

PALM BEACH COUNTY BAR ASSOCIATION

BULLETIN

www.palmbeachbar.org

December 2016

THE BAR STAFF WISHES, YOU A HAPPY AND SAFE HOLIDAY

Books and Bears Made Possible for National Adoption Day



Members of our Lawyers for Literacy Committee collected books and bears for the 15th Judicial Circuit's National Adoption Day program, which was held November 18. In addition, the group collected money for Target gift cards to be used by the older children. Books and bears were also donated to our juvenile judges for children in court for dependency hearings. A special "thank you" to all of our lawyers who continue to support this event year after year. *Happy Holidays from the Lawyers for Literacy Committee!*

Mark your calendar for upcoming Membership Events

December 1:

YLS No Shave November

December 7:

Annual Holiday Party and Silent Auction

January 7:

YLS 5K Run/Walk

February 10

2nd Annual Screen on the Green

February 16:

NCS PGA National Happy Hour and Putting Contest

March 10:

Annual Bench and Bar Conference

Holiday Party & Silent Auction NEW LOCATION! PGA NATIONAL RESORT AND SPA

400 Avenue of the Champions
Palm Beach Gardens
5:30 p.m. to 8:00 p.m.
Registration required online no later than
12.6.16 @ www.palmbeachbar.org

Nominating petitions available for Board of Directors

Members seeking to run for a position on the Board of Directors will need to obtain a nominating petition and must be a member in good standing of the Palm Beach County Bar Association. The nominating petition must be signed by no fewer than 20 members in good standing of the Association. Petitions for Presidentelect will be available on Friday, December 9 and are due back in the office by 5 p.m. on Tuesday, January 10. Petitions for director-at-large seats will be available on Friday, December 16 and are due back in the Bar office by 5 p.m. on Wednesday, January 18. Petitions may be obtained by calling the Bar office at 687-2800 or by sending an e-mail requesting a petition to ctbrown@palmbeachbar.org. For any of the positions, it is the candidate's responsibility to verify ahead of time through the Bar office that the members that sign their petitions are members in good standing. Otherwise, the petition will be deemed invalid. The annual election of officers and directors for the Palm Beach County Bar will take place via online voting in April.

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THE

BULLE-IIN

PALM BEACH COUNTY BAR ASSOCIATION

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President

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

2017 COURT HOLIDAY SCHEDULE	
New Year's Day	Monday, January 2
Martin Luther King Jr. Birthday	Monday, January 16
Good Friday	Friday, April 14
Memorial Day	Monday, May 29
Floating Holiday	Monday, July 3
Independence Day	Tuesday, July 4
Labor Day	Monday, September 4
Rosh Hashanah	Thursday, September 21
Veteran's Day	Friday, November 10
Thanksgiving Day	Thursday, November 23
Friday after Thanksgiving	Friday, November 24
Christmas Day	Monday, December 25

PLEASE NOTE:

Monday, February 20, 2017, and Monday, October 9, 2017 and Tuesday, December 26, 2017 are not court holidays. However, both are County holidays and County buildings will be closed. Therefore, court hearings cannot be scheduled on those days.

Board Meeting Attendance

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



Holiday Party & Silent Auction

Wednesday, December 7 from 5:30 p.m. to 8:00 p.m. PGA National Resort and Spa

400 Avenue of the Champions, Palm Beach Gardens

R.S.V.P. online @ www.palmbeachbar.org
PBCBA Members - \$50.00
Judges are complimentary

Attorneys who are not PBCBA members and spouses - \$65.00 Registration Deadline 12/2/16. Price increases by \$5.00

President's Message



Spotlight: Fifteenth Judicial Circuit Pro Bono Committee

By John R. Whittles

There is a local group of lawyers and judges that is leading the charge to promote pro bono services for people in our community who cannot afford to hire lawyers.

Meet the Fifteenth Judicial Circuit Pro Bono Committee.

The Fifteenth Judicial Circuit Pro Bono Committee was established by the Fifteenth Judicial Circuit by administrative order in 1996 with the goal of promoting pro bono participation in our legal community. The Committee is now chaired by Circuit Judge Samantha Schosberg-Feur who was happy to talk with me about the mission and new projects of the committee. "Our Pro Bono Committee has developed and supported exciting initiatives and projects through 15 different voluntary bar associations to members of our legal community to encourage more pro bono participation and to make a positive impact on the lives of the children, families and disadvantaged individuals who need our help. We have supported a back-to-school fundraiser for foster children, supported legal services for migrant farm workers in our community, assisted in establishing self-help centers for pro bono litigants in local courthouses, and collaborated with adopt-a-school programs."

The 100% Club

Judge Schosberg-Feur was very excited to talk about one of the Committee's newest initiatives – the "100% Club." A law firm makes "the club" when it achieves 100% participation of law firm members in the Legal Aid Society's Campaign for Equal Justice. The criteria are as follows: each firm member must annually take on at least one pro bono case or make an annual monetary contribution of at least \$350 to the Legal Aid Society. Benefits for "100% Club" members include: special recognition at Legal Aid Society's 28th Annual Pro Bono Recognition Evening & Auction and in the printed event program; special recognition in the Legal Aid Society's newsletter published; special recognition on the Legal Aid Society's website; and recognition in the Palm Beach County Bulletin and the Florida Bar News. Contact Legal Aid, the Committee or me to get involved.

Folks, we are all blessed with good jobs that allow us to provide for our families and do important work. We all need to strengthen our commitment to pro bono services and give back to the community we live in. Judge Schosberg-Feur reminded me, "as members of the Florida Bar, we all took an oath to 'never reject, from any consideration personal to myself, the cause of the defenseless or oppressed.' Do your part for those in need. Take a pro bono case, make a monetary contribution to Legal Aid, start your own pro bono project or event in collaboration with our Legal Aid Society or get your firm members to participate in the 100% club. Not only will you help someone in need, but you will be rewarded and fulfilled by your selfless acts and enriched by assisting in bettering the community we all live in."

Committee member, Bob Bertisch echoed these sentiments, telling me: "What I love about the Fifteenth Judicial Circuit Pro Bono Committee is that it encourages attorneys to become involved in providing pro bono services to the most disadvantaged and vulnerable members of our community and then witnessing the attorney's delight and satisfaction in using their legal skills to help someone who is truly in need. So many attorneys state after handling their first pro bono case - this is why I went to law school, to become a lawyer and truly help people. So it's really a win/win situation for both the client and the pro bono attorney."

Fifteenth Judicial Circuit Pro Bono Committee Hosts Pro Bono Week Celebration at Greenberg Traurig

On October 24, 2016, the Fifteenth Judicial Circuit Pro Bono Committee, including committee member and Greenberg Traurig shareholder, Bridget Berry, coordinated an event at Greenberg's West Palm Beach offices to kick off Pro Bono Week with members of the pro bono committee and a room full of distinguished guests. They even let me in. (I guess they had to.)

Special guests included Lawrence E. Moncrief, a lawyer who was recognized by Legal Aid Director Bob Bertisch for his long-standing commitment to pro bono services. For years, Mr. Moncrief has, in coordination with the Palm Beach Legal Aid Society, provided consultations and attended administrative hearings regarding social security and disability issues for indigent individuals. What made his remarks even more, well, remarkable is that, on the day of the event, he was celebrating his 90th birthday. He looked to be maybe in his 60's. Apparently, being kind keeps you young. You could see the pride in his eyes when he spoke of his service to the poor and it was awesome.

We also heard from Greenberg shareholder and ABA President-Elect, Hillary Bass, who gave an impassioned talk on her pro bono involvement in overturning the long-held constitutional ban on same-sex adoption and how, when she thinks about her proudest moments, every other paying case paled in comparison to that case.

It was a great evening and a fitting reminder of the benefit of working on pro bono cases; but it is a benefit not just to the client but also to the lawyer who can feel proud in doing what he or she is good at and helping the people who need it most. This should be a year-round commitment for all of us. Please contact Legal Aid, the committee or me to see how you can get involved. You won't regret it.



Find Colleagues Online!

PBCBA Online Membership Directory Always available – always current! Easy to access (members only) If your information is incorrect or you'd like to update your photo, please send information to mjohnson@palmbeachbar.org

A Retizement Luncheon For Patience That Did Not Disappoint

It was a special day in Palm Beach County when we honored Patience (who does not need a last name for identification) for her 36 years of service to our Bar. Thanks to our speakers and the nearly 270 members, friends and family who attended the luncheon at the Palm Beach County Convention Center, Patience received the send-off she deserved. The program included a proclamation from the Palm Beach County Board of County Commissioners, a video with messages from past presidents, a trip to Austria made possible by past presidents and directors AND the Palm Beach County Bar building will soon bear her name!



Palm Beach County Bar Association has had just three executive directors including newly selected Carla Tharp Brown (left) now retired Patience Burns (center) and Catherine Royce (right)



Will the real Patience Burns please stand up! Jay White, Patience Burns and Michelle Suskauer



Michael Napoleone and **Judge Peter Blanc**



Event Co-chairs Theo Kypreos and Michelle Suskauer, along with Bar President John Whittles surprised Patience with a trip to Austria! The well-deserved vacation was made possible with donations made by past board members



Congratulating Patience from left to right Judges Sheree Cunningham. Catherine Brunson, Cymonie Rowe and (Ret) Judge Lucy Chernow-Brown

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Congratulations

Patience!

Probate Corner



Removing Your Health Care Surrogate

by David M. Garten

EXAMPLE: Your client is 93 years old and suffers

years old and suffers from age related dementia (short term memory loss, etc.).

Overall, he appears to be in good health. You previously drafted his Heath Care Surrogate Designation ("Designation") wherein he named his girlfriend as his surrogate and his daughter as the alternate. There has not been a judicial determination of incapacity and his main treating physician believes that he has the capacity to make his own health care decisions. Your client instructs you to remove his former girlfriend as his surrogate because he no longer trusts her to make his health care decisions. In response, the former girlfriend files a lawsuit challenging her removal based on lack of capacity and undue influence by the daughter. You suspect that this is a precursor to the next wave of litigation challenging your client's capacity to act as trustee of his sizable trust. That's what happened to Sumner M. Redstone.



In Re: Advance Health Care Directive Of Sumner M. Redstone (Cal. Sup Ct. 11/25/15), the issue before the

court was whether Redstone, age 93 with a net worth of \$8.4 Billion, had sufficient mental capacity to terminate his designated surrogate. He had given the directive to his former girlfriend, Manuela Herzer but revoked that power a month later. With a substantial amount of money at stake for Herzer, she argued that Redstone was incompetent to revoke the power and replace her.

At the trial, Judge Cowan relied not only on the opinions of the experts but primarily on the testimony of Redstone himself, who appeared via deposition in light of the physical difficulties entailed in his coming to court to testify live. Judge Cowan found that although his speech was impaired and his mental acuity diminished, Redstone was unmistakable and firm in his desire to revoke the health care power of attorney he had given Herzer. He testified

unambiguously (and profanely) that he did not trust her and wanted her out of his life.

The key issue before the court was what level of capacity was needed for Redstone to revoke the directive. Herzer argued that a high level of capacity, similar to that required to enter into contracts, was needed for Redstone to revoke the power. Redstone, on the other hand, argued that a lower level of capacity, equivalent to that required to make a decision to marry or divorce (the lower level on the sliding scale of capacity) was all that was required.

The court held that in determining the degree of capacity needed to revoke a health care directive, analogizing to the capacity necessary for marriage or divorce was the most appropriate. Trust was the underlying concern in the context of marriage/divorce as well as for the exercise of health care directives, and even persons with diminished capacity are capable of making decisions about who they trust. Relying on Redstone's unambiguous testimony regarding his lack of trust for Herzer, the court held that he had sufficient capacity to determine who should control his health care decisions. The court gave little weight to whether or not Redstone was objectively justified in his lack of trust and rejected Herzer's argument that his change of heart was a result of undue influence by his daughter. A copy of the Tentative Ruling on Motion to Dismiss Petition, dated 5/9/16 and Redstone's deposition can be found at:

http://www.loeb.com/~/media/files/pdfs/20160509redstonedismissalorder.pdf

http://www.wsj.com/public/ resources/documents/redstone. deposition20160506.pdf

FLORIDA LAW: In Florida, "every competent adult has the fundamental right of self-determination regarding decisions pertaining to his or her own health, including the right to choose or refuse medical treatment." See, 765.102(1), F.S. To ensure that such right is not lost or diminished by virtue of later physical or mental incapacity, The Florida Health Care Surrogate Act

(§§765.202-765.205, F.S.) establishes a procedure that allows your client to designate a surrogate to direct the course of his health care and receive his health information. In addition, the Act establishes a procedure to determine your client's incapacity. See, 765.204(2), F.S. A determination that your client lacks capacity to make his own health care decisions is not construed as a finding that he lacks capacity for any other purposes. *See*, 765.204(5), F.S.

If your client has decisionmaking capacity, he can make his own health care decisions, amend the Designation, or revoke the Designation. The amendment or revocation can be verbal or in writing. *See*, §§765.104(1) and 765.204(1), F.S. Unfortunately, the Act does not speak to the level of capacity necessary to remove a surrogate. Assuming your client lacks capacity, an interested person may seek expedited judicial intervention to remove the surrogate pursuant to §765.105, F.S. if:

- (a) The surrogate's decision is not in accord with your client's known desires;
- (b) The Designation is ambiguous;
- (c) Your client changed his mind about designating or appointing the surrogate;
- (d) The surrogate was improperly designated or appointed;
- (e) The designation of the surrogate is no longer effective or has been revoked;
- (f) The surrogate has failed to discharge her duties;
- (g) The surrogate's incapacity or illness renders her incapable of discharging her duties; and/or
- (h) The surrogate has abused her powers.

In summary, in Florida, if your client wants to pursue removal of his surrogate and his capacity is in question, it may be necessary for the court to determine his level of capacity. Alternatively, if your client lacks capacity, an interested person may pursue removal of the surrogate.



HOW TO REGISTER

BY CHECK

The Technology Committee of the Palm Beach County Bar Association presents:



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

Tuesday, December 6, 2016, 11:30 a.m. - 1:00 p.m. PBCBA, 1507 Belvedere Rd., WPB

11:30 a.m. - 11:55 a.m. Late Registration / Lunch

11:55 a.m. 12:00 p.m.

Welcome and Opening Remarks
Robert Wilkins, Esq., Jones Foster; Technology Committee, Chair

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

Guest Speaker: Adriana Linares, Law Tech Partners**

Agenda

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.

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

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Return this form I must register online at www.palmbeachbar.org



Materials will be emailed to

registrants prior to the seminar

1.0 CLER; 1.0 Ethics; 1.0 Technology

\$ 35 PBCBA members/paralegals, \$ 75 non-PBCBA attorney members/paralegals. Support staff pay price reflective of their attorney/paralegal membership status. Support staff CANNOT pay online; please mail in registration. Those registering after 11.29.16 add \$10.00 late fee. All refund requests must be made no later than 48 hours prior to the date of the seminar.

Name:	 	Email address:	 	
Address:	 		 Phone:	

____ 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. (12.6.16 Technology seminar)

Palm Beach County Bar Association, 1507 Belvedere Road, West Palm Beach, FL 33406

^{**} 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.

Technology Corner



Can Your Clients Be Convicted For Threats on Social Media?

by Christopher B. Hopkins

Can't WAIT to shoot up my school. It's time. School getting shot up on a Tuesday.

In a series of Tweets over a two week period, a Florida high school student unintentionally set in motion a series of events – his arrest, trial, and appeal – which

ultimately revealed a gaping hole in Florida law: many threats on the Internet cannot be prosecuted under the relevant Florida Statute because the law fails to address the situation when threats are not directly made to a recipient but, instead, are broadcast via open social media platforms, discussion forums, and website comment sections.

In *J.A.W. v. Florida*, the Second District concluded that the Tweets above did not violate Florida Statute 836.10 ("Written Threats Statute") because the Statute's "narrow language" required that the threat be sent directly to intended victims or their family members. In *J.A.W.*, the teenager wrote his Tweets as jokes directed to his group of fellow gamers who felt their taste in heavy metal music was wrongly associated with school shootings. None of the recipients attended J.A.W.'s school or were even located in Florida (indeed, group members apparently got the "joke"); unexpectedly, the Tweets ultimately came to the attention of local (Sarasota) police. J.A.W. was charged and tried under the Statute but the appellate court reversed since he had not directly sent the threat to any victim(s).

The Second District acknowledged that social media platforms such as Twitter are "often used to post communications publicly, for the whole world to see, instead of sending those communications directly to any specific person" (discussion forums and comment sections also fit the criteria). The Court recognized, "in this context, a threat of violence made publicly on social media is likely to reach its target and cause fear of bodily harm just like a traditional letter [but not violate the Statute]."

The Written Threats Statute comprises five elements: it is a felony to (i) write or compose <u>and</u> (ii) send or procedure the sending of (iii) a letter, inscribed communication, or electronic communication (iv) <u>to the intended recipient</u> or a member of the recipient's family (v) which contains a threat to kill or injure the recipient or family member.

From 1900-1920, it was a common criminal practice to send so-called "black hand" extortion notes which were anonymously signed with a threatening symbol, the drawing of a black hand. The Written Threats Statute, enacted in 1913, may have been born out of that early Mafia practice. After one hundred years and four amendments, the Statute still requires that the threat must be sent to the victim or family member. The Legislature added "electronic communication" to the Statute in 2010 but this proved to be a belated (and perhaps incomplete) attempt to include all Internet communications. Social media platforms, forums, and comment sections were already widely used by that time but, either by choice or omission, any threats which were

openly (rather than directly) made in such forums would slip through the grasp of the Statute.

Meanwhile, in Florida's judiciary, online threats appeared to be a trend: five of the last six opinions interpreting the Written Threats Statute involved Internet-based communications. By 2013, two opinions confirmed that the Statute would not apply to online threats which were made openly but not directly.

Macchione v. State illustrated that the addition of "electronic communication" to the Statute in 2010 may have been too late to catch the social media explosion. Macchione's threatening Twitter posts and YouTube videos were circulated in 2009 before the "electronic communication" amendment and thus were outside of the scope of the then-applicable Statute. The Fifth District recognized that Twitter and YouTube had already "grown exponentially" by the time of the amendment but stopped short of discussing whether the Statute applied to "open" versus "direct" threats online. The First District, however, caught the point.

In *O'Leary v. State*, the defendant made threatening statements on Facebook about harming his relative who did not see the post because the defendant's account was private. However, by propinquity, the defendant was "Facebook friends" with a mutual relative; thus, the First District stitched together that O'Leary's threat was "sent to" the one relative who was his Facebook friend. Since that person was related to the victim, the statutory elements were met. Despite a successful prosecution under the *O'Leary* facts, the shortcoming in the Written Threats Statute was clear: a threat on social media would not be prosecutable since it was not sent to the victim unless, by pure chance, it could be argued that it was directed at a victim or family member who happened to be a "friend" or "follower" of the person making the threat.

The State might argue that Florida Statute 790.163(1) criminalizes a "false report, with intent to deceive, mislead, or otherwise misinform any person... concerning the use of firearms in a violent manner..." That law, however, requires "intent" which, as the Supreme Court confirmed in *Elonis v. U.S.*, can be difficult to prove. Since *Elonis*, defendants often deny criminal intent by claiming that their statements were "a joke" or quotes from violent rap songs.

J.A.W. confirms that the Written Threats Statute cannot address threats which, while still harmful, are openly (but not directly) made on the Internet. The Second District concluded that, "the Legislature may wish to revisit section 836.10 to address the modern problem of threats issued and shared publicly on social media."

Christopher B. Hopkins is a member of McDonald Hopkins, LLC. Send your (non-threatening) invectives to christopher. hopkins@mcdonaldhopkins.com.

The Alternative Dispute Resolution Committee of the Palm Beach County Bar Association presents:



ADR - A Help and Not a Hurdle



Monday, February 13, 2017, 8:00 a.m. - 4:40 p.m., PBCBA, 1507 Belvedere Rd., WPB

8:00 am -	8:30 am	Check in/Breakfast
8:30 am -		Welcome & Opening Remarks: Theodore Deckert, Esq., Matrix Mediation, LLC; Certified Circuit Civil, Family and County Mediator; Florida Supreme Court Qualified Arbitrator; ADR Committee Chair
8:40 am -		Diversity Issues in Mediation (CV) : Stephanie McHardy, Florida Dispute Resolution Center. (Special thanks to Theodore Deckert for underwriting speaker's transportation costs.)
9:30 am -	10:20 am	Taking ADR Seriously: Circuit Judge (Retired) Kenneth Stern, Esq., Stern Dispute Resolution
10:20 am -	10:30 am	Break
10:30 am -	11:20 am	Arbitration - Love it/Hate it Q&A - Interactive discussion between attendees and Moderated Panel of Judge, Arbitrator, Plaintiff and Defense Attorney addressing Current developments and issues regarding arbitration: (<i>Panelists TBA</i>)
11:20 am -	12:10 pm	ADR Case Law & Ethics Update (E): W. Jay Hunston, Jr., Esq., W. Jay Hunston, Jr., PA; Florida Certified Circuit Civil Appellate and Family Mediator; Florida Supreme Court Qualified Arbitrator
12:10 pm -	12:45 pm	Lunch *** Sponsored by MATRIX ***
12:45 pm -	1:35 pm	Use of Technology in Mediation: Christopher Hopkins, Esq., McDonald Hopkins LLC; Florida Certified Circuit Civil Mediator
1:35 pm -	2:25 pm	The Role of Civility in Mediation: <i>Michael D. Mopsick, Esq., Shapiro, Blasi, Wasserman, & Hermann, P.A.; Florida Supreme Court Certified Circuit Civil Mediator</i>
2:25 pm -	2:35 pm	Break
2:35 pm -	3:50 pm	Timing of Mediation - Four Quarters of the Dispute - Interactive discussion between attendees and Moderated Panel of Mediators: Moderator: W. Jay Hunston, Jr., Esq.; Panel: Theodore Deckert, Esq.; William J. Cea, Esq., Becker & Poliakoff; Board Certified in Construction Law; Florida Certified Circuit Civil Mediator; Victoria Calebrese, Esq.; Victoria Calebrese, PA; Board Certified in Marital and Family law; Florida Certified Family Mediator
3:50 pm -	4:40 pm	Domestic Violence Issues in Mediation (DV): Speaker TBA
<u>2/6/17, add \$1</u> eligible for up	0.00 late feet to 8.5 CME I For more in	R; 1.0 CLER Cost \$ 240 PBCBA members/paralegals; \$ 280 non-PBCBA attorney members/paralegals. After 2. All refund requests must be made no later than 48 hours prior to the date of the seminar. This course is hours. Mediators are required to self report those hours applicable to their areas of certification at the time of formation on the CME requirement, visit, www.flourts.org, select Alternative Dispute Resolution. Certificate of d at seminar.
HOW TO REGISTER	BY CHEO	
View Webinar		ble via webinar by registering at http://www.palmbeachbarcle.org Webinar can be viewed LIVE or ON-DEMAND. WEBINAR IN IS <u>NOT</u> HANDLED THROUGH THE BAR OFFICE. Please call (888) 449-2512 for webinar registration or visit chbarcle.org/
Name:		Email address:
Address:		Phone:
		nd the seminar, but would like to order the CD. The cost is the same as listed above, however please include \$10 for v four weeks for delivery. PBC Bar Association, 1507 Belvedere Rd., W. Palm Beach, FL 33406. 561-687-2800. (2.13 ADR)





In Praise of Negative Personalities

by Joy A. Bartmon

I have always been fascinated by the range of personalities I find in practicing law. Especially now

that I have become a Certified Family Mediator. My practice as a family lawyer was already chock full of personality characters. Becoming a mediator has convinced me that a personality being "good" or "difficult" is a matter of my perspective and my creativity. Much of the course of the mediation depends on whether I choose to see some traits as negative, or all traits as resources.

For example, in a litigated family law case, I dread the opposing counsel (or their client) who strives to be intimidating, nitpicks the details, wants to control everything and is demanding to the point of being rude. They enjoy being or seeming angry. As the mediator I can use this type of personality and turn it into a positive. This person is likely to be goal-oriented, organized, and ambitious. Their affinity to nitpick can expose the hidden problems that impede progress. Their obnoxiousness can be a reminder to the opposition that settlement is a far better option than a trial. This kind of person can use their need for control to set a clear agenda and keep the discussion on point. I will encourage them to use their strong personality to keep the mediation moving forward with solutions to each issue. I will find something during the mediation to characterize as an achievement made by this person, and with praise for that achievement get them to buy into reaching the next positive outcome. By equating settlement on a point, however small, with winning, this personality type can be convinced to be the driving force toward finding solutions.

It can be equally difficult, perhaps more so, to mediate with counsel or their client who is evasive and non-committal. These individuals are insecure, overly cautious and indecisive. Making a decision feels like work and they do not want to work for a settlement. They like other people to have to work hard for them. I try to determine if the indecision is the result of insufficient preparation or information. If so, can it be corrected during the mediation? Can a phone call be made that will

get the information needed? Or is the indecision a personality trait? If so, can I get them to express what they are worrying about? Sometimes they can reason out the pros and cons with the encouragement and empowerment that I am listening to them and understanding their concerns. I hammer away at the reasons why settlement is the best alternative. If settlement worries them, I tell them trial will be worse. I get them to see how much work has already gone into the case and how much more work a trial will be for them. I convince them that they are making the other side work hard for a settlement. I encourage them by showing respect and voicing praise for their input. If I help them to see that it feels better to make a decision over which they have some control, then I encourage them to decide rather than let someone else decide for them.

In some ways, the worst personality at a mediation is the happy-go-lucky, charming extrovert. As a mediator, this personality type is a pleasure to be in a room with, but you find that nothing is getting done. This person loves telling stories and making people laugh. With this person it is useful to have an agenda and continually get them back to the agenda. Of course, you must acknowledge their joke or story because they will be offended if you do not. They will interpret a too serious demeanor as a rejection of who they are. So, I accept them and give them the attention they want. I redirect their conversation to the issues by asking questions. I really listen to the answers. I laugh at the funny parts. But, then I rephrase their answers in a more neutral tone. I keep making the point that reaching a settlement is a cause for celebration and that they will be very happy when it is done.

The more I think of all the personality types a mediator meets, the more I am convinced that each one can be used, molded, directed, or perhaps exploited, to achieve a positive outcome. You can let yourself believe traits are only bad. Or you can respect the person, believe there are pros along with the cons, and figure out a way to use those traits for a successful mediation.



The YLS recently hosted one of its Sidebar Series on the topic of how to properly conduct a cross examination in Judge Meenu Sasser courtroom. The speakers were Roy Black, Fred Cunningham, and Sean Domnick.

Pictured: Judge Sasser, Fred Cunningham, Andrea Robinson, Roy Black, Dane Leitner and Jen Lipinski.

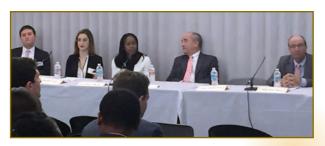
New Attorney Breakfast











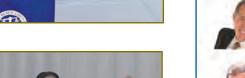






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MEDIATIONWORKS





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.

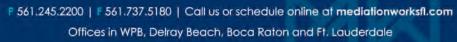


Cecelia Dempsey has been a lawyer for over 30 years and is licensed to practice in Florida, New York and Vermont. Cecelia is also a Florida Supreme Court Certified Circuit Civil, County and Appellate Mediator. Her areas of expertise include corporate, commercial, trademark and intellectual property disputes.



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.







Real Property and Business Litigation Report



by Manuel Farach

Anderson v. Epstein, Case No. 3D15-1050 (Fla. 3d DCA 2016).

Separate actions should be consolidated (not combined) when the causes of action and the parties are not identical.

Villamizar v. Luna Developments Group, LLC, Case No. 3D15-2222 (Fla. 3rd DCA 2016).

The giving of a power of attorney with regard to a non-assignable promissory note is not a transfer of the note that violates the anti-assignment provision.

Ocwen Loan Servicing, LLC v. Gunderson, Case No. 4D15-2809 (Fla. 4th DCA 2016).

A witness need not have participated in the boarding process nor have personal knowledge of a party's business practices in order to have business records admitted; general knowledge and trustworthiness of documents are sufficient.

Reverse Mortgage Solutions, Inc. v. The Unknown Heirs, Case No. 1D16-966 (Fla. 1st DCA 2016).

A court may not dismiss a case for the bad acts of counsel in a prior case involving the same mortgage.

Charbonier Food Services, LLC v. 121 Alhambra Tower, LLC, Case Nos. Nos. 3D16-356 & 3D16-753 (Fla. 3rd DCA 2016).

The following provision in a lease agreement is ambiguous and requires parol testimony:

If the Percentage Rent results in \$10,000.00 of monthly rent over the Fixed Base Rent beginning January 2015, then \$10,000.00 shall be added to the Fixed Base Rent...

Branch Banking and Trust Company v. Taylor, Case No. 1D15-5291 (Fla. 1st DCA 2016).

There is no requirement a plaintiff allege that all conditions precedent have occurred in order to accelerate a note and mortgage.

Powers v. HSBC Bank USA, N.A., Case No. No. 2D14-4857 (Fla. 2d DCA 2016).

A party may prove standing through equitable transfer by proving transfer of the securitized mortgage pool, but has to prove the mortgage in question was in the pool.

Bank Of America, N.A. v. Siefker, Case No. 4D14-1923 (Fla. 4th DCA 2016).

Florida Statute section 559.715 is not a condition precedent that must be complied with in order to institute a foreclosure case.

State Trust Realty, LLC v. Deutsche Bank National Trust Company Americas, Case No. 4D15-1667 (Fla. 4th DCA 2016).

A party that acquires a defendant's interest in a property after a lis pendens has been recorded and the defendant has been defaulted cannot challenge standing.

U.S. Bank National Association v. Anthony-Irish, Case No. 5D15-3153 (Fla. 5th DCA 2016).

A post-trial motion entered by a court without jurisdiction can be attacked at any time under Florida Rule of Civil Procedure 1.540 (b).

American Eagle Veteran Contracting, LLC v. Eiland, Case No. 5D15-4483 (Fla. 5th DCA 2016).

A court cannot grant a motion for summary judgment while a motion to compel arbitration remains pending and without being ruled upon.

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A court cannot grant a motion for summary judgment while a motion to compel arbitration remains pending and without being ruled upon.

Kuhajda v. Borden Dairy Company Of Alabama, LLC, Case No. SC15-1682 (Fla. 2016).

A Proposal for Settlement is not invalid under Florida Rule of Civil Procedure Florida Rule of Civil Procedure 1.442(c)(2) (F) for failure to state whether attorneys' fees were part of the claim even when the complaint does not include a claim for attorney's fees.

YLS Happy Hour





Welcome New Members!

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

Daniel William Bialczak: Stetson University, 2010; Associate in Korte & Wortman, P.A., West Palm Beach.

Bruce G. Burk: University of South Carolina, 2015; Associate in Clarke & Platt, West Palm Beach.

Cynthia Chiefa: University of Miami, 1983; Solo Practitioner, Boca Raton.

Randall Anthony Fischer: University of Detroit Mercy, 1990; Solo Practitioner, Jupiter.

Jacquin P. Gilchrist: University of Florida, 2008; Solo Practitioner. Coral Gables.

David Rogers Glickman: Florida State University, 2015; Associate in Markarian, Frank & Hayes P.A., Palm Beach Gardens. **Genevieve Hall:** Florida State University, 2004; Solo Practitioner, Lake Worth.

Jonathan Karp: Nova University, 2016; Associate The Karp Law Firm, Palm Beach Gardens.

Nathan A. Kelvy: University of North Carolina, 2011; Associate in Greenstein & Associates, West Palm Beach.

Sheereen E. Middleton: St. Thomas University, 2010; Boca Raton.

Kayla Leland Pragid: University of Miami, 2012; Associate in Akerman, West Palm Beach.

Pascale Reid: Florida A&M University, 2008; Associate in Bernard & Auguste, P.A., Delray Beach

Alan William Saladrigas: Florida International University, 2014; Office of State Attorney, West Palm Beach.

Caitlin Salazer-Reid: Michigan State University, 2009; Children's Legal Services, West Palm Beach.

Rachel Lauren Simowitz: University of Miami, 2016; Associate in Moskowitzk Mandell, Salim, & Simowitz, P.A., Ft. Lauderdale.

Ronald E. Stump: University of Denver, 2000, Associate in Schuler, Halvorson, Weisser, Zoeller, West Palm Beach.

Schnelle K. Tonge: University of Florida, 2006; Office of the Public Defender, West Palm Beach.

Karen Velez: Nova Southeastern, 2005; Office of the Public Defender, Ft. Lauderdale.

Kristin Vivo: University of Miami, 2008; Solo Practitioner. West Palm Beach.

Isabel Walker-Burgos: Stetson University, 2016; Associate in Ice Legal, P.A., Royal Palm Beach.



Diversity Corner



Following a Trailblazer

by Amy Pettway

Among the women attorneys in Palm Beach County who have demonstrated a life-long ability to influence and impact, Eunice Baros' biography tells an inspiring story of meeting goals, realizing dreams

and creating change.

A native New Yorker, Eunice was born in Manhattan shortly after World War II. If her family's ingenuity and hard work were any indications of what young Eunice would accomplish, she was destined at birth to become a trailblazer.

In Eunice's earlier years, her father was a successful inventor and businessman. He patented several of his inventions and manufactured gears for airplanes in a factory he owned near the Empire State Building. Eunice's maternal grandfather was a deputy sheriff of Bronx County, New York. Her mother was an artist and teacher. Eunice was surrounded by family who rejected complacency, choosing instead to produce and provide. While still a young girl, Eunice and her family moved to New Rochelle, New York and later moved again to rural Lake Mahopac, New York. There, Eunice walked more than a mile each day to catch the bus to school, and she learned to drive a Chris Craft at age 10.

By the time she was 14, Eunice took on her first job as a newspaper reporter for the *Coral Gables Times-Guide*. The year was 1977 when practicing law first sparked her interest. At the time, Eunice, then 34, authored a cover story for the *Miami Herald Tropic Magazine* which captured her perceptions of the Dade County Public Defender's Office. For weeks, Eunice shadowed public defenders as they maneuvered in and out of court. Eunice had an unfettered opportunity to interview the Public Defender and Assistant Public Defenders. Two of them, however, made the most lasting impressions on her life. Former Public Defender, now retired 3rd DCA Judge Phillip A. Hubbart, and retired Federal Magistrate Judge Linnea Johnson exhibited such passion and conviction for their work that they influenced Eunice's decision to apply for and attend law school.

Eunice enrolled in Nova Southeastern University College of Law in Davie, Florida in 1977. While a student at NSU, Eunice successfully juggled two other roles: single motherhood of a young son and a columnist for both *The Herald* and other publications. Notably, Eunice co-authored a book with Dr. Ferdie Pacheco, physician of the late Muhammad Ali. She also befriended fellow vegetarian Isaac Bashevis Singer, Nobel Prize winner for Literature about whom she wrote many national articles.

For ten years following her admittance to the Florida Bar, Eunice worked as an Assistant Attorney General, specializing in travel fraud and unfair and deceptive trade practices in the Miami Consumer Unit. Following this, she worked as a senior counsel for Holland & Knight, LLP in West Palm Beach for seven years. In 1998-99 Eunice was chair of the 4th DCA Judicial Nominating Commission, appointed originally by then Governor Lawton Chiles.

Finally, Eunice's one-time dream came true. In 1999, she was hired as an Assistant Public Defender in Palm Beach County. After 13 rewarding years, Eunice retired from the Public Defender's Office, but not from work. Currently she has a successful solo

Currently she has a successful solo general practice in Palm Beach

Gardens and is a Florida certified civil circuit mediator and approved mediator in the U.S. District Court in the Southern District of Florida.

In 2008, Eunice was named Alum of the Year by Nova Southeastern University. She is also the founding president of the NSU College of Law Alumni Chapter in Palm Beach County. Professionally and personally, Eunice has demonstrated her commitment to advancing diversity efforts in Florida. In her words "diversity enhances and enriches our lives." For the last several years, Eunice has held active board roles in the American Jewish Committee, Florida Legal Services, Inc., the Palm Beach Association of Criminal Defense Lawyers and the North County Section of the Palm Beach County Bar Association. Eunice also currently sits on the local Bar's Committee for Diversity and Inclusion, and she is a member of the F. Malcolm Cunningham, Sr. Bar Association. Eunice is married and has three children. Her daughters followed in their mom's footsteps for college at the University of Florida in Gainesville and are now attorneys.

Having come to understand the tremendous inroads Eunice Baros creates in the legal community towards diversity and inclusion, it is difficult to overlook any aspect of her incredible journey. As are many, I am proud to know her and look forward to tracking her



Former U.S. Attorney General Griffin Bell and Eunice Baros

steps as she continues to help expand the diversity landscape. When asked to share a quote that inspires her, our featured spotlight replied, "Be a rainbow in someone else's cloud," by Maya Angelou. Perhaps this is her secret to success.

Amy Pettway is a civil litigation practitioner for the Law Firm of Amy Pettway, P.A. Her practice areas include breach of contract, employee benefits, landlord/tenant issues, insurance litigation and wills. Amy is licensed to practice in Florida, Georgia and New York States. She is serving her second term as Chair of the Newsletter section of the Committee for Diversity and Inclusion.



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



"TECHNICAL WRITING FOR E-READING"

Thursday, January 12, 2017, 11:30 - 1:00 pm PBC Bar Association, 1507 Belvedere Road, WPB

Program: The seminar will focus on the technical side of brief writing. Topics will include: formatting briefs in Word by using bookmark links in a Table of Contents, using section headers to make a brief easier to navigate when it is being read electronically, converting word files to PDF rather than printing, signing, and scanning and creating bookmarks in Adobe.

As this seminar aims to cover technical topics, it is ideal not just for attorneys, but also paralegals, legal secretaries, clerks and other legal support staff! This is also a great "crash course" for non-appellate attorneys on the technical requirements for appellate filings!

11:30 - 12:00pm: Late registration, check-in and lunch

12:00 - 12:10pm: Lonn Weissblum, Clerk of the Fourth District Court of Appeal

Discussing the "do's and don'ts" regarding electronic filings to highlight common issues

and minimize the potential for filing rejections

12:10 – 12:20pm: Clerk's Office Staff Attorneys and Judicial Law Clerks

Providing prospective on electronic briefs and other filings received, and what they

consider effective

12:30 – 12:50pm: **Presentation by Technical Experts**

Learn how to implement tips and suggestions provided by the court staff. Tech experts

teach the nuts and bolts of preparing Word and PDF documents.

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12:50 – 1:00pm: Open Question and Answer Segment





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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. (1.12 Appellate).

Page 14 Bulletin

Bankruptcy Corner



What Does A Transferee Do When A Transfer Is Avoided?

by Jason S. Rigoli

A trustee, or debtor in possession, has the ability to avoid and recover preferential and fraudulent transfers. The policy behind these powers is "fairness." Preferences are avoidable so that one unsecured creditor

is not favored over other unsecured creditors.¹ Similarly, fraudulent transfer laws are in place to prevent depletion of the estate and to achieve fairness to all creditors by recovering for creditors property which was improperly conveyed.² Transferees, however, never feel that avoidance actions are "fair," so what rights does a defendant/transferee have when a transfer is avoided and recovered?

I. Allowable Post-Petition Claim In The Bankruptcy Case

Section 502 of the Bankruptcy Code³ governs the allowance of claims or interests in a bankruptcy case.⁴ Specific to transferees are subsections (d) and (h):

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.⁵

These provisions of the Bankruptcy Code push the same policy, "fairness," to the party on the other side of the transaction (the transferee) as the provisions authorizing the avoidance and recovery of the transaction. The parties should be put back to the "status quo."

A. Section 502(d)

Whether the avoided transfer was a preference or fraudulent transfer, if the transfer has been avoided and a judgment entered in favor of the trustee to recover under

1 Lawrence Ponoroff, Bankruptcy Preferences: Recalcitrant Passengers Aboard the Flight from Creditor Equality, 90 Am. Bankr. L.J. 329, 338 (2016) (internal citations omitted). Section 550, the transferee's claim is not allowed until the transferred property is returned to the estate or the transferee has paid the amount to the estate equal to the transferred property.7

B. Section 502(h) and Avoided Preferences

Section 502(h) provides that a transferee who received a preference that was avoided and recovered during the bankruptcy case has an allowable claim the bankruptcy estate for the amount the estate recovered.8 This puts the creditor, debtor, and other unsecured creditors back to the status quo.9 The policy analysis behind this interpretation is straight forward, the creditor would have had a claim if the Debtor had not decided to prefer that creditor over others, so the creditor should retain that right if it is required to repay the funds it received on that debt.

C. Section 502(h) and Fraudulent Transfers

Section 502(h) applies equally to avoided fraudulent transfers. The analysis, however, becomes slightly more complicated. The policy remains the same; "restore the parties to the positions held before the transfers." 10 In pushing that policy forward does a transferee receive a claim for the full value of the transferred property avoided? The answer is no. Courts have interpreted Section 502(h) to allow a transferee a claim in the amount of consideration paid to the debtor in exchange for the transfer.11

The logic behind this is sound: "If the transferee did not give any consideration for the fraudulent transfer, there is nothing to reinstate, and the return of the fraudulently transferred funds does not give rise to an allowable claim." 12 This is true even in cases of actual fraudulent transfers. 13

II. Conclusion

Transferees will probably never see the "fairness" behind the policy of avoidable transfers, however, transferees have some remedies in bankruptcy to allow them to preserve their financial condition to the extent the transferee provided the debtor with consideration. Additionally, a transferee may have additional remedies outside of the bankruptcy case, which are not addressed in this column.

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

² Fraudulent Transfers – In general; purpose; relationship to other law, 2 Bankruptcy Law Manual § 9A:29 (5th ed.) (June 2016)(internal citations omitted).

^{3 11} U.S.C. §§ 101, et seq. 4 11 U.S.C. § 502.

⁵ *Id*.

⁶ See In re Bankvest Capital Corp., 375 F.3d 51,66-68 (1st Cir. 2004)(internal citations omitted).

⁷ The amount to be paid would be determined by the Court and included in the Judgment as a finding as to the value of the asset transferred as of the date of the transfer.

^{8 11} U.S.C. § 502(h).

⁹ See Bankvest, 375 F.3d at 68 (internal citations omitted).

¹⁰ In re Tronox Incorporated, 503 B.R. 239 (Bankr. S.D. N.Y. 2013).

¹¹ *Id.* at 331 (internal citations omitted).

¹² Id. (quoting Gowan v. HSBC Mortgage Corp. (In re Dreier LLP), 2012 WL 4867376, at *3 (Bankr.S.D.N.Y. Oct. 12, 2012)).

¹³ Id. (citing ASARCO LLC v. Americas Mining Corp., 396 B.R. 278 (S.D.Tex.2008)).



BEST PRACTICES AND CHALLENGES FOR SOLO/SMALL FIRM ATTORNEYS



A lunchtime open forum discussion with other lawyers to talk about time management, client development, billing, motion practice and staffing issues facing Solo/Small Firm Attorneys

THURSDAY, JANUARY 26, 2017 11:45 a.m. to 1:00 p.m. Bar Office, 1507 Belvedere Road,

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Page 16 Bulletin

Solo/Small Law Firm Committee News



by Ronald Scott Kaniuk, Esq.

Hi! My name is Ron Kaniuk, and I am the 2016-17 Chair of the Solo/Small Law Firm Committee of the Palm Beach

County Bar Association.

According to The Florida Bar, there are 102,783 attorneys – this number includes 85,038 lawyers who are active and in good standing, 4,210 lawyers who are ineligible but in good standing (Military, Non-Resident, Judges and Others), and 13,535 lawyers who are ineligible (delinquent in dues, noncompliant with CLE requirements, inactive, suspended or other).

Almost two-thirds of these lawyers – or approximately 64,000 – practice in firms of five attorneys or less. Our Solo/Small Law Firm Committee focuses on attorneys practicing on their own or in firms of four attorneys or less.

For the large number of attorneys who are either on their own or at a small

firm, we are both attorneys and business owners, and are dependent upon a steady stream of new clients in order to grow and thrive.

These clients can be drawn from a variety of sources – advertising, repeat clients, new clients through client referrals and more.

The Bar Association can be an excellent source of referrals through Networking and through the Lawyer Referral Service.

Networking can be the most daunting task for new – and established – solo and small firm practitioners; however, it is also one of the most important things we must do. Strong referral relationships take time to build and must be nurtured. Being active in the Palm Beach County Bar Association, and in the Solo/Small Law Firm Committee, is a great way to network and build close and authentic personal relationships that are essential to a healthy referral network.

Our next Lunch and Learn program will be held on Thursday, January 26 from 11:45 a.m. to 1:00 p.m. at the Bar Office. The topic will be Best Practices and

Challenges for Solo/Small Firm Attorneys. Be sure to pre-register and join us!

These Lunch Programs provide an invaluable opportunity to network with your fellow practitioners, gain new perspectives, and grow your resources of and education. Whether you are new to the small firm world, or have been traveling this road for a while, I hope you will join us and be a part of building our connections.

In addition, I'd be remiss if I didn't promote the PBCBA's Lawyer Referral Service. If you are an attorney in good standing with The Florida Bar and have maintained professional liability insurance, you are eligible to join the PBCBA's Lawyer Referral Service. LRS Members refer the public to call the LRS. PBCBA Staff screens potential clients for you. LRS is inexpensive to join (\$150 annually).

I invite you to get involved with the Bar Association, our Solo/Small Law Firm Committee, and the Lawyer Referral Service.



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Let's WIN:



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



Litigating Personal Injury/Wrongful Death Cases – The Rules Have Changed. Things You Need to Know For Trial

Friday, February 17, 2017, 8:00 a.m. - 2:30 p.m. PBCBA, 1507 Belvedere Rd., WPB

	1 DODA, 1307 Delivedere Na., WI D
8:30 a.m 8:55 a.m.	Late registration and Breakfast
8:55 a.m 9:00 a.m.	Welcome and Opening Remarks: Timothy Murphy, Esq., Personal Injury of Florida, PI/Wrongful Death Committee Co-Chairperson
9:00 a.m 9:50 a.m.	How to Handle Collateral Source Setoffs - Medicare, Medicaid, etc.: Peter Hunt, Esq., LaBovick, LaBovick & Diaz Law Group
9:50 a.m 10:40 a.m.	Professionalism Presentation: Kara Rockenbach, Esq., Methe & Rockenbach, P.A.
10:40 a.m 10:50 a.m.	Break
10:50 a.m 11:40 a.m.	Healthcare Lien Resolution - How to Cut Through the Red Tape: Jason D. Lazarus, J.D., LL.M., Settlement Law Firm
11:40 a.m 12:30 p.m.	Lunch
12:30 p.m 1:20 p.m.	Obtaining Medical Records - The Buck Starts Here: Jasmine Rodriguez, Personal Injury of Florida
1:20 p.m 2:30 p.m.	Ethics in Advertising - How to Ethically Cast the Net: Brenda Fulmer, Esq., Searcy Denney Scarola Barnhart and Shipley
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		eminar, but would like to order the CD. The cost is the same as listed above, however please include \$10 for eeks for delivery. (2.17.17 Personal Injury seminar)

Palm Beach County Bar Association, 1507 Belvedere Road, West Palm Beach, FL 33406

Personal Injury Corner



"Unstriking" A Potential Juror

by Ted Babbitt

In *McCray v State*, 41 Fla. L. Weekly D1514 (Fla. 4th DCA 2016) the defendant appealed a trial court's refusal to allow him to "unstrike" a juror upon whom he had used his last preemptory strike so that

he could use that strike on another juror after the State had accepted the panel. The trial court denied the motion to unstrike the juror and the Fourth District affirmed. The Fourth District reasoned that since the State had revealed its strategy to accept the juror whom the defendant wished to unstrike, allowing the defendant to change the complexion of the jury once the State's strategy had been revealed would have prejudiced the State.

The Court in *McCray* relied upon its holding in *Davis v*. *State*, 922 So. 2d 454 (Fla. 4th DCA 2006). In *Davis* at 455 the District Court held:

Although it is clearly reversible error to deny a challenge to a juror when the defendant has not exhausted all of his peremptory challenges prior to the jury's being sworn, that is not the case where, as here, a party has exhausted all of its peremptory challenges. Under the facts of this case, we cannot say that the trial court erred in denying [the defendant's] request to withdraw a peremptory [strike] and then backstrike a previously accepted juror.

The Court in *McCray* relied on *Davis* to affirm the trial court's refusal to allow an "unstrike" once the panel had been accepted. At 1515 the Court held:

Similar to *Davis*, we cannot say here that the trial court erred in denying the defendant's motion to "unstrike" Juror 2.5, upon whom he used his last peremptory strike, so that he could use his last peremptory strike on Juror 3.9. The reason is because, as in *Davis*, after the defendant used his last peremptory strike on Juror 2.5, the state accepted the panel, *thereby revealing the state's strategy to accept Juror 3.9*. Allowing the defendant to reveal the state's strategy to accept Juror 3.9, and then allowing the defendant to "unstrike" Juror 2.5 in order to strike Juror 3.9, would have prejudiced the state. (emphasis in original).

In *McIntosh v. State*, 743 So. 2d 155 (Fla. 3rd DCA 1999) there is arguably a contrary holding. In this case the venire panel was exhausted with only 11 jurors selected for a 12 person jury. In order to obtain a jury, the State indicated a willingness to withdraw a previous peremptory strike and the defendant objected stating that the defendant's decisions in utilizing all of its strikes was made, in part, based on the assumption that that juror had been stricken by the state. The defendant requested an additional strike to utilize against another juror. The trial court refused to permit the defense to have another preemptory challenge and instead allowed the State to withdraw its preemptory challenge. The Third District at 156 reasoned as follows

We find no abuse of discretion in the trial court's seating of juror Blanco over defense objection. If defense counsel predicated the exercise of at least

some of the peremptory challenges on the theory that juror Blanco, having been stricken by the State, would not serve on the jury, then it would be understandable if the defense had requested an additional peremptory challenge to strike juror Blanco. In that circumstance, we would have a different case. Juror Blanco was, however, acceptable to the defense and the request instead was to strike a different juror. The claim of harm here was entirely speculative and the objection was properly overruled. (emphasis in original).

Thus, in essence, the Third District permitted the State to "unstrike" a juror in order to obtain a jury. Based upon the apparent potential for a conflict between the holding in *McCray* and the holding in *McIntosh*, the Fourth District certified conflict to the Supreme Court.

The Fourth District was unpersuaded by *McIntosh* and instead held that a party does not have a right to "unstrike" a juror previously stricken in order to strike another juror once the opposing party has accepted the jury. At 1516 the Fourth District held:

While we recognize that when a defendant has peremptory strikes remaining, "the courts of this state have uniformly held... that a defendant has the right to retract his acceptance and object to a juror at any time before the jur[y] is sworn," *Dobek v. Ans*, 475 So. 2d 1266, 1267 (Fla. 4th DCA 1985) (emphasis added), we are aware of no authority holding that a party, who has exhausted their peremptory strikes, has the right to retract a peremptory strike in order to use a peremptory strike on another juror after the other party has revealed their jury selection strategy but before the jury is sworn. To recognize such a holding would disrupt what should be an otherwise orderly jury selection process.

It will be interesting to see what the Supreme Court does with this conflict but for now, "unstriking" a juror after exhausting peremptory challenges is not permitted.



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January's CLE Hit List

Appellate Law - 01/12

Business Lit - 01/24

Judicial Lunch - 01/31

February's CLE Hit List

Employment Law - 02/03

Technology -02/07

Estate & Probate - 02/09

Real Estate - 02/10

ADR -02/13

Judicial Lunch - 02/14

Personal Injury - 02/17

Business Lit -02/24

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Webinar's can be viewed at: www.palmbeachbarcle.org

CLE Downloads Available at: www.palmbeachbar.org/continuing-legal-education

Bulletin Page 22

Court approves CLE Technology Component

The Supreme Court approved a three-hour increase in the Bar's CLE requirement, plus a new mandate to take technology-related CLE courses. With the September 29 opinion in <u>case no. SC16-574</u>, The Florida Bar becomes the first mandatory bar in the nation to require a CLE tech component for its members.

Starting January 1, 2017, the requirement will coincide with your next reporting cycle. For example, if your new cycle begins February 1, 2017, seminars offered after that date, which include technology credit(s), will count toward your technology requirement. Any seminar offered prior to your new reporting cycle will not count toward your requirement, however if you purchase the audio/webinar after the start of your new cycle, the seminar will count toward your new technology requirement.

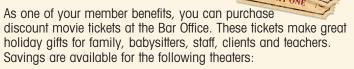
In anticipation of the requirements, two committees of the Palm Beach County Bar Association (Technology and Business Litigation) have scheduled a series of technology related seminars through May 2017, including the following (some seminars will provide not only technology credit, but other credit and board certification as well):

Jan 24	Social Media and E-Discovery
Feb 7	Recognizing and Addressing Common Security Threats in your Practice
Feb 24	Data security, Retention Obligations
March 3	Ipad for Litigators
March 17	Overview of State (local) and Federal Court Cost Shifting for E-Discovery
April 17	Mediating Business Litigation cases, with a Focus on Use of Trial and Presentation Software to Increase Effectiveness
May 5	Electronic Evidence at Trial

The following seminars offered prior to January 1, 2017 will provide credit when ordering the audio or webinar from a LIVE seminar, however just remember to order the materials after the start of your next reporting cycle.

November 17	Law firms and PII – Complying with Privacy				
	and Data Security (1.0 Technology; 1.0 Ethics;				
	1.0 CLER)				
December 6	Demystifying Encryption – What you Should				
	Know (1.0 Technology; 1.0 Ethics; 1.0 CLER)				

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County Recognizes Mediation Week

Palm Beach County Commissioner Priscilla Taylor recently presented the Palm Beach County Bar Association with a proclamation from the Board of County Commissioners proclaiming October 17-23, 2016, Mediation Week in Palm Beach County. The proclamation commends the members of the association for their efforts to promote alternative dispute resolution throughout the county. Receiving the proclamation on behalf of the association are Theodore Deckert, Alternative Dispute Resolution Committee Chair (left) and John Whittles, President.



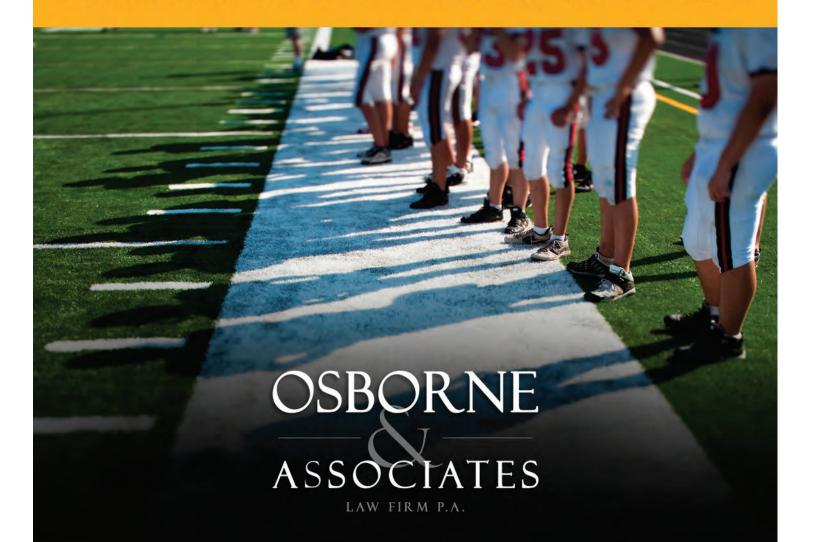
Four Bars — One Big Pink Party!

The North County Section wishes to thank all the members who came out to support breast cancer awareness month during its Fourth Annual PINK Party. The event was held at Cabo Flats in Jupiter along with members of FAWL, the Palm Beach County Justice Association, and the Hispanic Bar Association.



Palm Beach County Justice Association President-Elect John McGovern, North County Section President Rosemarie Guerini, FAWL President Cindy Crawford, Hispanic Bar Association President Christa McCann and Lindsay Mesches from Smiley Wiley Breast Cancer Foundation

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Bulletin



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 PBCBA, 1507 Belvedere Road, WPB

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

11:55 a.m. - 12:00 p.m. Kent Frazier, Esq., Akerman; Business Litigation CLE Committee, Chair

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, 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

Sponsor



Credits: 1.0 CLER and 1.0 ethics credit and 1.0 certification credits in Business Litigation

\$40 PBCBA members/paralegals; \$80 for non-PBCBA attorney members/paralegals. <u>Those registering after 12/1/16, add \$10.00 late fee.</u> 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



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



Social Media Discovery - Case Law Update and Strategies

Tuesday, January 24, 2017, 11:30 a.m. - 1:00 p.m. PBCBA, 1507 Belvedere Rd., WPB

11:30 a.m. - 11:55 p.m. Late registration / Lunch

11:55 a.m. - 12:00 p.m.

Welcome and Opening Remarks
Kent Frazier, Esq., Akerman; Business Litigation CLE Committee, Chair

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

Guest Speaker: Christopher B. Hopkins, Esq., McDonald Hopkins, LLC

<u>AGENDA</u>

- Florida Appellate Court Decisions on Social Media Discovery
- Palm Beach Circuit Court Orders on Social Media Discovery
- Strategy to Develop Social Media Discovery
- Sample Social Media Discovery Request



1.0 CLER expected; 1.0 Technology

\$25 PBCBA members/paralegals, \$65 non-PBCBA attorney members/paralegals. Those registering after 1/17/17 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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(1.24 Bus. Lit)

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The Business Litigation CLE Committee and Solo Practitioners of the Palm Beach County Bar Association presents:



You've Been Hacked, What Must You Do!

Friday, February 24, 2017, 11:30 a.m. - 1:00 p.m. PBCBA, 1507 Belvedere Rd., WPB

11:30 a.m. - 11:55 a.m. Late Registration/Lunch

11:55 a.m. - 12:00 p.m.

Welcome and Opening Remarks

Kent Frazier, Esq., Akerman; Business Litigation CLE Committee, Chair

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

Guest Speaker: Silka M. Gonzalez,

President and Founder, Enterprise Risk Management

Agenda

- How to prepare your practice and firm for the worst and to provide useful knowledge and counsel if and when your clients hacked.
- Discussion of what law firms must do when their data security systems have been breached.
- A view on the required response to data breach.
- What plans and procedures need to be in place to mitigate the damage from a data breach?

Sponsor



1.0 CLER; 1.0 Technology

\$ 25 PBCBA members/paralegals, \$ 65 non-PBCBA attorney members/paralegals. Support staff pay price reflective of their attorney/paralegal membership status. Support staff CANNOT pay online; please mail in registration. Those registering after 2.17.17 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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Alicia was formerly an associate attorney at a prominent insurance defense firm. She is the co-founder of In Jacob's Shoes, a charity which provides new and gently used shoes, athletic equipment and school supplies to thousands of children in need throughout South Florida.

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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, 2016, 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 - <i>Melissa Lader Barnhardt, Wells Fargo</i>				
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 Mighdoli 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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6.0 CLER; 1.0 ETHICS, plus Certification credits: 6.0 Elder Law; 6.0 Wills, Trust and Estate; 1.0 Tax Law 65 PBCBA members/paralegals, \$205 non-PBCBA attorney members/paralegals. Those registering after 12/2/16, add \$10.00 late 6. All refund requests must be made no later than 48 hours prior to the date of the seminar.					
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HEARSAY



Fifteen lawyers from Searcy Denney Scarola Barnhart & Shipley were recently recognized in the publication Best Lawyers in America 2017 Chris Searcy, Jack Scarola, Greg Barnhart, John Shipley, Sia Baker-Barnes, Brian Denney, Brenda Fulmer, Mariano Garcia, James Gustafson, Jack Hill, Darryl Lewis, Edward Ricci, Chris Speed, Karen Terry and Calvin Warriner Anais Taboas will join The Florida Bar Foundation Nov. 7 as its new South Florida Pro Bono Program Officer and will work out of space donated by top 100 U.S. law firm Akerman LLP in its Miami office.



Jones, Foster, Johnston & Stubbs, P.A. announces that **Megan Coughlin** has joined the firm as an associate attorney in the firm's probate litigation department.



Amber E. B. McMichael is now mediating full time at Matrix Mediation, LLC. She is a certified Circuit Civil, Family and Federal Mediator.

Nadine V. White-Boyd has opened White-Boyd Law, P.A in West Palm Beach representing individuals and small businesses in bankruptcy and real estate matters.

The American Bar Association Section of Dispute Resolution recently announced that Florida mediator **Richard Lord** has been elected as a 2016-2017 Council member. He will serve a three-year term and is currently the only member of the Council from this state.

Clark, Fountain, La Vista, Prather, Keen & Littky-Rubin, LLP announces that all six of its partners have been recognized by the prestigious publication *Best Lawyers in America*, 2016 edition: Mark W. Clark, Donald R. Fountain, Jr., Nancy La Vista, David C. Prather, W. Hampton Keen and Julie H. Littky-Rubin.





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CALENDAR December 2016

Thursday, December 1 5:30pm – 7:00pm YLS Happy Hour – No Shave November E. R. Bradley's Saloon

Friday, December 2 8:30am – 9:30am ADR Committee Meeting Bar Association Office

Bar Association Office

Friday, December 2 12:00pm – 1:00pm Circuit Civil Committee Judicial Conference Room

Friday, December 2 12:00pm – 1:00pm **Law Related Ed Meeting** Bar Association Office

Tuesday, December 6 11:00am – 1:00pm **Technology Seminar** Bar Association Office

Tuesday, December 6 12:00pm – 1:00pm Transaction Law Committee Meeting Bar Association Office Wednesday, December 7 – 9 **Board of Governors Meeting**Sandpearl Resort –
Clearwater Beach, FL

Wednesday, December 7 12:00pm – 1:00pm **Professionalism Committee Meeting**

Bar Association Office

Wednesday, December 7 1:00pm – 1:30pm **Professionalism Panel** Chief Judge Conference Room

Wednesday, December 7 5:30pm – 8:30pm **Holiday Party** PGA National

Thursday, December 8 11:30am – 1:00pm **Business Litigation Seminar**

Friday, December 9 8:00am – 4:00pm

Bar Association Office

8:00am – 4:00pm **Elder Law Seminar**Bar Association Office

Friday, December 9 12:00pm – 1:00pm **Judicial Relations Committee Meeting** Judicial Conference Room

Saturday, December 10 10:00am – 12:00pm Barnes and Noble – Legal Aid Bookfest Palm Beach Gardens

Tuesday, December 13 FMCBA/HBA Joint Holiday Party TBA (Tenative)

Tuesday, December 13 12:00pm – 1:00pm YLS Board Meeting Bar Association Office

Tuesday, December 13 5:00pm – 6:30pm **Board Meeting** Bar Association Office

Wednesday, December 14 12:00pm – 1:00pm

Bench Bar Committee Meeting
Bar Association Office

Wednesday, December 14 5:30pm – 8:00pm YLS Holiday Party for Foster Kids Marriott

Wednesday, December 14 12:00pm – 1:00pm Christian Legal Society Luncheon

Belle and Maxwell's Restaurant

Thursday, December 15 5:30pm – 7:30pm PBC Justice Association Reception Ruth's Chris @ City Place

Tuesday, December 20 12:00pm – 1:00pm **CDI Meeting** Bar Association Office

Monday – Friday, December 26 – 30 **Christmas Holiday** Bar Association Closed

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