



PALM BEACH COUNTY BAR ASSOCIATION

BULLE^TIN

www.palmbeachbar.org

December 2010



The Board of Directors and Bar Staff Wish You and Your Family a Happy Holiday Season!!

Mark your calendar for upcoming Membership Events

Leadership Seminar

December 3, 8:30 – 1:00 p.m.

Annual Holiday Party & Silent Auction

December 9, 5:30 – 8:00 p.m.
Frenchman's Reserve

Young Lawyers Panther's Game

December 15

Second Annual Lawyer Variety Show

January 22, 2011, 6:00 p.m.
Eissey Theatre at Palm Beach State College

Wine Tasting Event

February 3, 5:30 p.m.
The Phillips Point Club

Joint Luncheon with Forum Club

February 16, 11:30-1:00 p.m.
Speaker: U.S. Supreme Court Justice Stephen Breyer

Bench Bar Conference

March 4, 8:00 – 5:00
Palm Beach County Convention Center

Joint Luncheon with South County Bar

March 22, 11:45 a.m. – 1:00 p.m.
Benvenuto's in Boynton Beach
Speaker: FL Bar President Mayanne Downs

Annual Judicial Reception

May 3, 5:30 – 7:00 p.m.
The Harriet at City Place

Law Day Luncheon

May 6, 11:45 – 1:00 p.m.

Please join us for our

Holiday Party & Charity Auction

Thursday, December 9

5:30 p.m. to 8:00 p.m.

Frenchman's Reserve

3370 Grande Corniche, Palm Beach Gardens

\$35.00 for PBCBA members; \$45.00 for attorneys who are Non-PBCBA Members; \$45.00 Spouses; Judges are complimentary. Includes drinks, heavy hors d'oeuvres plus a chance to shop for holiday gifts at bargain prices!

One hundred percent of the proceeds benefit charities sponsored by the Young Lawyers and North County Sections. Thank you to our sponsors to date: Rock Legal Services & Investigations, Visual Evidence, Brooks Brothers, Sabadell United Bank, Bob Greenberg CLTC, LexisNexis and Torrington, Romagnolo & Goldberg Wealth Consulting Group at UBS. Pre-registrations are **required** and can be done on the Bar's website palmbeachbar.org

Nominating petitions available for Board of Directors

The annual election of officers and directors for the Palm Beach County Bar will take place via online voting in April. Persons seeking to run for a position on the Board of Directors will need to obtain a nominating petition and must be a member in good standing of the Palm Beach County Bar Association. The nominating petition must be signed by no fewer than 20 members in good standing of the Association. Petitions for President-elect will be available on December 15 and are due back in the office by 5 p.m. on January 14. Petitions for director-at-large seats will be available on December 22 and are due back in the Bar office by 5 p.m. on January 21. Petitions may be obtained by calling the Bar office at 687-2800 or by sending an e-mail requesting it at pburns@palmbeachbar.org. For any of the positions, it is the candidate's responsibility to verify ahead of time through the Bar office that the members that sign their petitions are members in good standing, otherwise, the petition will be deemed invalid.

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THE
BULLETIN

**PALM BEACH COUNTY
BAR ASSOCIATION**

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www.palmbeachbar.org

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The mission of the Palm Beach County Bar Association is to serve its members, foster professionalism and enhance the public's understanding and awareness of the legal system.

LETTERS TO THE EDITOR

The Palm Beach County Bar Association Bulletin welcomes your comments on topics relating to the law, the legal profession, the Palm Beach County Bar Association or the Bar Bulletin. Letters must be signed, but names will be withheld upon request. The editor reserves right to condense.



Send letters to:
EDITOR Bar Bulletin
Palm Beach County Bar Association
1601 Belvedere Road, #302E
West Palm Beach, FL 33406

15th JUDICIAL CIRCUIT 2011 COURT HOLIDAY SCHEDULE

The following holidays will be observed by the Fifteenth Judicial Circuit in 2011:

New Year's Day	Friday, December 31, 2010
Martin Luther King Jr. Birthday	Monday, January 17
President's Day	Monday, February 21
Good Friday	Friday, April 22
Memorial Day	Monday, May 30
Independence Day (observed)	Monday, July 4
Labor Day	Monday, September 5
Rosh Hashanah	Thursday, September 29
Columbus Day	Monday, October 10*
Veteran's Day	Friday, November 11
Thanksgiving Day	Thursday, November 24
Friday after Thanksgiving	Friday, November 25
Discretionary Holiday	Friday, December 23
Christmas (observed)	Monday, December 26
New Year's Day (observed)	Monday, January 2, 2012**

*Monday, October 10, 2011 is a County holiday and County buildings will be closed. Therefore, court hearings cannot be scheduled on that day. The Court will hold an in-service training for all 15th Judicial Circuit employees.

**January 1, 2012 falls on a Sunday. Therefore, the Circuit will recognize Monday, January 2, 2012, as the New Year's holiday and as the first holiday in 2012. This corresponds to the County's holiday schedule.

Did you buy tickets for the Variety Show?

Auditions for our Second Annual Lawyer Variety Show were held last month and the lineup of performers promises to be just as much fun and entertaining as last year! Make plans to join us on Saturday, January 22 from 6:30 pm to 9:00 pm at the Eissey Campus Theatre in Palm Beach Gardens.

If you haven't already purchased your seats, buy them today! Tickets are \$35.00 for Orchestra and \$25.00 for Balcony and can be purchased online at www.palmbeachbar.org. Seating is reserved and will be given on a first come first serve basis. The following members are scheduled to perform in this year's show.

Congratulations to...

Bryan Anderson
Wade Bowden
Brian Denney
Tracy Gerber
Sheri & Rex Hazeltine
John Howe
Al Johnson
Rick Kupfer
Adriana Lopez
Iola Mosley
Michael Napoleone
Mark Pachman

Adam Rabin
Darren Shull
Barry Silver
Jeremy Slusher
Carl Spagnuolo
Michelle Suskauer
Grey Tesh
Patti Velasquez
Jill Weiss
John Whittles
& the North County Section
Board of Directors

A portion of the show proceeds benefit the Legal Aid Society's new Armed Services Advocacy Project.

Family Connections Program Wish List

The Family Connections Program provides a child-friendly secured environment and trained personnel to schedule and supervise time sharing and monitored exchanges as court ordered between children and family members. This service is in need of items for children that participate in their program that include such things as: televisions, dvd players, Wii game system, movies, and other toys (legos, puzzles, card games, arts and crafts, books) and board games. If you are interested in making a donation, please contact Debra Oats-Ducram at (561) 355-4495 or contact her via email doats@pbcgov.org

President's Message



Stand up and try

By Michael J. Napoleone, President

By now, we have all likely (finally) digested our Thanksgiving feasts and are headed full-steam into the

holiday season. That means holiday parties – usually lots of them – including the Bar's Annual Holiday Party & Silent Auction at Frenchman's Reserve. We will all try to find time to squeeze in work between parties, shopping and, finally, starting that exercise program we've been talking about since our New Year's Resolution back in January, just eleven short months ago. Before you know it, 2010 will be in the books and you will soon be unwrapping that new 2011 "Word-of-the-Day", "Joke-of-the-Day", or "Inspirational-thought-of-the-Day" calendar. (People do still buy those, right?)

As you reflect back on the last eleven months, was it a good year? Ask yourself, did I make a difference, or did it seem like I was just on a stationary bike pedaling to nowhere? (Metaphorically speaking, of course; not on the real stationary bike that has become a permanent clothes rack in the corner of your bedroom.) Well, you may have fallen short on some resolutions, but there is still time to make a difference: contact the Legal Aid Society of Palm Beach County and volunteer to take on a pro bono case. Yes, this is one of "those" messages touting the value of pro bono work. Undoubtedly, everyone has heard about the One Campaign launched by The Florida Bar. The concept is simple: *One Client. One Attorney. One Promise.* By simply accepting one case, you can make a difference in the life of one person, one family who cannot otherwise afford the legal assistance they need.

Unfortunately, instead of "one," the word that comes to the mind of many lawyers is "why?" Why should I do pro bono work? The answer is simple: pro bono work can be some of the most challenging, interesting and meaningful work you will ever do as a lawyer. It reminds us of what made many of us choose the legal profession in the first place – it's creative, it's optimistic and it matters. I recently had the opportunity to speak at the admission ceremony for newly admitted attorneys.

As they stood there, full of hope and enthusiasm, and took the oath, I listened,

really listened, to the promise we all swore upon admission to the bar. Part of that oath is a pledge that we will "never reject the cause of the defenseless or oppressed or delay anyone's cause for lucre or malice." The holidays are the perfect time to finally take on that pro bono case that you have been promising yourself that you would handle when you finally found the time. It's like the saying, "You can't be too rich or too thin." The time is never right; but there are people who need your help now.

A movie I really enjoyed is *Dave*, where Kevin Kline plays the role of a presidential impersonator who, because the president has suffered a stroke, is enlisted to pretend to be the actual president. Moderate hilarity ensues. At a point near the end of the movie, "president" Dave pledges to make job creation the focus of his administration. To paraphrase, he says that the look on someone's face when they finally get that job, they look like they can fly; for them, it's not about the paycheck, it's about

respect, about being able to look in the mirror and know that you've done something valuable with your day. As for taking on the seemingly impossible goal of "full employment", he says, "You don't really know how much you can do until you stand up and decide to try."

We all recognize that the economy is still down, unemployment is still up, the foreclosure mess is only deepening as more and more layers are peeled back revealing more problems. As a result, Legal Aid has experienced a significant increase in the number of individuals and families seeking their services. The face of the typical Legal Aid client has changed and now includes many of our friends, colleagues and neighbors who are finding themselves in need of free legal assistance. People need help. They need your help. Don't let another year slip away without fulfilling that promise. Contact the Legal Aid Society at (561) 655-8944 or go online to www.legalaidpbc.org. Now is the time to stand up and try.
mnapoleone@richmangreer.com

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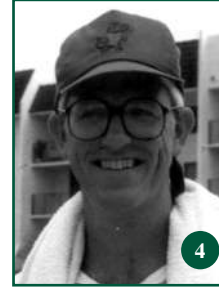
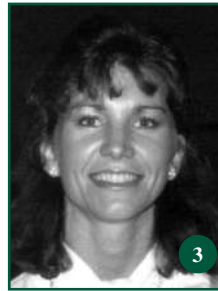
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Who are they?

Can you guess who these members are? Answers can be found on page 13. If you have old pictures of yourself or other members that you'd like featured, please send them to Patience Burns at the Bar Office.



The Solo & Small Firm Practitioners Committee meets every 6 weeks to network and discuss important timely topics. Attend the next event for lunch and CLE credit – all for just \$10.00!

December 1 – Law Office Technology: Tired of going to the Post Office?

January 19, 2011 – Law Office Compliance for Employees

February 24, 2011 – Internet Marketing

March 30, 2011 – Vendors from A to Z

May 11, 2011 – Taxes, Accounting & Staying out of Trouble!

REGISTER ONLINE @ www.palmbeachbar.org

(topics may change. Check the Bar's website for updates)

10th Annual Cup of Justice Golf Classic Raises \$40,000 for Educational Advocacy Project

The Legal Aid Society of Palm Beach County's 10th Annual Cup of Justice Golf Classic raised \$40,000 to support its Educational Advocacy Project. The project's mission is to ensure positive educational outcomes for disabled children attending Palm Beach County schools.

Attorney Robert Shalhoub chaired the October 11th tournament at Bear Lakes Country Club. The presenting sponsor of the event was Sabadell United Bank. Lunch was sponsored by Florida Crystals and dinner sponsorship was shared by the accounting firm of Caler, Donten, Levine, Porter & Veil, P.A. and the Law Offices of James A. Bonfiglio, P.A.



The accounting firm of Moore, Ellrich & Neal, P.A., was awarded the Cup of Justice after an outstanding round of golf. The team's players included Chappell Brown, Michael Scheve, Mark Luttier and Matthew Smith



Also playing in the tournament were attorneys Chris Larmoyeux, Michael Walsh and Eric Hewko

In Memoriam
Retired 3rd DCA Judge
Thomas H. Barkdull, Jr.
September 24, 2010

1957 Palm Beach County Bar President
Phillip D. Anderson
October 31, 2010

Family Picnic A Great Success!

More than 200 members, judges and their families attended the Bar's first family picnic at Dreher Park in West Palm Beach. The day included sunny skies, a law firm bake-off challenge, rock wall, bounce house, face painting, relays, live music, BBQ, ice cream, plus lots more! Here are photos from the picture perfect day:



Picnic Chair Sarah Shullman with her husband and two daughters.



Scott Smith with his wife Molly and their three children



Michael Napoleone with his son Christopher



Andrea McMillian and her daughter



Board members Grier Pressly and John Whittles made sure everyone had a nice cold cup of beer



Adrian Alvarez with his wife and two children



Bar staff Paula Rocker, Nancy Reidler and Shoshanah Spence



Winning first place in the Law Firm Bake-Off is Tracy Vaspoli (third from left) from Murray & Guari Trial Attorneys. Tracy received a \$100 gift certificate to Williams & Sonoma for her winning "White Chocolate Raspberry Truffle Cheesecake." Pictured from left to right: Jason Guari, June Cozza, Tracy Vaspoli, and our Bake-Off testers - Judges Ted Borras, Krista Marx and Joe Marx. Pat DeRamus (front) did a tremendous job organizing the contest. Thanks to all!



The Face Painter was a big hit too!



Event coaches Jon Mann and Ray Kramer led some awesome games including a water balloon toss won by Matthew Poirier and his friend JC

This event was made possible by the following sponsors:

Smith Ivey & Fronrath, P.L. (BBQ)
 Alan Kelman DDS (Ice Cream)
 Leifert & Leifert PA (Entertainment)
 Lesser Lesser Landy & Smith (Rock Wall)
 LexisNexis (Bake-Off)
 Lytal Reiter (Bounce House)
 Matrix Mediation (Picnic Tables)
 McCabe Rabin PA (Beer)
 Murray & Guari Trial Lawyers (Refreshments)

Palm Beach Co. Chapter of the Paralegal Association of Florida Inc. (Entertainment)
 Rock Legal Services & Investigations (Picnic Tables)
 Sabadell United Bank (Refreshments)
 Squire Sanders & Dempsey LLP (Face Painting)
 Steinger Iscoe & Greene P.A. (T-shirts)
 The Law Office of Robin Bresky (Bake Off)

Additional pictures can be found on the Bar's website at www.palmbeachbar.org.

Either one will do.



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Debtor's Interest in Intervivos Trust Ruled Not Property of the Bankruptcy Estate

Submitted by: *Marc P. Barmat*

Northern District of Florida Bankruptcy Judge

Lewis M. Killian, Jr. recently ruled against an objecting creditor seeking the determination that debtor's beneficial interest in an intervivos trust was property of the bankruptcy estate. See, *In re Ciano*, 433 B.R. 431 (Bankr. N.D. Fla. 2010). In *In re Ciano*, the undisputed facts are that the debtor's father established, as the grantor, an Irrevocable Lifetime Family Trust Agreement ("Trust") wherein the debtor and his two siblings were named as the beneficiaries and the debtor's father's second wife was named as the trustee. Prior to the establishment of the Trust, the debtor's father was the owner and insured under two life insurance policies. Upon creation of the Trust, the debtor's father transferred ownership of the policies to the Trust and designated the Trust as the beneficiary of both policies. The Trust contained the following spendthrift provision:

Spendthrift. A beneficiary's interest in this Trust may not be pledged, assigned, sold, transferred, alienated, encumbered or anticipated by such beneficiary in any way, nor shall any such interest in any manner be liable for or subject to the debts, liabilities or obligations of such beneficiary or claims of any sort, including those claims of my beneficiary's spouse against such beneficiary.

The debtor's father died 44 days after the debtor filed a Chapter 7 bankruptcy petition. Upon his death, the three beneficiaries were entitled to immediate distribution of their respective shares, which amounted to approximately \$1 million each.

A creditor of the bankruptcy estate filed a motion with the bankruptcy court seeking a determination that the Trust assets are property of the bankruptcy estate. The creditor's initial argument was that the spendthrift provision was

invalid and therefore 11 U.S.C. §541(c)(2), which recognizes the enforcement of restrictions "on the transfer of a beneficial interest of the debtor in a trust" did not apply. The Court rejected the creditor's argument and found the spendthrift provision to be valid as "the debtor did not exercise absolute dominion or control over any of the assets of the trust, and at the time of the petition was prevented from reaching any of the trust assets." *Id.* at 434.

The creditor further argued that the distribution to the debtor should be property of the bankruptcy estate based upon 11 U.S.C. §541(a)(5), which states that the bankruptcy estate is comprised of all of the following property, wherever located and by whomever held:

...

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date –

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

The creditor argued that the debtor's entitlement, within 180 days from the filing of the bankruptcy petition, to receive a share of the funds from the trust that the trust received as beneficiary of the life insurance policy, constitutes either a bequest, devise, or inheritance under §541(a)(5)(A) or receipt of funds as a beneficiary of a life insurance policy under §541(a)(5)(C).

In rejecting the creditor's argument, the court looked to the plain language of 11 U.S.C. §541(a)(5)(A) and found that the language does not encompass the

debtor's interest as one of three beneficiaries of a trust that is the sole beneficiary of two separate life insurance policies. *Id.* at 435. The court held that the debtor acquired his interest in the Trust as an inter vivos gift prior to the death of his father, and not as a result of the his father's death. Accordingly, the Trust was not in the nature of a testamentary trust, and the debtor did not obtain his interest in the Trust by way of a bequest, devise, or inheritance. *Id.* at 436.

The Court also rejected the creditor's argument that the Trust assets were property of the bankruptcy estate pursuant to 11 U.S.C. §541(a)(5)(C) "as a beneficiary of a life insurance policy..." In rejecting the creditor's argument, the Court found that the trust was the beneficiary of the life insurance proceeds, and that the debtor was merely one of three beneficiaries of the Trust. The Court noted that to rule otherwise would disregard the plain language of 11 U.S.C. §541(a)(5)(C) and effectively broaden the section to include beneficiaries of beneficiaries of life insurance policies. *Id.* at 437.

This article was submitted by Marc Barmat, Furr and Cohen, P.A., One Boca Place, Suite 337 West, 2255 Glades Road, Boca Raton, FL 33431; mbarmat@furrcohen.com

Board of Directors Meeting Attendance				
	Retreat	Aug	Sept	Oct
Bowden	x	x	x	x
Bresky	x	x	x	x
Coleman				
DiSalvo		x	x	
Guari	x	x	x	x
Hawkins				
Howe	x	x	x	x
Kapner	x	x	x	x
Kypreos	x	x	x	x
Napoleone	x	x	x	x
Prather	x			
Pressly	x	x	x	x
Rabin	x	phone	x	x
Reagan		x	Ponzoli	x
Small				
Suskauer	x	x	phone	x
Weiss	x	x	x	x
Whittles	x	x	x	x



The Bankruptcy Law CLE Committee
of the Palm Beach County Bar Association
presents:

**“View From High Places -
Insights from the Courts and a Trustee”**
Wednesday, March 9, 2011 - 11:00pm - 2:00p.m.

Bar Offices - 1601 Belvedere Rd., Suite 302E, WPB

Program Schedule



- 10:30am - 10:50pm **Check In / Late Registration**
- 10:50am - 11:00am **Welcome - Opening Remarks** - *Julianne R. Frank, Esq., Frank, White-Boyd, P.A., Bankruptcy CLE Committee Chair*
- 11:00am - 12:00pm **View from the Chapter 13 Trustee** - *Robin R. Weiner, Esq., Plantation, FL*
- 12:00pm - 12:30pm **Buffet Lunch**
- 12:30pm - 2:00pm **View from the Bench: The Words and Wisdom of our Bankruptcy Judges** - *Honorable Paul G. Hyman and the Honorable Erik P. Kimball, United States Bankruptcy Judges Southern District of Florida - Moderated by Julianne R. Frank, Esq., Frank, White-Boyd, P.A.*

SPONSORED BY:



This course is expected to receive 3.0 CLER from The Florida Bar.

The cost of the seminar, **including lunch**, is **\$75** for PBCBA members/legal assistants, **\$115** for non-PBCBA members/legal assistants. **After 3/2/11, add \$10.00 late fee.**

All refund requests must be made no later than 48 hours prior to the date of the seminar.

___ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

HOW TO REGISTER	 BY CHECK Return this form	 BY CREDIT CARD For security purposes, you must register online at www.palmbeachbar.org		Materials will now be emailed to all registrants prior to the seminar
------------------------	---	--	---	--

Name: _____

Telephone: _____

Address: _____

City/Zip _____

Email Address: _____

___ I will not be able to attend the seminar but would like to order the CD (allow 4 weeks for delivery) (Bankruptcy Seminar 3/9/11) Cost is the same as listed above, **in addition to \$10 for shipping and handling.**

PAYMENT BY **CHECK** ONLY, WITH THIS FORM.

Palm Beach County Bar Association, 1601 Belvedere Rd. #302E, West Palm Beach, FL 33406.

North County Section

These pictures were recently taken during a North County Section event at the Capital Grille in Palm Beach Gardens.



North County Board member Keith Campbell, David Zelner and NCS President Ned Reagan



Judge Peter Evans and Scott Murray



Greg Huber, Greg Yaffa and Greg Zele



Judge Roger Colton, Chief Judge Peter Blanc, Michael Napoleone and Judge Edward Garrison



W Scott Mason and Jessica Callow



Judge Laura Johnson and Greg Coleman

Benchmarks: Raising the Bar on Civics Education

The Florida Bar's Judicial Independence Committee has created an initiative entitled, "Benchmarks: Raising the Bar on Civics Education". This



program is designed to give attorneys activities that they can use to teach the fundamentals of government and the courts to adult civic and community groups. This is a critical mission and an important one for The Florida Bar and its members. An informed public is the best defense of a vigorous democracy, the rule of law and an independent, impartial and fair judiciary. Benchmarks aims to inform adults through engaging activities about judicial review; the Bill of Rights and reviewing laws to see if they are constitutional; facts and knowledge about U.S. government and the courts; and court funding. The program has five activities that attorneys can use when they speak to community groups. Each activity has an overview and supporting materials that can be found on The Florida Bar's website ranging from PowerPoint documents, flashcards, speaker notes and other items to make it easy for you to make the presentations.

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Deposing An Incapacitated Person

By David M. Garten, Esq.

As a prerequisite to deposing an incapacitated person (or an alleged incapacitated person), it may be necessary to: (a) have a hearing to determine whether the witness is disqualified from testifying, and/or (b) submit written deposition questions to the witness.

A witness is presumed competent to testify until the contrary is established. See §90.601, Fla. Stat. (every person is competent to be a witness, except as otherwise provided by statute); Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000); Hawk v. State, 718 So. 2d 159 (Fla. 1998). Even a person who has been declared insane can be found competent to testify. See Belcher v. Johnson, 834 So. 2d 422 (2nd DCA 2003), citing Fla. Power & Light Co. v. Robinson, 68 So. 2d 406 (Fla. 1953). The witness's unreliability goes to his credibility, which is for the trier-of-fact to consider. See Terry v. State, 668 So. 2d 954, footnote 9 (Fla. 1996), citing Weygant v. Fort Meyers Lincoln Mercury, Inc., 640 So. 2d 1092 (Fla. 1994).

A witness is incompetent to testify if the Court determines the witness is (1) unable to communicate to the Court; (2) unable to understand the duty to tell the truth; or (3) unable to perceive and remember the events. See Rutherford, Supra; citing §§ 90.603, .604, Fla. Stat. Competency to testify is established when a witness has sufficient understanding to comprehend the obligations of the oath and is capable of giving a correct account of the matters which the witness has seen or heard relative to the question at issue. See Kaelin v. State, 410 So. 2d 1355 (Fla. 4th DCA 1982).

In Belcher v. Johnson, 834 So. 2d 422 (Fla. 2nd DCA 2003), the Belchers sought to take the deposition of Ms. Roberts, who is an elderly woman suffering from dementia. Her guardian filed a motion for protective order seeking to prevent the deposition because Ms. Roberts was, to some degree, legally incapacitated. The trial court granted the protective order without an evidentiary hearing and without making a factual determination that Ms. Roberts should be disqualified to testify as a witness under

§90.603, F.S. Apparently, the trial court assumed that Ms. Roberts' incapacity for purposes of a guardianship proceeding rendered her disqualified to testify as a matter of law. The court quashed the protective order and remanded to the trial court to conduct a hearing to determine whether Ms. Roberts should be disqualified from testifying pursuant to section 90.603. The court reasoned that even a person who has been declared insane can be found competent to testify.

In Urbanek v. Hopkins, 993 So. 2d 1110 (Fla. 4th DCA 2008), a beneficiary of certain irrevocable living trusts sued the trustee for breach of fiduciary duty for failing to make distributions. In turn, the trustee counter-sued asserting that the beneficiary had induced the grantor to exert undue influence on the trustee to make improper distributions. The grantor was the father of the beneficiary and was not a party to the case. No claims were made by or against the grantor. The

trustee sought to take the grantor's oral deposition. The grantor's attorney objected to the deposition because the grantor was 88 years old and suffering from Parkinson's disease. The attorney furnished the trial court with a detailed affidavit from a physician who had specific knowledge about the grantor's condition and filed a motion to limit the deposition to written questions. In response, the trial court ordered the grantor and his physician to appear in court for a hearing on the grantor's medical condition. In spite of the affidavit establishing danger to the grantor's health from being forced to appear for a deposition, the judge nevertheless insisted that he come to court to testify and rejected the alternative of first permitting only a written deposition. The grantor did not personally come to court and appeared at the hearing through counsel. The trial judge ordered the grantor to submit to a compulsory medical examination (CME) by a physician chosen by the trustee within the next 30 days.

The appellate court quashed the order requiring a CME. The court found that the trustee failed to establish good cause

Continued on page 15

probate litigation



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The Elder Law Affairs Committee of the Palm Beach County Bar Association presents:

“13th Annual Elder Law Update”

Thursday, December 16, 2010 - 8:20a.m. - 2:00p.m.
Bar Offices - 1601 Belvedere Rd., Suite 302E, WPB

Program Schedule

- 8:00am - 8:20am Late Registration - Check In
- 8:20am - 8:30am Welcome - Opening Remarks - Seth A. Marmor, Esq., Shapiro Blasi Wasserman & Gora PA, Chair PBCBA Elder Law Affairs Committee, Florida Bar Board Certified Elder Law, and Wills, Trusts & Estates Attorney
- 8:30am - 9:20am The Role of Court-Appointed Counsel In Guardianship - Doing it Right & Doing it Ethically - Lawrence Levy, Esq., Law Office of Lawrence Levy, P A
- 9:20am - 9:50am Class Act Coverage - Bob Greenberg, CLTC, MetLife
- 9:50am - 10:00am Break
- 10:00am - 10:50am Annual Tax & Ethics Update - Michael A. Lampert, Esq., Michael A. Lampert, P.A., West Palm Beach, FL, Florida Bar Board Certified Tax Attorney
- 10:50am - 11:40am Medicaid Update - Leonard E. Mondschein, Esq., Chairman Elder Law Section of the Florida Bar, Florida Bar Board Certified Elder Law, and Wills, Trusts & Estates Attorney, Miami
- 11:40am - 12:00pm LUNCH (included in registration)
- 12:00pm - 12:30pm VA Aide & Attendance Benefits - Craig Carr, Palm Beach County Veterans Services Office,
- 12:30pm - 1:00pm Ethics and Professionalism: A Cut Above the Ordinary - Representative from the Professionalism Committee of the Palm Beach County Bar Association
- 1:00pm - 1:10pm Break
- 1:10pm - 2:00pm Legislative Update - Ellen S. Morris, Esq., Elder Law Associates, Legislative Chair Elder Law Section of the Florida Bar

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This course has been granted 6.0 CLER including 2.5 Ethics credit / 4.5 Elder Law; 4.5 Wills, Trusts & Estates Certification credits from The Florida Bar.

The cost of the seminar, **including lunch**, is **\$165** for PBCBA members/legal assistants, **\$205** for non-PBCBA members/legal assistants, if registered by 12/9/10. **Add \$25 to registration fee after that date.**

If a phone reservation is made and we do not receive payment and you do not attend, you will be charged \$25. All refund requests must be made no later than 48 hours prior to the date of the seminar.

___ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

HOW TO REGISTER



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For security purposes, you must register online at www.palmbeachbar.org



Materials will now be emailed to all registrants prior to the seminar

Credit card registration payment not accepted by Fax to comply with PCI regulations.

Please register me for the December 16, 2010 Elder Law Seminar:

Name: _____ **Telephone:** _____

Address: _____ **e-mail:** _____

___ I will not be able to attend the seminar but would like to order the CD Rom. (allow four weeks for delivery) (Elder Law 12/16/10) **Cost is the same as listed above, in addition to \$10 for shipping and handling. PAYMENT BY CHECK ONLY, WITH THIS FORM..**

Diversity Membership Luncheon



The PBCBA recently joined together with FAWL, the Hispanic Bar and the Cunningham Bar for a membership luncheon featuring guest speaker ABA President Steve Zack. PBCBA President Michael Napoleone is pictured above with the presidents of each of the co-sponsoring organizations: Samantha Feuer; Adrian Alvarez and Grasford Smith.



4th DCA Judge Carole Taylor, Sia Baker-Barnes, Lynn Solomon, Maureen Martinez and Craig Lawson



Steve Zack and Chris Searcy



Steve Stinson, Mario deMendoza and Pat Casey



FL Bar President-elect Scott Hawkins, ABA President Steve Zack, and 15th Circuit Board of Governors Rep Greg Coleman

Audio books recorded for the Blind & Dyslexic

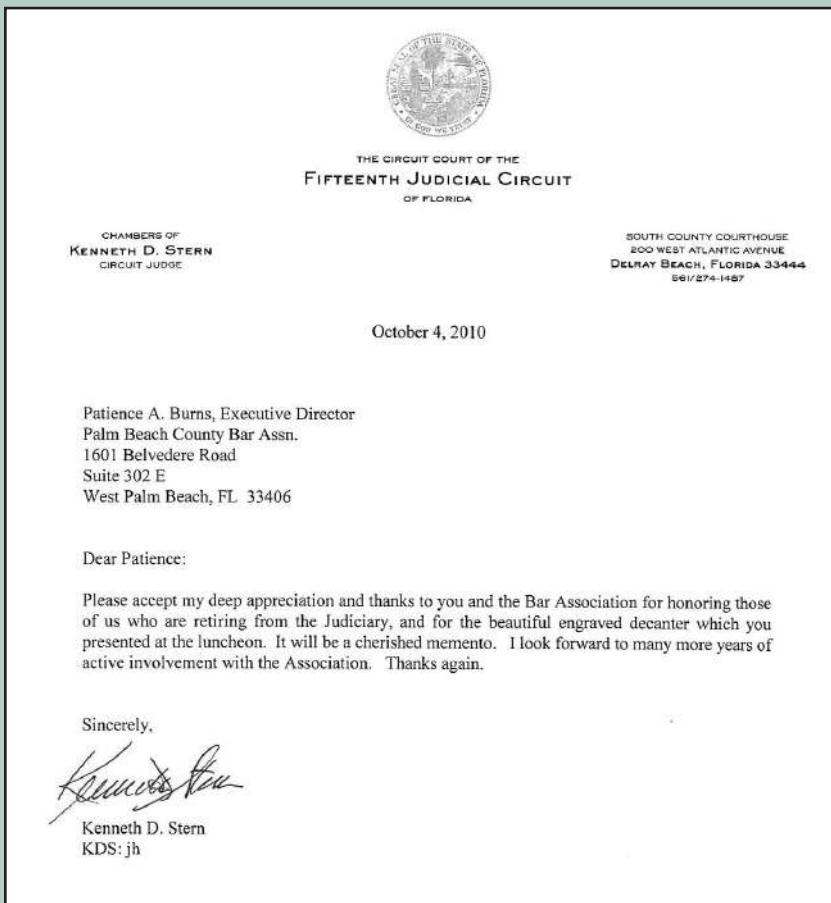
Members of the Lawyers for Literacy Committee recently volunteered at Recording for the Blind & Dyslexic (RFB&D), a national non-profit organization that produces educational audiobooks for students from pre-K through graduate school with visual and learning disabilities. RFB&D relies heavily on its 5,400 active volunteers nationwide. At its Boca location, the only RFB&D studio in Florida, 153 volunteers donated 6,819 hours last year, producing 258 books and serving 25,258 students.

Lawyers for Literacy Committee members learned the 60-plus year history of RFB&D, toured its new studios on the FAU campus, and tried their hand (and vocal cords) at recording audiobooks.

RFB&D will host a training session for interested volunteers on Saturday, December 4 at 10 am at RFB&D studios in Boca. For more information, contact Committee Chair Peggy Wood at wood@caldwellpacetti.com.



Lawyers for Literacy Chair Peggy Wood in the recording booth





The Golden Rule for Lawyers

By Dean T. Xenick, on behalf of the Professionalism Committee

My seven year old daughter is a genuinely sweet and caring child. She loves her family and adores animals. However, as all seven year olds do, every once in awhile she may say something that I don't necessarily like, to which I ask her, "Would you say that to your teacher?" Her response is always, "No," which garners my response, "then don't say that to me."

As attorneys, we sometimes get caught up in the defense of our clients to the point where we forget that we are dealing with other human beings and fellow colleagues with whom we share the same profession. So, before you fire off that snide e-mail, letter, or Motion for Sanctions to opposing counsel, ask yourself "Would I say that to the judge?" If the answer is no, you may want to reconsider your actions.

The Golden Rule ("Do unto others as you would have them do unto you" or the child's version, "Treat others as you want to be treated") is a practice that should be employed by attorneys daily in their practice. In that vein, I give you The Golden Rule for Lawyers: "Litigate against opposing counsel as you would want to be litigated against yourself."

The Golden Rule should apply to all aspects of our daily work life, including motion practice, courtroom demeanor and behavior. Call it the "Denny Crane effect," (he is a character from the TV shows "The Practice and "Boston Legal" - if you don't know who he is just Google him) but judges are seeing more disrespect and an increase of objectionable courtroom behavior as well. I recently took the CLE seminar, "Masters Seminar on Ethics 2009", which was provided by the Florida Bar. This seminar, moderated by several judges and lawyers, brought to the forefront this troubling trend. All of the judges in this seminar concluded that attorneys are becoming less professional towards other lawyers and more disrespectful towards judges in the courtroom. This does not bode well for our profession, especially in a climate of cynicism towards attorneys. We need to raise the bar (no pun intended) and act in a manner consistent with our profession. Just because our clients are at each others' throats does not mean that we need to participate in objectionable behavior. Further, when you engage in unprofessional conduct, you lose focus on the case and the representation of your client suffers.

That is not to say we should not zealously advocate for our clients. Aggressive representation is the trait of a *good* lawyer. However, aggressive and ethical representation are traits of a *great* lawyer. Ethics and aggressiveness are not mutually exclusive characteristics.

In Palm Beach County, ethics and professionalism are governed by the Standards of Professional Courtesy, and can be found on the Palm Beach County Bar Association's website, at <http://www.palmbeachbar.org/spc.php>. It goes without saying that each lawyer should read and follow these Standards when conducting themselves in the practice of law. Without reciting the Standards in their entirety, the section titled "Conduct Toward Other Attorneys, The Court and Participants" is worth quoting. Namely:

1. Attorneys should refrain from criticizing or denigrating the court, opposing counsel, parties or witnesses, before their clients, the public or the media, as it brings dishonor to our profession.

2. Attorneys should be, and should impress upon their clients and witnesses the need to be, courteous and respectful and not rude or disruptive with the court, opposing counsel, parties and witnesses.
3. Attorneys should make an effort to explain to witnesses the purpose of their required attendance at depositions, hearings or trials. Absent compelling circumstances, attorneys should give adequate notice to third-party witnesses before the scheduling of their depositions, advance notice of a subpoena for a deposition, hearing or trial. They should further attempt to accommodate the schedules of witnesses when resetting their appearance and promptly notify them of any cancellations.
4. Attorneys should respect and abide by the spirit and letter of all rulings of the court.
5. Attorneys should act and speak civilly to courtroom deputies/bailiffs, clerks, court reporters, judicial assistants and law clerks with an awareness that they, too, are an integral part of the judicial system. Attorneys should be selective in inquiries posed to judicial assistants to avoid wasting their time. Attorneys should endeavor to be knowledgeable about the court administrative orders, local rules and each judge's published or posted practices and procedures.

At the end of the day, Karma can be a wonderful thing. Like the folks at the Clematis Street Books & Internet Café ask us all to do: practice random acts of kindness. Make those acts of kindness towards opposing counsel, a judge, or both. After all, our clients will come and go, but we will likely have several cases against each other over our careers and we will be in front of the same judge on more than one occasion. As an added bonus, dealing with other attorneys and judges in a civil and ethical manner will make you a better and more respected lawyer, and will reduce your stress level. It's a win-win situation for everyone.

Attorney Dean Xenick is an associate with the firm of Burman, Critton, Luttier, and Coleman LLP and practices in the areas of personal injury, wrongful death, complex commercial litigation, insurance bad faith and construction litigation. Mr. Xenick is also a member of the Palm Beach County Bar Association's Professionalism and Judicial Relations Committees. He can be reached at 561-515-3122 and dtx@bclclaw.com

Holiday Book Drive

Sponsored by the Lawyers for Literacy Committee to benefit the children's literacy programs of the Literacy Coalition of Palm Beach County.

Collect the most new or nearly new children's books and receive a \$100 gift certificate to Barnes & Noble!

Book Challenge going on now thru December 17

Drop your books off at the Bar Office no later than 5:00 pm on Friday, December 17. (To be eligible for the prize, please fill out this form and leave it in your box of books.)

Your Name _____

Law Firm _____

Phone _____

Number of books collected _____

Thank you for giving the gift of reading to those in need.

Happy Holidays!

Welcome New Members!

The following represents each new member's name, hometown, law school, and date of admission to the Florida Bar and law firm association.

- SUSAN BALL** – New York Law School, 1994; West Palm Beach
- JARRETT D. BLAKELEY** – New York; Fordham University School of Law, 2006; Associate in Greenspoon Marder, P.A., Ft. Lauderdale
- MARK BOGEN** – Illinois; Loyola University, 1990; Bogen Law Group, P.A., Boca Raton
- GERARD COLLINS** – Massachusetts; Western New England College School of Law, 2004; Associate in Kay & Bender, P.L., Pompano Beach
- MATILDA GARCIA** – Florida Registered Paralegal Member; Frank, White-Boyd, P.A., Palm Beach Gardens
- MARISSA HOFFMAN** – New Jersey; University of Florida, 2000; Associate in Rigell & Associates, P.A., West Palm Beach
- CLAIRE HURLEY** – University of Akron School of Law, 2010; Associate in Cole Scott Kissane, West Palm Beach

- JENNIFER LANE** – Georgia; Nova Southeastern University Shepard Broad Law Center, 2010; Jupiter
- DAVID A. MCKIBBIN** – New York; University of Miami, 1972; Sole Practitioner, David A. McKibbin, P.A., West Palm Beach
- NATALIE MOLDOVAN-MOSQUEDA** – Ohio; Nova Southeastern University, 2010; Associate in Marschall & Associates, Palm Beach Gardens
- MICHAEL W. OLSEN** – Washington; University of Miami, 2009; Sole Practitioner, Royal Palm Beach
- ASHLEY ORTAGUS** – Florida; Florida State University College of Law, 2010; Legal Aid Society of Palm Beach County, Inc., West Palm Beach
- JOSEPH PEDUZZI** – Connecticut; Nova Southeastern University, 1999; Sole Practitioner, Law Office of Joseph A. Peduzzi, P.A., Palm Beach Gardens
- ANDREA A. ROBINSON** – Florida; Florida State University Law School, 2010; Office of State Attorney, West Palm Beach

- MEGAN ROGERS** – Minnesota; University of Denver/George Washington University, 2010; Boca Raton
- GREGORY SALNICK** – Florida; Florida State University, 2010; Office of State Attorney, West Palm Beach
- RICHARD A. SERAFINI** – New Jersey; Temple University, 1993; Partner in Ruden McClosky, West Palm Beach
- KHARI TAUSTIN** – University of Miami School of Law, 2010; Wellington
- PHYLLIS WEISSBERGER** – Florida Registered Paralegal Member; Maynor Sachs Copple, West Palm Beach
- DAVID ZELNER** – DePaul University College of Law, 2010; Associate in McHale & Slavin, P.A., Palm Beach Gardens



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NOMINATIONS SOUGHT FOR 2011 PRO BONO NIGHT AWARDS

The 23rd Annual Pro Bono Recognition Evening will be held on Saturday Evening May 7, 2011 at the Palm Beach County Convention Center. Anyone wishing to nominate an attorney, support staff member, law firm, individual or group for a Pro Bono Award for exemplary pro bono work in 2010 please fill out the form below. Reasons for the nomination should accompany this form and client names are not necessary. Client names will not be used for any press releases or for the program the night of the event without the client's written consent.

Nominating Form

Name of Nominee: _____

Firm Name: _____

Address: _____

Phone Number: _____

Reason for nomination: _____

Please mail nomination by January 15th to: Kimberly Rommel-Enright, Esq., Pro Bono Coordinator, Legal Aid Society of Palm Beach, County, Inc., 423 Fern Street, Suite 200, West Palm Beach, FL 33401. If you have any questions regarding these awards, please call Kim at 655 - 8944 ext. 265 or e-mail her at kenright@legalaidpbc.org.

Robert Bertisch, Executive Director

Attorneys that closed cases in September 2010

Thanks for all you do!

Richard Abedon
Barry S. Balmuth
Freeman Barner, Jr.
Gregory Burdick
Maxine Cheesman
Nancy E. Crown
Rosanne M. Duane
Joseph Farish
Amy Genet
Charles D. Jamieson
Georgina Jimenez-Orosa
Joseph E. Johnson
Judith Ann Just
Richard Kleid
Eric Klein
Anthony Manganiello

Penny Martin
Lawrence Moncrief
Shahar Pasch
Jordan Rappaport
Gerald Richman
Paul Roman
Moria Rozenson
Norman L. Schroeder, II
Sandra Seder
Michael Stern
Donald H. Tiller, III
Matthew Triggs
Gwendolyn Key Tuggle
Elissa Vessal
Mark Wilensky
Jerome Wolf

Total Hours Provided: 350.6



Who Are They?

From Page 4

1. Bill Boyes
2. George Psoinos
3. Susan Brattebo
4. David Rigell
5. Marvin Littky

Movie tickets make holiday great gifts for teachers, clients and staff!

The PBCBA has discount movie tickets available for its members. Remember, these tickets make great gifts for family, babysitters, staff, clients or end of the year gifts for teachers. Savings are available for the following theaters:

- * Muvico Theater - \$7.50 each (\$10.00 at box office)
- * Regal Theaters \$7.50 each (\$10.00 at box office)
- * Cobb Theatres \$7.50 each (\$10.00 at the box office)

Come by the office and pick up your tickets today (*payment only by check or credit card*). Tickets will only be FedEx'd (not mailed) if member provides us with a FedEx number.

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The Estate and Probate Law Continuing Legal Education Committee presents:

“The 28th Annual Estate and Probate Seminar - Part I”

Wednesday, January 26, 2011 - 8:00a.m.- 12:00p.m.

Bar Association Office, 1601 Belvedere Rd., Suite 302E, West Palm Beach, FL

Program Schedule



- 8:00a.m. - 8:25a.m. **“Hot” Breakfast Buffet / Late Registration and Check In**
- 8:25a.m. - 8:30a.m. **Welcome & Opening Remarks** - *Tasha K. Dickinson, Esq., Board Certified Wills, Trusts & Estates Attorney, Jones, Foster, Johnston & Stubbs, P.A., Committee Chair*
- 8:30a.m. - 9:20a.m. **Dealing With Attorney’s Fees Issues in Trust, Estate and Guardianship Matters – an Ethical Perspective** - *Peter A. Sachs, Esq., Board Certified Business Litigation and Civil Trial Attorney, Jones, Foster, Johnston & Stubbs, P.A.*
- 9:20a.m. - 9:50a.m. **Ethics and Professionalism: A Cut above the Ordinary** - *Representative from the Professionalism Committee of the Palm Beach County Bar Association*
- 9:50a.m. - 10:00a.m. **BREAK**
- 10:00a.m. - 10:50a.m. **Nuts and Bolts of Contested Guardianships** - *Peter J. Forman, Esq., Gutter Chaves Josepher Rubin Forman, and Lawrence J. Miller, Esq., Miller & O’Neill, PL*
- 10:50a.m. - 11:10a.m. **Proof of Due Execution of the Will/Trust: Who Has the Burden of Proof and How to Carry that Burden** - *Edward Downey, Esq., Board Certified Wills, Trusts & Estates Attorney, Downey and Downey, P.A.,*
- 11:10a.m. - 11:40a.m. **Till Death Do Us Part: Challenging Marriage and Spousal Rights Procured by Fraud, Duress or Undue Influence** - *John C. Moran, Esq., Gunster, West Palm Beach*
- 11:40a.m. - 12:00p.m. **Judicial Presentation** - *Judges Jack H. Cook and John L. Phillips, Fifteenth Judicial Circuit*

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This course is expected to receive 4.0 CLE including 1.5 Ethics credits from The Florida Bar. Certification credits are pending. The cost of seminar, which includes a **“hot” breakfast buffet** is **\$110** for PBCBA member attorneys/paralegals; **\$150** for non-PBCBA member attorneys/paralegals if registered by January 19, 2011; add \$25 after that date. **This seminar is for attorneys/paralegals only.** All refund requests must be made in writing and made no later than 48 hours prior to the date of the seminar.

HOW TO REGISTER	BY CHECK Return this form	BY CREDIT CARD For security purposes, you must register online at www.palmbeachbar.org	Materials will now be emailed to all registrants prior to the seminar
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Credit card registration payment not accepted by Fax to comply with PCI regulations.

Name: _____ **Telephone:** _____

Address: _____ **City/Zip** _____

Email Address: _____

___ I will not be able to attend the seminar but would like to order the CD (allow 4 weeks for delivery) (Estate/Probate Seminar 1/26/11) Cost is the same as listed above, **in addition to \$10 for shipping and handling.** PAYMENT BY **CHECK ONLY**, WITH THIS FORM.
Palm Beach County Bar Association, 1601 Belvedere Rd. #302E, West Palm Beach, FL 33406

Young Lawyers Section News



Members of the YLS came out to recognize immediate past YLS president Theo Kypreos. At left, current president Allison Kapner presented him with a gift to thank him for his year of service which included starting a couple of new projects: a fishing tournament and a habitat for humanity project.



Matt Ramenda, Theo Kypreos, Joanne O'Connor and Adams Weaver



Stuart Manoff, Mark Nichols and Evan Frederick



Circuit Judges Don Hafele and David French



YLS Hosts Panthers Game December 15

Please join the Young Lawyers Sections of the Palm Beach and Broward County Bar Associations for a V.I.P. Night with the Florida Panthers **Wednesday, December 15, 2010 at 7:00 p.m.** Come watch the Florida Panthers vs. Carolina Hurricanes at the Bank Atlantic Center. Ticket price is \$50 per ticket and includes:

- seat in Coach's Club Section
- access to Coach's Club Lounge
- free food and drinks (beer, wine, and soda)
- free parking

This event is open to your colleagues, friends, and family! In addition, The Palm Beach County Bar Association YLS will be paying for a charter bus for the first 50 registrants.

To Register:

Send this completed form, along with a check made payable to "Young Lawyers Section" to Julia Wyda at Sasser, Cestero & Sasser, P.A., P.O. Box 2907, West Palm Beach, FL 33402. Registration forms and checks must be received by December 6, 2010. If you have any questions, please e-mail Julia Wyda at jwyda@sasserlaw.com.

Name and phone #:

Address: _____

Number of Tickets _____

@ \$50.00 per ticket = \$ _____

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Fraudulent Misrepresentation

by Ted Babbitt

A recent Supreme Court opinion explains what is and is not required to sustain a cause of action for fraudulent misrepresentation.

Butler v. Yusem had a long history of appellate review ending with the opinion of *Butler v. Yusem*, 35 Fla. L. Weekly S493 (2010). The case resulted in two opinions from the Fourth DCA and two from the Supreme Court.

The case arose from a business partnership gone awry which resulted in a suit by Butler claiming fraudulent and negligent misrepresentation. The trial court denied both claims based on what it called “lack of due diligence” on Butler’s part in failing to follow up on certain contract provisions as well as “ask the right questions” to a bank about his partner’s solvency.

The Fourth DCA concluded that the trial court had misapplied the term “lack of due diligence” for what was really “justifiable reliance” and on the basis of the tipsy coachman doctrine affirmed the trial court’s denial of relief on both fraudulent and negligent misrepresentation.

The tipsy coachman principle permits an appellate court to affirm a trial court’s inappropriate reliance on a judicial theory so long as the record reflects ample evidence to support the finding on an alternate principle under the theory that the right result was reached for the wrong reasons.

A unanimous Supreme Court reversed the Fourth DCA with instructions to review each cause of action separately to determine if justifiable reliance really applied to each count.

The Fourth DCA, upon remand, did not obtain additional briefing and merely entered a revised opinion stating it had indeed applied the tipsy coachman principle to each cause of action and again affirmed the trial court.

Upon review of the Fourth DCA’s second opinion, the Supreme Court reversed, explaining that the Fourth DCA had misconstrued its mandate by not analyzing whether justifiable reliance applied to either fraudulent or negligent misrepresentation.

The Supreme Court held that justifiable reliance is not an element of fraudulent misrepresentation. At S494, the Court concluded:

Justifiable reliance is not a necessary element of fraudulent misrepresentation. As we have stated, there are four elements of fraudulent misrepresentation: “(1) a false statement concerning a material fact; (2) the representor’s knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in *reliance* on the representation.”

Johnson, 480 So. 2d at 627 (emphasis added). This is consistent with our prior opinion in *Besett*, 389 So. 2d at 998, holding that in an action involving fraudulent misrepresentation, the buyers did not need to allege that they had investigated the truth of the misrepresentations because for this claim, “a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him.” As we have explained, “the policy behind our holding in *Besett* is to prohibit one who purposely uses false information

to induce another into a transaction from profiting from such wrongdoing.” *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334, 336–37 (Fla. 1997).

Thus in the case of fraudulent misrepresentation the level of sophistication of the plaintiff is irrelevant as well as any purported negligence in failing to investigate the representations. Unless there exists actual knowledge on the part of the recipient of the lack of truth of the representations, no amount of negligence on the recipient’s part is relevant.

The same is not true with regard to the theory of negligent misrepresentation. At S494, the Court holds:

The same reasoning does not apply, however, when a party transmits false information but is not aware of the falsehood, giving rise to a negligent misrepresentation claim. See *Gilchrist*, 696 So. 2d at 337. As to negligent misrepresentation claims, although justifiable reliance on the misrepresentation is required as an element of the claim, justifiable reliance on a representation is not the same thing as failure to exercise due diligence. One does not necessarily translate into the other. In fact, in *Gilchrist*, the Court held that principles of comparative negligence would apply to negligent misrepresentation claims. *Id.* at 339. The Court recognized that while a recipient of information will not have to investigate every piece of information furnished, he or she is responsible for “investigating information that a reasonable person in the position of the recipient would be expected to investigate.” *Id.* Thus, a recipient of an erroneous representation cannot “hide behind the unintentional negligence of the misrepresenter when the recipient is likewise negligent in failing to discover the error.” *Id.*

This opinion separates the distinction between fraudulent and negligent misrepresentation and establishes that justifiable reliance is not a necessary element of the former but that comparative negligence applies to the latter.

NOTE: BECAUSE A NUMBER OF PEOPLE HAVE REQUESTED COPIES OF PAST ARTICLES, A COMPILATION OF THESE ARTICLES IS NOW AVAILABLE TO MEMBERS OF THE PALM BEACH COUNTY BAR ASSOCIATION, FREE OF CHARGE, BY CALLING (561) 684-2500.

Incapacitated Person

Continued from page 9

for a CME and that initially, any deposition had to be limited to written deposition questions. The court reasoned:

As to the compulsory medical examination (CME) of the grantor-father, the trial judge overlooked the burden placed by Florida Rule of Civil Procedure 1.360 on the proponent of a CME. Under the rule, the party seeking a CME must show that the person to be examined is a party in the litigation who has himself placed his physical condition at issue. The party seeking the CME must establish good cause for such an exam. Here the trial judge should have first required written deposition questions of the grantor-father. Before the trustee could thereafter show good cause for a CME, he would thereupon have to show why the results of the written deposition failed to furnish the relevant information sought from the grantor-father.

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PROVEN COMMITMENT TO BAR SERVICE

- Serves as President-Elect of the North County Section of the Palm Beach County Bar.
- Served six years as an elected member to The Florida Bar Young Lawyers Division Board of Governors.
- Serves as the current Chair of the Palm Beach County Bar Professionalism Committee.
- Co-recipient of the 2007 Legal Aid Society Firm Award.
- Serves as an appointed member of the United States District Court for the Southern District of Florida Ad Hoc Advisory Committee on Rules and Procedures.
- Serves as an appointed member of The Florida Bar's Professional Ethics Committee.
- Emeritus member of the Craig S. Barnard American Inn of Court.

Please Join Us in Supporting Ron!

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2. Past President of The Florida Bar Young Lawyers Division Board of Governors
3. Past President of the North County Section of the Palm Beach County Bar
4. Past President of the South Palm Beach County Bar Association
5. Past President of the F. Malcolm Cunningham, Sr. Bar Association
6. Past President of the Palm Beach County Chapter of the Florida Association for Women Lawyers
7. Past President of the Florida Association for Women Lawyers
8. Past President of the Palm Beach County Bar Association
9. Current/Past Governor to The Florida Bar Young Lawyers Division Board of Governors
10. President - Elect of the Palm Beach County Justice Association
11. Past President of the Palm Beach County Bar Association Young Lawyers Section
12. Past President of the Palm Beach Association of Criminal Defense Lawyers

Endorsement list as of October 22, 2010 to meet publication deadline.



Ron can be reached at: 561-803-3519 or rponzoli@richmangreer.com



The ABA Annual Meeting: San Francisco 2010

by *Donnie Murrell*,
PBCBA's Delegate to the ABA

The Somoans are mad, really mad. They are sick and tired of sharing a seat in the House of Delegates with Guam and other U.S. Pacific territories. They want their own seat in the House. And they damn near got it. During heated, emotional debate the three members of the Somoan Bar Association described how much it meant to them to fly 36,000 miles to attend ABA meetings. They described how emasculated they felt having to share power with the two lawyers from Guam with whom they have nothing in common. They pointed out the ABA commitment to diversity and how not a single meeting of the House of Delegates had convened with a Somoan war chant. After lengthy debate on Monday morning, their bid for a permanent seat fell short by less than fifty votes.

The Somoans are nothing if not resourceful, patient and persistent. By Monday afternoon, the House calendar was nearly complete and the attendance had thinned considerably. In fact, there was some question as to whether a quorum was present. (This reporter remained faithfully in his seat through-out the day and can thus relay this accurate eye-witness account.)

The Somaon counter-attack began at approximately 4:45 p.m. local time, dangerously close to cocktail hour. Even the most attentive members of the House were beginning to doze off in their chairs. A mild-mannered man stepped to the podium and began to cite from Robert's Rules of Order, never a good sign for cocktail hour. Sensing the danger of parliamentary procedure (and delayed cocktails), the members of the House snapped to attention. What was this rabble rouser saying? He had voted in the majority on the Somoa issue and was now calling to have the matter reconsidered? He had determined that he was wrong and wanted to revisit the matter. Those cunning Somoans had clearly waited for their opponents to lose interest and filter out of the House. If they carried Utah, they might pull this off. The Speaker appeared stunned. The House was abuzz, mayhem was in the air.

Somehow, the opponents of Somoa knew their numbers had dwindled to the point they could not win again. You could see panic in their eyes. Spontaneous huddles formed around the room. Suddenly, an anti-Somoan stepped to a mike and moved to postpone the vote to reconsider until the following morning when the House re-convened. That motion carried and the Somoan counter-attack failed. Cocktails were served on time.

Although the Somoans provided the only real drama in San Francisco, Florida provided most of the substance. Steve Zachs of Miami was sworn in as ABA President. Steve joins a long line of ABA presidents from Florida and will make us all proud. The bulk of the actual resolutions passed by the House at this meeting were matters dealing with criminal justice issues. These resolutions were presented and explained very ably by Florida State Wide Prosecutor Bill Shepherd, a member of the House representing the Criminal Law Section. Bill has done a tremendous amount of work with the Criminal Law Section. He did an outstanding job presenting the resolutions to the House of Delegates.

Florida Bar Board of Governors Report

- At its October 1 meeting, The Florida Bar Board of Governors:
- Recommended approval of Rule of Judicial Administration 2.516, dealing with electronic service of case documents. The rule will be filed in the supreme court and there will be a comment period. It will be posted on the website when the petition is filed.
- Discussed ways to continue to promote diversity in the profession beyond the Bar's new program to encourage local bars to pursue diversity. President Mayanne Downs and President-elect Scott Hawkins said they have talked with sections and committees about bringing in younger and diverse lawyers and putting them on leadership tracks.
- Voted to temporarily suspend Standing Board Policy 2.20 on campaigning for president-elect pending later confirmation of qualified candidates and further review of the ground rules for these elections.
- Approved an amendment to Rule 4-3.4, which would allow paying a reasonable fee for someone who is retired for being a witness in a case.
- Heard that the Rules Committee is considering an amendment eliminating Bylaw 2-5.2, which allows any Bar member to propose a resolution to be considered at the General Assembly of the Bar's Annual Convention.
- Heard that in addition to its other efforts, the Program Evaluation Committee is studying what the Bar can do to help members hard hit by the current economic recession.
- Heard that the Disciplinary Procedure Committee, in addition to working on forms and instructions to accurately reflect who in the law firm is responsible for properly maintaining trust account records, is considering computer software to help attorneys comply with the rules regulating trust accounts.
- Received a report on the New Rule 2.420 Seminar. It was the most downloaded/accessed program on LegalSpan in September. It explains the new rule on what information must be redacted in court filings as of October 1, 2010.

Should you have any questions, please contact one of the Circuit's four representatives: Greg Coleman, Michelle Suskauer, Lisa Small or David Prather

Circuit Court Report

CIVIL DIVISIONS • October 2010

DIVISION	JURY TRIALS	NON-JURY TRIALS	MOTIONS	CASES PENDING
AA KELLEY	03-11	03-11	01-11	1743
AB HAFELE	04-11	04-11	01-11	1640
AD FRENCH	03-11	03-11	12-10	1825
AE MCCARTHY	08-11	08-11	11-10	2035
AF MARX	04-11	04-11	01-11	1412
AG CROW	04-11	03-11	01-11	2069
AH FINE	04-11	04-11	11-10	1799
AI SASSER	03-11	03-11	12-10	1068
AJ ROSENBERG	05-11	05-11	01-11	1210
AN COX	04-11	04-11	12-10	1824
AO BARKDULL	03-11	01-11	01-11	1811

The Palm Beach County Bar Association's Alternative Dispute Resolution Committee Presents:

"Maintaining ADR's Relevance in 2011"



Monday, February 14, 2011 8:30a.m. – 5:00p.m.
Bar Association Offices
1601 Belvedere Road, #302E, West Palm Beach, FL



Program Schedule

8:00a.m. – 8:30a.m.	Late Registration/Check In
8:30a.m. – 8:40a.m.	Welcome & Opening Remarks - <i>W. Jay Hunston, Jr., Esq., Certified Circuit Civil and Family Mediator, Board Certified Civil Trial Lawyer Emeritus, Committee Chair</i>
8:40a.m. – 9:30a.m.	MEAC Opinions - Ethical Guidance for the Mediation Process - <i>Dr. Bernard H. Shulman, Esq., Certified Circuit Civil and Family Mediator</i>
9:30a.m. – 10:20a.m.	Arbitrators' Awards - Drafting Reasoned Awards & Dissents - <i>Rosemary Cooney, Esq., Sonneborn Rutter Cooney & Klingensmith P.A.</i>
10:20a.m. – 10:35a.m.	BREAK
10:35a.m. – 11:25a.m.	Practical Tools for Managing Diversity - It's Not Just Race and Religion - Moderator: <i>Robin Carol Shaw, Esq., Of Counsel to Shapiro Blasi Wasserman & Gora, P.A., Certified Circuit Civil, Family and County Mediator</i> Panel: <i>John P. Cohen, Certified County Mediator; Daniel R. Levine, Esq., Certified Circuit Civil Mediator, Board Certified Labor and Employment Attorney, Partner, Shapiro Blasi Wasserman & Gora, P.A.; Amber Elizabeth Borum McMichael, Esq., Certified Circuit Civil and Family Mediator; Elinor Robin, PhD, LMFT, LMHC; Certified Family, County and Dependency Mediator; and Amy S. Wolsky, Esq., Certified Circuit Civil, Family and County Mediator</i>
11:25a.m. – 12:00p.m.	Ethics and Professionalism: A Cut Above the Ordinary - <i>Representative from the Professionalism Committee of the Palm Beach County Bar Association</i>
12:00p.m. – 1:15p.m.	LUNCH - (On Your Own)
1:15p.m. – 2:05p.m.	Residential R/E Foreclosure Mediation in the 15th Circuit - <i>Meredith B. Trim, Esq., Director of Managed Mediation, PBCBA, RMFMP</i>
2:05p.m. – 3:00p.m.	Domestic Violence - Ten Tips and Differing Points of View - Moderator: <i>Robin Carol Shaw, Esq., Of Counsel to Shapiro Blasi Wasserman & Gora, P.A., Certified Circuit Civil, Family and County Mediator</i> Panel: <i>Susan F. Dubow, Certified Circuit Civil and County Mediator; Amy H. Eichman, Esq., Shapiro, Blasi, Wasserman, & Gora, PA; Amber Elizabeth Borum McMichael, Esq., Certified Circuit Civil and Family Mediator and Amy S. Wolsky, Esq., Certified Circuit Civil, Family and County Mediator</i>
3:00p.m. – 3:15p.m.	BREAK
3:15p.m. – 4:05p.m.	Evaluative Mediation Techniques - Pros and Cons - <i>Jeffrey S. Grubman, Esq., Jeffrey S. Grubman, P.A.</i>
4:05p.m. – 5:00p.m.	ADR Ethics: Recent Case Law & MEAC Update - <i>W. Jay Hunston, Jr., Esq., Certified Circuit Civil and Family Mediator, Board Certified Civil Trial Lawyer Emeritus</i>

This course is expected to receive **8.0 CLER hours including 3.0 Ethics credits/ Certification credit, 1.0 Domestic Violence credit and 1.0 Cultural Diversity credits** are pending from The Florida Bar.

The cost of the seminar is **\$225 for PBCBA members/paralegals; \$265 for non-PBCBA members/paralegals** if registered by 2/7/11; add \$25 to registration fee after that date. **All refund requests must be made no later than 48 hours prior to the date of the seminar.**

"This course is eligible for up to 8.0 CME hours including 3.0 Ethics credit; 1.0 Domestic Violence; 1.0 Cultural Diversity credits. Mediators are required to self report those hours applicable to their areas of certification at the time of their renewal. For more info on the CME requirement, visit, www.flcourts.org, select Alternative Dispute Resolution/Mediation."

____ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

HOW TO REGISTER



Materials will now be emailed to all registrants prior to the seminar

Name: _____ Telephone #: _____

Address: _____ Email Address: _____

____ I will not be able to attend the seminar but would like to order the CD (allow 4 weeks for delivery) (2/14/11ADR) Cost is the same as listed above, in addition to \$10 for shipping and handling. **PAYMENT BY CHECK ONLY, WITH THIS FORM. Palm Beach County Bar Association, 1601 Belvedere Road, Suite 302E, West Palm Beach, FL 33406.**

Gary S. Lesser

for

The Florida Bar Board of Governors, 15th Judicial Circuit, Seat 4

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What Supporters are Saying About Gary S. Lesser

Running for The Florida Bar Board of Governors, 15th Judicial Circuit, Seat 4

“When asked if I would support Gary Lesser for Florida Bar Board of Governors I was elated. There are few attorneys as active in their communities while being personally involved in their law firm’s practice of law. Gary’s list of leadership roles speaks to his commitment to our community and his law firm’s success.

I am reminded of the quote, “There’s a difference between interest and commitment. When you’re interested in doing something, you do it only when circumstance permit. When you’re committed to something, you accept no excuses, only results.” That describes Gary Lesser and why I support him absolutely in his quest for a Board of Governor’s seat. Please join me.”

Barry E. Krischer, Palm Beach County State Attorney 1992 - 2008
Member of the Florida Bar since 1973

“I have known Gary Lesser professionally for more than five years. I first met him in his position as Chairman of the Medical-Legal Committee of the Palm Beach County Bar Association.

Mr. Lesser is very well known for attending numerous different charitable events, and he is the organizer and central force in making many events happen. He opens his office to numerous events and makes those events successful and enjoyable. For years, he organized, coordinated and chaired meetings, bringing doctors and lawyers together to organize charitable and community service functions. He successfully worked to bridge many of the differences between the two groups.

Gary is a hard working civic and charitable leader in Palm Beach County and I highly recommend him for The Florida Board of Governors.”

Lawrence Gorfine, M.D.
President, Palm Beach County Medical Association

“I have had the pleasure of knowing Gary since Law School at the University of Miami. He is a caring, intelligent and honest professional and community leader. I highly recommend Gary for the Board of Governors. As with everything he does, I am confident that he will serve with distinction and integrity.”

Scott J. Brook, Esq.
Mayor of Coral Springs



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Can You Post a Deposition to YouTube?

By Christopher Hopkins, Chair, Law Practice Technology Committee

Can you recall a deposition where your “gotcha” question sent an adverse witness into a tailspin or your clever questioning cracked the case? A lot can happen in depositions and portions are showing up on

YouTube. Online mass communication has not only connected us via personal and professional social networking, it also gives lawyers a podium to speak to a broader audience. As with all matters involving the collision of law and technology, the simple proposition of uploading a 5-minute video to YouTube results in ethical questions – but it appears the practice is growing. This article will discuss the simplicity of posting a video deposition and outline some of the potential issues of the “YouTube deposition.”

According to a June 2010 Association of Corporate Counsel article, the practice of uploading deposition videos to YouTube is “widespread” as evidenced by 2,700 hits for the search term, “deposition.” Three months later, that number increased ten percent which suggests that the practice of uploading deposition videos is gaining traction (but may not exactly be “widespread”). Still, there are nearly 3,000 deposition snippets on YouTube. Most of the video depositions available on YouTube fall into the categories of (1) depositions of public or corporate figures, (2) mis-steps and outbursts, and (3) how-to-instruction.

Technology to Upload A Deposition

YouTube only accepts videos which are less than 15-minutes long (unless you are a “director”) so the initial questions are (1) how to convert the deposition from DVD to workable video and (2) how to edit the workable video to the sections (“snippets”) you wish to publish. On the PC, there is a number of video conversion software to rip DVD video into MP4 video format (the video-version of the music MP3 file): CloneDVDMobile, Xilisoft, and Easy DVD Ripper. Windows Movie Maker is a solid editing software tool. For the Mac, iMovie will handle both the DVD-to-MP4 conversion and editing steps. Easier still, you might ask the videographer to provide you with both DVD and MP4 versions as well as cut the excerpts for you. Finally, once the video is on YouTube, you can still make some final edits. See <http://bit.ly/9VEIr6>

Once you have a “bite size” video snippet of your deposition, you need to create an account on YouTube and upload the video. Consider whether you want the account in your name or the firm’s name. Pay attention, however, to the video title and search descriptions to garner maximum attention (e.g., use the word, “deposition”). If you create more than one video, YouTube places them all onto your “channel” where your library will exist. If users like one of your videos, this makes it easier to find your other submissions.

Is a YouTube Deposition an Advertisement?

In February 2010, the Florida Bar Standing Committee on Advertising issued its “Guidelines for Video Sharing Sites” which references YouTube by name but never mentions

uploading depositions. Instead, as the Committee is tasked, the guidelines were directed towards discussing how and whether Rules 4-7.2, 4-7.4, and 4-7.6 apply to video sharing in general. The brief guidelines indicate that videos “used to promote the lawyer or law firm’s practice are subject to the lawyer advertising rules.” Along these lines, “invitations to view or link to the lawyer’s [advertisement] video sent on an unsolicited basis are direct violations...” Again, this appears to relate only to “advertisement” videos with no specific statement that deposition excerpts, or even instruction how-to videos, are advertisements. See <http://bit.ly/cgDtYX> To date, there is no authority holding that a video deposition snippet is an “advertisement” any more than, say, this article.

Issues to Consider Before Uploading Depositions

Is your case still in dispute? In 2008, a Texas lawyer uploaded a deposition to YouTube where a car dealership president was explaining that a specific charge was a “fee” and not a “kickback.” The dealership convinced the court that the deposition snippet should be removed from YouTube since litigation was ongoing and the uploading was harassing, annoying, and embarrassing. Moreover, they argued that the short snippet was misleading since it took a few answers of out context. See <http://bit.ly/dseFmm> The timing of your upload to YouTube and the context given in the video are important considerations.

A deposition is not a public event so a preliminary step, prior to uploading a deposition video to the Internet, would be to file the transcript and video with the clerk as a public record. In pre-YouTube federal court opinions examining whether the public has access to filed records, some courts have used a one-step process (Has-it-been-filed-with-the-court?) whereas other courts have held that the public has a right to inspect filed materials only if the court relied upon them to determine a party’s substantive legal rights. See <http://bit.ly/crgGyH> Regardless, it appears that filing the transcript and video seems like the threshold step before uploading to YouTube.

Finally, there are issues of personal privacy such as alcohol/drug use, mental health, and HIPAA protections as well as business confidentiality such as trade secrets and practices to potentially avoid. Moreover, some court reporters and/or videographers may claim ownership to the transcript and video. See <http://bit.ly/cR0aw5>

Conclusion

Despite the foregoing concerns and pitfalls, there are a number of non-advertising, non-harassing purposes for publishing portions of video depositions. Lawyers who choose to use YouTube, however, need to be aware of the developing nature of the practice guidelines and rules.

Christopher B. Hopkins is a shareholder at Akerman Senterfitt and is the chair of the Law Office Technology Committee. Christopher.Hopkins@akerman.com or via YouTube.com/cbhopkins.

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The law firm of Kelley & Fulton, P.A. is pleased to announce that **Adelina Ruiz Baez**, formerly a Judicial Staff Attorney with the Fifteenth Judicial Circuit, has become associated with the firm. Her practice areas will include bankruptcy and foreclosure for debtors and creditors.

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CALENDAR

December 2010

Wednesday, December 1,
11:45am – 1:00pm
Solo Luncheon “Law Office Technology”
Bar Assn. Office

Wednesday, December 1,
Noon – 1:00pm
Business Law Practice Committee Meeting
Bar Assn. Office Board Room

Wednesday, December 1,
Noon – 1:00pm
NCS Board Meeting

Thursday, December 2, 6:00pm
South Palm Beach County Bar Assn. Holiday Party
Ruth’s Chris in Boca Raton

Friday, December 3,
8:30am – 1:00pm
Leadership Seminar
Bar Assn. Office

Tuesday, December 7,
6:00pm – 8:00pm
Christian Legal Society Women’s Gathering
Panera Bread Café,
Village Blvd., WPB

Wednesday, December 8 – 10
TFB Board of Governors Meeting
Amelia Island

Thursday, December 9,
Noon – 1:00pm
Diversity Committee Meeting
Bar Assn. Office

Thursday, December 9,
5:30pm – 8:00pm
PBCBA Annual Holiday Party
Frenchman’s Reserve

Friday, December 10,
9:30am – 4:45pm
“Practical Aspects of Conducting Family Law Trials” Seminar
Bar Association Office

Monday, December 13,
Noon – 1:00pm
BBC Committee Meeting
Bar Assn. Office

Monday, December 13, 5:00pm
PBCBA Board of Directors Meeting

Tuesday, December 14,
Noon – 1:00pm
YLS Board Meeting
Bar Assn. Office

Wednesday, December 15,
5:30pm
YLS Panthers Game

Thursday, December 16,
8:00am – 2:00pm
“13th Annual Elder Law Update” Seminar
Bar Assn. Office

Thursday, December 16,
6:30pm
Small Claims Clinic
Jupiter Branch Library

Friday, December 17,
8:30am – 9:30am
ADR Committee Meeting
Bar Assn. Office

Friday, December 17,
Noon – 1:00pm
Cunningham Bar Assn. Monthly Meeting
Library @ Main Courthouse,
WPB

Wednesday, December 22,
3:30pm – 4:30pm
Corporate Counsel Committee Meeting
Bar Assn. Office

Please note that the Bar Association will be closed for the holidays December 24-December 31.