



PALM BEACH COUNTY BAR ASSOCIATION

BULLETIN

www.palmbeachbar.org

June 2013



Dues Statements Mailed

Annual membership dues statements have been mailed to all PBCBA members for fiscal year 2013-2014, which begins July 1. If you did not receive a bill, contact Shoshanah at the Bar Office (687-2800) or sspence@palmbeachbar.org



The annual Dennis Koehler Memorial Attorneys vs. Judges Law Week Softball Game was held in late April. The attorneys won 15-12. For more photos, please see page 13.



Mark your calendar for upcoming Membership Events

- June 1:** Annual Installation Banquet
- June 15:** Young Lawyers Section Annual Fishing Tournament
- June 20:** Young Lawyers Section Summer Intern Happy Hour
- September 19:** Third Annual Membership Speed Networking Event
- September 27:** Diversity Luncheon with Guest Speaker Florida Bar President-elect Eugene Pettis
- December 5:** Annual Holiday Party and Silent Auction
- March 7, 2014:** Bench Bar Conference



YLS to Host Fishing Tournament June 15

The Young Lawyers Section will be hosting its fourth annual fishing tournament on Saturday, June 15 to benefit the Legal Aid Society's Legal Advocacy for Minor Mothers Project. This is the only legal-related fishing tournament taking place this year, so be sure to come out and join the fun! Entry fee is \$250 per boat and all activities will be held at the Palm Beach Yacht Club. For more information, go to the YLS website at www.palmbeachbar.org/yls.php

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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



15th Judicial Circuit Administrative Orders

www.15thcircuit.com/adminorders

REVISED ADMINISTRATIVE ORDERS

2 Series: General Orders

Administrative Order 2.310 - *Service by Email*. Revised April 10, 2013. Requires all attorneys to register with Court Administration's eService program (different than eFiling registration). Requires attorneys to notify the Clerk's Office when they are no longer counsel of record in accordance with Administration Order 2.311. Provides Email Designation forms to be included in self help packets for *pro se* litigants.

11 Series: Internal Policies and Procedures

Administrative Order 11.110 - *Appointment of Circuit Judges as Acting County Judges and County Judges as Acting Circuit Judges*. Revised April 1, 2013. Allows for temporary assignment of county judges to the circuit court and temporary assignment of circuit judges to the county court.

VACATED ADMINISTRATIVE ORDERS

4 Series: Criminal

Administrative Order 4.505 - *Felony Reassignment of Cases*. Vacated April 10, 2013. Vacated as obsolete due to the implementation of the Clerk and Comptroller's new case management system ("Showcase")

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Thank You for the Privilege of Serving – The Year in Review

By Adam Rabin

Thank you for the privilege of serving as your president this year. Aside from the personal satisfaction of working with many energetic board members, committee members and staff, our bar as an organization has accomplished some great things.

Last summer, our board set out to focus on five key goals during the current bar year. They included the following:

- (1) improving the culture of lawyer civility throughout South Florida;
- (2) continuing to promote strong diversity and inclusion programs;
- (3) developing future leaders within our bar;
- (4) working to improve our CLE offerings; and
- (5) hosting more membership lunches.

Today, we are proud to report that we have accomplished these goals. Below is a description of our work in these areas.

1. Improving the Culture of Lawyer Civility Throughout South Florida

Our bar was the first voluntary bar association in South Florida to sign a Joint Resolution to promote lawyer civility and a more uniform following of the standards of professional courtesy across South Florida. Forty-one other voluntary bar associations (“VBAs”) and six chief judges throughout South Florida then joined us in approving and helping promote the Joint Resolution to the nearly 40,000 lawyers in South Florida (see the Joint Resolution at www.palmbeachbar.org).

During the course of the year, the joint committee, consisting of the VBAs’ presidents, directors, and professionalism chairs, worked together to promote lawyer civility not only to their respective members, but also to non-members. The campaign consisted of creating “Got Civility?” buttons to be disseminated at major bar events, encouraging VBA presidents and local judges to write articles in bar bulletins about lawyer civility, to have the VBAs host a mass “re-taking of the oath of attorney admission” at their respective bench bar conferences and membership lunches, publishing a letter to every lawyer in South Florida that promotes following the standards of professional courtesy, and obtaining media coverage of the project to promote the cause.

While we expect that this project will continue for several years – as there is still much work to do to improve the culture of lawyer civility in South Florida – we were humbled by the recent announcement that our joint project won the Florida Bar’s Professionalism Award to be presented at the annual convention this summer.

2. Continuing to Promote Strong Diversity and Inclusion Programs

Since 2009, our bar proactively has strived to promote diversity and inclusion awareness and programs within our legal community. They include an annual diversity luncheon or summit; a summer diversity internship program for law students; regular lunch meetings with firm managing or hiring partners about our diversity programs; pairing mentors with

candidates interested in applying for the bench or a judicial nominating commission; encouraging the collaboration and participation from leaders of the minority and women’s bar associations; writing a monthly article in the *Bulletin* on a diversity topic; conducting a session for diverse law students at the annual Bench Bar Conference; participating in the annual Kozyak Foundation Minority Mentoring Picnic; creating a dedicated diversity web page on the bar’s website; launching the first of its kind “Diversity Placement Database” for firms to post job offerings for diverse candidates; and regularly promoting diversity projects and events to the media.

In just four years, our bar has come to be recognized as one of the most progressive VBAs in Florida for its commitment in promoting diversity and inclusion. Our goal is for Palm Beach County to be known as a legal community that welcomes and provides great opportunities for lawyers from all backgrounds.

3. Developing Future Leaders Within Our Bar

We have focused this year on developing and encouraging future leaders of our bar. Our premise is several-fold. First, that when a current board member, committee chair, or other leader sees the potential in another, he or she should take the time to encourage that person to take on a leadership position. Indeed, many board members were encouraged by another person at their firm or within the association to apply for a leadership position.

Second, during our planning meeting with this year’s committee chairs, we implemented a new policy that instead of committee chairs holding on to chair positions for years, our chairs instead would serve a presumptive term of one year. The theory behind this policy was to continue to create open opportunities for committee members to remain active and have the opportunity to chair the committee. The purpose of this is to continue to create new energy and creativity within our committees with the reward of receiving a chair position for great work as a committee member.

4. Working to Improve our CLE Offerings

In recent years, we have seen a continuing decrease in CLE attendance. We had attributed this downward trend to increased competition with the Florida Bar, other VBAs, private seminar companies, and online access to CLE content. To study this trend, we appointed board member, Greg Huber, to lead a task force to review what content our competitors were offering, to review how our bar could improve technology to offer better seminars, and to analyze the types of seminars that are typically more valuable to lawyers.

During its review, the task force determined that we could improve our technology, set more specific goals for our CLE committees, and offer more creative and innovative types of seminars. As a result of these findings, the task force and bar staff spent months researching webinar technology, culminating with our bar offering its first webinar in March 2013. We also recently hosted our first Golf Mixer CLE in April 2013 and Legal Legends versus Younger Guns mock-trial seminar in

Continued on page 4

The Year in Review

Continued from page 3

May 2013. During the coming year, our bar will be offering more webinars and continue the trend of innovative live seminars that mix quality content with networking opportunities.

5. Hosting More Membership Lunches

This year, we emphasized the goal of hosting more membership lunches with entertaining and informative keynote speakers. Over the last year, we have hosted the following six membership lunches.

- In October 2012, we hosted our annual diversity lunch that focused on helping women lawyers ascend to leadership positions within their firms with speaker Florida Bar President, Gwynne Young. We jointly hosted the lunch with FAWL, the F. Malcolm Cunningham, Sr. Bar, and the Hispanic Bar.
- In November 2012, we hosted U.S. Supreme Court Justice John Paul Stevens (ret.) with nearly 700 people attending. We are proud to be the only VBA in the nation to host six Supreme Court Justices in 6 years. As has been our tradition when hosting Supreme Court Justices, we jointly hosted this lunch with the Forum Club of the Palm Beaches.
- In February 2013, we hosted Eleventh Circuit Court of Appeals Chief Judge, Joel Dubina. Judge Dubina spoke on lawyer civility, writing tips, and practices that make for better advocacy before the Eleventh Circuit. We jointly hosted the lunch with the Federal Bar Association and the Bankruptcy Bar Association.
- In March 2013, at the Bench Bar Conference, we hosted the former special counsel to President Gerald Ford, Benton Becker, who was responsible for negotiating the pardon of President Nixon. While listening to him, many felt like they were hearing an untold part of American history. After Mr. Becker's presentation, our bar presented Susan Spencer Wendel, the longtime Palm Beach Post reporter on the courts, with a special lifetime achievement award for her lifetime of work and heroic courage in battling ALS.
- In April 2013, we hosted public speaker and persuasion consultant, Marsha Hunter. Ms. Hunter provided many tips on gesturing, physiology, and techniques while communicating

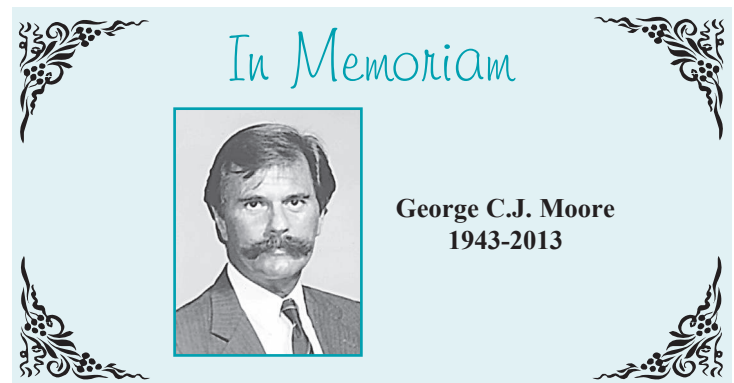
to judges, juries and public audiences. We jointly hosted this lunch with the Palm Beach County Justice Association.

- In May 2013, for our Annual Law Day lunch, we hosted Michael Glazier, the leading defense attorney in the nation representing universities under NCAA investigation. Mr. Glazier has represented most major universities undergoing an NCAA investigation in recent years. With the current, controversial climate over the fairness of NCAA investigations, and the media frenzy for information about them, hearing from someone who leads these internal investigations for the universities was a fascinating topic.

Conclusion

This year has proven a wonderful experience and we could not have accomplished our goals without the hard work and dedication of our talented board of directors, energetic committee members, and exceptional bar staff. We wholeheartedly believe that it is this mix of people that allows us to offer unique and quality programs to our members and makes our association one of the most respected VBAs in Florida.

Adam Rabin is a partner with McCabe Rabin, P.A. in West Palm Beach. He practices in the areas of business, securities and whistleblower litigation. You can e-mail him any comments at arabin@mccaberabin.com.



Board Meeting Attendance

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

Circuit Court Report CIVIL DIVISIONS • As of April 23, 2013

DIVISION	JURY TRIALS	NON-JURY TRIALS	MOTIONS	CASES PENDING
AA KELLEY	08-13	08-13	06-13	1248
AB GILLEN	08-13	08-13	06-13	1332
AD G. KEYSER	08-13	08-13	07-13	1439
AE FINE	10-13	10-13	05-13	1574
AF J. KEYSER	10-13	10-13	05-13	1258
AG CROW	10-13	06-13	06-13	1455
AH BROWN	09-13	09-13	07-13	1310
AI SASSER	08-13	07-13	04-13	1082
AJ ROSENBERG	08-13	08-13	06-13	1176
AN COX	11-13	11-13	07-13	1502
AO BRUNSON	09-13	08-13	04-13	1536

Judicial Luncheon Series – “Good Courtroom Practice”

By *Bill Abel*

On Wednesday, March 20, 2013, the Palm Beach County Bar Association hosted its monthly judicial luncheon where participants learned about “Good Courtroom Practice” and earned one CLE credit. The panel included the Honorable Jack S. Cox, Honorable Lucy Chernow Brown, Honorable Jeffrey D. Gillen, Honorable Catherine Brunson and Mr. Nole Chessman, head of technology for the courthouse. The discussion was moderated by Grasford W. Smith, Esq. of Richman, Greer, P.A. The topics included:

1. Use of Technology and Demonstrative Aids in the Courtroom

- The Courthouse has a technology office that is available to provide hardware assistance for hearings and trials. Request must be made at least two days before the scheduled hearing and five days before trial. The request form may be obtained on the Courthouse website (www.15thcircuit.co.palm-beach.fl.us.com); View the “For Attorneys” section on the Homepage; Select “Courtroom Media Request” form; Complete the form online. A technology assistant will contact you the following day.
- Each Circuit Civil Courtroom has a wall mounted 52 inch HDTV that is compatible with all types of hardware. The law library also rents additional hardware, including TV/DVD combination, Screens, ELMO or projectors, and x-ray view boxes. Submit a “Courtroom Media Request” form to rent these items. Payment must be made by cash or check only.
- Although courtroom technology is generally encouraged, all attorneys should strive to avoid “user error” issues that may delay court proceedings. In order to minimize this possibility, the technology department will allow you access to a courtroom in order to test out the Courthouse hardware prior to the actual court proceeding. Software support is not available.
- The benefits to using the Courthouse hardware include not having to go through security and having backup hardware available onsite.
- The judges all agreed that technology and demonstrative aids can be effective means of communicating with the jury so long as they do not hinder the presentation of the evidence. Effective use of technology includes: video deposition with text; cross-examination with video deposition; closing argument with clips of video testimony; blow-

ups of exhibits and demonstrative aids. Make sure the text is large enough to be read from the bench or jury box.

2. Effective Legal Memoranda

- Direct and concise memoranda are the most effective means of communicating. Tell the court the applicable law and relief sought early in the memorandum.
- If case law is provided with a motion, tab the cases and highlight the relevant portions. The more organized the materials, the faster the judge can analyze the information and render a ruling.
- For legal memoranda, send a copy only to the judge (not the clerk’s office) along with a cover letter to the judge identifying the date/time of the scheduled hearing. This will save a significant amount of time for the Courthouse staff.
- All memoranda and motions should be delivered to the courthouse five days before the scheduled hearing in order to allow adequate time to make it to the judge’s chambers. Responses should not be delivered a day before the hearing because it will not make it to the judge in time. Communicate with the judge’s JA if you must deliver a late response in order to ensure the judge gets a copy.

3. Effective Oral Argument

- Effective advocacy requires that the judge understand at the beginning of the hearing, who you are, who you represent, what relief you are seeking and why you are entitled to that relief.
- The judges handle hundreds of cases. Do not assume the court remembers your case or prior rulings. Treat each oral argument as its own distinct event.
- Talk with opposing counsel before the hearing and narrow the issues. Let the court know that you have spoken and that you have been able to work out everything except a few remaining issues which require a court ruling.
- If there is no longer a need for a scheduled hearing, advise the judge’s judicial assistant so the judge can avoid reviewing materials unnecessarily. Additionally, if a hearing is rescheduled, re-send the materials to the court. The judges do not retain materials when the matter is not reached as scheduled.

4. Talking to the Jury

- Do not repeat the same questions or make the same points; the jury gets it. Do connect the dots of your case, do define professional jargon and do use

simple everyday words to communicate your case.

- Pay attention to the jury. You can learn a lot about how your case is going by their demeanor and body language.
- Ask the jury to write down important information. Identify important evidence by exhibit number and page number for the jury’s easy reference.
- Always walk the jury through the verdict form.
- Tell the jury what you want and make it interesting. Tell them a story in opening and closing that communicates the case from your perspective.

5. Courtroom Demeanor and Professionalism

- Never give up your dignity or professionalism, regardless of how poorly opposing counsel is behaving. Rise above the fray and focus on the issues.
- Your credibility with the court is everything. Identify case law that is unfavorable and distinguish it, but do not ignore it. Answer the judge’s question directly and if you do not know the answer, concede that immediately, but never say something that is not accurate.
- Do not take cheap shots at opposing counsel as it only makes you look unprofessional in the eyes of the court.

Enjoy the
Dog Days of
Summer –
Go To The Movies!



Discount Movie Tickets

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

* **Muvico Theater - \$8.00 each**

* **Regal Theaters \$8.00 each**

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**

Cocktail Reception Benefits Legal Aid's Annual Fundraiser



Ron Ponzoli, Andrea Reid, Jason Reid, Bob Bertisch

On March 2, Linda & Donald Lyman together with Denise & Sam Isaacs and the South Palm Beach County Bar Association hosted a Gift Gathering Gala and Photography Exhibit & Sale at the Lyman's home in Broken Sound. This event was held in support of Legal Aid's 25th Annual Pro Bono Evening & Auction. Over 110 supporters dined on amazing delicacies prepared by Master Chef Sam Isaacs and enjoyed and purchased the photographic work of Boca Raton attorneys Michael Gora & Charles Cohen.

Photo by Tracey Benson

Our First Golf/CLE Mixer, A Hole In One Success!

Our first Golf/CLE Mixer was held at Bear Lakes Country Club for members of all levels, including beginners. Members enjoyed a beautiful day away from the office and outdoors. The event began with a brief CLE, followed by either a golf skills clinic or 9 holes, and concluded with a happy hour. The day was so enjoyable that members were already asking for a repeat again next year!



Evan Frederick, Karen Holloway from Northwestern Mutual, and Steven Grant



Thomas Lavin played 9 holes



Helene Hvizd and Scott Suskauer head out of a lesson



Seventeen (17) beginners and intermediate players participated in the clinic including Adam Rabin

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The 15th Judicial Circuit Professionalism Council: "When the Council Counsels"

By: Michael D. Mopsick, Co-Chair, Professionalism Committee
Amy S. Borman, Co-Chair, Professionalism Committee

Did you ever wonder how those anonymous professionalism letters become published in the Palm Beach County Bar Bulletin? Have you thought about how the attorneys who were counseled came before the Professionalism Council? After reading this column, you will not only be able to answer those questions, but you will learn much more.

The Palm Beach County Bar Association's *Standards of Professional Courtesy* were originally adopted in 1990 and were endorsed by the Judges of the Fifteenth Judicial Circuit in October 2007. The Florida Bar approved the *Ideals and Goals of Professionalism* also in 1990. The *Standards and Ideals* apply to all attorneys - and their staff - practicing law in the Fifteenth Judicial Circuit. Examples of some of the conduct covered by the *Standards* include¹:

1. communicating with opposing counsel prior to scheduling depositions and hearings;
2. giving at least five (5) business days notice for instate depositions and hearings;
3. scheduling depositions and hearings at mutually convenient times;
4. notifying opposing counsel and the court of scheduling conflicts as soon as the conflict is apparent (not the night before!);
5. granting reasonable requests for extension of time
6. refraining from criticizing the court, opposing counsel, parties or witnesses
7. speaking civilly to courtroom deputies, court reporters, judicial assistants and clerks.
8. endeavoring to be knowledgeable about administrative orders, local rules and each judge's divisional instructions.

So what happens when you do not comply with the *Standards or Ideals*, or are the victim of bad behavior by one of your peers? A Professionalism Council ("Council")² can be convened to review and discuss the matter, work with the attorney and use the circumstance as a vehicle for teaching. The Council addresses conduct that may not rise to the level of a violation of the Rules of Professional Conduct of the Florida Bar. It does not make findings as to whether a breach of ethics occurred. Rather, it is charged with working with attorneys whose conduct, while technically not unethical, was unprofessional.

The Professionalism Council is comprised of the President of the Palm Beach County Bar Association ("PBCBA"), a representative of the Florida Bar Board of Governors for the 15th Judicial Circuit, the Chairperson(s) of the PBCBA Professionalism Committee and three other persons appointed by the Chief Judge. The offending attorney is invited to attend and discuss the matter with the Council members. While the attendance by the attorney is voluntary, it is strongly encouraged. Regardless of whether the attorney attends, the Council takes up the matter and sends a letter to the attorney discussing his or her behavior. The letter is then published in the Bulletin, with names

¹ Due to space limitations the full list of standards cannot be published in the article. These standards are published at <http://www.palmbeachbar.org/spc.php>.

² Administrative Order 2.105 establishes the Fifteenth Judicial Circuit Professionalism Council and sets forth the procedures for the Council's meeting.

redacted, so that the event becomes a "teachable moment."

The goal is to educate as to what is - and what is not - appropriate conduct. Is it proper to copy a judge on a nasty email to opposing counsel? Should an attorney contact a judicial assistant and inquire about how the Judge might rule on a motion he plans to file? Should an attorney call another attorney "a liar" in written communications or in the courtroom? These are all examples of matters brought to the attention of the Council within the last few years.

The purpose is for the members of the Council to counsel the attorney. They discuss alternate ways of how the matter could have been handled. They help to find mentors for new/young attorneys who may not understand the nuances in procedure or the culture of civility in the practice of law in the Fifteenth Judicial Circuit.

Matters can be submitted to the Council by the judiciary, attorneys or litigants. The submission is made to the Chair(s) of the Professionalism Committee. Those submitted by attorneys or litigants are reviewed to determine whether unprofessional conduct likely occurred prior to convening a Council. A submission by a Judge automatically results in a Council hearing the matter. Forms for submission to the Professionalism Committee have been developed and are available on the PBCBA's website.

The Professionalism Council, although not unique among the circuits, is a rare educational tool. In our ongoing effort to restore civility and professionalism in the practice of law, we encourage everyone, lawyers and judges, to take advantage of the opportunities it provides.



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- ☞ Located directly across the street from West Palm Beach County Courthouse and City Hall
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- ☞ 93,000 SF Class A Office Building
- ☞ Attached 6 story parking garage
- ☞ 5:1,000 highest parking ratio in downtown WPB
- ☞ Full floor availability or may be subdivided
- ☞ Grand lobby featuring granite and marble finishes
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NCS Second Annual Beach Bash

The weather was perfect for the North County Section's Second Annual Caribbean Beach Bash at the Hilton on Singer Island. The Sunday afternoon included a Junkanoo Band, a sand castle contest, face painting, hair braids, DIY shell jewelry, a magician, lunch and so much more! Next year you can look forward to a new theme with new activities!



NCS President Ken Johnson with his wife and daughter making their sand castle.



Ned Reagan makes his way under the limbo with no problem!



A special thank you to Judges Krista and Joe Marx for judging the sand castle contest and to Marina Petillo for organizing the beach competition.



NCS Director Greg Yaffa and NCS President Elect Todd Stewart welcome our members with an adult beverage



Everyone loves a magician!



NCS Director Reid Bierer and Theo Kypreos

For additional pictures be sure to check out the Bar's Facebook page at www.palmbeachbar.org

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



The Boston Marathon Bombing and Faster Breaking News

By Christopher B. Hopkins

Fifty years ago, Americans were jolted from pre-Thanksgiving festivities by fateful “breaking news” from Dallas, Texas – only to actually witness, days later, Oswald shot to death on live television.

Anyone alive in November 1963 recalls how they learned of the news. The instant media, prolonged coverage, and live images made everyone spectators to history, if not seemingly participants. Since then, with 24-hour news coverage, nearly every major news event has been immediately accessible and visible to the public: from President Reagan’s attempted assassination to Columbine to September 11 as well as a cavalcade of natural disasters and reactor meltdowns. We see everything live and instantaneously.

The recent Boston Marathon bombings, however, may prove to be a defining moment in how, *and how fast*, Americans obtain “breaking news.” This is not the first time people have flocked to the internet for news. But the Boston attack was the first time where users, by massive numbers, culled and researched crowd photos to assist in the search; witnessed gunfire through YouTube clips; felt the military-like presence of law enforcement in Watertown via Instagram photos; exposed the suspect’s social media profiles; and monitored the police investigation on Twitter and U-Stream better and faster than CNN or Fox News could report. As the events unfolded in Boston, the explosion of the Information Age was mixed with a new accelerant.

On April 15, 2013, two bombs exploded near the marathon finish line along Boylson Street. Still and video footage were available from witnesses, broadcast, and security cameras. In short, there were “several Zapruders,” according to one analyst, who referenced the Kennedy assassination. Surprisingly, in these situations, there is no law enforcement standard for acquiring still images and video from the public.

Despite lacking organizational structure or forensic training, internet denizens took to sites like Reddit and 4chan to collect still and video images of the bombing sites and organize the content into “photo dump compilations.” See <http://bit.ly/106iYx> Working through forums like “FindBostonBombers,” users examined, cropped, enlarged, and notated pictorial evidence of movement in the crowd. This was a sophisticated undertaking: a public Google Document entitled “Boston Bombing Info Spreadsheet” tracked scene/evidence photos and suspect summaries with hyperlinked citations. See <http://bit.ly/106iRWq> By crowdsourcing the painstaking task of tracking people in busy photos, internet groups narrowed in on the two suspects and had compiled photographic evidence of their escape (without bookbags) by Wednesday. The FBI, meanwhile, announced its theories and photographs a day later.

By Thursday evening, YouTube videos of shootouts between the police and suspects appeared, giving a personal angle to events which were not always shown on TV. See <http://bit.ly/13D8yRy> and <http://bit.ly/13D84ek> When law enforcement tracked the second suspect into Watertown, photos from residents (ordered to remain indoors) flooded to Twitter, Tumblr,

and Instagram, giving a citizen’s perspective of what it is like to have military-style vehicles and hundreds of officers patrolling neighborhoods and entering homes. See <http://bit.ly/13DanOs> and <http://bit.ly/13DaCZY> or search for “Watertown” on Twitter; on the left column, click “top photos” or “top videos.”

While the search for the suspects continued into Friday, Bostonians posted to Twitter their firsthand accounts of the city-wide lockdown. Twitter was ablaze with trends like “#watertown” or “#bostonbombing” (“#” is a hashtag which signals that the attached word is the focal topic; as more people use a particular hashtag, you can see what topics are “trending”). Meanwhile, amateur sleuths discovered that user “@J_tsar” was one of the suspects and that he had been posting to Twitter after the attack. See <http://bit.ly/13DdHJr> Others found one of the suspect’s Amazon shopping list. See <http://amzn.to/XOZapB> Finally, users unearthed the profile of one brother on the Russian-equivalent of Facebook. See <http://bit.ly/13DdBK>

You can use the internet to monitor police scanners. During the manhunt, it was fascinating to hear Boston police operations. In the moments leading up to the capture of the second suspect, the police scanner provided riveting discussions from perimeter law enforcement about negotiators and flashbang grenades (CNN mentioned it 10 minutes later). On Twitter, a search for “#scanner” would keep you updated; for future events, listen to scanner audio via U-Stream, Broadcastify, or via iPhone apps like TuneIn, 5-0 Radio Police Scanner, Cop Radio, or Emergency Radio.

This is not to say that news from social media is superior to professional journalism. It is simply faster. You must be selective in what you believe and even more discerning about re-publishing. Early information can be deceiving and even reporters suffered some embarrassing moments. The tragedy in Boston hopefully will lead to efficient procedures for law enforcement to collect video; the public should have a way to quickly upload content directly to police or FBI. Moreover, since people were posting police scanner activity onto Twitter during the manhunt, there may be some changes going forward in what the police broadcast unencrypted. Finally, albeit less seriously, a memo must go out to YouTube videographers to stop shooting in portrait mode or, worse, narrating during their videos. If Abraham Zapruder could figure out how to focus a two-pound 8 mm camera for 26 seconds, it should be no problem fifty years later with a five ounce iPhone.

Christopher B. Hopkins is a shareholder at Akerman Senterfitt. You will not find him on Elm Street in Dallas or Boylston Street in Boston but you can drop an email to Christopher.Hopkins@Akerman.com.

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Tortious Interference With An Expectancy In Probate & Trust Proceedings

By: *David M. Garten*

This article will discuss the elements of a claim for tortious interference with an expectancy (“tortious interference”) in

Probate and Trust proceedings. Next month’s article will discuss defenses to this claim and strategic considerations in bringing/defending against this claim.

A cause of action for tortious interference is unusual in the sense that the plaintiff/beneficiary is authorized to sue to recover damages primarily to protect the decedent’s interest rather than the disappointed beneficiary’s expectations. The beneficiary is not directly defrauded or unduly influenced -- the decedent is. Thus, the courts have created this cause primarily to protect the decedent’s right to dispose of property freely and without improper interference. *See, Whalen v. Prosser*, 719 So. 2d 2 (Fla. 2nd DCA 1998).

A beneficiary does not have a vested claim for tortious interference until the testator’s death; therefore, 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, supra*; *Tensfeldt v. Tensfeldt*, 839 So. 2d 720 (Fla. 2nd DCA 2003).

To state a cause of action for tortious interference, the complaint must allege the following elements: (1) the existence of an expectancy; (2) interference of that expectancy through tortious conduct; (3) causation; and (4) damages. *See, Claveloux, supra*; *Davison v. Feuerherd*, 391 So. 2d 799 (Fla. 2d DCA 1980). Refer to the following cases where the allegations in the complaint were deemed sufficient to withstand a motion to dismiss: *Allen v. Leybourne*, 190 So. 2d 825 (Fla. 3rd DCA 1966); *Davison, supra*; and *Watts v. Haun*, 393 So. 2d 54 (Fla. 2nd DCA 1981). It is not necessary to state a cause of action for the underlying tort. *See, Nationwide Life Insurance Company v. Perry*, 2012 U.S. Dist. Lexis 146454 (S. Dist. Fla. 2012) (The court rejected the defendant’s argument that the tortious

interference based on fraud must meet the heightened pleading requirements. The court reasoned that this was not a fraud claim, despite the fact that evidence of fraud may be used to prove the claim.)

Existence of an Expectancy: Plaintiff must prove an expectancy. For example, in *Allen v. Leybourne*, 190 So. 2d 825 (Fla. 3rd DCA 1966), plaintiff claimed that the defendant had tortiously prevented the decedent from making another will favoring the plaintiff. The court allowed the plaintiff to proceed with her claim because if the will offered for probate was defeated, her intestacy share would be less than her expectancy under the subsequent will. In *Davison, supra*, the plaintiff alleged that the decedent, her stepmother, had “formed an intention” to give the plaintiff the major portion of her estate by amending a revocable trust to leave the residue to the plaintiff. Although the decedent’s attorney drafted the amendment, the defendants convinced her not to sign it. In *Martin v. Martin*, 687 So. 2d 903 (Fla. 4th DCA 1997), the decedent’s sons sued their step-mother alleging that she tortiously interfered with their inheritance rights, causing the decedent to reduce, over time, the amount they would inherit from him. Additionally, the plaintiff may have a claim against defendant for tortiously inducing the decedent to make inter vivos conveyances to the defendant, thereby reducing the size of the decedent’s estate and the beneficiary’s expectancy. *See, DeWitt v. Puce*, 408 So.2d 216 (Fla. 1981)(citing, *Hegarty v. Hegarty*, 52 F. Supp. 296 (D.Mass. 1943) and *Cyr v. Cote*, 396 A.2d 1013 (Me. 1979)); *Peralta v. Peralta*, 131 P.3d 81 (N.M. App. 2005).

Tortious Conduct: Plaintiff must prove that the defendant interfered with his inheritance through tortious conduct, i.e., fraud, duress, undue influence, defamation, abuse of fiduciary duty, forgery, alteration, or suppression of a will. *See, Davison, supra*; *Watts, supra*; *Whalen, supra*; *Doughty v. Morris*, 871 P.2d 380 (N.M. Ct. App. 1994). Mere negligence or even recklessness in breaching a duty to use reasonable care does not rise to the level

of intentional (tortious) conduct. *See, The Restatement (Second) of Torts*, §774B, cmt. a.

Causation: Plaintiff must prove that he would have realized his inheritance but for the defendant’s tortious conduct. “There must be proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator or that the gift would have been made inter vivos if there had been no such interference.” *See, Restatement (Second) of Torts* §774B cmt. d.

Damages: Plaintiff must prove the value of the property that he would have been received, or the lost expectation had the tortious conduct not occurred. *See, Restatement (Second) of Torts* § 774B, cmt. e (“The normal remedy... is an action in tort for the loss suffered by the one deprived of the legacy.”). Punitive damages are not a valid expectation. *See, DeWitt, supra*.

Burden of Proof: The plaintiff is required to prove tortious interference with “reasonable certainty”. *See, Davison, supra*; *Saewitz v. Saewitz*, 79 So. 3d 831 (Fla. 3rd DCA 2012). In *Saewitz*, the court defined the term “reasonable certainty” with regard to damages as follows:

“Under the reasonable certainty rule,... recovery is denied where the fact of damages and the extent of damages cannot be established with a reasonable degree of certainty.” [citation omitted]. The amount of damages claimed need not be proven with exactitude, but it must not be based upon speculation or guesswork. [citation omitted]. “The standard for the degree of certainty requires that the mind of a prudent impartial person be satisfied with the damages.” The proof adduced must be sufficiently definite for a reviewing court to perform its review obligation. [citation omitted].



By Manuel Farach

Flescher v. Oak Run Associates, Ltd., – So. 3d –, 2013 WL 1348134 (Fla. 5th DCA 2013).

A developer may draft association covenants so that developer retains the absolute right to change provisions, but changes are subject to reasonableness

requirement that character of development not be changed or burden on members increased.

U. S. Bank, N.A. v. Wanio-Moore, – So. 3d –, 2013 WL 1348245 (Fla. 5th DCA 2013).

Florida Rule of Civil Procedure 1.110 (b)'s verification requirement for mortgage foreclosures does not require the signer's position be stated in order to be valid.

In Re: Amendments To Florida Rule Of Judicial Administration 2.516, – So. 3d –, 2013 WL 1338033 (Fla. 2013).

The Florida Supreme Court clarifies Rule of Judicial Administration 2.516 to reflect that parties are required to serve court papers by e-mail (but may stipulate to opt out of doing so), and to clarify that a separate designation of e-mail address is not necessary.

LK Group Holding Co. v. Spurrier Investments, Inc., – So. 3d –, 2013 WL 1316134 (Fla. 4th DCA 2013).

An eviction which is reversed on appeal is not *ipso facto* a wrongful eviction.

In re Amendments To Florida Rule of Civil Procedure 1.442, – So.3d –, 2013 WL 1457749 (Fla. 2013).

A proposal for settlement must be accepted within thirty days of service; mailing time is not added to the thirty days.

McKenzie Check Advance of Florida, LLC v. Betts, – So.3d –, 2013 WL 1457843 (Fla. 2013).

Following *AT & T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740, 1744 (2011), the Florida Supreme court holds that class action waivers in arbitration proceedings do not violate Florida public policy.

GEICO General Ins. Co. v. Williams, – So.3d –, 2013 WL 1442157 (Fla. 4th DCA 2013).

Insurer abandons arguments raised only in a trial court Motion for Rehearing when it files its appeal before determination of the Motion for Rehearing.

Zodiac Records Inc. v. Choice Environmental Services, – So.3d –, 2013 WL 1629134 (Fla. 4th DCA 2013).

Former customer relationships are not trade secrets unless they are product of great effort and expense and consist of confidential (not publicly available) information.

Cromarty v. Wells Fargo Bank, NA, – So.3d –, 2013 WL 1629161 (Fla. 4th DCA 2013).

An undated blank indorsement does not, without more, establish that a plaintiff has standing at the time of filing a mortgage foreclosure suit.

Southfields of Palm Beach Polo and Country Club Homeowners Ass'n, Inc. v. McCullough, – So.3d –, 2013 WL 1629186 (Fla. 4th DCA 2013).

A community association has a duty, which can be enforced by mandatory injunction and mandamus if necessary, to file those documents under Fla. Stat. 712.05 of the Marketable Record Title Act to preserve the community's restrictive covenants.

Cobb v. Durando, – So.3d –, 2013 WL 1629226 (Fla. 2d DCA 2013).

A proposal for settlement must apportion between joint plaintiffs, even if the joint plaintiffs are married and even if their claim derives from real property owned as tenants by the entirety.

Branch Banking and Trust Co. v. Kraz, LLC, – So.3d –, 2013 WL 1629233 (Fla. 2d DCA 2013).

A FDIC "shared loss agreement" does not constitute "payment" of a defaulted mortgage loan such that the loan is not in default and a foreclosure cannot be prosecuted.

Marcus v. Florida Bagels, LLC, – So.3d –, 2013 WL 1748533 (Fla. 4th DCA 2013).

Equitable estoppel principles hold that a non-signatory to an arbitration agreement cannot compel the signatories into arbitration when they choose not to arbitrate.

Heller v. Blue Aerospace, LLC, – So.3d –, 2013 WL 1748545 (Fla. 4th DCA 2013).

Equitable estoppel principles hold that a signatory to an arbitration clause may compel arbitration against a non-signatory when the signatory raises allegations of concerted conduct by the non-signatory and signatories to the contract.

Hillsboro Management, LLC v. Pagono, – So.3d –, 2013 WL 1748615 (Fla. 4th DCA 2013).

De La Rosa v. Zequeira, 659 So.2d 239 (Fla.1995), holds that juror non-disclosure during *voir dire* will result in new trial when the withheld information is relevant and material in the case, juror conceals the information during questioning, and the failure to disclose is not due to complaining party's lack of diligence. A juror's prior litigation is material, concealment need not be intentional, and the technological ease with which counsel may access information impacts the question of diligence.

Atlantis Estate Acquisitions, Inc. v. DePierro, – So.3d –, 2013 WL 1748642 (Fla. 4th DCA 2013).

The full rental payment for a period, even if it is for the period of one year, means the rental payment is not "advance rent" under Fla. Stat. § 83.43 (9) and need not be segregated in a separate account under the Landlord Tenant Act. A tenant that pays for an entire year but is properly evicted under the Act before the end of the rental period may not claim the unused rental period as an "unjust enrichment" to the landlord.

Manuel Farach is Of Counsel with Richman Greer, P.A. in West Palm Beach. Readers can obtain the weekly version of the 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.



Jeremy Ronald Bloor: Jacksonville; University of Virginia, 2009; Associate in McDonald Hopkins, L.L.C. West Palm Beach.

J. Chris Bristow, Jr: Stetson University, 2009; Associate in Cole, Scott and Kissane, P.A., West Palm Beach.

Heather C. Casebolt: Florida Registered Paralegal Membership; McLaughlin & Stern, LLP, West Palm Beach.

Livia Chaykin: Law Student Membership, West Palm Beach.

Christina M. Cicconi: University of Miami School of Law, 2009; Associate in Cole, Scott and Kissane, P.A., West Palm Beach.

Patricia Concepcion: Law Student Membership, West Palm Beach.

Ruth Clayton: Sole practitioner in Miami.

Lloyd Jason Cornell: Winter Gardens; Widener University, 2010; Partner in Fox Rothschild, LLP, West Palm Beach.

Alan Edward DeSerio: Patterson, NJ; Florida State University, 1972; Associate in Pacific Legal Foundation, Stuart.

Hughens Dolisca: Sole practitioner in West Palm Beach.

April D. Edelman: Florida Registered Paralegal Membership, Fisher Bendeck, West Palm Beach.

Caitlin M. Ehinger: West Palm Beach Beach; Law Student Membership, Orlando.

Vance Gragg: NY; Florida State University, 1976; Sole Practitioner, Lake Worth.

Richard D. Greenfield: NY; Cornell University, 1965; Affiliate Membership, West Palm Beach.

Stephen N. Harber: John Marshall Law School, 2011; Associate in Cole, Scott & Kissane, P.A., West Palm Beach.

Frank R. Harding: Columbia University, 1962; Sole Practitioner, Tequesta.

D. Graham Hill: Miami; University of Florida, 2009; Associate in Comiter, Singer, Baseman & Braun, L.L.P., Palm Beach.

Rachel Hyman: Jacksonville; Nova Southeastern, 2009; Associate in Shapiro, Fishman & Gache.

Jacquelynn M. Jernigan: Florida Registered Paralegal Membership, Alley, Maass, Rogers & Lindsay, P.A., Palm Beach.

Ashley M. Johnson: Barry University, 2009; Associate in Joel M. Weissman, P.A., West Palm Beach.

Richard Kearley: Florida State University, 2012; Ft. Lauderdale.

Catherine Kent: University of Chicago, 2011; Associate in Alley, Maass, Rogers & Lindsay, P.A., Palm Beach.

David A. Kirsch: George Washington University, 2010; Associate in Cole, Scott & Kissane, P.A., West Palm Beach.

Ian L. Koven: Valparaiso University, 2011; Associate in Cole, Scott & Kissane, P.A., West Palm Beach.

Joseph Lopatka: University of California, 2006; West Palm Beach.

Stephen McGuinness: Harvard Law School, 2007; West Palm Beach.

Huma Noorani: Law Student Membership, Miami.



Christine T. Photenhauer: Alma Michigan; Thomas M. Cooley, 2012; Sole Practitioner, Sterling Heights, MI.

Nicola Hope Popovich: Victorville, CA; Florida Coastal, 2009; Associate in Pratt & Radford, P.L., West Palm Beach.

Marc Reiner: Orlando; University of Miami, 2005; Sole Practitioner, West Palm Beach.

Benjamin E.V. Ranta: Law Student Membership, West Palm Beach.

Tadena Simpson: Sole Practitioner, Lake Worth.

Diane N. Suarez: Law Student Membership, Lake Worth.

Marc Weiner: Stetson University, 2011, Associate in Eason Law Office, Clearwater.

Seth J. Welner: Associate in Holland & Knight LLP, West Palm Beach.

Anesha Worthy: Stetson University, 2008; St. Petersburg.

Kathryn C. Waddell: Florida Registered Paralegal Membership; Lytal Reiter Smith Ivey & Fronrath, West Palm Beach.



Nicole Lindsey Zakarin: Margate; University of Florida, 2012; Associate in Cole, Scott & Kissane, P.A., West Palm Beach.



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Highlights from Dennis Koehler Memorial Attorney vs. Judges Softball Game



The Attorney's Team



Judges Ron Alvarez and Mark Eissey, Tom Spall, Bill Pruitt, Judge Amy Smith and Tom Baird



Magistrate Sara Alijewicz, Federal Judge Ken Marra, Ret. Judge Richard Wennet and Circuit Judge James Martz



Law Week Committee Members Tanique Lee, Kirsten Herndon and Magistrate Sara Alijewicz thank Duffy's for generously sponsoring the picnic after the game



Judge Ken Marra



Bill Pruitt



Retired Judge Richard Wennet



Scott Wortman



Judge Mark Eissey



Amending Schedules Reopens Objection to Exemption Period

by Jason S. Rigoli

Debtors may amend their bankruptcy schedules at any time prior to the case being closed, absent a showing of bad faith or prejudice to creditors. Fed. R. Bankr. P. 1009. However, when debtors amend their schedules, a new objection to exemption period begins to run. Fed. R. Bankr. P. 4003(b)(1). An issue that arises is whether the new objection to exemption period applies to only those changes in the amendments or to any claimed exemption.

Rule 4003(b)(1) states:

(b) Objecting to a claim of exemptions

(1) Except as provided in paragraphs (2) and (3), a party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension.

There are two interpretations of 4003(b)(1) and the how the 30-day deadline applies to the amended schedules, the “restrictive rule” and “non-restrictive rule.” See, e.g., *In re Woerner*, 483 B.R. 106, 109 (Bankr. W.D.Tex. 2012). The restrictive rule allows “a party in interest... 30 days to object only to changes made by the amendment and not to claims that are unaffected by an amendment.” *Id.* at 109. The non-restrictive rule stipulates that “a party in interest may object to any claimed exemption within 30 days of an amendment to the schedules.” *Id.*

Currently there is no controlling authority in the Eleventh Circuit interpreting Rule 4003(b)(1). The Seventh and Ninth Circuit Courts of Appeal and the Eighth Circuit Bankruptcy Appellate Panel have followed the restrictive rule, holding that a party in interest may object only to those exemptions affected by the amendment. See, *Matter of Kazi*, 985 F.2d 318, 323 (7th Cir.1993)(Relying on “the principles of finality as expressed in *Taylor/v. Freeland & Kronz*, 503 U.S. 638, 644, 112 S.Ct. 1644, 118 L.Ed.

2d 280 (1992)” and *In re Payton*, 73 B.R. 31 (Bankr.W.D.Tex.1987)); *In re Bernard*, 40 F.3d 1028, 1032 (9th Cir.1994)(citing Collier and other cases that adopted the restrictive rule but providing no reasoning for adopting the rule); *In re Grueneich*, 400 B.R. 680, 684 & n. 10 (8th Cir. BAP 2009).

Recently the Bankruptcy Court for the Western District of Texas held that the non-restrictive rule applies under Rule 4003(b). *Woerner*, 483 at 110-11. The *Woerner* Court finding that:

Under Rule 1009, a debtor may amend a schedule as a “matter of course at any time before the case is closed.” Absent a showing of bad faith or prejudice to the creditors, a debtor may amend as often as he pleases... This rule is evinced to some extent by this case, in which Debtor has amended his schedules five times to date. There is no policy argument that the Code demand finality from parties in interest but allow the debtor wide latitude to undermine that finality.

Allowing a party in interest a second look at the claimed exemptions is not prejudicial to the debtor, particularly when amending schedules is strictly the debtor’s prerogative... Furthermore, although it would be ideal for a party in interest to object to exemptions the first time around, such exactitude is not mandated by the plain reading of the rule. Adopting the non-restrictive rule is all the more compelling given that no such strict requirements are demanded of the debtor to accurately file their exemptions under Rule 1009.

Woerner, 483 at 111. In the Southern District of Florida, Judge Kimball, in dicta, has expressed agreement with the non-restrictive rule when interpreting Rule 4003(b). See, *In re Allen*, 454 B.R. 894, 896 (Bankr. S.D.Fla. 2011)(citing *In re Ronk*, No. 05-42552-DML-7, 2006 WL 2385240, at *4, 2006 Bankr.LEXIS 1099, at *12-13 (Bankr. N.D.Tex. June 19, 2006).

Although there is no binding authority in the Eleventh Circuit, those debtors who take advantage of the liberal construction of Fed. R. Bankr. P. 1009, which allows debtors to amend their schedules almost at will, will have to be aware of the potential risk of losing the exempt status of an asset once the objection deadline is reopened.

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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“Keeping Diversity at the Forefront”

Submitted by Diversity Relations Subcommittee Co-Chairs Jean Marie Middleton and Laurie Stilwell Cohen

The Diversity Placement Database: Recruitment Tool for Improving Diversity in Palm Beach County



It is widely acknowledged that diversity in the workplace is good business. Numerous studies bear that out. In a July 2011, survey of executives at large global enterprises conducted by Forbes Insights, Forbes noted the following “key findings:”

- Diversity is a key driver of innovation and is a critical component of being successful on a global scale.
■ A diverse and inclusive workforce is crucial for companies that want to attract and retain top talent.
■ Nearly all respondents reported that their companies have diversity and inclusion strategies in place.
■ Organizations’ diversity goals and priorities won’t change significantly over the next three years.
■ Responsibility for the success of a company’s diversity/inclusion efforts lies with senior management.
■ Significant progress has been made to build and retain diverse workforces, but there are still some impediments to companies’ efforts.

“Global Diversity and Inclusion: Fostering Innovation Through a Diverse Workforce” (July, 2011), http://www.forbes.com/forbesinsights/innovation_diversity/index.html.

While these findings are encouraging with respect to business in general, diversity in the legal profession continues to lag. The American Bar Association (“ABA”) reports that the nationwide focus on diversity has led to some improvement, but not enough. The ABA states:

As America races toward a future where minorities will be the majority and more marginalized groups make their voices heard, the legal profession’s next steps towards advancing diversity must produce more viable, sustained outcomes. Despite our efforts thus far, racial and ethnic groups, sexual and gender minorities, and lawyers with disabilities continue to be vastly underrepresented in the legal profession.

American Bar Association, Presidential Diversity Initiative, Diversity in the Legal Profession: The Next Steps (April, 2010), http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf

Given these findings, how do we, as a legal community, ensure that our increased focus on diversity translates into real progress? In meetings with hiring partners and decision-makers around Palm Beach County, the Committee for Diversity and Inclusion frequently heard that employers are eager to recruit diverse attorneys, but do not know the best means to go about it. In response to this concern, the Committee for Diversity and Inclusion has created the “Diversity Placement Database.”

The Database, located on the Palm Beach County Bar Association’s website under the “Diversity” tab or at http://qnm20.securesites.net/pbcba/diversity/index.php, will be a

beneficial tool for both Palm Beach County employers seeking to recruit diverse attorneys and diverse candidates seeking new employment opportunities. Employers may obtain, free of charge, a user name and password from the Palm Beach County Bar Association and may post open attorney positions directly online on the Database. The employer will describe the open position and the experience and qualifications required. PBCBA will then assign a unique job identification number for each job posting.

Candidates are encouraged to review the listings, determine whether they meet the qualifications, and submit resumes directly to the employers, using the job identification number provided by the Database. Candidates will also be able to save individual jobs as “favorites” for ease of reference.

It is the hope of the Palm Beach County Bar Association’s Committee for Diversity and Inclusion that the Database will be a helpful recruitment tool for employers and candidates alike and will help achieve meaningful progress toward a more diverse legal community in Palm Beach County.

Laurie Stilwell Cohen and Jean Marie Middleton are co-chairs of the Diversity Relations Subcommittee of the Committee for Diversity and Inclusion. Laurie is the City Attorney for Wellington. She is also a Florida Supreme Court Certified Circuit Civil Mediator. Jean Marie serves as Assistant Counsel for the Palm Beach County School District. Jean Marie is also a Florida Supreme Court Certified Mediator.



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Rule 1.310(b)(6): Corporate Representative Depositions

By Matt Triggs and Jonathan Galler

Every once in a while, you come across an opinion that just seems destined to become a most cited case on a particular topic.

The recent opinion issued by the Fourth District in *Carriage Hills Condominium, Inc. v. JBH Roofing and Construction, Inc.*¹ is a perfect example. It reads like a manual for practitioners on how to properly notice and prepare a witness for a corporate representative deposition.

In that case, the Court held that the deposition of the defendant's corporate representative – a deposition that set the stage for plaintiff's subsequent summary judgment award – was not, in fact, a "corporate representative deposition" at all. At least not the sort contemplated by rule 1.310(b)(6) that is designed to bind a corporate party.

The lawsuit involved a contract dispute between a roofing company and a condominium association. The plaintiff served a notice for what it seemed to believe would be a corporate representative deposition. The notice did not actually cite rule 1.310(b)(6), but it sought the deposition of a representative of the defendant with "the most knowledge of the allegations contained in the complaint." The defendant, in turn, tendered the witness that it believed had "the most knowledge" of the allegations in the complaint.

At the deposition, the witness offered testimony that appeared to undermine the defendant's legal position. She was asked about, and provided, her own, personal views on a variety of matters at issue in the lawsuit, many of which suggested her lack of support for or belief in the claims and defenses alleged by the entity for which she was supposedly testifying.

Not surprisingly, the plaintiff moved for summary judgment. In response, the defendant proffered the affidavits of one current and one former officer of the defendant. Both provided testimony that was more closely aligned with the defendant's legal position in the case.

At the plaintiff's urging, the trial court struck the affidavits "invoking the principle that in situations where the non-movant in a motion for summary judgment submits

¹ 2013 WL 1136399 (Fla. 4th DCA Mar. 20, 2013).

an affidavit which directly contradicts an earlier deposition & courts may disregard the later affidavit."² The trial court then granted the motion for summary judgment on the basis of the deposition testimony.

In reversing, the Fourth District held that four findings must be made before a trial court will strike testimony on grounds that it contradicts testimony offered at a prior corporate representative deposition. First, the prior deposition testimony must have been provided by a duly noticed rule 1.310(b)(6) designee on a matter specified in the deposition notice. Second, the testimony to be stricken must directly contradict unequivocal prior testimony regarding matters of fact. Third, there must be no credible and reasonable explanation for the discrepancy. And, fourth, the striking of the testimony must be necessary to protect the integrity of the judicial process. "Absent such findings the alleged discrepancy is a matter to be considered by the trier of fact."³

The Court determined that none of those criteria was satisfied. Perhaps most interesting was the Court's conclusion that the deposition testimony at issue did not satisfy the first factor. The Court's opinion – which seems destined to become a "most cited" case on the topic of corporate representative depositions – provides a very detailed review of how rule 1.310(b)(6) is supposed to operate.

The Court explained that rule 1.310(b)(6) imposes burdens upon both parties. "The party seeking discovery is required to describe, with reasonable particularity, the matter(s) for examinations. The responding entity must then produce one or more witness who can testify as to the corporations' knowledge of the specific topics."⁴ Towards that end, the entity must prepare the witness sufficiently to enable the witness to give complete, knowledgeable and binding answers on behalf of the entity. "When a rule 1.310(b)(6) deposition is properly noticed and conducted, the testimony of the designee is deemed to be the testimony of the corporation itself."⁵

Despite the popularity of doing so,

² 2013 WL 1136399 at 2.

³ 2013 WL 1136399 at 7.

⁴ 2013 WL 1136399 at 3.

⁵ 2013 WL 1136399 at 3-4.



a rule 1.310(b)(6) notice of deposition should not seek the testimony of a representative with the "most knowledge" on any particular topic. In fact, as the Court held, the plaintiff's use of that designation in this case was "fundamentally inconsistent with the with the purpose and dynamics of the rule" because the rule allows the entity being deposed to select a designee without regard to his or her personal knowledge or lack thereof.⁶ Moreover, the Court determined that the designation, which is supposed to be made with reasonable particularity, was unduly broad in a case with multiple counts sounding in contract and tort.

The Court also determined that the defendant, for its part, failed to carry out its burden under the rule because it failed to properly prepare its designated witness to testify as to the entity's legal position. As the Court pointed out, the witness did just the opposite, making it clear that her beliefs and opinions were not necessarily shared by the defendant. She also repeatedly testified that she was not aware of critical facts, making it clear to the Court that she was testifying only as to her personal knowledge.

The Court held, for these and other related reasons, that the "corporate representative deposition" did not bind the defendant in the sense contemplated by rule 1.310(b)(6). In light of that, it was error for the trial court to strike the "contradictory" affidavits and enter summary judgment.

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.

⁶ 2013 WL 1136399 at 4.



Not So Fast: Setting Aside a Divorce Judgment Procured by “Fraud”

By Christopher R. Bruce

Anyone who has dabbled in a practice close to matrimonial law has or will inevitably face the following question in an interview with a potential client: “My former spouse tricked me, can I set aside my divorce decree?” Often, this question will be followed by an explanation of how the potential client’s former spouse engaged in a perceived litany of fraudulent acts. Unfortunately, in most cases it is not appropriate to set aside a final judgment of dissolution of marriage- even when an actual fraud has occurred.

Below is a basic outline of the law applicable to setting aside divorce judgments. Although this law is written for family law practitioners, the concepts explained herein are largely applicable to other litigation in Florida’s state courts.

Ground Rules

The Florida Rules of Civil and Family Procedure authorize a vacating a divorce judgment in limited circumstances. Within one year, a divorce judgment can be set aside due to several categories of mostly clerical mistakes, newly discovered evidence that could not have been discovered by due diligence, and fraud. After one year, it is generally “too late” to bring an action to set aside a divorce judgment, with the exception that Rule 12.540 states “there shall be no time limit for motions based on fraudulent financial affidavits in marital or paternity cases.”

Remember when evaluating a potential case for setting aside a divorce judgment that an appeal generally does not toll the time to bring an action to vacate a judgment under Rule 12.540. Furthermore, great care must be put into drafting a Rule 12.540 motion as any amendments to the motion after the one year deadline do not “relate back” to the original filing of the motion. This is because a Rule 12.540 motion is a “motion” and not a “pleading” to which the Rule 12.190 “relation back” provisions apply. Finally, it is improper to bring a 12.540 motion on identical grounds previously asserted in a Rule 12.530 petition for rehearing. *Sloan v. Sloan*, 393 So.2d 642 (Fla. 4th DCA 1981).

Basic Pleading Requirements

In *Flemenbaum v. Flemenbaum*, 636 So. 2d 579 (Fla. 4th DCA 1994), the Fourth District Court of Appeal established a two prong test for what must be alleged to establish a basis for setting aside a divorce judgment. The “*Flemenbaum Test*” states a party seeking to set aside a divorce judgment based on fraud must (1) specify the fraud that occurred and (2) explain why the fraud requires the final judgment to be set aside. *Id.* at 580.

Practice Tip: A trial court lacks jurisdiction to grant a motion to set aside a divorce judgment when the *Flemenbaum Test* is not satisfied. Under *Flemenbaum*, a deficient motion to set aside a judgment can be denied without an evidentiary hearing. A motion to dismiss citing *Flemenbaum* can quash a motion to vacate a judgment in its tracks.

Step 1: Pleading Fraud

Pleadings in an action to set aside a divorce judgment based on fraud must allege: (a) there was a misrepresentation of a material fact; (b) the defendant knew the falsity of the misrepresentation; (c) the defendant made the misrepresentation intending that the plaintiff would rely on it in doing an act

desired by the defendant; and (d) the plaintiff’s reliance caused damage. *Myers v. Myers*, 652 So. 2d 1214, 1215 (Fla. 5th DCA 1995). Merely pleading a former spouse omitted assets from a financial affidavit is not analogous to establishing the fraud requisite to setting aside a divorce judgment. See *Romero v. Romero*, 959 So. 2d 333, 338 (Fla. 3d DCA 2007). The pleadings must explain how the omission of an asset from a financial affidavit was fraudulent. See *id.*

Step 2: Pleading Why the Fraud Matters

Surprisingly, under *Flemenbaum* and prevailing jurisprudence, a showing of fraud does not automatically require a divorce judgment to be vacated. Instead, there must be a showing of why the fraud requires the judgment to be set aside. This is because, in some circumstances, fraud can be remedied without setting aside a judgment. As an example, the law provides divorced spouses are automatically tenants in common to any asset left unaddressed by a divorce judgment. See *Demorizi v. Demorizi*, 851 So. 2d 243 (Fla. 3d DCA 2003). Other cases hold that even egregious fraud does not require a judgment to be vacated when a party did not establish their entitlement to relief at trial. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Inc.*, 20 So. 3d 952, 957 (Fla. 4th DCA 2009).

Conclusion

Although vacating a divorce judgment is difficult, it can be done when the practitioner is mindful of the technical rules of engagement that apply to this area of the law. These rules and the client’s specific set of circumstances should be thoroughly reviewed before any significant resources are dedicated to pursuing a Rule 12.540 proceeding.

Christopher R. Bruce is a partner of the firm of Nugent Zborowski & Bruce. The firm’s practice is limited to resolving divorce litigation and related appeals. Christopher R. Bruce can be reached at (561) 844-1200 or cbruce@nugentlawfirm.com.

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Persuasion Tips

Our most recent membership luncheon was held with the Palm Beach County Justice Association and featured guest speaker Marsha Hunter, a communications and persuasion expert. The sold out event was a great success!



Photos by Tracey Benson

Hunter discussed techniques of using your hands to speak and persuade. Members John Whittles, Ron Ponzoli and Chief Judge Peter Blanc practicing their hand gestures.



Judges Lucy Brown and Catherine Brunson



Abigail Jorandby with her signed book by author and speaker Marsha Hunter



Bertisch, Legal Aid Board Member Patience Burns and Julianna and Chief Judge Peter Blanc.

On March 23, one hundred supporters of Legal Aid partied at the home of Gerry & Gwen Richman at a cocktail reception benefitting Legal Aid's Pro Bono Recognition Evening. Guests donated over 65 gifts which were auctioned at the May 18th event. Pictured at left are Legal Aid Executive Director Bob



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If you did not receive a statement, please contact Shoshanah Spence at (561) 687-2800.

Key Considerations for Seeking An Award of “Reasonable” Attorney’s Fees

by Adam Rabin and Rob Glass

Attorney’s fees disputes are often hotly contested. Once the court determines entitlement, the parties may vary widely on their respective assessments of reasonableness. Before submitting materials regarding the reasonableness of the amount of fees and reasonable hourly rates for attorneys, practitioners should be aware of the key authorities below.

1. *Florida Patient’s Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985)

Under *Rowe*, the Florida Supreme Court’s seminal case on reasonable attorney’s fees, a court must first decide the number of hours “reasonably expended” on the litigation. The court then must determine a reasonable hourly rate for the attorney. Multiplying these two numbers together provides an “objective basis” for the award, which can be adjusted based on contingency risk or the specific results obtained. “Reasonableness” is determined by reference to the factors discussed in *Rowe* and the similar factors listed in Rule 4-1.5 of the Rules Regulating the Florida Bar.

2. *Tomaino v. Tomaino*, 629 So. 2d 874 (Fla. 4th DCA 1993)

In this family law case, the Fourth DCA reviewed an award of attorney’s fees to the wife, where the wife hired two attorneys to represent her in the divorce action, one local and one from out of state. The court reiterated that the wife was “free to hire whomever she want[ed] to represent her.” The court reversed the award, however, finding that the work performed by both was duplicative. The court explained that “[i]t does not require one three hundred dollar an hour attorney to review the work of another equally expensive attorney.” *Id.* at 875. The court found that efforts by both attorneys “prominent, skilled members of the marital bar” to appear at hearings, depositions, and trial was excessive under the circumstances. The court was careful to explain that the “assistance of associates” would not necessarily be deemed duplicative B a point recently reaffirmed in *Mitchell v. Mitchell*, 94 So. 3d 706 (Fla. 4th DCA 2012).

3. *Baratta v. Valley Oak Homeowners’ Association at the Vineyards, Inc.*, 928 So. 2d 495 (Fla. 2d DCA 2006)

In *Baratta*, a homeowner appealed an award of attorney’s fees in favor of

a homeowners’ association after the case was dismissed. The Second DCA reversed the award, finding that the trial court failed to make sufficient factual findings regarding certain *Rowe* factors. The court provided some general “guidance” regarding reasonableness. First, “duplicative time charged by multiple attorneys working on the case is usually not compensable.” *Id.* at 499. Second, “work that is necessitated by the client’s own behavior should more properly be paid by the client than by the opposing party.” *Id.* Third, “attorney’s fees should not usually be awarded for claims on which the moving party was unsuccessful.” *Id.*

4. *Centex-Rooney Construction Co. v. Martin County*, 725 So. 2d 1255 (Fla. 4th DCA 1999)

In *Centex-Rooney*, Martin County sought damages for the defective construction of its new courthouse. After obtaining a verdict for damages, the county sought an award of \$1.8 million in fees for the five-year litigation. The construction company appealed the fee award, contesting the reasonableness of the amount. In upholding the award, the court noted certain exceptions to the general rules discussed above. For instance, the court explained that an award of fees for the work of multiple attorneys is permitted so long as the services rendered by each attorney are necessary and not duplicative. The court explained that multiple attorney conferences, which are frequently targeted as unnecessary, may be appropriate in a complex case to avoid any duplication of attorney efforts. Close calls will hinge on the complexity of the litigation. Ultimately, while the movant bears the burden of establishing the reasonableness of the fee award, the opponent bears the burden of identifying “with specificity which hours should be deducted,” as where time is duplicative or unnecessary. *Id.* at 1259.

5. *In re Estate of Platt*, 586 So. 2d 328 (Fla. 1991)

In this case, the Florida Supreme Court discussed the applicability of *Rowe* and the lodestar approach to probate litigation. In the process, the court also discussed what constitutes a “reasonable” hourly rate for an attorney. The court explained, for purposes of



taxing attorney’s fees against the opposing party, “a trial court is not bound to accept the hourly rate asserted by counsel who performed the service.” *Id.* at 334. The court also emphasized that a reasonable rate is that charged in the community by lawyers of similar skill and experience for similar services.

6. Section 57.104, Florida Statutes

Practitioners should also be aware of section 57.104, Florida Statutes, which governs fees recoverable for work performed by legal assistants and paralegals. Fees for such work may be awarded when the work constitutes “nonclerical, meaningful legal support to the matter” and when the non-attorney works under the supervision of a licensed member of the Bar. Examples of work that is compensable include legal research, case development or planning, preparation or interpretation of legal documents, or compilation and use of technical information from reference materials. Typical “clerical work,” such as sending mail or e-mail to the clerk or the opposing party, scheduling a hearing, or “file maintenance” is not compensable under this statute. *See Youngblood v. Youngblood*, 91 So. 3d 190 (Fla. 2d DCA 2012).

Conclusion

To determine and demonstrate the reasonableness of an award of attorney’s fees, there are certain key cases and propositions of law that a lawyer needs to know. These authorities relate to the number of hours, the rate, and the tasks which may or may not be reasonable given the facts of the case. With a working knowledge of these cases, the lawyer will be able to spend more time focusing on getting the best result for his or her client.

Adam Rabin and Rob Glass work at McCabe Rabin, P.A. in West Palm Beach and practice in the areas of business, securities and whistleblower litigation.

Trivia Luncheon So Much Fun!

Our first, but not our last, Administrative Assistants Trivia Luncheon was held at the Marriott and was so much fun! Teams answered history, sports, science and local legal questions. It was so much fun we will do it again!



Ryon McCabe and Robert Glass discussing an answer



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Young Lawyers April Happy Hour Highlights

The YLS recently hosted a happy hour at the Palm Beach Yacht Club. Pictured to the right are Mandell Sundarsingh, Colin White, W and Jessica Mason, Leanna Lalla and Judge Diana Lewis



Destinie Baker, Farah Lolagne and



Daniel Franks and Jason Gray



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HEARSAY

The law firm of Buckingham, Doolittle & Burroughs, LLP, announces that **Mark R. Osherow** has joined the firm as a partner in the Boca Raton office.



Ronald P. Ponzoli, Jr., a Shareholder with the law firm of Richman Greer, P.A., has been elected to The Florida Bar Board of Governors representing the 15th Judicial Circuit for a two year term starting July 1, 2013.

Robert H. Friedman, of Friedman P.A., will be honored with the Legal Aid Society of Palm Beach County's Civil Litigation Pro Bono Award at its 25th Annual Pro Bono Recognition Evening on May 18th at the Palm Beach County Convention Center.



McIntosh Sawran & Cartaya, P.A. a statewide litigation defense firm, is pleased to announce that **A. Candace Marcus**, a Partner in the firm's Medical Malpractice/Healthcare Law Division, is now resident in the firm's West Palm Beach office.

Keri-Ann C. Baker has recently been elected to the Board of Directors of the Marine Industries Association of Palm Beach County, Inc. The firm is also pleased to announce that Kathryn B. Rossmell has joined the firm's West Palm Beach Office as an associate.



Michael J. Napoleone, a Shareholder with Richman Greer, P.A., has been appointed as Chair of The Florida Bar's Constitutional Judiciary Committee for 2013-14.

Richard B. Warren and **Michael L. Grant** are pleased to announce the formation of Warren & Grant, P.A. The firm has relocated to Palm Beach Gardens.



John Moran becomes an American College of Trust and Estate Counsel (ACTEC) Fellow, one of the highest achievements for an attorney in the trusts and estates field.



W. Jay Hunston, Jr. has been selected to serve on the American Arbitration Association's Roster of Neutrals for Commercial and Construction Arbitration, as well as Mediation. Mr. Hunston has practiced law for 37 years and has been a full-time dispute resolution professional since 2001.



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CALENDAR

June 2013

<p>Saturday, June 1, 7:00pm – 11:30pm PBCBA Installation Banquet The Breakers Hotel</p>	<p>Tuesday, June 11, Noon – 1:00pm YLS Board Meeting Bar Association Office</p>	<p>Thursday, June 13, 11:45am – 1:00pm SPBC FAWL Elections/Installations Mariposa in Neiman Marcus</p>	<p>Thursday, June 20, 11:45am – 1:00pm Judicial Relations Committee Meeting Judicial Conference Room, Main Courthouse</p>
<p>Tuesday, June 4, 8:30am – 10:30am New Attorney Seminar Bar Association Office</p>	<p>Wednesday, June 12, 11:30am – 1:00pm CDI Committee Lunch Judicial Conference Room, Main Courthouse</p>	<p>Saturday, June 15, 8:00am – 5:00pm YLS Fishing Tournament</p>	<p>Thursday, June 20, 5:30pm – 7:00pm YLS Happy Hour Roxy's Saloon Room</p>
<p>Friday, June 7, 8:00am – Noon Community Association Law CLE Seminar Bar Association Office</p>	<p>Wednesday, June 12, Noon – 1:00pm Professionalism Committee Meeting Bar Association Office</p>	<p>Tuesday, June 18, Noon – 1:00pm Unified Family Practice Committee Meeting Judicial Conference Room, Main Courthouse</p>	<p>Tuesday, June 25, Noon – 1:00pm CDI Committee Meeting Bar Association Office</p>
<p>Saturday, June 8, 7:00pm – 10:00pm South Palm Beach County Bar Banquet Woodfield Country Club</p>	<p>Thursday, June 13 – 16 FJA Annual Convention Don CeSar</p>	<p>Thursday, June 20 – 23 FACDL Annual Meeting The Breakers</p>	<p>Tuesday, June 25, 5:30pm – 6:30pm Legal Aid Board Meeting Bar Association Office</p>
	<p>Thursday, June 13, 11:45am – 1:00pm FAWL Luncheon WPB Marriott</p>		<p>Wednesday, June 26 – 28 The Florida Bar Annual Convention Boca Resort</p>