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# THE CARLYLE APPELLATE LAW FIRM

A MEMBER OF THE FLORIDA APPELLATE ALLIANCE, PLC

## APPELLATE INSIDER

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### Former Fifth District Court of Appeal Judge, Earle W. Peterson, Jr., Joins The Carlyle Appellate Law Firm

In June, The Carlyle Appellate Law Firm welcomed former Chief Judge of Florida's Fifth District Court of Appeal, Earle W. Peterson, Jr., to the Firm. Peterson joins his fellow colleague on the bench, Gilbert S. Goshorn, Jr., and former Chief General Counsel to U.S. Senator Mel Martinez, Roy B. "Skip" Dalton, Jr., as "of counsel." In addition to handling appellate litigation matters within The Carlyle Appellate Law Firm, Peterson and Goshorn will be available to assist other appellate lawyers throughout Florida by conducting mock oral arguments in significant cases and providing appellate consultation and strategic evaluations to outside appellate counsel and their clients.

Peterson earned his undergraduate degree from Florida State University in 1957, as well as a commission in the US Army Reserve. After fulfilling his active duty requirement, he practiced as a certified public accountant until 1962 when he attended the University of Florida Col-



Photo courtesy of Michael Mason, Esquire

lege of Law where he obtained his J.D. with high honors and graduating first in his class. He was also inducted into the legal honor societies, Phi Kappa Phi and Order of the Coif. During law school he served as editor in chief of the symposium issue of the Law Review and published *Criminal Law: Plea of Nolo Contendere to an Indictment for First Degree Murder*, 16 E. Fla. L. Rev. 497 (1963) and *Florida*

*Judge continued on page 2*

### Attorney Chris Carlyle Achieves Board Certification in Appellate Practice

Chris Carlyle was recently board certified in appellate practice by The Florida Bar. To become board certified, an attorney must go through a lengthy application and testing process. An attorney must practice law for more than five years, have participated in more than five oral arguments, and must have primary

responsibility for more than 25 appellate cases. Additionally, comments are sought from attorneys and judges that the attorney has worked with, and the attorney must also pass an extensive examination which covers all aspects of appellate practice including civil and criminal ap-

*Certification continued on page 3*

## Shannon McLin Carlyle and Roy B. “Skip” Dalton, Jr. Chosen for *Florida Trends* 2006 Florida Legal Elite

The Firm is pleased to announce that two of its members, Shannon McLin Carlyle, founding partner and Roy B. “Skip” Dalton, Jr. (of counsel) were named to *Florida Trend* magazine’s 2006 Florida Legal Elite.

The list, which was published in the July 2006 issue, comprises the top 1.8 percent of lawyers practicing in Florida. Attorneys in the Florida Legal Elite are chosen by their peers through a process in which attorneys provide the names of Florida lawyers they hold in the highest regard—lawyers they have worked with personally or recommended to others.

Ms. Carlyle has extensive experience in state and federal appellate litigation. She is certified by the Board of Legal Specialization and Education of The Florida Bar as a specialist in appellate practice. She is also a certified circuit and appellate court mediator, and serves on the Executive Council of The Florida Bar’s Appellate Practice Section.

Mr. Dalton’s areas of practice include appellate and civil litigation, personal injury and wrongful death. He has practiced law in Florida for over 25 years and is a graduate of The University of Florida Law School. Mr. Dalton recently served as General Counsel to United States Senator, Mel Martinez.

### Notable Quote:

*“Character cannot be developed in ease and quiet. Only through experience of trial and suffering can the soul be strengthened, ambition inspired, and success achieved.”*

**Helen Keller**



### Firm’s New Location Complete....

Our office relocated to its present home on June 10. We look forward to serving our clients in this new state of the art facility. The Firm’s desktop technology is remotely accessible so the network can be reached from any location worldwide.

### Judge from front

*Procedures in Satisfying or Avoiding a Money Judgment*, 17 U. Fla. L. Rev. 269 (1964).

After graduation, Peterson became a partner with McCune Hiaasen, Crum, Ferris and Gardener in Fort Lauderdale, but moved to Lake County in 1979 where he engaged in private practice until he was appointed to the Circuit Court bench in 1988. Two years’ later, he was appointed to the Fifth District Court of Appeal where he served with distinction until his retirement in December, 2005. He was Chief Judge of the Fifth District from 1995 to 1997.

Peterson has also been active in his community throughout his judicial career. In 2005, he was instrumental in the formulation of the Lake-Sumter Inns of Court. As an avid Paso Fino owner, Peterson is a member of the Paso Fino Horse Association, and has traveled with his horse, Carlota la M “Carly”, throughout the country participating in parades and other events. During one of the most memorable retirement party’s in the Fifth District Court of Appeal’s history, Carly carried Peterson (who was donned with tuxedo, hat and bolero) through the Court’s parking garage and bowed elegantly following the judge’s farewell remarks.

## Chris Carlyle Selected for Leadership Florida Class XXV

Chris Carlyle was recently selected to participate in Leadership Florida’s Class XXV. Leadership Florida was founded in 1982 by the Florida Chamber of Commerce, and each year it selects a class comprised of leaders from throughout the State. The Class participates in a variety of programs over the course of one year designed to foster Leadership Florida’s mission, which is to build a strong, diverse state-wide network of leaders to make Florida a better place in

which to live and prosper.

Chris Carlyle is very active in many local organizations, including serving as President of the Leadership Lake County Alumni Association, and Vice-President in charge of development for the Boys & Girls Clubs of Lake and Sumter Counties. He also serves on the Board of Leesburg Regional Hospital Medical Center Foundation, as well as serving on the SunTrust Lake County Administrative Board.

## Trial Tip...

### Don't be afraid to object during closing argument!

Many attorneys are hesitant to object during closing argument. This is often the case because counsel fears drawing attention to a statement made by opposing counsel, and perhaps because they would like the same courtesy of an uninterrupted closing in return. However, if opposing counsel makes an improper argument, the failure to object will likely waive any possibility of relief in either the trial or appellate court.

In 2000, the Florida Supreme Court decided Murphy v. International Robotic Systems, Inc., 766 So. 2d 1010 (Fla. 2000), which set forth the Court's approach to improper, but unobjected to, closing argument in civil cases. The Court stated that a litigant may not seek relief in the appellate court for an allegedly improper comment unless the issue is first brought to the trial court in the form a motion for new trial. In order to prevail on such a motion, the party must demonstrate that the challenged argument was improper, harmful, incurable, and is "such that it so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial." Id. at 1030.

These standards are very difficult to meet, and a litigant seeking a new trial on this basis is obviously put in an awkward position. If the argument was so extreme as to meet these standards, then why didn't counsel object when the argument was made? Finally, the Court's decision concerning whether to grant or deny a new trial is reviewed by the appellate court under an abuse of discretion standard.

Murphy's holding in effect makes it nearly impossible to obtain a new trial if one chooses not to object to an improper comment during closing argument. The standard for a new trial is exceedingly difficult to meet, and it would indeed be a rare occurrence where an appellate court finds that the trial court abused its discretion in denying a motion for new trial. Thus, the lesson is to listen carefully to opponent's closing argument, and do not be afraid to object if necessary.



## Mission Statement

*The Carlyle Appellate Law Firm is an entrepreneurial and dynamic firm composed of lawyer and non-lawyer professionals who strive to give clients the best appellate representation in the State of Florida. We function as a team. We support, trust, and respect each other- both personally and professionally. We adhere to the highest ethical standards in our dealings with each other, with our clients, with the judiciary, with the legal profession, and with our community.*

## Firm Overview-

Our appellate lawyers vigorously represent clients in appeals to all five of Florida's district courts of appeal, the Supreme Court of Florida, the United States Court of Appeals for the 11th Circuit Court, and the Supreme Court of the United States.

We also provide strategic counseling and advice to trial lawyers and their clients on issues before they actually reach the appellate level. For instance, we are frequently retained to assist in briefing complex legal issues at the trial level to ensure that arguments are properly preserved for appeal. Other aspects of litigation support include assisting trial counsel with pre-trial motions, jury instructions, objections during trial and post-trial motions. We also evaluate the prospects of an appeal and assist in appellate mediation. Our two retired appellate judges, Gilbert S. Goshorn, Jr. and Earle W. Peterson, Jr. are available to serve as private judges, and conduct mock oral arguments. This is a unique service that Appellate Lawyers throughout the state utilize in significant and complex cases.

### *Certification from front*

peals, as well as state, federal and administrative matters.

In 2006, six lawyers in the State of Florida achieved board certification in appellate practice. At present, there are 150 attorneys who are board certified in appellate practice. Shannon McLin Carlyle achieved this certification in 2004..

Chris has extensive background in appellate law and commercial litigation. He is AV rated by Martindale Hubbell and is admitted to practice in Florida state and federal courts, the U.S. Circuit Court of Appeals for the Eleventh Circuit and the Supreme Court of the United States.

## Featured Opinion:

Florida Hematology & Oncology v. Tummala, 927 So. 2d 135 (Fla. 5<sup>th</sup> DCA 2006)

The Carlyle Appellate Law Firm was recently involved in a case decided by the Fifth District Court of Appeal which could potentially have long-ranging impacts in the area of non-compete provisions. In the case, a doctor left a medical practice and opened a new office. The practice sued the doctor, and claimed that opening the new office violated the non-compete provisions of his employment contract. The doctor went to great lengths not to see any current or former patients of the practice, and instead only saw new patients.

The key issue in the case concerned whether referring physicians can be considered a “legitimate business interest” under the applicable Florida statute. Florida law permits the enforcement of restrictive covenants (a/k/a “non-compete clauses”) where enforcement is necessary to protect one or more “legitimate business interests.” The statute notes that prospective clients may be a legitimate

business interest, though those clients must be specific and identifiable.

The Court stated that while referring physicians are an important part of a practice, they do not refer patients who are “specific and identifiable” as required by the statute. That being the case, the Court held that referring physicians were not a “legitimate business interest” as defined in the law. Further, the Court held that even assuming that referring physicians could, in theory, be legitimate business interests, the medical practice had not established that it was reasonably necessary to protect that interest by enforcing the restrictive covenant. Therefore, the trial court’s order refusing to enjoin the doctor was affirmed. The medical practice sought review of this decision by the Florida Supreme Court, but the Court had not accepted jurisdiction as of this writing.

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