

## PALM BEACH COUNTY BAR ASSOCIATION

# BULLEAIN

www.palmbeachbar.org

October 2016

# Former General Counsel to Major League Baseball to Speak November 9



The PBCBA is pleased to announce that it will host

a membership luncheon on November 9 with guest speaker Tom Ostertag.

This meeting will be held from 11:45 - 1:00pm at the Cohen Pavilion at the Kravis Center in West Palm Beach. Ostertag is Senior Vice President and Special Counsel for Major League Baseball and is the longest running General Counsel (through 6 different Commissioners). He joined Major League Baseball in 1985 and held various positions in both the Commissioner's Office and Major League Baseball Properties until he was named General Counsel in the Commissioner's Office in 1990. He held the position of Senior Vice President and General Counsel from 2000 to 2015, responsible for legal work in the Commissioner's Office including that relating to broadcasting, club ownership matters and litigation. He is also an officer of Baseball Assistance Team, a charity that helps former players and others in the Baseball family in need.

Tom joined Major League Baseball from the New York law firm of what is now Sidley Austin, where he had been since 1981. He received his law degree from the University of Virginia School of Law and his undergraduate degree from Dartmouth College. He has served as a Little League Coach and on his local Little League Board of Directors. Reservations for this luncheon are required and can be done on the Bar's website www.palmbeachbar.org.



The Young Lawyers Section recently donated over \$5,000 worth of school supplies and snacks to Washington Elementary. YLS members above (L-R) Dane Leitner, Chelsea Furman, Andrew Lochton, YLS Treasurer Scott Perry and Jennifer Lipinski are shown at the school distributing the snacks and back packs to the entire school.



# Whittles Kicks Year Off Like An Olympian!

Bar President John Whittles kicked off this year's committee chair meeting like a true Olympian! Our 27 committee chairs have an exciting year planned including legal education programming, networking and community service opportunities. Look for registration details online and in future Bulletin issues. To view more photos from this event, please see page 7.

## Mark your calendar for upcoming Membership Events

October 14, 11:30 – 1:30 Retirement Luncheon for Patience Burns

November 9, 11:45 – 1:00 pm Membership Luncheon with guest speaker Former MLB General Counsel Tom Ostertag December 7, 5:30 p.m.
Annual Holiday Party & Silent Auction

March 10

Annual Bench Bar Conference

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THE

## BULLETIN

PALM BEACH COUNTY BAR ASSOCIATION

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www.palmbeachbar.org

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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



Dear Bar Members:

How does one say good-bye and thank you after almost 36 years? It has been an unbelievable ride, but it's time to step aside and hand the reins over to someone else. I have seen so many changes since I first started in 1980... no computers (I worked on an electric Smith Corona typewriter; at least it was electric!), no fax machines, no cell phones and certainly no emails. When I started, there was

one other part-time employee, Executive Director Catherine Royce. Our office started on Narcissus Avenue in downtown West Palm Beach for 12 years, then moved over to the newly built Royce Hotel (now the Embassy Suites) for 20 years and of course, now we have our own building. We grew from that small staff, to now having a staff of seven. But one thing that has stayed consistent in all of those years is the dedication of the wonderful volunteer attorneys I have had the pleasure of working with. Such an incredible group that gives back so much, not only to their profession, but to the community. It is that dedication that has made this the best Bar Association in the state! I have truly enjoyed all of the years I have worked for each of you and I will carry with me the many friendships I have made along the way. I wish continued success to each of you individually and to the Palm Beach County Bar Association and thank you so much for the opportunity to have worked for you.

Patience A. Burns

## ALEXANDER "SANDY" MYERS, ESQUIRE



*Mediator/Arbitrator (Admitted to the FL Bar 1970)* 

- Florida Bar Board Certified Civil Trial Lawyer (1983-2007)
- Florida Certified: Circuit Civil Mediator (1998-Present)
   Family Mediator (1998-Present)
- ❖ Florida Qualified Arbitrator (1991-Present)
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## President's Message



## 2016-2017 and Beyond — We Have a Plan

By John R. Whittles

Your Board of Directors had its annual retreat on August 5-6,

2016 at the Bonita Springs Hyatt, which, strangely, is located in Bonita Springs, Florida. If you get a chance, you should go there. It is very familyfriendly with a great pool area, nice rooms and, most importantly, an ice cream store. I recognize that it was embarrassing for the other attendees and their families to see me, dripping wet in a towel and swim shorts, racing my four-year old daughter through the lobby to get in line for ice cream but you take your bar presidents as you find them. In times like this, my wife just chooses to pretend it is not happening and that's ok.

In any event, the meeting was enthusiastically attended by our Board members, outgoing Executive Director, Patience Burns, and incoming Executive Director, Carla Tharp Brown. As I mentioned in a previous post, the goal of this retreat was to consider a long-range plan for our Association to keep us on the successful pace we have maintained over the years under previous great boards and presidents. I am always proud to tell people about the services we provide our members, our great relationship with the bench in Palm Beach County and our very sound financial condition. However, the reality is that all of that could change without proper pre-emptive action and planning and, as a board we owe it to our members to not sit on past success but instead, like a chess match, try to stay a move or three ahead so we are not caught flat-footed in quickly changing times.

New technology, changing client expectations and competition from "corporate" legal providers can and will affect how our Association conducts business so, for this retreat, we as a board enlisted the help of Nora Riva Bergman, a former practicing lawyer and now accomplished organizational coach, to walk us through a process of examining our Association as a business and what

issues should be addressed on a longerrange basis to stay ahead of the curve. Moreover, because of the changing of the guard attendant to Patience's retirement and Carla coming on as our executive director, the timing was right to really examine our Association and improve upon what is already great.

After a long, four-plus hour session, in which Carla, Patience and all of your board members worked very hard and offered insightful comments and concerns, we came up with four areas that are of quintessential importance to our Association for study and action in the next year to two years:

(1) keeping members and acquiring new members; (2) an overview of our technological capabilities and needs;

(3) a comprehensive review of all of the programs offered by the PBCBA and

(4) managing a smooth transition from Patience's leadership to Carla's.

Keeping members and acquiring new members goes to the heart of our mission statement in providing services to lawyers that practice in Palm Beach County and also goes to our financial stability as membership dues income has been, is, and will remain our primary source of funds to operate the Association.

Our technological abilities and needs relate to our ability to provide services to our members, through continuing legal education, lawyer referral, and the logistics of paying for and attending bar functions. Our technological capability also factors into our ability to compete with third parties that provide or hope to soon provide the same services that we and our members provide; i.e., Avvo, Legal Zoom, The Florida Bar Lawyer Referral Program, and the like.

From time to time, Bar Associations should study their programs to determine what's working and not working. Therefore, we will be conducting a comprehensive review of all programs and events to ensure our programs, committees, CLEs and other offerings are meeting the needs of our membership.

The executive director transition is critical in that we have been successful

in large part because of the stability of our leadership at the bar office and the steady work of the bar staff. It is thus imperative that we support Carla and get her up to speed as soon as possible.

As a result of the meeting, the following were selected as "champions" of each of the four categories; Jessica Callow Mason will be the champion of the membership initiative; Greg Huber will lead the technology review; Lee McElroy will head up the review of all PBCBA programs; and Dean Xenick and immediate past President, Grier Pressly will oversee the logistics of the Patience-to-Carla transition.

We are scheduling followup progress meetings with these champions and Nora Riva Bergman who has graciously agreed to stay on through the follow-up meetings to help guide the implementation of whatever action is deemed necessary. We will also discuss these issues and implement necessary action at our monthly board meetings.

I am excited to be part of this because, for all this bar has done, I think we are on the verge of being even better. We have had many great boards and great presidents but this is really an exceptional group and Carla is going to be a great leader for us for years to come.

Please, nobody tell Shannon about the ice cream comment. She never reads these messages anyway. jwhittles@mathisonwhittles.com

## **Board Meeting Attendance**

	July	August
Barnes	Х	
D'Amore	Х	Х
Huber	Х	Х
Mason	phone	Х
McElroy	Х	Х
Pressly	Х	Х
Reagan	Х	Х
Smith, G.	Х	Х
Smith, S.	Х	Х
Whittles	Х	Х
Wilson	Х	Х
Wyda	Х	Х
Xenick	Х	Х

## YLS Annual Happy Hour with Federal Bar Association



Jason Lazarus, Patricia Lowry, Magistrate Judges William Matthewman and James Hopkins



15th Circuit Chief Judge Jeffrey Colbath, Federal Judge Robin Rosenberg, Michael Shiver and Ashley Drumm



Matthew Fiorello and 15th Circuit Judge Cheryl Caracuzzo



Jessie Ervolino and Labeed Choudhry



Paul Walsh and Chase Nugent



Christopher Evans, YLS President Ashley Wilson and Dane Leitner

# YLS Hosts Sidebar Series October 26

The Young Lawyers' Section Sidebar Series is hosting a luncheon on October 26, 2016 from 11:45am-1:30pm in the chambers of Judge Meenu Sasser. The topic of this Series is "How to Properly Conduct a Cross Examination." Don't delay in signing up for this event that typically sells out by going to the Bar's website, <a href="www.palmbeachbar.org">www.palmbeachbar.org</a>. Anticipated speakers/panelists include Roy Black, Fred Cunningham, and Sean Domnick.



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## Conflict Resolution Day and Mediation Week in October

#### by Theodore A. Deckert

As most lawyers who practice in Florida are aware, "Alternative Dispute Resolution" (ADR), and in particular mediation, have become more and more



common over the last few decades. Whether by contract, statute or rule, it is often the first resolution process parties with a dispute must utilize before they can "go to court." As such, it has become no longer the "alternative" but in fact the primary process for resolving many types of personal and business disputes.

October has become a time to promote and celebrate peaceful conflict resolution practices worldwide. Conflict Resolution Day was conceived in 2005 by the Association for Conflict Resolution, commonly known as ACR. Per its website, "www.acrnet.org", ACR is national professional association for mediators,

arbitrators, educators and other conflict resolution practitioners. ACR was formed in 2001 when several professional dispute resolution organizations merged. ACR works in a wide range of settings throughout the United States and around the world enhancing the practice and public understanding of conflict resolution.

Each Year ACR celebrates Conflict Resolution Day the third Thursday of October. **This year is it October 20, 2016.** Conflict Resolution Day was conceived by ACR to:

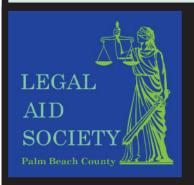
- Promote awareness of mediation, arbitration, conciliation and other creative, peaceful means of resolving conflict:
- Promote the use of conflict resolution in schools, families, businesses, communities, governments and the legal system;
- Recognize the significant contributions of (peaceful) conflict resolvers; and
- Obtain national synergy by having celebrations happen across the country and around the world on the same day.

Additional information about the ACR Conflict Resolution Day programs and activities can be found by clicking on the "Education" Tab at the ACR website.

In addition to Conflict Resolution Day, in 2011, the ABA declared the third week of October, **ABA Mediation Week** in part building on the efforts of ACR and many other national, state, and local organizations, which have traditionally celebrated conflict resolution during the month of October. Mediation Week this year is October 16-22. The theme for this year is "Celebrating Mediation in All Its Diversity" Per their website, "The ABA Mediation Week initiative is a celebration of the strides we have made in institutionalizing mediation as one of several appropriate dispute resolution processes." Information and resources for programs and activities can be found at the ABA Mediation Week website http:// www.americanbar.org/groups/dispute resolution/events cle/mediation week. html.

In Florida, for the past several years the Governor has issues a Proclamation recognizing Mediation Week in Florida. This year Governor Scott has declared October 17-23 as "Mediation Week" in the State of Florida. Locally, the ADR Committee of our bar association has over the years organized school essay and art contests and other community activities to promote mediation. This year it will be reaching out to organizations to offer speakers as part of its goal to promote ADR and inform our local community about ADR. Anyone who has a civic or other organization that would like to have a speaker should email me at ted@ matrixmediation.com.

## Get Your Foresome Now!



Legal Aid Society of Palm Beach County's

16th Annual

Cup of Justice Golf Classic

Monday, October 10, 2016 | 1:00pm Shotgun Start

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Bear Lakes Country Club - Lakes Course

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Golfers enjoy lunch, golf, dinner, goody bags, raffles, contests, trophies, prizes and much more!!!

## Attorney, Wife, Step-Mother... and Actress?

by Jen Iacobucci

There is a star among us and she is none other than local trial lawyer Kelly Hyman. In show business for 25 years, Kelly acted in both LA and New York since she was five years old and has been a member of the Screen Actors Guild since 1976. What started as a means to help her mom financially turned into a career that involved television shows, commercials, print ads and voice overs. Remember the voice from the late 1990s Kit Kat ads, Gimmie a Break? That's our Kelly Hyman.

Kelly's mother was a tennis pro and taught Charlton Heston. That relationship gave her the idea to have Kelly give acting a try. And it worked!

Kelly's other credits include the role of Loretta on The Young and the Restless. "I was mean and pregnant in that role," said Hyman. She was also in the TV Pilot, Getting There, as the daughter of Norman Fell (Mr. Roper from the sitcom Three's Company). Pillsbury, Tonka Toys, Texas Instruments and Coke are some of her commercial credits. Print ads included the famous Sears catalog, Spalding and Nabisco, among others.

Much of Kelly's time was spent taking acting lessons, tap



Photo ID: (I-r) Kelly Hyman, Actress Shalane McCall's friend, Brad Pitt and Shalane McCall from Dallas

dancing lessons and auditioning. She auditioned for a movie role in Honey I Shrunk the Kids and in the long-running television show, Charles In Charge, which she lost to her then friend, Nicole Eggert.

Like other actors, Kelly was schooled on the set. Getting her undergraduate degree did take a little longer, since at that time she was also spending much of her time acting.

In the late nineties, Kelly moved permanently to the east coast to appear on Off Broadway, before going to law school at age 30. A third generation lawyer, Kelly says her acting skills have helped her in and out of the courtroom. "I find it helps me step into someone's shoes and see their perspective," said Hyman. "I enjoy advocating for people". Her interest in the legal profession began in a civics class in high school.



She said, "We were holding a mock trial and someone said, 'Kelly, you should be the lawyer because you like to argue." Her boyfriend played the part of the witness in that trial. "My friends also said that I would be good playing the part of the lawyer because I liked to express myself."

Acting also had some nice perks - ahem, hanging out with Brad Pitt. Her friends also included actor Scott Grimes and her "bestie" was Shalane McCall from the prime time soap opera Dallas. "We would go on auditions, and would just all hang out together. It was normal."

Kelly earned a Bachelor's degree in communications from UCLA and she was awarded a J.D., with honors from the University of Florida College of Law.

Kelly is an attorney with the firm of Searcy, Denney, Scarola, Barnhart & Shipley, P.A. She practices in the firm's tobacco litigation unit and is currently on the Plaintiff's discovery committee for In Re: Santa Fe Natural Tobacco Company Marketing and Sales Practices Litigation, MDL No. 2695. She is the Vice President/President Elect of the Federal Bar, Palm Beach County Chapter, and is married to Bankruptcy Judge Paul Hyman, Jr., who has twins who are also lawyers from his previous marriage.

Kelly adds, "acting will always be a part of me." Just like being an advocate for others will always be a part of Kelly.

We wish our friend and former partner,

## Flynn Bertisch,

the best of luck and success! Michael, Jack, Greg and Lisa

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Bulletin



# New location for our Holiday Party & Silent Auction Save the Date and Join Us

Please mark your calendar for our annual holiday party and silent auction, which will be held on Wednesday, December 7 from 5:30 p.m. to 8:00 p.m. at PGA National in Palm Beach Gardens.

This party is one of our largest and most well attended events of the year, including cocktails, heavy hors d'oeuvres and one amazing silent auction benefitting local charity programs. The auction is presented by our hard working Young Lawyers and North County Section Board members. Donations for the auction are welcome and no item is too small. To donate a gift, please contact Lynne at 687-2800, ext 103.

A special thank you to our sponsors to date including Center State Bank; Domnick, Cunningham & Whalen; Esquire Bank; Global Engineering Solutions; Klett, Mesches & Johnson; Sabadell United Bank; U.S. Legal Support and Visual Evidence. Early registration is now open online at <a href="https://www.palmbeachbar.org">www.palmbeachbar.org</a>.



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



#### "PIP Hot Issues: Plaintiff's and Defendant's Perspectives"

Thursday, November 3, 2016, 11:30 - 1:00pm

PBC Bar Association 1507 Belvedere Road, WPB

#### **PROGRAM**

- EMCs Interpretation of the Statute
  - Benex

#### **SPEAKERS**

Jeffrey R. Hickman, Esq., Law Office of Jeffrey R. Hickman;

**GEICO General Insurance Company** 

Barry Aronin, Esq., Director of PIP Litigation; LaBovick Law Group

To register, visit the Bar's website www.palmbeachbar.org

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Trisha Armstrong Representing Unified Family Practice



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## Probate Corner



## The Florida Fiduciary Access To Digital Assets Act (Chapter 740)

by David M. Garten

The Florida Fiduciary Access to Digital Assets Act ("Act") went into effect on July 1, 2016. The goal of the Act is to facilitate fiduciary 1 access while respecting the privacy and intent of the account holder. It allows the fiduciary to "step into the shoes"

of the account holder and access, control, and/or copy digital assets from online accounts from banks, FaceBook, Google, Gmail, Instagram, etc., including account histories and user account information. The Act supplements the rights of an account holder under the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. § 2510-22.

The Act was also drafted in light of the fact that a deceased account holder likely registered with an on-line service by consenting to a terms-of-service agreement ("TOSA"). TOSAs specify the conditions controlling the relationship between an account holder and a custodian. The Act recognized that in most situations, the account holder likely consented to the TOSA by clicking "I agree" without ever reading it. The TOSA generally describe the account holder's rights in using the service, how personal information will be protected, the conditions on information sharing, and the account holder's rights upon death. The Act takes into account a custodian's possible refusal to grant fiduciary access simply because the deceased account holder consented to a blanket TOSA by specifying that fiduciary access, by itself, will not be deemed a violation of a TOSA or deemed an unauthorized transfer of an account.

In general, the Act accomplishes three purposes: First, it provides fiduciaries the legal authority to manage digital assets and electronic communications in the same manner that they manage tangible assets and accounts. Second, the Act provides custodians of digital assets and electronic communications the legal authority they need to interact with the fiduciaries of their users while honoring the user's privacy expectations for his personal communications. Most importantly, a custodian is granted immunity from liability for acts or omissions done in good faith compliance with the Act. And third, the Act gives users the ability to plan for the management and disposition of their digital assets if they should die or become unable to manage their assets by vesting fiduciaries with the authority to access, control, or copy digital assets and accounts.

The fiduciary's access to digital assets does not mean that the fiduciary is entitled to "own" the asset or otherwise engage in transactions with the asset. Consider, for example, funds in a bank account or securities held with a broker or other custodian, regardless of whether the bank, broker, or custodian has a brick-and-mortar presence. The Act affects records concerning the bank account or securities, but does not affect the authority to engage in transfers of title or other commercial transactions in the funds or securities, even though such transfers or other

transactions might occur electronically.

The following are two of the seven examples contained in the RPPTL White Paper:

Access to digital assets by personal representative: D dies with a will that is silent with respect to digital assets. D has a bank account for which D received only electronic statements, stored photos in a cloud-based Internet account, and an e-mail account with a company that provides electroniccommunication services to the public. The PR needs access to the electronic bank account statements, the photo account, and e-mails. The PR has the authority to access D's electronic banking statements and D's photo account because they fall under the Act's definition of a "digital asset." This means that if these accounts are password-protected or otherwise unavailable to the PR, then the bank and the photo account service provider must give access to the PR upon request. The PR is also able to request that the e-mail account service provider grant access to e-mails sent or received by D because the ECPA permits the service provider to release a catalogue<sup>2</sup> to the PR. The service provider may provide the PR access to the content of an electronic communication sent or received by D if the service provider is permitted under 18 U.S.C.§2702(b) to disclose the content. The bank may release the catalogue of electronic communications or content of an electronic communication for which it is the originator or the addressee because the bank is not subject to the ECPA.

Fiduciary's access to email account with employer:

D dies while employed by Company Y. Company Y has an internal email communication system available only to its employees. The PR of D's estate believes that D used Company Y's email system for some financial transactions that PR cannot find through other means. PR requests access from Company Y to the emails. Company Y did not have a TOSA with D regarding the use of electronic communications. Company Y is not a custodian as defined under the Act because it is a private e-mail service provider<sup>3</sup>; therefore, any digital assets created through employment belong to Company Y and the PR does not have access to the internal emails.

## **Upcoming CLE Seminars**

November 3:

PIP Hot Issues: Plaintiff's and Defendant's Perspectives

November 18:

Bankruptcy Seminar

**December 9:** Elder Law Seminar

<sup>&</sup>lt;sup>1</sup> The Act pertains to the following fiduciaries: (1) personal representatives, (2) guardians of the property of minors or incapacitated persons, (3) agents acting pursuant to a power of attorney, and (4) trustees. See §740.002(13), F.S.

<sup>&</sup>lt;sup>2</sup> Catalog of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person. See §740.002(4), F.S.

<sup>&</sup>lt;sup>3</sup> ECPA does not apply to private e-mail service providers such as employers and educational institutions. See 18 U.S.C. §2702(a)(2).

## Professionalism Corner



## **Changing Fee Arrangements During Representation**

by Dana E. Foster

What if a client requests that the lawyer switch from being compensated by the hour to accepting a contingency fee instead? How can the lawyer avoid potential conflicts, fulfill his or her duties of disclosure and accomplish this in a way

to maximize its enforceability? While the American Bar Association's (ABA) Model Rules of Professional Conduct clearly contemplate changes to fee arrangements (*see, e.g.,* Rule 1.5(b), which states "[a]ny changes in the basis or rate of the fee or expenses shall be communicated to the client"), the ABA has provided limited guidance on the most effective means for doing so. That guidance is found in ABA Formal Opinion 11-458.

#### When a Change in a Fee Arrangement is Permissible

ABA Opinion 11-458 considers when a change in an attorney fee arrangement is permissible under the Model Rules, and to a lesser extent, how such a change would be analyzed under common law contract principles. While the ABA Opinion notes that general principles of contract law apply and require little discussion, the ABA Opinion points out several areas where interpretation of an attorney's fee contract differs from that of ordinary contracts. For example, the ABA explains that:

- A modified fee contract does *not* require additional consideration for the modification to be effective, as most other contracts would; and
- The attorney bears the burden of justifying any change in an agreement midstream in the representation of a client, rather than both parties equally.

Importantly, Florida cases that pre-date the ABA Opinion suggest that additional consideration for the modification is required. See, e.g., <u>Independent Fire Ins. Co. v. Lugassy</u>, 636 So. 2d 1332, 1335 (Fla. 1994) (holding "general rules of contract law allow parties to alter the terms of a retainer agreement as long as new consideration is given"); Moreno v. Allen, 692 So. 2d 957, 959 n. 2 (Fla. 3d DCA 1997) (holding "[t]he latter [fee] agreements, entered into, as they were, in the course of the attorney-client relationship, were undoubtedly void for lack of consideration and overreaching"). So, at least in Florida, consideration for a change in a fee arrangement is an issue that needs to be considered and addressed. See, e.g., Lugassy, 636 So. 2d at 1335 (finding adequate consideration for modification where original fee agreement did not contemplate defending a counterclaim); Gen. John J. Pershing Auxiliary No. 6, Dept. of Florida v. Murphy, 341 So. 2d 809, 810 (Fla. 3d DCA 1977) (reducing fee award to amount of original agreement after finding there was no consideration provided for modified agreement).

#### **Modification of a Fee Arrangement**

Turning to how a modification of a fee arrangement is affected by the Model Rules, the ABA Opinion concludes that modifications of fee arrangements will be considered generally permissible provided:

- The modification was reasonable under the circumstances [ABA Model Rule 1.5(a)];
- The modification was communicated and fully explained to the client [Rule 1.4 and 1.5(b)]; and
- The modification was accepted, either expressly or through conduct, by the client.

These general rules are consistent with Florida case law. *See, e.g., In re Estate of Johnson*, 566 So. 2d 1345, 1347 (Fla. 4th DCA 1990) (holding changes to retainer agreement must be "mutually agreed to"); *Mercy Hospital, Inc. v. Johnson*, 390 So. 2d 103 (Fla. 3d DCA 1980) (holding the lawyer has the burden of showing the "fairness" of the modified retainer agreement by "clear and convincing proof").

#### **Examples of Acceptable Modifications to Fee Arrangements**

The ABA Opinion provides a few examples of acceptable changes:

- A firm may increase its hourly billing rates annually without negotiating every rate increase with the client *if* this is clearly communicated to the client, the client consents, and the increase is reasonable.
- A lawyer and client also may agree to change an hourly fee agreement to a contingent fee agreement, or vice-versa, provided that the lawyer complies with Rule 1.5(c), which requires a contingent fee agreement to be in writing and signed by the client.

## **Examples of Unacceptable Modifications to Fee Arrangements**

By contrast, the ABA Opinion points out the following unacceptable examples of fee modifications:

- A lawyer may not unilaterally impose a "success fee" on a client, altering the arrangement from an hourly rate to a contingency fee, without the client's informed consent.
- A lawyer may not threaten to withdraw if the client does not agree to an increase in the fee.

#### Conclusion

Overall, here is the lesson: It's often permissible for an attorney to change legal fee arrangements during an ongoing representation, as long as the change is both reasonable and consented to by the client.

Ms. Foster is counsel with the law firm of Ackerman, Link & Sartory, P.A.

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# The Business Litigation CLE Committee of the Palm Beach County Bar Association presents:



## Ethical Limits in e-Discovery and how to Avoid Sanctions and Malpractice Liability

Thursday, December 8, 2016, 11:30 - 1:00 pm PBC Bar Association, 1507 Belvedere Road, WPB

11:30p.m. - 12:00p.m.

Late registration, check-in and lunch
12:00p.m. - 12:10pm

Welcome and announcements
12:10p.m. - 1:00p.m.

David Steinfeld, Esq., Law Office of David Steinfeld, P.L.; Florida Bar Board Certified Business Litigation Specialist, Chair, Florida Bar Business Litigation Board Certification Committee

What are the ethical limits in this new world of e-Discovery?

a. Pre-suit Identification of Data, Preservation and Collection

What, if anything, can you tell a client to delete?
Can you pick and choose what data you collect from your own client?

b. Process, Review and Analysis of data in e-Discovery

Are the keywords that you select for a search protected work product?

Avoiding sanctions and malpractice liability while doing e-Discovery

- a. What changed in the Federal e-Discovery Rules after the December 2015 Amendments
- b. Review of recent cases under the new Rule 37 (Sanctions)
- c. Examination of Florida Bar Ethics Opinion 14 1
- d. The impact and implications for the Fourth DCA's *Nucci v. Target* decision

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This course has been granted 1.0 CLER and 1.0 ethics credit and 1.0 certification credits in Business Litigation from The Florida Bar. The cost of the seminar is \$ 40 for PBCBA members/paralegals, \$ 80 for non-PBCBA attorney members/paralegals. After 12/1/16, add \$10.00 late fee. All refund requests must be made no later than 48 hours prior to the date of the seminar.

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## Real Property and Business Litigation Report



by Manuel Farach

**Bair v. City of Clearwater,** – So. 3d –, 2016 WL 4150220 (Fla. 2d DCA 2016).

Requests for additional information during a construction project do not arise to the level of a violation of the Bert Harris Act, Florida Statute section 70.001. Additionally, equitable estoppel is a defensive doctrine that may not be used

offensively to seek money damages against government for blocking land development.

**575** Adams, LLC v. Wells Fargo, LLC, – So. 3d –, 2016 WL 4132004 (Fla. 3d DCA 2016).

An owner of property may take the deposition of a foreclosing mortgagee's witness, even if the owner is a "stranger to the property" (i.e., acquired the property after the *lis pendens* was filed).

State of Florida, Dep't of Environmental Protection v. Beach Group Investments, LLC, – So. 3d –, 2016 WL 4132112 (Fla. 4th DCA 2016).

A administrative takings claim is not ripe unless the landowner has applied for a variance and been rejected.

Green Emerald Homes, LLC v. The Bank of New York Mellon, – So. 3d –, 2016 WL 4138237 (Fla. 4th DCA 2016).

A party seeking to serve a limited liability company pursuant to Florida Statute section 608.463(1)(a) must perform a diligent search for the person to be served before serving by constructive service, i.e., the serving party must do more than merely attempting to serve the registered agent.

**Pro Finish, Inc. v. Estate of All American Trailer Manufacturers, Inc.,** – So. 3d –,2016 WL 4132721 (Fla. 4th DCA 2016).

An assignee under Florida's Assignment for Benefit of Creditors Act, Florida Statutes Chapter 727, must strictly comply with the time frames set forth in the Act (including petitioning the trial court for the establishment of the assignment within ten days and publishing for one month) and failure to do so renders the assignment proceedings invalid.

All South Subcontractors, Inc. v. Amerigas Propane, Inc., – So. 3d –, 2016 WL 4239846 (Fla. 1st DCA 2016).

An arbitration agreement contained in a bulk mailer sent out to prospective customers prior to the parties entering into a contract is not binding.

**Gdovin v. Dyck-O'Neal, Inc.,** – So. 3d –, 2016 WL 4204470 (Fla. 2d DCA 2016).

Florida Statute section 702.06 permits the filing of an independent action for deficiency judgment, even if a deficiency was prayed for in the foreclosure complaint, so long as the foreclosure court did not render a decision on the deficiency claim. Conflict certified with the First District Court of Appeal's decision in *Higgins v. Dyck-O'Neal, Inc.*, 41 Fla. L. Weekly D1376 (Fla. 1st DCA June 9, 2016).

Effs v Sony Pictures Home Entertainment, Inc., – So. 3d –, 2016 WL 4198129 (Fla. 3d DCA 2016).

The Continuing Tort Doctrine is not applicable to a claim for tortious interference when the continuing wrong is the continuing harmful effects of the tort, i.e., damages.

**Gomez v. Timberoff Roofing, Inc.,** – So. 3d –, 2016 WL 4205344 (Fla. 4th DCA 2016).

Recorded judgments which contain the address of the attorney for the creditor and not the creditor itself violate the requirements of Florida Statute section 55.10, and thus do not constitute liens on the real property of the judgment debtor.

**Dyck-O'Neal, Inc. v. McKenna,** – So. 3d –, 2016 WL 4262111 (Fla. 4th DCA 2016).

Florida Statute section 702.06 permit the filing of an independent action for deficiency notwithstanding deficiency was requested in the foreclosure complaint; conflict certified with the First District Court of Appeal's decision in *Higgins v. Dyck-O'Neal, Inc.*, 41 Fla. L. Weekly D1376 (Fla. 1st DCA June 9, 2016).

**Kajaine Estates, LLC v. US Bank National Ass'n,** – So. 3d –, 2016 WL 4252938 (Fla. 5th DCA 2016).

The question of whether a foreclosing lender can establish legal standing is different than whether the lender is the owner of a promissory note. Accordingly, an owner of a note may retrieve the original promissory note from the court file even if i was not able to establish legal standing to foreclose.

**Balaguer v. Physicians for the Hand, LLC,** – So. 3d –, 2016 WL 4376724 (Fla. 3d DCA 2016).

Orders regarding motions to vacate arbitration awards are governed by the same standards as appeals from orders generally, including review of findings of fact under a competent substantial evidence standard and legal issues under a *de novo* standard of review. Accordingly, failure to provide the appellate court with an arbitration record precludes a review of factual questions.

JP Morgan Chase Bank Nat. Ass'n v. Colletti Investments, LLC, – So. 3d –, 2016 WL 4381258 (Fla. 4th DCA 2016).

Special damages do not necessarily flow from the wrong or breach (even though they may naturally and proximately flow from the wrong or breach), and as a result, must be specifically pled to be recovered.

**Zucarelli v. Barfield,** – So. 3d –, 2016 WL 4381651 (Fla. 4th DCA 2016).

In order to prevail on a claim of selective enforcement of building codes, a plaintiff must prove "(1) that they were treated differently from other similarly situated individuals, and (2) that [d]efendant unequally applied a facially neutral ordinance for the purpose of discriminating against [p]laintiffs."

## Welcome New Members!

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

Eric Aaronson: Nova Southeastern University, 2015; Associate in Arnstein & Lehr LLP, West Palm Beach.

Amity R. Barnard: Vermont Law School, 2013; Associate in Corbett, White, Davis, and Ashton, P.A, West Palm Beach.

Janelle Batta: Law Student Membership, Jupiter.

Tracy Paige Berkman: Boston University, 2010; Associate in Ackerman, Link & Sartory, West Palm Beach.

**Ronald J. Berman:** University of Detroit, Solo Practitioner, Palm Beach Gardens.

**Labeed Ahmed Choudhry:** University of Florida, 2012; Associate in Ward Damon, West Palm Beach.

Mark S. D'Amore: Quinnipiac University, 2016; Solo Practitioner, Jupiter.

Jermaine K. Jackson: Thomas Cooley Law School, 2013; Associate in Derrevere, Hawkes, Black & Cozad, West Palm Beach.

Wilnar Jeanne Julmiste: Stetson University, 2006; Associate in Anderson Glenn, LLP, Boca Raton.

**Hillarey A. McCall:** University of Florida, 1986; Partner in Wyland Tadros, West Palm Beach.

**Alexandra E. Menegakis:** University of Florida, 2014; Office of the Public Defender, West Palm Beach.

**Yanique Lisa Otto:** Florida State University, 2013; Solo Practitioner, Delray Beach

**Kathryn Lewis Perrin:** Stetson University, 2008; Office of the State Attorney.

Michael Thomas Rasmussen: Nova Southeastern University, 2012; Solo Practitioner, Greenacres.

**Jeffrey Waintroob Roberts:** Florida International University, 2009; Solo Practitioner, Palm Beach Gardens.

Michael M. Rubenstein: University of Miami, 2012; SunTrust Private Wealth Management, Palm Beach.

**Zorelly Torres-Sanchez:** University of Puerto Rico, 2011; Associate in Nugent Zborowski & Bruce, North Palm Beach.

**Timothy Shields:** Law Student Membership, Wellington.



## FOUR BARS - ONE BIG PINK PARTY AND YOU'RE INVITED!

Join the NORTH COUNTY SECTION, along with members of FAWL, Palm Beach County Justice Association and the Hispanic Bar Association for one giant networking mixer to benefit Smiley Wiley Breast Cancer Foundation

Thursday, October 27, 2016 5:30 P.M. to 7:00 P.M. Cabo Flats @ 1352 U.S. Highway One in Jupiter

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Muvico (Carmike) Theater \$8.00 each Regal Theaters \$8.50 each

Come by the office and pick up your tickets today (payment only by check or credit card). Tickets will only be FedEx'd (not mailed) if member provides us with a FedEx number.

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Bulletin

## Diversity Corner



# Legend Amongst Us: My Quest to Find the First Black Female Attorney to Practice Law in Palm Beach County

by Lawonda R. Warren Esq.

"What does it take to be the first female anything? It takes grit, and it

takes grace," as stated by Meryl Streep. On July 27, 2016, I was installed as the 27th President of the F. Malcolm Cunningham, Sr. Bar Association (FMCBA). FMCBA's theme for the 2016-2017 year is: Ties that Bind Us: Looking Backward to Proceed Forward Promoting Community Consciousness Within the Legal Profession. In the spirit of that theme, I decided to honor our "Famous Firsts," by celebrating the achievements of black female attorneys in Palm Beach County during our 2016-2017 Officer Installation.

As I researched potential honorees, I was shocked at the realization that I could not identify the first black female to practice law in Palm Beach County. So I began to ask around, as I made it my journey to solve this mystery. No one could give me a definitive answer. Attorney Jean Middleton, a Past President of FMCBA, mentioned that Judge Catherine Brunson may have been the first, but she was not sure. Local legends Judge Edward Rogers and T.J. Cunningham, Sr. mentioned a woman named Debra Pole who now lives in California. Judge Brunson is a local senior judge and accomplished attorney, so I started with her.

Judge Brunson informed me that she started practicing law in Palm Beach County in 1976, but there was another black female attorney present when she arrived by the name of (guess who) Debra Pole. I conducted an internet

search and found Ms. Pole. I called her and we spoke for at least an hour. She indeed lives in California and is a partner with the international firm Sidley Austin LLP. As with Judge Brunson, she began practicing law in Palm Beach County in 1976. However, she was not sure if she was, in fact, the first black female attorney in the area because she remembered an attorney named Catherine Washington in the area around the same time. It turned out that Washington was Judge Brunson's maiden name! So I had narrowed the mystery down to two great black women pioneers, but who was first?

Upon further research through Judge Moses Baker, I found out that Ms. Pole started her career at the Palm Beach County State Attorney's Office. The State Attorney's Office informed that Ms. Pole's start date was August of 1976. Judge Brunson then confirmed her start date of June 1976, making her the FIRST black woman to practice law in Palm Beach County. When I told Judge Brunson that we would be officially honoring her as the first black female attorney to practice law in Palm Beach County at the installation, she said, "I'm glad I am alive to witness this honor."

Judge Brunson graduated from The Florida State University College of Law in December of 1974, where she was the first black female student to graduate from the law school. She was admitted to practice law in Florida on May 22, 1975. After starting her career as an Assistant Public Defender and attorney for the State Retirement

Commission, Judge Brunson moved to Palm Beach County in June of 1976 and began working at the Law Offices of Thomas Montgomery. In 1977, she became the first black attorney hired by the Palm Beach County Attorney's Office. Thereafter, in February of 1984, she became the first black female attorney to open a private practice in Palm Beach County. On August 10, 1994, she became the

first black female to be appointed as a Circuit Court Judge in Palm Beach County.

At the FMCBA Officer Installation, we celebrated the achievements of several black female attorneys, including Judge Brunson. All achievements were



submitted to the Historical Society of Palm Beach County for placement in their archives. Additionally, a historical display was created and revealed at the installation. The display is housed in the Richard and Pat Johnson Palm Beach County History Museum (Palm Beach County Historic Courthouse).

As the Committee for Diversity and Inclusion continues to promote diversity and make strides in helping to ensure that minority lawyers in Palm



Beach County have every opportunity to thrive in our community, I cannot imagine the adversity Judge Brunson must have faced 40 years ago as the first black female attorney

in Palm Beach County. I encourage everyone to visit the museum to view the display. This history is not just important to black attorneys or women, but to everyone in the legal profession.

Lawonda R. Warren is the President of the F. Malcolm Cunningham, Sr. Bar Association and member of Palm Beach County Bar Association's Committee for Diversity and Inclusion and Judicial Campaign Commission. Ms. Warren is an Assistant City Attorney/Police Legal Advisor for the City of Delray Beach, FL.



#### The Bankruptcy CLE Committee of the Palm Beach County Bar Association presents:



#### STAYING UP TO SPEED - CURRENT SUBSTANTIVE AND PROCEDURAL ISSUES IN BANKRUPTCY CASES

Friday, November 18, 2016, 11:30a.m. - 5:00p.m. PBCBA, 1507 Belvedere Road, WPB

11:30a.m. - 11:55a.m. Late registration, check-in and lunch

11:55a.m. - 12:00p.m. Welcome - Opening Remarks - Eric A. Rosen, Esq.,

Fowler White Burnett, P.A., Bankruptcy CLE Committee Chair

12:00p.m. - 12:50p.m. Surrendering Real Property: Really? - Eric A. Rosen, Esq.

1:00p.m. - 2:00p.m. Student Loans - Continuing Efforts to Avoid Non-Dischargeability -

Zach B. Shelomith, Esq., Leiderman Shelomith Alexander + Somodevilla, PLLC

2:00p.m. - 2:10p.m. Break

2:10p.m. - 3:00p.m. Non-Dischargeability Litigation (a/k/a Trials On Speed):

How To Handle Them (Including A Broader Scope of Potential Husky

**Defendants)** – Tina M. Talarchyk, Esq., The Talarchyk Firm

3:50p.m. Appeals: Do You Know Where to Look and The Time In Which You Can 3:00p.m. -

File? (You Better) - Thomas Zeichman, Esq., Massana, P.A.

3:50p.m. - 4:40p.m. Question and Answer Session - All seminar speakers and panelists

4:40p.m. - 5:30p.m. Reception

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This course is expected to receive 5.0 CLER, from The Florida Bar. The cost of the seminar is \$ 125 for PBCBA members/paralegals, \$ 165 for non-PBCBA attorney members/paralegals. After 11/11/16, add \$10.00 late fee. All refund requests must be made no later than 48 hours prior to the date of the seminar.

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Page 14 Bulletin







## FOURTH ANNUAL THANKSGIVING TEDDY BEAR AND BOOK DRIVE TO SUPPORT NATIONAL ADOPTION DAY

An annual program of the Lawyers for Literacy Committee

Donate a new Teddy Bear or a new Children's Book to benefit the Guardian Ad Litem program for the 15th Judicial Circuit

Books and bears will also be given to our Juvenile Judges for children in Court for dependency dockets.

Donations accepted at the Bar Office now through November 2

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The Technology Committee of the Palm Beach County Bar Association presents two seminars with Adriana Linares\* of LawTech Partners:



## Law Firms and PII: Complying with **Privacy and Data Security Laws**

Thursday, November 17, 11:30am - 1:00pm PBCBA, 1507 Belvedere Rd., WPB

Program: Law firms face legal and ethical obligations regarding the protection of employee and client personal information. This session will provide an overview of data protection laws and address the ethical and practical applications of these requirements to law firms.

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- Why keeping client data "confidential" is not enough
- Minimizing the risk under privacy and data security laws and Rules of Professional Conduct
- How to build and implement an effective and compliant privacy and data security program





## Demystifying Encryption - What You Should Know And What you Should Be Doing About It



Tuesday, December 6, 2016, 11:30 am - 1:00pm PBCBA, 1507 Belvedere Rd., WPB

Program: Encryption is a topic that we hear a lot about, but few have a complete handle on understanding. But now that encryption is simple to use – and inexpensive, there increasingly is a rise in the number of legal ethicists who believe that encryption (in some cases) is ethically required under Model Rules 1.1. Learn about tools, policies, procedures and training that you can do today and in your office to protect your data and your client's information.

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PATMTECH.

- Why whole disk encryption is important
- How to encrypt USB drives and back-up media

Understanding encrypted data "at rest" and "in motion

\*Adriana Linares is a law practice consultant and legal technology coach. She has years of experience working with law firms, legal departments, legal aid groups and even legal technology startups. Today she serves as a technology consultant to The Florida Bar.

The cost of each seminar is \$ 35 for PBCBA members/paralegals, \$ 75 for non-PBCBA attorney members/paralegals. All refund requests must be made no later than 48 hours prior to the date of the seminar.

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November 17 Law Firms and PII: Complying with Privacy and Data Security Laws (after 11/10 add \$10) December 6 Demystifying Encryption - What you Should Know (after 11/29 add \$10)

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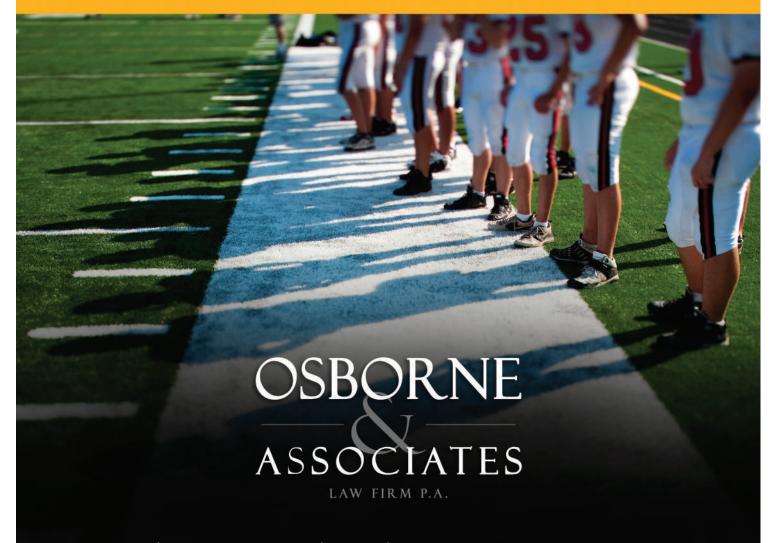
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#### MISCELLANEOUS

#### **Position Available / Desired**

Paralegal position in West Palm Beach. Must have 3-5 years Family Law experience. Applicant should be familiar with the Florida/Federal Rules of Civil Procedures and Florida Statues, with experience in trial preparation; including drafting and preparing legal documents, discovery, scheduling, e-filing, e-service and preparation for court proceedings. Position requires a professional disposition and proficient communication skills. Excellent benefits package including health insurance, dental insurance, life insurance, PTO and paid holidays. Contact information: anna@jmwpa.com

Schuler, Halvorson, Weisser, Zoeller & Overbeck, P.A. is seeking a full-time Associate Attorney with 2-3 years Personal Injury Protection (PIP) litigation claims experience to join our PIP team. Candidates must have document management skills and computer proficiency. Immediate opening. Negotiable salary and excellent benefits. Resumes to admin@shw-law.com.

#### OFFICE SPACE

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Office sublease. Centurion Tower, 1601 Forum Place, West Palm Beach. \$1,500 per month for attorney's office with staff cubicle. Access to copier, scanner, fax, internet, and filing cabinet. Attorney and staff parking included. Contact Janet at 561-659-7878

#### HEARSAY

The Law Offices of Richard S. Cohen, LLC d/b/a Cohen Legal is proud to announce **Jason L. Cohen** as a member of the firm. Jason joins Cohen Legal after more than five years of insurance defense litigation

Best-selling author Harvey Oyer received the Florida Authors & Publishers Association Gold Medal for Florida Juvenile Fiction & Non-Fiction for his book *The Adventures of Charlie Pierce: The Barefoot Mailman*.



John W. Little, III of Gunster was recognized by Past Chair Michael Gelfand of the Real Property, Probate and Trust Law Section at the Section's Executive Council

meeting in July, receiving the John Arthur Jones Annual Service Award.



Holland & Knight partner William Shepherd has been elected to the American Bar Association (ABA) Board of Governors. His one-year term began at the close of

the ABA's annual meeting in August. He previously served as chair of the ABA's Criminal Justice Section and as a member of its House of Delegates. Mr. Shepherd is a member of Holland & Knight's national White Collar Defense Team.

Three Cohen Milstein Attorneys Named to the 2017 Edition of Best Lawyers in Florida Theodore J. Leopold; Leslie M. Kroeger; Stephan A. LeClainche



The PBC Clerk and Comptroller, **Sharon Bock** and her office was the recipient of the Quality Senior Living Award during the Florida Conference on

Aging.

Jones, Foster, Johnston & Stubbs, P.A. announces that 17 lawyers were recently selected by their peers for inclusion in The Best Lawyers in America: Larry B. Alexander, Larry B. "Ben" Alexander, Jr., David E. Bowers, Margaret L. Cooper, H. Michael Easley, Scott G. Hawkins, Thornton M. "Tim" Henry, Peter S. Holton, Michael T. Kranz, Theodore S. Kypreos, Joanne M. O'Connor, John C. Randolph, Peter A. Sachs, Sidney A. Stubbs, Roberto M. Vargas, H. Adams Weaver and Robert W. Wilkins



Jones, Foster, Johnston & Stubbs, P.A. announces that firm shareholder Joanne M. O'Connor is now Florida Bar Board Certified as a Business Litigation Attorney



The Law Firm of Elisha D. Roy, P.A. is pleased to announce that Elisha D. Roy has been selected for Leadership Palm Beach County Engage Class of 2017.



Jones, Foster, Johnston & Stubbs, P.A. announces that firm attorney, William G. Smith, has been selected to be part of the Florida Fellows Institute.



Carri Leininger of Williams, Leininger & Cosby, P.A. has recently become Board Certified in Appellate Law.



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## CALENDAR October 2016

Monday, October 3 Rosh Hashanah Bar Office Closed

Friday, October 7 7:30am - 2:00pm**PBC Justice Association Golf Tournament** Falls of the PB

Friday, October 7 8:30am - 9:30am **ADR Committee Meeting** Bar Association Office

Monday, October 10, 1:00pm Legal Aid 16th Annual Cup of Justice Golf Classic Bear Lakes Country Club

Tuesday, October 11

12:00pm - 1:00pmYLS Board Meeting

Bar Association Office

Wednesday, October 12 Yom Kippur Bar Office Closed

Monday, October 17 6:30pm - 7:30pm**Small Claims Clinic** Okeechobee Branch Library

Tuesday, October 18 12:00pm - 1:00pm **CDI Meeting** Bar Association Office

Tuesday, October 18 12:00pm - 1:00pm **NCS Board Meeting** Duffy's NPB

Wednesday, October 19 12:00pm - 1:00pm Professionalism **Committee Meeting** Bar Association Office

Thursday, October 20 12:00pm - 1:30pm**Unified Family Practice Committee Meeting** Judicial Conference Room, PBC Courthouse

Thursday, October 20 5:30pm - 7:30pm**PBC Justice Association** Revolutions at City Place

Thursday, October 20 5:30pm - 7:00pmYLS Happy Hour

Tuesday, October 25 5:30pm - 7:00pm**Legal Aid Society Board** Bar Association Office

Wednesday, October 26 5:00pm - 6:30pm**Board Meeting** Bar Association Office

Thursday, October 27 5:30pm - 7:00pm **NCS Happy Hour** Cabo Flats, Jupiter



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