



# PALM BEACH COUNTY BAR ASSOCIATION

# BULLETIN

www.palmbeachbar.org

January 2011

The Board of Directors and Bar Staff wish you and your families a Happy New Year!

## U.S. Supreme Court Justice Breyer to Speak February 16



The Palm Beach County Bar Association, along with the Forum Club of the Palm Beaches, is proud to announce that U.S. Supreme Court Justice Stephen Breyer will be the guest speaker at a joint luncheon to be held on February 16. The luncheon will be held at the Palm Beach County Convention Center from 11:15 – 1:00 p.m. Copies of his new book, *Making Our Democracy Work: a Judge's View* will be available for purchase. Associate Justice Breyer was born in San Francisco and received an A.B. from Stanford University, a B.A. from Magdalen College, Oxford, and an LL.B. from Harvard Law School. He served as a law clerk to Justice Arthur

Goldberg of the U.S. Supreme Court during the 1964 Term; as an Assistant Special Prosecutor of the Watergate Special Prosecution Force, 1973; and as Special Counsel of the U.S. Senate Judiciary Committee. He was an Assistant Professor, Professor of Law, and Lecturer at Harvard Law School, 1967–1994 and a Visiting Professor at the College of Law, Sydney, Australia and at the University of Rome. From 1980–1990, he served as a Judge of the United States Court of Appeals for the First Circuit, and as its Chief Judge, 1990–1994. President Clinton nominated him as an Associate Justice of the Supreme Court, and he took his seat August 3, 1994. Registration will be by pre-paid reservations only and can be made at [www.palmbeachbar.org](http://www.palmbeachbar.org).

## Mark your calendar for upcoming Membership Events

**Second Annual Lawyer Variety Show**  
January 22, 2011, 6:30 p.m.  
Eissey Theatre at Palm Beach State College

**Joint Luncheon with Forum Club**  
February 16, 11:30-1:00 p.m.  
Speaker: U.S. Supreme Court Justice Stephen Breyer  
Palm Beach County Convention Center

**Wine Tasting Event**  
February 23, 5:30 p.m.  
The Phillip's Point Club

**Bench Bar Conference**  
March 4, 8:00 – 5:00  
Palm Beach County Convention Center

**Joint Luncheon with South Palm Beach County Bar**  
March 22, 11:45 a.m. – 1:00 p.m.  
Benvenuto's in Boynton Beach  
Speaker: FL Bar President Mayanne Downs

**Texas Hold 'Em Poker Tournament**  
April 7, 5:30 - 8:30  
Palm Beach Kennel Club

**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.

## 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](mailto: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  
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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

**Bench Bar Conference scheduled for March 4 at Convention Center**

This year's Bench Bar Conference has been scheduled for **Friday, March 4** at the Palm Beach County Convention Center. The Bench Bar Conference is an opportunity for attorneys and judges to meet informally in a roundtable atmosphere to discuss issues of concern to both the Bench and Bar. Registration forms are available online. Last year, over 1,000 people attended throughout the day and unfortunately, due to space limitations, many attorneys were turned away. Be sure to register early!

Sponsorship opportunities are still available to assist in the underwriting of this year's conference in the following amounts:

\$575 for law firms of 11 or more attorneys;  
\$375 for law firms with 3-10 attorneys; and  
\$225 for law firms with 1-2 attorneys.

Checks should be made payable to the PBCBA and mailed to: Patience Burns, 1601 Belvedere Road #302E, WPB, FL 33406.

**Last call for tickets to the Variety Show**

This is a reminder that the Variety Show takes place Saturday, January 22 at the Eissey Theatre Campus in Palm Beach Gardens. The evening begins with a cocktail reception at 6:30 pm followed by the performance at 7:30. You'll enjoy great entertainment including two special surprises! Seating is reserved. Tickets are \$35.00 for Orchestra and \$25.00 for Balcony. To purchase your tickets, RSVP online at [www.palmbeachbar.org](http://www.palmbeachbar.org).

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

*Join us for the fun!*



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# President's Message



## The Best is Yet to Come

*By Michael J. Napoleone, President*

Happy 2011! It is hard to believe that the Bar year is already half over. I know this time of year usually starts off with resolutions about the changes we all promise to make. The trouble with resolutions is that after about a month (or less), we've forgotten about them or simply decided that they weren't all that important. This is usually due to the fact that a typical resolution is based on what you think you should be doing, rather than what you really want to do. Our resolutions also tend to be too vague or overly broad, such as "eat better," "exercise more," or "generate more business." The problem with such resolutions lies in the failure to specifically define the ultimate goal, or establish a plan on how to accomplish it. Sometimes, our downfall is simply trying to make too many changes at once. This year, instead of making some arbitrary promises to yourself, strive to make confident, purposeful choices based on what really matters to you, and jump in with both feet. Enlist the support of family and friends; our social networks play a vital role in supporting our efforts to effect positive changes in our lives.

One choice I hope you will make this year is to join a Bar committee - it is never too late to get involved. The Bar is currently recruiting members for its newly formed **Law Related Education Committee**. The purpose of this committee is to promote effective law related education programs for adults and students in Palm Beach County, with an emphasis on respect for the legal system and civics education. The committee will also assist in coordinating the Justice Teaching program started by then Chief Justice Lewis, and will help identify speaking opportunities for Bar members who want to teach civics through The Florida Bar's Benchmarks program. This committee is an exciting opportunity for Bar members to promote legal education in their communities. Please contact me if you are interested in getting involved in this or any of the Bar's other committees.

While you are planning your new year, be sure to keep in mind the great activities the Bar has scheduled. The curtain rises January 22 for the Bar's Second Annual Lawyers Variety Show at the Eissey Campus Theatre. We have some great acts lined up this year and, like last year, there are sure to be some surprises in store. Tap into your inner oenophile on February 3 at the Bar's Wine Tasting at the Phillips Point Club. This event sold out last year and will likely sell out again, so be sure to buy your tickets early. On February 16 the Bar is again privileged to host a joint luncheon with the Forum Club featuring Supreme Court Justice Stephen Breyer. March 4 is the Annual Bench Bar Conference. Based on member feedback, we've added some new breakout sections and modified the format from prior years in ways that we hope

will improve upon an already tremendous event. Law Week officially kicks off on May 2 with a Judicial Reception and is followed by a week of great programs to benefit the community including Dial-A-Lawyer and seminars on small claims court, condo law, foreclosures, and more. Contact our Law Week Committee chairs, Maureen Martinez and Tanique Lee, to learn how you can get involved. Be sure to check the Bar's online calendar for other fantastic events including gatherings and programs of the Young Lawyers and North County Sections as well as the great continuing legal education programs organized by the Bar's thirty-seven hard-working committees.

I look forward to seeing you this year and I hope you make 2011 your best year ever!

**Register for  
Bar Events  
Online at...**



[www.palmbeachbar.org](http://www.palmbeachbar.org)

### Board of Directors Meeting Attendance

	Retreat	Aug	Sept	Oct	Nov
<b>Bowden</b>	x	x	x	x	x
<b>Bresky</b>	x	x	x	x	phone
<b>Coleman</b>					
<b>DiSalvo</b>		x	x		Schwartz
<b>Guari</b>	x	x	x	x	x
<b>Hawkins</b>					
<b>Howe</b>	x	x	x	x	x
<b>Kapner</b>	x	x	x	x	x
<b>Kypreos</b>	x	x	x	x	x
<b>Napoleone</b>	x	x	x	x	x
<b>Prather</b>	x				
<b>Pressly</b>	x	x	x	x	x
<b>Rabin</b>	x	phone	x	x	x
<b>Reagan</b>		x	Ponzoli	x	x
<b>Small</b>					
<b>Suskauer</b>	x	x	phone	x	x
<b>Weiss</b>	x	x	x	x	x
<b>Whittles</b>	x	x	x	x	x





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

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For security purposes, you must register online at [www.palmbeachbar.org](http://www.palmbeachbar.org)



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.



## New Veteran's Court Division

Submitted by Robin I. Bresky

Veteran's Court, a new division of the Fifteenth Judicial Circuit was unveiled when the first session was held at the Gun Club facility, on November 18, 2010 and

presided over by Judge Ted Booras, who himself is a Marine Corps Veteran and began to identify this need over a year ago. Chief Judge Peter Blanc was instrumental in developing this special court session. In Palm Beach, the need for our country's veterans who are charged with a crime to be assessed and provided with appropriate treatment, is now being met. Moreover, neither state nor local funds are being spent for this purpose, all services are being provided by the VA. The veterans are getting help with mental health, substance abuse, and homelessness issues, says Judge Booras.

How do veterans get identified and transferred from the general criminal division to this special session created exclusively for them? Currently, there is a push to identify veterans through educating law enforcement to ask, when making an arrest, if the defendant is a veteran. The Clerk of Court is also working hard to identify the veterans, says Booras. In addition, at the Gun Club facility Judge Krista Marx and Judge Booras both work to identify veterans at first appearance and place them, if appropriate, into this special division. Strategies are in place to have a Public Defender identify veterans that are currently in the system and transfer those cases over from the main courthouse to the veterans division at the Gun Club facility. Defendant veterans who are charged with either a misdemeanor or felony are eligible for the special division, as long as they do not score prison. The score sheet is determined based on previous criminal history. Moreover, defendants that plead not guilty and want to go to trial are not eligible for the special division. Finally, the State Attorney also has to agree to place the defendant into the division.

Often times the victim of the crime is a family member and it is the victim that wants the services for the veteran, says Booras. However, if it is a misdemeanor domestic violence case, there is already a special division in place, and so the veteran would be put into that division instead. A special feature of the veteran division is that services are actually provided to veterans by veterans. A mentoring program currently exists wherein the volunteer veterans go through a training program that will help them assist the defendant veteran work through the process. "Veterans really want to deal with other veterans so having a mentor like this is tremendously helpful to the defendant," says Booras. The Veteran Treatment Court manual states:

"The Veterans Treatment Docket is specifically designated and staffed to supervise felony or misdemeanor combat and non-combat Veteran defendants who have been referred to a comprehensive and judicially monitored program of treatment and rehabilitation services. The Veterans Treatment Docket

represents a very non-traditional approach to criminal offenders who have served both during peace and wartime. Rather than focusing only on the crimes they commit and the punishments they receive, Veterans Treatment Court also attempts to solve some of the participants' underlying health and psychosocial problems."

"One big advantage we have in Palm Beach is the Veterans' Hospital," says Booras, "there exists a Baker Act Facility and beds are therefore available for the veterans if needed. There is a VA coordinator that will be in attendance at every session of Veterans Court in order to help streamline the process."

Several years ago, Broward County had a push to have a Veterans Court, but it is not happening there at this time. In fact, currently there exists only one other special division for veterans in the state, says Booras. In Okaloosa County, located in the north Florida, Judge Patt Maney presides over a special docket for homeless veterans, says Booras. Here in Palm Beach County, Veterans Court will take place twice a month, on the first and third Thursday of the month. Since approximately sixty veterans are being booked into the county jail per month, Booras expects the division to grow rapidly and offer much needed assistance to those who have served our country!



Judge Ted Booras

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## Automatic Bank Account Freezes: Can They Do That?

Submitted by: *Marc P. Barmat*

As many chapter 7 debtors and their attorneys are finding out,

Wells Fargo has a national policy of freezing chapter 7 debtor's bank accounts immediately after the bankruptcy filing. As it turns out, Wells Fargo receives a daily update of all customer bankruptcy filings from the federal court's CM/ECF system. Once Wells Fargo becomes aware that their customer filed a chapter 7 bankruptcy, and the customer has account balances in excess of \$5,000.00, Wells Fargo notifies the debtor and the bankruptcy trustee that the account(s) are in "bankruptcy status." Once a case is in "bankruptcy status," the funds are frozen and then only payable pending direction from the bankruptcy trustee.

If your chapter 7 bankruptcy client's bank account gets frozen, you will surely get an anxious call demanding the release of their desperately needed money. The following questions then arise . . . Did the bank violate the automatic stay? Can I file an emergency motion to compel the release of the funds? Is this a sanctionable offense by the bank? The Bankruptcy Court for the Middle District of Florida recently answered these questions in the case *In re Young*, 2010 WL 3965698 (Bankr. M.D. Fla. 2010). In *In re Young*, Wells Fargo froze three of the debtor's accounts. Although the trustee instructed the bank to remove the freeze on two of the debtor's accounts, the trustee was unable to determine the exempt status of the third account. Accordingly, the third account remained frozen pending the trustee's further instructions. In response to the account freeze, the Debtor filed a motion seeking sanctions against the bank for violation of the automatic stay and requested an order directing the bank to immediately release the account to the debtor. *Id.* at 2.

In the debtor's motion, he argued that the bank's procedure violates the automatic stay set forth in 11 U.S.C. §362(a)(3) by "exercise[ing] control over property of the estate." *Id.* In ruling against the debtor, the Court first determined that pursuant to 11 U.S.C. §541, the accounts were property of the

bankruptcy estate, as the debtor had a legal or equitable interest in the accounts as of the commencement of the case. *Id.* Although the debtor claimed the accounts as exempt in his Schedule C, the mere claim of exemption did not cause it to cease being property of the estate until the exemption was allowed or the deadline to object to the exemption under Bankruptcy Rule 4003 expired. *Id.* at 4.

As a result of the Court's determination that the accounts were property of the bankruptcy estate, the debtor had an obligation to surrender the accounts to the trustee, pursuant to 11 U.S.C. § 521(a)(4) which requires the debtor to surrender all property of the estate to the trustee. *Id.* at 3. The bank, on the other hand, also had an obligation to turn over the accounts to the trustee, pursuant to the turn over provisions of 11 U.S.C. §542. *Id.*

In determining that the bank did not violate the automatic stay, the Court found that the hold was merely the bank's refusal

to perform its promise to pay to the debtor, who had absolutely no authority to direct the disposition of estate property after the case was filed. Thus, the Court ruled, the bank's refusal to turn over the account to the debtor could in no way give rise to a violation of the automatic stay. *Id.* at 4.

Finally, the Court ruled that the debtor did not have standing to seek sanctions for bank's alleged violation of the automatic stay as it was trustee to whom the obligation to turn over such property ran, and it was trustee who had right to use, collect and administer estate property, not the debtor. *Id.* at 5.

Although Wells Fargo appears to be the only bank freezing chapter 7 debtor's bank accounts, other banks may follow suit. Accordingly, it is incumbent upon chapter 7 debtor's attorneys to explain to their clients the potential risks that their accounts may be frozen for a period of time following the filing of their bankruptcy.

*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.*

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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.

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## May An Attorney-In-Fact Withdraw Money From the Principal's Totten Trust Without Express Authority Under The Power Of Attorney?

By David M. Garten, Esq.

In Beane v. SunTrust Banks, Inc., 2010 Fla. App. LEXIS 17153 (Fla. 4th DCA 11/10/10), the decedent, Lillian Wilde,

executed a durable power of attorney naming her niece, Deborah Lorenzo, as her attorney-in-fact. The durable power of attorney authorized the Lorenzo to “demand, sue for, collect, recover and receive all goods, claims, debts, monies, interest and demands whatsoever now due, or that may hereafter be due, or belong to me...”

The next day, Lorenzo, utilizing the power of attorney, transferred \$150,000 from Wilde’s Totten trust account at SunTrust Bank, which named Frances Wallin as the beneficiary, to another account in the name of Orson Lorenzo.

In 2007, the PR of Wilde’s estate filed suit against SunTrust for allowing the transfer of the funds from Wilde’s Totten trust. The trial court and the parties agreed that the dispositive issue was whether Lorenzo had the authority under the power of attorney to withdraw \$150,000. The PR claimed that the executed power of attorney did not expressly authorize the withdrawal of money from the Totten trust and relied on §709.08(7)(b), Fla. Stat. which states in part:

Notwithstanding the provisions of this section, an attorney in fact may not:

\* \* \*

5. Create, amend, modify, or revoke any document or other disposition effective at the principal’s death or transfer assets to an existing trust created by the principal *unless expressly authorized by the power of attorney...* [Emphasis Added]

The PR claimed that a Totten trust is a “disposition effective at the principal’s death.”

The trial court determined that the power of attorney allowed Lorenzo to withdraw the funds and that SunTrust could not be held liable as a matter of law. The appellate court, in affirming Judge Oftedal’s order, reasoned in part as follows:

Since an owner of a Totten trust can withdraw from the account without constraint, the prospective Totten trust beneficiary cannot object to the depositor’s withdrawal from the Totten trust. As this court explained:

Like a depositor’s withdrawal of funds from a Totten trust bank account, a settlor/trustee’s withdrawal of funds from a revocable trust is tantamount to a revocation or termination of the trust with respect to the funds withdrawn. It is in this context that Malasky held that a prospective trust beneficiary has no standing to object to such a disposition of the property; the settlor retained the right to remove the property from the trust for any purpose and for any reason.

Siegel v. Novak, 920 So. 2d 89, 95 (Fla. 4th DCA 2006).

Because the depositor can change the beneficiary without constraint, and the prospective beneficiary has no standing to object to such changes, we therefore find that merely

withdrawing money from the Totten trust does not, as a matter of law, change the “disposition effective at the principal’s death.” The depositor, or in this case the attorney-in-fact, merely changes the amounts within the Totten trust, which is a right retained by the depositor at all times, or by the attorney-in-fact while the durable power of attorney is in force.

**PRACTICE TIP:** You should consider adding language to your Durable Power of Attorney restricting the Attorney-In-Fact’s authority to revoke (i.e., withdraw assets from) all revocable trusts or Totten trusts created by the principal during the principal’s lifetime. Additionally, you should consider adding language to your client’s revocable Trust expressly reserving the right to withdraw assets from the Trust to the grantor and prohibiting any other person (including any Attorney-In-Fact) from exercising that right during the grantor’s lifetime. See Gurfinkel v. Marmor, 972 So. 2d 927 (Fla. 3rd DCA 2007) where the Trust expressly reserves the right to amend or withdraw assets from the Trust to the grantor and prohibits any “conservator,” “guardian,” or “any other person” from exercising these rights during the lifetime of the grantor.

**QUERY:** Could the PR have successfully argued that the Attorney-In-Fact was making a gift of the principal’s property without express authority under the power of attorney? See James v. James, 843 So. 2d 304 (Fla. 5th DCA 2003) (“In general, an agent cannot make gifts of his principal’s property to himself or others unless it is expressly authorized in the power.”).

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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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## Offer of Judgment Requirement for Particularity

by Ted Babbitt

RCP 1.442 has probably generated more appellate opinions than any other rule. A recent Second District opinion which highlights a prior Supreme Court opinion concerning the particularity necessary with respect to the kind of release that must be signed if a proposal for settlement is accepted is a case in point. Darrow v. Gilmer McCrary Heitman, 35 Fla. L. Weekly D2417 (Fla. 2nd DCA, Oct. 29, 2010) was a suit over real property. Proposals for settlement were made by the defendant to each of the plaintiffs offering a nominal sum and conditioning the acceptance upon plaintiffs' signing of "a release" and dismissal of the action. Defendants won and sought attorney's fees under RCP 1.442 and the appellate court refused to award those fees on the grounds that the proposal for settlement did not meet the requirements of RCP 1.442 with respect to particularity because the defendant failed to indicate whether each plaintiff was to sign a general or specific release and did not summarize the language to be used in the release. The Second District relied upon State Farm Mutual Ins. Co. v. Nichols, 932 So. 2d 1067, 1078 (Fla. 2006).

Nichols was a suit over PIP benefits won by the insurer. The proposal for settlement was for a nominal amount which included a requirement that the plaintiffs "execute a general release in the favor of State Farm which will be expressly limited to all claims, causes of action, etc., that have accrued through the date of Nichols acceptance of this proposal."

In addition to the PIP claim that was the subject of the litigation, plaintiffs also had an uninsured motorist claim pending. After losing the PIP suit plaintiffs argued that the terms of the proposal for settlement conceivably included a release of the UM claim as well as the PIP claim and, therefore, failed to meet the particularity requirements of RCP 1.442.

That rule requires that all proposals for settlement "state with particularity any relevant conditions" and "state with particularity all non-momentary terms." (Fla. R. Civ. P. 1.442(c)(2)(C)-(D)).

The Supreme Court agreed with the District Court that the language used by State Farm in its proposal for settlement failed to meet the requirements of Fla. R. Civ. P. 1.442. At 1078-79, the Court held:

We think it clear that when an offeror insists that an offeree sign a general release, the release becomes a stipulation or prerequisite of the contract. Even if the release does not constitute the essence of the settlement proposal-and thus a condition under subdivision (c)(2)(C) of the rule-at the very least it qualifies as a nonmonetary term under subdivision (c)(2)(D).

Next we consider what degree of particularity the rule requires. Some courts have demanded "that an offeror state *all the terms* of... any 'general release' or, instead, attach a copy of the actual documents themselves to the offer." Swarsel, 882 So. 2d at 453 (emphasis added). In this case, however, the Fifth District interpreted the rule as giving offerors the

option of including "either the proposed language of the release or a summary of the substance of the release." Nichols, 851 So. 2d at 746; see also Palm Beach Polo, 904 So. 2d at 653 (following Nichols); Boyd, 890 at 1242 (requiring only a summary 'sufficient to apprise [the offeree] of its terms').

We agree that a summary of the proposed release can be sufficient to satisfy rule 1.442, as long as it eliminates any reasonable ambiguity about its scope. As the Second District recently explained:

The rule intends for a proposal for judgment to be as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions. Furthermore, if accepted, the proposal should be capable of execution without the need for judicial interpretation. Proposals for settlement are intended to end judicial labor, not create more.

It is important to understand that the basis for the Supreme Court's conclusion cited above was the existence of the uninsured motorist claim along with the PIP claim. By siding with those District Courts who have held that only a summary of the release is necessary, the Supreme Court opened the door to an argument as to whether the summary adequately addresses all concerns possible relative to the preciseness of the language necessary under the rule. The Supreme Court explains at 1079

At the time of the offer, Nichols not only had a pending PIP claim against State Farm, but also a UM claim arising from the same accident and of greater value. Although that claim was not technically "*in ... the above-styled case,*" it could have been viewed as a claim "*arising out of... the above-styled case,*" because it arose from the same set of facts. State Farm's use of the broad phrase "all claims, causes of action, etc." exacerbated this ambiguity.

Each case must be looked at on its particular facts. It is easy to understand why the Supreme Court held as it did in State Farm v. Nichols. A proposal for settlement conditioned upon a release which might wipe out not only the pending PIP claim but additionally an uninsured motorist claim clearly does not satisfy the requirements of the rule. The decision in Darrow v. Gilmer is less clear. There the Second District based its denial of attorney's fees on the theory that a general release in a case involving alleged defects to property and misrepresentation of the condition of the property theoretically might waive the married plaintiffs' claim of joint ownership. That, in the writer's opinion, is a bit of a stretch.

The safest course is not to rely upon a summary of the release and to merely attach the proposed release to a proposal of settlement. That may or may not have cured the problem either in the State Farm case or Darrow. The problem is that in an actual settlement scenario, the parties negotiate the language of the release and any concerns on the part of the releasor are handled at that time. When a proposal or offer for settlement is made, no such negotiations occur. Nevertheless, these cases raise an issue that every attorney making a proposal under RCP 1.442 must consider.

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.





The Palm Beach County Bar Association's PI Wrongful Death CLE Committee Presents:

**“Back to the Basics: The Nuts of Bolts of Litigating Auto Negligence & Premises Liability Cases”**

Friday, February 11, 2011 - 8:30 a.m. – 1:45 p.m.  
Bar Association Office, 1601 Belvedere Road, Suite 302E, WPB, FL  
**This Program is open to all Attorneys and Paralegals, Plaintiff and Defense**

**Program Schedule**

- 8:30 a.m. - 8:50 a.m. **Late Registration/Check In**
- 8:50 a.m. - 9:00 a.m. **Welcome & Opening Remarks** - *Sia Baker-Barnes, Esq., Searcy Denney Scarola Barnhart & Shipley, P.A., Committee Chair*
- 9:00 a.m. - 9:30 a.m. **Presuit Preparation -**  
*Plaintiff: Lake H. Lytal, III, Esq., Board Certified Civil Trial Attorney, Lytal & Reiter, and Steve Sanchez, Paralegal, Lytal & Reiter*
- 9:30 a.m. - 10:00 a.m. **Filing and Responding Suit -**  
*Plaintiff: Salesia V. Smith-Gordon, Esq., Salesia Smith-Gordon, P.A.*  
*Defendant: Stephanie H. Luongo, Esq., Powers McNalis Torres & Teebagy*
- 10:00 a.m. - 10:30 a.m. **Discovery -**  
*Plaintiff: Gary S. Lesser, Esq., Lesser, Lesser, Landy & Smith, PLLC*  
*Defendant: Benjamin L. Bedard, Esq., Roberts, Reynolds, Bedard & Tuzzio P.A.*
- 10:30 a.m. - 10:45 a.m. **BREAK**
- 10:45 a.m. - 11:15 a.m. **“Ethics and Professionalism: A cut above the Ordinary”** - *Representative from the Professionalism Committee of the Palm Beach County Bar Association*
- 11:15 a.m. - 11:45 a.m. **Mediation** - *Speaker TBA*
- 11:45 a.m. - 12:15 p.m. **Bad Faith/Common Pitfalls in General Negligence Cases -**  
*Plaintiff: Todd S. Stewart, Esq., Board Certified Civil Trial Attorney, The Law Offices of Todd S. Stewart, P.A.*  
*Defendant: TBA*
- 12:15 p.m. - 1:15 p.m. **LUNCH**
- 1:15 p.m. - 1:45 p.m. **Trying Your Case -**  
*Plaintiff: Darryl L. Lewis, Esq., Searcy Denney Scarola Barnhart & Shipley, P.A.*  
*Defendant: TBA*



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

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**BRIAN R. DETTMAN** – Florida; Stetson Law, 2010; Office of State Attorney, West Palm Beach

**DOLORES FRANCIS** – Harvard Law School, 2005; 15th Judicial Circuit Court, West Palm Beach

**JAMES GAVIGAN, JR.** – Florida; University of Florida, 2010; Associate in Jones Foster Johnston & Stubbs, P.A., West Palm Beach

**HERMINE KHACHATRYAN** – Armenia; St. Thomas University School of Law, 2010; Sole Practitioner, Lake Worth

**ASHLEY MALNOVE** – Delray Beach

**LINDSEY R. MARCUS** – Florida; University of Florida, 2010; Assistant State Attorney, West Palm Beach

**JACOB RESNICK** – Tulane University, 2010; Boca Raton

**DENA THOMPSON** – Florida; California Western School of Law, 2010; Associate in Jacknin & Jagolinzer, West Palm Beach

**MATTHEW J. WILDNER** – Florida; Stetson, 2010; State Attorney's Office, West Palm Beach



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## BBQ & Casino Night Set for February 17

Join the North County Section for its annual BBQ & Casino Party on Thursday, February 17 from 5:30 pm to 8:00 pm at the Bonnette Hunt Club in Palm Beach Gardens.

Try your luck at blackjack, roulette, and craps while enjoying live music, a BBQ dinner and cocktails. Everyone is eligible for prizes whether you play or not.

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*From Page 4*

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2. Brooks Ricca
3. Judge John Hoy
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The Business Law Practice Committee of the  
Palm Beach County Bar Association  
presents:

*“Funding a New Business Venture”*

**Friday, February 25, 2011 - 11:30am - 2:00p.m.**  
**Bar Association Office, 1601 Belvedere Rd., Ste. 302E, West Palm Beach**

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



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**Program Schedule**

- 11:30am - 11:55am **Buffet Lunch / Check In / Late Registration**
- 11:55am - 12:05pm **Welcome - Opening Remarks** - *James P. Curry, Esq., Curry, PL*
- 12:05pm - 12:35pm **SBA Loan Programs** - *Vincent LoPresti, Area Manager United States Small Business Administration*
- 12:35pm - 12:50pm **Angel Investment Forum of Florida**- *Mark Flomenhoft, Founder, Angel Investment Forum of Florida*
- 12:50pm - 1:20pm **Funding a New Business Venture - From a Legal Perspective** - *Speaker TBA*
- 1:20pm - 1:50pm **“Ethics and Professionalism: A Cut above the Ordinary”**- *Representative from the Professionalism Committee of the Palm Beach County Bar Association*
- 1:50pm - 2:00pm **Question and Answer/Closing Remarks/Conclusion/Adjournment**

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**Palm Beach County Bar Association, 1601 Belvedere Road, Suite 302E, West Palm Beach, FL 33406. Telephone: (561) 687-2800**

# Gary S. Lesser for

## The Florida Bar Board of Governors

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◆ Past President Palm Beach County Bar Association  
▲ Past President Florida Justice Association (FJA)  
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□ Past President Florida Association for Women Lawyers  
■ Past President, FAWL, Palm Beach County Chapter

# What Supporters are Saying About Gary S. Lesser

## Running for The Florida Bar Board of Governors

### Leadership Roles

- **The Florida Bar** - Advertising Committee (Chair for 2010-2011 and Vice Chair for 2009-2010); Professional Ethics Committee (Chair for 2003-2004 and Vice Chair for 2001-2003); Professionalism Committee
- **Palm Beach County Bar Association** - Chair of the Medical Legal Committee, Four time Chair of the Professionalism Committee and Member of the Judicial Relations Committee
- **The Florida Bar Foundation** - Former Board Member, 2005-2008
- **Florida Justice Association** - Eagle Member and Member of the Continuing Legal Education Committee
- **Boca Raton Chamber of Commerce** - Trustee Member, 2008 - present
- **Jewish Federation of Palm Beach County** - Current Executive Board Member and Chair of Campaign Outreach; Former Chair of the Attorneys Division & Former Chair of the Business and Professional Division
- **Arthur I. Meyer Jewish Academy** - Fundraising Vice President and Former Legal Vice President
- **American Cancer Society** - Board Member, North County Unit
- **Daily Bread Food Bank** - Former Board Member



### Endorsements

“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**

“Gary Lesser and I met through our daughters being on the same gymnastics team. I also got to know Gary through his involvement with the community. Gary is a dedicated family man and a pillar of our community. Gary is a man of his word and puts his words into action. The Bar is very fortunate to have a man of Gary’s caliber to run for it’s Board of Governors, and I am glad to be supporting him.”

**David Levy, Mayor of Palm Beach Gardens**

*“This is our Florida Bar, and I will work hard for the integrity of our profession. Please contact me any time, as I want to make sure our voices are heard concerning the issues that affect the practice of law.”*



## The Legal Aid Society Honors Volunteer Attorneys

On November 16 the Legal Aid Society of Palm Beach County, Inc. honored its Pro Bono Project's Volunteer In-take Attorneys at a luncheon held at Bellagio in City Place. Those honored included retired or government attorneys who devote over ten (10) hours each month screening and interviewing clients for legal assistance through Legal Aid's Pro Bono Project. Honored at the luncheon were Richard Abedon, Georgina Jimenez-Orosa, Richard Kleid, and Lawrence Moncrief, unable to attend were Barry Weiss and Michael Stern. The volunteers honored have been involved in this important program for over nine years. They provide services to disadvantaged individuals in our community facing bankruptcy, consumer fraud, landlord-tenant, mortgage foreclosure, social security child custody and support issues.



Pictured Are: (L-R) Robert Bertisch, Richard Kleid, Georgina Jimenez-Orosa, Lawrence Moncrief and Richard Abedon

## Make a Difference at the State Attorney's Office

The State Attorney's Office of Palm Beach County is looking for retired attorneys who want to make a difference in the community. If you can volunteer for at least 1 day per week for a 4-hour shift, we can put you to work in our downtown West Palm Beach office. We need retired attorneys who can work in our appeals division handling research and writing. Our other divisions need assistance summarizing cases and making phone calls to victims and witnesses. Attorneys do not need to have practiced criminal law. Knowledge of Westlaw is helpful.

The State Attorney's Office is located at 401 North Dixie Highway, West Palm Beach, FL 33401, near the main courthouse. Volunteers park in the jury parking garage on Banyan Boulevard and parking for volunteers is free. For more information, please contact Sarah Alsofrom 561-355-7249 or [salsofrom@sa15.state.fl.us](mailto:salsofrom@sa15.state.fl.us)



### Have you recently moved?

Be sure to send your updated address, phone and email info to [sspence@palmbeachbar.org](mailto:sspence@palmbeachbar.org)

## Young Lawyers Section News

### November Happy Hour



Judge Jeffrey Colbath and YLS President Allison Kapner



Evan Frederick, John Howe and Mark Nichols



Heath Randolph, Michael Reitzell and Dan Britto



Alison Pawlosky, Brett Barner and Dolores Francis



The Palm Beach County Bar Association's  
Law Practice Technology Committee Presents:

***Dueling Smartphones:  
Best Legal Apps for iPhone, Android, and Blackberry***

**Friday, March 11, 2011 - 11:30a.m. – 2:10p.m.**

**Bar Association Offices 1601 Belvedere Road, #302E, WPB, FL**

**SPONSORED BY: Akerman Senterfitt  
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Mark S. Dobin, P.A.**



**Program Schedule**

- 11:30 a.m. - 12:00 p.m. **Late Registration / Check In / Lunch**
- 12:00 p.m. - 12:10 p.m. **Welcome & Opening Remarks** - *Christopher B. Hopkins, Esq.,  
Committee Chair, Akerman Senterfitt*
- 12:10 p.m. - 2:10 p.m. **Panel Discussion / Presentation: best law, business, travel, and  
productivity Apps for three Smartphone platforms** - *Marc S. Dobin, Esq.,  
Marc S. Dobin, P.A.; Christopher B. Hopkins, Esq., Akerman Senterfitt; and  
Joel B. Rothman, Esq., Board Certified Intellectual Property Law Attorney,  
Arnstein & Lehr LLP*

This course is expected to receive **2.5 CLER from The Florida Bar.**

The cost of the seminar is **\$45 (includes lunch)** for PBCBA members/paralegals;  
**\$85** for non-PBCBA members/paralegals if registered by **3/4/11**; add \$10 to registration fee after that date.

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.

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**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.

Name: \_\_\_\_\_ Telephone #: \_\_\_\_\_

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**Palm Beach County Bar Association, 1601 Belvedere Road, Suite 302E, West Palm Beach, FL 33406. Telephone: (561) 687-2800**



## Professionalism Council Letter

*Editor's Note: Per Administrative Order 2.105-9/10 In re: Fifteenth Circuit Professionalism Council, an attorney can be referred to the Council if their conduct is in a manner inconsistent with the PBCBA's Standards of Professional Courtesy or The Florida Bar's Ideals and Goals of Professionalism. Following the action of the Council, a letter is to be printed in the Bulletin redacting the name of the attorney. What follows is a recent letter from the Professionalism Council to an attorney referred to the Council.*

**Re: Professionalism Council**

Dear \_\_\_\_\_,

As you are aware from my prior letters to you, I am the Chair of the Palm Beach County Bar Professionalism Committee. I am writing to you on behalf of the Professionalism Council that met on November 4, 2010.

Much to the disappointment of the Professionalism Council, you chose not to attend the November 4 meeting of the Council. As you are aware, the purpose for the meeting was to discuss a Judge's Order that compelled your appearance before the Council to address matters which included a finding that intentional, false and misleading representations were made to the Court in a foreclosure action prosecuted by your Firm. Every opportunity was extended to you to participate in the Council, including the opportunity to appear at the Council by phone.

Your election not to attend did not preclude the Council from meeting and evaluating the matters raised in the Judge's Order. The purpose of this letter is to summarize the Council's discussions. Consistent with Administrative Order No. 2.105-9/10, a copy of this letter with your name redacted will be published in the Palm Beach County Bar Bulletin.

In summary, the Court's Order found that the Plaintiff financial institution, your client, approved a short sale on the

subject property. The result of the short sale was a release and discharge of the property from the mortgage, and a release of the Defendants from liability under the note. The Plaintiff financial institution's release of mortgage was recorded in the public records. Despite being contacted by Defendants' counsel regarding completion of the short sale, your Firm continued to prosecute the previously filed Motion for Summary Judgment. Sometime thereafter, your Firm presented the Court with an ex parte "Final Judgment of Foreclosure" that was entered by the Court. Shortly after entry of the Final Judgment, your Firm was contacted by defense counsel who reiterated that the property was sold, with a request that the foreclosure action be dismissed. At the time of this communication, defense counsel was unaware of the entry of the Final Judgment. In total disregard of all pleadings and communications with defense counsel, your Firm continued to pursue the foreclosure by allowing the Clerk of Court to set a judicial sale for the property. Your Firm's actions forced defense counsel to file a Motion to Vacate Final Judgment and for Cancellation of Foreclosure Sale. Thereafter, your Firm again presented an ex parte order "Granting Motion to Dismiss" which was found by the Court to misrepresent the facts as set forth in the pleadings. The Judge reprimanded you in the Order and ordered you to appear before the Professionalism Council.

The Council reviewed the Palm Beach County Bar Association Standards of Professional Courtesy ("Standards") and The Florida Bar's Ideals and Goal of Professionalism ("Ideals") when discussing the Judge's Order. The Council concluded that you and your Firm violated numerous professionalism standards and goals. First, your failure to timely notify the Court of the resolution of the foreclosure proceeding by way of the short sale violated section I(4) of Standards and section 6.8 of the Ideals, both of which require counsel to promptly notify the Court of any resolution between parties that renders a

*Continued on page 20*

## Gordon & Doner Announces Addition Of Veterans' Benefits Division



Mr. Josh Stone will lead the new Veterans' Benefits Division. Mr. Stone is an Accredited Non-Attorney Claims Representative/Agent for benefits within the Department of Veterans Administration.

During his time in the U.S. Navy, Mr. Stone was deployed overseas on multiple occasions with the U.S. Marine Corps as a Combat Medic. He is also a current member of the National Organization of Veterans' Advocates (NOVA).

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***Florida Association for Women Lawyers Palm Beach County Chapter***

**ANNUAL JUDICIAL RECEPTION**

***Norton Museum of Art***

***Wednesday, February 2nd, 2011 5:30 – 7:30 pm***

***\$55 FAWL members, \$65 non-members; Judiciary & Judicial Assistants Complimentary***

***Thank you to our sponsors to date:***

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***Please send payment to FAWL PO Box 3102, WPB FL 33402***

***If you are interested in sponsoring this event please e-mail [pbcfawl@att.net](mailto:pbcfawl@att.net)***

# Ron Ponzoli

Candidate for The Florida Bar  
Board of Governors Seat Four

*"I will be an influential voice in  
The Florida Bar, representing  
you with innovative ideas and  
strong leadership."*



## PROVEN LEADERSHIP AND COMMITMENT TO BAR SERVICE

- Serves as President-Elect of the North County Section of the Palm Beach County Bar Association
- 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 Association Professionalism Committee
- Co-recipient of the 2007 Legal Aid Society Firm Award
- Served 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

## Notable Endorsements:

### Past Florida Bar Presidents:

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John G. White, III (2008)  
Francisco R. Angones (2007)  
Alan B. Bookman (2005)  
Kelly Overstreet Johnson (2004)  
Miles A. McGrane, III (2003)  
Herman J. Russomanno (2000)  
Gerald F. Richman (1984)

Mayor Lois J. Frankel

Sidney A. Stubbs Jr. (Past member of The Florida Bar Board of Governors and Past President of The Palm Beach County Bar Association)

## Mission for the Board of Governors:

1. Increase diversity in Bar leadership by assisting minority Bar associations develop systems for elevating association members to leadership positions in the State and local Bars
2. Improve professionalism throughout The Florida Bar by working closely with local professionalism committees to continue to expand these committees' effectiveness
3. Work with government attorney offices and associations to advance the interests of government attorneys in The Florida Bar
4. Continue to address the impact of new technology on the practice of law

To support Ron and learn more about his campaign  
and endorsements visit

[www.supportponzoli.com](http://www.supportponzoli.com)

Ron can be reached at: 561-803-3519 or [rponzoli@richmangreer.com](mailto:rponzoli@richmangreer.com)



## Is Your Financial Advisor a Fiduciary or an Order Taker?

by *Ryon McCabe and Adam Rabin*

As a general rule, financial advisors fall into two categories: (1) brokers, who are registered under the Securities Act of 1934, and (2) investment advisors, who are registered under the Investment Advisors Act of 1940 (“IAA”). Investment advisors are subject to higher standards of regulation and licensing than brokers, and accordingly, investment advisors owe higher duties of care to their clients.

Brokers must pass the Series 7 exam, while investment advisors must pass the more extensive Series 65 exam. Likewise, while brokers are subject to the Financial Industry Regulatory Authority (FINRA) “suitability” rule, investment advisors are subject to that rule and a full fiduciary standard of care.

In general, the IAA defines an “Investment Advisor” as any person who is compensated for advising others as to the value of securities or to investing in, purchase or sell securities. The IAA carves out an exemption for “brokers.”

The IAA’s exemption for brokers is based on the notion that brokers perform a lower level of service for clients and are compensated differently. A “broker” does little more than bring a buyer and seller together for a given transaction and is compensated by receiving a commission on the transaction. Any investment advice is incidental to the transaction.

### The Transition from Commissions to Fee-Based Accounts

By 2005, the securities industry had changed vastly since the adoption of the IAA. Large brokerage firms had blurred the lines between brokers and investment advisors by actively marketing their employees to the public as “advisors.” At many firms, brokers had begun to carry the title “Financial Advisor.”

Most importantly, by 2005, brokerage firms had begun offering fee-based accounts (which proved more profitable than commission-based accounts). This negated the original premise behind the broker exemption. Brokers were no longer receiving compensation for transactions; they were receiving compensation for giving financial advice. Yet, they were not subject to the heightened fiduciary standards of the IAA.

This prompted protest from consumer advocate groups and the Financial Planning Association, comprised of Investment Advisers and Financial Planners. The financial planners pointed out that large brokerage firms were trying to “have their cake and eat it too” by marketing themselves to the public as advisors, but not holding themselves to fiduciary standards. They argued this created an uneven playing field for financial planners trying to compete against the large brokerage firms.

### The SEC’s Rule Extending the IAA’s Broker Exemption to Fee-Based Accounts is Stricken

In response, the SEC moved quickly to defend the large brokerage firms. In 2005, the SEC enacted a rule colloquially called the “Merrill Lynch Rule.” This Rule, found at 17 C.F.R. §275.202 (a)(11-1), extended the IAA’s broker exemption further than Congress had written. It provided that a broker who received special compensation through a fee-based account would not be deemed an Investment Advisor under certain circumstances. The effect of the Merrill Lynch Rule was to ensure that large brokerage firms could offer fee-based accounts without being subject to the IAA’s fiduciary standard of care.

Consumer advocate groups and the Financial Planning Association expressed outrage over the new rule and promptly challenged it in court. In 2007, the United States Court of Appeals for the District of Columbia struck down the Rule, finding that the SEC had exceeded its rule making power in enacting it. See *Financial Planning Ass’n v. S.E.C.*, 482 F.3d 481 (D.C. Cir. 2007). The Court held that the SEC could not make a

special exemption from the IAA for brokerage firms and their fee-based accounts.

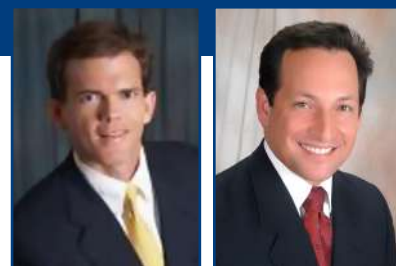
### Fee-Based Advisors Are Fiduciaries

As a result of this decision, brokerage firms cannot credibly claim their fee-based financial advisors are mere “order takers.” Instead, these financial advisors owe their clients a heightened standard of care of a fiduciary nature under the IAA. These fiduciary duties include the following:

- To render advice and to act solely in the best interests of the client at all times.
- To refrain from self-dealing and to provide full disclosure of all material facts affecting the client’s accounts.
- To comply in full with the suitability rule, borrowed from broker-dealer standard.
- To analyze the client’s investment objectives and risk tolerance and to devise an appropriate investment plan for the client.
- To provide ongoing advise and monitoring of the client’s investment plan.

These duties are the beginning, not the end, of a financial advisor’s duties as a fiduciary.

*Ryon McCabe and Adam Rabin are partners at McCabe Rabin, P.A. in West Palm Beach. They concentrate their practices in representing investors against Wall Street firms and handling business litigation cases.*



## Professionalism Council Letter

*Continued from page 17*

scheduled Court appearance unnecessary. Additionally, the submission of ex parte orders to the Court violated your duty of candor to the tribunal and opposing counsel and your duty of adherence to a fundamental sense of honor, integrity and fair play which are recognized in section IV of the Standards and sections 2 and 3 of the Ideals. Specifically, the Council believes submitting the ex parte orders to the Court violated the Standards and Ideals by misstating, misrepresenting and distorting facts to the Court, by failing to notify opposing counsel of your communications with the Court, and by failing to provide opposing counsel a copy of the proposed orders prior to your submission of the orders to the Court. The Council further believes that each of the actions set forth in the Judge’s Order violated the goal set forth in section 4 of the Ideals that “A lawyer should always conduct himself or herself to assure the just, speedy, and inexpensive determination of every action and resolution of every controversy.”

In conclusion, the Professionalism Council is deeply concerned by the actions outlined in the Judge’s Order. Attorneys have a continuing duty to be professional and courteous, which includes an unwavering obligation of candor to the Court and to opposing counsel. Had you appeared before the Council, we could have discussed with you how these issues arose and possibly helped you avoid these types of actions in the future. The Council can only hope that you and your Firm will never act in this fashion again.

Very truly yours,  
/S/ Ronald P. Ponzoli, Jr., CHAIR  
PBCBA PROFESSIONALISM COMMITTEE



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[www.palmbeachbar.org/online/courses.php](http://www.palmbeachbar.org/online/courses.php)



The North County Section recently hosted a joint happy hour with members of FAWL at the new Cabo Flats in Palm Beach Gardens.



Tanya Sachs Copple and Allison Lane



Gary Lesser and Ryon Copple



Michelle Suskauer, Rosemarie Guerini, Marina Petillo and Jill Weiss

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

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- \* Muvico Theater - \$7.50 each (\$10.00 at box office)
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**GREGORY TENDRICH, Esq.:** FINRA Arbitrator, Certified County Court Mediator & Former Series 7 licensed VP & Asst. General Counsel to Wachovia Securities and other local NYSE/FINRA brokerage firms, is accepting referrals and is available to co-counsel, provide trial/arbitration consultation or assistance in stock loss and investment related disputes, including prudent-investor, suitability, churning and misrepresentation claims in addition to SEC, FINRA, NYSE and other regulatory enforcement matters. Please call (561) 417-8777 or visit [www.yourstocklawyer.com](http://www.yourstocklawyer.com).

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Greenberg Traurig attorney **Mark F. Bideau** has been inducted as a Fellow of the American College of Trial Lawyers, one of the premier legal associations in America.



Sachs Sax Caplan has added Associate, **John C. Hornack** in the firm's Boca Raton office. Mr. Hornack practices in the areas of community association, foreclosure and labor & employment law.



**Phillippe Jeck**, Managing Partner of Jeck, Harris, Raynor & Jones, was honored to receive the 2010 "Champion of Children" award at the Kravis Center.

This award is in recognition of his passion and leadership in promoting and supporting the importance of early childhood education.

Best Lawyers has named **Jane Kreuzler-Walsh** as the "West Palm Beach Best Lawyers Appellate Lawyer of the Year" for 2011.

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# CALENDAR

## January 2011

Thursday, January 6,  
 11:45am – 1:00pm  
**Judicial Relations  
 Committee Meeting**  
 Judicial Conference Room

Tuesday, January 11, Noon – 1pm  
**Professionalism Sub-  
 Committee Meeting**  
 Bar Association Office Board Room

Tuesday, January 11, Noon – 1pm  
**YLS Board Meeting**  
 Bar Association Office

Wednesday, January 12,  
 Noon – 1pm  
**Membership  
 Committee Meeting**  
 Bar Association Office

Wednesday, January 12,  
 Noon – 1:00pm  
**NCS Board Meeting**

Thursday, January 13,  
 11:45am – 1:00pm  
**FAWL Membership Luncheon**  
 For more info, contact  
 pbcfawl@att.net

Thursday, January 13,  
 5:30pm – 7:00pm  
**YLS Happy Hour**  
 SKY 309, Downtown West Palm  
 Beach

Friday, January 14,  
 8:30am – 9:30am  
**ADR Committee Meeting**  
 Bar Association Office

Friday, January 14,  
 Noon – 1:00pm  
**Law Week Meeting**  
 Bar Association Office

Saturday, January 15,  
 7:00pm – 8:00pm  
**Legal Aid Gift Gathering**

Monday, January 17  
**Court Holiday –  
 Martin Luther King Day**  
 Bar Office Closed

Monday, January 17,  
 4:00pm – 5:00pm  
**Estate and Probate CLE  
 Committee Meeting**  
 Offices of Jones Foster & Stubbs

Wednesday, January 19,  
 11:30am – 1:00pm  
**Solo Luncheon**  
 Bar Association Office

Wednesday, January 19,  
 5:00pm – 6:00pm  
**PBCBA Board of Directors  
 Meeting**  
 Bar Association Office

Thursday, January 20 – 23  
**YLD Affiliate  
 Outreach Conference**  
 Disney's Boardwalk Inn,  
 Orlando

Friday, January 21,  
 Noon – 1:00pm  
**Cunningham Bar Association  
 Monthly Meeting**  
 Library @ Main Courthouse, WPB

Saturday, January 22, 6:30pm  
**Second Annual Lawyer  
 Variety Show**  
 Eissey Theatre,  
 Palm Beach Gardens

Monday, January 24,  
 Noon – 1:00pm  
**BBC Committee Meeting**  
 Bar Association Office

Wednesday, January 26 – 28  
**TFB Board of  
 Governors Meeting**  
 Tallahassee

Wednesday, January 26,  
 8:00am – Noon  
**Estate & Probate  
 CLE Seminar**  
 Bar Association Office

Wednesday, January 26,  
 3:30pm – 4:30pm  
**Corporate Counsel  
 Committee Meeting**  
 Bar Association Office

Thursday, January 27,  
 5:30pm – 7:00pm  
**PBC FAWL  
 Membership Reception**  
 Location TBA



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The Palm Beach County Bar Association (PBCBA) offers CLE hours from the sale of audio CD's recorded at previously held live seminars of the Association. We also have copies of audio CD's of live seminars from the Orange Co. Bar Assoc. (OCBA), Clearwater Bar Assoc.(CBA), Hillsborough Co. Bar Assoc.(HCBA), and the Dade Co. Bar Assoc.(DCBA). Members and non-members alike can benefit from this simple way of acquiring CLE and Ethics hours. To order, place an "x" next to the tapes you would like to order, complete this form and return to the Palm Beach County Bar Association, 1601 Belvedere Road, Suite 302E, West Palm Beach, FL 33406 or **fax to 561/687-9007**. **PLEASE WATCH EXPIRATION DATES**, we attempt to remove expired CD's but due to the distribution of this list occasionally courses will appear even though they have expired.

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	CBA	The Future of Elder Law (CD)+++1.0 Elder Law Cert.	1.0		\$25	\$65	03/16/11
	PBCBA	Practice and Procedure (Fam Law) (CD)+++1.0 Marital/Fam Law	1.0		\$25	\$65	03/22/11
	CBA	Protecting Medicare's Interest in Settlements(CD)+++1.0 Civil Trial	--	--	\$25	\$60	04/15/11
	CBA	Time Management Time Keeping & Billable Hours	1.0		\$25	\$65	04/15/11
	PBCBA	Preparing Client For Mediation (Fam Law) (CD)+++1.0 Marital/Family Law	1.0		\$25	\$65	04/16/11
	PBCBA	Entity Selection and Structuring (CD) +++1.0 Bus Lit Cert.	1.0		\$25	\$65	05/12/11
	OCBA	Wills/Trusts for Divorcing Clients (CD)	1.0		\$25	\$65	05/20/11
	PBCBA	Inside the Appellate Court(CD)+++2.5 Appellate Practice Cert.	5.0	1.0	\$150	\$210	06/04/11
	PBCBA	Special Needs Trusts(CD) +++1.0 Civil Trial; 4.5 Wills; 4.5 Elder Law; .50 Tax Cert.	6.0	1.0	\$165	\$205	06/15/11
	PBCBA	Charging Liens, Retaining Liens...(Fam. Law) (CD) +++1.0 Marital/Family Law Cert.	1.0		\$25	\$65	7/15/11
	PBCBA	Blogging for Lawyers: Internet Marketing for Non-Geeks(CD)	1.0		\$25	\$65	7/22/11
	PBCBA	Winter R/E – Hot Topics in a Cold Market (CD)+++4.0 R/E	4.0	4.0	\$145	\$185	7/27/11
	PBCBA	The View From the Bench (Bankruptcy Seminar) (CD)	2.0		\$50	\$90	7/29/11
	PBCBA	ADR in 2010(CD) +++**6.0 Civil Trial; 8.0 R/E	8.0	2.0	\$225	\$265	8/8/11
	HCBA	Continuing Mediator Education Credit(CD) <b>***ELIGIBLE FOR UP TO 8.5 CME CREDITS***</b>	9.0 ***	2.0	\$245	\$285	8/18/11
	PBCBA	Real Estate Issues in Bankruptcy Cases (Bankruptcy Seminar)(CD)	2.0		\$50	\$90	8/26/11
	PBCBA	Practical & Ethical Considerations in eDiscovery (Com'l Lit seminar)(CD) +++ 3.0 Bus. Lit./3.0 Civil Trial Cert	4.0	4.0	\$145	\$185	9/5/11
	PBCBA	Trial Superstars "Trying the Catastrophic Injury Case" (CD) +++5.5 Civil Trial Cert.	7.0		\$175	\$215	9/07/11
	CBA	Planning for Disability & Public Benefits (CD)+++ 1.0 Elder/ 1.0 Wills, Trusts & Estates Cert.	1.0		\$25	\$65	10/15/11
	PBCBA	Impact of the Current Economy on PI Cases(CD)+++3.5 Civil	4.5	.5	\$120	\$160	10/16/11

PBCBA	View from the Panel – Local Trustees(CD) (Bankruptcy Sem.)	2.0		\$50	\$90	10/20/11
PBCBA	What's New in Construction Law(CD)+++3.0Bus.Lit; 4.0 Constr.	4.0	.5	\$110	\$150	10/22/11
PBCBA	Securities Litigation 2010(CD) +++ 2.5 Bus Lit; 2.5 Crim Trial; 2.5 Civil Trial Cert.	3.0	1.0	\$90	\$130	10/28/11
PBCBA	Practical, Legal and Ethical Considerations in the Use of Experts (CD) (Com'l Lit. Seminar) +++3.0 Bus. Lit. Cert. credits	4.0	4.0	\$145	\$185	11/10/11
PBCBA	27 <sup>th</sup> Estate Probate Seminar(CD)+++6.0 Elder Law/6.0 Wills, Trusts & Estates Cert.	8.0	2.0	\$225	\$265	11/19/11
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+++Indicates Certification credits available; \*\*CM credits.

Please contact the Palm Beach County Bar Association for more detailed information.

Please call Eva Gray at (561) 687-2800 with any questions or for additional information.

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Payment Enclosed: Check # \_\_\_\_\_ Amount: \$ \_\_\_\_\_

Tape Order Subtotal: \$ \_\_\_\_\_

Please bill my credit card:  MC  VISA  AMEX Amount: \$ \_\_\_\_\_

Shipping/Handling: + \$10.00

Signature \_\_\_\_\_

Rush Fee: + \$25.00

Credit Card #: \_\_\_\_\_

Total Due: \$ \_\_\_\_\_

Expiration Date: \_\_\_\_\_

**NOTE: THE PURCHASE OF EACH CD IS VALID FOR INDIVIDUAL USE ONLY. DEFECTIVE RECORDINGS WILL BE REPLACED ONLY IF RETURNED WITHIN 30 CALENDAR DAYS FROM INVOICE DATE.**