



## PALM BEACH COUNTY BAR ASSOCIATION

# BULLE<sup>T</sup>IN

[www.palmbeachbar.org](http://www.palmbeachbar.org)

March 2017

### Amanda Knox to Speak

We are excited to announce Amanda Knox will be the keynote speaker for our annual Law Day Luncheon!



Amanda is an exoneree, criminal justice advocate, writer and journalist. She was twice convicted and acquitted of murder. She spent nearly four years in prison and eight years on trial for the murder of her roommate, Meredith Kercher, while studying abroad in Perugia, Italy in 2007. Italy's highest court definitively pronounced her innocent in March 2015. She wrote a memoir about her wrongful conviction, *Waiting to Be Heard*, published by HarperCollins in 2013. Most recently a Netflix documentary aired September 2016 entitled "Amanda Knox"

Please don't miss this year's Law Day Luncheon. Save the date and join us on Wednesday, April 26 from 11:30 a.m. to 1:00 p.m. at the Embassy Suites Hotel in West Palm Beach.

Save your seat by registering online today at [www.palmbeachbar.org](http://www.palmbeachbar.org)



On January 31st, the Palm Beach County Bar Association building was heavily damaged with smoke and water due to a fire. We are happy to report that no one was injured. The Board of Directors, the Executive Director and Bar Staff continue to work diligently to ensure the operations of the organization causes minimal disruption to the services of our members. You may continue to register for all scheduled events. We appreciate your patience as we continue to rebuild. We have a strong bar and we appreciate the support of

our members. We will continue to keep you abreast of our progress and hope to open our bar doors again within four to six months.

### Contributions sought for 2017 Law Week Judicial Reception

The Law Week Committee is requesting contributions from law firms for its annual Judicial Reception honoring the local judiciary and judicial assistants. The event will be held on Tuesday, May 2, 2017 at The Harriett in West Palm Beach. Sponsors will be recognized on email notices, on a sign at the reception and in the Bar Bulletin.

Those interested in making contributions should send a check no later than April 3rd to the Palm Beach County Bar Association, Attn: Carla Tharp Brown, P.O. Box 17726, West Palm Beach, FL 33416.

Sponsorship amounts are as follows:

\$575.00 for law firms 11 or more attorneys

\$400.00 for law firms 3-10 attorneys

\$250.00 for law firms 1-2 attorneys

*Thank you  
for your  
consideration!*

### Mark your calendar for upcoming Membership Events

**March 10, 2017**  
Bench Bar Conference

**April 20, 2017**  
Cannabis Law Summit

**April 26, 2017**  
Law Day Luncheon  
Guest Speaker: Amanda Knox

**May 2, 2017**  
Judicial Reception

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THE  
**BULLETIN**

PALM BEACH COUNTY  
BAR ASSOCIATION

JOHN R. WHITTLES  
President

[www.palmbeachbar.org](http://www.palmbeachbar.org)

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Executive Director

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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

## Baker-Barnes To Be Installed President

Save the date for the Palm Beach County Bar Association's  
**95th Installation Banquet**  
**Saturday, June 17, 2017**  
**The Breakers Hotel, Palm Beach**

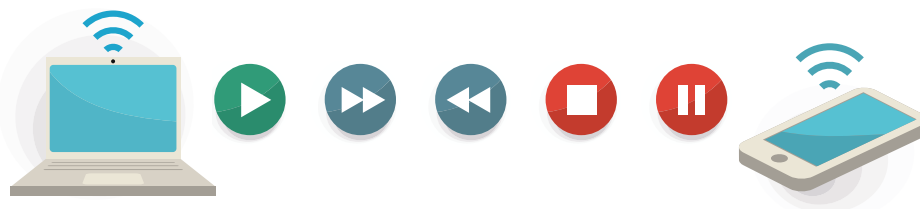
This event promises to be one of our largest and most well attended of the year! Join us as Rosalyn Sia Baker-Barnes is sworn in as our Bar's first African-American female President.

Formal invitations will be mailed early May.

Sponsorship opportunities available. To be recognized on the invitation, in the program and on the registration page, please call Lynne Poirier at 561-687-2800 or email [lpoirier@palmbeachbar.org](mailto:lpoirier@palmbeachbar.org) no later than March 17th.



Bar President John Whittles recently attended Judge Dana Santino's Investiture where he congratulated her and presented a personalized gavel on behalf of the Palm Beach County Bar Association.



## CLE On-Demand: Anytime & Anywhere

The PBCBA's seminars are available for immediate delivery through our website. You can purchase any of our seminars in MP3 format for immediate download, or you can still request a CD that will be mailed to you. We have a large library of courses recorded not only from our seminars but also those presented by the Orange County, Hillsborough County and Clearwater Bar Associations.

If your CLE deadline is coming up, be sure to check out our site to order your CLE today!

[www.palmbeachbar.org](http://www.palmbeachbar.org)

# President's Message



## eFiling – Good and Getting Better

by John R. Whittles

Remember the days before eFiling documents in state court? I have not so fond memories of 3:30 deadlines to have documents in the hands of the courier service and the unfortunate courier

assigned to me standing over my desk furious while I hurried through last minute corrections and copies were made of whatever document(s) needed to be filed that day. Thankfully, those days ended in 2010 when the Court's mandatory e-filing portal went online. That system has greatly reduced the amount of work involved in lawyers filing and serving court documents as lawyers can now file and serve court documents from any location at any time, not only in Palm beach County but to any court in the state. This paperless system has greatly improved our practicing lives.

### Maintaining and Improving the E-Filing Portal

Florida's eFiling system was years in the making and still undergoes regular updates and improvements. The Portal is maintained by FCCC, Florida Court Clerks and Comptrollers Association. The Florida Courts E-Filing Authority governs the Florida Courts E-Filing Portal. The Portal operates under the rules and standards set by the Florida Supreme Court, in consultation with the Florida Courts Technology Commission, a state-wide advisory board intended to offer assistance and solutions in the maintenance of and improvements to the eFiling portal system. The clerks of court throughout the state have also instituted an E-Filing Authority, which maintains a Board of Directors consisting of eight Circuit Court Clerks and the Clerk of the Supreme Court. Each Clerk, other than the Chair and the Clerk of the Supreme Court, is elected to represent a district of Clerks, based on county population.

All of these agencies regularly review the logistics of the eFiling portal and work to make the process more efficient, especially considering funding deficiencies that are commonplace throughout the state.

Further, Palm Beach County's public access to court records will soon undergo a very significant improvement in the level of service it provides by allowing users to search court records for the actual documents in the system, not just the docket entries but the document itself, fully downloadable, searchable and printable. This is a sea change for trial lawyers – boxes of pleadings, discovery responses, and court documents that for eons had been boxed and taken to court in the interest of having the entire file are accessible can be loaded onto an iPad and be instantly accessible. Even at small hearings, questions regarding the docket can be answered quickly by the lawyers at the podium.

### Standardization is the goal

Currently, 60 of the 67 counties in Florida use some form of searchable format for court records and the aspiration is to have the entire state on a searchable format by the end of this year with the federal courts' PACER system acting as the role model.

The goal of the Florida Court Clerk and Comptroller Agency and the clerks of court throughout the state is to have all of the eFiling systems in each state completely integrated regarding the program used to read and download a document. Currently, most counties store documents in their respective case management systems using a Tagged Image Format File ("tiff") format which allows a user to view and print the document. The ultimate goal however is for each county in the state to have the funding and infrastructure to use Adobe Acrobat ("PDF") format, which allows for character recognition word searches and access to any hyperlinks contained in the document.

### Resources

There is a very handy and useful E-filing guide that is maintained on Sharon Bock's website and I commend all of you to read the line below and give it your staff for review as well as the guide which visually walks the reader through the filing process. The link is:

[http://www.mypalmbeachclerk.com/uploadedFiles/Court\\_Services/eFiling/e-filing-guide-for-attorneys.pdf](http://www.mypalmbeachclerk.com/uploadedFiles/Court_Services/eFiling/e-filing-guide-for-attorneys.pdf)

## In Memoriam

Paul Marc Herman  
1949-2017



## Board Meeting Attendance

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



North County Section to Host:

# Cocktail Reception & Casino Party

With Craps, Blackjack, Poker and Slot Machines!

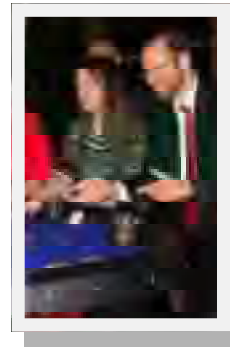
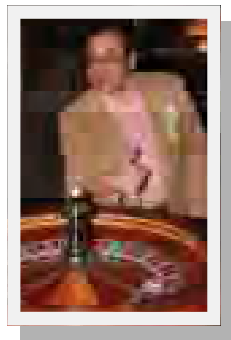


**WEDNESDAY, MARCH 15**

5:30 P.M. TO 8:00 P.M.

**ADMIRALS COVE - HARBOR VIEW ROOM**

200 ADMIRALS COVE BLVD., JUPITER



There will be cocktails, hors d'oeuvres and live music too!

**Say "YES" You'll Join Us! RSVP OnLine @ [palmbeachbar.org](http://palmbeachbar.org)**

RSVP by March 9 and receive a guest pass for easy access through the guard gate!

*Sponsored by:*



**D'Amore Law Firm**



NCS Members \$45.00 - Judges Complimentary Price increases by \$10.00 after 3/10/17

PBCBA Members who are not Section members and spouses: \$75.00

Casino games for entertainment purposes only





### A Call to Action

by *Courtney Tito*

A couple of years after graduating from law school, I took a job with an NGO, the Public International Law and Policy Group (“PILPG”), which took me to Baghdad for 7 months. PILPG received a grant to assist the Iraqi government with amending its Constitution and drafting implementing legislation. I arrived in Baghdad in November 2006 shortly after Saddam Hussein had been sentenced to death for his killing of 148 Shiites. I spent the next 7 months meeting with numerous Iraqi parliament members, the judges of the Iraqi Supreme Court and jurists all around the country. I traveled throughout the country as much as our security allowed and had regular appointments with the Iraqi Supreme Court judges at their offices in the “red zone,” meetings that were almost always punctuated with bombings and the sounds of war. We worked with parliamentarians, judges, lawyers and others in the legal profession to provide suggested amendments to the Iraqi Constitution and to draft implementing legislation for the Federal Supreme Court.

Despite the state of the country and despite the genuine animosity between the people of Iraq and their obvious disdain for much of American policy, without exception every single person I worked with and met during that incredible experience was desperate for reform and change and was willing to put in the work to make those changes. The Iraqi people put their disagreements aside so that they could utilize the resources (including PILPG’s team) provided to them to revise their Constitution and draft legislation to implement the important aspects of that Constitution. Without any reservation, I can say that, even as a woman in a very patriarchal society, I was treated with nothing but kindness, generosity and the highest forms of professionalism. These people were living in a constant state of fear and danger; indeed some had to take drastic measures to ensure that their meetings

with us remained secret upon fear of death and yet their professionalism in the tasks never wavered. In order to work towards turning their country around and re-building it they took advantage of every resource we could offer and spent hours and hours working with us to do the work necessary to create a new government.

When our grant came to an end, I came back to the United States and relocated to Miami. It was quite a shock to me when I came back to practice law to be continually faced with the rampant unprofessionalism that pervades the legal profession here in Florida. That is the reason I became involved in the Professionalism Committee when I moved up to Palm Beach and why I believe that the strides we have taken as a community have been so hopeful. It is also why I believe there should be a call to action for judges, lawyers, and paralegals – that we make the decision every day, in every interaction to simply be the best professional we can be and be the best ambassador for our profession possible.

It is clear that within our own community in the Palm Beach County Bar Association we are often “preaching to the choir” with our calls for increased professionalism and civility. I have met some of the best and most professional attorneys I have worked with in this country here in Palm Beach County, both in my firm and in the membership of the Palm Beach County Bar Association. But my practice in Palm Beach has also exposed me to those who just don’t get it or don’t care about being civil or professional. I believe it is incumbent on us to push the calls for increased professionalism and civility into our interactions with everyone we meet and interact with in our personal and professional lives.

I believe it is our duty as members of the legal profession to be ambassadors for professionalism, civility, common courtesy and kindness so that we can be a light of hope for each of our communities. We need to take a step back and understand that the disputes of our clients are not personal to us and conduct ourselves with the utmost respect for our clients, opposing counsel, opposing

clients, judges and everyone with whom we interact in our representation of these matters. This is not always an easy task, but if the Iraqi people who were facing such horrors in their own daily lives can be gracious, kind and professional to a young female attorney from the United States, then there is no reason each one of us cannot behave the same way with members of our own communities.

This is a message that needs to reach beyond the membership of our Palm Beach County Bar Association and the way that message gets out is through each one of us.

Professionalism should not be hard and it won’t be if we are all on the same page and hold ourselves and those with whom we interact accountable to the same standards. This is my call to action to spread the message of professionalism and civility expectations beyond our own membership.

# CM

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To schedule a consultation in your home or office,  
please call us at **(561) 360-3633**.



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



**The Changing Landscape of Securities  
Regulation, Arbitration and Litigation**

Wednesday, April 12, 2017, 12:30 - 6:00 p.m.

**LOCATION TBA: PLEASE CHECK THE BAR'S WEBSITE AND/OR YOUR EMAIL**

- 12:30 p.m. - 1:00 p.m. **Lunch, Check-in and Opening Remarks** – Jonathan B. Butler, Esq., Akerman LLP, Securities Law CLE Chairperson
- 1:00 p.m. - 1:30 p.m. **Securities Law Update & Other Hot Topics** – Jeremy M. Colvin, Esq., McDonald Hopkins LLC
- 1:30 p.m. - 2:15 p.m. **Expert Panel on the Department of Labor's Fiduciary Duty Rule** - Moderated by Jonathan B. Butler, Esq., Akerman LLP. Ryon M. McCabe, Esq., McCabe Rabin, P.A.; Jon A. Jacobson, Esq., Jacobson Law P.A.; and Gregg Breitbart, Esq., Kaufman Dolowich Voluck
- 2:15 p.m. - 2:30 p.m. **BREAK**
- 2:30 p.m. - 3:00 p.m. **FINRA Update & Hot Topics** - Manly Ray, FINRA Southeast Regional Director, Boca Raton. Moderated by Kelly Shivery, McCabe Rabin, P.A., Florida Registered Paralegal
- 3:00 p.m. - 4:00 p.m. **Mock Arbitration** - University of Miami Law Students and The Investor Rights Clinic at the University of Miami will present legal arguments on liability and damages in Oil & Gas Limited Partnership Cases. Moderated by Teresa J. Verges, Director, University of Miami Law School of Law Investor Right Clinic
- 4:00 p.m. - 5:00 p.m. **FINRA Arbitrators' Rulings & Rationale and Open Q&A with FINRA Arbitrators.** Moderated by Jonathan B. Butler, Esq., Akerman LLP
- 5:00 p.m. - 6:00 p.m. **Happy Hour**

Sponsors



4.5 CLER and 4.5 Business Litigation Certification credits. Cost \$ 115 PBCBA members/paralegals; \$ 155 non-PBCBA attorney members/paralegals. After 4/5/17, add \$10.00 late fee. All refund requests must be made no later than 48 hours prior to the date of the seminar.

**HOW TO  
REGISTER**

**BY CHECK**  
Return this form

**BY CREDIT CARD** For security purposes, you must  
register online at [www.palmbeachbar.org](http://www.palmbeachbar.org)

**Materials will be emailed to  
registrants prior to 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. PBC Bar Association, 1507 Belvedere Rd., W. Palm Beach, FL 33406. 561-687-2800.  
( 4.12.17 Securities law )

# Five Tips for Defending a Corporate Representative Deposition



by Adam Rabin

An effective tool for a party taking discovery in Florida state court is deposing the corporate representative of an adverse party or non-party.<sup>1</sup> Accordingly, a corporate representative deposition requires the lawyer defending the corporate representative to prepare diligently to defend the deposition. In this article, I outline five tips for defending

the corporate representative deposition.

## 1. Place Your Objections on the Record as to the Defects in the Notice.

When defending the deposition, you should carefully review the taking-party's notice to ensure it is in strict compliance with Rule 1.310(b)(6). The first defect the defending party is looking for is whether the witness is properly designated as a witness "with knowledge" of designated topics, as to opposed to the witness with "the most knowledge." The second defect you should look for is whether the designated topics on which you must prepare the witness are "reasonably particular" so you can prepare the witness adequately on the topics. Placing your objections to defects on the record early in a deposition may support a later argument (if you choose to make it) that the testimony provided should not be binding on the corporation.

## 2. Educate the Witness on What the Witness Did to Prepare on Each Designated Topic.

Under Rule 1.310(b)(6), it is the burden of the corporation named in the notice to ensure that the witness or witnesses the corporation appoints are educated adequately to speak to the topics designated in the notice. This can require a lot of planning and work with the witness. Make sure that the witness understands the overall dispute, the claims, the defenses, and the corporation's position. Also educate the witness that his or her personal observations or beliefs are not relevant and should not be shared. Instead, the witness is acting as a "corporate spokesperson" and is answering questions only in that capacity.

## 3. When Defending, Prepare the Witness to Speak as a "Corporate Spokesperson" Not as an Individual.

The key burden under Rule 1.310(b)(6) for the party defending the deposition is preparing the witness. Under the rule, the corporation is obligated to prepare a witness that can serve as the "voice" for the company's positions in this case and the witness's knowledge need not be personal. The "corporate spokesperson" analogy is a good one because a corporate spokesperson reports for the corporation irrespective of the spokesperson's individual positions, beliefs or observations. The key in preparing the corporate representative to testify is to ensure the witness is familiar with key documents (including those the witness did not author) and understands the corporation's major claims or defenses in the case. The other key is to make sure the corporate representative understands his or her testimony is binding upon the corporation. *See Carriage Hills*, 109 So.3d at 335.

## 4. Be Mindful of Allowing Your Witness to Testify in Both Corporate and Individual Capacities.

The defending party has to be aware of the hazards that may arise from allowing a witness to testify in both corporate and individual capacities within the same deposition. In *Carriage Hills*, this was one of the key problems in the case. *See Carriage Hills*, 109 So.2d at 335-336. The party taking the deposition in *Carriage Hills* improperly noticed the witness with "the most knowledge" of certain topics and the condominium association appointed its president as the designated witness. The problem was the association president did not agree with the position of the majority of the board of directors and, therefore, when she testified she gave her individual positions and opinions. When the association attempted to change its position later to contradict the prior testimony of its corporate representative, it created major issues over whether the testimony was proper and binding in the first place.

The overarching point is that the defending party should avoid allowing its corporate representative from testifying in an individual capacity.<sup>2</sup> The exception to this approach would be to draw clear lines of when the corporate representative questioning ended and the individual questioning has begun.

## 5. Whom You Select as the Designated Witness Matters.

Sometimes the party defending will select the designated corporate representative that is the most convenient or obvious person available, e.g., the president. Selecting the proper corporate representative requires deep thought, particularly in larger corporations in which the leaders' views may be disparate. This was exactly the predicament in which the condominium association in *Carriage Hills* found itself. *See Carriage Hills*, 109 So.3d at 335-36. In *Carriage Hills*, the defending condominium association appointed its president as the corporate representative for the designated topics by the adverse party. The problem was the president's individual view did not align with that of the majority of the board of directors.

It, therefore, makes sense that the corporation appoint a representative that can speak to the corporation's positions in a natural manner, where it would be difficult (as it was in *Carriage Hills*) to have a witness whose positions and opinions differ materially from the party the witness is representing. The defending attorney, therefore, should perform some due diligence to make sure the witness or witnesses selected are a "good fit" to represent the corporation in its deposition.

<sup>2</sup> The best approach to avoiding this testimony is preparing the witness in advance not to testify to his or her individual positions or opinions. The defending attorney also might consider moving for a protective order in advance of the deposition, if the attorney anticipates this type of questioning will occur and cannot be resolved in advance of the deposition.

<sup>1</sup> The governing rule is Florida Rule of Civil Procedure 1.310(b)(6) and the seminal case interpreting the rule is *Carriage Hills Condominium, Inc. v. JBH Roofing & Constructors, Inc.*, 109 So.3d 329 (Fla. 4th DCA 2013).





# IT ONLY HAPPENS ONCE A YEAR !

## LAW WEEK: MAY 1 - 5

Volunteers Needed for MOCK TRIALS and SPEAKERS in local Schools

### MOCK TRIAL AND SPEAKERS PROGRAM:

Return this form by March 17 to: Sherry Webber, Palm Beach County Attorney's Office, 300 North Dixie Highway, Suite 359, West Palm Beach, FL 33401. Volunteer Deadline Is March 17.

Further details @ [swebber@pbcgov.org](mailto:swebber@pbcgov.org)

**YES! Count Me In!**

Event Preference: Mock Trial \_\_\_\_\_ Speakers Program \_\_\_\_\_

Name: \_\_\_\_\_ Firm Address & Phone: \_\_\_\_\_

Email Address: \_\_\_\_\_ Practice Area(s): \_\_\_\_\_

Preferred day: \_\_\_\_\_ Monday, May 1 \_\_\_\_\_ Tuesday, May 2 \_\_\_\_\_ Wednesday, May 3 \_\_\_\_\_ Thursday, May 4 \_\_\_\_\_ Friday, May 5

School Preference (if any): \_\_\_\_\_ Level: \_\_\_\_\_ Elementary \_\_\_\_\_ Middle \_\_\_\_\_ High

Geographic Location Most Convenient To Your Office or Home: \_\_\_\_\_



**Legal Expo 2017**

**Date:** Thursday, March 30, 2017  
**Time:** 3:30 p.m. to 6:00 p.m.  
**Location:** Hilton Palm Beach Airport  
150 Australian Avenue  
West Palm Beach, FL

**RSVP:** [PBCLegalExpo@gmail.com](mailto:PBCLegalExpo@gmail.com)

Legal Expo 2017 is open to the entire legal and business community. Join us for this exciting event! Vendors will showcase their services to law firms and other professional businesses within the community.

"Sports" is the theme for Legal Expo 2017, so come dressed as your favorite sports star! Food, fun, and prizes round out this informative event. Complimentary Admission and Parking!

**For vendor information/registration, contact:**  
Gloria E. Hernandez, CLM  
[gehernandezclm@gmail.com](mailto:gehernandezclm@gmail.com)  
[www.pbcala.org](http://www.pbcala.org)



### 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](mailto:mjohnson@palmbeachbar.org)



## Tactical Mediation: Finding Value in Every Situation

by *Matthew Martin*

Mediation is always worth it. Always. It has become the source of much groaning and eye-rolling in our profession, frequently seen as yet another procedural obstacle. However, even in the most dire of circumstances, there is always something valuable to be gained. It is our obligation as lawyers to find it.

The Early Mediation can be tricky. We have all been there: preparing for mediation at the very outset of litigation, with little or no discovery. The client may be upset, and view the process as a waste of time and money. However, there is value to be had from each perspective.

From the Plaintiff's side, the opportunity exists to present the facts directly to the Defendant in the most favorable light possible. At the outset of litigation, the Plaintiff is – by nature of the system – better acquainted with the case than the Defendant. Documents have been obtained, witnesses interviewed, and experts consulted. That information resides solely with the Plaintiff, to be deployed at will. The result, if not immediate resolution, can be to focus the Defendant's attention, establish credibility, and raise the value of an ultimate settlement at a later date. In order to achieve these results, the Plaintiff should provide as much information as possible to the Defendant in advance of the mediation by way of records, bills, documents, etc., as opposed to supplying it all "on the day." Further, the Plaintiff should be careful to not overreach or overstate their claim. While they do possess the ability to present the facts in a favorable light, they still must be facts, and the light must be realistic.

From the Defendant's side, the opportunity exists to see Plaintiff's "best day," to further understand their theory of liability, and to challenge parts of the case which may seem Defense-favorable. The early mediation is Plaintiff's "open house," with the best

foot forward and the dirt swept under the rug. However, the Defendant can look around, knock on the walls, and flip the switches to get an early look at potential problems Plaintiff may be trying to downplay. To obtain the greatest benefit, the Defendant should view the Plaintiff's presentation and materials critically, but seriously. The Defendant should take time to presume Plaintiff's set of facts are true, and look for areas of weakness in Plaintiff's case.

Likewise, at the 11th hour with both parties having expended untold costs, time, and effort, and with all the cards on the table, the "Late Mediation," may be the most contentious. That said, as always, there is value to be found.

From the Plaintiff's side, late mediation presents an opportunity for a direct, face-to-face discussion with a full-authority representative of the Defendant. In other words, to sit at the same table with the person who will have to write a check – and explain it – in the event of a Judgment. For the best chance at cultivating value from a late mediation, the Plaintiff should present a comprehensive written demand to the Defendant, referencing important documents and testimony, including the value of all bills, liens, and other damages, with a copy to the mediator. However, the demand should be presented well in advance of the mediation, to ensure the Defendant has time to procure the required authority, and the value of the demand should be an accurate reflection of Plaintiff's "best day" at trial. Too often, we have all seen a night-before (or even day-of) "fantasy" demand derail settlement discussions and implode mediation.

From the Defense side, value is found in a frank discussion with the Plaintiff directly. An opportunity exists to explain the negative aspects of their case in a way their own attorney likely has not. Further, the mediator provides an independent, disinterested sounding board for the facts of the case in total, and a frank discussion will aid in trial

preparation. In order to achieve the greatest benefit, the Defendant should provide a confidential statement to the mediator only, as counterpoint to Plaintiff's demand. Defendant's statement should reference important documents and testimony, and serve as a basis for the points to be made with the Plaintiff directly during opening, and for the duration of the mediation.

Regardless of timing, the most basic value of mediation is the protection of our clients' 7th Amendment right to jury trial. As members of the practice, both as trial attorneys and participating mediators, we are inherently connected to this right, and we are stewards of its responsible invocation. We likewise have responsibilities to our clients, to our opposing party, and to the community at large to endeavor to reach a resolution.



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presents:



## E-Discovery Cost Shifting

Friday, March 17, 2017, 11:30 a.m. - 1:00 p.m.

**Fourth District Court of Appeal, 1525 Palm Beach Lakes Blvd., West Palm Beach**

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

11:55 a.m. - 12:00 p.m.  
**Welcome and Opening Remarks**  
**Kent Frazer, Esq., Akerman; Business Litigation CLE Chair**

12:00 p.m. - 1:00 p.m.  
**Guest Speaker: Gregory S. Weiss, Esq.,**  
**Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A.**

- **2012 E-Discovery Amendments to Florida Rules of Civil Procedure**
- **Case Law Interpreting Florida E-Discovery Amendments**
- **Federal Rules Addressing E-Discovery**
- ***Zubulake*: Landmark Decision in the Area of E-Discovery**
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(3.17 Business Litigation seminar)



# Real Property and Business Litigation Report



by *Manuel Farach*

**Samsung Electronics Co. v. Apple**, – S.Ct. –, 2016 WL 7078449 (2016).

There need not be infringement of the whole product for damages under Section 289 of the Patent Act; damages may be awarded for infringement of only a component of a multicomponent product.

**Moro Aircraft Leasing, Inc. v. International Aviation Marketing, Inc.**, –

So. 3d –, 2016 WL 7228858 (Fla. 2d DCA 2016).

Merely breaching a contract to be performed in Florida by not paying money due in Florida is not sufficient for a foreign defendant to be haled into Florida; minimum contacts, including performing substantial services in Florida, must still be satisfied.

**De La Osa v. Wells Fargo Bank, N.A.**, – So. 3d –, 2016 WL 7232272 (Fla. 3d DCA 2016).

An order dismissing a case for failure to appear for trial is a “judgment or decree” for purposes of Florida Rule of Civil Procedure 1.540 (b)(4).

**Harkless v. Laubhan**, – So. 3d –, 2016 WL 7388547 (Fla. 2d DCA 2016).

The right to receive rent from a parcel of land is subject to Florida’s Recording Act. Additionally, the phrase “subject to” in a deed does not automatically render the deed ambiguous so as to provide for parol testimony regarding the deed.

**Lally Orange Buick Pontiac GMC, Inc. v. Sandhu**, – So. 3d –, 2016 WL 7405665 (Fla. 5th DCA 2016).

A trial court valuing corporate shares through the corporate statutory appraisal process must, pursuant to Florida Statutes section 607.1330, adopt a valuation supported by competent, substantial evidence or appoint an independent appraiser to recommend the fair value of the shares.

**Ramphal v. TD Bank National Association**, – So. 3d –, 2016 WL 7405629 (Fla. 5th DCA 2016).

So long as the conclusion is supported by competent, substantial evidence and is clearly articulated, a trial court in deficiency proceedings has the discretion to find the property value to be one that is different than the testimony of the expert witnesses.

**Mackenzie V. Centex Homes, By Centex Real Estate Corporation**, – So. 3d –, 2016 WL 7407341 (Fla. 5th DCA 2016).

Florida Statute section 720.308(1)(b) (a developer, while in control of the homeowners’ association, may excuse itself from paying assessments if it agrees to fund any deficiencies in the budget) does not excuse a developer’s otherwise valid obligation to fund reserves while it controls the association.

**Beach Community Bank v. Spellman**, – So. 3d –, 2016 WL 7441729 (Fla. 1st DCA 2016).

A mortgage is a constitutionally protected property right, and a mortgagee cannot be forced to give up its mortgage in place of substitute collateral.

**Fonseca v. Taverna Imports, Inc.**, Case Nos. 3D15-737; 3D15-382; 3D14-2506 (Fla. 3d DCA 2017).

A corporate “event or transaction [such as a recapitalization or the levying on a judgment] should not be permitted where

its objective or result is the seizing of corporate control for an improper purpose.”

**Newman v. Guerra**, Case Nos. 4D15-1515 & 4D15-2588 (Fla. 4th DCA 2017).

The “significant issues” test of *Moritz v. Hoyt Enters., Inc.*, 604 So. 2d 807 (Fla. 1992), applies to claims for attorneys’ fees under Florida Statute section 713.29.

**Jallali V. Knightsbridge Village Homeowners Association, Inc.**, Case No. 4D15-2036 (Fla. 4th DCA 2017).

A lis pendens filed by a first mortgagee does not bar the foreclosure of an association’s subsequent lien for unpaid assessments against the owner where the association’s subsequent lien was imposed under the association’s declaration of covenants recorded before the first mortgagee recorded its notice of lis pendens.

**San Matera The Gardens Condominium Association, Inc. v. Federal Home Loan Mortgage Corporation**, Case No. 4D15-4400 (Fla. 4th DCA 2017).

The Fourth District joins the Fifth District and the Second District in holding that a servicer (a company authorized to collect payments under a loan) is entitled to the benefit of the safe harbor provision of Florida Statute section 718.116(1)(b).

**Lightfoot v. Cendant Mortgage Corp.** – U.S. –, Case No. 14-1055 (2017).

The Federal National Mortgage Association’s (“FNMA”) “sued and be sued clause,” 12 U. S. C. §1723a(a), does not confer federal court jurisdiction in all cases involving FNMA.

**Kroma Makeup Eu, LLC v. Boldface Licensing + Branding, Inc.**, Case No. No. 15-15060 (11th Cir. 2017).

Applying *Koechli v. BIP International, Inc.*, 870 So. 2d 940 (Fla. 1st DCA 2004), the Eleventh Circuit rules that equitable estoppel may be used to compel non-signatories to engage in arbitration only when the dispute with the signatory falls within the scope of the arbitration clause in the main dispute.

**Nipper v. Walton County**, Case No. 1D16-512 (Fla. 1st DCA 2017).

Government seeking to enjoin someone violations of its zoning code must demonstrate (1) a clear legal right to the relief, (2) inadequacy of a legal remedy, and (3) irreparable injury if the relief is not granted.

**The Bank of New York Mellon v. Glenville**, Case No. 2D15-5198 (Fla. 2nd DCA 2017).

Without citing conflict with *Straub v. Wells Fargo Bank, N.A.* 182 So.3d 878 (Fla. 4th DCA 2016), the Second District holds that Florida Statute section 45.031(7)(b) requires any person claiming a right to surplus funds must file a claim with the clerk of court within sixty days of the foreclosure sale itself; within sixty days of the later certificate of sale does not comply with the statute.

**Sand Lake Hills Homeowners Association, Inc. v. Busch**, Case No. 5D16-21 (Fla. 5th DCA 2017).

The “false or fictitious filing” provision of the Marketable Record Title Act, Florida Statute section 712.08, merely requires that a filing be false or fictitious (intent is irrelevant) before awarding attorney’s fees for the false filing.



Palm Beach County Bar Association Committee for Diversity and Inclusion

together with F. Malcolm Cunningham, Sr. Bar Association and the Palm Beach Co. Hispanic Bar Association

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**FRIDAY, MARCH 31 from 3:00 P.M. TO 6:00 P.M.**

**Fourth District Court of Appeal**

**1525 Palm Beach Lakes Blvd. , West Palm Beach**

### **AFTERNOON AGENDA**

**3:00 P.M. TO 4:00 P.M. APPOINTMENT TRACK PANEL**

**Judge Cymonie Rowe**

**Judge Meenu Sasser**

**Eunice Baros, Esq.- 4th District Court of Appeal (former JNC member)**

**Patricia Morales Christiansen, Esq.-15th Judicial Circuit (current JNC member)**

**Phillip H. Hutchinson, Esq.- 15th Judicial Circuit (former JNC member)**

**4:00 P.M. TO 5:00 P.M. ELECTION TRACK PANEL**

**Judge Schosberg Feuer**

**Judge Dina Keever-Agrama**

**Judge Bradley Harper**

**Rick Asnani- Political Consultant**

**5:00 P.M. TO 6:00 P.M. NETWORKING RECEPTION**

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## Loving v. Virginia — A New Perspective

by Laura Scala-Olympio

“Marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination. Under our Constitution, the freedom to marry or to not marry a person of another race resides with the individual and cannot be infringed upon by the State.” *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

Every law student remembers reading this passage from the seminal United States Supreme Court case of *Loving v. Virginia*. As a political science major and legal studies minor, I read the opinion numerous times during my years in school. So when *Loving*, a Golden Globe nominated major motion picture by director Jeff Nichols that focuses on the story of the couple behind the case was released in November 2016, my interest was piqued, and I headed to my local movie theater.

The film begins in 1958 with an interracial couple, Richard Loving, played by Joel Edgerton, and Mildred Jeter, played by Ruth Negga, deciding to marry. The young couple travels to Washington DC to wed, and after their nuptials, they return home to Central Point, Virginia. The Lovings, who are expecting their first child, buy an acre of land and begin making plans to build a home. The moment they start to think that a normal life may become their reality, an anonymous tip changes everything.

In the middle of the night, the local sheriff, played by Marton Koskas, and his deputies raid the couple’s home and arrest them for being in violation of Virginia’s Racial Integrity Act of 1942, which at the time codified the states anti-miscegenation law. The Lovings are hauled off to jail, forced to plead guilty, and sentenced to a year in prison. The Circuit Court suspends the couple’s sentence, on the condition that they not return to Virginia together for at least twenty-five years. While these facts are familiar, watching them come to life on screen provides a new perspective on the devastating impact this type of discriminatory legislation had on people and communities. With the Court’s ruling, Richard and Mildred are forced to abandon their home, family, and the beginnings of their new life.

Fortunately, a handwritten letter further changes things. While living in Washington DC, Mildred writes to U.S. Attorney General Robert F. Kennedy explaining her family’s situation and requesting assistance. Kennedy refers the case to the American Civil Liberties Union. Lawyers Bernard S. Cohen, played by Nick Kroll, and Phil Hirschkop, played by Jon Bass, take the case not only to help Richard and Mildred but also to attack the sixteen other states that had similar anti-

miscegenation statutes. After a decade of litigation, the case ultimately is heard by the U.S. Supreme Court. In a unanimous opinion, Chief Justice Earl Warren strikes down Virginia’s law as unconstitutional, and the couple returns home to Central Point to continue building the normal life they sought more than ten years before.

The film *Loving* provides a new perspective. It takes a well-known case and gives it context, showing viewers the underlying love story. In watching the film, it is obvious that Richard and Mildred are very much in love. Viewers will be in awe of the couple’s unwavering courage and faith in each other. There is also no doubt that these two people wanted to be together and were not afraid, no matter the consequences, of taking on the racist establishment through the only avenue available to them--the legal system.

While *Loving* can be enjoyed for its beautiful story and powerful performances, it will really strike a chord with lawyers, law students, and those who are seriously contemplating entering the legal profession. The movie highlights the important role lawyers have in seeking social justice: who else but a lawyer could help an interracial couple in a Southern small-town jail during the late 1950’s? Although *Loving* is not your typical courtroom drama, the film portrays the power lawyers have to positively impact and advocate for social change, and highlights how basic civil rights are protected by the U.S. Supreme Court. Watching this remarkable film should be a reminder for many of us of the reason we chose this profession in the first place—to help those who are treated unfairly or discriminated against and to be a positive force for change.

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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.

**Jason H. Alperstein:** University of Miami, 2008; Associate in Robbins Geller Rudman & Dowd, LLP, Boca Raton.

**Benjamin Baxter:** Michigan State University, 2015; Office of State Attorney, West Palm Beach.

**Andrew M. Bennett:** Florida State University, 2013; Palm Beach Gardens.

**Eric A. Bevan:** University of California (UCLA), 2007; Associate in Fox Rothschild LLP, West Palm Beach.

**Daniella E. Brooks:** Law Student Membership, West Palm Beach.

**Edgard Kenneth Cespedes:** University of Miami, 2016; Associate in Shochet Law Group, Lake Worth.

**Natalie G. Cohen:** Nova Southeastern University, 2002; Associate in Hark Yon Marmor PL, Boca Raton.

**Joseph David Coronato:** Thomas M. Cooley University, Florida Department of Legal Affairs, West Palm Beach.

**Heather Graboyes:** Florida Registered Paralegal Membership, West Palm Beach.

**Marc Hernandez:** University of Florida, 2014; Fourth District Court of Appeal, West Palm Beach.

**James Michael Hogan:** Barry University, 2015; Solo Practitioner, Palm Beach Gardens.

**Tarek Kirk Kiem:** University of Florida, 2003; Solo Practitioner, Lake Worth.

**Christian Kribbs:** Nova University, 2012; Associate in Hicks Motto & Ehrlich, Palm Beach Gardens.

**Jennifer Lettman:** Florida State University, 2015; Office of the State Attorney, West Palm Beach.

**Megan Anne McNamara:** University of Florida, 2014; Associate in Fox Rothschild, West Palm Beach.

**Michael C. Mikulic:** Notre Dame University, 2016; Fourth District Court of Appeals, West Palm Beach.

**Toni-Ann S. Miller:** University of Florida, 2016; Fourth District Court of Appeals, West Palm Beach.

**Wayne Howard Miller:** Western New England College, 2005; Solo Practitioner, Pompano Beach.

**Jaime A. Mosquera:** Law Student Membership, Lake Worth.

**David R. F. Ottey:** University of Florida, 2005; Palm Beach County Attorney Office, West Palm Beach.

**Sarah Papadelias:** University of Florida, 2016; Fifteenth Judicial Circuit, West Palm Beach.

**Evelyn W. Riley:** Florida Registered Paralegal; Palm Beach Gardens.

**Randall K. Roger:** Ohio State University, 1986; Solo Practitioner, Boca Raton.

**Cathy J. Russell:** Florida Registered Paralegal; Palm Beach Gardens.

**Dayami Sans:** St. Thomas University, 2016; Associate in Elder Law Associates, Boca Raton.

**Lara Suzanne Shiner:** Nova Southeastern University, 2010; Associate in Shiner Law Group, P.A.

**Jennito Simon:** Florida State University, 2012; Solo Practitioner, Lighthouse Point.

**Aubrey Q. Webb:** University of Miami, 2002; Solo Practitioner, Coral Gables.

**Samuel L. Winikoff:** University of Miami, 2016; Associate in Weiss Handler & Cornwell, P.A., Boca Raton.



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## Can A Trustee Ever Prosecute a 362(k) Claim?

by Jason S. Rigoli

Section 362(k) of the Bankruptcy Code<sup>1</sup> states: Except as provided in paragraph (2), **an individual** injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages. 11 U.S.C. § 362(k)(1) (emphasis added).

A majority of courts have held that the term "individual" means a natural person and therefore entities cannot remedy "willful stay violations" under section 362(k) of the Bankruptcy Code. *See, e.g., Maritime Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateauguay)*, 920 F.2d 180 (2d Cir. 1990).<sup>2</sup> This majority has also held that a bankruptcy trustee is not an "individual," rather the trustee is the representative of an entity, the bankruptcy estate, and therefore does not have standing to pursue a claim under section 362(k)(1). *See In re Pace*, 67 F.3d 187, 193 (9th Cir. 1995); *Henkel v. Lickman (In re Lickman)*, 297 B.R. 162, 194-96 (Bankr. M.D.Fla. 2003). Is there ever a situation where a trustee could prosecute a claim under section 362(k)(1)?

In what was a matter of first impression in this District, Judge Kimball recently found that there is a situation where a trustee can prosecute such a claim. The procedural background relevant in this case was that an individual debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. While the chapter 11 case was pending, the debtor filed two motions seeking relief under 362(k)(1). Subsequently, the case was converted to a case under Chapter 7 and the Trustee entered into a settlement agreement to resolve several issues, including the two stay

violation motions. The Debtor objected to the settlement of the stay violation motions on the ground that the Trustee did not have standing to bring such a claim, because the Trustee is not an "individual."

Judge Kimball found that the Trustee could, in fact, settle the stay violation motions because the claims became property of the bankruptcy estate during the individual Chapter 11. 11 U.S.C. §§ 541(a)(1) and 1115(a)(1). Upon conversion, the claims brought by the individual debtor remained property of the estate upon conversion of the bankruptcy case. 11 U.S.C. §§ 541(a)(7) and 1115(a)(1). As property of the

Chapter 7 bankruptcy estate, the Trustee has an obligation to "collect and reduce to money the property of the estate..." and to the exclusion of all others, including the debtor. 11 U.S.C. §§ 323, 704(a)(1). Accordingly, Judge Kimball held that the Trustee had the authority to settle the claims under section 362(k)(1). *See In re Michelle Metzler*, Case No. 16-11831-EPK [ECF No. 315] (Bankr. S.D.Fla. Jan. 11, 2017).

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<sup>1</sup> 11 U.S.C. §§ 101, *et seq.*

<sup>2</sup> The *Chateauguay* opinion refers to 11 U.S.C. § 362(h); 11 U.S.C. § 362(h) was re-designated as 11 U.S.C. § 362(k)(1) under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.



## CDI Cocktail Reception Highlights

The Committee for Diversity and Inclusion (CDI) recently held a Cocktail Reception at Cabo Flats in West Palm Beach. Members and law students gathered to network and learn about the 13th Annual Kozyak Minority Mentoring Picnic, which was held in February at Amelia Earhart Park in North Miami/Hialeah. For more information about the Mentoring program, contact Adam Rabin ([arabin@mccaberabin.com](mailto:arabin@mccaberabin.com))



**Gary Lesser, Nadine White-Boyd, Jean Marie Middleton and Adam Rabin**



**Mutamba Masimba welcomes members**



**Judge Nancy Perez spoke to our young lawyers**



**Lloyd Comiter and Grasford Smith**



**Kelly Rowley, Ryan Vataaro, Sarah Papadelias and Paula Carvajal**



**Chris Searcy,  
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Perez and Jay  
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## Committee for Diversity & Inclusion Annual Kozyak Minority Picnic



**2017**

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Thursday, April 6, 2017

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6:30 - 8:30 p.m. Dinner and Panel Presentation

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### JUDICIAL PANEL (Probate Division)

(expected)

Judges Howard K. Coates, Jr.; Jaimie R. Goodman; Judge Kathleen Kroll  
Janis B. Keyser; Karen M. Miller; Rosemarie Scher; Jessica J. Ticktin



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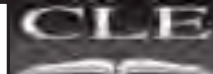


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## “Adequate” Disclosure In A Trust Disclosure Document

by David M. Garten

Section 736.1008(2), F.S. reads: “Unless sooner barred by adjudication, consent, or limitations, a beneficiary is barred from bringing an action against a trustee for breach of trust with respect to a matter that was **adequately disclosed in a trust disclosure document** unless a proceeding to assert the claim is commenced within 6 months after receipt from the trustee of the trust disclosure document or a limitation notice that applies to that disclosure document, whichever is received later.” [Emphasis added]

What is an “adequate” disclosure? Pursuant to §736.1008(4)(a), F.S., a matter is adequately disclosed “if the document provides sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the existence of a claim with respect to that matter.” Or, as stated in the negative, a disclosure is inadequate if there is insufficient information provided to a beneficiary about a claim or a potential claim against a trustee for breach of trust.

For example, in *Turkish v. Brody*, 2016 Fla. App. LEXIS 17684 (Fla. 3rd DCA 11/30/16), the court found that the limitation notice was not applicable because the co-trustees failed to adequately disclose a matter in a trust disclosure document.

In *Turkish*, the Settlor created two trusts: Trust Number One and Trust Number Two. The sole residuary beneficiaries of both trusts were the Settlor’s son and daughter, Arthur Turkish (“Arthur”) and Carole. Arthur and his daughter, Shari Turkish (“Shari”) were the co-trustees of both trusts.

In 2008, the Settlor settled an outstanding \$3M gift tax dispute with the IRS and requested that Arthur obtain the money to pay the IRS settlement from Trust Number One, transfer the money to himself, and then personally loan her the money. After the Settlor paid the IRS, she executed an unsecured promissory note evidencing the indebtedness to Arthur, individually. Carole objected to the IRS transaction asserting that the transaction was a breach of the co-trustees’ responsibility because the effect was to give over \$1 million to

Arthur from Trust Number One which was intended to benefit both Arthur and Carole.

In 2009, Carole received a revised trust accounting for the time period 2005-2007, a Receipt and Release Agreement (“RRA”), and a 6-month limitation notice. In response to Carole’s objections to the IRS transaction, the co-trustees and Carole executed a Supplemental Release Agreement (“SRA”), which provides that the SRA was supplementing the RRA for the 2005-2007 accountings. The SRA provides that the parties were settling all claims arising out of the IRS transaction. The SRA accurately reflects the IRS transaction and Carole’s objections to the IRS transaction. Specifically, the SRA provides that Arthur, individually, was willing to **“assign the Note to Trust Number One in satisfaction of any and all claims against him by all beneficiaries of Trust Number One”** arising out of the IRS transaction, and that “each interested party... waives any right he or she has, might have or has had to object to any action or omission of Arthur Turkish and/or Shari Turkish, individually, or of Arthur Turkish and/or Shari Turkish, as Trustees of Trust Number One.”

The Settlor died on June 2, 2010. On July 7, 2010, Carole received the 2008 accountings for both Trusts, a RRA, a 6-month limitation notice, and a Summary of Assets which adequately disclosed the value of assets in both Trusts.

On April 6, 2011 (more than 6 months after Carole’s receipt of the 2008 accounting), Carole sued Arthur and Shari for breach of fiduciary duty and unjust enrichment. The co-trustees defended, in part, on the basis that Carole’s claims for breach of trust relating to the IRS transaction are barred by Florida’s 6-month statute of limitations because the 2008 accounting adequately disclosed the IRS transaction.

The court conducted an evidentiary hearing on the issues pertaining to the 2005-2007 accountings, the RRA for those accountings, and the SRA pertaining to the IRS transaction. The court found that Arthur, as a co-trustee, failed to disclose to Carole, a beneficiary, material facts pertaining

to the matter being settled in the SRA. Specifically, Arthur failed to disclose to Carole that she was agreeing to settle all claims against Arthur and Shari, individually and as co-trustees, relating to the IRS transaction based upon Arthur’s agreement to “contribute” the promissory note executed by Mrs. Trask, which was **virtually a worthless piece of paper**, to Trust Number One. Prior to Carole’s execution of the SRA, not only did Arthur know that Mrs. Trask had very few personal assets, he also knew, but failed to disclose, that the Bal Harbour condominium Mrs. Trask lived in was owned by the 1980 Trust, not Mrs. Trask; Arthur was the sole beneficiary of the 1980 Trust upon Mrs. Trask’s death; and the Bal Harbour condominium would not become an Estate asset upon Mrs. Trask’s death, but instead would pass directly to Arthur.

In response, the co-trustees argued that even if the SRA was voidable based on Arthur’s failure to disclose material facts to Carole before she signed the SRA, Carole’s claims for breach of trust relating to the IRS transaction are barred by Florida’s 6 month statute of limitations because the 2008 trust disclosure documents, including the 2008 accounting, adequately disclosed the IRS transaction.

The appellate court disagreed. The court reasoned that “Carole’s claim against the Co-Trustees for breach of fiduciary duty was not based solely on the IRS transaction itself, but also on Arthur’s agreement to resolve Carole’s objections to the IRS transaction by “contributing” the promissory note executed by Mrs. Trask to Trust Number One without disclosing that he knew that the promissory note was virtually worthless.” The court held that the 6-month limitation notice didn’t apply because the 2008 trust accounting failed to disclose that the Note assigned to Trust Number One was essentially worthless because there are no assets in Mrs. Trask’s name.

**PRACTICE POINTER:** If you want to take advantage of the 6 month statute of limitations for breach of trust, DISCLOSE, DISCLOSE, DISCLOSE!!!



The Family Law CLE Committee of the Palm Beach County Bar Association  
presents



## Modification of Parenting Plans: Seven Practical Tips

Friday, April 28, 2017, 8:00 a.m. - 3:40 p.m.

**LOCATION:** TBA check the website and/or your email for seminar location

- 8:00 a.m. – 8:20 a.m. **Late registration**
- 8:20 a.m. – 8:30 a.m. **Welcome and Introductions**
- 8:30 a.m. – 9:20 a.m. **Use of G.A.L. and Experts in Modification** -  
Kim Yueh-Mei Nutter\*, Esq., Brinkley Morgan
- 9:20 a.m. – 10:10 a.m. **Children's Issues: Establishing a Substantial Change for Modification  
of Parental Responsibility and Timesharing** - R.T. White\*, Esq., Schultz &  
White, LLP
- 10:10 a.m. – 10:20 a.m. **Break**
- 10:20 a.m. – 11:10 a.m. **Attorney Fees** - Robert M.W. Shalhoub\*, Esq., Robert M.W Shalhoub, P.A.
- 11:10 a.m. – 12:00 p.m. **Discovery Related to Social Media and Technology** -  
Eddie E. Stephens\*, Esq., Ward Damon Posner Pheterson & Bleau
- 12:00 p.m. – 1:00 p.m. **Lunch**
- 1:00 p.m. – 1:50 p.m. **Professionalism Presentation** - D. Culver (Skip) Smith, III, Esq.,  
Culver Smith III, P.A.
- 1:50 p.m. – 2:40 p.m. **Calculating Child Support after Time Sharing is Modified** -  
Roderick C. Moe, CPA, P.A.
- 2:40 p.m. – 2:50 p.m. **Break**
- 2:50 p.m. – 3:40 p.m. **A View from the Bench** - Judges and Magistrates

\* Florida Bar Board Certified in Marital and Family Law

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7.0 CLER; 1.0 Ethics. Certification credits: 7.0 Juvenile Law and 7.0 Marital and Family Law. Cost: \$200 PBCBA members/paralegals; \$ 240 non-PBCBA attorney members/paralegals. Those registering after 4/12/17 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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(4.28 Family law seminar)





### Continuing Malpractice Caps Saga

by Ted Babbitt

In *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014), the Supreme Court of Florida found the statutory caps set forth in Fla. Stat. 768.118 unconstitutional as they applied to wrongful death cases. In a plurality opinion at 916 with Justice Pariente concurring, the Florida Supreme Court held:

[t]he statutory cap on wrongful death noneconomic damages fails because it imposes unfair and illogical burdens on injured parties when an act of medical negligence gives rise to multiple claimants. In such circumstances, medical malpractice claimants do not receive the same rights to full compensation because of arbitrarily diminished compensation for legally cognizable claims. Further, the statutory cap on wrongful death noneconomic damages does not bear a rational relationship to the stated purpose that the cap is purported to address, the alleged medical malpractice insurance crisis in Florida.

Thus, the Supreme Court found the statutory malpractice act unconstitutional both on the basis of unequal protection and on a failure of the rational basis test.

In *North Broward Hospital v. Kalitan*, 174 So. 3d 403 (Fla. 4th DCA 2015) review granted, No. SC15-1858, the Fourth District extended the Supreme Court's holding in *McCall*, supra, to an individual personal injury action holding that in such an action the malpractice caps were unconstitutional on essentially the same basis as the Supreme Court held them unconstitutional in wrongful death cases.

In *Port Charlotte HMA, LLC v. Suarez*, 41 Fla. L. Weekly D2393 (Fla. 2nd DCA 2016) the Second District joined the Fourth District in concluding that the noneconomic damage cap in Fla. Stat. 766.118 is unconstitutional as applied to an individual personal injury action. The Second District agreed with the Fourth District that there is no real distinction between a single claimant in a personal injury case who suffers noneconomic damages in excess of the statutory caps and the reasoning of the Supreme Court in *McCall*, supra, which involved multiple claimants in a wrongful death action. Both the Fourth District in *Kalitan* and the Second District in *Port Charlotte* concluded that injured parties in either wrongful death or personal injury actions with noneconomic damages in excess of the caps are not fully compensated when those damages are arbitrarily capped under §766.118.

The Supreme Court of Florida is currently reviewing *Kalitan* and its opinion will be forthcoming shortly but for now the only two District Courts considering the issue have held caps in malpractice cases as unconstitutional and all trial courts are bound by those decisions in the absence of a contrary District Court opinion. *Weiman v. McHaffie*, 470 So. 2d 682 (Fla. 1985).

NOTE: BECAUSE A NUMBER OF PEOPLE HAVE REQUESTED COPIES OF PAST ARTICLES, A COMPILATION OF THESE ARTICLES IS NOW AVAILABLE TO MEMBERS OF THE PALM BEACH COUNTY BAR ASSOCIATION, FREE OF CHARGE, BY CALLING (561) 684-2500.

### North County Section Seeks New Board Members

Are you looking for a great opportunity to get involved with our Bar and network with colleagues? Consider a leadership position running for the Board of Directors of the North County Section. The Board meets once a month to plan its calendar, including networking receptions, legal education seminars and its Jurist of the Year program.

There are five director seats open for a two year position, plus president-elect. Petitions will be available starting on Wednesday, March 1.

To be considered, you must submit a completed nomination form to the Bar Office no later than 5:00 p.m. on Thursday, March 30. If there is a contested election, voting will take place online in April.

The current Board includes Rosemarie Guerini, President; W Mason, President Elect, Lawrence P. Buck, Immediate Past President.

Directors serving terms ending June 2017 are David Steinfeld, Lawrence Strauss, Nicholas Johnson, Lindsay Warner and Gregory Zele.

Directors serving a two year term ending June 2018 include Misty Chaves, Malinda Hayes, Tanique Lee, R. Wayne Richter and Kate Watson.

For a petition, contact Lynne at [lpoirier@palmbeachbar.org](mailto:lpoirier@palmbeachbar.org)

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## NETWORKING @ NOON

Everyone needs to eat lunch!

Join the Solo and Small Firm Committee for its FIRST Networking @ Noon Event

**THURSDAY, APRIL 13, 2017**

11:30 a.m. to 1:00 p.m.

Location: TBA

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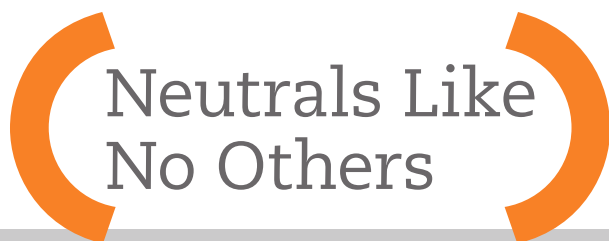
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And  
Sheryl G. Wood  
Sheryl G. Wood, P.A.

**Bankruptcy Law Award**

Alan R. Crane  
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**Child Advocacy Award**

Misty Taylor Chaves  
King and Chaves, LLC

**Civil Litigation Award**

Alison Brown  
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Delgado Law Group

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Christine Bialczak and Stuart J. Haft  
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**Real Property Law Award**

Robert C. Groelle  
Groelle & Salmon, PA

**Special Projects Award**

Carlton Fields Jorden Burt  
Roig Lawyers



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



## iPad for Litigators and Trial Presentations

Friday, March 3, 2017, 11:30 - 1:00p.m.

**FOURTH DISTRICT COURT OF APPEAL, 1525 PALM BEACH LAKES BLVD, 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: Spencer T. Kuvin, Esq., Law Offices of Craig Goldenfarb, P.A.*

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**Trial Preparations  
Depositions  
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### 1.0 CLER ; 1.0 Technology

The cost of the seminar is \$ 25 for PBCBA members/paralegals, \$ 65 for non-PBCBA attorney members/paralegals. Those registering after February 24, add \$10.00 late fee. All refund requests must be made no later than 48 hours prior to the date of the seminar.

#### HOW TO REGISTER

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**Materials will be emailed to  
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Name: \_\_\_\_\_ Email address: \_\_\_\_\_

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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. (3.3 Tech).

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



## “Home for the Holidays” Event for Legal Aid Society of Palm Beach County

**West Palm Beach, FL** – Over the holidays Terry Resk and Steve Mayans opened their historical home in Providencia Park to a 100 friends of the Legal Aid Society of Palm Beach County for a cocktail reception in support of Legal Aid’s 29th annual Pro Bono recognition Gala to be held on June 3, 2017, at the Palm Beach County Convention Center.

The evening included seasonal cocktails, hors d’oeuvres, music, and tours of the Resk/Mayans’ beautiful home and gardens. Guests donated a variety of gifts to be auctioned at the June 3rd event.



Michelle Suskauer, Jerry Beer and Terry Resk



Malcom and Dr. Pamela Cunningham, Jr, Jennifer & Adam Rabin

Photos by Tracey Benson Photography

## Leaping for Lawyers

On Saturday evening, January 28, 2017, over 175 friends and supporters of the Legal Aid Society of Palm Beach

County gathered at the Palm Beach International Equestrian Center in Wellington to enjoy an evening of cocktails, delicious hors d’oeuvres, and a spectacular show jumping competition. The evening benefitted Legal Aid’s 29th Annual Pro Bono Recognition Evening to be held Saturday evening, June 3, 2017, at the Palm Beach County Convention Center. The theme of this year’s Gala will be “Paris” and will honor twelve (12) attorneys, one (1) mediator, and three law firms whose pro bono contributions in 2016 were truly extraordinary.

Hosts for the night were Karen & Neil Anthony, Sherry & Jon Derrevere, Nicole Hessen Hammack, Liz and Ron Herman, Pamela Linden, Michelle & John McGovern, Cynthia & Michael Napoleone, Pamela and Michael Pike, Jennifer & Adam Rabin, Moria Rozenson & Al Malefatto, Sarah and Alan Shullman and Janet & Steven Teebagy.

Guests donated over 125 gifts which will be auctioned at the June 3rd event.

A gift of \$10,000 was pledged by Mark & Katherine Bellissimo to Legal Aid.

The Legal Aid Society of Palm Beach County, Inc., founded in 1949, is a private nonprofit, 501 (c)(3) organization dedicated to providing free legal services to disadvantaged children, families, elders and individuals living in Palm Beach County. Projects include the Domestic

Violence Project, Juvenile Advocacy Project, Foster Children’s Project, Ryan White Project, Fair Housing Project and Elder Law Project.





# CANNABIS LAW SUMMIT:



Presented by the Palm Beach County Bar Association

THURSDAY, APRIL 20

8:30 a.m.—1:00 p.m.

Marriott, 1001 Okeechobee Blvd., West Palm Beach

Sponsored by: **GreenspoonMarder**

## AGENDA

*This program will be moderated by Scheril Murray-Powell, Esq. and Melissa C. Papa, Esq. with speakers Melissa C. Papa, Esq.; Michael Minardi, Esq. and Roz McCarthy*

- ♦ Advocacy and understanding legalization vs. decriminalization
  - ♦ Medical benefits of Marijuana
- ♦ Arguments of the opposition to state legalization and potential pitfalls
- ♦ Cannabis careers and cyber security - document management needs for dispensaries and other cannabis career support functions
- ♦ Legal areas of practice affected by Cannabis Law

Limited space. First come first served.



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**\$165.00 for non-members**

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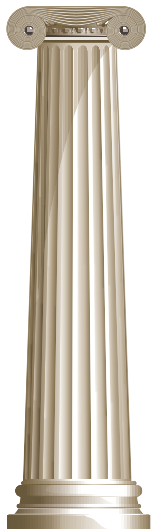
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**Vote from March 1 to March 21, 2017** | Look for your ballot in the mail or email



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## Bulletin Board

### \*\*\* Ad Rates \*\*\*

CLASSIFIED ADVERTISING RATES: TO PLACE AN AD: 1) Please E-mail all ads to: [mjohnson@palmbeachbar.org](mailto:mjohnson@palmbeachbar.org) 2) Upon receipt you will be notified of cost. 3) Send payment by the 25th of the month. 4) Cost: 50 words or less \$50, 50-75 words \$65, up to 75 words with a box \$75. 5) Members receive 1 free classified ad per year (excluding professional announcements). Ads will only be re-run by e-mailing: [mjohnson@palmbeachbar.org](mailto:mjohnson@palmbeachbar.org). Web-site advertising is also available for a cost of \$75 for a three week run. Payment must be received prior to publication and renewable only upon receipt of next payment.

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**North Palm Beach** office of national law firm seeks attorney with 3+ years of experience in first party property; PIP; and/or general liability claims. Will also consider candidates with general civil litigation experience, but specific familiarity in handling insurance defense matters is preferred. Please send cover letter, resume, and writing sample to [LWalsh@florida-law.com](mailto:LWalsh@florida-law.com)

**Associate Attorney** Klett, Mesches & Johnson, P.L., a business litigation law firm in Palm Beach Gardens, seeks associate attorney with minimum 3-5 years experience in business, commercial, or general litigation. E-mail Resumes to Linda Philbrick at [lphilbrick@kmjlawgroup.com](mailto:lphilbrick@kmjlawgroup.com). No phone calls please.

### HEARSAY



Foster, Johnston & Stubbs, P.A. announces that firm attorneys **James C. Gavigan, Jr.** and **William G. Smith** have been promoted to firm Shareholders. **Gavigan** focuses his practice in the areas of complex business litigation, real estate litigation, employment



litigation, and intellectual property litigation. **Smith** concentrates his practice in the areas of estate planning, estate and trust administration, taxation and transactional corporate law.



Cohen Milstein Sellers & Toll PLLC, is pleased to announce that **Poorad Razavi** has joined the firm's Palm Beach Gardens office.



Sachs Sax Caplan P.L. is pleased to announce that **Steven G. Rappaport, Esq.** has been appointed to the board of directors of the Fair Housing/Equal Employment Board of Palm Beach County.

# STOP REFERRING PERSONAL INJURY CASES ON A HANDSHAKE

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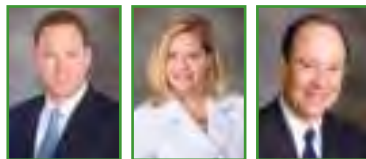
Cohen Milstein Sellers & Toll PLLC, a premier national plaintiffs' firm, is proud to announce that three attorneys have been selected for inclusion in the 17th edition of the *South Florida Legal Guide*. **Theodore J. Leopold**, a Partner at the firm, "Top Lawyer" for plaintiffs in the areas of Personal Injury / Wrongful Death, and Medical Malpractice. **Diana L. Martin**, "Top Up and Comer" in the area of Appellate Law. **Adam Langino**, "Top Up and Comer" for plaintiffs in the area of Personal Injury / Wrongful Death.

The 2017 edition of the *South Florida Legal Guide* names **Jones, Foster, Johnston & Stubbs, P.A.** as a "Top

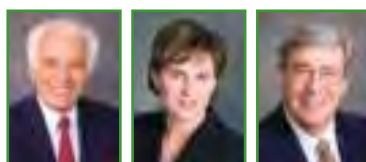


Law Firm." Additionally, it names

twelve Jones Foster lawyers as "Top Lawyers." **Larry B. Alexander**, Real Estate, Finance **David E. Bowers**, Labor and Employment, Trust and Estate Planning **Margaret L. Cooper**, Labor and Employment, Corporate and Business



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Jones, Foster, Johnston & Stubbs, P.A. announces that firm attorney, **Grasford W. Smith**, has been included in the Economic Council of Palm Beach County's inaugural "Emerging Leaders Class."

# Plaintiff Hurt in DUI

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\*\*\*\* DECEASED, FLORIDA BAR PRESIDENT  
\*\*\*\*\* DECEASED, FLORIDA BAR PRESIDENT, FEDERAL COURT JUDGE

## CALENDAR March 2017

Wednesday, March 1  
5:30pm – 6:00pm  
**South County Bar  
Board Meeting**  
Boca Raton

Thursday – Saturday,  
March 2-4  
**TFB Young Lawyers  
Division**  
Rosewood Mansion on  
Turtle Creek, Dallas, TX

Friday, March 3  
8:30am – 9:30am  
**ADR Committee Meeting**  
TBA

Friday, March 3  
11:30am – 1:00pm  
**Technology Seminar**  
4th DCA

Tuesday, March 7  
7:45am – 8:15am  
**UMC Coffee  
with the Judges**  
Judicial Dining Room

Tuesday, March 7  
12:00pm – 1:00pm  
**Transaction Law  
Committee Meeting**  
TBA

Wednesday, March 8  
6:30pm – 7:30pm  
**Small Claims Clinic**  
Jupiter Branch Library

Friday, March 10  
8:30am – 5:30pm  
**Bench Bar Conference**  
Palm Beach County  
Convention Center

Tuesday - Friday,  
March 14 – 17  
**ABA – Bar Leadership  
Institute 2017**  
Chicago, IL

Tuesday, March 14  
12:00pm – 1:00pm  
**YLS Board Meeting**  
TBA

Friday, March 17  
11:30am – 1:00pm  
**Business Litigation  
Seminar**  
4th DCA

Friday, March 17  
12:00pm – 1:00pm  
**Federal Bar Association  
Luncheon**  
Colony Hotel

Tuesday, March 21  
5:30pm- 7:00pm  
**Legal Aid Board Meeting**  
TBA

Wednesday – Saturday,  
March 22 – 25  
**Board of Governors  
Meeting**  
Casa Monica Hotel,  
St. Augustine, FL

Friday, March 24  
**Circuit Civil Practice  
Committee Meeting**  
Judicial Conference Room

Friday, March 24, 7:07pm  
**YLS Happy Hour**  
Roger Dean Stadium,  
Jupiter, FL

Friday, March 31  
12:00pm – 1:00pm  
**Judicial Relations  
Committee Meeting**  
Judicial Conference Room

Friday, March 31  
3:00pm – 6:30pm  
**Road to the Bench Seminar**  
4th DCA