



PALM BEACH COUNTY BAR ASSOCIATION

BULLE^TIN

www.palmbeachbar.org

July/August 2012

Weiss Investiture August 24



All members of the Bar are invited to the investiture ceremony of newly appointed County Court Judge Daliah Weiss. The ceremony will take place on Friday, August

24 at 4:00 p.m. in Courtroom 11A of the main courthouse in downtown West Palm Beach. Weiss was an assistant state attorney since 1996 and was chief of the county court and family violence units and also led the special victims unit.

Mark your calendar for upcoming Membership Events

July 12: Judicial Candidate Forum

August 24: Investiture Ceremony for Judge Daliah Weiss

September 29: Lawyers Have Heart Run

October 19: Diversity Luncheon with guest speaker FL Bar President Gwynne Young

November 16: Joint Luncheon with Forum Club with Guest Speaker Ret. U.S. Supreme Court Justice John Paul Stevens

December 6: Annual Holiday Party and Silent Auction at Frenchman's Reserve

February 1, 2013: Joint Luncheon with Federal Bar. Guest Speaker: 11th Circuit Chief Judge Joel Dubina

March 1: Bench Bar Conference

April 5: Membership Luncheon with Guest Speaker Marsha Hunter - Consultant on Persuasion and Public Speaking Techniques for lawyers

April 30: Annual Judicial Reception



Photograph by Tracey Benson Photography

Presenting Your Board of Directors for 2012-2013

Our annual Installation Banquet was recently held at the beautiful Breakers Hotel in Palm Beach for more than 500 lawyers, judges and special guests. Adam T. Rabin, of McCabe Rabin, P.A. was sworn in as the Bar Association's 90th President. Sponsors for the evening included Sabadell United Bank; Lytal Reiter Smith Ivey & Fronrath; The Daily Business Review; Fox Rothschild; Greenberg Traurig; Holland & Knight; Lesser Lesser Landy & Smith; McCabe Rabin; Murray Guari Trial Attorneys; Pleasanton Greenhill & Associates; Rock Legal Services and Investigations and Visual Evidence. For more photos from this event, please see page 9.

Pictured back row: Federal Judge Kenneth Marra; Greg Huber, director; Wade Bowden, director; Ken Johnson, North County Section president; Edward "Ned" Reagan, director; Sia Baker-Barnes, director; John Whittles, director and Theodore Kypreos, director.

Front Row: John Howe, immediate past president; Jessica Callow Mason, director; Grier Pressly, director; Lee McElroy, Young Lawyers Section president; Adam Rabin, president; and Jill Weiss, president-elect.

Inside...

Judicial Evaluation Feedback	2
President's Message	3
Legal Aid Honors Pro Bono	4
Professionalism Council	5
Judicial Profile	6
Capital Campaign	7
Probate Corner	8
Installation Banquet	9

Professionalism Corner	10
Real Property	11
New Members	12
Bankruptcy Corner	13
New Attorney Breakfast	14
Personal Injury Corner	15
Rules of Civil Procedure	16
Law Week	17
Technology Corner	19
Bulletin Board	23

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
1507 Belvedere Road
West Palm Beach, FL 33406



Did you Know? The Florida Bar has a Judicial Evaluation Feedback Program

The Florida Bar's Judicial Administration and Evaluation Committee assists the Florida Supreme Court in the Judicial feedback program. The goal of the feedback program is to provide a confidential means by which attorney members of The Florida Bar can communicate with appellate or trial court judges concerning their perceived specific strengths and weaknesses. Providing judges with confidential feedback, assists them with self-assessment and self-improvement. The voluntary, confidential feedback program for trial and appellate court judges began January 1, 1998. The committee hopes that this program will provide judges with useful and accurate substantive input from attorneys practicing before them

Feedback may be provided in two ways; by filling out a form and mailing it to The Florida Bar or by completing feedback forms online at www.floridabar.org/JudicialFeedback.

By mail:

On the trial court level, the court includes a Judicial Feedback Form and an envelope addressed to the judge in care of The Florida Bar when the court mails the Final Order ending the case to counsel of record. On the appellate court level, the clerk transmits the Judicial Feedback Form and associated instructions to all counsel of record who participated in the appeal at the time the appellate opinion is sent. Trial and appellate court feedback forms and an example of how the confidential envelope should look are available in PDF format .

Online:

There are separate forms for trial court judges and appellate court judges. Judges and attorneys can access the feedback form by going to www.floridabar.org/JudicialFeedback and following the prompts. Security is assured. To participate you need to have your Bar number and your Bar password. You can click on a prompt that will assist you in obtaining your Bar password.

All feedback is confidential pursuant to Florida Rule of Judicial Administration 2.051(c)(4). The judge may communicate the substance of the feedback to the chief judge or to another judge for the purpose of peer input, but otherwise the feedback may not be disclosed to any other person. For more information, contact Doris Maffei at The Florida Bar dmaffei@flabar.org

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President's Message



Promoting Lawyer Civility Throughout South Florida

By Adam Rabin

On September 12, 2011, the Florida Supreme Court amended the oath of admission to the Florida

Bar to include a pledge of "fairness, integrity, and civility" towards the court and opponents "in all written and oral communications" (the "Oath of Civility"). In doing so, the Supreme Court determined it is important to educate new attorneys that they are "professionals" and expected to treat the court and opponents with respect, fairness, and objectivity.

While only new attorneys take the Oath of Civility, the genesis for amending the oath derives from the conduct of experienced attorneys. Indeed, the need for improved lawyer civility applies to all attorneys.

Most experienced attorneys have had interactions with, or have received communications from, opposing counsel that can hardly be considered professional or civil. Further, most local attorneys have observed uncivil or discourteous behavior in cases set in and outside of Palm Beach County.

To address these issues, the Palm Beach County Bar Association recently formed a coalition with other voluntary bar associations in an effort to promote lawyer civility. The purpose of this coalition is to increase awareness of the Oath of Civility, jointly promote more civil behavior, and encourage a more uniform adherence to the standards of professional courtesy throughout South Florida.

In this respect, the Palm Beach, Broward, Dade, South Palm Beach, and Martin County Bar Associations have approved a joint resolution to work together in promoting lawyer civility and adherence to the standards of professional courtesy throughout South Florida. Various other bar associations, including but not limited to FAWL, the Cunningham Bar, the Hispanic Bar, the Cuban American Bar Association, and the Federal Bar Association, also have signed on in support of this resolution.

The same standards for lawyer civility and professional courtesy that we expect and follow in Palm Beach County unquestionably should be the rule, not the exception, throughout South Florida. As such, working with the other voluntary bars in an effort to promote lawyer civility and the standards of professional courtesy, gradually will begin to create an expectation and culture that such standards apply throughout South Florida.

During the coming year, the voluntary bars will work together to promote lawyer civility by corresponding with not only existing members of their organizations, but also with non-members. Notably, approximately 50% of attorneys practicing in South Florida are not members of any voluntary bar association. As such, many of

these attorneys do not attend the bench bar conferences, judicial lunches, and professionalism seminars that regularly espouse the tenets of professionalism and lawyer civility.

In sum, we expect that both increasing awareness of the Oath of Civility, and bridging the communication gap with non-members of the voluntary bars, will help ebb any further decline in lawyer civility. Indeed, we hope that by improving civility awareness, we can continue to create an improved practice culture throughout South Florida, where lawyers are more respectful and courteous to each other and, in turn, enjoy their careers more.

Adam Rabin is a partner with McCabe Rabin, P.A. He is Florida Bar Board Certified in Business Litigation and practices business, securities, and whistleblower litigation.



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Legal Aid Honors Providers of Pro Bono Services to Palm Beach County's Disadvantaged

On Saturday, May 19, over 700 friends and supporters of the Legal Aid Society of Palm Beach County joined together to celebrate the achievements of 9 attorneys, 2 dentists, 1 community activist & philanthropist, Legal Graphicworks and Office Depot at the 24th Annual Pro Bono Recognition Evening & Auction.

The theme of the evening was "Carnaval: A Night in Rio" and was held at the Palm Beach County Convention Center. The evening featured a silent auction, an awards ceremony, delicious Brazilian food and entertainment from the Brazilian & Latin Sounds Company and students from the Dreyfoos School of the Arts.



The individuals honored at this year's gala included:

- Kathryn M. Beamer, Esq. – Family Law Award
- Maxine Cheesman, Esq. – And Justice for All Award
- Amy L. Consentino, Esq. – Child Advocacy Award
- Kirk Friedland, Esq. – Real Property Law Award
- Elisa D. Garcia C., Esq. for Office Depot – Corporate Counsel Award
- Joe Herman, DDS & Mark Herman, DDS – Special Services Award
- Julie H. Littky-Rubin, Esq. – Appellate Law Award
- Patrick E. Quinlan, Esq. – Non-Profit Law Award
- Thomas E. Streit, Esq. – Advocacy for the Arts Award
- Patti A. Velasquez, Esq. – Alternative Dispute Resolution Award
- Barry R. Weiss, J.D. – Emeritus Award
- Jim Lucas & Tyler Benson of Legal Graphicworks – Litigation Support Award
- The Annual Suzanne Foley "Serving Justice" Award given in memory of Legal Aid's Associate Director of Development was presented to Bernadette Shalhoub.
- Emcees for the evening were Michelle Suskauer, Esq. & Mariano Garcia, Esq.

Haven't Paid Your PBCBA Dues Yet?

This will be your last issue of the Bulletin

PBCBA dues statements were mailed in April. If you have not already paid, we hope you will renew today.

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Per Administrative Order No. 2.105/9-10, In Re: Fifteenth Circuit Professionalism Council, when an attorney appears before the Council because of conduct inconsistent with the Standards of Professional Courtesy or the Ideals and Goals of Professionalism, a summary of that meeting is to be published in the Bar Bulletin with the name(s) redacted.

**Re: Fifteenth Judicial Circuit
Professionalism Council session
March 14, 2012**

Dear [Name]:

On March 14, 2012, a Professionalism Council met with you to discuss a judge's written referral to the Council dated August 9, 2011. This letter summarizes the Council's discussions with you on March 14, 2012.

The referral arose out of your representation of a plaintiff in an action for false imprisonment and malicious prosecution. Your client had failed timely to respond to interrogatories and requests for production, and the court had entered an order compelling a response. You informed the Council that your client then forwarded to you a box of documents, which you reviewed only for privilege, before producing the entire box to opposing counsel. You indicated that you were not aware that unsworn answers to interrogatories were in the box when you produced it.

Many of the answers and documents produced by you were either nonresponsive or dismissive of the requests, and the interrogatory answers written by your client included derogatory, sexist, and anti-Semitic language. The judge referred you to the Council after dismissing the action with prejudice as a sanction for your client's misconduct.

You have been a member of The Florida Bar in good standing for nearly thirty years. When you appeared before the Council, you were sincere and recognized that you had demonstrated poor judgment. You indicated that you had represented this client for three years in commercial-litigation cases. The client is from a country and culture in which respect for those of other ethnicities is less than what is expected in this country, and while you had noted that he had certain strongly held views, you attributed those to his ethnicity. You yourself are Jewish,

and you told us that the client had never expressed any anti-Semitic sentiments to you and that if he had, you would have declined to represent him.

When your client approached you regarding this malicious-prosecution action, you recognized that you were not competent to handle this matter. As a favor to this client, you nevertheless agreed to draft and file a complaint, because the statute of limitations was about to run. You advised the client that he would need to seek new counsel. You conceded that you took a hands-off approach to the case, believing that you would soon be replaced by substitute counsel. Your client, however, failed to obtain new counsel, and because the case was largely dormant, you did not pressure him to do so.

The Council expressed its belief that you had significantly deviated from your professional obligations in your handling of this matter and emphasized that your actions could have led to far more severe consequences with The Florida Bar. You acknowledged that you should never have accepted the representation, particularly when you recognized that you were not competent to handle this type of matter. Once you appeared on behalf of this client, however, you could not avoid complying with your professional obligations simply because you hoped the representation would be short-lived.

At the outset, you had an obligation to ensure that your client timely and completely respond to discovery. The Council questioned why, if you were unaware that unsigned interrogatory answers were in the box of documents, you would not have asked your client about his answers to interrogatories in order to comply with the Court order compelling responses. The Florida Bar *Ideals and Goals of Professionalism* ("Ideals") provide in section 4.8 that "[a] lawyer should assure that responses to proper requests for discovery are timely and complete and are consistent with the obvious intent of the request." The Palm Beach County Bar Association *Standards of Professional Courtesy* ("Standards") add in Section II(3) that "[a]ttorneys should not produce documents in a way calculated to hide or obscure the existence of documents."

As the judge recognized, it is not an excuse to state that you were unaware

of what the client had included among the documents that you produced to opposing counsel. The Ideals remind lawyers to "exercise independent judgment and ... not be governed by a client's ill will or deceit" and, specifically, to "counsel the client against the use of tactics designed... to embarrass, harass, intimidate, improperly burden, or oppress an adversary, party or any other person and should withdraw from representation if the client insists on such tactics." Ideals § 7, 7.4. Section III(1) of the Standards instructs attorneys to "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." Attorneys are also obligated to "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." Standards, § III(2).

In sum, you had a professional obligation to review the discovery materials to ensure not only that they were responsive, not privileged, and produced in accordance with the rules of civil procedure, but also that their content was courteous and respectful. The Council noted that you appeared to take the sanctions motion seriously and had retained counsel to represent you. However, the Council was surprised that you had not reached out to opposing counsel immediately, and we suggested that you could have sent a letter to your opposing counsel immediately upon receiving the motion for sanctions to repudiate your production.

We hope that your meeting with the Council has caused you to recognize that appearing in Florida courts on behalf of a client cannot be done halfway and to reflect on your process for screening clients and cases. We wish you much success as you continue your practice. Yours very truly,
D. Culver Smith III
Co-Chairperson, Professionalism Committee, Palm Beach County Bar Association
On behalf of the Fifteenth Judicial Circuit Professionalism Council

Judicial Profile of Judge Leonard Hanser

By: *Jeanette Bellon, Esquire on behalf of the Judicial Relations Committee*

A history buff is an easy way to describe Judge Leonard Hanser. A Floridian since birth, Judge Hanser's roots reach all the way back to Miami in the 1920's, as his grandfather ran a clothing store on Flagler Street in Miami. Thus, it is not surprising that his love of history began early. As a youngster, he would read anything that had to do with World War II and readily admits that this era is still his favorite topic to delve into.

Judge Hanser's family also shares his love of history. His wife, Lisa, who was his high school sweetheart, teaches civics to seventh graders. He has two children. His son, Daniel, has a degree from the University of Florida in history and is pursuing a career in radio sports broadcasting. His daughter, Jessica, is a graduate of Yale University having obtained her doctorate in history. Her area of specialty is British commerce; specifically, commerce between Britain and China in the late 18th and early 19th centuries. In addition, she speaks fluent Mandarin Chinese. Jessica also recently received a Fulbright Scholarship to study at the University of Hong Kong. While in Asia, Jessica will also be teaching at the University of Singapore as an assistant professor. As expected, Judge Hanser is proud of his children's accomplishments, including the fact that they both graduated from Florida public high schools.

Judge Hanser graduated high school in West Palm Beach and then obtained a degree in political science from the University of Florida. He went straight to law school, completing his juris doctorate at the University of Virginia in 1977. Upon graduation from law school, Judge Hanser returned to Florida, where he eventually opened his own private practice working primarily in civil law where he practiced real estate and bankruptcy litigation and drafted wills and trusts.

After sixteen years in private practice, Judge Hanser was looking to do something different and saw an advertisement in the local newspaper for a magistrate. He applied, and the rest is history. In 1993, he became a magistrate for the Circuit Court. Thereafter, in 2009, Judge Hanser was appointed to the County Court where he presides over criminal matters.

Circuit Court Report CIVIL DIVISIONS • As of May 25, 2012

DIVISION	JURY TRIALS	NON-JURY TRIALS	MOTIONS	CASES PENDING
AA KELLEY	10-12	10-12	07-12	1389
AB KASTRENAKES	11-12	11-12	08-12	1605
AD FRENCH	09-12	09-12	07-12	1736
AE MCCARTHY	03-13	03-13	07-12	1792
AF KEYSER	01-13	12-12	06-12	1653
AG CROW	10-12	09-12	07-12	1836
AH BROWN	10-12	10-12	06-12	1444
AI SASSER	09-12	08-12	06-12	1148
AJ ROSENBERG	11-12	11-12	06-12	1294
AN McSORLEY	11-12	11-12	08-12	1666
AO BRUNSON	10-12	09-12	06-12	1637



Judge Hanser with his son Daniel, daughter Jessica and wife Lisa.

Judge Hanser is also actively involved with the Palm Beach County Chapter of the American Inns of Court, where he served as President. The American Inns of Court was established in 1985 by Chief Justice of the United States Supreme Court Warren Burger. The Inns of Court consist of a group of judges, practicing attorneys, law professors and students who meet to discuss and promote legal ethics and professionalism. Currently, there are over 400 Inns of the Court chapters through-out the country.

Outside of the legal realm, Judge Hanser is still an avid reader of non-fiction. He is currently reading a book by Associate Justice Stephen Breyer regarding Justice Breyer's view on interpreting the United States Constitution. Although he has retired from running marathons, Judge Hanser is a dedicated runner, chalking up twenty-three miles a week. He enjoys playing classical piano pieces, such as Mozart and Beethoven, and is currently working on a duet with another attorney who is a cellist. He also enjoys traveling, having recently visited London and Eastern Europe.

Judge Hanser's favorite part about being on the bench is having the ability to interact with lawyers and having the opportunity to contemplate legal issues in criminal court. He wants to put people at ease in his courtroom, so that he can get the best out of each attorney appearing before him. He is a staunch believer that the court need not make an attorney nervous any more nervous than he or she already is, because better legal arguing leads to better judging.

Judge Hanser is concerned about reductions to the state budget for the judiciary and how that impacts people's access to the courts. Judge Hanser is also puzzled over the attacks on public employees, and has found the quality of work performed by public sector employees as good as the quality of work performed by private sector employees.

Finally, the best advice that Judge Hanser can give attorneys is to be prepared to argue your case, to listen to the questions that the judge asks you, and to answer the specific questions asked. When asked how he would want attorneys to remember him as a judge, Judge Hanser stated that he wanted to be remembered for allowing each party the opportunity to argue their cases before him and that he had ruled reasonably and fairly.

Capital Campaign – Thank You to Those Who Have Contributed!

Personalized Bricks Purchased (As of 4/30/12)

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 Bertisch, Robert & Harreen
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 Burns, John L.
 Burns, Tom & Patience
 Casey, Patrick
 Clark, Fountain, LaVista, Prather, Keen & Littky-Rubin
 Coleman, Greg & Monica
 Colton, Roger B.
 Cortvriend, Sarah
 Deckert, Ted
 Downey, Edward
 Dunwoody White & Landon, P.A.
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 Gamot, Melinda
 Gerber, Jonathan & Tracy
 Glickman, Garry
 Glickman, Witters & Marell
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 Hunston, Jay and Jane
 Jay R. Jacknin, P.A.
 Jenks, Debra & Robert Harvey
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The Bar Association has moved to its first permanent home located on Belvedere Road in West Palm Beach. The building is a state-of-the-art facility for our legal community to enjoy for many years to come. You can be a part of history by naming a room or buying a brick.

We sincerely thank the following firms and members who have contributed as of 11/25/11:

Searcy Denney Scarola Barnhart & Shipley Classroom
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 Holland & Knight LLP Member Services Office
 North County Section & Young Lawyers Section Communication Director's Ofc
 Lesser, Lesser, Landy & Smith Front Bench
 Lytal Reiter Smith Ivey & Fronrath Reception Area
 Jones, Foster, Johnston & Stubbs LRS Office
 Gunster Landscape
 Fisher & Bendeck Landscape
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“Clear And Convincing” Evidence

By David M. Garten, Esq.

What is “clear and convincing evidence” and when does it apply?

The clear and convincing evidence standard is used in the Powers of Attorney and Similar Instruments (Chapter 709), Florida Trust Code (Chapter 736), the Florida Guardianship Law (Chapter 744), Florida’s Health Care Advanced Directives (Chapter 765), Adult Protective Services Act (Chapter 415), §732.615, F.S., §655.79, F.S. and in various common law causes of action/defenses. As a result, it is crucial to understand the definition of clear and convincing evidence and to know when to apply this standard.

DEFINED:

The Standard Jury Instructions in Civil Cases defines clear and convincing evidence as follows:

411.3 CLEAR AND CONVINCING EVIDENCE

“Clear and convincing evidence” differs from the “greater weight of the evidence” in that it is more compelling and persuasive. “Clear and convincing evidence” is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction without hesitation about the matter in issue.

The Florida Supreme Court defined this standard as an intermediate level of proof that entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy. *See Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483 (Fla. 1999), *citing In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 967 (Fla. 1995). It is something more than a simple preponderance and less than the standard applied in criminal cases, and that it is evidence free of substantial doubts or inconsistencies. *See The Florida Bar v. Rayman*, 238 So.2d 594, 596 (Fla. 1970).

In *Reid vs. Estate of Edgar Sonder*, 63 So. 3d 7 (Fla. 3rd DCA 2011), the appellate court defined clear &

convincing evidence as an intermediate standard of proof between the “preponderance of the evidence” standard used in most civil cases, and the “beyond a reasonable doubt standard” of criminal cases, requiring the evidence to be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

APPLICATION:

ISSUE	STATUTE / CASE
Agent’s conflict of interest [in POA’s]	§709.2116(4)
Reformation to correct mistakes [in Wills]	§ 732.615
Evidence of oral trust	§ 736.0407
Reformation to correct mistakes	§ 736.0415
Revocation or amendment of revocable trust	§ 736.0602
Limitations on proceedings against trustees	§ 736.1008
Natural guardians	§ 744.301
Procedures to determine incapacity	§ 744.331
Procedure for extraordinary authority	§ 744.3725
Procedure for making a living will; notice to physician	§ 765.302
The proxy	§ 765.401
Immunity	§ 415.1036
Provision of protective services with consent; withdrawal of consent; interference	§ 415.105
Protective services interventions when capacity to consent is lacking; nonemergencies; emergencies; orders; limitations	§415.1051
Interference with investigation or with the provision of protective services	§415.1052
Administrative fines for false report of abuse, neglect, or exploitation of a vulnerable adult	§415.1113
Deposits and accounts in two or more names; presumption as to vesting on death	§655.79
Equitable or virtual adoptions	<i>Williams v. Estate of Pender</i> , 738 So. 2d 453 (Fla. 1st DCA 1999); <i>Douglass v. Frazier (In re Estate of Musil)</i> , 965 So. 2d 1157 (Fla. 2nd DCA 2007)
Promissory estoppel	<i>W.R. Grace & Co. v. Geodata Services, Inc.</i> , 547 So. 2d 919 (Fla. 1989)
Mutual mistake permitting reformation of an instrument	<i>Roberts v. Pfeiffer</i> , 135 So. 2d 246 (Fla. 2nd DCA 1961)

Installation Banquet



Lisa Hawkins, Scott Hawkins, Adam Rabin and Jennifer Rabin



Ana and Grasford Smith and John Whittles



Jason and Nicole Guari



Past Presidents Scott Hawkins, Jamie Pressly, Michael Walsh, Ted Leopold, Michael Napoleone, Judge Meenu Sasser, Michael Kranz, Adam Rabin, President; Stan Klett, Judge Lisa Small, John Howe, Michelle Suskauer, Richard Schuler, Manny Farach and Judge Amy Smith



Chief Judge Peter Blanc and his wife Juliana



Molly and Scott Smith



Greg and Laura Zele



Judge Daliah Weiss and her husband Jason



Jack and Anita Scarola

Additional banquet pictures can be found on the Bar's Facebook page at www.palmbeachbar.org

Movie tickets make 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 - \$8.00 each (\$10.00 at box office)
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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. **PRICES ARE SUBJECT TO CHANGE**



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Professionalism Corner

Towards a More Professional Discovery Response

Submitted by Amy Borman, co-chair, Professionalism Committee

On May 17, 2012, the PBCBA's Professionalism Committee, in conjunction with the Fifteenth Judicial Circuit, hosted its first annual "New Attorney Welcome Breakfast". The goal of the breakfast was to introduce new Palm Beach County Attorneys to the local practice and customs and to orient them to the level of professionalism expected by our judges. The number of judges in attendance emphasized the importance of the morning's theme "Reputation, reputation, reputation!"

While we all understand the importance of developing and maintaining a good reputation, we sometimes forget the types of behavior that separates the professional from the unprofessional. When we hear the egregious story we laugh (or shudder) and think "not me"; but is there other behavior in which you engage which nonetheless is still unprofessional?

Below are some pieces of advice the judges gave to the new attorneys, and which serve as welcome reminders to us all:

1. Know the local rules and administrative orders (located at www.15thcircuit.com/adminorders).
2. Be prepared. Provide case law to opposing counsel in advance of the hearing. Acknowledge the caselaw that is adverse to your position.
3. Answer questions asked by the court truthfully. You will gain more credibility with the judge if you admit you do not know the answer.
4. Don't interrupt or talk over the judge or opposing counsel, and don't roll your eyes while your opposing counsel is making an argument.
5. Talk to opposing counsel BEFORE you arrive at the hearing. If opposing counsel is requesting an extension of time, try and agree to it since one day you may need that same courtesy.
6. Resolve your issues early rather than the night before the hearing. Cancelling a special set hearing (that was scheduled four months earlier) may end up saving you a trip to the courthouse but it prevents others from utilizing that sought after court time.
7. Be respectful to court staff and judicial assistants.
8. Emergency Motions are for true emergencies. Know the true definition of an emergency. Once filed, an emergency motion is immediately brought up from the clerk's office to the judge's chambers for review. If the judge believes an emergency exists, a hearing will be set immediately so be prepared to be at the courthouse at the time the judge is available. If you find that it can wait another day or another week - then it is not a true emergency.
9. Act professionally. A dispute between the plaintiff and defendant does not equate to a dispute between the parties' counsel. You can advocate zealously for your client while retaining a professional and cordial relationship with your opposing counsel.
10. Get involved with the local bar associations. Seek out a mentor and welcome the help that others are willing to provide.



Lawyers Have Heart 5K Run

It's that time again, runners! This year's Lawyers Have Heart 5K Run is right around the corner.

Come join us on September 29, 2012 along scenic Flagler Drive as the Palm Beach County Bar Association and Lawyers Have Heart present the fourth annual Lawyers Have Heart 5K Run, to benefit the American Heart Association.

Thanks to strong support from our membership and the judiciary, this event has grown each year, becoming one of Palm Beach County's premier running events. Last year's event featured more than 800 runners, with over fifty local law firms and organizations fielding teams. With Natalie Morales of NBC's The Today Show as Grand Marshall, last year we raised over \$80,000. With the 15,000-person Heart Walk that immediately followed the Run, last year's combined event raised more than \$750,000 for local cardiovascular research and treatment, and for heart-healthy education.

This year, Natalie Morales returns as Grand Marshall, and an even larger turnout of runners and walkers is expected.

And once again the Run will be kick-started with the "Scales of Justice," a free 12-week boot camp fitness challenge. This year's Scales participants will train for twelve weeks to prepare for the Run, free of charge, at CrossFit CityPlace Gym in downtown West Palm Beach (www.crossfitcityplace.com). Last year's Scales participants got into great shape, improved their heart health and had fun doing it.

This event is a wonderful opportunity for members of the legal community, their families and friends to get healthy while raising money for a truly worthy cause. Cardiovascular disease is the single largest cause of death in America, killing more Americans than the next four causes combined. But it is preventable through education and life-style changes. So come on out and join Natalie Morales, your legal community and fifteen thousand of your closest friends on September 29.

**For more information and to register, please check out www.lawyershaveheartpb.org
And watch for upcoming PBC Bar email announcements for more details.**

Real Property and Business Litigation Report

June 2012 Summary

Submitted by Manuel Farach



Rhodes v. Newport Building and Const., Inc., – So.3d –, 2012 WL 1557323 (Fla. 2d

DCA 2012).

There are no further litigation proceedings once an arbitration award is paid in full. Accordingly, foreclosure of construction lien not permitted once arbitration award paid.

Feldman v. Villa Regina Ass'n, Inc., – So.3d –, 2012 WL 1520852 (Fla. 3d DCA 2012).

Damages for temporary injury to real property consists of cost of restoring the property to its original condition. When cost of repair exceeds the value of the property in its original condition or when the injury is permanent, the measure of damages is the diminution in value of the real property.

Philips Lake Worth, L.P. v. BankAtlantic, – So.3d –, 2012 WL 1520877 (Fla. 4th DCA 2012).

When the reading of two contractual provisions creates an ambiguity, parol evidence is permitted to explain the inconsistency. Accordingly, parol evidence is proper when a lease termination provision and new lease are in conflict with regard to right of new tenant to terminate a lease.

CitiMortgage, Inc. v. Synuria, – So.3d –, 2012 WL 1520883 (Fla. 4th DCA 2012).

Gross inadequacy of foreclosure sale price, even if lender caused the foreclosure sale problem, constitutes basis for vacating foreclosure sale.

Reese v. Ellis, Painter, Ratterree & Adams, LLP, – F.3d –, 2012 WL 1500108 (11th Cir. 2012).

Dunning letter and other documents sent to consumers that relate to the enforcement of a security interest may have a dual purpose and also relate to collection of a debt, and thus, are subject to the Fair Debt Collection Practices Act.

Give Kids the World, Inc. v. Sanislo, – So.3d –, 2012 WL 1645607 (Fla. 5th DCA 2012).

Exculpatory clauses are disfavored under the law, but unambiguous exculpatory contracts are enforceable unless they contravene public policy. The wording of the exculpatory clause must be clear and understandable so that an ordinary and knowledgeable person will know what he or she is contracting away. In examining exculpatory clauses, courts will review the unequal bargaining power of the parties only in the public utility or public function context.

Heck v. Bank Liberty, – So.3d –, 2012 WL 1623518 (Fla. 1st DCA 2012).

A party's "usual place of abode" for purposes of valid service under section 48.031(1) (a) is the place where the defendant is actually living at the time of service. The word "abode" means one's fixed place of residence for the time being when service is made. If a person has more than one residence, he must be served at the residence in which he is actually living at the time of service.

Bank of Montreal, Harris, N.A. v. Estate of Antoine, – So.3d –, 2012 WL 1605248 (Fla. 4th DCA 2012).

A deposition may be used in court even though the deposition was not complete as the witness died before cross-examination.

Taplin v. Taplin, – So.3d –, 2012 WL 1605253 (Fla. 3d DCA 2012).

The statute of limitations is inapplicable to shield trustees from claims of breach of duty by the beneficiaries of the trust.

In re McNeal, Slip Copy, 2012 WL 1649853 (11th Cir. 2012).

A debtor may "strip down" a wholly unsecured lien on their home under 11 U.S.C. § 502; *Dewsnup v. Timm*, 502 U.S. 410, (1992), applies only to partially unsecured liens.

Waverly at Las Olas Condominium Ass'n, Inc. v. Waverly Las Olas, LLC, – So.3d –, 2012 WL 1698165 (Fla. 4th DCA 2012).

A contractual attorneys' fees provision that provides for an award of attorneys' fees for "any litigation between the parties under this Agreement" permits an award of attorneys' fees for litigating the amount of, and not just entitlement to, attorneys' fees.

Virgilio v. Ryland Group, Inc., – F.3d –, 2012 WL 1758086 (11th Cir. 2012).

A 1.5% commission, without ability to control the purported agent's actions, does not create an agency relationship that requires *Johnson v. Davis* disclosures. The failure of a sales agent to disclose subdivision being marketed is next to a former bombing range does not rise to the level of unjust enrichment, FDUTPA or negligence.

Tempel v. Southern Homes of Palm Beach, L.L.C., – So.3d –, 2012 WL 1867586 (Fla. 3d DCA 2012).

A Fla. Stat. § 720.401 (1) (a) disclosure that does not state the current assessment and time period covered by the assessment violates the statute, and cannot be cured by reference to materials or information outside the disclosure.

US Acquisition, LLC v. Tabas, Freedman, Soloff, Miller & Brown, P.A., – So.3d –, 2012 WL 1859514 (Fla. 4th DCA 2012).

As an attorney charging lien against an aircraft applies to the aircraft and its parts (and not just the award of judgment or proceeds from aircraft), such an attorney charging lien must be perfected with the Federal Aviation Administration.

Thomas J. Duggan, LLC v. Peacock Point, LLC, – So.3d –, 2012 WL 2087907 (1st DCA 2012).

As-is provision in contract governing auction sale of six-lot waterfront subdivision placed on purchaser the risk of mistake and claim for misrepresentation or mutual mistake regarding whether subdivision was immediately ready for residential construction was unwarranted.

Continued on page 13

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.

Maura K. Anderson - Pittsburgh, PA; Emory University, 1996; Sole Practitioner, Boynton Beach.

Peter Antonacci - Quantico, VA; Florida State University, 1979; Government Attorney, Office of the State Attorney, Palm Beach County.



Rikki Lober Bagatell - Jacksonville, FL; Vanderbilt University, 2000; Associate in Shutts & Bowen, LLP, West Palm Beach.

Scott Berry - Connecticut; University of Connecticut, 2001; Partner Marshall & Berry, P.A., West Palm Beach.

Adele Blackmore - Greensburg, PA; University of Dayton, 1983; Associate in Nicholas J. Ryan & Associate, Ft. Lauderdale.

Jessica Bober - Miami, FL; University of Florida, 2011; Government Attorney, West Palm Beach.



Melanie Loretta Campbell - Edison, NJ; St. Thomas University, 2007; Associate in Rosenbaum Mollengarden, PLLC, West Palm Beach.

David S. Coleman - New York, NY; University Miami, 2011; Associate in Cole Scott & Kissane, P.A., West Palm Beach.

Alexander Czebiniak - Binghamton, NY; Florida State University, 2010; Government Attorney, Office of the State Attorney, Palm Beach County

Elizabeth Kayla Ehrlich - Brookline, MA; Boston College, 2006; Associate in Jones Foster Johnston & Stubbs, West Palm Beach.

Bradley Austin Fishberger - New York, NY; University of Miami, 2010; Associate in Cole Scott & Kissane, P.A., West Palm Beach.

Deborah P. Fitzgerald - Germany; University of Kentucky, 1979; Partner in Walton, Lantaff, Schroeder & Carson, Ft. Lauderdale.

Dana Fortugno - PA; Widener University, 1996; Sole Practitioner in Fortugno Law Office, West Palm Beach.

Jeffrey Galvan - Houston, TX; University of Arkansas, 2002; Partner in Galvan Messick, LLP., Boca Raton.

Allen Glass - Detroit College of Law, 1976; Sole Practitioner in Glass Law Group, P.A., Delray Beach.

Jeffrey William Hurcomb - Bridgeport, CT; University of Florida, 2008; Associate in Roberts, Reynolds, Bedard & Tuzzio, PLLC, West Palm Beach.

Sean Ingram - Panama Canal Zone; University of Richmond, 1999; Associate in Novak Druce & Quigg, LLP, West Palm Beach.

Michael Ryan Kassower - Coral Springs, FL; University of Florida, 2010; Associate in Cole Scott & Kissane, P.A., West Palm Beach.

Asami Kaye - Angeles City, Philippines; New England Law School, 2007; Sole Practitioner, West Palm Beach.

Angela Klemack - Columbus, Ohio; Syracuse University, 2009; Associate Duane Morris, LLP, Boca Raton.

Eldred Vernon Loftin - Fayetteville, N.C.; Florida Coastal University, 2001; Associate in McGrath Gibson, West Palm Beach.

Hillary Lovelady - WI; University of Baltimore, 2011; Associate in C. Deborah Bain, P.A., Jupiter.

Daniel Marshall - Indiana, PA; University of Connecticut, 2002; Partner Marshall & Berry, P.A., West Palm Beach.

Paul McMahon - Chillicothe, OH; University of Toledo, 1987; Partner in Cushnie & McMahon, P.L., Port St. Lucie.



Robert Saburo Miyashita - Honolulu, Hawaii; Florida Coastal College of Law, 2009; Associate in Romano Law Group, P.A., Lake Worth.

Jennifer Miller - Morse-Stamford, CT; Harvard Law School, 1991; Sole Practitioner, Delray Beach.

Michelle L. Nichols - Ft. Lauderdale, FL; Nova Southeastern University, Law Student Membership; Davie.

Elizabeth Patipa - West Palm Beach, FL; St. Thomas University, 2011; Associated with TLO, Boca Raton.

Elizabeth Peskin - Long Beach, CA; Tulane University, 2004; Associate in Rudolph & Associates, LLP, West Palm Beach.

Keith Pierro; University of Miami, 2005; Associate in Gold & Gold, P.A., Boca Raton.

Ashley Poulter - Hollywood, FL; University of Florida, 2010; Associate in Michael P. Walsh, P.A., West Palm Beach.

Amy S. Price - Des Moines, IA; University of Miami, 2011; Associate in McHale & Slavin, P.A., Palm Beach Gardens.

Casey Reiter - Gainesville, FL; Nova Southeastern University, 2010; Associate in Stuart R. Manoff & Associates, P.A., West Palm Beach.

Elizabeth D. Ross - Ft. Lauderdale, FL; University of Florida, 1985; Government Attorney with South Florida Water Management District, West Palm Beach.

Jeffrey Royer, Akron, Ohio; Northern Kentucky University, 1984; Sole Practitioner in J.T. Royer & Associates, LLC, West Palm Beach.

Daniel Schwarz - Plantation, FL; University of Miami, 2011; Government Attorney, Fourth District Court of Appeal, West Palm Beach.

Yana Shaw - Russia; Nova Southeastern University, 2009; Sole Practitioner in The Law Offices of Yana Shaw, P.A., Boca Raton.

Stefanie T. Silverman - Miami, FL; University of Florida, 2010; Associate in Cole, Scott & Kissane, West Palm Beach.

Jaclyn Soroka - Sarasota, FL; Florida International University, 2009; Associate in Rudolph & Associates, LLP, West Palm Beach.

Geoff Stahl - Chattanooga, TN; St Thomas University, 2010; Associate in Liggio Benrubi, P.A., West Palm Beach.

Samuel Stern - Fordham University, 2008; Government Attorney, Office of the State Attorney, Palm Beach County.

Alan St. Louis - Florida; Nova Southeastern University, 2009; Associate in Cole, Scott & Kissane, P.A., West Palm Beach.

Drew Stoller - New Kensington, PA; Nova Southeastern University, 1998; Partner in Roig, Tutan, Rosenberg, Martin and Stoller, P.A., Deerfield Beach.

Noah E. Storch - New York; Nova Southeastern University, 2010; Associate in Cole, Scott & Kissane, P.A., West Palm Beach.

Jared Ullman - Pace Law School, 2009; Associate in Ullman & Ullman, P.A., Boca Raton.

William J. Vericker - Summit, NJ; The Catholic University of America, 2001; Associate in Cole, Scott & Kissane, P.A., West Palm Beach.

Stephen E. Walker - Boynton Beach, FL; University of Florida, 2001; Associate in Burman Critton, Luttie & Coleman, West Palm Beach.

Nicole Michelle Wall - Baltimore, MD; Stetson University, 2005; Associate in Cole, Scott & Kissane, P.A., West Palm Beach.

Jeri Fickes West; Florida Registered Paralegal Membership, Palm Beach County Courthouse, West Palm Beach.

Jeffrey Joseph Wolfe - Providence, RI; Syracuse University, 1997; Associate in Rutherford Mulhall, P.A., Boca Raton.





Stripping Off Wholly Unsecured Mortgages in Chapter 7

By Marc P. Barmat

On May 11, 2012, the Eleventh Circuit Court of Appeals issued an unpublished opinion which will significantly change the local bankruptcy practice as it relates stripping off wholly unsecured mortgages. See, McNeal v. GMAC Mortgage LLC et al., Case No. 11-11352 (11th Cir. 2012). Prior to this recent Eleventh Circuit opinion, it was commonly understood that wholly unsecured mortgages could not be stripped off in a chapter 7 bankruptcy (although they could be stripped off in a chapter 13). This “understanding” was based in large part on the United States Supreme Court’s decision in Dewsnup v. Timm, 112 S. Ct. 773 (1992) which held that a chapter 7 debtor could not “strip down” a *partially* secured lien under 11 U.S.C. 506(d)¹.

¹ §506(d) provides: To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless—
(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

In McNeal, the debtor sought to “strip off” a second mortgage which was wholly unsecured, i.e., the amount of her first mortgage exceeded the value of her home. The bankruptcy court denied the debtor’s request and the district court affirmed. On appeal to the Eleventh Circuit, it was undisputed that the second mortgage was both an allowed claim pursuant 11 U.S.C. §502 and wholly unsecured pursuant to 11 U.S.C. § 506(a). In determining whether the second mortgage was voidable, the Eleventh Circuit looked to 11 U.S.C. § 506(d). In its analysis, the Eleventh Circuit recognized that several courts interpreted the Supreme Court’s Dewsnup decision to also preclude a chapter 7 debtor from “stripping off” a *wholly* unsecured junior lien. Notwithstanding the other court’s decisions, the Eleventh Circuit found that the controlling precedent, in the Eleventh Circuit, remains its prior decision in Folendore v. United States Small Bus. Admin., 862 F.2d 1537 (11th Cir. 1989). In Folendore, the Court concluded that an allowed claim

that was wholly unsecured was voidable under the plain language of 11 U.S.C. 506(d). In McNeal, the Court disagreed with the few bankruptcy courts within the Eleventh Circuit which treated Folendore as abrogated by Dewsnup, and noted the Supreme Court’s limitation in Dewsnup to the precise issue raised by the facts of that case.

The McNeal decision will significantly impact a debtor’s decision on whether to file a chapter 7 or chapter 13 bankruptcy. Until now, it was common practice for a debtor to choose to file a chapter 13 (as opposed to a chapter 7) for the sole purpose of stripping off wholly unsecured junior lien(s). However, now, as a result of the McNeal decision, debtors may choose to strip off wholly unsecured liens in a chapter 7 and avoid making plan payments over 5 years as necessary in a chapter 13.

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

June 2012 Summary

Continued from page 11

Freeman v. Quicken Loans, Inc., — U.S. —, 132 S.Ct. 2034 (2012).

A plaintiff seeking to establish a RESPA “fee splitting” violation under 12 U.S.C. § 2607 (b) must demonstrate a charge for settlement services was divided between two or more people; RESPA does not prohibit a single provider’s retention of an unearned fee.

Rissman, Barrett, Hurt, Donahue & McClain, P.A. v. Westport Ins. Corp., Slip Copy, 2012 WL 1889410 (11th Cir. 2012).

An attorney acting as an unlicensed broker in a real estate transaction is not covered by his law firm’s malpractice policy if he is sued by a participant in the transaction.

A weekly version of the Update can be received by sending an email to mfarach@richmangreer.com and writing “Request Weekly Update in the subject line.”



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New Attorney Professionalism Breakfast

In an effort to reach out to newly admitted attorneys practicing in Palm Beach County, the Palm Beach County Bar Association's Professionalism Committee, co-chaired by Chief Judge Peter Blanc, D. Culver Smith III and Carolyn Bell, held its inaugural "New Attorney Breakfast" on May 17, 2012 at the Palm Beach County Courthouse. Following opening remarks by Chief Judge Blanc, the administrative judges of the court's various divisions each spoke to the group of over 75 newly admitted Palm Beach County attorneys about the importance of building and maintaining their reputations and the "Do's and Don't's" of practicing in the various divisions. Florida Supreme Court Justice Jorge Labarga also addressed the group and discussed the rise of ethical violations occurring amongst members of The Florida Bar. D. Culver Smith III reviewed the Palm Beach County Bar Association's Standards of Professionalism which standards were adopted and approved by the judges of Palm Beach County and the Fifteenth Judicial Circuit.

In addition to the six administrative judges, many other civil, criminal and family judges attended the event. Eleven different local bar associations, along with the Palm Beach Legal Aid Society and Sharon Bock, Clerk of Court, had the opportunity to pass out information and speak with the new attorneys and encourage them to participate in the local legal community. The morning's event concluded with a tour of the courthouse. In an effort to provide a resource for those attorneys who may not have anyone to turn to for guidance and advice, the subcommittee on New Attorney Outreach, chaired by Amy Borman, will match up experienced attorneys in the community with those new attorneys in attendance.



Holland & Knight partner **William Shepherd** traveled in early May to Camp Justice, Guantánamo Bay, Cuba where he served as the American Bar Association's trial observer for the arraignment of Khalid Sheik Mohammed and his four co-defendants before the 9/11 Military Commission. The five defendants are charged with planning the 9/11 terrorist attacks. The Department of Defense approved five civilian observers to attend along with international media and 9/11 family members. Given Bill's criminal trial experience, and his role as Chair-Elect of the ABA's Criminal Justice Section, the DoD approved Bill's selection for this historic event.



Professionalism Committee Co-Chairs Skip Smith, Carolyn Bell & Chief Judge Peter Blanc



County Criminal Administrative Judge August Bonavita speaks as FL Supreme Court Justice Jorge Labarga looks on



Committee Member Sarah Shullman helps out with registration



Among some of the legal organizations represented were Jessica Callow Mason from the Inns of Court; Nicole Hessen and Adriana Gonzalez from the Hispanic Bar Association; Bob Bertisch from the Legal Aid Society



Family Law Administrative Judge Thomas Barkdull speaks to a full house of newly admitted attorneys

Pomeranian Pandemonium

~ and other poems ~

Wallace B. McCall
"Poet Lawreate"

Wally McCall
"Poet Lawreate"

Has Published his Second Collection of Poetry
Now Available on Amazon.com



Accident Report Privilege Regarding Witnesses

by Ted Babbitt

Sottilaro v. Figueroa, 37 Fla. L. Weekly D330 (Fla. 2nd DCA 2012) was an automobile pedestrian wrongful death action in which the 14 year old plaintiff's

decedent crossed a U.S. 27 major four lane highway with several of his friends. After reaching the median and attempting to cross the southbound lane, he was struck and killed by the defendant who, from the only available evidence, was traveling within the speed limit. At the scene of the accident a Deputy Sheriff took statements from the teenage friends of plaintiff's decedent as part of his traffic fatality investigation report. The witnesses all told him that the decedent was looking down at his phone and texting while crossing the highway and was not paying attention to oncoming traffic.

During depositions and eventually at trial, the witnesses denied knowing whether plaintiff's decedent was texting or not and the defendant sought to impeach these witnesses with the statements given to the police officer. The trial court, relying upon Williams v. Scott, 153 So. 2d 18 (Fla. 2d DCA 1963) declined to allow defense counsel to utilize the statements citing Fla. Stat. 316.066(5), the accident report privilege statute. That statute states the following:

Except as specified in this subsection, each crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report required by this section shall be without prejudice to the individual so reporting. No such report or statement shall be used as evidence in any trial, civil or criminal. However, subject to the applicable rules of evidence, a law enforcement officer at a criminal trial may testify as to any statement made to the officer by the person involved in the crash if that person's privilege against self-incrimination is not violated.

In Williams, supra, the issue concerned a statement given by a pedestrian who was struck by the defendant. The police officer testified that he had the impression that the pedestrian did not know what the color of the light was. The Second District, based upon the above-quoted statute, concluded that the statements of the pedestrian/plaintiff were privileged and, therefore, inadmissible. At 19-20, the Court held:

...we think his statements come within the protective cloak of § 317.17 F.S.A. The latter section, as previously noted, provides that '[a]ll accident reports made by persons involved in accidents shall be without prejudice to the individual so reporting...' (emphasis added)[.] This language does not restrict immunity to those who are required to report, and we are unable to read such restriction into the section by reference to other sections. (Emphasis added by the Court.)

Clearly the Second District in Williams recognized that the pedestrian had no responsibility under the statute to give a statement to the police officer but nevertheless held that that statement, once given, became privileged.

In Sottilaro, supra, the distinguishing feature was that the persons making the statement were not directly involved in the accident but rather eye witnesses to the accident. This distinction caused the Second District to make a 180° turn and conclude that the statements of the witnesses were not covered by the statute and were thus not privileged nor inadmissible.

The opinion in Sottilaro, supra, relies heavily on the fact that the witnesses were not required to give a statement to the police officer and that since the purpose of the statute is to preclude the invasion of the constitutionally protected right against self-incrimination, only those persons actually involved in the accident enjoy the privilege.

The Second District relies on McTevia v. Schrag, 446 So. 2d 1183 (Fla. 4th DCA 1984). In that case a witness who was a friend of the plaintiffs was following the plaintiffs in his car. At the time of the accident, the witness told the investigating officer that he did not witness the accident but two weeks later reversed his statement and claimed to be a witness to the accident. The Fourth District affirmed the trial court allowing the prior statement of the witness to be used as impeachment, stating that the accident report privilege only applied to those required to make a report and not to witnesses who volunteer information. The Fourth District gave as its reasoning that only persons who were required to make a report under the statute enjoyed a constitutional privilege against self-incrimination.

The McTevia case seems to fly in the face of the decision of the Second District in Williams but the Second District somewhat muddied the waters by not withdrawing the Williams opinion and instead concluding that because a pedestrian and a motorist involved in an accident both have the same standard of reasonable care, they are presumptively entitled to the same reciprocal rights and immunities when they become litigants so that allowing the pedestrian's statement to an officer into evidence while excluding the driver's statement would be unreasonable.

In Sottilaro, the Second District relies upon Brackin v. Boles, 452 So. 2d 540, 544 (Fla. 1984) in which the Supreme Court at 544 states:

We clearly and emphatically hold that the purpose of the statute is to clothe with statutory immunity only such statements and communications as the driver, owner, or occupant of a vehicle is compelled to make in order to comply with his or her statutory duty under section 316.066(1) and (2).

The Second District's conclusion that the plaintiff's decedent's friends who were witnesses and, therefore, not drivers, owners or occupants of the vehicle and thus not entitled to statutory immunity is supported by the Supreme Court opinion in Brackin, supra. While Williams, supra, would amend the Supreme Court's Brackin opinion by adding the word "pedestrian" to driver, owner or occupant, it is nevertheless clear that the compelling weight of authority supports the Second District's opinion in Sottilaro that witnesses who are not required to make statements utilized in an accident report are also not entitled to statutory immunity. There is no Fifth Amendment right against self-incrimination that is violated by such a holding and thus the very purpose of the statute supports that decision.

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.

Rule 1.330(a): Use of Depositions

By Matt Triggs and Jonathan Galler

The rules of civil procedure are essentially a collection of vehicles made readily available to litigators for the purpose of getting them safely to their legal destinations. Some rules, like those governing motions for dismissal and summary judgment, are vehicles with obvious popularity and muscle. Others, like Rule 1.330(a), are a bit less flashy but can be surprisingly powerful in their own right.

Rule 1.330(a) governs the conditions under which a deposition may be used at a hearing or trial against a party who was present or represented at the deposition or had reasonable notice of the deposition. The rule addresses three broad categories: the use of a deposition to impeach a witness who has appeared and testified; the use of the deposition of a party; and the use of the deposition of a party or non-party who is unavailable to attend the trial or hearing.

At issue in the recent case of *Bank of Montreal v. Estate of Antoine* was the use of the deposition of a witness who was dead and, thus, unavailable for attendance at trial. 2012 WL 1605248 (Fla. 4th DCA May 9, 2012). The trial court did not permit the use of the deposition at trial because the witness died before the completion of his deposition and before he was even cross-examined by the party against whom the deposition was to be used at trial.

But the Fourth District reversed the trial court's decision and, in so doing, illustrated the horsepower, so to speak, of Rule 1.330(a). In particular, Rule 1.330(a)(3)(A) provides that "[t]he deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is dead." The Fourth District concluded that the litigants should have been permitted to use that rule to drive right over two otherwise significant hurdles to the admissibility of the deposition.

The Hearsay Hurdle

By its own terms, Rule 1.330 allows the use of a deposition only if the testimony contained therein is otherwise admissible under the rules of evidence. And, as the Fourth District acknowledged, the deposition testimony at issue qualified as hearsay. Moreover, the "Former Testimony" exception to the hearsay rule, codified at section 90.804(2)(a), Florida Statutes, was inapplicable because it requires that the declarant be unavailable and that "the party against whom the testimony is now offered... had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

Citing, however, to *Dinter v. Brewer*, 420 So. 2d 932, 934 (Fla. 3d DCA 1982), the Fourth District wrote: "Hearsay which is inadmissible because it does not satisfy the provisions of the former testimony rule will still be admissible if it satisfies the provisions of Rule 1.330." In other words, it turns out that Rule 1.330 a rule of civil procedure is itself an exception to the hearsay rule. As the *Dinter* court put it, Rule 1.330 "eliminates the threshold hearsay objection based on the deponent's absence from the court and is, in this respect, a rule of evidence."

Dinter, 420 So. 2d at 934 n.1. See also Charles W. Ehrhardt, *Florida Evidence* § 802.1 (2012 ed.) (stating that the Florida Supreme Court has provided in some instances, such as Rule 1.330, for the admission of hearsay testimony).

The Florida Supreme Court has even described the Rules of Civil Procedure as the first place to look for the exception to the rule excluding depositions as hearsay. "It is generally accepted that when an exception to the rule excluding depositions as

hearsay is not found in the Rules of Civil Procedure, the evidence code may provide such an exception in a civil proceeding." *Rodriguez v. State*, 609 So. 2d 493, 498 (Fla. 1992) (distinguishing the use of depositions in civil and criminal proceedings).¹

Rule 1.330, therefore, provides a hearsay exception for the admissibility of depositions, and the provisions of the evidence code "expand the admissibility of depositions... but do not limit admissibility as provided for in the rule of civil procedure." *Dinter*, 420 So. 2d at 934 (internal brackets omitted).

The Due Process Hurdle

The Fourth District in *Bank of Montreal* also held that Rule 1.330 is a powerful enough vehicle to overcome even the due process concerns associated with allowing a deposition to be used against a party who never had an opportunity to cross-examine the witness. [W]e find it desirable to adhere to the Florida Rules of Civil Procedure, in this case rule 1.330. *Bank of Montreal*, 2012 WL 1605248, at *2. Specifically, the court found that the rule and its federal counterpart, Rule 26(d)(3), both serve the same objective: "the admission of the deposition of a witness who is now dead, even before completion of cross-examination." *Id.*

Citing a variety of legal commentators, as well as cases from several jurisdictions, including New York and Massachusetts cases dating back to the 19th century, the Fourth District emphasized its reluctance to allow direct testimony to go to waste. "No matter how valuable cross-examination may be, common sense tells us that the half-loaf of direct testimony is better than no bread at all." *Id.* at *3 (citing 1 McCormick, Evidence § 19 (6th ed. 2006)).

The Fourth District concluded that the trial court should decline to follow Rule 1.330 only where the party moving to exclude the deposition demonstrates that the loss of his or her opportunity to cross-examine the witness was a "material loss" or was caused by the witness through postponement or other deliberate interruption. In the case at issue, the court found that the benefit that supposedly would have been gained from cross-examining the witness was speculative and unlikely to have elicited anything of importance a conclusion which, thankfully for the lawyer involved, appears to have been a commentary on the facts of the case, rather than the lawyer's anticipated cross-examination skills! The court reversed the trial court's refusal to allow the use of the deposition at trial.

Although the specific fact pattern in *Bank of Montreal* is unusual, the holding of the case reveals that Rule 1.330 is a particularly effective vehicle for presenting depositions at trial in the face of what might otherwise seem like substantial evidentiary and procedural hurdles.

Matt Triggs is the head of the litigation department of Proskauer Rose LLP in Boca Raton. Jonathan Galler is a senior associate in the department. Both concentrate their practices in commercial and probate litigation.

¹ The power of Rule 1.330 to overcome hurdles like hearsay may be limited, however, to trials or hearings in the same judicial proceeding in which the deposition at issue was taken. See *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 259 (Fla. 1st DCA 1984).



Elizabeth Smart shares her story during Law Day Luncheon

You could hear a pin drop as Elizabeth Smart told her story of being kidnapped at age 14 by a man claimed God had commanded him to do. She was held captive for nine months. Elizabeth and her father formed the Elizabeth Smart Foundation, a children's rights organization that arranges to have self-defense taught in elementary schools. Elizabeth is a remarkable young lady whose story is about inspiration and overcoming extreme adversity by not allowing your past to dictate your future.



Pictured with guest speaker Elizabeth Smart (center) Law Week co-chairs Tanique Lee and Maureen Martinez



Mark and Wendy Murnan



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Law Week Highlights – Thank You Volunteers!



More than 40 members participated in either a mock trial or were guest speakers in schools throughout the county. In this picture, attorney Elizabeth Berkowitz coaches student Maya Rosenberg during the Arthur I. Meyer Jewish Academy's 7th grade mock trial. The student jury can be seen in the background.



Dial-A-Lawyer was held for three full days. Attorney Steven Rubin volunteered several hours answering calls and helping the public.



Judge Lisa Small and Judge Nancy Perez were among several hundred members attending our Annual Judicial Reception at the Harriett in West Palm Beach.



Judge's Team in our annual Lawyer vs Judges softball game.



Attorneys' Team, which won again this year with a score of 18-17.

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Matthew Schwencke

J.D., Stetson University
College of Law
Experience as defense attorney
in healthcare-related
litigation, represents victims of
catastrophic personal injury,
wrongful death, and
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Donald J. Ward III

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Lawyers in the Cloud – Can You Trust Online Storage?

By Christopher B. Hopkins

Law firms, like other businesses, suffer from data storage burdens and they struggle with the need to access files remotely. Often lawyers cannot send or receive large email attachments due to size restrictions. Increasingly, the solution rests in third party “cloud” storage providers. It could be a private cloud, where your entire system is hosted online, or a public cloud, such as Dropbox, which helps lawyers send or remotely access a subset of their files. The risk, however, is that cloud storage is an emerging technology with unclear legal and ethical boundaries.

In March 2012, the Fraunhofer Institute reported its study of the security methods of several cloud providers (bit.ly/M0Rvdu). Fraunhofer is likely an unfamiliar name but it is a massive, well-respected German research society which created, among other things, the MP3 file format. Ironically, the study results are limited since (a) they examined only seven cloud providers, (b) there was no clear winner, and (c) any cloud updates after the study changes the results. Instead, the study raises awareness of the points where danger can arise. Here are some initial considerations before you leap into the cloud.

Is the “cloud” inherently dangerous?

Lawyers often think of security in terms of preserving a client’s confidentiality. Some lawyers fear that email is unsecure but common business practices have galvanized the acceptance of email. The legal concept of “confidentiality” rests on the notion that third parties have been excluded. Leaving files with a third party requires some steps before confidentiality is achieved. Law firms rely on third party shipping and storage companies in the physical world; simply because we do so in the virtual world should not be cause for blind panic.

Reasonable concern, however, arises from the fact that digital transmission and storage of confidential information involves numerous third parties, known and unknown, as files travel over wifi or cell networks, through ISPs and email services, and across the various intermediary nodes of the internet. Before using a cloud service, lawyers need to ask what security is used during transmission and storage; if you do not understand the terminology, use a Google search to see how the IT community views the proposed security methods. Despite a cavalcade of news stories about hackers, data loss, and downtime, the general consensus is that responsible cloud computing is reasonably secure.

Where is your cloud located?

We call it a “cloud” but your data is stored terrestrially, somewhere. Consideration should be given to whether your data is stored domestically or internationally. If your provider is outside of the U.S., be aware of export laws,

application of non-U.S. laws, seizure by foreign governments, and enforcement of your contract rights (to say nothing of slow latency in your internet connection). Inside the U.S., providers are subject to the Patriot Act but you also have Fourth Amendment rights. There are jurisdictional considerations – will the location of your cloud-stored data create a “presence” where you do not want one? Also, what happens if the cloud provider’s servers are seized due to the actions of another client? Some redundancies, beyond a single cloud, may be in order. Finally, even with redundancies, make sure that a single natural disaster (e.g., a hurricane in Florida) does not risk both your cloud and your local data.

Trust... but verify

When storing data with a third party, you should consider encrypting your files. First, make sure that the connection between you and the cloud is secure through HTTPS or some other transport layer security. Second, ensure that the cloud stores your files in an encrypted format. Encryption can be done before data is transmitted to the cloud (“client-side” encryption) and/or upon arrival in the cloud (“server-side” encryption). Either way, there is the risk that the client (you) might lose your password or fail to limit access. With server-side encryption, there is the concern that a third party (malicious or not) has access to your data and that you may lose control of once-encrypted data if your provider receives a formal demand for access to your data. To this end, client-side encryption may be preferred.

File sharing risks

Often you need to send a large file via email but your system, or the recipient’s, declines a file over a certain size. The workaround is to use a cloud to store the file and then you simply email the file’s URL address. Using DropBox, for example, you can open specific files so that others have access.

If your cloud has this service, make sure that the file’s URL address does not contain information about you or the filing structure which might betray hints about other data (Fraunhofer recommends that the cloud generate a “unique identifier” in the URL). There should be a time-limit to how long it is accessible and the cloud provider should ensure that the file is not so public that it can be indexed by Google.

Recommendations

Digital file retention requires reasonable precautions and redundancies. For cloud storage: (a) keep a reasonably up-to-date secondary backup in a separate location, (b) consider client-side encryption before your data is sent, and (c) ensure responsible password and access protocols are followed at your firm.

Christopher Hopkins is shareholder at Akerman Senterfitt. Feel free to pierce through the wispy clouds of the node-ridden internet with an unencrypted communiqué to [christopher.hopkins@akerman.com](mailto:hopkins@akerman.com).

The Law Firm of Lytal, Reiter, Smith, Ivey & Fronrath
is proud to announce

Yvette M. Trelles, Esq.
has joined our firm.



ytrelles@foryourrights.com

Yvette M. Trelles will concentrate her practice in the areas of automobile accidents, premises liability and wrongful death. Ms. Trelles began her career at Lytal and Reiter in 1992. She then went on to open her own boutique personal injury firm where she had been practicing for the past twelve years. We are excited to welcome Yvette and her clients back to our firm.

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Lawyers for Literacy invites you to attend an open house at Learning Ally (formerly RFB&D)

Learning Ally is a recording studio on Florida Atlantic University's Boca Raton campus dedicated to digitally recording textbooks and literature for K-12, college and graduate students. These recordings are for those who cannot read print due to blindness, visual impairment, dyslexia or other learning disabilities. They rely on volunteer readers to help them with their mission.

On Wednesday, September 19, 2012 from 6:00PM to 8:00PM Learning Ally will open its doors to Lawyers who want to learn more about their organization. There will be a tour of the studio and light refreshments. If you want to try your hand and voice at recording, there will be volunteers available to lead you through the process. If you have teenage children that need volunteer hours, they may want to come along.

Last year, the Lawyers for Literacy Committee had a wonderful time learning and experiencing how important this studio is. This year we are inviting you!

Please RSVP by contacting Rita at Rita@markgreenberglaw.com. We will need your name, cell phone, work phone, and e-mail address.



Peggy Wood reading on tape during a Bar event in 2010

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North County Section honors Judge Alvarez

The North County Section recently honored Judge Ronald Alvarez with its 10th annual Jurist of the Year award. The program was held at Ruth's Chris Steak House in North Palm Beach and included more than 30 local judges and 100 members.



Accepting the award on behalf of Judge Alvarez who was unable to attend was his wife Elaine - pictured with Ron Ponzoli



Judges Krista Marx, Joe Marx and Sandra McSorley



Bob Bertisch and Judge Carole Taylor

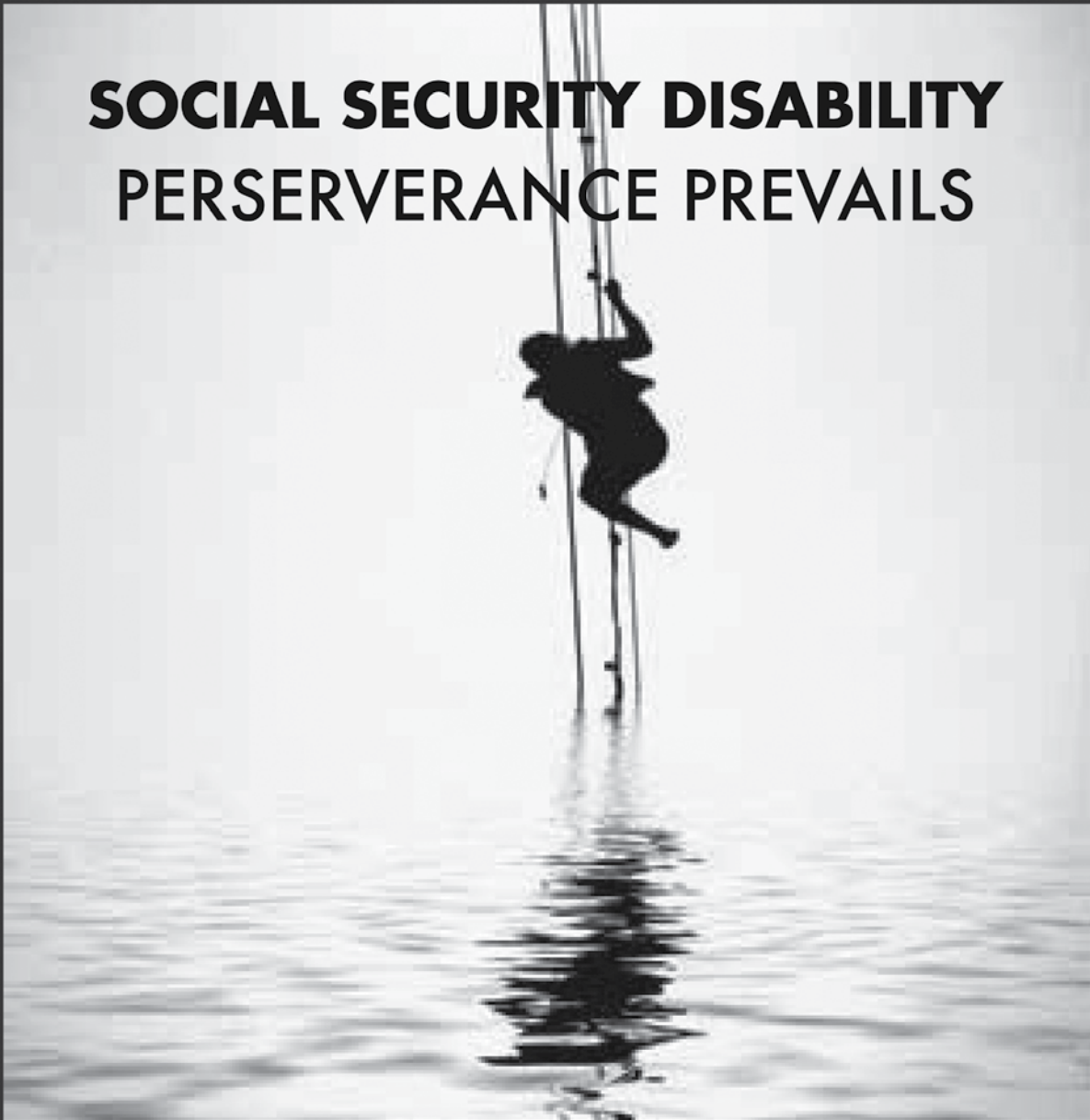


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HEARSAY

The Law Offices of Craig Goldenfarb is pleased to announce that **Anthony Goodman** has joined the firm as a litigator.



Manuel Farach, Of Counsel with the law firm of Richman Greer, P.A., has been named Chairman of the Palm Beach County Commission on Ethics, which enforces the Palm Beach County Code of Ethics.



Hicks, Motto & Ehrlich, P.A. is pleased to announce that **Carl J. Ward** and **Daniel L. Franks** has joined the firm as Associate attorneys and **John W. Carroll** has become Of Counsel to the firm.

Rutherford Mulhall, P.A. is pleased to announce that **Jeffrey J. Wolfe** and **David J. Kim** have recently joined RM in their Boca Raton office.



Gunster is pleased to announce that associate **Daniel Glassman** has been elected to the Board of Directors of the East Coast Estate Planning Council (ECEPC).

Shutts & Bowen, LLP is pleased to announce the West Palm Beach office hiring of **Rikki Lober Bagatell** as a partner.



Leora B. Freire, an associate with Richman Greer, P.A. has been elected President of the Palm Beach County Chapter of the Florida Association of Women Lawyers (FAWL).

Florida Bar Board Certified Business Litigation attorney **David Steinfeld** has been named as a Fellow in the national trial lawyer honor society Litigation Counsel of America.



Lewis, Longman & Walker is pleased to welcome **Scott R. Haft** as an associate in its West Palm Beach Office.

Jones, Foster, Johnston & Stubbs, P.A. announces **Christopher B. Cortez** has been elected to the Board of Governors for Leadership Palm Beach County, **Joanne M. O'Connor** has been elected to the Duke University Alumni Association Board of Directors, and **Carlos J. Berrocal** has joined the Susan G. Komen for the Cure South Florida Board of Directors.



Lesser, Lesser, Landy & Smith, PLLC (LL&S) attorney **Luis J. Delgado** has been inducted as Treasurer of the Palm Beach County Bar Association's Young Lawyers Section (YLS).



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CALENDAR

July/August 2012

<p>Tuesday, July 17, 11:45am – 1:00pm Unified Family Practice Committee Meeting Law Library, Main Courthouse</p>	<p>Wednesday, August 8, Noon – 1:00pm Professionalism Committee Meeting</p>	<p>Thursday, August 23, 6:30pm – 8:00pm Small Claims Seminar West Boynton Branch Library</p>	<p>Thursday, August 30, 6:00pm – 8:00pm PBJA Barrister's Bash Location TBD</p>
<p>Wednesday, July 25 – 28 Florida Bar Board of Governors Meeting Miami Beach</p>	<p>Thursday, August 9, 5:30pm – 7:00pm YLS Happy Hour w/Federal Bar Ruth's Chris at City Place</p>	<p>Friday, August 24, Noon – 1:00pm President's Council Meeting Bar Association Office</p>	<p>Friday, August 31, Noon – 4:00pm Legal Aid Training Bar Association Office</p>
<p>Wednesday, August 1, Noon – 12:30pm NCS Board Meeting</p>	<p>Tuesday, August 21, 11:45am – 1:00pm Unified Family Practice Committee Meeting Law Library, Main Courthouse</p>	<p>Tuesday, August 28, 11:00am – Noon Committee Chair Meeting Bar Association Office</p>	
<p>Monday, August 6, Noon – 1:30pm Hispanic Bar Association Justice Labarga Award Luncheon Kravis Center</p>	<p>Tuesday, August 21, 5:30pm – 6:30pm Legal Aid Board Meeting Bar Association Office</p>	<p>Wednesday, August 29, 5:00pm – 7:00pm PBCBA Board of Directors Meeting</p>	