



PALM BEACH COUNTY BAR ASSOCIATION

BULLE^TIN

www.palmbeachbar.org

February 2016



Robert P. Watson, Ph.D. to speak at Bench Bar

Historian, author, political commentator, community leader

Just in time for President's Day and the upcoming presidential election, we are pleased to present Dr. Robert Watson

as our speaker for this year's Bench Bar Conference on February 19. Dr. Watson is an award-winning professor, analyst for numerous news outlets, and author who has published books on history and politics.

A widely quoted and much sought-after political commentator, Watson has been interviewed by media outlets around the country and world, including CNN, MSNBC, Fox News, *USA Today*, *The New York Times*, NPR and the BBC. He is also the long-time political analyst for WPTV 5 NBC.

Dr. Watson is active in an array of initiatives including organizing voter registration drives, providing civic education programs for schools, training newly elected public officials

and moderating political debates. He is the co-founder of three non-profits – Think Act Lead; The Florida Initiative for Electoral Reform; and The Rational Majority – dedicated to civic engagement, grassroots political reform, and fact-checking political ads. Together with his teenaged son, he hosts an annual writing contest for lower and middle school students called Let's Write Together.

Dr. Watson was born in Harrisburg, Pennsylvania, attended public schools in nearby Hershey, and was educated at Virginia Tech, where he was a member of the football and track teams. Robert and his wife reside in Boca Raton with their children. Watson is Professor of American Studies at Lynn University and Senior Fellow at the Florida Joint Center for Citizenship.



Members of the YLS Board and "Santo" Claus (YLS Board member Santo DiGangi) hosted a holiday party for 75 foster children. In addition to providing toys for the children, the party included pizza, cookies and singing. A very special thank you to the **WEST PALM BEACH MARRIOTT** for once again donating the space for us to host this party. For more photos, see page 4.

Mark your calendar for upcoming Membership Events

February 4:

North County Section
BBQ and Casino Night

February 12:

Joint Membership Luncheon with Forum
Club with Guest Speaker U.S. Supreme
Court Justice Stephen Breyer

February 19:

Bench Bar Conference

May 3:

Annual Judicial Reception

May 5:

Law Day Luncheon

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THE
BULLETIN

PALM BEACH COUNTY
BAR ASSOCIATION

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

LETTERS TO THE EDITOR

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



Send letters to:
EDITOR Bar Bulletin
Palm Beach County Bar Association
1507 Belvedere Road
West Palm Beach, FL 33406

Contributions sought for 2016 Law Week Judicial Reception

The Law Week Committee is requesting contributions from law firms for its annual Judicial Reception honoring the local judiciary and judicial assistants. The event will be held on Tuesday, May 3 at The Harriett in West Palm Beach. Sponsors will be recognized on email notices, on a sign at the reception and in the Bar Bulletin.

Those interested in making contributions should send a check no later than March 15 to the Palm Beach County Bar Association, ATT: Patience Burns, 1507 Belvedere Road, WPB, FL 33406. Sponsorship amount are as follows:

\$575 for law firms of 11 or more attorneys

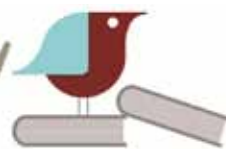
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\$225 for law firms with 1-2 attorneys

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The Profession of Presidents

by Grier Pressly

When President's Day is observed on February 15, all lawyers should celebrate the influence that our profession has had on the highest government office in our land. With apologies to Ohio and Virginia, it is the legal profession that is the true cradle of U.S. Presidents. It is simply astounding that 26 of 44 U.S. Presidents studied or practiced law before becoming president, including many of the most revered presidents in our nation's history – Adams, Jefferson, Lincoln, and FDR to name a few. At 16 former presidents, military officer (U.S. Army/U.S. Navy) is the next most common profession represented. And the dominance of the lawyer as nation leader is not unique to America. The majority of Canadian Prime Ministers have been lawyers. More lawyers have served as British Prime Minister than any other occupation profession. But it is the United States where the lawyer-statesman has thrived more than anywhere else in the world, and that trend is unlikely to change. In the 2016 presidential election, the Democratic nominee will almost certainly be a former lawyer, and two of the leading Republican candidates have law degrees. Both presidential candidates in the 2012 general election were lawyers.

Why is it that law has developed into the profession of presidents?

Is there a path-dependence explanation, by which the frequency of early lawyer-presidents bred later lawyer-presidents?

Is it because law schools are incubators of presidential minds, training scholars to think critically, to employ reason in analysis, to develop diligence and discipline, to digest and understand large volumes of complex and technical information, and to appreciate the importance of human relations, all necessary traits for the leader of the free world?

Is it the versatility of the law degree, and the fact that the practice of law often touches all three branches of government?

Could it be due to the fact that more so than any other profession lawyers possess the skills exhibited by the most effective political candidates for office – public speaking, debate, and the art of persuasion?

Is it because the legal profession naturally attracts and develops ethical leaders?

Perhaps it is because the "farm system" of the presidency is dominated by lawyers? More lawyers occupy the Governor's office and the U.S. Senate and House than any other profession.

Is it because the office of the president calls for the devotion to the principles of the rule of law and respect for the Constitution, principles that lawyers are sworn to uphold?

Maybe it has something to do with the flexibility of the profession and its appeal to those interested in a life in politics - the ability of lawyers to halt their practice to run for public office, to restart their practice when their time in public office is over, and to practice law part-time while serving in the legislature?

Could the answer even be traced back to the founding of our country? A majority of the signers of the Declaration of Independence and the framers of the Constitution were lawyers. These American icons have been role models for politicians for more than two centuries, and remain so today.

Whatever the explanation, we should be proud that our profession has generated more U.S. Presidents than any other single profession, and all Americans should appreciate what the legal profession has contributed to the preparation and effectiveness of our nation's leaders.

Bench Bar Conference: Friday, February 19. If you have not already done so, please register for the Bench Bar Conference. Space is limited. The registration deadline is February 12. We are once again expecting more than 1,000 registrants for the conference, and the participation of our judges is as strong as it has ever been. Bench Bar Co-Chairs, Kai Li Fouts and Poorad Razavi, and their hard working committee, have planned a program of practice based sessions that promises to be informative and worthwhile for all attendees. In recognition of President's Day earlier in the week, Dr. Robert Watson will be our lunchtime keynote speaker. Dr. Watson is a renowned expert on presidential politics, and his presentation will be timely as the presidential primaries heat up before our general election later in the year. As always, the recipients of the Bar's annual Judge Edward Rogers Diversity Award and Sidney A. Stubbs Professionalism Award will be honored during the lunch program. I look forward to seeing you at the conference on February 19!

Phone: (561)659-4040

E-mail: gpressly@presslyandpressly.com

Board Meeting Attendance

	AUG	SEPT	OCT	NOV	DEC
Barnes	X	X	X	X	X
Buck	X	X		X	X
Delgado	X		X	X	X
Huber	X	X	X	X	X
Kypreos	X	X	X	X	X
Mason	X	X	X	X	X
McElroy	X	X	X	X	X
Pressly	X	X	X	X	X
Reagan	X	X	X	X	X
Smith	X	X	X	X	X
Whittles	X	phone	X	X	X
Wyda	X	X	X	X	X
Xenick	X	X	phone	X	X

ADR in 2016 - Challenging Old Paradigms

Monday, February 8, 2016 - 8:00a.m. – 5:00pm.
Bar Association Offices, 1507 Belvedere Rd., WPB

8:00am – 8:30am **Late Registration/Check In**

8:30am – 8:40am **Welcome & Opening Remarks** - Theodore A. Deckert, Esq., Matrix Mediation, LLC; Certified Circuit Civil, Family and County Mediator; Florida Supreme Court Qualified Arbitrator; Committee Chair

8:40am – 10:10am **What do ADR Consumers Want? Q&A** - Moderated Panel of attorneys, Insurance adjustors, public and private risk managers will share what they want from ADR Professionals

Moderator: Theodore A. Deckert, Esq., Matrix Mediation LLC. **Panelists:** Plaintiff Attorney Jack Scarola, Esq. - Searcy, Denny, Scarola, Barnhart & Shipley, PA; Insurance Defense Attorney Gregory T. Anderson, Esq. - Anderson Mayfield Hagan & Thron, P.A.; Insurance Adjustor Cindy M. Ruehl, CLA - Geico Insurance Company; Risk Manager Julie Sassa - Palm Beach County School Board; Family Attorney Victoria A. Calebrese, Esq. - Victoria Calebrese PA; Commercial Litigation Attorney Patricia A. Leonard, Esq. - Shutts & Bowen, LLP; Corporate Counsel Gregory S. Tendrich, Esq. - Gregory Tendrich, PA

10:10am - 10:20am **Break**

10:20am – 11:10am **Arbitration Under Revised Ch. 682** - Donna Greenspan Solomon, Esq., Solomon Appeals, Mediation & Arbitration; Certified Circuit Civil, Appellate and Family Mediator; FL Supreme Court Qualified Arbitrator

11:10am – 12:00pm **ADR Case Law & Ethics Update (E)** - W. Jay Hunston, Jr., Esq., W. Jay Hunston, Jr., PA; Certified Circuit Civil, Appellate and Family Mediator; Florida Supreme Court Qualified Arbitrator

12:00pm - 12:40pm **Lunch topic/speaker: Effectively Using Social Media in Mediation Marketing** - David Steinfeld, Esq., Law office of David Steinfeld PL. *****LUNCH Sponsored by: Matrix Mediation, LLC*****

12:40pm – 1:30pm **Dealing with High Emotions in Mediation** - Psychologist Sheila Cohen Furr, Ph.D., A.B.N., Board Certified in Clinical Neuropsychology by the American Board of Professional Neuropsychology; Certified Family Mediator

1:30pm – 2:20pm **What??? DV in Non-Family Law Cases???. (DV)** - Robin Caral Shaw, Esq., Robin Caral Shaw, PA; Certified Circuit Civil, Family and Appellate Mediator; Amy S. Wolsky, Esq., Amy S. Wolsky Mediations; Certified Circuit Civil, Family, Appellate and County Mediator

2:20pm - 3:10pm **"It's Legal Now, But Not That Simple. LGBT ADR Issues Under Current Law"(CD)** - Elizabeth F. Schwartz, Esq., Elizabeth F. Schwartz PA; Certified Family Mediator

3:10pm – 3:20pm **BREAK**

3:20pm – 5:00pm **Challenges of Mediating Outside The Box But Inside the Ethics Rules Q&A (E)** - Interactive discussion between attendees and panel of experienced mediators

Moderator: W. Jay Hunston, Jr., Esq., W. Jay Hunston, Jr., PA. **Panelists:** Rodney G. Romano, Esq., Matrix Mediation LLC; Certified Circuit Civil Mediator; Jeffrey Grubman, Esq., JAMS; Certified Circuit Civil Mediator; Kim Nutter, Esq., Brinkley Morgan; Certified Family Mediator; R. William Rutter, Jr., Esq., Sonneborn Rutter Cooney & Smith PA; Certified Circuit Civil Mediator

This course has been granted **9.5 CLER including 3.0 Ethics credits from The Florida Bar**. Early registration cost is **\$260** for PBCBA members/paralegals; **\$310** for non-PBCBA members/paralegals if registered by 2/1/16; add \$25 late 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 8.5 CME hours. 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."

____ 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.

Register by check or credit card (For security purposes, you must register online at www.palmbeachbar.org. If you can't leave the office, you can attend via live webinar by registering at <http://www.palmbeachbar.org>

Name: _____ Telephone #: _____

Address: _____ Email Address: _____

____ I will not be able to attend the seminar but would like to order the CD (allow 4 weeks for delivery) (2/8/16 ADR) Cost is the same as listed above, in addition to \$10 for shipping and handling. **PAYMENT BY CHECK ONLY, WITH THIS FORM.** PBCBA, 1507 Belvedere Road, West Palm Beach, 33406

Holiday Party Highlights

Our annual Holiday Party was held at Frenchman's Reserve Country Club in Palm Beach Gardens where 400 of our members enjoyed an evening of cocktails, conversation and the opportunity to shop for nearly 200 great items at bargain prices in our silent auction. And best of all, one hundred percent of the proceeds benefit charities including our Young Lawyers holiday party for 75 foster children.



PBCBA President Grier Pressly, Judge Laura Johnson, Catherine Royce and Jerry Beer



Mandell Sundarsingh and Leanna Lalla



Lynn Whitfield and Gloretta Hall



Patricia Christiansen, Judge Meenu Sasser and Jeanmarie Whalen



Michael Napoleone, Amanda Keller and Todd Stewart



Ellen Malasky, Michael Kranz, Tanique Lee, and Chase Nugent



Lindsay Warner, a North County Section Board member and talented artist, painted and donated this lady bug picture for the auction. Thank you, Lindsay!



Patricia Allen and Bruce Harris placing their bids



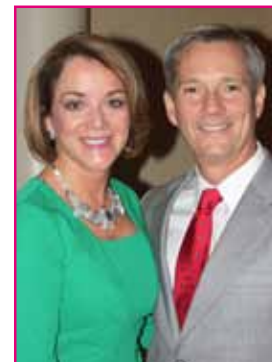
Joanne O'Connor and Ret. Judge Lucy Brown



Judge Peter Blanc and Juliana Blanc



Michael Hyman, Sherry Hyman and Greg Barnhart



Judge Krista Marx and Judge Joseph Marx

Communication with Represented Persons

by Alan St. Louis, on Behalf of the Professionalism Committee



Many of us may recall from law school that under the Rules of Professional Conduct, a lawyer is prohibited from discussing the subject of the representation with an individual who is represented by counsel unless the individual's lawyer has consented. Fla. R. Prof. Cond. 4-4.2(a). This has been referred to as the rule against ex parte communication with a represented person and it serves the purpose of protecting the public from "improper approaches" by adverse lawyers in a matter. See *Reynoso v. Greynolds Park Manor, Inc.*, 659 So. 2d 1156, 1159 (Fla. 3d DCA 1995). Nonetheless, the rule may still be misunderstood or even violated as I have witnessed on a couple occasions.

In both instances, the fact pattern was similar. In the first case, opposing counsel grew frustrated with how a lawsuit was unfolding. He sent a letter addressed to the adverse party, as well as its counsel, setting forth various factual and legal arguments pertaining to his position on the dispute. He also made disparaging comments about the lawyer of the represented party.

In the second case, the opposing counsel sent a letter to the adverse lawyer requesting production of insurance policies. However, the letter was also mailed to the adverse client as a "courtesy copy."

As a practical matter, the aforementioned represented persons would have received the communication if their respective counsel desired to convey it. However, the opposing counsel took it upon themselves to bypass this process and personally deliver the correspondence; either due to a perceived strategical advantage or belief that this was permissible under the professional rules. Upon initial discussion, the adverse counsel implied that there was no harm because the lawyer of the represented person was copied on the communication. In this regard, the question is whether consent arises simply by including the lawyer on the communication.

In *The Florida Bar v. Nunes*, the Supreme Court of Florida addressed a lawyer's communication in the context of Rule 4-4.2(a). The respondent-lawyer had sent a letter to the adverse counsel criticizing the latter's handling of a foreclosure matter and copied the recipient-counsel's client. So. 2d 1202 (Fla. 1995). The court determined that this communication with the represented client was without consent under the rule and, due to the violation, imposed a public reprimand and 10-day suspension. *Id.* at 1203-04.

The *Nunes* decision is notable for several reasons. First, it conveys that unilaterally including the lawyer of a represented person is insufficient to establish consent to communicate with the represented person. Second, the decision shows that the rule may be violated even if the communication is not technically addressed to the represented person when he or she is included in the communication without permission.

The above holding conforms to the commentary within the rule which expresses that it was designed to safeguard persons, who have elected to be represented by a lawyer, from "overreaching" as well as the "uncounseled disclosure of information." Fla. R. Prof. Cond. 4-4.2 (comment). Upon returning to the question set forth above, it is apparent that consent cannot arise in this context simply by including the lawyer of a represented person in communication. Instead, the consent must be expressly provided beforehand.

In addressing the initial two fact patterns, it appears the rule was violated in both instances. In the first case, consent was not created simply by including the representing lawyer on the correspondence. Similarly, in the second case, there was no consent to copy the represented person on the letter simply because the correspondence was addressed to its counsel. The authoring attorneys engaged in overreaching apparently for self-serving reasons. Moreover, they interfered with the represented persons' right to receive information by, and through, counsel and in an appropriate context. Should you ever encounter a circumstance where this rule is violated, it would be prudent to inform the offending lawyer of the applicable rule in writing and warn against any further unauthorized communication.

Alan St. Louis is an associate with Cole, Scott & Kissane, P.A. where his practice includes civil defense in the areas of legal and professional malpractice, business litigation, real estate, premises liability, and other commercial litigation. Alan has been practicing law in Palm Beach County for over 6 years.



W. Jay Hunston, Jr.

Mediator/Arbitrator/Special Master

Since 2001, limiting his practice to all forms of effective dispute resolution, including mediation, arbitration, special master, and private judging services.

- J.D., Stetson Univ. College of Law
- Fla. Bar Bd. Cert. Civil Trial Lawyer, 1983 - 2003
- Fla. Cert. Circuit Civil, Appellate & Family Mediator
- Member, AAA Roster of Neutrals for Commercial and Construction Arbitration & Mediation
- Qualified Fla. Arbitrator
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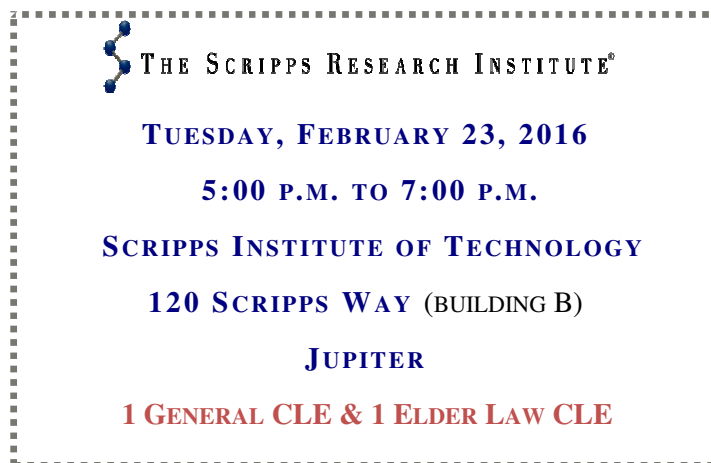
ARE YOUR CLIENTS COMPETENT TO SIGN THAT WILL, TRUST OR CONTRACT?

THE EFFECTS OF ALZHEIMER'S AND DIMINISHED CAPACITY ON OUR CLIENTS

Members of our **North County Section** are invited to a special presentation featuring Dr. Ronald Davis, Founding Chair of Neuroscience at The Scripps Research Institute in Jupiter. Learn about exciting research taking place in our own backyard! Meet Dr. Davis, along with other local scientists, during our cocktail reception, plus pick up 2 CLE credits! Space limited. RSVP today!



Dr. Ronald Davis, Founding Chair
Neuroscience - Scripps Institute



RONALD DAVIS is one of the nation's leading experts on the molecular biology of learning and memory. He completed his doctorate in genetics at the University of California, Davis, in 1980. As a postdoctoral Fellow with Norman Davidson at the California Institute of Technology, he began to use molecular biological tools to approach the problem of learning and memory. His basic research has broad implications for many psychiatric and neurological diseases, including schizophrenia, autism, Alzheimer's disease, attention deficit hyperactivity disorder and mood disorders. He has received numerous awards for his pioneering research, including the prestigious Jacob Javits Award.

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- NCS Member Price: \$20.00 includes cocktail reception & CLE credit
- Judges are complimentary: - 0 -
- Non section members and spouses are welcome for \$30.00

Legal Aid and Brooks Brothers' Annual Holiday Event Benefits Children's Programs

In November, 175 young professional friends of the Legal Aid Society of Palm Beach County enjoyed festive drinks, hors d'oeuvres, and shopping at Brooks Brothers in the Gardens Mall. This annual event, now in its 11th year, benefits Legal Aid's Children's Advocacy projects which provide critical legal services to abused, neglected, abandoned, disabled, and foster children in Palm Beach County through its Foster Children, Juvenile Advocacy, Education Advocacy, Relative Caregivers, and Children's Health and Immigration Programs.



Patricia Leonard, Ellen Malasky, Jill Weiss, Michelle Suskauer, Amy Devore, and Sarah Cortvriend



Kristy and Grier Pressly

Upcoming CLE Seminars:

Your CLE Committee Chairs have been very busy at work planning live CLE seminars for our membership for this year. For more information about these seminars, please visit the Bar's website: palmbeachbar.org and click on the calendar icon at the bottom of the page. Also, don't forget, most of these seminars are also held live via webinar if you are not able to leave your office to attend in person.



February 11:
Judicial Lunch: Technology

February 23:
Scripps Institute CLE and Mixer

February 24:
Judicial Lunch: Judicial Assistants/Legal Assistants

February 25:
Personal Injury: Medical School for Lawyers

March 3:
Business Litigation: Pre-Trial Issues

March 4:
Appellate Practice in the Electronic Age

March 9:
Solo and Small Firm: Business School for Lawyers CLE and Networking Reception

March 10:
Estate and Probate

March 11:
Family: Agreements

March 30:
Judicial Lunch: Evidence

April 7:
Securities

April 11:
Business Litigation

April 15:
Workers' Compensation

April 20:
HIPPA, HITECH and DATA Security Lunch and Learn

April 21:
Elder Law: View from the Bench

April 22:
Local Rule 7.1, Local Rule 4 and Successful UMC Practice – Lunch and Learn

April 29:
Employment Law: ADA (Federal and Florida law)

May 17:
Real Estate

May 18:
Privacy and Security for Law Firms

May 19:
Business Litigation

May 20:
27th Annual Community Association Law

May 25:
Technology and ESI Discovery

May 26:
Judicial Lunch: Bias Discovery

June 2:
Appellate: Best Practices

June 23
Judicial Lunch: Professional Decorum

Don't forget to use the PBCBA's Diversity Placement Database when seeking to hire attorneys for your firm.

Go to the Bar's website and click on the diversity tab.

**HELP
WANTED?**



Malicious Prosecution and the Litigation Privilege

by Ted Babbitt

The litigation privilege is an absolute privilege which protects attorneys and litigants because of wrongful acts taken in the course of and relating to litigation in Florida. It was first recognized in Florida in 1907 in *Myers v Hodges*, 44 So. 357 (Fla. 1907). It was extended in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606 (Fla. 1994) beyond defamatory statements of slander or libel. In *Levin* at 608 the Supreme Court held:

We find that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding... Participants [must] be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.

The Florida Supreme Court extended the privilege in *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380 (Fla. 2007) when it declared at 384:

The litigation privilege applies across the board to actions in Florida, both to common-law causes of action, those initiated pursuant to a statute or of some other origin.

In *Wolfe v Foreman*, 128 So. 3d 67 (Fla. 3rd DCA 2013) the issue was whether the litigation privilege applied to the filing of a cause of action based on a claim of malicious prosecution. In essence the question was whether the filing of the allegedly malicious complaint was itself protected by the litigation privilege. Since the basis of malicious prosecution is the malicious filing of a lawsuit without probable cause, a holding that such a filing was absolutely privileged would bar all causes of action for malicious prosecution in Florida. In *Wolfe*, supra, at 70, the Third District concluded that the malicious filing of a complaint was, indeed, protected by the litigation privilege even if that effectively barred all actions for malicious prosecution in Florida. The Court held:

Because the Florida Supreme Court has clearly and unambiguously stated, not once, but twice, that the litigation privilege applies to **all** causes of actions, and specifically articulated that its rationale for applying the privilege so broadly was to permit the participants to be “free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct,” we are obligated to conclude that the act complained of here – the filing of the complaint – is protected by the litigation privilege. Thus, the trial court properly granted a judgment on the pleadings for Wolfe’s cause of action against the Miami Lawyers for malicious prosecution.

In *Fisher v. Debrincat*, 169 So. 3d 1204 (Fla. Fourth DCA 2015) the Fourth District Court of Appeals refused to follow *Wolfe*, supra, and held that a malicious prosecution action was not barred by the litigation privilege. At 1207, the Fourth District held:

In our view, *Wolfe* went too far in its application of the litigation privilege. Because the commencement

or continuation of an original criminal or civil judicial proceeding is an act “occurring during the course of a judicial proceeding,” and having “some relation to the proceeding,” malicious prosecution could never be established if causing the commencement or continuation of an original proceeding against the plaintiff were afforded absolute immunity under the litigation privilege. If the litigation privilege could apply to bar a malicious prosecution action, this would mean that the tort of malicious prosecution would be effectively abolished in Florida – or, at the very least, eviscerated beyond recognition.

The Fourth District cited a similar case in the Fifth District, *Wright v Yurko*, 446 So. 2d 1162 (Fla. 5th DCA 1984) as well as the Second District holding in *Olson v. Johnson*, 961 So. 2d 356 (Fla. 2nd DCA 2007).

In refusing to follow the Third District’s opinion in *Wolfe*, supra, the Fourth District in *Fisher*, supra, makes a compelling argument that the Supreme Court’s broad language in *Levin*, supra, was not intended to essentially eliminate malicious prosecution cases in Florida. At 1208, the Fourth District holds:

As a practical matter, such a broad application of the litigation privilege would mean that a malicious prosecution would rarely, if ever, be actionable. Indeed, it is difficult to envision how a malicious prosecution claim would ever be actionable where the original proceeding was a civil lawsuit.

The Florida Supreme Court has declared that it “does not intentionally overrule itself sub silentio.” *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). If the litigation privilege could be applied to bar a malicious prosecution action, this would mean that the Florida Supreme Court silently eviscerated the longstanding common law tort of malicious prosecution. Had the Florida Supreme Court truly meant for the litigation privilege to immunize conduct that would otherwise constitute malicious prosecution under the common law, one would have expected the court to say so explicitly.

Commencement or continuation of an original judicial proceeding is an element of malicious prosecution, a longstanding tort with ancient roots. It is unfathomable that the Florida Supreme Court intended to cloak the commencement or continuation of a judicial proceeding with absolute immunity when such conduct occurs as an element of the tort of malicious prosecution.

The Fourth District in *Rivernider v. Meyer*, 174 So. 3d 602 (Fla. Fourth DCA 2015) and in *Edwards v Epstein and Rothstein*, 40 Fla. L. Weekly D2550 (Fla. 4th DCA Nov. 12, 2015) reaffirmed its holding in *Fischer*, supra, and has now three times certified conflict with *Wolfe* to the Florida Supreme Court.

Three out of the five District Courts have refused to follow the Third District’s opinion in *Wolfe*, supra, which essentially eliminated the tort of malicious prosecution in Florida on the basis of the litigation privilege. While the ultimate decision rests with the Supreme Court, it is unlikely *Wolfe* will stand.



Medical School for Lawyers

Thursday, February 25, 8:15 a.m. – 5:00 p.m.
PBCBA - 1507 Belvedere Road, WPB, FL 33406



- 8:15am - 8:40am **Late registration / Check in / Breakfast**
- 8:40am - 8:50am **WELCOME, Introduction of Program Committee, and Opening Remarks** - Timothy Murphy, Esq., Personal Injury of Florida and Matthew Lane, Esq., Matthew Lane and Associates, PI/Wrongful Death Co-Chairpersons
- 8:50am - 9:40am **Diagnostic Testing, MRIs of Cervical and Lumbar - How to read and what to look for**
Speaker TBA
- 9:40am - 10:30am **TBI - Symptoms to look for. Diagnostics/Treatment** - Andrew Walker, M.D., Beaches Open MRI, LLC
- 10:30am - 10:40am **BREAK**
- 10:40am - 11:30pm **Non-Invasive Procedures and Enriched Platelet Therapy** - Lawrence S. Gorfine, M.D., Palm Beach Spine Diagnostics Institute
- 11:30pm - 12:20pm **Spine Injury and Surgery** - Alexander N. Leonard, M.D., Orthopaedic Care Specialists
- 12:20pm - 1:20pm **LUNCH** (provided)
- 1:20pm - 2:10pm **Lower extremities, Common Trauma Injuries, Affected Anatomy/Treatment** - Joseph B. Chalal, M.D., Performance Orthopedics
- 2:10pm - 3:00pm **Upper Extremities, Common Trauma Injuries and Affected Anatomy/Treatment**
Rajen Nadioo, MD, Orthopedic Special Surgery of the Palm Beaches
- 3:00pm - 3:10pm **BREAK**
- 3:10pm - 4:00pm **Life Care Plans - What they Are, How They Work and Separating the Wheat from the Chaf** - Craig H. Lichtblau, M.D.
- 4:00pm - 5:00pm **Happy Hour**

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Holy Revival! Reviving The Decedent's Former Will

by David M. Garten

"The revocation by the testator of a will that revokes a former will shall not revive the former will, even though the former will is in existence at the date of the revocation of the subsequent will." *See*, §732.508(1), F.S. However, if the testator's current will fails for *lack of validity*, as opposed to a voluntary revocation, it will be presumed under the doctrine of dependent relative revocation ("DRR") that the revocation of the former will was conditioned on the validity of the current will. In other words, DRR creates a rebuttable presumption that the testator would have preferred to revive his earlier devises through his former will rather than let the property go by intestacy. *See*, *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So. 2d 1002 (Fla. 5th DCA 2005).

PARTIAL v. TOTAL INVALIDITY: If the execution of a will is procured by fraud, duress, mistake, or undue influence, the will *or any part so procured* is void, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons. *See*, §732.5165, F.S. For example, if the court finds that the revocation clause of the current will is valid but that the remainder of the will is invalid, the testator's property may go by intestacy.

SIMILARITIES BETWEEN WILLS: The application of DRR hinges, in part, on whether "the provisions of the current invalid will are sufficiently similar to the former will." In order to determine whether the presumption exists or is rebutted, the court must confine its inquiry to the testamentary documents before it without resort to extrinsic evidence. Hence, in order to determine the testator's presumed intent, the court must consider whether the provisions of the present invalid will are sufficiently similar to the former will. If the later revoked will is sufficiently similar to the former will, then the court can more easily indulge the presumption that the testator intended the revocation of the former will to be conditional on the validity of the later will and that the testator prefers the provisions of the former will over intestacy. *See*, *Wehrheim*, *supra*.

UNDUE INFLUENCE/EXTRINSIC EVIDENCE: However, in cases of undue influence, the court's inquiry is not confined to the four corners of the testamentary documents before it. The presumption of DRR only requires a showing of "broad similarity" between a decedent's current will and his former will; therefore, the probate court may consider any admissible, extrinsic evidence when measuring similarity for purposes of DRR's application. Extrinsic evidence may be essential in order to grasp the true testamentary intentions of a testator who has left multiple wills, some of which may or may not have been affected, to some degree, by another's undue influence. Without resort to extrinsic evidence, a proponent for the doctrine's presumption may have no viable means of

showing sufficient similarity between the tainted and untainted portions of testamentary documents and an adverse party would never have a way to rebut the presumption. Therefore, in cases involving undue influence, a probate court is not confined to the testamentary documents when determining whether the doctrine of dependent relative revocation should apply. Upon a finding of undue influence, a probate court may consider any relevant, admissible evidence to decide if the testator intended a will's revocation clause to be conditional upon the will's efficacy. *See*, *Rocke v. Am. Research Bureau (In re Estate of Murphy)*, 2015 Fla. App. LEXIS 16740 (Fla. 2nd DCA November 6, 2015).

BURDEN OF PROOF POST-DRR: When the presumption of DRR arises, the burden of proof shifts to the opponent of the presumption to show that the testator held an independent, unaffected intention to revoke his former will. *See*, *Rocke*, *supra*.

Elections for North County Section Board of Directors

Are you looking for a great opportunity to get involved with our Bar and network with colleagues? Then please consider a leadership position running for the Board of Directors of the North County Section.

The Section seeks six new members. Petitions for five Director seats, plus president-elect will be available starting on Tuesday, March 2.

The Board meets once a month to plan various networking events and programs for its members.

To be considered, you must submit a completed nomination form to the Bar Office no later than 5:00 p.m. on Thursday, March 31. If there is a contested election, voting will take place online in April and winners will be announced online in May.

The current Board includes President, Larry Buck; President-Elect, Rosemarie Guerini and Immediate Past President Greg Yaffa.

Directors serving terms ending June 2016 are Bettee Collister, Malinda Hayes, Wayne Richter, Larry Strauss and Kate Watson.

Directors serving a two year term expiring June 2017 include W Mason, David Steinfeld, Nick Johnson, Lindsay Warner and Greg Zele.

Contact Lynne for a petition form at lpoirier@palmbeachbar.org

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



Pre-Trial Issues in Business Litigation Cases



Thursday, March 3 - 8:00am - 12:00pm
PBCBA, 1507 Belvedere Road, W. Palm Beach

Program Schedule

- 8:00am - 8:25am **Late Registration / Check In / Breakfast**
- 8:25am - 8:30am **Welcome and Opening Remarks** - *Kent Frazer, Esq., Akerman; Business Litigation CLE Committee, Chair*
- 8:30am - 9:20am **Engagement and valuation: Who is Your Client and Does He/She/It Have Authority to Retain? Pros, Cons and Ethical Considerations of Hourly, Hybrid and Contingency Fee cases. Assessing damages or valuation based on nature of engagement. The Engagement Agreement: how to protect the lawyer and the firm.** *Brian S. Bull, Esq., Scott, Harris, Bryan & Jorgensen, P.A.; Board Certified in Business Litigation*
- 9:20am - 10:10am **Discovery and E-Discovery in Business Litigation Cases** - *David Steinfeld, Esq., Law Office of David Steinfeld, P.L.; Board Certified Business Litigation*
- 10:10am - 10:20am **BREAK**
- 10:20am - 12:00pm **Judicial Roundtable: View from the Bench and with Seasoned Business Trial Lawyers on Hot Topics in Business Litigation** - *Judges and attorneys TBA*

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This course has been granted **4.0 CLER and 1.0 Ethics credit, including 4.0 certification credits in Business Litigation** from The Florida Bar. Early registration cost for the seminar is \$115 for PBCBA members/paralegals, \$165 for non-PBCBA members/paralegals if registered by 2/25/16; Add \$15 to registration fee after that date.

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The U.S. Supreme Court's 2016 Abortion Case

by Christopher B. Hopkins

The U.S. Supreme Court granted cert in *Whole Women's Health v. Cole*. This 900-word essay braves to explain *Cole*, abortion law precedent, and how Justice Kennedy stands to decide the issue. A recent Seventh

Circuit opinion by Judge Posner (*Planned Parenthood of Wisc. v. Schimel*) may also play a role. Abortion cases are perhaps the best example of how the advancement of technology challenges our notions of privacy and complicates the application of *stare decisis*.

Let's begin with broad, risky predictions: the Court will not resolve the abortion debate nor will it overturn *Roe v. Wade*. What will happen? Several justices will write that the constitutional issues should not be reached due to lesser legal issues which stand in the way. Conservative justices will re-affirm their position that *Roe* was bad law and that *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883 (1992) was a failed, incomplete departure. But, since it granted cert in *Cole*, the Court is expected to reach the issue of whether a Texas law is an "undue burden" on the right to abortion. The Court will presumably split into equal teams of conservative and liberal justices, leaving Kennedy thrust into a judicial version of capture the flag.

Cole arises from a 2013 Texas law which requires doctors who perform abortions to have admitting privileges at a local hospital and that the outpatient center where the abortion is performed must meet ambulatory surgical center standards. While this sounds simple, medical complications during abortions are rare, the need for surgical sterility is misplaced, and there are non-medical (business) impediments to obtaining hospital privileges. In effect, the law forces 75% of abortion clinics in Texas to close. In *Cole*, the Supreme Court may clarify what is an "undue burden" and determine whether the judiciary must accept, on face value, a legislature's articulation of a valid state interest or whether the courts may examine if new restrictions actually further a valid interest.

The Supreme Court accepts abortion cases not to resolve the abortion debate but to remind the general population that there is, indeed, a relevant third branch of government which, like the other two, is fully capable of annoying the hell out of the people which it serves (paraphrasing Justice Scalia). Perhaps the Court's more sinister purpose is to test aging lawyers' memories with the elements of the rational-basis, intermediate, and strict scrutiny tests and to remind lawyers and scholars alike that reaching an intended outcome is often the sole criteria for determining which test applies.

The 1973 case of *Roe v. Wade* held that women have a fundamental right to abortion before viability and that a rigid trimester framework governs. Twenty years later, the Court made a massive shift towards emphasizing states' interest and the wide discretion granted to legislatures. In 1992, *Casey* confirmed the so-called "unbroken commitment by this Court to the essential holding of *Roe*" but then went on, after pages on *stare decisis*, to dismantle the trimester standard and to downshift from a strict

scrutiny to a revised rational basis test. *Casey* states that, "*Roe* did not declare an unqualified constitutional right to abortion [but rather] protects the woman from unduly burdensome interference." It is this "undue burden" standard which may control the outcome of *Cole*.

The Supreme Court has since applied *Casey* three times. In 1997, the Court held that a law requiring that only doctors perform abortions was not a "substantial obstacle to a woman seeking an abortion." Three years later, in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court held that a ban on "D&X" procedures was unconstitutional because there was no exception for the preservation of the health of the mother. In 2007, the Court in *Gonzalez v. Carhart*, 550 U.S. 124 (2007) considered an improved version of the *Stenberg* law and upheld it. In both *Stenberg* and *Carhart*, the Court considered medical evidence. *Carhart* specifically held that courts have, "an independent constitutional duty to review [a legislature's] factual findings..." That analysis of evidence may be important in deciding *Cole*.

In *Cole*, Texas claimed that it was protecting women's health by requiring admitting-privileges and requiring clinics to be equipped as surgical suites. Detractors, however, assert that there is no supporting medical evidence and that the outcome is an undue burden. The Fifth Circuit held that legislative bodies have wide discretion and that courts should not re-weigh evidence where there is scientific uncertainty. Just like climate change and gun control, advocates on both sides can always come forward with "evidence." In his November 2015 opinion, Judge Posner concluded that the claimed "uncertainty" about abortion procedures was overstated, if not biased, and that "an abortion-restricting statute sought to be justified on medical grounds requires... medical grounds [which] are valid..."

The shift in analysis from *Roe* to *Casey* was predicated, in part, on technological developments. In the post-*Casey* era, many courts are called upon to weigh medical evidence which is constantly advancing and, as some justices have pointed out, makes "viability" a difficult standard to fix. We will see how the Court rules this summer.

Christopher B. Hopkins is a member of McDonald Hopkins LLC. Deploy your best Scalia-esque screed to chopkins@mcdonaldhopkins.com.

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The Appellate Practice Committee of the Palm Beach County Bar Association
presents:

**“Appellate Practice in the Electronic Age:
Electronic Records, Clerk’s Office Procedures, and Privacy Rules”**
A panel discussion and question and answer session



Friday, March 4 - 11:30am - 1:00p.m.
PBCBA Offices - 1507 Belvedere Road, WPB



Program Schedule

11:30am - 11:55am **Lunch and Check-In**

11:55am - 12:00pm **Welcome - Opening Remarks** - Nichole J. Segal, Esq.,
Burlington & Rockenbach, P.A.

12:00pm - 1:00pm **Panel Discussion**

- * Lonn Wiessblum, Clerk, 4th District Court of Appeal
- * Judges from the 4th District Court of Appeal
- * Clerks from County Court

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YLS Holiday Party for Foster Kids



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YLS President Lou Delgado and "Santo" Claus DiGangi



Greg Salnick, Scott Perry and YLS Secretary Andrea Robinson



Judge Ed Artau and Colleen Farnsworth



One of the children thanked the attorney who bought his gift for him



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Real Property and Business Litigation Report



by *Manuel Farach*

Surloff v. Regions Bank, – So.3d – 2015 WL 7275207 (Fla. 4th DCA 2015).

A bank that communicates loan denial information to an applicant is not responsible for the applicant's suicide, notwithstanding the "Undertaker's Doctrine" and notwithstanding the bank knew the applicant's unstable mental

condition, as the bank has no special duty to the applicant and legal duty requires more than foreseeability alone.

Environ Towers I Condominium Association, Inc. v. Hokenstrom, – So.3d – 2015 WL 7273418 (Fla. 4th DCA 2015).

There can be more than one "prevailing party" for attorneys' fees purposes in litigation between a condominium association and a unit owner.

Infinity Home Care, L.L.C. v. Amedisys Holding, LLC, – So.3d – 2015 WL 7292837 (Fla. 4th DCA 2015).

Referral sources are a legitimate business interests subject to protection by covenants not to compete under Florida Statute section 542.335; conflict certified with Florida Hematology & Oncology v. Tummala, 927 So.2d 135 (Fla. 5th DCA 2006).

Udick v. Harbor Hills Development, L.P., – So.3d – 2015 WL 7302585 (Fla. 5th DCA 2015).

Homeowners bind all other homeowners under res judicata principles when they conclude a derivative action against an association.

Guzman v. Deutsche Bank Nat. Trust Co., – So.3d – 2015 WL 7568558 (Fla. 4th DCA 2015).

Standing is determined at time of filing suit, and an amended complaint does not relate back for standing purposes.

Mia Real Holdings, LLC v. Nolan, – So.3d – 2015 WL 7571468 (Fla. 4th DCA 2015).

An estimate prepared in anticipation of trial testimony is not a business record as it is not kept in the ordinary course of business.

Bank of New York v. Von Houtman, – So.3d – 2015 WL 7571489 (Fla. 4th DCA 2015).

A motion for attorneys' fees under Florida Rule of Appellate Procedure 9.100 (k) must be filed within twenty days after responding to a petition for original jurisdiction otherwise the claim for fees is waived.

Dyck-O'Neal, Inc. v. Duffy, – So.3d – 2015 WL 7750066 (Fla. 2d DCA 2015).

A trial court may decline to dismiss an action under Florida Statue 57.011 even though an out of state plaintiff fails to file a non-resident costs bond within twenty days after motion to dismiss is filed.

Mederi Caretenders Visiting Services Of Southeast Florida, LLC v. White, – So.3d – 2015 WL 7752751 (Fla. 4th DCA 2015).

The Fourth District reaffirms its holding in Infinity Home Care, L.L.C. v. Amedisys Holding, LLC, Case No. 4D14-

3872, slip op. (Fla. 4th DCA November 18, 2015), that referral sources are protected under Florida Statute section 542.335.

U.S. Bank, N.A. v. Grant, 2015 WL 7752864 (Fla. 4th DCA 2015).

A bank's mortgage lien takes priority over a later filed community association lien; the association lien does not relate back to the declaration of the community association unless the association declaration reflects it will have priority over later filed mortgage liens.

Mauro v. Wells Fargo Bank, N.A., – So.3d – 2015 WL 7752675 (Fla. 4th DCA 2015).

Returns of service are not excluded on hearsay grounds.

Transunion Risk and Alternative Data Solutions, Inc. v. Reilly, – So.3d – 2015 WL 7740421 (Fla. 4th DCA 2015).

Once a party enforcing a restrictive employment covenant shows it had a legitimate business interest covered by the covenant, it is entitled to a rebuttable presumption of irreparable injury and the employee must prove the absence of injury. Likewise, a continued breach of the covenant establishes an inadequate remedy at law, substantial likelihood on the merits, and the public interest in entering an injunction.

Daniel v. Morris, – So.3d – 2015 WL 7782828 (Fla. 5th DCA 2015).

A creditor has a non-delegable duty to ensure that self-help repossession does not breach the peace.

Akin Bay Company, LLC v. Von Kahle, – So.3d – 2015 WL 8345357 (Fla. 3d DCA 2015).

An assignee under Florida Statute section 727.104 (the Florida Assignment for Benefit of Creditors statutes) is bound by a mediation and arbitration clause in an assignor's agreement with a third-party.

Deutsche Bank National Trust Company on behalf of LSF MRA Pass-Through Trust v. Perez, – So.3d – 2015 WL 8347002 (Fla. 3d DCA 2015).

A witness listed in a general fashion is sufficient unless the party opposing the substitution of the general listed witness with a specific witness can demonstrate prejudice.

Ocwen Loan Servicing, LLC v. Delvar, – So.3d – 2015 WL 8347300 (Fla. 4th DCA 2015).

A purported oral modification of a mortgage cannot be enforced as it violates the Statute of Frauds, and the Statute of Frauds cannot be circumvented by claims of promissory estoppel.

Aboumahboub v. Honig, – So.3d – 2015 WL 8347628 (Fla. 4th DCA 2015).

Strict compliance with notice provisions is required for ex parte enforcement of defaults under settlement agreements.

Nikolits v. Neff, – So.3d – 2015 WL 8348320 (Fla. 4th DCA 2015).

A homeowner has a strict jurisdictional time limit under Florida Statute section 194.171(2) to appeal the valuation of their property, and this limitation cannot be circumvented by enveloping a challenge to last year's assessment in the challenge to the current year assessment.

Death of DOMA, Yet Still So Far to Go

by Nancy Ferraro

In August of last year, I was privileged to make a presentation to the Lavender Law Conference in New York City. Lavender Law is the nationwide bar association of the Lesbian, Bisexual, Gay and Transgender (the "LGBT") community. During the three day conference, the main discussions were centered around marriage equality. As it turned out, it was a big year for marriage equality. In January of this year, the Florida legislature approved the bill allowing same sex marriage, followed quickly by the United States Supreme Court ruling in *Obergefell v. Hodges*, 135 S. Ct. 2071, 191 L. Ed. 2d 953, 576 U.S. (2015), making marriage equality the national standard. However, there were many other troubling issues discussed at Lavender Law.

The concerns expressed by practitioners across the country included housing the transgender homeless, cyber bullying of LGBT teens, equal rights in schools and other places of public accommodation, and the gay panic defense, amongst others. It saddens me to think that we accept the *status quo*, what we perceive to be a civilized society, yet we still have to legislate respect for one another. How can we allow a defendant to plead 'gay panic' as a defense to overreacting to a perceived threat with exaggerated violence? How is it that teachers, whom we rely to safeguard our childrens' wellbeing, stand idle, and sometimes partake in the bullying of an openly gay student?

I believe, and I challenge you to consider, that the key to creating a more cohesive, understanding and less litigious society, is education, open dialogue, and setting an example of mutual respect and acceptance. These issues cannot be ignored by practitioners, because they affect us at the state and local level, almost on a daily basis. As late as February of this year, the Florida legislature was still discussing the Single Sex Public Facilities Bill, disallowing transgender people to use public restrooms of the sex with which they identify.

In May, a complaint was filed in Miami-Dade County against a private school in Palmetto Bay. The lawsuit alleged bullying at Palmer Trinity School of a 14 year-old boy. Not only was the boy taunted with gay slurs, he was sexually assaulted by three classmates. As shocking a story as this is, it is heightened by the videotaping and sharing of the videotape with other students, teachers and the bus driver. The adults involved allegedly did nothing.

According to the Homeless Coalition of Palm Beach County (the "Coalition"), the LGBT community has a heightened risk of violence, abuse and exploitation compared with their heterosexual peers. Citing 2015 statistics, the Coalition states that 30% of clients utilizing housing programs identify as LGBT, and 40% of homeless youth serviced identify as LGBT. The Compass Gay & Lesbian Community Center of Lake Worth and the Palm Beaches ("Compass") states that there are more than 500,000 LGBT people in Florida. And that number is growing. Almost every day, Compass conducts events and support groups to address the legal and social equality concerns of the LGBT community.

Compass has invited me, and I invite you in turn, my colleagues, to join me in presenting a series of discussions over the next year, to address the LGBT community on legal issues with which they are concerned.

As Justice Kennedy wrote in the Court's opinion in *Obergefell*, *ibid*, "Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty." I pledge to do my part to link arms with the LGBT community in the march toward the full promise of liberty. Please join me. Together we can shed a light on injustice and, in so doing, dispel it.

Nancy Ferraro, an affiliate member of the PBCBA, is a partner in the New Jersey law firm of Barrood & Barrood, P.C. A new resident of Florida, she is looking forward to becoming a member of the Florida bar in 2016. She serves on the Committee for Diversity and Inclusion of the Palm Beach County Bar Association. Nancy may be reached at nferraro999@gmail.com.

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Federal Criminal Defense



Tuesday, April 26, 11:30 - 1:00pm
1507 Belvedere Road, WPB

Program Schedule

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

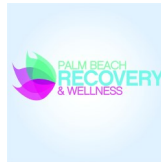
12:00 p.m. - 12:05 p.m. **Welcome - Opening Remarks** - Ron D. Herman, Esq., Herman Law, P.A.

12:05 p.m. - 1:00 p.m. **Guest Speaker:** Valentin Rodriguez, Esq., Valentin Rodriguez, P.A.
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Program

- Advancing theory and themes through opening to closing
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- What to expect in the proffer and what to avoid
- Pitfalls of "relevant conduct" in federal criminal cases
- Loss calculations in fraud and white collar cases

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Rules of Civil Procedure Corner

Rule 1.380(b): Civil Contempt

by Matt Triggs and Jonathan Galler

Have an opposing party who believes that discovery is an “optional” phase of litigation? Does he treat as merely aspirational an order compelling compliance with a discovery obligation? If so, perhaps a civil contempt order will change that thinking. But a recent Second District opinion highlights just how exacting the standards for civil contempt are and how any misstep along the way will result in an order that will not hold up on appeal. *See Menke v Wendell*, 40 Fla. L. Weekly D2515 (Fla. 2d DCA Nov. 6, 2015). *Menke* was a commercial litigation dispute in which the Wendells sued Menke for fraud after their \$180,000 investment in Menke’s real estate holding company evaporated during the recession. During the discovery phase of the case, the Wendells moved to compel the production of documents allegedly not provided in response to their requests for production. When the requested discovery was not produced, the Wendells moved for, and received, a civil contempt order. Menke’s appeal by means of a petition for writ of certiorari followed.

In discussing the requirements for civil contempt, the Second District started with the basics: to hold someone in contempt for violation of a discovery order, you need an order that is both clear and definite. *See Menke*, at *2. “[W]hen a final judgment or order is not sufficiently explicit or precise to put the party on notice of what the party may or may not do, it cannot support a conclusion that the party willfully or wantonly violated that order.” *See id.* (quoting *Keitel v. Keitel*, 716 So. 2d 842, 844 (Fla. 4th DCA 1998)).

The discovery “order” on appeal in *Menke* failed even that initial test because the trial court neither granted nor denied the then-pending motion to compel. There was no transcript of the hearing on the motion to compel, and – critically – there was no order entered following the hearing. All that existed for appellate purposes was a “court appearance record”

from the hearing, which contained notes addressing the categories of documents requested for production.

Nevertheless, the trial court held Menke in contempt, fined him \$20,000 and directed that his pleadings be stricken if he did not pay the fine within thirty days. That, too, was a problem according to the Second District. As explained by the court in *Menke*, an order imposing a fine for civil contempt must include a provision by which the sanctioned party has the ability to purge the contempt, which instructions must be “feasible for the contemnor.” *Menke*, at *3. Further, civil contempt sanctions are either compensatory or coercive, and the sanctions imposed must have some bearing upon the harm suffered by the injured party. For compensatory fines, the idea is to compensate for losses sustained as a result of the contempt, and so the fine must be based on evidence of the injured party’s actual loss. Because the order on appeal in *Menke* contained no purge provision, it could not be deemed coercive. And because no evidence was presented as to the damages incurred as a result of the “contempt,” it could not be deemed compensatory. For all those reasons, the Second District quashed the contempt order.

So while a contempt order may be just the cure for a discovery apathy, *Menke* reinforces that a movant must proceed carefully and seek relief that is both appropriate and legally justified under the circumstances.

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



Welcome New Members!

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

Isam Jamal Alsafer: Florida Coastal School of Law, 2011; Associate in Phelan Hallinan Diamond & Jones, PLLC, Ft. Lauderdale.

Matthew Patrick Coglianese: University of Miami, 1984; Partner in Rasco Klock, Coral Gables.

Carl J. Domino: Nova Southeastern University, 2015, Jupiter.

Aaron C. Dunlap: University of Miami, 2007; Village of Wellington.

Carey Z. Gibson: Florida Registered Paralegal Membership; Kaye Scholer, LLP, West Palm Beach.

Edgardo Hernandez: University of Miami, 2011; Partner in Trinity Law, P.A., West Palm Beach.

David K. Markarian: University of Miami, 1985; Partner in Markarian Frank White-Boyd & Hayes, Palm Beach Gardens.

Margaret Fanjul Montalvo: Nova Southeastern University, 1993; Solo Practitioner, Palm Beach Gardens.

Edmund Joseph Sikorski: University of Detroit, 1969; Affiliate Membership, Palm City.

Thomas G Zeichman: Nova Southeastern University, 2012; Associate in Messana, P.A., Ft. Lauderdale



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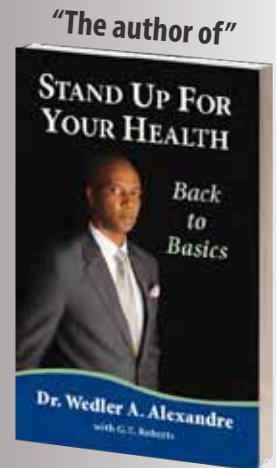


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OFFICE SPACE

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HEARSAY

Philippe Jeck was elected to a 2 year term for 2016-18 as Chair of the Palm Healthcare Foundation, Inc. Board of Trustees. The Foundation is a public healthcare foundation primarily addressing the needs of Palm Beach County residents.



Michael J. Napoleone of Richman Greer, P.A. was elected without opposition to a four-year term on the Wellington Village Council. He will be the first new council member ever to take a Wellington council seat through an unchallenged election.



Shannon Sagan of Shannon J. Sagan, P.A., has been named as a board member of The Glades Initiative

Akerman is pleased to announce the elevation of the following new partners in their West Palm Beach Office: **Bradley McPherson** – Fraud & Recovery and **Noelle Pankey** – Litigation.

The Law Offices of Nugent, Zborowski & Bruce proudly announce that **Curt Sanchez** has joined the firm. Mr. Sanchez brings with him valuable litigation and appellate experience, adding the firm's well-established marital and family law practice. www.nugentlawfirm.com | www.divorcecourtappeals.com



Ciklin Lubitz & O'Connell, a West Palm Beach full service law firm, is pleased to announce that **Zachary M. Rothman** has joined the firm as an associate attorney in the Wills, Trusts, Estates, and Guardianships practice group. He attended the University of Florida for undergraduate studies and earned a J.D. in 2015 from the University of Florida's Fredric G. Levin College of Law.

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CLE Seminar IN-PERSON registration v. Webinar registration

A tutorial


The Palm Beach County Bar Association is very pleased that during the last few years it has offered our members the opportunity to attend seminars via webinar in addition to in-person. The demand for the webinars has increased during the past year, however registration procedures for the webinars versus registering to attend in-person is experiencing growing pains.

Registration and payment for webinars is handled by a third party, mylawcle. Registration for in-person seminars continues to be handled through the Palm Beach County Bar Association.

Webinar registration instructions: Visit palmbeachbar.org and click:

- *Membership/CLE on the home page*
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Opps! I want to switch my registration from in-person to webinar or vice versa

If after registering to attend a seminar in-person you decide that you would like to attend via webinar, you need to cancel your in-person registration through the PBCBA and re-register through our third party administrator, mylawCLE by following the directions above. Likewise, if you registered for the webinar and decide to attend in-person please cancel your webinar registration by calling (888) 449-2512 and re-registering through the Palm Beach County by following the directions above.



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CALENDAR February 2016

Tuesday, February 2,
5:30 pm – 7:30 pm

**NCS FAU Reception
for the Board**

Wednesday, February 3,
12:00 – 1:00 pm

**Judicial Relations Committee
Judicial Conference Room**

Wednesday, February 3,
12:00 – 1:00 pm

**Transaction Law
Committee Meeting
Bar Association Office**

Thursday, February 4,
11:30 am – 1:00 pm

**Criminal Law CLE Seminar
Bar Association Office**

Thursday, February 4,
5:30 pm – 8:00 pm

**NCS BBQ & Casino Party
Bonnette Hunt Club**

Friday, February 5,
8:30 am – 9:30 am

**ADR Committee Meeting
Bar Association Office**

Friday, February 5,
11:30 am – 1:00 pm

**Holland Luncheon
Cohen Pavilion at the
Kravis Center**

Saturday, February 6, 8:00 am
**NCS Second Annual Softball
Challenge against Martin Co**

Monday, February 8,
8:00 am – 4:30 pm
**ADR CLE Seminar
Bar Association Office**

Tuesday, February 9,
11:45 am – 1:00 pm
**Unified Family Practice
Committee Meeting
Judicial Dining Room**

Tuesday, February 9,
12:00 pm – 1:00 pm
**YLS Board Meeting
Bar Association Office**

Tuesday, February 9,
12:00 pm – 1:00 pm
NCS Board Meeting

Wednesday, February 10,
10:00 am – 11:30 am

**New Attorney Seminar
Bar Association Office**

Wednesday, February 10,
12:00 pm – 1:00 pm
**FAWL Board Meeting
Bar Association Office**

Wednesday, February 10,
5:30 pm – 7:30 pm
**FAWL Annual
Judicial Reception
Norton Museum**

Thursday, February 11,
5:30 – 7:00 pm
**Federal Bar
Cocktail Reception
The Colony Hotel**

Friday, February 12,
11:00 am – 1:30 pm
**Membership Luncheon –
U.S. Supreme Court Justice
Stephen Breyer
Cohen Pavilion**

Thursday, February 11,
5:30 pm – 7:00 pm

**YLS Happy Hour
Dada in Delray Beach**

Friday, February 19
**Bench Bar Conference
Palm Beach County
Convention Center**

Tuesday, February 23,
5:00 pm – 7:00 pm
**NCS Scripps Research
Institute Reception
Scripps, Jupiter**

Wednesday, February 24,
12:00 pm – 1:00 pm
**Judicial Luncheon
North County Courthouse**

Wednesday, February 24,
5:00 pm – 6:00 pm
**Board Meeting
Bar Association Office**

Thursday, February 25,
8:00 am – 6:00 pm
**PI CLE Seminar and Reception
Bar Association Office**