



# PALM BEACH COUNTY BAR ASSOCIATION

# BULLETIN

www.palmbeachbar.org

July/August 2016



Kudos to our Young Lawyers Section on another successful fishing tournament that raised over \$10,000 for Legal Aid's Education Advocacy Project. Pictured (l-r) YLS president Ashley Wilson, event co-chairs Nicole Barna, Abigail McCall and Jared Gillman and Alex St. Pierre from Legal Aid.

## Annual Installation Banquet



Congratulations to this year's Board of Directors who were recently sworn into office during the Bar's annual Installation Banquet at The Breakers Hotel in Palm Beach. Nearly 500 guests enjoyed a cocktail reception, dinner, dancing and networking in the magnificent Venetian Ballroom. A special thank you to our evening sponsors including Mathison Whittles, Searcy Denney Scarola Barnhart & Shipley, Lytal Reiter Smith Ivey & Fronrath, Law Offices of Shannon Mahoney, Greenspoon Marder, Pressly & Pressly, Alpine Jaguar, Daily Business Review, Esquire Bank, First Republic Bank, Fox Rothschild, Joel Weissman, Phipps Reporting, Rehmann, Sabadell United Bank and Southern Specialties

Front row: Dean Xenick (director), Greg Huber (director), Judge Caroline Shepherd who administered the oaths of office, John Whittles (president) Sia Baker-Barnes (president-elect) and Grier Pressly (immediate past president)

Back row: Jessica Callow Mason (director), Julia Wyda (director), Scott Smith (director), Ned Reagan (director), Rosemarie Guerini D'Amore (North County Section president), Lee McElroy (director), Ashley Wilson (Young Lawyers Section president) and Grasford Smith (director). For more photos from this year's event, please see page 4.

## Save The Date for a Very Important Luncheon!



If you haven't already heard the news, Patience Burns is retiring after nearly 36 years of working for the Palm Beach County Bar Association. A special luncheon is planned for Friday, October 14 from 11:30 a.m. to 1:30 p.m. at the Palm Beach Convention Center. Please save the date and help send her off in an appropriate and well-deserved fashion. Look for registration and further details in the next *Bar Bulletin*.

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THE  
**BULLETIN**

PALM BEACH COUNTY  
BAR ASSOCIATION

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President

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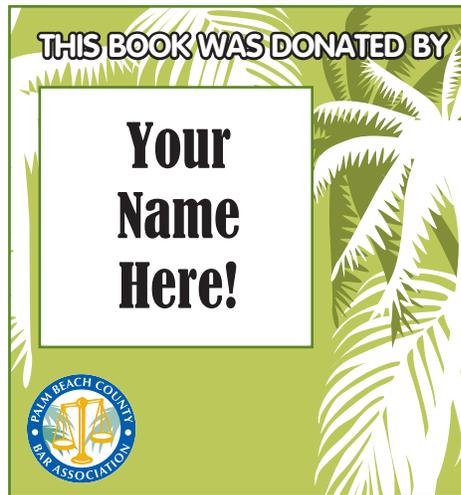
## LETTERS TO THE EDITOR

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:

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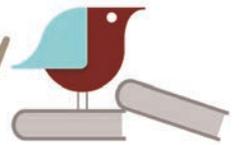
## Sponsor a book this summer!



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## A New Year - Following a Legend in 2016

By John R. Whittles

### Executive Director Search

"A new year" sounds odd in the summer. In any event, July is the beginning of a new bar year and your Board's top concern in the next few months is to find

a new Executive Director after Patience Burns announced her retirement in April of this year. While the Board and various past presidents have tried everything to entice her into a change of heart and un-retire, there is apparently no ransom of B-52's (the beverage, not the bomber) that we could muster to change her mind and we are now resigned to the fact that she deserves to spend time with her family after thirty six (36) years of dedicated service.

Grier Pressly, our immediate past president, penned an article for the Bulletin a few months back that ably thanked Patience for her work and friendship over the years. Take a read or re-read of it to get a sense of what those who have worked with Patience previously feel about her. Personally, based on fifteen fast-flying years working with Patience, I can tell you that she is as good a person as we could have had and is as capable as any executive could be. While she could herself perform just about every job in the office, she was equally adept at surrounding herself with talent and assembled a bar staff that is second to none, from which we all have benefitted over the years. Patience will be missed and hopefully will stay in close contact with all of us in between exciting trips abroad.

Now the Board must find a successor. To that end, in April 2016, Grier Pressly assembled a Search Committee that would be tasked with replacing the irreplaceable. Former Palm Beach County Bar President (oh yeah, and former Florida Bar President) Greg Coleman graciously agreed to be the chairperson of this committee, which is otherwise staffed by other notable former Palm Beach County Bar Presidents Jerry Beer, John Howe, Circuit Judge Lisa Small and Jill Weiss.

This Search Committee received no less than sixty-three (63) applications for the Executive Director position from candidates that are gender diverse, racially diverse and geographically diverse. Despite the fact that we had an exceptionally large pool of qualified candidates, the Search Committee reduced that number to eleven (11) of the very most qualified. The Search Committee interviewed those top eleven via video conference in mid-June and, after debate and thoughtful consideration, reduced that exceptional group down to five people. Those five traveled to West Palm Beach on July 13 and 14 to sit for in-person interviews with the Board of Directors and the Board is working diligently and efficiently to make an offer to the most qualified of that group. Thank you to the Search Committee for the hard, good work to get us to this point.

I promise as your president that the Board will be very careful to choose the very best candidate and that we will give this process the careful consideration it deserves. After all, maintaining the success of the very best bar association in

the state is serious work. We should have a new Executive Director hired by the end of July and Patience - who has agreed to stay on into September and even afterward if necessary - will continue to assist in the transition.

### Patience Burns' Tribute Luncheon - Friday, October 14, 2016

In that regard, please remember that a tribute luncheon for Patience has been planned for Friday, October 14, 2016 at the Palm Beach County Convention Center. The luncheon will begin at 11:30 and conclude at 1:30. Look for registration and further details in the next *Bar Bulletin*. Thanks go out to former Bar Presidents Michelle Suskauer and Theo Kypreos who have worked very hard to ensure that this event will be a great one and a fitting sendoff for Patience.

### Implementing Palm Beach County Bar Long-Range Plan

At our Board retreat on the weekend of August 5, the Board will be discussing plans for the new year and, in particular, the implementation of a long-range, three to five year plan, which will be designed to help this Board and future boards focus on goals and stay in front of issues that affect our members; technological, economic, social and political changes that could affect the practice of law and the way this association serves its members. To accomplish this, the Board is enlisting the assistance of a strategic planning consultant who will help the Board sort through the issues and put together a concrete plan with quantifiable long-term goals. We are very fortunate that we are in good financial condition and can provide great professional and personal benefits for our members and we will work hard to maintain that. I'll report further on this in future articles and we are looking forward to another great year for our association. If anyone needs anything, call Grier.

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# Annual Installation Banquet aka "Bar Prom"



Shannon Mahoney and President John Whittles



Immediate Past President Grier Pressly and Kristy Pressly



Steve Walker and Judge Joe Marx



Judge Krista Marx and Greg Coleman

Some of the PBCBA Past Presidents with ED Patience Burns



Jamie Beale and John Howe



Carl Wald and Tara Kopp



Judge Laura Johnson and Kim Ciklin



Bill and Melissa Lazarchick and Liz and Ron Herman



Judge Lisa Small, Michelle Suskauer, Judge Samantha Schosberg Feuer and Cindy Crawford



Domenic Balzano, Antonietta Brancaccio Balzano, Denise Mutamba, and Masimba Mutamba



### Will Judge Sasser's Standing ESI Order Apply to Your Case?

by *Christopher B. Hopkins*

Do you know what a .pst file is? Have you created a client data map? What is the difference between system and substantive metadata? Lawyers can no longer ignore or avoid e-discovery – the preservation and production of electronically stored information (ESI) – since the practice was embedded in the Florida Rules of Civil Procedure in 2012. Starting July 1, 2016, Judge Meenu Sasser of the Fifteenth Judicial Circuit has issued a Standing Order on Electronically Stored Information Discovery to both coax and compel lawyers into discussing and addressing ESI discovery. This article will re-introduce you to Florida's e-discovery rules, provide an overview of Judge Sasser's Standing Order, and identify resources for handling e-discovery issues in your cases.

In 2012, the Florida Rules of Civil Procedure were amended to include e-discovery. The amendments are similar but less demanding than their federal counterparts; Rule 1.200 states that a case management order “may” require lawyers to “consider” ESI admissibility and “discuss” the “possibility” of ESI agreements. Rule 1.280 more forcefully establishes ESI as a part of discovery and articulates the boundaries of what is “reasonably accessible.” Rule 1.350 explains the form of ESI production and Rule 1.380 defines sanctions for failure to preserve ESI.

To date, there have been no state appellate decisions interpreting the foregoing 2012 amendments. There have been a number of journal articles, forms, and circuit court orders. Judge Sasser is not the only jurist to rule on e-discovery issues but locally she is the first to issue a *standing* ESI order. Obtain the Standing Order on Judge Sasser's Fifteenth Judicial Circuit page (quick link: [www.bit.ly/JudgeSasser](http://www.bit.ly/JudgeSasser)). Former Judge Kenneth Stern, Mark Osherow, and Greg Weiss of the Bar's Circuit Civil Committee provided input on the Order.

The Standing Order applies to most business and professional liability cases and is triggered by the plaintiff's designation on the civil cover sheet. According to Judge Sasser, the purpose is to open a dialogue between parties; indeed, you will note that the Order does not require actual production. The Standing Order may be viewed as a “meet and confer” order which serves the practitioner since: (a) it puts counsel and client on notice of preservation requirements which could avoid later sanctions; (b) it requires counsel and client to discuss and understand sources of e-discovery and what may or may not be reasonably accessible; (c) it sets a tone of cooperation and communication between counsel at the beginning of the case; and (d) it may reduce confusion, expense, and motion practice later in discovery.

While the plaintiff is required to serve the Standing Order on the defendant and the parties are to schedule the “meet and confer” within 60 days, careful review of the Standing Order reveals that counsel's substantive first step is to confer with

the client and obtain ESI information. By the time of the meet and confer, counsel needs to “be prepared to discuss in detail” various ESI issues. It is advisable to send the Standing Order and a summary of the e-discovery Rules to the client so they understand the necessary steps and consequences. As soon as practical, counsel should issue a litigation hold letter and comply with Rule 1.380.

In preparation for the meet and confer, counsel will need to obtain information such as: identity of ESI custodians; structure of the client's system and email accounts which may contain relevant information or information which would potentially lead to discovery of admissible evidence; the existence and nature of ESI policies; and identification of all relevant software. Typically, it is not difficult to ascertain the ESI custodian(s) however it can be surprisingly time-consuming to develop an accurate “data map” of where ESI may exist (do not overlook phones, backups, cloud, IM, and social media accounts). While most companies use suites like Microsoft Office, be aware of database, time-keeping, and industry-specific software. Look for landmarks such as when the client may have gone through a major software change or hardware upgrade which makes legacy data harder to access. Again, this is reconnaissance at this stage and not production.

The “meet and confer” should occur by phone or in person since it requires counsel to “actually discuss... in detail” the ESI issues above as well as the need for an ESI clawback agreement; scope, cost, and estimated time for ESI discovery; and whether ESI issues may significantly protract litigation.

If the parties successfully complete the meet and confer, they simply file a “short,” joint Notice of Compliance within 15 days. If something is not completed, the plaintiff shall notice a Rule 1.200 case management conference.

A number of ESI resources exist including the 2016 Florida Handbook on Civil Discovery Practice, the Florida Bar Business Section's draft Stipulation Establishing Electronic Discovery Protocol, and several Florida Bar Journal articles (links, and some further discussion about these resources, on [www.hopkins.law](http://www.hopkins.law)).

If ESI discovery issues are cumbersome to the point of distracting counsel from the prosecution or defense of the case – or if counsel is simply unequipped – consider hiring separate counsel to handle the discrete ESI issues so that primary counsel can focus on the case. Likewise, the parties may hire an experienced ESI lawyer to serve as an e-discovery special master. Another option is to hire an e-discovery mediator to efficiently bring parties together to create an ESI exchange protocol without the risk of adverse orders or sanctions.

*Christopher B. Hopkins is an ESI lawyer and certified circuit court mediator with McDonald Hopkins LLC ([chopkins@mcdonaldhopkins.com](http://chopkins@mcdonaldhopkins.com)).*



## Asset Transfer Schemes Are Actual Fraud

by Jason S. Rigoli

The United States Supreme Court weighed in on whether a fraudulent transfer scheme could result in a nondischargeable debt under 11 U.S.C. § 523(a)(2)(A). See *Husky International Electronics v. Ritz*,

Case No. 15-145, –Sct.–, 2016 WL 2842452 (May 16, 2016). Section 523(a)(2)(a) of the Bankruptcy Code reads:

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--2) for money, property, services ...**to the extent obtained by**-- (A) false pretenses, a false representation, or **actual fraud**, other than a statement respecting the debtor's or an insider's financial condition;

11 U.S.C. § 523(a)(2)(A)(emphasis added).

In *Husky* the debtor, Ritz, was part owner and director of a company, Chrysalis Manufacturing Corp. ("**Chrysalis**"). Chrysalis was indebted to Husky because of Chrysalis' purchase of electronic components from husky in the ordinary course the parties' business relationship. 2016 WL 2842452, at \*2. While indebted to Husky, Ritz drained Chrysalis by transferring large sums of money to other entities Ritz controlled. *Id.* at \*3. Husky

sued Ritz, individually, under Texas law to hold him, as a shareholder, personally liable for the debt. *Id.* The United States District Court for the Southern District of Texas found that Ritz was liable under Texas law, but that the debt did not fit within the exception set forth in 11 U.S.C. § 523(a)(2)(A) and was dischargeable. *Id.* The Fifth Circuit Court of Appeal affirmed. *Id.*

The Supreme Court reversed and, in holding with the Seventh Circuit and First Circuit Courts of Appeal, expanded the exception to discharge under § 523(a)(2)(A). The Supreme Court held that fraudulent transfer schemes done with the actual intent to hide, delay, or defraud creditors falls within the meaning of "actual fraud." *Id.* at \*4-6 (internal citations omitted). The majority opinion, in fairly short shrift, explained that a debt arising from the fraudulent transfer scheme could potentially satisfy the "to the extent obtained by" provision. *Id.* at 7-8.

Meanwhile the lone dissent by Justice Thomas, addresses the "to the extent obtained by" issue at length arguing that § 523(a)(2)(A) requires the debtor to have from inception used fraudulent means to obtain the assets giving rise to the debt and that an asset transfer scheme cannot satisfy that requirement. *Id.* at 9-14. The majority, however, remanded this matter to the

*Continued on page 13*

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## Lessons Learned...and Still Learning

by Michelle L. Azar on Behalf of the Professionalism Committee

I always thought by this time - deep into my third decade of practice - that I would know it all, or at least most of it, and that I would never have to look back and wonder if I could have done something better, more efficiently, etc. At least it happens less often now. And that is the nature of this work, we learn as we “practice”.

Here I share a few of the principles I have learned, and those of various colleagues I polled:

- Treat the opponent like you like them, and you probably will. If a phone call is your first contact with a lawyer, use it as an opportunity to talk a little about one another, and tell her/him that you look forward to litigating with them. If you first meet in a courtroom, shake hands, and introduce yourself. After a hearing, ask for a few minutes to talk about the case, clients, and how you can work with one another to handle the case efficiently. I know this sounds trite, but it’s also true. People don’t just want to be liked; they also want to be respected. When you treat them with respect, they almost always reciprocate, because they want your respect.

– Cole FitzGerald

- When dealing with a particularly difficult opponent or even if you are just having a bad day, take a minute to think it over before hitting “send” on the response to that nasty, threatening email you just received. I had one of my professors in law school tell us “don’t ever put anything in writing unless you are 100% comfortable having it be on the front page of the newspaper.” And we often forget that emails are written communication.

– Cary Sabol

- Always remember that cases come and go, but most attorneys will see the attorney on the other side again. How you treat opposing counsel or the tactics you use in one case, may come back to bite you in the long run. Just because you are zealously advocating for your client does not mean that you have to be difficult for the sake of being difficult or treat opposing counsel the way your client feels about the opposing party.

– Scott Perry, Sue-Ellen Kenny (follow the golden rule)

- Sometimes asking if you did something to offend the other person or acknowledging that the other person may be having a difficult day can cause the other side to pause and reflect on his or her own actions. Ask the other person to lunch. Getting to know someone as a person and not simply as “the opposing counsel” humanizes them.

– Tami Augen Rhodes

- I always return telephone calls the same day I receive them, even after hours. Clients often complain that they cannot reach their lawyers and that is so frustrating, not to mention nerve wracking, when clients are concerned about their important issues. If a lawyer is unavailable, sending an email, texting, or having a secretary or paralegal return a

message is an alternative. It is essential professional behavior and good business practice as well. – Eunice Baros

- One of the things that I learned over time that goes against my natural desire to be friends with opposing counsel is to never become so familiar with your opposing counsel that you lose your litigation edge. You can be courteous and professional without becoming so close with your opponent that you forget that you are, in fact, adversaries.

– Brian LaBovick

- Emails may not convey the tone you have in mind. An email can be perceived as curt or short when it is merely intended to convey information in a matter of fact sort of way. Adding conversational words such as an opening greeting, e.g., “good morning”, can help convey your request without sounding unpleasant in tone. Not only does this help smooth the way to a better relationship with the opponent, but you seem reasonable rather than whiny or overly demanding.

- Another good reason to be careful in how you treat your adversaries in litigation is that you never know when the circumstances change. For instance, a prior adversary (in highly contested and unfriendly matters) may later be endorsed by colleagues, apply to be a judge or other positions of authority, become co-counsel in other matters, and even be referred back as a client. Naturally, any issues stemming from prior encounters may negatively impact these unrelated future events.

– Alan St. Louis

- Watch other attorneys, including the opponent, to learn from them. Judges are generally willing to have you sit in on trials; just call their Judicial Assistants to find out their policy and when trial is starting.

- I am amazed that with all that has been said about professionalism, especially here in PB County, some still think they are better advocates, more “aggressive”, if they are difficult to work with. I feel like I accomplish so much more, with less expense, for our clients through diplomacy. Even where we disagree with the other side and we have to go to court, I think lawyers are better advocates if they can present a crisp, interesting issue that isn’t confused by distracting side issues or personal attacks.

– David Ackerman

- Adopt a mentor! The Palm Beach County Bar Association has mentors available for the asking. This isn’t just for new attorneys either. It’s great for handling an area a little outside your usual practice, or bouncing ethical dilemmas off a colleague.



## The Art Of Dying

by David M. Garten

“It’s a good day to die!” It may be, but HOW does your client want to die? Does he want to die naturally or with the administration of aid-in-dying drugs? If your client has a terminal condition and is a resident of California, Montana, Oregon, Vermont, or Washington, he has a choice.

However, if he is a resident of Florida, the administration of aid-in-dying drugs is illegal and he must die naturally. §765.309, F.S. The intent behind this statute is the protection of human life and the preservation of ethical standards in the medical profession.

In Florida, if a patient has a life expectancy of 6 months or less, he is typically admitted to hospice. Hospice may administer pain relieving medication and may withhold or withdraw life-prolonging procedures, such as a feeding tube and respirator, to assist the patient to die peacefully and without pain. Hospice also provides physical, psychosocial, emotional, and spiritual assistance to the patient to promote his well-being, comfort, and dignity throughout the dying process.

But how does the treating physician know whether your client wants to withhold or withdraw life-prolonging procedures? The easiest way is to have your client execute a living will. §§765.301-765.309, F.S. The purpose of a living will is to direct the withholding or withdrawal of life prolonging procedures in the event one has a terminal condition<sup>1</sup>, an end-stage condition<sup>2</sup>, or is in a persistent vegetative state<sup>3</sup>. §765.302(1), F.S. In the absence of a living will, the decision may be made by a health care surrogate. §765.305, F.S. Absent the above, the decision can be made by an individual referenced in §765.401, F.S. in order of priority.

<sup>1</sup> “Terminal condition” means a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death. See, §765.101(22), F.S.

<sup>2</sup> “End-stage condition” means an irreversible condition that is caused by injury, disease, or illness which has resulted in progressively severe and permanent deterioration, and which, to a reasonable degree of medical probability, treatment of the condition would be ineffective. See, §765.101(4), F.S.

<sup>3</sup> “Persistent vegetative state” means a permanent and irreversible condition of unconsciousness in which there is: (a) The absence of voluntary action or cognitive behavior of any kind. (b) An inability to communicate or interact purposefully with the environment. See, §765.101(15), F.S.

In contrast with the expansive coverage and simplicity of a living will, a Do Not Resuscitate Order (“DNRO”) deals specifically with the refusal of cardiopulmonary resuscitation in the event of cardiac or pulmonary arrest and must be signed and dated by a physician. §401.45(3), F.S. and Fla. Adm. Code R. 64B8-9.016. DNRO’s are generally used by paramedics in pre-hospital settings such as a patient’s home, a long-term care facility, or during transport to or from a health care facility. Fla. Adm. Code R. 64J-2.018. *Scheible v. Joseph L. Morse Geriatric Ctr., Inc.*, 988 So. 2d 1130 (Fla. 4th DCA 2008) is a good example of why your client should have both a DNRO and a living will.

In *Scheible*, Mrs. Neumann was admitted to Morse Geriatric Center (“Morse”) in 1992 at the age of 89. At the time of her admission, she was diagnosed with senile dementia and a seizure disorder. Mrs. Neumann’s granddaughter presented Morse with a living will previously signed by herself and Mrs. Neumann that stated there were to be no life-prolonging treatments or resuscitative measures taken on Mrs. Neumann’s behalf if she had a terminal condition or was in the process of dying. Mrs. Neumann did not have a DNRO.

On the evening of October 17, 1995, the nursing home staff found Mrs. Neumann unresponsive in her bed. She was breathing, but staff could not obtain her vitals. They called 911. EMS arrived, intubated her, administered dopamine, and took her to the hospital. During transport, Mrs. Neumann attempted to remove the tubing and her hands were placed in physical restraints. At the hospital, Mrs. Neumann was placed on life support for three days and died four days after life support was discontinued. The cause of death was cardiopulmonary arrest.

The estate sued Morse, in part, for breach of contract on the theory that the living will was incorporated into the contract between Mrs. Neumann and Morse for her care. A representative of Morse testified that that they were aware of the living will, but given the emergency circumstances, the patient’s history of seizures and desire for some care, such as antibiotics, and the absence of a DNRO, they determined that Mrs. Neumann should be evaluated. Apparently, Morse’s defense was not persuasive because the jury found that Morse had breached its contract with Mrs. Neumann and awarded her estate \$150,000 in damages.

## North County Section “Passes the Gavel” and Begins Its Year

The North County Section recently hosted its second annual Pass the Gavel for its Board of Directors. The event was held at III Forks in Palm Beach Gardens. The purpose for the evening was to thank the 2015/16 officers and directors and welcome newly elected volunteers. Look for upcoming networking and CLE events in future Bulletin issues.



L to R: Judge John Phillips performed the Oath of Office; W Mason, president-elect, Rosemarie Guerini D’Amore, president and Larry Buck, passes the gavel and becomes immediate past president.



## Expect the Unexpected in a Family Law Mediation

by Victoria Calebrese

*“Both parties come up or down to the same level of insanity during a divorce.”*

- Author unknown

Divorce, paternity and other related family law matters can be an “insane” time for most couples. In all family law matters, mediation is required prior to a temporary relief hearing and also prior to trial. Thus, in a Family Law matter, the parties get two attempts to resolve the issues amicably at mediation. There are some unique aspects in family law mediation. This article will address some of those nuances.

### Separate Caucuses

Family law mediations usually start and end in separate caucuses (rooms). Seldom will the parties and their counsel begin together in one room, not even for the mediator’s opening statement. Most parties do not even want to see the other party before, during or after mediation. There are times when one party and his/her counsel will wait until the other party has left the building before they exit from their mediation room.

### Non-party Participants

Since in most family law mediations parties are separated from the inception, the parties may not be aware of any non-parties who are in the other room. There are times when a parent of a party or a new spouse or significant other attends the mediation and wants to be a participant in the mediation process. Per the mediation statute and rules, unless the opposing party agrees, the non-party participant cannot be present in the caucus. The non-party participant can remain in the waiting room outside of the caucus. Depending on whether the non-party participant is perceived to be a positive or negative influence, the opposing party may agree to permit them to remain in the room and participate in the mediation, especially if it will assist in the process. There is no way of knowing definitively if a party calls,

texts or emails a non-party participant during the mediation caucus for advice. This is difficult to stop, but often occurs when a party wants advice outside of the caucus. A way to avoid this dilemma is for the attorney, if he/she is aware that their client is bringing someone to the mediation, to call opposing counsel prior to the mediation and seek the approval of the opposing party. This avoids surprise on the day of mediation and also limits further escalation of emotions and saves time.

### All or Nothing Approach

In family law mediations there are generally a number of competing issues which can become inextricably intertwined. Some attorneys take an “all or nothing approach”, while other attorneys will agree on some issues; such as equitable distribution and have the remaining issues tried before the Court. Settling some issues will decrease attorney’s fees and costs but, on the other hand, some parties want a “whole package approach” so they do not feel that they have conceded on one point when there are remaining unresolved issues to resolve.

Commonly, in family law mediations, most parties take the “all or nothing approach”. Looking at the “whole picture” does have its advantages in family matters. Most of all, this approach creates finality.

### Lack of Financial Information

Parties are not able to come to a resolution at mediation if there is a lack of financial disclosure. If the parties’ incomes are at issue, (particularly a self-employed party) or the value of a business is at issue, and limited documentation has been provided to opposing counsel prior to mediation, agreements are usually not reached in the mediation.

Even though further discovery may be necessary to reach an agreement at mediation, each party can become educated as to the legal positions that the other party is formulating or will present to the Court. Thus, even if the parties attending the mediation

do not have sufficient discovery to come to an agreement, the mediation is still a successful tool to define issues, narrow the issues and to determine the weaknesses and strengths on each side of the case.

### Wanting Your Day in Court

Sometimes there is no agreement at mediation simply because a party wants their day in Court. He or she wants the judge to hear their story and tell the judge how terrible their spouse has been in their relationship or how they have been wronged. The emotion overcomes logic. As in non-family law mediations, a cost benefit analysis is performed by the attorney as to what the attorney’s fees and costs would be to go through a trial versus what the chances of success will be on certain issues before the Court. Despite the fact that the cost to litigate an issue may be greater than the chances of success this will not deter some clients from taking the matter to trial.

Thus, the level of “insanity” of a party plays an important role in the mediation process wherein each attorney, as well as the mediator, needs to expect the unexpected in family law mediation.

### Do You Need a Mentor?



The Palm Beach County Bar Association’s Mentor Program is designed to provide members with a quick and simple way to obtain advice, ideas, suggestions, or general information from an attorney that is more experienced in a particular area of law. The mentors provide a ten-to-fifteen-minute telephone consultation with a fellow attorney, at no fee. Any member of the Palm Beach County Bar, whether newly admitted or an experienced practitioner, can use the program. Call the Bar office at 687-2800, if you need a Mentor.

# Law Day Luncheon



Guest speaker Former U. S. Attorney General Alberto Gonzales and then Bar President Grier Pressly



Greg Yaffa, Clinton Lewis, Fred Cunningham and Jose Rodriguez



Mariano Garcia, Karen Terry and Chief Judge Jeffrey Colbath



Barbara Dawicke and Mary Quinlan



Judge Catherine Brunson, Bob Bertisch and Judge Sheree Cunningham



Tammy Anton (Shadow A Judge), Sherry Webber (Mock Trials and Speakers), Heather Wallace-Bridwell (Law Week Chair)



Caryn Stevens and Marci Finkelstein



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# North County Section News

## North County Section honors Judge John Phillips with its 14th Annual Jurist of the Year Award

The North County Section recently hosted its annual Jurist of the Year program at Ruth's Chris Steak House in North Palm Beach. This is a special event that never disappoints with a networking reception, followed by a three course dinner, and award presentation. Judge Ken Marra, last year's award recipient, was sworn to our cone-of-silence and charged with the duty of introducing this year's surprise recipient. Judge Marra's meaningful and clever presentation kept our members on their toes and in suspense until the very end of his remarks – everyone knows Judge Phillips and his love for cars! Thank you, Judge Marra. And, congratulations to Judge Phillips!



On behalf of the North County Section, President Larry Buck presented Judge Phillips with a beautiful crystal gavel



Judge Marra's suspenseful remarks made for a great surprise!



NCS President Larry Buck thanked Patience Burns for her dedication and years of service to our Bar and the Section. In addition to enjoying a day at the spa, she received a special "Golden Ticket," for free drinks at any NCS event – valid on the date of her retirement with no expiration.



NCS Director Kate Watson and Magistrate Maxine Williams



Jay White, Judge Peter Blanc (2005 Jurist of the Year Recipient), George Bush and Victoria Bush



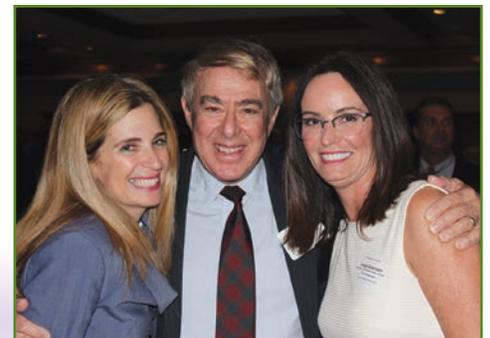
Ken Johnson and Judge Nancy Perez



NCS 2016/17 President-Elect W Mason, Rick Chaves and newly elected NCS Director Misty Chaves



Retired Judge Amy Smith and her JA Harriet Merlin



Judge Daliah Weiss, Mitch Beers and Judge Cheryl Caracuzzo



# NEW! ONLINE VIDEOS

We are **EXCITED** to offer a **NEW** addition to our *Palm Beach County Find A Lawyer* site! All current *Palm Beach County Find A Lawyer* members will receive a **COMPLIMENTARY VIDEO!** Video marketing is a great way to connect with the public!

If you are not already a member - join and be seen online!

For your convenience, videos for **current profile members** will be shot on Friday, September 16 and on Tuesday, September 20 from 10:00 a.m. to 1:00 p.m. at the studios of *TheLaw.TV* in West Palm Beach. To schedule your production time, and for further details, contact Lynne at [lpoirier@palmbeachbar.org](mailto:lpoirier@palmbeachbar.org)

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Only \$150.00 a month!



## Drinks & Dinner on Derby Day

On May 7, over 650 members of the legal community together with friends and supporters of the Legal Aid Society of Palm Beach County gathered at the Palm Beach County Convention Center to honor nine attorneys, one law firm, a community volunteer, and the executive director of the Palm Beach County Bar Association at the 28th Annual Pro Bono Recognition Evening. The 12 award recipients were recognized for their extraordinary pro bono contributions in 2015. In honor of the Kentucky Derby being held the same day, the theme of this year's gala was "Derby".



Those being honored at this year's celebration included (front row): Greg Coleman – And Justice For All Award; Event co-chairs Rick and Karen Benrubi and Molly ad Scott Smith and Legal Aid Executive Director Bob Bertisch. (back row) Evening co-emcee Mariano Garcia; Lisa Markofsky and Anthony P. Vernace – Non Profit Award; Robert J. Hauser – Appellate Law Award; Holly Tabernilla – Immigration Law Award; Patience Burns – The annual Suzanne Foley "Serving Justice" Award, given in memory of Legal Aid's Former Associate Director of Development; Private Investigator Bob Goldberg – Special Services Award; Staci Burton – Family Law Award; Amanda Rae Keller – Civil Litigation Award; Art Menor on behalf of Shutts & Bowen – Law Firm Award; Maria J. Patullo – Veterans Advocacy Award; Evening co-emcee Michelle Suskauer and Board President Miriam Acosta-Castriz



Photos by Tracey Benson Photography

Al and Melinda Gamot

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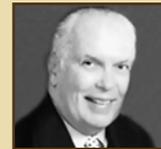


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## In Memoriam



**G. Michael Keenan**  
1955 – 2016



**Edward D. Lewis**  
1932- 2016  
PBCBA President 1972



**William H. Pruitt**  
1929 – 2016

## Asset Transfer Schemes...

Continued from page 6

Fifth Circuit to determine "whether the debt to Husky was 'obtained by' Ritz' asset-transfer scheme." *Id.* at \*8 n. 3.

While the issue is not completely settled, because no framework has been presented to determine when an asset transfer scheme satisfies the "to the extent obtained by" language, if a debtor has engaged in the transferring of assets, debtor's counsel must do a thorough analysis what the debtor obtained as a result of the scheme.

*This article submitted by Jason S. Rigoli, Furr Cohen, One Boca Place, Suite 337W, 2255 Glades Road, Boca Raton, FL 33431, [jrigoli@furrcohen.com](mailto:jrigoli@furrcohen.com)*



## Workers' Compensation Attorney's Fee Schedule Unconstitutional

by Ted Babbitt

In *Castellanos v Next Door Company*, 41 Fla. L. Weekly S197 (April 28, 2016), the Florida Supreme Court found Fla. Stat. 440.34 (2009) to be unconstitutional. Section 440.34 Fla. Stat. (2009) mandates

a conclusive fee schedule for awarding attorney's fees to the claimant in a workers' compensation case. The statute provides that an attorney representing a claimant in a workers' compensation case can only receive a fee based upon a percentage of the benefits obtained for the client. The statute provides that the attorney's fee would amount to 20% of the first \$5,000.00 of benefits secured, 15% of the next \$5,000.00 benefits, 10% of the remaining benefits during the first ten years after the claim was filed and 5% of any benefits after that 10 year period. The statute specifically provides that the Judge of Industrial Claims cannot award an attorney's fee in excess of that amount nor can that Judge approve a settlement where the claimant has agreed to pay his or her attorney an amount in excess of that schedule.

In *Castellanos*, the employer raised a dozen defenses which had to be rebutted by the attorney for the claimant. It was undisputed that the claimant's attorney expended over 107 hours of reasonably required work in order to obtain an award just under \$900.00. Using the statutory scale, the attorney was thus awarded a fee equal to \$1.53 per hour for over 100 hours of work. The statute precluded the Judge of Industrial Claims and any Court reviewing the Judge's order from questioning the amount provided for in the schedule and provided an irrebuttable statutory presumption that the fee was appropriate. The testimony from both sides concluded that the claimant's attorney's work was necessary, the claimant never could have been successful without a skilled attorney, the hours of the attorney were reasonable and that the award was ridiculous. Nevertheless, the Judge of Industrial Claims, as well as the First District Court of Appeals, concluded that they were precluded from questioning the adequacy of the attorney's fee.

The Supreme Court reviewed the case de novo and concluded that the statute was unconstitutional under both the state and federal constitutions. The Supreme Court noted that the workers' compensation law was designed to assure "the quick and efficient delivery of disability and medical benefits to an injured worker." A long line of Florida cases holds that a claimant is entitled to be represented by an attorney and that the attorney's fee should be borne by the employer so as to assure that the claimant receives an appropriate net recovery. The Court held that the provision regarding attorney's fees was adopted to discourage an employer or its carrier from unnecessarily resisting claims in order to force a worker into an inadequate settlement.

The issue before the Supreme Court was viewed by the Court as a question of whether the conclusive statutory presumption, rather than the amount of the attorney's fees, was an inherent constitutional flaw in the statute. The Court cites

several cases questioning the validity of the conclusive statutory presumption and reiterated the constitutional test for such a statute.

This Court has set forth the following three-part test for determining the constitutionality of a conclusive statutory presumption, such as the fee schedule provided in section 440.34: (1) whether the concern of the Legislature was "reasonably aroused by the possibility of an abuse which it legitimately desired to avoid"; (2) whether there was a "reasonable basis for a conclusion that the statute would protect against its occurrence"; and (3) whether "the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption." *Recci Am. Inc. v Hall*, 692 So. 2d 153, 154 (Fla.1997) (citing *Markham v. Fogg*, 458 So. 2d 1122, 1125 (Fla. 1984).

The Supreme Court found that the elimination of the authority of the judiciary to review or alter a fee award completely frustrated the purpose of the workers' compensations scheme.

Based upon the irrebuttable nature of the fee award under § 440.34, the Court concludes that the statute is unconstitutional.

But the conclusive fee schedule prevents all injured workers –whether they have small-value or high-value claims – from presenting evidence to prove that the fee is inadequate in any given case. Without the ability of the attorney to present, and the JCC to determine, the reasonableness of the fee award and to deviate where necessary, the risk is too great that the fee award will be entirely arbitrary, unjust, and grossly inadequate. We therefore conclude that the statute violates the state and federal constitutional guarantees of due process.

While the Court declares the statute unconstitutional, it indicates that the statutory schedule still provides a starting point for the award of a reasonable attorney's fee. The Court concludes that because § 440.34 has been held unconstitutional, the prior statute providing for a reasonable fee was revived. However, the claimant must show that utilizing only the statutory scheme would result in an unreasonable fee in order to obtain a fee in excess of that schedule.



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.

# Real Property and Business Litigation Report



by *Manuel Farach*

**United States Army Corps Of Engineers v. Hawkes Co.**, – S.Ct. –, 2016 WL 3041052 (2016).

A determination by the Corps of Engineers that land contains waters covered by the anti-discharge provisions Clean Water Act, 33 U. S. C. §§1311(a), 1362(7), constitutes “final agency action” that can be immediately challenged by the landowner

without the necessity of seeking a permit or risking possible enforcement action.

**Securities and Exchange Commission v. Graham**, – F.3d –, 2016 WL 3033605 (11th Cir. 2016).

28 U.S.C. § 2462 bars the Securities and Exchange Commission from bringing claims for damages unless brought within five years. However, the limitations provision does not apply to claims for injunctions.

**Hewett v. Wells Fargo Bank, N.A.**, – So. 3d –, 2016 WL 3065014 (Fla. 2d DCA 2016).

A debtor in bankruptcy, as the result of the automatic stay, may not file an appeal.

**Wells Fargo Bank v. Sawh**, – So. 3d –, 2016 WL 3065812 (Fla. 3d DCA 2016).

A trial court must hold a trial or evidentiary hearing in order to judicially determine the amounts necessary to redeem a mortgage under Florida Statute section 45.0315.

**Segall v. Wachovia Bank, N.A.**, – So. 3d –, 2016 WL 3065599 (Fla 4th DCA 2016).

A party seeking to prove standing as the surviving corporate entity after a merger must offer evidence that all of the prior entity’s assets were merged into the surviving entity.

**Deutsche Bank National Trust Company v. Baker**, – So. 3d –, 2016 WL 3087775 (Fla. 4th DCA 2016).

Even if evidence of damages was erroneously admitted, a lender states a prima facie case for foreclosure upon admission of evidence of the default and damages.

**Bunin v. Matrixx Initiatives, Inc.**, – So. 3d –, 2016 WL 3090777 (Fla. 4th DCA 2016).

The changes to Florida Statute 90.702 (the adoption of the Daubert standard for expert testimony) are procedural or remedial and are to be applied retroactively.

**Townsend v. R.J. Reynolds Tobacco Company**, – So. 3d –, 2016 WL 3191105 (Fla. 2016).

The 2010 version Florida Statute section 55.03(3) applies to a judgment entered between October 1998 and June 30, 2011, and accordingly, judgments entered in that time period have a non-fluctuating interest rate of six percent (6%).

**Higgins v. Dyck-O’Neal, Inc.**, – So. 3d –, 2016 WL 3191146 (Fla. 1st DCA 2016).

A trial court’s reservation of jurisdiction to consider the entry of a deficiency decree requires the plaintiff seek a deficiency in that action, and further prohibits the plaintiff from filing a separate suit at law seeking a deficiency.

**Nowlin v. Nationstar Mortgage, LLC**, Case No. 2D15-331 (Fla. 2d DCA 2016).

A contract (such as a mortgage) is modified upon there being an offer, acceptance, and consideration. “Pursuant to contract law, the acceptance of an offer which results in an enforceable agreement must be (1) absolute and unconditional; (2) identical with the terms of the offer; and (3) in the mode, at the place, and within the time expressly or impliedly stated within the offer.” Acceptance is the last act necessary to complete a bilateral contract.

**Florida Peninsula Ins. Co. v. Brunner**, – So. 3d –, 2016 WL 3181908 (Fla. 3d DCA 2016).

The following provision makes a proposal for settlement ambiguous and unenforceable due to the requirement imposed on third parties:

It is agreed upon by ANN BRUNNER and his [sic] respective counsel that all known liens, attorney charging liens or other claims of third parties, will be satisfied and extinguished by ANN BRUNNER and his [sic] counsel.

**Florida Community Bank, N.A. v. Red Road Residential, LLC**, – So. 3d –, 2016 WL 3176813 (Fla. 3d DCA 2016).

A party seeking prevailing party fees under Florida Statute section 57.105(7) (reciprocity of contractual prevailing party fees) must both prevail in the litigation and be a party to the contract containing the fee provision.

**Halo Electronics, Inc. v. Pulse Electronics, Inc.**, – S.Ct. –, 2016 WL 3221515 (2016).

The test of In re Seagate Technology, LLC, 497 F. 3d 1360, 1371, “objective recklessness” test for awarding attorney’s fees in patent infringement cases is rejected; there is “no precise rule or formula” for awarding damages under 35 U. S. C. §284 and a district court’s “discretion should be exercised in light of the considerations’ underlying the grant of that discretion.”

**In Re: Standard Jury Instructions In Civil Cases** – Report No. 15-01, Case No. SC15-1275 (Fla. 2106).

The Florida Supreme Court issues new instructions on duty to maintain evidence.

**MMMG, LLC v. Seminole Tribe of Florida, Inc.**, – So. 3d –, 2016 WL 3265485 (Fla. 4th DCA 2016).

Recognized Native American tribes enjoy sovereign immunity under United States law, and any waiver of that immunity must be in accordance with that tribe’s organizational documents.

**Herbits v. Board Of Trustees Of The Internal Improvement Trust Fund**, Case No. 1D15-1076 (Fla. 1st DCA 2016).

Conveyance of sovereign submerged lands (“SSL”) by the Trustees of the Internal Improvement Trust Fund, even if the Trustees retain a reverter right, removes the SSL designation such that private third parties have no standing to challenge the Trustees’ later modification of the deed restrictions it originally placed on the land.

**Nunez v. Riley**, Case No. 5D14-4386 (Fla. 5th DCA 2016).

A proposal for settlement to a single defendant in a case with multiple defendants is rendered ambiguous and unenforceable by use of the word “all damages” since the proposal would impermissibly seek to settle claims for parties other than the named party.

## Welcome New Members!

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

**Ricardo A. Antaramian:** Florida State University, 2005; Solo Practitioner, Boca Raton.

**Julia A. Barrett:** Law Student Membership, Gordon & Doner, P.A., Palm Beach Gardens.

**Seth C. Behn:** Nova Southeastern University, 2014; Associate in Lewis, Longman & Walker, P.A., West Palm Beach.

**Nicholas Bykowski:** Oklahoma City University, 1977; Office of Financial Regulation, West Palm Beach.

**Sabrina Chavers:** Law Student Membership, West Palm Beach.

**Kathleen Ann Daly:** Fordham University, 1990; Solo Practitioner, Miami.

**Allyson Leigh Gaiser:** Duke University, 2012; Legal Aid Society of Palm Beach County.

**Paige Hardy Gillman:** University of Florida, 2008; Associate in Mrachek Fitzgerald Rose Konopka Thomas & Weiss, Stuart.

**Michael Greenberg:** University of Florida, 2015; Florid Fourth District Court of Appeal, West Palm Beach.

**Michael Adam Gross:** Case Western Reserve University, 2000; Partner in Ulmer & Berne, LLP, Boca.

**David L. Hirschberg:** University of Florida, 2003; Partner in Gladstone & Weissman, P.A., Boca.

**Nicole Jackson:** University of Miami, 1994; Associate in Lesser, Lesser, Landy & Smith, LLC, West Palm Beach.

**Denise Jensen:** Nova Southeastern University, 2002; Associate in Gladstone & Weissman, P.A., Boca.

**Walter Scott Johns, V:** Cleveland-Marshall College of Law, 2010; Associate in Nason Yeager Gerson White & Lioce, P.A., Palm Beach Gardens.

**Samantha R. Kelly:** Florida State University, 2015; Associate in Simses & Associates, P.A., Palm Beach.

**Constance S. King:** Florida Registered Paralegal Membership, McLaughlin & Stern, LLP, West Palm Beach.

**Matthew Lewis Kwasman:** St. Thomas University, 2008; Associate in Nason Yeager Gerson White & Lioce, P.A., Palm Beach Gardens.

**Nicholas Stephern Madsen:** Florida State University, 2012; Associate in Roberts Reynolds Bedard & Tuzzio, West Palm Beach.

**Sashane McDonald:** Law Student Membership, West Palm Beach.

**Corey R. O'Neal:** Notre Dame University, 2010; Associate in Reid Burman Lebedeker, West Palm Beach.

**Paul Edward Petillo:** Loyola University, 1985; Officer of the Public Defender, West Palm Beach.

**Eliana Putney:** Florida State University, 2008; Associate in Lytal Reiter Smith Ivey & Fronrath, West Palm Beach.

**Amarys Reyes:** Florida Registered Paralegal Membership, Lytal Reiter Smith Ivey & Fronrath, West Palm Beach.

**Roberto Rodriguez:** Nova Southeastern University, 2013; Associate in Shutts & Bowen, LLP, West Palm Beach.

**David A. Rondon:** George Washington University, 2007; Solo Practitioner, Boynton Beach.

**Miriam J. Rosenblatt:** Nova Southeastern University, 2014; Wellington.

**Hunter Sharpe:** University of New Hampshire, 2013; Associate in Adams Coogler, P.A., West Palm Beach.

**Ian K. Shaw:** University of Miami, 2014, Delray Beach.

**Azlina Goldstein Siegel:** Nova Southeastern University, 2006; Associate in Nason Yeager Gerson White & Lioce, P.A., Boca Raton.

**Ryan J. Smollar:** St. Thomas University; Partner in Elder Law, P.A., Lantana.

**Max J. Solomon:** Law Student Member, Boynton Beach.

**Robin L. Standley:** Florida Registered Paralegal Membership, West Palm Beach.

**Raul A. Valero:** Nova Southeastern University, 2013; Associate in McDonald Hopkins, West Palm Beach.

**Tova Naomi Verchow:** Nova Southeastern University, 2015; Associate in Gladstone & Weissman, P.A., Boca Raton.

**Jeremy Zubkoff:** Santa Clara University, 2004; Solo Practitioner, Ft. Lauderdale.



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## Making a Difference: The Diversity Internship Program

by **Laura Scala**

In 2010, the Committee for Diversity

and Inclusion (CDI) revamped the PBCBA's Diversity Internship Program (DIP) with a goal of continuing to provide law students of diverse backgrounds work experience through summer internships with participating law firms and governmental agencies in Palm Beach County. The CDI's broader purpose was to give law students the opportunity to gain valuable insight into the Palm Beach County legal community and encourage them to return to our county after graduation to begin their legal careers.

Since the program's inception, the DIP has distinguished the Palm Beach County Bar Association and the CDI as state-wide leaders in promoting diversity. Additionally, the DIP and CDI have made successful inroads in meeting its broader purpose of bringing a more diverse face to our legal community. Over the last six (6) years, fifteen (15) former participants in the DIP actively sought legal work locally, returning to Palm Beach County following graduation. Several of these former interns were hired by local firms that participated in the DIP.

In recognition of the program's success, former DIP interns were recently recognized at the CDI's Annual Diversity Luncheon.

Tabitha A. Taylor, a former DIP intern and current Associate in the Boca Raton office of Schouest, Bamdas, Soshea & BenMaier, PLLC, fondly remembers her time as a DIP intern, stating:

*"As a DIP intern, I wasn't just introduced to the Palm Beach legal community, I was shown the beauties of Palm Beach County - and I fell in love! I felt right at home working in Palm Beach County when I made the transition from intern to attorney and genuinely love serving the area. The DIP has*

*so much to offer its interns, and I'm grateful to be one of those selected to participate."*

This summer, the DIP placed eight (8) interns with a varied group of Palm Beach County law firms and state agencies. The DIP also raised \$9,500.00 in donations from the local legal community to sponsor the salaries of interns working with the participating state agencies. Continuing the DIP's tradition of excellence, this year's group of interns represent law schools from all over Florida, each having a very unique background, promoting the program's objectives.



**(L-R) DIP Chair Jean Marie Middleton, Tim Chalumeau – McLaughlin Stern; Joleen East - Shutts & Bowen; Phoebe Joseph, 4<sup>th</sup> DCA; Sashane McDonald – Searcy Denney Scarola Barnhart & Shipley; Tereza Horakova – Squire Patton & Boggs; and Jennifer Helmy – Lesser Lesser Landy & Smith.**

Throughout the summer, the DIP hosts a variety of events to help the interns make the most of their summer experience and gain valuable insight about the local legal community. On June 3<sup>rd</sup>, the DIP's Committee Chair Jean Marie Middleton hosted a First Connections Breakfast at the Bar Association Office to welcome the interns and officially kick off the summer full of events. During the breakfast the interns were given the opportunity to network with each other along with CDI members. Other events will include an Intern Lunch Social at City Place and the Young Lawyer's Division Happy Hour promoting networking with Bar Association members. Interns will also have the opportunity to learn about the inner workings of our court system

and network with the local judiciary during the Young Lawyers Tips & Tools Workshop. The Workshop will begin with a panel discussion that will provide information on how to develop a positive reputation as a young lawyer and will conclude with a behind the scenes tour of the Main Courthouse. This year's interns will also attend monthly CDI meetings giving them an opportunity to temporarily participate with a Bar Association Committee and meet local lawyers with assorted professional backgrounds and expertise.

The DIP will close on August 1<sup>st</sup> with a Wrap-Up Reception at Shutts & Bowen, LLP. The reception is an opportunity for the CDI and DIP to thank the interns for their participation in the program and acknowledge the participating employers and sponsors for their commitment to the committee's goal promoting diversity in Palm Beach County.

The CDI and the DIP would like to thank this year's participating employers and sponsors: **Kelly Kronenberg; McLaughlin & Stern; Shutts & Bowen, LLP; the State Attorney's Office; the Fourth District Court of Appeal; Searcy Denney Scarola, Barnhart, & Shipley, PA; Squire Patton & Boggs; and Lesser, Lesser, Landy, & Smith, PLLC.** Additionally, firms or government agencies that would like to join the CDI's efforts to further the progress of increasing diversity within our Bar Association, are encouraged to participate in the DIP next summer or make a contribution to help the CDI and the DIP defray the cost of an internship with a government agency. Please visit the DIP website for additional information, <http://www.palmbeachbar.org/diversity-internship-program/>.

*Laura Scala is a member of the Committee for Diversity and Inclusion. Laura is an Attorney at Lesser, Lesser, Landy, & Smith, PLLC. She focuses her practice on personal injury, motor vehicle negligence, and premise liability. She was a Diversity Internship Program intern during the summer of 2013 and hired by her DIP employer Lesser, Lesser, Landy, & Smith. She can be reached at [lscala@lesserlawfirm.com](mailto:lscala@lesserlawfirm.com).*

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## “Mass Torts and Their Relationship to Your Medical Malpractice Case”

by Joseph A. Osborne

Many product liability claims are hidden in medical malpractice claims. While there may be a medical malpractice component to your client’s claim, do not automatically assume that a poor medical outcome is physician error. All surgical procedures involve the use of medical devices and prescription drugs. Even if there is a clear case of medical malpractice, circumstances may warrant investigating what surgical instruments, implants and drugs were utilized to determine if they played a role in causing your client’s injuries. When a patient is injured, the source of the injury is not always clear at first. For example, a woman may be injured because the transvaginal mesh used to treat her pelvic organ prolapse failed. Alternatively, she may be injured because her doctor mistakenly placed the mesh in the wrong place. It is critical to evaluate potential claims to determine if framing the claim is best suited under medical malpractice, product liability or a hybrid of both. Accountability is the key. Manufacturers and medical providers must be held accountable for the harm they impose on the most fragile of our society — those that are sick and/or injured.

Challenges abound in cases that combine the nuances of both product liability and medical malpractice claims. Anticipating and overcoming the obstacles in litigation against medical providers and product manufacturers is the key to a successful outcome. Manufacturer defendants often utilize malpractice issues as a sword in product liability cases, citing: (1) physician error; (2) patient non-compliance; (3) preemption; and/or the (4) learned intermediary doctrine. The safety and effectiveness of a medical device, no matter how thorough and competent the design, also depends on the competence of the medical provider using or applying the device.

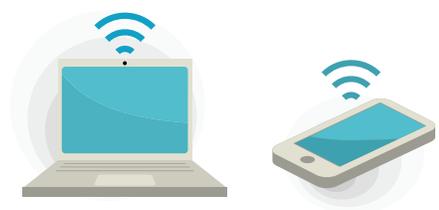
Under Florida law, a medical provider and/or hospital cannot be joined as a defendant to a strict-liability action for a product that was rendered in a surgical procedure when the services could not have been rendered without utilizing the product. Such claims must be brought as medical negligence under Florida law. See *Christenson*, 2008 WL 2074422, at \*2 (“When a patient is harmed by a defective product used in surgery, her claim is properly brought under Florida’s medical malpractice statutes, not under a theory of strict liability.”)

The benefits of framing an action as a product liability case against the manufacturer defendant(s) include: (1) longer statute of limitations period, (2) longer statute of repose, (3) diversity and (4) no pre-suit requirement. Although several legal bases exist for products liability claims, all of them require proof that the product was defective. Three types of product defects are recognized: design, manufacturing, and warning. Besides the existence of the defect in the product, plaintiff must link that defect to the claimed injury or damage.

Where litigation strategy dictates pursuant of claims against medical providers/facilities and manufacturer defendants careful consideration must be paid to compliance with the

presuit requirements of Chapter 766 as well as the potentially the conflicting statutes of limitation. Failure to comply with the statutory requirements will preclude an otherwise viable cause of action. Actions involving both medical malpractice and product liability claims against diverse medical providers and manufacturer defendants filed in state court often trigger defendant(s) to move for removal, citing fraudulent joinder in an effort to defeat diversity. An action is properly removed when “there is no possibility that the plaintiff can establish a cause of action against such an in state defendant,” such as a medical provider or facility. See *Christensen v. Mentor Corp.*, No. 08-60371-CIV, 2008 WL 2074422 \*1 (S.D. Fla. May 15, 2008). Florida courts have clearly stated that any claims against a hospital related to an allegedly defective product used during a procedure at the hospital should be brought under Florida’s medical malpractice statute, Florida Statute Chapter 766, triggering the pre-suit screening and notice requirements. See *Christensen*, 2008 WL 2074422 at \*1 (“When a patient is harmed by a defective product used in surgery, her claim is properly brought under Florida’s medical malpractice statutes, not under a theory of strict liability.”) (citing *Porter v. Rosenberg*, 650 So.2d 79, 82-83 (Fla. DCA 1995)).

*Mr. Osborne practices with the Boca Raton firm of Osborne & Associates in the area of complex civil litigation, including mass torts. He can be reached at [JOsborne@oa-lawfirm.com](mailto:JOsborne@oa-lawfirm.com)*


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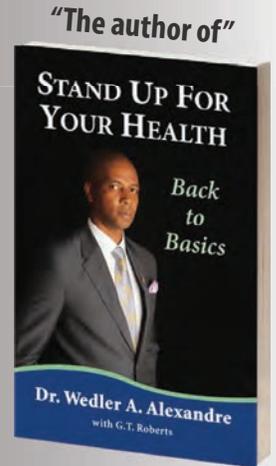


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## Law Related Education Committee: Educating Local Rotarians

by Brad Avakian and Brett L. Goldblatt

Over the past few months, members of the Law Related Education Committee (LREC) of the PBCBA were able to educate the public on a number of legal issues by visiting some local Rotary Clubs and giving presentations as part of The Florida Bar Benchmarks Program.

Andrew Kwan of Beasley Kramer & Galardi, P.A. and Brett L. Goldblatt of Richman Greer, P.A. gave a presentation to the Wellington Rotary Club in which they explained the process by which the Florida Constitution is amended and discussed some of the proposed amendments to be voted on by the public come this November. Additionally, the West Palm Beach Rotary Club heard from one of their own members when I had the opportunity to present The Florida Bar's history of voting rights in America and tried to stump some of my fellow Rotarians with Voter Literacy Tests from the 1960s. Also, following an outstanding response to LREC's call for volunteers, the Palm Beach Rotary Club was schooled

on the very important topic of how to judge our judicial candidates when Pamela Guerrier, Director of Palm Beach County Office of Equal Opportunity, Timothy Murphy, Partner at Personal Injury Florida, and Michael Lufty, Judge Hyman's Law Clerk, gave their presentation on the Island.

All three of these presentations were a big success and helped to effectuate a more informed citizenry here in Palm Beach County. The Law Related Education Committee (LREC) continues to make efforts to impart a deeper understanding of our judicial system, elections, and civics in general. Please contact our fearless Chairwoman, Amy Levenberg Terwilleger, at [aterwilleger@gunster.com](mailto:aterwilleger@gunster.com) if you are interested in presenting in the future or joining the Committee.

*Brad Avakian practices with The Grantham Law Firm and Brett L. Goldblatt is with Richman Greer, P.A.*

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## HEARSAY

**W. Jay Hunston, Jr.**, of W. Jay Hunston, Jr., P.A., Stuart, Florida, has been appointed to serve a 3 year term on the Florida Supreme Court's Alternative Dispute Resolution Rules and Policy Committee.



Florida Bar Past President **Gregory W. Coleman** was one of two people who received The Florida Bar Foundation's 2016 President's Award for

Excellence June 16 at the Foundation's 40th Annual Reception & Dinner in Orlando.



West Palm Beach County attorney **David Prather** has been appointed to the board of The Florida Bar Foundation, a statewide charitable organization whose mission is to provide greater access to justice.



Jones, Foster, Johnston & Stubbs, P.A. announces that **Scott G. Hawkins** has joined the Council of Advisors at the University of Florida's Bob Graham Center.

Lesser, Lesser, Landy & Smith attorneys **Gary S. Lesser, Joseph B. Landy, Mickey S. Smith, and Chad C. Hastings** have been recognized by Super Lawyers ratings service as "Super Lawyers".



**Karen Terry** of Searcy Denney Scarola Barnhart & Shipley, P.A. has recently become Board Certified in Civil Trial Law.



Jones, Foster, Johnston & Stubbs, P.A. announces that firm attorney and former United States Congressman, **Harry A. Johnston II**, has been named Community Leader of the Year by The Chamber of Commerce of the Palm Beaches.



**Eddie Stephens**, a partner and marital and family law attorney at the West Palm Beach-based firm Ward Damon, has been appointed a co-chair of The Florida Bar Family Law Section Technology Committee for 2016-2017



Cohen Milstein Sellers & Toll PLLC, a national plaintiff litigation firm, is pleased to announce that Associate **Nicholas C. Johnson**, is a graduating member of the Wm. Reece Smith, Jr. Leadership Academy 2015-2016 Class III.

Jones, Foster, Johnston & Stubbs, P.A. announces that 14 of its attorneys made the 2016 list of Florida Super Lawyers: **David E. Bowers** – Estate Planning & Probate, **Margaret L. Cooper** – Business Litigation, **Tasha Dickinson** – Estate Planning & Probate, **Scott G. Hawkins** – Business Litigation Thornton **M. Henry** – Estate Planning & Probate, **Theodore S. Kypreos** – Estate & Trust Litigation, **Joanne M. O'Connor** – Business Litigation, **Peter A. Sachs** – Business Litigation, **Sidney A. Stubbs** – Business Litigation, **Allen R. Tomlinson** – Business Litigation, **Roberto M. Vargas** – Business Litigation, **H. Adams Weaver** – Eminent Domain, **Robert W. Wilkins** – Business Litigation Rising Stars: **Grasford W. Smith** – Business Litigation



**Theodore J. Leopold** will be honored with the EAGLE Centurion Award presented by the Florida Justice Association (FJA) for his lifetime commitment to

leadership and public justice advocacy, and for his tireless efforts to protect access to Florida courts.



The Law Firm of Elisha D. Roy, P.A. is pleased to announce that **Elisha D. Roy** was appointed to the Board of Directors of the Greater Palm Beach County Chapter

of JDRF.



Civil trial Attorney and Partner, **Leslie M. Kroeger** of Cohen Milstein Sellers & Toll PLLC has been elected to serve as Secretary for the Florida Justice Association (FJA).



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CALENDAR  
July/August 2016

Wednesday, July 27 – July 30  
**Board of Governors Joint Senior / YLD Meeting**  
Eden Roc Miami Beach

Wednesday, July 27  
12:00pm – 1:00pm  
**Appellate Practice Committee**  
Bar Association

Wednesday, July 27  
6:30pm – 8:00pm  
**F. Malcolm Cunningham, Sr. Bar Association**

Thursday, July 28  
4:00pm – 6:00pm  
**NCS Board Meeting**  
Carmine's PBG

Friday, July 29  
11:30am – 12:30pm  
**PI Committee Meeting**  
Bar Association

Friday, July 29  
12:00pm – 1:00pm  
**Circuit Civil Practice Committee Meeting**  
Judicial Dining Room

Monday, August 1  
5:30pm – 7:00pm  
**CDI Diversity Internship Program Wrap-Up Reception**  
Shutts & Bowen WPB

Tuesday, August 2  
6:00pm – 8:00pm  
**F. Malcom Cunningham, Sr. Bar Association Judicial Candidates Forum**

Thursday, August 4  
11:45am – 1:00pm  
**Judicial Relations Committee Meeting**  
Judicial Conference Room – PBC Courthouse

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

Friday, August 12  
11:45am – 1:30pm  
**Hispanic Bar Association Labarga Lunch**  
Hilton Hotel

Tuesday, August 16  
12:00pm – 1:00pm  
**NCS Board Meeting**  
Duffy's NPB

Wednesday, August 17  
5:30 – 7:00pm  
**F. Malcolm Cunningham, Sr. Bar Association Kick-Off Happy Hour**

Thursday, August 18  
5:30pm – 7:00pm  
**YLS Happy Hour**

Friday, August 19  
11:00am – 1:00pm  
**Committee Chair Meeting**  
Bar Association Office

Tuesday, August 23  
5:30pm – 7:00pm  
**Legal Aid Society Board**  
Bar Association Office

Thursday, August 25  
**Unified Family Practice Committee Meeting**  
Judicial Conference Room – PBC Courthouse

