



# PALM BEACH COUNTY BAR ASSOCIATION BULLETIN

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## “Follow the rules and do the right thing” ~ Judge Sherri Collins



Judge Sherri Collins

“Follow the rules and do the right thing”: this is the mantra of Judge Sherri Collins, who was appointed to the county bench in December 2016, filling the vacancy created by the elevation of Judge Dalia Weiss to the circuit bench.

Judge Collins was born in Philadelphia, the last of three children born to a very bright tax and estate planning lawyer and his microbiologist wife. Her father graduated first in his law school class, and earned the highest score on the Philadelphia bar exam at the time. When Judge Collins was five years old, her family moved to unincorporated Dade County, and her mother took a job at Miami Children’s Hospital. Although she was the baby of the family, Judge Collins learned to be extremely self-sufficient at a young age. Her mother, Francine, states that Judge Collins was “a very mature five-year old.” Francine and her husband encouraged that five year-old to be intellectually curious, and to first seek answers to her questions herself, before coming to them for answers.

Many weekends, while her mother worked, a young Judge Collins assisted her father, either working in his law office or accompanying him as he made house calls to his clients. She observed the professional, yet caring, way in which her father treated his clients, and that was imprinted upon her. Judge Collins strives to treat everyone with dignity and respect, the way her father did. Many judges and lawyers consistently describe Judge Collins as having an extraordinary work ethic, a trait that Judge Collins’ parents also instilled in her.

Judge Collins states that she has been continuously employed since she was a teenager, working, at that time as a babysitter and a mall food-court employee. While enrolled at Miami Killian Senior High School, she held a part-time job, but so expertly budgeted her time that she was able to fully participate in extracurricular activities and still graduate from high school early.

Judge Collins also worked throughout her undergraduate years at the University of Florida, where she majored in Economics. At UF, Judge Collins was a campus leader and was selected for membership in the prestigious Florida Blue Key student honor and service society. During her senior year, this overachiever broke her femur in a skiing accident, causing her to miss a month of school, and to be on crutches for a year.


During that time of reflection, she decided to become a lawyer, took the LSAT, and was accepted into the University of Florida College of Law. (This judge bleeds orange and blue). Judge Collins’ many work experiences taught her the value of hard work, and provided her with an understanding of how many different types of people work and live, which is particularly helpful dealing with pro se litigants in county court.

At UF Law, Judge Collins was an outstanding member of the Trial Team, even as she worked part-time. She had a personal homecoming of sorts, when she traveled back to Miami-Dade County to argue in the state Trial Team finals at the Miami-Dade County Courthouse, where her father beamed with pride as he observed her in the competition. Sadly, Judge Collins’ beloved father, who taught her so much, passed away shortly after her law-school graduation. Her mother is alive and well, though, enjoying her daughter’s many successes.

*Story Continued on Page 12*




North County Section Members  
Start Your Day Off Right With  
**COFFEE BEFORE UMC**  
Casual Coffee Hour with North County Judges



**TUESDAY, DECEMBER 5**  
7:45 a.m. to 8:30 a.m.  
North County Courthouse  
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Non Section Members Welcome for \$10.00 (or) Join the  
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# The Bulletin

Palm Beach County  
Bar Association

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Carla Tharp Brown  
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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.

# Mark Your Calendar

November 2:  
New Attorney Breakfast

November 7:  
NCS Happy Hour

November 10: Office Closed  
Veteran's Day

November 14:  
UMC Coffee w/the Judges

November 23-24: Office Closed  
Thanksgiving

November 30:  
YLS No Shave November  
Happy Hour

December 7: Save the Date  
Holiday Party Kravis Center

December 26-29:  
Bar Office Closed

March 9:  
Bench Bar Conference

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# Happy Holidays

Palm Beach County Bar Association  
invites you to

the Annual Holiday Party  
&  
Silent Auction

Thursday, December 7, 2017

5:30 pm to 8:00pm

Kravis Center, 701 Okeechobee Blvd  
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# PRESIDENT'S Message

## Can you pass the test?



**Rosalyn Sia Baker-Barnes**  
2017-18 PBCBA President

If you're like me, the recent election season has you politically exhausted. I take my responsibility as an American seriously, but if I'm being honest, I was looking forward to the day when all the TV ads would stop, all the messages were finally approved and we could start addressing some of the real issues facing our nation. I am proud to be an American. Even with all of the controversy swirling around our country, we can always find ways to come together. Take a look at how we responded to those in Texas and Louisiana, affected by Hurricane Harvey, and here in our Home state, when Hurricane Irma impacted our entire State, and how locally, we are helping our fellow Citizens in Puerto Rico after Hurricane Maria. Even in times of turmoil, we as Americans find a way to answer the call, put our differences aside, and treat one another with the care and respect that we all deserve. Somehow we are able to get away from politics and get back to those things that shape our country.

Our strength is rooted in our history, good and bad, and lessons we have learned along the way. We fly our flags high, and we proudly call ourselves Americans, but how much of that history do we really know? In a 2012 Xavier University study of 10 random questions on the Naturalization exam (USCIS), only one in three American citizens passed the exam. Compare this to the 97% of immigrants who pass the test. Some 17 states have now passed laws requiring high school students to pass a citizenship test in order to graduate from high school. Florida's Sandra Day O'Connor Civics Education Act requires our students to pass a civics education course, but does not require students to pass the USCIS official test. So my question to you is, can you pass the test? I selected a few of the questions below, just to see how we do.

1. How many Amendments does the Constitution have?
2. What is the Economic System in the United States?
3. How many U.S. Senators are there?
4. What is one responsibility that is only for U.S. Citizens?

5. Name one of the two longest rivers in the United States?

6. Under our Constitution, some powers belong to the Federal government. What is one power of the Federal government?

7. When was the Constitution written?

The Palm Beach County Bar Association hopes to re-engage our youth not with the politics of today, but with civics education, information and history through our You've Been Served Initiative (YBS). We are taking our first steps this month, through a partnership with the Southern District of Florida. Local students from two local high schools will learn and study the 100-question test required to become a United States Citizen. They will be reminded of our Constitutional rights, and those actions which are prohibited in our Nation. Following the test, they will attend and participate in a Naturalization ceremony, meet and greet the Presiding Federal Judge and some of our newest citizens. It is our hope that through this program, we can remind our youngest citizens of those fundamental rights and liberties upon which our Nation is founded.

At the end of the day, we have a right to our own feelings and views when it comes to politics. But we as lawyers, more than anyone, should be the first to stand up when our constitutional rights are being challenged and minimized. It is incumbent upon us to make sure that our future citizens understand the importance of our rights as citizens of this Country. I encourage to join and get involved with our membership committee, our YBS Initiative and make a positive impact in our community. To take the citizenship test, visit [www.uscis.gov](http://www.uscis.gov).

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**Find the Answers on page: 14**

A handwritten signature in blue ink that reads "Sia Barnes".

# NEW MEMBERS

## NOVEMBER 2017

Nicholas Bright:  
Florida Coastal, 2012;  
Solo Practitioner,  
Delray Beach

Madeline Moreira:  
Arkansas, 2013;  
Solo Practitioner,  
West Palm Beach

Andre Raikhelson  
University of Miami, 2013;  
Partner in Williams | Raikhelson  
West Palm Beach

Olivia Retenauer:  
University of Miami, 2012;  
Associate in Rudolph & Associates,  
West Palm Beach

### Save the Date!

Wednesday, November 15, 2017 | 5pm to 8pm  
Brooks Brothers | Gardens of the Palm Beaches | 3101 PGA Boulevard



SUPPORTS THE LEGAL AID SOCIETY OF PALM BEACH COUNTY, INC.

Enjoy a 15% discount on purchases made during the event and  
10% of the evening's proceeds will benefit the  
Legal Aid Society of Palm Beach County

For more information, contact Bob Bertisch  
at 561-655-8944 or [rbertsich@legalaidpbc.org](mailto:rbertsich@legalaidpbc.org)



## BOARD Meeting Attendance

### 2017-2018

	JULY	AUGUST	SEPTEMBER
BARNES	X	X	X
CALLOW	X	X	X
DEMERY	X	X	PHONE
HUBER	X	X	X
LEWIS	X	X	X
MASON	X		X
McELROY		X	X
REAGAN		X	X
SMITH, G.	X	X	X
SMITH, S.	PHONE		X
WHITTLES	X	X	X
WYDA	X	X	X
XENICK		X	X





**DONNA GREENSPAN SOLOMON**

# Arbitration Case Law Update – 2017, pt. 1

The following are recent cases of interest regarding arbitration issues:

*Hernandez v. Crespo*, 211 So. 3d 19 (Fla. 2016). Arbitration agreement is void as against public policy where it diverges from statutory provisions of Medical Malpractice Act (disapproving *Santiago v. Baker*, 135 So.3d 569 (Fla. 2d DCA 2014)).

*Dea v. PH Fort Myers, LLC*, 208 So. 3d 1204 (Fla. 2d DCA 2017). Assisted living facility not entitled to compel arbitration of complaint filed by resident's estate where facility's predecessor entered into contract, which was silent as to whether successors in interest could enforce agreement.

*Moen v. Bradenton Council on Aging, LLC*, 210 So. 3d 213 (Fla. 2d DCA 2017). Health care proxy for nursing home patient does not have authority to bind patient to arbitration because that is not health care decision.

*Angels Senior Living at Connerton Court, LLC v. Gundry*, 210 So. 3d 257 (Fla. 2d DCA 2017). Argument that arbitration agreement allows arbitrator, instead of court, to determine whether written agreement to arbitrate exists is waived if not raised in initial motion to compel arbitration or at hearing on motion.

*Vitacost.com, Inc. v. McCants*, 210 So. 3d 761 (Fla. 4th DCA 2017). As a matter of first impression, the terms and conditions of sale, including an arbitration provision, were not sufficiently incorporated into an Internet sales agreement to compel purchaser to arbitrate products liability claim. Purchases were subject to such terms and conditions, and website allowed purchaser to check-out without seeing hyperlink to "terms and conditions."

*Timber Pines Plaza, LLC v. Zabrzyski*, 211 So. 3d 1147 (Fla. 5th DCA 2017). Vendor, by filing suit to enforce amended deed restrictions (ADR), did not waive right to compel arbitration on purchasers' counterclaim for breach of contract because no significant relationship existed between vendor's claims under the ADR and arbitration clause in the contract between the parties.

*Sawgrass Ford, Inc. v. Vargas*, 214 So. 3d 691 (Fla. 4th DCA 2017). Even though employee may have waived right to arbitrate class action claim by filing suit, employer was nevertheless equitably estopped from refusing to arbitrate where employer had compelled arbitration of substantially similar claims brought by different employees in federal court.

*Israel v. Costanzo*, 216 So. 3d 644, 646 (Fla. 4th DCA 2017). A motion to vacate arbitration award must be filed within 90 days after movant receives notice of award unless movant alleges corruption, fraud or other undue means, in which case motion must be made within 90 days after ground is known or by exercise of reasonable care would have been known by movant.

*Fouche v. Pilot Catastrophe Services, Inc.*, 217 So. 3d 225 (Fla. 5th DCA 2017). The imposition of a stay, not an order of dismissal, is appropriate disposition when matter is sent to arbitration.

*Kaplan v. Epstein*, 219 So. 3d 932 (Fla. 4th DCA 2017). When parties agree to submit to voluntary binding arbitration pursuant to section 44.104, Florida Statutes, any appeal is to circuit court and no further review permitted unless constitutional issue is raised.

*Rockledge NH, LLC v. Miley By & Through Miley*, 219 So. 3d 246 (Fla. 5th DCA 2017). Arbitration provision that purports to preclude application of Adult Protective Services Act's prevailing party fee provision is unenforceable as against public policy. However, prevailing party fee provision that does not go to the "very essence" of the agreement may be severable if arbitration agreement contains a severability clause.

*Leon County v. Sebastian*, 42 Fla. L. Weekly D1187 (Fla. 1st DCA May 25, 2017). Appeal dismissed because order requiring parties to reschedule arbitration did not determine entitlement to arbitration, which was made in earlier referral order.

*Anderson v. Taylor Morrison of Florida, Inc.*, 42 Fla. L. Weekly D1232 (Fla. 2d DCA May 31, 2017). Arbitration provision precluding homeowners from statutory remedy for builder's improper installation violates public policy and is unenforceable.

*Sanders v. Drivetime Car Sales Co., LLC*, 221 So. 3d 718 (Fla. 1st DCA 2017). Arbitration provision prohibiting private attorney general actions did not preclude Florida Deceptive and Unfair Trade Practices Act (FDUTPA) claims since a person has no statutory right to represent the enforcing agency or another person under FDUTPA.

*Saunders v. St. Cloud 192 Pet Doc Hosp., LLC*, 42 Fla. L. Weekly D1766 (Fla. 5th DCA Aug. 11, 2017). Employee's claims not relating directly to employment contract were not subject to arbitration provision contained within the contract.

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*\*Donna Greenspan Solomon is one of three attorneys certified by The Florida Bar as both Business Litigator and Appellate Specialist. Donna is a Member of the AAA's Roster of Arbitrators (Commercial Panel). She is a FINRA-Approved and Florida Supreme Court Qualified Arbitrator. She is also a Certified Circuit, Appellate, and Family Mediator. Donna is a Member of the Florida Supreme Court Committee on Standard Jury Instructions—Contract and Business Cases, and is the current Chair of the Business Litigation Certification Committee. Donna can be reached at (561) 762-9932 or Donna@SolomonAppeals.com or by visiting www.solomonappeals.com.*



JASON S. RIGOLI

## Judicial Estoppel When a Debtor Fails to Disclose a Civil Suit in Bankruptcy

Judicial estoppel is an equitable doctrine “intended to protect courts against parties who seek to manipulate the judicial process by changing their positions to suit the exigencies of the moment.” *Slater v. United States Steel Corporation*. – F.3d --, 2017 WL 4110047 at \*1 (11th Cir. Sept. 18, 2017).

### I. Application in Federal District Court

In the Eleventh Circuit, the doctrine of judicial estoppel has a two-prong test: “whether (1) the party took an inconsistent position under oath in a separate proceeding, and (2) these inconsistent positions were ‘calculated to make a mockery of the judicial system.’” *Id.* at \*5 (citing *Burnes v. Pemco Aeroplex, Inc.*, 1289 F.3d 1282 (11th Cir. 2002)). The second prong has been a point of perplexity in applying judicial estoppel in this circuit. *Slater* seeks to remove this confusion.

*Slater* overrules the portions of *Burnes* and *Barger v. City of Cartersville*, 348 F.3d 1289 (11th Cir. 2003), permitting the “district court to infer intent to misuse the courts without considering the individual plaintiff and the circumstances surrounding the nondisclosure.” *Slater*, at \*1. The *Slater* Court held:

[T]o determine whether a plaintiff’s inconsistent statements were calculated to make a mockery of the judicial system, a court should look to all the facts and circumstances of the particular case. When the plaintiff’s inconsistent statement comes in the form of an omission in bankruptcy disclosures, the court may consider such factors as the plaintiff’s level of sophistication, whether and under what circumstances the plaintiff corrected the disclosures, whether the plaintiff told his bankruptcy attorney about the civil claims before filing the bankruptcy disclosures, whether the trustee or creditors were aware of the civil lawsuit or claims before the plaintiff amended the disclosures, whether the plaintiff identified other lawsuits to which he was party, and any findings or actions by the bankruptcy court after the omission was discovered.

*Slater*, at \*8. The district court must now employ a totality of the circumstances test to determine whether the plaintiff-debtor has intended to make a “mockery of the judicial process” and may not infer such intent based upon mere non-disclosure.

### II. Application of Judicial Estoppel in Florida State Court

*Slater* does not, however, change the application of judicial estoppel in Florida state court proceedings. *Slater* involved a federal claim pending in federal district court, which requires the application of federally created doctrine of judicial estoppel.

Florida employs a three-prong test, similar to the test articulated by the United States Supreme Court in *New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). The Florida Supreme Court characterized judicial estoppel as an equitable doctrine that protects the integrity of the judicial process and “prevents parties from ‘making a mockery of justice by inconsistent pleadings,’ and playing fast and loose with the courts.” *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001) (citing *American National Bank v. Federal Deposit Insurance Corp.*, 710 F.2d 1528, 1536 (11th Cir. 1983) and *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)).

The *Blumberg* Court further explained that “the party claiming the estoppel must have been misled and have changed his position; and an estoppel is not raised by conduct of one party to a suit, unless by reason thereof the other party has been so placed as to make it to act in reliance upon it unjust to him to allow that first party to subsequently change his position.” *Id.* A situation justifying the application of judicial estoppel “is more than affront to judicial dignity.” *Scarano v. Cen. R. Co. of N.J.*, 203 F.2d 510, 513 (3rd Cir. 1953).

In *Grau v. Provident Life and Acc. Ins. Co.*, 99 So. 2d 396 (Fla. 4th DCA 2005), Florida’s doctrine of judicial estoppel was surmised by the Court as follows:

A claim or position successfully maintained in a former action or judicial proceeding bars a party from making a

completely inconsistent claim or taking a clearly conflicting position in a subsequent action

or judicial proceeding, to the prejudice of the adverse party, where the parties are the same in both actions, subject to the “special fairness and policy considerations” exception to the mutuality of parties requirement.

*Id.* at 399 (summarizing *Blumberg*). The Florida test requires the “mutuality of parties” for the application of judicial estoppel. The *Slater* Court found that its two-prong test was consistent with *New Hampshire* test because the Supreme Court did not have the non-disclosure issue brought before it and stated that the application of judicial estoppel should be flexible. *Slater*, at \*5.

### III. Conclusion

When applying judicial estoppel, the test to determine whether the plaintiff-debtor intended to make a “mockery of the judicial process” has been clarified to be a “totality of the circumstances” test. However, the application of judicial estoppel in Florida civil matters continues to have an even higher burden on the party seeking its application including “mutuality of parties” and success on the merits by the debtor-plaintiff.

*\* This article submitted by Jason S. Rigoli, Esq., Furr Cohen, 2255 Glades Road, Suite 337W, Boca Raton, FL 33431, jrigoli@furrcohen.com.*



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



# VIEW OF BANKRUPTCY PRACTICE:

**The interaction between bankruptcy and state court practice**

*Wisdom from the bankruptcy world for paralegals, non-bankruptcy practitioners, experienced and new Bankruptcy Practitioners*

Friday, December 8, 2017, 12:00 p.m. - 6:00 p.m.  
Fourth District Court of Appeals, 1525 Palm Beach Lakes Blvd, W. Palm Beach, FL

- 12:00 p.m. - 12:25 p.m. **Lunch / Check In / Registration**
- 12:25 p.m. - 12:30 p.m. **Welcome and Opening Remarks**, Nadine V. White-Boyd, Esq.,  
Bankruptcy CLE Committee Chairperson
- 12:30 p.m. - 1:30 p.m. **Technology Compliance in Bankruptcy and other Courts** - Cameron  
Cradic and Sean Kilmartin
- 1:30 p.m. - 2:30 p.m. **Rule 9011 Warnings**  
**Exceptions to Discharge – 11 USC 523(a)(4)** – Malinda Hayes, Esq.  
**Exceptions to Discharge - 11 USC 523(a)(6)** - Eric Rosen, Esq.
- 2:30 p.m. - 2:45 p.m. **Break**
- 2:45 p.m. - 4:00 p.m. **Ethics and Professionalism – “Stop Dabbling in Bankruptcy:  
What Every Lawyer and Paralegal Need to Know”** - US Trustee Heidi  
Feinman, Chapter 7 Trustees Michael Bakst, Esq. and Deborah  
Menotte. Moderated by Julianne R. Frank, Esq.
- 4:00 p.m. - 5:00 p.m. **One on One with Hon. Judge Paul G. Hyman** - David Carter, Esq.
- 5:00 pm. - 6:00 p.m. **Reception**

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Credit: 5.0 CLER, plus 1.0 Technology. Cost: \$165 members; \$205 non-members. Those registering after 12/1/17 add \$10 late fee. All refund requests must be made no later than 48 hours prior to the date of the seminar. Register online at [www.palmbeachbar.org](http://www.palmbeachbar.org) or by mail (return this form with your check)

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# Thankful Tuesday 11/7

North County Section Members are Cordially invited to a Complimentary Happy Hour  
Tuesday, November 7

5:30 - 7:00

Yard House, Palm Beach Gardens

RSVP online @ [www.PalmBeachBar.org](http://www.PalmBeachBar.org)



In lieu of a registration fee, please consider donating one silent auction item for our holiday party in December.

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## CLE Programming

- Hot Topics in Employment Law: What Your Clients Need to Know  
November 2
- 20th Annual Elder Law Seminar  
November 9
- Wrongful Death 101: From Sign-Up Through Trial  
November 16
- Interaction: Bankruptcy and State Court Practice  
December 8
- Mediating Business Cases: Strategies, Analysis and Advice  
December 14
- Marketing for Appellate Lawyers  
January 22
- 2018 Medical School for Lawyers  
February 1
- Inaugural Outstanding Appellate Advocacy Seminar  
February 2
- Ethics, Professionalism and Technology  
February 9
- Evolving Trends in ADR: Cooperation, the Key to Agreement  
February 12
- Technology/Business Litigation seminar  
February 16
- Bracing for the Storm: Preparing for a Hurricane and Aftermath  
February 20

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LISA KOHRING

# Freedom of Speech and Football: The Game's About to Start!

In August of 2016, Quarterback for the San Francisco 49ers Colin Kaepernick decided to kneel during the Star Spangled Banner in silent protest against police brutality towards people of color. Thereafter, Kaepernick's actions caused a ripple effect; he was benched after suffering public backlash for his expression and he later opted out of his contract with the San Francisco 49ers and became a free agent. Since then, a "movement" has emerged with individual players, entire teams, and even team owners unifying in support of Kaepernick's message and bringing awareness to an important cause. Some players are kneeling and other players are locking arms with their teammates, or opting out of participating in the National Anthem all together and staying in the locker room. This silent protest "movement" has emotions running high from both proponents and opponents and it has sparked a national debate about social injustices faced by people of color and freedom of speech.

Kaepernick says he is not protesting the flag, he is protesting social injustices suffered by people of color. After the police shooting of Terrence Crutcher, a forty year old unarmed black man, whose alleged shooter was acquitted of first degree manslaughter, and the police shooting of Keith Lamont Scott, a forty-three year old African American, Kaepernick said the shootings were perfect examples of what he was protesting.

Although significant media attention has centered around the discussion of whether Kaepernick's First Amendment rights have been abridged, the First Amendment only prohibits the government from infringing on freedom of speech; it does not prevent private employers from taking action based on speech. The San Francisco 49ers, is a private employer, and making the decision to bench Kaepernick and eventually allowing him to opt out of his contract is not prohibited by the First Amendment.

Proponents of the movement believe the protest is not about disrespecting members of the military, but about "standing up for the people of this country, being patriotic, and sending a message that this Country needs

to be better." In 2016, President Barack Obama stated that Kaepernick was exercising his constitutional right to protest and commented that Kaepernick's expression has generated more conversation about issues that have to be discussed.

Opponents of Kaepernick's decision to kneel believe it is disrespectful to service members. Many involved in the debate have focused on the manner in which Kaepernick protested, arguing that he "went about it the wrong way." They gain strength in the belief that the flag represents a unified support for members of the armed forces. Hall of Famer and longtime civil rights activist Jim Brown condemned Kaepernick's conduct, and during an interview with *The Postgame*, stating, "he wouldn't "desecrate [the] flag and [the] national anthem ...Kaepernick has to make up his mind about whether he is truly an activist or truly a football player." President Trump has called for the firing of players who refuse to stand during the Star Spangled Banner and Bruce Levell, the Executive Director of the National Diversity coalition for President Trump says "[t]he President of the United States is passionate, the flag affects all of us. If you are going to protest the flag, it wouldn't be fair to the boss if you disobey the rules. Do it on your own dime." Others have accused Kaepernick of breaking federal law.

But, did Kaepernick break the law? Although there is a National Anthem statute, 36 U.S. Code § 301, which outlines suggestive conduct when saluting the flag, there is no criminal or civil penalty for not following the suggestions. This was not always the case though, in 1916, "the City of Baltimore signed a law prohibiting indiscriminate renditions of the song and stipulated that musicians should stand for the song." Baltimoreans were not pleased with the law and claimed that it was "outrageous that they should be required to rise every time they heard [the Star Spangled Banner]" and strongly "objected to it in this land of individual liberty and Freedom." *Id.* Others called it "un-American." *Id.*

On March 3, 1931, the US Congress passed a resolution adopting the Star Spangled Banner as the official anthem of the US, and

there was no mention of civil or criminal penalties for violating the law.

What's the bottom line? No one can argue that the "movement" is about patriotism and the flag is about patriotism. We each have to determine for ourselves how we choose to interpret the term. Maybe patriotism means standing during the Star Spangled Banner and supporting the service members of our great Country or maybe it means kneeling "for the people of this Country and sending a message that this Country needs to be better." Either way, diversity is a necessary component of strength and progress in our community and freedom of speech is a core pillar of our democracy.

*Lisa Kohring is a Senior litigator with the School Board of Palm Beach County practicing Labor and Employment law. She can be reached at Lisa.kohring@Palmbeachschools.org*







ANDREA MCMILLAN

## Judge Sherri Collins

In the summers between law school semesters, Judge Collins completed unpaid internships at the Dade (now Miami-Dade) County State Attorney's Office under the leadership of Janet Reno. During her first summer, she was paired with a female homicide prosecutor, which gave her a happy epiphany: she wanted to be a prosecutor! A more sobering epiphany came as a result of Operation Court Broom, a probe of judicial corruption in Miami that led to the convictions of three judges, a former judge and six lawyers. Judge Collins states that Operation Court Broom made her realize how critical it is for litigants and judges to conduct themselves with the utmost integrity at all times.

Upon graduating from law school, Judge Collins was hoping to join the Miami-Dade County State Attorney's office, but, unfortunately, that office was then under a hiring freeze. However, the State Attorney's Office in the 16th Judicial Circuit in Monroe County had an opening, and Judge Collins seized upon it. She landed a position in the prosecutor's office in Plantation Key, prosecuting misdemeanors, and eventually felonies, in the upper Keys. After two years, Judge Collins was transferred to the Marathon Key office, where she prosecuted felonies for six years. Thereafter, she returned to Plantation Key, where, for the next four years she prosecuted a variety of felonies, including DUI manslaughter.

Judge Collins' stint in the Keys turned out to be a most fortunate turn of events, because that is where she met her husband, Chuck Collins. Like many prosecutors, Judge Collins used to "ride shift" with different law enforcement agencies. One day, she was called to "ride shift" with Chuck, a marine homicide investigator, with the Florida Fish and Wildlife Conservation Commission. After riding shift with Chuck to investigate a serious boating accident, Judge Collins and Chuck became friends. Their friendship blossomed into romance, and after three years of dating, they married in Miami.

In 2004, Chuck earned his MBA degree in Crisis Management and Business, and was promoted to the position of Regional Director of the Florida Fish and Wildlife Conservation Commission. Consequently, the Collins family relocated to Palm Beach County, with their two children, Rachel and

Ryan, then, respectively, ages five and six. Judge Ted Booras, then Chief Assistant State Attorney for the Fifteenth Judicial Circuit, knew Judge Collins, knew she would be a great asset to this Palm Beach County State Attorney's office, and immediately hired her.

Judge Collins prosecuted misdemeanors and felonies in the 15th Judicial Circuit from 2004 until her appointment to the bench. During that time she developed a reputation as a tenacious and tireless litigator, dedicated to the pursuit of justice. She also demonstrated an inquisitive mind, an almost encyclopedic knowledge of criminal and evidence law, and a great willingness to mentor and nurture young prosecutors, who often lined up outside her office seeking her assistance on their cases. Ultimately, in addition to prosecuting her own cases, Judge Collins was appointed the Director of Training and Legal Education for the State Attorney's Office. In April, 2016, the Florida Fish and Wildlife Conservation Commission named her "Prosecutor of the Year," for her tireless work teaching law enforcement officials throughout the State of Florida, and beyond.

Judge Collins' public service extends to other areas as well: for many years she was a Girl Scout leader and a merit badge counselor for the Boy Scouts. In addition, she served as a Captain for Project Graduation, a program put on for high-schoolers on graduation night, as an alternative to alcohol and drug-fueled activities.

During her career as a prosecutor, Judge Collins handled many high-profile cases and many smaller cases that did not make the headlines, but were life-changing for ordinary people and their families. Many victims and their families appreciated the care and compassion Judge Collins showed them as she prosecuted their cases, and even after the cases were over. Several victims and their families attended Judge Collins' investiture a testament of appreciation for Judge Collins' hard work and sense of humanity.

As to high-profile cases, Judge Collins may be best known as a member of the team of prosecutors who successfully prosecuted

Wellington Polo mogul John Goodman for the DUI manslaughter of 23-year-old Scott Wilson, who died in 2010. After Goodman's conviction was overturned due to jury misconduct, Judge Collins was part of the team that retried Goodman in 2014. Both of those trials were evidence intense, and often required Judge Collins to respond to numerous motions before the court on very short notice. She expertly and ethically handled the matters presented to her, and the team won another conviction.

Two and a-half years ago Chuck retired from the Florida Fish and Wildlife Conservation Commission. He is now Executive Director of the Marine Industries Association, which hosts the annual Palm Beach International Boat Show. Rachel, now age 19, is a student at the University of Florida, diligently working towards dual degrees in Business and International Studies. Ryan, who is autistic, is now 21, recently completed a life skills program, and is also doing well.

Judge Collins immensely enjoys serving on the bench. She learns new things each day from her colleagues on the bench, members of the bar, and the litigants appearing before her. In her leisure time, she enjoys cooking, traveling, and seeing Broadway shows. She is a voracious reader, who belongs to six libraries, sometimes reading up to three books each week. Clearly, she remains an overachiever.

Although ultra-prepared, organized, and the consummate professional, Judge Collins has a delightful, dry sense of humor and a wonderful ability to make people feel comfortable around her. These, along with her other fine qualities, make her a wonderful addition to our Palm Beach County bench. Her Dad would certainly be proud!

*Andrea McMillan is a solo practitioner at Law offices of Andrea D. McMillan, PA, representing personal injury plaintiffs. She can be reached at adm@amcmillanlaw.com.*



Contact Eva at 561.687.2800 for details



ADAM RABIN

### WHAT ARE THE KEY DUTIES OWED BY MANAGERS AND MEMBERS?

As of January 1, 2015, the Florida Revised Limited Liability Company Act (the "Revised Act") took effect as to all Florida limited liability companies ("LLCs"). Under the Revised Act, there are certain key duties that apply to LLC managers and members. Which duties apply to managers and members, however, depends on the LLC's designation of management as manager-managed or member-managed.

#### Under the Revised Act, How Are Managers and Members' Duties Defined?

Under the Revised Act, the fork in the road is that the organizing members of the LLC must designate whether the LLC will be manager-managed or member-managed. This is an important distinction because the Revised Act defines managers and members' rights and duties based upon this designation. If no designation is made, however, the LLC defaults to a member-managed LLC. In what in many cases will be an unintended consequence, this default designation will give all members the right to manage the LLC and will impose broader duties and potential liability upon all members. See § 605.0407(1), Fla. Stat.

Further, under the Revised Act, there is no longer a "managing member" of an LLC. See § 605.0407(1), Fla. Stat. The so-called managing-member of an LLC is now obsolete, and any LLC operating agreement or articles of organization should be updated to reflect this legislative change.

In this vein, any update to an operating agreement or articles of organization should also designate the management type for the LLC. From this designation, the managers and members' specific rights and duties will follow. The operating agreement or articles of organization further may define, broaden, and limit managers and members' rights and duties (with some non-waivable exceptions). See §§ 605.0407, 605.0105, Fla. Stat.

#### What are the Key Duties for Managers and Members in an LLC?

Each manager of a manager-managed LLC, or member of a member-managed LLC, owes a fiduciary duty of loyalty to the LLC and its members. This is the core duty imposed upon managers and members, the breach of which often results in litigation. Importantly, the fiduciary duty of loyalty is not imposed upon a member if the LLC is manager-managed. Members only have such a duty in a member-managed LLC. See § 605.04091(2), Fla. Stat.

The fiduciary duty of loyalty requires a manager in a manager-managed LLC, and a member in a member-managed LLC, to do the following:

1. Account to the LLC, and hold for it as trustee, the LLC's property, profit or benefit derived by the manager or member.
2. Refrain from dealing with the LLC as a person having an interest adverse to the LLC.
3. Refrain from competing with the LLC.

See § 605.04091(2), Fla. Stat.

The Revised Act, however, also imposes certain limits on the above fiduciary duty of loyalty. In particular, managers or members do not violate their duty of loyalty solely because their conduct furthers their own interest. See § 605.04091(5), Fla. Stat. Likewise, the manager or member is entitled to rely on information, opinions, reports or statements that are prepared by employees, professionals, or any appointed committees, if they are considered reasonably reliable. See § 605.04091(4), (6), Fla. Stat.

In addition to the duty of loyalty, a manager in a manager-managed LLC, and a member in a member-managed LLC, also owes a fiduciary duty of care to the LLC and its members. The duty of care specifically requires that the manager or member refrain from engaging in grossly negligent or reckless conduct, willful or intentional

misconduct, or a knowing violation of law. See § 605.04091(3), Fla. Stat.

Managers and members also must execute their fiduciary duties of loyalty and care consistently with the obligations of good faith and fair dealing. See § 605.04091(4), Fla. Stat.

#### Do Operating Agreements and Common Law Principles Supplement a Manager or Member's Duties?

The Revised Act gives maximum effect to the principle of freedom of contract and to the enforceability of operating agreements. The principles of law and equity, including common law principles relating to the fiduciary duties of loyalty and care, supplement the provisions of the Revised Act. § 605.0111(3), Fla. Stat. This suggests that case law from other areas, including the law governing corporations, may be borrowed and applied to LLCs.

#### Conclusion

Under the Revised Act, it is critical for the organizers or management of an LLC to designate whether the LLC is manager-managed or member-managed. The key duties that govern managers and members, including the fiduciary duties of loyalty and care and the obligation to perform such duties in good faith, directly flow from this management designation. Equally important, the limitations on such duties may insulate or limit a manager or member's liability based upon this designation. As a result, all operators of an LLC should have competent counsel review the LLC's management designation and operating agreement, if any, to ensure that LLC is compliant with the Revised Act.

*Adam Rabin is a shareholder with McCabe Rabin, P.A. and is Florida Bar Board Certified in Business Litigation. Mr. Rabin concentrates in LLC member disputes and whistleblower qui tam litigation.*



TED BABBITT

# AMENDMENT 7 PRODUCTION AND FEDERAL PREEMPTION

In Charles v Southern Baptist Hospital, 209 So. 3d 119 (Fla. 2017), the Florida Supreme Court decided the issue of whether the Federal Patient Safety and Quality Improvement Act preempts the Amendment 7 production of adverse medical incidents. The First District Court of Appeal in Southern Baptist Hospital, Inc. v Charles, 178 So. 3d 102 (Fla. 1st DCA 2015) concluded that adverse medical incident reports requested pursuant to Amendment 7 of the Florida Constitution constituted "patient safety work product" pursuant to the above Federal Act. The Florida Supreme Court took jurisdiction based upon the provision of the Florida Constitution which allows it to review any decision declaring invalid a state statute or a provision of the state constitution and reversed the First District based on a statutory interpretation of the Federal Act and the resulting conclusion on preemption. The Supreme Court held that the Federal Act was never intended as a shield to the production of documents required by Amendment 7.

The Federal Patient Safety and Quality Improvement Act for 2005 created a voluntary system of data sharing of health care errors for the purpose of improving patient safety. This Act created confidentiality of the information reported in order to make sure the providers felt comfortable sharing data. The lower court held that the information reported under the Federal Act was not privileged and required it's production. The First District granted a petition for writ of certiorari and held that the documents met the definition of patient safety work product because they were placed in the hospital's patient safety evaluation system and thus the plain language of the Federal Act prohibited their production and were privileged, confidential and not discoverable. The First District also held that under the supremacy clause of the United States Constitution, the Federal Act preempted any discovery rights under Amendment 7.

The Supreme Court read the Federal Act differently and pointed out that Congress had carved out broad exceptions that did not include information that was collected or

existed separately from the patient's safety evaluation system. The Florida Supreme Court held that health care providers were required by Florida State law to keep adverse medical incident reports and that patients had a right to access adverse medical incident reports under the Florida Constitution. The Supreme Court, therefore, held that the First District reading of the Act was in error. At Page 1211 the Supreme Court held:

Simply put, adverse medical incident reports are not patient safety work product because Florida statutes and administrative rules require providers to create and maintain these records and Amendment 7 provides patients with a constitutional right to access these records. Thus, they fall within the exception of information "collected, maintained, or developed separately, or exists separately, from a patient safety evaluation system." See id. § 299b-21(7)(B)(ii). In addition, their disclosure fits squarely within the providers' recordkeeping obligations under state law. Id. § 299b-21 (7)(B)(iii).

The Supreme Court concluded that hospital records do not become patient safety work product just because a hospital voluntarily places them in a patient safety evaluation system under the Federal Act. Medical care providers have an independent obligation under Florida law to create and maintain these records and Amendment 7 gives patients a constitutional right to discover them. Thus, adverse medical incident reports are discoverable under Amendment 7 and do not constitute Federal Safety Work Product under the Federal Act.

The Court also concluded that the Federal Act does not preempt state law as embodied in Amendment 7. At page 1214 the Court held:

It is antithetical to the idea of preemption, which requires a clear expression of Congressional intent, that the Federal Act, which permits, but does not require provider participation, would preempt a state constitutional amendment. In the context of the Federal Act's scheme allowing for voluntary participation, it is clear that a mandatory disclosure law in our state constitution is not preempted by a health care provider's choice to participate in the Federal Act, coupled with its choice to place documents into a patient safety evaluation system. (Emphasis in original).

Thus, the Florida Supreme Court has held that the Federal Patient Safety Quality Improvement Act does not shield documents otherwise discoverable under Amendment 7 nor does that Act preempt the application of Amendment 7.

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.

.....  
***Answer Key from pg 4 Presidents Message:***

- 1. 27***
- 2. Capitalist and Marketing Systems***
- 3. 100***
- 4. Serve on a jury or vote in a federal election***
- 5. Missouri River or Mississippi River***
- 6. To print money, to declare war, to create an army or to make treaties***
- 7. 1787***



The Personal Injury/Wrongful Death CLE Committee of the Palm Beach County Bar Association Presents

# Wrongful Death 101: From Sign-up Through Trial



Thursday, November 16, 2017, 11:30a.m. - 5:00p.m.

Fourth District Court of Appeal, 1525 Palm Beach Lakes Blvd., W. Palm Beach

**11:30 a.m. - 12:00p.m. Check-In / Late Registration / Lunch**

Brian Sullivan, Esq., Sullivan Law P.A., Chairperson, Personal Injury/Wrongful Death CLE Committee

**12:00 p.m. - 1:00p.m. Working up the Wrongful Death Case Pre-Suit**

Craig M. Goldenfarb, Esq. Law Offices of Craig Goldenfarb, P.A.

**1:00 p.m. - 2:00p.m. The Medical Examiner's Role in the Wrongful Death Case**

Barbara C. Wolf, M.D., Forensic Pathologist, District Medical Examiner at District 5 Medical Examiner's Office

**2:00 p.m. - 2:15p.m. Break**

**2:15 p.m. - 3:15p.m. Defending the Wrongful Death Case**

Barry Postman, Esq., Cole, Scott & Kissane, P.A.; Board Certified Civil Trial Lawyer

**3:15 p.m. - 4:15p.m. Pursuing the Wrongful Death Case from the Plaintiff's Side**

F. Gregory Barnhart, Esq., Searcy, Denney, Scarola, Barnhart & Shipley, P.A.; Board Certified Civil Trial Advocacy by The Florida Bar

**4:15 p.m. - 5:00p.m. Panel Discussion**

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Name: \_\_\_\_\_ Email address: \_\_\_\_\_

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\_\_\_\_ I will not be able to attend the seminar, however I would like to order the audio. The cost is the same as listed above, however please include \$10 for shipping and handling. Allow one week for delivery. PBC Bar Association, P.O. Box 17726, W. Palm Beach, FL 33416. 561-687-2800. 11.16.17 PI seminar

# Awards to be presented at Bench Bar Conference – Nominations Requested

Three awards will be presented at the March 9, 2018 Bench Bar Conference: the 7th Annual Judge Edward Rodgers Diversity Award, the 19th Annual Sidney A. Stubbs Professionalism Award and the “You’ve Been Served” Award. Members are encouraged to nominate a member or organization for either of these prestigious awards.

The recipient of the Professionalism Award must be an individual member of the Palm Beach County Bar Association. The Professionalism Award recognizes an attorney who has demonstrated or promoted outstanding professionalism in Palm Beach County, as defined by exemplary ethical conduct, character and integrity, respect for the legal system and all of its participants, commitment to maintaining the highest levels of professional competence, courtesy and civility, and commitment to serving clients, the community and the public good. The deadline to submit nominations will be **January 8**.

Criteria for the Diversity Award requires that the recipient should be a person (must be a PBCBA member) or organization who:

1. Demonstrates a consistent pattern of (either the individual or organization’s) commitment to the recruitment, retention and promotion of individuals of underrepresented populations;
  2. Cultivates and promotes diversity and gender initiatives that establish and foster a more inclusive and equitable work environment;
  3. Promotes and facilitates education, community outreach and social engagement with and between people of varying ethnic or religious backgrounds, gender, socioeconomic status, sexual orientation, and/or physical and mental capabilities so that persons of diverse background can enter and prosper in the legal field;
  4. Exhibits visionary and insightful leadership to confront and resolve inequities through strategic decision-making, allocation of resources, and establishment of priorities;
  5. Outlines defined goals, actions steps and accomplishments toward achieving a work environment that recognizes, promotes and encourages a diverse workforce at all levels throughout an organization;
  6. Implements and carries out best practices that support diversity and inclusion goals.
- The deadline to submit nominations will be **January 10**.

Applications for the Professionalism and Diversity awards can be found on the Bar’s website at [www.palmbeachbar.org](http://www.palmbeachbar.org).

The recipient of the “You’ve Been Served” Award should be nominated for their outstanding service to the community. To nominate a fellow PBCBA member, send an email to [ybs@palmbeachbar.org](mailto:ybs@palmbeachbar.org) with the person’s name, contact information and your reasons for nominating him or her.

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DAVID M. GARTEN

## 2017 Amendment To §744.331 (Effective July 1, 2017)

Section 744.331, F.S. details the procedures for determining the ward's incapacity in guardianship proceedings. During the 2017 legislative session, there were substantial changes made to both the procedure for filing, service, and admissibility of the examining committee members' reports and the date of the adjudicatory hearing. Those changes read:

### (3) EXAMINING COMMITTEE.—

(e) Each member of the examining committee shall examine the person. Each examining committee member must determine the alleged incapacitated person's ability to exercise those rights specified in s. 744.3215. In addition to the examination, each examining committee member must have access to, and may consider, previous examinations of the person, including, but not limited to, habilitation plans, school records, and psychological and psychosocial reports voluntarily offered for use by the alleged incapacitated person. Each member of the examining committee must file his or her report with the clerk of the court submit a report within 15 days after appointment.

(h) Within 3 days after receipt of each examining committee member's report, the clerk shall serve the report on the petitioner and the attorney for the alleged incapacitated person by electronic mail delivery or United States mail, and, upon service, shall file a certificate of service in the incapacity proceeding. The petitioner and the attorney for the alleged incapacitated person must be served with all reports at least 10 days before the hearing on the petition, unless the reports are not complete, in which case the petitioner and attorney for the alleged incapacitated person may waive the 10 day requirement and consent to the consideration of the report by the court at the adjudicatory hearing. If such service is not timely effectuated, the petitioner or the alleged incapacitated person may move for a continuance of the hearing. A copy of each committee member's report must be served on the petitioner and on the attorney for the alleged incapacitated person within 3 days after the report is filed and at least 5 days before the hearing on the petition.

(i) The petitioner and the alleged incapacitated person may object to the introduction into evidence of all or any portion of the examining committee members' reports by filing and serving a written objection on the other party no later than 5 days before the adjudicatory hearing. The objection must state the basis upon which the challenge to admissibility is made. If an objection is timely filed and served, the court shall apply the rules of evidence in determining the reports' admissibility. For good cause shown, the court may extend the time to file and serve the written objection.

(5) ADJUDICATORY HEARING.— (a) Upon appointment of the examining committee, the court shall set the date upon which the petition will be heard. The date for the adjudicatory hearing must be conducted at least 10 days, which time period may be waived, but no more than 30 days, after the filing of the last filed report of the examining committee members set no more than 14 days after the filing of the reports of the examining committee members, unless good cause is shown. The adjudicatory hearing must be conducted at the time and place specified in the notice of hearing and in a manner consistent with due process.



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## Florida Real Property and Business Litigation Report



MANNY FARACH

**Tubby's Customs, Inc. v. Euler**, Case No. 2D16-3878 (Fla. 2d DCA 2017).

A party who has been aggrieved by a total breach of contract may elect benefit of the bargain damages where "the proper measure of damages [is] either the reasonable cost of completion, or the difference between the value the [repair] would have had if completed and the value of the [repair] that has been thus far performed."

**The Bank of New York Mellon Corporation as Trustee v. Anton**, Case No. 3D15-2213 (Fla. 3d DCA 2017).

A mortgage foreclosure complaint which alleges the same default date as a previously unsuccessful foreclosure but adds the word "and all subsequent payments" is not barred by the statute of limitations.

**Wells Fargo Bank, N.A. v. Richards**, Case Nos. 4D16-1364 and 4D16-2033 (Fla. 4th DCA 2017).

An unsigned (i.e., oral) mediation agreement affecting a mortgage is an attempt to modify a credit agreement in violation of both the Statute of Frauds, Florida Statute section 725.01, and the Banker's Statute of Frauds, Florida Statute section 687.0304, and is not enforceable.

**3709 N. Flagler Drive Prodigy Land Trust, Mango Homes LLC v. Bank Of America, N.A.**, Case No. 4D16-3255 (Fla. 4th DCA 2017).

A purchaser subsequent to a mortgage may not challenge the validity of the mortgage but may challenge the standing of the mortgagee to foreclose.

**U.S. Bank, N.A., v. Diamond**, Case No. 5D16-3609 (Fla. 5th DCA 2017).

Judgment cannot be entered for missed monthly payments outside the statute of limitations.

**Holmes Regional Medical Center, Inc. v Allstate Insurance Company**, Case No. SC15-1555 (Fla. 2017).

A judgment debtor is not entitled to seek equitable subrogation against a subsequent tortfeasor until the debtor has satisfied the judgment.

**Kennedy v. RES-GA Lake Shadow, LLC**, Case No. 1D16-4708 (Fla. 1st DCA 2017).

A party who has an interest in an asset must be joined in the proceedings supplementary that are used to execute upon the asset.

**Lesinski v. South Florida Water Management District**, Case No. 4D17-40 (Fla. 4th DCA 2017).

The time limits of Florida Rule of Civil Procedure 1.420 are mandatory, and compliance with the rule cannot be excused through application of excusable neglect principles under Florida Rule of Civil Procedure 1.540.

**White v. Mederi Caretenders Visiting Services of Southeast Florida, LLC**, Case No. SC16-28 (Fla. 2017).

Home health service referral sources can be a protected legitimate business interest under Florida's Non-Compete Statute, Florida Statute section 542.335.

**MVW Management, LLC v. Regalia Beach Developers LLC**, Case No. 3D16-2198 (Fla. 3d DCA 2017).

"Advancement" and "indemnity" of attorney's fees under management or operating agreements are different concepts and Florida law typically offers indemnification for third party (and not first party) claims.

**Inspired Capital, LLC v. Condé Nast**, Case No. 3D17-547 (Fla. 3d DCA 2017).

The "arising out of or related to" analysis of Jackson v. Shakespeare Foundation, Inc., 108 So. 3d 587 (Fla. 2013) ("arising out of or related to" is broader than "arising out of" an encompasses more claims) applies to venue provisions as well as arbitration provisions.

**Hart v. Credit Control, LLC**, Case No. 16-17126 (11th Cir. 2017).

A debt collector's voicemail is a "communication" under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, and initial communications that do not contain a "mini-Miranda" warning violates the Act. However, a voicemail that identifies the caller and the purpose of the call is a "meaningful disclosure" under the Act; identification of the person making the call is not required.

**Slater v. United States Steel Corporation**, Case No. 12-15548 (11th Cir. 2017) (en banc).

A court must examine all circumstances – not just failure to disclose assets on bankruptcy schedules – when determining whether to apply judicial estoppel in civil proceedings subsequent to a debtor's bankruptcy proceedings.

**McIntosh v. Wells Fargo Bank, N.A.**, Case No. 5D16-2189 (Fla. 5th DCA 2017).

A foreclosing plaintiff must, as conditions precedent, comply with HUD regulations that limit acceleration and foreclosure when the mortgage incorporates the regulations.

**Llano Financing Group, LLC v. Petit**, Case No. 1D16-3168 (Fla. 1st DCA 2017).

A lender's claims based on a faulty appraisal accrues immediately and is subject to Florida Statute section 95.11(3)'s four-year statute of limitations.

**Florida Farm Bureau Casualty Insurance Company v. Gray**, Case No. 1D16-3118 (Fla. 1st DCA 2017).

The failure of a client to pay his attorney the contracted-for hourly rate does not transform the representation into a contingency fee representation, and as a result, a multiplier is not proper under this form of representation.

**AHF-Bay Fund, LLC v. City of Largo, Florida**, Case No. 2D14-408 (Fla. 2d DCA 2017).

A subsequent purchaser is on constructive notice of and bound by a non-recorded agreement when there is a recorded memorandum of agreement in the title record and the recorded memorandum refers to a non-recorded agreement which states that the non-recorded agreement runs with the land.

**Friedle v. The Bank Of New York Mellon**, Case No. 4D15-1750 (Fla. 4th DCA 2017).

An authenticated document is not automatically admissible if another section of the Evidence Code (such as hearsay) makes the document non-admissible. Additionally, the Topsy Coachman Rule does not apply if the trial court record is not sufficiently developed.



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# ADR MEDIATION Week



At the Commission meeting on October 3, 2017, the Board of County Commissioners of Palm Beach County proclaimed Mediation Week. The proclamation was presented by Palm Beach County Mayor Paulette Burdick to PBCBA President Sia Baker-Barnes, ADR Committee Chair Rosine Plank-Brumback and Theodore Deckert.

## MEMBERSHIP Luncheon

Membership Luncheon: **Why it Matters! An update on the State of The Florida Bar**

These pictures were recently taken during a membership luncheon featuring Florida Bar President Michael Higer. Higer was in town to talk to our members about the importance of work/life balance.

During the luncheon, Sia Baker-Barnes honored Stan Klett with the Bar's Inaugural "You've Been Served Award!" The award was established to encourage volunteerism and reward our members who have had the greatest impact on our community. Stan was the founder of the bar's annual holiday party and silent auction, which raises thousands of dollars each year for abused and neglected children.

PBCBA President Sia Baker-Barnes and FL Bar President Michael Higer



Charles Hanna and Lawrence Greenberg



FL Bar Board of Governor Gary Lesser and Judge Samantha Schosberg-Feuer



Sia Baker-Barnes honored Stan Klett



# NORTH COUNTY Section

## North County Section - Fifth Annual Pink Party

Members of FAWL, F. Malcolm Cunningham, Sr. Bar Association and the Hispanic Bar Association recently joined members of our NORTH COUNTY SECTION for its fifth annual Pink Party at Cabo Flats in Jupiter. Guests wore pink in support of breast cancer awareness and raised \$2,250.00 for Smiley Wiley Breast Cancer Foundation.



NCS President W Mason, FAWL President Katie Kiziah and F. Malcolm Cunningham, Sr. Bar Association President Nick Johnson donated a check to Lindsay Mesches with Smiley Wiley Breast Cancer Foundation. (not pictured Nelson Baez, Hispanic Bar president)



Judge Robert Panse and Adam Doner



NCS President W Mason, sporting a pink skirt for the cause, along with Colleen Farnsworth and Judge Edward Artau



NCS Director Tanique Lee and Gabrielle Jackson



Andrea McMillan and NCS Director Misty Chaves



Congratulations to NCS Director Wayne Richter for winning the Smiley Wiley door prize basket!



YLS September Happy Hour @ the Tory Burch Store



Professor Ehrhardt to present Emerging Issues in Florida Evidence

Florida State University Ladd Professor Emeritus Charles W. Ehrhardt will speak on Emerging Issues in Florida Evidence on Tuesday, November 28 from 11:45 a.m. – 1:30 p.m. at The Marriott Hotel in West Palm Beach. The program will also be streamed-live in Judge Delgado's courtroom at the South County Courthouse. Included in the agenda will be Daubert/Frye, Expert Witness Discovery Issues, Business Records Exception and Social Media Evidence in both Civil and Criminal Cases. YLS members pay \$50 and PBCBA members who are not YLS Section members pay \$60. At this time, the program is open to PBCBA members only. Registration is available through the Bar's web-site at [www.palmbeachbar.org](http://www.palmbeachbar.org). This program is being presented by the Young Lawyer's Section as part of its Sidebar Series.



# CLE AUDIO LIBRARY

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Turn around time: 7 days

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Audio available in the following practice areas:

ADR	Commerical Litigation	Estate and Probate	Real Estate
Appellate	Construction	Family Law	Securities
Bankruptcy	Criminal Law	Miscellaneous	Technology
Business	Diversity	PI/Wrongful Death	Workers' Compensation
Civil Trail	Employment Law	Professionalism	

For a complete list of available audios, visit [www.palmbeachbar.org/apps/cle/](http://www.palmbeachbar.org/apps/cle/)

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 Any questions, please contact Eva at [egrays@palmbeachbar.org](mailto:egrays@palmbeachbar.org)



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

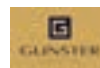


**Hot Topics in Employment Law:  
What Your Clients Need to Know**

Thursday, November 2, 2017, 12:30p.m. - 5:30 p.m.  
Fourth District Court of Appeal, 1525 Palm Beach Lakes Blvd., West Palm Beach, FL

- 12:30p.m. - 12:55p.m. **Late Registration, Check-in**
- 12:55p.m - 1:00p.m. **Welcome and Introductions:** Shayla Waldon, Esq., Akerman LLP, Employment Law CLE Committee, Chair
- 1:00p.m. - 1:50p.m. **Update on Trade Secrets Law - Making the Federal Defend Trade Secrets Act Work for You:** Sarah M. DeFranco, Esq., Akerman LLP
- 1:50p.m. - 2:40p.m. **Protecting the Company's Interests - Non-Compete Update:** Cathleen Scott, Esq., Scott Wagner and Associates, P.A.; Board Certified in Labor and Employment Law; Florida Certified Circuit Civil Mediator
- 2:40p.m. - 2:50p.m. **Break**
- 2:50p.m. - 3:40p.m. **Workers' Compensation - What Companies Need to Know:** Judge Thomas Hedler, Office of Judges of Compensation Claims
- 3:40p.m. - 4:30p.m. **Hot Topics in Discrimination:** Shayla Waldon, Esq., and Melissa Zinkil, Esq., Akerman LLP
- 4:30p.m. - 4:40p.m. **Break**
- 4:40p.m. - 5:30p.m. **Dueling Perspectives - an FLSA Analysis:** Mark J. Berkowitz, Esq., Mark J. Berkowitz, P.A, and Jean Marie Middleton, Esq., Senior Attorney - Employment & Labor Litigation, Office of General Counsel, School District of Palm Beach County

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Credit: 5.0 CLER. Certification credits: 5.0 Labor and Employment law and 1.0 Workers' Compensation. \$165 PBCBA members/paralegals; \$ 205 non-PBCBA attorney members/paralegals. Those registering after 10/26/17 add \$10.00 late fee. All refund requests must be made no later than 48 hours prior to the date of the seminar. Register online at [www.palmbeachbar.org](http://www.palmbeachbar.org) or by mail (return this form with your check)

Name: \_\_\_\_\_ Email address: \_\_\_\_\_

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\_\_\_\_\_ I will not be able to attend the seminar, however I would like to order the audio. The cost is the same as listed above, however please include \$10 for shipping and handling. Allow 1 week for delivery. PBC Bar Association, P.O. Box 17726, W. Palm Beach, FL 33416. 561-687-2800. 11/2/17 Employment Law seminar



The Elder Affairs Committee of the  
Palm Beach County Bar Association Presents

## 20th Annual Elder Law Seminar

Thursday, November 9, 2017; 8:00 AM - 4:00 PM  
Fourth District Court of Appeal, 1525 Palm Beach Lakes Blvd., WPB

8:00 a.m. – 8:20 a.m. **Late Registration and Check-In**

8:20 a.m. - 8:30 a.m. **Welcome & Opening Remarks** – Heather Boyer Samuels, Esq.,  
Solkoff Legal, P.A., and Tequisha Y. Myles, Esq., Legal Aid Society of Palm Beach  
County, Co-Chairs, PBCBA Elder Law Affairs Committee

8:30 a.m. – 9:20 a.m. **Changes in the Medicaid Home Care, Waiver, and Wait List Prioritization -**  
Kim Clawson, Area Agency on Aging

9:20 a.m. – 10:10 a.m. **VA Aid and Attendance: Putting together a Fully Developed Claim -**  
Greg Glenn, Esq., Gregory Glenn, P.A.

10:10 a.m. – 10:20 a.m. **Break**

10:20 a.m. – 11:10 a.m. **Tax Law and Ethics Update** - Michael A. Lampert, Esq., Florida Bar Board  
Certified in Tax Law; Michael A. Lampert, P.A.

11:10 a.m. – 12:00 p.m. **Elder Mediation** - Dr. Elinor Robin and Susan Dubow

12:00 p.m. – 1:00 p.m. **Lunch**

1:00 p.m. – 1:50 p.m. **Legislative & Case Law Update** - Allison Sabocik, Esq., Pankauski-Hauser PLLC

1:50 p.m. – 2:00 p.m. **Break**

2:00 p.m. – 2:50 p.m. **Effectively using Technology in your Elder Law Practice -**  
Daniel A. Terner, Esq., Terner Elder Law, P.L.

2:50 p.m. – 4:10 p.m. **Elder Law Litigation Panel:** Brett Barner, Esq., Barner & Barner, P.A.,  
David R. Schwartz, Florida Bar Board Certified in Elder Law,  
David R. Schwartz, P.A., and Jami L. Huber, Esq., Jami L. Huber, P.A.

Sponsors



Credit: 7.5 CLER, plus .5 Ethics and 1.0 Technology. Certification credits: 7.5 in Elder Law . Cost: \$ 245 members; \$ 285 non-members. Those registering after 11/1/17 add \$10 late fee. All refund requests must be made no later than 48 hours prior to the date of the seminar. [Register online at www.palmbeachbar.org](http://www.palmbeachbar.org) or by mail (return this form with your check)

Name: \_\_\_\_\_ Email address: \_\_\_\_\_

Address: \_\_\_\_\_ Phone: \_\_\_\_\_

\_\_\_\_ I will not be able to attend the seminar, however I would like to order the audio. The cost is the same as listed above, however please include \$10 for shipping and handling. Allow 1 week for delivery. PBC Bar Association, P.O. Box 17726, W. Palm Beach, FL 33416. 561-687-2800. 11/9/17 Elder Law seminar



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**Let's WIN!**

The Business Litigation CLE Committee of the Palm Beach County Bar Association  
Presents



## Mediating Business Cases: Strategies, Analysis and Advice from the Experts

Thursday, December 14, 2017, 11:30 a.m. - 1:00 p.m.  
Fourth District Court of Appeal, 1525 Palm Beach Lakes Blvd., West Palm Beach, FL

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11:30 a.m. - 12:00 p.m. **Check In / Late Registration / Lunch**  
*Welcome: William B. Lewis, Esq., Morgan & Morgan, Committee Chairperson*

12:00 p.m. - 1:00 p.m. **Panel Discussion** with *Circuit Judge (Retired) Kenneth D. Stern, Esq., Stern Dispute Resolution; Bruce G. Alexander, Esq., Board Certified in Construction Law; Ciklin, Lubitz & O'Connell; and Jeffrey S. Grubman, Esq., JAMS ADR*

*Moderated by Raymond E. Kramer III, Esq., Beasley Kramer & Galardi, P.A.*

### Topics:

- Selection of a business mediator
- Tips for mediator's summaries
- How to effectively present your client's case
- Technology in mediation
- Strategies for negotiation of business cases in mediation
- Recruiting the mediator as your ally

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Credit: 1.0 CLER, plus 1.0 Business Litigation Certification Credit. Cost: \$35 members; \$75 non-members. Those registering after 12/7/17 add \$10 late fee. All refund requests must be made no later than 48 hours prior to the date of the seminar. [Register online at www.palmbeachbar.org](http://www.palmbeachbar.org) or by mail (return this form with your check)

Name: \_\_\_\_\_ Email address: \_\_\_\_\_

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\_\_\_\_\_ I will not be able to attend the seminar, however I would like to order the audio. The cost is the same as listed above, however please include \$10 for shipping and handling. Allow one week for delivery. PBC Bar Association, P.O. Box 17726, W. Palm Beach, FL 33416. 561-687-2800. 12/14/17 Business Lit seminar



# BULLETIN Board

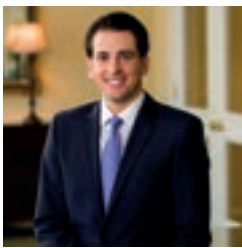
## Professional Announcements:

The following announce their availability for referral, assistance and consultation.

**GREGORY TENDRICH, Esq.:** "AV Preeminent" rated, FINRA Arbitrator and Mediator, Certified County Court Mediator and former Series 7 licensed VP & Asst. General Counsel to national and regional stock brokerage firms. All securities & investment related matters involving the recovery of losses due to stock broker fraud, misrepresentation, churning and unsuitable recommendations, in addition to representation of advisors in SEC, FINRA, regulatory enforcement, contract and employment matters. (561) 417-8777 or visit [www.yourstocklawyer.com](http://www.yourstocklawyer.com)

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## Hearsay



**G**unster, one of Florida's oldest and largest full-service business law firms, is pleased to announce that private wealth services attorney Joshua N. Goldglantz was recently accepted into the third class of the Florida Fellows Institute of the American College of Trust and Estate Counsel.



**S**chwed, Adams, Sobel & McGinley, P.A. is pleased to announce that Paul R. Shalhoub, Esq. has joined the firm's Palm Beach Gardens office. Paul was recently recognized as a 2017 Florida Super Lawyer Rising Star and will be focusing his practice on plaintiff personal injury matters.



**B**rian Patrick Sullivan of Sullivan Law P.A. has been admitted to the prestigious Insurance Law LLM Program at the University of Connecticut, School of Law. Mr. Sullivan will continue his firm's practice specializing in Personal Injury and Insurance Law

**T**he firm formerly known as Atherton Law Group is now Atherton McAuliffe & Reeder PA. The firm's 9 attorneys, including shareholders Scott Atherton, Michael McAuliffe and Martin Reeder, continue to represent corporate clients, media organizations, and certain individuals in complex commercial litigation, shareholder disputes, healthcare fraud cases, white collar criminal investigations, defamation claims, and employment-related disputes.

**E**ffective October 1, 2017, Tama Beth Kudman, P.A. will be moving her Florida office location: Tama Beth Kudman, P.A. - The Comeau Building, 319 Clematis Street, Ste. 107, West Palm Beach, FL 33401, Ph: 561-472-0811, Fax: 561-828-0210

**T**he Law Offices of Craig Goldenfarb, P.A. and Craig Goldenfarb, Esq. have founded Heart of the Game, Incorporated, a 501(c)(3) non-profit who mission is to provide free Automatic External Defibrillators (AEDs) to community and youth recreation organizations.

**P**ressly, Pressly, Randolph & Pressly, P.A. is pleased to announce that Stephen G. Vogelsang, Esq. has joined the firm. Steve brings 30 years of experience representing high net worth families in Palm Beach County with their gift, estate planning and estate administration needs.

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june	april 25
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september	july 25
october	august 25
november	september 25
december	october 25

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▶ 2-full	1999.00	5397.00	10194.00	17591.00
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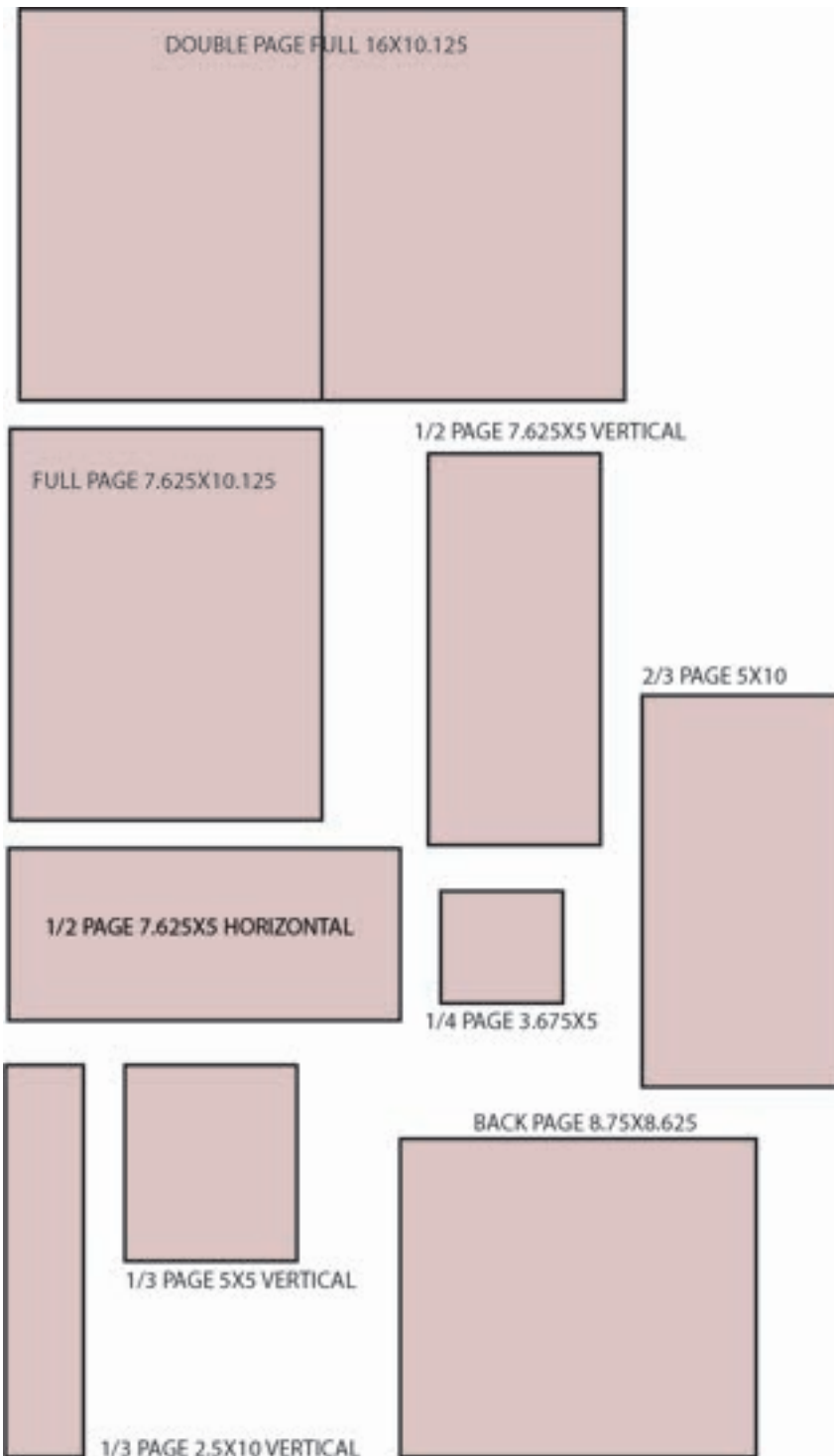
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\*Active Members are entitled to one(1) free classified ad per year.

# CALENDAR OF EVENTS

## NOVEMBER 2017

### NOVEMBER

THURSDAY, NOVEMBER 2,  
7:30AM – 8:00AM  
NEW ATTORNEYS BREAKFAST  
NORTH END CAFETERIA

THURSDAY, NOVEMBER 2,  
12:30PM – 5:00PM  
EMPLOYMENT LAW SEMINAR  
4TH DCA

FRIDAY, NOVEMBER 3,  
8:30AM – 9:30AM  
ADR COMMITTEE MEETING  
N. FLAGLER - GL

FRIDAY, NOVEMBER 3,  
11:45AM – 1:15PM  
FEDERAL BAR ASSOCIATION  
LUNCHEON  
KRAVIS CENTER

TUESDAY, NOVEMBER 7,  
12:00PM – 1:00PM  
LAW WEEK COMMITTEE MEETING  
SUITE 900

TUESDAY, NOVEMBER 7,  
5:30PM – 7:00PM  
NCS HAPPY HOUR  
YARD HOUSE, PBG

WEDNESDAY, NOVEMBER 8,  
12:00PM – 1:00PM  
PROFESSIONALISM COMMITTEE  
MEETINGS  
4TH DCA

THURSDAY, NOVEMBER 9,  
8:00AM – 4:00PM  
ELDER LAW SEMINAR  
TBA

THURSDAY, NOVEMBER 9,  
5:30PM – 7:00PM  
PBCJA / BCTLA JOINT MIXER  
MAGGIANO'S BOCA

FRIDAY, NOVEMBER 11  
BAR OFFICE CLOSED  
VETERAN'S DAY

MONDAY, NOVEMBER 13,  
6:30PM – 7:30PM  
LANDLORD TENANT PROGRAM  
OKEECHOBEE BRANCH LIBRARY

TUESDAY, NOVEMBER 14,  
7:45AM – 8:30AM  
UMC COFFEE  
NEC

TUESDAY, NOVEMBER 14,  
11:30AM – 1:00PM  
NCS BOARD MEETING

TUESDAY, NOVEMBER 14,  
12:00PM – 1:00PM  
PARALEGAL COMMITTEE MEETING  
N FLAGLER

TUESDAY, NOVEMBER 14,  
12:00PM – 12:30PM  
YLS BOARD MEETING  
515 N FLAGLER RD, LARGE  
CONFERENCE ROOM

WEDNESDAY, NOVEMBER 15,  
12:00PM – 1:00PM  
TRANSACTION COMMITTEE MEETING  
BROAD AND CASSELL

WEDNESDAY, NOVEMBER 15,  
12:00PM – 1:00PM  
UNIFIED FAMILY PRACTICE  
COMMITTEE MEETING  
JUDICIAL CONFERENCE ROOM

WEDNESDAY, NOVEMBER 15,  
5:00PM – 6:00PM  
BAR BOARD MEETING  
SEARCY DENNEY

WEDNESDAY, NOVEMBER 15,  
5:30PM – 7:00PM  
LEGAL AID  
BROOKS BROTHERS

THURSDAY, NOVEMBER 16,  
11:30AM – 5:00PM  
PI SEMINAR  
4TH DCA

THURSDAY, NOVEMBER 16,  
12:00PM – 1:00PM  
CONSTRUCTION LAW COMMITTEE  
MEETING  
BECKER & POLIAKOFF

THURSDAY, NOVEMBER 16,  
6:00PM – 8:00PM  
PBCJA JURIST OF THE YEAR EVENT  
HONORING JUDGE ARTAU  
KRAVIS CENTER COHEN PAVILION

TUESDAY, NOVEMBER 21,  
12:00PM – 1:00PM  
CDI MEETING  
AMERICAN LUNG ASSOCIATION

THURSDAY – FRIDAY,  
NOVEMBER 23 – 24  
THANKSGIVING  
BAR OFFICE CLOSED

TUESDAY, NOVEMBER 28,  
11:45AM – 1:30PM  
YLS SIDEBAR  
MARRIOTT, WPB

TUESDAY, NOVEMBER 28,  
5:30PM – 7:00PM  
LEGAL AID BOARD MEETING  
LEGAL AID OFFICES

WEDNESDAY, NOVEMBER 29,  
11:30AM – 1:00PM  
COMMITTEE CHAIR MEETING  
515 N FLAGLER DR, (DOWNSTAIRS  
CONFERENCE ROOM)

WEDNESDAY, NOVEMBER 29,  
12:00PM – 1:00PM  
REAL ESTATE COMMITTEE MEETING  
N FLAGLER – GL ROOM

THURSDAY, NOVEMBER 30,  
5:30PM – 7:00PM  
YLS HAPPY HOUR-NO SHAVE  
PGA NATIONAL RESORT & SPA  
I BAR ROOM



PRESORT STD  
US POSTAGE  
PAID  
WEST PALM BEACH FL  
PERMIT NO. 66

# PALM BEACH COUNTY BAR ASSOCIATION BULLETIN

PO BOX 17726 WEST PALM BEACH, FL 33416 WWW.PALMBEACHBAR.ORG

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**BEASLEY KRAMER & GALARDI, P.A.**  
ATTORNEYS AT LAW

Our partners Jim Beasley and Joe Galardi have recently been recognized by *Best Lawyers in America* for the following practice areas:

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- Real Estate Litigation
- Securities Litigation
- Trust and Estate Litigation
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