadow, slamming doors to employment, education, and housing. This barrier is particularly daunting for vulnerable youth in foster care, already grappling with a myriad of challenges and frequently entangled with law enforcement, further imperiling their prospects for a brighter future.

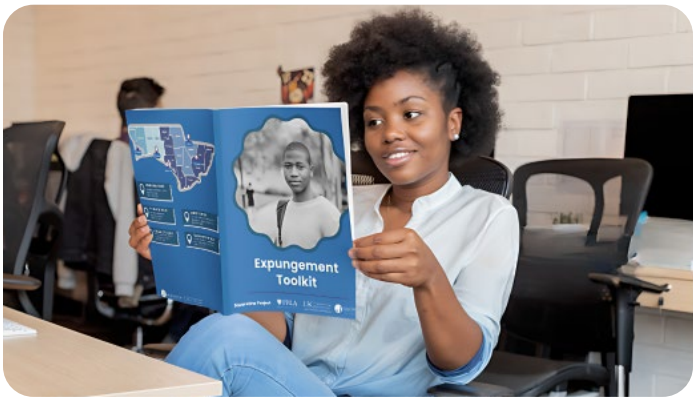
Legal Services of North Florida (LSNF) has long been at the forefront of advocating for the marginalized, recognizing the dire need to address the gap in understanding and accessing expungement opportunities, particularly for youth. LSNF staff is proud to launch a new program: **Project Clean Slate.** This project is an expungement toolkit—a groundbreaking initiative developed in collaboration with leading experts in juvenile delinquency in Florida.

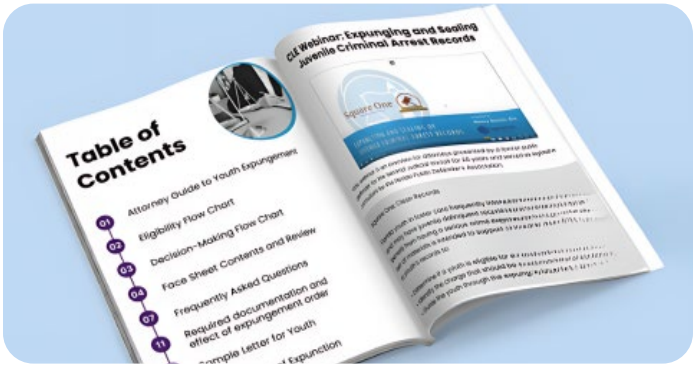
This toolkit is filled with a collection of invaluable resources, including an attorney guide, eligibility flow chart, decision-making flow chart, face sheet contents and review, frequently asked questions (FAQ), required documentation, and the transformative effects of an expungement letter. Additionally, it includes a sample letter customized for youth and highlights the numerous benefits of expungement.

A standout feature within the toolkit is the Continuing Legal Education (CLE) webinar by Nancy Daniels, Esq., a revered figure with 26 years of experience as a public defender in Florida's Second Judicial Circuit. Daniels' insights, honed over decades on the front lines of criminal justice, offer invaluable guidance to attorneys navigating the complexities of expungement.

"We believe in second chances and the power of a clean slate," says LSNF Managing Attorney Stephanie Johnson. With Project Clean Slate, LSNF is on a mission to rewrite the narrative for countless youth, equipping them with the tools to reclaim their futures and chart a course toward brighter horizons.

To discover more about the transformative impact of Project Clean Slate and its role in reshaping opportunities for youth, visit www.LSNF.org/Expungement. Join LSNF in paving the way for a future where every young individual has the chance to thrive, unburdened by the shadows of their past.





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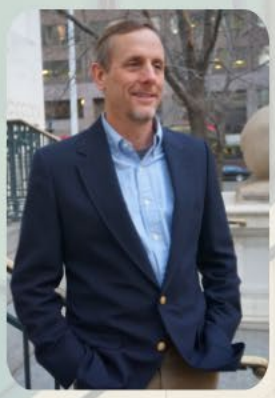

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Lawyer Trust Accounts—Make Sure You are Following the Rules

By Lee Allman

For attorneys, keeping up with trust accounting rules can be a daunting and stressful task. It takes discipline to follow Bar requirements, but once you set up effective procedures you will protect not only your license but your client's funds as well.

Please note that the rules listed below are based on the Florida Bar Rules for the State of Florida. Although they may be similar, rules can vary from state to state.

What Type of Trust Account?

Law firms may utilize two types of trust accounts. The first is a non-IOTA account that accrues interest and is used in circumstances where the client's funds are significant or will be held for a long period of time. It is usually set up for an individual client matter due to the large amount. The second type is the IOTA account where any interest earned on the account is transferred to the Florida Bar Foundation directly from the bank. Knowing which type of account to use is important and requires you to use good faith judgment. The Florida Bar Rules list considerations to determine which to use. *See* R. Regulating Fla. Bar 5-1.1(g)(3)(a)–(e). These can be found on its website.

Setting up a Trust Account

There are several initial rules to consider when setting up a trust account in the State of Florida. *See* R. Regulating Fla. Bar 5-1.1(k), 5-1.2(b)(1), (d)(4).

- It must contain the words "trust account" in the account title and the name of the firm. For example, "Smith & Smith Law Firm Trust Account".
- The account **cannot** have overdraft protection.
- The account **cannot** have debit or ATM cards linked to it.
- The bank must have authorization to notify the Bar of any returned checks or overdrafts that are not due to bank error.

The Florida Bar provides three forms to use when opening a trust account.

- Notice to Funding Florida Legal Aid Form (formerly the Florida Bar Foundation)—Provides the Florida Bar information on the account for future communications.
- Notice to Eligible Institutions Form—Provides notice and information to the bank you will be setting the trust account up with and details of the trust account requirements.
- Sample Trust Account Bank Notification Letter—Gives the financial institution permission to notify the Florida Bar of any returned checks or overdrafts. You should print this on your firm's letterhead.

Finally, when setting up the account, it is a good idea to deposit a small amount (usually around $200) to cover possible bank fees. With most banks, you can also ask that any fees associated with the account come out of the firm's operating account, but it is smart to have this small amount in place to be safe. Track this amount under a separate client ledger and title it clearly, so it is known to be the firm's funds. This is the only amount that belongs to the firm that is allowed to be in the trust account to avoid violating the commingling rules of firm's funds with client trust funds. As you review the account each month, be sure to replenish this firm fund, if needed.

Written Trust Account Plan

If the firm has more than one attorney, each trust account must have a written trust account plan. R. Regulating Fla. Bar 5-1.2(c). The plan should be kept on file at the firm and updated as personnel and signatories change. This plan should not be filed with the Florida Bar but saved

in the firm's records. Not only will it help keep you in compliance with Bar rules, but it will also provide clear guidance within the firm as to who is responsible for the account maintenance.

A trust account plan must include, at a minimum:

- A list of names and titles of those authorized to sign checks.
- Name and title of person that prepares the monthly trust account reconciliation.
- Name and title of the attorney responsible for reviewing and approving the prepared reconciliations.
- Name and title of the attorney that is responsible for answering any questions related to the trust account.

A firm manager or a CPA may be allowed to sign checks, but it is important to remember **it is ultimately the lawyer's responsibility to make sure the account transactions follow the Bar rules.**

Trust Deposits and Disbursement Rules

The only funds that should be deposited into the trust account are those for advanced fees and costs that have not been earned or incurred yet. Non-refundable flat fees and retainers (payments that guarantee future availability of services) should be deposited into the firm's operating account. Nonrefundable fees and retainers should be designated as such in a written client fee agreement.

Once fees are earned and expenses incurred, the attorney should transfer the earned amounts from the trust account to the operating account. It is a good idea to do this on at least a monthly basis or during the firm's normal billing cycle.

Also, be careful not to disburse uncollected funds. Funds are uncollected until they are fully deposited, settled, and released to the trust account. There are exceptions to the rule for funds that are considered limited risk, but it is done at the attorney's own risk. *See* R. Regulating Fla. Bar 5-1.1(j).

If the account becomes short of funds, the attorney should immediately act to protect other client funds in the account, no matter if it is due to fraud or mistake. One option is for the attorney to make up the shortage with their own funds. Bar rules require immediate notification to the Bar if there is a shortage or other issues arise. R. Regulating Fla. Bar 5-1.1(a)(1)(b).

Trust Account Reconciliation and Documentation of Transactions

It is required that trust accounts have a three-way reconciliation each month; many attorneys may not be aware of this requirement. This is not your typical bank reconciliation. The three-way reconciliation reconciles the trust account journal, the bank statement, and the client liability ledgers. *See* R. Regulating Fla. Bar 5-1.2(d)(1). The reconciliation should list any outstanding deposits and checks and explain any differences. It is good practice to have the preparer of the reconciliation sign it and have the attorney responsible for reviewing it sign as well. Also, each month, the outstanding transactions should be reviewed to see if any follow-up is required. If an issued check is outstanding for more than 60 days, it is important to follow up on it to help keep the account clean and prevent future issues in tracking down payees.

Documentation can be original or electronically kept. Deposits should include a copy of the deposit slip showing the date, amount, client, and source of the funds. Checks and electronic transfers should have a documented request showing the requesting attorney, payee, amount, copy of the invoice, and reason for the payment.

Other items and reports that need to be kept on file (paper or electronically) are:

- Cash receipts and disbursement journals
- Ledgers on each client
- Bank statements
- Attorney approved three-way monthly reconciliations

This documentation should be kept for six years after conclusion of representation for which the trust funds were involved. *See* R. Regulating Fla. Bar 5-1.2(b), (f).

Also, keep in mind if you decide to dissolve or sell the firm, the attorney is responsible for making reasonable arrangements to maintain the records and funds of the trust account. R. Regulating Fla. Bar 5-1.2(f)(1)–(2).

Each year, when attorneys complete their Bar renewal, they are asked to certify that they are following the trust rules or send in a written explanation if not. R. Regulating Fla. Bar 5-1.2(d)(5). It is important to follow these rules. Once you have appropriate policies and procedures in place, maintaining a trust account is easy and discrepancies can be quickly identified and corrected.

Lee Allman, CPA is the Principal of All Law Accounting, PLLC, which provides Law Firm Accounting and Advisory Services. He can be reached by email at Lee@AllLawAccounting.com or phone (850) 570-7757.

Crafting Connections: Ti Adoro Studios' Approach to Client Connections

By Alena Johnsen

Welcome to the heart of Tallahassee, where Ti Adoro Photography Studios thrives amid the city's vibrant energy. Here, it's not just about capturing images; it's about weaving stories, freezing emotions, and forging bonds that last a lifetime.

At Ti Adoro Studios, we're all about diving deep into the essence of our clients' stories and personalities. Before we even lift our cameras, we embark on a journey to understand the unique narratives behind each person who steps into our studio. It's about more than just taking photos; it's about capturing who they really are.

In many ways, our approach mirrors that of a diligent attorney. Like them, we believe that listening is key. Understanding our clients' desires and dreams is what sets us apart. Just as a lawyer meticulously studies a case, we take the time to truly connect with our clients, ensuring that every image we capture resonates with authenticity and depth.

Imagine a lawyer tackling a case without fully understanding their client's story. The outcome would lack resonance, just like photos taken without a genuine connection. We believe that personal touch is what elevates our work beyond mere snapshots.

Our dedication doesn't end when the session is over. We invest in building lasting relationships, just like a lawyer supports their client beyond the courtroom. Whether it's guidance, support, or simply a listening ear, we're here for our clients every step of the way.

Let's say you've just had an amazing photo session with us at Ti Adoro Studios. The smiles were genuine, the laughter contagious, and the memories captured forever. But our journey together doesn't end when the last click of the camera echoes through the studio.

Here's how we do it:

1. Personalized Thank-You Notes: Within a few days of your session, expect a heartfelt thank-you note from us. It's not a generic template; it's personalized just for you, reflecting the moments we shared and the joy we captured together.

2. Photo Reveal Session for Outdoor Sessions: Once all your photos are beautifully edited, we'll schedule a photo reveal session. It's a chance for you to see your images for the first time and relive the magic of your session. We'll guide you through selecting your favorites and help you choose the perfect way to display them.

3. Follow-Up Call: After your photo reveal session, we'll check in with you to make sure you're thrilled with your photos. It's an opportunity for us to address any questions or concerns you may have and ensure that your experience with us exceeded your expectations.

4. Stay in Touch: Our relationship doesn't end after your session; it's just the beginning. We'll keep in touch through social media, email newsletters, and special offers tailored just for you.

5. Client Appreciation Events: We know you're excited to reconnect and network, so once a year we have our Client Appreciation Party to say thank you for trusting us with your portraits.

But wait, how does this relate to lawyers, you ask? Well, picture this:

Imagine a lawyer winning a case for their client and then disappearing into the legal abyss, never to be heard from again. Not a great scenario, right? Just like us, lawyers should follow up with their clients to ensure their needs are met and their expectations exceeded.

Here's how lawyers can strengthen their relationships with clients through post-case follow-up:

1. Thank-You Notes: A personalized thank-you note from the lawyer expressing gratitude for the client's trust and support can go a long way in fostering goodwill.

2. Case Updates: Keeping the client informed about the status of their case, even after it's concluded, shows that the lawyer values their relationship and cares about their well-being.

3. Feedback Session: After the case is resolved, scheduling a feedback session with the client allows the lawyer to gather insights on their performance and areas for improvement—or that worked well and should continue.

4. Stay in Touch: Maintaining regular communication with the client through newsletters, updates on relevant legal matters, and invitations to firm events helps to keep the relationship alive and thriving, and that client thinking of you the next time they need legal services.

By following these simple steps, both photographers and lawyers can ensure that their clients feel valued, supported, and appreciated long after the initial transaction is complete. It's all about building lasting connections and nurturing relationships that stand the test of time.

In a world of fleeting connections, we stand for authenticity and genuine human interaction.

So, when you're looking for more than just a photo, consider entrusting your story to Ti Adoro Studios. In our studio, you'll find not only a reflection of yourself but also a testament to the power of connection—a sentiment that transcends photography and resonates in every aspect of life.

Alena Johnsen is the co-owner of Ti Adoro Studios, Inc.

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Licensed Process Servers Versus Motion and Order: What You Need to Know

By Brennan Fogarty

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Spring is here, and it's a great time to be getting out and having a chance to meet with clients, new and old. My field agents have also been enjoying the mild weather as our whole team continues to work to provide you with the very best service of process.

Here in the Second Circuit, I was recently given the honor of being appointed to the Process Server Review Board. The chief judge appoints process servers in the Second Circuit, and servers here are able to serve in all 6 counties. One of my duties on the board was to review and edit the process server test to reflect the most recent changes to chapter 48. I was present to assist in proctoring the test as well and got to meet all the new prospective process servers. I am happy to report that all the staff members in our office passed the test with flying colors. Each and every person in our office is an expert on how to perform service of process to satisfy the statutes.

Of the 67 counties of the State of Florida, 13 counties have no licensed private process servers appointed or certified by the chief judge of the circuit or county sheriff at all. This is not a reflection of the abilities of the local residents, but of the policy of the judges and sheriffs in those counties. When service is needed in these areas, we can still provide it for you, though it does require the extra step of completing a motion to appoint a private process server and obtaining an order appointing a process server. In the business, we call these "motion and order counties."

This brings me to recent developments in our industry that all our clients should be aware of. Although Jacksonville does have some private processors duly appointed by the sheriff, the sheriff's policy for the past eight years has been to move Duval County towards becoming the fourteenth motion and order county in the State. To this end, the sheriff has declined to appoint any new process servers, and has actively hindered business operations for process servers working in the area. There is roughly 1 certified server per 100,000 people in Duval County—a burden ten times the average for the State of Florida. Naturally, this has driven prices and turnaround times up. If you ever find yourself in need of quick service in the Jacksonville area, you'd be well advised to reach out to our office here in Tallahassee and see if filing a motion and order will speed up your service. There seems to be no end in sight as far as the bottle neck for service of process the Jacksonville Sheriff's Office has introduced.

We at Accurate Serve will always be eager to assist you with any questions you may have about serving papers. Call or email us at any time, and our staff will be standing by.

Brennan is the owner and operator of Accurate Serve's Tallahassee office, and an Accredited Florida Process Server. Accurate Serve handles service issues and requests county-, state-, and nation-wide, as well as internationally.

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Read the Words: There is no Duty to Act in Good Faith in International Sales Law

By Kyle Sill

Words matter. And they particularly matter when reading and interpreting statutes and treaties. This is also of increased import when addressing international law. First, our common-law based U.S. system uses a textual approach and requires first looking to the words of any statute.[1] And second, on the international front, the civil law tradition (used in about 60% of the world[2]) demands strict adherence to the words of its codes because judicial interpretations of those codes are not as precedential and binding as in common law systems.[3]

And with that background comes the Convention on Contracts for the International Sale of Goods, the CISG—a 1980 treaty, now in force in 95 countries, including even North Korea.[4] Every major country, including the U.S., has adopted it, with the notable exception of the U.K. countries and Ireland. Otherwise, if a merchant in one country sells goods to a merchant in another country, the CISG automatically governs the formation of that contract and the rights and obligations of the parties—unless explicitly excluded by the parties.[5]

So what? Well, imagine a contract is concluded, and the CISG is the governing law. A dispute arises and one party argues the other party did not act in good faith—as would be required under many national contract laws.[6] This breach would entitle the party to remedies.

But buyer beware: if you enter that CISG contract, the result should not be the same. The CISG contains no positive duty to act in good faith. Instead, the CISG has a duty to interpret the CISG in good faith. Under Article 7(1), "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." And that is it. "Good faith" appears once and only once—and only in the interpretive context. And that should be the end of our story.[7]

Nevertheless, some courts and scholars find a way to insert a good faith duty into the CISG's text.[8] Some through Article 7(1). Some suggesting the CISG is silent on the issue, so there must be resort to gap-filling. And still others, simply declaring it must be because it would be inconceivable to not have such a provision. All of these approaches are (respectfully) wrong. There is clearly only one reading of the CISG text: the text simply does not allow for an independent duty of good faith in parties' actions.

First—and definitively—the text is clear: "In the interpretation of this Convention, regard is to be had to . . . the observance of good faith in international trade." Thus, good faith is required in interpreting the CISG—not as a positive duty or obligation of the parties. The drafting history on this provision confirms this plain and clear text and mere interpretive use. During drafting, there was intense debate "between those [countries] who would have preferred a provision imposing directly on the parties the duty to act in good faith during the formation, performance, and termination of the contract of sale, and those who were opposed to any explicit reference to the principle of good faith."[9] At what points of contracting would it apply? What does a "duty of good faith" mean? And how would the plethora of varying national courts resolving CISG issues harmonize the duty? The result: a "statesmanlike compromise" and "hard-won settlement" that "bur[ied] the principle of good faith" and relegated it to interpreting the CISG.[10]

Second, gap filling to manifest a good faith requirement is inappropriate. Article 7(2)—also part of how to interpret the words of the CISG—provides that if there is an interpretive question on "matters governed by [the CISG] which are not expressly settled in it," that question

is settled "in conformity with the general principles on which [the CISG] is based or, in the absence of such principles, in conformity with the law applicable by virtue of [conflict of laws rules]." Asserting there is a "gap" and good faith is a general principle on which the CISG is based, scholars then read in an affirmative good faith duty.[11] Or, scholars resort to national laws or international law principles, which often include an affirmative duty.[12]

But to apply Article 7(2), there must first be a gap; i.e., something the CISG covers but did not explicitly discuss. And here, the lack of a positive good faith duty was deliberate and intentional. The drafters expressly declined to include the duty after considered discussion. Further, even without that foreclosing this "gap," there would still be no gap. The CISG covers and controls the "rights and obligations of the seller and the buyer."[13] It lists, through 2 chapters and 35 articles, those obligations and resulting remedies—in extensive and comprehensive detail.[14] Notably absent from this detailing of every right and obligation: good faith. There is no room to implant (read: create) a new obligation when all the obligations are listed and covered. There is simply no "gap" to fill; and merely noting good faith may be an overall general principle does not somehow create a gap to be filled by a positive duty using that general principle.

This is not to say the CISG permits a veritable free-for-all. Quite the contrary. Again, the CISG has explicit provisions on how the parties must conduct themselves; i.e., their rights and obligations. And those provisions must be read—and complied with—in good faith.[15]

For example, the buyer has a duty to pay and facilitate payment to be made.[16] The buyer has a duty to perform that obligation in good faith; and what steps were necessary for the buyer must be interpreted in good faith. Or, the CISG precludes a party from relying on the other party's nonperformance "to the extent that such failure was caused by the first party's act or omission."[17] Whether one party's act caused the other's nonperformance must be evaluated through a good faith lens. In this context only, good faith applies. This directly reads the CISG text, which has a specific obligation, and the words of that obligation, and then interprets those words and applies them to the party's conduct. The important consideration is the express duty. Because then, in contrast to a general duty to act in good faith, there is something to interpret and perform—and Article 7 is being used to interpret, in good faith, a textual obligation of a party. In this way, not having an explicit, stand-alone duty to act in good faith will not open any doors to a hailstorm of unscrupulous conduct. The CISG includes protections and safeguards. There is no need to make one up.

So, coming back to the beginning: words matter. And the CISG words are simple, clear, and definite. There is no positive duty of good faith in action under the CISG. There is no room to read the text differently, "fill" any non-gaps, or to wish the duty into the CISG as a policy choice. Don't let anyone tell you otherwise.

Endnotes

[1] *See* Antonin Scalia & Bryan A. Garner, Making Your Case, The Art of Persuading Judges 42, 44–51 (Thomson/West 2008).

[2] *See* JuriGlobe, Percentage of the World Population, Civil Law & Common Law Systems (University of Ottawa study).

[3] *See* Joseph F. Morrissey & Jack M. Graves, International Sales Law and Arbitration: Problems, Cases, and Commentary 23–26 (Kluwer Law Int'l 2008).

[4] Rwanda and Saudi Arabia have signed it, and it will go into effect in September and October 2024 in those countries. *See* UNCITRAL CISG Status.

[5] *See* CISG Arts. 1, 2, 4. The CISG is an opt-out treaty, no opt-in is required; and that opt-out generally would happen through a choice of law clause specifically designating some national contract law to apply.

[6] Florida and the UCC, for example. *See* § 671.203, Fla. Stat. ("Obligation of good faith.—Every contract or duty within this code imposes an obligation of good faith in its performance and enforcement."); UCC § 1-203. Germany, France, and China are international examples. *See* German Civil Code (BGB) § 242 ("An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration."); French Civil Code Art. 1104 ("Contracts must be negotiated, formed and performed in good faith. This provision is a matter of public policy."); PRC Contract Law Art. 6 ("The parties shall abide by the principle of good faith in exercising their rights and performing their obligations.").

[7] *See* Ingeborg Schwenzer, *Interpretation and Gap-Filling under the CISG*, in Int'l Commerce & Arbitration, Current Issues in the CISG & Arbitration 112 (Vol. 15 2014) (Eleven Int'l Publ'g) ("Thus, the scope of application of the principle of good faith must be restricted to the interpretation of the Convention and cannot be used as a general corrective tool.").

[8] *See* Steven D. Walt, *The Modest Role of Good Faith in Uniform Sales Law*, 33.1 Boston University Int'l L.J. 37, 56–58 (Spring 2015) (discussing

various national courts from around the world using good faith as an independent duty). As a specific example, in the Machinery Case, the German Supreme Court, without discussion and as a matter of fact simply declared, "It would, therefore, contradict the principle of good faith in international trade (Art. 7(1) CISG)" to require a party to take a certain action. *Machinery Case*, CISG-online No. 617, BGH Case No. VIII ZR 60/01 (Germany Supreme Court Oct. 31, 2001).

[9] *See* Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, in 23 Int'l Lawyer 443–83 (1989).

[10] *See id.*; Article 7: Secretariat Commentary; *Summary of UNCITRAL Legislative History*, Working Group, Report of Session 9 (Sept. 1977) (discussing adopting a requirement of "fair dealing and good faith" in forming contracts).

[11] *See generally* Fredrik Liljeblad, *The Status of Good Faith in the 1980 United Nations Convention on Contracts for the International Sale of Goods—A Study in the Light of Article 7*, at 42–43, 59 (Masters Thesis 2002).

[12] *See id.* at 43; UNIDROIT Principles 1.7.

[13] CISG Art. 4.

[14] *See* CISG Arts. 30–65; *see* also CISG Arts.71–88 (detailing other obligations common to seller and buyer).

[15] *See* U.N. Conference on Contracts for the Int'l Sale of Goods, Official Records, A/CONF.97/19, at Secretariat Commentary on Draft, A/CONF.97/5, p.18 (explaining Article 7 "requires that the provisions of the Convention be interpreted **and applied in such a manner that the observance of good faith in international trade is promoted"** and "good faith . . . applies to all aspects of the interpretation and application of the provisions of this Convention") (emphasis added).

[16] *See* CISG Art. 54.

[17] *See CISG Art. 80.*

Kyle is a Senior Law Clerk for Judge Susan Kelsey at the First District Court of Appeal. He also teaches International Sales & Arbitration at FSU Law; and he coaches the FSU Law Vis International Commercial Arbitration team. The views expressed in this article are solely his and do not represent the views of his or any judge, the Court, or any other organization or entity. Thank you to the 2023–2024 FSU Vis Moot Team for your hard work and dedication. The plethora of hours with you all rehashing and delving into this good faith issue reignited a passion for the issue and inspired the need to write. Thank you!

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MEMBER SPOTLIGHT

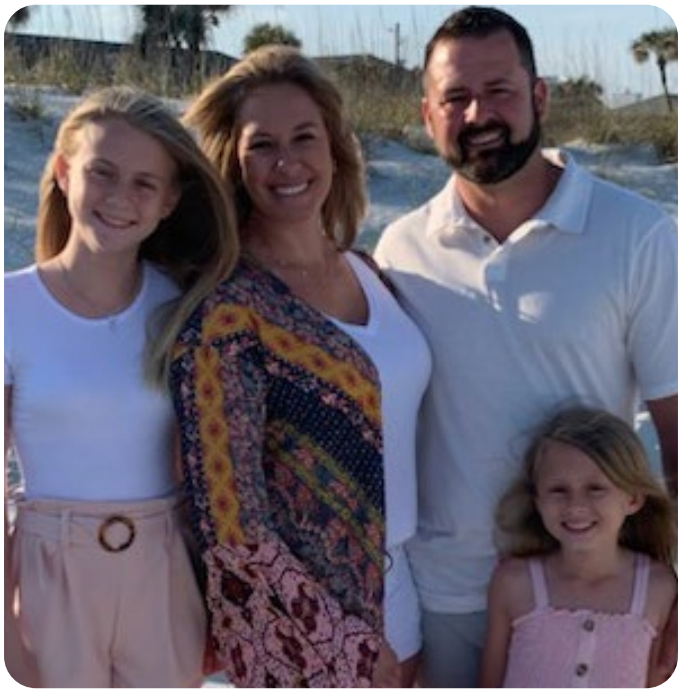
JUDGE STEFANIE NEWLIN

Our Bulletin profile this month is on Leon County Judge Stefanie M. Newlin. Judge Newlin is a Leon County Court judge who received her J.D. from Stetson University College of Law and her undergraduate degree from the University of Florida. She was appointed to the Leon County bench by Governor DeSantis in 2020. Prior to being appointed, Judge Newlin served as an Assistant State Attorney in the Thirteenth Judicial Circuit from 2004–2007 and then in the Second Judicial Circuit from 2007 until she was appointed to the bench in 2020. During her tenure as an Assistant State Attorney, she served as Chief of the Gadsden County office.

Judge Newlin has been a member of the Tallahassee Bar Association since 2021. In addition to her County Court responsibilities, Judge Newlin also handles injunction hearings, simplified dissolutions of marriage, and adoptions. Judge Newlin serves as a judicial member of the Mediator Qualifications and Discipline Review Board, Northern District. This board responds to complaints filed against certified and or court-appointed mediators. For the last two years, Judge Newlin has been a team leader on the Stafford Inn of Court.

Why do you find it important to stay involved with voluntary bar associations, like TBA?

I genuinely enjoy meeting new people and getting together with old friends and colleagues, so voluntary bar events are a welcome addition to my busy schedule. I find networking among attorneys and judges to be particularly refreshing, as it's nice to get to know the lawyers who appear before me in a different, more relaxed setting. I think when lawyers see members of the judiciary at these functions, it helps to humanize the bench and allows attorneys and judges to foster more congenial relationships. Being a judge can be very isolating at times, so I appreciate that TBA provides frequent opportunities to socialize. Voluntary bar associations like TBA are invaluable assets to the legal community. I was not very involved in them as a law student or a young lawyer, but I recognize now how important they are, especially early in a lawyer's career. Now, I tell whoever will listen to get involved—do it early and often!



What motivates you?

My girls. It is important to me they know they can do anything they want to do in life. My family's support has been invaluable to me throughout my career, and my girls inspire me every day to be the best version of myself.

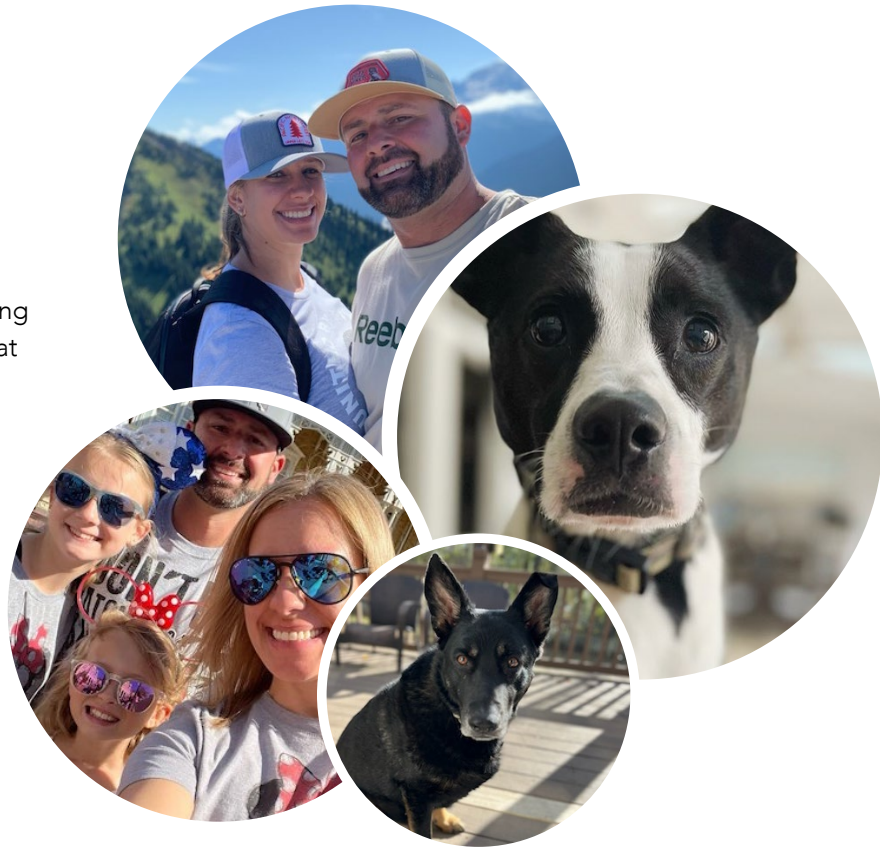
What do you do for fun?

Travel. We frequent Franklin, North Carolina and Neptune Beach, Florida. My husband and I try to make it to one away football game a year. This year we are headed to see Florida State play in Ireland. I also enjoy spending time

with my husband and our girls, Madisyn and Blakely, and our dogs, Beedo and Wheeler.

If you could change one thing about the practice of law, what would it be and why?

Professionalism. Attorneys seem to be placing less emphasis on engaging with colleagues and judges in a professional manner. I would strongly encourage opposing sides to sit down face to face and talk out their cases, or at the very least pick up the phone or schedule a Zoom. Things are often lost in translation when attorneys send emails or text messages, especially across the various generations. I believe we get so much more accomplished when we sit down with one another face to face. It's hard for a person to be openly hostile when the person is sitting directly in front of you. I truly believe our system can be adversarial without being unprofessional, and would encourage all attorneys to remember civility when engaging with colleagues or judges.



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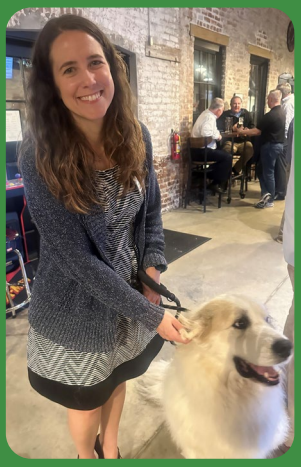
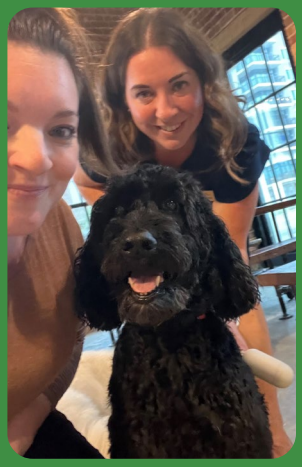


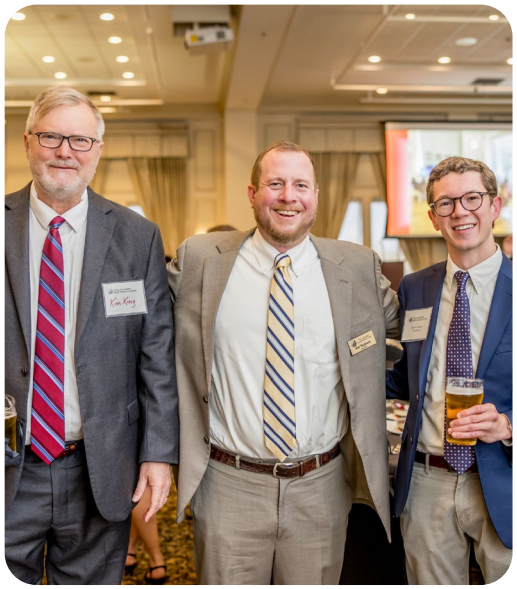


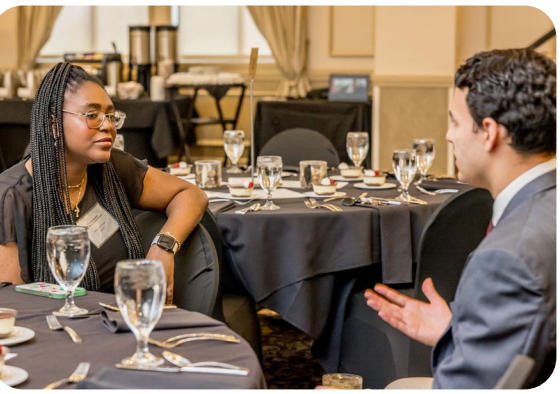
Happy Hour at Amicus

On March 5, TBA hosted a Member Social at Amicus Brewing Ventures. TBA members socialized while enjoying barbecue from Sonny's and craft beer from Tallahassee's newest brewery. This was a family-friendly event, with both kids and dogs running around enjoying the evening. Keep an eye out for our next Member Social in June!

Table for 8

For the second year in a row, TBA partnered with the Bridge to Law School program to put on the Table for 8 event. Students participating in the FSU CARE program, FSU law students, lawyers, and judges enjoyed lively conversations about the practice of law and professionalism led by facilitator judges. At the end of the night, students shared the most impactful things they had learned from the conversations. A big thank you to all our members who sponsored students, which allowed them to attend free of charge!





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Member Happy Hour
Jeri's at Market Square

JULY 17
Judicial Candidate Forum
Location TBD

AUGUST 06 | 11:45am-1pm
CLE Luncheon
Location TBD

SEPTEMBER 12 | 5:30Pm-8pm
Member Happy Hour
Location TBD

OCTOBER 02 | 11:45am-1pm
Chili Cookoff
Goodwood Museum & Gardens

NOVEMBER 07 | 11:45am-1pm
CLE Luncheon & Annual Meeting
Location TBD

DECEMBER 07 | 5:30pm-8pm
Bench & Bar Holiday Party
Location TBD

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