



PALM BEACH COUNTY BAR ASSOCIATION

BULLE^TIN

www.palmbeachbar.org

September 2010

Bar Hosts Constitution Day Luncheon September 17

The United States Constitution was adopted by the Constitutional Convention on September 17, 1787. That document has shaped much of our country's history over the past 223 years. But what do you really know about the creation of America's foundational document? Could it be that the Constitution was illegally adopted? Is it true that a document associated with freedom and democracy was actually forged in secrecy? And why might it matter that the Constitution was the result of earlier failures by the

founders to establish a blueprint for American government? Professor Michael Allen of Stetson University College of Law will discuss these issues as well as current constitutional issues as we celebrate the 223rd birthday of the United States Constitution. Michael Allen is a Professor of Law at Stetson University College of Law teaching courses in Civil Procedure, Remedies, Complex Litigation, Constitutional Law I, Veterans Benefits Law, Practice, and Policy, and the Federal Courts and the Federal System. During his time at Stetson, Professor Allen has received the University level award for Excellence in Teaching, been twice named the Best All Around Professor, and five times been awarded the Golden Apple Achievement Award for teaching. He graduated in 1992 from Columbia University School of Law where he was a

Harlan Fiske Stone Scholar during his last two years.

Join us for this special luncheon honoring Constitution Day on Friday, September 17, 2010 from 11:45 am to 1:00 pm at the Crowne Plaza Hotel in West Palm Beach. The cost is \$25.00 for PBCBA members; \$35.00 for lawyers who are not members; and judges are complimentary. How well do you know the Constitution? There will be a prize for the smartest table! To register, log onto palmbeachbar.org. A special thank you to our title sponsors: Debra Duran & Associates; Lesser Lesser Landy & Smith; Leopold-Kuvin and Visual Evidence.



Mark your calendar for upcoming Membership Meetings

Constitution Day Membership Luncheon
September 17

Employment Law Seminar
September 30

Lawyers Have Heart 5K Run
October 2

Membership Luncheon
October 19
Speaker: ABA President Stephen Zack

Family Picnic
October 23
Dreher Park in West Palm Beach

Annual Holiday Party & Silent Auction
December 9

Second Annual Lawyer Variety Show
January 22, 2011

Wine Tasting Event
February 3

Bench Bar Conference
March 4

Joint Luncheon with South County Bar
March 22
Speaker: FL Bar President Mayanne Downs

Annual Judicial Reception
May 3

Law Day Luncheon
May 6



Scott Hawkins was recently sworn in as president-elect of The Florida Bar by Florida Supreme Court Justice Peggy Quince. His wife Lisa holds the Bible as immediate past president Jesse Diner looks on. Congratulations to Scott who will take office as president in June 2011.

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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
1601 Belvedere Road, #302E
West Palm Beach, FL 33406

Welcome Aboard!

Meredith Trim joins the Bar Association as its first Director of Managed Mediation. Previously, she worked as an Adjunct Professor at Palm Beach State College teaching Business Law and at FAU Honors College teaching Constitutional Law. She also volunteered at the Legal Aid Society of Palm Beach County where she worked with foreclosure defendants.

Meredith lives in Palm Beach Gardens with her husband, and two children ages 16 and 18. In her spare time, you can find her gardening, reading, and kayaking.

Hutch Floyd comes to us from The Legal Aid Society of Palm Beach County where he was the Legal Assistant for the Foreclosure Defense Unit and staff attorneys.

Hutch grew up in Charlotte, North Carolina and attended UNC Charlotte. In his spare time, he enjoys fishing, most recreational activities and cooking with good friends.



Meredith Trim (right), Director of Managed Mediation and Hutch Floyd, Mediation Coordinator

New Residential Mortgage Foreclosure Program

Palm Beach County homeowners facing foreclosure will now be guaranteed a chance to work with their lenders as the courts try to reduce a foreclosure overload. On July 12, the new Residential Mortgage Foreclosure Program opened its doors with Meredith Trim as Director and Hutch Floyd as Mediation Coordinator. All foreclosures are now subject to a new state Supreme Court order requiring mediation on homesteaded properties before a foreclosure hearing is held. The mediations will give owners and lenders a chance to see whether an alternative to foreclosure such as a loan modification, deed in lieu of foreclosure or short sale, is an option. For additional details, log onto www.palmbeachbar.org.



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President's Message



Fall: The Season of Renewal

By Michael J. Napoleone

Poets and gardeners will tell you that spring is the season of renewal. For me, it has always been fall. Few things compare to the joy of that opening weekend of the college football season. There are new faces everywhere, each team starts with a blank slate, and the talk begins about the possibility of a bowl bid, a conference championship, or, for some, a national championship. As a Gator, I've become rather spoiled and accustomed to winning seasons and championships, so perhaps I look forward to each new season with more enthusiasm than many others (you know who you are).

There are many parallels between the college football season and our Bar year. In the spring, instead of the first weeks of practice, our committees are formed through the appointment of chairs and committee members. These committees begin to meet and develop their game plans for the coming year. Summertime is generally the "off season," as many of our members travel and take family vacations. When fall rolls around, the Bar year truly kicks off. Seminars and events are scheduled, and members are networking at luncheons, happy hours and continuing legal education programs. The calendar year concludes in December with the Bar's holiday party and the college football conference championship games. In January, a national champion is crowned, the Bar begins to lay the groundwork for the next year and the cycle begins anew.

Fall is also a great time to familiarize yourself with the many benefits available to Bar members. Members can set up their firms to accept credit card payments through Affiniscap; professional liability insurance is available from USI Affinity;

discounted payroll processing is provided by Paychex; and AMO Office Supply provides discounts on office supplies. Many members are unaware that several State approved online courses are available to members, which include online traffic school, the Parent Education & Family Stabilization Course, First Time Driver (DATA) Course, and Florida Notary Service. If accessed through the Bar's website, a small portion of the proceeds from those courses are remitted to the Bar. Discounted tickets to the movies and many of Florida's theme parks can be purchased from the Bar office. A complete list of member benefits is posted on the Bar's website. Not only do these programs represent an excellent

value to members, but a portion of the revenues generated through these programs provides an additional stream of revenue to the Bar that enables us to keep the membership dues low. I hope you will explore some of the available benefits of your membership; for those already taking advantage of these opportunities, thank you.

Let's have a great year and **Go Gators!**



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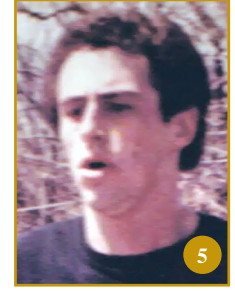
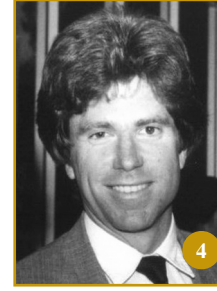
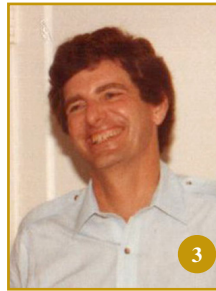
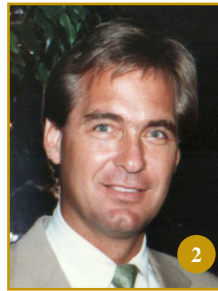
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Who are they?

Can you guess who these members are? Answers can be found on page 13. If you have old pictures of yourself or other members that you'd like featured, please send them to Patience Burns at the Bar Office.



ABA President Steve Zack to speak October 19



The Palm Beach County Bar Association is pleased to welcome Miami lawyer Stephen N. Zack, a partner in the law firm Boies, Schiller & Flexner, as its guest speaker for a membership luncheon to be held on October 19. This luncheon will be co-presented with FAWL, the Cunningham Bar and the Hispanic Bar Associations. Zack was elected as president-elect of the American Bar Association in 2009 – the first Hispanic American to achieve that distinction. The son of a Cuban mother and American father, Zack

is focused on promoting civics education, the importance of inspiring a new generation of lawyers and ABA programs that advance access to justice for everyone in the United States. In addition, he will work to create a commission on Hispanic rights. Mark your calendar and watch the Bar's website for further information.

Unified Family Court Practice Committee

The UFC Committee started the 2010-2011 year off with a well attended meeting to discuss the future of the committee and what its focus should be. Attended by numerous local practitioners, leadership from the Clerk's office, Magistrates Kirigin and Williams, as well as Judges Kroll, Brunson and Lewis, the first meeting was quite successful. In addition to looking into updating our webpage on the Palm Beach County Bar's website, we will be planning numerous roundtable discussions on topics ranging from adoption to crossover cases to handling General Magistrate cases. In addition, we will be looking into what our Committee can do to assist the shortage with the supervised visitation/timesharing program, Family Connections. It is possible this valuable resource may be lost and by reaching out to other community organizations we are hopeful we can come up with creative solutions to what could be a devastating problem.

The input of family practitioners and the Bench is necessary to the success of this Committee. I encourage you to join if you are not a member and come out for our next meeting: September 8, 2010 at the Law Library at the Main Courthouse. If you are not already a member of the Committee, please email me at eroy@sasserlaw.com to let me know you will be coming!

Help Needed for Families Facing Foreclosure

Beginning this fall, all foreclosures on homestead property must be referred to mediation as a result of the Florida Supreme Court ordered Residential Mortgage Foreclosure Mediation Program (RMFMP). The program is designed to bring lenders and borrowers together with a specially trained mediator in an attempt to find ways to avoid foreclosure. To assist in this process, the Legal Aid Society of Palm Beach County is recruiting attorneys to represent the homeowners at these mediations. This is a wonderful opportunity to provide pro bono services in a limited capacity while helping families keep their homes. The Legal Aid Society will be providing training to those attorneys interested in volunteering. Please visit our website at www.legalaidpbc.org for more information about the training. You may also contact Kim Rommel-Enright at 561-822-9769 or kenright@legalaidpbc.org.



North County Section

As a way to beat the heat, the North County Section recently hosted its first Summer CLE and Cool Cocktail Reception at Abacoa Golf Club in Jupiter. Mark Murnan of Complete Legal Investigations spoke about Privacy Legislation and its Impact on Attorneys.



Kevin McKinley, Ryon McCabe and John Howe



Larry Buck, NCS Director and Larry Strauss



Ted Deckert and Sally Benson



Gary Gomoll, Sue Ellen Kenny, Wendy Murnan and Mark Murnan



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Please join us in welcoming Merryl Silverman Haber to our Firm. Merryl brings more than 18 years of legal and trial experience to direct and manage the Firm's Boca Raton office, and represent injured clients and their families in auto negligence (including commercial trucking) and premises liability cases, and related liability injury cases. We are pleased to add such an experienced attorney to our firm.

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

"Second Annual Martinis and Migraines"

Employment Law Update, Getting Paid and Paying Out,
Issues with Solvency, Bankruptcy & Sanctions

Thursday, September 30, 2010 - 1:30pm—5:00pm

Bar Association office- 1601 Belvedere Rd., Suite 302 East West Palm Beach, FL

Program Schedule



1:00 - 1:30pm - **Late registration check-in**

1:30 - 1:35pm - **Welcome & Opening Remarks** - *Cathleen A. Scott, Esq., Employment Law CLE Committee Chairperson, Cathleen Scott, P.A.*

1:35 - 2:20pm - **FLSA Update & Hot Topics** - *Matthew N. Thibaut, Esq., Casey Ciklin Lubitz Martens & O'Connell*

2:20 - 3:10pm - **Insolvency, Bankruptcy, & How to Enforce Employment Law Judgments** - *Alan R. Crane, Esq., Furr & Cohen PA*

3:10 - 3:20pm - **BREAK**

3:20 - 4:10pm - **The New Employment Reality, Sanctions & Rule 57.105** - *Richard E. Johnson, Esq., Board Certified Labor & Employment Law Attorney*

4:10 - 5:00pm - **Listen and Learn - Judicial Round Table Discussion With Judges:** *Honorable Judge Glenn D. Kelley, 15th Judicial Circuit, Honorable Judge Robin L. Rosenberg, 15th Judicial Circuit, and Honorable Judge Jonathan D. Gerber, 4th District Court of Appeal*

5:00 p.m. **Happy Hour:** *Share a Martini with colleagues compliments of ARC Mediation*

Sponsored By:



Please drink responsibly

This course has been granted **4.0 CLER / 1.0 Ethics credits/ 3.0 Labor & Employment Certification credits** from The Florida Bar.

Seminar cost is \$115 for PBCBA members/paralegals; \$155 for non-PBCBA members/paralegals if registered by 9/23/10; add \$25 after that date. All refund requests must be made no later than 48 hours prior to the date of the seminar.

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

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Will Twitter Ruin Your Legal Writing?

by Christopher B. Hopkins

Twitter appeared in the mainstream a little over a year ago and, quickly thereafter, critics charged that capping our thoughts at 140 characters would destroy the ability to communicate in proper English. Instant messaging, after all, had turned “text” into a verb and whole sentences into acronyms. Twitter satisfies our short attention span with bite-size commentary while starving our ability to focus on one thing at a time. Will technospeak and twitterbabble desecrate our pleadings and distort our closing arguments?

Such fears might amount to putting the “cart before the horse.” Rather than be concerned about what *might* hijack our vernacular, we should examine its current state: most lawyers still speak and write like they are nineteenth century farmhands.

Think that’s “hogwash”? Few, *if any*, of us have likely ever actually put a real cart behind a live horse, much less cleaned a pig. Yet you were likely comfortable reading those expressions about carts, horses, and hogwash. Our language suffers from what one might call the Bucolic Infection, a disease which strikes lawyers who, in exaggerated phrases, turn to country-fied idioms in an effort to come across as an easygoing everyman. You might say that we have “gone to town” on those platitudes.

Why do lawyers cling to farm-speak when it has little application to our modern daily lives? Perhaps it is an effort to “harken back” to simpler times when homespun wisdom would save the day on *Little House on the Prairie*. Meanwhile, present-day life is quite different. The only blackberry you know of probably has a small screen and keyboard. Long ago we replaced the

loom and the sextant for a word processor and GPS. Even that reference to *Little House* recalls a time, three decades ago, when you received a tv signal through an antenna. Our language has been clearly “in a rut” for more than two turns of a century. Out with the Bucolic Infection, a verbal virus! It is time to update how we communicate.

Great sentiments of the modern era can be encapsulated in 140 characters: (1) Ask not what your country can do for you, ask what you can do for your country; (2) In the future, everybody will be world-famous for fifteen minutes; (3) I have not failed. I’ve just found ten thousand ways that won’t work; or even (4) fifteen minutes could save you fifteen percent or more on car insurance.

Did Kennedy mean to say, “what’s good for the goose is good for the gander”? Was Warhol “getting down to brass tacks”? Was Edison putting on a “dog and pony show”? Is Geico a “straightshooter”? It is more likely that you have brandished the latter set of clichés more recently than you’ve quoted the former. Worse still, most of us have little knowledge of waterfowl, brass tacks, carnival shows or gunplay. So we do not even know the meaning behind our own words. We, as lawyers, are clearly “not out of the woods.”

Yet, as lawyers, we should know better. Even before law school, we have been taught to keep it short. Judges and juries might embrace a character limit on lawyer-speak. We should be cognizant of our word choices so that they naturally communicate our thoughts with *meaningful* expressions. Instead, we often rely on outdated colloquialisms despite the fact that, some time ago, the cows arrived safely at home.

Do you have a case of the Bucolic Infection? Consider Twitter to be your diagnostic tool. Try to type a complex thought into Twitter. Better “hold your horses.” The 140 character limit probably cut you off at first reference to “the real McCoy.” Upon a second attempt to put a leash on your words you may find that “that dog doesn’t hunt.” The 140 character cap compels you to stop, think, and craft a sentence with only the essential words. Consider the effort it would take to turn your short missive into something persuasive, humorous or meaningful. Using concise language takes more thought, not less.

Listen to people’s expressions during conversations, hearings, and oral argument. The Bucolic Infection is an epidemic. It appears that we have developed few new expressions since the invention of the automobile. Perhaps it is time that we communicate without pre-packaged clichés or at least speak in terms which have present-day application.

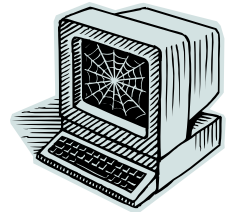
On the contrary, this is not a recommendation that we import tech-influenced slang into our pleadings (OMG!). Leave that kind of talk to the “spring chickens” and their newfangled texting machines (i.e., your iPhone). Instead, our first task should be to eradicate the Bucolic Infection by ridding our minds of outdated expressions. There is some merit to the emerging “short form” writing style (see 140characters.com). Stated differently: when it comes to word choices, we should, indeed, “throw the baby out with the bathwater.”

Christopher B. Hopkins is the Chair of the PBCBA Technology Committee. He is a shareholder with Akerman Senterfitt LLP and can be reached at christopher.hopkins@akerman.com.



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

***Is Your Firm's Website Out of Compliance
With the Ethics Rules?***



**Friday, November 19, 2010 - 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. **"Your Website Probably Violates the Rules Regulating The Florida Bar -
Florida Supreme Court Mandates Compliance by July 1, 2010"**

Speaker

***Jan L. Jacobowitz, Esq., Director
Ethics & Professional Responsibility Program
Center For Ethics & Public Service
University of Miami School of Law***

This course is expected to receive **2.5 CLER credits from The Florida Bar**. Ethics credits are pending.

The cost of the seminar is **\$60.00 (includes lunch)** for PBCBA members/paralegals;

\$100 for non-PBCBA members/paralegals if registered by **11/12/10**; add \$25 to registration fee after that date.

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

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Supreme Court Decides Exemption Case

Submitted by: Marc P. Barmat

A recent United States Supreme Court decision has resolved a conflict among the various Circuits regarding how the value of certain exemptions are claimed and the effect on the trustee's ability to administer those assets. See, Schwab v. Reilly, 130 S.Ct. 2652 (2010).

In Schwab, the debtor listed business equipment on schedule B as an asset and valued the business equipment at \$10,718.00. On schedule C, the debtor claimed the business equipment as exempt with the same value of \$10,718.00. The trustee did not object to the exemption because the amount of the claimed exemption was within the allowed statutory dollar amount. When the trustee later had the equipment appraised and found out the equipment was worth \$17,200.00, the trustee filed a motion to sell the equipment to recoup the excess value for the bankruptcy estate. The debtor opposed the motion and argued that the equipment was fully exempt because the trustee did not object to the claimed exemption. The bankruptcy court denied the trustee's motion and the district court and Third Circuit affirmed. The United States Supreme Court reversed and held that a chapter 7 trustee (or another interested party) is not required to object to a claimed exemption that is within statutory limits in order to preserve the estate's right to retain any value in the asset beyond the value of the exempt interest. Id.

In Schwab, the Court focused on the language of 11 U.S.C. §522(l) which states:

The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section... Unless a party in interest objects, the property claimed as exempt on [schedule C] is exempt.

The Court found the portion of 11 U.S.C. §522(l) that resolves this case is

not the provision stating that the "property claimed as exempt on [schedule C] is exempt." Rather, it is the portion that defines the objection's target, namely, the "list of property that the debtor claims as exempt under subsection (b)." Id. Subsection (b) of §522 states a debtor may exempt property specified under §522(d). Most of the exemptions listed under §522(d) specifically refer to a debtor's "interest" in the property up to a specified dollar amount, not the property itself. Therefore, the exemption claimed is the debtor's "interest" in the property and not the actual asset. Accordingly, if the value of the asset is greater than the debtor's interest in the property, then the trustee may liquidate the asset and retain the value of the asset over the claimed exempt value for the benefit of the bankruptcy estate.

The practical effect of the Schwab decision, as noted by the Court, is that if a debtor wants to exempt the full market value of an asset or the asset itself, the debtor should list the value of the claimed exemption as "full fair market value" or "100% of the fair market value." This type of claimed exemption will then encourage the trustee to promptly object to the exemption if the trustee wishes to challenge the claimed exemption. If the trustee fails to object or if the trustee's objection is overruled, then the debtor will be entitled to keep the full value of the asset. If the trustee's objection is sustained, then the asset, or a portion of it, will be turned over to the estate. Either of these scenarios will facilitate the prompt disposition of the asset and provide the debtor and creditors with finality.

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



W. JAY HUNSTON, JR. Mediator/Arbitrator

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- Florida Bar Board Certified Civil Trial Lawyer (1983-2003)
- Florida Bar Board Certified, Emeritus in Civil Trial Law (2003-Present)

- Florida Certified:
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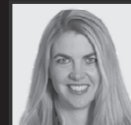
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Thomas F. Meyer, Esq.



Spendthrift Trusts Are Alive & Well In Palm Beach County

By David M. Garten, Esq.

A spendthrift trust is a trust "created with a view of providing a fund for the maintenance of another, and at the same time securing it against his own improvidence or incapacity for self-protection." See *Croom v. Ocala Plumbing & Elec. Co.*, 62 Fla. 460, 57 So. 243 (1911). When a trust includes a valid spendthrift provision, a beneficiary may not transfer his interest in the trust and a creditor or assignee of the beneficiary may not reach any interest or distribution from the trust until the beneficiary receives the interest or distribution. See §736.0502(3), Fla. Stat. [But see §736.0503 Exceptions to spendthrift provision].

In *Miller v. Kresser*, 34 So. 3d 172 (Fla. 4th DCA 2010), the settlor established a Trust for the benefit of her son, James and named her other son, Jerry, sole trustee. The James Trust is a discretionary trust under which Jerry has absolute discretion to make distributions for James and James' qualified spouse. The James Trust contains a spendthrift provision and a provision under Article V(B) which gives Jerry, as trustee, the complete discretion to terminate the trust by distributing the entire principal to the beneficiary for any reason.

James' creditor sued to invalidate or pierce the spendthrift provision in the James Trust. In the Final Judgment, the trial court set forth a detailed account of James' significant control over the James Trust and over Jerry, as trustee. The court found that Jerry had almost completely turned over management of the trust's day-to-day operations to James. James controlled all important decisions concerning the trust assets, including investment decisions. Jerry never independently investigated these decisions to determine whether they were in the best interest of the trust, and some of the decisions have turned out

to be unwise. The trial court concluded that Jerry simply rubber-stamped James's decisions and "serve[d] as the legal veneer to disguise [James's] exclusive dominion and control of the Trust assets." The court held that James' exclusive dominion and control over the James Trust served to terminate the trust's spendthrift provision, allowing James' creditor to reach all of the trust's assets to satisfy his judgment. The court further concluded that Jerry, by giving James control over the trust and complete access to the trust's assets, effectively turned over to James all of the trust's assets pursuant to Article V(B) of the trust, thereby subjecting the assets to execution.

On appeal, the court found that under §736.0502(2), Fla. Stat., a creditor could not reach any interest in a spendthrift trust until the beneficiary received a distribution. Under § 736.0504(2), Fla. Stat., when a trust provided a trustee with complete discretion over distributions, a creditor could only reach the distributions made by the trustee and a creditor could not compel distributions even if the trustee abused his discretion in managing the trust. The court stated: "While we agree that the facts in this case are perhaps the most egregious example of a trustee abdicating his responsibilities to manage and distribute trust property, the law requires that the focus must be on the terms of the trust and not the actions of the trustee or beneficiary. In this case, the trust terms granted Jerry, not James, the sole and exclusive authority to make distributions to James. The trust did not give James any authority whatsoever to manage or distribute trust property." As there had been no distribution to the beneficiary, and as the trustee had complete control over trust distributions, the court found that the trial court erred in invalidating the spendthrift provisions and permitting the creditor to reach undistributed trust assets.

In addition, the trial court erred in concluding that there was a merger under the trust terms. For the merger doctrine or Article V(B) to apply, Jerry would have to convey legal title of the trust principal to James. This conveyance never occurred. Moreover, the trial court did not terminate the trust, as would be required with a merger or under Article V(B).

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The Dance of the Lawyer Expert: What Ethical Duties and When?

by Culver "Skip" Smith III
on behalf of the Professionalism Committee

A respected South Florida partner in a nationally prominent law firm recently was disqualified from appearing as successor counsel for the plaintiff in litigation in which he earlier had been approached by the defendant's counsel about the possibility of serving as a testifying expert but was not hired. The court based its decision on the conclusion that the lawyer had received confidential information during a pre-hiring conference with the defendant's counsel and that the defendant as a result would suffer an unfair disadvantage were the lawyer thereafter to represent the plaintiff as counsel. Whether the lawyer had, in fact, received information that was confidential was hotly contested, but the court's conclusion that it was preordained the result. Although the case is unique to its facts (potential testifying expert *who was not hired* representing the adverse party in the *same* litigation), it suggests the timeliness of revisiting the nature of an expert's relationship with the hiring party and the ethical obligations and limitations that flow from it.

One must first distinguish between a testifying lawyer expert and a consulting lawyer expert. The latter in effect serves as co-counsel to the party's lawyer, thus invoking all of the ethical duties inherent in any lawyer-client relationship. The more difficult conflict issues arise in the case of a testifying lawyer expert.

The following principles seem well settled:

1. A lawyer serving as a testifying expert on behalf of a party that is another lawyer's or law firm's client does not thereby establish a lawyer-client relationship with that party. See, e.g., ABA Formal Op. 97-407 (1997). Thus, with one important exception, the conflict-of-interest rules do not apply: The lawyer may concurrently or subsequently undertake a representation directly adverse to the party for whom he or she

is testifying as an expert, because that party is not a client. That is, no duty of undivided loyalty applies.

2. The important exception involves confidential information. Here, "confidential information" refers to truly confidential information of a party, not the broader "information relating to the representation of a party" referred to in the ethical rule on confidentiality. Most legal authorities hold that any information provided to a testifying expert is discoverable, including information that otherwise might be deemed confidential. Nonetheless, the testifying expert may have a duty under agency law to protect confidential information of the party. When the expert wishes concurrently or later to undertake representation adverse to the party for whom he or she is testifying, the question becomes whether that duty would create a substantial risk that the representation of the adverse party would thereby be materially limited. If the lawyer cannot reasonably believe that the representation would suffer no material limitation, client consent is no cure.

Given the likely discoverability of all information furnished to a testifying expert, one could reasonably contend that a party hiring a testifying expert can harbor no reasonable expectation of confidentiality or waives confidentiality by disclosing it to the testifying expert (a third party). In a disqualification proceeding, however, that argument likely will fall on unreceptive judicial ears: in such matters the courts tend to be swayed by a subjective sense of fundamental unfairness or by a perceived need to maintain a "level playing field."

It is important, therefore, to all concerned that the testifying expert and the hiring party at the outset confirm the role that the expert is expected to serve (testifying versus consulting) and delineate the effects of that role on issues such as confidentiality and disclosure of sensitive information. If the expert's role should change from testifying to consulting or to a blend of both, further exposition of the ramifications is essential. As one wag has said, the easiest thing to achieve in human discourse is a misunderstanding. As with many ethical issues, a misunderstanding is a dangerous thing.

Comments on this article are welcome. Skip Smith may be reached at csmith@culversmithlaw.com.

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



LAURIE J. BRIGGS – New York; Nova Southeastern University, 1993; Associate in Searcy Denney Scarola Barnhart & Shipley, P.A.

DEREK C. BROWN – South Florida Water Management District, West Palm Beach

JOSEPH P. CHASE – Florida; Vanderbilt University, 2010; Gunster, West Palm Beach

LORI "DENISE" COFFMAN – Arkansas; Nova University Law School, 1987; Clerk & Comptroller, Palm Beach County

KEVIN J. FIORE – Associate in St. John, Core, & Lemme, P.A., West Palm Beach

ANDREW FRANKLIN – University of Toledo College of Law 2006; State Attorney's Office, 17th Judicial Circuit, Ft. Lauderdale

RORY E. JURMAN – New York; Albany Law School Union University, 2000; Partner in Fowler White Burnett P.A.

MARILI KELLY – Brazil; Faculdades Metropolitanas Unidas; Affiliate Membership; Lake Worth

ANDREI A. KOROTKOV – Ukraine; Florida State University, 2009; Gunster, West Palm Beach

EMILY MALLOR – Florida; St. Thomas University, 2007; Government Attorney, Ft. Lauderdale

ANGELIA PATTERSON – France; Thomas Cooley Law School, 2009; Legal Aid Society of Palm Beach County, West Palm Beach

LISA A. PRYCHODKO – University of Miami; Law Student Membership, Lake Park

CHARLES RANDALL – Michigan; Detroit College of Law, 1987; Law Office of Charles P. Randall, Boca Raton

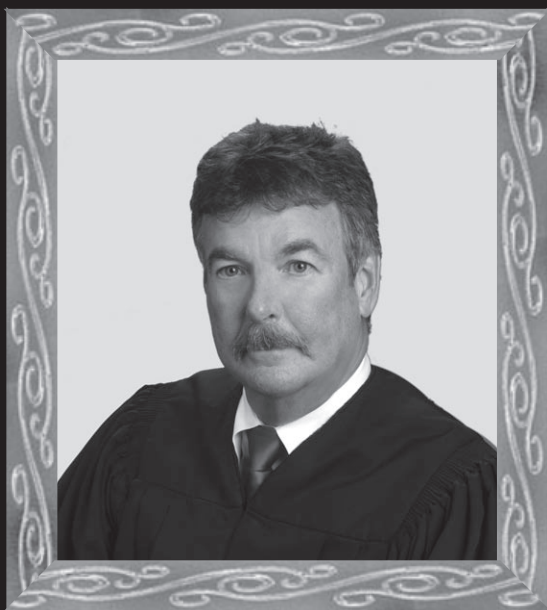
ELISABETH A. ROMFH – Florida; University of Florida Levin College of Law, 2009; Associate in Carlton Fields, P.A., West Palm Beach

ROLAND SALLOUM – Florida; Thomas Goode Jones School of Law, 2010; Associate in Reynolds & Reynolds, P.L., West Palm Beach

STUART SALTMAN – Massachusetts; Case Western Reserve University; Affiliate Membership, Boynton Beach

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Florida Bar Board of Governors Report

At its July 23, 2010, meeting in Sarasota, The Florida Bar Board of Governors:

- Heard that Proposed Advisory Opinion 09-1, addressing when lawyers may contact government officials who are represented by counsel, will be postponed until the board's December meeting to allow attorneys representing government entities more time to make suggestions.
- Approved a recommendation from the Board Review Committee on Professional Ethics to allow the Professional Ethics Committee to prepare an advisory opinion on the ethical obligations of a lawyer who is asked to disclose confidential information of a decedent by the personal representative of the decedent's estate.
- Heard BRCPE Chair Carl Schwait report that the committee will attempt to complete the Supreme Court mandated review of Bar advertising and marketing rules and policies by the May 2011 meeting. On a related issue, he noted the U.S. 11th Circuit Court of Appeals had ruled in *Harrell & Harrell v. The Florida Bar*. The firm had claimed that five Bar advertising rules were unconstitutional. A district court judge ruled in favor of the Bar, but the circuit court found that four of the issues should have further proceedings at the district court.
- Heard President Mayanne Downs announce that immediate Past President Jesse Diner will head up a Bar effort to prevent the Legislature from adjusting pension benefits for judges. Twelfth Circuit Chief Judge Lee Haworth, appearing earlier in the meeting, asked for the Bar's help on the issue saying reducing benefits would make it harder to attract qualified lawyers, especially civil practitioners, to the bench.
- Approved an addition to Rule 4-1.5 governing the hiring of an outside law firm to negotiate the resolution of medical lien issues in a personal injury case.
- Voted to approve a recommendation from the Standing Committee on the Unlicensed Practice of Law to oppose suggested amendments to the ABA Model Rules that would allow attorneys licensed in foreign countries to register as authorized house counsel in Florida or to appear pro hac vice in the state. The committee said it would be hard to verify licensing standards in foreign jurisdictions.
- Approved the recommendation of the Program Evaluation Committee to create a new section on alternative dispute resolution.
- Approved the recommendation of the Program Evaluation Committee to create a nine-member committee to study mandatory regulation of paralegals. PEC Chair Greg Coleman said paralegals have come to the Bar requesting that they be regulated by the Bar or the Supreme Court.
- Approved the Investment Committee's recommendation to hire five fund managers for expanded investments in the Bar's long-term investment portfolio and to reallocate investment targets for the new and existing investment categories.
- Discussed e-filing and e-service and related rules that will soon come to the board for its review and comment.
- Approved a recommendation from the Communications Committee to not list any ratings, including Martindale-Hubbell, on the expanded Bar member profile page on the Bar's website.
- Approved the sunset of the 2008-10 legislative positions of The Florida Bar and its committees and the rollover of selected 2008-10 positions requested by several sections for the 2010-12 biennium.



Should you have any questions, please contact one of the Circuit's four representatives: David Prather; Lisa Small; Florida Bar President-elect Scott Hawkins; Greg Coleman or Michelle Suskauer.

Historical Committee

Who Are They?

From Page 4

1. Joe Kulunas
2. Peter Broberg
3. Skip Smith
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Craig Goldenfarb

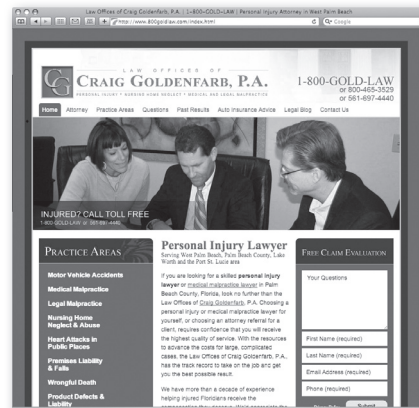
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BP Oil Watch Out the Suits are Coming

by Ted Babbitt

Unless you have been living in a cave for the last several months with no electricity and no access to the news, you have been bombarded by the results of the worst environmental disaster in the history of the world, the BP oil spill. It is no secret that commercial fisherman have suffered from Louisiana to Florida and inevitably into Texas as well. A recent opinion of the Florida Supreme Court in the case of Curd v. Mosaic Fertilizer, LLC, 35 Fla. L. Weekly S341 (June 18, 2010) could not be more timely. That case arose out of the Second District Court of Appeal opinion in Curd v. Mosaic Fertilizer, LLC, 993 So. 2d 1078 (Fla. 2nd DCA 2008) in which the Second District affirmed the dismissal of the lawsuit brought by commercial fisherman against a fertilizer company that had polluted the waters of Tampa Bay. The Supreme Court held that the fishermen's three count complaint for statutory liability under Fla. Stat. 376.313(3) for common law strict liability by Mosaic's use of its property for an ultra hazardous activity and for simple negligence all validly stated a cause of action. The parallel to the BP Oil spill is inescapable.

In this suit the facts were that Mosaic had a phosphate storage area on a creek which fed into Tampa Bay. The complaint alleged that Mosaic had been warned by the EPA that its storage pond dike was about to be breached and that even a few inches of rain would result in the dike giving way. On September 5, 2005, the dike was breached and the resultant pollutants escaped into Tampa Bay. Fisherman claimed that even though they owned no property on the Bay, their livelihood was destroyed because the underwater plant life, fish, bait, and crabs and other marine life were damaged along with the reputation of the fishery products so that the fisherman were both unable to fish and were alternatively unable to sell their catch and had a resultant economic loss.

On the first count, the Supreme Court reviewed Fla. Stat. 376.313(3) which provides for a private cause of action for anyone damaged as a result of pollution. Interestingly, a predecessor to that act was entitled the "Oil Spill Prevention and Pollution Control Act." The statute provides for a private cause of action for damages and attorney's fees for polluting the waters surrounding the State. The Court pointed out that the statute permits recovery for damages to "natural resources including all living things," that negligence need not be proven under this statute and that the only defenses are those enumerated in Fla. Stat. 376.308 which includes acts of war, acts by a governmental entity, acts of God or acts or omission of a third party. The lack of property ownership is not a defense and at 343 the Court holds:

"In sum, the Legislature has enacted a far-reaching

statutory scheme aimed at remedying, preventing, and removing the discharge of pollutants from Florida's waters and lands. To effectuate these purposes, the Legislature has provided for private causes of action to any person who can demonstrate damages as defined under the statute. There is nothing in these statutory provisions that would prevent commercial fisherman from bringing an action pursuant to chapter 376."

The Supreme Court rejected the Second District's conclusion that the economic loss rule precluded recovery in this case. The Court cites with approval its opinion in Indemnity Insurance Co. v. American Aviation, Inc., 891 So.2d 532 (Fla. 2004) which held that the economic loss rule only applied where there was a claim for damages arising out of a breach of contract or where the defendant was the manufacturer or distributor of a defective product which had been itself damaged but had not caused any personal injury or damages to any other property. Since this case does not fall within the limited purview of those two situations, it did not preclude recovery in this case.

The Court also concluded that there was a common law cause of action for release of toxins as an ultra hazardous activity. The Court held that this case involved the obligation of a polluter to commercial fisherman that was different than to the public at large. While other Courts have held that there can be no recovery for purely economic loss when there is no bodily injury or property damage, the Florida Supreme Court concluded in this case that legal precept did not apply in this case. The Court's conclusion was that the reason behind that general rule is to preclude liability for remote and speculative injuries that the Defendant could not foresee. However, in this case the Court disagreed with the Second District's conclusion that the fishermen did not "own" the fish in question at the time of their destruction and, therefore, suffered no property damage. The Court concluded that licensed commercial fisherman did, indeed, have a foreseeable interest in the harvesting of fish within waters that the defendant ultimately polluted. The Court cited among other cases Louisiana ex rel. Guste v. The M/V Testbank, 254 F. Supp. 1170 (E.D. La. 1981) where the Louisiana Court allowed a claim by commercial fisherman damaged when two ships collided resulting in pollution of the waters by chemical cargo.

The Court also held that a cause of action for common law negligence was sustainable in this case citing the classic four elements necessary to prove negligence including duty, a breach of that duty, proximate cause and damages. The duty in this case, the Court concluded, arises because the fishermen are encompassed within a foreseeable zone of risk damaged by the pollution in question. The Court thus concluded

"Here, the discharge of the pollutants constituted a tortious invasion that interfered with the special interest of the commercial fishermen to use those public waters to earn their livelihood. We find this breach of duty has

Continued on page 17



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Ill-Gotten Gains Inadequate to Prove Damages for Breach of Non-Compete

By Hank Jackson

Florida's non-compete statute, enacted in 1996, contains a remedy section providing that "a court shall enforce a restrictive covenant by any appropriate and effective remedy, including temporary and permanent injunctions." *Fla. Stat.* § 542.335(1)(j) [emphasis added]. While injunctive relief is a contemplated remedy and the statute goes so far as to provide a presumption of irreparable harm in such cases, damages are also available. However, when establishing damages in non-compete cases, courts hold plaintiffs to strict proof requirements as to causation. As recently explained in *Proudfoot Consulting Company v. Gordon*, 576 F.3d 1223 (11th Cir. 2009), evidence that the breaching party received ill-gotten gains is insufficient proof of damages under Florida law.

Because it is sometimes easier to prove the ill-gotten gains to the breaching party than the actual losses of the enforcing party, plaintiffs may overly focus on the benefits to the breaching party. The error in this approach is that, under common law contract damage theories, one party's gain is not necessarily the cause of the other party's loss. In *Proudfoot*, after analyzing several Florida cases, the Court concluded that there was no legal authority for the recovery of ill-gotten gains from a defendant in a breach of contract claim. *Id.* at 1245. Consequently, *Proudfoot* reversed the trial court's award of damages that was based on ill-gotten gains. The Court reasoned that damages for breach of a non-compete are intended to make the prior employer whole and not to punish the former employee. *Id.* at 1242. At the same time the Court reversed the damage award, it affirmed the injunctive relief granted. *Id.* at 1246.

The misconception that ill-gotten gains is a proper remedy

may result from the fact that a related cause of action does actually permit it. The non-compete statute refers to Florida's Uniform Trade Secret Act. A valid non-compete must be supported by one or more legitimate business interests. And the protection of trade secrets, as defined by the trade secret act, is specifically listed in the non-compete statute as the first example of such a legitimate business interest. *Fla. Stat.* § 542.335(1)(b)1. The trade secret act, however, has a separate remedy provision. Unlike the non-compete statute, its remedy provision specifically provides that damages may be based on "unjust enrichment" or "reasonable royalty" – both of which look to the benefit to the violator and not simply the loss to the plaintiff. *Fla. Stat.* § 688.004.

Furthering the confusion, a count for breach of a non-compete and a separate count for violation of the trade secrets act are often brought in the same lawsuit. However, the count for breach of the non-compete is usually substantially easier to establish. This is because the second listed legitimate business interest in the non-compete statute (the first being trade secrets) is "valuable business information ... that otherwise does not qualify as trade secrets" *Fla. Stat.* § 542.335(1)(b)2. Since proving the existence of "valuable business information" is less burdensome than establishing a bona fide trade secret, this second listed legitimate business interest is more often ultimately relied upon in enforcing a non-compete.

There are many times a plaintiff should recover damages for breach of a non-compete. However, evidence of ill-gotten is simply inadequate proof.

Hank Jackson is a commercial litigator with Shutts & Bowen LLP

The Judicial Relations Committee is hosting the next in its series of Judicial Luncheons on **September 8, 2010, 11:45am – 1:00pm.**

The topic for the luncheon is **"Voir Dire".**

Agenda includes Pre-screening Venire; Effective voir dire; Challenges for Cause; Court rules/procedures (if any) for peremptory challenges.

Lawrence E. Brownstein, Lawrence E. Brownstein, PLLC, will moderate the luncheon.

The Judicial panelists for this luncheon TBA.

Cost: \$30 PBCBA Members, if registered by September 1, 2010; add \$10 after that date.

Luncheon for PBCBA Members only.

This event is limited to 50 registrants; pre-registration is required. This course has been granted 1.0 CLER from the Florida Bar.

Location: Main Courthouse, north end of cafeteria.

This event is limited; RSVP's are required. Please register online. Walk-ins cannot be accommodated.

BP Oil

Continued from page 15

given rise to a cause of action sounding in negligence. We note, however, that in order to be entitled to compensation for any loss of profits, the commercial fishermen must prove all of the elements of their causes of action, including damages."

The probabilities are great that this case will form the bedrock of litigation against BP Oil as a result of the Gulf oil spill. It is hard to imagine a better template for that litigation.

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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HEARSAY



Patrick J. Casey has been appointed to a three-year term on the board of The Florida Bar Foundation, a statewide charitable organization that works to expand access to justice on behalf of Florida's legal profession.



Rand Hoch of the Law and Mediation Offices of Rand Hoch, P.A. was honored with the Compass Leadership Award in recognition of his work to achieve inclusive social justice.

Stuart B. Klein, P.A. and **Michael N. Jonas, P.A.** are pleased to announce the formation of Klein & Jonas, a partnership including professional associations, located at 2801 PGA Blvd., Suite 110, Palm Beach Gardens, FL 33410. Phone (561) 478-1566.



McCabe Rabin, P.A. announces that **Mark Nichols** has joined the firm as an associate. He graduated from the University of Florida's School of Law in 2008 and is the Vice-Chair of the Florida Bar's Business Litigation Committee. Mark is the firm's fourth lawyer.



Wallace B. McCall has joined the law firm of Leopold~Kuvlin, P.A. as "Of Counsel." His areas of practice include medical, hospital and nursing home malpractice, personal injury, wrongful death, and product liability.



Ellen S. Morris, Esq. has been included in *Super Lawyers South Florida* 2010 edition **and** named to *Florida Trend's* 2010 Legal Elite. Ms. Morris is a partner of Elder Law Associates PA, with offices in Boca Raton, Aventura, West Palm Beach, and Weston.

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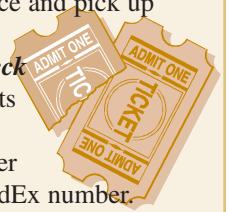
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CALENDAR September 2010

Friday, September 3,
11:45am – 1:00pm
**Judicial Relations
Committee Meeting**
Judicial Dining Room,
Main Courthouse

Monday, September 6
Court Holiday – Labor Day
Bar Office Closed

Wednesday, September 8,
11:45am – 1:00pm
Judicial Luncheon
North end of Cafeteria,
Main Courthouse

Wednesday, September 8,
11:45 am – 1:00pm
**Unified Family Practice
Committee Meeting**
Judicial Dining Room,
Main Courthouse

Wednesday, September 8,
5:30pm – 6:00pm
**PBC FAWL Welcome &
New Member Reception**

Thursday, September 9
Court Holiday – Rosh Hashanah
Bar Office Closed

Thursday, September 9 – 12
YLD BoG Meeting
Ritz-Carlton, Amelia Island

Friday, September 10,
8:30am – 9:30am
ADR Committee Meeting
Bar Association Office

Tuesday, September 14,
Noon – 1:00pm
YLS Board Meeting
Bar Association Office

Tuesday, September 14,
5:30pm – 7:30pm
Judge Garrison Transition Party
McCormick & Schmicks, City Place

Wednesday, September 15,
Noon – 1:00pm
**Professionalism Committee
Meeting**
Bar Association Office

Thursday, September 16,
11:45am – 1:00pm
PBC FAWL Luncheon
Panel of Past Florida Bar Presidents

Thursday, September 16,
5:30pm – 7:00pm
NCS Happy Hour
Brio's, Palm Beach Gardens

Thursday, September 16,
6:00pm – 8:00pm
**Christian Legal Society
Women's Gathering**
Panera Bread, Village Blvd.

Friday, September 17,
11:30am – 1:00pm
Constitution Day Luncheon
Crowne Plaza Hotel

Friday, September 17,
Noon – 1:00pm
**Cunningham Bar Assn.
Monthly Meeting**
Library, Main Courthouse

Tuesday, September 21,
Noon – 1:00pm
**Bankruptcy Law
CLE Committee Meeting**
Bar Association Office

Wednesday, September 22 – 24
TFB Midyear Meeting
Orlando

Wednesday, September 22,
11:30am – 1:00pm
Solo Luncheon
Bar Association Office

Wednesday, September 22,
3:30pm – 4:30pm
**Corporate Counsel
Committee Meeting**
Bar Association Office

Wednesday, September 22,
5:00pm – 6:00pm
**PBCBA Board of Directors
Meeting**
Bar Association Office

Thursday, September 23,
6:00pm – 8:00pm
PBJA Dinner

Thursday, September 23,
6:30pm – 8:00pm
Small Claims Clinic
Lantana Road Library, Lantana

Tuesday, September 28,
5:30pm – 6:30pm
Legal Aid Board Meeting
Bar Association Office

Wednesday, September 29 – October 2
Board of Governors Meeting
Windsor Court, New Orleans, LA

Wednesday, September 29,
Noon – 1:00pm
Membership Committee Meeting
Bar Association Office

Thursday, September 30,
1:00pm – 6:00pm
Employment Law CLE Seminar
Bar Association Office