



PALM BEACH COUNTY BAR ASSOCIATION

BULLETIN

www.palmbeachbar.org

December 2009



Mark your calendar for upcoming Membership Meetings

Tri-County Appellate Law Seminar

December 4, 11:30 – 5:30 p.m.
Boca Raton Marriott

Annual Holiday Party & Silent Auction

December 10, 5:30 – 7:00 p.m.
Frenchman's Reserve
Palm Beach Gardens

Inaugural Lawyer Variety Show

January 9, 6:00 p.m.
PBCC Eissey Theatre

Wine Tasting Event

January 13, 5:30 – 7:30 p.m.
Phillips Point Club, West Palm Beach

Bench Bar Conference

February 19, 2010
Palm Beach County Convention Center

Joint Luncheon with South County Bar Association

March 16, 11:45 – 1:00 p.m.
Guest Speaker: FL Bar President Jesse Diner and FL Bar Foundation President Adele Stone
Boca Raton Marriott

Annual Judicial Reception

May 5, 5:30 – 7:00 p.m.
The Harriett at City Place

Law Day Luncheon

May 7, 11:45 – 1:00 p.m.

Annual Installation Banquet

June 12, 7:00 p.m.
The Breakers Hotel, Palm Beach



*The Board of Directors
and Bar Staff
Wish You and Your Family
a Happy Holiday Season!*



Nominating petitions available for Board of Directors

The annual election of officers and directors for the Palm Beach County Bar will take place via online voting in April. Persons seeking to run for a position on the Board of Directors will need to obtain a nominating petition and must be a member in good standing of the Palm Beach County Bar Association. The nominating petition must be signed by no fewer than 20 members in good standing of the Association. Petitions for President-elect will be available on December 15 and will be due back in the office by 5 p.m. on January 15. Petitions for director-at-large seats will be available on December 22 and will be due back in the Bar office by 5 p.m. on January 22. Petitions may be obtained by calling the Bar office at 687-2800 or by sending an e-mail requesting it at pburns@palmbeachbar.org. For any of the positions, it is the candidate's responsibility to verify ahead of time through the Bar office that the members that are signing their petitions are members in good standing, otherwise, the petition will be deemed invalid.



Tickets are still available for the Inaugural Lawyer Variety Show, Saturday, January 9th at the Eissey Theatre in Palm Beach Gardens. Come and enjoy cocktails, great entertainment plus show your support for the Legal Aid Society of Palm Beach County and the North County Section's Scholarship Fund at Palm Beach Community College. Our performance lineup includes the following lawyers showing off their various talents: Brian Denney, Tom Grusek, Jeremy Slusher, Kathryn Lewis, Iola Mosley, Mark Pachman, Charlie Pickett, Lee Rosenthal, Siobhan Shea, Darren Shull, Skip Smith, Carl Spagnuolo, Grey Tesh, Patti Velasequez and John Whittles. Tickets are just \$35 a piece.

For tickets, register on line @ www.palmbeachbar.org.

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THE BULLETIN

PALM BEACH COUNTY BAR ASSOCIATION

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www.palmbeachbar.org

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FAX (561) 687-9007

e-mail info@palmbeachbar.org.

Advertising Information:

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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



15th Judicial Circuit 2010 Court Holiday Schedule

The following holidays will be observed by the Fifteenth Judicial Circuit in 2010:

New Year's Day	Friday, January 1, 2010
Martin Luther King Jr. Birthday	Monday, January 18, 2010
President's Day	Monday, February 15, 2010
Good Friday	Friday, April 2, 2010
Memorial Day	Monday, May 31, 2010
Independence Day (observed)	Monday, July 5, 2010
Labor Day	Monday, September 6, 2010
Rosh Hashanah	Thursday, September 9, 2010
Veteran's Day	Thursday, November 11, 2010
Thanksgiving Day	Thursday, November 25, 2010
Friday after Thanksgiving	Friday, November 26, 2010
Discretionary Holiday	Thursday, December 23, 2010
Christmas (observed)	Friday, December 24, 2010
New Year's Day (observed)	Friday, December 31, 2010*

*January 1, 2011 falls on a Saturday. Therefore, the Circuit will recognize **Friday, December 31, 2010**, as the New Year's holiday and as the first holiday in 2011. This corresponds to the County's holiday schedule.

Note: Monday, October 11, 2010, is a County holiday and County buildings will be closed. Therefore, court hearings cannot be scheduled on that day. The Court will hold an in-service training for all 15th Judicial Circuit employees.

Who Do You Know?

The Bar Association is always looking for interesting, high profile speakers to address the members at membership luncheons. If you have any connections or know someone that does that may assist us in bringing in some great speakers, please let us know. Contact Executive Director Patience Burns at pburns@palmbeachbar.org if you have an idea or if you can help us out.



The Bar would like to sincerely thank Dr. Maureen Sullivan who assisted with the Lawyers Have Heart contestants Mike Kranz and Julie Jennison. Dr. Sullivan worked diligently with both of them by providing nutritional guidance and diet information in their quest to lose weight.

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Lindsay Hanson, Cathleen Scott, Deborah Baker

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Throughout This Past Year, and
Best Wishes for a Happy Holiday Season.



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President's Message



Just One Case

By Michelle R. Suskauer, President

The Florida Supreme Court is looking for you! Yes, you. The Supreme Court's

Standing Committee on Pro Bono has initiated the One Campaign in response to the decrease in pro bono services provided by attorneys over the last several years and the overwhelming need of citizens in our state for legal assistance. What is the One Campaign? One Client, One Attorney, One Promise. This program is designed to motivate every attorney in Florida to accept one pro bono case each year. Just one case. If this goal is accomplished, there will be a drastic reduction in the enormous backlog of cases that currently exists.

Under the leadership of First

District Court of Appeal Judge William Van Nortwick, Chair of the Standing Committee on Pro Bono, the One Campaign has put together a three-pronged approach to increasing pro bono participation:

- outreach to the lawyers of Florida in order to inspire them to perform pro bono;
- reinventing pro bono with legal service organizations;
- preparing marketing materials for judges and bar leaders in their outreach to lawyers.

At the end of October, I assembled representatives from every local voluntary bar organization in Palm Beach County to discuss innovative ways in which we can increase pro bono participation in our area. We will all be

working together to motivate every attorney in our county to fulfill the promise we made at the beginning of our careers, "to never reject the cause of the defenseless or oppressed...". So how do you get that case? Look no further than our own Legal Aid Society of Palm Beach County. We are so fortunate to have one of the most well respected legal services organizations in the State of Florida right in our own backyard. Legal Aid is in desperate need of attorneys to both take cases and to participate in the Campaign for Equal Justice. Contact Legal Aid's Pro Bono Supervising Attorney Kimberly Rommel-Enright at (561) 655-8944. Do not wait. It starts with one case....

www.onepromiseflorida.org



www.palmbeachbar.org

Board of Directors Meeting Attendance

	June Retreat	Aug	Sept	Oct
Bowden	x	x	x	x
Guari	x	x	x	x
Howe	x	x	x	Phone
Jenks	x	x	x	
Kypreos	x	x	x	x
Martinez	x	x	x	x
Napoleone	x	x	x	x
Pressly	x	x	x	Phone
Rabin	x	x	x	x
Schuler	x	x	x	x
Suskauer	x	x	x	x
Weiss	x	x	Phone	x
Whittles	x	x	x	x



W. JAY HUNSTON, JR. Mediator/Arbitrator

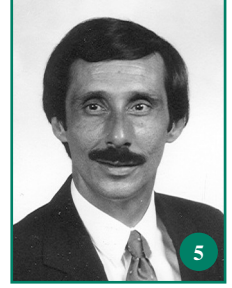
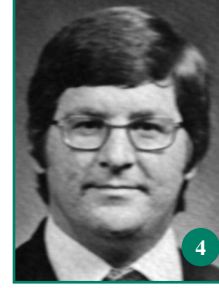
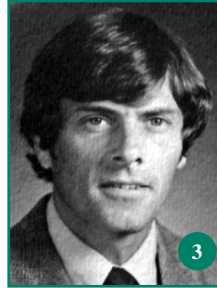
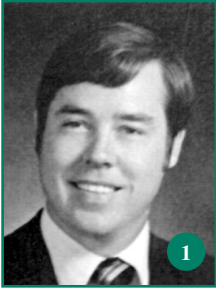
- J.D. Stetson Univ. College of Law (1976)
- Florida Bar Board Certified Civil Trial Lawyer (1983-2003)
- Florida Bar Board Certified, Emeritus in Civil Trial Law (2003-Present)
- Florida Certified:
 - Circuit Civil Mediator (1991-Present)
 - Family Mediator (1998-Present)
- NASD/FINRA Approved Mediator
- Qualified Florida Arbitrator
- Admitted to Practice in Florida and Montana
- Hourly and Per Diem Rates Available upon Request

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Who are they?

Can you guess who these members are? Answers can be found on page 18. 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.



The Palm Beach County Bar Association's
Solo and Small Firm Practitioner's Committee
Presents

NETWORKING & LEARNING LUNCHEON SERIES

For attorneys in firms with five or fewer lawyers and no more than 3 of whom work in the same practice area. Register online at www.palmbeachbar.org

Thursday, December 3
Managing Stress In Your Practice
11:45 am to 1:00 pm
Bar Office

Wednesday, January 13, 2010
Law Office Accounting
11:45 am to 1:00 pm
Bar Office

Wednesday, March 3
TBA

Thursday, April 15
Internet Marketing: Beyond the Basics
Presented by FindLaw
11:45 am to 1:00 pm
Bar Office

Thursday, May 20
Marketing: TV, Radio & Print
What works & what doesn't
11:45 am to 1:00 pm
Bar Office



Judge John Kastrenakes was sworn in as a Circuit Judge by his good friend The Honorable Federico A. Moreno, Chief United States District Judge, Southern District of Florida

probate litigation

(5 6 1)

5 1 4 - 0 9 0 6

referral fees

pankauski

LAW FIRM
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West Palm Beach

Western County Networking Event Highlights



Craig Stein, Judge Glenn Kelley & Judge Don Hafele



Laurie Cohen, Richard Carey and Al Morici



Dan Galo, Steven Haligas and Victoria Calebrese



Frank Gonzalez, Ben Shenkman and Jeffrey Friedman

One Campaign

Dear Fellow Members of the Palm Beach County Bar:

This fall has been an unprecedented time for celebration and opportunity for attorneys in the State of Florida. October marked the launch of the One Campaign initiated by the Supreme Court's Standing Committee on Pro Bono led by Judge William Van Nortwick. The **One Campaign**, *one client, one attorney, one promise*, is committed to giving attorneys the opportunity to renew the promise to "never reject the cause of the defenseless or oppressed". The focus of the campaign is to engage more attorneys in providing pro bono legal services through their local legal aid programs by taking on **ONE** case. Following the initiative, November marked the beginning of the Legal Aid Society's annual **Campaign for Equal Justice** and we need your help more than ever. The request for services from residents facing mortgage foreclosure, domestic violence, reduction in disability benefits and bankruptcy is overwhelming. Additionally, the need for attorneys to represent abused and neglected children continues to grow. As in the past under the Florida Supreme Court's standard of participation in pro bono service activities you can assist in one of two ways.

1. Handle a referral through Legal Aid's Pro Bono Project;

2. Make a tax deductible contribution of \$350 or more to Legal Aid's Pro Bono Program. Two years ago we requested members of the private bar to increase their annual contribution to \$400 and over 43% of you responded positively. It is our hope that in 2009-2010 the number of attorneys increasing their donation will continue to rise.

If you are already a supporter of the Campaign for Equal Justice, thank you. We look forward to your 2009-10 contribution. If you have not previously participated or are new to the community, please help us by sending in your check or giving your time to this important cause. Imagine the impact we could make if every attorney in Palm Beach County took just **ONE** pro bono case this year. If you have not received your letter and would like more information about Legal Aid or our award winning Pro Bono Program please call or email Bob Bertisch at (561) 655-8944 x 247; rbertisch@legalaidpbc.org. Thank you.

Robert Bertisch, Executive Director, Legal Aid Society of Palm Beach County
Grier Pressly, Board Liaison – Pro Bono Efforts

THE PALM BEACH COUNTY BAR ASSOCIATION'S FAMILY LAW CLE COMMITTEE AND UNIFIED FAMILY COURT PRACTICE COMMITTEE INVITE YOU TO LUNCH AND LEARN THIS YEAR. . . .

OBTAIN CLE CREDIT, INTERACT WITH JUDGES AND FELLOW PRACTITIONERS
AND HAVE LUNCH ON US!

COST: \$35/Members per seminar; \$75/Non-members
(add \$10 late registration fee if not registered 7 days before seminar date)

Date	Topic	Speaker	Location
January 15, 2010 <i>Lunch Sponsored By: Sasser, Cestero & Sasser, P.A.</i>	Charging Liens, Retaining Liens and Collecting Fees in a Difficult Economic Climate Erskine Rogers, Esq.,	Rutherford Mulhall, P.A.; Michael Koenig, Jr., Adorno & Yoss, P.A.	Palm Beach County Bar Offices
March 24, 2010 <i>Lunch Sponsored By: Complete Legal Investigations</i>	Presenting a Temporary Relief Case	Roundtable Judicial Panel	Main Courthouse North End of Cafeteria
April 14, 2010 <i>Lunch Sponsored By: Complete Legal Investigations</i>	Client Intake and Consultation... Getting the Best Client	Jeffrey A. Weissman, Esq., Gladstone & Weissman	Palm Beach County Bar Offices



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

"Special Needs Trusts – The Basics and Beyond"

Tuesday, December 15, 2009 - 8:25a.m. - 2:00p.m.

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

Program Schedule

- | | |
|-------------------|--|
| 8:00am - 8:25am | Late Registration - Check In |
| 8:25am - 8:30am | Welcome - Opening Remarks - David R. Schwartz, Esq., Greenacres, FL, Florida Bar Board Certified Elder Law Attorney, Chair PBCBA Elder Law Affairs Committee |
| 8:30am - 10:00am | "Everything You Wanted to Know About Inter Vivos and Testamentary Special Needs Trust: From A to Z" - Stephanie L. Schneider, Esq., Stephanie L. Schneider, P.A., Plantation, FL, Florida Bar Board Certified Elder Law Attorney |
| 10:00am - 10:10am | Break |
| 10:10am - 11:40am | SSA Speaks: A Practical Review of the New 2009 POMS on Drafting and Administering Government Approved Special Needs Trusts - David J. Lillesand, Esq., Lillesand and Wolasky, P.L., offices in Miami & Gainesville, FL |
| 11:40am - 12:00pm | LUNCH (included in registration) |
| 12:00pm - 12:30pm | Marketing Special Needs Trusts to Personal Injury Lawyers - Craig Goldenfarb, Esq., Law Offices of Craig Goldenfarb, P.A., West Palm Beach, FL |
| 12:30pm - 1:00pm | Tax Aspects of Special Needs Trusts - The Basics - Michael A. Lampert, Esq., Michael A. Lampert, P.A., West Palm Beach, FL, Florida Bar Board Certified Tax Attorney |
| 1:00pm - 2:00pm | Elder Law for Trial Lawyers: How the Elder Law Attorney can Market to and Serve the Trial Bar - Scott M. Solkoff, Esq., Solkoff Legal, P.A., Delray Beach, FL, Florida Bar Board Certified Elder Law Attorney |

As a public service project the Elder Law Affairs Committee has adopted the Indian Ridge School, a unique therapeutic day school that serves students from all of PBC who suffer from emotional and behavioral disorders. The school and students are in dire need of supplies. **We ask that each attendee either donate some school supplies or make a monetary contribution. Supplies/Donations can be dropped off at seminar location.**

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Estate & Trust Litigation

This course has been granted 6.0 CLER including 1.0 Ethics credit /4.5 Elder Law; 4.5 Wills, Trusts & Estates; .50 Tax Law; 1.0 Civil Trial Law Certification credits from The Florida Bar.

The cost of the seminar, **including lunch**, is **\$150** for PBCBA members/legal assistants, **\$195** for non-PBCBA members/legal assistants, if registered by 12/8/09. **Add \$25 to registration fee after that date.**

If a phone reservation is made and we do not receive payment and you do not attend, you will be charged \$25. All refund requests must be made no later than 48 hours prior to the date of the seminar.

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

**HOW TO
REGISTER**



MAIL the completed
form w/check



FAX the completed form to
561/687-9007



ON-LINE at
www.palmbeachbar.org

Please register me for the December 15, 2009 Elder Law Seminar:

Name: _____

Telephone: _____

Address: _____

City/Zip _____

Name on Credit Card: _____

Signature: _____

Credit Card #: _____ **Visa** __ **Amex** __ **MC** __ **Exp:** _____ **Amount \$** _____

___ I will not be able to attend the seminar but would like to order the CD Rom. (allow two weeks for delivery) (Elder Law 12/15/09)
Cost is the same as listed above, in addition to \$10 for shipping and handling.

Nominations Sought for 2010 Pro Bono Night Awards

The 22nd Annual Pro Bono Recognition Evening will be held on Saturday Evening May 8, 2010 at the Palm Beach County Convention Center.

Anyone wishing to nominate an attorney, support staff member, law firm, individual or group for a Pro Bono Award for exemplary pro bono work in 2009 please fill out the form below. Reasons for the nomination should accompany this form and client names are not necessary. Client names will not be used for any press releases or for the program the night of the event without the client's written consent.

-----Nominating Form-----

Name of Nominee: _____

Firm Name: _____

Address: _____

Phone Number: _____

Reason for nomination: _____

Please mail nomination by January 15th to: Kimberly Rommel-Enright, Esq., Pro Bono Coordinator, Legal Aid Society of Palm Beach County, Inc., 423 Fern Street, Suite 200, West Palm Beach, FL 33401. If you have any questions regarding these awards, please call Kim at 655 - 8944 ext. 265 or e-mail her at kenright@legalaidpbc.org.

Robert Bertisch, Executive Director

SAVE THESE DATES AND WATCH FOR YOUR INVITATIONS!

Upcoming events that will benefit the
Legal Aid Society of Palm Beach County

GREAT WEEKEND EVENT

December 4th 5th and 6th
7th Annual Holiday Bookfest and Luncheon
and CityPlace Shopping Spree
(featuring discounts at great shops and more!)

GIRLS NIGHT OUT

AT SAKS IN THE GARDENS

THURSDAY, JANUARY 28, 2010

6:00 to 8:00 p.m.

Fashion, fun and philanthropy just for the girls!
Cocktails and hors d'oeuvres
Lafayette 148 Resort 2010 Fashion Presentation
Laura Mercier MasterClass
Accessorize and look your best from work to weekend
Raffles Galore!

WATCH FOR OUR GIFT GATHERING GALA INVITATIONS

and....

Save SATURDAY, MAY 8, 2009

for the

22nd ANNUAL PRO BONO RECOGNITION EVENING!

Thinking of Making a Move?

Office space available for lease.

1525 N. Flagler Drive, Suite #200 has water view space available for lease
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For more information or to view the space, please contact us at **(561) 366-9099**.

Through the Looking Glass: When Is an “Earned Retainer” Earned?

by D. Culver “Skip” Smith III On behalf of the Professionalism Committee

“I don’t know what you mean by ‘glory.’” Alice said.

Humpty Dumpty smiled contemptuously. “Of course you don’t – till I tell you. I meant ‘there’s a nice knock-down argument for you!’”

“But ‘glory’ doesn’t mean ‘a nice knock-down argument,’” Alice objected.

“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean – neither more nor less.”¹

Alas, we lawyers are not the final arbiters on what our documents mean. That task has been co-opted by the courts or, in more anguishing circumstances, by The Florida Bar’s Department of Lawyer Regulation. This is no more true than in the case of so-called “earned retainers.”

Case in point: You are a “marital and family” lawyer (one of our profession’s modern euphemisms). You are engaged by a new client, to whom you quote and from whom you receive an “earned retainer” of \$4,000.00. You explain to the client that this retainer is deemed “earned when received” (a supreme oxymoron, indeed) and is under no circumstance refundable in whole or part. Your client nods in an apparent signal of comprehension and signs your clear and unambiguous, rock-solid engagement letter to that effect. Well, at least you think it’s rock solid. Two days later, your client calls not to say “I love you” but to say “you’re fired” (or, perhaps, in the terminology of another modern euphemism, “I have decided to go in a different direction”), because she has hired a competitor recommended to her on Facebook by her new best friend forever. She, of course, asks you to send her four grand back to her.

Although you have not yet spent the money (the weekend has not yet arrived), you did deposit the funds into your operating account (which you believed you ethically were required to do because, after all, the money was “earned” and, thus, yours and not to be commingled with client trust funds), and you have performed a couple of hours worth of initial investigation and analysis. Besides: (1) the client agreed that the \$4K was “earned” when received and (best of all) not refundable, (2) you read Florida Bar Ethics Opinion 93-2 to support your position (it doesn’t), and (3) of greatest motivational significance, you’re angry. So you demur to the request for refund.

A few days later, the “inquiry” from The Florida Bar arrives in the mail, generated by a complaint by the client. You wisely engage Y.T. or a similarly qualified professional (assuming for sake of discussion that there is one) to respond to the complaint and fight it on – you guessed it – principle. You fork over a \$5K retainer that is refundable, a condition destined quickly to become moot. Does this make sense? You know the answer to that annoying question, but there you find yourself anyway.

First, a lexicographic refresher:

earn (ûrn) *tr.v.* To acquire or deserve *as a result of effort or action*.²

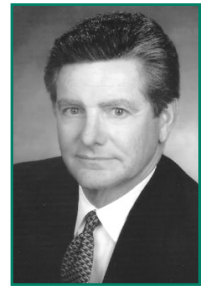
Rock-solid contract or no, the ethical inquiry will focus on whether the fee was earned by effort, not by contract. Your hourly rate is \$400, and you devoted two hours to the matter. The Bar’s conclusion: \$4,000 is an excessive fee for \$800 worth of work that did not result in a conclusion of the matter or otherwise approach the full scope of the contemplated services.

Face it: this is eminently logical. Never mind that the client did not give you the opportunity to perform fully. Unless you can demonstrate *actual* loss of other business as a direct result of the engagement (e.g., *offered* representation of the opposing spouse or of a prospective client whose representation in an unrelated matter you declined because of the newly acquired matter’s anticipated demands on your time, which implies that you have nothing else to do) – or unless your appearance in the matter has caused the opposition immediately to capitulate due solely to your towering reputation – the fee *ethically* is deemed excessive. (Note: This concept applies equally to a prepaid flat fee, which is nothing more than a fee paid in advance for work yet to be performed.)

In short, you will (pursuant to Y.T.’s sage advice) promptly refund \$3,200 to avoid disciplinary proceedings (and lawyer’s fees), having, of course, in the meantime likely paid most or all of the balance for Y.T.’s fine services. As in the case of that great but fragile linguistic philosopher Humpty Dumpty, all the King’s horses and all the King’s men cannot put your fee back together again. The bottom line: you have to play for pay. (Don’t be discouraged: Once upon a time in America, that was the overriding principle of personal economic advancement – even among the ruling class.)

¹ Lewis Carroll, *Through the Looking-Glass and What Alice Found There* (1871), reprinted in Lewis Carroll, *The Complete Illustrated Works*, at 136 (Edward Guiliano ed., Gramercy Books 1995).

² *American Heritage Dictionary of the English Language* 561 (4th ed. 2000) (definition 2) (emphasis added).



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



WINTER 2010 REAL ESTATE SEMINAR "Hot Topics in a Cold Market"

Wednesday, January 27, 2010 - 8:00 a.m. - 12:15 p.m.
Bar Association Offices, 1601 Belvedere Road #302E, WPB



Program Schedule

- 8:00am - 8:20am Late Registration/Check In
- 8:20am - 8:30am Welcome and Opening Remarks - Steven D. Rubin, Esq.,
Board Certified Real Estate Attorney, Real Estate Committee Chairperson
- 8:30am - 9:00am Homestead Tax Exemption Portability: What you need to advise your clients in every residential transaction, and ethical considerations. - Robert I. MacLaren, II, Esq.,
Osborne & Osborne, P.A., Board Certified Real Estate Attorney
- 9:00am - 10:00am FAR/BAR Form vs. FAR Form: Where they diverge, case law construction of competing terms, and ethical considerations. -
John R. Banister, Esq., Rutherford Mulhall, P.A., Board Certified Real Estate Attorney
- 10:00am - 10:15am Break
- 10:15am - 11:15am Compliance With (new) RESPA: Mock HUD-1/1A preparation and ethical considerations. - Deborah Boyd, Esq., First American Title Insurance Company,
Board Certified Real Estate Attorney
- 11:15am - 12:15pm The Latest: Foreclosures, Short Sales, and Loan Modifications and Ethical Considerations:
- From the Borrower's and Purchaser's Perspectives - Gregory Cohen, Esq.,
Cohen, Scherer, Norris & Weinberger, Board Certified Real Estate Attorney
- From the Lender's Perspective - Michael W. Simon, Esq.,
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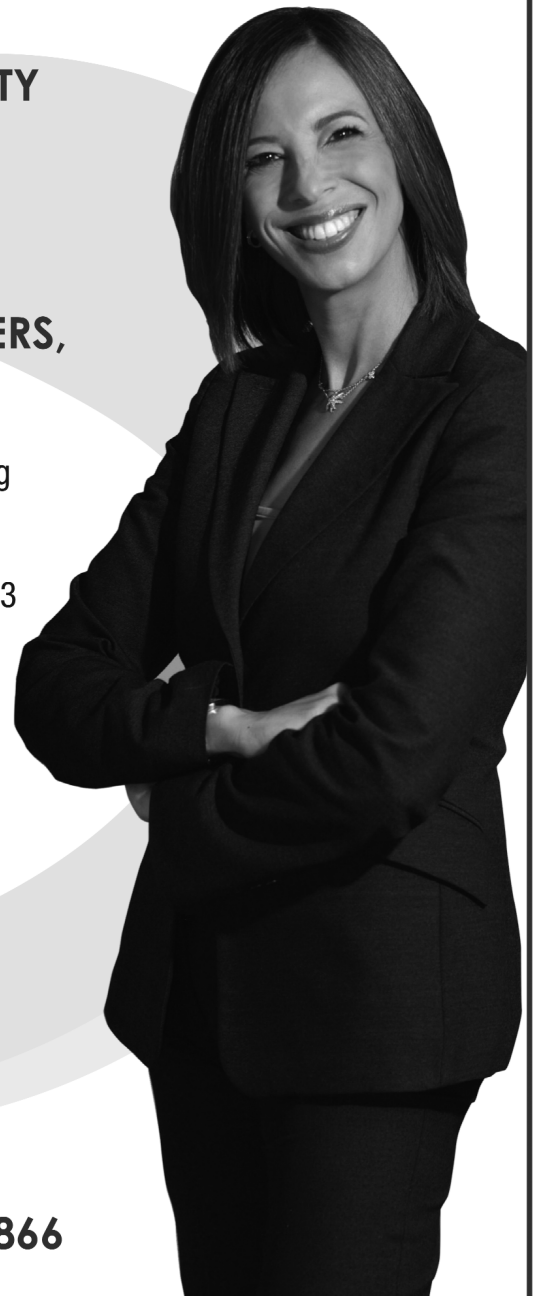
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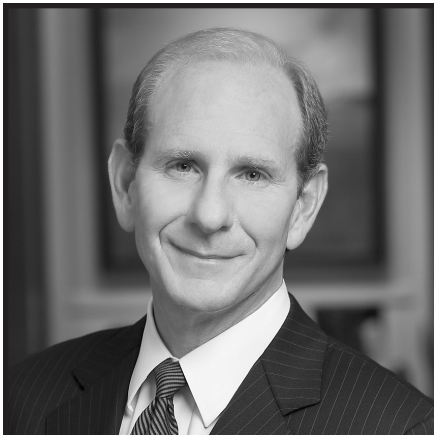


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Use of Depositions of Employees

by Ted Babbitt

Most trial lawyers are familiar with Fla. R. Civ. P. 1.330(a)(3) which allows a deposition to be used under varying circumstances such as the death of a witness more than 100 miles away from the trial, a witness who is unavailable due to illness, infirmity or imprisonment, a witness who cannot be subpoenaed or an expert witness. Recent cases make it clear that the deposition of an employee of a party is admissible even if the witness does not meet one of the criteria of 1.330(a)(3) if the statements of the employee can be considered an admission against interest.

That question arose in the case of *Petit-Dos v. School Board of Broward County*, 2 So. 3d 1022 (Fla. 4th DCA 2009). In that case, the trial judge refused to allow the plaintiff to read excerpts from the deposition of an employee of the defendant regarding questions concerning her responsibility for the accident. In reversing, the Fourth District pointed out that Fla. R. Civ. P. 1.330(1) allows a deposition to be used by any party, not only in impeachment of a witness but "for any purpose permitted by the Florida Evidence Code." Since sec. 90.803 of the Florida Evidence Code provides that even if a witness is available for testimony, statements which are admissions by a party's employee concerning a matter within the scope of their employment while they were employed are admissible. Depositions of employees are admissible even though the witness does not meet the other criteria of the Rule regarding their unavailability. The Court quoted with approval the case of *Castaneda v. Redlands Christian Migrant Assoc., Inc.*, 884 So. 2d 1087 (Fla. 4th DCA 2004). In that case, depositions of employees of a day care center where the plaintiff's child was injured were not permitted in evidence and the Fourth District reversed citing the same rule and evidentiary code as relied upon in *Petit-Dos*, *supra*.

The opinion in *Castaneda* clears up the distinction between the admissibility into evidence of statements of employees as opposed to nonparty witnesses who may make admissions against interest. At 1091, the court holds:

"Statements of employees within the scope of their employment and during its existence are admissible in Florida:

Florida courts have consistently admitted into evidence statements by employees concerning matters arising from the course of their employment under the doctrine of admissions. It is important to note that such statements are admissible because they are the admissions of a party-opponent or adverse party and not because they are declarations against interest. The differences between these two well-recognized exceptions to the hearsay rule are: an admission is made by a party to the litigation, while a declaration against interest is made by a non-party; an admission comes into evidence despite the presence at trial of its author, while the general hearsay rule concerning

unavailability of the declarant applies in the case of declarations against interest. The statement sought to be introduced as an admission need not have been consciously against the interest of its maker at the time it occurred, while the declarant in the case of the other hearsay exception must have been aware of a risk of harm to his own interests at the time he spoke."

Allowing depositions of employees to be read to the jury makes consummate good sense. The very existence of the agency relationship between an employee and the employer defendant makes the employee's statements usable against the employer because they are, in fact, admissions of a party. Particularly in the corporate world, an employer cannot act without its employees. The employee's actions are, in fact, actions of the corporate employer and not to recognize that their statements within the course of their employment bind their employer creates a legal fiction that makes no sense. In fact, at 1091, the Fourth District in *Castaneda* uses precisely that analogy.

"We analogize the introduction of employee depositions as admissions to the introduction of the deposition of a party or of the officer, director, or managing agent of a party, which may be done for any reason pursuant to Florida Rule of Civil Procedure 1.330(a)(2)."

These opinions are important because the constraints of Fla. R. Civ. P. 1.330(a)(2) allow only the depositions of an officer, director, or managing agent of a corporation to be used by the adverse party for any purpose. These opinions make clear that any employee's deposition regardless of that employee's status can be utilized as admissions against interest of the employer party.

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As The World Turns: Another Decision Interpreting the Statutory Personal Property Exemption

By Marc P. Barmat

In the October 2009 edition of the Palm Beach County Bar Association Bulletin, I discussed Chief Bankruptcy Judge Paul G. Hyman, Jr.'s opinion which broadly interpreted the 2007 amendment to Florida Statutes § 222.25(4) which increased a debtor's personal property exemption from \$1,000 to \$4,000 for a debtor who "does not claim or receive the benefits of a homestead exemption. . ." In *In re Abbott*, 2009 WL 1872125 (Bankr. S.D. Fla.), Chief Judge Hyman held that "Debtors who owe more on their homes than the home is worth do not receive any benefit from the homestead exemption in the bankruptcy context because there simply is no equity to protect from creditors." *Id.* at 7. Chief Judge Hyman noted the statute does not state that the statutory personal property exemption is unavailable to a debtor who owns a homestead; rather it states that it is unavailable to a debtor who receives the benefits of a homestead exemption. *Id.*

Now, more recently, Bankruptcy Judge Raymond B. Ray of the Southern District of Florida, (Fort Lauderdale Division) issued an opinion which also attempts to interpret the meaning of the phrase "receive the benefits of a homestead exemption" in Fla. Stat. § 222.25(4). In *In re Archer*, 2009 WL 3169820 (Bankr. S. D. Fla.), Judge Ray more broadly interprets the statutory personal property exemption as compared to Chief Judge Hyman's holding in *In re Abbott*. In *In re Archer*, Judge Ray held that debtors who reaffirmed their mortgage, despite the fact that they had no equity, and continued living on the property while not claiming a homestead exemption in their chapter 7 bankruptcy schedules were ineligible for the increased personal property exemption under Fla. Stat. § 222.25(4). In *In re Archer*, the value of the debtors' mortgage exceeded that of their property. Accordingly,

Judge Ray found that the Trustee would likely abandon the property to the debtors and in the interim, the debtors would remain in the property without abandoning it. Therefore, since no action would have taken place under Florida law that would constitute an abandonment of the homestead, the debtors would have received the benefits of a homestead exemption and not be eligible for the statutory personal property exemption. *Id.*

In arriving at the *In re Archer* opinion, Judge Ray agreed with the court in *In re Franzese*, 383 B.R. 197, 206 (Bankr. M.D. Fla.2008), which held that in the context of Fla. Stat. § 222.25(4), the phrase "receive the benefits of" refers to the legal right or advantage the Florida Constitution confers upon a homestead owner, regardless of whether the owner actually relies on the privilege. To the contrary, in *In re Abbott*, Chief Judge Hyman agreed with other courts that drew meaning from the fact that the statute is written in the present tense and therefore the language of

the statute requires that the debtor presently receive benefits that derive from the constitutional exemption of the home from the reach of creditors.

Until such time as the appellate courts have the opportunity to flush out the meaning of "claim or receive the benefits of a homestead exemption" bankruptcy attorneys will have to take extra time to understand and explain to their clients the varying opinions that exist from the bankruptcy judges who have grappled with the application of Fla. Stat. § 22.25(4). Accordingly, potential debtors must be made aware of the risks involved with claiming the additional \$4,000 personal property exemption if they do not claim a homestead exemption and yet continue to reside in their home, regardless of whether the home has equity or not.

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



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A Trial Court May Award Attorney's Fees and Costs to be Paid from the Estate Against a Beneficiary's Portion of the Estate Only for Bad Faith, Wrongdoing, or Frivolous Litigation

By David M. Garten, Esq.

Sec. 733.106(4), Fla. Stat. reads:
When costs and attorney's fees are to be paid from the estate, *the court may direct from what part of the estate they shall be paid.* [Emphasis added]

In In re Estate of Lane, 562 So. 2d 352 (Fla. 4th DCA 1990), the court held that before the trial court may assess fees against a beneficiary's share of an estate pursuant to §733.106(4), there must be a finding of bad faith or wrongdoing by the beneficiary which would warrant such an assessment.

Additionally, §733.6175(2), Fla. Stat. reads:

Court proceedings to determine reasonable compensation of the personal representative or any person employed by the personal representative, if required, are a part of the estate administration process, and the costs, including attorneys' fees, of the person assuming the burden of proof of propriety of the employment and reasonableness of the compensation shall be determined by the court and paid from the assets of the estate unless the court finds the requested compensation to be substantially unreasonable.

The court shall direct from which part of the estate the compensation shall be paid. [Emphasis added]

In Geary v. Butzel Long, 13 So. 3d 149 (Fla. 4th DCA 2009), the court expanded the holding in Estate of Lane and held that before the trial court may assess fees against a beneficiary's share of an estate pursuant to §733.6175(2), there must be a finding of bad faith, wrongdoing, or *frivolous litigation* by the beneficiary which would warrant such an assessment.

"Frivolous" is defined as "of little weight or importance; having no basis in law or fact; light, slight, sham, irrelevant, superficial." See Allen v. Estate of Dutton, 384 So. 2d 171 (Fla. 5th DCA 1980), citing Webster's Third New International Dictionary (1976). A frivolous claim is "one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed" [Wiggins v. Southern Management Corp., 629 So. 2d 1022 (Fla. 4th DCA 1993)], or the action is "so clearly devoid of merit, both on the facts and the law, as to be completely untenable". [United Cos. Fin. Corp. v. Hughes, 460 So. 2d 585 (Fla. 2d DCA 1984)]. "A frivolous argument is one which is so devoid of merit that it can be determined without argument or research." See Smalbein v. Volusia County Sch. Bd., 801 So. 2d 169 (Fla. 5th DCA 2001), footnote 3.

Query, does the same rule apply to trusts? Refer to §§736.1004(2), 736.1005(2), 736.1006(2), and 736.1007(9), Fla. Stat.



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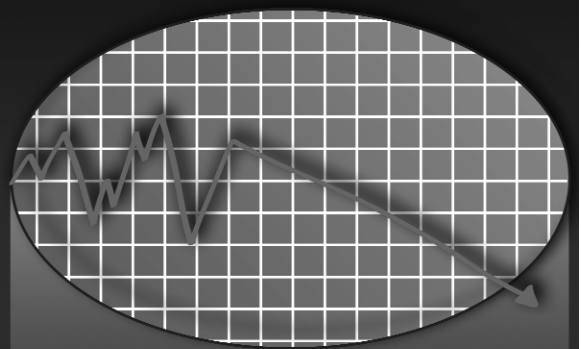
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Young Lawyers Past President's Party



The YLS recently held a reception honoring immediate past president John Whittles to thank him for his year as president. John is pictured to the left with current YLS President Theo Kypreos who presented him with a plaque with pictures from his year as president.



Judge Don Hafele, Rachael Johnson, Tanya Reed, Telsula Morgan and Judge James Martz



Liz and Ron Herman and Julia Wyda



Melissa Devlin, Bill Lazarchick, Miles McGrane, Carina Leeson and Lindsay Demmery



Joe Galardi, Cary Sabol and Patti Leonard



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2009 Diversity Summit Report — Where Do We Go From Here?

By John Howe

In September, the Palm Beach County Bar Association hosted its inaugural Diversity Summit ("Summit"). While by all accounts, the Summit was well-attended and a success, the crowd of attendees was very "diverse". To anyone in attendance who did not know otherwise, it would have appeared that the legal community in Palm Beach County reflects the diversity of the local population. But, in fact, that could not be further from being true.

After the luncheon portion of the Summit, there was a "town hall" style discussion which was attended by about one half of those who attended the luncheon. During the discussion, some statistical figures were presented to the audience that painted the true picture of where Palm Beach County's legal community stands in the area of diversity. Florida Bar figures this year for the 15th Circuit on the gender and ethnic make-up of the 6,055 active lawyers, reflect 34% are female, 66% are male, 3% African-American, 1% Asian/Pacific Islander, 90% Caucasian, 5% Hispanic and 1% Other.

Only when compared against the demographic composition of the local community, can one get a true understanding of degree to which diversity is lacking in our local legal community. The raw data from the Florida Bar placed side by side with data from the U.S. Census for Palm Beach County for 2008 is as follows:

15th Circuit Attorneys	2008 U.S. Census Data
Female:.....34%	Female:.....51%
Male.....66%	Male.....49%
African-American.....3%	African-American.....17%
Asian/Pacific Islander:..1%	Asian/Pacific Islander:2%
White/Non-Hispanic:..90%	White/Non-Hispanic:63%
Hispanic:.....5%	Hispanic:.....18%
Other:.....1%	Other:.....1%

The purpose for presenting this data was to underscore why the issue of the lack diversity is one that is still very much alive, relevant, and deserving of our attention. While a handful of managing-level partners of firms stayed for the town hall discussion, the audience to which this data was presented was largely comprised of minority lawyers. It is important to point this out, because over many years of seeing diversity initiatives come and go, this is how they usually start out: a big event (usually called a summit, symposium, etc.), an audience (mostly minority, disabled, gay, lesbian and cross-gender people in attendance) and a long discussion about how to address the issue. Conspicuously absent are usually the decision-makers at law firms, corporations and government agencies who are in a position to bring about change. After the big event, everyone goes their separate ways, and the issue is not addressed again until the next big event with the same people from prior big events discussing the issue. That is why we are here now. Albert Einstein defined insanity as doing the same thing repeatedly but expecting a different result. So, how do we avoid the "big event" trap?

While the Summit was a great start, it was only that — a start. The real important post-summit question is: Where to do we go from here? I readily admit that we do not have all of the answers, but that is not the biggest impediment to progressing toward diversity. The biggest impediment to this and any other diversity effort is not having a mechanism in place that requires the issue to be actively addressed. In recognition of this fact, at the PBCBA's October board meeting, I proposed, and the Board voted to approve, an amendment to the Association's bylaws. The amendment establishes a standing committee dedicated to achieving diversity in our legal community. This bylaw amendment not only mandates the existence of the committee, but also mandates that a member of the Board serve as co-chair and report on the committee's activities at each board meeting.

Why is this amendment significant or necessary? Its significance rests on the fact that prior to this time, there has never been any requirement that the PBCBA, as a body, pay any attention to the issue of the lack of diversity. True, for many years there has been a Diversity and Gender Sensitivity Committee, and an Anti-Discrimination Policy was enacted in 2007. However, the committee was never something that was mandated to exist and could have been dissolved at any time. Furthermore, while the committee has always been chaired by dedicated

people, nothing required the Association's leadership to place any focus or to be informed on issues of diversity. Furthermore, the Anti-Discrimination policy does nothing to actively promote and encourage its membership to recognize the need for inclusion.

For the first time in its history, the issue of diversity and inclusion will be a part of the very fabric of the PBCBA. Whether it is addressed will no longer be subject to the whims of change. This bylaws amendment is not only designed to send a message that the PBCBA is truly committed to inclusion, but it is absolutely essential if we are to ever advance toward diversity. While the PBCBA cannot, nor seeks to, exert control over any other organization's practices related to diversity and inclusion, it can certainly promote the issue and ensure that will not again be pushed aside. Most importantly, for those on sidelines with the notion that the Summit represents only another shooting star for diversity in Palm Beach County's legal community, we would invite you to take a stand for diversity and vote in favor of the amendment to advance us toward becoming a more diverse bar.



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The Palm Beach County Bar Association's Alternative Dispute Resolution Committee Presents:



"ADR in 2010—The Challenges of a New Decade"

Monday, February 8, 2010 8:30a.m. – 5:00p.m.
Bar Association Offices
1601 Belvedere Road, #302E, West Palm Beach, FL



Program Schedule

8:00a.m. – 8:30a.m.	Late Registration/Check In
8:30a.m. – 8:45a.m.	Welcome & Opening Remarks - <i>W. Jay Hunston, Jr., Esq., Committee Chair</i>
8:45a.m. – 9:15a.m.	Rights - Who Has What Rights in Mediation? - <i>Dr. Bernard H. Shulman, Esq., Associated with Alternative Resolution Consultants</i>
9:15a.m. – 10:00a.m.	ADR Ethics: Recent Case Law & MEAC Update - <i>W. Jay Hunston, Jr., Esq., Board Certified Civil Trial, Committee Chair</i>
10:00a.m. – 10:15a.m.	BREAK
10:15a.m. – 10:45a.m.	Creative ADR - Functioning Outside the Box - <i>Steven A. Stinson, Esq., Stinson Alternative Dispute Resolution LLC</i>
10:45a.m. – 11:15a.m.	Civility Matters - <i>Charles D. Damsel, Esq., Board Certified Civil Trial</i>
11:15a.m. – 11:45a.m.	The Psychology of Impasse In Negotiations and Mediations - <i>Catherine S. Eaton, Esq.</i>
11:45p.m. – 12:45p.m.	LUNCH - Sponsored By: Sonneborn, Rutter, Cooney & Klingensmith, P.A.
12:45p.m. – 1:45p.m.	What Are the Boundaries for Deception in Mediation? - <i>Robin Caral Shaw, Esq., Moyle, Flanigan, Katz, Breton, White & Krasker, P.A., and Amy Wolsky, Esq.</i>
1:45p.m. – 2:45p.m.	Ethical Dilemmas in Dispute Resolution Practice - <i>Panel Discussion</i>
2:45p.m. – 3:00p.m.	BREAK
3:00p.m. – 3:15p.m.	Mandatory Real Estate Foreclosure Mediation - Where Are We Today? - <i>W. Jay Hunston, Jr., Esq., Board Certified Civil Trial, Committee Chair</i>
3:15p.m. – 3:50p.m.	R/E Foreclosure Mediation - the Debtor's Perspective - <i>James A. Bonfiglio, Esq.</i>
3:50p.m. – 4:25p.m.	R/E Foreclosure Mediation - the Lender's Perspective - <i>Roy A. Diaz, Esq., Smith Hiatt & Diaz, P.A.</i>
4:25p.m. – 5:00p.m.	R/E Foreclosure Mediation - Challenges for the Future! - <i>Panel Discussion</i>

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The cost of the seminar is **\$200 for PBCBA members/paralegals; \$240 for non-PBCBA members/paralegals** if registered by 2/1/10; 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**

"This course is eligible for up to 8.0 CME hours including 2.0 Ethics credit. Mediators are required to self report those hours applicable to their areas of certification at the time of their renewal. For more info on the CME requirement, visit, www.flcourts.org, select Alternative Dispute Resolution/Mediation."

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___I will not be able to attend the seminar but would like to order the CD (allow 2 weeks for delivery) (2/08/10 ADR) Cost is the same as listed above, in addition to \$10 for shipping & handling.

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HEARSAY



William C. Wright has joined the consumer justice law firm of Leopold ~ Kuvin, P.A. Mr. Wright specializes in consumer, antitrust and securities class-action litigation and will be heading up the firm's class-action practice.



Nellie L. King has been elected Vice President of the Florida Association of Criminal Defense Lawyers. Ms. King has also been elected to the Board of Directors of Father Flanagan's

Boys Town Florida, an organization dedicated to providing services to struggling children and families.

MISCELLANEOUS

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From Page 4

1. J. Richard Harris, 2. Lane Matthews,
3. Richard Holt, 4. Wally McCall,
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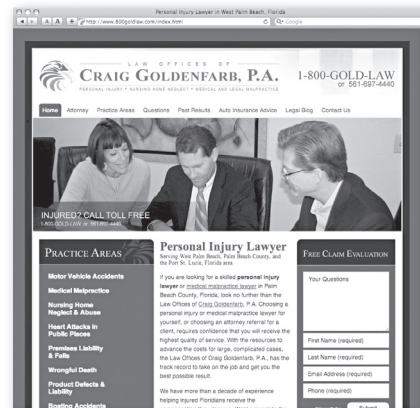
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CALENDAR

December 2009

Wednesday, December 2,
6:00pm
SPBCBA 2009 Holiday Party
Ruth's Chris Steakhouse,
225 NE Mizner Blvd.,
Boca Raton

Thursday, December 3,
11:30am – 1:00pm
Solo Luncheon
Bar Association Office

Friday, December 4,
8:30am – 9:30am
ADR Committee Meeting
Bar Association Office

Friday, December 4,
11:00am – 2:00pm
FAWL Barnes & Noble Event
City Place

Friday, December 4,
11:30am – 5:00pm
Appellate Law Seminar
Boca Raton Marriott

Friday, December 4,
11:30 am – 1:00pm
Solo Luncheon
Bar Association Office

Tuesday, December 8,
12:00pm – 1:00pm
YLS Board Meeting
Bar Association Office

Tuesday, December 8, 2009,
6:30 p.m. to 8:30 p.m.
**Christian Legal Society
Women's Gathering**
Panera Bread, 771 Village
Blvd, West Palm Beach

Tuesday, December 8,
7:00pm
Palm Beach Justice
Association Dinner

Wednesday, December 9 – 12
**The Florida Bar
Board of Governors**
Amelia Island

Thursday, December 10,
5:30pm – 8:00pm
**PBCBA Holiday Party &
Silent Auction**
Frenchman's Reserve

Friday, December 11,
11:30am – 1:00pm
Technology Seminar
Bar Association Office

Friday, December 11,
12:00pm – 1:00pm
**BBC Worker's Comp.
Practice Committee
Meeting**
Duffy's on Okeechobee Blvd.

Monday, December 14,
12:00pm – 1:00pm
**Bench Bar
Conference Meeting**
Bar Association Office

Monday, December 14,
5:00pm
**PBCBA Board of Director's
Meeting**

Tuesday, December 15,
8:25am – 2:00pm
**Elder Law Seminar
"Special Needs Trust"**
Bar Association Office

Wednesday, December 16
**TFB Videotaped Seminar
"Basic Commercial
Litigation"**
Bar Association Office