



PALM BEACH COUNTY BAR ASSOCIATION

BULLE^TIN

www.palmbeachbar.org

July/August 2013

Florida Bar President to Speak September 27



Florida Bar President Gene Pettis will be the keynote speaker during our annual Diversity Luncheon on Friday, September 27 at the Marriott in West Palm

Beach. Pettis is co-founder of Haliczzer Pettis & Schwamm, a Ft. Lauderdale firm, where he focuses his practice in the areas of medical malpractice, personal injury, commercial litigation and employment law. Pettis is the first African-American in the Bar's history to serve in the position of President. Join us for this special luncheon where we will also recognize outgoing Chief Judge Peter Blanc for his dedication and commitment to the 15th Circuit and welcome incoming Chief Judge Jeffrey Colbath. This luncheon is expected to be sold out. Be sure to save your seat by registering online at www.palmbeachbar.org



Mark your calendar for upcoming Membership Events

September 19: Third Annual Membership Speed Networking Event

September 27: Diversity Luncheon with Guest Speaker Florida Bar President-elect Eugene Pettis

October 26: Family Day at Dreher Park Zoo

December 5: Annual Holiday Party and Silent Auction

March 7, 2014: Bench Bar Conference

Presenting Your Board of Directors for 2013 - 2014



Congratulations to Jill Weiss who was recently sworn in as the Bar Association's 91st President during the Installation Banquet at the Breakers Hotel in Palm Beach. More than 425 guests attended the event honoring Jill and our Board of Directors. Sponsors included Sabadell United Bank; Searcy Denney Scarola Barnhart & Shipley; Sachs Sax Caplan; Daily Business Review; Daszkal Bolton; Northwestern Mutual; Pressly & Pressly, P.A.; Fox Rothschild, LLP; Joel M. Weissman P.A. and Visual Evidence.

Front row: Theodore Kypreos, president elect; Jill Weiss, president and Adam Rabin, immediate past president

Standing left to right: Julia Wyda, YLS president; Greg Huber, director; Lee McElroy, director; Grier Pressly, director; John Whittles, director; Sia Baker Barnes, director; Todd Stewart, NCS president; Ned Reagan, director, Jessica Callow Mason, director and Dean Xenick, director.

Photo by Tracey Benson

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THE
BULLETIN

PALM BEACH COUNTY
BAR ASSOCIATION

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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



In Memoriam

Joseph R. Lowicky
1956 – 2013

Thomas M. Mettler
1932 - 2013

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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President's Message



Growing a Great Bar Starts with You

By Jill Weiss

So now that I have been installed as the 91st President of the Palm Beach County Bar Association, had fun at the installation dinner, and have selected committee chairs, I am faced with the one task as President that I was dreading...writing a monthly President's message. After multiple attempts at starting this message, it became clear to me that I should write a column on why I joined the PBCBA. We are, after all, one of the best bar associations in the country for what we offer and deliver to our members and the community at large. Even with all that is offered, only 50% of the attorneys practicing in Palm Beach County are members of the PBCBA. Why? Maybe they do not see the value in being a member. So, I thought of a number of reasons why a Palm Beach County attorney should join this organization.

One reason to join the PBCBA – perhaps the best reason - is for the contacts you will make and the friendships you will forge, both personally and professionally. Through our various networking events - YLS happy hours, membership lunches, Bench Bar Conference, Holiday Party, and Judicial Reception to name but a few- members have the opportunity to meet judges, fellow attorneys in the same practice areas, attorneys outside your own practice area, experienced attorneys, baby faced new attorneys, the list is simply limitless. Networking and meeting new contacts will serve to enhance your career and your practice.

A second reason to join the PBCBA is for the programs the PBCBA offers that will advance your practice of law.

The Bar offers Continuing Legal Education seminars across a wide array of subjects including specific practice areas, professionalism and ethics, trial practice and technology. These programs are offered live, by webinar, DVD or are available by download to your iPhone or other smartphone. And if you already “know it all”, you have the opportunity to be a presenter and share what you know with other attorneys.

A third reason is the opportunity to give back to the profession and the community. Having served on a number of Bar committees, I can say without question, that it is a gratifying and rewarding experience. You can make a difference through committee, civic, and philanthropic work. Our members are mentors to other lawyers, and school children. They promote professionalism, literacy and civics education. Our members give countless hours improving the practice of law and the community in Palm Beach County. We do make a difference in many ways.

Now, those are just three reasons important to me to be a member of the Palm Beach County Bar Association, other members can cite other reasons to join. With so much to offer it makes you wonder why a greater percentage of practicing attorneys have not joined and become active in our Bar. So as this Bar year begins, I request you make a conscious effort to identify fellow attorneys that are not members and bring them to a Bar event. Share with them your reasons for being an active member of our Bar. Our members are the PBCBA's very best marketing tool.

Board Meeting Attendance

| | July | Aug | Sept (No Mtg) | Oct | Nov | Dec | Jan | Feb | Mar | Apr | May |
|----------|------|-----|------------------|-------|-----|-----|-------|-----|------|-------|-----|
| Barnes | x | x | | x | x | x | x | x | x | phone | x |
| Bowden | | x | | x | x | x | x | x | | phone | x |
| Howe | x | x | | x | x | x | x | x | x | x | x |
| Huber | x | x | | x | x | | x | x | x | x | x |
| Johnson | x | x | | x | x | x | phone | x | x | x | x |
| Kypreos | x | x | | phone | x | x | x | x | x | x | x |
| Mason | x | x | | x | x | x | x | x | x | x | |
| McElroy | x | x | | x | x | x | x | x | Wyda | x | x |
| Pressly | x | x | | x | x | x | x | x | x | x | x |
| Rabin | x | x | | x | x | x | x | x | x | x | x |
| Reagan | x | x | | x | x | x | x | x | x | x | x |
| Weiss | x | x | | x | x | x | x | x | x | x | x |
| Whittles | x | x | | x | x | x | x | x | x | x | x |

Circuit Court Report CIVIL DIVISIONS • As of June 14, 2013

| DIVISION | JURY TRIALS | NON-JURY TRIALS | MOTIONS | CASES PENDING |
|--------------|-------------|-----------------|---------|---------------|
| AA KELLEY | 11-13 | 11-13 | 07-13 | 1201 |
| AB GILLEN | 10-13 | 10-13 | 07-13 | 1340 |
| AD G. KEYSER | 10-13 | 10-13 | 08-13 | 1475 |
| AE FINE | 01-14 | 01-14 | 07-13 | 1593 |
| AF J. KEYSER | 01-14 | 01-14 | 06-13 | 1268 |
| AG CROW | 01-14 | 10-13 | 08-13 | 1455 |
| AH BROWN | 09-13 | 09-13 | 07-13 | 1309 |
| AI SASSER | 10-13 | 08-13 | 06-13 | 1083 |
| AJ J. MARX | 11-13 | 11-13 | 07-13 | 1214 |
| AN COX | 02-14 | 02-14 | 09-13 | 1503 |
| AO BRUNSON | 09-13 | 09-13 | 06-13 | 1531 |

YLS May Happy Hour



Jessica Callow Mason, 4th DCA Judge Alan Forst, YLS President Julia Wyda, W Mason and YLS President-elect Lindsay Demmery



Darren Ayoub and Paul Shalhoub



Brad Thomasma, Tanique Lee, Jason Gray and Ronald Seymour



Christa McCann and Ann Breeden

15th Judicial Circuit Administrative Orders

www.15thcircuit.com/adminorders

NEW ADMINISTRATIVE ORDERS

2 Series: General Administrative Orders

Administrative Order 2.312 - *Electronic Filing of Documents*. Entered June 17, 2013. Sets for the procedures for the e-filing of original documents, Affidavits, Returns of Service, verified documents, non-conforming documents, emergency matters, signatures, envelopes, confidential information, and addresses matters of multiple cases, pro hac vice appearances and electronic issuance by the Clerk's Office.

4 Series: Criminal Orders

Administrative Order 4.411 - *Alternative Sanctions Program for Felony Offenders*. Entered May 2, 2013. Created the Alternative Sanctions Program for technical felony probation violations.

REVISED ADMINISTRATIVE ORDERS

3 Series: Civil Orders:

Administrative Order 3.301 - *Foreclosure Division "AW"*. Amended June 18, 2013. Modified the paragraph on Continuances of Trials and the paragraph on Defaults.

4 Series: Criminal Orders

Administrative Order 4.101 - *Administrative Procedures in the Criminal Division*. Revised May 29, 2013. Amends certain dates/times for criminal hearings.

Administrative Order 4.502 - *Circuit Criminal Felony Allocation*. Revised May 29, 2013. Sets forth dates/times for hearings in Felony Division "Y" (West County Courthouse).

5 Series: Unified Family Court Orders (Domestic Relations & Juvenile Orders)

Administrative Order 5.101 - *Unified Family Court Jurisdiction*. Revised May 31, 2013. Shifted certain zip codes for the central courthouse to the north county courthouse. Shifted certain zip codes from the south county courthouse to the central courthouse. Added a zip code to the south county courthouse. This applies only to new cases filed AFTER May 31, 2013.

10 Series: Traffic Orders

Administrative Order 10.301 -- *Civil Traffic Infraction Hearing Officer Program*. Revised June 11, 2013. Deleted names of those Traffic Hearing Officers who are no longer part of the program.

11 Series: Internal Policies and Procedures

Administrative Order 11.105 - *Judicial Rotation Policy*. Revised June 6, 2013. Sets forth assignment of cases when a matter has been returned to the trial judge by motion, remand, retrial or return unless the matter is for modification in a family or juvenile case, post judgment issue or if the Chief Judge determines that judicial economy requires otherwise.

Installation Banquet



Judges Krista and Joe Marx



Judges Moses Baker and Timothy McCarthy



Jennifer McCabe, Ryon McCabe, Penny Beers and Mitch Beers

Past Presidents: Judge Meenu Sasser, Jamie Pressly, Richard Schuler, Michael Napoleone, Jerry Beer, Michelle Suskauer, Adam Rabin, Jill Weiss (current president), John Howe, Manny Farach, Scott Hawkins and Jay White. Back Row Michael Walsh, Mike Kranz, Judge Amy Smith and Stan Klett.



Additional pictures can be seen on the Bar's Facebook page.



Judge Lucy Brown and Michael Walsh



Chief Judge Jeffrey Colbath and his wife Maryann



Greg Yaffa, NCS president elect and his wife Julian



Alexandra and Joel Weissman



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The Supreme Court's New "Code for Resolving Professional Complaints"

by *D. Culver Smith III*
On behalf of the Professionalism Committee

On June 6, 2013, the Supreme Court of Florida adopted a "Code for Resolving Professionalism Complaints." *In re Code for Resolving Professionalism Complaints*, No. SC13-688 (Fla. June 6, 2013). This comes at the request of the Supreme Court of Florida Commission on Professionalism, which the Court created in 1996 at the request of The Florida Bar following a task-force report that Florida lawyers' professionalism was in a state of "steep decline." The Court noted that since that time, state and local efforts to enhance professionalism have followed a "passive, academic approach" (CLE programs, etc.) that "has probably had a positive impact toward improving professionalism or at least maintaining the status quo by preventing a further decline." *Id.* slip op. at 2. Nonetheless, the Court agreed with the Commission "that we continue to experience significant problems that are unacceptable," *id.*, and that "further integrated, affirmative, practical and active measures are now needed." *Id.* slip op. at 2-3.

The new code is not a "code of professionalism" per se, rather incorporates by reference certain existing standards of behavior: the Oath of Admission to The Florida Bar, the Florida Bar Creed of Professionalism, the Florida Bar Ideals and Goals of Professionalism, the Rules Regulating The Florida Bar, and the decisions of the Court itself. The first three are easy enough to absorb, but the Rules Regulating The Florida Bar and especially the Court's decisions leave a lawyer with a vast expanse of uncertainty. Nonetheless, this is the first time that the Court has officially adopted the Florida Bar Ideals and Goals of Professionalism and the Florida Bar Creed of Professionalism as standards for professional behavior.

The new code establishes a mechanism for processing complaints of unprofessional conduct that does not necessarily rise to the level of an ethics violation. It calls for such complaints to be screened by The Florida Bar's Attorney Consumer Assistance Program department (ACAP). ACAP currently performs the intake and screening functions for all bar grievances—i.e., the first-line determination whether an ethical violation may have occurred. The code gives ACAP the option of providing remedial guidance or referring the matter to a "local professionalism panel." If ACAP views the complained-of conduct as rising to the level of an ethics violation, it likely will refer the complaint to one of the Bar's disciplinary branch offices for further investigation and processing.

This comes more than twenty years after the Palm Beach County Bar Association adopted Standards of Professional Courtesy that themselves incorporate by reference the Florida Bar Ideals and Goals of Professionalism. Those standards have been endorsed by the judges of the Fifteenth Judicial Circuit by administrative order that created a circuit Professionalism Council for receiving and processing complaints of unprofessional conduct by lawyers practicing in this circuit. The new code does not purport to preempt that process. The Palm Beach County Bar Association Professionalism Committee currently doubles as the local Circuit Committee on Professionalism. By the time this article is published, our chief

judge will have designated the committee or the Professionalism Council as this circuit's Local Professionalism Panel under the new code.

How this new effort by the Supreme Court will play out remains to be seen. Regardless, the Court unequivocally has spoken to unprofessional behavior by Florida lawyers. The Court already has demonstrated a readiness to impose discipline for disruptive, rude, or unprofessional behavior that one otherwise might believe does not rise to the level of an ethics violation. It has done so under the guise of Rule Regulating The Florida Bar 4-8.4(d), which prohibits conduct "prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis." It cites some examples in the new code itself, including *Florida Bar v. Ratiner*, 46 So. 3d 35 (Fla. 2010) (suspension, public reprimand, and probation with conditions), and *Florida Bar v. Martocci*, 791 So. 2d 1074 (Fla. 2001) (public reprimand and probation with conditions). One hopes that the Court's adoption of the Oath of Admission, the Creed of Professionalism, and the Ideals and Goals of Professionalism as "Standards of Professionalism" and creation of a process for resolving professionalism complaints will be seen by Florida lawyers as a warning shot and will further deter unprofessional conduct.

As of this writing, one can find The Florida Bar Ideals and Goals of Professionalism on the Bar's website by clicking on "Professional Practice," then "Henry Latimer Center for Professionalism," then "About the Center," then "Ideals and Goals of Professionalism," and The Creed of Professionalism by clicking on "Professional Practice," then "Henry Latimer Center for Professionalism," then "About the Center," then "Guidelines for Professional Conduct," then "The Creed of Professionalism."

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Celebrity Bartending Event Raises Funds for Victims of Domestic Violence

The F. Malcolm Cunningham Sr. Bar Association recently hosted a celebrity bartending night at the 264 Grill in Palm Beach to benefit Legal Aid. Over \$2,500 was raised, which will be used to provide free legal services to victims of domestic abuse, sexual assault, dating violence and stalking. Chairman of the event was Grasford Smith and the event's sponsor was Prose Legal Video Services. Celebrity bartenders included John Howe, Adam Rabin, Bruce Lewis, Toni Salopek, Daniel Jackson and Keely Gideon-Taylor.

Photos by Tracey Benson



Lynn Solomon and Grasford Smith



Brian and Judge Rosemarie Scher; CBA President Salesia Smith-Gordon and PBCBA President Adam Rabin

Legal Superheroes Receive Their Just Rewards

On Saturday evening, May 18th, over 725 friends and supporters of the Legal Aid Society of Palm Beach County gathered at the Palm Beach County Convention Center to celebrate the achievements of 14 "Superheroes" in our community as well as the many other attorneys and professionals who have provided aid to our clients over the past year. Eight attorneys, one law firm, three community partners, a disaster responder and a theatre teacher from Dreyfoos School of the Arts were honored at the 25th Annual Pro Bono Recognition Evening.

Those honored included:

Abigail Beebe, Esq. - Family Law Award
 Kaleb Bell, Esq. - Bankruptcy Law Award
 Brooks Brothers - Corporate Partner Award
 Ciklin Lubitz Martens & O'Connell - Firm Award
 Kai Li Fouts, Esq. - And Justice For All Award
 Robert Friedman, Esq. - Civil Litigation Award
 Steven N. Glenn - Special Services Award
 Amy Hickman, Esq. - Child Advocacy Award
 Junior League of Boca Raton - Community Service Award
 Garry Q. Lewis - Suzanne Foley "Serving Justice" Award
 Leslie Rose - Emeritus Award
 Gary Woodfield, Esq. - Civil Litigation Award
 Matthew Zimmerman, Esq. - Consumer Law Award
 The Bankruptcy Bar of the Southern District of Florida - Voluntary Bar Association Award

Co-Chairs of the evening were Hampton & Joette Keen and Gary & Jennifer Lesser; Mariano Garcia & Michelle Suskauer were the emcees. Entertainment was provided by Carl Spagnuolo (piano) & Talia Suskauer (vocals).

Photos by Tracey Benson



Pro Bono Winners

(standing, left to right) Jeffrey Devore, Jeffrey Garber, Ellen Norris, Amy Hickman, Abigail Beebe, Bob Bertisch, Kaleb Bell, Robert Crane, Jackie Reeves, Leslie Rose, Garry Q. Lewis, Jennifer Lesser & Gary Lesser (seated, left to right) Kai Li Fouts, Alan Ciklin, Gary Woodfield, Jessica Callow Mason, Robert Friedman, Tina Talarchyk

Pro Bono Attorneys Needed to Help with Guardianship and Guardian Advocacy Cases!

The Legal Aid Society of Palm Beach County has seen a sharp increase in the past few months in requests for attorneys to assist with filing guardianships and guardian advocacys. A great many of the cases involve disabled children reaching the age of majority and adults caring for their aging and incapacitated parents. Due to the increase in requests the Legal Aid Society

has had to institute a wait list for clients seeking these services. As a result we are looking for attorneys to volunteer to represent these low income clients in their efforts to obtain guardianship. Attorneys can volunteer by contacting the Pro Bono Project at the Legal Aid Society directly at 561-655-8944 ext. 235 or kenright@legalaidpbc.org.

THANK YOU VOLUNTEERS!



Adam Rabin and Law Week Keynote Speaker Michael Glazier, a collegiate sports attorney who represents colleges, universities, associations and individuals in NCAA infractions and compliance related matters.



Steven Rubin answers calls during one of the three days of Dial-A-Lawyer



Judge John Phillips and Judge Caroline Shepherd at the Judicial Reception held at the Harriett



Chief Judge Peter Blanc met students and teachers participating in Shadow-A-Judge. Teacher Charles Rawls from Palm Beach Lakes High School is seen wearing the judge's robe and testing its impact on his students while the Chief Judge discussed its meaning and importance.



Law Week Chair Kirsten Herndon kicks off the week live on Channel 12



Elizabeth Berkowitz participates in a Mock Trial at the Arthur I. Meyer Jewish Academy where the students put on the trial in front of an audience of parents and school administrators.



Bradley Biggs cleans out his closet for our Law Suit Day Clothing Drive. We had so many dresses, pants, suits, ties, jackets, shoes and purses that we had to dedicate a room in the office to keep the items. The clothes were donated to The Lords Place and to the Public Defenders Boutique.

Renew your Bar dues today to take advantage of all our benefits!

The Palm Beach County Bar Association's Real Estate CLE Committee presents:



"Important Factors for Every Real Estate Attorney to Consider"

Friday, August 23, 2013 - 8:00a.m. - 12:15p.m.
Bar Association Offices



Program Schedule

- 8:00am - 8:20am **Late Registration/Check In**
- 8:20am - 8:30am **Welcome and Opening Remarks** - *Gregory R. Cohen, Esq., Cohen, Norris, Wolmer, Ray, Telepman & Cohen, Board Certified Real Estate Attorney, Real Estate Committee Chairperson*
- 8:30am - 9:30am **Homestead and Probate** - *Ricardo M. Rivas, Esq., State Underwriting Counsel, Fidelity National Title Group*
- 9:30am - 10:00am **Electronic Recording of Documents with County Recorder** - *Pat Sponem, Sales Account Executive - Florida, Simplifile*
- 10:00am - 10:30am **Ethics & Real Estate** - *Eunice T. Baros, Esq.; Nadine V. White-Boyd, Esq., Frank, White-Boyd, P.A., Palm Beach Co. Bar Association Professionalism Committee*
- 10:30am - 10:45am **BREAK**
- 10:45am - 11:45am **Current Tax Issues for Real Estate Attorneys** – *Michael A. Lampert, Esq., Michael A. Lampert, P.A., Board Certified Tax Law Attorney*
- 11:45am - 12:15pm **Environmental Issues for Real Estate Attorneys** – *Alfred J. Malefatto, Esq., Lewis, Longman & Walker P.A.*

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This course is expected to receive 4.0 CLER including .50 Ethics credits; Real Estate Certification credits are pending from the Florida Bar.

Early registration cost for the seminar is \$110 for PBCBA members/paralegals, \$150 for non-PBCBA members/paralegals if registered by 8/16/13; 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.

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

HOW TO REGISTER



BY CHECK
Return this form



BY CREDIT CARD
For security purposes, your must register online at www.palmbeachbar.org



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

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

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) (8/23/13R/E) Cost is the same as listed above, in addition to \$10 for shipping and handling.

Palm Beach County Bar Association, 1507 Belvedere Road, West Palm Beach, FL 33406. Telephone: (561) 687-2800



Can Government Compel Your Client to Decrypt a Hard Drive?

By Christopher B. Hopkins

The May 2013 article regarding the limited Fourth Amendment protection afforded to travelers' phone and computer devices upon crossing the U.S. border lead local criminal defense counsel, Larry Buck, to pose this Fifth Amendment question: can the government compel a person to hand over the password to an encrypted hard drive?

Once again, novel technology and limited legal precedent suggest that this will be a case-by-case, court-by-court question likely destined for the U.S. Supreme Court. Recent case law, however, provides some guidance.

The Fifth Amendment holds that a natural person cannot be "compelled in any criminal case to be a witness against himself." To fall within the ambit of the Fifth Amendment, a person must show (1) compulsion, (2) testimonial communication or act, and (3) incrimination. This protection is extended to both incriminating evidence and content which would lead to incriminating evidence. Your client's decryption and production of content triggers constitutional protection because such acts are "testimonial" because they require a *mental* process (recalling the password) as opposed to a simple physical act, like producing a key, fingerprints, blood samples, or donning gloves.

Of course, there are exceptions to this "testimonial"-based protection. First, the government could extend both "use" and "derivative use" immunity, which likely dissolves constitutional protection. Second, if the "location, existence, and authenticity" of the purported evidence is already known by the government, then the content of the individual's mind (the password) is not used against him and there is no constitutional protection. This is known as the "foregone conclusion doctrine" – of note, four federal circuits require a "reasonable particularity" standard which has not been adopted by the Supreme Court. Third, albeit untested in the encryption context, there is a Required Records Exception to the Fifth Amendment when the requested documents are required to be kept by regulation. <http://1.usa.gov/18Ec8s1>

Problems arise when clients are chatty or careless in "jealously protecting" their constitutional rights. In *Boucher II*, border patrol searched the defendant's laptop for images/videos. Incriminating file names were found and the defendant made inculpatory statements about owning the laptop and downloading child pornography. When the laptop was shut down and later accessed, the Z: drive became password-protected via PGP software. The district court held that the "location" and "existence" of the subpoenaed files were known to the government. Moreover, Boucher's production of the password would not "authenticate" the Z: drive since he previously admitted possession of and had given access to the drive; finally, the government extended immunity for the act of production. Thus, Boucher had no Fifth Amendment rights.

In a similar 2012 case, defendant Fricosu's PGP-encrypted computer was seized. In a recorded phone call between Fricou and her incarcerated husband, she admitted being the owner /

sole or primary user of the machine and that she could access the encrypted contents – thus, she had no Fifth Amendment protection (the government's lack of knowledge of the content of specific files was not a barrier). While a motion to reconsider was pending, defendant Fricosu's ex-husband handed over the password. <http://bit.ly/ZHbt8R> In short, evidence of the client's sole / primary control or ownership of the machine coupled with admitted knowledge of the password may overcome any constitutional rights.

In the case of *In Re: Grand Jury Subpoena* Dated March 25, 2011, Florida defendant John Doe declined to decrypt seven hard drives which were suspected of containing child pornography but were protected with TrueCrypt. The prosecution's forensic expert admitted that, although encrypted, it was possible that the drives contained no information. The Eleventh Circuit held that Doe's decryption and production would be testimonial because it was tantamount to Doe testifying about (1) his knowledge of the location and existence of potentially incriminating files; (2) his possession, control, and access; and (3) his ability to decrypt. Unlike *Boucher and Fricosu*, the government had no independent knowledge of existing files located on the drives and thus there was no "foregone conclusion" exception.

In April 2013, a District Court in Wisconsin denied a writ for decryption of nine previously seized computers. Defendant Feldman was the sole occupant of the residence and he had a degree in computer science, a job working as a software engineer, and even a software patent. The computer login screen showed one user: his first name. FBI examiners found eMule P2P software and log histories reflecting the distribution and storage of over 1,000 files with names indicative of child pornography. Unlike the Florida case, the prosecution was able to establish, as a "foregone conclusion," that the drives actually contained data, the probable existence of specific files, and even file names. But, even though Feldman was presumably able to decrypt the drives because of his computer expertise, he never admitted personal access and control. In what the court described as a "close call," the writ was denied. <http://bit.ly/18Em4Sm> but see <http://1.usa.gov/18Erk8u>

The mere presence of encrypted files should not imply illegal behavior any more than owning a locked safe. It appears that PGP and TrueCrypt provide reliable security. The weakness is on the human-side: admissions, disclosures, or poor password safekeeping. Looking ahead, if a defendant uses cloud storage, how will the government prove "location" much less possession, control, and access? Likewise, if a device is accessed via fingerprint, retina or facial scan, will future courts hold that to be "testimonial"?

Christopher B. Hopkins is a shareholder at Akerman Senterfitt. Send your cryptography or constitutional communiqués to Christopher.Hopkins@Akerman.com.



Defenses To A Claim For Tortious Interference With An Expectancy In Probate & Trust Proceedings

By: **David M. Garten**

Last month's article discussed the elements of a claim for tortious interference with an expectancy ("tortious interference") in Probate and Trust proceedings. This article will discuss defenses to a claim for tortious interference.

DEFENSES:

1. **Have you exhausted your probate remedies?** If adequate relief is available in the probate proceeding, you must exhaust your probate remedies before a tortious interference claim can be pursued. *See, DeWitt v. Duce*, 408 So. 2d 216 (Fla. 1981).
2. **Is your claim ripe?** In *Children's Hospital, Inc. v. Owens*, 754 So.2d 802 (Fla. 2nd DCA 2000), appellants were eight of twenty-eight charities among the residual beneficiaries of decedent's will. Appellant/charities filed a civil suit against the decedent's caretaker for a constructive trust and tortious interference. The caretaker was granted summary judgment. The appellate court affirmed, finding that if the charities could ever pursue a claim for tortious interference, the claim had not yet accrued because the estate administration was still pending, so the charities had not yet been damaged. The court also concluded that any attempts to retrieve estate property from the caretaker should be left to the administrator ad litem through proceedings in probate because the administrator ad litem can pursue claims for the benefit of all recipients under the will and that the charities' action either duplicates those efforts or is an attempt to gain an advantage over the other beneficiaries.
3. **Are you collaterally estopped from pursuing your claim?** The doctrine of collateral estoppel prevents identical parties from relitigating the same issues that have already been decided. Assuming a petitioner files suit in the probate division to vacate the will on the basis of undue influence and

loses, collateral estoppel may prevent her from pursuing a claim for tortious interference on the same grounds. *See, Kramer v. Freedman*, 272 So. 2d 195 (Fla. 3rd DCA 1973) wherein the testator's daughter unsuccessfully contested the probate of her father's will, which excluded her. The daughter was collaterally estopped from pursuing a subsequent lawsuit for tortious interference.

4. **Has the statute of limitations run on your claim?** A cause of action for tortious interference accrues upon the testator's death. *See, Claveloux v. Bacotti*, 778 So. 2d 399 (Fla. 2d DCA 2001); *Whalen v. Prosser*, 719 So. 2d 2 (Fla. 2nd DCA 1998); *Tensfeldt v. Tensfeldt*, 839 So. 2d 720 (Fla. 2nd DCA 2003).
5. **Do you have personal jurisdiction over the defendant?** A minimal level of contact with Florida is sufficient to subject a non resident defendant to the personal jurisdiction of the Florida courts for allegedly committing an act of tortious interference. *See, Watts v. Haun*, 393 So. 2d 54 (Fla. 2nd DCA 1981) wherein the court held that Florida had personal jurisdiction over appellant because she committed the act of tortious interference by coming to Florida to take her father back to New York to prevent him from carrying out his intent to make the gift of the stock to appellees.
6. **Is the trust incorporated into the will?** If the trust is sufficiently incorporated into the will, a plaintiff cannot properly challenge the validity of the trust on the basis of tortious interference without challenging the validity of the will because the will and trust are read together. *See, Pasquale v. Loving*, 82 So. 3d 1205 (Fla. 4th DCA 2012); *Sun Bank/Miami, N.A. v. Hogarth*, 536 So. 2d 263 (Fla. 3d DCA 1988).
7. **Did you file your claim in the proper division?** All of the judges of the Circuit Court are authorized to exercise that court's jurisdiction; therefore, the question is one of divisions of the court

(probate division v. civil division) and which division handles which type of case. *See, Guardianship of Bentley*, 342 So. 2d 1045 (Fla. 4th DCA 1977); *Payette v. Clark*, 559 So.2d 630 (Fla. 2nd DCA 1990). Probate proceedings are in rem proceedings. *Refer to* §731.105, F.S. Because a claim for tortious interference is a claim for money damages against an individual, the lawsuit should be filed in the civil division. However, this rule may not apply to trusts. *Compare, Palm Beach County Administrative Order No. 6.102.*

8. **Is the testator deceased?** As a general rule, a beneficiary does not have a vested claim for tortious interference until the testator's death. *But see, Carlton v. Carlton*, 575 So. 2d 239 (Fla. 2nd DCA 1991) wherein the appellants, brothers of the deceased, brought an action against appellees, co-personal representatives of the estate of the deceased, alleging that the deceased intentionally interfered with appellants' expected inheritance from their still-living parents. The court held that because the cause of action was actually against the deceased, appellants had only a limited time period in which to file their action. As such, the court reversed the lower court's dismissal of the action, and remanded for further proceedings.

For an expanded version of this article, refer to my web site at gartenlaw.com.

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By Manuel Farach

Stone v. BankUnited, – So.3d –, 2013 WL 1845584 (Fla. 2d DCA 2013).

A lender may prove standing by means other than a dated allonge; standing may be proven circumstantially by payments made by a borrower after assignment, a purchase and assumption agreement, and by the

method of servicing the loan.

B&B Tree Service, Inc. v. Tampa Crane & Body, Inc., – So.3d –, 2013 WL 1810761 (Fla. 2d DCA 2013).

Claims for loss of use require a different measure of damages than lost profits (which must have been in the reasonable contemplation of the parties at time of contract).

Fisher Island Ltd. v. Fisher Island Investments, Inc., Slip Copy, 2013 WL 1831728 (11th Cir. 2013).

Bankruptcy courts, being Article II courts, have a different standard for standing than Article III courts. The bankruptcy court “person aggrieved” test requires a higher causal link between the act and injury in order to establish standing.

Dolphin LLC v. WCI Communities, Inc., Slip Copy, 2013 WL 1831737 (11th Cir. 2013).

A common sales force between two real estate developments, even if both developments are owned by the same parent company, is not sufficient to constitute a “common marketing plan” so as to aggregate the separate developments and subject an otherwise exempt development to the requirements of the Interstate Land Sales Act, 15 U.S.C. §§ 1701– 1720.

Kehoe v. Garemore, – So.3d –, 2013 WL 1918845 (Fla. 5th DCA 2013).

A jury’s determination of the amount of damages in a quantum meruit action for improvements to real property is preclusive on a counterclaim for defective work.

In re Northlake Foods, Inc., – F.3d –, 2013 WL 1859118 (11th Cir. 2013).

A Subchapter S election is of sufficient value that its election by a shareholder in exchange for the payment of dividends does not constitute a fraudulent conveyance.

Sas v. Federal Nat. Mortg. Ass’n, – So.3d –, 2013 WL 2120264 (Fla. 2d DCA 2013).

A witness without personal knowledge may not testify as to the contents of a business record if the record is not first admitted into evidence.

Raymond James Financial Services, Inc. v. Phillips, – So.3d –, 2013 WL 2096252 (Fla. 2013).

Florida’s statute of limitations, Fla. Stat. § 95.011, applies to arbitration actions.

City of Palm Bay v. Wells Fargo Bank, N.A., – So.3d –, 2013 WL 2096257 (Fla. 2013).

Notwithstanding their home rule powers, municipalities may not create code enforcement liens that have superpriority over previously filed interests of record.

Greenspoon Marder, P.A. v. Moscoso, – So.3d –, 2013 WL 1980255 (Fla. 3d DCA 2013).

Charging lien is enforceable for hourly, non-contingent portions of an unpaid fee even when lawyer withdraws without cause before occurrence of contingency.

Bullock v. BankChampaign, N.A., – S.Ct. –, 2013 WL 1942393 (2013).

“Defalcation” under 11 U.S.C. § 523 (a) (4) involves a culpable state of mind of knowledge or gross recklessness with regard to actions inconsistent with fiduciary duty.

Bowman v. Monsanto Co., – S.Ct. –, 2013 WL 1942397 (2013).

The Patent Exhaustion Doctrine does not permit a farmer to save seeds from one planting season for use in another in violation of a licensing agreement.

Castetter v. Henderson, – So.3d –, 2013 WL 2256520 (Fla. 5th DCA 2013).

A constructive trust on real property may not be based on co-habitation alone; a party must establish a promise, express or implied; a transfer of property and reliance thereon; a confidential relationship; and unjust enrichment of a contribution to acquisition of the real property (defrayment of household expenses is not sufficient).

U.S. Bank Nat. Ass’n v. Cramer, – So.3d –, 2013 WL 22318919 (Fla. 2d DCA 2013).

Appointment of a receiver is approached with great caution pre-judgment, but the caution and the legal requirements to appoint a receiver diminish once judgment is entered. A receiver may be appointed post-judgment in special circumstances (e.g., foreclosure sale postponement) to protect the property and the rights of parties.

Zlatkiss v. All America Team Concepts, LLC, – So.3d –, 2013 WL 2359108 (Fla. 5th DCA 2013).

Spendthrift trusts do not violate the right of access to courts found Fla. Const. Article I, Section 21 as spendthrift trusts bar collection on a judgment, not access to courts.

First Baptist Church of Cape Coral, Florida, Inc. v. Compass Const., Inc., – So.3d –, 2013 WL 2349380 (Fla. 2013).

So long as the fee agreement provides for this form of alternative fee, a court presiding over an indemnity case may award the higher of the contractual fee between the attorney and the client or the fee deemed reasonable by the court.

Rocket Group, LLC v. Jatib, – So.3d –, 2013 WL 2319486 (Fla. 4th DCA 2013).

Although not specifically listed as a category under Florida Rule of Judicial Administration 2.420 (a), corporate records may be confidential, and if so, may be filed under seal to “avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed . . .”

Manuel Farach is Of Counsel to Richman Greer, P.A. in West Palm Beach and practices in the areas of Real Estate, Business Litigation and Appellate Law. Request the Weekly Update by sending an email to mfarach@richmangreer.com and writing “Request Update” in the subject line.

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.

Safiah Afify: State Attorney's Office, West Palm Beach.

Andrew Agnini: Monterey, CA; University of Miami, 2011; Associate in Frankl & Kominsky, P.A., Boynton Beach.

Steven Barber: St. Louis Park MN; Harvard, 1989; Partner in Steptoe & Johnson, LLP, Washington, DC.

Cara Baros: Law Student Membership, West Palm Beach.

Elaine M. Bucher: Cambridge, MA; University of Pennsylvania, 1995; Partner in Gunster, West Palm Beach.

Jared B. Chaykin: Law Student Membership, Wellington.

Kenneth W. Cohen: Queens; St. Thomas University, 2006; Associate in McHale & Slavin, PA, Palm Beach Gardens.

T.J. Corbin: Nova Southeastern University; Solo Practitioner, Delray Beach.

Jarrett DeLuca: University of Florida, 2006; The DeLuca Law Firm, Boca Raton.

Michael D. Dickenson: Nova Southeastern University, 2010; Associate Schuler, Halvorson, Weisser and Zoeller, West Palm Beach.

Jared Dokovna: Benjamin N. Cardozo School of Law, 2004; Solo Practitioner, West Palm Beach.

Leah Ann Foertsch: Richmond, VA; St. Thomas University, 2004; The Wagner Law Group, Palm Beach Gardens.

Jared Paul Greenberg: Nova Southeastern University, 2009; Associate in Greenberg & Strelitz, P.A., Boca Raton.

Jonathan P. Hart: University of Miami, 2008; Associate Shutts & Bowen LLP, West Palm Beach.

Keith A. Howard: Law Student Membership, West Palm Beach.

Stephanie W. Kaufer: Roberts, Reynolds, Bedard & Tuzzio, P.A., West Palm Beach.

Carolyn H. Kowalsky: Atlanta; Florida State, 1985; South Florida Water Management, West Palm Beach.

Mary Patricia Lewis: Florida Registered Paralegal Membership, Lytal Reiter, Smith, Ivey, Fronrath, West Palm Beach.

Anya Elisa Macias: FL; Nova Southeastern, 1999; Shapiro, Fishman & Gache, LLP, Boca.

Masimba Mutamba: Associate in Morris, Laing, Evans, Brock & Kennedy, Chtd, Wellington.

Daija Page: University of Miami School, 2012; Fourth District Court of Appeal, West Palm Beach.

Hampton C. Peterson: Birmingham; Nova Southeastern University, 1981; Office of the Clerk and Comptroller, West Palm Beach.

Nadia Phanco: Law Student Membership, Jacksonville.

Amanda C. Rosenfield: Associate in Simpson & Simpson LLC, Palm Beach Gardens.

Alvaro C. Sanchez: Law Student Membership, Wellington.

Misty Sheets: Nova Southeastern University, 2009; Associate in Law Offices of Marshall C. Watson, P.A., Boca Raton.

Anton D. Smith: Drake University Law School, 2009; Associate in Hilley & Wyant-Cortez, P.A., North Palm Beach.

Neil B. Solomon: NY; University of Miami, 1997; McLaughlin & Stern LLP, West Palm Beach.

Nazil Sonmez Matt: Nova Southeastern University, 2012; Legal Aid Society of Palm Beach County.

David Neal Stern: University of Florida, 1993; Associate in Frank, Weinberg & Black, P.L., Boca Raton.

Shannon R. Strasser: Stetson University College of Law, 2012; Associate in Quintairo Prieto Wood & Boyer P A, West Palm Beach.

Cara Thomas: Pittsburgh; Nova Southeastern University, 2007; Associate in Nason Yeager Gerson White & Lioce, P.A., West Palm Beach.



Teresa A. Voorhees: Florida Registered Paralegal Membership, McLaughlin & Stern LLP, West Palm Beach.

Veronika Warren: Law Student Membership, West Palm Beach.

Abraham M. Zaretsky: Nova Southeastern University, 2012; Associate in the Law Firm of Richard P. Zaretsky, PA, West Palm Beach.

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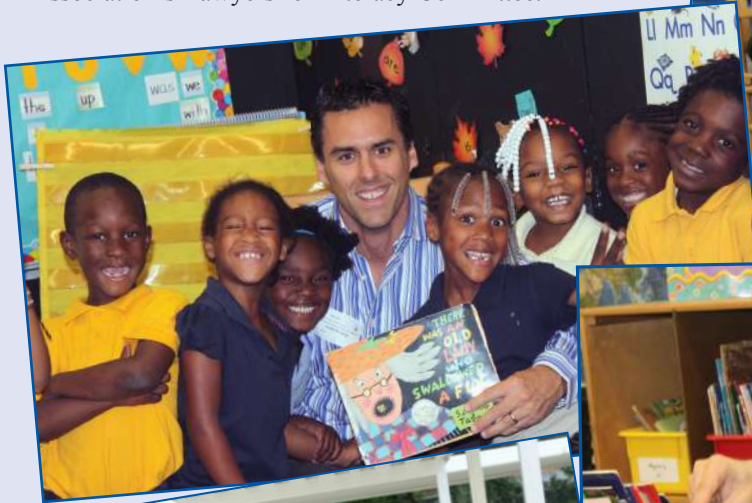
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YLS Reading Is Fundamental

Members of the Young Lawyers Section ended the school year by reading to children at Washington Elementary School in Riviera Beach. In addition to volunteering in the classroom, attorneys delivered ten boxes of new and gently used books to the school. The books were made possible by the Association's Lawyers for Literacy Committee.



Captions:

Top Left: Judd Koenig surrounded by happy readers!

Middle Left: Young Lawyer at heart Jack Scarola is escorted to class

Bottom left: Thank you volunteers! Thomas Allison, Jack Scarola, Kalinithia Dillard, Elliot Hallak, Cris Rapp, Rena Taylor, Jonathan Mann and Judd Koenig

Top right: Elliot Hallak takes a break from reading to smile for the camera

Middle Right: Thomas Allison, Reading Is Fundamental Chair, is seen "roaring" with the book

Bottom Right: Kalinithia Dillard reads "The Very Busy Spider"



Defining Defalcation

by Jason S. Rigoli

Section 523(a)(4) of the Bankruptcy Code exempts from discharge “any debt - for fraud or defalcation while acting in a fiduciary capacity; embezzlement or larceny.” 11 U.S.C. § 523(a)(4). Defalcation has been an exception to discharge in federal bankruptcy since 1867, and since that time

courts have disagreed as to its meaning.

The United States Supreme Court, in *Bullock v. BankChampaign, N.A.*, 133 S.Ct. 1754, (2013), has recently weighed in narrowing the definition of “defalcation” by requiring a culpable state of mind, stating:

[W]here the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong. We include as intentional not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent. Thus, we include reckless conduct of the kind set forth in the Model Penal Code. Where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary “consciously disregards” (or is willfully blind to) “a substantial and unjustifiable risk” that his conduct will turn out to violate a fiduciary duty.

Id. at 1759.

In *Bullock*, Randy Curtis Bullock’s (the “Debtor”) father had established a trust for the benefit of the Debtor and his siblings. The Debtor was made the (nonprofessional) Trustee of the Trust and the only asset was the father’s life insurance policy. *Bullock*, at 1757. The trust instrument permitted the Debtor to borrow funds from the insurer. *Id.* The Debtor borrowed funds from the Trust on three occasions, each time all of the borrowed funds plus interest were repaid. *Id.* The Debtor’s siblings filed suit against him in Illinois state court. *Id.* The state court held that the Debtor had breached his fiduciary duty, however, it explained:

[The Debtor] “does not appear to have had any malicious motive in borrowing funds from the trust” but nonetheless” was clearly involved in self-dealing.”

Id. The Bankruptcy Court held that the state-court imposed debts fell within section 523(a)(4)’s exception “ ‘as a debt for defalcation while acting in a fiduciary capacity.’ ” *Id.* at 1758. The District Court affirmed. The Eleventh Circuit Court of Appeals affirmed, writing “ ‘defalcation requires a known breach of a fiduciary duty, such that the conduct can be characterized as objectively reckless.’ ” *Id.* quoting *Bullock v. BankChampaign, N.A.* (In re *Bullock*), 670 F.3d 1160, 1166 (11th Cir. 2012).

Several considerations were taken into account by the Supreme Court in interpreting the term “defalcation.” Beginning with the application of the canon in interpretation “*noscitur a sociis*,” or it is known from its associates. *Bullock*, at 1760 (citing *Neal v. Clark*, 95 U.S. 704, 709, 24 L.Ed. 586 (1878)). The Supreme Court looked to its opinion in *Neal*, interpreting fraud and looking to its “linguistic neighbor, ‘embezzlement’” the *Neal* Court found that as embezzlement required a showing of moral turpitude or an intentional wrongs, fraud requires an equivalent showing. *Bullock*, at 1760 (citing *Neal*, at 709).

Applying this canon in the *Bullock* case, the Supreme Court stated:

Neal has been the law for more than a century. And here, the additional neighbors (“larceny” and, as defined in *Neal*, “fraud”) mean that the canon *noscitur a sociis* argues even more strongly for similarly interpreting the similar statutory term “defalcation.”

Id. The Court was quick to point out that “this interpretation does not make [defalcation] identical to its statutory neighbors. And similarly, defalcation can occur without corresponding fraud, embezzlement or larceny. *Id.* Additionally, the Court considered that exceptions “should be confined to those plainly expressed.” *Id.* (internal citations omitted). Further, the exceptions set forth in section 523 have been generally confined to “strong, special policy considerations, such as the presence of fault... In the absence of fault, it is difficult to find strong policy reasons favoring a broader exception here, at least in respect to those whom a scienter requirement will most likely help.” *Id.* at 1761.

The *Bullock* opinion is narrow and only resolves the question: what state of mind is required for defalcation? The broader issue as to what conduct rises to this heightened standard will continue to be determined on a case-by-case basis.

This article submitted by Jason S. Rigoli, Furr and Cohen, P.A., One Boca Place, Suite 337 West, 2255 Glades Road, Boca Raton, FL 33431, jrigoli@furrcohen.com

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Diversity Corner

Meet the 2013 Diversity Interns!

The Committee for Diversity and Inclusion's Summer Diversity Internship Program (D.I.P.) is well under way!

This year's program is packed full of substantive programs and networking activities that are sure to keep the Interns and their liaisons quite informed.

The program officially began with a Breakfast on May 31st when the Interns and their Committee liaisons met to get acquainted. Next, on June 12th a "Tips and Tools" workshop was held at the main Courthouse to assist the Interns in honing their legal skills and develop a good reputation as a young lawyer. A Courthouse tour is scheduled for July 12th to give the Interns an opportunity to learn about the various court sections and how they operate.

Additionally, throughout the summer there will be a number of opportunities for the Interns to attend social events to network with other summer interns and members of the bar; as well as judges.



Our 2014 Interns pictured above are:

Back Row left to right: Sayed Zonaid, Sophia Bernard, Samuel Bryant, Sherri-Ann Clarke, Ricardo Marengo, Nelson Rodriguez

Front Row left to right: Oscar Florez, Zee Asghar, Tabitha Taylor, Lauren Gonzalez, Brittany Dancel, Natasha Samria, Sabrina Jadunandan

Not pictured: Clementine Uwabera, Jenniza Rosado

Our 15 Interns represent a variety of the Florida Law schools and one out of state school. The breakdown of the law schools represented are as follows:

UM - 3

FIU - 1

Florida Coastal - 2

UF - 6

Stetson - 1

FSU - 2

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In addition to a variety of law schools being represented, there are also a variety of law firms and government agencies that have agreed to participate in the DIP and either hire an Intern or sponsor an Intern. The participating Firms, Companies, and Government Agencies are as follows:

Akerman Senterfitt, Florida Crystals, McCabe Rabin, Office of State Attorney, Fox Rothschild, Lesser Lesser Landy & Smith, St. John Rossin, Squire Sanders, Office of Attorney General, Wicker Smith, Palm Beach County School District, South Florida Water Management District, Powers McNalis, Gilbert | Yarnell, Shutts & Bowen.

As you can see, the D.I.P. is in full swing and promises to be a great experience for our Interns and our sponsoring law firms, agencies and companies.

We like to extend a heartfelt "Thank you" to the 2013 D.I.P. Events Sponsors: A Better Digital, Shutts & Bowen LLP and US Legal Support.

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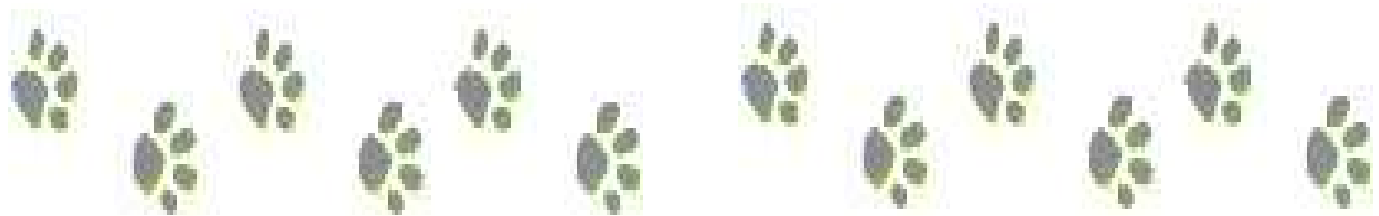
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Rule 1.310: Depositions

By Matt Triggs and Jonathan Galler

Location, location, location.

When scheduling depositions, it's an issue that can create minor delays and skirmishes or that can snowball into the sort of mess that famously drove one federal judge to order the dispute to be resolved by a round of "rock, paper, scissors." See *Avista Management, Inc. v. Wausau Underwriters Ins. Co.*, 2006 WL 1562246 (M.D. Fla. Jun. 6, 2006). (If you've never read that order, put down this Bulletin and look it up on Google.)

Perhaps surprisingly, the rules of civil procedure do not prescribe the location for the deposition of a corporate defendant. But, as the First District recently reiterated, case law makes clear that the corporate defendant's principal place of business – not the venue in which the injury took place or where the action is proceeding – is the appropriate location for the defendant's deposition. That is, as long as the defendant is not seeking affirmative relief. *CVS Caremark Corp. v. Latour*, 109 So. 3d 1232 (Fla. 1st DCA 2013).

In *Latour*, a Judge of Compensation Claims denied a motion for protective order that sought to relieve the employer's corporate representative of the obligation to travel 60 miles to attend a deposition in the county where the plaintiff worked. The plaintiff argued that the location was proper because that was where the injury occurred and where at least one of the employer's businesses was located.

The employer sought certiorari review. Before addressing the merits of the appeal, the First District analyzed whether certiorari review was appropriate. For such review to be proper, the defendant had to show more than legal error. The order had to "depart from the essential requirements of law and thus cause material injury to the petitioner throughout the remainder of the proceedings below, effectively leaving no adequate remedy on appeal." *Latour*, 109 So. 3d at 1234.

The court concluded that certiorari review was indeed appropriate, and irreparable harm shown, merely because the deposition notice sought to require 60 miles of travel. The court reasoned that the deposition cannot be "un-taken," and thus

found that there was irreparable harm. Nevertheless, as the court noted, the focus of its opinion was on whether there had been a departure from the essential requirements of the law.

The court held that there was such a departure. Because the corporate defendant had not sought any affirmative relief, it could be deposed only where its principal place of business was located. Any other result would constitute an undue burden or expense upon the defendant. *Latour*, 109 So. 3d at 1235-36.

In reaching its conclusion, the court relied heavily on the Third District's decision in *Fortune Ins. Co. v. Santelli*, 621 So. 2d 546 (Fla. 3d DCA 1993). *Fortune* held that although a plaintiff's deposition can be noticed for the county in which the action is pending, the converse did not necessarily hold true. According to *Fortune*, a defendant can be required to appear for a deposition in the county in which the action is pending only if the defendant is seeking affirmative relief. *Fortune*, 621 So. 2d at 547.

On that basis, the *Latour* court distinguished its own decision in *Ormond Beach First National Bank v. J.M. Montgomery Roofing Co.*, 189 So. 2d 239 (Fla. 1st DCA 1966). There, the court quashed an order that precluded the defendant from taking the deposition of the officers of a corporate plaintiff (i.e., the party seeking affirmative relief) in the county where the action was pending. *Latour*, 109 So. 3d at 1236.

Left open to debate is the question of what it means for a defendant to seek affirmative relief. It seems obvious that asserting a counterclaim would qualify, but the case of *Kaufman v. Kaufman*, 63 So. 2d 196 (Fla. 1952) seems to allow for the possibility that even pleading affirmative defenses might, at least in some instances, subject a defendant to the requirement of traveling for a deposition. *Id.* at 202-03 ("Ordinarily a defendant should not be required to travel any great distance in order to be examined by the plaintiff for discovery purposes when no affirmative defenses or counter claims are involved.").

Interestingly, the *Latour* court



issued its opinion – and quashed the challenged order – even though the deposition at issue had already been taken in the interim (in the county of the defendant's principal place of business). Ordinarily, the taking of the deposition would moot the appeal, but the court decided to proceed with the appeal and decide it on the merits because the plaintiff had indicated that she intended to seek sanctions based on the defendant's insistence that the deposition take place in the county of its principal place of business.

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.

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Depositions Of Attorneys Of Record

By Ted Babbitt

Allstate Insurance
Co. v. Total Rehab
and Medical Centers,

Inc., 38 Fla. L. Weekly D619 (Fla. 4th DCA March 13, 2013) is a puzzling case on its facts. In that case, Allstate Insurance Company brought a suit seeking money damages against several medical centers. Two of the attorneys representing Allstate created what they called a master summary chart. This chart was apparently a summary of a number of personal injury protection files created by Allstate as well as a number of billing charts created by the medical centers.

A trial was had during which this attorney created chart was introduced into evidence as a summary based upon §90.956 Fla. Stat. The trial ended with a mistrial and before the case was retried, the defendants sought to take the depositions of Allstate's attorneys who had created the chart contending that the chart was a key exhibit and that the attorney's knowledge concerning this creation was relevant information that was discoverable.

Allstate sought protection from the trial court to prevent their attorneys' depositions from being taken on the grounds that to do so would disclose attorney-client and work product information that was privileged. The trial court denied the motion thus allowing the depositions to be taken and certiorari was brought in an effort to overrule the trial court's order.

The appellate court ruled that the first prong for obtaining certiorari review had been met in that if, in fact, discovery was protected by attorney-client or work product privileges, permitting that discovery to go forth constituted irreparable harm which was not correctable by a final appeal.

The Fourth District concluded: However, Petitioners have failed to show that the trial court's order departed from the essential requirements of the law. While it is true that the attempt to depose a party's attorney during ongoing litigation has been

rejected when irrelevant or privileged information was sought from the attorney, attorneys are not *per se* exempt from the reach of Florida Rule of Civil Procedure 1.310(a), which allows the taking of the deposition of *any person*. Citing cases. As the trial court retains authority under Rule 1.310(c)(d) to prohibit inquiry of genuinely privileged materials, we cannot say the order appealed from departs from the essential requirements of the law, a prerequisite to certiorari relief. (Emphasis in original.)

What does this case stand for? Does this mean that every time an attorney prepares a trial exhibit, he or she is subject to having their deposition taken? The answer is no. This is a unique set of facts and the holding is limited. The mistake that these attorneys made was offering their chart into evidence in the first place. The evidentiary exhibits should have been the underlying data from which the chart was made. The chart could have been used as a demonstrative exhibit rather than putting it into evidence. Had that been done, there is little doubt that discovery would not have been permitted. By putting the chart into evidence and apparently using it as a key exhibit in the trial the attorneys injected themselves into the case itself. Unlike a demonstrative exhibit, this chart could be taken back to the jury room and relied upon as evidence. How was it created? What was left out? These questions became relevant once the exhibit was accepted into evidence.

In addition, nothing in this opinion should be read as permitting inquiry into work product or attorney-client matters. To the contrary, the Court specifically referenced the trial judge's authority to prevent that from happening. In addition, to make sure that the wrong message was not sent to the trial courts of this state, the Court stated:

While we recognize the potential for abuse of the process of deposing the opposing party's attorney during ongoing litigation, we are confident trial courts in

this district will use their powers of supervision over discovery to prevent privileged information from being disclosed.

Nevertheless, this case provides a lesson for all trial attorneys. Substantive exhibits are normally not created by attorneys. Demonstrative exhibits are. Putting a demonstrative exhibit into evidence can open the door to the attorney becoming a fact witness, which not only raises the specter of discovery but causes increased work for the attorneys and trial court in order to prevent the unwitting dissemination of attorney-client or other privileged information.

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North County Section Honors Judge Richard Oftedal



The North County Section recently honored Judge Richard Oftedal with its 11th Annual Jurist of the Year Award. The award recognizes a local judge for his or her commitment to the Bench and Bar. With so many deserving and worthy judges in the 15th Circuit this is always a difficult decision. Members of the North County Section send their recommendations to the Board of Directors. The Board votes anonymously and the recipient's name is kept secret until the night of the event. Sponsors for this year's dinner included Sabadell United Bank; Ciklin Lubitz Martens and O'Connell; Lawrence P. Buck; PNC Bank; Leopold Law and Visual Evidence.

NCS President Ken Johnson congratulates Judge Richard Oftedal



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Give VOICE to Leadership

by Nora Riva Bergman

I recently did a search for books about leadership at amazon.com. My search turned up 96,703 results in a variety of formats from paperbacks to hardbacks to Kindle books and audio books.

Although millions of words have been written about one word, understanding leadership doesn't have to be difficult or complicated. Leadership is not – as the old saying goes – rocket science. It is, however, “human science,” because the essence of leadership is about understanding yourself and others.

Leadership can exist at any level in an organization. And in the best organizations, leadership does exist at every level. Regardless of whether you are a sole practitioner, managing partner, paralegal or law clerk, you have the responsibility to lead.

As someone once said, leadership is not a position, it is an action. But how can you distill all that leadership is into a concept that can be drawn upon and put into action every day? In an effort to add only slightly to the lexicon of leadership, I offer the acronym VOICE.

V: Vision

Great leaders don't focus on what's wrong, they envision a positive future. Then they work to influence others to help them make that vision a reality.

“The goal is not to speculate about what might happen, but to imagine what you can make happen.”

- From, *Leading the Revolution*, by Gary Hamel

O: “Own It” – Know your own strengths and weaknesses. Leaders are self-aware.

Self-awareness means understanding ourselves – and understanding how we are perceived by others.

Why is self-awareness important? Because without self-awareness we can get caught up in behaviors that are inconsistent with our own values and beliefs. Without self-awareness, we may not have the courage to say “no” to the unimportant things in life so that we can focus on the truly important. Without self-awareness, leaders may fear appearing vulnerable. Without self-awareness, leaders can't understand how their characteristics and behaviors are impacting other people. Self-awareness is the ability to understand ourselves and our characteristics, and utilize our characteristics in ways that serve us best.

I: Influence – Leaders know how to influence others and mold consensus.

The days of “my way or the highway” leadership are over. There was a time when leadership was thought of as mere strength. In today's world, an autocratic, dictatorial leadership style just doesn't work. Even worse, it's damaging. It leads to one-way communication and misunderstandings. Regardless of whether you're leading an executive board, the people in your office, or your family, understanding and appreciating people's differences will help you influence them to your point of view.

C: Communication – Leaders know how to effectively communicate and listen to others.

Communication is one of the most important skills in life. And while at least half of the communication equation involves listening, most of us have little or no training in listening – really listening. In fact, various listening studies have shown that we remember between 25% and 50% of what we hear. So the best way to improve your communication is to practice being a better listener. Here are three things to always remember:

- 1) Don't interrupt;
- 2) Don't finish the other person's sentences;
- 3) Don't be distracted; focus on the person.

E: Example – Leaders walk the talk and lead by example.

Do you bring a positive attitude to the office every day? Remember that, as a leader everything you do matters. Everything. Look at the culture of your office, is it positive or negative? Whatever the culture, environment or mood, it is a reflection of the leadership. Whatever your attitude, good or bad, it's your choice. Here's the good news; you can make a conscious decision to change your attitude at any time. As a leader, it's your job to model the kinds of attitudes and behaviors you want to encourage in your team. You set the tone for your office. So, make a conscious choice to set a good tone. In the words of Winston Churchill, “If you can't laugh, smile. If you can't smile, grin. If you can't grin, stay out of the way until you can.”

Leadership may not be rocket science, but if you remember these five components of leadership and act on them, you can give VOICE to leadership every day.



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The Inn would like to thank its Members, past and present, Founders and Past Presidents for 25 years of involvement, dedication and leadership. Congratulations to the Inn's 2013 Outstanding Jurist of the Year recipient, the Honorable Jack S. Cox, and to Professor Jani Maurer for 25 continuous years of service to the Inn.

The Inn would like to give a special thank you to its 25th Anniversary Celebration Sponsors, without whom the Celebration would not have been possible.

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HEARSAY



Jill G. Weiss, an attorney at the law firm Sachs Sax Caplan, P.L., was installed as President of the Palm Beach County Bar Association on

June 1, 2013.

Charles H. Damsel, Jr. has been recognized by Florida Trend magazine as a member of the 30 Year Club of Florida attorneys and judges who have maintained Board Certification in Civil Trial law for more than 30 years.

Jones, Foster, Johnston & Stubbs, P.A. announces that **Grasford W. Smith** has joined the firm's Litigation Department as Senior Counsel.

Fox Rothschild, LLP is pleased to announce that experienced intellectual property attorney **Carol E. Thorstad-Forsyth** has been elevated to Partner.



The Executive Women of the Palm Beaches honored **Jane Kreusler-Walsh**, of Kreusler-Walsh, Compiani & Vargas, P.A., as the recipient of the 2013 Women in Leadership Award for the private sector. Ms. Kreusler-Walsh was recognized for her outstanding achievements, generosity of spirit and commitment to integrity.



Lindsey Wagner of Cathleen Scott & Associates, P.A. was named Labor and Employment Law committee Vice-Chair for the American Bar Association's Young Lawyers Division.



The Florida Bar Association announced that Searcy Denney Scarola Barnhart & Shipley attorney **Mariano Garcia** has met its standards of certification and is now a Board Certified Specialist in Civil Trial Law.



Lewis, Longman & Walker Shareholder **Michelle Diffenderfer** has been selected to serve as a member of the Southeast Florida Coral Reef Initiative (SEFCRI) for a two-year term.

Michael D. Dickenson has become an Associate with Schuler, Halvorson, Weisser & Zoeller, P.A. Mr. Dickenson's primary area of practice is PIP benefits litigation.

We've Moved

Bar Assn. New Address:
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The Florida Bar released its "Legal Milestone" list of members who have maintained their Board Certification status for over 30 years and **Sidney A. Stubbs, Jr.** and **Thornton M. "Tim" Henry** from Jones, Foster, Johnston & Stubbs made the esteemed list.

Philippe Jeck received the "Above and Beyond Special Recognition" award from the Northern Palm Beach County Chamber of Commerce. The award from the board of directors acknowledged his many years of service to the community and the Chamber as a past director and general counsel.

Chambers US: America's Leading Lawyers for Business, has ranked **Richman Greer, P.A.** as one of the top law firms in Florida for General Commercial Litigation for the seventh consecutive year since 2007.

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* DECEASED
 ** FLORIDA BAR PRESIDENT
 *** DECEASED, FLORIDA BAR PRESIDENT, SUPREME COURT JUSTICE
 **** DECEASED, FLORIDA BAR PRESIDENT
 ***** DECEASED, FLORIDA BAR PRESIDENT, FEDERAL COURT JUDGE

CALENDAR

July/August 2013

Tuesday, July 23,
 Noon – 1pm
CDI Committee Meeting
 Bar Assn. Office

Wednesday, July 24 – 26
TFB Board of Governors' Meeting
 Amelia Island

Wednesday, July 24,
 Noon – 1pm
Law Related Education
 Bar Assn. Office

Thursday, July 25,
 5:30pm– 7pm
CDI Reception
 264 Grille Palm Beach

Wednesday, July 31,
 Noon – 1pm
Solo Committee Meeting
 Bar Assn. Office

Thursday, August 1,
 Noon – 1:30pm
NCS Board Meeting
 Duffy's North Palm Beach

Saturday, August 3 – 4
PBCBA Board Retreat

Thursday, August 8,
 6:30pm – 8pm
Small Claims Clinic
 Palm Beach Gardens Library

Monday, August 12,
 Noon – 1pm
Hispanic Bar Luncheon
 Cohen Pavilion

Tuesday, August 13,
 6pm – 8:30pm
YLS Board Meeting

Thursday, August 15
Family Law CLE Lunch Seminar
 Bar Assn. Office

Thursday, August 15,
 5:30pm – 7pm
YLS/Federal Bar Happy Hour
 264 Grill, Palm Beach

Friday, August 16,
 Noon – 1pm
President's Council Meeting
 Bar Assn. Office

Tuesday, August 20,
 Noon – 1pm
CDI Committee Meeting
 Bar Assn. Office

Wednesday, August 21,
 11am – 1pm
Committee Chair Meeting
 Bar Assn. Office

Friday, August 23,
 Noon – 1pm
PBCJA Lunch
 Bear Lakes Country Club

Friday, August 23,
 1pm – 5pm
Real Estate CLE Seminar
 Bar Assn. Office

Tuesday, August 27,
 5:30pm – 6:30pm
Legal Aid Board Meeting
 Bar Assn. Office

Thursday, August 29,
 5:30pm – 7pm
PBCJA Barrister's Bash