



PALM BEACH COUNTY BAR ASSOCIATION

BULLETIN

www.palmbeachbar.org

November 2011

Support National Adoption Day

It's not often you see smiles in a courthouse, but on Friday, November 18, the Palm Beach County Courthouse will be filled with nothing but happy people!

This year, children who are in dependency care who have been the victims of child abuse are expected to take part in National Adoption Day and we need your help. The Bar, along with the 15th Judicial Circuit, local agencies and volunteers, are planning a memorable day for the families. Please help us by making a donation for food, games and gifts. As a sponsor for a donation of \$250.00 your name or the name of your firm will be on the brochure for National Adoption Day, as well as in the Palm Beach County Bar Association Bulletin.

Please make your check payable to the Palm Beach County Bar Association and mail it to: Attention Lynne Poirier, 1601 Belvedere Road, Suite 302E, West Palm Beach, 33406 no later than November 12.

Anyone who is interested in helping volunteer for the day please call Kitty Callan at 252-9240.

Thank you!

Penny Martin, NAD Liaison, P.B.C. Bar

Mark your calendar for upcoming Membership Events

Membership Luncheon

November 14

Marriott West Palm Beach

Speaker: FL Bar President Scott G. Hawkins

Annual Holiday Party & Silent Auction

December 1

Frenchman's Reserve, Palm Beach Gardens

Third Annual Lawyer Variety Show

January 21, 2012

Eissey Theatre, Palm Beach State College

Bench Bar Conference

March 9

Palm Beach County Convention Center

Annual Judicial Reception

May 1

The Harriet at City Place

Annual Installation Banquet

June 2

The Breakers Hotel, Palm Beach



Membership Luncheon November 17 to Feature FL Bar President Scott Hawkins

The Florida Bar's 63rd president, our very own Scott G. Hawkins, will address the membership at a luncheon to be held on November 17 at the West Palm Beach Marriott. The meeting will be held from 11:45 - 1:00 p.m. and the cost to attend is \$35 for members, \$45 for non-members; judges complimentary. Registration is available online at www.palmbeachbar.org/register.php.

Hawkins is Vice-Chair of Jones, Foster, Johnston & Stubbs, P.A. and is Board Certified in Business Litigation. His clients include technology companies and major land owners. He served President of the Palm Beach County Bar Association from 2000-2001.

An active alumnus at the University of Florida, Scott has held the positions of President of the International Alumni Association, President of the College of Law Alumni Council, Member of the Board of Trustees of the College of Law and Board Member of the University of Florida Foundation. Additionally, he is Vice-Chair of the Palm Beach Atlantic University Board of Trustees.

Scott graduated with honors B.S.B.A. and received his J.D. from the University of Florida. As a Rotary International Foundation Scholar, he received an M.B.A. from the University of Edinburgh, Scotland.



Ready Or Not, Here Come The Holidays!

Join us for our Annual Holiday Party and Silent Auction on Thursday, December 1 from 5:30 pm to 8:00 pm at Frenchman's Reserve in Palm Beach Gardens. The cost is \$35.00 and includes drinks, heavy hors d'oeuvres plus a chance to shop for holiday gifts at bargain prices.

One hundred percent of the proceeds benefit charities sponsored by the Young Lawyers and North County Sections. To RSVP, register online @ www.palmbeachbar.org

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THE
BULLETIN

PALM BEACH COUNTY
BAR ASSOCIATION

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President

www.palmbeachbar.org

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West Palm Beach, FL 33406
(561) 687-2800
FAX (561) 687-9007
e-mail info@palmbeachbar.org.

Advertising Information:

Shoshanah Spence • sspence@palmbeachbar.org

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

LETTERS TO THE EDITOR

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

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



Smalls & Solos Receive Lunch, CLE Credit & Gifts!



The Solo and Small Firm Practitioners Committee recently kicked off the year with a lunch meeting including CLE credit and gifts for everyone! Pictured from left to right: Cindy Hopkins, Signature Court Reporting; Misty Chaves, Solo & Small Firm Committee Chair; Jennifer Wyman, The Crexent Business Center and Michael Downey from Visual Evidence.

Don't miss the November 2nd luncheon for more networking, CLE credit, lunch and prizes! The topic will be "Ethical Issues With For-Profit Referral and Legal Support Services." RSVP online @ www.palmbeachbar.org

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The Solo & Small Firm Practitioners Committee
Presents:

LAWYER BEWARE:

Ethical Issues With For-Profit Referral and Legal-Support Services

Wednesday, November 2

11:45 am to 1:00 pm

Bar Offices



11:45: Lunch & Networking

Noon: Traps, conflicts & pitfalls of running a small firm presented by
D. Culver "Skip" Smith III, Esq.

Learn about referrals from private, third party, web-based sources including paying for recommending services, fee sharing, advertising & solicitation. Find out about fee sharing with non-lawyers, conflicts of interest and charges to clients. Also to be discussed, billing for services actually rendered & not as a percentage of fees.

RSVP: Register online @ www.palmbeachbar.org

Cost: \$10.00 register by 5:00 pm on October 31 to avoid a \$5.00 late fee

Sponsored by:



This course is expected to receive 1.0 CLER from The Florida Bar.

RSVP online @ www.palmbeachbar.org or mail your check along with this portion of the form to:
Palm Beach County Bar Association, 1601 Belvedere Road, Suite 302E, West Palm Beach, FL 33410

Name: _____ Phone: _____

Address: _____ City/Zip _____

Email Address: _____

President's Message



Giving Thanks for Civility and Professionalism – I Swear

By John M. Howe

It is hard to believe that Thanksgiving is right around the corner. As the fall season advances and the holiday season approaches, we, the lawyers of Palm Beach County, have so much to be thankful for. We live and practice in one of the most beautiful places in the country, a reprieve from scorching summer temperatures and heat indices should be here anytime now, and yes, Gator Football is in full swing! But, for all of these blessings we enjoy, how often do we recognize and reflect upon our good fortune as advocates when we encounter civility, fairness, integrity and professionalism exhibited by our opposition? Apparently, the Florida Supreme Court (“FSC”) believes that these attributes are becoming increasingly scarce in our profession in that, on September 12, 2011, the court handed down Ruling #SC11-1702 styled IN RE: OATH OF ADMISSION TO THE FLORIDA BAR.

In entering SC11-1702, the FSC found that “...[i]n recent years, concerns have grown about acts of incivility among members of the legal profession.” This FSC finding raises many questions. The amendment was strongly supported by the American Board of Trial Advocates (ABOTA). ABOTA Palm Beach Chapter President, Mickey Smith, stated “This change in the oath should make it clear to the small minority of attorneys who do not practice with civility that their actions are wrong and will not be tolerated.” However, are instances of incivility really on the rise, or are we experiencing the collateral effects from phenomena we have come to know as E.R.S. (Email Rage Syndrome) and B.B.L. (Bashing by Listserv)? In other words, is it that we lawyers are increasingly acting like jerks toward each other, or has our awareness of such incidents simply grown, due to the use (abuse) of the “reply all” and “forward to group” functions, blogs, and professional distribution lists by a few rogue lawyers to bash other lawyers. These digital tools and functions have also been increasingly utilized to publicize instances of unprofessional conduct by other members

of the legal profession. In any event, unprofessional conduct and incivility has caught the attention of the state’s highest court. Accordingly, the FSC ordered the Oath of Admission to The Florida Bar be amended to include the following clause: **“To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.”**

From now on, all inductees to the Bar will be required to make this pledge. So what does this mean for the way veteran Bar members behave toward each other? This issue has sparked debate in many legal circles. It has been suggested by some that all members of the Bar should be encouraged, or even required, to re-take their oaths to include the new pledge. I disagree. In my opinion, the oath of attorney we all took already requires us to conduct ourselves in a civil and professional manner in our interaction with courts, court officers, clients, juries, parties and witnesses. Yep, I think that covered everybody. And, there were no provisions of the old oath that allowed unprofessionalism or incivility outside the courtroom either. So, does the amendment to the oath serve as a noble reminder from the FSC of how we should treat each other? It may. But, as far as I am concerned, we were already required to treat opposing parties and their counsel with fairness, integrity and civility, both in court and out, and in all oral and written communications (including electronic communication).

However, we should all take this new provision of the oath to heart as a personal admonition and reminder of how we should treat our sisters and brothers in the practice of law. Are you conscientious of those attributes? When was the last time you shook your opposing counsel’s hand after spirited oral arguments at a hearing – regardless of who won? Would you point out a scrivener’s error, favorable to you or your client, but which was not a part of the agreement? Have you ever made a conscious decision to pick up the phone and actually speak to opposing counsel instead of selecting “reply” or “reply all” and eviscerating her or him?

Have you ever encouraged two lawyers who are feuding in a public online forum to work it out in private? Have you ever mentored a new lawyer to take the “high road”? If you had difficulty answering any of these questions in the affirmative, you might consider taking the revised oath. If you disagree with such gestures of fairness, integrity and civility, it would make no difference which version of the oaths you took. I believe, however, that the overwhelming majority of lawyers, in this circuit and elsewhere, would share these sentiments, both in theory and in practice. For that super-majority, your original oaths should suffice. **Happy Thanksgiving!**

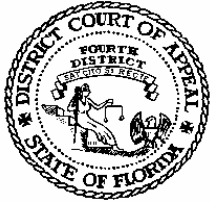


Featured Board Member - Robin Bresky

This month’s featured member of the board is Robin Bresky. Robin has got to be one of the most energetic and involved lawyers I know! In addition to practicing law and serving on our Bar’s board, Robin also serves on the boards of the South Palm Beach County Bar Association, Legal Aid Society, and as Treasurer of FAWL. Somehow, she balances all of these activities with being a wife and the mother of two outstanding children. A South Florida native, Robin attended law school at the Chicago Kent College of Law. She has been practicing law for 12 years and is the proprietor of Robin Bresky, P.A. in Boca Raton. Her firm specializes in appeals and civil and criminal litigation support. Robin is married to Dr. Kenneth Bresky, and they are the justifiably proud parents of a son who is freshman at the University of Texas, and a daughter who is a junior in high school. The Bresky Family pets are a chocolate Labrador retriever named Lucky, and a Cotton de Tulear, named Candy. When she is not spending time with her family or practicing, Robin enjoys voluntary bar work. Her personal creed is “Anything worth doing is worth doing well” – and that, she does!

The Palm Beach County, South Palm Beach County and Broward County Bar Associations present:

Inside the Appellate Court: A Day with the Judges of the Fourth DCA



Thursday, November 3, 2011

9:30 a.m. - 3:30 p.m.

West Palm Beach Marriott, 1001 Okeechobee Boulevard, WPB 33401

Program Schedule

- 9:30 am - 9:50 am **Registration / Check-In**
- 9:50 am - 10:00 am **Welcome and Introductions** - *Siobhan H. Shea, Esq., Siobhan Helene Shea Appellate Practice*
- 10:00 am - 10:50 am **Conversation with the Clerk**- *Honorable Judges Burton C. Conner and Cory J. Ciklin, Fourth District Court of Appeal, and Marilyn Beutenmuller, Clerk of Court, Fourth District Court of Appeal*
- 10:50 am - 11:50 am **The Wonderland of Writs - How Extraordinary** - *Chief Judge Melanie G. May and Judge Robert M. Gross, Fourth District Court of Appeal*
- 11:50 am - 12:30 pm **LUNCHEON**
- 12:30 pm - 1:00 pm **Moving into the Electronic Age at the 4th DCA** - *Chief Judge Melanie G. May and Judge Martha Warner, Fourth District Court of Appeal*
- 1:00 pm - 1:10 pm **BREAK**
- 1:10 pm - 1:40 pm **Motion Practice** - *Honorable Judges Carole Y. Taylor, Dorian K. Damoorgian and Burton C. Conner, Fourth District Court of Appeal*
- 1:40 pm - 2:40 pm **Practical Ways to Win an Appeal** - *Honorable Judges Dorian K. Damoorgian, Spencer D. Levine and Jonathan D. Gerber, Fourth District Court of Appeal*
- 2:40 pm - 2:50 pm **BREAK**
- 2:50 pm - 3:30 pm **Legal Jeopardy** - *Honorable Jonathan D. Gerber, Fourth District Court of Appeal*
- 4:00 pm - 6:00 pm **Cocktail Reception** Celebrating the Upcoming **50th Anniversary** of the Fourth DCA in 2015

RECEPTION LOCATION : **Fourth District Court of Appeal**
1525 Palm Beach Lakes Boulevard, West Palm Beach, Florida

This course has been granted **5.5 CLER/3.0 Appellate Practice Cert. credits from the Florida Bar**. The cost of the seminar, lunch and reception is **\$125** if registered by **10/27/11**; **\$165** after that date; **Govt. attorneys & law clerks \$100.00 if registered by 10/27/11; \$125.00** after that date.

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

If a phone reservation is made and we do not receive payment and you do not attend, you will be charged \$25.

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

HOW TO REGISTER



BY CHECK
Return this form



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



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

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

Name: _____ Telephone: _____

Address: _____ City/Zip _____

Email Address: _____

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

Michael L. Scheve

1980-2011



Burman, Critton, Luttier & Coleman, LLP lost a colleague and a friend on August 27, 2011 when Mike Scheve passed away. "Scheve", "Sche-vee" or "Scheves" not only had distinctive nicknames for himself, but for everyone else as well. He was a young man with a bright future, a desire to excel as a lawyer and a keen and compassionate understanding of his clients' needs. Scheve's life was celebrated on September 2nd and 3rd in Orlando with his parents, Larry and Trish Scheve, his sister, family members, long-time girlfriend Alexandra Mantucci and as many close, caring and loving friends as any one person could ever hope to have. Scheve with his ever gracious and happy spirit lived more in his 31 years than many people do in a lifetime.

We will miss Scheve greatly, but his spirit, kindness and incredible personality will always be with our firm and each of us.

Capital Campaign – Thank You to Those Who Have Contributed!



The Bar Association will soon be moving to its first permanent home located off Belvedere Road in West Palm Beach. The building will be a state-of-the-art facility for our legal community to enjoy for many years to come. You can be a part of history by naming a room or buying a brick.

We sincerely thank the following firms and members who have contributed as of 9/30/11:

SEARCY DENNEY SCAROLA

- BARNHART & SHIPLEY, P.A.....Meeting & Seminar Room
- LYTAL REITER SMITH IVEY & FRONRATH Reception Area
- RICHMAN GREER, P.A. Executive Director’s Office
- SCHULER HALVORSON WEISSER & ZOELLER, P.A. Small Conference Room
- LESSER LESSER LANDY & SMITH PLLC Outside Bench
- NORTH COUNTY SECTION & YOUNG LAWYERS SECTION . Communications Office
- HOLLAND & KNIGHT..... Member Services Office
- JONES FOSTER JOHNSTON & STUBBS Lawyer Referral Service
- WYLAND & TADROS Work Room
- H. IRWIN LEVY Visiting Attorney’s Office

Additional rooms are still available!



President Howe visits the construction site to monitor the renovations. Members can also view the progress of the renovation by visiting palmbeachbar.org/campaign.php

Would you like have a permanent place in the Bar’s new building?

For further information regarding naming rights or to purchase a brick, please contact Lynne Poirier at the Bar Office or scan the QR Code here with your Smartphone or go to palmbeachbar.org/capital.campaign.php



Personalized bricks:

- Akerman
- Adams, Coogler, Watson, Merkel, Barry & Keller, P.A.
- Agnant, Linda
- Babbitt, Johnson, Osborne & LeClainche, P.A.
- Beer, Jerald
- Bertisch, Robert & Harreen
- Breton, Lynch, Eubanks & Suarez-Murias, P.A.
- Burns, Lois
- Burns, Tom & Patience
- Clark, Fountain, LaVista, Prather, Keen & Littky-Rubin
- Coleman, Greg & Monica
- Colton, Roger B.
- Farrell, John
- Fine, Edward
- Fox Rothschild
- Gamot, Melinda
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- Hispanic Bar Association
- Howe, John
- Hunston, Jay and Jane
- Jenks, Debra & Robert Harvey
- Klett, Stan
- Law Offices of Irwin J. Block PLLC
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- Lazarus, Jason
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- Napoleone, Michael
- Palm Beach Spine & Diagnostic Institute
- PBC Chapter of Paralegal Association
- Pineiro Byrd PLLC
- Pressly & Pressly
- Prior, Ted
- Proskauer Rose LLP
- Rock Legal Services & Investigations
- Rutherford Mulhall, P.A.
- Sabadell United Bank
- Signature Court Reporting
- Smith, Amy L.
- Sorgini, Robert
- Stewart, Todd
- Suskauer, Michelle
- U.S. Legal Support
- Wroble, Art

Welcoming new and returning members

The Membership Committee recently hosted its first Speed Networking & Cocktail Reception at BB Kings in West Palm Beach. This format offered our new and returning members a chance to meet one another and network after hours. A good time was definitely had by all! Thanks to our sponsors from Esquire Deposition Services, Intelligent Office, PNC Bank and Visual Evidence.



Membership Committee Chair Curt Sanchez welcomes members Adelina Ruiz-Baez (left) and Shavarne Dahlquist (right)



New member Sarah Cohen and Colleen Farnsworth



New members Peter Spett and Marc Sinensky



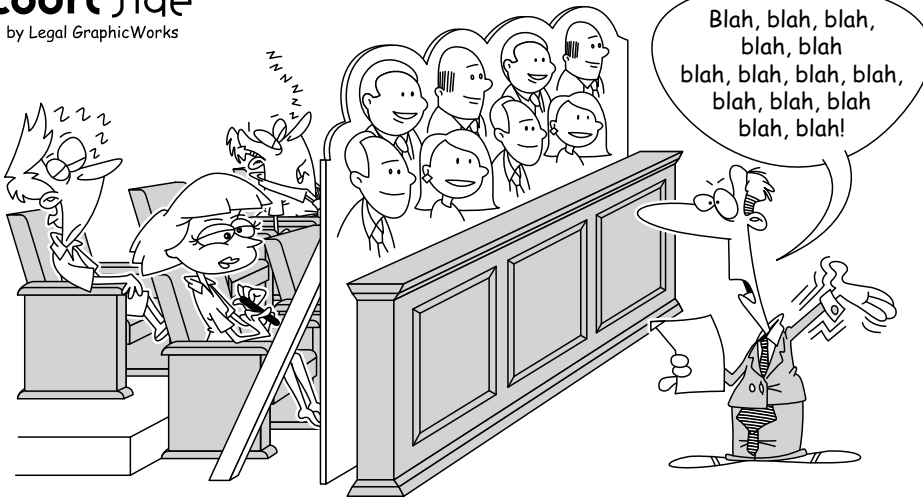
Judge Lisa Small and Greg Margre



Veteran members Steve Hein and Bar President John Howe

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

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Admissibility of Full Amount of Medical Bills

by Ted Babbitt

In Durse v. Henn, 36 Fla. L. Weekly D1472 (Fla. 4th DCA, July 6, 2011). The Fourth District was faced with a number of questions. One dealt with a police officer's ability to testify based,

in part, upon information received from one of the drivers in an automobile accident case. The trial court erroneously permitted the testimony and the Fourth District reversed based upon a violation of Florida's accident report privilege, Fla. Stat. 316.066(7). The Court relied on Hammond v. Jim Hinton Oil Co., 530 So. 2d 995 (Fla. 1st DCA 1988) and Dinowitz v. Weinrub, 493 So. 2d 29 (Fla. 4th DCA 1986) to the effect that even if only a portion of the officer's testimony came from information obtained from one of the drivers, that testimony is excluded as privileged under the aforesaid statute.

A second issue related to whether the plaintiff could introduce only the amount of the medical bills which his provider accepted as final satisfaction of his outstanding bills or whether the entire medical bill could go into evidence to be reduced post-judgment in accordance with the collateral source statute. At D1473, the Court cited with authority the following:

The collateral source rule functions as both a rule of damages and a rule of evidence. As a rule of damages, 'the collateral source rule permits an injured party to recover full compensatory damages from a tortfeasor irrespective of the payment of any element of those damages by a source independent of the tortfeasor.' As a rule of evidence, the collateral source rule prohibits the introduction of any evidence of payments from collateral sources, upon proper objection. In Florida, the damages portion of the rule has been superseded by legislative action. However, the evidentiary portion of the rule remains alive and well in Florida.

The Court distinguished Thyssenkrupp Elevator Corp. v. Lasky, 868 So. 2d 547 (Fla. 4th DCA 2003) which held that the defendant was entitled to a post-verdict reduction based upon Medicare payments made. The Thyssenkrupp Court reasoned that Medicare payments, unlike insurance payments, were available to all citizens through the government and failing to reduce the judgment by those "free" payments had the effect of a windfall to the plaintiff. In Durse, the Court adopted the reasoning of the First District in Nationwide Mut. Fire Ins. Co. v. Harrell, 53 So. 3d 1084 (Fla. 1st DCA 2010) which refused to reverse a trial court which had allowed the full amount of the medical bills into evidence despite payment by a private health insurer of a much lesser amount adopting the reasoning of the Florida Supreme Court in Florida Physician's Insurance Reciprocal v. Stanley, 452 So. 2d 514 (Fla. 1984) which limited the common law collateral source rule to those benefits earned in some way by the plaintiff. The Nationwide Court held:

Here, there is no dispute that appellee paid the premiums for her health insurance. Accordingly, pursuant to the evidentiary portion of the collateral source rule as it currently exists in Florida, we hold that the trial court correctly ruled that appellant was entitled to introduce into evidence (and to request from the jury) the gross amount of her medical bills, rather than the lesser amount paid by appellee's private health insurer in full settlement of the medical bills.

Interestingly in the case at bar, the plaintiff did not have private health insurance. Rather, he had negotiated with his providers for a lower amount. The Durse Court held, however, that by so negotiating the medical bills, Mr. Durse had "earned in some way" within the meaning of the Nationwide case, a lower bill and the trial court thus erred by excluding the full amount of the medical bills from evidence.

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

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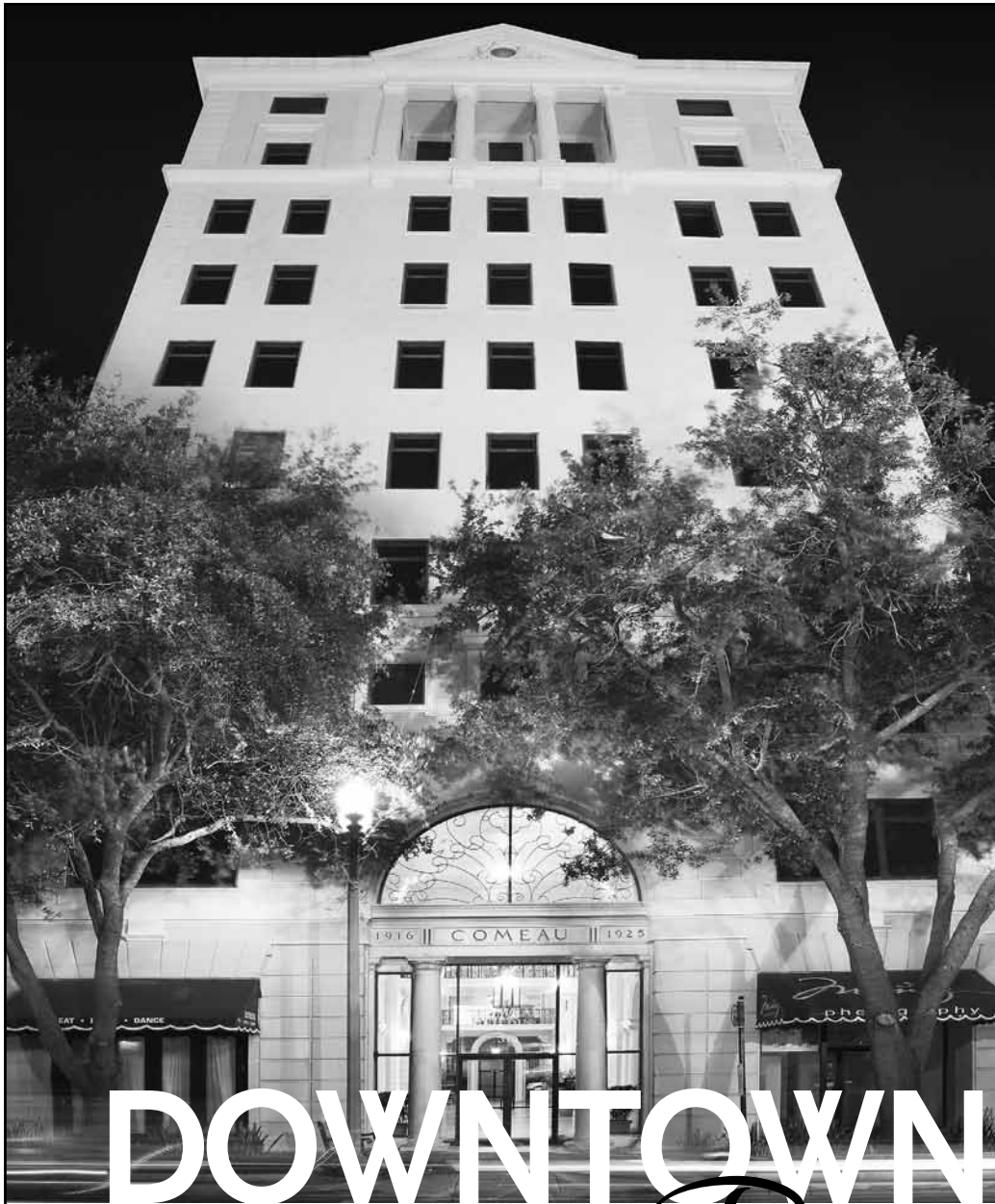
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Inherited IRAs Qualify as Exempt

By Marc P. Barmat

On May 31, 2011, the Florida Legislature amended Florida Statute § 222.21 to clarify its intent as to the exempt status of an inherited Individual Retirement Account (“IRA”). The amended legislation was said to be in response to the recent opinions in *Robertson v. Deeb*, 16 So.3d 936 (Fla. 2d DCA 2009) and *In re Ard*, 435 B.R. 719 (Bankr. M.D. Fla. 2010) which held that inherited an IRA was not exempt.

Prior to the May 31, 2011 amendment, the Robertson court held that an inherited IRA was a separate account from the original IRA and was not exempt for garnishment. In *Ard*, the bankruptcy court in the Middle District of Florida found the *Robertson* opinion compelling and held that an inherited IRA that a chapter 7 debtor acquired following the death of her father was property of the bankruptcy estate. Both the *Robertson* and *Ard* courts focused their attention on the language of the old statute, which stated that the exemption only ran to “one particular fund or account,” and since the inherited IRA is a new, or separate account, the exempt status is lost. Further, the courts looked to the change in the character of the IRA from the original settlor to the

beneficiary of the inherited IRA. *Ard*, 435 B.R. at 719-22.

In amending Florida Statute § 222.21, it is apparent that the Florida Legislature’s intent was to afford all beneficiaries of these tax exempt instruments the same level of protection under state law as is afforded under federal law. While under federal law there are some differences in the treatment of an IRA and an inherited IRA, the interest of the beneficiary in the inherited IRA remained tax exempt until distribution of the assets being held in that fund are made.

The amended Florida Statute § 222.21(2)(c) now reads:

Any money or other assets or any interest in any fund or account that is exempt from claims of creditors of the owner, beneficiary, or participant under paragraph (a) does not cease to be exempt after the owner’s death by

reason of a direct transfer or eligible rollover that is excluded from gross income under the Internal Revenue Code of 1986, including, but not limited to, a direct transfer or eligible rollover to an inherited individual retirement account as defined in s. 408(d)(3) of the Internal Revenue Code of 1986, as amended. This paragraph is intended to clarify existing law, is remedial in nature, and shall have retroactive application to all inherited individual retirement accounts without regard to the date an account was created.

Based upon the Florida Legislature’s amendment to Florida Statute § 222.21, an individual beneficiary of an inherited IRA will now be able to exempt their interest from garnishment, or in the case of a bankruptcy filing, from becoming property of the bankruptcy estate.

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

Board Meeting Attendance

	Retreat	Aug	Sept
Barnes	x	x	x
Bowden	x	x	x
Bresky	x	x	x
Guari	x	x	x
Howe	x	x	x
Kypreos	x	x	x
Lazarus	x	x	x
Napoleone	x	x	x
Ponzoli	x	x	x
Pressly	x	x	x
Rabin	x	x	x
Weiss	x	x	x
Whittles	x	x	x



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



“The View From the Local Bench”

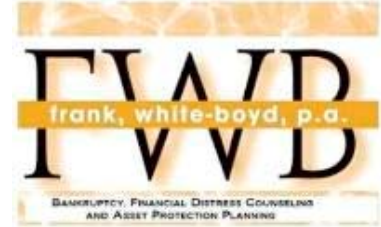
Wednesday, February 22, 2012 - 11:45a.m. - 2:00p.m.

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

Program Schedule

11:45am - 12:00pm **Check In / Late Registration**

12:00pm - 12:25pm **Buffet Lunch - Sponsored by:**



12:25pm - 12:30pm **Welcome - Opening Remarks - *Julianne R. Frank, Esq., Frank, White-Boyd, P.A., Bankruptcy CLE Committee Chair***

12:30pm - 2:00pm **The View From the Bench: The Words and Wisdom of Our Bankruptcy Judges - *Honorable Paul G. Hyman and Erik P. Kimball, United States Bankruptcy Court - Moderated by Julianne R. Frank, Esq.***

This course is expected to receive 2.0 CLER from The Florida Bar.

The cost of the seminar, **including lunch**, is **\$40** for PBCBA members/paralegals, **\$80** for non-PBCBA members/paralegals. **After 2/15/12, add \$10.00 late fee.**

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Statute Of Limitations On Objection To The Qualifications Of A Personal Representative

By David M. Garten, Esq.

Section 733.212(3), Fla. Stat. reads: “Any interested person on whom a copy of the notice of administration is served must object to the validity of the will, *the qualifications of the personal representative*, the venue, or the jurisdiction of the court by filing a petition or other pleading requesting relief in accordance with the Florida Probate Rules on or before the date that is 3 months after the date of service of a copy of the notice of administration on the objecting person, or those objections are forever barred.” [Emphasis added]

In *Hill v. Davis*, 2011 Fla. LEXIS 2048; 36 Fla. L. Weekly S 487 (Fla. 9/1/11), the issue before the Court was whether an objection to the qualifications of a personal representative of an estate is barred by the three-month filing deadline set forth in §733.212(3), Fla. Stat. when the objection is not filed within that statutory time frame.

FACTS: In 2007, the decedent’s stepson, a resident of

New York, filed a petition for administration in the Florida estate asserting that he was entitled to be appointed personal representative of the estate because he was the decedent’s stepson and was nominated as personal representative in the will. The trial court admitted the will to probate and appointed the stepson as the personal representative. The court granted letters of administration and the stepson published the notice of administration on July 13, 2007. A copy of the notice of administration was served on the decedent’s mother on July 24, 2007. On August 6, 2008, the decedent’s mother filed a motion challenging the appointment of the decedent’s stepson as personal representative because he was a nonresident and was not eligible to serve. The stepson’s status as a nonresident was known to the mother at the outset.

HOLDING: The Florida Supreme Court held that §733.212(3) bars an objection to the qualifications of a personal representative, including an objection that the personal representative was never qualified to serve, if the objection is not timely filed under this statute, except where fraud, misrepresentation, or misconduct with regard to the qualifications is not apparent on the face of the petition or discovered within the statutory time frame.

Mark your calendar!

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

“14th Annual Elder Law Update”

Friday, December 16, 2011 - 8:20a.m. - 2:00p.m.
Bar Offices - 1601 Belvedere Rd., Suite 302E, WPB

Program Schedule

- 8:00am - 8:20am Late Registration - Check In
- 8:20am - 8:30am Welcome - Opening Remarks - *Seth A. Marmor, Esq., Shapiro Blasi Wasserman & Gora PA, Chair PBCBA Elder Law Affairs Committee, Florida Bar Board Certified Elder Law, and Wills, Trusts & Estates Attorney*
- 8:30am - 9:15am The State Attorney’s Office Looks at Elder Abuse - *Preston Mighdoll, Esq., State Attorney’s Office, Fifteenth Judicial Circuit*
- 9:15am - 10:15am New Durable Power of Attorney Act - *Howard S. Krooks, Esq., Elder Law Associates*
- 10:15am - 10:30am Break
- 10:30am - 11:15am VA Benefits and the Appeals Process - *Laura S. Rotstein, Esq., Florida Bar Board Certified Elder Law Attorney*
- 11:15am - 12:15pm Qualified Income, Special Needs and Pooled Income Trusts - *Travis D. Finchum, Esq., Karol, Hausman, Sosnik & Finchum, LLP, Florida Bar Board Certified Elder Law Attorney*
- 12:15pm - 12:30pm LUNCH (included in registration)
- 12:30pm - 1:15pm Annual Tax Law and Ethics Update - *Michael A. Lampert, Esq., Michael A. Lampert, P.A., Florida Bar Board Certified Tax Attorney*
- 1:15pm - 2:00pm Medicaid Update - *Stephanie L. Schneider, Esq., Florida Bar Board Certified Elder Law Attorney*

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Rule 1.420(e): Dismissal For Failure To Prosecute

By Matt Triggs and Jonathan Galler

Moving to dismiss a lawsuit for failure to prosecute is kind of like poking a bear with a sharp stick to see if it will wake up. But, as the Fourth District Court of Appeal recently confirmed, the bear does not have to wake up to keep the lawsuit alive; it just has to stir or grunt.

Rule 1.420(e)

Dismissals for failure to prosecute are governed by Rule 1.420(e). The rule, as amended in 2005, sets forth a two-step process by which a dormant case may be dismissed. First, a notice is filed after 10 months without any record activity. Second, assuming no record activity for another 60 days, a motion to dismiss is filed and heard.

Step One: Notice of No Record Activity

The rule provides that where “it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 10 months,” and where there has been no stay, a notice that there has been no such activity may be filed. The notice may be filed by a party, the court, the clerk of the court, or even by an interested non-party.

In *Weston TC LLLP v. CNDP Marketing Inc.*, a case decided this past summer, the Fourth District reviewed a trial court’s dismissal for failure to prosecute where, after an extended period of inactivity, the plaintiff’s attorney filed nothing more than a notice of unavailability prior to the hearing on the motion.

In its decision, the court recounted the history of Rule 1.420(e) and, in particular, explained that “[f]or many years, Florida courts drew a distinction between ‘active’ and ‘passive’ record activity, with only active activity being sufficient to avoid dismissal under Rule 1.420(e).”¹

But after more than 50 years of struggling with the active/passive distinction, the supreme court in 2005 abandoned that “subjective analysis” and adopted instead “a bright-line test that will ordinarily require only a cursory review of the record by the trial court.”² Under the bright-line test, “if a review of the face of the record reveals activity by filings of pleadings, order of court, or otherwise, an action should not be dismissed.”³ On that basis, the court held that the filing of a motion for admission *pro hac vice* constituted record activity precluding dismissal.

A lengthy footnote in the Fourth District’s opinion in *Weston TC LLLP* chronicles a myriad of other examples of “record activity” that have been deemed sufficient to preclude dismissal under the bright-line test, including: a notice of change of address; a request for production; a notice of deposition, even though the deposition was subsequently cancelled; a civil cover sheet; and a notice of compliance with discovery.⁴

Step Two: Motion to Dismiss

The rule also provides that if no record activity occurs within the 60 days following the service of the notice, and no stay is issued or approved before the expiration of the 60 days, “the action shall be dismissed by the court on its own motion



or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a party

shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending.”

When the Florida supreme court established its bright-line test in *Wilson*, Rule 1.420(e) had not yet been amended and did not divide up the 12 months of inactivity that must precede dismissal. That is, the rule did not require the filing of a notice of record inactivity at the end of 10 months, followed by a 60-day grace period, during which the plaintiff may take the necessary steps to avoid dismissal.

The question presented to the Fourth District in *Weston TC LLLP*, then, was whether the supreme court’s bright-line test for “record activity” governs not only the 10-month period but also the 60-day notice period created by the amendment to Rule 1.420(e). Shortly before the Fourth District issued its opinion, the supreme court put the question to rest in *Chemrock Corp. v. Tampa Elec. Co.*, concluding that the bright-line test “applies to both time periods set forth in the amended rule.”⁵

On that basis, the Fourth District reversed the trial court’s order of dismissal because the notice of unavailability of plaintiff’s attorney, which had been filed during the 60-day notice period, qualified as “record activity” under the bright-line test.

Interestingly, the Fourth District also took on a thorny ambiguity in the rule. Specifically, the court noted that, under the rule, a plaintiff can avoid dismissal of a lawsuit during the notice period not only with record activity but also by obtaining a stay or by showing good cause why the action should remain pending. But, as the court explained, obtaining a stay or showing good cause would seem to constitute “record activity” under the bright-line test, thereby rendering unnecessary the rule’s mention of those particular options for avoiding dismissal. To resolve this issue, the court concluded that, “under the rule, motions for stay and showings of good cause are exceptions, and the proper scope of record activity is, therefore, anything that could be filed except for those two things.”⁶

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

¹ 66 So. 3d 370 (Fla. 4th DCA 2011) (citations omitted).

² *Wilson v. Salamon*, 923 So. 2d 363, 368 (Fla. 2005).

³ *Wilson*, 923 So. 2d at 368 (internal quotation marks and citations omitted).

⁴ 66 So. 3d at 373, n.1.

⁵ 2011 WL 2566394 *6 (Fla. June 30, 2011).

⁶ 66 So. 3d at 375.

The Palm Beach County Bar Association's Commercial and Business Litigation CLE Committee presents:



**Substantive Law and Practical Advice
from the Masters
in the Litigation and Trial of Business Disputes -
A Lunchtime Seminar Series**

January 18, 2012

March 1, 2012

April 4, 2012

May 9, 2012

11:45 a.m.—1:00 p.m.

Judicial Conference Room, Main Courthouse, WPB

Lunches Sponsored By: BankAtlantic

January 18, 2012 – “The Use of ADR in Business Litigation” - *L. Louis Mrachek, Board Certified Civil Trial and Business Litigation Lawyer, Page, Mrachek, Fitzgerald & Rose, P.A.*

March 1, 2012- "Proving and Defending Against Damage Claims in Business Litigation" - *James W. Beasley, Jr., Beasley, Hauser, Kramer & Galardi, P.A.*

April 4, 2012 – "Commercial Consultants, LLC v. BBA US Holdings, Inc.: A Case Study In Fee-Shifting Issues" - *John “Jack” Scarola, Board Certified Civil Trial and Business Litigation Lawyer, Searcy, Denney, Scarola, Barnhart & Shipley, P.A.*

May 9, 2012 - “View from the Bench” - *Judges TBA*

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The Supreme Court, GPS Darts & George Orwell

By Christopher Hopkins, Chair, Law Practice Technology Committee

The case of *U.S. v. Jones* is set for oral argument before the U.S. Supreme Court this month and may resolve whether police may physically attach a GPS transmitter on a person's car to track its movements for an extended period – without a warrant. If so, taken to an extreme, could the government then track all cars? The *New York Times* proclaimed that the Orwellian conundrum in *Jones* was “the most important Fourth Amendment case in a decade.” Is 2011 the new 1984?

Before we dive into the fractious argument of totalitarianism versus anonymity, take the following quiz regarding, “the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...” Constitutional scholars, criminal law attorneys, and fans of *The Wire* may have an advantage. *Can this be done without a warrant? Answer “true” or “false.”*

1. Police may implant a transmitter in a container to track its movements along a 100+ mile trip across state lines.
2. Police may install and monitor a device attached to the outside of a public phone booth which can overhear the person inside.
3. Police may use thermal imaging of a house to detect radiating heat as evidence of a drug “grow house.”
4. Police may search trash bags left at the curbside of a house.
5. In an area with normal air traffic, police may not circle above a Florida house to look for marijuana growing in the backyard.
6. Border patrol police may squeeze luggage in an overhead bus rack to determine whether it contains a “brick” of drugs.
7. True or False: Only Spiderman has the ability to shoot a miniature GPS-enabled dart with a glue adhesive at a moving vehicle to track its location.
8. Police may record the telephone numbers dialed from a person's phone.
9. Police may briefly detain a person whom they reasonably suspect is involved in criminal activity.
10. There is no presumption that a warrant is required, unless infeasible, for a search to be reasonable.

If you responded “true” to 1, 4, 8, and 9 (your score being “1984”) then you are likely as sharp as the 80% who passed the recent July bar exam.

In the pending case, the High Court will hear about the largest cocaine bust in the history of the District of Columbia which was accomplished through surveillance enhanced by GPS. Specifically, police physically implanted a GPS transmitter on the suspect's car while it was parked in public and then tracked its travels on public roadways for a month. Ultimately, that led to evidence of a conspiracy to distribute drugs since the suspect was tracked traveling to/from a drug lab.

The pertinent issues in warrantless GPS-search-and-seizure cases appear to include: (1) whether the physical touching of

the car to implant the transmitter is permitted, (2) the duration of the surveillance, (3) whether police obtained information beyond the car's travels on public roadways, and (4) the proper interpretation of the phrase “dragnet-type law enforcement practices” used in *U.S. v. Knotts*. In that case, the Court held that a transmitter attached to a canister of chemicals did not violate a person's reasonable expectation of privacy when it was transported on a single-but-lengthy trip.

In *Jones*, however, the issue of GPS surveillance is further complicated beyond the facts of *Knotts* since the GPS was transmitting for a month. The U.S. Court of Appeals for the D.C. Circuit distinguished a “discrete journey” from “prolonged surveillance,” finding that “unlike one's movements during a single journey, the whole of one's movements over the course of a month is not *actually* exposed to the public because the likelihood anyone will observe all those movements is effectively nil.” Moreover, the D.C. Court held, the “whole of one's movements” creates a “mosaic” which reveals more than short-term surveillance. The underlying case, *U.S. v. Maynard*, is here: <http://bit.ly/qBkAnk>

Advocates for GPS surveillance note that the technology merely enhances (or simplifies) the same information which prolonged visual surveillance might provide and that people on public roads have no reasonable expectation of privacy regarding their movements. Detractors voice the concern that lengthy GPS surveillance enables a Big Brother scenario where citizens' daily lives can be recorded through our routine travels.

On rehearing, the D.C. Court did not decide whether reasonable suspicion or probable cause would have allowed the use of GPS and further denied that its decision had called into question the viability of prolonged traditional surveillance. The dissenting judges averred that there was no difference between *Knotts* and *Jones* except “the volume of information obtained is greater.” That order is here: <http://bit.ly/p8vepf>

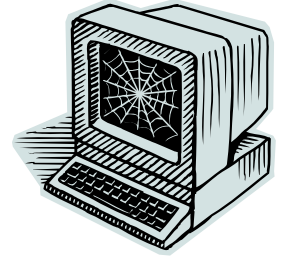
The Government's Petition to the U.S. Supreme Court for a Writ of Certiorari and Jones' Opposition can be found here: <http://bit.ly/oRNpEk> To follow the briefing schedule, the Court's docket is here: <http://bit.ly/nrSrx8>.

In the *Times*' article, “Court Case Asks if ‘Big Brother’ is Spelled GPS,” it is suggested that “judges around the country have been citing George Orwell's ‘1984’ to sound an alarm.” While arguably true, a quick search in FastCase reveals that only a surprising few Florida court opinions reference Orwell, who himself was once a police officer. For further reading, consider the recent Fourth District Court of Appeal decision in *Tracey v. State of Florida*, involving the use of cell site location information to track a person's cell phone, <http://bit.ly/ocjg4G>

Christopher Hopkins is a shareholder with Akerman Senterfitt. Send your Orwellian propaganda and rebellious newspeak (but please, no GPS darts) to Christopher.Hopkins@Akerman.com.



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



***Is Your Website in Compliance with
Florida's New Advertising Regulations?***

**Friday, November 18, 2011 - 11:30a.m. – 2:10p.m.
Bar Association Offices 1601 Belvedere Road, #302E, WPB, FL**

Program Schedule

- 11:30 a.m. - 12:00 p.m. **Late Registration / Check In / Lunch**
- 12:00 p.m. - 12:10 p.m. **Welcome & Opening Remarks - Christopher B. Hopkins, Esq.,
Committee Chair, Akerman Senterfitt**
- 12:10 p.m. - 2:10 p.m. **Is Your Website in Compliance with Florida's New Advertising
Regulations?**

Speaker

***Jan L. Jacobowitz, Esq., Director
Professional Responsibility and Ethics Program
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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.

Darren M. Allen, California; Nova Southeastern University, Law Student Membership; Boca Raton.

Heather Ann Aquafresca - Massachusetts; Florida Coastal School of Law, 2007; Associate in Patti Heidler Ladwig, P.A., Wellington.

Kelly A. Buist - Florida; University of Florida, 2006; Associate in Murphy Reid, LLP., Palm Beach Gardens.

Elizabeth E. Cantu - Texas; Nova Southeastern University, 2010; Associate in Vernis & Bowling of Palm Beach, P.A., North Palm Beach

Joyce Cohen - New Jersey; Albany Law School, 2003; Office of Criminal Conflict and Civil Regional Conflict, Boynton Beach.

Norman Patrick Hely - Kentucky; Vanderbilt University, Law Student Member; West Palm Beach.

Jennifer Hudson - Stetson University College of Law, 2009; Fourth District Court of Appeal, West Palm Beach.

Vincent L. Leonard Florida Registered Paralegal Member; Searcy, Denney, Scarola, Barnhart, & Shipley, P.A., West Palm Beach.

Kris Lier - Illinois; University of Maryland School of Law, Law Student Member; Jupiter.

Jody Elizabeth Miller - Florida; University of Florida, 2007; Associate in Wilmington Trust, Palm Beach.

Michael Anthony Motto - New York; Nova Southeastern University, 1995; Partner in Hicks Motto & Ehrlich, Palm Beach Gardens.

Michelle T. Murray - Hong Kong; Florida International University, Law Student Member; Boca.

Sean Murray - Florida; Cumberland School of Law, 1980; Sole Practitioner, Ft Pierce.

Katherine Newcomer, Law Student Member; North Palm Beach.

John E. Page - New York; University of Miami, 2004; Partner in Shraiberg, Ferrara & Landau, P.A.; Boca Raton.

Alyse Mari Reiser - Florida; University of Florida, 2010; Associate in Gunster Yoakley & Stewart, P.A., West Palm Beach.

John K. "Jack" Rice - Florida; Florida Coastal School of Law, Law Student Member; Jacksonville.

Thomas Schnieders - Ohio; Nova Southeastern University, 2000; Sole Practitioner, Greenacres.

Paul Shafranski - Florida; University of Florida, 2010; Fourth District Court of Appeal, West Palm Beach.

Daniel C. Shatz - Illinois; Cornell Law School, Law Student Member; West Palm Beach.

Charles Benjamin Strasser - Florida; Nova Southeastern University, 2003; Associate in Methe & Rockenbach, P.A., West Palm Beach.

Trent J. Swift - Florida; New York Law, Law Student Member; West Palm Beach.

Courtney Grace Tito - American University, 2003; Associate in McDonald Hopkins, LLC. West Palm Beach.



Michael Anthony Tomberg - Texas; St. Thomas University, 1998; Sole Practitioner ; Juno Beach.

Katherine E. Van Deusen - Tennessee; Vanderbilt University, Law Student Membe; West Palm Beach.

Kelly Rose Ziegler - Florida; University of Florida, 2007; Associate in Walton Lantaff Schroeder & Carson LLP; West Palm Beach.

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Negligent Referral Liability? Who Knew???

By Dana E. Foster, Esq.

In this age of legal specialties and topic-specific board certifications, many lawyers refer clients and potential clients to other lawyers who are more experienced in a given area of law. Many lawyers will be surprised to learn, however, that under Florida case law, if the lawyer who receives the referral commits malpractice in handling the case, the lawyer who made the referral can be held liable for the client's loss. Indeed, according to the American Bar Association, there is an increasing number of claims against lawyers for negligent referrals. See *Networking for Referrals: Sending Cases to Other Lawyers Isn't As Risky If You Know Their Qualifications*, 90 A.B.A. Journal 34 (May 2004).

The main Florida case on this issue, while somewhat dated, is *Noris v. Silver*, 701 So.2d 1238 (Fla. 3rd DCA 1997). In *Noris*, the client resided in Florida but was injured in Illinois, when a vehicle struck his bicycle. The client contacted Attorney A, who had previously represented him in some matters. Because Attorney A did not handle personal injury cases, he referred the client to Attorney B. Attorney A had a history of referring clients to Attorney B and in sharing in the fees recovered by Attorney B, but had not entered a written agreement regarding division of the attorney fee for *Noris'* case. After Attorney B failed to file suit within the applicable statute of limitations, the client sued Attorney B for malpractice, and also sued Attorney A for malpractice and negligent referral.

The Third District Court of Appeal upheld the trial court's dismissal of the negligent referral claim, noting the client conceded that Attorney A did not know that Attorney B would commit malpractice. However, the court found a factual issue of whether there was a fee-splitting agreement between the attorneys, and consequently reversed the grant of Attorney A's motion for summary judgment on the malpractice claim. The court observed that, under Rule 4-1.5(g) of the Rules Regulating the Florida Bar, when the client's fee is divided between attorneys in different firms, the attorneys must assume joint responsibility for the representation of the client. The court concluded that if the attorneys agreed to division of the fees, then Attorney A shared responsibility for malpractice committed by Attorney B.

Given this, what should you do to reduce your chances of incurring referral liability? *The most effective way to prevent liability for referral liability is to not accept any referral fee.* However, if you are inclined to accept a referral fee, here are some suggestions:

1. *Have a Plan.* Consider all areas of the law that your firm does not cover and start tracking down some good referrals. Screen them, meet them and establish a relationship.
2. *Do Your Homework.* Research the attorneys you are considering referring a client to. Make sure they have experience in the area needed. You may want to look into any reported decisions involving the attorneys, as well as check to ensure the attorneys remain in good standing with the Florida Bar (<http://www.floridabar.org/names.nsf/MESearchDK?OpenForm>).
3. *Explain to the Client Why You're Making the Referral.*

Pay attention to how you are communicating the referral to your client. It is important for the client to understand they are not being shuffled off, but being specifically transferred to someone who has a specialty or is board certified. If you are going to receive a referral fee, be upfront and get the client's written informed consent as required under Rule 4-1.5(g) of the Rules Regulating the Florida Bar.

4. *Consider Your Options.* If you don't know a lawyer who practices in the needed area of law, don't take a chance. Maybe suggest someone who can make the referral. Or, as a last resort, consider suggesting that the client contact the local bar (561-687-3266) or Florida Bar Association's referral program (800-342-8011).
5. *Document Your Decision.* Whether you chose to decline the client outright or refer the client to a colleague, it is important (and easy) to make clear in writing, as soon as possible, whether or not you or your law firm is establishing an attorney-client relationship. Proper documentation may avoid a lawyer being named a defendant in a legal malpractice suit.
6. *Stay in the Loop If You Are Accepting A Fee.* You have a duty to stay informed about how the case is proceeding. Send a letter to the attorney receiving the work explaining that you want to be kept informed and request copies of all correspondence and pleadings in the case.

Additional tips for managing the risks of referral can be found in *Liability for Referrals*, 14 Fla. Prac., Elder Law § 1:27 (2010-11 ed.), *No Good Deed Goes Unpunished: Managing the Risks of Referrals*, 39 Colo. Law. 55 (April 2010) and *Networking for Referrals: Sending Cases to Other Lawyers Isn't As Risky If You Know Their Qualifications*, 90 A.B.A. Journal 34 (May 2004).

In conclusion, while most clients understand that attorneys are not familiar with all areas of the law, they reasonably expect that each of us knows competent attorneys to refer them to when their needs fall outside the realm of our expertise. Let's not disappoint them when they have placed their faith in our recommendations. Equally important, let's protect ourselves from the potential for negligent referral liability.

Ms. Foster is an associate with the law firm of Ackerman, Link & Sartory, P.A.

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Real Property and Business Litigation Report

September 2011 Summary

Submitted by Manuel Farach



FL-Carrollwood Care, LLC v. Gordon, – So.3d –, 2011 WL 3364349 (Fla. 2d DCA 2011).

An arbitration agreement which lacks an express grant of jurisdiction to award punitive damages is not substantively unconscionable because arbitrators inherently have such jurisdiction. Likewise, a cap on non-economic damages and limitation on discovery also do not make a mandatory arbitration provision unconscionable.

Strickland v. Jacobs, – So.3d –, 2011 WL 3364379 (Fla. 2d DCA 2011).

An employer is liable for the intentional torts committed by her employee while the employee is acting in the course and scope of her duties when the act was meant to further the interests of the employer.

Hutson v. Plantation Open MRI, LLC, – So.3d –, 2011 WL 3300213 (Fla. 4th DCA 2011).

A party may oppose a summary judgment by filing an affidavit in opposition and moving to amend its affirmative defenses and setting the motion to amend for hearing the same date as the summary judgment.

Inc. v. 21 Coral Way Condominium Investments, /22 Condominium Association, Inc., – So.3d –, 2011 WL 3300233 (Fla. 3d DCA 2011).

A party may not contest the payment of a condominium special assessment by the defense of breach of fiduciary duty by the board of directors of the association.

Palmerest Homes of Tampa Bay, LLC v. Bank of America, N.A., – So.3d –, 2011 WL 3518026 (Fla. 2d DCA 2011).

Trial courts, not arbitration panels, determine the threshold issues of waiver, unconscionability of the whole

contract (as opposed to unconscionability of the arbitration clause), and whether third parties are bound to arbitrate.

Parker v. LaSalle Bank Nat. Ass'n, – So.3d –, 2011 WL 3476668 (Fla. 4th DCA 2011).

Constructive service is ineffective if the affidavit of diligent service shows a lack of diligence in attempting to locate the defendant, i.e., only one attempt at service and no attempts to inquire of neighbors or the tenant. This demonstrates lack of diligence despite searches for credit information, directory assistance, motor vehicle records, the post office, property tax records, national death records, and prison records.

Katzman v. Rediron Fabrication, Inc., – So.3d –, 2011 WL 3477093 (Fla. 4th DCA 2011).

Discovery upon a hybrid fact/expert witness is not necessarily restricted to the factors set forth in *Elkins v. Syken*, 672 So.2d 517 (Fla. 1996).

CBT Flint Partners, LLC v. Return Path, Inc., – F.3d –, 2011 WL 3487023 (11th Cir. 2011).

Patent claim construction is a matter of law, and a reviewing court can correct an obvious mistake by inserting the word “and” in between “detect” and “analyze.”

Robles-Martinez v. Diaz, Reus & Targ, LLP, – So.3d –, 2011 WL 3586179 (Fla. 3d DCA 2011).

Returns of service can be challenged by either demonstrating the return is not “regular on its face,” i.e., does not comply with Florida Statute § 48.21 and is therefore facially invalid, or by alleging the service of process is invalid by contesting the factual allegations of the return, e.g., the party was substitute served at a location not her “usual place of abode.” A facially regular return is prima facie proper, and the party contesting service must prove the deficiency by clear and convincing evidence. The statute requires service “at the usual place of abode,” i.e., only requires the party be living at the premises at the time of

service. The statute does not require service at the “residence” of the party (which may be different than “usual place of abode”).

I-Net Technologies, Inc. v. Salazar, – So.3d –, 2011 WL 3586233 (Fla. 4th DCA 2011).

A cause of action in a personal services contract dispute accrues, for venue purposes under Florida Statute §47.051, where the personal services are rendered.

City of Riviera Beach v. That Certain Unnamed Gray, Two Story Vessel Approximately Fifty-Seven Feet in Length, – F.3d –, 2011 WL 3629483 (11th Cir. 2011).

A “vessel” under 1 U.S.C. § 3 (federal maritime law) includes “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water,” notwithstanding the vessel is built to be and is used as a residence and is not capable of navigation.

Patel v. Boers, – So.3d –, 2011 WL 3754651 (Fla. 5th DCA 2011).

A general assignment is sufficient to assign a restrictive covenant pursuant to Fla. Stat. § 542.335 (1) (f) (2).

1321 Whitfield, LLC v. Silverman, – So.3d –, 2011 WL 3685757 (Fla. 2d DCA 2011).

Constructive service is permitted on LLCs as the Florida LLC Act provides for service on LLCs in accordance with Chapters 48 and 49 of the Florida Statutes, which chapters permit constructive service.

Blumstein v. Sports Immortals, Inc., – So.3d –, 2011 WL 3687423 (Fla. 4th DCA 2011).

A statement crosses the line from innocent, non-actionable statement to one upon which a claim for negligent misrepresentation lies when the utterer has a direct, pecuniary interest in the transaction or context such that it is equitable to impose a duty of care and diligence in making the statement.

Bulletin Board

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George W. Bush, Jr., a partner at the law firm of Fox, Wackeen, Dungey, Beard, Sobel, Bush & McCluskey, LLP, was named to the Big Brothers Big Sisters of Palm Beach and Martin counties 2011-12 Board of Trustees.



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CALENDAR

November 2011

- | | | | |
|--|---|--|---|
| <p>Wednesday, November 2, 11:30am-1pm
 Solo Luncheon
 Bar Association Office</p> <p>Thursday, November 3, 9:30am-3:30pm
 Appellate Law Seminar
 Marriott, Okeechobee Blvd., WPB</p> <p>Thursday, November 3, 4pm-6pm
 Appellate Cocktail Reception
 4th District Court of Appeal
 1525 Palm Beach Lakes Boulevard,
 West Palm Beach</p> <p>Thursday, November 3, 5:30pm-7:30pm
 Joint FAWL Networking Reception/
 Happy Hour
 South County FAWL/
 Palm Beach County FAWL
 Bar Louie's-Boynton Beach</p> <p>Thursday, November 3, 6:30pm-7:30pm
 Christian Legal Society
 Women's Gathering
 Panera Bread, 771 Village Blvd, WPB</p> <p>Friday, November 4, 8:30am-9:30am
 ADR Committee Meeting
 Bar Association Office</p> <p>Friday, November 4, 9am-10am
 FAWL Diversity Seminar</p> <p>Monday, November 7, Noon-1pm
 Hispanic Bar Assn. Meeting
 Judicial Conference Room,
 Main Courthouse, WPB</p> | <p>Tuesday, November 8, 11:45am-1pm
 Circuit Civil Committee Meeting
 Judicial Conference Room,
 Main Courthouse, WPB</p> <p>Tuesday, November 8, Noon-1:00pm
 YLS Board Meeting
 Bar Association Office</p> <p>Wednesday, November 9, 8am-Noon
 Securities Law CLE Seminar
 Bar Association Office</p> <p>Wednesday, November 9, Noon-1pm
 NCS Board Meeting
 Office of McHale & Slaviv</p> <p>Wednesday, November 9, 6:30pm-8pm
 Small Claims &
 Mediation Presentation
 Palm Beach Gardens Library</p> <p>Thursday, November 10, 11:45am – 1pm
 Judicial Relations Committee Meeting
 Judicial Conference Room,
 Main Courthouse, WPB</p> <p>Thursday, November 10, Noon-1:30pm
 South County FAWL Luncheon
 Seasons 52</p> <p>Friday, November 11
 Veterans Day – Court Holiday
 Bar Office Closed</p> <p>Saturday, November 12
 Minority Picnic</p> | <p>Tuesday, November 15, 12:30pm-1:30pm
 Bench Bar Committee Meeting
 Bar Association Office</p> <p>Tuesday, November 15, 5:30pm
 Inns of Court Meeting
 Palm Beach County Courthouse
 Judicial Conference Room</p> <p>Tuesday, November 15, 6:00pm
 Legal Aid Brooks Brothers Event
 Gardens Mall</p> <p>Wednesday, November 16, 11:45am-1pm
 Judicial Luncheon
 North end of cafeteria,
 Main Courthouse, WPB</p> <p>Wednesday, November 16, 5pm-6pm
 PBCBA Board of Directors Meeting
 Bar Association Office</p> <p>Thursday, November 17, 11:30am-1pm
 PBCBA Membership Luncheon
 The Marriott, West Palm Beach
 Guest Speaker: FL Bar President Scott
 Hawkins</p> <p>Thursday, November 17, 5:30pm-7:30pm
 Federal Bar Judicial Reception
 The Marriott, West Palm Beach</p> <p>Thursday, November 17, 5:30pm-7:30pm
 PB Justice Association Meeting
 Café Saporì</p> | <p>Friday, November 18, 11:30am – 2:10pm
 Law Practice Technology Committee
 CLE Seminar
 “Is your Website in Compliance with
 Fla’s New Advertising Regulations?”
 Bar Association Office</p> <p>Friday, November 18, 11:45am-1pm
 SPBCBA Membership Luncheon
 The Marriott @ Boca, Boca Center</p> <p>Friday, November 18, 5:00pm
 Cunningham Bar Association
 General Member Meeting</p> <p>Thursday/Friday, November 24 - 25
 Thanksgiving Holiday/Court Holiday
 Bar Office Closed</p> <p>Tuesday, November 29, Noon-1pm
 Committee for Diversity & Inclusion
 Committee meeting
 Bar Association Office</p> <p>Tuesday, November 29, 5:30pm-6pm
 Legal Aid Board Meeting
 Bar Association Office</p> <p>Wednesday, November 30, 5:30pm-7pm
 South County FAWL Holiday Party
 Hosted by Sabadell United Bank</p> |
|--|---|--|---|

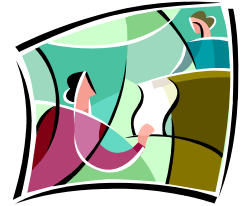


The Palm Beach County Bar Association's Family Law CLE Committee Presents:

The Psychological Dimensions of a Family Law Case

Friday, January 13, 2012 9:15 a.m. – 5:00 p.m.
Bar Association Offices, 1601 Belvedere Road, #302E, WPB, FL

Program Schedule



- 9:00am - 9:15am **Late Registration and Check in**
- 9:15am - 9:20am **Welcome & Opening Remarks** - *Matthew Jay Lane, Esq., Matthew Lane & Associates, P.A., Committee Chair*
- 9:20am - 11:20am **Panel Discussion—Social Investigations, Time-Sharing Evaluations, and GAL's** - *Eddie E. Stephens, III, Esq., Eddie Stephens P.A., Board Certified Marital and Family Law Attorney; Shelia Furr, PhD; Michael O'Hara, Psy.D.; and Lisa McDermott-Perez, PhD, LMHC*
- 11:20am - 12:00pm **Legal Aid Society of Palm Beach County Juvenile Advocacy Project - Dependency Overview** - *William W. Booth, Esq., Legal Aid Society of Palm Beach County*
- 12:00pm - 1:00pm **Lunch**
- 1:00pm - 2:30pm **Direct & Cross Examination of Psychological Experts** – *Charles D. Jamieson, Esq., The Law Firm of Charles D. Jamieson, PA, Board Certified Marital & Family Law Attorney, and Deborah O. Day, Psy.D.*
- 2:30pm - 2:45pm **BREAK**
- 2:45pm - 3:15pm **Case Law Update** - *Georgia T. Newman, Esq., Law Office of Georgia T. Newman, P.L.*
- 3:15pm - 4:00pm **Ethics Update - Income unreported to the IRS; Taking the 5th, and Recent changes in the ethical obligation to correct false testimony by a client** - *Erskine C. Rogers, III, Esq., Rutherford Mulhall, P.A., Board Certified Marital & Family Law Attorney*
- 4:00pm - 5:00pm **Annual View from the Bench** - *The Honorables James L. Martz, John L. Phillips, and Magistrate Diane M. Kirigin, Fifteenth Judicial Circuit, Moderated by Matthew Jay Lane, Esq., Matthew Lane & Associates, P.A., Committee Chair*

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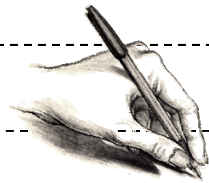
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THIRD ANNUAL LAWYER VARIETY SHOW



"The event was 10 times better than I ever expected it to be. I am truly amazed at the talent every single act displayed. I will definitely be going next year"

Shannon Sagan, Esq.



The show was AWESOME! Thanks for making sure I went. I would never have guessed it would be that much fun.!

Ryon McCabe, Esq.

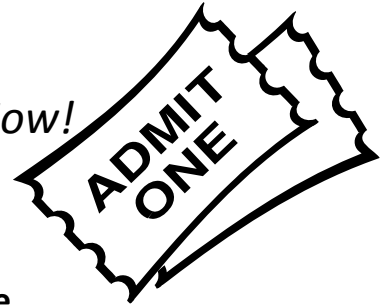
We have NEW and exciting acts, including a performance by one of our local judges!

Don't Miss it ~ Tickets On Sale Now!

Saturday, January 21, 2012

6:30 pm Cocktails - 7:30 pm Performance

Eissey Theatre, Palm Beach Gardens



With an all new line-up, this year's program promises to be an evening of entertainment, fun & surprises.

Acts include comedy, a variety of music and dancing.

Tickets are just \$35.00 for Orchestra and \$25.00 for the Balcony. Preferred seating will be given on a first come first serve basis.

To reserve your tickets, register online @www.palmbeachbar.org.

To purchase your tickets, log onto the Bar's website at www.palmbeachbar.org and click on register for events. Or, send us a check made payable to the Palm Beach County Bar Association, 1601 Belvedere Road, Suite 302E, West Palm Beach, FL 33406.

Yes! I would like to attend the Variety Show!

Please send me _____ tickets in Orchestra (\$35 each) or Balcony (\$25 each) (circle which section)

Check enclosed in the amount of \$_____

Your name _____

Mailing address _____

Email Address: _____ Phone: _____