



PALM BEACH COUNTY BAR ASSOCIATION

BULLETIN

www.palmbeachbar.org

November 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.

Happy Thanksgiving from the Board and Staff



*Welcome Aboard
Carla!*

Carla Tharp Brown, the Bar's new Executive Director received a warm welcome during our special Open House for her. She is pictured here with Sarah Cortvriend. To see more photos from this event, see page 4.

Holiday Party & Silent Auction – New Location

We hope you will join us for our annual holiday party and silent auction 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 heavy hors d'oeuvres, an amazing silent auction, plus adult beverages. One hundred percent of the auction proceeds will benefit charities sponsored by our Young Lawyers and North County Sections.

A special thank you to our sponsors from Center State Bank; Domnick, Cunningham & Whalen; Esquire Bank; Global Engineering Solutions; Klett, Mesches & Johnson; Northwestern Mutual; Sabadell United Bank; U.S. Legal Support and Visual Evidence.

Attend the party by registering online @ www.palmbeachbar.org.

Mark your calendar for upcoming Membership Events

November 9, 11:45 – 1:00 pm
Membership Luncheon with guest speaker
Former MLB General Counsel Tom Ostertag

December 7, 5:30 pm
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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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



**North County Section
To Host November
Networking Mixer**

Thursday, November 10
5:30 p.m. to 7:00 p.m.
Yard House, Palm Beach Gardens
NCS Members: \$10.00
PBCBA Non-Section members
and spouses: \$25.00
RSVP online @ PalmBeachBar.Org

Board Meeting Attendance

	JUL	AUG	SEPT
Barnes	X		phone
D'Amore	X	X	X
Huber	X	X	X
Mason	phone	X	X
McElroy	X	X	X
Pressly	X	X	X
Reagan	X	X	X
Smith, G.	X	X	X
Smith, S.	X	X	X
Whittles	X	X	X
Wilson	X	X	X
Wyda	X	X	X
Xenick	X	X	X



Bar President John Whittles recently attended Judge Cymonie Rowe's Investiture where he congratulated her on her appointment to the 15th Circuit. On behalf of the

Palm Beach County Bar Association, John presented Judge Rowe with a personalized gavel.

Save the Date!

Tuesday, November 15, 2016 | 5pm to 8pm
Brooks Brothers | Gardens of the Palm Beaches | 3101 PGA Boulevard



SUPPORTS THE LEGAL AID SOCIETY OF PALM BEACH

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

For more information, contact Bob Bertisch at 561-655-8944 or rbertsich@legalaiddpbc.org





A Lesson from the Presidential Debate

By John R. Whittles

I am writing this message the morning after the first of a series of debates between the two presidential candidates. I admit to being, like many of us, a fan not only of the substance of the debate but the agonizing tension and pure theater and pageantry of it all. For the whole 90 minutes, I was on the edge of my seat waiting for the next strategic move, the next gaffe, the next proudly articulated moment. It was definitely a mixture of both and it reminded me of the job that lawyers do in attempting to convince judges, juries and other audiences on behalf of our clients. I wrote down (without naming any names) a couple of themes that I kept seeing over and over again last night that seem to translate from the debate stage to the courtroom:

- 1. Whoever you are, own it.** Whenever I see someone acting robotic or unnatural, I wonder what about themselves they don't like to require putting on the show. It is rare when someone can effectively act like someone else. Conversely, being comfortable in your own skin sure seems to be the foundation for being convincing. It eliminates the burden and effort of keeping a certain face on and allows the speaker to focus on just delivering the message and driving it home.
- 2. No robot speeches; just talk.** Words do matter but people respond to people, not the words themselves. From what I have seen, effective communication has to involve some sort of connection between the speaker and the audience. Just talk; and I don't mean mindless talk, but the connection is more important than the syntax. It amazes me when these professional politicians and other public speakers have a crowd of people staring at them, hanging on their every word, and then they look down at a piece of paper or un-holster some canned, thesaurus-fueled speech and you can just feel the air go out of the room and an opportunity lost. There is no magic at all in reading but a connection between a speaker and audience in a public setting can be magical. Bill Clinton was great at it. Ronald Reagan was great at it. Similarly, there are lawyers in our community that seem to have it down to a science. Even for the rest of us that don't have it nailed like that yet, it is in any event easier to forgive a speaker who stumbles over a phrase while making eye contact and looking for that connection than suffer through someone perfectly reading a speech or mechanically piecing words together without the feeling that makes a presentation a conversation and not a lecture.
- 3. Polite is effective.** Making a professional and relaxed presentation with your adversary standing next to you, staring at you, is a contradiction, especially if you do not like the other person. I saw a mixed bag of body language; little bits of understandable animosity at times and out-and-out contempt and rudeness at other times. Those natural feelings are tough things to restrain but watching

the debates reminded me that insults are distracting and petulant and just turn the audience off. Whenever I heard someone interrupting, refusing to conclude an answer or giving a snide look of disdain, in my mind I was docking that candidate a point or two. On the contrary, good ideas don't need insults and strong delivery of those ideas reduce bickering to unnecessary effort. I am not suggesting that adversaries need to be sweet to each other but the best lawyers and politicians I have seen are usually so in control, that engaging in low blows would slow them down. That is where we all want to be – where we are so confident in our abilities and message that there is no need to go there. Also, no reasonable person likes a bully.

- 4. Be careful of the weeds.** Details are necessary but there should be an understanding that lots of details without some context first can be exhausting for the listener. In court, I sometimes get so excited to reproduce my knowledge of something at a moment's notice, that I look at the judge after twenty or thirty seconds of excited arguing and his or her eyes are rolled back like a slot machine, hoping that I will soon stop talking. Other times, I think to slow down a little bit and it goes something like this –give the big picture (let that sink in), give the primary facts (let that sink in), and now that the stage is set, make those points with conviction and feed off of that look of recognition when the judge (or whoever) understands what you are saying and why.
- 5. Respect closely-held beliefs that you disagree with.** There are certain things you cannot change about people whether you like them or not. If a speaker cannot recognize that, I believe he or she has almost no chance of being persuasive. A gun control advocate is not going to convince a card-carrying NRA member that guns are bad no matter how brilliantly the anti-gun words are combined and delivered. To have any hope of making in-roads on closely held beliefs, there has to be a fundamental acceptance of the contrary belief followed by some logic that eventually soaks in. A full frontal assault of ridiculing someone's beliefs will never work and will only make for an angry listener. I think that's human nature and people just dig in to instead convince you that you are the one who is wrong. To get someone's attention, do something to recognize or respect that closely held belief and then explain why you feel differently, and when you do, do that part with feeling. This goes back to persuading by connecting instead of being wordy.

Those are all of my thoughts - five. Next time, hopefully I will have six or more. I am looking forward to the next debate. Highest-stakes drama with all of the world watching. jwhittles@mathisonwhittles.com

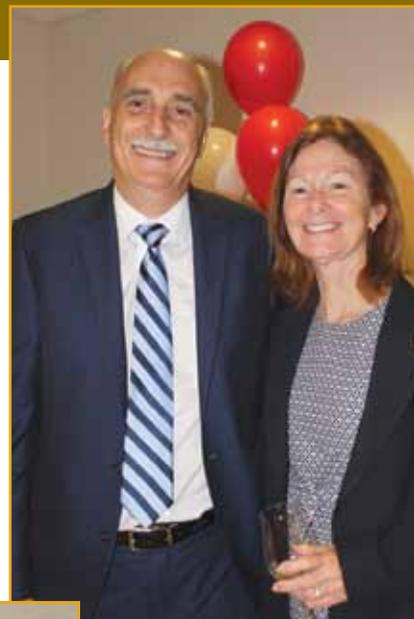
Welcome Aboard Carla!



Jessie Ervolino, Shannon Mahoney and Trisha Armstrong



Andrea McMillan and Amy Fischer



United States District Court Judge Ken Marra and Bridget Berry



Executive Director Carla Tharp Brown and Julianne Frank



Phillip Hutchinson and newly appointed Judge Cymonie Rowe

ABA Annual Meeting Report August 2016: San Francisco



*by the PBCBA's
ABA Delegate
Donnie Murrell*

I missed the mid-year meeting in San Diego. There was no way my wife was going to miss the annual meeting in San Francisco, one of her favorite cities. So I went with her. We left West Palm at 6:30 a.m. Even that early it was already 85 degrees with about 98% humidity. The temperature was 59 degrees when we landed in San Francisco. It was a nice change.

There was also a distinct change in the air at the ABA meeting. Past annual meetings have had attendance of ten to twelve thousand lawyers. Only about five thousand registered for this meeting. The General Assembly is the traditional high point of the annual convention. I would estimate less than five hundred lawyers attended. The massive Mascone Convention Center swallowed the "crowd".

The ABA has an Expo for vendors, just as the Florida Bar does at its annual meeting. Just a few years ago, the Expo was so popular the ABA actually charged admission to stroll through it. That has changed. This year admission to the Expo was free once again, but it was sparsely attended by vendors. The biggest exhibitor by far was the ABA book section. The Florida Bar attracts far more vendors.

While visual signs of decline were obvious, even more telling was the open friction that erupted between the leadership of the ABA and the ABA Foundation. The Foundation is the charitable arm of the ABA. It is a separate entity with its own leadership, budget and staff. It has raised the large sums of money it gives away largely by selling insurance to ABA members.

The ABA is in financial distress. Its membership is dwindling and has been for some time. The ABA noticed the Foundation is sitting on about \$15million in reserves. The ABA decided to offer insurance products of its own to members. The Foundation is furious. It sees this as

direct competition. The feud broke out into the open just prior to the House of Delegates meeting. While there was no actual bloodshed, *any* open dissent or discord among ABA leadership is so rare as to be noteworthy when it occurs. There is trouble in paradise.

Maybe nothing illustrates the divide between ABA leadership and the "main street lawyer" as much as the joint reception given for newly minted ABA President Linda Klein and president-elect Hillarie Bass of Miami. Ms. Klein is from a firm in Atlanta with 650 lawyers. Ms. Bass chairs the 600 hundred member Litigation Department of Greenberg Traurig. Their firms threw quite a party. Held in a grand ballroom with enormous crystal chandeliers, the reception featured live music, open bar(s), and buffet stations featuring everything from seafood to roast beef and everything in between.

I drank the liquor, ate the food, listened to the music and tut-tutted about unmet legal needs of the poor until they closed the party down.

Jurisdiction Over Trust Beneficiaries

by David M. Garten



Jurisdiction over God: In *State Senator Ernie Chambers v. God* (D. Neb. 2007), Senator Ernie

Chambers of Nebraska filed a law suit against God, seeking a permanent injunction against God's harmful activities. Senator Chambers contends that he had jurisdiction over God because "Defendant is present in Douglas County by and through putative agents, representatives, spokespersons (hereinafter "agents") of various religious denominations, persuasions, cults and the like, who publicly and notoriously hold themselves out to be agents of Defendant who are authorized to speak for and represent Defendant". Senator Chambers requested that the court "find that lawful personal/constructive service has been effectuated by virtue of the fact that Defendant, being omniscient, shall be deemed to have actual notice of this action...". The trial court dismissed the lawsuit with prejudice, in part, because God wasn't served a legal notice and there can never be service effectuated on God.

Jurisdiction over Satan: In United States ex rel. *Gerald Mayo v. Satan & His Staff*, 54 F.R.D. 282, 283 (W.D. Pa. 1971), the plaintiff filed a civil rights action alleging Satan and his employees "on numerous occasions caused plaintiff misery and unwarranted threats, against the will of plaintiff" and "placed deliberate obstacles in his path and caused plaintiff's downfall." Plaintiff asserted these transgressions violated his constitutional rights. Judge Weber denied the application, in part, because he questioned "whether plaintiff may obtain personal jurisdiction over the defendant in this judicial district."

Florida's Trust Code: Sec. 736.0202, F.S. reads in relevant part: (2) PERSONAL JURISDICTION. (a) Any...trust beneficiary, or other person, whether or not a citizen or resident of this state, who personally or through an agent does any of the following acts related to a trust, submits to the jurisdiction of the courts of this state

involving that trust:... 8. Accepts a distribution from a trust having its principal place of administration in this state with respect to any matter involving the distribution...

EXAMPLE: Your client makes distributions from his trust to Lilith Grotto Church Inc. of the Church of Satan ("Church of Satan"), a 501(c)(3) nonprofit organization located in Manhattan NY, and names Church of Satan as a trust beneficiary. Post-death, the successor trustee contends that the Church of Satan improperly received pre-death transfers and unduly influenced the settlor into naming it as a beneficiary of the trust. Does the Florida court have personal jurisdiction over the Church of Satan so that the trustee can sue the church (or Satan and his minions) in Florida? This question may have been answered in *Abromats v. Abromats*, 2016 WL 4366480, 2016 U.S. Dist. LEXIS 108420 (S.D. Fla. August 16, 2016).

In *Abromats*, the settlor created a revocable trust while residing in Florida. The settlor made distributions from the trust to her son, Philip, who lives in Wyoming. After her death, Philip was sued in Florida by the trustee for an accounting and for undue influence in connection with a trust amendment that reinstated him as a beneficiary of the trust. In response, Philip filed a Motion to Dismiss on the basis of lack of jurisdiction. The court, in denying the motion, found that it had jurisdiction over Philip. The court reasoned in part:

Clifford's Complaint seeks to declare null and void the September Amendments, which reinstated Philip as a beneficiary entitled to Trust funds. See Complaint; see also ECF No. [1], Exh. A, at 33. The Complaint also seeks approval of an Accounting, which by its nature, encompasses the distributions Philip admits he received. As such, the Court finds that the distributions Philip accepted from the

Continued on page 15

MEDIATIONWORKS

Because Mediation Works



Eric H. Luckman is the founder of MediationWorks. He has been a lawyer for over 33 years and has been a Florida Bar Board Certified Civil Trial Lawyer for over 20 years. Eric is also a Florida Supreme Court Certified Circuit Civil Mediator. His areas of expertise include personal injury and wrongful death, insurance coverage and bad faith claims, professional malpractice claims and condominium and homeowners association disputes.



Wallace B. McCall has been a lawyer for over 40 years and has been a Florida Bar Board Certified Civil Trial Lawyer for over 30 years. Wally is also a Florida Supreme Court Certified Circuit Civil Mediator. His areas of expertise include personal injury and wrongful death, medical malpractice and products liability claims.



Philip G. Thompson has been a lawyer for over 20 years and is an active civil trial lawyer, handling cases for both plaintiffs and defendants. Phil is also a Florida Supreme Court Certified Circuit Civil Mediator. His areas of expertise include personal injury and wrongful death, professional malpractice claims, worker's compensation claims and general civil litigation matters.



Cecelia Dempsey has been a lawyer for over 30 years and is licensed to practice in Florida, New York and Vermont. Cecelia is also a Florida Supreme Court Certified Circuit Civil, County and Appellate Mediator. Her areas of expertise include corporate, commercial, trademark and intellectual property disputes.



Donna Greenspan Solomon has been a lawyer for over 20 years and is one of only 3 lawyers certified by The Florida Bar as both an Appellate Expert and Business Litigation Specialist. Donna is also a Florida Supreme Court Certified Circuit Civil, Family and Appellate Mediator. Her areas of expertise include contract disputes, business torts, partnership agreements, and insurance coverage claims.

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Judicial Profile: Judge Cymonie Rowe

by *Misty Chaves*

Newly robed Judge Cymonie Rowe is no stranger to the courtroom. Before her recent appointment onto the bench, Judge Rowe practiced in front of the bench for nearly twenty years, zealously advocating for her clients.

Judge Rowe was born in Hartford, Conn. to immigrant Jamaican parents. At the age of four, her family relocated to Palm Beach County, where she has resided ever since. She has one sibling, her younger brother, Therol Rowe. She graduated high school from St. Andrews in Boca Raton- Her extended family is large and many of her aunts, uncles and cousins pursued their higher education at The University of Miami. Thus, when it came time to matriculate to college, there was simply no other choice but UM.

While a student at UM, Judge Rowe earned degrees in broadcast communications and psychology. Her dual degree taught her not only how to speak succinctly, but how to communicate and approach persons of varying backgrounds, ethnicities, educational levels and social classes with understanding and temperance.

After graduating from UM with her dual degree, the question loomed, “what now?” UM Professor Paul Driscoll, whom she fondly refers to as not only a past professor, but an advisor, mentor and friend, encouraged her to apply to law school – an educational path that was not previously on her radar. Judge Rowe applied and was accepted to Nova Southeastern School of Law where she obtained her Juris Doctorate in three years, even though she attended classes part time and held several jobs clerking for local attorneys. Judge Rowe found herself embracing the law and achieving many accolades, including the position of Editor of the Nova Southeastern International Journal of Law. Judge Rowe attributes the genesis of her legal career, as well as a “life lesson learned” to Professor Driscoll (now the Vice Dean of the University of Miami School of Communications). In hindsight, she realized the importance of listening to others’ opinions and embracing them, even if they take you outside of your comfort zone. Professor Driscoll told her she would make an exceptional attorney and, while perhaps not totally believing him initially, “time” has revealed his wisdom.

After graduating Nova Southeastern in 1997, Judge Rowe started a legal career that would take her through some of the best insurance defense firms in Palm Beach County. She crafted and honed her trial skills with Flanagan, Maniotis; Dickstein, Reynolds; Kirwan, Spellacy; and Green Akerman. She eventually accepted a job with Liberty Mutual, handling primarily complex defense litigation cases and mentoring junior attorneys.

There have been many events that have shifted the currents of her life. In 2002, while caring for her uncle, an undercover police officer who had been shot and was learning to walk again, she met Steve Hinkel. Steve was visiting a roommate who was also going through rehab. That fated encounter led to wedded bliss. Cymonie and Steve have enjoyed 14 years of marriage.

Probably one of the most life-altering moments for Judge Rowe, was in 2005 when, during the course of her career, her father passed away. She describes him as a kind, loving, hard-working family man and wells up with “tears of appreciation” when she speaks of him. As the sadness of his passing washed over her, she acknowledged an urge inside to do more, to serve,



to connect with her community. In 2006, she first applied for a judicial appointment. In 2016, and after four (4) applications, Governor Scott appointed Cymonie Rowe to the 15th Judicial Circuit.

Judge Rowe commenced her new role as a Palm Beach County Judge on August 11, 2016, presiding over a civil docket of approximately 1300 cases. She has enthusiastically embraced her newest challenge with the same philosophy that has propelled her throughout her career. It’s simple, really: The Golden Rule – do unto others as you would have them do unto you. Civility and professionalism towards your fellow attorneys will not only be encouraged, but demanded, within her courtroom.

Judge Rowe credits much of her character, her dedication to work, her temperament, and judicious nature, to her family. Her beloved father instilled a healthy work ethic and desire to complete all undertakings to the utmost of her abilities, never taking shortcuts and never giving up; her mother continues to inspire her as she oversees a family owned and operated Home Health Agency, serving the needs of Palm Beach County; her brother, Therol Rowe, and her husband, Steven Hinkel, assist with the operation of the family business; and her grandmother, with whom she spent much of her youth, instilled a simple mantra with which she governs her life: Be Kind, Be Strong and Be Humble.

Judge Rowe tries not to take herself too seriously; but the job? The job she takes VERY seriously. She considers it her privilege to serve Palm Beach County and to do so with a smile.



Missing Bar Events? Be Sure to Read your eNewsletters

Is your current email address on file with our office? If not, please be sure to send your current information to us. As postage rates continue to rise,

the Bar is sending notices of all of its functions – membership luncheons, free happy hours, judicial receptions, judicial evaluations, online voting, and important court information via email. Don’t be left out of the loop! Send your email address to us today to mjohnson@palmbeachbar.org



Ice cream, Volkswagen and Stryker Hips: Disparate Products; Similar Result

by Joseph A. Osborne

Ice cream, Volkswagen, Stryker Hips – all have something in common despite the disparity in product use and industry, each has been the subject of a full scale product recall. Product recalls often affect the goods we rely upon in our daily lives; from our transportation, to the foods we consume, and the medications/medical devices prescribed to wide ranging health ailments. Stryker Corporation made headlines in July 2012 when it recalled two of its artificial hip implant systems – the Rejuvenate Modular and ABG II Modular Neck-Hip Stems. The company stopped all global sales and production of these components. The recall came three months after Stryker issued an “Urgent Field Safety Notice” to implant surgeons and hospital risk managers pointing out the potential health hazards associated with the two products – including corrosion and “fretting,” which allows minute shards of its metallic components to leach into a patient’s tissues, bones and/or bloodstream.

History appears to be repeating itself, most recently, on August 29, 2016, Stryker has taken a limited, quiet approach with respect to the issuance of an Urgent Medical Device Recall Notification for the LFIT™ Anatomic CoCr V40™ Femoral Heads directed to implant surgeons and hospital risk managers. This notification differs from the 2012 action in that it relates to the femoral head component, identifying potential hazards including, excessive metal debris, fractured hip stem trunnion, pain requiring revision, and/or adverse local tissue reaction.

The recall process typically begins with the device manufacturer becoming aware of the issue warranting a recall action, initiating the recall, and notifying FDA’s Office of Regulatory Affairs, (“ORA”) district office. The ORA district office issues a 24-hour alert to CDRH and a recall classification recommendation. CDRH conducts a final review and classification. Recalls are publicly posted online within a day of classification.

As defined at Title 21, Code of Federal Regulations (CFR), 7.3(g), “Recall means a firm’s removal or correction of a marketed product that the Food and Drug Administration considers to be in violation of the laws it administers and against which the agency would initiate legal action, e.g., seizure.” A Class I recall is a situation in which there is a reasonable probability that use of or exposure to a violative product will cause serious adverse health consequences or death. A Class II recall is a situation in which use of or exposure to a violative product may cause temporary or medically reversible adverse health consequences, or where the probability of serious adverse health consequences is remote. Also, a Class III recall is a situation in which use of, or exposure to, a violative product is not likely to cause adverse health consequences.

The vast majority of recalls are voluntary. Approximately 99% of all recalls in the last ten years, according to the FDA, are voluntary recalls taken by firms regulated by the FDA.

There are rare exceptions which a mandatory recall can be ordered by the FDA. It is the manufacturer’s responsibility to promptly notify individuals or accounts regarding the recall by issuing a “recall communication.” 21 C.F.R §7.49.

The likelihood of success in admitting or excluding evidence of a product recall is influenced, in part, by the facts of individual cases. Avenues of admission of such evidence include: (1) hearsay exceptions; (2) relevancy to the product, defect and injury at issue; (3) feasibility of precautionary measures; and/or (4) impeachment. Defendants can seek to exclude product recall evidence as not relevant, arguing that product recall evidence cannot be utilized to move from the general to the particular to prove that the particular product at issue in the litigation contained the defect to which the product recall related. Of note, if the recall was involuntary, aside from the exceptions to the hearsay rule, there is sound argument as to admissibility, that this form of recall is conducted pursuant to statute or regulatory mandate, and thus is not a statement.

With recalls on the rise, manufacturers find themselves performing a difficult balancing act. On one hand, it must ensure that its products are safe and on the other, it must defend suits and try to keep recall information from being admitted into evidence.

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.

Personal Injury Seminar
 “PIP Hot Issues: Plaintiff’s and Defendant’s Perspectives”
 November 3, 11:30 a.m. - 1:00 p.m.

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North County Section Highlights

Members of the North County Section recently enjoyed a networking mixer at III Forks in Palm Beach Gardens.



NCS President Rosemarie Guerini D'Amore and Jeffrey D'Amore



Dean Xenick and Peter Hunt



Philip Forbes, Maura Curran and Barbara Forbes



NCS Director Tanique Lee, Gabrielle Jackson, Ilisa Carlton and Michael Gelfand



Erskine Rogers and Judge Laura Johnson



Jerry Leakey and Andrew Lockton

Awards to be presented at Bench Bar Conference — Nominations Requested

Two awards will be presented at the March 10, 2017 Conference: the 6th Annual **Judge Edward Rodgers Diversity Award** and the 18th Annual **Sidney A. Stubbs Professionalism Award**. Members are encouraged to nominate a member or organization for either of these prestigious awards.

The recipient of the **Professionalism Award** must be an individual member of the Palm Beach County Bar Association. The Professionalism Award recognizes an attorney who has demonstrated or promoted outstanding professionalism in Palm Beach County, as defined by exemplary ethical conduct, character and integrity, respect for the legal system and all of its participants, commitment to maintaining the highest levels of professional competence, courtesy and civility, and commitment to serving clients, the community and the public good. **The deadline to submit nominations will be January 11.**

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

1. Demonstrates a consistent pattern of (either the individual or organization's) commitment to the recruitment, retention and promotion of individuals of underrepresented populations;
2. Cultivates and promotes diversity and gender initiatives that establish and foster a more inclusive and equitable work environment;
3. Promotes and facilitates education, community outreach and social engagement with and between people of varying ethnic or religious backgrounds, gender, socioeconomic status, sexual orientation, and/or physical and mental capabilities so that persons of diverse background can enter and prosper in the legal field;
4. Exhibits visionary and insightful leadership to confront and resolve inequities through strategic decision-

making, allocation of resources, and establishment of priorities;

5. Outlines defined goals, actions steps and accomplishments toward achieving a work environment that recognizes, promotes and encourages a diverse workforce at all levels throughout an organization;
6. Implements and carries out best practices that support diversity and inclusion goals.

The deadline to submit nominations will be January 11.

Applications for either of these awards can be found on the Bar's website here: <http://www.palmbeachbar.org/award-nomination-forms/>

Bankruptcy Seminar

"Staying Up To Speed - Current Substantive and Procedural Issues in Bankruptcy Cases"

November 18, 11:30 a.m. - 5:00 p.m.
PBCBA Office



Why Does Mediation Take So Long?

by William Cea

As anyone who has participated in mediation knows, it usually takes much longer than the parties anticipate.

Parties generally come prepared to “hit the ground running” and negotiate a settlement along whatever preconceived terms they have in mind. Often times, however, the bulk of the mediation session is taken up by an exchange of information, drilling into factual and legal disputes, and exploring opportunities for resolution. In my experience, all of this typically takes place prior to a discussion about actual settlement terms.

As discussed in a prior article, preparation for mediation is essential. No matter how well prepared you are, however, that does not necessarily translate into how long the mediation will take. The reality is that if the lines of communication, facts and legal issues were so straight forward, the parties wouldn’t be in the dispute to begin with. So the negotiation that seemingly should take an hour, often lasts all day and sometimes into the evening. In addition to preparing a mediation summary and making sure that the case is actually ready for mediation, clients should be prepared for what they may experience at mediation itself.

First, there is the joint session, which is vitally important for understanding each participant’s position, as well as identification of impediments to settlement. For example, your opposing counsel’s presentation will likely raise the impediments to settlement, as well as factual and legal disputes. Identifying these impediments is critical in order that you can get to the actual negotiation.

Next, the caucus sessions usually focus on the various areas of disagreement that need to be addressed prior to meaningful negotiation of terms. While a mediator cannot provide legal advice or render any decisions, the role of the mediator is to make best use of the confidential and privileged

nature of the discussions to break down barriers and assist the parties in better understanding each other’s position. In a multi-party case with claims, counterclaims and claims for indemnity, for example, discussion of impediments to settlement could last for hours. While this may seem laborious, this is an outstanding opportunity to streamline fact finding and exchange information that could take months and great expense to accomplish through formal discovery.

Your case may involve experts. The parties should consider whether it makes sense for the experts to attend, and whether a caucus to bring the experts would facilitate a resolution. For example, in a construction dispute, the experts are usually critical. If parties’ experts can meaningfully discuss and agree on a scope of repair, that has an obvious benefit of clearing the way to negotiate the cost of repair. This may seem elementary to some, but this is the type of meaningful discussion that can take place through mediation without anyone feeling that they are compromising their position at trial. Whether it is getting experts in a room together, or communications handled through the mediator, it is the exchange of information and the exploration of the underlying differences in positions that gives a mediator the opportunity to assess the areas of agreement and disagreement, and possibilities for settlement.

Alternatively, it may simply be that certain documents have not been exchanged and time is needed for opposing parties to review them during the course of mediation. While there is a natural inclination to resist aiding the other side and avoid divulging litigation strategy, if the desired result is a settlement, then why not put the cards on the table in a privileged setting? It may be that the response you receive is something you or your client had not considered.

Additionally, parties need to factor in ample time to actually prepare the settlement agreement. How many times

do you get to the point of an agreement in principal, just to have to spend another hour or more agreeing on the written document? While you may be able to mitigate some of this time by bringing a form or boiler plate document with you, often times issues such as the scope of a release, who is to be included in the release, time for performance, enforcement, and non-monetary terms take time to flesh out on paper. The parties oftentimes seem surprised or exhausted by the time the agreement is being reduced to writing. If parties are not prepared to work on the document itself, it could lead to frustration or a premature end to the process without a signed agreement.

Thus, in order to avoid the frustration and fatigue that could undermine your mediation session, it is important to consider how long the session may take. Fully explaining the mediation process to your clients in advance will help them prepare and avoid your being asked “how come this is taking so long?”

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Real Property and Business Litigation Report



by *Manuel Farach*

Madison At Soho II Condominium Association, Inc. v. Devo Acquisition Enterprises, LLC, Case No. 2D15-2067 (Fla. 2d DCA 2016).

A court may use the legislature's recent clarifying amendment to a statute, enacted during the pendency of this appeal, to interpret the pre-amended version of that statute. Accordingly and under Florida

Statute section 718.116 (3), accord and satisfaction principles do not apply to payments to community associations.

Bollettieri Resort Villas Condominium Association, Inc. v. The Bank Of New York Mellon, Case No. 2D15-3186 (Fla. 2d DCA 2016).

While a mortgage foreclosure action must be based on a default within the five year statute of limitations, each missed payment is a new default and foreclosure may be based on a default within the five years even if not the first default. Conflict certified with *Hicks v. Wells Fargo Bank, N.A.*, 178 So. 3d 957 (Fla. 5th DCA 2015).

Abukasis v. MTM Finest, Ltd., Case No. No. 3D15-1448 (Fla. 3d DCA 2016).

Former Florida Statute section 605.0503 then numbered section 608.433, points out the exclusive remedies available to a judgment creditor as to a judgment debtor's interest in an LLC is a charging order, or a charging order followed by a foreclosure sale."

Ober v. Town Of Lauderdale-By-The-Sea, Case No. 4D14-4597 (Fla. 4th DCA 2016).

A lis pendens terminates at final judgment, and liens or claims filed after final judgment of foreclosure are not extinguished by lis pendens or foreclosure sale.

Denault v. G. Robert Toney & Associates, Inc., Case No. 4D15-740 (Fla. 4th DCA 2016).

A listing agreement does not create a fiduciary duty to sell a repossessed property for a minimum sum.

Jupiter House, LLC v. Deutsche Bank National Trust Co., Case No. 4D15-1852 (Fla. 4th DCA 2016).

Substitute service on a limited liability company is strictly construed, and the failure to file the affidavit required by the statute invalidates the substitute service.

Magwitch, LLC v. Pusser's West Indies Limited, Case No. 2D15-897 (Fla. 2d DCA 2016).

The appointing of a registered agent and registering to do business in Florida are, without more, insufficient to confer minimum contacts on a defendant. Likewise, the use of a fulfillment house in Florida to fulfill internet orders is insufficient when the fulfillment house constitutes a de minimus amount of the defendant's total business.

Marcinkewicz v. Quattrocchi, Case No. 3D15-1068 (Fla. 3d DCA 2016).

A party challenging the validity of a deed based on lack of capacity of the grantor has to burden to prove the grantor lacked mental capacity, and moreover, the strong presumption in favor of the validity of deeds can only be overcome "by clear, strong and convincing evidence."

Blair Nurseries, Inc. v. Baker County, Case No. 1D16-0423 (Fla. 1st DCA 2016).

A local agency has no discretion to deny the adoption or vacating of a plat when the statutory requirements are met, and the decision of the local agency is subject to review in the circuit court sitting in its appellate capacity.

Ganson v. City of Marathon, Case No. 3D12-777 (Fla. 3d DCA 2016).

Judge Shepherd writes an extensive dissent to the effect that "excessive economic injuries caused by government action [must] be compensated.:

Kjellander V. Abbott, Case No. 1D15-5475 (Fla. 1st DCA 2016).

Notwithstanding a contract provision stating the parties did not rely on representations, another provision that brokers were still subject to statutory requirements including duties of honesty and fair dealing, to disclose all known facts that materially affect the value of the property and are not readily observable, and to not make misleading, deceptive, or fraudulent representations in any transaction.

Beach Community Bank v. v. Disposal Services, LLC, Case No. 1D15-5330 (Fla. 1st DCA 2016).

A secured creditor has the right to possess the collateral upon default, and accordingly, the failure of the debtor to turn over the collateral upon the secured creditor's demand constitutes an act of conversion.

Accardi v. Regions Bank, Case No. 4D15-3213 (Fla. 4th DCA 2016).

A mortgage encompasses alluvium that is added after the mortgage is granted.

Perkins v. Wells Fargo Bank National Association, Case No. 5D15-2118 (Fla. 5th DCA 2016).

A final judgment entered after the case has been removed to federal court is void.

Kjellander V. Abbott, Case No. 1D15-5475 (Fla. 1st DCA 2016).

Notwithstanding a contract provision stating the parties did not rely on representations, another provision that brokers were still subject to statutory requirements including duties of honesty and fair dealing, to disclose all known facts that materially affect the value of the property and are not readily observable, and to not make misleading, deceptive, or fraudulent representations in any transaction.

Smith v. Reverse Mortg. Solutions, Inc., No. 3D13-2261 (Fla. 3d DCA 2015).

Upon rehearing, the Third District rules that a reverse mortgage may not be foreclosed until the death of all borrowers; a wife who does not sign the promissory note (signed only by husband) but signs the mortgage itself is a "borrower" whose homestead may not be foreclosed until her death as death of the borrower is a condition precedent to foreclosure.

Accardi v. Regions Bank, Case No. 4D15-3213 (Fla. 4th DCA 2016).

A mortgage encompasses alluvium that is added after the mortgage is granted.

Perkins v. Wells Fargo Bank National Association, Case No. 5D15-2118 (Fla. 5th DCA 2016).

A final judgment entered after the case has been removed to federal court is void.



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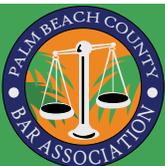
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Let's WIN!

The Ideal Mentor: Rosalyn Sia Baker-Barnes of Searcy Denney

by Shashane McDonald



The summer of 2016 was many of firsts for me. It was the first time I came to West Palm Beach; it was the first time I walked into a law firm; and it was the first time I met the lady I aspire to be when I “grow-up” – Attorney at Law, Rosalyn Sia Barnes. Sia, as she is affectionately known, epitomizes everything I want to be in life. I am grateful for the Palm Beach County Bar Association and their Diversity Internship Program for matching me with the best mentor ever.

What makes Sia great in my estimation? Because she is a mother of three young children, a partner in a prestigious law firm, really pretty and carries herself with the grace and class befitting of a First Lady or a Queen; it is also her humility and her gracious demeanor. Most people I have met who have that much going for them (with as many accomplishments and accolades as Sia) are usually a bit smug or condescending. The thing about Sia that truly struck me the most was her humility and genuineness. She is a brilliant attorney; she is an excellent advocate; and she exudes the kind of confidence walking into a deposition that I wish to develop. She knows the law, and she fights for her clients to win their cases. It is her work ethic, class and grace that I wish to emulate.

I have spent only a few weeks working at Searcy Denney, but during that time, Sia has taught me so much. She took me to my first deposition; told me the benefits of sometimes settling a case for the client’s sake rather than going to trial; and she made me read the depositions and pleadings in some of

the most interesting personal injury and medical malpractice cases. However, my lessons extend much further than the law. An ideal mentor shows you how to navigate the profession, how to conduct yourself as an attorney, and how to dress. By her words and conduct, Sia sets the standard.

In essence, Sia is teaching me how to develop professionally in every area. I am a rising third-year law student at the University of Florida, but around her I feel like I am ready to do my first civil litigation trial. With all she does, Sia still took the time to mentor me, talk to me, and teach me. Once, we drove for almost two hours for a hearing, and the entire way, I listened as she shared her cases and experience. She explained how to turn a bad situation into a better one. When we arrived at the hearing, as the only plaintiff’s attorney against many defense attorneys, she held her own and showed she is a very capable force to be reckoned with.

I felt so proud when accompanying her to functions. Sia introduced me to other attorneys and judges. The reason I felt so proud, however, is because I knew I was walking beside one of the most respected and admired attorneys. Sia’s reputation speaks for itself, and I am hoping I can have the type of respect and admiration that she receives from her peers and everyone she works with. Her humility and grace are astounding.

I am eternally grateful to the Palm Beach County Diversity Internship Program for helping me find my way and purpose in this profession. In fact, I have now decided that I want to live and practice law in Palm Beach County. I also now want to be like Ms. Rosalyn Sia Baker-Barnes and be able to make my mark in the community and in the legal profession. It is always good to have such great mentors and leaders who inspire young people.

I am grateful for the opportunity to work with Searcy Denney Scarola Barnhart and Shipley and its commitment to diversity. I got the opportunity to work with a great firm, see the practical side of civil and

commercial litigation and learn about medical malpractice, personal injury and mass torts. I now have a better sense of my place and purpose in the legal profession and where I want to be. When I “grow up” I want to be just like Sia.



Bio: Shashane McDonald is a graduate of the University of Oxford, England with a Degree in Criminal Justice and Criminology. She is a third-year law student at the University of Florida Levin College of Law. She loves learning new languages; having received a diploma in Spanish and currently learning French. She loves playing chess and Scrabble.

This past summer, Shashane interned at Searcy Denney Scarola Barnhart and Shipley under the immediate supervision of Rosalyn Sia Baker-Barnes. At the University of Florida, Shashane is a member of the Trial Team, the Alternative Dispute Resolution Team, the Florida Bar Young Lawyers’ Division and the Black Law Students’ Association.

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

Friday, November 18, 2016, 11:30 - 5:00 pm
PBCBA, 1507 Belvedere Road, WPB

- 11:30am - 11:55am **Late registration, check-in and lunch**
- 11:55am - 12:00pm **Welcome – Opening Remarks** - Eric A. Rosen, Esq.,
Fowler White Burnett, P.A., Bankruptcy CLE Committee Chair
- 12:00pm - 12:50pm **Surrendering Real Property: Really?** – Eric A. Rosen, Esq.
- 1:00pm - 2:00pm **Student Loans – Continuing Efforts to Avoid Non-Dischargeability** -
Zach B. Shelomith, Esq., Leiderman Shelomith Alexander + Somodevilla, PLLC
- 2:00pm - 2:10pm **Break**
- 2:10pm - 3:00pm **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
- 3:00pm - 3:50pm **Appeals: Do You Know Where to Look and The Time In Which You Can
File? (You Better)** – Thomas Zeichman, Esq., Massana, P.A.
- 3:50pm - 4:40pm **Panel Discussion: Real Property, Student Loans, Non-Dischargeability
Litigation and Appeals** - All seminar speakers
- 4:40pm - 5:30pm **Reception**



Course credit: 5.0 CLER and 5.0 Business Litigation certification credits. Cost: \$125 for PBCBA members/paralegals, \$165 for non-PBCBA attorney members/paralegals. After 11/11/16, add \$10.00 late fee. Refund requests must be made no later than 48 hours prior to the date of the seminar.

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____ I will not be able to attend the seminar, but would like to order the CD. The cost is the same as listed above, however please include \$10 for shipping and handling. Allow four weeks for delivery. PBC Bar Association, 1507 Belvedere Rd., W. Palm Beach, FL 33406. 561-687-2800. (11.18 Bankruptcy). Palm Beach County Bar Association, 15075 Belvedere Road, West Palm Beach, FL 33406



All Sales Are Final (Well Most Sales)

by Jason S. Rigoli

In bankruptcy, § 363 asset sales have become an important and sometimes necessary tool of debtors. Under § 363 debtors are permitted to sell their assets outside the ordinary course of business free and clear of all liens, claims, and encumbrances, including those assets that are subject to a “bona fide dispute.”¹ For a multitude of reasons, a final sale order and the transfer of property through it are good against the world. In a recent, well-reasoned, thorough 82-page opinion, Chief Bankruptcy Judge Paul G. Hyman, Jr., articulated the strength of force of a §363 sale order.²

Generally, an order from a bankruptcy court approving the sale of assets acts as a “transfer[of] property rights which are good against the world,”³ which “may only be vacated when the party seeking to overturn the sale order establishes that there was *fraud, unfairness, or mistake* in the conduct of the sale or establishes some other basis for relief under Federal Rules of Civil Procedure 60(b).”⁴

The applicable sections of the Bankruptcy Code⁵ and Federal Rules of Bankruptcy Procedure⁶ provide protections for parties by mandating “notice and a hearing” before a court may approve the sale of a debtors assets.⁷ “[P]arties holding known liens or asserting known interests in property to be sold are entitled to actual notice of a debtor’s intent to sell such property free and clear of those interests.”⁸ The notice requirements for § 363 sales “are founded in fundamental notions of procedural due process.”⁹ However, parties who may hold an interest in property that the debtor is proposing to sell should be aware that mailing the notice to the appropriate address of the aggrieved party satisfies the notice requirement set forth in the Bankruptcy Code and Bankruptcy Rules, receipt of the notice by the aggrieved party is not required.¹⁰

The satisfaction of the notice provisions upon the mailing to the appropriate address is critical to potential interest holders, because any subsequent argument to overturn the sale order or claim to certain property could be estopped on one

of two principles: (1) equitable mootness¹¹ and (2) consent.¹² Equitable mootness may apply where the aggrieved party failed to timely assert their right or objection and the “circumstances have changed so as to ‘render it inequitable to consider the merits...’” or the “transaction is too complex and difficult to unwind.”¹³ The interest holder may otherwise consent to the sale by failing to raise a timely objection when adequate notice has been provided.¹⁴ Furthermore, “active participation” in the sale process by the interest holder is not required, so long as the interest holder received adequate notice, procedural due process is satisfied, and the sale will be final.¹⁵

Conclusion

A final sale order results in a final sale of a debtor’s assets to the extent that adequate notice was provided to all parties, specifically potential interest holders, and the debtor and/or purchaser did not commit fraud, the sale process was fair, and there was no mistake. It is imperative that any party, who believes they hold any interest in property of debtor, must timely assert their rights or raise an objection to the sale, because if you sit on your rights you may just lose them.

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

¹¹ *TRADS*, at 72.

¹² *Id.* at 74.

¹³ *Id.* at 72-73.

¹⁴ *Id.* 74.

¹⁵ *TRADS* at 64 n. 112 (internal citations omitted).

Jurisdiction over Trust Beneficiaries

Continued from page 5

Trust establish the requisite minimum contacts, as they are sufficiently “related to” the instant cause of action and the forum. Furthermore, by accepting distributions from the Trust administered from Florida, with the assistance of Florida-based professionals, from funds based in Florida accounts, and with the understanding that Florida law governed, Philip unquestionably “purposefully availed [himself] of forum benefits” and made it such that he “could reasonably anticipate being haled into court” in Florida. See *Fraser*, 594 F.3d at 850.

The Order on Motion to Dismiss is a “must read” for any lawyer involved in a dispute involving jurisdiction over a trust beneficiary. A copy of the order can be found at:

<https://dockets.justia.com/docket/florida/flsdce/0:2016cv60653/481259>

¹ See, 11 U.S.C. § 363(b) and (f).

² *TransUnion Risk and Alternative Data Solutions, Inc. v. The Best One, Inc., and Ole Poulsen*, Adversary Pro. No. 14-01793-BKC-PGH_A, Trial Order [ECF No. 473], dated August 18, 2016 (hereinafter referred to as “**TRADS**”)

³ *Id.* at 62 (citing *In re Daewoo Motor Co. Ltd., Dealership Litig.*, No. MDL-1510, 2005 WL 8005218, at *6 (M.D. Fla. Jan. 6, 2005); *Regions Bank v. J.R. Oil Co., LLC*, 387 F.3d 721, 732 (8th Cir. 2004)).

⁴ *Id.* (citing *Hayes v. Sullivan*, 1992 WL 486914 (D.Mass. 1992); *FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 286 (7th Cir. 2002) (emphasis added)).

⁵ 11 U.S.C. §§ 101, *et seq.*

⁶ Federal Rules of Bankruptcy Procedure 1001, *et seq.* (“**Bankruptcy Rules**”)

⁷ *TRADS*, at p. 66 (citing *Morgan Olson L.L.C. v. Frederico (In re Grumman Olson Indus., Inc.)*, 467 B.R. 694, 706 (S.D.N.Y. 2012)).

⁸ *Id.* (internal citations omitted).

⁹ *Id.* (internal citations omitted).

¹⁰ *Id.* at 68 (citing *Dusenbery v. U.S.*, 534 U.S. 161, 170, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002); *Sanders v. Henry Cty., Ga.*, 484 F. App’x 395, 397 (11th Cir. 2012); *In re Johns-Manville Corp.*, No. 82 B 11656 (CGM), 2016 WL 3574051, at *14 (Bankr. S.D.N.Y. June 30, 2016); *Green v. Sheppard (In re Sheppard)*, 173 B.R. 799, 805 (Bankr. N.D. Ga. 1994) (citing Fed. R. Civ. P. 5(b); Fed. R. Bankr. P. 7005)).

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Late Registration/Lunch

12:00 p.m. - 1:00 p.m.

*Magistrate Linda Goodwin
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Welcome New Members!

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

Brandon U. Campbell: University of Florida, 2014; Associate in Schouest, Bamdas, Soshea & Ben Maier, Boca Raton.



Christopher Cronenwett: Thomas M. Cooley Law School, 1998; House Counsel with Trust Bridge, Inc.

Deena M. Gray: Nova Southeastern University, 2001; Associate in Greenspoon Marder, P.A., Ft. Lauderdale.

James Derrick Hibbard: Florida A & M University, 2015; West Palm Beach.

Talat Kayar: Brooklyn Law School, 2006; Partner in Conrad & Kayar, P.A., West Palm Beach.

Emanuel L. McMiller: Law Student Membership, Mishawaka, IN.

Martha Montour: McGill University, 1988; Affiliate Membership, Kahnwake, Quebec Canada.

Scheril A. Murray Powell: Florida International University, 2016; Associate in Doumar, Allsworth, et al, Ft. Lauderdale.

Sean Michael Smith: University of Florida, 2014; Associate in Shutts & Bowen, West Palm Beach.

Lawyers for Literacy Committee Remembers National Assisted Living Week

Our generous members recently donated hundreds of magazines to Savannah Court of the Palm Beaches for National Assisted Living Week. The Lawyers for Literacy Committee presented the donations, served ice cream, and held a "Famous Book Bingo" game for the residents. Thank you to these volunteers with great BIG caring hearts!



Rebecca Brock

Front row is our very own Champion for Literacy Andrew Kwan, along with several of our Lawyers for Literacy Committee members, including Colleen Farnsworth, Sheryl Wood, Brad Avakian, Laura Scala, Judge Nancy Perez, Rebecca Brock and Melynda Melear



Melynda Melear and Laura Scala



Brad Avakian



Sheryl Wood



The Personal Injury/Wrongful Death CLE Committee of the
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“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;
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Palm Beach County Bar Association, 1507 Belvedere Road, West Palm Beach, FL 33406



Production Of Opposing Party's Attorney's Fee Records

by Ted Babbitt

In the recent Supreme Court case of *Paton v GEICO Gen. Ins. Co.*, 190 So. 3d 1047 (2016) the Supreme Court resolves a conflict between the District Courts on whether opposing counsel's attorney's fee records are discoverable with respect to a motion to tax attorney's fees.

Prior to the decision in *Paton, supra*, the law in the Fourth and Second District was controlled by *Estilien v. Dyda*, 93 So. 3rd 1186 (Fla. 4th DCA 2012) and *HCA Health Services of Florida v. Hillman*, 870 So. 2d 104 (Fla. 2nd DCA 2003).

In *Estilien*, the Fourth District held that a party seeking to discover the opposing party's attorney's billing records was required to show that those records were actually relevant, that discovery was necessary, and that the substantial equivalent could not be obtained from other sources. The *Estilien* Court found that the records of opposing counsel were, at best, only marginally relevant as to the determination of what a reasonable attorney's fee would be for the moving party. *Estilien, supra*, at 1188-89.

In *Hillman, supra*, the Second District held that the billing records of opposing counsel were only sometimes relevant and that even when relevant they were protected by both attorney-client and work product privileges, *Hillman, supra*, at 107.

These cases were consistent with the Fourth District opinion in *Heinrich Gordon Batchelder Hargrove Weihe & Gent v. Kapner*, 605 So. 2d 1319 (Fla. 4th DCA 1992) which held that the billing records of opposing counsel were not discoverable if they contained any privileged or irrelevant information.

In *Anderson Columbia v Brown*, 902 So. 2d 838 (Fla. 1st DCA 2005), the First District held that because the trial court's order did not require defense counsel to provide the descriptions of the services that they provided, there was no requirement to reveal the mental impressions, conclusion, opinions, or legal theories of defense counsel and therefore, where relevant, the billing records of opposing counsel were discoverable within the discretion of the trial court.

In *Paton*, in the underlying District Court opinion of *GEICO Gen. Ins. Co. v Paton*, 150 So. 3d 804 (Fla. 4th DCA 2014), the Fourth District relied upon *Estilien* and *Hillman* and granted a writ of certiorari striking the trial court's order requiring production of opposing counsel's time records.

In the Supreme Court's review of *Paton*, the rationale of the First District in *Anderson Columbia, supra*, was followed. At S117 the Supreme Court held:

We agree with the rationale of the First District in *Anderson Columbia* and conclude that the billing records of opposing counsel are relevant to the issue of reasonableness of time expended in a claim for attorney's fees, and their discovery falls within the discretion of the trial court when the fees are contested. When a party files for attorney's fees against an insurance company pursuant to *sections 624.155 and 627.428, Florida Statutes*, as occurred here, the billing

records of the defendant insurance company are relevant. The hours expended by the attorneys for the insurance company will demonstrate the complexity of the case along with the time expended, and may belie a claim that the number of hours spent by the plaintiff was unreasonable, or that the plaintiff is not entitled to a full lodestar computation, including a multiplying factor.

In this opinion, the Supreme Court assumes that the trial court's order would allow the redaction of any privileged information but with that proviso would not require the moving party to make any special showing to obtain opposing counsel's billing records. At 117, the Court holds:

We hold that the hours expended by counsel for the defendant insurance company in a contested claim for attorney's fees filed pursuant to *sections 624.155 and 627.428, Florida Statutes*, is relevant to the issue of the reasonableness of time expended by counsel for the plaintiff, and discovery of such information, where disputed, falls within the sound decision of the trial court.

This decision eliminates the conflict among the District Courts on the issue of whether opposing counsel's billing records are relevant and discoverable in a motion for attorney's fees. While the holding specifically refers to Fla. Stat. 624.155 and Fla. Stat. 627.428, there is no reason to assume that the reasoning would not equally apply to any other claim for attorney's fees.

Technology Seminar

"Law Firm and PII: Complying with Privacy and Data Security Laws"

November 17, 11:30 a.m. - 1:00 p.m.

PBCBA Office



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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

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

Late registration, check-in and lunch

12:00 p.m. - 1:00 p.m.

David Steinfeld, Esq., Law Office of David Steinfeld, P.L.;
Florida Bar Board Certified Business Litigation Specialist,
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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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Credits: **1.0 CLER and 1.0 ethics credit and 1.0 certification credits in Business Litigation.** Cost: \$40 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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Palm Beach County Bar Association, 1507 Belvedere Road, West Palm Beach, FL 33406

Want The Opportunity To Speak To Diverse Groups Within Our Community?

The Law Related Education Committee brings information that every American citizen should know into the community through speeches at local organization meetings and events. Recently, the committee sponsored a Youth Law Day with the Office of the State Attorney to expose over 100 youths to different facets of the legal community including judges, civil attorneys, criminal defense attorneys, Federal and State prosecutors, and law enforcement officers. A special thank you to Sherri Collins and Andrew Kwan for making this event possible. If you would like to present a Benchmarks program please contact Amy Terwilleger, Law Related Education Chair, at aterwilleger@gunster.com or call 650-0695.



Judge Samantha Schosberg Feuer



Judge James Martz



Judge Jeffrey Gillen



Officer Sohn of the Boynton Beach Police Department

Pro Bono Corner Nominations Sought for 2017 Pro Bono Night Awards

The 29th Annual Pro Bono Recognition Evening will be held on Saturday Evening June 3, 2017 at the Palm Beach County Convention Center.

Anyone wishing to nominate an attorney, support staff member, law firm, individual or group for a Pro Bono Award for exemplary pro bono work in 2016, please fill out the form below. Reasons for the nomination should accompany this form and client names are not necessary. Client names will not be used for any press releases or for the program the night of the event without the client's written consent. Feel free to use additional paper if necessary.

Name of Nominee: _____

Firm Name: _____

Address: _____

Phone Number : _____

Reason for Nomination: _____

Your Name (Optional): _____

Please mail or email nomination by December 11th to:
 Kimberly Rommel-Enright, Esq.
 Legal Aid Society of Palm Beach County, Inc.
 423 Fern Street, Suite 200
 West Palm Beach, FL 33401
kenright@legalaidpbc.org
 If you have any questions regarding these awards, please call Kim at 655 - 8944 ext. 265 or e-mail her at kenright@legalaidpbc.org.
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SUCCESSFUL FINANCIAL PLANNING and RETIREMENT STRATEGIES for SOLO and SMALL LAW FIRMS

Wednesday, November 16

11:45 a.m. to 1:00 p.m.

Bar Office

Lunch & CLE including General 1.0, Business Litigation 1.0,

Elder Law 1.0 or Wills, Trusts & Estates 1.0

\$15.00 for PBCBA members



Presented by Brooke McKernan Northwestern Mutual

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1. SUCCESSFUL FINANCIAL PLANNING FOR THE SOLO AND/OR SMALL LAW FIRM:

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2. FINANCIAL STRATEGIES THAT CAN BE EASILY IMPLEMENTED

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3. INDIVIDUAL DISABILITY INCOME PLANS FOR PRACTITIONERS AND EMPLOYEES

What are the Pros and Cons?

4. RETIREMENT STRATEGIES. AM I SAVING ENOUGH? CAN I SAVE MORE?

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What to do When You are Already Maximizing Qualified Retirement Plans.

6. SUCCESSION PLANNING FOR THE SOLO AND SMALL LAW FIRM



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



“The 19th Annual Elder Law Seminar”

Friday, December 9, 8:00am – 2:40pm
PBCBA - 1507 Belvedere Road, WPB

Program Schedule

- 8:00am - 8:20am **Late Registration / Check In / Breakfast**
- 8:20am - 8:30am **Welcome and Opening Remarks** - *Heather Samuels Esq., Solkoff Legal, P.A.*
- 8:30am - 9:20am **Special Needs Trusts and the ABLE Act** - *Melissa Lader Barnhardt, Wells Fargo*
- 9:20am - 10:10am **Litigation 101: Elder Abuse and Exploitation from the Prosecutor’s Table - What the State Can and Cannot Do** - *Mitchell Kitroser, Esq., Preston Mighdoll, Esq., and Kathryn Perrin, Esq.; Kitroser & Associates*
- 10:10am - 10:20am **Break**
- 10:20am - 11:10am **Tax Law and Ethics Update** - *Michael Lampert, Esq., Michael A. Lampert, P.A., Florida Bar Board Certified Tax Lawyer*
- 11:10am - 12:00pm **Long Term Care Insurance in the Scope of Medicaid Planning** - *Anne Desormier-Cartwright, Esq., Elder and Estate Planning Attorneys, P.A. Erik Jorgensen, Edward Jones*
- 12:00pm - 1:00pm **Lunch**
- 1:00pm - 1:50pm **Panel Discussion** - *DCF Caseworker and Attorneys*
- 1:50pm - 2:40pm **Panel Discussion** - *Palm Beach County Court Case Managers*

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Credits: 6.0 CLER; 1.0 ETHICS, plus Certification credits: 6.0 Elder Law; 6.0 Wills, Trust and Estate; 1.0 Tax Law. Cost: \$165 PBCBA members/paralegals, \$205 non-PBCBA attorney members/paralegals. **After 12/2/16, 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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Palm Beach County Bar Association, 1507 Belvedere Road, West Palm Beach, FL 33406

Pike & Lustig, LLP Welcomes Two New Firm Members

West Palm Beach, Florida – September 19, 2016 – The personal injury and business litigation law firm of Pike & Lustig, LLP located in West Palm Beach, Florida is pleased to announce that it recently welcomed two new members to its team: Daniel A. Kirschner, of Counsel, and Rick Darquea, Senior Litigation Paralegal.

Both Daniel and Rick bring a vast amount of experience to the litigation table. Daniel Kirschner is a member of the firm’s business litigation practice, and has spent years dedicated to the representation of clients in legal matters involving fraud, breach of contract, and breach of fiduciary agreements. One unique asset that Daniel offers to the Pike & Lustig, LLP team is his particular knowledge of Federal Indian law, the Federal Tort Claims Act, and the Indian Self-Determination and Education Assistance Act. In fact, he has represented federally recognized Indian tribes in myriad claims over the years. His knowledge of state and federal laws make him a formidable opponent in a courtroom, and a resource one wants on their side. In addition to his many years’ experience in and out of the courtroom, Daniel has been called a “rising star” by *Super Lawyers’* magazine, and is licensed to practice before all courts in the state of Florida.



Daniel A. Kirschner
Of Counsel



Rick Darquea
Sr. Litigation Paralegal

In addition to strengthening its business litigation team, the law firm of Pike & Lustig, LLP is also thrilled to announce that it has added another victims’ rights advocate to our team. Rick Darquea is a senior litigation paralegal who focuses in research and investigation in cases of wrongful death and injury, and is known for his dedication to clients and community. Born in Ecuador and speaking three languages fluently (English, Italian, and Spanish), Rick is recognized by the Latin-American community in West Palm Beach, and had dedicated a significant amount of his time helping others in need. In addition to his work in the field of personal injury, Rick is also competent in complex business and commercial litigation matters, and spent many years working in the finance and nightclub and hospitality industries. His eclectic background allows him to analyze problems from a unique perspective and develop creative solutions.

Both Daniel and Rick are passionate about community and family. Their addition to the Pike & Lustig team is a display of the law firm’s continual commitment to excellence in and out of the courtroom, strong ethics and values, and always putting clients’ needs first.

The law offices of Pike & Lustig, LLP is located in West Palm Beach, Florida and serves clients throughout the state. Our practice areas include personal injury, business litigation, and insurance litigation.

Contact:

Pike & Lustig, LLP
 2465 Mercer Avenue, Suite 204
 West Palm Beach, Florida
 561-855-7585



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

1.0 CLER; 1.0 Ethics; 1.0 Technology

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

1.0 CLER; 1.0 Ethics; 1.0 Technology



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.

Sponsor

- Understanding encrypted data “at rest” and “in motion”
- Why whole disk encryption is important
- How to encrypt USB drives and back-up media



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

I would like to attend the following seminar(s):

- 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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(11.17 Technology) (12.6 Technology)

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Attorney: We are currently seeking an attorney with 1-5 years’ experience as an associate with central Palm Beach County law firm. Position will provide an ideal opportunity for lawyer seeking to do both transactional and litigation work. Candidate should be a self-starter with good communication skills. Salary commensurate with experience. Email resume to: westernpalmbeachlawfirm@gmail.com

Legal Assistant: Small workers’ compensation defense firm seeks experienced secretary/legal assistant with 1-2 years’ experience in workers’ compensation. Must be detail-oriented and able to multi-task. Spanish speaking preferred. Medical, dental, 401k. Excellent working environment. Please email resume to billingdept@clarkeplatt.com

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HEARSAY



Best Lawyers in America recently announced that **James W. Beasley, Jr.** has been selected for inclusion in its 23rd annual edition.

Best Lawyers recognized Jim for his litigation work in the fields of Banking and Finance, Mergers and Acquisitions, Real Estate, Securities and Trust and Estates.



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 J. GRIER PRESSLY III

* DECEASED
 ** FLORIDA BAR PRESIDENT
 *** DECEASED, FLORIDA BAR PRESIDENT, SUPREME COURT JUSTICE
 **** DECEASED, FLORIDA BAR PRESIDENT
 ***** DECEASED, FLORIDA BAR PRESIDENT, FEDERAL COURT JUDGE

CALENDAR

November 2016

Tuesday, November 1
 12:00pm – 1:00pm
Transaction Law Committee Meeting
 Bar Association Office

Wednesday, November 2
 12:00pm – 1:00pm
Securities Committee Meeting
 Bar Association Office

Thursday, November 3
 11:30am – 1:00pm
PI Seminar
 Bar Association Office

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

Friday, November 4
 11:00am – 12:30pm
Tech Seminar
 Bar Association Office

Friday, November 4
 12pm – 1pm
Federal Bar Association Luncheon
 Kravis

Friday, November 4
 12:00pm – 1:00pm
Judicial Relations Committee Meeting
 Judicial Conference Room

Tuesday, November 8
Election Day

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

Wednesday, November 9
 11:30am – 1:00pm
Membership Luncheon with Tom Ostertag
 Cohen Pavilion

Thursday, November 10
 5:30pm – 7:00pm
NCS Happy Hour
 Yard House

Friday, November 11
Veteran's Day
 Bar Office Closed

Monday, November 14
 6:30pm – 7:30pm
Landlord Tenant Clinic
 Okeechobee Branch Library

Tuesday, November 15
 11:45am – 1:00pm
FAWL Membership Luncheon
 Kravis Center Pavilion

Tuesday, November 15
 12:00pm – 1:00pm
CDI Meeting
 Bar Association Office

Tuesday, November 15
 12:00pm – 1:00pm
NCS Board Meeting
 Duffy's NPB

Tuesday, November 15
 5:00pm – 8:00pm
Legal Aid Brooks Brothers Event
 Gardens Mall

Wednesday, November 16
 11:30am – 1:00pm
Solo and Small Firm Luncheon
 Bar Association Office

Wednesday, November 16
 12:00pm – 1:00pm
Bench Bar Committee Meeting
 Bar Association Office

Wednesday, November 16,
 5:00pm – 6:30pm
Board Meeting
 Bar Association Office

Thursday, November 17,
 11:30am – 1:30pm
Tech Seminar
 Bar Association Office

Thursday, November 17,
 12:00pm – 1:30pm
Unified Family Practice Seminar
 North End Cafeteria

Thursday, November 17,
 5:30pm – 7:30pm
PBC Jstc Assn Jurist Dinner
 Marriott at City Place

Friday, November 18
 11:30am – 6:00pm
Bankruptcy Seminar
 Bar Association Office

Thursday – Friday,
 November 24 -25
Thanksgiving
 Bar Office Closed

Tuesday, November 29
 5:30pm – 7:00pm
Legal Aid Society Board
 Bar Association Office